

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CRIMINAL CASE NO: 2008/0013

BETWEEN

THE QUEEN

Crown

V

JHONNALY GARABITO

Defendant

Appearances: Mrs. Joanne Walsh Crown Counsel I and Mr. Adalai Smith Crown Counsel II
for the Prosecution
Counsel Mr. Steadroy Benjamin for the Defendant

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2008: July 9
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JUDGMENT ON SENTENCING

[1] **Blenman J:** Mr. Jhonnaly Garabito was indicted by Mr. Anthony Armstrong, learned Directed of Public Prosecutions, on an indictment which charged him with murder. The Crown alleged that on the 26th April 2007, at Ebenezer, in the parish of Saint Mary's, he murdered Mr. Bernard Davis. He was tried by a mixed jury which unanimously found him guilty of the lesser count of manslaughter. Learned Defence Counsel, Mr. Steadroy Benjamin, requested a Social Investigation Report and the Court ordered that a report be provided. He is now before the Court for sentencing. Ms. Alethea Byers, Senior Probation Officer provided the Court with a Social Investigation Report.

[2] **Facts**

Based on the evidence the Crown presented, Jhonnaly, at the time of the incident was a school boy, 15 years old. He attended the Jennings Secondary School and Bernard, though of the same age, was not attending school. On the day in question, Jhonnaly had left school and was in the company of friends when he was set upon by Jason, one of Bernard's friends. Jhonnaly had a red handkerchief tied around his head and was biting the end when Jason pulled away the handkerchief. The two boys had an altercation and a fight ensued. Bernard and Jhonnaly also fought. Later, Bernard's grandmother came and took him away. On her way home in the company of Bernard, Jhonnaly followed them and threatened to kill Bernard; at this time, he was armed with a knife. On receiving the threats, the deceased, Bernard, took a cutlass from his friend and dealt Jhonnaly three blows, none of which injured him. Jhonnaly retaliated by stabbing the deceased three times with a knife in the chest. Bernard succumbed to the injuries he received.

[3] Dr. Petra Miller Nanton, pathologist who performed the autopsy, provided evidence as to the cause of death. The doctor said that the death was due to cardiac tamponade with hemorrhage consequent on multiple stab wounds to the chest.

[4] **Plea in mitigation**

Learned Defence Counsel Mr. Steadroy Benjamin implored the Court not to impose a severe custodial sentence on the accused due to the fact that he is not known to the law. Counsel asked the Court to take into consideration that Bernard was the aggressor and that before receiving the fatal injuries, he used a cutlass to assault Jhonnaly. Counsel told the Court that Jhonnaly was a school boy with an excellent record. The Social Investigation Report indicates that this conduct for which he has been convicted is an aberration. Mr. Benjamin asked the Court to pay careful attention to the Social Investigation Report as it paints a very good picture of the defendant. The community, in which he lives, regards him as quiet. His teachers are said to think highly of him. Counsel also asked the Court to attach considerable weight to Jhonnaly's youthful age.

[5] Mr. Benjamin said the defendant is remorseful. He referred the Court to the Social Investigation Report which indicates that Jhonnaly is a member of the Pentecostal church and attends the Youth Group. He does not display any anti-social behaviour. His teacher stated that he has done very well academically and that he was never suspected of being involved in any anti-social behaviour. Jhonnaly is regarded by the community in which he lives, as a calm, polite and affectionate young person.

[6] Ms. Alethea Byers stated in the Social Investigation Report, that on the other hand, members of the community in which Bernard lived described the deceased as being involved in a gang and having a violent temper. Ms. Byers also said that Jhonnaly regrets killing Bernard. The investigation revealed that “Jhonnaly lived a quiet life, in that he behaved well, but faltered in this instance”.

[7] **Law**

The relevant law is section 5 of the Offences Against the Persons Act Cap 300 Laws of Antigua and Barbuda. Section 5 states that the Court can impose a maximum sentence of 35 years for the offence of manslaughter.

[8] **Court’s consideration**

I have listened to the very impassioned submissions of learned Defence Counsel, Mr. Benjamin. In determining the appropriate sentence that I should impose on the defendant, I am required to consider the individual circumstances of the offence and the character of the offender, together with the subjective factors which may have influenced the offender’s actions. I must also take into account the gravity of the offence, the applicable principles of sentencing, the relevant law and the sentencing guidelines set by our Court of Appeal. I will also take into account the mitigating and aggravating factors.

[9] I am mindful of the fact that no two cases are alike. In passing the appropriate sentence, I must ensure that I do justice between the defendant and the victim Bernard, the latter whose life has been snuffed away from hm. In exercising my discretion, I must ensure that the punishment I impose on the defendant reflects the seriousness of the crime.

[10] **Mitigating and Aggravating Factors**

Through the mitigating factors, the culpability of the defendant is enhanced. The mitigating factors would include the fact that Jhonnaly has no previous convictions, is a young offender, has a good character, is respected at school and in his community, and is genuinely remorseful.

[11] The aggravating factors include violence of a gratuitous or excessive nature. In the case at bar, the aggravating factors are that a knife was used to inflict the fatal injuries coupled with the fact that the defendant inflicted more than one stab wound on the deceased. However, I must also take into account, that before receiving the fatal injuries, Bernard used a cutlass and lashed Jhonnaly.

[12] Weighing the mitigating and the aggravating factors, it seems to me that the mitigating factors slightly outweigh the aggravating factors.

[13] **Sentencing principles**

The Court, in sentencing the defendant, must apply the well known principles of sentencing as stated in **R v Sergeant 60 Cr App R 74**. Lawton LJ identified the classical principles of sentencing as retribution, deterrence, prevention and rehabilitation. These principles were judicially acknowledged by Byron CJ in **Desmond Baptiste et al v The Queen Criminal Appeal NO.8 of 2003, Saint Vincent and the Grenadines**.

[14] **Deterrence**

“Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behaviour. Of what value however are sentences that are grounded in deterrence? Specific deterrence may be an ineffective tool to combat criminal behaviour that is spontaneous or spawned by circumstances such as addictions or necessity. Drug and alcohol addiction as well as need may trigger high rates of recidivism. Experience shows

that general deterrence too is of limited effect. These sentences tend to lose their potency with the passage of time.'

[15] **Prevention**

"The goal here is to protect society from those who persist in high rates of criminality. For some offenders, the sound of the shutting iron cell door may have a different effect. Some however never learn lessons from their incarcerations and the only way of curbing their criminality is through protracted sentences whose objective is to keep them away from society. Such sentences are more suitable for repeat offenders."

[16] **Rehabilitation**

"Here the objective is to engage the prisoner in activities that would assist him in reintegration into society after prison. However the success of this aspect of sentencing is influenced by executive policy. Furthermore, rehabilitation has in the past borne mixed results. Of course sentencing ought not to be influenced by executive policy such as the availability of structured activities to facilitate reform."

[17] **Retribution**

The objective here is to reflect society's intolerance for criminal conduct. The court, in sentencing an offender, should impose a sentence to show the court's abhorrence with criminal conduct of the defendant.

[18] I come now to apply the above mentioned principles to the case at bar.

[19] **Deterrence**

There is no need for my sentence to reflect specific deterrence. However, there is a need for the sentence that I impose to seek to deter other persons from committing crimes of violence.

[20] **Prevention**

The offence for which Jhonnaly has been convicted is out of character. There is no evidence that there is any risk of recidivism, so I do not need to reflect the need to prevent him from committing another offence. I accept the assessment of the Probation Officer, his teacher and the community, that he is a loving and polite young person who also has a good character. It is very unlikely that he would commit any other offence. I am sure that he would learn from his experience and would not repeat the same mistake.

[21] **Rehabilitation**

It is my hope that Jhonnaly uses the time that he would spend in custody and obtain counseling.

[22] **Retribution**

I am of the view that my sentence should punish the defendant for taking Bernard's life and deal condignly with the defendant. In sentencing the defendant, the Court must show society's abhorrence for criminal activities. I have to send a strong message. The offence for which the defendant has been convicted is a serious one. I am very concerned about the ease with which young persons resort to violence in an effort to resolve conflict. This is the second matter during this assizes in which a knife was used by a young person to fatally stab another young person. In determining the appropriate sentence to impose on the offender, the Court is also required to do justice between the offender and the victim.

[23] I pause to pay particular regard to the fact that the defendant has no previous convictions.

[24] Byron CJ, as he then said in **Desmond Baptiste v The Queen** *ibid* stated, "as to the fact that the offender was committing a crime for the first time, it seems to us that the importance of this circumstance should be left to the discretion of the sentencer as a matter that is to be taken into account with all other mitigating circumstances of the offence. It must be stressed though that the more serious the offence, the less relevant will be this circumstance".

[25] Our then Chief Justice also said that “on the issue of the age of the offender, a sentencer should be mindful of the general undesirability of imprisoning young first offenders. For such offenders, the Court should take care to consider the prospects of rehabilitation and accordingly give increased weight to such prospects. Where imprisonment is required, the duration of incarceration should also take such factors into account. In the same vein, in cases where the offender is a mature individual with no apparent propensity for commission of the offence, the sentencer may also take this circumstance into account in weighing the desirability and duration of a prison sentence. As with first time offenders, the more serious the offence, the less relevant will be these circumstances”.

[26] **Sentencing Guidelines**

Our Court of Appeal has set a bench mark of 15 years in prison for the offence of manslaughter. This bench mark has been scaled up or down depending on the totality of circumstances. See **The Queen v Trudy Edward, Criminal Appeal No.56 of 2003 Saint Lucia**.

[27] Also in **Frederick Jackson v The Queen, Criminal Appeal No.6 of 2001 Saint Vincent**, the defendant was indicted for murder, but the jury found him guilty of manslaughter. The trial judge sentenced him to 15 years in prison and on appeal; his sentence was reduced to 10 years in prison.

[28] In **The Queen v Brian Walters, Criminal Case No.3 of 2006, British Virgin Islands**, the defendant who was 15 years at the date of the incident was convicted of manslaughter. After trial, he was sentenced to 6 years in prison, based on very strong mitigating factors.

[29] In **The Queen v Stephen Greaves High Court, Criminal decision of the High Court of Antigua and Barbuda**, the defendant was charged with the offence of murder and he was convicted of manslaughter. He used a knife and a drink opener to inflict several wounds on the deceased. At the time of the trial, the defendant was 32 years old and he had no previous convictions. The court sentenced him to 10 years in prison.

[30] In **The Queen v Sherfield Bowen Criminal Case No.25 of 2005 Antigua and Barbuda**, the defendant who fatally shot his girlfriend was convicted of manslaughter. He was sentenced to 5 years in prison.

[31] In **Kenneth Samuel v The Queen Criminal Appeal No. 7 of 2005 Saint Vincent and the Grenadines**, the appellant who was indicted for the offence of murder, and who pleaded guilty to manslaughter has a sentence of 25 years reduced to 7 years in prison by our Court of Appeal. Barrow JA quite rightfully stated,

“As a matter of reasoning the maximum penalty must be appropriate only for the worst case. The judge, therefore, erred in premising his sentencing exercise on a starting sentence of life imprisonment. The judge instead should have started with a sentence of, say, fifteen years’ imprisonment and applied the remission that he found appropriate of one third for a guilty plea to that figure. The further reductions that the judge found appropriate- for his remorse, for his very good character- should also be made from the bench mark sentence instead of from the sentence of life imprisonment.”

[32] In **The Queen v Miguel Santana Demorsis, Criminal case No.00131 2005 Antigua and Barbuda**, the defendant, who was 19 years, at the time of the incident, was convicted, after trial, of manslaughter. He used a knife to inflict the fatal injuries on the deceased. He had no previous conviction and the Court sentenced him to 7 years in prison.

[33] It is wrong for a sentencer in determining the appropriate sentence, to simply impose the maximum sentence on a first offender. To the contrary, the Court in seeking to determine the appropriate sentence must determine a notional sentence and give a reduction for factors that reflect the mitigating circumstances of the case such as the defendants’ genuine remorse, his youthfulness and his clean criminal record.

[34] In sentencing the defendant, I am sending a message to young persons in Antigua and Barbuda that crime will not be tolerated. I therefore will impose a sentence that would indicate that the Court will deal condignly with offenders who utilise knives to commit

offences, in so doing, will ensure that justice is tempered with mercy. I take into consideration the mitigating and aggravating factors. I also take into account the gravity of the offence and the relevant legal principles in determining the penalty to impose on the defendant. I have paid particular regard to the circumstances in which the defendant committed the offence.

[35] I am of the view that the defendant is culpable. Further, the incident which resulted in Bernard losing his life could have been avoided if Jhonnaly had shown some more restraint.

[36] **Conclusion**

I have given careful consideration to Mr. Benjamin's plea in mitigation. I accept that the defendant is genuinely remorseful and that he is aware of the seriousness of the offence that he has committed. It is my hope that he will use the time that he will spend in prison to reflect on the devastating consequences of his actions. The mitigating factors are very compelling these include the fact that he has a clean record and is youthful, together with his good character, have weighed heavily in my sentencing. The fact that he used a knife to inflict the fatal wounds on the deceased is of grave concern to me. While there is no evidence that there is the likelihood of Jhonnaly committing another offence, I cannot overlook the fact that he inflicted more than one stab wound on the deceased and is very culpable.

[37] In view of the totality of circumstances, I am of the considered view that the appropriate sentence to impose on Jhonnaly is 7 years in prison. The Sentence is to take effect from today's date.

[38] The Court acknowledges the assistance of the Learned Director of Public Prosecutions and Learned Defence Counsel

Louise Esther Blenman,
Resident High Court Judge.