

BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL)

CASE NO. 18 OF 2007

BETWEEN:

THE QUEEN

-and-

ANDREW MILTON
DENNIS CAMPBELL
GEORGE O'CONNOR

Appearances:

Mr. Terrence F. Williams, Director of Public Prosecutions. With him are Ms. Tiffany R. Scatliffe, Senior Crown Counsel and Mr. Valston Graham, Crown Counsel for the Crown

Mr. Dwight Reece for the Defendant, Andrew Milton

Mr. Hayden St. Clair Douglas and Mr. Patrick Thompson for the Defendant, Dennis Campbell

2009: October 05

2009: October 06, November 23

JUDGMENT ON SENTENCING

(Criminal Law – murder –mandatory life imprisonment –sections 150 and 23 of the Criminal Code, 1997- section 9(2) of the Parole Act, 2009 - setting of minimum term before consideration of eligibility for parole – choice of three starting points: “whole life”, 30 years or 15 years – general considerations- seriousness of the offence – aggravating and mitigating factors –announcement of minimum term in open court)

Introduction

[1] HARI PRASHAD-CHARLES J: In *R. v David Swain*¹, I stated that the law regarding the sentencing of persons convicted of murder has undergone some major changes since May of

¹ BVI High Court Criminal Case No. 17 of 2009 –judgment delivered on 10th November 2009 [unreported].

this year when select sections of the Parole Act, 2009 (“the Act”) came into force². Prior to the enactment of this legislation, every person convicted of murder was automatically visited with the penalty of life imprisonment³. No consideration whatsoever was given to any mitigating factors that the convicted person desired or was able to put forward. In fact, the trial judge was duty-bound to hand down the mandatory sentence of life imprisonment in every case where there was a conviction of murder.

- [2] The Act contains provisions of great importance to the sentencing of offenders sentenced to life imprisonment for murder. The Act does not affect the fact that the mandatory sentence for murder remains life imprisonment. It transferred the role of the Executive in determining the minimum term to the trial judge. As a result, a judge upon sentencing a person to imprisonment for life is now required to state whether such person may be eligible to be considered for parole and if such person is found to be so eligible, to state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time⁴.
- [3] Another provision of great significance in the Act is that although the offender may be released on licence, and the minimum period affects the date on which this may happen, the offender remains at risk of being returned to prison for the rest of his life⁵.
- [4] Following the unanimous verdict of guilty of murder against the two defendants, Andrew Milton and Dennis Campbell, the court embarked on a sentencing hearing on 6th October 2009 to determine the defendants’ eligibility for parole and to state the minimum period of imprisonment that they should serve before being considered for parole.

The facts

- [5] The facts of the case as outlined by the Crown and which the jury must have accepted are as follows: in August 2006, Milton came to the British Virgin Islands (“the BVI”) and stayed with his sister, Kerriann Ebanks at the Keturah Crabbe Apartments at Little Dix Hill, East End. At the time, Kerriann was sharing her apartment with her friend of 10 years, Dorcas Elizabeth Rhule

² The Governor has proclaimed that select sections of the Act namely 1, 2, 4(5), 9, 23, 29 and 30 of the Parole Act, 2009, No. 7 of 2009 shall come into force on 20th May 2009.

³ See sections 150 and 23 of the Criminal Code 1997 (Act No. 1 of 1997) of the Laws of the Virgin Islands.

⁴ See section 9(2) of the Parole Act, 2009.

⁵ See sections 14(b) and 15. However, they are not yet in force.

also called Louise. Shortly after his arrival into the Territory, Milton requested of his sister to go to Her Majesty's Prison to visit their brother, Mirouts, also known as Kirk who was an inmate there. Whilst at the prison, an altercation ensued between Kerriann and their uncle, Philemon Miller, also an inmate at the prison. On the advice of a prison guard, Kerriann left the prison and waited in her car while Milton stayed and completed his visit. When Milton returned to Kerriann's car he was quiet and he turned the radio up. Shortly after, Milton paid another visit to the prison. Kerriann then went to Jamaica for two weeks. Upon her return, she was told that Milton threatened her life as he felt that she was responsible for their uncle and brother being in prison. As a result, Kerriann asked Milton to move out of her apartment. With the assistance of Hubert McLeod, Milton moved out of Kerriann's apartment to Desmond Alphonso's ("DA") house at Kingston taking with him some cushions from a sofa chair on Kerriann's balcony.

- [6] In the afternoon of Saturday, 30th September 2006, Milton, driven by McLeod, went to Kerriann's apartment to collect some things he had left behind. An argument ensued between Milton and Kerriann. Milton threatened to kill her. It ended by Kerriann asking Louise to throw her keys and she drove off to the East End Police Station.
- [7] Later that same evening, McLeod drove Milton, George O'Connor and Christopher "Gogo" Bailey to the Terrence Lettsome Airport to collect Dennis Campbell also known as "Soupy" who was coming in from Jamaica. Immigration Officer, Walter Maduro processed Campbell and O'Connor came and collected him. Milton referred to Campbell as the "Magic Man". In the vehicle, Milton stated that he wanted Campbell to kill his sister, Kerriann and help him to break his brother and uncle out of prison. Campbell told Milton that as it was family business he had to handle that for himself. That same night, O'Connor showed a black 45 caliber gun to Campbell.
- [8] On Tuesday, 3rd October 2006, Kerriann took her Ford Explorer to Tola Motors for the technician to take a look at it as she was experiencing some mechanical problems. The technician and her went on a brief test drive and ended up by DA's house where Milton, Campbell and Bailey were working illegally. Kerriann asked the technician to stop and she threatened the men that she was sending Immigration for them.

- [9] Later that same afternoon, McLeod transported Campbell and Milton to Boxer's house at Baughers Bay where they met O'Connor. The men ate. Milton stated that his sister brought immigration for him. O'Connor inquired of Milton what he would do. Milton replied that *"he going to kill his sister and one of them police boy"*. Then Milton asked O'Connor for the glove and O'Connor told him that the glove is at his house in town. McLeod drove Milton and Campbell to O'Connor's house in town and Milton went and got the glove. Campbell took some latex gloves that McLeod had on the back seat of his car. They then went back to Boxer's house at Baughers Bay where they got some duct tape. Shortly after, McLeod drove Milton and Campbell to Dale's house at East End where Bailey, armed with a firearm, was picked up. McLeod dropped Milton, Campbell and Bailey by a church close to Kerriann's apartment.
- [10] In the evening Kerriann came home from work. Before going to her apartment, she called out to Louise who gave her a faint response. Upon approaching her door, Kerriann heard her phone ringing and realized that Louise was not answering it, quite untypical of Louise. She found the door unlocked and was quarreling to herself that she had told Louise to keep the door locked at all times because of the threat from her brother to kill her. Unsuspectingly, she stepped inside to look on the dining table to see if the key was there. The key was not there so she was still looking for it in her handbag. When she looked up, she saw her brother Milton with a gun pointed at her. She wanted to run but her legs became heavy. She couldn't move. As she was there contemplating whether to go down on her knees and beg her brother not to kill her, she saw someone else run past her. She "pivoted" and jumped over the steps. She landed to the bottom. She hit her head and got up and started to run again. As she ran, she was shouting "murder, murder" and ended up at a neighbour's apartment. She stayed there until the police arrived.
- [11] John Shirley, a neighbour was home at this time. He heard a scream and looked out and saw a man whom he described as being lighter than him on the stairs. He went in his apartment and called 911. Simone Syfox Foster, who lives directly below Kerriann's apartment heard when Kerriann called out to Louise. She also heard a loud sound as if something fell in her apartment.
- [12] While speaking to the 911 operator, John Shirley got a spotlight and shone it on Kerriann's car when he realized that someone was trying to get into it. He saw three men who then walked

away hastily towards the garbage receptacle. John Shirley shone the light to get the attention of the garbage truck. It was at that stage that he realized that there was a body on the ground. The body was subsequently identified as Louise.

[13] After the incident, Milton, Campbell and Bailey hid out in the bushes and in an abandoned house in the Fish Bay area for about a month. In a nationwide hunt, the men were spotted by the police from a helicopter. Milton and Campbell were later intercepted. At the time of their capture, Campbell had in his possession a firearm and 5 live-rounds of ammunition.

[14] On 5th October 2009, the jury returned a unanimous verdict of guilty of murder against Milton and Campbell for the death of Louise. The jury also returned a unanimous verdict of guilty of conspiracy to murder Kerriann against both defendants and another defendant, George O'Connor. This judgment is concerned only with the sentencing of Milton and Campbell.

Plea in mitigation

Milton

[15] In his fervent plea in mitigation, Mr. Reece, appearing for the defendant, Milton urged the court to be lenient and considerate even though Milton said that he wished not to be considered for parole. Learned Counsel implored the court not to impose consecutive terms of imprisonment for the two offences and to consider 25 years as the appropriate starting point in this case. Counsel was however unable to provide any authority to substantiate the latter submission.

Campbell

[16] Learned Counsel Mr. Douglas appearing for Campbell submitted that Campbell has spent most of his time in prison since his arrival in the BVI. He said that Campbell is a young man, 26 years of age. He urged the Court to temper justice with mercy and compassion.

Submissions by the Crown

[17] The Learned DPP helpfully identified the aggravating factors as well as the mitigating factors in the present case. The aggravating factors are:

- (i) there was planning between the men which showed some degree of premeditation,
- (ii) there was use of a firearm in the offence. While it was not fired, it was present at the scene,

- (iii) the method by which Louise was killed is disturbing and shows some sadistic intent,
- (iv) the defendants have previous convictions.

[18] No mitigating features were identified.

The Powers of the Court

(a) The Criminal Code, 1997

[19] Section 150 of the Criminal Code provides that any person who is convicted of murder is liable to imprisonment for life. Section 23 states:

"A person liable to imprisonment for life or any other period may be sentenced to a shorter term, except in the case of a sentence passed in pursuance of section 150.

(b) The Parole Act, 2009

[20] Section 9(2) of the Act reads:

"A judge upon sentencing a person to imprisonment for life, shall state whether such person may be eligible to be considered for parole and, if a person is found to be so eligible, state a minimum period of imprisonment that such person shall serve before being considered for parole for the first time".

Mandatory Life Sentences [U.K.]

[21] Section 269 of the Criminal Justice Act, 2003 ("the CJA, 2003") provides for the determination of a minimum term in relation to mandatory life sentence.

- (1) "This section applies where after the commencement of this section a court passes a life sentence in circumstances where the sentence is fixed by law.
- (2)
- (3) The part of his sentence is to be such as the court considers appropriate taking into account –
 - a) the seriousness of the offence, or of the combination of the offence and any one or more offences associated with it, and
 - b)
- (4) If the offender was 21 or over when he committed the offence and the court is of the opinion that, because of the seriousness of the offence, or of the combination of the offence and one or more offences associated with it, no order should be made under

subsection (2), the court must order that the early release provisions are not to apply to the offender.”

Starting points

[22] Schedule 21 of the CJA, 2003 provides for appropriate starting points depending on the seriousness of the offence.

4 (1) If—

- (a) the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is exceptionally high, and
- (b) the offender was aged 21 or over when he committed the offence,

the appropriate starting point is a whole life order.[emphasis added]

(2) Cases that would normally fall within sub-paragraph (1)(a) include—

- (a) the murder of two or more persons, where each murder involves any of the following—
 - (i) a substantial degree of premeditation or planning,
 - (ii) the abduction of the victim, or
 - (iii) sexual or sadistic conduct,
- (b) the murder of a child if involving the abduction of the child or sexual or sadistic motivation,
- (c) a murder done for the purpose of advancing a political, religious or ideological cause, or
- (d) a murder by an offender previously convicted of murder.

[23] 5 (1) If—

- (a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high, and
- (b) the offender was aged 18 or over when he committed the offence,

the appropriate starting point, in determining the minimum term, is 30 years.[emphasis added]

(2) Cases that (if not falling within paragraph 4(1)) would normally fall within sub-paragraph (1)(a) include—

- (a) the murder of a police officer or prison officer in the course of his duty,
- (b) a murder involving the use of a firearm or explosive,
- (c) a murder done for gain (such as a murder done in the course or furtherance of robbery or burglary, done for payment or done in the expectation of gain as a result of the death),
- (d) a murder intended to obstruct or interfere with the course of justice,
- (e) a murder involving sexual or sadistic conduct,
- (f) the murder of two or more persons,
- (g) a murder that is racially or religiously aggravated or aggravated by sexual orientation, or
- (h) a murder falling within paragraph 4(2) committed by an offender who was aged under 21 when he committed the offence.

Aggravating and mitigating factors

[24] Paragraphs 8–11 of the Schedule read aggravating and mitigating factors. Paragraph 8 states that having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of the starting point.

[25] Section 10 lists the aggravating factors that may be relevant to the offence of murder to include-

- (a) “a significant degree of planning or premeditation,
- (b) the fact that the victim was particularly vulnerable because of age or disability,
- (c) mental or physical suffering inflicted on the victim before death,
- (d) the abuse of a position of trust
- (e) the use of duress or threats against another person to facilitate the commission of the offence,
- (f) the fact that the victim was providing a public service or performing a public duty, and
- (g) concealment, destruction or dismemberment of the body.

[26] Mitigating factors that may be relevant for the offence of murder include-

- (a) an intention to cause serious bodily harm rather than to kill,

- (b) lack of premeditation,
- (c) the fact that the offender suffered from any mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957) lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,
- (e) the fact that the offender acted to any extent in self defence,
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender”.

UK Case Law

[27] The Act is a novel piece of legislation modeled after the CJA, 2003 [U.K.]. It is, in this context, that UK case law is very instructive in giving guidance in determining the minimum term. The case of **The Consolidated Criminal Practice Direction (Amendment No. 8) (Mandatory Life Sentences)**⁶ sets out the procedure that the Court should follow in setting minimum terms in murder cases. The Court must consider the seriousness of the offence and explain Schedule 21 of the CJA, 2003. In very serious cases where there are a number of aggravating factors as set out in section 10 of Sch. 21, a minimum term of 30 years is appropriate.

[28] In **R v. Sullivan; R v Gibbs; R v Elener; R v Elener [2004]**⁷, the Court of Appeal heard four conjoined appeals which raised questions as to the correct approach to be adopted by sentencing courts when applying the provisions of the CJA, 2003 in order to set minimum tariff periods. The recommended tariff for very serious murders was 30 years and 14 years for average murders.

[29] In **R v. Ennis**⁸, Mr. Ennis appealed his minimum term of 30 years on the basis that it was manifestly excessive. The Court found that it was a premeditated robbery, where firearms were used and which resulted in a death. The trial judge found that there were no mitigating circumstances. The appellate judge found that the trial judge did not take the mitigating factors

⁶ [2005] 1 Cr. App. R. 8.

⁷ [2004] EWCA Crim 1762; [2005] 1 Cr. App. R. (S) 67.

⁸ [2008] EWCA Crim. 969

of Sch. 21 of the CJA, 2003 into consideration, such as the lack of intention to kill and lack of premeditation in respect of the murder. The 30 year sentence was reduced to 25 years with time spent on remand deducted from same.

[30] The case of **R v. Neil Jones and others**⁹ is the most recent guidance handed by the Court of Appeal concerning the determination of a minimum sentence. The Court stated that while judges should be mindful of the guidance provided, each case would depend on its particular facts. As it relates to imposing one of the three starting points the following should be considered:

“A whole life order should be imposed where the seriousness of the offending was so exceptionally high that just punishment required the offender to be kept in prison for the rest of his or her life. Where such an order was called for, the case would often not be on the borderline. The facts of the case considered as a whole would leave the judge in no doubt that the offender must be kept in prison for the rest of his or her life. If the judge was in doubt, this might well be an indication that a finite minimum term which left open the possibility that the offender might be released for the final years of his or her life was the appropriate disposal. To be imprisoned for a finite period of 30 years or more was a very severe penalty. If the case included one or more of the factors set out in para.4(2), it was likely to be a case that called for a whole life order, but the judge must consider all the material facts before concluding that a very lengthy finite term which left open the possibility that the offender might be released for the final years of his or her life was the appropriate disposal”.

BVI Case Law

[31] In **R v Aaron George**¹⁰, the defendant pleaded guilty to the murder of Vincent Connolly. The defendant gave a statement to the police implicating the person he alleged contracted him to kill the victim¹¹. The victim was found outside his home dead with five gunshot wounds. The defendant was sentenced to life imprisonment with a possibility of parole after serving 22 years.

[32] In **R v. David Swain**¹², the defendant, aged 53, was convicted by a unanimous jury of the murder of his wife. The murder was carefully planned and premeditated. It came on the last

⁹ [2006] 2 Cr. App. Rep (S) 19

¹⁰ BVI Criminal Case No. 21 of 2008. Oral judgment delivered on 23rd June 2009.

¹¹ It is to be noted that at the subsequent trial of the person whom he alleged contracted him to kill, the defendant who was the key witness for the prosecution said that he lied to the police as to that person's involvement because he wanted to get a lesser sentence and to appease his friends.

¹² BVI Criminal Case No. 17 of 2009. Sentencing Judgment delivered on 10th November 2009 [unreported].

day of their vacation. It was done for financial gain and a desire for Mr. Swain to fully pursue a love affair which he had begun prior to his wife's unfortunate and untimely death. He was sentenced to life imprisonment with a possibility of parole after serving 25 years less time spent on remand.

Court's considerations

- [33] This was a cold-blooded murder. The defendants went to Kerriann's apartment to kill her. Fortunately, she managed to escape and sought refuge at a neighbour's apartment. Her roommate, Louise, an innocent bystander was strangled and thrown over a four-storey building. The murder was premeditated and carefully planned. The "magic man" Campbell was recruited from Jamaica to execute Milton's plan to kill his own sister. Louise was brutally murdered during the course of a planned murder.
- [34] In light of the above authorities and a review of the circumstances, this case falls within the exceptionally high category, as set out in Sch. 21 of the CJA, 2003. The appropriate starting point is 30 years in view of the fact that the defendants went to Kerriann's apartment armed with a firearm. In **Neil Jones**¹³, the court held that where a firearm was carried for the purpose of being used as an offensive weapon, it is hard to envisage a reason for not following the guidance in Sch. 21 of the CJA, 2003 and adopting 30 years as a starting point.
- [35] Having determined the starting point, the court may either increase the minimum term or reduce the minimum term depending upon whether there are aggravating or mitigating features other than those which have determined the seriousness of the conduct. In this case, there are no mitigating factors. The Crown has identified four aggravating features but as I just stated, the court has to be mindful not to apply any of those factors a second time around in making any adjustment. To my mind, there are three aggravating features namely: (1) a significant degree of planning and premeditation was involved; (2) the method by which Louise was killed is disturbing and shows some sadistic intent and (3) both men have previous criminal convictions. On 4th November 2008, Milton was sentenced to 3 years imprisonment for handling stolen goods. Campbell has three previous convictions. On 22nd November 2008, he was sentenced by the Magistrate to 3 ½ years imprisonment for carrying an unlicensed firearm

¹³ [supra]

and 6 months for possession of 5 rounds of explosives, both terms to run consecutively. On 4th November 2008, Campbell was also sentenced to 5 years imprisonment for burglary.

[36] As I already indicated, each case would depend critically on its particular facts. In this case, the facts are particularly grave. This is a case where the defendant, Milton was the instigator of this ghastly plan to kill his own sister because he felt that she was a police informer and she was responsible for his brother, Kirk and uncle being in prison. He brought in Campbell to execute this dreadful plan. Kerriann narrowly escaped her death. Before the defendants made good their escape, they had to wipe out all evidence so they strangled Louise, rendering her unconscious or dead before throwing her over the balcony. From the evidence, it was revealed that Louise, aged 39, left behind, in Jamaica, two young children. She came to the BVI to work and was employed as a dishwasher at a restaurant at East End. She was at home that day because it was her day off.

[37] The defendant, Milton has shown no compunction for his actions as he still maintains his innocence. The defendant, Campbell was quiet and impassive throughout the trial.

CONSPIRACY TO MURDER

[38] The defendants, Milton, Campbell and O'Connor were convicted by a unanimous jury of conspiracy to murder Kerriann Ebanks between 30th September 2006 and 3rd October 2006. The sentencing of O'Connor was dealt with separately and does not concern this judgment.

[39] Section 156 of the Criminal Code, 1997 provides:

"Any person who conspires with any other person or solicits, encourages, persuades, endeavors to persuade, or proposes to any other person, to murder any person, whether such person is within the Territory or elsewhere, commits an offence and is liable on conviction to imprisonment for a term not exceeding fourteen years."

[40] In England, conspiracy to murder carries a maximum sentence of life imprisonment¹⁴. The maximum sentence which our court can impose is 14 years. However, the court has a wide discretion in sentencing both at common law and under the laws of this Territory (see sections 22 and 23 of the Criminal Code) to enable it to do justice having regard to the particular facts of each case.

¹⁴ See s. 3(2) of the Criminal Justice Act, 1977.

[41] In the absence of case law on conspiracy to murder in our jurisdiction, I turn to English law for guidance. The case of **R v Barot**¹⁵ concerns an appeal concerning a failed terrorist plan which was thwarted by security officials. The Court of Appeal set down some guidance with respect to conspiracy to commit murder. The Court advised that the facts of each case determine what is a suitable sentence, but it must also be borne in mind the following:

1. Seriousness of the offence,
2. Detail of planning involved,
3. Whether the conspiracy would have been put into practice.

[42] It cannot be doubted that this is an extremely serious offence and call for an immediate custodial sentence. But, the decision as to the length of such sentence is heavily dependent on the aggravating and mitigating features and, usually to a lesser extent, the personal circumstances of the offender. The aggravating features of this case have already been identified. There are no particular factors which mitigate the offence.

[43] In the present case, the conspiracy to kill Kerriann was put into effect and it resulted in the death of Louise. Detailed planning was involved as Campbell was specially recruited from Jamaica to kill Kerriann.

[44] I have also taken into consideration all that was said by the defendants in mitigation including their antecedents. I have also noted that the defendants had been on remand for two years from November 2006 to November 2008 for these offences. From November last year, both defendants have been serving sentences of varying lengths for various offences. In this regard, due credit must be allowed to the defendants for the two years spent on remand awaiting trial.

[45] I also bear in mind the main objectives of criminal sanction: retribution, deterrence, prevention and rehabilitation.

The sentences

[46] Taking all matters into consideration, the following are the sentences of this court:

¹⁵ [2007] EWCA Crim. 1119.

MILTON:

Murder: Imprisonment for life with a minimum period for parole eligibility of 35 years.

Conspiracy to murder: 10 years imprisonment.

These sentences are to be served concurrently with the other sentence (3 years for handling stolen goods) that Milton is now serving.

CAMPBELL:

Murder: Imprisonment for life with a minimum period for parole eligibility of 35 years.

Conspiracy to murder: 10 years imprisonment.

These sentences are to be served concurrently with the other sentences (9 years altogether) that Campbell is now serving¹⁶.

Indra Hariprashad-Charles

High Court Judge

¹⁶ See details of these sentences at paragraph 35.