SAINT LUCIA

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

CRIMINAL CASE NO. SLUCRD2008/1294B

BETWEEN:

THE QUEEN

Claimant

and

LUVINA CHARLES

Defendant

Appearances:
Mr. Leon France for the Claimant
Mr. Leslie Mondesir for the Defendant

2016: July 22.

JUDGMENT ON SENTENCING

[1] **CUMBERBATCH, J.:** The defendant was indicted for the offence of murder for that she on the 29th September 2008 at around 3.00am at La Pointe, Dennery whilst intending to cause grievous bodily harm caused the death of Alfred Jn Louis ('the deceased') contrary to section 85(b) of the Criminal Code 2008. The defendant pleaded not guilty at her arraignment but at a later stage entered a plea of guilty to the lesser offence of manslaughter. This plea was accepted by the crown. The court ordered a pre-sentenced report be filed and set a date for a sentencing hearing.

THE FACTS

[2] On the 29th September 2008, the deceased and the defendant had a little drink up at their home. The deceased was consuming alcohol with his friends. There was a misunderstanding between

the deceased and the defendant with respect to a secret conversation between the deceased and one of his friends. The deceased left the house with his friends while the defendant remained home.

[3] On the return of the deceased to the house, the deceased was outside on his cell phone speaking. An argument ensued between the deceased and the defendant. The deceased became agitated as he had already consumed alcohol.

[4] An altercation ensued between the defendant and the deceased outside in relation to a woman on the cell phone with the deceased.

[5] The deceased gave the defendant a punch on her mouth and the defendant took the deceased cell phone, broke it and threw it under the house.

[6] The defendant told the deceased that she was going to tell her mother what had transpired.

[7] The defendant went into the house followed by the deceased and a further altercation ensued during which the deceased pushed the defendant in the kitchen where the dishes were.

[8] During the course of the altercation and wrestling, the defendant retrieved a knife in the dish drainer and an injury was sustained by the deceased to his neck.

[9] The neighbours were alerted and came to the house to assist.

[10] The defendant called the emergency services at Dennery and accompanied the deceased to the Dennery Hospital and then the Victoria Hospital in Castries.

[11] The defendant was detained in custody and a statement under caution was taken from her.

[12] The defendant was also taken to the St. Judes Hospital in Vieux Fort for medical attention.

[13] A post mortem was conducted and it was determined that the deceased suffered a single stab wound to the left side of his neck.

THE PRE-SENTENCING REPORT

[14] The defendant and the deceased lived and cohabited in a common law union at her mother's residence then moved to their own premises. She was pregnant at the time of this incident but from all accounts that relationship was not a happy one as neighbours state they were always involved in a brawl. The defendant herself stated that she was abused by the deceased especially when he was under the influence of alcohol. She however usually kept these incidents to herself.

[15] The defendant is regarded as someone who is strong, fun-loving, quiet and helpful. Others regard her as jealous and obsessive. She is a self employed grocery shop owner. She is remorseful and in this regard stated thus to the probation officer:

> *"The defendant further disclosed that she felt terrible, when the deceased succumbed to his injuries and she wanted to die along with him because she did not want to lose him; she loved him despite the issues between them. She informed that writer that she spent two weeks on remand and pleaded guilty on the advice of her lawyer. The defendant disclosed that she has been living for the past eight years with the deceased on her mind and will spend the rest of her life knowing that she took his life."*

[16] The defendant in open court expressed her regrets and apologies to the mother of the deceased who accepted her apologies. I will return to other aspects of this report later in this judgment.

SUBMISSIONS

[17] The court received written submissions from counsel for the crown and the defence. In his written submissions Mr. Mondesir for the defendant outlined the facts of the incident on that fateful night and provided what he considered to be the aggravating and mitigating factors. Counsel contends that the mitigating factors outweigh the aggravating ones and as such urged the court to impose a reasonable sentence in the circumstances of the case.

[18] Mr. Brette for the crown joined issue with the mitigating factors as stated by defence counsel and contends that some of the matters raised therein cannot be considered to be mitigating factors. Crown Counsel identified the defendant's motherhood, employment and allegations of domestic

violence as matters which do not constitute mitigating factors for the purposes of assessing the defendant's culpability.

THE LAW

[19] I will apply the classical principles of sentencing to the case at bar.

RERIBUTION

[20] This is one of those unfortunate cases which originated from a domestic dispute. The pre-sentencing report discloses that the parties were always in a brawl, a vernacular form of describing an unhappy relationship. The defendant inflicted a single stab wound to the neck of the virtual complainant whilst resisting his attack on her following a violent quarrel. This occurred whilst the deceased was chocking her in the kitchen in the vicinity of the kitchen sink.

[21] Not surprisingly the only evidence available comes from the defendant herself. That evidence in my view is exculpatory.

DETERRENCE

[22] Whilst offences of homicide are on the rise in this jurisdiction I find that homicide offences of this nature are not significant in number. There is no history of criminal conduct by this defendant hence I do not consider this principle applicable to her.

PREVENTION

[23] This defendant is a first offender and is not considered to be a danger to the community. The Pre-Sentencing Report discloses that she is engaged in legitimate employment and has started a relationship with another male person who describes her as being a good person. Thus this principle is also not applicable to the defendant.

REHABILITATION

[24] The defendant stated in the pre-sentencing report that she needs counseling to deal with this incident. She maintains that she did not kill the deceased intentionally and if she had to switch places with him to make the situation any better she would not hesitate to do so.

[25] I find by virtue of the foregoing that the defendant is in need of rehabilitation. I further find that she needs appropriate counseling for her predilection to react aggressively as stated by the probation officer. I am however comforted by the fact that she is amenable to counseling and rehabilitation.

[26] I find the following to be the aggravating and mitigating factors herein.

AGGRAVATING FACTORS

1. The loss of a human life.
2. The use of a weapon.

MITIGATING FACTORS

1. The defendant was the victim of domestic abuse,
2. The defendant was pregnant and under attack by the deceased who was choking her,
3. There was one single stab wound
4. The defendant's guilty plea,
5. The remorse expressed.
6. The crown's case is woefully weak.

[27] I have conducted a balancing exercise of the aggravating and mitigating factors and find the mitigating factors outweigh the aggravating ones. In considering Mr. Brette's submissions I have looked at the dictum of Sir David Simmons CJ in the unreported decision of **Neverlaine Springer v The Queen (No. 2)** from the Court of Appeal of Barbados. In that case the court considered whether the learned trial judge was correct in dismissing a submission of no case to answer where issues of self defence and accident were raised by the defendant. The defendant in a statement to the police stated that the deceased had attacked him with a gun. They had a struggle and the gun went off. Not dissimilar to the case at bar there was no other evidence available.

[28] Chief Justice Simmons opined thus at paragraphs 29 and 30 his decision:

> *"[29] In this appeal, the trial judge ruled in dismissing the no case submission that, on 'the totality of the evidence' he felt bound to dismiss the submission. The totality of the evidence in this case and its substantial basis were the oral and written statements of the appellant which clearly contained uncontradicted evidence of accident and self-defence. Of course, issues of self-defence and accident are essentially issues of fact for the jury's determination. In a case where there are several witnesses whose evidence touches and concerns those issues, a trial judge should properly leave them for the jury's decision. But where, as here, the only evidence raising those issues comes from the defendant and forms part of the prosecution case, in our view a judge would be entitled to stop the case.*

We cannot speculate outside the evidence as adduced. Speculation is not evidence; evidence consists of facts; speculation is guesswork. In this regard. we must bear in mind an observation of Lord Wright made, the method of inference fails and what is left is mere speculation or conjecture.

"[30] This was not a case where the strength or weakness of the prosecution's case depended on a view taken of the reliability of various witnesses. Such matters are, as Lord Lane said in Galbraith, "generally speaking within the province of the jury..." In Galbraith there were three witnesses to the issue but none of them was satisfactory. In such a situation of more than one witness to the issue, the judge would be weighing the evidence in a manner that was properly the function of the jury. He would be assessing the credibility and consistency of the evidence of various witnesses. That is a jury's function. Here the only direct evidence of the facts in issue were the oral and written statements of the appellant uncontradicted except in respect of the lie told to S/Sgt. Louis.

[31]... such evidence as there was, was of such a nature and quality that, taken at its highest, it was all in favour of the appellant. In our view, this appeal sits comfortably within the first sentence of the dictum of Lord Widgery in Barker quoted at para [16] supra and we hold that the learned trial judge erred in law in not upholding the submission of no case to answer."

[30] I do not accept crown counsel's submission that the defendant was the aggressor that night. I find that to be no more than unsubstantiated speculation. Indeed there is no evidence that could be adduced by the crown to negative the defence of self defence. Thus the defendant's version of occurrences that night is virtually unchallenged. Moreover the crown's case is that there was a single stab wound inflicted, hence it cannot be said that the defendant used more force that was necessary to repel the attack on her by the deceased.

[31] I will consider the dictum of Rawlings JA as he then was, in the decision of **Mervin Moise v The Queen**. In that decision the learned Justice of Appeal stated thus:

"It is a mandatory requirement in murder cases for a Judge to take into account the personal and individual circumstances of the convicted person. The Judge must also take into account the nature and gravity of the offence; the character and record of the convicted person; the factors that might have influenced the conduct that caused the murder; the design and execution of the offence, and the possibility of reform and social re-adaptation of the convicted person.... The sentencing Judge is fixed with a very onerous duty to pay due regard to all of these factors."

[32] In summary, the sentencing Judge is required to consider, fully, two fundamental factors. On the one hand, the Judge must consider the facts and circumstances that surround the commission of

the offence. On the other hand, the Judge must consider the character and record of the convicted person. The Judge may accord greater importance to the circumstances, which relate to the commission of the offence. However, the relative importance of these two factors may vary according to the overall circumstances of each case.

SENTENCE

[33] This case though involving a loss of life is inherently a weak one. It is unlikely that it would have survived a no case submission. However the defendant on her lawyer's advice has chosen to adopt the course herein. The mitigating factors outweigh the aggravating ones which is a compelling reason for the imposition of a non-custodial sentence or a custodial sentence at the lower end of the scale.

DELAY

[34] The court must also consider the issue of delay. This incident took place on the 29th September 2008 and the defendant was indicted on the 30th December 2009. It took a further 7 years for the defendant's trial to commence. This was done at the instance of the defendant's counsel who held discussions with the Chambers of the DPP with the view to having his client plead guilty to the lesser count of manslaughter.

[35] No reason has been proffered by the crown for the inordinate delay in bringing this matter to a stage of finality. I find that there are no complex issues of law and evidence to which the delay could be attributed.

[36] Though the defendant was on bail she was charged with the most heinous offence known to mankind and as such was forced to live her life having the proverbial sword of Damocles hanging over her head. Moreover as stated aforesaid the case against her was inherently weak. Thus the defendant is entitled to an appropriate reduction in sentence for the breach of her constitutional rights to a fair hearing within a reasonable time.

SENTENCE

[37] The offence for which this defendant is convicted carries a maximum sentence of life imprisonment. I find however that there are certain special circumstances in the case at bar, namely;

- The case against the defendant is woefully weak and may not have survived a no case submission. There is no evidence disclosed which would serve to negative self-defence,
- The mitigating factors outweigh the aggravating ones,
- The inordinate delay in bringing this case to a stage of finality

[38] I have also considered the sentencing guidelines of the UK on manslaughter as a result of provocation, to wit,

> *"Bearing in mind the loss of life caused by manslaughter by reason of provocation, the starting point for sentencing should be a custodial sentence. Only in a very small number of cases involving very exceptional mitigating factors should a judge consider that a non-custodial sentence is justified.*
> *The same general sentencing principles should apply in all cases of manslaughter by reason of provocation irrespective of whether or not the killing takes place in a domestic context."*

[39] The guidelines go on to state thus:

> *"(c) When looking at the nature of the provocation the court should consider both the type of provocation and whether, in the particular case, the actions of the victim would have had a particularly marked effect on the offender:*
>
> - *actual (or anticipated) violence from the victim will generally be regarded as involving a higher degree of provocation than provocation arising from abuse, infidelity or offensive words unless that amounts to psychological bullying*
> - *in cases involving actual or anticipated violence, the culpability of the offender will therefore generally be less than in cases involving verbal provocation*
> - *where the offender's actions were motivated by fear or desperation, rather than by anger, frustration, resentment or a desire for revenge, the offender's culpability will generally be lower.*
>
> *3.4 The circumstances of the killing itself will be relevant to the offender's culpability, and hence to the appropriate sentence:*
>
> - *in general, the offender's violent response to provocation is likely to be less culpable the shorter the time gap between the provocation (or the last provocation) and the killing – as evidenced, for example, by the use of a weapon that happened to be available rather than by one that was carried for that purpose or prepared for use in advance"*

[40] The stabbing of the deceased took place in the defendant's kitchen where she obtained a knife. It is common knowledge that a knife is a necessary implement in the household kitchen. Thus the weapon used happened to be available and was not carried or prepared for the purpose of stabbing the deceased. The revelations in the Pre-Sentencing Report and the defendant's confession statement suggest that the provocation is cumulative as the defendant suffered domestic violence from the deceased over some period of time.

[41] I will now consider the effect of the defendant's post offence behavior on the sentence to be imposed. The guidelines suggest thus:

> *"3.6 Post-offence behaviour – The behaviour of the offender after the killing can be relevant to sentence:*
>
> - *immediate and genuine remorse may be demonstrated by the summoning of medical assistance, remaining at the scene, and co-operation with the authorities*
> - *concealment or attempts to dispose of evidence or dismemberment of the body may aggravate the offence."*

[42] The agreed facts of this case reveal that the defendant alerted neighbours after the incident and summoned the emergency services at Dennery. She also accompanied the deceased to the hospital where she herself was treated for injuries. The defendant co-operated fully with the police by giving a full statement under caution of the events that took place that fateful day.

[43] On the question of how delay which results in a breach of a defendant's constitutional rights impacts on sentencing the Board opined thus in **Celine v State of Mauritius:**

> *"It is relevant, however. to refer to the observation of the Board in Boolell at paragraph 39 to the effect that it was not acceptable to put into operation a prison sentence some 15 years after it had been imposed "unless the public interest affirmatively required a custodial sentence, even at this stage". Although the period of time between sentence and the hearing of the appellant's appeal is much less (6 years and 4 months) , it is still appropriate to consider whether the public interest requires that a custodial sentence be imposed. (emphasis added)"*

[44] I find that the inordinate delay is by no means due to deliberate attempts by the defence to delay the progress of this trial. There is no evidence adduced by the crown to explain the reasons for the inordinate delay herein. In the circumstances, I find that the defendant's constitutional right to a fair hearing within a reasonable time has been breached.

[45] In the circumstances however this being a case of homicide, the court should impose a custodial sentence. I find that a period of imprisonment of 3 years would be appropriate. However, by virtue of the inordinate delay this defendant would have in the words of Lord Kerr:

> *"to confront the prospect of imprisonment when he is much older than he would have been if the trial had been conducted expeditiously."*

[46] Taking into account the strong mitigating factors and the special circumstances in this case aforesaid I am persuaded that justice would not be served by committing this defendant to serve a period of imprisonment at this time. Accordingly the court will suspend that sentence thus:

[47] The defendant will serve the said period of 3 years imprisonment which is hereby suspended on the following terms and conditions,

- In the event of the Defendant committing another offence punishable with imprisonment of 3 years or more she will serve the said period of imprisonment of 3 years,

- The defendant shall serve a period of probation for 2 years during which time she shall,

    - Attend counseling sessions as decreed by her probation officer,
    - Perform 100 hours community service at times and locations as directed by her probation officer

- In the event of the defendant failing to serve her probation as hereinbefore ordered the defendant shall serve a period of imprisonment of 3 years.

FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE