

SAINT LUCIA

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

CRIMINAL CASE NO. SLUHCR2010/0017

BETWEEN:

THE QUEEN

Claimant

and

DELLINGER JOSEPH

Defendant

Appearances:

Mr. Leon France for the Claimant
Mr. Colin Foster for the Defendant

2016: December 14.

JUDGMENT ON SENTENCING

- [1] **CUMBERBATCH, J.:** The Defendant was indicted by the Director of Public Prosecution for the offence of Murder contrary to section 85(b) of the Criminal Code 2008 for that he on the 9th December 2006 at La Ressource whilst intending to cause grievous bodily injury to Kirby Charles (the Deceased) did cause his death. At the close of the crown's case in a fully contested jury trial the Defendant offered a plea of guilty to manslaughter which was accepted by the crown. After the Defendant was allocated the court ordered a Pre-Sentenced Report. The court later ordered written submissions from Crown Counsel and defence counsel.

THE FACTS

- [2] On the night of the 8th December the Defendant and Deceased met at a birthday party at Doe Carmel. At that occasion the Defendant was seen playing his hands in the face of the Deceased

who retaliated by lashing him in his face with a rum bottle. The Defendant left the party after he was spoken to by the host.

- [3] In or around 3:00 p.m. the following morning the Defendant and two others came to the home of the Deceased and called him out. Stones were also thrown on the roof of the Deceased family's home. At that time the Defendant was armed with a cutlass. When the Deceased went out on the road to meet with the Defendant he was attacked by the Defendant who threw him to the ground and commenced inflicting chops to him with his cutlass. The Deceased was able to get up and run from his attacker but he was pursued by the Defendant who inflicted more chop wounds to him. The Deceased was pronounced dead on the scene by the District Medical Officer.
- [4] Dr. Stephen King who performed a post mortem examination on the body of the Deceased opined that the cause of death was hemorrhagic shock as a result of multiple incised wounds which numbered 24 with significant lacerations to the head and neck.

THE PRE-SENTENCE REPORT

- [5] The Defendant is an issue of the marriage between his parents. He had a happy upbringing and was provided with all necessities. He attended the Vieux Fort Secondary School and was at all times meaningfully employed thereafter in the construction industry.
- [6] The Defendant is not known to be involved in violent criminal activity but instead is considered by his parents and community residents to be a loving, caring and respectful person. Community residents state they were surprised to hear that the Defendant was involved in this matter and opine that he had to be provoked to commit the act.
- [7] The Defendant admitted chopping the Deceased and accepted full responsibility for his actions. He also expressed his remorse for what he did.

THE LAW

- [8] The court will apply and consider the classical principles of sentencing to the case at bar.

RETRIBUTION

- [9] The Defendant brutally chopped and killed the Deceased. There were as many as 24 incised wounds inflicted to the Deceased who unsurprisingly died on the scene. Dr. King who testified during the trial stated that the injuries to the neck were deep and exposed the spinal canal. The skull was also deeply cut and its contents exposed. The Defendant stated that as a result of the earlier altercation at Doe Carmel he suffered a cut lip and broken tooth.
- [10] The Defendant's reaction to the earlier incident resulted in the loss of a human life in the most brutal of circumstances. The evidence reveals that the Deceased was at the time of the cutlass attack unarmed and was chopped near to his home. The Court must show its abhorrence for this level of brutality meted out to an unarmed person especially in light of the prevalence of serious acts of homicide within the jurisdiction.

DETERRENCE

- [11] This principle is of specific and general application. It is specific to the Defendant to deter him from reoffending in like manner and general to the public at large to desist from committing acts of homicide in circumstances where it is not justified. The Defendant hitherto clean criminal record and the positive sentiments expressed of him in the Pre-Sentenced Report makes this principle inapplicable to him. However the rising number of homicide in the jurisdiction must be addressed by the court by the sentences imposed.

PREVENTION

- [12] As stated aforesaid the Defendant is not known to be involved in violent conduct and is a first offender. He has whilst on remand taken steps to improve his academic status. Moreover he is by no means considered to be a danger to the community.
- [13] Thus I find that this principle is not applicable to him and will not include it in my determination of an appropriate sentence.

REHABILITATION

[14] The Defendant is a prime candidate for rehabilitation. He has whilst on remand already taken steps to prepare himself for his reintegration with the society by successfully pursuing subjects at the CXC examinations. He is remorseful and has taken full responsibility for his actions.

[15] I find the following to be the aggravating and mitigating factors:

AGGRAVATING FACTORS

1. The seriousness of the offence of taking a human life,
2. The level of brutality displayed by the Defendant,
3. The Defendant was armed with a cutlass whilst the Deceased was unarmed,
4. The traumatic effect of the killing on the family of the Deceased who observed its occurrence.
5. The prevalence of the offence of homicide within the jurisdiction.

MITIGATING FACTORS

1. The defendant's guilty plea,
2. The remorse expressed

[16] I have considered and balanced the aggravating and mitigating factors in light of the facts and circumstances of this case. Having done so I find that the aggravating factors outweigh the mitigating ones.

[17] In Blackstone's Criminal Practice 2009 at Appendix 8 Sentencing Guidelines Counsel Guidelines under the heading **Manslaughter By Reason of Provocation** it is suggested that the following factors are to be taken into consideration by the sentencing court.

1. The sentences of public protection must be considered in all cases of manslaughter,
2. The presence of any of the generally aggravating factors identified in the Council's **Guideline Overarching Principles; seriousness** or any of the additional factors identified in this guideline will indicate a sentence above the normal starting point,
3. This offence will not be an initial charge but will arise following an initial charge of Murder. The council Guideline **Reduction in sentence for a guilty plea** will need to be applied with this in mind. In particular consideration will need to be given to the time at which it was indicated that the Defendant will plead guilty by reason of provocation,

4. An assessment of the degree of provocation as shown by its nature and duration is the critical factor in the sentencing decision,
5. The intensity, extent and nature of the loss of control must be assessed in the context of the provocation that preceded it,
6. Although there will usually be less culpability when the retaliation to provocation is sudden, it is not always the case that greater culpability will be found where there has been a significant lapse in time between the provocation and killing,
7. It is for the sentencer to consider the impact on an offender of provocation behavior that has built up over a period of time,
8. The use of a weapon should not necessarily move a case into another sentencing bracket,
9. The use of a weapon may reflect the imbalance in strength between the offender and the victim how that weapon came to hand is likely to be far more important than the use of the weapon itself,
10. It will be an aggravating factor where the weapon is brought to the scene in contemplation of use before the loss of self-control (which may occur sometime before the fatal incident),
11. Post offence behavior is relevant to the sentence. It may be an aggravating or mitigating factor. When sentencing the judge should consider the motivation behind the offender's actions.

[18] These guidelines are equally applicable in cases of a guilty plea as well as in findings of guilt by a jury. In A.G's reference Nos. 74, 95 and 118 of 2002 in the English C/A decision of **Regina v Suratan et al** the court set out assumptions which a sentencer must make in favour of an offender found guilty of manslaughter by virtue of provocation. These are;

"First, he must assume that the offender had, at the time of the killing, lost his self-control. Mere loss of temper or jealous rage is not sufficient.

Second, he must assume that the offender was caused to lose his self-control by things said or done, normally and as in the cases with which we are concerned, by the person whom he has killed.

Third, he must assume that the defendant's loss of control was reasonable in all the circumstances, even bearing in mind that people are expected to exercise reasonable control over their emotions, and that as society advances it ought to call for a higher measure of self-control.

Fourth, he must assume that the circumstances were such as to make the loss of self-control sufficiently excusable to reduce the gravity of the defendant's offence from murder to manslaughter.

Moreover, the sentencing judge must make these assumptions whether the offender has been found not guilty of murder but guilty of manslaughter by reason of provocation by a jury after a contested trial, or the Crown has accepted a plea of not guilty of murder but guilty of manslaughter by reason of provocation.

- [19] The court however went on to refer to the dictum of Shaw LJ in the decision of **R v Bancroft (1981) 3 CAR (S) 119, 120**;

"Theoretically and logically, though in a sense remote from human affairs, if there is a successful defense of provocation, and it is recognized by the jury that the accused whom they are trying was not in possession of his self-control because of conduct of his victim, one could argue that the sentence should be virtually a nominal one. However, it has to be recognized in human affairs, notwithstanding that a man's reason might be unseated on the basis that the reasonable man would have found himself out of control, that there is still in every human being a residual capacity of self-control, which the exigencies of a given situation may call for. That must be the justification for passing a sentence of imprisonment, to recognize that there is still some degree of culpability, notwithstanding that the jury have found provocation."

- [20] Crown counsel robustly submits that the offence was a planned one of vigilante vengeance of a most heinous and venomous nature. He contends that the provocation was of a small degree and that a cooling off period had elapsed. He urged the court to consider this together with the aggravating factors to tip the sentencing scale upwards.
- [21] Mr. Foster for the Defendant submits that his client suffered a high degree of provocation. He added that when the Defendant accosted the Deceased at his home the Deceased threatened to shoot him which further provoked the Defendant. He referred the court to the favorable comments made of the Defendant in the Pre-Sentence Report and contends that he is a man of good character. Counsel also submitted that the court should take into account the delay suffered by the Defendant whilst awaiting his trial on remand.

SENTENCE

- [22] The Court must at all-times bear it in mind that this is a case of manslaughter not murder hence the assumptions aforesaid must be applied. However the court is also required to strike a balance

between the Defendant's conduct under provocation and his residual degree of capability. The sentencing guidelines aforesaid are of equal importance to the sentencer.

- [23] I have considered the Defendant's personal circumstances and find that he was not the product of a troubled or abusive childhood. Indeed the Pre-Sentence Report reveals quite the opposite.
- [24] The provocation accepted by the court is the incident at the party at Doe Carmel where the Deceased struck the Defendant on his head with a bottle. I do not accept the assertion by the Defendant that when he and his cohorts all armed with cutlasses confronted the Deceased in front of his home that a threat made by the Deceased to shoot him amounts to provocation. In the circumstances I find the degree of provocation to be low.
- [25] This offence was most brutal and heinous. The defendant armed with a cutlass severely chopped the Deceased until he was helpless and was left to die at the scene within minutes of the attack. The findings of Dr. King are independent testimony thereto. The Defendant admits in the Pre-Sentence Report that he was encouraged by others to vent his rage on the Deceased for striking him with a bottle the night before. It is common ground that within hours after the commission of this offence the Defendant departed this country for Barbados. He was arrested and charged on his return from that country.
- [26] I am guided by the dictum of Shaw LJ in the Bancroft decision which was cited with approval in the A.G.'s reference aforesaid, that there exists in every human a residual capacity for self-control, which the exigencies of any given situation may call for. The gravity of the offence must be commensurate with the punishment. The Defendant's rehabilitation is another factor of utmost importance.

DELAY

- [27] Defence counsel has urged the court to take into consideration the excessive delay in bringing this matter to trial. The court is well aware that previous efforts to commence this Defendant's trial have been stymied by the at times unexplained absences of defence counsel. Indeed matters reached a stage when after successive and prolonged absences by defence counsel the court offered the Defendant the choice of a state appointed lawyer to enable the trial process to

commence. The court must however take the issue of delay into account. The Defendant was taken into custody in or around the month of March 2007 when he was arrested on his return from Barbados. In **Celine v State of Mauritius** the Privy Council opined thus on the question of delay at paragraph 19:

*"This issue has been considered more recently by the Board in **Boolell v The State [2006] UKPC 46** where reference was made to the decision of the House of Lords in Attorney General's Reference (No. 2 of 2001) [2003] UKHL 68, [2004] 2 AC 72 which had held that although through the lapse of time in itself there was a breach of article 6(1) of the European Convention on Human Rights and Fundamental Freedoms, the appropriate remedy would not necessarily be a stay of proceedings but "would depend on all the circumstances of the case". In light of that decision, delivering the judgment of the Board in Boolell, Lord Carswell said at para 32 "Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:*

- (i) *If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.*

An appropriate remedy should be afforded for such breach..."

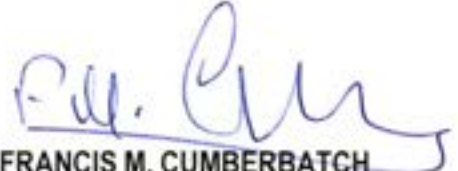
- [28] On the question of how delay which results in a breach of a defendant's constitutional rights impacts on sentencing the Board opined thus:

"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)

- [29] Parliament has enacted a maximum penalty of life imprisonment for the offence of manslaughter as a result of provocation. The UK Sentencing Guidelines Council has recommended for offences with a low degree of provocation a sentence range from 10 years of life imprisonment, with a starting point of 12 years in custody. I find in all the circumstances of this case that a custodial sentence is inevitable. The low degree of provocation and the extremely brutal manner in which the Deceased was killed persuades me to apply a benchmark of 20 years imprisonment. I will deduct 3 years for the guilty plea which was not made at the earliest possible opportunity as submitted by defence counsel but after the crown closed its case in a prolonged trial. Moreover

there is no evidence before me that defence counsel had at an earlier time offered to plead guilty to manslaughter by virtue of provocation which said offer was refused by the crown. I will also deduct 2 years for the delay.

- [30] The Defendant will serve a period of imprisonment of 15 years. He will be credited for all time spent on remand whilst awaiting his trial. He will also receive counselling for anger management and cannabis use.


FRANCIS M. CUMBERBATCH
HIGH COURT JUDGE

