Neutral Citation Number: [2023] CA (Bda) 22 Crim

Criminal Appeal No. 4 of 2023

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CRIMINAL JURISDICTION
THE HON MRS JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2021: No. 35

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
and
JUSTICE OF APPEAL IAN KAWALEY

- -

Between:

ANTHONY DAVIS

Appellant

- and -

THE KING

Respondent

Mr. Mark Pettingill, Chancery Legal, for the Appellant

Ms. Cindy Clarke, Director of Public Prosecutions, for the Respondent

Hearing Date: 7 November 2023
Date of Judgment: 17 November 2023

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APPROVED JUDGMENT

BELL JA:

Background

1. Anthony Davis ("the Appellant") was convicted on his plea of guilty to a charge of murder contrary to section 287(1) of the Criminal Code Act 1907 ("the Code"), entered on 22 February 2023. The victim was Morrisa Moniz, with whom the Appellant had been in a relationship for some five years. This relationship was described in the summary of evidence as being "off and on" and had involved domestic abuse in the recent past. The victim had begun a relationship with another man, something that the Appellant had become aware of. The attack by the Appellant on the victim had occurred during the early morning of 11 November 2021. At the start of the attack the victim had called 911, and there was a transcript of this call in evidence; further, the house in which the attack took place had CCTV coverage, which recorded the Appellant's words following his finding a message on the victim's phone which evidenced her new relationship. That coverage also showed the Appellant chasing the victim through the house, armed with two knives.

2. The words spoken by the Appellant, which were recorded at 2.35am, shortly after the two had arrived home, made it crystal clear that his intention, even before the violence began, was to kill the victim. He had a knife, something which the victim had mentioned during the 911 call. The Crown's case was that the Appellant had brought the one knife to the house. At one stage, the victim had locked herself in a bathroom, off the bedroom. The Appellant could be seen on the CCTV footage leaving the bedroom, going to the kitchen, and returning with a knife in each hand. The victim had by this time left the bedroom, and the CCTV footage showed the Appellant continuing to chase her, with a knife in each hand, at a time when the victim had already been wounded and was leaving a trail of blood as she continued her attempts to escape. The last words heard from the victim came at 2.43am, and she showed no signs of life when the Police arrived. The postmortem showed that she had sustained two deep stab wounds, one of which had penetrated the stomach, and the other being a wound to the heart which had penetrated the pulmonary artery and the right ventricle. The victim sustained at least 16 additional wounds, and the cause of death was given as "multiple sharp force injuries with manual strangulation".

3. Submissions on sentence were heard on 27 March 2023, and the judge delivered her sentencing ruling on 29 March 2023, when she sentenced the Appellant to a life sentence with a minimum term of imprisonment for 23 years before he could be considered eligible for parole.

The judge's remarks on sentencing

4. The judge noted the competing positions of the Crown and the defence on sentence, the former submitting that the appropriate range of sentence before eligibility for parole could be considered (effectively the only issue to be determined on this appeal) should be between 23 and 30 years, whereas counsel for the defence argued for a period not exceeding 20 years. The judge noted the abusive nature of the relationship between the two and found that the fact that the Appellant had retrieved and armed himself with two knives before chasing the victim through at least two rooms was an aggravating factor. In fact, the victim had mentioned in her 911 call that the Appellant had a knife, before he left the bedroom and went to the kitchen and returned to continue his attack, armed with two knives, one in each hand (Record of Appeal page 17, lines 14 and 19/20). So that would appear to be consistent with the case put by the Crown, and the Record does not support the assertion by the Appellant's counsel that he did not travel to the scene with a knife. The reality is that the position is unclear.

5. The judge referred in sentencing to the 2012 case of *R v Simpson*, and the 2011 case of *R v Pearman*. Both were Bermuda cases which involved murder with a knife, and both originally involved substantial sentences broadly comparable in terms of eligibility for parole to the 23 years fixed by the judge in this case. The original sentence in *Simpson* had been 23 years, and in *Pearman* had been one of 25 years. In *Pearman* (which preceded *Simpson*) the sentence had been reduced by the Court of Appeal to 21 years. But Pearman's eligibility for parole was reduced by the Privy Council to 15 years, and by the Court of Appeal to a similar level in Simpson's case, in light of the Privy Council's decision in *Pearman*. However, as Baker P pointed out in *Simpson*, since the Privy Council case, the Legislature had amended section 288(1) of the Code in 2014, giving the court a discretion as to the portion of a

sentence that must be served before an application to the Parole Board could be made. Thus, the two cases can be looked at as representing the sentence which the Bermuda courts would have imposed had the offences been committed after 2014.

6. The judge also referred to English authority in terms of the cases of *R v Sullivan* [2004] EWCA Crim 1762, *R v Thomas* [2010] 1 Cr App R 14, and *R v Bristol* [2013] 1 Cr App R (S) 81. *Sullivan* was a case concerning a dispute between neighbours, where the defendant had gone outside his house armed with a bayonet, with which he had inflicted a single, fatal stab wound to his neighbour's chest. The judge had taken a starting point of 15 years and had settled on a minimum period of 13 years and 88 days.

7. *Thomas* involved a murder against a background of domestic violence, where there had been a trial. The judge settled on a 15-year starting period for Thomas's parole eligibility, before considering the aggravating factors which brought the period up to 17 and a half years. The sentencing judge referred to the fact that it was always open to a judge to consider not only the gravity of the offence, but a defendant's antecedent behaviour. It is to be noted that the defendant in the *Thomas* case was found not to have had an intention to kill the victim.

8. The facts in the case of *Bristol* are very similar to those of this case. The judge had regard to Bristol's previous good character, and to his past behaviour towards the victim, which had included a strangulation attempt. The judge started with a 15-year period as the starting point for parole, which was adjusted to 22 years taking into account the history of past violence and intimidating conduct as a significantly aggravating factor. The sentence was upheld on appeal.

9. The judge in the present case described the attack as being "vicious and ferocious" leaving no doubt that the Appellant intended to kill the victim. I would agree and would add that the transcript taken from the CCTV footage establishes that there is no need to draw inferences in this regard. The Appellant's own words, expressed as "You're dead tonight", "Today is your last day of freedom", and "This is what death looks like" establish beyond any doubt that immediately before the attack, the victim's death was the Appellant's objective.

10. The judge also referred to the sentence imposed on the Appellant for an offence of causing actual bodily harm to his then infant child by either throwing him or dropping him out of a second storey window. The judge in that case did not make a ruling as to whether the case concerned throwing or dropping the child. But clearly the judge regarded the previous offence as an aggravating factor.

11. Before the judge, the Appellant's counsel had submitted that the involvement of alcohol should not be seen as an aggravating factor. One can see arguments either way; behaviour caused by the excessive consumption of alcohol is not to be excused, and the consumption of that which reduces control makes matters worse; on the other hand, the absence of alcohol could be said to show that what the defendant did reflected his true intentions. This aspect of matters was covered in the case of *Sullivan* below. But the point is effectively academic in this case, because the judge made no reference to the issue in her sentencing remarks. The Appellant's counsel also suggested that the case of *Pearman* was a more serious case than the instant case. I do not agree; both were horrific attacks which were very similar in nature.

12. Finally, I would note that the judge did identify the various factors she was obliged to consider under the law.

The grounds of appeal

13. The grounds of appeal as originally put were simply that the judge failed properly to apply the mitigating factors in favour of the Appellant, and that the sentence was in all the circumstances manifestly excessive. In regard to the second of these, the difficulty facing the Appellant was that there is a relatively modest difference between the 23-year period for eligibility for parole fixed by the judge, and the period of 20 years suggested by counsel for the Appellant. The word "manifestly" can be equated to "obviously", but in my judgment has to be significant, and it seems to me doubtful that this case crosses the "manifestly excessive" threshold. Counsel for the Appellant sensibly took the same view, and in his written submissions abandoned this ground of appeal, leaving only the complaint that the

judge failed properly to apply the mitigating factors in favour of the Appellant when sentencing.

The written submissions of counsel

14. Mr Pettingill first addressed the issue of intoxication, noting that counsel on both sides had addressed this issue before the sentencing judge. The Crown referred to the commission of the offence while under the influence of alcohol as being a particularly aggravating feature, while counsel for the Appellant simply commented "I am not altogether sure that the use of alcohol is aggravating". The judge did not refer to intoxication in her sentencing remarks, so it cannot be said that she accepted the Crown's submissions that alcohol was an aggravating feature.

15. Nevertheless, Mr Pettingill explored the issue of intoxication first with reference to section 43 of the Code, which permits intoxication to be taken into account in determining whether there was an intention to cause a specific result. He submitted that if intoxication gave rise to a statutory defence to a "specific intent" crime, it cannot then be an aggravating feature. The conclusion does not follow from the premise. The fact that intoxication may be relevant in determining whether a defendant had a particular intent tells one nothing about its relevance as either an aggravating or a mitigating factor. And in this case the Appellant's words, captured on the CCTV footage and referred to in paragraph 9 above, made his intention abundantly clear. Intoxication did not come into play. Mr Pettingill noted that the judge had not taken a clear position regarding intoxication and invited the court to give guidance on the issue.

16. Mr Pettingill's second point was in relation to the judge's finding that it was an aggravating feature of the case that the Appellant had "retrieved and armed himself with two knives before chasing the victim through no less than two rooms before stabbing her on 17 occasions". Even though the record is not completely clear on whether the Appellant had taken a knife to the house, he clearly had a knife with which he first attacked the victim,

before leaving the bedroom, and walking towards the kitchen, returning with a knife in each hand. In my view the judge's statement cannot be faulted.

17. Ms Clarke's submissions had been received first in time, before Mr Pettingill had been instructed, so have to be read accordingly. She noted that this was the first appeal to deal with knife crime murders in a domestic setting since the amendment of the Code and invited the court to provide guidance as to the appropriate sentencing range. I should add that Mr Pettingill accepted instructions at short notice, and the court is grateful to him for having done so.

Oral submissions

18. Mr Pettingill concentrated on the issue of intoxication, which he contended should be seen as a mitigating factor, despite the fact that the judge had made no reference to it in her sentencing remarks. Mr Pettingill had not been counsel below but believed that the hospital report which was prepared because the Appellant had been admitted after the incident showed that the Appellant had consumed alcohol but did not speak to the Appellant's level of intoxication. It is to be noted that he could be heard on the CCTV footage insisting that he was not drunk. Ms Clarke confirmed that the report went no further than to indicate that the Appellant had some alcohol in his system.

19. Mr Pettingill referred the court to the judgment of the Lord Chief Justice in *Sullivan*. In that case, Lord Bingham had set out a list of the various factors which might mitigate or aggravate the normal penalty. The list for the latter cases did not include intoxication, but immediately following the list, Lord Bingham said this: "The fact that a defendant was under the influence of drink or drugs at the time of the killing is so common that I am inclined to treat it as neutral." It may well be this is the reason why the judge did not make specific reference to it.

20. Mr Pettingill was asked whether the fact that the judge had not taken a starting point and then applied mitigating and aggravating factors to it was properly a cause for complaint, to

which he indicated that this was not his submission. He agreed that if intoxication was not a mitigating factor, he could not object to a period of 23 years before eligibility for parole.

21. Ms Clarke clarified that in her submissions to the judge she had suggested a range of 23 to 30 years, and that the starting point in this case before eligibility for parole should be 25 years. That, she said, was the appropriate starting point for murder involving the use of a knife where there had been an intent to kill, as in this case.

Findings

22. The first matter to be dealt with is the issue of intoxication. It is not surprising that Lord Bingham chose to treat this as neutral, though he did carry on to say that where two people in the position of the Appellant and the victim indulge in a violent quarrel in which one dies, he would tend to recommend a term somewhat below the norm. But that is not the position in this case, where before the Appellant began his attack on the victim, he had made it clear in no uncertain terms that he intended to kill her.

23. In circumstances where the judge made no reference whatsoever to the Appellant's level of intoxication, I find it impossible to conclude that she in fact imposed a greater sentence on the Appellant than she would have if his intoxication had not been a factor. I would therefore dismiss the ground of appeal based on the theory that the judge imposed a greater sentence on the Appellant on the basis of his intoxication.

24. As indicated, Mr Pettingill took no point on the manner in which the judge had reached a sentence requiring 23 years to be served before eligibility for parole. For my part, I think it would have been helpful if the judge had fixed a starting point, and then identified the factors (which might go either way) which required movement from that starting point. But I would not regard it as an error on her part not to have done so.

25. Ms Clarke submitted that the court should indicate that the appropriate starting point for murder using a knife where there was an intention to kill the victim should be 25 years. Counsel were agreed that the existing practice was to identify a range, and then to fix a

starting point within that range. The level of sentence suggested by Ms Clarke does seem to me to be appropriate as a starting point, and I would endorse that approach, following which the judge should consider aggravating and mitigating factors before reaching a final decision in a particular case.

26. I would therefore regard the judge's sentence of 23 years before eligibility for parole as appropriate and would dismiss the appeal against sentence.

KAWALEY JA:

27. I agree.

CLARKE P:

28. I, also, agree.