

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCR 2017/0009

DIRECTOR OF PUBLIC PROSECUTIONS

AND

PRINCE YAHWEH HENRY

Appearances:

Mr. Teshawn Vasquez and Mr. Vaughn Woodley for the Crown.
Ms. Natasha Grey for the Defendant.

2020: March 20, 23
May 5

SENTENCING JUDGMENT

FACTS

- [1] **THOMPSON, JR. J:** Prince Yahweh Henry (“the defendant”) was the father of Ihaijah Rastafri Kelly. Ihaijah Kelly was one of a pair of twins born and delivered at home on the 17th day of November 2014. Between the 21st and the 23rd day of November 2014, the defendant left for the mountain with Ihaijah Kelly. According to him, the infant child was ‘not breathing good’ so he (Prince Yahweh) took the child into the mountain to breathe air. The defendant subsequently returned from the mountain without the baby (Ihaijah Kelly).
- [2] On the 23rd day of November 2014, Esther Henry, the mother of the defendant, notified the Stapleton Police Station of the missing baby Ihaijah. As a result of the report made, a search party was formed which went in search of the baby.
- [3] The search party journeyed to Parry’s Village, St. Peters the home of Prince Henry. Amongst the search party was Sergeant Fitzroy Morton. On arrival at Parry’s Village the search party met the defendant, on his property, standing by a tree picking some leaves. Sergeant Morton approached the defendant and asked him about the missing baby. The defendant then responded that the baby had in a

demon and that he took the baby to the mountain for the baby to get some fresh air and the devil burst out of the baby and he and the devil had a fight and then the devil ran up the mountain and he ran up the mountain after the devil and buried the baby.

- [4] Sergeant Morton then inquired of the defendant as to where the baby was buried. Sergeant Morton and other members of the armed forces then journeyed back to the Stapleton Police Station. Sergeant Morton along with the defendant and his mother then set out to search for where the defendant said he buried the baby. The defendant took Sergeant Morton to an area where he farmed in the Parry's mountain and pointed out to him where the baby was buried. In the area which was pointed out to Sergeant Morton, he saw what appeared to him as bones, intestines and what looked like a piece of scalp.
- [5] The remains were photographed by crime scene investigator Nallie Joseph. Having photographed the remains, they were then examined by forensic pathologist Dr. Valery Alexandrov, where Dr. Alexandrov prepared a report of his findings. The findings revealed that the remains were that of a new born baby, and the cause of death was rapid dehydration as a result of abandonment in high ambient temperature.
- [6] On the 10th day of July 2015, Consie Rogers, Detective Sergeant of Police charged the defendant on a Warrant in the First Instance for the offence of manslaughter of Ihaijah Rastafari Kelly.
- [7] By an indictment filed on, the 25th day of September 2017, the defendant was charged with manslaughter contrary to Common Law.
- [8] The defendant's trial began on the 27th day of January 2020. On the 5th day of February, 2020 the jury returned a unanimous verdict of guilty against the defendant.

The Law

- [9] Section 5 of the Offences Against the Persons Act CAP 4.21 of the Laws of the Federation of St. Christopher and Nevis provides that "a person convicted of manslaughter shall be liable, at the discretion of the court, to life imprisonment with or without hard labour or to pay such fine as the court may award, in addition to or without any such other discretionary punishment as aforesaid."

Crown's Submissions

- [10] The crown submitted that the defendant's offending was aggravated by the following:
 - a) The life of an infant was lost

- b) Some degree of suffering was endured on the part of the baby.

[11] The crown submitted that the defendant's offending was mitigated by the following

- a) The defendant comes to the court with a clean record.
- b) Little or no premeditation involved in the commission of the crime, (The defendant held the honest belief that he was not endangering the life of the infant child)
- c) Delay, the Court of Appeal in **Violet Hodge v Commissioner of Police**¹ opined that where there is an excessive delay between when the convicted has been charged and convicted, the court can exercise its discretion in giving the defendant a discount on the sentence imposed. In the case at bar, almost 5 years had elapsed before the accused tried. In the premises the court in exercising its discretion may give a discount on the sentence which it would impose on the convict.

[12] The crown further submitted that the Compendium Sentencing Guideline of the Eastern Caribbean Supreme Court, has not yet evolved to include the offence of manslaughter. Therefore, it was their submission that the court could derive assistance from the "Gross Negligence Manslaughter" guideline from the United Kingdom Sentencing Council.

[13] Pursuant to the United Kingdom Sentencing Council Guidelines, the first step a sentencer should take in arriving at a starting point for the offence of Gross Negligence Manslaughter is to examine the degree of culpability of the offender and the harm caused as a result of his actions or inactions. There are four categories of culpability², enumerated as A to D. They submitted that when the guidelines are married with the facts of the case at the defendant's culpability was at level B or high culpability.

[14] The factors indicating higher culpability are as follows:

- The offender continued or repeated the negligent conduct in the face of obvious suffering caused to the deceased by that conduct.
- The negligent conduct was in the context of other serious criminality.
- The offence was particularly serious because the offender showed a blatant disregard for a very high risk of death resulting from the negligent conduct.
- The negligent conduct was motivated by financial gain.

¹ BVICRAP2015/0005

² United Kingdom Sentencing Council Guideline Page 10 Tab 1

- The offender was in a leading role if acting with others in the offending.
- Concealment destruction defilement and dismemberment of the body where not separately charged.

[15] The factors indicating lower culpability are as follows:

- The negligent conduct was a lapse in the offender's otherwise satisfactory standard of care.
- The offender was in a lesser or subordinate role if acting with others in the offending.
- The offender's responsibility was substantially reduced by mental disorder, learning disability or lack of maturity.

[16] It was their submission that based on the UK guideline, the relevant sentencing range for this defendant, having regard to his culpability and the harm caused was 6 to 12 years imprisonment with a starting point of 8 years imprisonment.

[17] The crown contended that the court could move upwards or downwards from the starting point based on the court's assessment of the aggravating and mitigating factors.

[18] The crown submitted that the defendant's offending was aggravated, since his actions amounted to continued or repeated negligent conduct, in the face of obvious suffering caused to the deceased. Furthermore, they argued that the destruction of the infant's remains served to aggravate his offending. They accepted that the defendant's offending did not amount to a blatant disregard for the risk of death and accepted that the negligent conduct was a lapse in the defendant's otherwise satisfactory, if not exemplary, standard of care.

[19] The crown also relied on the decision of the Court of Appeal of England and Wales in R v Pearson [2019] EWCA Crim 455 in support of their submission that this Court would be entitled to treat the conduct of the defence as an aggravating factor. In Pearson, the Court of Appeal was of the view that the court was empowered to regard serious allegations made against others in the course of the defendant's case, without a reasonable evidential basis as an aggravating factor. [see Pearson at paragraphs 14 to 19 et seq].

[20] The crown also put before the court the sentencing remarks of Mr. Justice Singh in the Central Criminal Court ["the Old Bailey"] in the matter of **R v Kunene and Kunene**. In **Kunene**, the defendants had pled guilty to the offence of gross negligence manslaughter. The defendants were the parents of a 6-month-old baby who died from rickets as a result of a severe vitamin D deficiency. At paragraph 30 of his sentencing remarks, Mr. Justice Singh said:

“The secular courts of this country apply the secular law of the land. They do so equally to all who come before them. The law respects the right of everyone to freedom of thought and belief. However, the right to manifest one’s religion is not absolute. It is limited in particular by the rights of others. The state has a particularly important duty to protect the right to life especially when a young child is concerned.”

[21] Finally, the crown put before the court the case of GDAHCR2017/0018 **Regina v Joylyn James**. In that case, the accused pleaded guilty to the offence of manslaughter. The defendant was playing with a pellet gun and opened fire on an infant. The infant was hit in the head and sometime thereafter the infant succumbed to the injuries and died. The defendant was sentenced to serve a 2-year sentence of imprisonment which was suspended for two years and was required to keep the peace for two years and perform 200 hours of unpaid work together with attending counseling and therapy for 12 months.

[22] The crown submitted that the sentence in **Joylyn James** meant that a suspended sentence or alternatively a partly suspended sentence, was a viable sentencing option in relation to this defendant, with scope for a three year suspension period.

[23] Before the court heard from the defendant’s counsel and witnesses at the sentencing hearing, the court also received the social inquiry report from Ms. Tivanna Wharton, a probation officer from the Probation Department. The social inquiry report was tendered in evidence through Ms. Wharton and counsel for the crown and defence were permitted to cross examine Ms. Wharton.

[24] Ms. Wharton confirmed that while her department provided counselling services, she could not say whether they would be able to provide those services to persons in custody. In her view, the defendant indicated that he regretted his actions on the day in question. When taxed by the court on the distinction between regret and remorse, Ms. Wharton indicated that in her professional view the defendant was regretful of his actions but not remorseful.

Defence Submissions

[25] The defendant called three witnesses at his sentencing hearing. The first witness was his mother, a Ms. Esther Henry. The second witness was Dr. Terrance Drew and the third witness was the defendant’s wife, Mrs. Chanara Henry. The defendant’s mother and wife had been extensively interviewed by the probation officer and their evidence was consistent with what was contained in the social inquiry report.

[26] Essentially, they extolled the defendant’s virtues as a man, a father, a provider and model citizen in his community. They indicated the hardship that his family would sustain if he were incarcerated for a further period. It was common ground that the defendant was an exceptionally hard working, generous and decent man who enjoyed a close relationship with his children. The defendant was well regarded in

his community and his wife and mother entreated the court to be merciful and not impose a further custodial sentence.

[27] Ms. Grey for the defendant made the following submissions. Firstly, Ms. Grey submitted that there was no evidence that the infant suffered before its demise and as such the only aggravating factor was the fact that the life of an infant was lost.

[28] Insofar as mitigation was concerned, Ms. Grey submitted that the defendant was remorseful, that is to say, deeply regretful of his actions and not just sorry for his actions as convicted persons are likely to be. This remorse was expressed through his counsel who indicated that the defendant had taken personal responsibility for his offending in causing the death of the infant, albeit at a very late stage in the proceedings.

[29] Ms. Grey submitted that the following mitigating factors were properly made out:

- (i) The defendant's remorse,
- (ii) The defendant's co-operation with the investigation,
- (iii) The defendant's previous good character,
- (iv) The defendant is the sole or primary caregiver for dependent relatives,
- (v) That for reasons beyond the defendant's control he was subject to stress or pressure which related to and contributed to the negligent conduct,
- (vi) The defendant is a young offender (when Ms. Grey was taxed on this issue, she abandoned this argument. This was unsurprising since the defendant was aged 29 at the time of the offence and could not rely on his so-called youthfulness as a mitigating factor).

[30] Ms. Grey emphasized page 11 of the social inquiry report which was expressed in the following terms:

"Prince Yahweh has been convicted of manslaughter and is very regretful for some of the actions he took on the day in question. Mr. Henry through his past experiences with the hospital as well as his Rastafarian beliefs may have made poor judgment in not seeking medical help from the medical professionals during his son's time of distress. It is important to note that Mr. Henry has accepted his negligence in not alerting the authorities of the birth of the child and of the difficulties experienced after birth. In hindsight there may have been other possible decisions Mr. Henry thinks he could have made but added that in the moment it was a time of distress for everyone involved."

[31] Ms. Grey argued that a 3 year starting point was appropriate in the circumstances and that a non-custodial sentence comprising of a counselling element, a community service element with a bond/default imprisonment condition and a suspended sentence would meet the ends of justice. In this regard, Ms. Grey

relied heavily on the **Joylyn James** decision although she accepted that in **James** the defendant had pled guilty, thus saving the State the trouble of a trial.

- [32] At the close of Ms. Grey's submissions, she indicated that the defendant wished to address the court. The defendant perfunctorily stated that he was seeking leniency on behalf of himself and his family and that he was sorry and expressed his sympathy to his family for the pain and hardship that he had caused.

Court's Analysis

- [33] In passing sentence for this matter, the court's first consideration is to determine the appropriate starting point. In this regard, the court has had regard to the Manslaughter Definitive Guideline on Sentencing for Gross Negligence Manslaughter in the United Kingdom and out of an abundance of caution, this Court has also taken into account the United Kingdom Child Cruelty Guideline which addresses the offence of causing or allowing a child to die, contrary to Section 5 of the Domestic Violence Crime and Victims Act of 2004. The court pauses here to observe that the Sentencing Guidelines are not rigid and fixed categories. They are categories meant purely to guide and assist the court in determining the appropriate sentence having regard to the harm caused and the offender's culpability.

- [34] In determining the starting point, the court must first determine the offence category. These categories are high culpability, medium culpability and lesser culpability. In the instant case, this Court is satisfied that the defendant's culpability falls somewhere between high culpability and lesser culpability. This is for the following reasons: lesser culpability includes a momentary or brief lapse in judgement in cases of neglect or low-level neglect. High culpability speaks to a deliberate disregard for the welfare of the victim.

- [35] In this Court's view, the defendant's offending falls somewhere between the higher and lesser categories. It would not be fair to characterize the defendant's offending as a momentary or brief lapse in judgment or low-level neglect, but in the same vein the defendant's offending does not rise to the high culpability threshold, which would include prolonged or multiple incidences of serious cruelty, including serious neglect or gratuitous degradation or the use of force or the use of a weapon.

- [36] In my view having considered the UK sentencing guidelines for gross negligence manslaughter and the UK sentencing guidelines for causing or allowing a child to die, it is my view that the appropriate starting point is 8 years imprisonment with the category range of between 5 to 9 years imprisonment, having regard to how the aggravating and mitigating factors are analyzed.

- [37] In determining the starting point of 8 years imprisonment, I take the following into account. Firstly, the fact that the offence was particularly serious because the offender while not showing a blatant disregard for a high risk of death, the

negligent conduct did in fact appear to be a lapse in the offender's otherwise satisfactory and exemplary standard of care.

- [38] The defendant's offending is also aggravated by the fact that the body of the deceased was destroyed by wild animals. The most significant fact is the loss of life of the infant in question, so when weighing up all of the matters and taking everything into consideration, it is my considered view that the determination of the offence category does not fit neatly into the boxes set out in the guidelines, since there are areas which fall within one factor which could easily fall within another factor as well. It is for that reason that I have carefully considered the varying starting points and it is my view that the appropriate starting point is 8 years custody.

Aggravating & Mitigating Factors

- [39] The next factor for the court's consideration is the analysis of the aggravating and mitigating factors.

- [40] In my view, the defendant's offending is aggravated by the following:

- (i) his failure to seek medical help³ and
- (ii) the manner in which his defence was conducted at trial.

The defendant's offending is mitigated by the following:

- (i) the fact that he has no previous convictions for any offence,
- (ii) the fact of his remorse albeit expressed late in the day,
- (iii) the fact that he is the primary carer for dependent relatives,
- (iv) the fact of his previous good character⁴ and exemplary conduct as a citizen in the Federation of St. Christopher and Nevis,
- (v) the fact of his cooperation with the investigation,
- (vi) the fact that for reasons beyond his control he was subject to stress or pressure from competing or complex demands which related to and contributed to the negligent conduct.

- [41] Therefore, this Court is satisfied that the harm caused by the defendant falls into category 1, the more serious category, and as such a starting point of about 8 years imprisonment with a category range of 3 to 8 years in custody is appropriate.

Conduct of Defence

³ This aggravating feature appears in the UK Child Cruelty Guideline which the court provided to counsel for the Crown and defence at the sentencing hearing

⁴ The UK Child Cruelty Guideline lists no previous convictions and good character as separate mitigating factors

- [42] On the issue of the conduct of the defence as an aggravating factor, the court is fortified in its position by the authority of the **Queen v Richard Pearson** in that case, at paragraphs 14 to 18 of the Court of Appeal in the UK that it is possible for the court to regard serious allegations made against others, without reasonable evidential basis as an aggravating factor.
- [43] In the instant case, the defendant made serious allegations against the members of the police force and the apparatus of the state, generally in relation to the treatment that was meted out to him while he was in custody on November 23rd and 24th, 2014.
- [44] Those allegations warranted a *Voir Dire* which occupied significant time and which I find having regard to the verdict aggravates the defendant's offending. As such, I will take the conduct of his defence into account as an aggravating factor.
- [45] For the avoidance of doubt, I should make it clear that the taking into account of this factor as an aggravating feature of his offending, is not intended or should be characterized as an attempt to penalize the defendant for taking the matter to trial, but it is well established law that if in the course of advancing your defence you make spurious or ill-founded allegations, then that can, having regard to the particular circumstances, amount to an aggravating factor and I so find.

Delay

- [46] This Court was initially minded to consider the delay between the defendant's offending and his eventual conviction on February 5th, 2020 as a mitigating factor. This Court was empowered to do so having regard to the Court of Appeal decision in the case of **Violet Hodge v The Commissioner of Police** which this Court is familiar with.
- [47] This Court having considered the decision in **Violet Hodge**, does not find that the delay ensures to the benefit of the defendant in this matter. To consider the delay as a mitigating feature would be to double count since this Court will also consider and take into account the time that the defendant has spent in custody. The delay and the time spent in custody go hand-in-hand and the defendant cannot expect to receive credit for time spent in custody and credit for the delay in these particular circumstances. I am therefore not satisfied that delay is a mitigating factor which can be added to the credit balance for the defendant.

Suspended Sentence

- [48] Counsel for the defendant submitted that the court was empowered to impose a non-custodial penalty. Counsel for the crown submitted that a partly or wholly suspended sentence is a sentencing option which is available to the court in this particular matter and they reminded the court that a sentence can be suspended for up to three years and imprisonment suspended for three years.
- [49] With the greatest of respect to counsel for the defendant and the crown, I do not agree that a suspended sentence is appropriate in these particular circumstances.

[50] The options which would be open to the court according to counsel for the defence are as follows:

- a. the defendant could be sentenced to receive counselling,
- b. the defendant could be sentenced to receive a community service order of approximately 200 hours of community service,
- c. the defendant should be sentenced to receive a default position should he fail to comply with his community service obligations, and
- d. a suspended sentence analogous to the sentence imposed on **Joylyn James** in Grenada for manslaughter by gross negligence was appropriate to be imposed on the defendant.

[51] I regrettably find that I am not able to impose such a sentence. In my view, a suspended sentence does not fit and meet the justice of this particular case and I am not minded to impose such a sentence. It follows therefore that a custodial sentence must be imposed on the defendant. The only issue to be resolved is the length of that custodial sentence.

Sentence

[52] As I had previously indicated, I have arrived at an 8-year starting point for the reasons I had previously advanced. I accept the fact that the mitigating factors outweigh the aggravating factors. In my view, the sentence to be served by the defendant is substantially less than what would be served if the aggravating factors had outweighed the mitigating factors. Manslaughter is a serious offence and manslaughter by gross negligence is no less serious than any other form of manslaughter. Of course, I accept that while the 10 to 15 years sentencing benchmark for manslaughter in the Caribbean does not necessarily apply to manslaughter by gross negligence, the loss of life in such tragic circumstances must attract a custodial sentence. It is for this reason, this Court is satisfied that the starting point is a sentence of 8 years imprisonment.

[53] On any analysis, the balancing of the aggravating and mitigating factors reduced the sentence to one of 5 years imprisonment. The defendant has served 1 year 11 months and 20 days in custody and this time will be deducted from the time that this defendant is to serve.

Patrick Thompson Jr.
High Court Judge (Ag.)

BY THE COURT

REGISTRAR