

SAINT LUCIA

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

CRIMINAL CASE NO. SLUHCR2007/0120

BETWEEN:

THE QUEEN

Claimant

and

SHELDON FLETCHER

Defendant

Appearances:

Mr. Leon France for the Claimant
Mr. Horace Fraser for the Defendant

2017: May 18.

JUDGMENT ON SENTENCING

- [1] **CUMBERBATCH, J.:** By an indictment filed on the 22nd April 2008, the Director of Public Prosecutions indicted the Defendant together with one Anroy Cornibert for the offence of Murder of Luke Alvin Charles (the Deceased) on Saturday 21st August 2004, contrary to Section 170 of the Criminal Code 1992. Both Defendants were convicted as indicted in a fully contested trial before Benjamin J (as he then was) and the Defendant was sentenced to life imprisonment. He appealed his conviction and sentence, however the absence of the summation of the Learned Trial Judge resulted in the Court of Appeal ordering a retrial. This was done on the 11th December 2012.
- [2] The Defendant was again indicted on the 21st November 2016 for the offence of Murder and Manslaughter of the said Deceased contrary to Sections 170 and 168 (1) of the Criminal Code 1992. On the day of the commencement of his retrial the Defendant offered to plead guilty to the

offence of Manslaughter by Unlawful Harm contrary to Section 168 (1) of the Criminal Code 1992
After the allocutus the Court ordered a Pre-Sentence Report be prepared.

THE FACTS

- [3] On 21st August, 2004 about 3:30 p.m. at Conway in the quarter of Castries, Carlos Jn. Baptiste, a resident of Conway, was seated in an alleyway in close proximity to a vendor's tray being manned by Marvin Edward aka Shark. Mr. Jn. Baptiste was in the company of Luke Alvin Charles a.k.a. "BoomBoom", one Hage who was accompanied by his female companion and Kevin Alexander. Mr. Jn. Baptiste was seated next to Luke Alvin Charles at the material time. They were all conversing and smoking at the time.
- [4] Whilst there, Mr. Jn. Baptiste notice the Defendant whom he also knows by the alias "Danman" approaching them accompanied by another individual known to him as Anroy Cornibert a.k.a. "Tilo". This witness noticed both men were armed with firearms at the time and a female known to him as Charlyn Joseph was being held at gunpoint by the said Anroy Cornibert.
- [5] This witness recalls that when the Defendant got closer to them, he went directly to Luke Alvin Charles and said to him "Garson I don't like you" and proceeded to kick him to the face. At this point this witness recounts that Luke Alvin Charles replied "Garson I did not do you nothing." This witness then heard Mervin Edward asking the Defendant to desist from what he was doing.
- [6] Mr. Carlos Jn. Baptiste then witnessed the Defendant discharging his firearm in the direction of the Deceased. The Defendant at the time was in close proximity to the Deceased. He noticed Luke Alvin Charles holding his chest and fell in a crouched position. The Defendant continued to fire at the Deceased at this point this witness began running away from the scene and recalls hearing more gunshots being discharged. He remained away from the scene for approximately 20 minutes and upon his return he saw police were present but did not see Luke Alvin Charles there. He then approached the officers and spoke to them.
- [7] Luke Alvin Charles arrived at the Victoria Hospital via ambulance about 3:45 p.m. He was attended to by the Medical Officer on duty, Dr. Mershack A Naawee. He arrived at the Accident and Emergency Department, bleeding from the head, right arm and he was unconscious. This

doctor noticed multiple gunshot wounds to the head with entrance and exit wounds. His pupils were dilated fixed and unreactive. He was also found to have an abnormal respiratory pattern. Although managed aggressively and resuscitative measures were applied, he died at the Accident and Emergency Department of the said Hospital at 5:20 p.m. on the 21st of August 2004.

[8] A post mortem examination was conducted on the body of Luke Alvin Charles by Dr. Stephen James King, Forensic Pathologist, at the mortuary of the Victoria Hospital about 1:20 p.m. on 23rd August, 2004. At the said time the body was identified to Dr. King by Wiltina Flavy as her son.

[9] Dr. King observed a number of wounds to the body and identified them as LC1- LC8:

- LC 1 was a wound to the left side of the forehead. It appeared furrowed along the skin, ragged and there was some blackening in that wound. LC 8 was the underlying exit wound in the right parietal area.
- LC 2 was an entry wound to the back of the head to the right. Underlying this wound was a track from a bullet that had passed through the right parietal bone, through the right cerebral hemisphere and through the right temporal bone. A copper coloured bullet was recovered in the right zygomatic area.
- LC 3 was a slit related to bone fragments from LC 2.
- LC 4 was a gunshot entry wound to the back of the right forearm. The bones of the right forearm were fractured with LC 6 being the exit wound.
- LC 7 was a gunshot entry wound to the left thigh from the front with LC 5 being the associated exit wound to the outer and posterior left thigh.

[10] Dr. King opined that the cause of death was brain damage as a result of a gunshot wound that entered the back right side of the head. There was also a contributing cause of hemorrhagic shock related to multiple gunshot wounds. He counted 4 gunshot entry wounds.

THE PRE-SENTENCE REPORT

[11] The Defendant was raised by his mother in Ciceron, Castries. His father assisted her to maintain him when growing up and he developed a close relationship with him. He also benefitted by being a part of the extended family of Ciceron which was responsible for his supervision when his mother was away at work.

[12] The Defendant admitted to involvement in gang activities and drug trafficking. Nevertheless he is regarded in high esteem by community residents who speak of him in glowing terms. He showed no remorse for killing the Deceased and instead denies responsibility for his death. In this regard the Court notes that there is no application before it to vacate the Defendant's guilty plea.

[13] The Court is satisfied that the Defendant is and was at the material time represented by able and experienced Counsel. Moreover this being a retrial the Defendant was well aware of the nature and extent of the allegations made against him. Indeed the issues remained unchanged as he was again indicted for shooting the Deceased thus causing his death. The facts were accepted by both the Defendant and his Counsel at his sentencing hearing. Thus the Court will proceed to sentence the Defendant notwithstanding his claims of innocence.

[14] I shall return to other aspects of this report later in this judgment.

THE SUBMISSIONS

[15] The Court received written submissions from Counsel for the Defendant and the Director of Public Prosecutions both of which were quite helpful. Mr. Fraser for the Defendant submitted what he considered to be the aggravating and mitigating factors herein and contends that the mitigating factors seemingly match the aggravating ones. Counsel further contends that though the case at bar may be classified as a bad case it is not within the realm of the worst case.

[16] Defence Counsel urged the Court to balance the need for retribution against the favourable prospects of rehabilitation. He suggested a determinate sentence of 16 years of imprisonment to be appropriate.

[17] The Director of Public Prosecutions contends that the major factor for the Court's consideration is the Defendant's degree of culpability. He submits that the Defendant was part of a joint enterprise to cause the death of the Deceased for which he has not shown any remorse. He went on to address the Court on the application of the four classical principles of sentencing.

[18] The Director of Public Prosecutions contends that though the accepted benchmark for this offence is 15 years imprisonment, the special circumstances herein justify an increase in that benchmark. In support thereof, the Director of Public Prosecutions submits that the aggravating factors far outweigh the mitigating ones and the Defendant's previous convictions for firearm offences are indicative of his propensity for gun violence.

THE LAW

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

RETRIBUTION

[20] This is a case of a bold and brazen killing in public during daylight hours a scenario hitherto unknown to the relatively tranquil atmosphere of life on this island. The findings of the pathologist are indeed a silent testimony of the viciousness of this offence.

[21] What makes this killing that much more egregious is the Defendant's refusal to accept responsibility for his heinous conduct and his bizarre attempts at painting himself as a victim. The sentencing Court must carry out its duty to show abhorrence for this kind of conduct.

DETERRENCE

[22] This principle is of both general and specific application. Specific to the offender to deter him from reoffending in like manner; and general to the society at large to deter those who seek to emulate the criminal conduct of the Defendant.

[23] The Director of Public Prosecutions submits and the Court accepts that the Defendant seems to have learnt nothing from his previous convictions. Instead however he has taken his criminal conduct to the highest level known to man which is the wanton taking of a human life. Thus the Court must seek to deter this Defendant and others of similar ilk from committing offences of homicide

PREVENTION

[24] This principle is applicable to those who are considered to be a danger to the community. The Defendant is spoken of in glowing terms by persons in his community, Ciceron to the extent that he

is considered by some to be a mentor. The Court finds it difficult to accept these views as being genuine when it is considered that prior to the commission of this offence the Defendant has been convicted for offences of possession of an unlicensed firearm, possession of ammunition without being the holder of a licence therefor and wounding for which he served periods of imprisonment. It seems to me to be no more than an attempt by community residents to gild the lily. However there are not any similar views of the Defendant's character from the residents of Conway.

- [25] As stated aforesaid the Defendant is a self-confessed gang member and drug trafficker and has now added homicide to his repertoire of convictions. Thus the Court must take into consideration this principle in determining an appropriate sentence herein.

REHABILITATION

- [26] The Defendant's rehabilitation is of paramount importance to ensure his smooth reintegration to the society. This process has however been compounded by his blunt refusal to take responsibility for his crime and as a consequence the lack of remorse. Thus he will require an aggressive program of rehabilitation to address his predilection for violence and antisocial conduct.

- [27] The following are considered to be the aggravating and mitigating factors herein:

Aggravating Factors

1. The senseless taking of a life in a most brutal manner;
2. The offence was committed in public during daylight hours;
3. The use of a firearm which was never recovered;
4. The absence of remorse;
5. The Defendant's denial of his involvement in this offence;
6. The Defendant's previous convictions for offences involving firearms and violence.

Mitigating Factors

1. The Defendant's guilty plea.

- [28] After having conducted a balancing exercise with the aggravating and mitigating factors, I find that the aggravating factors significantly outweigh the mitigating ones.

SENTENCE

- [29] In **Mervin v The Queen** Rawlings JA (as he then was) stated the approach to be taken by the Court in sentencing in cases of homicide. Though the Learned Justice of Appeal was adjudicating in a case of Capital Murder, I find the following dictum to be appropriate here and will apply same, to wit:

"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 for the offence, and the possibility to 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.

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."

- [30] In applying the principles foresaid it is evident that the seriousness of this offence cannot be overstated. The facts so dictate. This Defendant who is not a first offender is also unrepentant though he has entered a guilty plea and both he and his Counsel accepted the facts herein. He has adopted a disturbing posture of disabusing his mind, of his criminal conduct to the extent of denying his involvement in this offence. This does not auger well for his rehabilitation. To this must be added the Defendant's admitted gang related activities, drug trafficking and his convictions for firearm related offences and wounding.
- [31] I have already alluded to the glowing terms in which the Defendant is described by community residents which I do not accept. The Court has noted that the Pre-Sentence Report is bereft of opinions of the Defendant's character from residents in the Conway area which the Defendant frequented and indulged in criminal activity.
- [32] I find in the circumstances that the Court must attach greater importance to the seriousness of the offence rather than the Defendant's personal circumstances.

- [33] It is trite that Parliament has imposed a maximum penalty of life imprisonment for persons convicted of this offence. This is indicative of the seriousness with which the legislature views this heinous offence. Moreover the aggravating factors outweigh the mitigating ones. Hence a custodial sentence is inevitable, however the Court must determine whether an indeterminate sentence would be appropriate.

DELAY

- [34] This issue was not addressed by either the Director of Public Prosecutions or Defence Counsel. The Court must however take the issue of delay into account.

- [35] The Defendant was taken into custody in or around the month of September 2004 when he was arrested on his return from Dominica. 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 **Boole/I 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 **Boole/I**, 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 with 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..."

- [36] 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 **Boole/I** 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)

[37] After the Court of Appeal ordered a retrial for this Defendant this matter seems to have been put in a state of hibernation by the Crown as no serious effort was made to have the retrial proceeded with in an expeditious manner as ordered by the Court of Appeal. Indeed no reason has been proffered by the Crown for this breach of the Defendant's constitutional rights to a fair Trial within a reasonable time.

[38] I have already considered the seriousness of this offence and its impact on the tranquility of the City of Castries. The Court takes judicial notice of the notorious fact that tourism is the nation's largest income earner and the mayhem and confusion caused by a police shoot out in its capital city will not inure to its economic benefit. As such I find that in all circumstances of this case the society would demand that a custodial sentence be imposed.

[39] In my consideration of the seriousness of the offence, I must bear in mind that multiple gunshot wounds were inflicted on the Deceased during daylight hours in a public place in the presence of members of the public. Thus taking into account all the circumstances of this case I find that the suggested bench mark of 15 years imprisonment is inadequate. I am comforted in that view by the dictum of Baptiste JA who opined in **Roger Naitram at al v The Queen** that the Court ought not to approach and apply guidelines in a mechanistic manner as they are just guidelines.

[40] Section 1097 of the Criminal Code 2008 provides thus:

"(1) This section applies where a Court passes a custodial sentence.

(2) The custodial sentence shall be-

(a) for any term (not exceeding the permitted maximum) as in the opinion of the Court is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with the offence; or

(b) where the offence is of a violent or sexual nature, for such longer term (not exceeding that maximum) as in the opinion of the Court is necessary to protect the public from serious harm from the offender.

(3) Where the Court passes a custodial sentence for a term longer than is commensurate with the seriousness of the offence, or the combination of the offence and other offences associated with it, the Court shall-

- (a) state in open Court that it is of the opinion that subsection (2)(b) applies and why it is of that opinion; and*
- (b) explain to the offender in open Court and in ordinary language why the sentence is for such a term.*
- (4) A custodial sentence for an indeterminate period shall be regarded for the purposes of subsections (2) and (3) as a custodial sentence for a term longer than any actual term."*

[41] This section clothes the Court with a wide discretion of sentencing. The seriousness of the offence and the Defendant's culpability should not be trivialized. I find that in acting as he did the Defendant clearly evinced the intention of taking his criminal conduct to the highest possible level without regard for the safety and well-being of members of the public who were present at the time of the commission of this offence.

[42] Defence Counsel suggested in his written submission that a further 4 years should be added on to the Defendant's sentence having regard to the manner in which this offence was committed. I commend Mr. Fraser for his candour.

[43] The Court is not of the view that notwithstanding the seriousness of the offence the Defendant ought to be the recipient of an indeterminate sentence. The Pre-Sentence Report discloses favourable features for his rehabilitation such as his good conduct whilst on remand and his stated intention to get to know his children better and to pursue the professions of tile laying and a farming to be able to earn a legitimate living.

[44] Thus the Court will impose a determinate sentence. I find the following to wit:

- The killing of the Deceased took place in public during daylight hours;
- Multiple gunshot injuries were inflicted on the Deceased;
- The Defendant is unrepresented for taking the life of the Deceased;
- The Defendant's history of firearm related offences and violence;
- The Defendant's gang involvement and drug trafficking activities which may be the cause for him to re-offend in like manner.

To be special circumstances sufficient enough to warrant a departure from the benchmark of 15 years imprisonment.

[45] I will for the reason aforesaid apply a benchmark of 25 years imprisonment from which I will deduct 3 years for the guilty plea and 2 years for the delay. Accordingly the Defendant is sentenced to 20 years imprisonment. He shall be credited for all time spent on remand whilst awaiting his Trial. He shall receive counselling for his anti-social conduct and anger management.

FRANCIS M. CUMBERBATCH

HIGH COURT JUDGE

BY THE COURT

REGISTRAR

