

THE EASTERN CARIBBAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

COMMONWEALTH OF DOMINICA

CRIMINAL

CASE NO. DOMHCR2014/0039

BETWEEN

THE STATE

V

DONALD MASSICOTT

Appearances: Ms. Evelina Baptiste the Director of Public Prosecution

Mr. Kondwani Williams for Defendant

2015: September 30th

JUDGMENT ON SENTENCING

- [1] **THOMAS, J [Ag]:** By an indictment filed on 10th April 2015, Donald Massicott of Bataca, St. David was charged with the murder of John Tyson on the 10th May, 2015. The accused later pleaded guilty to manslaughter.
- [2] In the circumstances of the guilty plea the court ordered a Social Inquiry Report, such a report was prepared by Anestin Baron, Probation Officer.
- [3] In the report, the Probation Officer examined the defendant's family background, home, school and the prisoner was also interviewed and his biological mother. The defendant's attitude towards the offences is also detailed.

[4] Other interviews included the prisoner's mother, his maternal grandmother, (deceased's sister), victim's two sisters, the victim's brother-in-law and other family members.

[5] The Probation Officer's Report ends with the following conclusion:

"In summary, Donald's act of violence has claimed the life of an individual. Although Donald continues to express remorse for his actions and he claims to acknowledge the impact of his action on himself, his family and the victim's family, one cannot trivialize the wrongfulness of his actions.

Donald was described by many individuals as one who possessed violent tendencies. Based on the insight obtained on his upbringing, it appears that Donald was subjected to various familial issues that seemingly affected his full developmental progress. At the age of fourteen years Donald suffered a mental breakdown and attempted to commit suicide. This episode in Donald's life led to the disruption of his secondary level education and his formal education altogether. This lack of a proper educational foundation could be one of the many contributing factors to Donald's lack of structure and involvement in delinquent behaviors'.

Based on information, Donald lacked in emotional support from his parents; his mother was inconsistent in her responsibilities towards him and he was not acquainted with his father. Seemingly, only Donald's maternal grandmother showed genuine interest in his overall welfare and well-being.

Although there may be a range of contributing factors to Donald's act of violence, one cannot downplay his actions. During the interview he calmly reiterated what happened on the day in question and also spoke of his upbringing and challenges encountered during his adolescent and early adulthood. Based on the information obtained, one is left to wonder whether violence is part of his personality.

In undertaking a general assessment one should note the reports that Donald engaged in certain behaviours in the community as well as his illegal drug use and peddling of cocaine. Taking into consideration all sentiments expressed, the outcome is not encouraging. Most of the family of the deceased, John Tyson, opined that Donald should be held accountable for his actions. Donald's maternal grandmother who is also the sister of the victim opined that although she lost a brother, the incident already occurred and it is not possible for him to return to them. As such, she expressed the view that Donald deserves a second chance in life.

Taking into consideration all sentiments expressed, it is hoped that this report will assist the Honourable Court in handing down the appropriate sentence to Donald Massicott."

[6] The Probation Officer has painted a picture of an individual who did not have the parental guidance from both parents. Instead, he was raised by his maternal grandmother. The social consequences of these facts are for those skilled in behavioral issues such as psychiatrist. It suffices to say that the defendant was exposed to violence from an early age and this may have contributed to his aggression.

[7] The court must now examine the following matters in the context of sentencing: the nature of the offence, the manner of execution, the age of the defendant and the victim, the maximum penalty under the law for the offence, the aims of sentencing, the mitigating factors, the aggravating factors, the plea in mitigation and the Social Inquiry Report.

Nature of the offence

[8] The offence is manslaughter which is the unlawful killing of another.

Manner of execution

[9] In this regard the court is guided by extracts from the Post Mortem Report prepared by Dr Milagros Romero Fernandez, Pathologist.

[10] Under the heading 'Internal Examination' the following appears:

- "There was an open wound in the neck of 6cm with fracture of the hyoid bone, of four right rib, the right clavicle with section of the subclavian artery.
- Presence of fluid in the lumen of the air passages was not observed.
- The right and left lungs weighed 600g and 700g. Severe hemorrhage of right lung as consequence thoracic trauma was observed.
- The heart weighed 500g. Tricuspid measured 12cm, right ventricle measured 1cm and left ventricle measured 1.5cm
- Liver weighed 1600g and showed severe congestion.
- The spleen weighed 120g and showed severe congestion.

- Both kidneys weighed 120g and showed marks of chronic Pyelonephritis, and of Benin Nephrosclerosis.
- Severe congestion of all organs.”

Pathological diagnosis

1. Hemorrhagic shock
 - a. Severe thoracic hemorrhage by section of the right subclavian artery.
 - b. Severe traumatic hemorrhage of the right lung.
2. Large area of hemorrhage in the muscles of the thorax.
3. Kidneys with characteristic of shock.
 - a. Nephrosclerosis are chronic Pyelonephritis

Opinion

[11] It is my opinion that 52 years old John Tyson, died as a consequence of hemorrhagic shock due to injuries caused by several wounds, with section of the right subclavian artery.

Dr. Milegnos Romero Fernandez
Pathologist.”

Age of Prisoner and victim

[12] The victim at the time of his demise was 52 years old while the defendant was 24 at the time of the offence in 2014.

Maximum Penalty

[13] The maximum penalty under section 6 of the **Offences Against the Person Act**¹ is life imprisonment.

¹ Chap. 10:31

Principles of sentencing

[14] The principles of sentencing are retribution, deterrence, reformation and protection of society.

These are applied by the court in calibrating an appropriate sentence in the particular case. It is to be noted further that the protection of society may be said to be the end result.

[15] These principles have been applied by the court of England from about 1974² and by our courts from 2008 as evidenced by the reasoning of Byron CJ, as he then was. The case is **Desmond Baptiste v R**³. and this is the manner of his reasoning:

“Retribution at first glance tends to reflect the Old Testament biblical concept of an eye for an eye, which is not tenable in law. It is rather a reflection of society’s abhorrence for criminal conduct. Society through its courts must show abhorrence for particular offence and the only way the court can show is by the sentence they pass.”

Deterrence is general as well as specific in nature. The former is intended to be a restraint against potential criminal activity by others whereas the latter is a restraint against the particular criminal relapsing into recidivist behaviour of what value however are sentences that are grounded in deterrence? Specific deterrence may be an ineffective tool to combat criminal behaviour that is spontaneous or spawned by circumstances such as addictions or necessity. Drug and alcohol addiction as well trigger high rate of recidivism. Experience shows that general deterrence too is of limited affect. These sentences tend to lose their potency with the passage of time.

Prevention-the goal here is to protect society from those who persist in high rates of criminality for some offenders, the sound of the shutting an iron cell door may have a deterrent effect. Some however, never learn lesson from their incarceration and the only way of curbing their criminality is through protracted sentences whose objective is to keep them away from society. Such sentences are set to repeat offenders.

With rehabilitation the objective here is to engage the prisoner in activities that would assist him with reintegration into society after prison. However, the success of those aspects of sentencing is influenced by executive policy. Furthermore, rehabilitation has in the past yielded mixed results; of course sentencing ought not to be influenced by executive policy such as the availability of structured activities to facilitate reform.”

² See: R v Sangeant [1974] 60 Crim Appeal R. 74 Per Lawton LJ

³ Criminal Appeal No. 8/ 2003

Mitigating factors

[16] This must be the way the defendant was brought up and by whom. For one thing, he never knew who his father is and his maternal grandmother featured substantially in his life.

Aggravating factors

[17] On the defendant's own admission, he hit his uncle "plenty times" with an axe while he was asleep and left him wheezing and gasping for breath. The underlying issue was money owed by the defendant to the deceased. And further, the defendant's contention that the constant request for the money was stressing him out.

Defendant's record

[18] The defendant has 6 convictions 3 of which concern wounding in 2009 and 2010.

Plea in mitigation

[19] Learned counsel in his plea focused on the family background, parenting, the absence of a father, the use of drugs and consequences and attempted suicide. He also spoke of the defendant's conscience and his expression of remorse. This was in aid of asking the court to be lenient on the prisoner.

[20] A former Chief Justice Sir Deny Williams of Barbados, speaking at a conference on Criminal Justice and the Role of Sentencing⁴ said in part as follows:

"Many experienced judges and magistracies recognize that sentencing is one of the most difficult part of the judicial function. Offenders vary from person to person according to the diversity of their backgrounds. Moreover the circumstances in which crimes are committed vary from case to case. A person stealing to feed his or her family does not merit the same treatment as one who steals for profit. A man breaking and entering a dwelling house cannot expect to be treated like one whose criminal behaviour carries no threat of person violence or death."

⁴ Held September 15-17, 1994 in Barbados

[21] As can be expected, there is no single methodology in sentencing given the myriad of laws in different circumstances and the peculiar social context of each person to be sentenced. In this regard it has been said⁵ that:

“It is not possible to deal with the sentencing function and process in isolation. It has to be part of a correctional framework, which recognizes human values and the contributory role played by all human beings in the upliftment or debasement of these values.”

[22] Another approach was advanced by Mr. Justice Floyd in the case **The Queen v Jay Maria**⁶ Chin reasoned thus:

“The sentencing process seeks to promote a respect for the law and orderly society. If sentencing the court must consider things. In fashioning a sentence appropriate to the facts of this case and the characteristics of the offender, the court must consider the principles set out in the case of R v Sergeant 60 CPR App R 74 and referred to with approval in the case of **Desmond Baptiste v The Queen**, Saint Vincent and the Grenadines Criminal appeal no 8 of 2003.”

[23] All of the statements and dicta cited point in a common direction in that the sentence must fit the crime as being part of the correctional framework and all of this with a view to promoting respect for the law and order in society.

[24] It is within this framework must be considered a man who killed his uncle while he slept because he was irritated by request made for money loaned.

Sentencing for manslaughter

[25] In the case of **Hilary Patrick Tench v The Queen**⁷ our Court of Appeal confirmed that the benchmark sentence for manslaughter is 15 years imprisonment. Naturally, this has been varied in order to address the myriad of circumstances that have arisen. In actual fact the sentences have reached

⁵ Carl Rattray, Q.C, D.J, President of the Jamaica Court of Appeal, conference on “Criminal Justice and the Role of Sentencing.” September 15-17, 1994, Barbados.

⁶ Criminal Case No. 0031 of 2011

⁷ Criminal Appeal No. 10/1994 per Barrow JA. See also R v Trendy Edward criminal case No 56/2003 (SLU), The Queen v Emanuel Wilson Case no SLUCR 2008/0768 (SLU).

as high as 18 years in the case of **Kenneth Samuel v The Queen**⁸ which involved a dispute over \$10.00 resulting in death, a charge of murder and a guilty plea to manslaughter. However, the sentence was reduced to 7 years imprisonment by the Court of Appeal. But in **The Queen v Theodore Horsford**⁹ a fatal shooting and a charge of murder ended with a guilty plea of manslaughter and a sentence of 18 years.

[26] In the jurisdiction of Dominica a perusal of the cases reveal sentences from 2 years¹⁰ to, 4, 8 and 15 years in relation to the second, third and fifth defendant¹¹ and to 8 years.

Aims of sentencing in context

[27] The aims of retribution, deterrence and protection are immediately relevant to this grave case of a cold blooded killing of a family member. Thus it may be said that the Dominican society would seek through the court their retribution, the need to deter others and protection from like acts so that order can be prevail.

[28] In terms of rehabilitation, this must arise within the context of what is available and at the same time counseling is hereby ordered after an evaluation by the psychiatrist.

Sentence

[29] This is a grave and worrying case of manslaughter which must not be disguised by the guilty plea to manslaughter. It is cold blooded act and cannot be seen in any other perspective.

[30] Therefore in arriving at an appropriate sentence the court must have regard to the following.

1. Importantly, the manner of the killing
2. The fact that it is a family member that was involved.
3. The fact that an axe was used and then thrown away but later found.
4. Sentences upped in cases of manslaughter in the OECS region;

⁸ Criminal Appeal No. 7 of 2005 (SVG).

⁹ Criminal Case No. 2008/0010 (Anu)

¹⁰ R v Olive Xavier, Criminal Case No. 2007/0017

¹¹ The State v Mabel Theodore & Eloi Bethelmie Criminal case No. 28/2007

5. The gradual rise of cases of manslaughter and guilty pleas to murder on a murder charge.
6. The guilty plea
7. Social Inquiry Report
8. The principles of sentencing and their contextual application.

[31] The guilty plea mandates the court to fix a nominal sentence that is less than the maximum for the offence and a reduction of 1/3 or that sentence with the residue being the actual sentence. Accordingly the court uses the bench mark a nominal sentence is fixed 12 years and reduced by 1/3 yields, being 4 years and the sentence is 8 years imprisonment. Time on remand to court towards the sentence.

[32] The court also orders that you receive psychiatric counseling and or treatment.

Errol L Thomas

High Court Judge (Ag)