

IN THE SEYCHELLES COURT OF APEAL

Reportable

[2020] SCCA 18 December 2020
SCA 13/2020
(Appeal from CR30/2018)

In the matter between

EMMANUEL JONATHAN SAFFRANCE
(rep. by Joel Camille

Appellant

and

THE REPUBLIC
(rep. by Rongmei Lansinglu)

Respondent

Neutral Citation: *Saffrance v R* (SCA 13/2019) [2020] SCCA (18 December 2020).

Before: Twomey, Robinson, Dingake JJA

Summary: Charge of murder - conviction of lesser offence of manslaughter- sentence of fifteen years – appeal on sentence- distinction between voluntary and involuntary manslaughter – enhanced sentence of imprisonment for voluntary manslaughter

Heard: 2 December 2020

Delivered: 18 December 2020

ORDER

On appeal from Supreme Court (Govinden J sitting as court of first instance).

The appeal is dismissed. A sentence of twenty years' is substituted for the term of fifteen year's imprisonment imposed by the Supreme Court.

JUDGMENT

TWOMEY JA (ROBINSON AND DINGAKE JJA concurring)

[1] The Appellant, Emmanuel Saffrance, was charged with the murder of Keven Bristol while they were both convicts sharing a prison cell at Montagne Posée Prison on 15 April

2018. The jury, after deliberation, returned a unanimous verdict of guilty of the lesser offence of manslaughter against the Appellant. He was subsequently sentenced to a term of fifteen years' imprisonment by the learned sentencing judge. From this sentence, the Appellant has appealed on two grounds namely that:

(1) The sentence of fifteen years meted out to the Appellant by the learned trial judge is manifestly harsh and excessive, in all the circumstances of the case and in that the learned trial judge has failed to have an appreciation of the mitigating facts vis a vis the aggravating factors in relation to the case against the Appellant.

(2) The sentence of fifteen years of imprisonment is also manifestly harsh and excessive in that it goes contrary to sentencing principles, in that the learned trial judge has failed to consider sentencing patterns in cases of similar nature.

[2] We propose to consider these grounds together as they both relate to the submission by the Appellant that the sentence passed was manifestly harsh and excessive.

[3] The circumstances of the killing of the victim in this case is, in my opinion, important in the consideration of the appeal and worthy therefore of scrutiny. On 15 April 2018, the Appellant, the victim and five other inmates who had been recently admitted to prison on unrelated convictions, found themselves sharing a cell in what is known as the Care Transition Unit (CTU) at the Montagne Posée Prison.

[4] The evidence at trial included the testimony of two of these inmates who had shared the cell with the Appellant and the victim at the time of the incident. From this testimony together with the Appellant's statement to the police following the incident, as well as his statement from the dock, undisputed facts can be gleaned. The Appellant did not know the victim personally or prior to the incident. The victim who was an alcoholic appeared mentally disturbed during the time he was in the cell and spoke continuously to himself. This was annoying to all the inmates and prevented them from sleeping.

[5] The Appellant became annoyed with the victim and at some stage in the night beat up the victim by punching him and hitting him with a broom and with his fists. The Appellant also got his safety boots, put them on and kicked the victim, at which point the victim laid on the ground and did not fight back. The victim was also visibly bleeding and

indicated that he was in pain. He subsequently laid on the floor motionless. He was pronounced dead at 6 am on 15 April 2018.

- [6] The Forensic Report prepared by Professor Aquilino Santiago Garrido, forensic pathologist, who carried out a post mortem on the victim is very explicit as to the injuries suffered by the victim. It states that there were injuries to the victim's right eye brow, to his left eye, to his left ear, to his chin with these injuries caused by foot kicks, fist blows and kicks with safety boots. On the left part of the victim's rib cage were multiple dark spots showing trauma possibly caused by blunt objects. He concluded that the victim had died by violent causes from traumatic shock, subdural haemorrhage, rib fracture and lungs contusion together with multiple contusions to the head and thorax. Dr. Paresh Bharia, a pathologist, who assisted Professor Santiago Garrido with the autopsy corroborated the forensic report, testifying that the victim suffered subdural bleeding, oedema and congestion in the brain, bleeding in the eye balls and multiple fractures of the right ribcage and bleeding around both clavicles and the lungs and stomach and "shock" kidneys (through insufficient blood supply).
- [7] The Forensic Scientist, Mrs. V. Ujoodha Deepo who examined the genetic material retrieved from the crime scene, the body of the deceased and the inmates in the cell, testified that the genetic material of the deceased was found under the Appellant's fingernails. Further, the deceased's blood was found both on the Appellant's feet and on a bag belonging to the Appellant. More of the victim's blood was found on the floor of the cell and on the broom the Appellant admitted using to hit the victim.
- [8] The defences raised by the Appellant at trial were that he had acted in self-defence and that he had been provoked by the victim. However, Counsel for the Appellant ultimately focussed on the second defence and contended that the action of the victim muttering to himself in the night "would have made the [Appellant]) lose his self-control and put him in a state of passion and as a result he did the act on the deceased that led to his death".
- [9] After the jury returned a verdict of guilty of manslaughter and the learned trial judge had convicted him of the offence, Counsel for the Appellant addressed the Court in mitigation of the sentence to be passed. He submitted that the Court should consider that the offence

was a “spur of the moment incident”. He stated that at the time of the incident the Appellant was not a first offender and was serving a four-year sentence for the offence of grievous harm. He also submitted that the Appellant was a 50-year-old self-employed qualified welder, with two adult children. He cited several cases of manslaughter: *R v Sirame* (SCA 06/2012) [2014] SCCA 6 (11 April 2014), in which the Appellant was sentenced to five years’ imprisonment for manslaughter; *R v Dine* (64 of 2005) [2006] SCSC 2 (15 January 2006) where the sentence was also five years’ imprisonment; and *R v Marc Expedie* Quatre where the accused had shot the victim and was sentenced to four years imprisonment.

[10] The provisions in the Penal Code for the offence of manslaughter are as follows –

“section 192. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed “manslaughter”. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.

195. Any person who commits the felony of manslaughter is liable to imprisonment for life.”

[11] The Penal Code also makes provision for the defence of provocation to the charge of murder, and defines “provocation” in the following terms:

“197. When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, he is guilty of manslaughter only.

198. The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult it done or offered

...

A lawful act is not provocation to any person for an assault.

An act which a person does in consequence of incitement given by another person in order to induce him to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault...”

[12] Hence, where a murder charge is preferred against an accused person and there is a killing with the intent for murder but where a partial defence applies, manslaughter is committed instead.

[13] In *Sirame*, Msoffe JA further explained the distinction between the type of manslaughter referred to above (voluntary manslaughter) and involuntary manslaughter:

“15. The offence of manslaughter is usually divided into two generic types – voluntary and involuntary. Voluntary manslaughter is committed where the accused has killed with malice aforethought, and could be convicted of murder, but there are mitigating circumstances present reducing his culpability. In other words, voluntary manslaughter consists of those killings which would be murder because the accused has the relevant mens rea but which are reduced to manslaughter because one of the defences, like diminished responsibility, provocation, etc., exists in the case.

16. Involuntary manslaughter is an unlawful killing committed by an accused who did not have malice aforethought but who, nevertheless, had a state of mind, which the law treats as culpable. BLACK’S LAW DICTIONARY [Ninth Edition, by Bryan A. Garner] defines it as a “Homicide in which there is no intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not included within the felony – murder rule... Involuntary manslaughter is a “catch-all” concept. It includes all manslaughter not characterized as voluntary...”

[14] In *Ragain v R* (2013) SLR 619, a case involving a running down by a bus, Fernando JA (as he then was) explained a further distinction in involuntary manslaughter offences, that is, constructive manslaughter and “culpable negligence manslaughter. In both these types of involuntary manslaughter an unlawful killing is done without an intention to kill or to cause grievous bodily harm:

“[22] Thus there are two main elements of this offence, namely an unlawful act or an unlawful omission and such unlawful act or unlawful omission should have caused the death of another person. Thus, the causal connection between the unlawful act or unlawful omission and resulting death has to be established.

Manslaughter by an unlawful act covers ‘constructive’ (unlawful act) manslaughter while manslaughter by an unlawful omission covers ‘culpable negligence’ manslaughter. Although these two types have their application to given sets of facts they do overlap to a certain extent.

*[23] In order to prove constructive manslaughter there must be evidence to establish that the accused intentionally performed an ‘act’ and that ‘act’ is unlawful and that ‘act’ resulted in the death of a person. According to s10 of the Penal Code “... a person is not responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.” For an act to be ‘unlawful’ it should be dangerous to be treated as criminal. In *Andrews v Director of Public Prosecutions* [1937] AC 576, the House of Lords held that only acts which are inherently criminal can form the basis of a constructive manslaughter charge. This is because certain acts are lawful if done properly, but unlawful if done dangerously or negligently, the most common example being, driving offences.”*

- [15] The law in regard to involuntary manslaughter was clarified by the House of Lords in *R v Adomoko* [1995] 1 AC 171 in which Lord Atkin distinguished the two types of manslaughter comprised in the offence of, namely “unlawful” act manslaughter and manslaughter by gross negligence involving a breach of duty.
- [16] In a hierarchy of seriousness, where the highest culpability for each of the offences of homicide are considered, the offence of murder would be at the summit, followed by voluntary manslaughter and then involuntary manslaughter committed by an unlawful act and lastly gross negligence manslaughter. These levels of culpability should, in my opinion, be reflected in the penalty imposed for the offence committed.
- [17] In the present case, the learned trial judge, when summing up, correctly distinguished between the types of manslaughter, adding that voluntary manslaughter was an offence to be considered in this case as the defence had raised the defence of provocation. He stated that if the jury was “satisfied beyond reasonable doubt that the prosecution had failed to disprove provocation beyond reasonable doubt, the offence of murder would be reduced to one of manslaughter.”
- [18] It is impossible to second-guess the jury and to know the reason for their preferring a manslaughter verdict to one of murder. Further, the learned trial judge did not provide

reasons for the term of imprisonment imposed. However, it can clearly be inferred that as he had directed the jury on the issue of provocation and the corresponding reduced charge of voluntary manslaughter, the sentence he passed was one in respect of voluntary manslaughter given the verdict returned.

[19] In any case, the sentence of fifteen years is within the parameters of the law, as the maximum sentence for the offence of manslaughter is life imprisonment. In this respect, it also cannot be said that the sentence was wrong in principle.

[20] With regard to sentencing in general and in relation to the present case, Msoffe JA's pronouncement in *Jumaye v R* (CR SCA 08/ 2011) [2014] SCCA 26 (14 August 2014) is apt:

“In Seychelles the law relating to an appeal against sentence is settled. In the much celebrated case of Dingwall v Republic (1963-1966) SLR 205 at page 206 it was stated: -

The appellate court will only alter a sentence imposed by the trial court if it is evident that it has acted on a wrong principle or overlooked some material factor or if the sentence imposed is manifestly excessive (or inadequate) in view of the circumstances of the case.

12. Quoting Archbold, 35th Edition, paragraph 947, the Court in Dingwall also observed that a court of criminal appeal does not alter a sentence on the mere ground that if it had been trying the case, it might have passed a somewhat different sentence.”

[21] This Court continues to endorse this approach to sentencing. As I have already observed, the sentence was not wrong in principle. Further, Counsel for the Appellant has not advanced any ground of appeal that the sentence overlooked some material factor. The only ground of appeal relates to the sentence being manifestly harsh and excessive.

[22] With regard to sentencing in general, as was stated in *Savy v R* (1976) SLR 54, the Court should consider inter alia, the necessity of punishing crime, the deterrent effect on others of an appropriate punishment, the need to protect the public from offences, the previous good character of the accused, the motive for the offence and the loss of usefulness to the State by a prison sentence. In *R v ML & Ors* (CR 38/2019) [2020] SCSC 256 (16 April

2020), the Court again reiterated the general principles of sentencing in this jurisdiction and stated:

“... [T]here are key components to be considered when imposing a sentence... This issue was considered in Njue v R (2016) SCCA 12,(para 14) where it was pointed out that when sentencing, a Court must be guided by several principles including public interest; the nature of the offence and the circumstances it was committed; whether there is a possibility of the offender to be reformed; the gravity of the offence; the prevalence of the offence; the damage caused; any mitigating factors; the age and previous records of the accused; the period spent in custody; and the accused’s cooperation with law enforcement agencies. These factors can be grouped into three categories namely - looking at the crime committed, the offender and the interests of society.” (Emphasis added).

[23] Of the three factors to be considered with regard to the crime committed in the present case, I note that it was particularly violent, ferocious and vicious as shown by the injuries inflicted on the victim. The deliberate act of fetching and putting on boots to more effectively deliver killer blows to the victim whilst he lay on the floor motionless is especially noted. These acts were an unnecessary, unreasonable and disproportionate reaction by the Appellant to the victim’s ramblings and inability to settle down in the cell.

[24] Further, as submitted by Counsel for the Respondent, no effective mitigation was offered by the offender. The fact that he is a welder and a father of two adult children does not amount to mitigation. He showed no remorse and expressed no apology. He stated that his actions were as a result “of an unfortunate incident”. He admitted that he had the day before the incident been imprisoned for another violent crime to undergo a sentence of imprisonment for four years. That sentence and conviction was with regard to the case of *R v Saffrance* CO 653/14, to which we have been referred and in which he was found guilty of grievous harm to one Hortensia Sinon, his then partner and mother of his two children. He had stabbed her with a knife in the right side while she made tea with the wound penetrating her diaphragm and into the right lobe of her liver and he had also cut her arm. He left her bleeding in the home and she was thankfully rescued by her son. She was brought to hospital bleeding profusely from the deep penetrative wounds and underwent surgery by two medical teams. She was admitted to hospital for six days. The propensity of the Appellant to violence is clearly demonstrable in this case

- [25] It is also my view that the cases cited by Mr. Camille for the Appellant to support this ground of appeal do not lend themselves well to the distinction drawn in manslaughter cases as explained above. In *Sirame* (supra) a term of 5 years' imprisonment was imposed on the convict for having stabbed the victim. In that case, the convict underwent medical, psychological and psychiatric evaluations, the results of which concluded that he had a clinical psychological profile of personality disorder. He was emotionally unstable and impulsive with substance abuse re-enforcing the primary pathologic. In that case therefore, the lesser sentence is justified by the diminished capacity of the convict.
- [26] In *Labrosse v R* (SCA 27/2013) [2016] SCCA 35 (09 December 2016) the Court of Appeal imposed a similar sentence of five years. In that case, the Appellant was diagnosed with a similar condition to *Sirame*. He had been found guilty of murder by a jury but the Court of Appeal reduced the conviction to manslaughter with a sentence of 5 years' imprisonment. In the case of *Lawen v The Republic* [2000] SCCA 12 (SCA CR 12/1999) [2000] SCCA 23 (07 April 2000), the Court of Appeal reduced a sentence of 20 years for manslaughter to 10 years in light of the convict being a first offender and suffering from a mental impairment. Similarly, the cases of *R v Hoareau* (1982) SLR 87, *R v Norcy Dick* (unreported) CO 04 of 1995, and *R v Barreau* (CO 07/2019) [2020] SCSC 79 (06 February 2020) cited by Counsel for the Appellant are also not comparable. These were all cases of manslaughter involving diminished responsibility and in the cases of *Hoareau*, *Dick* and *Barreau*, the accused persons had also pleaded guilty.
- [27] The cases of most relevance is *Jumaye* (supra) and *Mondon v R* (4 of 2005) (4 of 2005) [2006] SCCA 3 (18 May 2006) where convictions for murder were quashed and substituted by manslaughter by the Court of Appeal and 15-year imprisonment sentences. In the former case, the convict had stabbed the victim during a robbery and in the latter case, the Appellant stabbed his friend during a quarrel at a birthday party.
- [28] As I have explained, I have been mindful to clearly explain the distinction between voluntary manslaughter and involuntary manslaughter to point out the more severe nature of the former offence, which must be reflected in the penalty imposed. Mrs. Lansinglu, for the Republic has submitted that in line with the Court of Appeal Rules (Rule 31(5))

and the case of *Cliff Emmanuel v R* (unreported) SCA07/2006 delivered on 12 December 2008, the impugned sentence of fifteen years' imprisonment is inadequate considering the seriousness of the offence, the previous conviction of the Appellant and other aggravating factors in the case and that the sentence of imprisonment should therefore be increased. I entirely agree with her submission.

[29] I am not of the view that the sentence of fifteen years' imprisonment imposed on the Appellant meets the principles of sentencing with respect to the crime committed, the character and propensity for violence of the offender and the interests of society.

[30] The Appellant is a dangerous man, committing two heinous crimes in a row and who without respect for human life took the life of an inmate who was clearly of unstable mind, defenceless and trapped without any escape possible in the limited confines of a cell. The Appellant's despicable and senseless acts have to be severely punished and society has to be protected from him.

[31] This Court is permitted under Rule 31 of the Seychelles Court of Appeal Rules to enhance sentences where it is necessary to do. This is a case where such necessity arises. The Appellant's sentence ought to be enhanced.

[32] In the circumstances, the appeal is dismissed and we substitute a sentence of twenty years' imprisonment for that of fifteen years' imposed by the court *a quo*.

Signed, dated and delivered at Ile du Port on 18 December 2020.

Twomey JA

I concur

Robinson JA

I concur

Dingake JA