

JERSEY / JUDGMENT

McCormick -v- AG [2015]

JCA 158 (29 July 2015)

[2015] JCA 158

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Court of Appeal 29 July 2015 Before : J. W. McNeill., Q. C., President N. Pleming, Q. C., and D. Perry, Q. C. Darren Neil McCormick -v- The Attorney General Application for leave to appeal by Darren Neil McCormick against sentence. H. Sharp, QC., Crown Advocate. Advocate J. C. Gollop for the Appellant.

JUDGMENT

PERRY JA:

Introduction

This is the judgment of the Court. 1. Darren Neil McCormick ("the Appellant") is 36 years old (date of birth 14 December 1978). On 13 October, 2014, he appeared before the Royal Court and pleaded guilty to a single offence of murder. On 8 January, 2015, he was sentenced to life imprisonment (that is the mandatory sentence for murder) and ordered to serve a minimum term of 25 years (less days served on remand). 2. The Appellant now seeks leave to appeal against sentence and raises a number of issues concerning the Royal Court's approach to the calculation of the minimum term and the adequacy of its reasons. We grant leave to appeal. 3. The issues raised by the Appellant require us to consider the operation of the Criminal Justice (Life Sentences)(Jersey) Law 2014 . This is the statute that makes provision for the calculation of the minimum period of imprisonment to be ordered by a court when sentencing a person convicted of murder to life imprisonment. Ultimately, we are required to consider whether the sentence represented by the minimum term was manifestly excessive or wrong in principle. The Facts 4. The facts of the offence may be stated quite shortly. The murder took place on 5 April, 2014. The victim, Colin Chevalier, who was then aged 46, was attacked while lying in his bed at home and at a time when he posed no threat to the Appellant. The attack was horrifyingly brutal. Using an axe, which belonged to the victim, the Appellant inflicted multiple head wounds consistent with an attempted decapitation. In the opinion of the pathologist it is highly likely that Mr Chevalier was attacked at a time when he was sleeping and he would have been rendered unconscious very rapidly by one of the heavy and devastating blows to his head. There is no doubt that the offence was accompanied by an intention to kill, rather than an intention to cause serious bodily harm. 5. The Appellant remained at the scene of the murder for more than two hours during which time

he committed various acts of mutilation to the victim's body. Using the axe he made a sustained, but unsuccessful attempt to sever the victim's right hand. Using a Stanley knife, which he found on the premises, he cut off the victim's right ear. When the Appellant was taken into police custody on the following day, the ear was still in his possession. 6. The pathologist concluded that there had been over 50 separate actions on the Appellant's part producing a total of 41 wounds. 7. At some point during the course of the incident, the Appellant dipped his fingers in the victim's blood and wrote on the bedroom wall above the victim's body: "If there is no fuck. Why can't I be normal. All liars." 8. The reason for the murder is unknown. The background is that for a period of time Mr Chevalier had supplied the Appellant and others with controlled drugs. In the days leading up to the killing, the Appellant had been absent from work, spending his time drinking whisky and consuming drugs. The purpose of his visit to Mr Chevalier's home appears to have been to obtain a further supply of drugs and certainly at the time of the attack the Appellant was intoxicated through a combination of alcohol and Ethylphenidate, a controlled drug also known as crystal. 9. The Appellant was taken into custody on 6 April 2014. At around 7:40am that day he was seen waist deep in water on the eastern side of the Island in possession of a knife. He appeared to be distressed. He was approached by a police officer and taken to hospital. Subsequently, when interviewed, he admitted the killing but claimed that the events were all a 'blur'. 10. On 9 April, 2014, the Appellant was indicted directly to the Royal Court. Medical reports, obtained at the request of his legal representatives, did not identify any abnormality of mind that could have given rise to any defence of diminished responsibility. The reports did however reveal a number of matters. First, that the Appellant had experienced an unsettled and troubled upbringing. Second, in 2011 he had been diagnosed with an arterial venous malformation for which he had undergone treatment, including surgery. Third, following his diagnosis and surgery he had developed epilepsy. It was the considered opinion of the experts that neither the arterial venous malformation nor the epilepsy had played any part in the murder. It was however the case that the Appellant exhibited features of an antisocial personality disorder which lowered his threshold for violent behaviour. 11. At the time he came to be sentenced the Appellant had 25 previous convictions comprising 48 offences in all. The vast majority of these offences had been committed while under the influence of drink or drugs. His most recent conviction had been on 14 July, 2008, when he was sentenced to 7 years' imprisonment for an offence involving the importation of controlled drugs into Jersey. Of more relevance was a conviction recorded on 13 February, 2003, when the Appellant pleaded guilty to an offence of grave and criminal assault committed in 2002. The facts of that offence bear a striking resemblance to the murder committed by the Appellant in 2014. In the earlier case, the Appellant, who was heavily intoxicated, went to the victim's bedsit premises, kicked down the door, smashed a bottle he was holding and used the broken glass to attack the victim who was lying on his bed. The victim, who suffered a number of wounds to his face and upper body, managed to escape from the attack and sought help from his landlady. She called for an ambulance and the victim survived after receiving emergency resuscitation treatment and a blood transfusion. For this offence, the Appellant was sentenced to 6 years' imprisonment, with a concurrent term of 3 years' imprisonment for an offence of breaking and entering with intent. In the course of his sentencing remarks, the Commissioner (F. C. Hamon Esq.) described the attack as "frenzied" and

noted that had the victim not managed to get help from his landlady "he might very well have died from his injuries." The Sentencing Hearing 12. At the sentencing hearing before the Royal Court the issue that fell to be determined was the period that should be fixed as the minimum term to be served by the Appellant before consideration can be given for his possible release from prison. The Court received submissions from the Solicitor General for the Crown and Advocate Gollop for the defence. It had before it various medical reports, a social enquiry report, a number of testimonials written on the Appellant's behalf, as well as a letter written by the Appellant in which he expressed remorse for his actions. 13. The Solicitor General submitted that the minimum term should be 32 years. This was on the basis that the circumstances of the attack and the Appellant's previous conviction for grave and criminal assault rendered the offence 'particularly serious' within the meaning of the Life Sentences law. The Solicitor General arrived at the figure of 32 years by adopting a starting point of 30 years, and after balancing the various aggravating and mitigating factors present in the case. 14. On behalf of the Appellant, it was submitted that the appropriate starting point was 15 years and that, after balancing the aggravating and mitigating features of the offence, the minimum term should be in the order of 18 to 20 years. 15. In the course of giving the Court's judgment, the Bailiff noted that a majority of the Jurats had accepted the Solicitor General's submissions at least to the extent that the appropriate starting point was 30 years. This was on the basis that the murder was particularly serious owing to the earlier conviction for a very similar frenzied attack. The majority then took into account a number of mitigating factors and reduced the 30 year starting point to 25 years. 16. A minority of the Court also reached the minimum term figure of 25 years, but did so by taking a different route. They accepted the submission made on the Appellant's behalf that the appropriate starting point was 15 years, but considered that the aggravating factors greatly outweighed the mitigating factors. In particular, the minority referred to the previous conviction for a similar assault, the brutal nature of the attack on a defenceless man in his own home, the mutilation of the body, and the fact that the attack had been carried out under the influence of a cocktail of alcohol and drugs taken voluntarily. 17. Both the majority and minority of the Court were unanimous in identifying the relevant mitigating factors as being:- (i) the offence was not premeditated; (ii) the Appellant's antisocial personality disorder; (iii) the Appellant's troubled background; (iv) the letters and references supplied to the Court which suggested that the Appellant had made some effort to turn his life around since his release from his last sentence of imprisonment; and (v) the Appellant's plea of guilty. The Grounds of Appeal 18. Before us, on behalf of the Appellant, Advocate Gollop made two key arguments. First, that there was no justification for the starting point of 30 years adopted by the majority. Second, that both the majority and minority failed adequately to explain how they had reached the figure of 25 years. In support of these arguments Advocate Gollop advanced five grounds of appeal which, reduced to their essentials, are as follows:- (i) The majority of the Superior Number attached too much weight to the Appellant's previous conviction for grave and criminal assault and this led to an erroneous and excessive starting point of 30 years. (ii) The majority of the Superior Number did not make clear what aggravating and mitigating factors were taken into account when arriving at the starting point of 30 years; nor is it clear what allowances or deductions were made thereafter to arrive at a minimum term of 25 years. (iii) The sentencing court failed to specify what credit

had been given for the Appellant's plea of guilty. (iv) The sentencing court failed fully to explain its decision. (v) The minority of the Superior Number failed to explain how they had arrived at a minimum term of 25 years. 19. Before addressing the merits of these grounds of appeal it is necessary to explain the framework for sentencing in cases of murder. The Legal Framework 20. In any case of murder there is only one sentence the court can pass, namely life imprisonment. At the time it imposes this sentence, the court is required to specify the minimum period of time that the offender will serve in prison before becoming eligible for release on licence. This period is known as the minimum term. The procedure for fixing the minimum term is contained in the Criminal Justice (Life Sentences) Jersey Law 2014 . This statute requires the sentencing court to proceed in three stages. First, it must identify the appropriate starting point in relation to an adult offender convicted of murder (Article 4). The starting point for an exceptionally serious case is the whole of the offender's life (Article 5). The starting point for a particularly serious case is 30 years (Article 6) and in every other case the starting point is 15 years (Article 7). At the second stage (by reason of Article 9), the court is required to take into account any aggravating factors or mitigating factors (to the extent that it has not allowed for those factors in fixing the starting point). Then, having fixed a starting point in relation to the offender, and having considered the aggravating or mitigating factors, the court is required to order in relation to the offender a minimum period of imprisonment in relation to the offence (Article 10). 21. The Life Sentences Law provides guidance to the sentencing court on the appropriate starting point in relation to the offender. Article 5(2) provides:- "Without limiting the generality of paragraph (1), cases that would normally be regarded as exceptionally serious include the following - (a) murder of 2 or more persons, where each murder involves any of the following - (i) a substantial degree of premeditation or planning, (ii) the abduction of the victim, (iii) sexual or sadistic conduct; (b) murder of a child, if the murder involves the abduction of the child or sadistic or sexual motivation; (c) murder for the purposes of advancing a political, religious or ideological cause; (d) murder by an offender previously convicted of murder." 22. Article 6 provides that the appropriate starting point in relation to an offender shall be the period of 30 years if three conditions are satisfied. The first condition is that the offender's case does not fall within Article 5(1). The second condition is that the offender was 18 years of age or older when he or she committed the offence. The third condition, contained in Article 6(1)(c) in the following terms:- "the court considers that the offender's offence, or the combination of the offender's offence and other offences of the offender that are associated with the offence, is particularly serious." 23. Article 6(2) then provides a number of non-exhaustive factors that would normally lead to the case being regarded as particularly serious. 24. As noted above, by reason of Article 7 the appropriate starting point of 15 years applies in any case where the court does not consider that the offender's case falls within either Article 5 or Article 6. 25. It is also relevant to note that by reason of Article 11(1), the court may order a minimum term of imprisonment of any length, including a period that is the whole of the offender's life, irrespective of the starting point fixed by the court. 26. The legislation in Jersey is similar to the statutory scheme governing the imposition of mandatory sentences of imprisonment for life in England and Wales. That scheme, contained in the Criminal Justice Act 2003 , also sets out a number of general principles for determining the minimum term, and, as in Jersey, the starting points are set at a whole life order,

30 years and 15 years. 27. The English Court of Appeal has considered the operation of the Criminal Justice Act regime in a number of important decisions. These decisions have emphasised that there is considerable flexibility within the scheme and that the overall legislative aim is to achieve a just result by a process of structured reasoning. 28. In Attorney Generals' Reference No 12 of 2008 (R v Robert Cole)

[2008] EWCA Crim 1060 ;

[2009] 1 Cr App R (s) 97, Lord Phillips of Worth Matravers C. J., criticised the way in which the sentencing court had adopted a "somewhat mechanistic or arithmetical approach" when assessing the seriousness of the offence for the purpose of identifying the appropriate starting point. He went on to say (at paragraph 18):- "...whether the court starts at 15 or 30 years, the sentencing exercise requires an assessment of the seriousness, having regard to the facts of the particular case; and that can result, quite properly, in a sentence that is some distance from the starting point that has been taken." 29. Earlier, in R v Jones

[2005] EWCA Crim 3115 ; [2006] CR App R (s) 121, Lord Phillips had emphasised that the starting points are intended to give the sentencing court guidance as to the range within which the appropriate sentence is likely to fall, having regard to the more salient features of the offence, but even then, detailed consideration of aggravating or mitigating factors may result in a minimum term of any length depending on the features of the individual case. 30. In R v Height and Anderson

[2008] EWCA Crim 2500 ; [2009] 1 Cr App R (s) 656, Lord Judge C. J. made clear (at paragraph

29) that the statutory regime was intended to provide a framework for achieving a just result in every case:- "We have lost count of the number of times when this court has emphasised that these provisions are not intended to be applied inflexibly. Indeed, in our judgment an inflexible approach would be inconsistent with the terms of the statutory framework. No scheme or guidance or statutory framework can be fully comprehensive and any system of purported compartmentalism or prescription has the potential to produce injustice. Even when the approach to the sentencing decision is laid down in an apparently detailed and, on the face of it, intentionally comprehensive scheme, the sentencing judge must achieve a just result." 31. We should also make reference to the decision in R v Mohamed Khaleel

[2012] EWCA Crim 2035 ; [2013] 1 Cr App R (s) 122, where the Court of Appeal made clear that in carrying out the evaluation of seriousness, consideration must be given to any relevant previous conviction. In that case, a murder committed by the appellant while at large on licence, following an earlier conviction for manslaughter in virtually identical circumstances, was properly assessed as an offence of particularly high seriousness, thus justifying a 30 year starting point. While it is correct to note that the decision of the Court of Appeal placed emphasis on section 143 of the Criminal Justice Act 2003 which requires courts to treat previous convictions as aggravating factors where it is reasonable to do so, we consider that section 143 is merely a restatement of the English common law: see for example R-v-Millberry

[2003] 1 Cr App R 25 (at paragraph 29). There is no good reason why a sentencing court in Jersey could not regard a relevant previous conviction as an aggravating factor when considering the seriousness of an offence for the purposes of the Life Sentences Law. Indeed, such an approach is consistent with the terms of Article 5(2)(d). In our view, as a matter of statutory construction and as a matter of customary law it would be highly relevant to take into account not only an offence of murder, but also any offence of manslaughter or any significant offence of violence that did not result in death. Discussion 32. In our judgment, the aggravating factor present in the Appellant's case, namely his previous conviction for grave and criminal assault (committed in remarkably similar circumstances to the murder) was in itself sufficient to entitle the majority of the Royal Court to conclude that this was a particularly serious murder warranting a 30 year starting point. As a matter of ordinary reason, as well as authority (*R v Mohamed Khaleel*, supra), the previous conviction was highly material to the exercise of evaluating the seriousness of the offence. As the Bailiff noted in his judgment:- "8 ... Article 5(2)(d) provides that where an offender has previously been convicted of murder, this will normally lead to the offence being treated as exceptionally serious, so that the whole life starting point is appropriate. Now the defendant has not previously been convicted of murder so that is not applicable but he might easily have been. The previous grave and criminal assault involved a similar attack on a defenceless man in bed, using on that occasion a broken bottle. These injuries were severe and the victim might have died if he had not received prompt emergency treatment at hospital." In the view of the majority, if a previous conviction for murder means that an offence moves up to the exceptionally seriousness category, by analogy a previous conviction for a very similar frenzied attack which could easily have led to death, enables the Court to treat the offence as particularly serious so that a starting point of 30 years is appropriate." 33. In our judgment there is nothing objectionable about this approach. 34. Having settled on a starting point of 30 years, the majority of the Royal Court conducted the exercise mandated by Article 9 of the Life Sentences Law. This process, of adjusting the minimum term after considering the aggravating and mitigating factors, was explained by the Bailiff in his careful judgment:- "10 The majority conclude that there is one additional aggravating factor which has not been taken into account in reaching the starting point of 30 years and that is the mutilation of the body. Against that, of course, the mitigating features must be balanced. The Court is unanimous in considering that the [mitigating factors] comprise the fact that the offence was not premeditated, the defendant's antisocial personality disorder, although the Court feels that the weight to be attached to that in this case is minimal, the defendant's background, the letters and references which have been supplied and the defendant's attempt to turn his life around in the comparatively short period since he was released from his last sentence of imprisonment. The Court also takes into account his guilty plea. We agree with the approach in the English case of *R v Last* [2005] 2 CR App R (s) 64, namely that one sixth of the minimum term reached after applying the aggravating and mitigating facts to the starting point can be deducted, but with a maximum of 5 years. Carrying out that exercise the majority of the Jurats conclude that the correct minimum term in this case is one of 25

years." The minority in fact reach exactly the same figure but they do so by a different route." 35. There are three things to note about these passages. First, the majority of the Jurats were careful not to double count the aggravating factors that had been taken into account when assessing the starting point. Second, the Appellant was given a single comprehensive discount for all the relevant mitigating factors including his plea of guilty. There is no doubt that this was the correct approach to take: see *Harrison v Attorney General*

[2004] JCA 046; *Attorney General v Goss*

[2005] JRC 132 . Third, when the Bailiff referred to the exercise carried out by the majority, he was referring to the balancing exercise required by Article 9 and not simply to the discount for the Appellant's plea of guilty: this much is obvious from the context. 36. As the Bailiff also noted (at paragraph 12) the minority of the Royal Court reached the minimum term figure of 25 years by a different route. Having taken a starting point of 15 years, they concluded that the aggravating factors greatly outweighed the mitigating factors. This was a perfectly permissible chain of reasoning and involved a faithful application of the statute. What is of most significance is that the sentencing Court was unanimous in its assessment of the overall seriousness of the offence. 37. Turning now to the arguments advanced on the Appellant's behalf, we reject the contention that the majority of the Royal Court were not entitled to have regard to the Appellant's previous conviction for grave and criminal assault when conducting its evaluation of the seriousness of the offence. As the English authorities make clear, and as we would wish to emphasise, there is considerable flexibility inherent in the scheme and it was not wrong in principle for the majority to attach weight to an earlier conviction for a serious, violent offence, committed in circumstances which bore a striking resemblance to the murder. In our judgment, when considering the seriousness of an offence a previous conviction is properly regarded as an aggravating factor if it can reasonably be treated as such having regard to all the circumstances. The important point is that the majority did not double count the Appellant's record as an aggravating factor and in our view the majority's reasoning cannot be faulted. 38. We also reject the Appellant's second ground of appeal. The majority, having properly arrived at a starting point of 30 years, conducted the balancing exercise required by Article 9 of the statute and arrived at a minimum term of 25 years. The majority identified the aggravating and mitigating factors and it is obvious that the mitigating factors were taken into account to reduce the starting point by a period of five years. The Royal Court was not required to specify in relation to each mitigating factor what allowance or discount had been given. Such an approach would have the effect of introducing into the scheme the very mathematical rigidity which the case law has deplored. It was entirely correct for the Royal Court to calculate a single comprehensive discount and reach the appropriate minimum term. In our view no possible complaint arises from the fact that the Royal Court did not specify a precise figure for the discount applicable to each mitigating factor. 39. For the same reasons, we also reject the Appellant's third ground of appeal. The Royal Court was not required to

specify a precise figure for the effect of the Appellant's plea of guilty and the exercise conducted by the Court was consistent with the terms of Article 9 of the Life Sentences Law. 40. We also reject the Appellant's fourth ground of appeal. The Royal Court explained its decision with great clarity and the Appellant cannot have been left in doubt as to the seriousness of his offending or how the minimum term had been calculated. 41. Similarly, we see no force in the Appellant's fifth ground of appeal. The process of the minority's reasoning is clear. The minority adopted a starting point of 15 years. They then conducted the exercise of balancing the aggravating and mitigating factors. They concluded that the identified aggravating factors greatly outweighed the identified mitigating factors and that the appropriate minimum term was 25 years. The conclusion reached by both the majority and minority was one reasonably open to them and in our view the 25 year minimum term was correct. 42. In conclusion we wish to add these comments. This was a brutal murder committed by a 35 year old man on a defenceless victim. It involved the mutilation of the victim's body. It was seriously aggravated by the Appellant's previous conviction for grave and criminal assault, committed in similar circumstances. The process of reasoning adopted by the majority and minority of the Royal Court demonstrate two possible and equally legitimate routes to determining the minimum term. The statute is intended to operate with flexibility and produce an outcome that is just. In the Appellant's case the minimum term of 25 years was a just result. It was neither manifestly excessive nor wrong in principle. For these reasons, this appeal is dismissed. 43. We are grateful to Advocate Sharp QC and Advocate Gollop for their extremely helpful written and oral submissions. Authorities Criminal Justice (Life Sentences)(Jersey) Law 2014. Criminal Justice Act 2003. R-v-Millberry

[2003] 1 Cr App R 25 . Attorney Generals' Reference No 12 of 2008 (R v Robert Cole)

[2008] EWCA Crim 1060 ; [2009] 1 Cr App R (s) 97. R v Jones

[2005] EWCA Crim 3115 ; [2006] CR App R (s) 121. R v Height and Anderson

[2008] EWCA Crim 2500 ; [2009] 1 Cr App R (s) 656. R v Mohamed Khaleel

[2012] EWCA Crim 2035 ; [2013] 1 Cr App R (s) 122. Harrison v Attorney General [2004] JCA 046. Attorney General v Goss

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