



[2021] JMSC Crim 7

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CRIMINAL DIVISION

CLAIM NO. CACT 2021CR00215

BETWEEN

REGINA

CROWN

AND

FABIAN SKERVIN

DEFENDANT

Ms. Ashtelle Steel Assistant Director of Public Prosecution for the prosecution.

Mr. Anthony Williams and Ms Judian Bailey for the Defendant.

Heard: 28th of July and October 21st, 2021.

Double murder during the course of a robbery – Guilty plea – Fitness to plea

L. SHELLY WILLIAMS, J

Background

[1] Mr. Melbourne Flake who, was eighty- one years old, and Mrs. Etta Flake, who was seventy-four years old, were Jamaicans who had been residing in Canada. In January 2018, they were visiting Jamaica and staying at their residence in St. Thomas. They had been renovating their home in Jamaica and had employed a number of workmen one of whom was the defendant.

[2] On the 8th of January 2018, family and friends of the two deceased made unsuccessful attempts to contact them. On the 9th of January 2018 a family friend decided to visit the couple. After gaining access to the house, he found Mrs. Flake in her bedroom with her hands and feet bound and her face almost completely

wrapped with tape. The police were summoned and on arrival Mr. Flake was discovered with his hands and feet bound and with wounds to his head. They were taken to the Princess Margaret Hospital where they were pronounced dead.

- [3] On the 21st of January 2021 the police were notified that Mr. Flake's debit card had been used at several locations in St. Thomas. The police received video recordings and picture from ATMs and a jewellery store that implicated the defendant Mr. Skervin. On arrest the defendant made several utterances. He was then cautioned, and he made further utterances confessing to the murder of Mr. and Mrs Flake. He later gave a caution statement again confessing to the murders. He indicated that he did not mean to kill them. He admitted that he had entered the house of the victims and had hidden in a closet and that he had with him a piece of board. He indicated that he had demanded the debit card and that Mr Flake had physically resisted him. He then beat Mr. Flake with the piece of board so that Mr. Flake would tell him the PIN for the card. He indicated that he did tie them up before he left. His actions clearly showed premeditation.
- [4] One area of concern had been whether or not the defendant was fit to plea. This was due to certain utterances he had made on being arrested as well as in his caution statement. The defendant had stated among other things that he did commit the offence but he did it, "as me did ina one situation weh all worm did a take up him ears and have people a obeah me." He was evaluated by a forensic psychiatrist and he was found to be fit to plea. Defence counsel did not raise the issue of fitness to plea, and based on the forensic psychiatrist's report and the demeanour of the defendant in court, I did not see the need to have the issue tried.
- [5] On the 28th of July 2021 he pleaded guilty to both counts of the indictment that charged him for murder.

The Law

Murder

The Statutes

[6] There are two statutes that give guidance as to the sentences that can be handed down in cases of murder. These are the Offences Against the Persons Act and the Criminal Justice (Administration) (Amendment) Act 2015. Section 3 of the Offences Against the Persons Act states that:-

3. (1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's life eligibility for parole, as if those provisions had been substituted 6(1) to (4) of the Parole Act-

a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or

b) where, pursuant to subsection (1)(b), a court imposes –

i. A sentence of imprisonment for life, the court shall specify a period being not less than fifteen years; or

ii. Any other sentence of imprisonment, the court shall specify a period, being not less than ten years,

which that person should serve before becoming eligible for parole.

[7] Therefore, the appropriate sentence is life imprisonment, and what is to be decided is the number of years to be imposed on the defendant before he is eligible for parole. In this case the defendant pleaded guilty and the law allows for discounts once such a plea is entered. The discounts that are allowed are detailed in Section 42 (E) of the Criminal Justice (Administration) (Amendment) Act which states that:-

42(E) Subject to subsection (3), where a defendant pleads guilty to the offence of murder, falling within section 2 (2) of the Offences Against

the Person Act, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant had the defendant been tried and convicted of the offence.

(2) Pursuant to subsection (1), the Court may reduce the sentence in the following manner-

a) Where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-three and one third per cent;

b) Where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to twenty-five per cent;

c) Where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen per cent.

(3) Notwithstanding subsection (2) the Court shall not impose on the defendant a sentence that is less than the prescribed minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the Offences Against the Person Act.

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant.

[8] Although the Criminal Justice (Administration) (Amendment) Act allows for these discounts to be granted, it gives discretion to the courts as to whether these discounts may be applied. Section 42 (H) details what the court should consider when awarding these discounts. It states that :-

42(H) Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D(2) and 42E(2), the Court shall have regard to the following factors namely-

- a) Whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
- b) The circumstances of the offence including its impact on the victims;
- c) Any factors that are relevant to the defendant;
- d) The circumstances surrounding the plea;
- e) Where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

[9] In approaching the issue of a possible discount I take into consideration that there are cases where a discount may not be granted. There is a line of cases that proffer this view including the cases of **R v Hastings** [1996] 1Cr. App R (s) 167, **R v Landy** 16 Cr. App. R (S) 908 CA and **R v Davis** 2 Cr. App. R. (S) 168, CA.

[10] This was also held to be the position in the Guyanese case of **The State v Sydney** (2008) 74 WIR 290 where Cummings JA, in discussing the approach to be taken on the defendant entering a guilty plea stated at page 7 that :-

.... in some cases, the discount on the sentence may be reduced or even denied altogether owing to the gravity of the offence or the strength of the case against the offender, examples include cases where there is overwhelming evidence against the offender or where he has been caught red handed.

Sentencing Guidelines

[11] The sentencing guidelines mirrors somewhat the Offences Against the Persons Act and as such merely indicates the minimum that the courts should consider in handing down sentences.

Case law

[12] In the case of **Paul Brown v R** [2019] JMCA crim 3 F Williams JA did an analysis of the sentences handed down in murder cases and concluded that they ranged between 25 to 45 years with the higher figures to be considered where there are instances of multiple murders.

Time spent in custody

[13] It is now a settled position that time spent in custody must be deducted from any sentence of the Defendant. This was stated in the case of **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P, writing on behalf of the court, at paragraph [34], stated the following:

...in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial..."

I will reduce the sentence of the defendant by the time spent in custody.

Aggravating Circumstances :-

- a. The murder was premediated.
- b. More than one person was killed.
- c. The murder was committed during the course of a robbery.
- d. The defendant used the debit card of the deceased to purchase numerous items including appliances and jewellery.

- e. The victims in this case were senior citizens.

Mitigating Circumstances :-

- f. He entered a guilty plea.
- g. He has a good Social Enquiry Report.
- h. He has no previous conviction.

Sentencing

[14] The guilty plea made by the defendant could be viewed as an early guilty plea. I note that the case has been before the court since 2018. Due to certain utterances that had been made by the defendant, the court had ordered that he be analysed by a forensic psychiatrist. The report from the forensic psychiatrist was submitted to the court indicating that the defendant was fit to plea. The defendant then entered a guilty plea on the next court date.

[15] This has to be balanced against the position that the evidence against the defendant was overwhelming. I say this as :

- a. He was seen on video using the debit card of the deceased Mr. Flake shortly after their bodies were discovered.
- b. He made a number of statements confessing to killing both deceased.

[16] I am aware that the defendant may be given up to one third discount for his plea, however, in light of the overwhelming evidence I will only give him a fifteen percent discount.

[17] Taking into consideration the age of the defendant, the plea in mitigation, the impact statement of the relatives of the two deceased, and abiding by the case law my starting point is 30 years. Due to the aggravating circumstances listed above I will increase his sentence by fifteen years ie up to forty-five years.

- [18]** I would award him a discount of fifteen percent due to his guilty plea, which would reduce his sentence to thirty- eight and two months. I will further reduce the sentence by two years ie one year for good social enquiry report and once year for good antecedent report ie to thirty-six years and two months. I would further reduce the sentence by the time spent in custody ie three years and eight months ie thirty- two years and four months.
- [19]** He is sentenced to life imprisonment and he is to serve thirty- two years and four months before the possibility of parole on count one. He is similarly sentenced to life imprisonment and to serve thirty- two years and four months before the possibility of parole on count two. The sentences are to run concurrently.