THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
CRIMINAL DIVISION

CRIMINAL CASE NO: ANUHCR1994/0015

BETWEEN:

THE QUEEN

Respondent/ Complainant

AND

EVERTON WELCH

Applicant/ Defendant

Appearances:

Dr. David Dorsett, Counsel for the Applicant/Defendant
Mr. Anthony Armstrong, Director of Public Prosecutions, for the Respondent/Complainant

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2011: October 28
2011: December 14

JUDGMENT ON SENTENCING

1. FLOYD, J.: The defendant, Everton Welch, was convicted on June 20, 1994 of the murder of Rolston Samuel, committed on January 8, 1993. He was sentenced to be delivered to prison until the Governor General's (Her Majesty's) pleasure be known. He has remained there ever since.

THE FACTS

2. From my review of the case file, I have determined that Mr. Welch, hereafter referred to as the defendant, was arrested for this offence on February 10, 1993. He was held in custody up until his trial, when he was convicted on June 20, 1994 and sentenced.

3. The defendant was originally charged and indicted along with a second person, Eustace Armstrong. However, on June 13, 1994, as the trial was about to commence, the defendant applied for a severance and obtained a separate trial.

4. The case for the prosecution was that Mr. Armstrong and Mr. Welch, during the early hours of January 8, 1993, had gone to the dwelling house of the deceased, to steal. While they were in the house, the deceased returned home. A struggle ensued and Mr. Welch and/or Mr. Armstrong dealt several blows to the deceased, who later died from his injuries.

5. The consulting pathologist, Dr. Lester Simon, testified that the body of the deceased was found on the kitchen floor. A post mortem was later conducted and the cause of death was given as severe loss of blood caused by multiple wounds to the face, scalp and neck of the deceased. Lacerations to the head, neck and fingers were caused by a sharp instrument such as a cutlass, sword, or bill used with severe force. The other injuries could have been caused by a blunt instrument such as a stone or a piece of wood. The pathologist estimated that the injuries would have been inflicted a half hour or 45 minutes prior to the actual death itself.

6. On December 21, 2009, the defendant filed a Fixed Date Claim Form seeking, amongst other things, a declaration that the sentence of detention at Her Majesty's Pleasure was unconstitutional.

7. The defendant filed a Notice of Application on September 28, 2010, applying for Judgement based on the response filed by the Attorney General on July 6, 2010. Further material was filed and submissions were made.

8. By order dated March 4, 2011, the Hon. Justice Mario Michel ruled that the sentence for the defendant, pronounced on June 20, 1994 to be kept at Her Majesty's Prison in safe keeping until Her Majesty's pleasure is known, was invalid. Justice Michel corrected it to a sentence of detention at Her Majesty's Prison at the court's pleasure. His Lordship further directed that the defendant be brought before a court at the earliest convenient time on an application to review the detention of

the defendant from 1993 to 2011, so that the court could make its pleasure known in relation to the continued detention of the defendant.

9. That application was heard by this court on October 28, 2011 and we are here today for the court to make its pleasure known, that is, to issue a determinant sentence.

SUBMISSIONS

10. Learned counsel for the defendant, Dr. Dorsett, provided the court with two cases: Elvin Barry et al v. The Queen ECSC Criminal Appeals Nos. 5, 9 and 10 of 2004 and Peter Solomon v. The Queen ECSC Criminal Appeal No. 4 of 2005. Dr. Dorsett directed this court to paragraph 61 of the Barry case, submitting that the facts set out therein were similar to the case at bar. The Barry case involved a murder committed in the course of an armed robbery in the victim's home.

11. In the Barry case, at paragraph 60, the sentence imposed on the defendant, Zoyd Clement, who was under 18 years at the time of the offence, was detention at the pleasure of the court for a period not exceeding 15 years.

12. Dr. Dorsett then referred the court to the Solomon case, at paragraph 26, where Gordon, JA held that, on the authority of Elvin Barry et al v. The Queen and to maintain consistency of practice within the jurisdiction, the appellant, who was aged 16 years at the time of the offence, was sentenced to detention at the pleasure of the court for a period not exceeding 15 years.

13. Dr. Dorsett urged this court to consider 15 years as being the appropriate sentence for this defendant. Since he has been in custody since 1993, the defendant has accumulated almost 19 years in custody for this crime. The sentence should, therefore, be one of time served.

14. Dr. Dorsett also submitted that this court should consider the general principle of remission, which in this jurisdiction indicates that persons serving a sentence shall receive credit for their time in custody, amounting to one third. Therefore, applying this calculation, if the sentence was one of 15

years, then with credit for ordinary remission, the defendant would serve 10 calendar years or two thirds of the sentence period.

15. Dr. Dorsett also referred to the affidavit of the defendant filed on March 8, 2011. The affidavit indicates that Mr. Welch has been incarcerated for 18 years and that he believes he is completely rehabilitated. The defendant has been appointed a trustee as well as an assistant welfare officer within the prison. He states that he was under the age of 18 when he committed this offence.

16. Indeed, when this court examines the case file, it notes references to the defendant being 17 years old in February 1993 when he was incarcerated. There is also a copy of a birth certificate which purports to show that the defendant was born on March 8, 1975. It does not appear to be in dispute, therefore, that at the time of the offence, the defendant was under the age of 18 years.

17. The defendant called one witness on his behalf during the sentencing hearing. Reverend Dennis Armsby is the Assistant Prison Chaplain. He testified that he has known the defendant since the defendant entered Her Majesty's Prison. Rev. Armsby testified that during the time he has known him, the defendant has learned to read and write and to "behave properly". Rev. Armsby knew the defendant as a "young scamp" who was wild and disobedient. He testified that the defendant has changed for the better, converting to Christianity and turning into a "useful citizen".

18. The Learned DPP, Mr. Armstrong, submitted that the Barry and Solomon cases could be distinguished from the case at bar because this case is a re-sentencing. The sentence of 15 years imposed in those cases cannot be transplanted to the facts of this case.

19. Mr. Armstrong submitted that these cases do not establish sentencing guidelines, nor do they establish a maximum sentence for this type of offence. The latter would be a matter for parliament. The cases do not alter the principle that the determination of an appropriate sentence is a matter entirely for the sentencing judge. Mr. Armstrong referred to paragraph 62 at page 21 of the Barry case, which held that sentencing discretion rests with the sentencing judge and an appellate court does not substitute its own decision for that of the trial judge unless the trial judge exercised the sentencing discretion erroneously by not properly considering the facts or by proceeding on a

wrong factual basis or by erring in principle or in law. In fact, the Court of Appeal in the Barry case upheld the sentence imposed.

20. Mr. Armstrong referred this court to the case of R v. Sargeant 60 Cr. App. R. 74 and the classic principles of sentencing, which include retribution, deterrence, prevention and rehabilitation.

21. The Learned DPP also referred this court to the cases of The Queen v. Rudy Monelle ECSC Crim. Case No. 0015 of 2007, Antigua and Barbuda and Harry Wilson v. The Queen ECSC Civil Appeal No. 30 of 2004. Both of these cases set out the balanced considerations a sentencing court must take into account in a murder case. These include the character, record and personal and individual circumstances of a defendant, as well as the facts and circumstances surrounding the commission of the offence, the nature and gravity of the offence, the design and execution of the offence and the possibility of reform and social re-adaptation of the defendant.

22. Mr. Armstrong pointed out the horrific nature of this offence, including the multiple injuries that led to the deceased bleeding to death in his own home.

23. Mr. Armstrong urged the court to take into account the time spent in custody by the defendant but not to incorporate any calculation of remission into that consideration.

ANALYSIS

24. Sentencing involves many considerations. In the words of Lawton, LJ in the Sargeant case, the court endeavours to answer the question, "What ought the proper penalty to be?" Sentencing seeks to promote respect for the law and an orderly society. The sanctions imposed by a sentencing court when fashioning the proper penalty are based upon the following principles: a) retribution, the court must reflect society's abhorrence of particular types of crime through punishment of such unlawful conduct, b) deterrence, specific to the offender and generally to likely offenders or persons who may be minded to commit similar offences, c) prevention, to protect the public from offenders who persist in committing crimes by separating them from society, d)

rehabilitation, to engage offenders in activities designed to assist them in their reintegration into society.

25. A sentence should be increased or decreased to take into account all aggravating and mitigating factors relating to both the offence and the offender. Sentencing principles in the case of murder were clearly set out by Rawlins, JA (as he then was) in the case of Harry Wilson v. The Queen ibid at paragraphs 17 and 18:

    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 of the offence, and the possibility of reform and social re-adaptation of the convicted person….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.

26. The case at bar is a matter of re-sentencing. When I consider this offence, I note that the facts demonstrate a break in and robbery at a residence. The perpetrators were surprised by the arrival of the homeowner which tragically resulted in his death. I am moved by the thought of the homeowner, Mr. Samuel, lying bleeding to death after being savagely attacked and I note that one or more weapons were used to inflict the injury upon him. The impact of the loss of Mr. Samuel upon his friends and family would have been and still is tremendous, and nothing that this court does or says can ever comfort them nor make up for their loss.

27. I am satisfied, however, that although the violence inflicted was enormous and brutal, the planning involved was not. The evidence appears to indicate that the defendant and another man broke into the residence to steal and not to harm the occupants. The arrival of the homeowner was

unexpected. The offence was executed in a clumsy manner and was motivated by greed and economic gain.

28. When the court considers the individual characteristics of the defendant, I note that no reference has been made to any prior record or criminal antecedents. It is apparent, therefore, that the defendant comes before this court as a first offender. Of course, the court also notes that the more serious the offence, the less relevant the lack of a record is and there is no more serious offence than murder.

29. The court also takes particular note of the age of the applicant. When he carried out this crime, the applicant was 17 years of age. This is a significant consideration. Under the terms of The Juvenile Act, CAP 229 of the Laws of Antigua and Barbuda at Section 2, a "child" means a person under the age of 14 years. A "juvenile" means a person under the age of 16 years. A "young person" means a person who has attained the age of 14 years and is under the age of 16 years.

30. However, under the terms of The Offences Against The Person Act, CAP 300 of the Laws of Antigua and Barbuda, Section 3 (1) provides, in relation to the death penalty for murder, the "sentence of death shall not be pronounced or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of 18 years."

31. Clearly, therefore, although an offender in that age category is not to be considered either a juvenile or a young person, his age is a factor to be considered by a sentencing court, particularly in cases of murder. Mr Welch was over the age of 16 years but under the age of 18 years when he committed this offence. He was 17 years old and I take careful note of that.

32. Sentencing principles include the notion of a general undesirability of imprisoning young offenders. This must, of course, be balanced with a consideration of the facts of the crime for which the offender is being sentenced, which in this case were serious and violent in the extreme.

33. The sentence for a crime of this magnitude, including the degree of violence involved, must reflect society's abhorrence of the crime. Consequently, the principle of deterrence must be given primary consideration. A message must be sent to others in this community that crimes of violence, particularly where weapons are used and especially when there is loss of life, will be met with significant custodial dispositions.

34. I turn now to consider the defendant himself more closely. What are his personal circumstances and his chances of reform and reintegration into society? To assist me, I review the submissions made at the sentencing hearing. Rev. Armsby spoke highly of the defendant. He told this court that he had witnessed a change come over the defendant. He described the defendant as a man who was now a useful citizen, a trustworthy man of honour. Not only did the defendant age by 19 years from a young 17 year old person to a 36 year old man but he also matured, emotionally and intellectually. He learned to read and write, to behave properly and to discard his wild and disobedient ways.

35. The observations of Rev. Armsby are corroborated by the sworn affidavit of the defendant, which informs me that during his period of incarceration, the defendant has been appointed a trustee and an assistant welfare officer within the prison. I was advised that prisoners who demonstrate positive behaviour rise to these positions. To my mind, these are notable achievements.

36. From my first hand observations of touring Her Majesty's prison in St. John's, conditions are difficult, to say the least. Some members of our community may say that is the way it should be, however, we remain a civilized society balancing punishment with rehabilitation. Prison officials attempt to provide programs for inmates but like anything else in these difficult economic times, the challenges to provide adequate funding for such programs are enormous. Therefore, if we are to truly promote the concept of rehabilitation as the significant principle of sentencing that case law and precedent tell us that it is, we must recognize those offenders who lift themselves up and take meaningful strides towards becoming productive and contributing members of society.

37. We cannot simply pay lip service to the concept of rehabilitation. We must recognize and reward those offenders who accept and make use of that which is available to them, meagre though that

may be at times. Mr. Welch has shown that he can be rehabilitated and reformed. There is every indication that he can adapt and re-enter society.

38. This court must also consider the time served in prison by the defendant. The record indicates that he spent 16 months in custody (1 year and 4 months) prior to his conviction at trial. Following his conviction, he spent a further 17 years and 6 months in prison, up until today's date. Mr. Welch has therefore served a total of 18 years and 10 months or essentially 19 years in prison for this crime.

39. In addition to this calculation, I am reminded by learned counsel for the defendant that if Mr. Welch had been serving a determinant sentence imposed on him at the time of conviction, he would have received the benefit of remission. That is a concept which credits offenders for time served during sentence. Generally speaking, convicted offenders sentenced to determinant time in custody will serve two thirds of their sentence. The learned DPP has argued that I should not consider that but I am of the view that it is something that I cannot ignore, even if I do not accept the fully calculated remission figure. Remission in this case would add approximately 6 years to the time served by the defendant.

40. When considering the amount of time already spent in custody and whether or not any additional time in detention should be ordered, I am mindful of the principle of totality of sentence. Under that consideration, an offender should not be sentenced to a term of imprisonment that is unduly long or harsh so as to overwhelm or crush the offender, thus rendering rehabilitation fruitless. I consider totality of sentence in conjunction with both the age of the defendant, particularly at the time of offence, and his personal circumstances as reflected in the gains he has made while incarcerated.

41. With regard to the submissions of learned counsel concerning the cases of Barry and Solomon previously referred to, this court does not find that these decisions impose a ceiling of 15 years for crimes of murder where the offender was under the age of 18 years. The directives and assistance gleaned from these cases, while helpful and instructive, do not, in the view of this court, detract from the fundamental principle that sentencing remains at the discretion of the sentencing judge. To that end, the sentencing judge must consider all of the factors relating to the offender and the offence. I agree with the learned DPP in that regard and I find that those cases do not seek to

impose a maximum sentence for such factual situations nor to restrict nor fetter the sentencing judge. I refer to the case of Nardis Maynard v. The Queen, ECSC Criminal Appeal No. 12 of 2004, where Rawlins, JA (as he then was) stated:

Sentencing in murder cases is at the discretion of the judge, who may impose such sentence as the circumstances of the crime and the aggravating and mitigating factors demand. Judges usually try to be consistent and are entitled to consider similar cases.

42. To that end, I have reviewed the case law in this jurisdiction for the last several years for the crime of murder and I have found that sentences have ranged from 12 years to life in prison.

SENTENCE

43. This court has taken all of the above into account and carefully considered the facts, the law and the submissions of learned counsel. While the offence was a heinous one, the defendant was 17 years old at the time of its commission. The defendant has demonstrated significant and positive advancement while incarcerated. He has served what amounts to 19 years in Her Majesty's Prison and he has taken advantage of opportunities there to better himself. It now falls to this court to determine a fit and appropriate sentence at this stage of the case. In light of the totality of the circumstances, this court is of the view that to incarcerate Mr. Everton Welch any further would not serve the interests of justice. The record will reflect 19 years, time served and the defendant, Everton Welch, is hereby released as of this date.

RICHARD G. FLOYD
HIGH COURT JUDGE