[2023] UKPC 32
Privy Council Appeal No 0090 of 2020

JUDGMENT

Roger Watson (Appellant) *v* The King (Respondent) (Bahamas)

From the Court of Appeal of the Commonwealth of The Bahamas

before

Lord Lloyd-Jones
Lord Briggs
Lord Stephens

JUDGMENT GIVEN ON
5 September 2023

Heard on 27 April 2023

Appellant
Paul Taylor KC
Amanda Clift-Matthews
Daniella Waddoup
(Instructed by Simons Muirhead Burton LLP)

Respondent
Rowan Pennington-Benton
(Instructed by Charles Russell Speechlys LLP (London))

LORD LLOYD-JONES:

1. The appellant, Mr Roger Watson, appeals against his sentence of 50 years' imprisonment imposed on 25 June 2009 by the Court of Appeal of the Commonwealth of The Bahamas in respect of an offence of manslaughter.

2. The trial of the appellant took place before Allen SJ and a jury in the Supreme Court, Nassau, The Bahamas between 13 and 26 September 2006. He was charged with a single count of murder contrary to section 291 of the Penal Code (Ch84), and he pleaded not guilty.

3. The prosecution case at trial was that on 15 January 2003 at around 8:00pm the appellant used a rifle to shoot a series of bullets into the house of a Mr Pinder, a wooden structure where Mr Pinder and another man, Mr Munroe, often stayed. The shooting left ten bullet holes in the front partition wall. One of the bullets struck and killed Eddison Curtis-Johnson, Mr Pinder's 12-year-old stepson, who was sitting in the living room at the time.

4. The case against the appellant was largely based on recognition. Three other witnesses described seeing the shootings. One of these witnesses also gave evidence that he had witnessed an altercation between the appellant and Mr Munroe on the day of the shooting.

5. The prosecution alleged that the appellant harboured "feelings of enmity" towards Mr Munroe and intended to kill him. There was no evidence that lights were on in the house, with the exception of an outside light, and there was no other evidence that indicated that it was observable from the outside of the property that someone was at home.

6. The appellant advanced at trial a defence of alibi. He gave evidence that at the time in question he was by a bar with friends and a girlfriend. The bar manager gave evidence that he had seen the appellant outside the bar in question but could not recall the exact time, only that he thought that it was "sun-setting time."

7. As to the alleged motive for the shooting, the appellant accepted that there had been two previous altercations between him and Mr Munroe involving things being thrown at the appellant's car. He denied, however, that there had been any sort of confrontation between him and Mr Munroe on the day of the shooting and he denied feeling angry towards him.

8. On 26 September 2006, the appellant was convicted of murder by a unanimous verdict.

9. As a result of delay in obtaining a psychiatric report, it was not until 20 September 2007 that the appellant was sentenced. The court heard evidence from a psychiatrist and the appellant's mother, and it heard oral submissions from counsel. The trial judge sentenced the appellant to death pursuant to section 2 of the Capital Punishment Procedure Act (Ch94).

10. In a written ruling delivered on the 20 September 2007 the judge noted the following matters:

> (1) The evidence showed that a number of bullets had been fired into the home, that the weapon was a high-powered rifle and "that the bullet which hit the deceased was a special bullet which exploded on impact causing a bursting of the victim's head and the expulsion of brain tissue." (In fact, it seems that the bullet was an ordinary .223 high velocity round for use in a rifle, but it caused enhanced impact trauma for the reasons explained by the expert at trial.)
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> (2) The circumstances which emerged during the trial showed that the appellant had had an altercation previously with the uncle and father of the victim, evidence from which the prosecution invited the jury to infer that the motive for shooting up at the house was revenge.
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> (3) Having considered the evidence of the probation officer, the psychiatrist and the appellant's mother, the evidence disclosed no personal circumstances which may have influenced the events which could be considered mitigating. Nor had the judge found any other mitigating circumstances.
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> (4) The appellant's antecedents showed a propensity to violence. However, all of his convictions except for one offence of assault were spent at the time of the hearing and, as a result, only that one offence of assault was taken into consideration.
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> (5) Murder was extremely prevalent and spiralling ever upwards in The Bahamas. As a result, the objective of sentencing for this offence must be retribution and deterrence.

11. The Judge concluded:

"Having considered:

(i) that the victim was an innocent child;

(ii) that a firearm was used in the commission of an offence;

(iii) that the offence was as a result of an assault, I consider a 'home invasion'.

(iv) that the convict deliberately and callously stood in front of, and fired into, the home, reckless as to whether anyone was at home at the time and not caring who was hit, an act of terrorism;

(v) that there was no remorse shown by the convict;

(vi) that there are no mitigating factors;

(vii) that there was significant premeditation in that the convict;

(a) secured a high-powered rifle capable of penetrating the walls of the home and special bullets designed to kill and destroy;

(b) outfitted himself in camouflage clothing in an attempt to disguise himself;

(c) arranged to be dropped at the crime scene and picked up after the shooting;

(d) chose 8:00pm on a weeknight, a time when children and parents were likely to be at home;

> I conclude this is a case, which fits in the upper range of the spectrum of criminal culpability for murder."

12. The appellant appealed to the Court of Appeal against his conviction and sentence. On 25 June 2009, the Court of Appeal (Sawyer P and Osadebay JA; Longley JA dissenting) quashed the appellant's conviction for murder and substituted a conviction for manslaughter, imposing a sentence of 50 years' imprisonment.

13. The principal ground of appeal against conviction was that the judge had misdirected the jury on the issue of the requisite intention for murder. The Court of Appeal noted (at para 35) that in The Bahamas, unlike England and some other countries, the specific intention required to be proved in law for murder is an intention to kill. Any other intention, such an intention to cause grievous bodily harm or recklessness as to whether death would be caused, is not sufficient. (*James Dean v Regina* [1989-90] 1 LRB 534.)

14. The Court of Appeal then referred to section 12(3) of the Penal Code (Ch.84) which provides:

> "If a person does an act of such a kind or in such a manner as that, if he used reasonable caution and observation, it would appear to him that the act would probably cause or contribute to cause an event or that there would be great risk of the act causing or contributing to cause an event, he shall be presumed to have intended to cause that event, unless it is shown that he believed that the act would probably not cause or contribute to cause the event. "

The judge, in directing the jury, had used the words of the subsection, referring to the great risk of harm and death being caused by the voluntary actions of the person who fired into the wooden house with a high-powered rifle and high velocity bullets. The majority of the Court of Appeal noted that the difficulty was that there was no evidence that anyone was in the house that night. It considered that, since the owner was not at home and there was no evidence that the appellant knew or that, if he had used reasonable caution and observation, he ought to have known that someone was in the house that night, all that could reasonably be inferred was that the appellant was reckless. The majority considered that the judge's direction was inadequate, first because there was no evidence that anyone was at home and secondly because it presupposed actual or constructive knowledge in the appellant of the presence of persons in the house at the time of the shooting when in fact there was no evidence as to that nor could such knowledge be presumed without evidence. Furthermore, the direction appeared to indicate that recklessness as to whether death occurred or not was

sufficient to support conviction for murder in The Bahamas. As a result, this was a misdirection. The majority concluded that the jury must have been confused into believing that recklessness in not caring whether or not someone was in the building was sufficient in The Bahamas to found a conviction for murder. These were misdirections which undermined the integrity of the conviction for murder.

15. The majority then disposed of the appeal (at paragraph 45) in the following terms:

> "For the reasons given, we would allow the appeal, quash the conviction for murder, set aside the death penalty; and substitute therefore a conviction for manslaughter and impose a sentence of fifty years' imprisonment with effect from the date of conviction because in our judgment on the scale of manslaughter, this offence stands at the top end."

16. On 15 December 2021, the Judicial Committee of the Privy Council granted the appellant permission to appeal against the sentence of 50 years' imprisonment imposed on 25 June 2009 by the Court of Appeal.

17. The grounds of appeal are as follows –

> Ground 1: There was a serious breach of natural justice when the sentence was imposed because:
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> (a) the Court of Appeal failed to give the appellant the opportunity to address the court on the duration of the fixed term sentence that was appropriate in his case;
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> (b) the Court of Appeal failed to give adequate reasons as to why 50 years' imprisonment was the appropriate term.
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> Ground 2: The sentence was based on an error of principle and / or an error of fact, in that the Court of Appeal did not reflect in the sentence its own finding that the appellant lacked an intention to kill.

Ground 3: The Court of Appeal failed to consider mitigating factors.

Ground 4: The Court of Appeal failed to take into account the 3-year period that the appellant had served in custody on remand.

Ground 5: The sentence was manifestly excessive in all the circumstances.

GROUND 1: BREACH OF NATURAL JUSTICE

18. On behalf the appellant it was submitted that there was a substantial breach of natural justice and a denial of the appellant's right to a fair trial. The Court of Appeal, having reduced his conviction for murder to one of manslaughter, proceeded to sentence him without inviting the appellant to address the court on the question of the appropriate sentence. Although there is no transcript of the appeal hearing, there does not appear to have been any discussion during the hearing about the term of imprisonment that would be appropriate for a substituted conviction for manslaughter should the appeal against conviction succeed. It is the recollection of both counsel representing the appellant on that occasion that the court did not invite submissions on the length of a custodial sentence either at the hearing or at any time prior to delivery of the judgment. The written and oral submissions of the parties before the Court of Appeal focused on whether the offence warranted a death sentence and did not address the term of imprisonment if the appeal against conviction was allowed. Nothing in the judgment indicates that there was a discussion during the hearing of the appropriate sentence for manslaughter. On behalf of the appellant, it is accepted that counsel then representing him should have been prepared to address the Court of Appeal on sentence in the event that the appeal against conviction was allowed. Nevertheless, it is said that the Court of Appeal should have afforded the appellant that opportunity and that, had it done so, he could have drawn to the attention of the court comparable sentences for similar offences.

19. In the Board's view the failure of the Court of Appeal to hear the appellant's counsel on this issue before passing sentence was a serious breach of procedural fairness.

20. In *Moss v Queen* [2013] UKPC 32; [2013] 1 WLR 3884 the Court of Appeal of The Bahamas had allowed Moss's appeal against a conviction for murder and substituted a conviction for manslaughter. It then resentenced the appellant without hearing submissions as to the appropriate term. Lord Hughes, delivering the judgment of the Board, stated (at para 5):

> "It is elementary that, at least where the sentence is not fixed by law, a criminal court has a duty to give a defendant the opportunity to be heard, through counsel or otherwise, before sentence on him is passed. That is so however little there may appear to be available to be said on his behalf. As Megarry J memorably put it in *John v Rees* [1970] Ch 345, 402:
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> > 'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'
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> An omission to hear a defendant before passing sentence is a serious breach of procedural fairness. That simple proposition does not need the citation of authority."

Lord Hughes went on to note that there may be cases in which, despite a breach of this duty by the court, a reviewing court can be confident that no injury can have been done to the defendant because no submissions that might have been made on his behalf could have reduced the sentence below that passed. However, he observed, in a serious case of homicide such as *Moss*, and especially where a long sentence had been passed which had some time to run, the Board would need to consider long before reaching such a conclusion. The Board was satisfied that *Moss* was not a case in which that could be said.

21. *Bain v The Queen* [2020] UKPC 10; [2020] 4 WLR 104 is authority to similar effect. In that case, following conviction of the appellant for murder, the Court of Appeal of The Bahamas allowed his appeal against sentence and, without hearing submissions on the issue, substituted a term of 55 years' imprisonment. On further appeal to the Judicial Committee of the Privy Council, the Board allowed the appeal against conviction but went on to observe, in relation to the appeal against sentence, "that as a matter of basic fairness the appellant should have been given the opportunity to address the court on the appropriate length of sentence before a determinate sentence was imposed" (at para 97).

22. Within this first ground, the appellant also objects that the failure of the Court of Appeal to give reasons for its decision that 50 years' imprisonment was the appropriate sentence was a further serious breach of procedural fairness. In this regard the appellant points out that the sentencing hearing before the trial judge was concerned only with

whether the death penalty should be imposed and there was no discussion of fixed terms of imprisonment should the death penalty be inappropriate.

No change in mental culpability

23. On behalf of the respondent Mr Rowan Pennington-Benton submits, first, that although a conviction for manslaughter had been substituted for a conviction for murder, there was no necessity to hear the appellant on sentence because the mental culpability and moral gravity of the appellant's conduct remained exactly the same. He suggests that although the offence of which the appellant stood convicted had changed, the conduct and mens rea which gave rise to that conviction had not changed. As a result, he submits, the trial judge's assessment of the culpability of the appellant's conduct, made in the context of a conviction for murder, could fairly be transferred into the context of a conviction for manslaughter without any need for reconsideration.

24. Even if addressed on its own terms, this submission is untenable. Murder and manslaughter are distinct offences, each with its different requirements as to the necessary mental element. Murder is rightly regarded as the more serious offence, a distinction heightened here because in The Bahamas a conviction for murder can only arise where there is an intention to kill. The comparative gravity of the offences is reflected in the maximum sentences which may be imposed; in The Bahamas the maximum sentence for murder is the death penalty and the maximum sentence for manslaughter is life imprisonment. The Board's attention was drawn to *Attorney General v Larry Raymond Jones*, SCCrApp Nos 12, 18 and 19 of 2007, where the Court of Appeal of The Bahamas pointed to the fact that although there are no statutory guidelines for sentencing for manslaughter, sentences passed or upheld by that court during the previous seven years had ranged from 18 years to 35 years' imprisonment. In the present case it was a basic requirement of procedural fairness that, following his successful appeal against conviction for murder, the appellant should have been given the opportunity to address the Court of Appeal as to the correct factual basis on which he should be sentenced for the offence of manslaughter, as to the range of sentences imposed by the courts for manslaughter and as to where his offence stood within that range.

25. Moreover, the sentencing criteria for murder in The Bahamas are very different from the sentencing criteria for manslaughter. It is impossible to achieve a just sentence by simply transposing a sentence for murder to what may be considered an equivalent level on the scale of sentences for manslaughter.

26. Furthermore, the respondent's submission rests on a false premise. The majority in the Court of Appeal took a different view from that of the trial judge as to the mens rea of the appellant.

27. As we have seen, the trial judge directed the jury, on the basis of section 12(3) of the Penal Code, that they could infer an intention to kill on the facts if they found that, had the appellant used reasonable caution and observation, he would have foreseen a great risk of death. (The Board notes in passing that this difficult statutory provision has given rise to unnecessary complications in other cases and has recently been considered by the Judicial Committee of the Privy Council in *James Miller v The King* [2023] UKPC 10.)

28. The trial judge expressly rejected a defence plea in mitigation that the appellant had no intention to kill and would not have known that anyone was inside the house.

29. As Mr Pennington-Benton put it in his written case the trial judge sentenced the appellant on the basis that he had been so reckless that this amounted to a form of constructive intention.

30. By contrast, the Court of Appeal accepted that there was no evidential basis for such an inference. It emphasised that there was no evidence that the appellant knew or must have known that the deceased or any other persons were in the house. There was no sign from the exterior of the house that anyone was at home that evening and there was no other evidence that the appellant would have known that anyone was inside. All that could reasonably be inferred was that the appellant had been reckless and, contrary to what appeared to be indicated by the judge's direction, that did not satisfy the mens rea for murder in the law of The Bahamas which requires an intention to kill.

31. As a result, the factual matrix against which the appellant was required to be sentenced was different from that before the trial judge by reason of the ground on which the Court of Appeal allowed his appeal against conviction for murder.

<u>The sentencing hearing before the trial judge</u>

32. Secondly, it is submitted on behalf of the respondent that the appellant had already had the opportunity to address the trial court in relation to his state of mind and his mitigation, so that there was no need for him to make submissions on sentence following the substitution of a conviction for manslaughter on appeal. This submission is also untenable.

33. The fact that submissions on sentence and mitigation were made on an appellant's behalf following his conviction for murder, does not relieve an appellate court of the obligation to hear submissions on sentence and mitigation following the quashing of that conviction and the substitution of a conviction for a lesser offence.

34. Furthermore, as we have seen, the factual matrix against which the sentencing exercise had to be carried out, particularly in relation to the appellant's mens rea, was different as a result of the successful appeal.

35. In these changed circumstances, there was potentially a great deal to be said on behalf of the appellant which was new. The culpability of the appellant was now required to be assessed against a different range of criteria and judicial guidance, namely those applicable to cases of manslaughter. In particular, this was the first occasion in these proceedings on which the duration of a custodial sentence for manslaughter fell to be considered by a court. Having regard to the gravity of the offence and the length and potential range of determinate sentences available, it was particularly important that the appellant should have the opportunity to address the appellate court on where within the range his case fell. (See in this regard the observations of Lord Hamblen in *Bain* at para 97.)

36. In any event, the Court of Appeal made no reference in its judgment to the sentencing remarks of the trial judge. In the circumstances it would have been entirely inappropriate to do so.

Cases before the Board in which a death sentence was commuted

37. Thirdly, the respondent points to cases in which the Judicial Committee of the Privy Council has substituted a sentence of life imprisonment for a death sentence, where excessive delay in carrying out the death sentence has rendered execution cruel and inhuman. In several of these cases a sentence of life imprisonment was imposed without a fresh resentencing hearing and without providing any reasons for the new sentence (*Pratt and Morgan v Attorney General for Jamaica* [1994] 2 AC 1; *Lewis and others v The Attorney General of Jamaica* [2001] 2 AC 50; *Ramdeen v The State* [2014] UKPC 7; [2015] AC 562). These instances do not, however, provide a true analogy. In these cases there had been no successful appeal against conviction for murder or against sentence. Resentencing was necessary as a matter of constitutional relief because the carrying out of the original sentence would no longer have been lawful. Furthermore, these cases proceeded on the basis that, since the death penalty had been a lawful sentence when imposed, it was not necessary to order a resentencing hearing and a life sentence was an appropriate alternative sentence when commuting the death penalty. More recently, in *Lendore v Attorney General of Trinidad and Tobago* [2017] UKPC 25; [2017] 1 WLR 3369, where death sentences had been lawful when passed, the Board accepted that the presidential power of pardon extended to substituting lesser sentences in cases of undue delay but emphasised that the appropriate substituted sentences would have to be set having regard to the circumstances of each individual case. (See Lord Hughes at para 80.) More recently still, in *Boodram v Attorney General of Trinidad and Tobago* [2022] UKPC 20, the Board held that in cases where carrying out a death sentence has become unlawful, the court is not limited to imposing a life

sentence as a substitute sentence but has a discretion to impose a full range of sentences which will be exercised having regard to the circumstances of the individual case. In any event, these authorities have no direct relevance to the situation under consideration on this appeal.

Failure to give reasons

38. The second limb of the appellant's first ground is concerned with the failure of the Court of Appeal to give reasons for the sentence of 50 years' imprisonment.

39. It is a basic requirement of procedural fairness that a sentencing tribunal should give reasons for the sentence imposed, in particular so that the defendant may be made aware of the gravity of his wrongdoing and so that he may be advised as to possible grounds of appeal. It is also important that victims and the public should be made aware of the reasons why a sentence has been imposed. Reasons need not be extensive, but they must meet these basic requirements.

40. In the present case the respondent says that the appellant could not have been left in any doubt as to the reasons for the sentence because the trial judge had given reasons for her sentence and the Court of Appeal had said that his offence was at the upper end of the spectrum of offences of manslaughter. However, following the quashing of the murder conviction, the resentencing in the present case was necessarily a substantially different exercise from the trial judge's sentencing for murder. As discussed above, the factual matrix, sentencing criteria and judicial guidance relied upon by the trial judge were very different from those which should have been considered by the Court of Appeal when sentencing for this offence of manslaughter. Furthermore, the judgment of the Court of Appeal, while indicating that this was a very serious case of manslaughter, gave no indication as to why it imposed a sentence some 15 years longer than the highest sentence for manslaughter in the cases surveyed in *Larry Raymond Jones*. In the Board's view, the failure of the Court of Appeal to give its reasons for the imposition of such a draconian sentence was a further denial of a fundamental procedural right.

Conclusion on Ground 1

41. For these reasons the Board will advise His Majesty that the appeal should be allowed and the sentence of 50 years' imprisonment should be quashed.

GROUND 4 – FAILURE TO TAKE ACCOUNT OF TIME SPENT IN CUSTODY ON REMAND

42. Section 186(2) of The Bahamas Criminal Procedure Code states that a sentence of the court takes effect from the day on which it was imposed unless the court directs otherwise. In passing sentence in the present case the Court of Appeal ordered that the sentence of 50 years' imprisonment was to run from the date of conviction. As a result, the sentence fails to take account of the period of some three years which the appellant spent in custody on remand pending trial.

43. The appellant submits that a sentencing court must give credit for the period spent in custody awaiting trial and that this would ordinarily be by way of arithmetical deduction (*Flowers v The Queen* SCCrApp No 278 of 2014 at para 4; *Jones* at paras 36 and 47).

44. The respondent does not resist the appeal on this ground. When the resentencing exercise is conducted, the appellant must be given appropriate credit for time spent in custody prior to sentencing.

45. For this further reason the Board will advise His Majesty that the appeal should be allowed and the sentence of 50 years' imprisonment should be quashed.

GROUNDS 2, 3 AND 5

46. At the conclusion of the oral hearing the Board informed the parties that they were minded to advise His Majesty that the appeal should be allowed and the sentence quashed on grounds 1 and 4. At that point we indicated to Mr Paul Taylor KC on behalf of the appellant that, while we were willing to hear him on the remaining grounds, it was the preliminary view of the Board that these grounds raise matters which would more appropriately be considered by the Court of Appeal when this case is remitted. Sentencing practice inevitably varies from State to State and must take account of local conditions of which the Court of Appeal is fully aware and the Board is not. Mr Taylor agreed that this was the most appropriate course.

CONCLUSION

47. Accordingly, the Board will humbly advise His Majesty that this appeal should be allowed on grounds 1 and 4, that the sentence of 50 years' imprisonment should be quashed and that the matter should be remitted to the Court of Appeal of The Bahamas for resentencing.