

**COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 11 of 2020**

B E T W E E N

GARY THURSTON

Intended Appellant

AND

REGINA

Intended Respondent

BEFORE: **The Honourable Sir Michael Barnett, P**
 The Honourable Madam Justice Crane-Scott, JA
 The Honourable Mr. Justice Evans, JA

APPEARANCES: **Mr. James Thompson, Counsel for the Intended Appellant**
Mrs. Olivia Nixon, Counsel for the Intended Respondent

DATES: **17 November 2020; 1 February 2021; 22 March 2021; 26 May 2021; 21**
 June 2021; 14 July 2021

Criminal Appeal – Extension of Time Application – Intended appeal against sentence – Whether sentence unduly severe – Whether sentence based on a wrong principle of law – Probation report – Psychiatric report – Court’s duty to inform itself in relation to proper sentence to be passed – Counsel’s duty to assist court as to what that evidence should be adduced – Section 185 Criminal Procedure Code Act, Ch. 91

On 28 March 2018 following a trial, a jury acquitted the intended appellant of the murder of Sekeno Collie and of the attempted murder of Conceta Lawrence. He was, however, convicted of the

attempted murder of Stephanie Kemp. He was subsequently sentenced on 10 December 2019 to 30-years imprisonment. The background facts which gave rise to the offence are that the intended appellant and the virtual complainant Kemp were in a relationship which Kemp ended around 2 April 2016. Days later, on 6 April 2016, the intended appellant visited Kemp's home and shot her, Collie and Lawrence, Kemp's school mate and mother, respectively.

Following his conviction and sentence the intended appellant failed to file an appeal within the 21-day statutory deadline for appeals stipulated in the Court of Appeal Act. He filed an Extension of Time Application 1 year and 2 months late seeking an extension of time to file an intended appeal on the sole ground that the 30-year sentence for attempted murder is harsh and unduly severe. The Crown opposed the application on the basis that the intended appeal had no prospects of success.

After hearing the contending arguments, the Court reserved its decision.

Held: Extension of time application dismissed. Conviction for attempted murder is affirmed together with the 30 year sentence which the judge imposed. After deducting the 4 years spent on remand, the intended appellant will serve 26 years imprisonment from 10 December 2019.

The factors to be considered on an extension of time application are well known: the length of and reasons for the delay, the prospects of success and the prejudice, if any, to the intended respondent.

The intended appellant is 1 year and 2 months out of time and he blames the prison authorities for this period of delay. He submits that his proposed appeal against sentence has good prospects of success due to missteps by his counsel in the court below which resulted in the judge imposing a sentence which was unduly harsh and severe.

In her sentencing remarks, the learned judge outlined the mitigating factors as well as the aggravating factors, and correctly found that the aggravating factors far outweighed the mitigating factors which she identified. It is obvious that the determinate 30-year sentence which the judge ultimately imposed falls within the range of sentences which are imposable and have been imposed for attempted murder in this jurisdiction.

In summary, the Court is satisfied that there is no basis on which the exercise of the learned judge's sentencing discretion would likely be impugned on appeal. Accordingly, the Court is satisfied that the intended appeal against sentence has absolutely no prospects of success

Alexander Williams v. Regina SCCrApp. & CAIS No. 155 of 2016 mentioned
Attorney-General v. Vilner Desir & Delano Taylor SCCrApp. & CAIS No. 45 of 2015 considered
Director of Public Prosecutions v. Ernesta Butler SCCrApp. & CAIS No. 97 of 2019 considered
Errol Knowles v. Regina SCCrApp. & CAIS No. 79 of 2017 mentioned
Garvin Adderley v. Regina SCCrApp. & CAIS No. 250 of 2017 mentioned
Garvin Pratt v. Regina SCCrApp. & CAIS No. 41 of 2016 considered
James Miller v. Regina SCCrApp. & CAIS No. 106 of 2009 considered
Michael Scott v. Regina SCCrApp. & CAIS No. 163 of 2012 considered

Rael Pierre v. Regina SCCrApp. & CAIS No. 48 of 2017 considered
Solomon Higgs v. Regina SCCrApp. & CAIS No. 180 of 2013 considered
The Attorney-General v. Larry Raymond Jones et al SCCrApp. & CAIS Nos. 12, 18 and 19 of 2007 mentioned

JUDGMENT

Judgment delivered by The Honourable Madam Justice Crane-Scott, JA:

Introduction

1. On 28 March 2018 the intended appellant (“Thurston”) was acquitted of the murder of Sekeno Collie (Count 1) and of the attempted murder (Count 2) of Conceta Lawrence. He was, however, convicted of the attempted murder (Count 3) of Stephanie Kemp. He was subsequently sentenced on 10 December 2019 to 30 years imprisonment.
2. Thurston initially filed a Criminal Appeal Form 1 Notice of Appeal against his conviction and sentence on 24 January 2020, which was by then some 24 days beyond the 21-day statutory deadline for appeals. It was not until 25 March 2021 that his Court-appointed attorney filed the required Application for Extension of Time to Appeal (“EOT Application”) supported by Thurston’s affidavit filed on the same day. The EOT Application was subsequently amended on 7 June 2021 to add 2 additional grounds of appeal.
3. At the hearing before us on 21 June 2021, counsel for Thurston, Mr. James Thompson abandoned both of Thurston’s intended grounds of appeal (i.e. grounds 1 and 2) against conviction. The Court was advised that the amended EOT application would proceed on the basis, *inter alia*, that Thurston’s complaint that the sentence imposed was harsh and unduly severe (i.e. ground 3) had good prospects of success.
4. For all of the reasons set out in this Judgment, we have dismissed the intended appellant’s EOT Application which, we are satisfied, has absolutely no prospects of success.

5. Some background facts will provide the necessary context for the jury's guilty verdict, as well as provide the factual background against which the 30 year sentence was imposed.

Background Facts

6. The Crown's case at trial was that Thurston and the virtual complainant, Stephanie Kemp ("Miss Kemp"), had been in an intimate relationship which had just ended. The couple both attended a local church and their relationship began in January 2015. The relationship was initially a visiting relationship, but after some time, Thurston moved into Miss Kemp's home in Ridgeland Park West which she occupied with her two kids from a previous relationship, her sister and her mother, Conceta Lawrence.
7. On or about 2 April 2016, Miss Kemp informed Thurston that she wished to end the relationship. Some days later, on 6 April 2016, Thurston entered the house, went into Miss Kemp's bedroom where he begged her not to end the relationship, and further begged for sex. At some point, Miss Kemp went to use the restroom, leaving her cellphone on the bed. On her return to the bedroom, her cellphone was missing and Thurston had left the house. She immediately accosted him outside the house where he denied having taken her phone. She eventually informed Thurston that she needed to collect her children from school and did not want to leave home without her phone. At that point, Thurston offered her a ride in his jitney to collect the children from school. She accepted his offer.
8. Whilst Miss Kemp was in the jitney on the way to the school, Thurston drove his bus very slowly. He continually begged her not to end the relationship as they could **"work this out"**. She told him she did not want to work things out and that she was done. When they got to the vicinity of the gas station at Poinciana and Robinson Road, he stopped the bus and told her to go and get the kids as he was going to make a school run. He said that he would meet her back at home. He then offered to give her the cellphone at which point, she told him not to worry about it and that she was going to get her kids and would meet him at home and they would talk then.
9. As Miss Kemp was walking in the area of the College of The Bahamas, she sensed something behind her. On looking back she observed Thurston's bus being driven slowly behind by one of Thurston's men. Thurston then walked up to her and accosted her about **"this G person"** whose name appeared in her cellphone. She told him that whatever was in her phone was of no concern to him **"because me and you have nothing anymore."** She crossed the road to avoid an argument, but Thurston ran behind her and started to choke her. He threw her against a passing truck and ran back to his bus which sped off.
10. A friend in a passing jeep then gave her a ride to her kids' school where she collected them and started to walk back to Poinciana to catch the Blue Hill Road bus to get back onto Market

Street. At some stage, an old school friend of hers, Sekeno Collie, stopped his car to give her and the kids a ride home. After dropping the children home, Sekeno Collie then gave her a ride to the Grove Police Station where she made an official report to police about Thurston's behaviour. While in the Grove Station, Thurston came inside and told her: **“this don't have to go like this. We could work things out”** to which she told him: **“Gary, I'm finished.”**

11. Miss Kemp left the Grove station in Sekeno Collie's car. Sekeno dropped her home and said he would return later to check on her. Thurston was already parked in front of her home when she arrived home. She went into her bedroom and started collecting Thurston's clothes and other belongings together. At this point, Thurston walked into the house and pleaded with her mother to talk to her on his behalf; to which Conceta Lawrence replied; **“I can't say anything to her because she look like she already made up her mind.”**
12. According to the evidence, Thurston then went into Miss Kemp's bedroom and said: **“Man Stephanie, please, man. Let me just take you out for dinner, you and the kids;”** to which she replied: **“No, this is finished. I'm finished with it. I have had enough.”** At this point, Thurston left the house and drove off.
13. About 2 or 3 hours later on, Sekeno Collie returned to the house in his vehicle. He was immediately followed by Thurston in his bus. Both men walked towards the house where Miss Kemp met them on the front porch. Thurston then asked her whether this was her new man and was told: **“New man? This is my schoolmate, Sekeno.”** Sekeno extended his hand to introduce himself. Thurston, however, refused to shake hands with Sekeno and went back to the bus. Sekeno then told Miss Kemp he was going to hail her later because this looked like **“this was going to be long.”** However, just as she went inside the house, she heard what sounded like a car tyre burst twice and then heard her mother exclaim: **“Oh my God Stephanie, Gary killed your schoolmate.”**
14. Miss Kemp ran to the front door and saw Thurston coming towards the door. She ran back inside towards the bedroom area looking for her kids. On approaching the hallway she saw Thurston's shadow and on turning, she realized she had been shot in her left side. She fell somewhere between the bedroom door and the hallway. She saw Thurston coming towards her and closed her eyes. She heard the gun click back and heard him say: **“if I can't have you nobody else could have you.”** She then heard when the bus pulled out, but didn't know what else had happened before that.
15. Conceta Lawrence's evidence before the jury was that she saw when Thurston cranked his gun on the outside and shot Sekeno Collie twice before he jumped over the flower pots and came towards the front door. According to the witness, Thurston shot at the door and entered the house; after which he ran down the hallway and shot at her daughter, Stephanie, and then put

the gun barrel against her daughter's forehead. Conceta Lawrence told the jury that she had put up her hands as Thurston had shot at her. She showed the jury the missing ring finger of her left hand which had been injured by the shot. She told the jury that he had then cranked his gun again and shot her in her thigh. According to Conceta Lawrence, Thurston returned to her briefly and asked her where the "**little rascals**" were before leaving the house.

16. The jury was also told that after hearing Thurston's bus pull out, Miss Kemp had asked God for strength and had then picked herself up and started to walk. Holding onto her side, she stepped over her mother, Conceta Lawrence, who had been lying injured on the floor inside the house. On seeing her mother's phone in a chair, Miss Kemp dialed 911 and walked outside the house where she saw Sekeno Collie slumped inside his car where he had been shot to death. The police arrived shortly afterwards, along with the ambulance and she and her mother were both taken to hospital for medical attention.
17. A medical report prepared by Dr. Francita Pinder in relation to Miss Kemp was also put into evidence. It revealed that Miss Kemp had been found to be suffering from a gunshot injury to the left lateral chest. Wadding from the gunshot casing was also found embedded in her left lateral chest wall.
18. While their injuries were not life threatening, the evidence was that both women could have bled out and died without medical attention.

The EOT Application

19. As is well known, this Court's power to grant an extension of time within which to appeal is conferred by rule 9 of the Court of Appeal Rules, 2005. When exercising the discretion, the Court considers four factors, namely: the length of the delay; the reasons for the delay; the prospect of success of the intended appeal; and the prejudice, if any, to the intended respondent. See **Alexander Williams v. Regina** SCCrApp. & CAIS No. 155 of 2016; **Errol Knowles v. Regina** SCCrApp. & CAIS No. 79 of 2017; and **Garvin Adderley v. Regina** SCCrApp. & CAIS No. 250 of 2017.
20. *Length of delay and Reasons for delay*: The initial period of delay which transpired between the expiry on 31 December 2019 of the 21-day statutory deadline for appeals and 24 January 2020 when Thurston filed his Criminal Appeal Form 1 was approximately 24 days. Regrettably, Thurston did not also file the necessary Criminal Appeal Form 2 seeking an extension of time within which to appeal. The required EOT Application was not filed until 25 March 2021 when it was made on his behalf by his court-appointed legal representative. This effectively means that the total period of delay is not 24 days, as Mr. Thompson contends, but approximately 1 year and 2 months.

21. In his supporting affidavit, Thurston sought to blame the prison authorities for not providing him with the requisite form in a timely manner. He, however, claims to have obtained the assistance of his trial attorney-at-law, Keevon Maynard in January 2020 who had helped him complete the Criminal Appeal Form 1 which he had then handed to the Prison authorities for filing at the Court of Appeal Registry. He once again sought to blame the prison authorities for not filing the completed form at the Registry in a timely manner and says that in any event, due to his incarceration, any delay which occurred was beyond his control.
22. While excuses of this type are frequently proffered by would-be appellants to explain why appeal forms are not filed within the statutory deadlines, Thurston's excuse was unconvincing. This is because it is obvious that by the time he obtained counsel's assistance in completing the Form 1 in January 2020, the time for lodging his appeal would have already expired. If, as he claimed, he had indeed obtained counsel's assistance in completing the Form 1, he would by then have been required to complete not only a Form 1, but the Form 2 application requesting an extension of time within to appeal. This was not done until March 2021 when his court-appointed attorney filed the EOT Application on his behalf.
23. Although we found Thurston's excuse unconvincing, it was evident from his affidavit that he was unfamiliar with the statutory procedures for appeals. That notwithstanding, we turned to consider the prospects of success of his intended appeal.
24. *Prospects of Success of Ground 3*: As indicated, at the hearing Thurston abandoned his intended appeal against conviction and wishes to appeal against his 30 year sentence on the basis that it is harsh and unduly severe.
25. In his written submissions, counsel for the intended appellant, Mr. James Thompson, sought to convince us that a number of mis-steps by Thurston's trial attorney, Mr. Maynard, during the sentencing phase had unfairly prejudiced Thurston and had adversely impacted the sentence which the judge ultimately imposed.
26. Firstly, he complained that Thurston's trial attorney, had not requested a probation report but had, during his mitigation address, merely referred to and utilized the contents of a psychiatric report notwithstanding that the report had not been formally put into evidence through its author. He submitted that as the report had not formally been adduced in evidence during the sentencing phase, the trial judge was under no obligation to have regard to its contents or to accept Mr. Maynard's submission that he be sentenced as a person suffering from diminished responsibility.
27. Next, Mr. Thompson suggested that defence counsel's failure to obtain a probation report effectively deprived Thurston of an opportunity to express remorse for his actions which would

have provided a mitigating factor in his favour. In his view, the failure of Mr. Maynard to request a probation report enabled the Crown prosecutor as well as the judge to utilize the absence of remorse as an aggravating factor. In this regard, he drew our attention to page 586 lines 9-11 of the transcript in which the Crown closed its address by observing that Thurston had **“expressed no remorse for his actions”**; and the judge’s sentencing remarks at page 601 lines 24-25 where the judge clearly treated the absence of remorse as an aggravating factor, stating: **“despite all the very incriminating evidence, he had shown no remorse.”**

28. In the face of both these omissions, Mr. Thompson submitted that the sentencing phase was materially deficient and flawed. He urged us to remit the matter to the Supreme Court for re-sentencing.
29. As we see it, Mr. Thompson’s submission, if accepted, would impugn the entire sentencing exercise which took place in the court below merely on the basis of specific omissions of Thurston’s former legal representative which, he claims, led to the imposition of a sentence which is harsh and unduly severe. The submission is unsustainable for the following reasons.
30. In the first place, the submission fails to recognize that as drafted, intended ground 3 is limited to a request for an appellate assessment as to whether Thurston’s 30 year sentence falls outside the range of sentences which the sentencing judge applying her mind to all the relevant factors, could reasonably consider appropriate and is thereby harsh and unduly severe. As we see it, issues such as whether defence counsel failed to ensure that the psychiatric report was formally adduced into evidence, or failed to ensure that a probation report was obtained, are irrelevant to an assessment as to the severity of the sentence and certainly, could never result in the entire sentencing exercise in the court below being overturned.
31. While section 185 of the Criminal Procedure Code Act, Ch. 91 gives a sentencing court a discretion, before handing down a sentence, to determine what evidence should be received in order to inform itself as to the proper sentence to be handed down, it is undoubtedly for counsel for the defence to indicate to the judge what that evidence should be. At pages 578 (line 30) through 579 (line 11) of the transcript, the following exchange between defence counsel and the judge (following the return of the verdict) reveals that defence counsel was not only given the opportunity to request a probation report, but his decision not to request it was deliberately taken:

“THE COURT: ...What is the position of the defence?”

MR. MAYNARD: My Lady, I guess at this time we’ll have to prepare for a plea in mitigation when it come (sic) to sentence.

THE COURT: Do you need a probation report, or you'd like to just go into mitigation?

MR. MAYNARD: Mitigation is fine, my Lady. I don't see the need for a probation report unless the Court sees otherwise.

THE COURT: No, it's what you require. I did have a psychiatric report for him and I do have some of what he has been through in that.

MR. MAYNARD: I think that should suffice.

THE COURT: Very well." [Emphasis added]

32. It is clear from the foregoing exchange that the judge intended to have regard to the contents of Thurston's psychiatric report for purposes of the sentencing exercise, notwithstanding it was not in evidence before her. Indeed, beginning at page 588 (line 14) of the transcript, following an objection by the Crown prosecutor to Mr. Maynard's use of the psychiatric report in his mitigation address, the following exchange is seen:

"MR. CUMBERBATCH: I do have that, but that was not led at trial. That is not in evidence in this matter.

THE COURT: The Court had knowledge of the same because ... Mr. Coleby represented the defendant, and that after visiting his client and communicating with his family, he requested a psychiatric evaluation. And I requested it on his behalf as evidence by my clerk and I have a psychiatric report dated the 1st of May which is before the Court. And...even though it wasn't tendered in evidence, just as I have your submissions, it is something that the Court will be able to look at because it was this Court's request that he had it done.

Now if you are saying that you need to speak with Dr. Dillet, that is something that you have to consider, but I have the report here and unless and until you want to speak with Dr. Dillet, would you like to set a date?

MR. CUMBERBATCH: No, my Lady...

MR. MAYNARD: The reason why I didn't ask for a probation report because I have a psychiatric report. It indicates exactly that. Continuing on, my Lady.”
[Emphasis added]

33. Against that background, we fail to see how Mr. Thompson could expect on his intended appeal to obtain an order setting aside, as materially irregular, the entire sentencing exercise which took place in the court below, simply because the psychiatric report was not formally tendered in evidence through its maker and because a probation report was not requested or obtained by Thurston's attorney-at-law.
34. As we see it, even in the absence of a formal probation report, there was, in our view, nothing which prevented Thurston from expressing his remorse for his actions directly to the court, or alternatively, through his counsel with a view to mitigating the severity of his sentence. The submission is completely without merit.
35. I turn now to consider, Mr. Thompson's specific submissions in relation to the alleged severity of the 30 year sentence and the authorities cited.
36. Referring to the decision of this Court (differently constituted) in **Director of Public Prosecutions v. Ernesta Butler** SCCrApp. & CAIS No. 97 of 2019, Mr. Thompson submits that Thurston's 30 year sentence is harsh and unduly severe because it is evident that the learned judge also erred in principle by placing reliance on the suggested range of thirty to sixty (30-60) years for murder established in this Court's guideline judgment of **The Attorney General v. Larry Raymond Jones et al** SCCrApp. & CAIS Nos. 12, 18 and 19 of 2007.
37. He drew our attention, in particular to the range of sentences affirmed or substituted in the following authorities, namely: **James Miller v. Regina** SCCrApp. & CAIS No. 106 of 2009; **Michael Scott v. Regina** SCCrApp. & CAIS No. 163 of 2012; **Solomon Higgs v. Regina** SCCrApp. & CAIS No. 180 of 2013; **Attorney-General v. Vilner Desir & Delano Taylor** SCCrApp. & CAIS No. 45 of 2015; **Garvin Pratt v. Regina** SCCrApp. & CAIS No. 41 of 2016; **Rael Pierre v. Regina** SCCrApp. & CAIS No. 48 of 2017.
38. In response, counsel for the respondent, Mrs. Olivia Nixon, submitted that ground 3 had no prospects of success. She pointed out that the offence carried a maximum sentence of life imprisonment and that in imposing the 30 year sentence, the learned judge remained within the framework of the law and the sentence was consistent with the authorities having regard to

the nature of the offence and the circumstances of the present case. Furthermore, the judge committed no error in principle and accordingly, there was no basis on which this Court could interfere. Mrs. Nixon further distinguished the authorities laid-over by Mr. Thompson and submitted that the 30 year sentence was proportionate to the gravity of the offence. We agree.

39. It is clear from the trial transcript that the intended appellant was being sentenced in relation to the attempted murder of Stephanie Kemp. Based on the Crown's case, the three offences for which the intended appellant was indicted and stood trial all formed part of a continuous sequence of events which were alleged to have occurred within minutes of each other at Miss Kemp's Ridgeland Park home on the evening of 6 April 2016.
40. The Crown's evidence at trial was overwhelming. In our view, Thurston is indeed fortunate that the jury did not also convict him of the murder of Sekeno Collie and the attempted murder of Miss Kemp's mother, Conceta Lawrence, who lost a finger and was shot in her thigh during the intended appellant's murderous spree outside and inside the sanctity of her home.
41. That notwithstanding, the attempted murder offence involving Miss Kemp was carried out in the most horrendous manner. It was carried out by a man consumed by jealous rage who, quite simply, refused to accept that their intimate relationship of the past 15 months was at an end. After entering her residence with murderous intent, he shot her in her left lateral chest, before callously placing the barrel of his shotgun against her forehead saying: **"if I can't have you nobody else could have you."**
42. In her sentencing remarks, the learned judge outlined the mitigating factors as well as the aggravating factors, and correctly found that the aggravating factors far outweighed the mitigating factors which she identified. While she admittedly, adverted to the guidelines for murder established in **Larry Raymond Jones**, the judge was clearly well aware that she was sentencing Thurston, not for murder, but for attempted murder, an offence which, as she observed, carried a maximum indeterminate sentence of imprisonment for life.
43. It is obvious that the determinate 30-year sentence which the judge ultimately imposed falls within the range of sentences which are imposable and have been imposed for attempted murder in this jurisdiction. What is more, the circumstances of this case are not dissimilar to those in **Michael Scott** where Scott's appeal against his sentence of 34 years imprisonment for the attempted murder of his estranged wife was dismissed and the sentence affirmed.
44. In summary, we are satisfied that there is no basis on which the exercise of the learned judge's sentencing discretion would likely be impugned on appeal. Accordingly, we are satisfied that intended ground 3 has absolutely no prospects of success on an appeal.

Disposition and Order

45. In the result, we dismiss the Extension of Time application and affirm the intended appellant's conviction for attempted murder together with the 30 year sentence which the judge imposed. For the avoidance of doubt, after deducting the 4 years spent on remand, the intended appellant will serve 26 years imprisonment for the offence of attempted murder from 10 December 2019.

The Honourable Madam Justice Crane-Scott, JA

The Honourable Sir Michael Barnett, P

The Honourable Mr. Justice Evans, JA