[2014] JMCA Crim 33

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 114/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCINTOSH JA
THE HON MISS JUSTICE MANGATAL JA (Ag)

JOEL DEER v R

Ms Althea McBean for the appellant

Orett Brown for the Crown

27 June and 18 July 2014

PHILLIPS JA

[1] The appellant, Joel Deer, was charged on an indictment containing one count of illegal possession of firearm and one count of robbery with aggravation. On 28 August 2012, he pleaded guilty to both counts, and on 2 November 2012, Fraser J sentenced him to 10 years and 16 years imprisonment at hard labour respectively, to run concurrently. The single judge who reviewed his application for leave to appeal against sentence granted the application on the ground that, although the trial judge referred

to a discount for the guilty plea, the sentences imposed did not appear to reflect the discount.

[2] The allegations as outlined by the prosecution were that on 2 July 2009 at around 1:30 pm, the appellant, armed with a firearm and in the company of another man, who also had a firearm, robbed Mr Linton Green of a wrist watch, a gold chain, $70,000.00 and two cellular phones, as he sat in his parked car at the corner of Marcus Garvey Drive and East Avenue in Kingston. On 8 October 2009, the appellant was pointed out by Mr Green at an identification parade.

[3] The learned trial judge in handing down sentence stated:

> "Because you have pleaded guilty, you are entitled to the benefit of that in reducing your sentence because as your counsel has advanced, it is a display of remorse and it has saved the Court's time. I, however, also have to bear in mind, in addition to the guilty plea, that he has done three years after you have made help [sic], it has come after a previous conviction and other offences and so it cannot properly be said to be a guilty plea at the earliest possible opportunity. Nevertheless a guilty plea is a guilty plea and you have to be given the appropriate credit for that. Suffice [sic] to say that the discount will not be as large as it would have been had you gotten to it earlier. The guilty plea of course has to be looked at in lieu [sic] of the fact that you are currently serving a sentence in relation to the offences for which you have been convicted and I say that to mean that there has to be some balancing of your guilty plea against the fact that you now have previous convictions, all for serious offences, two for firearm, and two being involved in violence, Robbery with Aggravation, similar to this case, as well as Wounding with intent. So the Court has to take all those factors into account and I do take seriously what has been urged on your behalf and in particular, the expressions

> of faith and confidence which both Elder Evering and Your Counsel have indicated the remorse in you, in light of your interactions. We are taking everything into account."

[4] A single supplementary ground of appeal was filed on behalf of the appellant and the original ground abandoned. The ground reads:

> "The Learned Trial Judge erred in failing to grant an appropriate discount on the Appellant's sentence in light of his plea of guilty."

[5] Miss McBean submitted that there has been a long established principle of sentencing that the court will be more lenient on an accused who has pleaded guilty by giving him a discount in the sentence imposed because he has saved the court's time and resources. She also submitted that there has been a long established principle at common law that the discount the accused would receive is a reduction of one-third or a quarter of the sentence the accused would have received had he been tried and convicted, and not a discount on the maximum sentence. She cited the authority of **Basil Bruce v R** [2014] JMCA Crim 10 to show that a reduction of one-third has been adopted in our jurisdiction. She further submitted that the usual range of sentences for robbery with aggravation is 15 years, and two-thirds of that would be 10 years, but given the appellant's antecedents and the circumstances of this case, an appropriate sentence would be 12 years. Mr Brown, at the invitation of the court, submitted that the appellant may not have had the full benefit of the guilty plea as having waited for, it

seems, three years, the benefit to be derived from the plea, that is, saving the court's resources, would have been diminished.

[6] It is well accepted that when a person pleads guilty his sentence should be reduced (*Archbold: Criminal Pleading, Evidence and Practice 2013 edn:- Sentence and Orders on Conviction, para. 5-112*). In **R v Boyd** (1980) 2 Cr App R (S) 234, the court stated that the policy of the courts is that where a man pleads guilty, "the court encourages a plea of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty". This court endorsed that position in **R v Everald Dunkley** RMCA No 55/2001, delivered 5 July 2002 where, in referring to and applying its earlier decision in **R v Delroy Scott** (1989) 26 JLR 409, it stated that "this act of pleading guilty must be a prime consideration in favour of the offender, who has admitted his wrong on the first opportunity to do so before the court [and] [t]here ought to be some degree of discounting, that is in a reduction of sentence".

[7] It is of significance that the court in **Everald Dunkley** stated that the discount ought to be given where the plea of guilty was given at the first opportunity, the implication being that the court may not be as lenient if there is delay in giving the guilty plea. Indeed, in **R v Hall** (2007) 2 Cr App R (S) 42, the court noted that where an accused had not pleaded guilty at the first given or earliest opportunity the discount or credit given would be less than other accused who pleaded guilty at the first given opportunity. In that case, at a plea and case management hearing the accused pleaded guilty but on the basis of a plea put forward orally, which was not accepted by the Crown. The appellant then put forward a written basis of plea which was closer to the

Crown's case, but that too was not accepted by the Crown. Finally, he caved in as the trial got closer, agreeing to everything but one minor aspect of the prosecution's case. It was held that he could not be said to have pleaded guilty at the first reasonable opportunity and was therefore not entitled to full credit for his guilty plea.. Thus, in each case there is a presumption that the later the stage of the proceedings that the accused pleads guilty the less will be the discount applied to the sentence.

[8] The amount of credit to be given for a guilty plea is at the discretion of the judge. In **R v Buffrey** (1993) 14 Cr App R (S) 511 at page 514, Lord Taylor CJ, in addressing the issue as to what should be the period of discount for an accused who has pleaded guilty, stated that while there was no absolute rule as to the discount to be applied and each case must be assessed on its own facts, as a general rule "something of the order of one-third would very often be an appropriate discount from the sentence which would otherwise be imposed on a contested trial". The learned authors of *Archbold: Criminal Pleading, Evidence and Practice* 1992 at paragraph 5-153 state:

> "The extent of the 'discount' to be allowed in the recognition of a plea of guilty has never been fixed, but cases in which the reductions of sentence have been made by the Court of Appeal on this ground suggests that it is normally between one-fifth and one-third of the sentence which would be imposed on a conviction by a jury. In determining the amount of the discount in a particular case, the court may have regard to the strength of the case against the offender: an offender who pleads guilty in the face of overwhelming evidence may not receive the same discount as one who has a plausible defence."

The position of applying a one-third discount has been adopted in this jurisdiction (see **Everald Dunkley** and **Basil Bruce v R**).

[9] It is to be noted that while the ground of appeal as couched challenges the sentences in general, no issue was taken with the 10 years imprisonment for the illegal possession of firearm. Therefore, our consideration will be confined to the appropriateness of the sentence of 16 years for the robbery with aggravation. The approach of an appellate court in sentencing matters is that the court will not alter a sentence merely because it is of the view that it might have passed a different sentence. In **Matthew Hull v R** [2013] JMCA Crim 21 Panton P stated that the sentence should only be altered where there appears to have been an error in principle, and a sentence that is manifestly excessive is an indication of a failure to apply the right principles.

[10] In embarking on the sentencing exercise, the learned judge stated that he took into account the guilty plea. This was the correct approach, as in **R v Fearon** (1996) 2 Cr App R (S) 25, the court stated that it is highly desirable in every case where an accused pleads guilty in the Crown Court for the sentencing judge invariably to state that he has taken into account the fact that the accused has pleaded guilty. However, failure to do so will not necessarily result in the Court of Appeal reducing sentence: if it is clear from the nature of the sentence in relation to the offence that credit was in fact given for the guilty plea, there will be no reduction (*Archbold: Criminal Pleading, Evidence and Practice 2013 edn at paragraph 5-112*). In the instant case, the learned judge stated that the usual discount would not apply. It appears that this decision was

influenced by two factors: (a) the appellant had waited three years to plead guilty, the suggestion being that he had not done so at the earliest opportunity, and (b) he had previous convictions for similar offences. The learned judge also said he took into account the fact that the appellant had been incarcerated for three years, but did not indicate in what way this would be applied to the overall sentence.

[11] Based on the authorities canvassed above, having recognized that there had been a guilty plea, the learned judge ought then to have determined what sentence he would have imposed on the appellant if the appellant had gone through a trial and had been convicted. In the course of determining the sentence which would have been imposed on conviction, the learned judge would have had to consider the aggravating and mitigating factors which would impact on the term of imprisonment. The learned judge did identify aggravating factors, such as the appellant having had four previous convictions and the fact that the robbery was committed in broad daylight, as well as mitigating factors, such as the appellant's unstable family life, his being gainfully employed as a labourer up to the time of his arrest and his involvement in religious activities while in prison. However, having not indicated what the starting point was in relation to the sentence it makes this court's review far more difficult in being able to say how the learned judge was in fact influenced by these aggravating and mitigating factors in determining the appropriate sentence to impose.

[12] A review of several cases from this court reveals that the range of sentences imposed for the offence of robbery with aggravation after conviction is between 10 and 15 years, although the maximum allowed by statute is 21 years. Of course, the length

of sentence imposed within the range would be determined by the circumstances of the case. In **Jermaine Cameron v R** [2013] JMCA Crim 60 at para [54], Morrison JA noted that "[s]entences of 10 years' imprisonment for illegal possession of a firearm and 15 years' imprisonment for robbery with aggravation are well within the usual range of sentences imposed at trial and approved by this court for like offences". In **Kemar Palmer v R** [2013] JMCA Crim 29, sentences of 10 years and 15 years imprisonment respectively were imposed for illegal possession of firearm and robbery with aggravation; in **Wayne Samuels v R** [2013] JMCA Crim 10, the sentences of imprisonment were 10 years, seven years and 12 years for robbery with aggravation, illegal possession of firearm and shooting with intent respectively; and in **Andrew Mitchell v R** [2012] JMCA Crim 1, sentences of 10 years, 10 years and 17 years imprisonment were imposed for the offences of robbery with aggravation, illegal possession of firearm and shooting with intent respectively. In our view, unless the circumstances of a case of robbery with aggravation are extremely reprehensible or unless there are other compelling reasons to do otherwise, the sentence imposed should be in the range of 10-15 years.

[13] In this case, the record of the proceedings discloses that the appellant had been convicted of four offences: two counts of illegal possession of firearm, one count of robbery with aggravation and one count of wounding with intent for which he was then serving his sentences. These offences took place on 12 June 2009, some 20 days prior to the commission of the offences under consideration, and it seems to us that this factor could be viewed as a compelling reason to take the sentences for the offences

under consideration out of the normal range. Had it not been for that fact, the appropriate sentence of imprisonment to be imposed after trial in this case, would have been 15 years as was the case in **Joel Deer v R** [2014] JMCA Crim 11, where, in relation to the offences committed on 12 June 2009, this court upheld a sentence of imprisonment of 15 years for the offence of robbery with aggravation.

[14] The offences under consideration being a different transaction from those committed on 12 June 2009, the sentences imposed for them, could readily have been made consecutive to the sentences for the 12 June 2009 offences (see section 14 of the Criminal Justice (Administration) Act). However, a relevant principle in sentencing, which the learned judge might well have had in mind, is the totality principle, which allows the sentencing judge to impose a total sentence which is just and proportionate. In *Blackstone's Criminal Practice 2014*, the learned authors in commenting on the totality principle as established by case law and as codified in the UK sentencing guidelines, state:

> "…all courts, when sentencing for more than a single offence, should pass a total sentence which reflects all the offending behavior before it [sic] and is just and proportionate. This is so whether the sentences are structured as concurrent or consecutive. Therefore, concurrent sentences will ordinarily be longer than a single sentence for a single offence."

[15] As indicated above (paras [3] and [4]), it appears that the learned judge was of the view that the usual discount would not apply because the appellant had waited three years and had therefore not entered the guilty plea at the earliest opportunity.

There is no evidence on the record indicating when the appellant was first brought before the court or why trial in relation to the 12 June 2009 offences took place in 2011 and indeed what occurred between 2009 and 2012, when the appellant pleaded guilty. It is still fair to say, however, that the appellant had not pleaded guilty at the earliest opportunity since the matter would no doubt have come before the court prior to the date of arraignment, so that in keeping with the authorities, although the appellant would be entitled to a discount, it would be less than the usual one-third.

[16] Additionally, notwithstanding that this court has tended to apply a one-third discount on a plea of guilty it must surely be recognised that there will be cases such as the instant case, where the circumstances warrant a different approach. This appellant, 20 days after the first set of offences, was still in possession of an illegal firearm and still using it to commit serious offences. What is more, the firearm was not recovered and so was still available for use in other offences. As the learned authors of *Archbold: Criminal Pleading, Evidence and Practice 1992* state at paragraph 5-153:

> "The extent of the 'discount' to be allowed in the recognition of a plea of guilty has never been fixed …"

And in our view it should be a matter for the sentencing judge to determine how in the particular circumstances of each case "knocking something off the sentence" should be accomplished (see **R v Boyd** referred to above). Here, in our opinion, the appellant benefitted from his guilty plea by the fact that the sentences were made concurrent and in declining to make the sentences consecutive, the learned judge appears to have had regard to all the factors he outlined in his sentencing remarks. He gave the appellant

due consideration for his guilty plea in only imposing a sentence of 16 years for robbery with aggravation to be served concurrently with the sentences he was then serving, and we see no reason to disturb that sentence.

[17] We would therefore dismiss the appeal against sentence and order that the sentence commence from 2 November 2012.