[2015] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 39/2011

BEFORE: **THE HON MR JUSTICE PANTON P**
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)

PAUL KENNEDY v R

Andrew Wildes instructed by Mrs Valerie Neita-Robertson for the applicant

Mrs Lori-Anne Cole-Montaque for the Crown

26 January 2015

ORAL JUDGMENT

MCDONALD-BISHOP JA (Ag)

[1] This is an application for leave to appeal against sentence arising from the trial of the applicant before Sykes J sitting in the High Court Division of the Gun Court between 23 November 2010 and 21 December 2010. The applicant was charged on two counts of an indictment. The first count charged him with the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act and the second count charged him with the offence of illegal possession of ammunition contrary to the same section of the Firearms Act.

[2] He was found guilty on both counts on 21 December 2010 and was sentenced on 20 April 2011. In respect of count one, he was sentenced to 15 years imprisonment at hard labour and on count two, six years imprisonment at hard labour. The sentences were ordered to run concurrently.

[3] The applicant, initially, filed his application for leave to appeal both conviction and sentence, which was refused by a single judge of this court. At this time, he renews his application but only in respect of leave to appeal against sentence, as learned counsel on his behalf, Mr Wildes, has advised the court that he would not pursue the application for leave to appeal against conviction. This would mean, therefore, that the facts on which the applicant was convicted are accepted by him as constituting the case that was brought against him by the prosecution.

[4] A brief overview of those facts that led to his conviction and sentence will now be outlined. The prosecution relied on the testimony of one witness, Sergeant Andrea Scarlett, who on 5 July 2001, was a constable. On that date, at about 10:20 a.m., she was with a party of police from the Area 5 Headquarters on special static duty along the Whitehall Avenue, Kingston 8 area, in the parish of Saint Andrew. During the course of that duty, Sergeant Scarlett saw a white Toyota Corolla motorcar being driven along Whitehall Avenue, heading towards Mannings Hill Road. She signaled the car to stop and the driver obeyed.

[5] The applicant was a passenger in that vehicle along with four other persons, including the driver. He was seated at the left rear passenger seat and when the vehicle stopped, he alighted from the vehicle and stood directly in front of Sergeant Scarlett. She observed that he held a black plastic bag in his left hand with his right hand inserted inside the bag. She made certain observations of him, particularly, that he was shifting his hand inside the bag. She held on to the bag and a tussle ensued between them. She tried to pull the bag from him and he tried to pull it away and it was only when she was assisted by a colleague who was on duty with her that she managed to take the bag from him.

[6] Upon examination of the bag by Sergeant Scarlett, it was found to contain a firearm, which upon further checks revealed that it was loaded with 10 9 mm cartridges. Later checks in the same plastic bag revealed 31 cartridges and an extra magazine. The applicant was asked at the time, after being cautioned, whether he had a licence for those items and he said to Sergeant Scarlett, "*no officer, but me glad seh a wah woman ketch me with it".* He then told her that he had bought the gun for $80,000.00 and the reason he gave was that *"some man shoot me up and wah kill off me and me family".*

[7] The applicant was taken to the Constant Spring Police Station where he was arrested and charged for the offences of illegal possession of firearm and ammunition. The firearm and ammunition were tested by a ballistics expert who found that the firearm was a semi-automatic Ruger model 9 mm pistol in good working condition and capable of discharging deadly missiles from its barrel. The 41 cartridges were also

found to be ammunition for use in that firearm and other firearms of similar calibre and were capable of being fired.

[8] Of course, at the trial the applicant denied the prosecution's case that he was found in possession of the firearm and ammunition as alleged. The learned trial judge, however, accepted the case presented by the prosecution and, accordingly, entered verdicts of guilty on both counts.

[9] The applicant before us argued two grounds of appeal with the principal one being ground one in which he contended that the sentence imposed by the learned trial judge in relation to the offence of illegal possession of firearm is manifestly excessive even in circumstances where the offence is accompanied by aggravating features.

[10] The second ground, which may be said to be a subsidiary ground, is that the learned trial judge erred in accepting the witness for the prosecution (Sergeant Scarlett), for the purpose of convicting the applicant but rejected her testimony for the purpose of sentencing him. Certain portions of the transcript were extracted by learned counsel and used to advance the argument on behalf of the applicant that the learned trial judge, having accepted Sergeant Scarlett's testimony about the explanation given by the applicant when he was apprehended, had then said in sentencing him that he did not accept that he had said that.

[11] We find it convenient to first treat with and dispose of ground two because it is seen as a ground that should not delay us. This is due to the fact that having examined the transcript, we find that this complaint is misconceived. It is clearly based on a

misinterpretation of what the learned trial judge stated arising from the manner the statement was recorded upon transcription. When the impugned portion is read in the context of other parts of his remarks made in sentencing the applicant, the meaning of the learned trial judge's remarks is clear and unambiguous. It reveals no inconsistency as alleged. He did accept that the explanation was given as stated by the witness but he rejected it because in his words: "It doesn't sounds [sic] like the real story to me. It sounds like you were transporting - it appears that you were transporting firearms from point A to point B". We find no unfairness to the applicant resulting from the learned trial judge's treatment of the evidence concerning his explanation to the police. So, without further ado, we can say that ground two has no merit.

[12] We will now embark on our assessment of ground one which embodies the complaint that the sentence for illegal possession of firearm is manifestly excessive. The submission of Mr Wildes is that numerous authorities from this court, even in recent times, have tended to suggest that the appropriate range for mere possession of firearm and ammunition is closer to 10 than 15 years. In support of this contention, he cited before us three authorities, which are all decisions from this court: **Evon Johnson v R** [2014] JMCA Crim 43; **Kirk Mitchell v R** [2011] JMCA Crim 1; and **Andrew Mitchell v R** [2012] JMCA Crim 1.

[13] Learned counsel has cited those cases to say that in the light of dicta distilled from them, a sentence of 15 years imprisonment for illegal possession of firearm is manifestly excessive even with significant aggravating features to the offence. Hence, the sentence should be set aside and a lesser sentence substituted by this court.

[14] We have examined the particular circumstances of this case within the context of the authorities cited by learned counsel. It is evident that the learned trial judge properly took into account several special features of the case that he had before him for consideration, which serve to distinguish it from the authorities cited by learned counsel. The learned trial judge found, in the light of the nature of the firearm, the number of rounds of ammunition in the applicant's possession and the circumstances in which he was apprehended, that he was transporting the firearm from one point to another or was, in fact, trading in firearms. We do not believe that such a conclusion is unreasonable on the facts before him.

[15] Another feature that we would highlight that the learned trial judge, particularly, considered, and which we have taken into account, is also the fact of the applicant's reluctance to co-operate with the police and to willingly hand over the illegal articles when he was confronted by the police.

[16] The learned trial judge, against all that background, paid particular attention and attached due weight, which he ought to have done, to the fact that the applicant has two previous convictions for the same offences. This, he treated as a significant aggravating feature in the case. This court cannot say that he was wrong to do so.

[17] We have taken into account the prevalence of these offences and the fact that the illicit possession and use of firearms continue to be a scourge on our country. We have paid due regard to the principles applicable to sentencing and also to the submissions made by learned counsel for the applicant that usually the starting point

for the offence of illegal possession of firearm is between eight and 10 years. We cannot, however, ignore the law that the upper limit for such an offence is a maximum of life imprisonment. This reveals the clear intention of Parliament to treat possession of firearms, *simpliciter*, just as serious as the use of them. The courts, however, may not, ordinarily, impose the maximum sentence of life imprisonment but that is not to say it can never be done. Everything depends on the circumstances of a given case and the circumstances of the particular offender.

[18] In this case, the applicant, unlike the offenders in all the other cases brought to our attention by learned counsel, has previous convictions for the same offences of illegal possession of firearm and ammunition for which he was sentenced to a term of incarceration. This applicant, having been previously incarcerated, has re-offended by committing the same offences. We cannot, at all, say that the learned trial judge should be faulted for attributing significant weight to that fact.

[19] The antecedent of the applicant does raise serious questions as to the type of sentence that would be necessary to ensure his rehabilitation, to deter his re-offending, to deter others of like mind and to protect the public from such errant conduct. We have also noted that this was not a sentence based on a plea of guilty, which, in the ordinary course of things, would merit a discount in sentencing. All these are matters we have taken into account in determining whether the sentence is manifestly excessive.

[20] The message must be sent and it must be sent clearly that this court will not condone the illegal possession of firearms and ammunition, particularly, in such circumstances as these, where the offender (with a previous conviction for the same offences) was found on a public road, in a public passenger vehicle with members of the public and who, upon apprehension, sought to hinder the police in their effort to gain control of the illegal weapon.

[21] The totality of the circumstances must be considered and we having done so do find that the firearm cannot be viewed in isolation from the 41 rounds of ammunition and extra magazine he had in his possession. The concurrent sentences of 15 years imprisonment for illegal possession of firearm and six years imprisonment for the ammunition, when viewed globally against that background, cannot, at all, be said to be manifestly excessive.

[22] In the result, this application for leave to appeal against sentence is refused. The sentences are to be reckoned as having commenced from 21 December 2010.