[2023] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00057

ROMARIO ABRAHAMS v R

Miss Hazel Gordon for the applicant

Miss Channa Ormsby and Miss Domonique Martin for the Crown

13 February 2023

ORAL JUDGMENT

STRAW JA

[1] Mr Romario Abrahams, the applicant, pleaded guilty to five counts on an indictment, on 25 January 2020. On count one, illegal possession of firearm, he was sentenced to 15 years' imprisonment at hard labour. On count two, assault, he was sentenced to one year imprisonment at hard labour. On count three, unlawful wounding, he was sentenced to three years' imprisonment at hard labour. On count four, attempting to discharge a loaded firearm, he was sentenced to 13 years' imprisonment at hard labour and on count five, illegal possession of ammunition, he was sentenced to 15 years' imprisonment at hard labour.

[2] The applicant had previously applied for leave to appeal against sentence before a single judge, but this was refused on 9 November 2022. Before us is a renewal of that application.

[3] The facts, in summary, are that the applicant went into the Cross Roads Police Station on 22 August 2019, to make a report. He had been there the day before and was told to come back with certain documents. The police officer who was to assist him was busy. The applicant asked to use the restroom. Having gone into the restroom, he came back to the police officer to indicate that there was a problem. The police officer went with him into the restroom. At this stage, the applicant took the licensed firearm of the police officer, pointed the firearm at him, hit the officer with the firearm over the head causing a wound which bled, then attempted to discharge the firearm at the officer. The police officer said he heard the click but, one can only say, by the grace of God, nothing was discharged. The officer then ran out of the bathroom and the applicant ran out of the police station and escaped.

[4] This incident was apparently caught on tape and so the applicant's identity was known to the police. On 23 August 2019, acting on information, the police found the applicant at the Oasis Medical Center. He was arrested and the firearm recovered in his possession.

[5] The applicant's complaint is that the learned judge erred in applying the sentencing principles and that the sentences were manifestly excessive; that the learned judge erred in terms of how she applied the starting point, which, according to the applicant was at the higher end of the scale. This is in light of the fact that he had pleaded guilty, he had no previous convictions and had a good community report.

[6] Having considered the submissions of both counsel, we recognized that the learned judge did consider all the relevant sentencing principles, but we would agree that she erred by incorporating all the aggravating features into her starting point; in particular, in relation to counts one, four and five. We refer to the usual cases in this regard, such as **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20. It is on that basis we engaged in a re-sentencing exercise, applying of course, the principles adumbrated in **R v Ball** (1951) 35 Cr App Rep 164 and **Alpha Green v R** (1969) 11 JLR 283.

[7] We do not accept, however, that the learned judge erred in principle in arriving at a higher starting point for counts one and four, as the circumstances of the offence were egregious and distinguishes it from other relevant cases. The seriousness of this offence would be that the applicant entered into the very bowels of the system of justice, into a police station, to commit these offences. We accept, therefore, that these counts would require a higher starting point.

[8] For illegal possession of firearm, the usual starting point is 10 years; for count four, which is the attempt to discharge a firearm, the usual starting point is seven years. The learned judge used 15 years as her starting point for counts one and five (illegal possession of firearm and ammunition), and 12 years for count four. However, as indicated previously, we do believe that the higher starting point is merited in relation to counts one and four.

[9] In looking at the discount that should be applied in the sentencing process on account of the guilty plea, we considered that 10% would be appropriate in light of the fact that the applicant could be described as having been caught red-handed, as he was seen on the security cameras located in the police station. So, it was to his benefit to plead guilty.

[10] In relation to count one, we therefore use the starting point of 15 years. We looked at the aggravating features and added six years to the starting point. These included luring the police officer into the restroom, disarming him, using the firearm to assault and wound him, and then attempting to discharge the firearm at the policeman and escaping from the police station. We, therefore, reached a figure of 21 years. We then subtracted three years for mitigating factors - good community report, no previous convictions, and the applicant's age (although age is not as relevant in relation to offences involving illegal possession of firearm). However, he was 24 years old at the time of the committal of the offences and, as the learned judge stated, he seemed to be capable of rehabilitation. We were now left with a total of 18 years to which was applied the 10% discount. This resulted in a figure of 16 years, two months and 12 days. Having deducted the time that

the applicant spent in custody, that is, one year, this would result in a sentence of 15 years, two months, and 12 days. However, we would not be increasing the sentence actually imposed by the learned judge and so for the sentence of illegal possession of firearm we came to the conclusion that 15 years was appropriate in the circumstances.

[11] In relation to count two, we recognized that the judge did not apply any of the relevant factors to a consideration of count two; the maximum is one year imprisonment. We took note that the applicant would have already spent that period as time served, so we accepted the submissions of both counsel that this ought to be adjusted and we would impose the sentence of one year as time already served.

[12] In relation to count three, unlawful wounding, we recognized that this was part and parcel of the whole transaction during which the firearm was obtained and used to harm the police officer. We applied a starting point of two years, as the maximum penalty is three years. We added one year for aggravating factors, then we took off three months for the mitigating factors, which left us at two years and nine months. We applied 10% as a discount for the guilty plea, which brought us to two years, five months and 14 days from which was deducted one year for the time spent in custody. The final sentence would be one year and five months.

[13] In relation to count four, the attempt to discharge a loaded firearm, we were of the view that 12 years as the starting point (used by the learned judge) was somewhat low, so we applied 13 years, as the circumstances were serious and revealed a wanton disregard for the life and safety of the police officer. We added six years for the aggravating factors which would result in a figure of 19 years; we took off three years for the mitigating factors (which brought it down to 16 years). We then applied the 10% discount which would result in a figure of 14 years four months and 24. One year was deducted for time spent in custody, however, we did not indicate an intention to increase the sentence beyond 13 years. The ultimate sentence would therefore remain at 13 years for count four.

[14] In relation to count five (illegal possession of ammunition), we did think that it needed some adjustment. This court has, for the most part, adjusted sentences for illegal possession of ammunition depending on the amount of ammunition recovered or in the possession of a defendant. This principle has been applied in several cases including **Lavar Whitter v R** [2022] JMCA Crim 44. However, there is no evidence as to the amount of ammunition involved. In the interest of fairness, we applied, a starting point of seven years. We added six years for the aggravating factors which would take us to 13 years. We subtracted three years for the mitigating factors which would take us back to 10 years. The 10% discount for the guilty plea resulted in a sentence of nine years from which we subtracted one year for the time spent in custody. This would leave the ultimate sentence of eight years for illegal possession of ammunition.

[15] The orders of the court are as follows:

1. The application for leave to appeal sentence is granted.
2. The hearing of the application is treated as the hearing of the appeal.
3. The appeal against sentence is allowed in part. The sentences of the learned judge on count one for illegal possession of firearm of 15 years and on count four for the attempt to discharge a loaded firearm of 13 years, are affirmed.
4. The sentences in relation to count two for assault, count three for unlawful wounding and count five for illegal possession of ammunition are set aside and substituted therefor are the following:
    a. In relation to count two, for assault, the sentence is to be designated as time served.
    b. In relation to count three for unlawful wounding, the sentence is one year and five months, time having been deducted for pre-sentence remand.

c. The sentence in relation to count five, illegal possession of ammunition, is eight years' imprisonment at hard labour, time having been deducted for pre-sentence remand.

5. The sentences are to run as of the date they were imposed on 7 August 2020 and are to run concurrently.