

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 90/2014

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA**

DERYCK AZAN v R

Ernest Smith for the applicant

Miss Donnette Henriques for the Crown

25, 31 July 2019 and 10 July 2020

FOSTER-PUSEY JA

[1] On 23 October 2014, after a trial before Gayle J (“the judge”) in the Manchester Circuit Court, the applicant was convicted of the offences of illegal possession of firearm, illegal possession of ammunition and shooting with intent. On 31 October 2014 he was sentenced as follows for the various offences: 15 years’ imprisonment at hard labour for illegal possession of firearm, 10 years’ imprisonment at hard labour for illegal possession of ammunition and 35 years’ imprisonment at hard labour for shooting with intent. These sentences were ordered to run concurrently.

[2] The applicant applied for leave to appeal his conviction and sentence. On 12 May 2017 a single judge of this court refused him leave to appeal against both his conviction

and sentence. The single judge found that the main issues in the case were credibility and identification and they were adequately dealt with by the judge. She also expressed the view that the sentences imposed were not manifestly excessive in light of the applicant's brazen actions.

[3] The applicant has now renewed his application before this court. At the commencement of the hearing, counsel for the applicant sought and was granted permission to abandon the original grounds of appeal and to instead argue only one ground of appeal relating to the sentence of 35 years' imprisonment at hard labour imposed by the judge for the offence of shooting with intent. Counsel for the applicant submitted that the sentence imposed for the offence of shooting with intent was manifestly excessive.

[4] On 31 July 2019, having considered the evidence and submissions from counsel, we handed down the following decision:

- "1. Application for leave to appeal against the sentence of 35 years on count 3 of the indictment for shooting with intent is granted.
2. The hearing of the application is treated as the hearing of the appeal.
3. The appeal is allowed and the sentence of 35 years' imprisonment at hard labour imposed on the applicant by the learned trial judge for shooting with intent on 31 October 2014 is set aside.
4. The court substitutes therefor a sentence of 17 years' imprisonment at hard labour, taking into account the

period of two years spent by the applicant in custody pending trial.

5. The sentence of 17 years' imprisonment at hard labour for shooting with intent is to be reckoned as having commenced on 31 October 2014.
6. The sentence is to run concurrently with the other sentences."

[5] Counsel were advised that the reasons for the decision would follow and we now provide same with apologies for our delay in doing so.

The prosecution's case

[6] The case presented by the prosecution was that on 19 September 2012 at about 3:00 pm, Constable Shenley Allen was travelling in a white Suzuki motorcar owned by the Transport Authority along Main Street off North Race Course Road, Mandeville, in the parish of Manchester. He was on duty and was dressed in plain clothes, as were three other police officers who were travelling with him. He was seated in the front passenger seat of the vehicle.

[7] While travelling along Main Street he observed a silver Honda Civic motorcar exit a shopping centre onto the roadway. As the silver motorcar reached the food court, Constable Allen saw two men, one of whom he later identified as the applicant, positioned behind it. The two men pulled firearms from their waistbands, went to either side of the silver motorcar and began firing shots into the motorcar.

[8] Constable Allen instructed the driver of the vehicle in which he was travelling to go towards the silver motorcar which had crashed into a little island on the roadway. As

they grew closer to the vehicle he saw the applicant use a firearm to break the window on the right side of the silver motorcar, after which he fired shots into it at a man sitting around the steering wheel and removed a handbag.

[9] Constable Allen exited the vehicle in which he was travelling, shouted "Police," and the men turned and fired shots in his direction. Constable Allen returned fire, the men ran off, he gave chase and the two men continued to fire in his direction. Constable Allen was then joined by then Inspector (later Deputy Superintendent of Police – "DSP") Paul Bernard.

[10] At the trial DSP Bernard stated that on the date of the incident, he was at a food court at the Manchester Shopping Centre complex. While there he heard around four explosions which sounded like gun shots. He ran in the direction from which he had heard the explosions. Just before reaching North Race Course Road, he saw a silver Honda motorcar on an embankment and two young men, one in a yellow shirt and the other in a white shirt, standing outside the motorcar using their hands to hit on the windows of its two front doors.

[11] DSP Bernard said that he later realized that the young man in the yellow shirt had a gun in his hand and was at first hitting the window however he later stepped back and pointed the gun towards the car. Shortly after, two other policemen arrived in a white Suzuki Vitara. The two young men, after seeing these other policemen, began to fire shots in their direction. The policemen then returned fire and the two young men began to run along North Race Course Road. At this time, DSP Bernard, who was in plain clothes,

joined the chase of the two young men, who were later apprehended in a yard. A firearm and rounds of ammunition were recovered from the applicant. The young man in the white shirt gave his name as Deryck Azan, the applicant in this matter. Deputy Superintendent Bernard testified that, as a friend of the applicant's family, he had known him for approximately 16 or 17 years.

[12] In cross-examination, DSP Bernard said that, at one point during the incident, and before the Suzuki Vitara vehicle arrived, he was looking at the young man in the white shirt for "about ten seconds".

[13] Detective Constable Garth Chambers testified that on the day in question he was at the Mandeville CIB Office when he overheard a transmission from area control. Thereafter, he along with other police officers proceeded to the Manchester Shopping Centre. On arrival, the police officers divided themselves into four groups and went in various directions on foot. Detective Constable Chambers said he heard a loud explosion coming from the rear of a building and proceeded in that direction. While entering an area between two buildings, he saw a man in a white T-shirt and a blue jeans pants with a plaited hairstyle, who was later identified as the applicant, running with a black object protruding from his pants pocket. The applicant was later intercepted and a chrome and black firearm was taken from his possession. He was arrested and taken to the Mandeville Regional Hospital for treatment.

[14] Detective Corporal D'Wayne Card also said that he overheard a radio transmission at the Mandeville Police Station on the date of the incident. Having heard same, he and

another police officer quickly proceeded to Hargreaves Avenue in Mandeville. Upon arrival he saw a crowd and a Honda Civic motorcar which had bullet holes and damaged windows. After receiving information from other police personnel, he proceeded to the Mandeville Regional Hospital where he saw two men in handcuffs in the company of two police officers. The young men identified themselves as Deryck Azan and Jerome McKenzie. They were treated and released into police custody.

The applicant's case

[15] In an unsworn statement from the dock, the applicant denied being involved in the incident which had occurred on 19 September 2012. The applicant stated that he was on his way to visit a female acquaintance, had just disembarked from a taxi, and was walking along a roadway to the Mandeville Town Centre area, when he heard sounds like explosions coming from the direction in which he was heading. He then saw two persons, one in a yellow shirt and one in a white shirt, similar to his, running in his direction. The one in the white shirt appeared to have a gun in his hand and was waving it. He also saw people running towards a church. The applicant said that he too began to run in the same direction.

[16] The applicant further stated that the man in the white shirt ran up to him and told him not to move. At this point, they were at the back of a large house. The man then told him to sit down and he complied by sitting on a manhole cover. He begged the men to not kill him. After some minutes the police appeared, identified themselves and instructed them to not move. They began to fire shots at the man in the yellow shirt. The

applicant stated that while this was happening he lay flat on the ground. The man in the yellow shirt began to run and it appeared that he threw away the gun. After the shooting exchange had ended, the applicant stated that he attempted to rise from the ground, and one of the police men told him to not move. He was handcuffed and taken around to the front of the building. While there one of the police men came up and said: "a di boy dis in a di white shirt". He was subsequently taken to the Mandeville Police Station where he was arrested and charged.

[17] Having reviewed the transcript, we agreed with the single judge of appeal that the main issues which arose in the trial were alibi, credibility and identification and the judge adequately addressed them. Counsel for the applicant therefore was correct in not challenging the conviction.

Submissions

Applicant's submissions

[18] Counsel for the applicant, Mr Smith, argued that the sentence of 35 years' imprisonment at hard labour which the judge imposed for the offence of shooting with intent was manifestly excessive. He submitted that the sentence of the judge exceeded the normal sentencing range by 20 years, as the normal sentence for shooting with intent is 15 years' imprisonment. Furthermore, the judge would have to have had compelling reasons to justify his imposition of such a sentence.

[19] Counsel highlighted that the judge, in sentencing the applicant, took into account the time of day, broad daylight, when the incident occurred, and the fact that the

applicant had engaged police officers in what he described as a “serious exchange of gun shots”. Counsel contended, however, that these were not compelling reasons for the sentence imposed in light of the normal range of sentence for this offence. He argued that there was nothing in the character of the offence or the character of the offender which merited 35 years’ imprisonment at hard labour.

[20] Counsel referred to and relied on the following cases, namely: **Kirk Mitchell v R** [2011] JMCA Crim 1, **Omar Brown v R** [2015] JMCA Crim 31 and **Wayne Samuels v R** [2013] JMCA Crim 10 to bolster his point that the sentence of the judge was outside of the normal range of sentences for shooting with intent. These cases, with the exception of **Omar Brown v R**, reflected a range of 10-15 years’ imprisonment. Counsel posited that in the last case, **Omar Brown v R**, the 18-year sentence that was imposed was as a result of that applicant’s previous firearm conviction, which was not similar to the case at bar.

[21] Counsel acknowledged that the applicant had four previous convictions: larceny of small stock in 2005; possession of ganja in 2007; dealing in ganja in 2007; and attempting to export ganja in 2007. Counsel contended that these convictions were different in nature from the conviction for shooting with intent as they were all related to drugs, or were minor, and not violent in nature.

[22] In light of these cases, counsel initially urged this court, in considering the appropriate sentence, to start at the higher level of 15 years’ imprisonment at hard labour and reduce it by two years, to 13 years’ imprisonment at hard labour, in light of the time

that the applicant spent in custody before trial. Counsel submitted that the incident took place in 2012 and the record revealed that the applicant was taken into custody from the day of the incident and remained there until he was sentenced. At the lower end of the scale, counsel urged 10 years' imprisonment at hard labour, less the two years for time spent in pre-trial custody, amounting to eight years' imprisonment at hard labour with the sentences running concurrently. As such, counsel submitted that the applicant, having served seven years, would have already served two-thirds of his sentence and could therefore be released forthwith. Counsel also highlighted that this court should bear in mind that the applicant's co-accused was sentenced to seven years' imprisonment for the same offence.

[23] When the prescribed minimum sentence pursuant to section 20(2)(a) of the Offences Against the Person Act ("OAPA") was brought to the attention of counsel for the applicant, he urged that the applicant be given a sentence of 15 years' imprisonment at hard labour, especially since, even if his pre-trial custody years were to be taken into account, he could not be sentenced to less than the statutory minimum of 15 years' imprisonment at hard labour.

The Crown's submissions

[24] In response, Crown Counsel conceded that the sentence imposed by the judge for shooting with intent was manifestly excessive.

[25] Counsel submitted that the sentence imposed by the court should fit the offender and the crime as enunciated in **Meisha Clement v R** [2016] JMCA Crim 26.

[26] Counsel argued that in considering the sentences to be imposed on the applicant, the judge took into account the contents of the social enquiry report, the applicant's antecedents and the seriousness of the offence. In addition, the judge addressed his mind to the principles of sentencing as regards the aggravating and mitigating factors, and arrived at appropriate sentences in respect of counts one and two although not for count three. The judge was not able to identify any mitigating features. The social enquiry report was bad and there was no character evidence on behalf of the applicant. Although it was argued by counsel for the applicant that the four previous convictions were non-violent, counsel for the Crown contended that the applicant was a person "escalating up the criminal trajectory".

[27] Counsel relied on the cases of **Andre Brown v R** [2014] JMCA Crim 44, **Davin McDonald v R** [2016] JMCA Crim 31, **Michael Ewen v R** [2016] JMCA Crim 19, **Travis McPherson and Odean Samuels v R** and **Micheal Burnett v R** [2017] JMCA Crim 11 all of which, except the last case, involved shooting at police officers, in circumstances similar to the instant case. In those matters sentences of 8-15 years' imprisonment had been imposed.

[28] Crown Counsel emphasized that section 20(2)(a) of the OAPA provides that a person who commits the offence of shooting with intent shall be sentenced to life imprisonment or any other term not less than 15 years. Therefore, a range between 15-20 years was suggested. In light of the circumstances of the case, such as the four

previous convictions, the bad social enquiry report and the absence of character evidence, counsel proposed a starting point of 17 years' imprisonment.

[29] Counsel identified as an aggravating feature of the case, the attack against law and order. Although no one was injured, there had been such an intent, and it could have been a case where the applicant was just a poor shot. As such, she submitted that five years should be added to the 17 years, resulting in 22 years, and a discount of two years for time spent in custody should be applied, resulting in a sentence of 20 years' imprisonment at hard labour.

Analysis

[30] In considering this issue, it was important for us to see how the judge approached the sentencing process. At pages 210 - 212 of the court's transcript, he said:

"Stand up, Mr. Azan. I have read the Social Inquiry Report prepared here and it is not one of the best as your lawyer says, it is probably not the worst, but I use my words it is not the best.

It said that he was a – doing well and because of getting himself involved with other persons who might have influenced him [sic]. Family members are saying that he has changed for the worst [sic]. That's what the report is saying. And who best knows about a person as family members.

Father and mother are disappointed according to the report, they said they have always wanted so much good for you as their first child but you have disappointed them, that's what they are saying. It is said that the mother's word is that, a rather intelligent woman too, a mother who happened to get a scholarship to a university and his father was a coach, track coach too, won't say much about that. And she had all the dreams about her first son, but she is so disappointed from what I read here, she wouldn't want to be here today.

The father says in his statement, and they tried their best to send him abroad so that he could do well, education wise, because they saw potential in him. That's what they say, good potential, but I don't know what it is. They don't know, they can't answer why. And I notice that in his growing up he attended – the religion was, he use [sic] to attend the Kingdom Hall of the Jehovah Witnesses that is what it says. As far as I am concerned they are rather meek and quiet persons, always doing their work.

But what you did, you have four previous convictions, none for violence, but what took place today, broad day light and engaging the police in a serious exchange of gunshots. You are from a good family name, one of Jamaica's name, [sic] Azan, not an ordinary name, not one of the ordinary names, a big name. I don't know what is in your mind, I wish I could get in there and see what is inside there, I don't know. I don't know what is operating within you, I wish I could see. Just like how your mother and father wondering what is in you, I am wondering the same. But this offence is something that you have to go to prison for, I have no choice. You engaged the police in such [sic] serious shootout where guns were recovered, that's serious business.

And as such for the Illegal Possession of Firearm the sentence of the Court is 15 years.

For Illegal Possession of Ammunition the sentence of the Court is 10 years, and not one police you shot at, is two policemen. Serious shooting that day. Even when the police call out police, shots, guns just bark and continue to bark at them, no surrender, that's serious, very serious.

For the Shooting with Intent, I will have to send you for 35 years, imprisonment hard labour. Sentence to run concurrently."

[31] It is clear that the judge placed much emphasis on the brazen actions of the applicant, who had exchanged gunfire with the police in "broad daylight".

[32] Before we proceeded to examine the appropriate sentence to be imposed on the applicant, we noted that the applicant's counsel, in passing, raised the issue of parity.

Counsel argued that the applicant's sentence was significantly different from that of his co-accused who was sentenced to seven years' imprisonment for the same offence. Counsel did not argue this point with force or in detail, and as such this court could not properly make a determination on the issue.

[33] In reviewing the sentence of a judge at first instance, we are mindful of the guidance of Morrison P in **Meisha Clement v R**. At paragraph [42] of the judgment Morrison P cited the case of **Alpha Green v R** (1969) 11 JLR 283, 284, in which the court adopted the following statement of principle by Hilbery J in **R v Ball** at page 165 which states:

"In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. **If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene.**" (Emphasis added)

[34] The narrow issue to be determined by this court was the appropriate sentence to be imposed on the applicant who was convicted of the offence of shooting with intent pursuant to section 20(2)(a) of the OAPA. Crown Counsel conceded that the sentence of 35 years' imprisonment at hard labour was manifestly excessive. We also agree. We were therefore obliged to give fresh consideration to the appropriate sentence to be imposed on the applicant.

[35] Counsel for the applicant urged this court to impose a sentence of 15 years' imprisonment at hard labour and counsel for the Crown recommended a sentence of 20 years' imprisonment at hard labour.

[36] Morrison P, in **Meisha Clement v R**, has usefully outlined guiding principles in relation to sentencing. At paragraph [41] he said:

"As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines, derives clear support from the authorities to which we have referred:

- (i) identify the appropriate starting point;
- (ii) consider any relevant aggravating features;
- (iii) consider any relevant mitigating features (including personal mitigation);
- (iv) consider, where appropriate, any reduction for a guilty plea; and
- (v) decide on the appropriate sentence (giving reasons)."

[37] On 23 July 2010, there was a significant change to section 20 of the OAPA, which had provided that a person convicted of the offences of shooting with intent and wounding with intent to do grievous bodily harm would be liable to imprisonment for life, with or without hard labour. Section 20(2) was amended to provide for a prescribed minimum sentence of 15 years' imprisonment in respect of the offences of shooting with

intent and wounding with intent involving the use of a firearm (see **Toussaint Solomon v R** [2020] JMCA App 9 and **Curtis Grey & Toussaint Solomon v R** [2018] JMCA App 30).

[38] The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, Appendix A Sentencing Guidelines – Quick Reference Table also provides useful guidance. It states:

Offence	Section of the Act	Statutory Maximum (SMax)	Statutory Minimum (SMin)	Normal Range (NR)	Usual Starting Point
Shooting or attempting to shoot or wounding with intent to do grievous bodily harm	S. 20	Life	15 years (in the case of persons convicted of shooting with intent or wounding with intent involving the use of a firearm) S. 20(2)	5 – 20 years	7 years (other than when SMin applies)

[39] In determining the appropriate sentence of the applicant, both counsel compared several cases of a similar nature to the case at hand. For the offence of shooting with intent the applicants/appellants in the following cases were sentenced as follows:

- a. **Travis McPherson and Odean Samuels v R** [2017]
JMCA Crim 36 - 10 years' imprisonment (sentenced in 2012);
- b. **Kirk Mitchell v R** - 15 years' imprisonment (sentenced 2007);
- c. **Wayne Samuels v R** - 12 years' imprisonment (convicted May 2010 and sentenced August 2010);
- d. **Andre Brown v R** [2014] JMCA Crim 44 - 15 years' imprisonment (sentenced 2011);
- e. **Davin McDonald v R** [2016] JMCA Crim 31 – 15 years' imprisonment (sentenced 2013);
- f. **Michael Ewen v R** [2016] JMCA Crim 19 – 10 years' imprisonment (sentenced 2011); and
- g. **Omar Brown v R**– 18 years' imprisonment. (sentenced 2011).

Crown Counsel relied on the case of **Michael Burnett v R**, but it is our view that this case is not helpful in resolving the issues at hand. In that matter the applicant had been convicted of the offences of illegal possession of firearm and ammunition and robbery

with aggravation. In addition, none of those offences in the circumstances of that case required the imposition of a statutory minimum sentence.

[40] In the instant case, the applicant was charged pursuant to section 20 of the OAPA and therefore the minimum prescribed sentence to be imposed by law is 15 years' imprisonment. Of all the cases listed above it was only **Omar Brown v R** in which specific reference was made to the issue of the mandatory statutory minimum of 15 years' imprisonment for the offence of shooting with intent. Some of the cases were also concluded prior to the July 2010 amendment.

[41] In **Omar Brown v R** the appellant shot at a group of men and was convicted for the offences of illegal possession of firearm and shooting with intent. He was later sentenced to 10 years' imprisonment on the first count and 18 years' imprisonment on the second count. The sentences were ordered to run concurrently. No firearm was recovered although one spent shell was found at the scene. The appellant had one previous conviction for illegal possession of firearm and had only recently completed a period of parole when the offences were committed. He had also recently married and was a father of young children. The aggravating factor, according to Daye J, the trial judge in that case, was that the appellant had shot at four persons intending to kill them. The mitigating factors were that he had a young family and had made attempts to secure employment.

[42] Morrison P (Ag) (as he was then) concluded at paragraph [9] of the judgment of this court:

“Mr Green was only slightly less diffident on the matter of sentence, submitting that the sentence imposed by the learned trial judge for the offence of shooting with intent was manifestly excessive. It is clear that the judge sought to strike a balance between the factors which were unfavourable to the applicant (such as the fact that this was his second conviction for an offence involving a firearm and that, having only recently completed a period of parole, he again found himself on the wrong side of the law) against those which weighed in his favour (such as his recent status as a family man and provider). **In all the circumstances, taking into account that (i) the minimum sentence to which the applicant was liable by virtue of section 20 of the Offences Against the Person Act was 15 years’ imprisonment;** and (ii) this was the applicant’s second conviction for an offence involving the use of a firearm, **we are quite unable to say that the sentence of 18 years’ imprisonment imposed by the learned trial judge was manifestly excessive.**” (Emphasis added)

[43] Having considered these cases, we deduced that an appropriate sentence range for the offence of shooting with intent, in circumstances where the statutory minimum is applicable, is 15-20 years’ imprisonment at hard labour.

[44] The maximum sentence of life imprisonment is usually reserved for the most serious circumstances. In our view this incident could not be described in such terms. However, in agreement with the views of the judge, we found that the actions of the applicant were brazen, especially considering the time of day when the incident occurred. The applicant’s use of a firearm, a lethal weapon, and his intention to cause grievous bodily harm to police officers, persons appointed to uphold law and order in the society, are serious factors. In these circumstances, we believed that an appropriate starting point was 18 years’ imprisonment at hard labour.

[45] Counsel for the applicant argued, with a view of mitigation, that although the applicant had four previous convictions they were non-violent in nature and were also different in nature. While this may be true, we agreed with the submission of Crown Counsel that the previous convictions appeared to reflect an escalation of unlawful conduct and disregard for law and order and so could properly be seen as aggravating factors. For this, we adjusted the starting point by adding two years, arriving at 20 years' imprisonment at hard labour.

[46] The social enquiry report of the applicant reflected that the applicant's family was very disappointed in how he had developed; however, it appears that the applicant has the capacity to reform. We noted that he is a graduate of the Garvey Maceo High School and that he obtained three CXC subjects and two GCE subjects with credit. He had also completed a one-year course in Business Management Study and Accounting in England. In addition, the applicant had been gainfully employed as a cashier, accountant, auditor and manager at several business entities. We also considered the fact that the applicant has a family and is the provider for his young children, who are his dependents. As such, we deducted one year, arriving at 19 years' imprisonment at hard labour.

[47] In light of the above stated reasons, we believed that a sentence of 19 years' imprisonment at hard labour was appropriate.

[48] The record reveals that, having been arrested in September 2012, the applicant was never offered bail and was eventually convicted on 23 October 2014. The law is well settled in our jurisdiction that an offender should generally receive full credit, and not

some lesser discretionary discount, for time spent in custody pending trial (see paragraph [34] in **Meisha Clement v R**). The application of this general principle is limited in matters in which there is a statutory mandatory minimum sentence. The court cannot credit time spent if, in so doing, it would result in the imposition of a sentence which is less than the mandatory minimum sentence pursuant to the OAPA. See paragraph [26] of **Ewin Harriott v R** [2018] JMCA Crim 22 in which the issue arose in the context of the mandatory minimum sentence pursuant to the Sexual Offences Act. That challenge did not, however, arise in the circumstances of this case, in light of the sentence at which we arrived.

[49] We gave the applicant credit for the two years he spent in custody before trial, and this resulted in a sentence of 17 years' imprisonment.

[50] The above are the reasons why we had set aside the sentence of 35 years' imprisonment at hard labour for the offence of shooting with intent and substituted 17 years' imprisonment at hard labour with the sentence running concurrently with those for the other offences.