[2023] JMCA Crim 38

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 42/2020

ALPHANSO BAILEY v R

Chumu Paris for the applicant

Ms Kathy-Ann Pyke and Dwayne Houston for the Crown

19 and 21 July 2023

Criminal Law – Sentence – Whether lack of remorse is an aggravating factor - Whether sentence manifestly excessive

Criminal Law – Sentence – Illegal possession of firearm – Illegal possession of ammunition – Similar range of sentencing and starting points

ORAL JUDGMENT

BROOKS P

[1] The applicant, Mr Alphanso Bailey, was, on 10 April 2019, convicted in the Western Regional Gun Court Holden at Montego Bay, in the parish of Saint James of the offences of illegal possession of a firearm and illegal possession of ammunition. He was tried before a judge sitting without a jury. On 19 July 2019, the learned judge sentenced Mr Bailey to 13 years' imprisonment at hard labour for the firearm offence and 10 years' imprisonment at hard labour in respect of the ammunition offence.

[2] Mr Bailey applied for leave to appeal from both the convictions and the sentences. A single judge of this court refused his application in respect of the convictions but

granted it in respect of the sentences. Mr Bailey, not only sought to pursue the leave to appeal but, initially, sought to renew his application for leave to appeal the convictions. At the hearing of the appeal, learned counsel appearing for him, Mr Chumu Paris, informed the court that the application for leave to appeal the convictions would not be pursued. The issue for the court's consideration, therefore, is whether the sentences are manifestly excessive.

[3] The prosecution's case against Mr Bailey is that on the evening of 12 June 2017, at about 10:45 pm, two police officers, members of a joint police/military patrol, acting on information, entered Mr Bailey's room in a house at Richmond District in the parish of Hanover. They saw Mr Bailey standing in the room. He appeared frightened when he saw them. They searched the room in his presence and, under a carpet under the bed in the room, found a black and silver Ekol Firat Magnum pistol. The weapon contained 14 .380 cartridges.

[4] The police officers, who entered and searched the room, were Corporal Dwight Braham and Constable Leighton Campbell. Constable Campbell spoke to Mr Bailey about the firearm. According to Constable Campbell, Mr Bailey replied saying "[a]h nuh fi mi gun dat, yuh nuh, officer, and mi naah tek nuh lock. A waa man gi mi fi keep dis mawning and mi naah tek nuh lock up fah". According to Corporal Braham, the answer was "a nuh fi mi, yuh nuh, somebaddy gi mi fi keep till a mawning". He told them the name of the person who, he said, had given him the firearm. They went in search of that person but their efforts were fruitless. They arrested and charged Mr Bailey.

[5] Ballistic tests on the items found proved that the firearm had a defective hammer but was capable of being repaired to become a firearm in accordance with the Firearms Act ('the Act'). It, therefore, satisfied the definition of a "component part" for the purposes of the Act. The 14 rounds of ammunition had been adapted to fit the firearm and satisfied the definition of ammunition, as set out in the Act.

[6] Mr Bailey denied that he was present when anything was found in his room. In an unsworn statement, he said the police came into his room, took him to the kitchen, started to slap him and asked him, "where di bwoy dem deh". While in the kitchen he heard someone cry out "Gun". They took him to his room and started beating him. They took him to other places away from the premises and also beat him. He denied knowing anything about a gun and denied that he told the police that someone gave him the gun. He said a person named Sean used to occupy the premises along with him but Sean took "bad company" to the house and Mr Bailey had to turn him out.

[7] The learned judge, after recounting both the case for the prosecution and the defence, found that the firearm and the ammunition were a firearm and ammunition for the purposes of the Act. She rejected Mr Bailey's case and accepted the evidence of the two police officers that Mr Bailey had exclusive possession of the room and that he was present when the firearm was found. She found that he had concealed the firearm and therefore he was in illegal possession of the firearm and the ammunition.

[8] In sentencing him, the learned judge reviewed the principles of sentencing, which she identified as retribution, deterrence, rehabilitation and protection of society. She found that only deterrence and rehabilitation applied to Mr Bailey. She, however, took a negative view of the fact that he gave the Probation after-care officer, who investigated his case for the purposes of preparing a social enquiry report, a different story from the case he advanced at the trial. She found this to be a rejection of the court's verdict. It appears that the learned judge used this feature to use a higher starting point than she ordinarily would have. She said, in part, on page 116 of the transcript:

> "So, despite the fact that you are 34 years old, you have no previous convictions, you have a good Social Enquiry Report, the Court is going to start at 12 years imprisonment which is appropriate in this case. The maximum sentence is life imprisonment; the usual range is [between] seven and fifteen years, after trial the usual point that the Court starts is ten years."

[9] In, thereafter, considering the aggravating and mitigating features of the offence and the offender, the learned judge credited him with a year for the mitigating factors, but again spoke to Mr Bailey's refusal to accept the verdict. She considered that an aggravating factor, and added time for it in calculating the sentence. She said in part, at pages 116 -117 of the transcript:

> "…The aggravating factor, particularly your refusal to accept the verdict of this Court, your persistent denial that despite your trial, and finding of guilt that you do not accept the verdict, and you have advanced all these matters not led in evidence at your trial with a view to swaying the Court aggravates your sentence, and I will add two years for that."

[10] Mr Paris, as well as Mr Dwayne Houston, who responded for the Crown, submitted that the learned judge erred in principle in her approach to the issue of lack of remorse in considering the sentence. Both counsel relied on the judgment in **Lavar Whitter v R** [2022] JMCA Crim 44 in which it was said, in part, at para. [26], that:

> "…Furthermore, whereas contrition and accepting responsibility for a crime is a factor in mitigation, a defendant's insistence on his innocence is not an aggravating factor."

[11] In conducting his own assessment of the correct approach to the sentencing, Mr Paris submitted that, after crediting Mr Bailey with one month for pre-trial remand time, the appropriate sentences were six years and 11 months' imprisonment for the offence of illegal possession of a firearm and four years and 11 months' imprisonment for illegal possession of ammunition.

[12] Mr Houston, for his part, agreed with Mr Paris that the learned judge erred in her approach to sentencing. He also agreed that the appropriate sentence for illegal possession of ammunition was four years and 11 months' imprisonment, but submitted that the appropriate sentence for the firearm offence was eight years and 11 months' imprisonment.

[13] Having considered the transcript of the sentencing, it does appear, from what has been recounted above, that the learned judge seems to have not only used the factor of

lack of remorse as an aggravating factor in the sentencing exercise, but double-counted that factor in both fixing the starting point and increasing the sentence as part of the mathematical portion of the exercise. At best, it is not clear whether she did double-count.

[14] There is a principle in the decided cases that whereas remorse, when expressed, especially in a plea of guilt, can be used as a mitigating factor in sentencing (see paras. [36] – [37] of **Meisha Clement v R** [2016] JMCA Crim 26), lack of remorse is not to be automatically used as an aggravating factor. Despite a guilty plea in that case, the absence of remorse was treated in **Meisha Clement v R** "as an aggravating feature of the case" (para. [55]). Ms Clement, despite pleading guilty, gave the Probation after-care officer the clear impression that she was not guilty of the offence.

[15] In her usual careful, comprehensive approach, McDonald-Bishop JA considered the issue of lack of remorse in **Bernard Ballentyne v R** [2017] JMCA Crim 23. The learned judge of appeal warned that caution must be exercised when treating lack of remorse as an aggravating feature. She then considered previously decided cases on the point (see para. [68]). She also said, in part, in para. [69] of the judgment:

> "…It seems right to say, therefore, that while absence of remorse is a factor to be considered in appropriate circumstances, it must be approached with caution as it is not a conclusive indicator that the defendant is beyond rehabilitation and thus likely to reoffend, therefore justifying a longer period of incarceration. **The extent to which it should serve as an aggravating factor in sentencing, therefore, must depend on the circumstances of each case and it should only be one of many factors to be considered without undue weight given to it**." (Emphasis supplied)

[16] In **Bernard Ballentyne v R** the judge at first instance added five years to the pre-parole time that Mr Ballentyne had to serve. This court found that the judge at first instance "would have erred in principle" if he had added the five years "merely on the basis of what he perceived to have been the apparent lack of remorse on the part of [Mr Ballentyne]" (see para. [70]).

[17] This court summarised the relevant principles in para. [19] of **Jesse Gayle v R** [2018] JMCA Crim 5:

> "On the issue of the comments concerning Mr Gayle's refusal to accept the verdict, it is necessary to make the following broad points:
>
> a. Non-acceptance of a verdict is not an aggravating feature in respect of considering sentence. This is because the non-acceptance may result from a variety of reasons. It may be, in some circumstances, a genuine expression of maintaining innocence (see paragraph [68] of **Bernard Ballentyne v R** [2017] JMCA Crim 23).
>
> b. A demonstration of lack of remorse may be considered an aggravating feature (see paragraph [55] of **Meisha Clement v R** [2016] JMCA Crim 26).
>
> c. A sentencing judge should, however, be cautious in giving expression to an opinion that an offender does not express remorse. The failure is not definitive. **Bernard Ballentyne v R**, at paragraphs [68] – [69], also addresses this point.
>
> d. Where an offender does express genuine remorse, the expression may be considered a mitigating factor in respect of considering the appropriate sentence for that offender (see **Lindell Howell v R** [2017] JMCA Crim 9, paragraphs [21]-[23])."

[18] The statement in **Lavar Whitter v R** places the matter more emphatically than the above-cited cases suggest. The statement was made in response to submissions made by the Crown rather than in response to a statement made during sentencing. The statement is, however, not in conflict with the cases cited above.

[19] The learned single judge of this court, who granted Mr Bailey leave to appeal against the sentences, noted that the learned judge arrived at different sentences for the two offences although she did not state differing starting points. In this regard, it may also be said that the learned judge erred in principle.

[20] Having stated that the learned judge did err in principle in:

a. specifically adding two years for what she perceived to be Mr Bailey's lack of remorse; and
b. failing to state separate starting points for the two offences,

it is necessary to consider the sentencing afresh.

[21] The correct approach has been set out in numerous decisions in this court following the decisions of **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20. Those decisions and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), require the sentencing court to adopt a systematic approach to sentencing. McDonald-Bishop JA, in **Daniel Roulston v R** [2018] JMCA Crim 20, said, in para. [17] of her judgment:

> "Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
> b. identify the appropriate starting point within the range;
> c. consider any relevant aggravating factors;
> d. consider any relevant mitigating features (including personal mitigation);
> e. consider, where appropriate, any reduction for a guilty plea;
> f. decide on the appropriate sentence (giving reasons); and
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable[])."

[22] In this case, the sentencing range was correctly identified by the learned judge to be seven to 15 years.

[23] The Sentencing Guidelines, at page A-15, use the same approach for the offences of illegal possession of a firearm and illegal possession of ammunition. The range of sentences for both is seven to 15 years. It may fairly be said that the prevalence of

firearm offences at this time in this country's history, is such that people should realise that the illegal possession of a firearm and ammunition is strongly condemned and that committing those offences attracts a severe penalty. The use of the lower end of the scale is not appropriate in this case. The usual starting point of 10 years, as identified by the Sentencing Guidelines should be used for both offences.

[24] The aggravating factor is that Mr Bailey, at 34 years of age, at the time of the offence, was a mature man and should have known better than to commit such offences. A year should be added for that factor for each offence.

[25] The mitigating features are that he had a good social enquiry report, he had no previous conviction and was employed at the time of the commission of the offences. The fact that the firearm was defective at the time cannot be considered a mitigating factor. Not only could it have been repaired, but even in its defective state it could have been used to intimidate or commit other offences. Two years should be deducted in respect of each offence, for the mitigating features.

[26] From the resultant figure of nine years, the pre-trial remand time of three weeks, rounded up to one month, should be deducted from the sentence for each offence, leaving sentences of eight years and 11 months' imprisonment.

Conclusion

[27] The court agrees with counsel in respect of their joint stance that the learned judge erred in principle in her consideration of the sentences. A reconsideration of the sentences using the method set out in **Daniel Roulston v R** results in a reduction in the sentences that the learned judge imposed. The appeal should, therefore, be allowed in respect of both sentences.

[28] The orders, therefore, are as follows:

1. The application for leave to appeal against the convictions is refused.

2. The appeal against the sentences is allowed.

3. The sentences of 13 years at hard labour for illegal possession of a firearm and 10 years at hard labour for illegal possession of ammunition are set aside and the sentences of eight years and 11 months' imprisonment at hard labour are substituted for each of those offences.

4. Both sentences shall run concurrently and are to be reckoned as having commenced on 19 July 2019, which is the date on which they were originally imposed.