[2011] JMCA Crim 76

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 84/09

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA

MICHAEL BERNARD v R

Leonard Green for the applicant

Mrs Lisa Palmer-Hamilton and Miss Michelle Salmon for the Crown

16 February 2011

ORAL JUDGMENT

MORRISON, JA

[1] This is an application for leave to appeal against sentence, the background to which is that the applicant pleaded guilty on an indictment which charged him with wounding with intent. The applicant was at the material time a District Constable and it appears that on 23 July 2006, at about 10:00 pm, the complainant and a friend were walking in front of the public library in Savanna-la-mar when a police vehicle drove up and the complainant heard someone in the vehicle using indecent language to him, who then said: "don't move". The complainant said that as he turned his head in the direction of the voice, he saw flashes of light and heard explosions coming from that

direction. It was the driver of the vehicle who was pointing the gun in his direction. The complainant felt his body go numb and he fell into a drain along the side of the road. Two men alighted from the back seat of the car and the complainant felt someone searching him while he was lying in the drain. He was then put into the said vehicle and taken to the public hospital where it was discovered that he had received gunshot wounds. He suffered serious spinal cord injuries as a result of the wounds and, as a consequence, he is now paralysed from the waist down.

[2] When Beswick J, who was trial judge, came to consider the question of sentencing the antecedents of the applicant were put before her and these showed that he was in fact a District Constable and that he had no previous convictions. He was 26 years old when this incident took place and he had dependents.

[3] In support of the plea of mitigation made by counsel on his behalf, it was advanced that the applicant had been on duty that night, and that he had that very night responded to two previous calls in respect of both of which he had been under fire from gunmen, and the judge accepted this. So this was the third call to which the applicant was responding on the night in question. Counsel for the applicant also urged the fact that when police officers are subjected to gun fire, the expectation or the hope is that they would get counseling right afterwards. The learned judge then said:

> "You were deprived of that counseling and instead of stopping you continue in the execution of your duties. That is what he has urged me to remember and I remember them. Another interesting feature of this sentencing exercise, was that the complainant himself attended court on the day of sentencing in his wheel chair, he told the court

> himself that he had forgiven the applicant and that he in fact was urging some leniency towards the applicant."

The judge noted that the complainant was 17 years old at the time of the offence and he was now 19, and he judge said:

> "I believe and he said he has forgiven you and I will bear than in mind."

[4] In all of these circumstances, the learned judge imposed a sentence of three years imprisonment on the applicant.

[5] Mr Leonard Green who appeared before us on the applicant's behalf this morning has submitted that in the circumstances of this case the sentence imposed by the learned trial judge was manifestly excessive and I think it is fair to say that Mr Green has urged everything that could possibly be urged in favour of this application. He observed that: "the applicant was obviously operating in circumstances of great pressure" and he urged on us the decision in the case of ***R v Pearline Wright*** to make the point that in a case such as this, where a guilty plea had been entered, sentencing should take place on the view of the facts most favourable to the accused person. From that point of view, he asked us to focus on the trauma to which the applicant had been subjected on that night suggesting that, as an inexperienced and perhaps not properly trained District Constable, the applicant had reacted to stress in a way that might be categorized as inappropriate but certainly did not warrant three years imprisonment.

[6] Mr Green volunteered his own recommendation of what the sentence should have been, which was not more than 12 months, which is to say "a single sharp shock that would have sent a message to the applicant while at the same time recognizing the concerns of the complainant himself and of the greater society".

[7] We have taken everything that Mr Green has said into account. We have read and re-read the transcript in this matter. We think it is obviously a wholly unfortunate incident that has resulted in life of a young man being changed unalterably for all times and perhaps in the life of the applicant himself being changed unalterably for some time.

[8] We appreciate that, as Mr Green urges, the circumstances of the case may not demonstrate the kind of criminality that the law is intended to proscribe and to punish. However, we think that in a case such as this, balancing all of the factors, which is to say, the need to pass a sentence that gives an opportunity for rehabilitation, as well as the punitive aspect that in fact demonstrates a society's feeling of repugnance for this kind of conduct, the sentence passed by the learned trial judge of three years imprisonment cannot by any measure be said to be manifestly excessive. Indeed it might be said that the applicant was fortunate in all the circumstances. So on that basis the application for leave to appeal against sentence will be refused.

[9] When this matter first came before the single judge for consideration on paper, the judge had ordered that the sentence should run from 15 July 2009, that is, six

weeks from the date of conviction, which was in accordance with the usual practice of this court when matters such as this are considered in chambers. In fact in accordance with the same practice, we should today order that the sentence should run from a date three months after the original conviction. However, in recognition of some of the factors that Mr Green has put before us, we have decided that we will depart from that usual practice and we will order that the sentence should run from the actual date upon which it was imposed, which would be 4 June 2009.