JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT NO COA2020CR00074

SWEETLAND BURGESS v R

Paul Gentles for the appellant

Miss Paula Llewellyn KC and Miss Sharelle Smith for the Crown

29 May and 1 June 2023

Criminal Law – Sentence – Reduction of the Mandatory Minimum for time spent in pre-trial custody – Certificate pursuant to section 42K of the Criminal Justice Administration Act – Wounding with intent - Offences Against the Person Act section 20(2)(b)

ORAL JUDGMENT

BROWN JA

[1] On 22 October 2020, the appellant was tried and convicted in the High Court Division of the Gun Court, on an indictment for illegal possession of firearm and wounding with intent. On 17 December 2020, the learned judge, who presided at the appellant's trial, sentenced him to eight and 15 years' imprisonment, respectively. The learned judge also ordered that the sentences should run concurrently. The learned judge, at the time of pronouncing sentence, did not issue a certificate under section 42K of the Criminal Justice Administration Act ('CJAA'). However, a certificate dated 23 February 2023 is included in the appellant's bundle attached to the skeleton submissions.

[2] The appellant made an application for permission to appeal his conviction and sentence. His application was considered by a single judge of this court who refused him leave to appeal his conviction but granted him leave to appeal his sentence. The appellant has not sought to exercise his right to renew his application for leave to appeal his conviction before us. The appellant's counsel seeks to argue a sole ground, namely, the sentence is excessive.

Background

[3] Before examining the submissions, we provide a summary of the evidence upon which the appellant's conviction was grounded. On the evening of 24 March 2019, between 5:00 pm and 5:30 pm, the complainant was seated, in the company of a friend, beside his shop in the Coronation Market in the parish of Kingston. While seated, a man, later identified as the appellant, walked past him. Soon after that the complainant heard "click, click" and looked around. He saw the appellant, standing about an arm's length away and wearing no face covering, pointing a gun at his face.

[4] The complainant next heard three clicks. That spurred him into action. He got up and made two or three steps in an attempt to escape down an alley. When the complainant turned to go down the alley, he received one gunshot wound to his chest, which felled him. As he lay on the ground the appellant continued to shoot at him. The complainant managed to get up. He ran to the nearby Darling Street Police Station. There he told the sergeant on duty that he had been shot by a man known to him as Sweetland. The complainant was taken to the Kingston Public Hospital, where he remained admitted for two or three weeks.

[5] The appellant was subsequently apprehended on 18 October 2019, by a district constable, who knew the appellant by name. The appellant was formally charged with the offences on 12 November 2019. He testified at his trial and raised the defence of an alibi.

Appellant's submissions

[6] Mr Paul Gentles, who appears for the appellant, in his written submissions, highlighted an exchange between the learned judge and counsel which, in sum, shows that the learned judge was minded to (a) impose the mandatory minimum sentence, and (b) credit the appellant for the 14 months spent in remand before he was sentenced. Acknowledging that the learned judge had not issued a certificate under section 42K, learned counsel referred us to **Kerone Morris v R** [2021] JMCA Crim 10 in which the judge's 42K certificate was not issued contemporaneous with the imposition of sentence. Counsel also cited **Paul Haughton v R** [2019] JMCA 29 and stressed that there, as here, the certificate was issued post the filing of the appeal but before the hearing. Counsel characterized the non-issue of the certificate as "an unfortunate error". Counsel submitted that at the very least, the appellant should be credited with the 14 months spent on remand, resulting in the following reduction in his sentences: (i) six years and 10 months on count one; (ii) 13 years and 10 months on count two.

Submissions made on behalf of the Crown

[7] Counsel for the Crown took no issue with the late issuance of the section 42K certificate. However, counsel advanced the view that the issuance of the certificate does not equate to an automatic reduction in the sentence.

[8] Citing a section of the transcript, learned counsel argued that the learned judge was disposed to imposing a sentence below the prescribed mandatory minimum, but for that legal constraint. Counsel noted that the learned judge was not similarly circumscribed in his powers as it relates to the sentence for illegal possession of firearm.

[9] Learned counsel, therefore, concentrated on the sentence attracting a prescribed minimum period of incarceration. The Crown contended that it was in disagreement with the position that, generally and without more, a prescribed minimum sentence is excessive, in light of the circumstances of the case and in comparison with previously

decided cases. Accordingly, the sentence imposed on the appellant did not result in any miscarriage of justice.

[10] Developing the point, counsel argued that the learned judge's sentencing exercise showed little to no regard for the guidance laid down in **Meisha Clement v R** [2016] JMCA Crim 26. Having outlined the methodology set out in **Meisha Clement v R**, it was submitted that the normal range of sentences for wounding with intent is between 15-20 years. After collating the mitigating and aggravating factors, counsel presented a table of cases which showed, for the most part, that this court left undisturbed sentences of 15 and 17 years' imprisonment imposed for this offence. In one instance, the sentence was reduced from 25 to 18 years' imprisonment. The table of cases comprised: **Tafari Morrison v R** [2023] UKPC 14; **Doron Ferguson v R** [2020] JMCA Crim 36; **Aamir Hanson v R** [2022] JMCA Crim 61; **Carey Scarlett v R** [2018] JMCA Crim 40; **Andrew Mitchell v R** [2012] JMCA Crim 1.

[11] Moving from there, learned counsel referred to **Deryck Azan v R** [2020] JMCA Crim 27, which declared the sentencing judge's lack of capacity to give cognizance to time served in calculating a sentence, if doing so resulted in a sentence below the prescribed statutory minimum. **Lennox Golding v R** [2022] JMCA Crim 34 was then cited as a circumstance for reducing the sentence below the statutory minimum, at the appellate level. Nevertheless, it was the position of counsel for the Crown that the sentence imposed in this case is not excessive so there is no compelling reason to disturb it. The written submissions were concluded as follows, "[t]here is the clear demonstration that in the interests of justice, the sentence imposed is beyond reasonable".

Discussion

[12] These adversaries are not separated by an intellectual chasm. Although the sole ground of appeal asserts the sentence to be excessive, learned counsel for the appellant made no submissions to support the ground as framed. The focus of the appellant's submissions was to persuade this court to give the appellant credit for time spent on remand before he was sentenced.

[13] That said, having regard to the wording of the solitary ground of appeal, learned counsel for the Crown has our sympathy and gratitude for the time and energy expended in demonstrating that the sentence of 15 years' imprisonment for wounding with intent is not excessive. Although the Crown conceded the appellant's point, it was initially submitted that when the imbalance between the aggravating and mitigating factors are considered, the learned judge should have adopted a higher starting point and, had he done so, giving credit for time served would become academic. Hence, the sentence should remain undisturbed. However, the departure from the methodological approach, as we will show below, was not so erroneous to entitle this court to intervene beyond the statutory remit of the section 42K certificate: **Alpha Green v R** (1969) 11 JLR 283.

[14] As was noted above, no issue was joined with the time the section 42K certificate was issued. And correctly so, as there is clear precedent for this: **Paul Haughton v R** (see also **Kerone Morris v R** in which no certificate was issued but the judge made statements tantamount to the issuance of one). It is instructive to quote the section:

> "42K. – (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall–
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> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.
>
> (2) A certificate issued to a defendant under subsection (1) shall outline the following namely–
>
> (a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;

> (b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and
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> (c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.
>
> (3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of Appeal may–
>
> (a) impose on the defendant a sentence that is below the prescribed minimum penalty; and
>
> (b) Notwithstanding the provisions of the Parole Act, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole." (Italics as in the original)

[15] It is clear that, before issuing a certificate, a sentencing judge must make a predicate determination that the sentence is manifestly excessive and unjust, relative to the peculiar circumstances of the case before him. That predicate determination can be arrived at by resort to the sentencing methodology laid down in **Meisha Clement v R** (see also **Daniel Roulston v R** [2018] JMCA Crim 20). As was portended by the observation of counsel for the Crown, there was no pretence by the learned judge to adhere to the now well-established methodology to arrive at a term of imprisonment.

[16] Although the learned judge's approach to the sentencing exercise did not accord with established practice, it is fair to say that he considered the matter in the round. For the sentencing hearing the learned judge was provided with both a social enquiry and an antecedent report. At the end of the plea in mitigation, the learned judge, at page 96 of the transcript, lines 27-32, addressed the appellant in these words:

> "… I have looked at your report with anxiety, but I have to bear in mind the principles of sentencing, rehabilitation, reformation, reflection on society … deterrence."

The learned judge then went on to consider the personal circumstances of the appellant, such as his age. The learned judge also took into his consideration the quick resort to, and prevalence of gun violence (see page 96 of the transcript, lines 32-33; page 97, lines 1-33; page 98, lines 1-11) as well as the proliferation of guns and bullets in the society (see page 98, lines 13-33; page 99, lines 1-11).

[17] The learned judge then adverted to his earlier exchange with the appellant's counsel concerning the interplay between the prescribed mandatory minimum sentence and the legal requirement to give credit for time spent on remand. In that prefatory exchange (page 94 line 31 to page 96 lines 1-11), the learned judge exposed his thought that a sentence of 15 years was in his contemplation but, he desired to give the appellant full credit for time served. Ultimately, the learned judge imposed the mandatory minimum penalty prescribed under section 20(2)(b) of the Offences Against the Person Act and, belatedly, issued a certificate under section 42K of the CJAA.

[18] The certificate bearing the learned judge's signature and seal of the Supreme Court, reads, insofar as is relevant:

> "The case is a fit case for an Appeal against sentence … under section 42K [of the CJAA] … on the ground that having regard to the circumstances of the case, it would be manifestly unjust for the said defendant to be sentenced to the prescribed minimum penalty for the following reason(s)."

In the space that follows the above quotation, one reason appears, namely, "time spent in custody". The certificate further reflects the sentence the court would have otherwise imposed as "13 years [and] 10 months".

[19] As we noted above, learned counsel for the Crown urged us to leave the sentence undisturbed, on the basis that 15 years' imprisonment is not manifestly excessive. In pure jurisprudential thought, the argument that 15 years' imprisonment for this offence is not

manifestly excessive or unjust, cannot be faulted. Firstly, that sentence has been declared constitutional, even when imposed on an offender who was a child at the time of committing the offence (**Tafari Morrison v R**). Secondly, by virtue of the Sentencing Guidelines for use by Judges of the Supreme Court and Parish Courts, December 2017, the range of sentences for this offence is 15-20 years.

[20] Aside from the purity of the argument, however, the cases upon which the Crown sought to rely are distinguishable from the instant case. The first point of departure is that none of the cases cited was argued under section 42K of the CJAA (recognized as a distinguishing factor in **Paul Haughton v R**, at para. [50]). The second point of distinction, is that, in all the cases except **Aamir Hanson v R** the question of giving full credit for pre-sentence incarceration was not discussed. In that case the court declined to interfere with the mandatory penalty in the absence of a section 42K certificate consistent with the learning in **Kerone Morris v R** which applied **Paul Haughton v R**.

[21] On the contrary, where this court hears an appeal pursuant to a section 42K certificate, even if it disagrees that the sentence is manifestly excessive and unjust, the sentence may be adjusted to give full credit for time spent on remand (see **Garfield Elliott v R** [2023] JMCA Crim 22; **Lennox Golding v R** [2022] JMCA Crim 34; **Paul Haughton v R**).

[22] In the instant case, while the sentence of 15 years cannot be considered manifestly excessive, the injustice of imposing the minimum penalty without regard to the time already spent on remand, looms large as a compelling reason to disturb the sentence. So that, applying **Garfield Elliott v R**, the appellant's sentence should be adjusted to reflect the sentence the learned judge would have imposed, but for the legislative constraint of the Offences Against the Person Act.

Conclusion

[23] The narrow point of appeal is whether the appellant should be given credit for time served on remand in circumstances where the numerical years to which he has been

sentenced to imprisonment, on the face of it, cannot properly be described as manifestly excessive, in light of section 42K of the CJAA. However, allowing credit for time spent on remand, pursuant to a section 42K certificate, is one way to reconcile the mandatory penalty with the dictates of **Callachand and Another v The State** [2008] UKPC 49 and **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ). Both cases are authority for the proposition that a convicted person should be given full credit for time spent on remand.

Order

[24] Accordingly, we make the following orders:

1) The application for leave to appeal against conviction is refused.

2) The appeal against sentence is allowed in part. The sentence of 15 years' imprisonment for wounding with intent is set aside and a sentence of 13 years and 10 months' imprisonment is substituted therefor, the pre-sentence detention of 14 months having been credited.

3) The appellant is to serve nine years and two months' imprisonment before becoming eligible for parole.

4) The sentence of eight years for illegal possession of firearm is affirmed.

5) The sentences are to be reckoned as having commenced on 17 December 2020.