[2024] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE BROWN JA
THE HON MRS JUSTICE SHELLY WILLIAMS JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 44/ 2014

ARTNELL BURTON v R

Atiba Dyer for the applicant

Miss Kathy-Ann Pyke and Miss Alice-Ann Gabbidon for the Crown.

7 and 8 February 2024

ORAL JUDGMENT

F WILLIAMS JA

[1] On 4 April 2014 the applicant was convicted by a judge, sitting without a jury, (hereinafter referred to as 'the learned judge') in the High Court Division of the Gun Court, at King Street, Kingston for the offences of (i) illegal possession of firearm (count one); and (ii) wounding with intent (count two). On 25 April 2014, he was sentenced to the following terms of imprisonment: (i) count one – 20 years; (ii) count two – 22 years. The sentences were ordered to run concurrently. His application for permission to appeal against conviction and sentence was refused by a single judge of appeal on 21 November 2022, and, as is his right, he renewed his application before us.

[2] The facts of the case against the applicant were that he, on 21 December 2012, in the parish of Saint Andrew, went to the door of the virtual complainant's one-room apartment and opened gunfire at him, thereby injuring him. Just before doing so, he said to the complainant: "Yu fi dead, you know" (page 20 of the transcript). On the complainant's testimony, the applicant fired the gun over the head of the complainant's son, who was sitting by the doorway, cleaning his school shoes, and

into the room where the complainant was, in close proximity to his wife and three-year-old daughter. The incident is said to have occurred around 7:00 pm. The complainant testified that he had known the applicant for some 25 years, had seen him earlier the same day (about two hours before) and was able to see him by way of electric lights that were by his room door and elsewhere on the premises.

[3] In his defence, advanced in an unsworn statement, the applicant, who admitted to knowing the complainant and of living near to him, (as the complainant testified), denied shooting the complainant, stating that he was in the Linstead area of Saint Catherine, at the material time.

[4] Being aggrieved by his conviction and sentences, the applicant filed his criminal form B1 on or about 7 May 2014. The grounds that he outlined in that form, seeking permission to appeal, were as follows:

> "(1) **Mis-identify by the Witness:** - That the prosecution wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> (2) **Lack of Evidence:** - That the prosecution failed to present to the court any form of Material evidence to link me to the alleged crime.
>
> (3) That the evidence and testimonies upon which the Learned Trial Judge relied on [sic] for the purpose to convict me, lack facts and creditability, [sic] thus rendering the verdict unsafe in the circumstances.
>
> (4) **Improper Police Procedures: -** That the police caused my identity to be exposed to the prosecution witness at the police station before the Official Identification Parade was held thus compromising my innocence."

[5] However, on 6 February 2024, Mr Atiba Dyer, on behalf of the applicant, sought and was granted permission to abandon these original grounds and to argue one supplemental ground, which was that: "the sentences are manifestly excessive".

[6] The basis of this request was Mr Dyer's candid concession that he was unable to advance any arguments in respect of the original grounds of appeal so far as the

conviction was concerned. He said that he had received the applicant's written instructions to make the concession.

[7] The Crown, through Miss Alice-Ann Gabbidon, agreed with the position taken by Mr Dyer.

[8] The main issue that arose in the trial was identification by way of recognition. This was adequately addressed by the learned judge who had more than enough of an evidentiary base to find that the applicant was the assailant. A challenge to the convictions, therefore, would have been an exercise in futility.

[9] With regard to the sentences imposed, Mr Dyer sought to persuade the court that, for reasons outlined in his oral and written submissions, it should substitute the sentence of 20 years for illegal possession of firearm with one of 19 years, and to substitute the sentence of 22 years for wounding with intent with one of 21 years. The main basis for the submission was that the learned judge did not follow the now-standard procedure set out in cases such as **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20. The Crown, on the other hand submitted that, even though the learned judge did not follow that procedure, if the sentences were to be calculated using that procedure, they would justifiably be either the same or higher.

[10] In our view the sentences cannot fairly be said to be manifestly excessive. With regard to the sentence for illegal possession of firearm, we accept as correct and appropriate the range in which the starting point should fall, outlined in **Lamoye Paul v R** [2017] JMCA Crim 41 at para. [18] as follows:

> "[18] In respect of illegal possession of firearm, we have concluded that the sentence is manifestly excessive after an application of the relevant principles of sentencing. The learned judge was required to choose a starting point and a range for the offence, which she did not. <u>Bearing in mind that this is not a case that involved the possession of a firearm simpliciter, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate</u>. …" (Emphasis added)

[11] In the case of **Carey Scarlett v R** [2018] JMCA Crim 40, Brooks JA (as he then was) opined on an appropriate range of sentence for the offence of wounding with intent involving the use of a firearm. At para. [36] thereof, he stated the following:

> "[36] The normal range of 15-17 years for the offence of wounding with intent, using a firearm, as suggested by learned counsel for the Crown, would not be an inaccurate assessment using that limited analysis. The Guidelines must, however, have been informed by a wider canvass of the relevant cases and therefore should not be ignored or undermined. The normal range for that offence must, therefore, be considered to be 15- 20 years."

[12] In referring to this case and its reference to "The Guidelines", we bear in mind that the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts did not come into effect until December of 2017, and that this case was tried in 2014.

[13] Even with that consideration in mind, however, we formed the view that the sentence imposed for these offences are not manifestly excessive. We say so for two reasons. For one, we have guidance in numerous cases dealing with sentences for wounding with intent before the promulgation of the Sentencing Guidelines. One such case is **Kamar Morgridge v R** [2011] JMCA Crim 7. In that case, a sentence of 15 years for wounding with intent was upheld by this court. The facts of that case involved an off-duty police constable whose firearm was wrestled from her when she reached for it whilst being robbed and it was used to shoot her once in the thigh. The case did not mention any previous convictions on the part of that applicant. In **Logan Nelson v R** [2015] JMCA Crim 11 a similar sentence was upheld by this court for wounding with intent, the court commenting that it could well have been higher given the applicant's two previous convictions. Those convictions were for robbery with aggravation, for which he was sentenced to three months' imprisonment in 2004, and simple larceny, for which he was fined in 2003.

[14] Therein lies the difference between the sentences in those cases and the instant case (and this is the second reason). In this application the applicant had five previous convictions. He got these convictions from three incidents between 1991 and 1999.

They were all firearm and ammunition offences (unlike the previous offences in **Logan Nelson v R**). They are set out at page 246 of the transcript in the evidence of Detective Corporal Exdod Davy, giving the applicant's antecedent report, as follows:

> "The six (6) previous convictions are: Illegal Possession of Firearm, on the 16th of December, 1991, where he got four (4) years imprisonment at hard labour. Second conviction Illegal Possession of Firearm convicted on the 3rd of the October, 1996 he got seven (7) years imprisonment at hard labour. Third conviction was Shooting with Intent on the 3rd of October,1996 where he got seven (7) years imprisonment at hard labour. The fourth conviction... And the fifth conviction January 1, 1999 where he got fifteen (15) years imprisonment at hard labour. And the sixth conviction for Illegal Possession of Firearm 19th of January 1999, where he got ten (10) years imprisonment at hard labour."

[15] These previous convictions aside, there was also the social enquiry report which was negative in general, but particularly so in the community report. This was what was reported from community enquiries:

> "Caladium Crescent, where Defendant resided, was visited. Residents indicated that Mr. Burton was a nuisance to the community and that [h]is entanglement with law for gun related offences has become the norm. Tower Avenue, where Offender indicated that he frequently visits was also visited. Community members shared similar sentiments to those of the residents from Caladium Crescent. Family members stated that they have no interest in the affairs pertaining to Mr. Burton as his behaviour throughout the years has been rather distasteful."

[16] In these circumstances, the applicant may well be regarded as most fortunate not to have received sentences that were more severe. His ground challenging the sentences on the basis that they were manifestly excessive is therefore wholly unmeritorious and was doomed to failure.

[17] The only matter that detained us was the contention that the applicant was not credited for the time he spent in custody on pre-sentence remand. Unfortunately, this point was not raised by counsel for the applicant at the trial or raised by the learned judge. As is now well known, however, a sentencing court is required to give an

offender full credit for the time that offender spent on pre-trial remand. (See, for example, **Romeo DaCosta Hall v R** [2011] CCJ 6 (AJ) and **Callachand & Anor v. State of Mauritius** (Mauritius) [2008] UKPC 49 (4 November 2008). In the latter case, at para. 9, Sir Paul Kennedy, writing on behalf of the Board, observed as follows:

> "In principle it seems to be clear that where a person is suspected of having committed an offence, is taken into custody and is subsequently convicted, the sentence imposed should be the sentence which is appropriate for the offence. It seems to be clear too that any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing." (Emphasis added)

[18] In keeping with this, we are obliged to credit the applicant with a period of one year, which is the figure that counsel on both sides can be certain about from the evidence, as that spent by the applicant in custody. It is only to that extent, therefore, that the sentence will be adjusted.

[19] The following, then, are the orders of the court.:

(i) The application for leave to appeal against sentence is granted.

(ii) The hearing of the application is treated as the hearing of the appeal.

(iii) The appeal against sentence is allowed in part, in that, whilst the sentence of 20 years' imprisonment for the offence of illegal possession of firearm and the sentence of 22 years for the offence for wounding with intent are affirmed, those sentence are reduced by a period of one year, the applicant having been credited with that time as time spent on pre-sentence remand. The applicant will, therefore serve a sentence of 19 years'

imprisonment for illegal possession of firearm and 21 years' imprisonment for wounding with intent.

(iv) The sentences are to run concurrently, and are to be reckoned as having commenced on the date on which they were imposed, that is, 25 April 2014.