JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 37/2013

BEFORE: THE HON MR JUSTICE MORRISON P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA

MICHAEL EVANS v R

Delano Harrison QC for the applicant

Mrs Sharon Milwood-Moore for the Crown

24, 25 November and 18 December 2015

MCDONALD-BISHOP JA

[1] This is an application for leave to appeal against sentence. On 13 March 2013 the applicant, Mr Michael Evans, appeared before Pusey J, sitting alone in the High Court Division of the Gun Court in Kingston. The applicant was charged on an indictment containing two counts. The first count charged him with the offence of illegal possession of firearm and the second count charged him with the offence of robbery with aggravation. The applicant pleaded guilty to both offences and on 20 March 2013, he was sentenced to 10 years and 15 years imprisonment at hard labour, respectively.

The sentences were ordered to run concurrently with each other as well as with sentences he was serving at the time for two similar offences.

[2] The applicant sought leave to appeal against sentence on the following grounds:

> "(1) **Unfair Trial**: - That the Sentences are harsh and Excessive and cannot be justified when all the circumstances are taken into consideration.
>
> (2) That the Learned Trial Judge did not temper justice with mercy as the Sentences reflect the severity of the sentences.
>
> (c) That the Learned Trial Judge relied on evidence and testimonies which are lacking in the facts and credibility. Thus rendering the verdict unsafe."

[3] The application was considered and refused by a single judge of this court on the basis that the sentences could not be viewed as being manifestly excessive. As a result, the applicant renewed his application before this court. On 25 November 2015, we refused the application for leave to appeal against sentence and ordered that the sentences are to be reckoned as having commenced on 20 March 2013, the date on which they were imposed. These are our reasons for that decision.

The background facts

[4] The undisputed facts which gave rise to the plea of guilty, briefly stated, were as follows: On 7 November 2011, at about 7:10 pm, the complainant was sitting at a bus stop located on Marcus Garvey Drive in Kingston when he was approached by the applicant and another man. The applicant pointed a firearm at him and demanded what he had in his possession. In response, the complainant handed over to the applicant his

Blackberry cellular phone, which was valued at about $20,000.00. The applicant and his companion then left the scene. Subsequently, the complainant positively identified the applicant at an identification parade, which eventually led to charges being laid against him for the offences in relation to which he was sentenced that now form the subject of this appeal.

Grounds of appeal

[5] Mr Harrison QC, who appeared for the applicant in renewing his application before this court, sought and was granted leave to abandon ground (c) of the original grounds (paragraph [2] above) on the basis that that ground was, in effect, an appeal against conviction, which the applicant was not pursuing. Leave was also granted to the applicant to pursue and argue a single supplemental ground of appeal which, essentially, encompasses the original grounds (1) and (2). The relevant ground of appeal reads:

> "The sentence imposed by the learned sentencing judge in relation to both offences, with which the applicant was charged, was manifestly excessive."

Submissions

[6] Mr Harrison, in advancing the ground of appeal, maintained that the sentences were manifestly excessive because the learned judge had failed to take into account and/or to properly treat with several matters that have caused him to err, in principle, in sentencing the applicant. The complaints of the applicant with respect to these matters are conveniently divided into four sub-issues as follows**:**

(i) failure of the learned judge to procure a social enquiry report to assist in the determination of the appropriate sentences;

(ii) failure of the learned judge to accord any discount in the sentences for the guilty pleas;

(iii) failure of the learned judge to pay regard to the possibility of the applicant's rehabilitation;

(iv) failure of the learned judge to take into account a mitigating factor that should have weighed in the applicant's favour.

Each sub-issue will now be examined, in turn.

Discussion

(i) **failure of the learned judge to procure a social enquiry report to assist in the determination of the appropriate sentences**

[7] Mr Harrison noted that after the applicant had pleaded guilty to the offences, his counsel, at the time, appeared to have "presumed" that sentencing would have proceeded with a social enquiry report. The learned judge, however, did not seek to obtain a social enquiry report, which may have been helpful to him in sentencing the applicant. According to learned Queen's Counsel, the information usually derived from the antecedent report is of limited assistance to a trial judge engaged in the sentencing process as it is usually "bare and sketchy" and so a social enquiry report would be more helpful. He argued that in the special circumstances of the applicant's case ("tending to suggest incipient recidivism"), the more "detailed, and searching, material" usually presented in the typical social enquiry report would have been warranted. Therefore, to do justice in sentencing the applicant, he argued, the learned judge should have

availed himself of the social enquiry report that defence counsel, "seemingly, envisaged would have been obtained".

[8] In considering this point raised by learned Queen's Counsel, it is observed that there is nothing in the record of the proceedings which indicates that there was a definitive application made by defence counsel for a social enquiry report. So, it cannot be said that the learned judge had denied an application for a social enquiry report to be obtained. Evidently, the learned judge had formed the view that a social enquiry report was unnecessary and that he could have sentenced the applicant with the aid of the antecedent report only.

[9] We do recognize the utility of social enquiry reports in sentencing and cannot downplay their importance to the process. Indeed, obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice. John Sprack in A Practical Approach to Criminal Procedure, tenth edition, page 395, paragraph 20.33, in his discussion of the provisions of the Powers of Criminal Courts (Sentencing) Act 2000, as they relate to the use of pre-sentencing reports in the UK, noted:

> "Even if there is no statutory requirement to have a [social enquiry] report, the court may well regard it as good sentencing practice to have one, particularly if it is firmly requested by the defence. Nevertheless, even where the obtaining of a pre-sentence report is 'mandatory', the court's failure to obtain one will not of itself invalidate the sentence. If the case is appealed, however, the appellate court must obtain and consider a pre-sentence report unless that is thought to be unnecessary."

[10] Mr Harrison, in making his submissions, has not argued that it was mandatory for the learned judge to obtain a social enquiry report in the circumstances of this case and neither did he say that there was a firm request from defence counsel for one to have been obtained. Of course, we do accept that the learned judge, even in the absence of any mandatory requirement or a request from defence counsel, could have requested one on his own volition and in his own discretion. The question for this court, therefore, is whether the learned judge erred, in principle, when he failed to obtain a social enquiry report in the circumstances of this case, thereby rendering the sentences he imposed on the applicant manifestly excessive.

[11] We have observed that although Mr Harrison had contended that a social report was necessary to do greater justice to the applicant, he had not, in the end, pointed to anything pertaining to the circumstances of the applicant that could persuade this court to the view that a social enquiry report could have assisted him in obtaining a lesser sentence. Given the applicant's antecedents, it is virtually unlikely that a social enquiry report could have been of any real benefit to him in all the circumstances of the case.

[12] In the result, we find nothing from which we could conclude that the applicant would have been prejudiced, in any way, by the absence of a social enquiry report. In other words, we do not discern any injustice that would have been caused to him due to the failure of the learned judge to procure a social enquiry report before sentencing him. The contention on behalf of the applicant that the learned judge erred in principle by failing to obtain a social enquiry report, thereby rendering the sentences manifestly excessive, cannot be accepted.

(ii) **Failure of the learned judge to accord any discount in the sentences for the guilty plea**

[13] It was also Mr Harrison's contention that the learned judge did not accord to the applicant any discount in sentencing on account of the plea of guilty to both offences. According to Mr Harrison, the applicant had pleaded guilty at the earliest opportunity, thus indicating a sense of remorse and also that he is deserving of some credit, in the form of a reduction in the sentence which would have been imposed if he had been convicted after a full trial. He, particularly, drew support for this argument from the dicta of this court in **Bertell Myers v R** [2013] JMCA Crim 58 and **Jermaine Barnes v R** [2015] JMCA Crim 3.

[14] Those cases, cited above by learned Queen's Counsel, like so many other authorities from this court as well as from other jurisdictions, have reinforced the principle that a person who pleads guilty may expect some credit for doing so, by way of discount in the form of reduction in the sentence which would have been imposed if he had been convicted at trial after a plea of not guilty. The reasons underlying this principle are by now so well–known that they need not be repeated for present purposes except to say that the oft-cited one is the saving of judicial time which is a scarce resource.

[15] In treating with the guilty plea, the learned judge, apart from indicating that he had taken the plea into account, had only indicated, that if the matter had gone to trial, he "might have" imposed 20 years on the applicant. Beyond that, he did not indicate

the methodology he had employed in arriving at the sentences he imposed, particularly, the starting point he had utilized for each offence, how he treated with mitigating and/or aggravating factors by reference to the starting point in arriving at the sentences imposed and the measure of discount he had accorded the applicant by reference to the starting point he had used. Regrettably, we have not obtained sufficient assistance in this regard in keeping with the approach recommended by this court in several cases. See, for instance, **Basil Bruce v R** [2014] JMCA Crim 10 and **Joel Deer v R** [2014] JMCA Crim 11. The complaint of the applicant as to the approach of the learned judge in this regard cannot be dismissed as being baseless.

[16] What is clear from the authorities, however, is that the extent of the discount to be allowed, in recognition of a guilty plea is not fixed, albeit that the courts have normally suggested somewhere in the region of one-fifth to one-third. It is such that the discount to be allowed must be assessed, as a general rule, by reference to the facts of each particular case (see **Joel Deer** at paragraph [8] and the authorities cited therein). Ultimately, it is a matter for the discretion of the sentencing judge to determine the appropriate discount, having regard to the circumstances of the case and of the offender and after paying due regard to the established principles of law governing the question.

[17] In the absence of any assistance from the learned judge in the instant case as to what allowance he had particularly made for the plea of guilty, it was incumbent on this court, at the end of the day, to look at all the circumstances of this case in the round, within the context of relevant authorities as to the range of sentences for the offences

in question, in order to determine whether the sentences were manifestly excessive. The ultimate resolution of this question did warrant an examination of the other issues raised by the applicant.

(iii) Failure to pay regard to the possibility of the applicant's rehabilitation

[18] Learned Queen's Counsel further contended on behalf of the applicant that "it is plain, from the learned judge's sentencing remarks, that he was so preoccupied with the applicant's 'previous convictions for similar offences' that he gave no consideration to the possibility of the applicant's rehabilitation". Relying on dicta from **Regina v Errol Brown** (1988) 25 JLR 400, 401, learned Queen's Counsel noted that a custodial sentence "need not be so long as to deprive the applicant of all hope", but that "[h]e must be given some hope", and the sentence must reflect that.

[19] It is, indeed, apparent on the face of the transcript that the learned judge did not, at any time, indicate that he had taken into account the need to rehabilitate the applicant. He expressly focused his attention, primarily, on deterrence. His obvious focus on the principle of deterrence, no doubt, emanated from the fact that the applicant had two previous convictions for firearm offences of similar nature, in respect of which, at the time of the plea, he was serving seven years imprisonment. The criticism of the learned judge with regard to him having failed to demonstrate that he had taken into account the need to rehabilitate the offender is not at all unjustified.

[20] The contention of Mr Harrison, however, is not simply that the learned judge failed to show that he had the possibility of the rehabilitation of the applicant in mind but rather that that preoccupation had led him to impose the sentences that were manifestly excessive. It would mean, on the basis of that argument, that the learned judge would have erred in principle, thereby warranting the interference of this court. While we do find some merit in the complaint that the learned judge had failed to expressly indicate that he had the applicant's rehabilitation in mind, he cannot at all be faulted for paying specific attention to the fact that the applicant had previous convictions for similar offences and that he was actually serving a term of imprisonment for them while being sentenced. It was incumbent on the learned judge, in such circumstances, to pay regard not only to the issue of deterrence and rehabilitation but also to the important issue of the protection of the public from one who has manifested a tendency to re-offend.

[21] The learned judge did consider the issue of consecutive sentences in the light of the circumstances before him. Given the provisions of the Criminal Justice (Administration) Act, section 14, that permit the imposition of consecutive sentences in such situations, as well as the applicable case law treating with the issue of consecutive sentences being imposed for offences committed by an offender during the course of different transactions, the learned judge's pre-occupation with the applicant's previous convictions is quite understandable. It cannot be seen as being inappropriate, in all the circumstances of this case. The fact of there being previous convictions for similar

offences was not only a significant aggravating factor but was also relevant because the applicant was incarcerated on the earlier convictions at the time of sentencing.

[22] The learned judge by focusing on those matters, clearly, and properly too, did recognise the totality principle enunciated in the authorities, which was relevant to his consideration. This is how he puts it:

> "The second case is a recent case, that I can't remember the name of it now, but is a judgment of Mr Justice Brooks in the court of Appeal, where he had indicated that in terms of consecutive sentences the court should try to avoid consecutive sentences and what the Court ought to do is to have a sentence of an additional length which would take into consideration the sentence that the person is now serving." [**Kirk Mitchell v R** [2011] JMCA Crim 1]

[23] The totality principle, as enunciated in the authorities is, basically, that a sentencing judge should impose a total sentence for different offences that, when looked at globally, will reflect all the offending behaviour before it and is just and proportionate. The learned judge, evidently, having paid due regard to the totality principle, the plea of guilty and the applicant's previous convictions for like offences, arrived at the sentences imposed. The question is whether he erred in principle in imposing those sentences, having regard to the totality principle.

[24] It is observed that there is no distinction made by the applicant between the sentences for illegal possession of firearm and robbery with aggravation. It seems that his complaint is that the sentences for the two offences were manifestly excessive. However, having paid regard to the line of authorities from this court that has established the range for firearm offences of this nature, we find that we cannot agree

that the sentences as imposed on the applicant, who is an offender with previous convictions for similar offences and who has pleaded guilty, would fall outside the established range of sentences which has been settled to be between 10 and 15 years, in the case of first time offenders who are sentenced following a trial.

[25] Indeed, this court in **Joel Deer** (per Phillips JA), had concluded on the facts of that case and after reviewing several relevant authorities, that concurrent sentences of 10 years imprisonment for illegal possession of firearm and 16 years imprisonment at hard labour for robbery with aggravation, following a guilty plea (like in the instant case), were not manifestly excessive when the totality principle was applied and the range of sentences of this court for such offences was considered. As Phillips JA noted in that case at paragraph [14] and which we will adopt with just slight modification in treating with the facts of this case:

> "The offences under consideration being a different transaction from those [for which the applicant was previously convicted], the sentences imposed for them, could readily have been made consecutive to [the earlier sentences]."

It is clear that the learned judge in the instant case had refrained from imposing consecutive sentences, having borne in mind the totality principle. He cannot at all be faulted for taking the approach in imposing a longer concurrent sentence.

[26] We find that the aggregate sentence imposed on the applicant for all his offending, that is, arising from the two separate transactions in which he was involved, would be 15 years, being for two counts of illegal possession of firearm and two counts

of robbery/assault with intent to rob. This when broken down in actual years would mean that the applicant would have been sentenced to serve seven years for the first set of offences and to an additional eight years for the second set of offences. These sentences, when viewed from that perspective, cannot at all be said to be manifestly excessive. This is particularly so too, when one bears in mind that the maximum penalty for the offence of illegal possession of firearm is life imprisonment and it is 21 years for the offence of robbery with aggravation. It cannot at all be said that a total of 15 years for four firearm offences (which are serious offences) was manifestly excessive. It is well in keeping with what the legislature intended should be the sanction for such offences involving the use of a firearm, imitation or real, and, particularly, upon a second conviction for the same offences.

[27] The applicant had committed separate offences at separate times, involving different victims, he must be penalized for the different offences committed on the two separate occasions. The sentences are commensurate with the seriousness of the offences committed by him. The aggregate sentence of 15 years imprisonment imposed on him reflects all his offending and was just and proportionate in all the circumstances.

[28] In our view, it cannot fairly be said that the learned judge erred in principle in treating with the previous convictions in the way he did. The fact that he allowed all the sentences to run concurrently is a clear indication that he gave effect to the totality principle and so, despite the noted shortcomings in his reasons for sentencing, he cannot be held to have erred in principle. We, therefore, rejected the complaint that the sentences imposed and ordered to run concurrently were manifestly excessive.

(iv) **Failure to take into account a mitigating factor that should have weighed in the applicant's favour**

[29] Mr Harrison had also submitted that the learned judge had failed to bear in mind, as a mitigating factor, to the applicant's credit, the fact that no injury had been occasioned to the complainant in the course of the robbery. For support, he relied on dictum from **Regina v Errol Brown**. It is, indeed so, that the learned judge did not expressly demonstrate that he had taken that fact into account. In the light of our finding, however, that the sentences imposed were not manifestly excessive, this complaint could not advance the applicant's cause. It was, therefore, not accepted as a proper basis on which to hold that the learned judge erred in principle so as to justify this court in reducing the sentences imposed on him, or any of them.

Conclusion

[30] We found that there was no merit in the single ground advanced by the applicant for leave to appeal against sentence. The application was, therefore, refused and the order made for him to serve the sentences as imposed by the learned judge.