[2018] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 90/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

JESSIE GAYLE v R

Ms Jacqueline Cummings for the applicant

Ms Maxine Jackson and Stephen Smith for the Crown

22 and 24 January 2018

BROOKS JA

[1] Messrs Jessie Gayle and Fabian Steele were both convicted on 22 June 2012 of the offences of illegal possession of firearm and shooting with intent. This was in the Western Regional Gun Court held in the parish of Saint James. They were each sentenced, on 30 July 2012, to 12 years imprisonment at hard labour for the count of illegal possession of firearm and to 18 years and 15 years imprisonment, respectively, on the count of shooting with intent. The sentences were ordered to run concurrently.

[2] The evidence led by the prosecution at the trial was that, Messrs Gayle and Steele were the persons who shot at Constable Sasa-Marley Barrett and Special Constable Shawn McKenzie, while they were on duty, on 8 January 2010, at Harmony

Town in the parish of Westmoreland. Mr Gayle was arrested on 20 January 2010 and Mr Steele on 20 April 2010.

[3] Both men applied for leave to appeal against their respective convictions and sentences. Mr Steele's application has already been heard and dismissed. Mr Gayle's was deferred in order to have other counsel assigned to consider the application.

Submissions

[4] When Mr Gayle's application came on for hearing, Ms Cummings, who appeared on his behalf, candidly informed the court that she could find no basis to advance the application in respect of the convictions. We agree with her assessment. Mr Gayle's application for leave to appeal against the convictions should therefore be dismissed. Learned counsel did, however, advance Mr Gayle's application for leave to appeal against the sentence imposed on him for the offence of shooting with intent.

[5] Mr Gayle's complaint is that there is an improper disparity between the sentence imposed on him, as opposed to that imposed on Mr Steele, for the offence of shooting with intent. Ms Cummings supported his stance. She submitted that the only difference between Mr Steele and Mr Gayle, for the purposes of that sentence, is that Mr Gayle had a previous conviction for unlawful wounding. Learned counsel argued that that difference would not warrant Mr Gayle receiving an increased sentence.

[6] Ms Cummings made a further submission. She argued that the learned sentencing judge was wrong to have made negative comments, during sentencing, about Mr Gayle's refusal to accept the verdict. Learned counsel, very properly, argued

that that is not a proper basis for increasing a sentence. She noted that there was no mention of that principle in the recently launched sentencing guidelines for the judiciary but that the principle was an established one.

[7] As has become customary in recent times, the court sought assistance from the Crown in respect of sentence. Mr Smith, for the Crown, was also very helpful in this regard. Learned counsel argued that where there is a lack of remorse that may be considered an aggravating factor for the purposes of an appeal. Mr Smith submitted that sentences are not readily disturbed by this court and there needed to have been more in order to disturb the sentence imposed on Mr Gayle for the offence of shooting with intent.

Discussion

[8] As it relates to the disparity in sentence imposed on Mr Gayle and his co-offender (that is 18 years against 15 years), as complained of by Ms Cummings, guidance may be had from the cases of **R v Kenneth John Ball** (1951) 35 Cr App R 164 and **R v Mary Richards** (1955) 39 Cr App R 191. In **R v Ball**, the Court of Appeal of England stated that in deciding the appropriate sentence, the sentencing judge ought to have consideration, first and foremost, of the public interest and that "when two persons are convicted together of a crime...in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other", in the light of the "background, antecedents and character of the one and his whole bearing in Court" (page 166 of the report).

[9] The court also rejected the argument that a severe sentence to one prisoner must be unjust because his co-accused, who was convicted of the same crime, received a lighter sentence or none at all. Hilbery J stated that the argument, "has neither validity nor force" (page 166), provided the differentiation in treatment is based on the differences in the characters and antecedents of the two convicted persons.

[10] In **R v Mary Richards**, that court stated that the fact that a co-offender receives a shorter sentence is not a ground on which the court would ordinarily interfere. It considered a disparity between the sentences given to the appellant, Ms Richards, and her mother, with whom she had been jointly indicted. Ms Richards was sentenced to four years imprisonment, while her mother, although convicted for more offences than Ms Richards, received a sentence of only two years. The court noted that the sentence imposed on the mother was wholly inadequate, but could not adjust it because the mother had not appealed. It further found that although four years was not inappropriate in the circumstances, the disparity could not be justified. It accordingly reduced Ms Richards' sentence to three years.

[11] We, therefore, cannot agree with Ms Cummings' arguments on the disparity aspect of her submissions. There are at least three reasons for our stance. Firstly, the offence of unlawful wounding for which Mr Gayle was sentenced to three months imprisonment at hard labour is an offence against the person, as is the offence of shooting with intent. A second conviction of violence against the person, for which a greater sentence is imposed, cannot be validly criticised unless it is completely disproportionate.

[12] It is to be noted that Mr Gayle's previous conviction was for an offence committed while he was in custody for the offence, which is the subject of this application. He was sentenced to three months imprisonment for that previous offence. Mr Steele also had a previous conviction, but it was for an act of dishonesty, namely, shop-breaking.

[13] The second reason for disagreeing with Ms Cummings is that there was at least one other significant difference between Mr Steele's antecedents and those of Mr Gayle. It is that the learned sentencing judge observed that the social enquiry report for Mr Steele was positive, whereas, despite justifiable extraction of other negative comments in Mr Gayle's social enquiry report, it was "generally not positive" (page 246 of the transcript).

[14] The learned sentencing judge explained his observation on this point. Mr Steele was reported to be industrious, helpful, respectful and a peacemaker. Although Mr Steele's previous conviction was an aggravating factor, he did receive commendation from the learned sentencing judge for his forthrightness in disclosing the previous conviction. Mr Gayle did not merit such commendations in his social enquiry report, rather, he could only benefit from the mitigating factors of his young age (19 years at the time of the offence), his pre-trial custodial period and the fact that he had been gainfully employed.

[15] As a subset of that point, although the learned sentencing judge did not specifically mention it, the social enquiry report stated that Mr Gayle was "carefree"

about the matter and laughed in response to questions posed by the probation officer concerning the issue. He was also said to be undisturbed about receiving a custodial sentence.

[16] Those comments in the social enquiry report were sufficiently significant for learned defence counsel to have mentioned it in the plea for mitigation of the sentence. The submissions were not misplaced.

[17] Those two considerations may also be considered as part of a third, which is that the appellate court will not lightly disturb the sentence imposed at first instance. The standard for interference with a sentence imposed at first instance is that that sentence is "manifestly excessive". In addition, this court has always adopted the stance that it will not interfere with the exercise of the discretion of the sentencing judge, who would have seen the complainants and the appellants during the trial and observed the demeanour of each. The point was made by Hilbery J in **R v Ball** at page 165. He said, in part:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses as to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

[18] These factors, along with the principles extracted from **R v Ball**, impel the decision that the sentences imposed on Mr Gayle should not be disturbed on the basis

of disparity with the sentence imposed on Mr Steele. There is valid justification for the disparity.

[19] 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]).

[20] The learned sentencing judge did express the view that Mr Gayle did not accept the verdict. He said at page 245 of the transcript:

> "There are, however, a number of aggravating factors, the seriousness of the offences...The fact that you have demonstrated a lack of acceptance of the Court's verdict, you gave conflicting reports about the verdict..."

[21] We are of the view that those comments are not sufficient to warrant disturbing the sentences passed by the learned sentencing judge. The sentences were within the usual range of sentences for those offences and, as has already been observed, the difference in the sentences between Messrs Gayle and Steele for the offence of shooting with intent was justified by the disparities between their respective antecedents. The application for leave to appeal against sentence should, therefore, also be dismissed.

Order

[22] Based on those reasons the orders are:

1. The application for leave to appeal is dismissed in respect of both convictions and sentences.
2. The sentences are to be reckoned as having commenced on 30 July 2012.