[2022] JMCA Crim 58

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEAL NO 28/2014

OMAR GREEN v R

Mrs Carol DaCosta and Miss Kerry-Ann Wilson for the appellant

Miss Ashtelle Steele and Miss Tashell Powell for the Crown

3 November 2022

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] This is a renewed application for leave to appeal conviction and an appeal against sentence brought by Mr Omar Green also known as Omar Wedderburn ('the appellant').

[2] The appellant was charged on an indictment containing three counts. On count one, he was charged with the offence of illegal possession of firearm, on count two with the offence of assault with intent to rob, and on count three with the offence of shooting with intent. Between 21 and 23 January 2014, he was tried in the High Court Division of Gun Court where he was convicted on all three counts.

[3] The prosecution's case against the appellant was that on 26 September 2011, he was in the company of another man ('the principal assailant') who was armed with a firearm. Both men disembarked a bus on Washington Boulevard in the parish of Saint Andrew and ran in the direction of the complainant who was standing outside a cook shop. As they were about to pass the complainant, the principal assailant stopped and

instructed the appellant to search the complainant. The appellant stopped and attempted to steal a gold chain from the complainant's neck by grabbing at the gold chain twice. His attempts were unsuccessful. The principal assailant pulled a firearm from his waistband. The complainant, in response, drew his licensed firearm and fired in the direction of his assailants. The principal assailant fired back before running off with the appellant. The complainant reported the incident at the Duhaney Park Police Station. Investigations led the police to the Kingston Public Hospital ('KPH') where the appellant was receiving treatment for gunshot wounds. He was spoken to by the police who informed him that he was a suspect. He was subsequently identified by the appellant on an identification parade and charged with the offences of illegal possession of firearm, assault with intent to rob, and shooting with intent.

[4] At the trial, the appellant gave an unsworn statement from the dock. That statement, in summary, was that he was an innocent bystander who was shot whilst walking along Washington Boulevard at the time of the incident. He ran after being shot and subsequently lost consciousness. When he woke up, he found himself at the KPH. He denied being in the company of anyone as he was walking alone.

[5] On 21 March 2014, the appellant was sentenced to seven years' imprisonment at hard labour for the offence of illegal possession of firearm (count one), and 15 years' imprisonment at hard labour, each, for the offences of assault with intent to rob, and shooting with intent (counts two and three). The sentences were ordered to run concurrently.

[6] The appellant applied for permission to appeal his convictions and sentences on the grounds that (1) he was wrongfully identified by the prosecution witnesses; (2) he received an unfair trial; (3) there was a lack of evidence linking him to the crimes; and (4) there was a miscarriage of justice. His application for leave to appeal his convictions was refused by a single judge of the court. However, the single judge saw it fit to grant the application for leave to appeal the sentences. On July 15, 2022, the appellant filed a

notice of appeal from the refusal of a single judge (the Criminal Form B6) renewing his application for leave to appeal against his convictions, as he is entitled to do.

The application for leave to appeal against conviction

[7] Counsel Miss Wilson, on behalf of the appellant, candidly informed the court that upon the review of the transcript, there was nothing she could impress upon the court that would be useful in mounting a challenge to the appellant's convictions. She noted that the learned trial judge in her very detailed and comprehensive summation identified all the relevant issues and found the prosecution witness of fact to be a truthful and credible witness. Counsel also acknowledged that the learned trial judge applied the appropriate legal principles with respect to participation and aiding and abetting in the commission of a crime, and the illegal possession of a firearm used in the commission of a crime.

[8] Having examined the transcript and the law applicable to the issues which arose for the consideration of the learned trial judge, we endorse the view of the single judge that the conviction ought not to be disturbed and accept the concession of counsel for the appellant as one which has been rightly made. The learned trial judge's summation and directions to herself are unimpeachable. We find that she correctly directed herself regarding the elements of each of the offences for which the appellant was charged and dealt with them separately in her analysis of the evidence. She rightly identified the central issues to be identification and credibility, particularly the credibility of the complainant. She also accurately recounted and applied the law pertinent to the issue of visual identification as outlined in **R v Turnbull and others** [1976] 3 All ER 549, and thoroughly treated with the evidence, including specific weaknesses in the identification evidence. The learned trial judge was also correct in her treatment of section 20(5) of the Firearms Act regarding the evidential burden borne by the appellant to offer a reasonable explanation for being in the company of the principal assailant. Her conclusions are well supported by the evidence and cannot be faulted. Consequently, we see no basis on which the appellant's convictions may be disturbed.

[9] The convictions on all three counts of the indictment must stand.

[10] On the foregoing bases, the application for leave to appeal conviction is refused.

The appeal against sentence

[11] The appellant's appeal against sentence is grounded in the argument that the sentences imposed on him were manifestly excessive as the learned trial judge erred by failing to give credit for the two years and six months, he spent in pre-sentence custody.

[12] Counsel for the Crown acknowledged that any time spent in custody prior to sentencing should be taken fully into account when assessing the length of sentence that is to be served from the date of sentencing (see **Callachand and another v The State** [2008] UKPC 49 and **Meisha Clement v R** [2016] JMCA Crim 26). Crown Counsel, therefore, accepted that the sentence of seven years' imprisonment at hard labour imposed on count one for the offence of illegal possession of firearm, would have to be set aside to give credit for the two years and six months the appellant served in pre-sentence custody.

[13] However, Crown Counsel, Miss Powell, argued that notwithstanding this principle, the learned judge was unable to exercise this discretion with respect to the sentence she imposed on count three for the offence of shooting with intent. This is because it was not open to her, in the circumstances, to impose a sentence below the statutory minimum penalty of 15 years' imprisonment (see **Ewin Harriott v R** [2018] JMCA Crim 22).

[14] This court accepts the submissions of the Crown that the court is not permitted to give credit for time served in pre-sentence custody with respect to the offence of shooting with intent. The sentence imposed on the appellant for this offence is the statutory minimum sentence prescribed by section 20(2) of the Offences Against the Person Act, which is a term of imprisonment "not being less than fifteen years".

[15] This court has established in several cases that it does not have the jurisdiction to go below the statutory minimum to make allowance for time spent in pre-sentence

custody (see for example **Ewin Harriott v R**). Consequently, the sentence of 15 years' imprisonment at hard labour on count three for the offence of shooting with intent cannot be disturbed.

[16] With respect to the offence of assault with intent to rob, section 37(3) of the Larceny Act, stipulates a penalty of "imprisonment with hard labour for any term **not exceeding ten years**" (emphasis added). The learned trial judge, therefore, exceeded her jurisdiction in imposing a sentence of 15 years imprisonment for the offence. As a consequence, the sentence imposed on the appellant for assault with intent to rob must be set aside.

[17] The court accepts that the guidance provided in **Meisha Clement v R** and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') would not have been available to the learned trial judge at the time she sentenced the appellant. That notwithstanding, this court, now having the benefit of such guidance, would have to apply it in determining the appropriate sentence for the offence of assault with intent to rob. We, must express our gratitude to counsel for the Crown for helpfully providing the court with their calculations following an application of the established arithmetical formula. We accept that a starting point of six years would be appropriate having regard to the fact that a firearm was used in the commission of the offence with the applicant playing a major role. The offence was also committed by two perpetrators in a public place, which are aggravating features. These would be mitigated, however, by these factors: the absence of previous convictions; the appellant's age; and his favourable antecedents and community report. After balancing the aggravating and mitigating factors, we conclude that the mitigating factors outweigh the aggravating factors.

[18] Therefore, we endorse the proposition of the Crown that a sentence of five years' imprisonment for the offence of assault with intent to rob would be commensurate with the seriousness of the offence. It also follows that for this offence, the appellant would

be entitled to be credited for the two years and six months, he spent in pre-sentence custody.

[19] Accordingly, we would set aside the sentence of 15 years' imprisonment at hard labour on count two for the offence of assault with intent to rob. We would substitute therefor, a sentence of two years and six months, having found that the learned trial judge had imposed a sentence that was not authorized by law and having taken into account the time the appellant spent in pre-sentence custody.

[20] Consequently, in the light of our review and findings, the appeal against sentence will be allowed, in part.

Disposition

[21] Accordingly, the orders of the court are as follows:

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

(2) The appeal against sentence is allowed, in part.

(3) The sentences of seven years' imprisonment at hard labour on count one and 15 years' imprisonment at hard labour on count two of the indictment are set aside.

(4) The sentence of 15 years' imprisonment at hard labour on count three for the offence of shooting with intent is affirmed.

(5) Substituted for the sentences on counts one and two that have been set aside are the following sentences:

(a) On count one, for the offence of illegal possession of firearm, four years and six months' imprisonment at hard labour, having taken into account the two years

and six months the appellant spent in pre-sentence custody.

(b) On count two, for the offence of assault with intent to rob, two years and six months' imprisonment at hard labour, having taken into account the two years and six months the appellant spent in pre-sentence custody.

(6) The sentences are to be reckoned as having commenced on 21 March 2014 and are to run concurrently as ordered by the learned trial judge.