[2018] JMCA App 30

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEALS NOS 43 & 44/2012

APPLICATIONS NOS 67 & 68/2016

CURTIS GREY & TOUSSAINT SOLOMON v R

Ms Melrose Reid and Miss Nancy Anderson for the applicants

Jeremy Taylor and Mrs Larona Montague-Williams for the Crown

14 June 2017 and 12 October 2018

IN CHAMBERS

MORRISON P

[1] The applicants are currently serving seven concurrent terms of imprisonment at hard labour at the Tower Street Adult Correctional Centre in the following circumstances.

[2] The applicants were jointly charged on a seven-count indictment in respect of various offences allegedly committed on 19 January 2008. The case for the prosecution was that the applicants and another man entered a bar at New Holland in the parish of Saint Elizabeth at approximately 6 o'clock in the evening and robbed the bartender of

an undetermined sum of money. During the course of the robbery, one of the three men pointed a gun at someone in the bar and fired a shot at her. That same evening, when a police officer attempted to intercept the men, one of them brandished what appeared to be a firearm and the police officer fired two shots at him. Subsequently, a homemade firearm with one round of ammunition in it was found in a motor car owned by the first named applicant.

[3] On 22 March 2012, after a trial before D McIntosh J (the judge) in the High Court Division of the Gun Court at Black River in the parish of Saint Elizabeth, the applicants were convicted of the offences of illegal possession of firearm (counts 1 and 5); illegal possession of ammunition (counts 2 and 6); robbery with aggravation (count 3); shooting with intent (count 4); and assault (count 7).

[4] On 27 April 2012, the judge sentenced the applicants to 10 years' imprisonment at hard labour on counts 1 and 5, five years' imprisonment at hard labour on counts 2 and 6, 15 years' imprisonment at hard labour on counts 3 and 4, and three years' imprisonment at hard labour on count 7.

[5] The applicants have applied for leave to appeal against their convictions and sentences. On 11 and 12 April 2017, the applications were considered on paper and refused by a single judge of appeal. As regards sentence, the single judge observed that the sentences imposed by the judge were in keeping with the law and the established ranges. It was therefore ordered that the sentences should be reckoned as having commenced on 27 April 2012. The first named applicant has since indicated his

wish to renew the application for leave to appeal before the court, but this application is still pending.

[6] The applications which are now before me are concerned with the duration of the sentence of 15 years' imprisonment imposed by the judge on count 4. In this regard, the transcript of the proceedings at the sentencing hearing conducted by the judge indicates[1] that, in the light of the provisions of recent legislation to which he was referred, the judge took the view that the court was "obliged to pass at least a certain level of sentence".

[7] Before turning to the substance of the applications, I must first explain how, sitting as a single judge of appeal, I come to have any jurisdiction to consider them at all.

[8] Prior to 23 July 2010, section 20 of the Offences Against the Person Act (the OAPA) provided that a person convicted of the offences of shooting with intent and wounding with intent to do grievous bodily harm would be liable to imprisonment for life, with or without hard labour.

[9] With effect from 23 July 2010[2], section 20 of the OAPA was amended to provide that a person convicted before a Circuit Court of (a) shooting with intent to do grievous bodily harm, or with intent to resist or prevent the lawful apprehension or detainer of

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[1] Transcript, page 340
[2] Offences Against the Person (Amendment) Act, 2010

any person; or (b) wounding with intent, with the use of a firearm, "shall be liable to imprisonment for life, or such other term, **not being less than fifteen years**, as the Court considers appropriate"[3] (emphasis supplied). As amended, section 20(2) of the OAPA therefore provides for a prescribed minimum sentence of 15 years' imprisonment in respect of the offences of shooting with intent and wounding with intent involving the use of a firearm.

[10] In a companion measure, which also took effect on 23 July 2010[4], the Firearms Act was amended to provide for prescribed minimum sentences of 15 years' imprisonment upon conviction in a Circuit Court for the offences of importation or exportation of a firearm or ammunition without an appropriate permit[5]; manufacturing or dealing with a firearm or ammunition or prohibited weapon without an appropriate licence[6]; purchasing, acquiring, selling or transferring any firearm or ammunition without an appropriate licence[7]; possession of a firearm or ammunition with intent to endanger life or cause serious injury to property[8]: and use and possession of a firearm or imitation firearm in certain specified circumstances[9].

[11] In a measure obviously designed to mitigate the rigour – and potential injustice - of these prescribed minimum sentences in deserving cases, the Criminal Justice

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[3] OAPA, section 20(2)
[4] Firearms (Amendment) Act, 2010
[5] Section 4(2)(a)(ii) and 4(2)(b)(ii)
[6] Section 9(2)(a)(ii) and 9(2)(b)(ii)
[7] Section 10(7)(a)(ii)
[8] Section 24(1)(b)
[9] Section 25(3)(b)

(Administration) (Amendment) Act, 2015 was brought into effect on 30 November 2015. This Act amended the Criminal Justice (Administration) Act (the CJAA) by inserting, among other provisions which are not presently relevant, section 42L:

> "(1) Subject to subsection (4), a person who –
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> (a) has been convicted before the appointed day of an offence that is punishable by a prescribed minimum penalty; and
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> (b) upon conviction of the person, the trial judge imposed a term of imprisonment that was equal to the prescribed minimum penalty for the offence,
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> may apply to a Judge of the Court of Appeal to review the sentence passed on his conviction on the ground that, having regard to the circumstances of his particular case, the sentence imposed was manifestly excessive and unjust.
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> (2) An application made under subsection (1) shall –
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> (a) be made within six months after the appointed day or such longer period as the Minister may by order prescribe;
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> (b) outline the circumstances of the particular case which, in the opinion of the person, rendered the sentence imposed on him manifestly excessive and unjust; and
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> (c) contain such particulars (if any) as may be prescribed.
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> (3) Where the Judge of the Court of Appeal reviews an application made pursuant to subsection (1) and determines that, having regard to the circumstances of the particular case, there are compelling reasons which render the sentence imposed on the defendant manifestly excessive and unjust, the Judge may –

(a) impose a sentence on the person that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period, no being less than two thirds of the sentence imposed by him, which the person shall serve before becoming eligible for parole.

(4) Subsection (1) shall not apply to a person who is serving a term of imprisonment for the offence of murder."

[12] Lastly, I will mention the Judicature (Appellate Jurisdiction) (Amendment) Act, 2015, which also came into force on 30 November 2015. This Act inserted two new subsections after section 13(1) of the Judicature (Appellate Jurisdiction) Act (the JAJA), as follows:

"(1A) Notwithstanding subsection (1)(c), a person who is convicted on indictment in the Supreme Court may appeal under this Act to the Court with leave of the Court of Appeal against the sentence passed on his conviction where the sentence was fixed by law, in the event that the person has been sentenced to a prescribed minimum penalty in the circumstances provided in -

(a) ...; or

(b) section 42L of the *Criminal Justice Administration Act*.

(1B) For the purposes of subsection (1A), the reference to 'Supreme Court' shall include the High Court Division and the Circuit Court Division of the Gun Court established under the *Gun Court Act*."

[13] Taken together therefore, the CJAA and the JAJA as amended establish two routes of review of a prescribed minimum penalty imposed in the Circuit Court or the Gun Court. First, by way of an application to a Judge of Appeal under section 42L(1) of the CJAA for a review of the sentence on the ground that, having regard to the circumstances of the particular case, the sentence imposed was manifestly excessive and unjust. And second, by way of an appeal against sentence under section 13(1A) of the JAJA, with the leave of the Court of Appeal, to the court itself.

[14] These applications fall into the first category. Accordingly, provided that they were made within six months of 30 November 2015, that is, no later than 31 May 2016, the applicants are entitled to apply to a Judge of the Court of Appeal for a review of the prescribed minimum penalty which was imposed on them, viz, the sentences of 15 years' imprisonment for shooting with intent, on the ground that they were manifestly excessive or unjust. If, upon a review of the prescribed minimum penalty, the Judge of the Court of Appeal considers that there are compelling reasons which render the sentences imposed on the applicants manifestly excessive or unjust, that judge is therefore empowered by section 42L of the CJAA to (i) substitute sentences on the applicants that fall below the prescribed minimum penalty; and (ii) specify a period of not less than two thirds of the sentences to be served by them before they become eligible for parole.

[15] No question of the timeliness of these applications arises, since they were both filed well within the six-month period allowed by section 42L(2)(a) of the CJAA. The

single question for my consideration is therefore whether the sentences of 15 years' imprisonment for shooting with intent were manifestly excessive and unjust, having regard to the circumstances.

[16] In relation to Mr Curtis Grey, Ms Reid drew my attention to a number of factors which, she submitted, militated in favour of a sentence below the prescribed minimum penalty. These were that (i) there was no injury to anyone as a result of the shooting incident; (ii) the firearm involved in the incident was recovered; (iii) there was no real indication from the evidence which of the men had the firearm in his possession; (iv) Mr Grey may not have been the trigger man; (v) Mr Grey was himself injured and had to be hospitalised for several months; and (vi) Mr Grey had been gainfully employed before the incident, his character was "impeccable" and he had no previous convictions.

[17] In all these circumstances, Ms Reid invited me to substitute a sentence of no more than 10 years' imprisonment for the prescribed minimum penalty of 15 years imposed by the judge.

[18] In relation to Mr Toussaint Solomon, Ms Reid reminded me of the judge's characterisation of him[10] as having been led by his "older, wiser, more intelligent worldly wise brother" (that is, Mr Grey). In these circumstances, she invited me to substitute a sentence of no more than five to eight years for the 15 years imposed by the judge.

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[10] Page 340 of the transcript

[19] Following on from Ms Reid, Miss Anderson reminded me of my power to fix a minimum pre-parole period of two thirds of whatever sentence was imposed.

[20] For the Crown, Mrs Montague-Williams agreed that these applications were governed by section 42L of the CJAA. However, she also raised the question of whether the OAPA as amended in 2010, which introduced the prescribed minimum penalty of 15 years' imprisonment for shooting with intent, applied to this case at all, given that the offences for which the applicants were convicted were committed in 2008.

[21] In this regard, Mrs Montague-Williams quite properly referred me to section 16(11) of the Constitution of Jamaica[11], which provides that "[n]o penalty shall be imposed in relation to any criminal offence … which is more severe than the maximum penalty which might have been imposed for the offence … at the time when the offence was committed or the infringement occurred".

[22] Mrs Montague-Williams also referred me to the decision of this court in **Norick Brooks v R**[12]. Delivering the judgment of the court in that case, Brooks JA expressed the view (albeit *obiter*, as it turned out) that the minimum sentence of 15 years' imprisonment imposed by the sentencing judge for a firearm offence committed before

[11] As amended by section 2 of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011
[12] [2014] JMCA Crim 20

the 2010 amendment to the Firearms Act[13] ran afoul of section 16(11) of the Constitution.

[23] In support of this view, Brooks JA referred to the decision of the Privy Council on appeal from a decision of this court in **Albert Huntley v Attorney-General and Another**[14]. In that case, in considering the import of the predecessor to section 16(11)[15], Lord Woolf located the principle which it enshrines within the context of the law's traditional disapproval of any measure which increases the punishment or adversely affects the position of a person previously convicted of a criminal offence under a different punishment regime.

[24] I am, of course, grateful to Mrs Montague-Williams for bringing this point to my attention. But, despite its obvious importance, I do not think that I am entitled to take cognisance of it on these applications. As is clear from section 42L of the CJAA, the jurisdiction given to a Judge of the Court of Appeal under the section is confined to a review of a sentence imposed pursuant to a mandatory minimum penalty provision, with a view to determining whether, in the circumstances of the particular case, the sentence was manifestly excessive and unjust. It is therefore a provision designed (solely) to mitigate the operation of the mandatory minimum penalty regime in a deserving case. In my view, any question which arises as to constitutionality or

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[13] See para. [11] above
[14] (1994) 46 WIR 218
[15] Section 20(7) of the pre-2011 Constitution

otherwise of the mandatory minimum penalty will be a matter for determination in an appeal to the Court of Appeal constituted in the usual way.

[25] So the only question which properly arises on these applications is whether the sentences of 15 years' imprisonment imposed on the applicants for shooting with intent can be said to be manifestly excessive or unjust. In considering this question, I have looked first at the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, which were issued in January 2018 (the Sentencing Guidelines). Although only issued earlier this year, the Sentencing Guidelines were explicitly derived from the experience of judges and sentencing courts going back several years. In Appendix A of the Sentencing Guidelines[16], the normal range of sentences for shooting with intent is stated to be five-20 years' imprisonment, with a usual starting point of seven years (save in cases in which the prescribed minimum penalty applies).

[26] Second, in order to test whether the sentences of 15 years' imprisonment imposed on the applicants, putting on one side the prescribed minimum penalty, are manifestly excessive or unjust, I have considered a few of the decisions of this court dealing with sentences for shooting with intent.

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[16] At page A-3

[27] Taking them in roughly chronological order, there is first of all **Kirk Mitchell v R**[17]. Mr Mitchell was convicted in the High Court Division of the Gun Court of the offences of illegal possession of firearm, shooting with intent at police officers and wounding with intent. He was sentenced to seven years' imprisonment on the first offence and 15 years' imprisonment on each of the others. Although the latter two sentences were ordered to run concurrently, the sentencing judge ordered that they should to run consecutive to the sentence on the first offence. In effect, the total sentence was therefore 22 years. The only issue taken on appeal related to the appropriateness of the consecutive sentences. The appeal succeeded to the extent that the order that counts two and three should run consecutive to count one was quashed; and the court ordered that the sentences on all three counts should run concurrently.

[28] A similar result ensued in **Ryan Lewis v R**[18], in which the appellant was convicted in the High Court Division of the Gun Court of the offences of illegal possession of firearm, shooting with intent and robbery with aggravation. The offences arose out of a confrontation between the appellant and the complainant, during which the former accused the latter, who it appeared was not from the area, of "watching him". The appellant was sentenced to seven years' imprisonment for illegal possession of firearm, 12 years for shooting with intent and 10 years for robbery with aggravation. However, although ordering that the sentences for shooting with intent and robbery

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[17] [2011] JMCA Crim 1

[18] [2011] JMCA Crim 3

with aggravation should run concurrently with each other, the court ordered that they should run consecutive to the sentence for illegal possession of firearm. Again, the only issue taken on appeal related to the consecutive sentences and, again, the appeal succeeded on that ground only.

[29] In **Travis McPherson and Another v R**[19], the applicants were each sentenced to serve seven years' imprisonment at hard labour for illegal possession of firearm and 10 years' imprisonment at hard labour for shooting with intent at two police officers. A firearm was recovered in the vicinity of the shooting. The sentences were ordered to run concurrently in respect of each man. Although both applicants filed grounds of appeal complaining that the sentences were manifestly excessive, counsel appearing for each of them in this court accepted that the sentences were within the usual range for those offences. In declining to disturb the sentences, the court expressed the view that these concessions were appropriately made and commended counsel for their candour[20].

[30] In **Omar Brown v R**[21], a case decided after the introduction of the mandatory minimum penalty for shooting with intent, the applicant was convicted of illegal possession of firearm and shooting with intent at a group of men. For each of these offences, he was sentenced to 10 and 18 years' imprisonment respectively. His appeal

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[19] [2017] JMCA Crim 36

[20] See per Brooks JA at para. [57]

[21] [2015] JMCA Crim 31

against the sentence for shooting with intent failed, this court considering that, in all the circumstances, taking into account that, firstly, the minimum sentence to which the applicant was liable by virtue of section 20 of the OAPA was 15 years' imprisonment; and secondly, this was the applicant's second conviction for an offence involving the use of a firearm, the sentence of 18 years' imprisonment imposed by the learned trial judge could not be said to be manifestly excessive.

[31] In **Michael Ewen v R**[22], the applicant was convicted of the offences of illegal possession of firearm and shooting with intent at two police officers after a trial in the High Court Division of the Gun Court. He was sentenced to nine and 10 years' imprisonment respectively, and the sentences were ordered to run concurrently. His application for leave to appeal against the sentences failed, this court taking the view that the sentences were well within the range of sentences normally given for these offences. Accordingly, they could not be said to be manifestly excessive.

[32] And, finally, I will mention **Jessie Gayle v R**[23], in which the applicant was sentenced to 12 years' imprisonment for illegal possession of firearm and 18 years for shooting with intent at two police officers. The applicant had a previous conviction for the offence of unlawful wounding, for which he was sentenced to three months' imprisonment. The only argument advanced on appeal (unsuccessfully, as it turned out) against the sentence of 18 years' imprisonment for shooting with intent was that it was

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[22] [2016] JMCA Crim 19
[23] [2018] JMCA Crim 5

significantly higher than the 15 years imposed on another defendant in the same matter who had been earlier dealt with by the court.

[33] This necessarily limited survey of some of the previous sentencing decisions of this court indicates sentences for shooting with intent ranging from 10-18 years' imprisonment. In both of the two cases at the upper end of the range (**Omar Brown v R** and **Jessie Gayle v R**), the defendants had previous convictions as an additional aggravating factor. This suggests that the true range in cases with no exceptional features is somewhere between 10-15 years. The only matter at the top of this range was a case involving a shooting at police officers (**Kirk Mitchell v R**). However, the two other cases in which the complainants were police officers attracted sentences of 10 years' imprisonment (**Travis McPherson and Another v R** and **Michael Ewen v R**).

[34] In this case, neither applicant had any previous convictions. They were both in gainful occupations at the time of their arrest. Members of their respective communities spoke well of both of them. No-one was injured and the firearm involved in the shooting was recovered. In the case of the second named applicant, it is clear that the judge considered that he had to some extent been led into the criminal adventure by the first named applicant.

[35] In these circumstances, in my view, a sentence in keeping with the sentence imposed in **Travis McPherson and Another v R** (and approved by the Court of Appeal) provides an appropriate basis for sentencing for shooting with intent in this

case. I accordingly consider that the sentence of 15 years' imprisonment imposed on both applicants by the judge, on the basis that he was "obliged to pass at least a certain level of sentence", was indeed manifestly excessive and unjust.

[36] I will therefore impose a sentence of 10 years' imprisonment on the first named applicant and, to give effect to the judge's clear view of the differing culpability of the applicants, eight years' imprisonment on the second named applicant. I will also stipulate that the applicants should each serve a period of at least two thirds of their sentences before becoming eligible for parole. These sentences are to run concurrently with the other sentences imposed by the judge and are to be reckoned as having commenced on 27 April 2012.

[37] I cannot leave the matter, however, without proffering profuse apologies to counsel for the applicants, the Crown and, even more so, the applicants themselves, for the long delay in issuing this ruling. While some of the reasons for delays of this nature are well known, I am painfully aware that they can in no way lessen the inconvenience which they cause to the parties.