[2022] JMCA Crim 72

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL COA2019CR00032

ROMAUN MURRAY V R

Atiba Dyer for the appellant

Andre Wedderburn for the Crown

19 and 20 December 2022

ORAL JUDGMENT

DUNBAR GREEN JA

[1] On 21 March 2019, the appellant was sentenced to 23 years and 10 months' imprisonment for wounding with intent to cause grievous bodily harm, following a guilty plea in the Manchester Circuit Court before Bertram-Linton J ('the learned judge'). A single judge of appeal granted the appellant leave to appeal his sentence, primarily on the basis that the learned judge had imposed a sentence that was higher than the range of sentences for similar offences, in circumstances where the appellant pleaded guilty on the first relevant date.

Prosecution's case

[2] Briefly stated, the prosecution's case was that, on 22 January 2018, at about mid-day, there was an argument involving the appellant, his grandfather and the complainant, about the complainant's occupation of a room in the grandfather's house. The complainant eventually agreed to vacate the room/house and the appellant walked away, but soon returned, drinking and smoking. He threatened to kill the complainant should

he not vacate the house on the same day. A fight ensued and the appellant used a knife to stab the complainant multiple times to his side, abdomen and chest. The complainant managed to escape but was chased by the appellant and chopped with a machete to his back, left hand and left thumb.

Ground of appeal and submissions

[3] At the hearing of the appeal, on 19 December 2022, there being no objection from the Crown, the appellant was granted leave to abandon his original grounds of appeal and argue, instead, a single supplementary ground, that is, "[t]he sentence imposed by the learned judge was manifestly excessive".

[4] In challenging the reasonableness of the sentence imposed, counsel for the appellant, Mr Dyer, submitted that the learned judge fell into error when she failed to apply the sentencing principles set out in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), and relevant authorities from this court, including **Meisha Clement v R** [2016] JMCA Crim 26. It was argued, in particular, that there was a failure, on the learned judge's part, to: (i) reveal how the sentence was arrived at; (ii) identify a starting point; (iii) demonstrate why the maximum possible discount of 50% did not apply in this case; and (iv) demonstrate that she had credited the appellant for the time spent in pre-sentence custody. It was contended that she had also imposed a sentence that was outside the normal range, without reasons, although the appellant had pleaded guilty on the first relevant date.

[5] On behalf of the Crown, Mr Wedderburn conceded that the learned judge did not demonstrate that she had applied the correct principles and methodology in her approach to the sentencing of the appellant. He, therefore, proposed the following approach:

i) an adoption of a starting point of 10 years;

ii) application of a 50% discount, by which the notional figure of 10 years would be reduced to five years' imprisonment;

iii) an upward adjustment of that figure, by five years, on account of the aggravating factors, resulting in a provisional sentence of 10 years' imprisonment; and

iv) finally, a downward adjustment of the provisional sentence of 10 years by one year and two months for time spent in pre-sentence custody, resulting in a sentence of 8 years and 10 months' imprisonment.

Discussion

[6] The authorities have made it plain that this court ought not to disturb the sentence imposed by the sentencing judge unless she erred in principle (see **Meisha Clement v R**, **R v Ball** (1951) 35 Cr App R 164, 165 and **R v Alpha Green** (1969) 11 JLR 283, 284). It is, therefore, to be determined whether the learned judge erred in one or more of the established sentencing principles, and if any such failure resulted in a sentence that was manifestly excessive.

[7] In her sentencing remarks, the learned judge acknowledged the plea of guilt and that a level of discount was permitted by law. She also acknowledged that the maximum sentence for this offence is life imprisonment; the normal range of sentences is five to 20 years' imprisonment; and the usual starting point is seven years. However, she did not state a starting point within the range, as required, based on the nature and seriousness of the offence, and the appellant's level of culpability.

[8] The learned judge highlighted the following relevant aggravating factors but failed to show how they impacted any intended starting point:

i. the appellant's extremely poor community report;

ii. the level of premeditation;

iii. the appellant's previous threat to the complainant and "bragging" about his intention to kill or cause him grievous bodily harm; and

iv. the appellant's attack on the complainant having been a sustained one.

[9] The learned judge also failed to mention any mitigating factor, although the appellant's then attorney-at-law had brought to her attention mitigating circumstances which ought to have been considered, including a medical report which concluded that the appellant was medically classified as schizophrenic. The social enquiry report had also revealed that the appellant had a history of mental illness and that his conduct was, seemingly, generally impacted by mental instability.

[10] During the hearing of the appeal, we were provided with a psychiatric report in respect of the appellant, dated 5 August 2018, which confirmed that he suffered from schizophrenia and "cannabis use disorder", for which treatment was prescribed. He was, however, declared fit to plead.

[11] In our view, the learned judge should have had regard to those circumstances. Para. 2.5 of the Sentencing Guidelines provides:

> "[i]n cases of suspected psychiatric illness or impairment, it will be desirable to obtain a psychiatric report, so as to ensure that the sentencing judge is equipped with all the material required to determine the appropriate sentence, given the circumstances of the particular offender."

[12] The learned judge did not say what percentage discount the appellant would receive for pleading guilty on the first relevant date, the only remark, in that regard, being that:

> "[The appellant]… pleaded guilty and in all the circumstances I note he did what the law says about the possibility -- which may happen -- of up to [sic] 50 percent discount. Regrettably I am not able to offer him up to that 50 percent discount in these circumstances."

[13] Although it was disclosed in the antecedent report that the appellant had two previous convictions (simple larceny and malicious destruction of property for which concurrent sentences of a year's imprisonment were imposed), it was not indicated in the sentencing remarks whether those convictions had any effect on the sentence imposed.

[14] We take note of the mention by the learned judge that the appellant should be given full credit for the time spent on pre-sentence remand (one year and two months), and that, having pronounced the sentence of 23 years and 10 months, she went on to indicate that this sentence was arrived at after she had deducted one year and two months. Implicit in her explanation was that the provisional sentence was 25 years' imprisonment.

[15] Although, at the outset of the sentencing process, the learned judge identified relevant factors for her consideration, she erred in principle when she failed to demonstrate: (i) that she balanced the relevant sentencing principles; (ii) how she arrived at the provisional sentence in light of the aggravating and mitigating features of the case; and (iii) what level of discount was applied, if any, for the guilty plea (see the Sentencing Guidelines as well as **Meisha Clement v R** and **Jermaine McIntosh v R** [2020] JMCA Crim 28 for the principles that should guide a sentencing judge in the execution of the sentencing duty; and **Daniel Roulston v R** [2018] JMCA Crim 20 for the appropriate methodology to be adopted).

[16] We accept the Crown' s submission that the approach to the sentencing, adopted by the learned judge, was flawed, but we do not agree with the approach suggested by Mr Wedderburn. The proper methodology was outlined by McDonald- Bishop JA, at para. [17] of **Daniel Roulston v R**, viz:

a) identify the sentence range;

b) identify the appropriate starting point within the range;

c) consider any relevant aggravating factors;

d) consider any relevant mitigating features (including personal mitigation);

e) consider, where appropriate, any reduction for a guilty plea;

f) decide on the appropriate sentence (giving reasons); and

g) give credit for time spent in custody, awaiting trial for the offence (where applicable).

[17] Given that the learned judge erred, in principle, this court had to consider the matter of the sentencing and the sentence afresh.

[18] At the outset, in giving effect to the parity principle in sentencing, it was important to examine the treatment of sentences, by this court, in like cases, only that in each of the cases which follow, there was, in fact, a trial. In **Raymond Whyte v R** [2010] JMCA Crim 10, a laceration to the base of the left hand by the use of a machete, damaging tendons and nerves, with loss of sensation in fingers and a thumb, resulted in a sentence of 12 years' imprisonment at hard labour, which was not found to be manifestly excessive. In **Raymond Hunter v R** [2011] JMCA Crim 20, in which a sharp instrument was used to inflict several injuries to a police officer's chest and leg by a recidivist at a police lock-up, a sentence of 25 years' imprisonment at hard labour was reduced to 17 years' imprisonment at hard labour. In **Ronald Webley and Another v R** [2013] JMCA Crim 22, the appellants' respective sentences of 12 years' imprisonment and nine years' imprisonment were upheld for a chop wound which almost completely severed the complainant's hand. In **Sylburn Lewis v R** [2016] JMCA Crim 30, the complainant was chopped with a machete, injuring a hand and severing three fingers, then chased and chopped again multiple times. The sentence of 28 years' imprisonment was reduced to 17 years' imprisonment. In **Worrel Wint v R** [2019] JMCA Crim 11, the complainant was stabbed several times as he fell to the ground. The sentence of 25 years' imprisonment was reduced to 19 years and 10 months' imprisonment.

[19] In setting a starting point for the instant case, we considered the intrinsic seriousness of the offence as well as the nature and extent of the injuries. The medical report stated that the complainant sustained "multiple chop wounds, 6 cm to left side of upper chest; 12 cm left arm; 8 cm left elbow; 10 cm upper back. Stab wounds to hepatic region -- left side, 2 stab wounds, 2 cm of abdomen". Given the multiple serious injuries and the clear intention of the appellant to commit more serious harm than resulted, we did not believe that the usual starting point of seven years should be applied and so, we adopted a starting point of 10 years as appropriately reflecting the intrinsic seriousness of the offence. To this notional figure, we added six years on account of the other aggravating factors itemised by the learned judge (see para. [8] above), as well as the propensity of the appellant for violent conduct. This brought the figure to 16 years. We then subtracted two years for the mitigating factors which we assessed to be the appellant's mental state and indication of his previous consistent employment. The result was a figure of 14 years.

[20] We then considered the level of discount which was appropriate on account of the guilty plea which was given on the first relevant date. Section 42D (1) of the Criminal Justice (Administration) (Amendment) Act permits a discount of up to 50% on a plea of guilt, on the first relevant date, for the instant offence. Section 42H provides that the level of discount should be considered in light of factors, including:

> (a) whether the reduction of the sentence would be disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant (appellant), that it would shock the public conscience;
>
> (b) the circumstances of the offence;
>
> (c) any factors that are relevant to the defendant;
>
> (d) the circumstances surrounding the plea; and

(e) whether the defendant had any previous convictions.

[21] Having considered those factors, we were of the view that a discount of 50% would not be appropriate because of the appellant's previous criminal conduct and the clear intent to kill the complainant. In the circumstances, we gave a discount of 25%. On the application of that discount, we arrived at a provisional sentence of 10 years and six months' imprisonment. We then applied the full credit of one year and two months. The sentence arrived at was nine years and four months' imprisonment.

Conclusion

[22] In all the circumstances, the sentence imposed, by the learned judge, was manifestly excessive. Given the appellant's proven mental condition, he should be provided with targeted treatment as deemed appropriate by a medical expert.

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

(1) The appeal against sentence is allowed.

(2) The sentence of 23 years and 10 months' imprisonment is set aside, and substituted therefor is a sentence of nine years and four months' imprisonment.

(3) The sentence is to run from the date on which it was imposed, that is, 21 March 2019.

(4) The appellant is to undergo psychiatric evaluation and treatment, as required, for the extent of his incarceration.