[2022] JMCA Crim 59

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00033

PAUL RAINFORD v R

Leroy Equiano for the applicant

Miss Sophia Rowe and Mrs Christina Porter for the Crown

9 November 2022

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] Mr Paul Rainford ('the applicant') has renewed his application for leave to appeal sentence following the refusal of his initial application by a single judge of this court.

[2] The applicant was convicted in the High Court Division of the Gun Court on an indictment that charged him with the offences of illegal possession of firearm (count one), and illegal possession of ammunition (count two), contrary to section 20(1)(b) of the Firearms Act. In summary, the conjoined particulars of the offences are that on 14 May 2019 in the parish of Kingston, the applicant unlawfully had in his possession a firearm and ammunition not under and in accordance with the terms and conditions of a firearm user's license.

[3] The applicant pleaded guilty to both counts, and on 6 March 2020, he was sentenced to 12 years' imprisonment at hard labour for the offence of illegal possession of firearm, and four years' imprisonment at hard labour for the offence of illegal

possession of ammunition. The learned sentencing judge had the benefit of a social enquiry report and a plea in mitigation before he arrived at the sentences imposed.

[4] The applicant's application for leave to appeal his sentences stands on the solitary ground that the sentences are manifestly excessive.

[5] The salient facts on which the applicant's convictions and sentences are based are that on 14 May 2019, at approximately 3:45 pm in the Shanty Town area of Riverton City, Kingston 11, members of the security forces on a joint police-military patrol saw the applicant running with what appeared to be a firearm. He was chased and he dropped the firearm and ran into a swamp. The area was searched and the applicant found. The firearm was also recovered. It was found to be a shotgun containing seven 12-gauge cartridges. The firearm was found to be in good working condition and the rounds were viable rounds. Upon being cautioned, he told the police "officer dem kill me two bredda and mi nuh want dem kill me too".

[6] The complaint of Mr Equiano, on behalf of the applicant, is that the learned sentencing judge had put too much weight on the applicant's re-offending and failed to take into account all factors favourable to the applicant. The applicant had seven previous convictions, two of which were for firearm offences. In 2008, he was sentenced to nine years imprisonment for the offence of illegal possession of firearm. Counsel contended that the learned sentencing judge was wrong to say he did not see anything in mitigation of sentence, as there were these mitigating factors: the applicant did not challenge the security forces; he was gainfully employed; he is seemingly a family man; and he received a favourable report from the community.

[7] Counsel also questioned the learned sentencing judge's treatment of the issue of whether the applicant ought to have benefitted from a guilty plea discount. He argued that the learned sentencing judge's failure to apply a guilty plea discount was based on his conclusion that it would alarm the public's conscience if he were to give a lesser sentence than the nine years' for which the applicant was previously convicted and

sentenced for a similar offence. He submitted that the learned sentencing judge's consideration of whether the giving of a guilty plea discount would shock the public's conscience ought to have occurred only after he had settled the sentence he would have given, prior to the application of any discount.

[8] However, Mr Equiano accepted the learned sentencing judge's reasoning that, concerning the offence of illegal possession of firearm, the applicant ought not to receive a sentence that is below the nine years he had received for a previous and similar conviction. On his own review of the sentence, counsel posited that a sentence of 10 years' imprisonment for the offence of illegal possession of firearm would have been reasonable after making allowance for aggravating and mitigating factors, and applying a discount of 33.3% for the applicant's guilty plea.

[9] In response, counsel for the Crown, Mrs Porter, submitted that the sentences are not manifestly excessive and ought not to be disturbed. She argued that the learned sentencing judge had regard to all relevant considerations and arrived at appropriate sentences which do not warrant the intervention of the court. Citing several authorities, counsel advanced the view that even if the court were to embark upon a recalculation of the sentences, an application of the relevant principles of law having regard to the aggravating and mitigating factors, the discount for the guilty plea, and the time served by the applicant in pre-sentence custody, a sentence of 12 years and six months' imprisonment would have been justified for the offence of illegal possession of firearm. On that basis, counsel contended that the sentence would not be manifestly excessive to warrant the intervention of this court.

[10] Having considered the helpful submissions of counsel on both sides and having had regard to the reasoning of the learned sentencing judge and all the matters that were placed before him, we concentrated on the reasoning of the learned sentencing judge at pages 15 and 16 of the transcript. There, he indicated, among other things, that the starting point for the offence of illegal possession of firearm had to be 15 years. However, he did not demonstrate how he arrived at that starting point. We also note that

the learned sentencing judge seems not to have identified any mitigating factor, as he rhetorically questioned whether there was any; and although he identified some aggravating factors, he did not consider them within the context of the application of the arithmetical formula established by **Meisha Clement v R** [2016] JMCA Crim 26. It is, therefore, unclear as to how the learned sentencing judge had moved from his starting point of 15 years to the ultimate sentence of 12 years' imprisonment.

[11] What is patently clear, however, is that the sentence of 12 years' imprisonment for the offence of illegal possession of firearm was a downward adjustment of 20% from the declared starting point of 15 years. This must have been because the learned sentencing judge had taken into account the applicant's guilty plea. In our view, the applicant would have been entitled to no more than a 15% discount for the guilty plea, given his previous convictions. Therefore, the mitigating factors Mr Equiano had identified could sufficiently have been accounted for in the remaining 5% reduction from the starting point, as they were by no means overwhelming. On that basis, we conclude that although the learned sentencing judge did not demonstrate how he arrived at the sentence of 12 years' imprisonment for illegal possession of firearm, it cannot be said that he erred in principle to the extent that the court should interfere with the sentence he imposed for that offence.

[12] The court also notes that the learned sentencing judge did not explain how he had arrived at the sentence of four years' imprisonment for illegal possession of ammunition. However, it cannot be said that this sentence is manifestly excessive, particularly, having regard to the personal circumstances of the applicant as a repeat offender.

[13] Accordingly, we do not find that the sentences of 12 years' imprisonment at hard labour for the offence of illegal possession of firearm, and four years' imprisonment at hard labour for the illegal possession of ammunition are manifestly excessive.

[14] We note, however, that the learned sentencing judge did not expressly give credit for the time the applicant had spent in pre-sentence custody. The law has been settled

that time spent in custody, prior to sentencing, ought to be fully taken 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**). Counsel for the applicant indicated that the applicant spent 10 months in pre-sentence custody. The Crown did not challenge this assertion. Therefore, the applicant would, be entitled to a credit of 10 months for the time he spent in pre-sentence custody.

[15] Consequently, in the absence of an indication by the learned sentencing judge that he gave full credit to the applicant for the time he spent in pre-sentence custody, the court is moved to adjust the sentences imposed, on both counts of the indictment, by giving credit for the 10 months spent by the applicant in pre-sentence custody.

[16] Based on the foregoing, we would allow the application for leave to appeal sentence so that credit may be given for the 10 months the applicant spent in pre-sentence custody.

[17] Accordingly, the sentence of 12 years' imprisonment on count one for the offence of illegal possession of firearm will be adjusted downward by 10 months to a sentence of 11 years and two months' imprisonment, and the sentence of four years' imprisonment on count two for the offence of illegal possession of ammunition to a sentence of three years and two months' imprisonment, both at hard labour.

Disposition

[18] The orders of the court are as follows:

(1) The application for leave to appeal sentence is granted.

(2) The hearing of the application is treated as the hearing of the appeal.

(3) The appeal is allowed.

(4) The sentences of 12 years' imprisonment at hard labour for illegal possession of firearm and four years' imprisonment at hard labour for

illegal possession of ammunition are set aside and substituted therefor are the following sentences:

(a) illegal possession of firearm (count one) – 11 years and two months' imprisonment at hard labour having taken into account the 10 months spent in pre-sentence custody, for which the applicant is credited.

(b) illegal possession of ammunition (count two) – three years and two months' imprisonment at hard labour having taken into account the 10 months spent in pre-sentence custody, for which the applicant is credited.

(5) The sentences are to run concurrently and are to be reckoned as having commenced on 6 March 2020, the date they were imposed.