JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 81/2016

DAVION SCOTT v R

Yushaine Morgan for the applicant

Ms Claudette Thompson and Ms Carolyn Wright for the Crown

22 and 24 January 2024

Criminal law- Sentence – Wounding with Intent - Use of a firearm - whether sentencing judge's failure to take into account mitigating factors arising from pre-sentence reports renders sentence manifestly excessive - Section 20 of the Offences Against the Persons Act

ORAL JUDGMENT

SHELLY-WILLIAMS JA (AG)

Introduction

[1] The applicant, Mr Davion Scott, was tried and convicted in the High Court Division of the Gun Court on 29 September 2016 for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count one) and wounding with intent contrary to section 20(1) of the Offences Against the Persons Act ('OAPA') (count two). He was sentenced on 31 October 2016 to 10 years' imprisonment at hard labour for illegal possession of firearm and 17 years' imprisonment at hard labour for wounding with intent. Both sentences were ordered to run concurrently.

[2] The applicant filed an application for leave to appeal against his conviction and sentence. The application was considered by a single judge of this court and refused. Before us counsel, Mr Morgan, on behalf of the applicant, has renewed the application for leave to appeal against sentence and has indicated that this is only in relation to the offence of wounding with intent (count two). Counsel has specifically indicated that he has been instructed to abandon the application regarding conviction. The court granted him leave to do so.

The prosecution's case

[3] The prosecution's case was that on 1 April 2014, at about 11:30 pm, the complainant and her two children were at home in Spanish Town, Saint Catherine. The complainant heard banging on her door, which was then kicked off. The applicant, who is the brother of the complainant, then entered her bedroom and started shooting at her, hitting her several times all over her body. The complainant pretended to be dead, after which the applicant left her home. The complainant was transported to the hospital where she was treated and hospitalized for three months and had to wear a colostomy bag because of the injuries received from the gunshots.

The case for the defence

[4] The applicant gave an unsworn statement from the dock denying his involvement in the commission of the offences. He also raised the defence of alibi.

Submissions

[5] Counsel for the applicant submitted that, based on the circumstances of this case, the learned trial judge had adopted the correct starting point of 20 years. He acknowledged that the learned trial judge had awarded a full discount of three years to the applicant for his pre-sentencing remand. However, Mr Morgan argued that the learned trial judge erred in not taking account of the mitigating factors of the applicant's good antecedent report as well as the favourable social enquiry report in granting a

further reduction in the sentence. This, he submitted resulted in the sentence being excessive.

[6] Counsel for the Crown submitted that, although the learned trial judge may not have abided by the general principles of sentencing, the sentence of 17 years was within the established range of sentences for the offence and, as such, was not manifestly excessive. In support of the Crown's position, Ms Thompson relied on the cases of **Carey Scarlett v R** [2018] JMCA Crim 40 and **Radcliffe Allen v R** [2021] JMCA Crim 19. She also urged the court to adopt the principle stated in the case of **Kayode Garwood v R** [2023] JMCA Crim 52 that it is within the discretion of the trial judge to determine whether a social enquiry report ought to be obtained and relied on in the process of sentencing.

Analysis

[7] The approach to be adopted by this court as it relates to sentencing was laid down by Hilberry J in the case of **R v Ball** (1951) 35 Cr App Rep 164, where, at page 165, it was stated that:

> "…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 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."

[8] Morrison P, in the case of **Meisha Clement v R** [2016] JMCA Crim 26, provided guidance as to the approach to be adopted by the court in sentencing. At para. [41], he stated that:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines, derives clear support from the authorities to which we have referred:

(i) identify the appropriate starting point;

(ii) consider any relevant aggravating features;

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

(iv) consider, where appropriate, any reduction for a guilty plea; and

(v) decide on the appropriate sentence (giving reasons)."

[9] There was a refinement of the principles to be utilized, and further guidance was given to the approach to be adopted in sentencing in the case of **Daniel Roulston v R** [2018] JMCA Crim 20, where McDonald-Bishop JA stated at para. [17] that:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> 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)."

[10] In this case the methodology by which the learned trial judge arrived at his sentence had not been demonstrated. Whereas he had established a starting point and had noted the aggravating and mitigating factors, he, however, failed to indicate in a mathematical formula, that he had made any adjustment to the starting point relative to these factors. The only discernible adjustment was the crediting of the three years' pre-

sentence remand. In light of the learned trial judge's error as identified by counsel for the appellant and in accordance with established practice of the court, we are entitled to consider the question of sentence afresh.

[11] In so doing, it is incumbent on this court to determine whether the failure of the learned trial judge to adhere to the proper methodology has resulted in a manifestly excessive sentence. This was enunciated by McDonald Bishop JA in the case of **Lincoln McKoy v R** [2019] JMCA Crim 35 at para. [43], where she stated:

> "We note that the learned trial judge did not expressly set out the methodology in sentencing that the court now routinely employs by choosing a range of sentences, a starting point and by making the necessary adjustments for aggravating and mitigating factors through the application of an acceptable mathematical formula. There is, therefore, no demonstration of how he had arrived at the sentence imposed. For this reason, the court cannot hold, without more, that the learned trial judge did not err in principle in sentencing the applicant. It, therefore, falls on this court to determine the appropriate sentence that ought to have been imposed after an application of the relevant principles."

[12] In calculating the appropriate sentence, this court has to first identify the range of sentences for this offence and an appropriate starting point within that range. The offence of wounding with intent with a firearm is contrary to section 20 of the OAPA. This offence, in 2016, carried a mandatory minimum sentence of 15 years, which would be the usual starting point. Brooks JA (as he then was) in **Carey Scarlett v R** had opined that a range of 15 to 20 years was an appropriate range for this offence. Brooks JA stated at para. [56] that:

> "The normal range of 15-17 years for the offence of wounding with intent, using a firearm, as suggested by learned counsel for the Crown, would not be an inaccurate assessment using that limited analysis. The Guidelines must, however, have been informed by a wider canvass of the relevant cases and therefore should not be ignored or undermined. The normal range for that offence must, therefore, be considered to be 15-20 years."

[13] The Sentencing Guidelines for use by the Judges of the Supreme Court of Jamaica and the Parish Court ('Sentencing Guidelines'), promulgated in 2017, gives guidance as to the starting point and the range for the offence of wounding with intent. Having regard to the number of times the complainant was shot and the nature and gravity of the injuries she sustained, we believe that a starting point of 17 years is appropriate.

[14] The aggravating and mitigating circumstances relating to this offence would also have to be identified. The single judge in refusing application for leave to appeal conviction and sentence had enumerated a comprehensive list of the aggravating factors, which we substantially adopt. These factors are:

> "a. The offence was committed during a home invasion late at night.
> b. The offence was premeditated (the applicant's words on entering the house were 'Gal, a come me come fe kill yuh now')
> c. The complainant is the applicant's sister (an egregious breach of trust especially in light of the undisputed evidence that she is the eldest child of their mother and whenever her mother would travel overseas she was the one who would take care of the applicant when he was a young child until he was grown).
> d. The offence was committed in the presence of the complainant's two young children (who are the applicant's niece and nephew)
> e. When the applicant's niece called out to him for help his only response was, 'a dead that fe dead'."

To these aggravating factors, we would add the prevalence of this type of offending in the parish of Saint Catherine in which this incident occurred. Based on the aggravating factors, we would add seven years to the starting point, which brings us to a sentence of 24 years.

[15] The learned trial judge, whilst acknowledging that the applicant had no previous conviction, had not demonstrated how he treated that feature as a mitigating factor. We would regard the absence of previous conviction as an appropriate mitigating factor, as also the fact that he had a positive social enquiry report. We, therefore, would allow a reduction of two years on account of the mitigating factors. This brings the sentence to 22 years.

[16] The applicant had spent three years in pre-sentence remand. Therefore, as the learned trial judge had demonstrated, the applicant is entitled to full credit for his pre-sentence remand as dictated by cases such as **Meisha Clement**. This would reduce the sentence to 19 years. On our computation, the applicant could have been sentenced to 19 years after taking into account the time spent in pre-sentence custody.

[17] We, therefore, conclude that, contrary to counsel's submissions that the sentence of 17 years is excessive, it was entirely appropriate as it falls within the range of sentences for this type of offence as per the Sentencing Guidelines. This is also in keeping with sentences imposed by this court in similar circumstances (see **Evon Johnson v R** [2014] JMCA Crim 43; **Antonio McIntosh v R** [2019] JMCA Crim 18; **Howard Hughes v R** [2023] JMCA Crim 44).

Conclusion

[18] The court acknowledges that the learned trial judge had fallen into error by not observing and demonstrating the principles enunciated in the known authorities and the Sentencing Guidelines in his approach to sentencing the applicant. However, after applying the established principles and methodology to the sentencing process that should have been applied by the learned trial judge, we have arrived at a sentence that is higher than the sentence imposed for the offence of wounding with intent.

[19] Therefore, we conclude that the sentence of 17 years' imprisonment imposed for the offence of wounding with intent is not manifestly excessive. For this reason, the application for leave to appeal the sentence of 17 years' imprisonment for wounding with intent must be refused.

[20] The orders of the Court are as follows:

1. With leave of the court, the application for leave to appeal conviction is abandoned.

2. The application for leave to appeal sentence is refused.

3. The sentences are to be reckoned as having commenced on 31 October 2016, the date they were imposed, and are to run concurrently as ordered by the learned trial judge.