[2023] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00007

PAUL TOMLINSON v R

Miss Tamika Menzie for the applicant

Miss Natalie Malcolm for the Crown

27 February 2023

ORAL JUDGMENT

D FRASER JA

Background

[1] On 15 October 2020, following a trial before Morrison J ('the learned trial judge'), the applicant, Paul Tomlinson, was convicted in the High Court Division of the Gun Court, at King Street in the parish of Kingston, on an indictment that charged him with the offences of illegal possession of firearm (count 1) and wounding with intent (count 2). On 28 January 2021, he was sentenced to a term of 10 years' imprisonment at hard labour on count 1 and 15 years' imprisonment at hard labour on count 2.

[2] On 19 April 2022, a single judge of this court refused the applicant leave to appeal his convictions and sentences. As is his right, he renewed his application before the court. The cases advanced at trial by the prosecution and the defence will now be outlined to provide the context for the grounds of appeal filed and the submissions made by counsel on each side.

The case for the prosecution

[3] The case for the prosecution is that sometime after 9:45 pm on 1 July 2019, the complainant, Jeremiah Bailey, was sitting in his car outside his yard in the parish of Kingston, when a grey car being driven by "Mad Head" also called "Dwayne" drove up beside the complainant's car. The area was well-lit by street lights. The right-back window of the grey car was rolled down, through which the complainant saw the applicant, known to the complainant as "John Boops" or "Johnny Boops" from his same community for over 25 years. The complainant saw the unobstructed face of the applicant. His evidence was that "[i]t don't take a minute to see him, because when mi look pon him when the car stop and me see him, me see him good good". The complainant also saw another man known to him as "Yankey", sitting in the back of the car.

[4] After the window was rolled down, the complainant saw "a gun come up" and the applicant shot the complainant twice — once in his eyebrow, with that shot exiting through his ear and secondly in his right shoulder. The grey car then sped off. Under cross-examination, the complainant denied suggestions that he was telling lies on the applicant because he wanted the applicant, "Mad Head" and "Yankey" off the road as they were competing for drug turf.

The case for the defence

[5] The applicant gave sworn evidence in which he acknowledged knowing the complainant and "Mad Head". He, however, raised an alibi, maintaining that he was at home making slippers at the time of the incident and that he heard about it the following day. He also stated that both the complainant and "Mad Head" had competing drug operations "beside each other".

The application for leave to appeal

[6] Counsel for the applicant did not seek to challenge the convictions of the applicant. She was granted leave by the court to abandon the initial five grounds of appeal and to

pursue two supplemental grounds filed 1 December 2022, challenging the sentences of the applicant. These are, ground 1: "The Learned Trial Judge failed to take into consideration the time spent on remand awaiting trial" and ground 2: "The sentence imposed is manifestly excessive". Given the nature of the submissions advanced on each ground and the manner in which they were responded to, it will be convenient to treat with them together.

Ground (1) - The learned trial judge failed to take into consideration the time spent on remand awaiting trial

Ground (2) - The sentence imposed is manifestly excessive

The submissions

Counsel for the applicant

[7] The central complaint raised in respect of both grounds, was that the learned trial judge failed, in keeping with settled principles, to give the applicant full credit for the one year, six months and 14 days he spent in pre-sentence custody. Counsel relied on the well known cases of **Callachand & Anor v The State of Mauritius** [2009] 4 LRC 777; **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ); **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20.

Counsel for the Crown

[8] Counsel for the Crown submitted that having regard to statutory requirements and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, the sentences imposed on both counts were well within the range of sentences usually imposed for such offences and were not manifestly excessive. However, counsel also observed that the learned trial judge had not followed the formulaic approach recommended in cases such as **Meisha Clement v R** and **Daniel Roulston v R** and had not specifically credited the applicant with the time he spent in pre-sentence custody. Consequently, in accordance with settled law as outlined in

Callachand & Anor v The State of Mauritius, counsel advanced that in respect of count 1, the court should credit the applicant with the time spent in custody and resentence him to a period of imprisonment for eight years and six months.

[9] Conversely, in relation to count 2, counsel argued that the mandatory minimum sentence having been imposed, the failure of the learned trial judge to credit the applicant for the time he spent in custody, did not warrant the intervention of the court based on the peculiar facts of this case. In particular, the significant aggravating features of this case would not justify the sentence of the applicant being reduced below the statutory minimum. In support of her submissions, counsel relied on the Judicature (Appellate Jurisdiction) Act ('JAJA'), the Criminal Justice Administration Act ('CJAA') and the cases of **Paul Haughton v R** [2019] JMCA Crim 29; **Kerone Morrison v R** [2021] JMCA Crim 10 and **Lennox Golding v R** [2022] JMCA Crim 34.

Discussion and analysis

[10] As submitted by counsel, it is now settled law that a defendant being sentenced is entitled to be fully credited by means of an arithmetical deduction for any time spent in custody prior to sentencing: **Callachand & Anor v The State of Mauritius; Romeo Da Costa Hall v The Queen**; **Meisha Clement v R** and **Daniel Roulston v R.** Accordingly, as the learned trial judge erred in failing to afford the applicant credit for the one year, six months and 14 days he spent in custody prior to sentencing, this court will intervene, consider the sentence anew and reduce it. Consequently, on count 1, the 10-year sentence should be adjusted by that time period to eight years, five months and 16 days.

[11] The sentence imposed by the learned trial judge on count 2 is the statutory minimum period of 15 years. The question thus arises whether there is a basis for this court to reduce that sentence below the statutory minimum. Section 13(1A) and (1B) of the JAJA provides as follows:

> "(1A) Notwithstanding subsection 1(c), a person who is convicted on indictment in the Supretne 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 passed was fixed by law, in the event that the person has been sentenced to a prescribed mininuun penalty in the circumnstances provided in —
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> (a) section 42K of the Criminal Justice (Administration) Act, and has, pursuant to that section, been issued with a certificate by the Supreme Court to seek leave to appeal to the Court of Appeal against his sentence; or
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> (b) section 42L of the Criminal Justice Administration Act.
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> (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."

[12] In **Ewin Harriott v R** [2018] JMCA Crim 22, it was held that the court was unable to disapply the prescribed minimum sentence as no certificate had been issued under section 42K of the CJAA and the applicant in that case had not sought to rely on the transitional gateway provided by section 42L, which was operative for six months after the 2015 amendments to the CJAA.

[13] In **Paul Haughton v R**, the appellant having been the beneficiary of a certificate under section 42K from the sentencing judge, this court was able to reduce the sentence below the prescribed minimum. Morrison P was thus able to state at para. [50] that:

> "[I]t is clear from the authorities that, however short the period spent on remand may be, the appellant is entitled to have it reflected in the sentence [**Meisha Clement v R** [2016] JMCA Crim 26, para. [34]; **Callachand & Anor v The State** [2008] UKPC 49, para. 933]. Happily, once a certificate has been granted by the sentencing judge pursuant to section 42K(1) of the CJAA, it is open to this court to reduce the sentence below the prescribed minimum sentence [CJAA, section 42K(3)(a)]. This factor serves to distinguish this case from **Ewin Harriott v**

> **R**, in which the appeal did not come before this court through the section 42K gateway and the court was therefore powerless to dis-apply the prescribed minimum sentence in order to reflect the time spent on remand. On this point, therefore, we will allow the appeal and reduce the sentence…to reflect the time spent on remand before sentencing…"

[14] So fundamental is the importance of a defendant being credited, where appropriate, with time spent in pre-sentence custody, that in **Kerone Morrision v R**, this court credited the appellant with the time he served in custody even though the sentencing judge had not issued a ceritificate under section 42K. This was on the basis that the court was acting "in the spirit of the legislation and the inclination of the learned Judge", who could "properly be taken as having certified" that she would have imposed a lesser sentence if she could have, based on certain mitigating factors, but erred in not issuing the certificate.

[15] No certificate was issued in the instant case nor any indication given by the learned trial judge that had he been permitted, he would have imposed a sentence below the statutory minimum on count 2. Indeed, neither would have been appropriate in this case. The dicta of Laing JA (Ag) in **Lennox Golding v R** is apposite on this point. At para. [67], he stated:

> "It needs to be appreciated that the issue which arises when this court is reviewing a statutory minimum sentence, pursuant to its power to do so granted by the CJAA, as identified by Morrison P in **Paul Haughton v R** [2019] JMCA Crim 29 at para. [13] is:
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> > '…whether, as the learned judge thought, the circumstances of the case are such as to make the imposition of the minimum sentence of 15 years' imprisonment for the offence of [wounding with intent] manifestly excessive and unjust; and, if so, what is the appropriate sentence to be imposed on the appellant instead.'"

[16] On the facts of this case, it would have been absolutely remarkable if a certificate had been contemplated or issued. The list of seven aggravating features evident in the case balanced against the three mitigating factors makes the sentences tend significantly towards leniency. They are by no means excessive and, undoubtedly, not manifestly excessive or unjust. They are at the lower end of sentences for these offences given the features of this case. The serious aggravating factors were:

i) The prevalence of illegal firearms in Jamaica;

ii) The prevalence of the use of illegal firearms in Jamaica;

iii) The applicant had five previous convictions two of which were for illegal possession of firearm and shooting with intent;

iv) The applicant's recent return from incarceration;

v) The applicant's role in the commission of the offence;

vi) The fact that an illegal firearm was still at large; and

vii) The fact that the offence was premeditated as the applicant had previously threatened to kill the complainant, and given that the complainant was shot in the face, the threat could easily have been actualised.

[17] The mitigating features were that:

i) The applicant appeared contrite at sentencing;

ii) The applicant's age of 34 years; and

iii) He was engaged in employment as a slippers' vendor.

[18] In the circumstances, no certificate under section 42K of the CJAA having been issued and the sentence on count 2 having been lenient, there is no basis for this court to intervene. The sentence on count 2 should therefore remain undisturbed.

[19] The application for leave to appeal against conviction should be refused. The application for leave to appeal sentence should be granted and the appeal allowed in part to allow for the reduction of the sentence on count 1, to afford the applicant full credit for the time he spent in pre-sentence custody. The sentence on count 2 should be affirmed.

Order

[20] The court therefore orders as follows:

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

(2) The application for leave to appeal sentence is granted and the hearing of the application is treated as the hearing of the appeal against sentence.

(3) The appeal against sentence is allowed in part:

(a) The sentence of 10 years' imprisonment at hard labour on count 1 for illegal possession of firearm is set aside and substituted therefor is the sentence of eight years, five months and 16 days (the applicant having been given full credit for the one year, six months and 14 days he spent in pre-sentence custody);

(b) The sentence of 15 years' imprisonment on count 2 for wounding with intent is affirmed.

The sentences are to run concurrently and are to be reckoned as having commenced on 28 January 2021, the date they were imposed.