[2019] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 43/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

CURTIS GREY v R

Miss Nancy Anderson for the appellant

Miss Patrice Hickson for the Crown

14 and 17 January 2019

EDWARDS JA

[1] The appellant, Mr Curtis Grey, was tried and convicted in the Saint Elizabeth Circuit Court on seven counts for varying offences, to include, two counts each of illegal possession of firearm and illegal possession of ammunition, one count of shooting with intent, one count of robbery with aggravation and one count of assault. The count for which this court was asked to concern itself in this appeal, was that for robbery with aggravation. On the count of robbery with aggravation, the appellant was sentenced to 15 years imprisonment.

[2] The appellant filed notice and grounds of appeal in this court, challenging his conviction and sentence. At the hearing of the appeal, counsel for the appellant, Ms Nancy Anderson, sought and obtained leave to abandon the original grounds of appeal which

were filed, and to argue supplemental grounds challenging the sentence of 15 years imprisonment imposed against the appellant for the offence of robbery with aggravation.

[3] The supplemental grounds of appeal filed were as follows:

> "GROUND ONE
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> The Learned Sentencing judge failed to take into consideration (a) the circumstances of the robbery: undetermined sum and no identification of the [appellant], as one of the men in the shop or in the car; and (b) the time the [appellant] spent in custody awaiting trial, thus making the sentence for the offence of robbery with aggravation manifestly excessive, harsh and unjust.
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> GROUND TWO
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> The delay in the hearing of the trial (over 4 years) and this appeal (over 6 years) are breaches of the [appellant's] Constitutional right to a fair trial within a reasonable time - section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution and thus his sentence should be reduced as a remedy.
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> GROUND THREE
>
> The sentence imposed on the [appellant] for the offence of robbery with aggravation was manifestly excessive, harsh and unjust."

[4] The facts of this case may be visited with some brevity. A robbery occurred at a bar in New Holland in the parish of Saint Elizabeth on 19 January 2008. Sometime late in the evening on that date, a black BMW motor car drove up to the bar in question, and three men came out of the car and entered the bar. Only the bartender and the owner of the bar (two females) were there at that time. After placing orders for alcoholic beverages, one of the men who came out of the motor vehicle pulled a knife and robbed

the bartender of an "undetermined sum of money" and phone cards. Another of the men, who had entered the bar, fired a shot at the bartender; after which the men left the bar and drove away in the BMW. The following day, the investigating officer located the BMW motor car, held the second man, and then went to another location where the appellant was seen with two other men. The appellant pointed a firearm at the officer, after he identified himself, and the officer fired two shots at the appellant. The appellant along with the other men ran into nearby bushes and escaped. He was later seen at the hospital with "bandages on one of his feet". The appellant was subsequently arrested and taken into custody.

[5] The appellant admitted that he was the owner of the black BMW motor car, and that he was the driver of the said car on the night of the robbery and the next day, but denied any involvement in the robbery, and denied having a firearm. Following his trial, he was convicted, as previously mentioned.

[6] The information before the court at the sentencing hearing, in relation to the appellant, was gleaned from the social enquiry report and his antecedent report, provided by the police. These indicated that the appellant was born on 21 February 1981, which made him 27 years old at the time the offence was committed. He was educated at Kingston College and completed school with an honours diploma and seven Caribbean Examination Council subjects. At school he was president of the Key Club, a member of the Inter School Christian Fellowship, and a student council representative. He later attended the College of Insurance and Professional Studies where he obtained certificates in the subjects he studied there. He then worked for 13 years in the insurance industry.

He was a member of the Saint Andrew Kiwanis Club and the Saint George's Anglican Youth Fellowship. He was gainfully employed at the time of his arrest, and had no previous convictions. He was the father of one son who was said to be dependent on him. The appellant also called two character witnesses.

[6] In his brief sentencing remarks, the trial judge took into account the fact that the appellant was an educated individual; that the members of the community in which he was raised knew him and spoke well of him; and that his character witnesses thought highly of him.

[7] The grounds of appeal filed are directed at the sentence imposed for the offence of robbery with aggravation. The appellant's challenge to the sentence imposed for the offence of robbery with aggravation, in short, was that, given the circumstances, it was manifestly excessive, harsh and unjust.

[8] The appellant had applied to a single judge of appeal to reduce the mandatory minimum sentence of 15 years imposed by the learned trial judge for the charge of shooting with intent, pursuant to section 42L(1) of the Criminal Justice (Administration) Act. The appellant's application was successful and that sentence was reduced to 10 years. Counsel argued that since that charge and the robbery with aggravation charge arose from the same incident, this court ought to take into account the fact that the sentence of 15 years, in relation to the shooting with intent, had been considered manifestly excessive and harsh, and had been reduced to 10 years.

[9] Ms Anderson argued that based on the circumstances, that is: that there were five men; there was no evidence that the appellant was one of the three men who entered the shop; there was no evidence that the appellant was the one who fired the shot; and that only an 'undetermined' sum of money was taken, there was a lack of aggravating features, which counsel maintained, should have resulted in a reduced sentence.

[10] Counsel submitted that the usual range for the offence of robbery with aggravation is 10–15 years, and that the usual starting point is 12 years; citing this court's decision in **Jerome Thompson v R** [2015] JMCA Crim 21 and the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts (the Sentencing Guidelines).

[11] Counsel suggested that the antecedent report, the character witnesses and the trial judge's remarks would assist the court when considering the circumstances of this particular case. Counsel highlighted other factors he wished the court to consider, which were that; the appellant had a son who was five years old; had no previous convictions; was an upstanding member of his profession and society; and was gainfully employed. The learned trial judge, counsel argued, was mandated to give 15 years for the shooting with intent; and so might not have thought it necessary to scrutinize the circumstances, with a view to imposing a more appropriate sentence for the count of robbery with aggravation.

[12] Counsel also pointed out that the learned trial judge failed to take into account the time spent in custody. Counsel complained further that there was excessive delay in

having the matter tried and the appeal heard, for which, she said, the appellant should receive some credit. Counsel asked this court to, therefore, apply the decision in **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, and reduce the sentence in order to remedy the breach of the appellant's constitutional right to a fair trial within a reasonable time.

[13] Counsel submitted that, taking into account all the circumstances of the case: that in the two incidents, no one but the appellant himself was injured; the fact of his unblemished record and sterling character; and the fact that the usual starting point is 12 years, the sentence should be reduced to 10 years. Counsel posited further, that there should be a further reduction of at least nine months for the time the appellant had spent in custody as well as credit given for the delay. This, counsel submitted, would result in a more appropriate sentence of eight years.

[14] Counsel for the Crown took the view that although, at the top of the scale, the 15 years imposed by the trial judge was appropriate, and ought not to be disturbed.

[15] The general approach of the court in appeals against sentence is that which was enunciated in **R v Alpha Green** (1969) 11 JLR 283 at 284, which adopted the statement of Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164 at page 165 that:

> "In the first place, 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 this 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 the Court will intervene."

[16] This court in **Meisha Clement v R** [2016] JMCA Crim 26, influenced in part by an earlier decision of this court in **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 55/2001, judgment delivered 5 July 2002, articulated a clear and proper approach to sentencing for the guidance of sentencing judges when they embark upon a sentencing exercise. The appellant in the instant case was sentenced prior to the decision in **Meisha Clement v R**, and so the learned trial judge did not have the benefit of the guidance contained therein. Since **Meisha Clement v R**, there has also been established, for the benefit and use of judges of the Supreme Court and the Parish Courts in this jurisdiction, sentencing guidelines, which were explicitly derived from the experiences of judges and sentencing courts going back several years. These guidelines, for the most part, are in keeping with the methodology and approach of this court, set out in **Meisha Clement v R**, and it is, therefore, useful to be guided by both in the sentencing process.

[17] In **Jerome Thompson v R**, which was a case decided in 2015 before the Sentencing Guidelines had been issued, Brooks JA had pointed out at paragraph [34] that "[t]he usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years".

[18] The statutory maximum sentence for the offence of robbery with aggravation is 21 years. In this case, although the trial judge referred to the mitigating circumstances

of the appellant, it was not possible to determine what range he was working with, and what he had in mind as an appropriate starting point before these mitigating circumstances were applied. The learned trial judge, in his brief sentencing remarks, referred to his disappointment in the actions of the appellant based on his intelligence and the opportunities available to him, but that did not assist in pointing this court to what sentence he had in mind before applying these mitigating factors. The trial judge having failed in this regard, would have erred in principle, and this court may then revisit the question of the appropriate sentence to be imposed on the appellant.

[19] Since the **Meisha Clement v R** decision was handed down, and the later Sentencing Guidelines were established, this court has reviewed sentences by having regard to whether the sentence imposed by the sentencing judge was arrived at by applying recognised accepted principles, and whether it was in keeping with the present guidelines. The sentence imposed must reflect the range of sentences usually imposed for that offence, or like offences in similar circumstances, unless some exceptional circumstances exist. The trial judge must also give reasons for imposing the sentence, he or she so imposed.

[20] The approach the sentencing judge should take was set out in **Meisha Clement v R** and has been reiterated by this court time and time again, more recently in the case of **Daniel Roulston v R** [2018] JMCA Crim 20. The judge in passing sentence should reveal the process by which he or she arrived at the sentence imposed. Having determined that a custodial sentence is appropriate, the judge should:

(a) determine the usual range of sentence imposed for such offences by reference to the circumstances of the offence, using appendix A of the Sentencing Guidelines as an appropriate guide, but always taking into account the submissions of counsel and previous sentencing decisions;

(b) choose an appropriate starting point, according to the established guidelines, and according to the circumstances of the offence, the intrinsic seriousness of it, taking into account the offender's culpability in committing it;

(c) consider the impact of any aggravating or mitigating features, and determine the sentence, whether on a point higher or lower along the range; and

(d) give full credit for the time spent in pre-trial custody.

[21] Accepting, as we do, that the usual range for the offence of robbery with aggravation is 10-15 years and the usual starting point is 12 years, the next consideration is whether there were any aggravating features which would move it upwards of 12 years, to justify a sentence of 15 years given by the judge, which is at the top of the range. Counsel posited that there was none. We tend to agree. The circumstances of the robbery, whilst baffling, had no unusual aggravating feature. The aggravating features were the senseless conduct of the appellant; the fact that it was a robbery with a firearm where a shot was fired; and the number of persons involved. Whilst we condemn the senselessness with which this crime was committed, these aggravating features, we

believe, were already counted in the very nature of the offence that caused the starting point to be established at 12 years, in the first place.

[22] We conclude, therefore, that there were no aggravating factors which justifies moving this case to the top of the range.

[23] The mitigating factors, we have already referred to: no one, apart from the appellant, received any serious physical injury, the sum involved seemed small, and it did not appear to be a pre-planned venture. The appellant was a relatively young man, seemingly with great promise and potential; his character was highly regarded by the two witnesses who gave evidence on his behalf; he was a member of several reputable clubs; he had no previous convictions; was gainfully employed; and the father of one child dependent on him for support. Clearly there was capacity for reform. Taking those mitigating factors into account, we agree that it ought to result in an appropriate reduction in the sentence to ten years.

[24] Counsel also asked the court to consider giving credit for the delays the appellant faced. In **Melanie Tapper v DPP**, both this court and the Privy Council thought that a reduction or adjustment to the sentence imposed was one of the appropriate remedies available for a breach of the right to a fair hearing within a reasonable time.

[25] In this case, there was a delay in the matter being tried of about four years. The incident took place in 2008 and the trial was in 2012. Counsel for the Crown maintained that this was not unreasonable, and that it was due to various reasons, not all the fault of either the Crown or the appellant. The delay in the hearing of the appeal was due to

no fault of the appellant but resulted from the unavailability of the transcript. That took a further four years. Consideration should also be given to this fact, in arriving at the appropriate sentence. A sentence of 9 years is therefore appropriate in this case.

[26] The accused was also entitled to full credit for time spent in pre-trial custody. It would appear from the record and from counsel's submissions, that the accused would have spent a year in custody before his conviction and sentence. The accused is entitled to a reduction in the sentence to take account of that period.

[27] For those reasons, we are of the view that, after taking into account the time spent in pre-trial custody, a sentence of a term of eight years imprisonment should have been imposed on the appellant, for the offence of robbery with aggravation. In the light of that the sentence of 15 years imprisonment was manifestly excessive.

[28] Before parting with this appeal, however, we wish to point out what we consider to be a grave error in the sentence imposed by the trial judge on count seven of the indictment, which charged the appellant with assault. The sentence imposed by the trial judge was three years imprisonment, but the maximum sentence for assault at common law, by virtue of section 43 of the Offences Against the Person Act, is one year. The issue was traversed by this court in the case of **Denmark Clarke v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 153/2006, judgment delivered 9 July 2009, which was a case of assault using a firearm. Harrison JA, in delivering the judgment of the court, indicated that the maximum penalty for common

assault was one year, and that the judge had exceeded his jurisdiction when he imposed a sentence of four years for that offence.

[29] Although in the instant case counsel did not put forward any argument on this point, in light of the trial judge's error, it is incumbent on this court to act in the interests of justice and revisit the sentence imposed in respect of count seven for assault. In the circumstances of this case, as already indicated, and having regard to the sentencing principles aforementioned, a sentence of nine months imprisonment seems appropriate. The remaining sentences are affirmed.

[30] The appeal against sentence is, therefore, allowed. On count three of the indictment which charged the appellant with robbery with aggravation, the sentence of 15 years imprisonment is quashed and set aside, and a sentence of eight years imprisonment is substituted therefor. On count seven of the indictment which charged the appellant with assault, the sentence of three years imprisonment is quashed and set aside, and a sentence of nine months imprisonment substituted therefor. The said sentences are to be reckoned as having commenced on 27 April 2012, the date they were originally imposed and are to run concurrently.