[2017] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

SITTING IN LUCEA IN THE PARISH OF HANOVER

SUPREME COURT CRIMINAL APPEAL NO 123/2010

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

LAMOYE PAUL v R

Trevor Ho-Lyn for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Stephen Smith for the Crown

4 and 8 December 2017

MCDONALD-BISHOP JA

[1] This an appeal brought by Mr Lamoye Paul, the appellant, in respect of sentences imposed on him on 2 December 2010 in the High Court Division of the Regional Gun Court (Western), holden at Montego Bay in the parish of St James.

[2] The appellant was jointly charged with another on an indictment containing three counts: the first count charged them with the offence of illegal possession of firearm; the second count, with burglary; and the third count, robbery with aggravation.

[3] Upon his arraignment, the appellant pleaded not guilty to burglary, but guilty to illegal possession of firearm and robbery with aggravation. The guilty pleas were accepted and the prosecution offered no evidence in relation to the charge of burglary. A formal verdict of not guilty was entered for burglary and the appellant was discharged on that count of the indictment.

[4] The appellant was sentenced to 15 years' imprisonment for illegal possession of firearm and eight years' imprisonment for robbery with aggravation.

[5] Inexplicably, the transcript of the proceedings does not reveal the deep facts on which the pleas of guilty, and the prosecution's decision to offer no evidence for the burglary, were based. It does appear that there was an omission on the part of the court to have the facts outlined by the prosecuting counsel and agreed by the defence. This court is, therefore, placed at a grave disadvantage in treating with the appeal given the factual deficiencies in the circumstances surrounding the charges brought against the appellant and to which he had pleaded guilty.

[6] The only indication of the nature of the allegations brought against the appellant, and to which he was pleaded, is that gleaned from the particulars of the offence, which collectively indicate the shape of the prosecution's case against the appellant on those two counts. The bare facts are that on 28 July 2010, in the parish of Hanover, the appellant, in the company of another (who was charged with him), and armed with a firearm, robbed the complainant of her property, which included $3,500.00 in cash, a $100.00 Digicel phone card and groceries valued at $1,500.00.

[7] Given the fact that no evidence was offered against the appellant for burglary and given that the basis for doing so is not revealed, the specific facts that would go in support of the charge of burglary have been ignored for the purposes of the appeal. This would include allegations that the incident occurred during the night and that the appellant broke and entered the complainant's dwelling house. So, only the facts constituting the two offences for which he has been convicted have formed the factual background of our review.

[8] It is also considered necessary to say from the outset that in the interests of justice, any disadvantage to the appellant that could result from the absence of the material facts relevant to the issue of his sentencing has not been treated with in any way adverse to his interest or to his detriment. The omission of the facts enures to his benefit in the consideration of this appeal.

[9] In his application for leave to appeal, the appellant had filed a single ground of appeal. He contended that the sentence of 15 years, imposed on him for illegal possession of firearm, is harsh and excessive, having regard to the evidence. A single judge of this court, on reviewing his application for leave, granted him leave for that ground to be explored on the basis that the learned judge failed to demonstrate that she had correctly applied the applicable sentencing principles in accordance with the relevant authorities and erroneously formed the view that she was bound to impose 15 years as the statutory minimum sentence for the offence of illegal possession of firearm. The single judge of appeal further opined that given the nature and seriousness of the offences, and the particular circumstances of the appellant, being a

person without previous convictions who had pleaded guilty, it seems arguable that the sentence imposed, especially for illegal possession of firearm, is manifestly excessive.

Ground of appeal

[10] The appellant, having been informed by the ruling of the single judge, sought and obtained leave to abandon the original ground of appeal and to argue a solitary supplementary ground. That ground reads:

> "1. The Learned Trial Judge (LTJ) failed in her consideration of the appropriate sentence to balance the mitigating factors against the aggravating factors and did not consider the usual sentences imposed for offences such as the one before her as she mistakenly assumed that the offences for which the Appellant was charged carried a minimum mandatory sentence. Accordingly absolutely no benefit was afforded the Appellant for his guilty plea. In all the circumstances the sentences were manifestly excessive."

The issues

[11] There are two discrete issues that have arisen from the single ground of appeal; they are:

> (1) whether the learned judge erred in law when she considered herself bound by a statutory minimum sentence and as a result failed to consider the aggravating and mitigating factors before sentencing the appellant; and

(2) whether the sentences imposed by the learned judge were manifestly excessive as a result of her misdirection in imposing a statutory minimum sentence.

[12] Although only two issues have been identified as arising from the supplemental ground of appeal, we have seen it necessary to briefly examine two other relevant issues raised by Mr Ho-Lyn, during the course of his submissions. They are:

(3) the failure of the learned judge to procure a social enquiry and a psychiatric report (additional pre-sentence reports) prior to sentencing the appellant; and

(4) whether the appellant is entitled to an order for his immediate release from custody.

Issue (1)

Whether the learned trial judge misdirected herself in sentencing the appellant when she considered herself bound by a statutory minimum sentence in relation to the offence of illegal possession of firearm

[13] We find that there is merit in this aspect of the appellant's ground of appeal and that the Crown has rightly conceded. The learned judge was wrong to impose a sentence of 15 years on the sole basis that she was constrained to do so by statute, which has prescribed a minimum sentence for that offence. In doing so, the learned judge failed to give any consideration to the established approach to sentencing and the applicable principles enunciated in the various authorities from this court. See, for instance, **Regina v Sydney Beckford and Davis Lewis** (1980) 17 JLR 202 and more recently, **Meisha Clement v R** [2016] JMCA Crim 26 (although, admittedly, the

learned judge would not have had the benefit of this later decision at the time of the sentencing hearing).

[14] The appellant was charged for illegal possession of a firearm contrary to section 20(1)(b) of the Firearms Act ('the Act'). The prescribed maximum penalty for that offence, which is set out in section 20(4) of the Act, is life imprisonment. There is no provision for a minimum sentence. Therefore, the learned judge had the discretion to impose a sentence below 15 years.

[15] Section 25(3) of the Act, which prescribes a minimum sentence of 15 years for offences falling within that section, does not apply to the offence of illegal possession of firearm with which the appellant was charged. The penalty under section 25 has no applicability to section 20, as the sections have created separate and distinct offences, and the prosecution did not proffer a charge under section 25, which they could have done (see **R v Henry Clarke** (1984) 21 JLR 75).

[16] The learned judge, therefore, erred in law and in principle, when she considered herself bound to apply a statutory minimum sentence to the section 20 offence, and failed to adhere to the correct approach in sentencing the appellant.

Issue (2)

Whether the sentences imposed by the learned judge are manifestly excessive as a result of the error in applying the statutory minimum sentence

[17] After considering counsel's helpful submissions, the applicable law, the circumstances of the case as well as the circumstances of the offender, we conclude,

that the sentence of 15 years, imposed on the appellant for illegal possession of the firearm, is manifestly excessive. We, however, find, as submitted by the Crown, that the sentence of eight years imposed for robbery with aggravation cannot be said to be manifestly excessive.

a. *Illegal possession of firearm*

[18] In respect of illegal possession of firearm, we have concluded that the sentence is manifestly excessive after an application of the relevant principles of sentencing. The learned judge was required to choose a starting point and a range for the offence, which she did not. Bearing in mind that this is not a case that involved the possession of a firearm simpliciter, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate. Having borne in mind the deficiencies in the recording of the facts of this case, as to the type of firearm involved and whether the appellant was the perpetrator in actual possession, as distinct from being in the company of a person in possession at the time of the commission of the offence, it is our view that a starting point of 12 years would be appropriate.

[19] This now takes us to the aggravating features, which would cause an upward adjustment to the starting point. Given the paucity of facts regarding the circumstances surrounding the incident, we have found no aggravating feature on the facts, which would not be inherent in the commission of the particular offence. The only aggravating feature that is identified by the court, given the nature of the offences charged, is the prevalence of these offences within the jurisdiction.

[20] In terms of mitigating features, Mr Ho-Lyn pointed to: (a) the age of the appellant (20 at the time); (b) that the appellant had no previous convictions; and (c) that a firearm was recovered by the police from the co-accused and, therefore, taken from the streets. We attach no weight to the age of this appellant as a mitigating factor within the context of the Gun Court Act. No allowance is also made for the fact that a firearm was recovered. This is so, as there is no evidence that a firearm was recovered from the appellant himself and there is also no evidence that he assisted the police in the recovery of any firearm connected to the offences for which he was charged on the indictment before the sentencing judge. The fact that he has no previous conviction is, of course, taken into account in his favour as a significant mitigating factor. This mitigating factor places the appropriate provisional sentence (sentence that would have been imposed had he gone to trial) to be 10 years' imprisonment.

[21] The appellant is, however, entitled to a reduction in the sentence on account of his guilty plea. Mr Ho-Lyn argued for a 50% discount, in accordance with section 42D of the Criminal Justice (Administration) Act. We however agree with the submissions of Mr Smith, advanced on behalf of the Crown (upon the invitation of the court) that the Criminal Justice (Administration) Act is not applicable to this case. The appellant was sentenced before the passage of the amendment to that Act, which does not have retrospective effect. In keeping with the common law position that applies, it is our view that a one-third discount for the guilty plea is appropriate and reasonable. We conclude, therefore, that a sentence of seven years' imprisonment is reasonable and

proportionate for the offence of illegal possession of firearm on account of the guilty plea.

b. Robbery with aggravation

[22] The appellant was sentenced to eight years' imprisonment for robbery with aggravation. The usual starting point for that offence is 12 years. However, for a robbery executed with a firearm, and also by more than one perpetrator, the starting point must be higher. In this case, where there were at least two perpetrators, the range within which the sentence should fall should be anywhere between 15-17 years. In this case, we would use a sentence of 15 years as the starting point.

[23] As the use of the firearm and the number of perpetrators have already been taken into account in setting the starting point, these factors will not be utilised as aggravating features. This would amount to double counting.

[24] As mitigating features, we have taken into account the fact that the appellant has no previous convictions and there is nothing to clearly suggest, given the paucity of facts before this court, that he was the one in actual possession of the firearm that was used in the robbery. Taking these considerations into account, the sentence would fall within a range of between 11-13 years' imprisonment. We would choose, as a provisional sentence, 12 years' imprisonment. After applying a further one-third reduction on account of the guilty plea, the appropriate sentence would be in the region of eight years.

[25] It is evident that that the eight years' imprisonment imposed on the appellant by the learned judge for robbery with aggravation is not unreasonable or disproportionate in all the circumstances. Accordingly, the contention of the appellant that the sentence of eight years is manifestly excessive is not accepted. There is, therefore, no basis in law, for the court to disturb the sentence of eight years' imprisonment that the learned judge had imposed on the appellant for robbery with aggravation.

Issue (3)

Failure of the learned judge to obtain additional pre-sentence reports

[26] Mr Ho-Lyn, during the course of his submissions, had raised the issue that the learned judge ought to have had a social enquiry report to assess the background of the offence and of the offender as well as a psychiatric report as to the probability of the rehabilitation of the offender. This was not formulated as a ground of appeal, but given the relevance of the complaint to the issue of sentencing, in general, we found it appropriate to pay brief attention to the arguments of counsel.

[27] While it is accepted that reliance on pre-sentence reports is a good sentencing practice, as established by this court in several authorities, there is no statutory requirement that makes it obligatory on a sentencing judge to obtain social enquiry and psychiatric reports in all cases. It is a matter for the discretion of the sentencing judge, given all the circumstances of the case and of the offender.

[28] In the instant case, the learned judge had the benefit of the usual antecedent report and there was no request for any additional report by counsel representing the

appellant at the hearing. In the absence of any request for those special pre-sentencing reports during the sentencing hearing, it cannot be said that the learned judge was obliged to obtain them, as contended by Mr Ho-Lyn. In fact, Mr Ho-Lyn has not demonstrated, and we have failed to see, the material benefit that would accrue to the appellant, if such reports were to be obtained. So, even though this court has the authority to request the reports in question, we do not find it necessary to do so in the circumstances of this case and of the offender, because in our view, they would not be of any benefit to the appellant. See dicta of this court in **Michael Evans v R** [2015] JMCA Crim 33, paragraph [9] and **Sylburn Lewis v R** [2016] JMCA Crim 30, paragraphs [15] and [16].

[29] It cannot be said that the absence of a social enquiry and/or psychiatric report in this case has resulted in prejudice to the appellant or is such as to lead to miscarriage of justice. Therefore, the failure of the learned judge to obtain those reports does not render the sentences manifestly excessive or otherwise inappropriate.

Issue (4)

Whether an order should be made for the immediate release of the appellant

[30] Mr Ho-Lyn also contended that given the sentences that ought properly to have been imposed on the appellant, and the time he has already spent in custody, the appellant has already exceeded his reasonable sentence. In the circumstances, Mr Ho-Lyn submitted that the appellant is entitled to immediate release. The question of whether the appellant is entitled to immediate release is one for the prison authorities. We would only ensure that the time spent in custody, between the filing of his

application for leave to appeal, and the hearing of the appeal, is taken into account and credited to him. Accordingly, no order will be made by this court for the appellant's immediate release. Instead, the sentences are to be reckoned as having commenced on the date of imposition by the learned judge, being 2 December 2010.

Order

[31] The order of the court shall be:

(1) The appeal is allowed in part.

(2) The sentence of 15 years' imprisonment for illegal possession of firearm is quashed and the sentence of seven years' imprisonment at hard labour is substituted therefor.

(3) The sentence of eight years' imprisonment at hard labour for robbery with aggravation is affirmed.

(4) The sentences are to be reckoned as having commenced on 2 December 2010 and are to run concurrently.