[2021] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 66/2016

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

KERONE MORRIS v R

Ms Jacqueline Cummings instructed by Archer, Cummings & Company for the appellant

Adley Duncan and Ms Vanessa Campbell for the Crown

3 and 12 March 2021

BROOKS P

[1] On 5 June 2013, Mr Phillip Williams was riding a bicycle along Camperdown Road in the parish of Kingston when the appellant, Mr Kerone Morris, used a firearm to fire four shots at him, injuring Mr Williams' left leg. Both were under the age of 18 years at the time of the offence. They had had a fight a month before the shooting.

[2] Mr Morris was tried and convicted by a judge, sitting alone, in the High Court Division of the Gun Court, for the offences of illegal possession of firearm and wounding with intent. On 10 June 2016, the learned judge sentenced him to 15 years'

imprisonment at hard labour for each of the offences. That was the minimum sentence that she could have imposed for the offence of wounding with intent.

[3] The learned judge could have issued a certificate, pursuant to section 42K of the Criminal Justice (Administration) Act (as amended in 2015) (the CJAA), to the effect that, were she not so bound, she would have imposed a lesser sentence (the certificate). She did not. She, however, orally indicated during sentencing that had she not been bound to impose that mandatory minimum sentence, she would have credited Mr Morris with the period of 18 months that, she calculated, he had spent on remand.

[4] A single judge of this court refused Mr Morris' application for leave to appeal against his conviction and the mandatory sentence, but granted him leave to appeal in respect of the sentence in respect of the illegal possession of firearm. He, however, has renewed his application for leave to appeal against his conviction and the mandatory sentence.

[5] In this appeal, Ms Cummings, for Mr Morris, informed the court that he no longer contests his conviction. She argued, however, that the learned judge erred in not granting the certificate and that this court should remedy the error. Learned counsel also argued that this court could take the learned judge's statements during sentencing, as an indication that had she properly apprised herself of the legislation, she would have issued the certificate. Ms Cummings submitted that, even in the absence of a certificate, this court has the jurisdiction to reduce even a mandatory minimum sentence by the time spent on remand. She relied, for support, on a number of cases

including **Jeffrey Ray Burton v The Queen and Kemar Anderson Nurse v The Queen** [2014] CCJ 6 (AJ).

[6] Learned counsel also submitted that the sentence for the offence of illegal possession offence is also manifestly excessive in the circumstances, particularly bearing in mind Mr Morris' age at the time of its commission. She asked the court to set aside the sentences and reduce them to accord with the circumstances of the case.

[7] Ms Campbell, for the Crown, argued that the sentences were appropriate as:

a. the sentence for wounding with intent was the minimum sentence that the learned judge could have imposed; and

b. the sentence for illegal possession of firearm fell within the normal range of sentences for the offence.

Learned counsel, however, argued that this court could reduce the sentence in respect of the illegal possession of firearm, by the time spent on remand. Included among the cases cited by Ms Campbell are **Orville Campbell v R** [2014] JMCA Crim 14 and **Carey Scarlett v R** [2018] JMCA Crim 40.

[8] Before commencing a detailed assessment of the submissions, it is convenient, at this stage to reject, as incorrect, Ms Cummings' submission that, even in the absence of a certificate, this court is entitled to reduce a statutorily imposed minimum sentence, by the time spent on remand. The error was pointed out to learned counsel during the course of argument by reference to **Tafari Morrison v R** [2020] JMCA Crim 34.

However, the position was clearly stated by Morrison P in **Paul Haughton v R** [2019] JMCA Crim 29. The learned President said at paragraph [50]:

> "But the issues of the period spent on remand by the appellant before sentence and the appellant's eligibility for parole remain outstanding. On the first issue, it 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. 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. This factor serves to distinguish this case from **Ewin Harriott v R** [[2018] JMCA Crim 22], 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**…." (Emphasis supplied)

The principle of giving full credit for time spent on remand, as established in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), and followed in **Jeffrey Ray Burton v The Queen and Kemar Anderson Nurse v The Queen**, cannot override the clear contrary intention of this country's Parliament.

[9] The fact that, by this court's calculation, Mr Morris spent 19 months on remand, does not allow, without a certificate, for a reduction of the statutory minimum. There is also no room for the reduction of the statutory minimum sentence merely because Mr Morris was a minor at the time of the offence. In addition, bearing in mind the premeditated and deliberate nature of this shooting, it cannot be said that the mandatory sentence was disproportionate to the offence (see **Tafari Morrison v R**).

[10] Having disposed of that misconception in Ms Cummings' submission, the other aspects of the submissions will be discussed.

[11] It is important to note, as a precursor to the analysis, that this court will defer to the indications of a sentencing judge, if the judge did not err in principle. It therefore means that this court will only intervene where the sentence is excessive or so inadequate as to demonstrate that the judge applied the wrong principles (see **R v Alpha Green** (1969) 11 JLR 283).

[12] In this case, the learned judge did not err in stating that she was obliged to impose the sentence of 15 years in respect of the offence of wounding with intent, since Mr Morris used a firearm in its commission. Section 20 of the Offences against the Person Act stipulates a mandatory minimum sentence of 15 years in respect of the offence of wounding with intent, with the use of a firearm. She did err, however, in two respects:

a. despite her inclination toward a lower sentence, she did not issue the certificate that section 42K of the CJAA allows; and

b. she seemed to have considered that she was bound by legislation to impose a mandatory sentence in respect of the offence of illegal possession of firearm.

[13] In respect of the offence of wounding with intent, it is important at this stage to quote section 42K of the CJAA. It states:

"(1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall–

(a) sentence the defendant to the prescribed minimum penalty; and

(b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.

(2) A certificate issued to a defendant under subsection (1) shall outline the following namely–

(a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;

(b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and

(c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may–

(a) impose on the defendant a sentence that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[14] Bearing those statutory provisions in mind, it is also important to note how the relevant part of the learned judge's reasoning compares to them. She said, in part, at pages 160-162 of the transcript:

> "…As I said those are two serious offences and I don't know if your attorney did not explain to you that there is what is called a mandatory minimum for these offences, in other words, the Court cannot go below that in terms of sentencing. **I will, however, point out to your attorney that there is a section now under the Criminal Justice Administration Amended** [sic] **Act that does allow for certain things to be done in relation to that**.
>
> In other words, there can be direct appeal, if for nothing else alone, in terms of the sentence, the mandatory minimum. And let me say this, that normally sentencing guidelines say that the Court is to take into consideration the time what [sic] you would have already spent in custody, but Mr. Peterkin says that it is one and a half year, I would probably need a proper calculation. He has been in custody since when?
>
> MR PETERKIN: Since the 18th of November 2014, M'Lady.
>
> HER LADYSHIP: So I guess we could say one and a half year. The difficult [sic], however, is that **the Court is not supposed to reduce the sentence for a mandatory minimum, even by the time that the person has spent in custody**. I will make a comment about that, but in passing sentence on you, as I said, there are very serious offences, you are

young, you have a decent Antecedent, it does not suggest to me that you are involved in criminality in general in the area. You would have been about 17 at the time. I see where even when you were expelled from St. Georges College that you went and did some certificate in Graphic Designs and you were working as a handyman, so these are all pointers to the fact that rehabilitation is strong including what the probation officer has told the Court about your reaction to being under their jurisdiction as a juvenile that it does show that you can be redeemed.

I am going to make one further comment in terms of mitigation, although there is not much that I can do, and this is not a strong point, is just something that I observed during the trial, that the complainant was shot in his leg which would indicate to me that there was no serious – you did not shoot to kill, although shooting someone in the leg can be deadly. I am not putting too much on it, I am just saying that is a point that I also looked at, that the man was shot in his leg.

Saying all that to say, sir, my intention would have been to reduce the sentence by the time that you have already spent in custody, but I cannot. I am not going to make the sentence any higher, although it is wounding with intent and it is with a firearm, but bearing in mind all that I have said, including the fact that you have spent one year and a half in custody and I cannot [treat] with it based on our Law, the sentence of the court on each count –

MR PETERKIN: I think Your Ladyship can also recommend…

HER LADYSHIP: Yes, Mr Peterkin, allow me to finish – is that you will be sent to prison for fifteen (15) years on each count. The sentences are to run concurrently. **The Law – and I am sorry I don't have it with me, I thought I had put it with my stuff, the particular section of the Criminal Justice Amended** [sic] **Act, does not allow me to say – I am trying to remember the exact words – as to**

> **whether or not I could recommend that a lesser time be spent. The most that I can say is that I would have reduced the fifteen (15) years by one and a half year. I would have reduced it, bearing in mind the time you have already been in custody but I cannot, it is on the record and so this is something that can be pursued**." (Emphasis supplied)

[15] The learned judge erred, therefore, in not realising that she was required to issue a certificate if she was of the view that the sentence should have been less severe. She was entitled to issue a certificate, which placed in writing her opinion as to the appropriate sentence. It is plain that if she had had her copy of the statute with her, at the time, she would have complied with the provisions of section 42K of the CJAA.

[16] The certificate need not have been delivered in court at that time. In **Paul Haughton v R**, a similar situation existed. The sentencing judge, in that case, made comments consistent with section 42K of the CJAA but did not, at that time, issue an executed certificate. The executed certificate was issued after the appeal had been filed, and in fact, only three days before the appeal was heard. There was no complaint about this court using it.

[17] One view of the situation in this case is that the learned judge's error, in failing to issue the certificate, cannot now be cured. It probably would be correct to say that a late certificate cannot properly be issued in this case, because the appeal has already been heard. No definite ruling is made in that regard. On those premises, the argument

would be that without a certificate, this court cannot interfere with the sentence in respect of the offence of wounding with intent.

[18] Another view is that it would be a miscarriage of justice for the court's hands to be tied in these unusual circumstances, even in the face of the learned judge's error. There would be a direct impact to the liberty of the subject, which is contrary to the learned judge's intentions and, contrary to the spirit of section 42K of the CJAA. The provisions of section 13(1)(c) of the Judicature (Appellate Jurisdiciton) Act (JAJA) are, however, to be borne in mind. The section gives a convicted person leave to appeal in certain instances including:

> "with the leave of the Court of Appeal against the sentence passed on his conviction **unless the sentence is one fixed by law**." (Emphasis supplied)

[19] It is accepted that the sentence in this case is one fixed by law, nonetheless, the appellate jurisdiction is designed to cure errors made at first instance. Where the error is in respect of sentence, the court may consider the case as provided by section 14(3) of the JAJA:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

[20] On the same date that the CJAA was amended to include section 42K, section 13 of the JAJA was amended to include subsections (1A) and (1B). They provide for

dealing with appeals from mandatory minimum sentences imposed by statute. The subections state:

> "(1A) Notwithstanding subsection (1)(c), a person who is convicted on indictment in the Supreme 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 was fixed by law, in the event that the person has been sentenced to a prescribed minimum penalty in the circumstances provided in –
>
> (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
>
> (b) section 42L of the Criminal Justice [(]Administration[)] Act.
>
> (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."

[21] It is also of significance that there existed, at the time that Mr Morris was sentenced, no form of certificate that had been approved for use in respect of section 42K of the CJAA. In fact, although various judges formulated their own versions of a certificate, one was not approved by the Rules Committee of the Supreme Court until December 2020; long after Mr Morris was sentenced.

[22] In the unusual circumstances of this case, the court should act in the spirit of the legislation and the inclination of the learned judge. The justice of the case demands it. Although the learned judge did not issue a certificate, she can properly be taken as

having certified that she would have imposed a sentence that would have been less than the statutory minimum. Her reasons, as she expressed them, would be:

a. Mr Morris' youth and good antecedents

b. that he did not appear to have intended to kill his victim (although she did not place much weight on this factor); and

c. the fact that he has spent time on remand.

She also certified that the reduced sentence that she would have imposed would be 18 months less than the statutory minimum.

[23] If that "certification" is accepted, it is also important to note that although section 42K of the CJAA contemplates that the certificate is to be placed before a single judge of this court, it may be considered by the court. This was done in **Paul Haughton v R** (see paragraph [11]).

[24] Based on that "certification" in the present case, the court may adjust the sentence in accordance with sections 13(1A) and 14(3). The adjustment would accord with the learned judge's reasoning in giving Mr Morris credit for the time that he spent on remand. She calculated that period to be 18 months, but it was just eight days shy of 19 months. Accordingly, this court will apply a credit of 19 months for time Mr Morris spent on remand in respect of the wounding with intent.

[25] The learned judge's error in respect of the approach to the offence of illegal possession of firearm also requires the court to consider that sentence anew. The

correct approach is now well known. In **Daniel Roulston v R** [2018] JMCA Crim 20, McDonald Bishop JA, at paragraph [17], summarised the current methodology to be applied to sentencing:

> "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)."

[26] The normal range for sentencing for illegal possession of firearm, pursuant to the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines), is seven to 15 years, with a starting point of 10 years (see Appendix A, page A-15). A sentence at the top of the range is inappropriate in this case as this was a single firearm and not an automatic weapon. The usual starting point of 10 years will be used in this case. The aggravating features in this case are that it was used on a public road in broad daylight to commit a serious offence. Five years must be added to his sentence for these aggravating factors. The mitigating factors included:

> a. Mr Morris' youth;
>
> b. his antecedent report, which the learned judge found to be "decent"; and

c. the fact that, technically, this was his first offence (an aspect of the Social Enquiry Report was properly disregarded by the learned judge).

Five years will be deducted for these mitigating factors.

[27] In light of the foregoing, 10 years would be the appropriate sentence in this case, for this offence. Mr Morris was on remand for almost 19 months (from 18 November 2014 to 10 June 2016)[1]. He is entitled to full credit for that period, in accordance with the Sentencing Guidelines. The result is a sentence of eight years and five months' imprisonment for illegal possession of firearm.

Conclusion

[28] Having found Mr Morris guilty on the indictment, the learned judge imposed the mandatory minimum sentence of 15 years for the offence of wounding with intent. She was of the view that he should be afforded credit for the time that he spent on remand but erred in failing to issue a certificate to that effect. This court could cure that error in these peculiar circumstances.

[29] The learned judge also erred in taking the view that the mandatory minimum sentence also applied to the offence of illegal possession of firearm. This court can also cure that error. In assessing that sentence, it is found that it is manifestly excessive in

[1] Page 160 of the transcript

that, it is, without a valid explanation, at the top of the usual range. It also does not include a credit for the time that Mr Morris spent on remand.

[30] Accordingly, the sentences imposed by the learned judge are set aside. In substitution therefor a sentence of 13 years and five month's imprisonment is imposed in respect of the offence of wounding with intent, and for the offence of illegal possession of firearm a sentence of eight years and five months' imprisonment is imposed. The sentences should run concurrently and be reckoned as having commenced on 10 June 2016.

[31] The orders are:

1. The application for leave to appeal against conviction is refused.
2. The application for leave to appeal against the sentence in respect of wounding with intent is granted, and the hearing of the application is treated as the hearing of the appeal.
3. The appeals against the sentences of wounding with intent and illegal possession of firearm are allowed.
4. The sentences imposed by the learned judge are set aside and substituted therefor are the following sentences:

(a) 13 years and five months' imprisonment at hard labour for the offence of wounding with intent.

(b) eight years and five months' imprisonment at hard labour for the offence of illegal possession of firearm.

5. The sentences are to run concurrently and are to be reckoned as having commenced on 10 June 2016.