[2021] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00063

RAFFEL RATTRAY v R

Robert Fletcher for the appellant

Orrett Brown and Miss Renelle Morgan for the Crown

14 and 16 December 2021

G FRASER JA (AG)

Background

[1] Mr Raffel Rattray ('the appellant') was charged on an indictment containing five counts: illegal possession of firearm (counts 1 and 4), shooting with intent (count 2), assault (count 3), and illegal possession of firearm (count 5).

[2] It was the prosecution's case that on 10 December 2016, at about 8:45 am, in the parish of Portland, the appellant entered the yard of Mr Rohan Johnson ('the complainant'). Upon entering, the appellant lifted his shirt and displayed a handgun located to the side of his waist. He held on to the gun handle and said "a licence, dis a licence firearm, carry back mi board because yuh a trespass". There was then an exchange in dialogue between the appellant and the complainant. The appellant removed the gun from his waist and pointed it in the direction of the complainant and uttered "put back mi board dem now, yuh a delay". The complainant enquired from him whether he was going to shoot him, to which the appellant responded, "stop delay man, mi want

dem move". The complainant walked away and later made a report to a police officer who instructed him to make an official report, which he did on 15 December 2016. The police went to the premises of the appellant, informed him of the report made against him and cautioned him. The appellant led the police to a section of his yard where the police retrieved a firearm containing seven rounds of ammunition.

[3] On 18 June 2019, before the circuit court, holden at Port Antonio in the parish of Portland, the appellant pleaded not guilty with respect to the offence of shooting with intent (count 2), but pleaded guilty on all the other counts. He was sentenced on 28 June 2019, to four years' imprisonment at hard labour on each of the counts relating to the offences of illegal possession of firearm and illegal possession of ammunition, and three years' imprisonment at hard labour for the offence of assault. The sentences were ordered to run concurrently.

[4] Dissatisfied with his sentences, the appellant applied for, and was granted leave by a single judge of this court, to appeal.

The appeal

[5] With the leave of this court, the appellant abandoned his original grounds of appeal (which were premised on misidentification by the witness, lack of evidence, unfair trial and miscarriage of justice), and argued, instead, one supplemental ground of appeal, that "[t]he sentence is manifestly excessive".

[6] Mr Fletcher, counsel for the appellant, provided written and oral submissions wherein he argued that "manifestly excessive means that a judge has taken things into account which ought not to be taken into account or has not taken some things into account or given weight to things which ought to have been given weight or taken into account It also may have a component relating to whether the terms of years or other sentence is out of sync with sentences given in similar matters". He submitted that in the context of this case, the sentencing was irregular and that the learned sentencing judge did not give enough weight to certain factors. In his written submissions counsel had

particularly argued that sufficient consideration was not given to the mitigating factors, such as the fact that the appellant had no previous convictions, he was seen as hard working and gainfully employed throughout, he kept to himself, he was provoked, no injury was caused to the complainant, and that he cooperated with the police when he pointed out where the firearm was located. However, counsel had tempered his complaints in his oral submission and acknowledged that the learned sentencing judge had alluded to all but one of these factors in her consideration of sentencing. The specific factor that she failed to enumerate, he said, was that the appellant had cooperated with the police and assisted in the recovery of the firearm.

[7] Counsel further contended that the learned sentencing judge made brief comments on the community reports that the appellant was antisocial, though no examples were given, and that the appellant was said to be "hanging out with the wrong crowd that was outside of Jamaica". Counsel submitted that this was "unverifiable opinion and speculation".

[8] In the end, counsel submitted that more credit could have been given for the mitigating factors and that it is difficult to work out where the learned sentencing judge placed weight in arriving at a satisfactory sentence

[9] In response, Mr Brown, counsel for the Crown, submitted that the sentences on the counts relating to the offences of illegal possession of firearm and illegal possession of ammunition are not manifestly excessive. He argued that the learned sentencing judge had the accepted principles in mind when she sentenced the appellant, and considered the usual starting point, the mitigating factors, the aggravating factors, and the effect of the guilty plea. He contended that the usual starting point for the offences of illegal possession of firearm and illegal possession of ammunition is 10 years, and that the learned sentencing judge employed this starting point. This was reduced by 50%, to five years, on account of the appellant's guilty plea, and further discounted by another year, to four years, based on the mitigating factors identified by the learned sentencing judge. Counsel reasoned that with the normal range of sentence for offences of this nature being

seven – 15 years, as stated in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), the sentences imposed against the appellant fell outside the lower end of this range. On this basis, he submitted that the appellant's contention that the sentences were manifestly excessive is unsustainable.

[10] With respect to the sentence imposed on the appellant for the offence of assault, counsel acknowledged that the learned sentencing judge erred in imposing a sentence of three years' imprisonment at hard labour. He pointed out that the maximum term of imprisonment applicable to assault at common law is one year, and as such, a sentence of three years was manifestly excessive.

[11] In considering whether a sentence is manifestly excessive, we are guided by the dictum of Morrison P in **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**'), where at paras. [42] and [43] he stated:

> "[42] …in considering whether the sentence imposed by the judge in this case is manifestly excessive, as Mr Mitchell contended that it is, we remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R** [(1969) 11 JLR 283, 284], in which the court adopted the following statement of principle by Hilbery J in **R v Ball** [(1951) 35 Cr App R 164, 165]:
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> > '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 this Court will intervene.'
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> [43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[12] Accordingly, based on the single supplemental ground of appeal argued on behalf of the appellant, this court's concern is to determine:

> (i) whether the sentences imposed by the learned sentencing judge were arrived at by applying the usual, known and accepted principles of sentencing; and
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> (ii) whether the said sentences fall within the range of sentences which the court is empowered to impose for the particular offence, and which is usually given for like offences in like circumstances.

[13] With respect to the methodology to be employed by judges in the sentencing process, McDonald-Bishop JA, in **Daniel Roulston v R** [2018] JMCA Crim 20, having considered the amalgam of principles provided in **Meisha Clement**, and the Sentencing Guidelines, 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:
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> a. identify the sentence range;
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> 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)."

[14] In the instant case, the learned sentencing judge did not identify the sentencing range for the offences she had to assess. However, she identified the usual starting point as being "in the region of some ten years". This is the usual starting point recommended by the Sentencing Guidelines with respect to the offences of illegal possession of firearm and illegal possession of ammunition. Her failure to first identify the sentencing range with respect to these offences was, therefore, not detrimental.

[15] As it relates to the learned judge's consideration of any relevant mitigating and aggravating factors, she clearly identified what she considered to be relevant mitigating factors. Among them were the fact that the appellant pleaded guilty, that he had no previous convictions, that there was no injury caused to the complainant, that there were positive aspects of the social enquiry report, that he was gainfully employed throughout, and that he was provoked (though she correctly acknowledged that this was not a defence to charges against him). As for the aggravating factors, she noted that the offence is quite serious, and that he took the law into his own hands because he thought the complainant had done him wrong. She also stated that she took into account the negative aspects of the social enquiry report, all that his attorney-at-law had urged on her, and the fact that the complainant was obviously very shocked about what took place and no doubt must have gone through some trauma.

[16] Having assessed the learned sentencing judge's remarks and the final sentences she imposed for the offences of illegal possession of firearm and illegal possession of

ammunition, it appears that she deducted one year based on her assessment of the mitigating factors juxtaposed with the aggravating factors. We see no error in principle applied by the learned sentencing judge in her assessment of the mitigating and aggravating factors. Neither do we see any evidence that she failed to give enough weight to the mitigating features.

[17] With respect to the learned sentencing judge's treatment of the appellant's guilty plea, the appellant, prudently raised no issue regarding the reduction applied. He was correct in not doing so as the learned sentencing judge had reduced his sentence by 50%, which is the maximum reduction allowed pursuant to section 42D(2)(a) of the Criminal Justice (Administration) Act, as amended in 2015. There was also no issue regarding any giving of credit for time spent in custody as the appellant was on bail prior to being sentenced.

[18] We must note that based on the Sentencing Guidelines, the normal range of sentence for the offences of illegal possession of firearm and illegal possession of ammunition is seven – 15 years. Therefore, the sentences of four years' imprisonment imposed on the appellant, by the learned sentencing judge, for these offences falls outside the lower end of the normal range.

[19] Having found that the learned sentencing judge did not erred in the principles she applied in her assessment of the sentences imposed on the appellant for the offences of illegal possession of firearm (counts 1 and 4) and illegal possession of ammunition (count 5), and further having found that the sentences imposed with regard to these offences are outside than the lower end of the normal range, we see no basis on which it can be successfully argued that the sentences, with respect to these offences, are manifestly excessive.

[20] However, as it relates to the offence of assault, there is nothing from the learned sentencing judge's remarks which indicates that she identified a separate sentencing range and starting point for this offence. On a whole, her assessment of the sentence

with respect to this offence appears to have been rolled up with her assessment of the offences of illegal possession of firearm and illegal possession of ammunition. In this regard, the learned judge would have erred in her assessment of the sentence imposed for the offence of assault.

[21] Further, section 43 of the Offences Against the Person Act states that:

> "43. …whosoever shall be convicted upon an indictment for a common assault shall be liable, to be imprisoned for a term not exceeding one year, with or without hard labour."

[22] The learned sentencing judge's imposition of three years' imprisonment for the offence of assault was therefore two years in excess of the maximum sentence imposed by statute. Accordingly, the sentence of three years' imprisonment at hard labour, with respect to the offence of assault, was without jurisdiction.

[23] Although there was no complaint in relation to count two of the indictment and no appeal was raised in relation to it, it would be remiss of us if we were to ignore the absence of any satisfactory determination of that count of the indictment which charged the appellant with the offence of shooting with intent. Significantly, on arraignment the appellant had pleaded "not guilty" to this count of the indictment. However, neither the transcript of proceedings, nor any endorsement on the indictment, has clearly indicated how the prosecution had dealt with this issue. The usual indication would have been an announcement by the prosecutor as to their intention of either proceeding to trial on that count or an intention to offer no evidence on it. If the latter intention is indicated to the trial court, then a proper endorsement of the indictment would be to register the not guilty plea, to register the prosecution's intention to abandon the charge, and finally to register an acquittal in relation to such a count.

[24] In the light of our conclusions, the order of the court is as follows:

(1) The appeal against sentences is allowed in part.

(2) The sentences of four years' imprisonment at hard labour with respect to the offences of illegal possession of firearm (counts 1 and 4), and illegal possession of ammunition (count 5) are affirmed.

(3) The sentence of three years' imprisonment with respect to the offence of assault (count 3) is quashed and a sentence of one year imprisonment at hard labour is substituted therefor.

(4) The sentences are to be reckoned as having commenced on 28 June 2019, and are to run concurrently.