[2022] JMCA Crim 44

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00019

LAVAR WHITTER v R

Kemoy McEkron for the appellant

Mrs Sharon Milwood-Moore and Miss Monique Scott for the Crown

5 and 8 July 2022

LAING JA (AG)

Background

[1] On 29 July 2017, at approximately 11:30 pm, the applicant was walking in Chancery Hall, Red Hills, in the parish of Saint Andrew, when he was stopped by police officers. A Smith and Wesson pistol with seven live rounds of ammunition was taken from his person.

[2] The appellant was tried, before Graham-Allen J ('the learned trial judge'), sitting without a jury, in the High Court division of the Gun Court holden at King Street, Kingston, on an indictment that contained two counts, which were for illegal possession of firearm (count one) and illegal possession of ammunition (count two). On 31 August 2018, he was convicted on both counts. On 12 October 2018, he was sentenced to 9 years and three months' imprisonment on each count. The sentences were ordered to run concurrently.

[3] The applicant filed a Criminal Form B1 seeking leave to appeal his convictions and sentences. A single judge of this court considered and refused his application. Mr McEkron has sensibly conceded that there is no merit in a challenge to the conviction of the applicant and, accordingly, did not argue the single ground of appeal against conviction. The applicant renewed his application for leave to appeal his sentences and was permitted to argue before us the following supplemental ground:

> "The sentencing judge erred in failing to adequately demonstrate how she arrived at her sentence and whether she applied the relevant principles in sentencing the applicant."

The applicant's submissions

[4] Mr McEkron contended that on the face of it, the sentences do not appear to be manifestly excessive when one considers the range of sentences for the offences. However, based on the peculiarities of the case and the failure of the learned trial judge to carry out the sentencing exercise in accordance with the well-known principles of sentencing, this affected the eventual sentences that were passed on the applicant. Counsel referred to the guidance of this court given in the case of **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') and submitted that the learned trial judge erred when she considered only one mitigating factor. Furthermore, in so doing, she did not demonstrate that she applied her mind to the said factor in arriving at her sentence. Counsel submitted that the following factors ought to have been demonstrably considered by the learned trial judge in mitigation of the sentence:

(1) the age of the applicant;

(2) the fact that the applicant was gainfully employed and his employer gave character evidence on his behalf;

(3) the personal circumstances of the applicant, he being a father of four children who were all dependent on him. The applicant also had health concerns; and

(4) the applicant had no previous conviction.

[5] It was argued by counsel, that these mitigating factors, as identified, should have been weighed against the single aggravating factor identified by the learned trial judge in her determination of the sentences. Accordingly, her failure to do so provides a reason for this court to consider whether she acted incorrectly in exercising her discretion in the sentencing of the applicant.

[6] It was also submitted by Mr McEkron, that the learned trial judge stated, "… I cannot close my eyes to the report of the probation officer", in her exchange with counsel who represented the applicant at the trial. However, the learned trial judge did not indicate how the information contained in the social enquiry report from the probation officer influenced the sentences that were handed down.

[7] Mr McEkron did not take issue with the learned trial judge using 10 years as the starting point for sentencing. However, he posited that had the appropriate mitigating factors been considered and the proper methodology been employed, the single aggravating factor would have increased the sentence to 12 years, but the mitigating factors would have reduced it to eight years. The period of nine months spent in custody on pre-trial remand would be deducted from this time, resulting in a sentence of seven years and three months in respect of each offence.

The Crown's submissions

[8] The essence of the submissions on behalf of the Crown was that the sentences imposed by the learned trial judge for the offences fell within the range of sentences that the court is empowered to impose and which is usually given for like offences committed in similar circumstances. Further, that although the learned trial judge did not engage in a mathematical calculation to arrive at the sentences, she evidently applied the relevant sentencing principles. Mrs Milwood-Moore, relied on the observations of P Williams JA in **Kemar Effs v R** [2022] JMCA Crim 9 at para. [58] and McDonald-Bishop JA in **Lincoln McKoy v R** [2019] JMCA Crim 35 at para. [54], in support of these submissions.

[9] Reference was also made to several cases involving the offences of illegal possession of firearm and illegal possession of ammunition to illustrate the usual range of sentences imposed for these offences. Counsel cited, for instance, the case of **Ian Wright v R** [2011] JMCA 11, in which this court set aside a sentence of 12 years' imprisonment and substituted a sentence of 10 years' imprisonment for illegal possession of a firearm taken from the leg of the applicant's trousers. She also referenced **Keith Reid v R** [2014] JMCA Crim 39, in which the court upheld a sentence of 12 years' imprisonment for the offence of illegal possession of firearm, where the firearm was recovered under a pillow in a room occupied by the applicant and in circumstances where the applicant had a previous conviction recorded against his name for a similar offence.

[10] The Crown also commended the case of **R v Dwayne Taylor** [2021] JMSC Crim 05 for this court's consideration. In this case, the firearm and ammunition were recovered from a hidden compartment in a motor car being driven by the accused. He was sentenced to 15 years' imprisonment in respect of the illegal possession of firearm and five years' imprisonment in respect of the ammunition.

[11] Mrs Milwood-Moore submitted that when these cases are considered, the sentences imposed by the learned trial judge cannot be said to be manifestly excessive. However, if the court was of the view that the sentences should be reconsidered, an appropriate starting point would be 10 years. The aggravating factors would be the firearm recovered from the applicant, the fact that the applicant did not accept responsibility for his actions, the seriousness of the offence, the prevalence of illegal firearms in the society, and the need for the community to be protected. It was submitted that these aggravating factors would increase the sentence to 12 years.

[12] It was further submitted that the mitigating factors would be the applicant's youth and the possibility of rehabilitation, the fact that he had no previous convictions recorded against his name, his four children for whom he provided and the fact that he was gainfully employed. It was suggested that these mitigating factors would reduce the

sentence to 10 years, from which the nine months spent in pre-trial custody would be deducted, resulting in a sentence of nine years and three months' imprisonment.

Discussion and analysis

[13] We have considered whether the sentence passed by the sentencing judge warrants the intervention of the court, pursuant to section 14(3) of the Judicature (Appellate Jurisdiction) Act, which provides that:

> "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."

[14] In analysing this issue, due consideration was given to the authority of **R v Ball** (1951) 35 Cr App R 164, at page 165, and the principles espoused therein, which have been repeatedly referred to by this court, 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 this Court will intervene."

[15] In **Meisha Clement**, at para. [43], Morrison P, in delivering the judgment of the court, explained the role of this court in analysing the appropriateness of the sentence that was passed, as follows:

> "[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."

[16] At para. [41] of **Meisha Clement**, Morrison P offered a roadmap to the sentencing judge, which has been refined in **Daniel Roulston v R** [2018] JMCA Crim 20, where McDonald-Bishop JA, at para. [17], indicated that the following approach and methodology is to be employed:

> "a. identify the sentence range;
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> b. identify the appropriate starting point within the range;
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> c. consider any relevant aggravating factors;
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> d. consider any relevant mitigating features (including personal mitigation);
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> e. consider, where appropriate, any reduction for a guilty plea;
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> f. decide on the appropriate sentence (giving reasons); and
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> g. give credit for time spent in custody, awaiting trial for the offence (where applicable. [sic]"

[17] These guidelines have been affirmed and adopted in numerous cases by this court. The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') also provide useful assistance in the application of the sentencing methodology.

The learned trial judge's sentencing remarks

[18] During the sentencing exercise, the learned trial judge, gave an exposition of the aims and objectives of sentencing. She also demonstrated an awareness of the classical principles of sentencing, namely deterrence, prevention, retribution and rehabilitation. She identified the usual sentencing range for the offences of illegal possession of firearm and illegal possession of ammunition. She also determined an

appropriate starting point of 10 years, with which there is no complaint by the applicant. The learned trial judge identified the applicant's youth as a mitigating factor but did not demonstrate that it had any effect on the starting point of 10 years because the only deduction was in respect of the time spent on pre-trial and pre-sentence remand. The learned trial judge also referred to illegal possession of a firearm as "something that is prevalent in the society" and a factor which she had to take into consideration in sentencing the applicant but did not demonstrate if, or how, it affected the sentence. On that basis, we concluded that the learned trial judge erred in principle in sentencing the applicant, in terms of the approach she employed, and that it fell on the court to determine the appropriateness of the sentences that were imposed, after applying the relevant principles. Furthermore, with specific reference to the offence of illegal possession of ammunition, the learned trial judge did not give independent consideration to the appropriate sentence for this offence. Therefore, it was our view that this amounted to an error in principle that also required the court's intervention.,

The Social Enquiry Report

[19] The Social Enquiry Report ('the SER') in respect of the applicant (also referred to at the sentencing hearing as the probation report), indicated that on 3 September 2012, the applicant was placed on a two-year probation order and was supervised by the Spanish Town Probation Office. On 27 September 2012, when he was 17 years of age, he was admitted to a juvenile correctional centre on a sentence of six months' correctional order, for the offences of illegal possession of firearm and illegal possession of ammunition. Counsel for the applicant at trial took no issue with the SER and did not question the probation officer. The SER was permitted to stand for the purposes of the record.

[20] The relevance or irrelevance of the applicant's previous convictions was brought to the fore in the exchange between the learned trial judge and counsel for the applicant, while counsel was making her plea in mitigation on his behalf. Counsel in the court below had highlighted the fact that the applicant had no previous convictions

recorded against his name and was asked by the learned trial judge whether she had read the probation report. Counsel indicated that what is stated in the probation report occurred when the applicant was a minor and asked that this would not be used against the applicant. The response of the learned trial judge, at page 243 lines 14-16 of the transcript, was as follows:

> "HER LADYSHIP: He has no previous conviction against his name, but I cannot close my eyes to the report of the probation officer."

[21] This exchange has not demonstrated any deficiency in the methodology employed by the learned trial judge. The important consideration is that the learned trial judge did not identify the applicant's previous possession of an illegal firearm and ammunition as an aggravating factor.

[22] A SER is valuable in assisting a sentencing judge to determine a sentence which takes into account the personal circumstances of an offender, while having regard to the generally accepted objectives of sentencing. The SER, in respect of the applicant, contained information about the applicant, including his previous encounter with the criminal justice system, which information could not have been ignored by the learned trial judge in considering the applicant's antecedent history and the aims of sentencing. Had the learned trial judge treated the previous convictions of the applicant as an aggravating factor, the sentence would have had to be higher. However, she started at the usual starting point for firearm offences, which would have applied to an offender without a previous conviction. Therefore, there is nothing objectionable in the referenced statement by the learned trial judge because she was entitled to consider the SER in its entirety in assessing the individual before her.

[23] We find no basis to conclude that she erred in law in considering the SER, which contained a reference to the applicant's prior interaction with the criminal justice system, as a child.

[24] In any event, we have noted that the SER in respect of the applicant cannot, by any objective standard, be considered to be positive. While it is settled that the difficult circumstances experienced by an offender in his formative years, may amount to a mitigating factor, the SER in the instant case did not demonstrate such circumstances that could be treated as giving rise to mitigating factors. The report contained information of the applicant having been raised in a single-parent household, and posited that this may have resulted in "limited supervision and perhaps poor discipline". This fact, without more, was not a mitigating factor that could lead to a corresponding downward adjustment of the sentence in this case.

An appropriate sentence for the offence of illegal possession of firearm

[25] We agree with the view shared by counsel on both sides that 10 years may be considered an appropriate starting point for the offence of illegal possession of firearm. We wish to note, however, that in this case, the firearm was loaded and although we have not chosen to utilise a higher starting point, if we had done so, it could be justified having regard to this fact. A primary aggravating factor is the prevalence of illegal firearms in the society, the negative impact of which has been repeatedly highlighted in this court. The circumstances in which the applicant had the firearm were also aggravating. His possession of a loaded firearm was brazen. He was on the public thoroughfare at approximately 11:30 pm in a community where he did not reside and in the vicinity of persons attending a party.

[26] As it relates to the submissions on behalf of the Crown in respect of possible aggravating factors to be considered, it is our opinion that there was nothing exceptional about the characteristics of the firearm, a Smith and Wesson 9 mm pistol, which would justify its nature as a separate and independent aggravating factor in its possession. The seriousness of the offence is a factor which is already accounted for in the starting point we have determined and does not deserve further treatment as an aggravating factor. Furthermore, whereas contrition and accepting responsibility for a crime is a factor in mitigation, a defendant's insistence on his innocence is not an aggravating factor.

Therefore, the foregoing factors highlighted by the Crown have not been treated as aggravating features to result in an upward adjustment to the starting point.

[27] The fact that the applicant has no previous conviction recorded against his name, is a mitigating factor. So too are his personal circumstances in that he was gainfully employed and is the father of four minor children who were dependent on him for support. It is particularly noted that at the time of his arrest, he was the primary care giver for one of them However, the mitigating force of this factor is lessened by the seriousness of the offending. As the Court of Appeal of England and Wales opined, in **R v Kathryn Nethersole** [2015] EWCA Crim 2174, the interests of the applicant's children must "be balanced against society's interest in the proper enforcement of the criminal law, having regard in particular to the seriousness of the offending" and that, "the sole care of children is not a trump card".

[28] It is our view, that using the starting point of 10 years and applying the aggravating and mitigating factors, which we have identified, there would be no movement from the starting point of 10 years because the aggravating and mitigating factors would be evenly balanced. It follows that a sentence of 10 years' imprisonment at hard labour would be appropriate, as the learned trial judge concluded.

Time spent on pre-sentence remand

[29] It is now settled law in this jurisdiction that an appellant should receive the full credit for the time spent on remand before sentence, which was not as a result of him serving a sentence for another offence (see **Callachand & Anor v The State** [2008] UKPC 49). The learned trial judge has quite correctly credited the applicant for the nine months that his counsel indicated, on the date of sentencing, was the period that he had spent in custody.

[30] From the 10 years' imprisonment, which we have found to be appropriate, this period of nine months would be deducted, resulting in a sentence of nine years and three months' imprisonment.

[31] We have noted the observations of McDonald-Bishop JA in **Lincoln McKoy** v **R** at para. [54] that even though the learned trial judge did not "…demonstrably conduct the requisite analysis of the relevant principles of law and apply the accepted mathematical formula … it cannot reasonably be said that the sentence he imposed is manifestly excessive to warrant the intervention of this court". In this case, on our assessment, we arrived at a sentence of nine years and three months' imprisonment, which is identical to the sentence imposed by the learned trial judge.

[32] Additionally, to determine whether the sentence imposed by a judge is manifestly excessive, the court is also required to consider other cases to ensure that like sentences are being imposed for like offences committed in similar circumstances. This is to achieve consistency while, of course, taking into account the particular circumstances of the appellant (see **Meisha Clement** at para. [21]). We have concluded that the sentence imposed by the learned trial judge for the offence of illegal possession of firearm was well within the range of sentences imposed for illegal possession of firearm simpliciter, which have received the sanction of this court such as in the cases of **Ian Wright v R** and **Keith Reid v R** cited by the Crown. Accordingly, it is evident that the sentence she imposed in respect of the count for illegal possession of firearm is not manifestly excessive. Consequently, there is no justification for the intervention of this court.

<u>The sentence for illegal possession of ammunition</u>

[33] Although this offence is also governed by section 20(4) of the Firearms Act, it is clear, based on the authorities, that it is to be given independent consideration, even where there is also a charge for illegal possession of firearm arising from the same circumstances.

[34] The Sentencing Guidelines suggest a normal range of seven to 15 years for illegal possession of ammunition, which is the same for illegal possession of firearm. It also recommends the same starting point of 10 years. However, historically, the courts have treated illegal possession of ammunition as attracting less severe sentences than

illegal possession of firearm. A review of the authorities suggests that a primary consideration for the courts in imposing a sentence is the quantity of ammunition found in a person's possession.

[35] In this case, having regard to the quantity of ammunition involved, that is, seven rounds, we are of the view that a starting point of seven years would be appropriate. Applying the similar aggravating and mitigating factors as were utilised in respect of our analysis of the sentence imposed by the learned trial judge in respect of the offence of illegal possession of firearm, we have arrived at a sentence of seven years. From this, we have deducted the time spent on pre-sentence remand being nine months, which results in a sentence of six years and three months' imprisonment.

[36] In considering other decisions, we have noted the case of **Anthony Gayle v R** [2021] JMCA Crim 30, in which the appellant was a police officer who used his service weapon to attempt a robbery. He was convicted for the offences of shooting with intent, illegal possession of firearm and illegal possession of ammunition. He was sentenced to 10 years' imprisonment for illegal possession of ammunition. This court, in reducing this sentence to three years took account of the fact that only two rounds of ammunition were used in the commission of the offence and that the remaining rounds were in the appellant's lawful possession, in his capacity as a police officer.

[37] In **Tyrone Headley v R** [2019] JMCA Crim 33, the appellant, who was also a police officer, was found to be in possession of a Smith and Wesson 9mm pistol with 10 cartridges. This was not his service pistol. This court affirmed the sentence of five years for illegal possession of ammunition as being well within the normal range of sentences.

[38] We wish to note the case of **Denver Bernard v R** [2019] JMCA Crim 13, in which the appellant was found to be in possession of 1,395 assorted rounds of ammunition, along with a total of 17 firearms. McDonald-Bishop JA acknowledged that the normal sentencing range, based on the Sentencing Guidelines, for illegal possession of ammunition was between seven and 15 years. My learned sister further observed that

the usual starting point for sentencing is 10 years. However, she considered 12 years as an appropriate starting point, in that case, having regard to the significant amount of assorted ammunition recovered. Ultimately, after several mitigating factors were considered along with the appropriate discount for an early guilty plea, the sentence of 10 years' imprisonment, imposed by the sentencing judge was reduced to six years' imprisonment. We wish to highlight that, having regard to the huge quantity of ammunition involved, among other things, this case is considered to be exceptional on its facts.

[39] In our view, although a sentence nine years and three months' imprisonment is within the range of sentences for the offence of illegal possession of ammunition, it is at the higher end of the scale, when the quantity of ammunition involved in the instant case and sentences based on similar facts in other cases are considered. In such circumstances, we have concluded that the sentence imposed by the learned trial judge for this offence is manifestly excessive and, accordingly, should be set aside. We would hold that the sentence of six years and three months' imprisonment be substituted therefor.

Conclusion

[40] For the reasons expressed herein, regarding the application for leave to appeal sentence, we are of the view that the sentence of the learned trial judge imposed for illegal possession of firearm should not be disturbed, whereas the sentence for illegal possession of ammunition should be set aside and the sentence of six years and three months' imprisonment be substituted therefor.

Order

[41] Accordingly, we make the following orders:

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.

3. The appeal against sentence is allowed in part.
4. The sentence of nine years and three months' imprisonment imposed on 12 October 2018 for the offence of illegal possession of firearm is affirmed.
5. The sentence of nine years and three months' imprisonment imposed on 12 October 2018 for the offence of illegal possession of ammunition is set aside and a sentence of six years and three months' imprisonment is substituted therefor.
6. The sentences are to run concurrently as ordered by the learned trial judge and are to be reckoned as having commenced on 12 October 2018.