[2020] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 73/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

NATALIE WILLIAMS v R

Sanjay Smith for the appellant

Adley Duncan and Mrs Nickeisha Young Shand for the Crown

1 and 2 June 2020

PHILLIPS JA

[1] This is an appeal against sentence imposed on Miss Natalie Williams (the appellant) on 20 October 2015. She pleaded guilty to two offences: illegal possession of firearm (count one) and robbery with aggravation (count two). She was sentenced to 12 years and 10 years respectively, and had now been incarcerated for five years. The sentences were ordered to run concurrently.

[2] The convictions, which are the subject of this appeal, arose from an incident that occurred on 27 June 2015 in the parish of Saint Andrew. At midnight that day, Mr Richard Bullock was awakened by the sound of his son screaming. He went to enquire and saw three men: one with a handgun to his son's head; the other with a machete in

his right hand; and another with what appeared to be a kitchen knife in his hand. The man with the gun threatened to kill Mr Bullock's son and stated that he was contracted to kill his son. The third man ushered Mr Bullock, his son and wife to a bedroom, where they proceeded to bind them together with duct tape, and blindfold them using a necktie. They stole items valued at over $2,000,000.00, including: three credit cards; a National Commercial Bank Midas Card (for which the man with the gun demanded the PIN); keys for two motor cars belonging to Mr Bullock; a laptop; tablet and jewellery. During his ordeal, Mr Bullock was told, in great detail, personal information, which could only have come from someone close to the family.

[3] About half-hour later, Mr Bullock heard the cars driving away and so he and his family freed themselves. He then proceeded to his mother-in-law's room where he saw the appellant tied up with duct tape. The appellant was employed by Mr Bullock, at his residence, as a caregiver for his elderly mother-in-law.

[4] Mr Bullock made a report to the police that day. It was later revealed that his Midas Card had been used at a number of locations in the parish of Saint Ann. On 8 July 2015, the appellant was seen on video footage purchasing items at a supermarket with the use of Mr Bullock's Midas Card. On 15 July 2015, one of the appellant's co-accused (her boyfriend) was seen with a motor car belonging to Mr Bullock. His home and that of the appellant's mother were searched, and stolen items belonging to Mr Bullock were recovered. When cautioned and shown a photograph of the supermarket video, the appellant said nothing. However, her co-accused boyfriend admitted to robbery using what he described as "a piece of board that looked like a gun", and

stated that he did so because he was in debt, the appellant was pregnant with his child, and she was also pressuring him for money. He also stated that she had planned everything. The third co-accused, after being cautioned, also stated that the appellant had planned the entire ordeal because she wanted Mr Bullock's cars.

[5] In a Question and Answer, the appellant admitted that she knew Mr Bullock's bank card had been robbed from him and that she had used the card to buy groceries in the supermarket. She also admitted that items stolen from the Bullock's were found at her mother's house.

[6] All three co-accused were charged for illegal possession for firearm and robbery with aggravation. They pleaded guilty when they were arraigned on 12 August 2015, and the appellant was sentenced as stated at paragraph [1] herein.

[7] The appellant, having filed her application for leave to appeal on 2 November 2015, was granted leave to appeal by the single judge of appeal, who stated that a sentence of 12 years' imprisonment for illegal possession of firearm on a guilty plea "appears to be on the high side". The judge of appeal commented that the learned judge's sentencing remarks "did not disclose what were the specific circumstances that had led him to that result".

[8] The appellant relied on one ground of appeal which was that the sentences on both counts were manifestly excessive.

[9] In sentencing the appellant, the learned judge said that he had taken all the matters submitted to him under careful consideration, particularly, the contents of the Social Enquiry Report. In terms of mitigating factors, he made special note that the appellant had pleaded guilty at a very early stage of the proceedings. He also took note of her family situation, in that, she already had two young children with another child on the way, and she was only 23 years old.

[10] In terms of the aggravating factors, he indicated that certain matters were of grave concern, namely:

1. the fact that the appellant was employed in the home that was robbed;
2. the appellant was linked with at least one of the persons involved in the robbery, namely, Mr Terrol Youngsam (her boyfriend); and
3. after the robbery, she was seen using the Midas Card which had been obtained in the robbery.

[11] The learned judge described the above behaviour as a "nefarious breach of trust", in that, she had been employed in someone's home to take care of an older family member, and she had used that knowledge to assist and facilitate a robbery in the said home, which not just deprived the owners of property, but was a robbery that threatened the life of a young person. The learned judge said he had to consider the appellant's circumstances, as well as the fact that he had a duty to the society to ensure that persons who acted in such a manner were dealt with very severely, so that

members of the society will understand that this sort of behaviour must be treated seriously.

[12] He identified a sentencing range of 18-20 years in respect of illegal possession of firearm and robbery with aggravation. He said, having considered the mitigating factors as mentioned above, he arrived at the sentences as indicated in paragraph [1] herein.

[13] The appellant submitted that the learned judge had erred in:

(i) having not given adequate or appropriate consideration to the fact that the appellant had pleaded guilty at the first relevant court date, and had not wasted judicial time, resources or increased expenses;

(ii) failing to give sufficient consideration to the fact that the appellant was eight months pregnant at the time of sentencing;

(iii) failing to take into account that the appellant had admitted her participation in the robbery in the Question and Answer;

(iv) failing to take into account that she had cooperated fully with the police;

(v) failing to take her age into account;

(vi) failing to take into account the fact that she had no previous convictions;

(vii) having stated a sentencing range, but not having given a specific starting point in respect of the sentencing on each count;

(viii) failing to take into account that the appellant had not directly assaulted, threatened, used violence, or in any way brandished any weapon during the incident;

(ix) failing to take into account the appellant's capacity for reform; and

(x) imposing sentences on the appellant which lacked parity with the sentences imposed on the appellant's co-accused.

[14] Counsel for the appellant referred to the fact that the appellant was a practical nurse; and an educated Christian young woman who seemed to have taken "a wrong turn from a straight path". He referred to a character witness called on her behalf, Mr. Jeremiah Henry, who had known her from birth and who said he knew her to be a "well behaved person" and was really surprised to hear of the offences in respect of which she had been found guilty.

[15] Counsel for appellant, in his submissions, relied on several relevant authorities, namely: **R v Collin Gordon** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 211/1999, judgment delivered 3 November 2005, **R v Pearlina White** (1988) 25 JLR 221, **Joel Deer v R** [2014] JMCA Crim 33, **Paul Kennedy v R** [2015] JMCA Crim 5 (in respect of the effect of the guilty plea); **Tafari Williams v R**

[2015] JMCA App 36 (abandonment of appeal, effective date of sentencing); **Denver Bernard v R** [2019] JMCA Crim 13 (starting point in sentencing; the principle of parity in sentencing); and **Ian Wright v R** [2011] JMCA Crim 11 (range of applicable sentence for the relevant offences).

[16] Counsel for the respondent, in keeping with the principles emanating from **R v Ball** (1951) 35 Cr App Rep 164, reminded the court that it ought not to intervene in the sentence imposed by the learned judge in the court below, unless this court was satisfied that the sentence was manifestly excessive or inadequate, to such an extent, that it indicated that there was a failure to apply the right principles of sentencing. Counsel indicated, however, that the court had erred in failing to identify the appropriate starting point in sentencing the appellant on the respective counts, and relied heavily on the principles set out by Morrison P in **Meisha Clement v R** [2016] JMCA Crim 26. We agree with his submissions in this regard.

[17] On the invitation of the court, both counsel helpfully submitted the suggested starting points in respect of both offences, and made the necessary adjustments for the aggravating and mitigating factors. Counsel for the appellant suggested, in relation to illegal possession of firearm, a starting point of 10 years with a sentence of five years imprisonment. For robbery with aggravation, counsel for the appellant suggested a starting point of 12 years with a sentence of six years imprisonment. Counsel for the respondent, on the other hand, suggested a starting point of 10 years for illegal possession of firearm with a sentence of three to five years imprisonment. In so far as

robbery with aggravation was concerned, he submitted a starting point of 15 years, with a sentence of five and a half to eight years imprisonment.

[18] The variance in approach between counsel, was, in one instance, the starting point in relation to robbery with aggravation, and in the other, the level of discount in relation to the guilty plea, and how and when the adjustment should be made in relation to the aggravating factors. The parties were agreed on the mitigating factors, namely: the guilty plea; no prior convictions; good character; age; her qualification or being helpful to society; her capacity for reform; limited participation (no use of a weapon); and her family situation with two young children and one on the way.

[19] Whereas counsel for the appellant considered the nefarious breach of trust and the use of the Midas Card shortly after the incident in the supermarket as aggravating factors to increase the starting point, counsel for the respondent utilized those factors to arrive at a starting point.

[20] As indicated in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts (the Sentencing Guidelines), once the normal range for the particular offence has been identified, the sentencing judge's first task is to choose the appropriate starting point. To do that, the judge must make an assessment of the "intrinsic seriousness of the offence", taking into account the offender's culpability in committing it, and the harm, physical or psychological, caused or intended to be caused, or that might foreseeably have been caused, by the offence (see **Meisha Clement v R** at paragraph [29]). The starting point, therefore,

represents provisionally what the sentencing judge considers to be appropriate for the offence before adjustment in relation to the aggravating and mitigating factors.

[21] The aggravating factors may relate to the offence and the offender which would create an upward adjustment to the starting point. The mitigating factors are those which reduce the seriousness of the offence or the culpability of the offender (see paragraphs 8 and 9 of the Sentencing Guidelines).

[22] The Sentencing Guidelines were issued in December 2017 and were not available to the learned judge at the sentencing hearing. Nonetheless, they are useful in reflecting the range of sentences imposed by the court at that time. The Sentencing Guidelines indicate a normal range of sentencing in respect of illegal possession of firearm or ammunition under section 20 of the Firearms Act as between 7-15 years, with a usual starting point of 10 years. Being guided by the Sentencing Guidelines, the starting point of 10 years, which in our view is applicable to the circumstances of the instant case, we will also use a starting point of 10 years. We accept the mitigating factors as set out by counsel, but would commence with a reduction of one-third for the guilty plea. We would then make a further adjustment of a reduction of two years for the other mitigating factors, and an increase of one year for the aggravating factors. The sentence of five years and six months to which we have arrived will take into account the fact that the appellant spent three weeks in custody.

[23] For robbery with aggravation, the normal range of sentencing is 10-15 years with a usual starting point of 12 years. We would also utilise a starting point of 12 years in

the circumstances of this case. We would give a one-third reduction for the guilty plea. We would decrease the sentence by a further two years for the mitigating factors, and then would add one year for the aggravating factors. The resulting sentence is seven years imprisonment taking into account the three weeks in custody.

[24] In all these circumstances, we would make the following orders:

1. The appeal is allowed.
2. The sentence imposed on count one for illegal possession of firearm is set aside, and a sentence of five years and six months is substituted therefor.
3. The sentence imposed on count two for robbery with aggravation is set aside, and a sentence of seven years imprisonment is substituted therefor.
4. The sentences which were ordered to run concurrently, shall be reckoned as having commenced on 20 October 2015.