**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 154/2008**

**BEFORE: THE HON MR JUSTICE BROOKS JA**
**THE HON MRS JUSTICE McDONALD-BISHOP JA (Ag)**
**THE HON MRS JUSTICE SINCLAIR-HAYNES JA (Ag)**

**JERMAINE BARNES v R**

**Cecil J Mitchell for the appellant**

**Mrs Denise Samuels-Dingwall for the Crown**

**16 February 2015**

**ORAL JUDGMENT**

**BROOKS JA**

[1] On 5 November 2008, Mr Jermaine Barnes, during the case for the prosecution, pleaded guilty in the High Court Division of the Gun Court, to an indictment charging him with illegal possession of firearm and two counts of robbery with aggravation. Sykes J sentenced him, on 5 December 2008, to 10 years' imprisonment in respect of each of the three counts. Whereas the sentences in respect of the robbery offences were ordered to run concurrently, they were ordered to run consecutively to the sentence in respect of the firearm.

[2] Mr Barnes applied for permission to appeal against the sentence imposed by the learned sentencing judge. His application was granted by a single judge of this court. Mr Mitchell argued the appeal before the court.

[3] Learned counsel argued, with the permission of the court, three grounds of appeal, namely:

> "1. That the Appellant pleaded guilty to the offences charged after the trial was commenced but before the case for the Crown was completed and in those circumstances the Appellant ought to have been given a discount in respect of the sentences imposed.
>
> 2. The sentence was manifestly excessive.
>
> 3. That the Learned Trial Judge ought not to have imposed consecutive sentences upon the Appellant bearing in mind that the offences of Illegal Possession of Firearm and Robbery with Aggravation arose out of one transaction."

[4] Before considering his submissions in respect of these grounds, a brief outline should be given of the evidence that was adduced by the prosecution before Mr Barnes recanted from his original plea of not guilty.

**The background to the sentences**

[5] Two witnesses gave evidence for the prosecution. The evidence adduced from them was that on 1 January 2007 a man and his girlfriend were walking along Half-Way-Tree Road in the parish of Saint Andrew when they were accosted by two men armed with guns. The men robbed them at gunpoint of cash, two cellular telephones and a silver chain. The men then ran and made good their escape.

[6] It appears that their freedom thereafter was short-lived because when the male complainant telephoned the number of one of the stolen telephones the following morning, it was answered by a police officer at the Half-Way-Tree police station. He went there straightway and identified the two telephones that had been taken the previous evening.

[7] On 11 January 2007, he attended an identification parade and identified the appellant Mr Barnes as one of the robbers.

[8] It was after the female complainant had given her testimony at the trial and the male complainant was in the course of being cross-examined that Mr Barnes asked to be re-pleaded. It was then that he changed his plea to guilty. A social enquiry report and an antecedent report revealed that, despite his relatively young age of 21 years, he had two previous convictions for robbery with aggravation.

[9] The learned sentencing judge, in his usual careful manner pointed out that he regarded Mr Barnes' guilty plea as being a part of "risk assessment". He explained the need to sentence robbers to long periods of imprisonment and he explained the juridical basis for consecutive sentences when illegal firearms were utilised in the process of criminal activity. He then imposed the sentences mentioned above.

**Ground One – The discount**

[10] Mr Mitchell, in arguing the first ground of appeal, submitted that the learned trial judge should have given the customary discount in response to the guilty plea, and that

in failing to do so, had erred. Learned counsel pointed out that neither of the witnesses was challenged on their veracity. He argued that the guilty plea was an indication of remorse.

[11] A plea of guilty, by itself, may be an indication of remorse. Sir Denys Williams CJ so stated in delivering the judgment of the Court of Appeal of Barbados in **Keith Smith v R** (1992) 42 WIR 33, at pages 35-36:

> "It is accepted that a plea of 'Guilty' may properly be treated as a mitigating factor in sentencing as an indication that the offender feels remorse for what he has done. It is also clear that an offender with a good or relatively good record may have his sentence reduced to reflect that record."

The timing of the plea must, however, be taken into account in considering both the issue of remorse as well as the issue of the appropriate reduction, or discount, to be applied to the sentence.

[12] The principle of allowing a discount in the usual sentence, when there is a plea of guilty, is also well established in this jurisdiction. The application of the discount was recognised in **R v Delroy Scott** (1989) 26 JLR 409. The discount is, however, based on the fact that the offender has recognised his error, is remorseful of it and has not wasted the time of the court. That principle is only applicable when the offender has made his plea of guilty on the first opportunity to do so. It does not apply when, as in this case, the machinery of the court has had to be put in gear, the prosecution has been asked to present its case and the witnesses are put to the stress of attending court and being cross-examined.

[13] P. Harrison JA (as he then was) explained in **R v Collin Gordon** SCCA No 211/1999 (delivered 3 November 2005) that a late plea of guilty does not entitle the offender to the traditional discount. In that case, Mr Gordon was charged with illegal possession of a firearm and wounding with intent to do grievous bodily harm by shooting his victim. He initially pleaded not guilty and the trial commenced. The trial court heard the evidence of the complainant, another witness to the shooting, and the investigating officer. After the prosecution had closed its case, Mr Gordon changed his plea to guilty on both counts.

[14] Mr Gordon appealed against the sentences imposed on him. He complained that the sentencing judge had failed to give him the benefit of the discount to which, he said, his guilty plea entitled him. In refusing to disturb the sentences imposed on Mr Gordon, Harrison JA, in giving the decision of the court, explained that a discount was not merited. He said at page 5 of the judgment:

> "In the instant case, there was no guilty plea entered 'on the first opportunity'. The plea of 'not guilty' was changed to 'guilty' after the close of the prosecution's case. The applicant may then well have viewed the prosecution's proven case as overwhelming. It was not a case of an offender frankly admitting his guilt. He was capitulating to the inevitable. Neither can he be seen, as it were, as saving judicial time or saving expense."

[15] In applying that learning to this case, Mr Barnes cannot be said to be in any different position from Mr Gordon in **R v Colin Gordon**. It is true that the prosecution in this case had not yet closed its case. It is also true that the male witness had not yet completed his testimony. Despite that situation, Mr Barnes was not pleading guilty on

the first opportunity to do so. In any event, it may be gleaned from the exchanges between the prosecutor and the learned judge, that after the completion of the cross-examination of the male civilian witness, the only witness who was left to be called by the prosecution was the investigating officer. The investigating officer was also expected to produce the cellular telephones, which, it was expected, the male civilian witness would have identified as his property that had been robbed from him.

[16] Mr Mitchell is not on good ground in respect of this complaint. This ground fails.

**Ground two – The level of sentences**

[17] Mr Mitchell, quite rightly, did not place much stress on this ground. In fact, learned counsel conceded that the sentences of 10 years imprisonment in respect of each of these offences is consistent with (and lower in some instances), the level of sentences usually imposed for offences of this type. There is no merit in this ground.

**Ground three – The consecutive sentences**

[18] The principle that consecutive sentences are not usually imposed when the offences arise out of the same transaction is also a long established principle. Langrin JA in **R v Walford Ferguson** SCCA No 158/1995 (delivered 26 March 1999) so stated, at page 8 of the judgment:

> "When imposing consecutive terms the sentencer must bear in mind the total effect of the sentence on the offender. Where two or more offences arise out of the same facts but the offender has genuinely committed two or three distinct crimes it is often the general practice to make the sentences concurrent."

That principle has been repeated in more recent cases such as **Kirk Mitchell v R** [2011] JMCA Crim 1. This court has said on numerous occasions that in circumstances where the offences arise from a single transaction that consecutive sentences are not appropriate. We repeat the principle here.

[19] These cases all make the point that it is the totality of the sentences that should be considered by the sentencing judge and the appellate court. Despite what has been said above, however, it is to be noted that consecutive sentences will not be disturbed, even if arising out of the same transaction, if the total effect on the offender does not amount to a manifestly excessive sentence. In **Chin v R** SCCA No 84/2004 (delivered 26 July 2005) Smith JA, in delivering the judgment of the court, addressed the issue of consecutive sentences. He said at page 14 of the judgment:

> "...Consecutive sentences would clearly be wrong if the offences arose out of the same incident. However where the offences are committed on separate occasions there is no objection in principle to consecutive sentences...
>
> In determining whether or not the consecutive sentences of 5 years imprisonment are manifestly excessive, the court must bear in mind the age of the victim, the object of the law which is to protect young girls from men and from themselves, the hitherto good character of the applicant, the relationship between the applicant and the complainant and of course the maximum sentence which such an offence attracts...."

That judgment dealt with offences of carnal abuse committed on separate occasions.

[20] In applying that learning to the present case, it is to be noted that when the consecutive element is considered, the learned sentencing judge imposed a total sentence of 20 years on Mr Barnes. The imposition of consecutive sentences would not

be the norm in circumstances such as these. The question however, is whether, assessed globally, 20 years is inappropriate for the circumstances of this case.

[21] The offences were committed against the background where the illegal use of firearms is a scourge on our society. The Firearms Act has stipulated sentences for life for offenders. Robbery with aggravation also carries a serious penalty of 21 years imprisonment at hard labour (see section 37(1) of the Larceny Act). In this case Mr Barnes and his accomplice pounced on two young people on New Year's Day when they were on a mission to enjoy themselves. There was no previous connection between them. This was unadulterated criminal behaviour affecting the security of the populace.

[22] On the positive side for Mr Barnes, the firearms brandished were not fired or used to inflict any harm on either of the civilian witnesses. Nor were they subjected to any unusual form of physical abuse. On the other hand, Mr Barnes has two previous convictions for robbery with aggravation. The first two were committed in close proximity to each other and the learned sentencing judge noted that the second was committed while Mr Barnes had a suspended sentence in force in respect of the first.

[23] Mr Mitchell submitted that perhaps the court could consider a sentence of 15 years in respect of the robbery offences and order them to run concurrently with the sentence in respect of the illegal possession of firearm. We are not in agreement with that approach. We do not think that it takes into account the previous convictions. It is also to be made clear, as has been outlined above, that Mr Barnes is not entitled to any reduction as a result of the change of his plea to guilty. In the circumstances,

looking at the sentences as a whole, we do not find that the consecutive element of the sentence, although against the established principles, has resulted in a manifestly excessive sentence in this case.

[24] This ground also fails.

**ORDER**

1. The appeal against sentence is refused.
2. The sentence imposed by the court below is affirmed and shall be reckoned has having commenced on 5 December 2008.