[2023] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN

SUPREME COURT CRIMINAL APPEAL NO 43/2017

RANDY BLAKE v R

Obika Gordon for the applicant

Miss Paula Llewellyn KC, Director of Public Prosecutions and Ms Carolyn Wright for the Crown

3 and 5 July 2023

Criminal Law – Identification – Credibility – Sentence – Illegal Possession of Firearm – Illegal Possession of Ammunition – Shooting with Intent

ORAL JUDGMENT

BROWN JA

[1] The applicant was convicted on an indictment charging him with illegal possession of firearm, illegal possession of ammunition and shooting with intent, before Thompson-James J ('the learned judge'), in the High Court Division of the Gun Court on 10 March 2017. On 13 April 2017, he was sentenced to concurrent terms of imprisonment of seven, two and 19 years respectively.

[2] A single judge of this court considered, and refused, his application for leave to appeal against his conviction and sentence. This is, therefore, the renewed application for permission to appeal against conviction and sentence.

[3] The applicant listed what amounts to five grounds of appeal in his application for leave to appeal (see Criminal Form B1). Those grounds are reproduced immediately below:

> "1. **Misidentity by the Witness**: that the prosecution witness wronglfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. **Lack of Evidence**: That the prosecution failed to present to the court any 'Concrete' piece of evidence (Material, Forensic or Scientific) to justified [sic] and substantiate the alleged charges preferred against me by the Police, which eventually led you[sic] my conviction.
>
> 3. **Conflicting Testimonies**: That the prosecution witness presented to the court conflicting and contrasting testimonies which amount to purjury[sic], thus call in to question the soundness of the verdict.
>
> 4. **Unfair Trial**: that the evidence and testimonies upon which the learned trial judge relied on for the purpose to [sic] convict me lack facts and creditability thus [rendering] the verdict unsafe in the circumstances.
>
> B. that the court failed to recognize the fact that I was wrongfully arrested, accused and charged for no justifiable reason, I was just an innocent by stander [sic] going about my business when I was arrested.
>
> 5. **Miscarriage of Justice**: that the prosecution failed to recognised [sic] the fact that I had nothing [to] do with the alleged crime for which I was wrongfully convicted for [sic]."

Before summarizing the submissions, it is pertinent to provide a background to the events which led to the applicant's conviction.

Background

[4] On 21 March 2014, at about 8:35 pm, the police were on mobile patrol along Beeston Street in the parish of Kingston, in a marked double cab Hilux pick-up. The

applicant and another man were observed walking towards the service vehicle, each with a firearm in his hand. Both the applicant and the other man fired upon the police. The police returned the gunfire and both men ran, at a point going in different directions. The applicant was chased and eventually held, while the other man escaped.

Submissions for the applicant

[5] Mr Gordon, in his skeleton submissions, frankly conceded that, having carefully examined the transcript of the evidence and the summation, there is no basis upon which to pursue this application, either in respect of the conviction or the sentence. In learned counsel's opinion, the learned judge comprehensively reviewed the evidence, correctly isolated the relevant issues as identification and credibility and applied the applicable law. In his oral arguments, Mr Gordon informed the court that he has the applicant's written authorization to proceed in the manner conveyed by his submissions. Mr Gordon disclosed further, although this information was not contained in an affidavit, that the applicant confirmed to him his admissions in the social enquiry report that he was in possession of the illegal firearm and fired at the police.

Submissions for the Crown

[6] Ms Llewellyn KC for the Crown did not demur. King's Counsel agreed that the central issue was identification and submitted that the learned judge closely considered the circumstances in which the identification of the applicant was made. King's Counsel also highlighted that the learned judge directed herself on the weight to be given to the applicant's unsworn statement, the grounding of the court's jurisdiction, the legal issue of possession and the chain of custody.

Discussion

[7] We have carefully considered the above submissions against the backdrop of our own perusal of the transcript of evidence and the learned judge's summation. Having done so, we find Mr Gordon's concession well-made and, accordingly, cannot fault the learned King's Counsel for agreeing with it. The issues which called for the learned judge's

resolution were: (a) primarily, the correctness of the identification of the applicant; and (b) secondarily, the credibility of the witnesses for the prosecution.

[8] In respect of the overarching issue of identification, it has long been established that where the case for the prosecution depends wholly or substantially upon the correctness of visual identification, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance upon that evidence: **R v Turnbull** [1977] QB 224. Both sides have agreed that the learned judge warned herself after the fashion of the guidelines in **R v Turnbull**, and scrupulously examined the circumstances under which the identification of the applicant was made. There is clearly no merit in the ground that the applicant was misidentified by the witnesses.

[9] We now turn to consider the collateral or secondary issue. The learned judge highlighted and considered the inconsistencies in the evidence of the case for the prosecution. Sitting alone, it was her province to consider and determine the credibility of the witnesses. We can find no fault in her resolution of the inconsistencies. That there were inconsistencies, or what is described in original ground three as conflicting testimonies, is commonplace in criminal trials, especially when the events giving rise to the indictment are not of recent vintage. It is noted that the trial was approximately three years removed from the date of the incident. In any event, the learned judge found (in our view, correctly) that such inconsistencies as existed, were minor and did not go to the root of the prosecution's case. Therefore, there is no merit in this ground.

[10] The other grounds are similarly without merit. Contrary to the assertion in ground two (lack of evidence), there was a sufficiency of evidence upon which to ground the convictions. Firstly, immediately after the firefight with the members of the Constabulary, the applicant was pursued and held by police personnel, two of whom never lost sight of him during the chase. Secondly, the firearm containing one unexpended round was removed from his person. Thirdly, the swabs of the applicant's hands revealed gunshot residue, at trace level. Fourthly, physical examination of the service vehicle showed bullet

holes. Fifthly, ballistics evidence confirmed the firearm and ammunition found on the applicant's person to be in conformity with their assigned definitions in the Firearms Act. Therefore, it is fair to say there was an abundance of evidence to support the verdicts of guilty returned by the learned judge. This ground is clearly hopeless.

[11] Likewise, the fourth ground which challenges the fairness of the trial, is unsustainable. The applicant gave an unsworn statement. The learned judge correctly directed herself that it was her duty to decide how much weight should be given to his unsworn statement. The learned judge went further and fully reviewed the unsworn statement. Remarkably, notwithstanding the fact that the applicant made an unsworn statement, the learned judge gave him the benefit of a standard good character direction. On the other hand, our scrutiny of the record did not show that anything took place at the trial which could fairly be said to undermine its fairness. Neither did our reading of the transcript disclose anything that sounds in the vein of a miscarriage of justice.

[12] We, therefore, conclude that the convictions are safe. We will now consider the appropriateness of the sentences imposed.

Sentence

Submissions for the applicant

[13] Mr Gordon did not retreat from his position that there is no basis on which to advance the application in respect of sentence. By the silence of his submissions on the point, Mr Gordon seems to have found no fault with the sentences for illegal possession of firearm and ammunition. However, he submitted that the learned judge's starting point of 25 years, for the offence of shooting with intent, was relatively high. That notwithstanding, in light of the normal range of sentences for this offence and the learned judge's generous approach in arriving at the sentence of 19 years' imprisonment, counsel maintained that there is no ground for challenge.

Submissions for the Crown

[14] Learned King's Counsel advanced a similar argument. Our attention was drawn to **Meisha Clement v R** [2016] JMCA Crim 26 to demonstrate the circumstances in which this court will set aside a sentence. She submitted that the absence of a starting point is no warrant to disturb the sentence, as in all other respects the learned judge applied the accepted principles. **Ryan McLean, Richard Gordon and Christopher Counsel v R** [2021] JMCA Crim 21 ('**McLean and Ors v R**'); **Danny Walker v R** [2018] JMCA Crim 2; and **Troy Barrett v R** [2022] JMCA Crim 24 were cited as authority for that proposition.

Discussion

[15] Admittedly, the learned judge did not expressly follow the well-established methodology in arriving at the sentences imposed. However, while trial judges are encouraged so to do, this court, on review, does not adopt a formulaic, but a principled approach to sentencing. This position was compendiously expressed by Morrison P in **Meisha Clement v R**, at para. [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."

This principled approach is of some vintage (see **R v Ball** (1951) 35 Cr App R 164, applied by this court in **Alpha Green v R** (1969) 11 JLR 283). In brief, this court will be disinclined to interfere with the discretion exercised in imposing a sentence unless that sentence offended the applicable principles (see **Garfield Elliott v R** [2023] JMCA Crim 22).

[16] More recently, in **McLean and Ors v R** this court, applying the learning referred to above, refused to disturb the sentences imposed, merely on the basis that the sentencing judge had failed to state her stating point, in violation of the methodology stipulated both in **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20. At para. [101], Dunbar Green JA, writing for the court, said, "the learned judge did not expressly state the starting points which she used in arriving at the sentences imposed but we were satisfied that, in all other respects, she applied the accepted principles of sentencing". Unless it can be demonstrated that the sentencing judge's departure from principle was of such materiality to justify interference by this court, it will not be disturbed (see **Danny Walker v R**, para. [82]; **Troy Barrett v R**, at para. [104]).

[17] In this case, the learned judge expressly stated a starting point in relation to shooting with intent. Respectfully, learned counsel for the applicant misunderstood what the learned judge said in choosing her starting point. The learned judge initially thought of imposing a sentence of 25 years, from which she would have deducted three years to result in 22 years. However, she reconsidered, had regard to the mandatory minimum of 15 years, and commenced at 22 years from which she deducted three years to arrive at 19 years' imprisonment (see page 248 lines 29-33; page 249 lines 1-11).

[18] The resulting sentence, which reflected no mathematical accounting for the disproportionate aggravating factors, falls within the normal range of sentences imposed for this offence between 5-20 years (see Appendix A, A-2 of the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines')). These were matters Mr Gordon frankly conceded. King's Counsel is correct that the learned judge also had within her contemplation other principles of sentencing, namely, rehabilitation, protection of the society, as well as the aggravating and mitigating factors.

[19] The learned judge adopted a similar approach in respect of the offences of illegal possession of firearm and ammunition. In these instances, however, no starting point was expressed. Both offences are punishable under section 20 of the Firearms Act. The

normal range of sentences listed for both offences in the Sentencing Guidelines is between seven-15 years' imprisonment. Therefore, the sentence for illegal possession of firearm falls at the lowest end of the range while the sentence for illegal possession of ammunition falls below the lowest point. Consequently, neither sentence can be said to be manifestly excessive. Hence, we agree with the submissions that there is no basis upon which to interfere with the exercise of the learned judge's discretion in imposing the sentences.

[20] In the light of the conclusions above, it is hereby ordered as follows:

> The application for permission to appeal against conviction and sentence is refused. The sentences are to be reckoned as having commenced on 13 April 2017, the date on which they were imposed.