[2023] JMCA Crim 57

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00085

JEMOY DALLAS v R

Paul Gentles for the appellant

Ms Kathy-Ann Pyke and Ms Kristen Anderson for the Crown

22 and 24 November 2023

Criminal law-Sentencing-whether statutory minimum sentence for making use of a firearm to commit a felony manifestly excessive- judge's certificate issued- section 42K of the Criminal Justice (Administration) (Amendment) Act-- section 25(1) of the Firearms Act

ORAL JUDGMENT

LAING JA (AG)

Introduction

[1] On 16 October 2019, Jemoy Dallas ('the appellant') was convicted, after a trial by a judge sitting without a jury (hereinafter referred to as 'the learned trial judge'), in the High Court Division of the Gun Court, for the offences of making use of a firearm to commit a felony, contrary to section 25(1) of the Firearms Act (count one) and robbery with aggravation contrary to section 37 (1)(a) of the Larceny Act (count two). He was sentenced on 20 December 2019, to 15 years' imprisonment at hard labour on count one, and three years' imprisonment at hard labour suspended for three years on count two. The sentence on count two was ordered to run consecutively to the sentence on count one. The learned trial judge issued a judge's certificate pursuant to section 42K of the

Criminal Justice (Administration) (Amendment) Act, 2015 ('the CJAA') by which he confirmed that the court would have imposed a sentence of two years' imprisonment for the offence of making use of a firearm to commit a felony, had there been no prescribed minimum penalty ('the Certificate').

[2] The appellant filed an application for leave to appeal against his convictions and sentences which was considered by a single judge of this court. The application was refused.

Summary of the evidence

[3] The incident giving rise to the appellant's trial, conviction and sentencing occurred on 6 March 2018 at approximately 6:30 pm. The complainant was standing at a bus stop on Constant Spring Road across from the Shell gas station, in the vicinity of the Merl Grove High School in Saint Andrew. He was responding to a text message on his phone when a male person grabbed it from his hands and said "gi mi this". This male was joined by another. Shortly afterwards they were in turn joined by the appellant, who said "back off" and pulled what appeared to be a gun from his waist. The complainant was backing off when he was struck at the back of his neck, and he realised that there were two other males behind him. The complainant created distance between himself and the five males, who then proceeded to walk in the direction of the Shell gas station. The complainant followed them, and the appellant pointed the gun in the direction of the complaint. The complainant retreated but continued to follow the five persons as they walked on a nearby road.

[4] The complainant saw a police vehicle and made a report to the police officers who were inside. The police pursued the five individuals whom the complainant was following and apprehended them. The complainant confirmed to a police officer that they were the five individuals that had robbed him of his cell phone and whom he had been following. The appellant was searched, and an imitation firearm was taken from the backpack that he was wearing. An identification parade was not held, but at the trial the complainant

was permitted to do a dock identification and he identified the appellant as the third man, the one who had the gun.

The defence's case

[5] In his unsworn statement the appellant denied that he participated in the commission of the offences.

Submissions for the appellant

[6] Mr Gentles, conceded that there was no legal basis to renew his application to challenge the appellant's conviction, but he pursued the application for leave to appeal against the sentence for the offence of making use of a firearm to commit a felony. Counsel, on behalf of the appellant, requested and was granted permission to abandon the original grounds of appeal and to proceed on the sole ground that "having regard to the circumstances of the applicant's particular case, the sentence of 15 years' imprisonment at hard labour on count one was manifestly excessive and unjust".

[7] In his written submissions, counsel relied on the Certificate and urged the court to consider the sentence anew and exercise its discretion in accordance with section 42(L) of the CJAA to reduce it and impose a sentence of two years' imprisonment. That is the sentence that the learned trial judge indicated that he would have imposed, had there not been a prescribed minimum penalty.

[8] In his oral arguments, Mr Gentles refined his written submissions and presented a nuanced position. He conceded that the figure of two years' imprisonment reflected in the Certificate could not be produced in a vacuum but needed to be justified by legal principles. Counsel accepted that the sentencing methodology that is to be adopted is described by McDonald-Bishop JA, in the case of **Daniel Roulston v R** [2018] JMCA Crim 20, ('**Daniel Roulston**') at para. [17], as follows.

> "[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:

a. identify the sentence range;

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)."

[9] In applying this methodology, Mr Gentles argued that a starting point of 15 years should be reserved for more serious cases. He urged the court to utilise a starting point of 10 years. He identified two aggravating factors, namely, the fact that the appellant was a part of a group of five individuals when the offence was committed, and the act of violence of slapping the complainant to the back of his neck. However, counsel contended that the latter was not substantial and should not be treated as an aggravating factor.

[10] Counsel modified his written submissions by abandoning some of his previously identified mitigating factors, but maintained his reliance on the following:

a. The appellant's age. At the time of the incident, he was 18 years of age and counsel argued that his conduct can be deemed "as sheer stupidity not far-fetched from the conduct of a young developing and immature mindset of some children within that age group";

b. The appellant had no prior convictions and counsel suggested that he is capable of being rehabilitated;

c. The weapon used was an imitation firearm and was incapable of discharging deadly bullets; and

d. The appellant's favourable social enquiry report.

[11] Mr Gentles advanced the position that the aggravating factors would increase the sentence from a starting point of 10 years to 12 years. However, by applying a discount of two years to each of the four mitigating factors, the court would end with a sentence of four years' imprisonment which would be appropriate in the circumstances of the case.

Submissions for the Crown

[12] Ms Kristen Anderson, on behalf of the Crown, acknowledged that the Certificate provides the court with a wide jurisdiction to impose a sentence that the court deems just in the circumstances by virtue of the operation of section 42K of the CJAA. The Crown also conceded that, in the circumstances of the instant case, a sentence of imprisonment below the statutory minimum is appropriate. However, it was submitted that there is no legal justification for the sentence of two years' imprisonment which is indicated by the learned trial judge.

[13] Ms Anderson commenced her submissions on the question as to what an appropriate sentence might be, by a reference to the principles of sentencing which were reaffirmed by Harrison JA (as he then was) in **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered on 5 July 2002. Harrison JA stated that the objective of sentencing is to satisfy the goals of retribution, deterrence, reformation and protection of the public, singly or any combination of them. Counsel argued that since the appellant did not express any remorse, his prospect of rehabilitation was low, and this objective should not feature prominently in his sentencing.

[14] Counsel agreed with Mr Gentles that the sentencing methodology that is to be adopted in achieving these goals was elucidated by McDonald-Bishop JA, and is to be found in the case of **Daniel Roulston**. In this regard, there was consensus between Counsel for the appellant and the Crown.

[15] In proposing an appropriate sentence, Ms Anderson relied on the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts,

December 2017 ('the Sentencing Guidelines'), which indicates that the normal range of sentence for the offence of making use of a firearm to commit a felony is 15-25 years, and the usual starting point is 15 years. The Crown submitted that 15 years is an appropriate starting point for this matter because there are no extraordinary factors that warrant a higher one, since the circumstances of the commission of the offence were not particularly egregious. In determining the starting point, Ms Anderson indicated that the Crown considered the use of a weapon, the intrinsic seriousness of the particular offence and the prevalence of the offence in the community. Ms Anderson was asked by the court whether the fact of the use of a weapon was not an essential element of the offence of making use of a firearm to commit a felony and therefore subsumed in it. She conceded that it is a component of the offence and accordingly, this factor ought not to influence the starting point. However, counsel argued that even if this is removed as a consideration, the starting point would remain the same since it represents the statutory minimum.

[16] Following an exchange with the court and on further consideration, Ms Anderson conceded that this court has repeatedly indicated that whereas a plea of guilty and the implicit expression of remorse is a mitigating factor, the absence thereof is not to be treated as an aggravating factor. Accordingly, the suggestion that the appellant's lack of remorse is an aggravating factor was withdrawn. Counsel advanced the position that the appellant brandishing the firearm at the complainant after the robbery and escape remained a relevant aggravating factor, and since it was not considered in fixing the starting point there is no risk of double counting. Counsel maintained the Crown's reliance on that sole remaining aggravating factor and submitted that two years be added to the suggested starting point of 15 years, which would take the sentence to 17 years.

[17] Ms Anderson identified three mitigating factors, namely the age of the appellant, the fact that he had no previous convictions and his favourable social enquiry report. The court was urged to apply two years to each of these mitigating factors which would result in a sentence of 11 years.

Analysis

[18] In reviewing a statutory minimum sentence, pursuant to its power to do so granted by the CJAA, the issue which arises for this court's consideration was identified in the case of **Paul Haughton v R** [2019] JMCA Crim 29, in which Morrison P at para. [13] made the following observation:

> "The single issue which arises on this appeal is therefore whether, as the judge thought, the circumstances of this case are such as to make the imposition of the prescribed minimum sentence of 15 years' imprisonment for the offence of rape manifestly excessive and unjust; and, if so, what is the appropriate sentence to be imposed on the appellant instead."

In this case we are concerned with the offence of making use of a firearm to commit a felony, but similar considerations apply as they do to the offence of rape.

[19] Section 42K (1) of the CJAA provides for the learned trial judge to issue a certificate in respect of an appeal in certain circumstances as follows:

> "42K (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall –
>
> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence."

[20] The appellant being a person who was sentenced to a statutory minimum sentence and who, after being sentenced received the Certificate from the learned trial judge under section 42K of the CJAA, was entitled by section 13(1A) and (1B) of the JAJA, as amended, to appeal to this court for leave to appeal his sentence, leave having been refused by a single judge of this court.

[21] The first determination for us to make, therefore, is whether the circumstances of the case are such as to make the imposition of the minimum sentence of 15 years' imprisonment for the offence of making use of a firearm to commit a felony, manifestly excessive and unjust. In this regard, it is helpful in our analysis to examine what the result would be when a proper sentencing exercise is conducted.

[22] The current approach to sentencing has now been settled in this court by cases such as **Meisha Clement v R** [2019] JMCA Crim 29 and **Daniel Roulston** the latter of which both Mr Gentles and Ms Anderson relied. The methodology to be employed has been referred to in the submissions of counsel and it is not necessary to repeat it here. We also note that the Sentencing Guidelines support this approach as set out in **Daniel Roulston**.

[23] A major point of difference in the submissions of counsel for the appellant and the Crown, had to do with the appropriate starting point. In explaining the concept of the starting point, Morrison P in **Meisha Clement v R** [2019] JMCA Crim 29 at para. [26], referred to the case of **R v Saw and Others** [2009] EWCA Crim 1, at para. 4, where Lord Judge CJ observed that "the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features". Mr Gentles urged us to utilise a starting point of 10 years and Ms Anderson submitted that it ought to be 15 years. We have not been directed to any legal authority, nor have we by our research been able to locate any authority that supports a starting point below a prescribed minimum penalty.

[24] In **Haughton** at para. [36] Morrison P stated that:

> "… we are of the view that, so long as the prescribed minimum sentence laid down in section 6(1)(a) of the [Sexual Offences Act] remains, it is simply not possible for this court – or indeed the framers of the Sentencing Guidelines - to propose a starting point lower than 15 years in a case of rape..."

It is our opinion that this proposition is equally applicable to the offence of making use of a firearm to commit a felony. Therefore, we agree with the submissions of Ms Anderson that 15 years is an appropriate starting point in this case, considering the intrinsic seriousness of the offence and the aggravating features related to its commission, alluded to by counsel in her submissions and to which reference has previously been made.

[25] Another point of disagreement between counsel had to do with whether that fact that the weapon was an imitation firearm should be treated as mitigating factor. Save for this, both counsel agreed on the mitigating and aggravating factors and the degree, in terms of years, by which they should influence the starting point.

[26] The offence of making use of a firearm to commit a felony can be committed with a firearm capable of discharging projectiles or with an imitation firearm. We find merit in the submission of Mr Gentles that because the firearm in this case was an imitation firearm which was not capable of discharging a bullet this fact should be treated as a mitigating factor. The reason for such treatment is that among the elements that the court must assess is the relative dangerousness of the appellant's conduct. In doing so, we are obliged to consider the seriousness of the harm that could have resulted from the manner of the commission of the offence. In this case, because the firearm was an imitation firearm, the risk to which the complainant and other members of the public were exposed, was substantially reduced. However, the importance we attach to this as an independent factor has not been weighted as heavily as the other mitigating factors.

[27] We have also noted that the imitation firearm was not a crudely constructed one. Officer Davis who recovered it from the backpack that was being worn by the appellant, described it a page 423 lines 10-16 of the transcript as follows:

> "…Board and metal imitation gun with metal top, board handle with a spool and a metal trigger guard. The trigger guard this is metal, with a screw used as the trigger, household screw, the handle is board, the top is metal with a piece of board inside it."

The learned trial judge, during his summation at page 684 of the transcript, observed that "…with the untrained eyes and certainly from a distance, whatever distance, it does give an appearance of being real".

[28] The realistic impression given by the imitation firearm due to the nature of its construction, facilitated the commission of the robbery by ensuring the compliance of the complainant who backed away when it was pointed at him initially, and caused the complainant to increase the distance between himself and the appellant when the complainant was following the group of five persons. The level of fear experienced by the complainant was therefore not lessened because the firearm was an imitation firearm, this fact not being known to him. This was a point which Mr Gentles readily accepted.

[29] Whereas we accept that, generally, the court may link the presence of remorse with the prospect of rehabilitation of the offender, in this case we do not agree with Ms Anderson's submission that the absence of such remorse should diminish rehabilitation as an objective of the sentence which is to be imposed on the appellant. In this regard the appellant's age is a significant factor and is closely tied to the prospect of his rehabilitation. For this reason, we have attached significant weight to the appellant's age as a mitigating factor. We have considered whether a period of 15 years' imprisonment would render any benefit to the rehabilitation of the appellant which could not be achieved by a shorter period. We concluded that a shorter sentence would serve the objectives of sentencing the appellant given his age and the fact that he does not have any previous convictions. We did not accept the period of two years which the learned trial judge indicated in the Certificate that he would have imposed had there been no prescribed minimum penalty, as being a sentence that would serve the interests of justice for the appellant or the public.

Conclusion

[30] In conducting our analysis, we utilised a starting point of 15 years which was submitted by Ms Anderson. We considered the aggravating factors of the brandishing of the firearm and pointing it in the direction of the complainant while he was pursuing the

appellant and the other members of his group. Against this, we balanced the mitigating factors, namely, the youthfulness of the appellant, the fact that he had no previous convictions, his good social enquiry report, and the fact that the firearm was an imitation firearm.

[31] We arrived at a considered opinion, that, in all the circumstances of this case, there were compelling reasons which rendered the prescribed minimum sentence manifestly excessive and unjust. Having balanced the aggravating factor against the mitigating factors, we concluded that the mitigating factors significantly outweigh the aggravating factor. We are of the view that the single aggravating factor would increase the starting point to 17 years which would be reduced by nine years on account of the mitigating factors collectively, resulting in a sentence of eight years' imprisonment.

[32] Where a certificate has been issued and this court agrees and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, section 42K 3(a) of the CJAA empowers this court to impose on the defendant a sentence that is below the prescribed minimum penalty.

Order

[33] Accordingly, we make the following orders.

1. The application for leave to appeal sentence is granted.

2. The hearing of the application for leave is treated as the hearing of the appeal.

3. The appeal is allowed in part.

4. The sentence of 15 years' imprisonment for the offence of making use of a firearm to commit a felony is set aside and substituted

therefor is a sentence of eight years' imprisonment at hard labour.

5. The sentence of three years' imprisonment suspended for three years' imprisonment for the offence of robbery with aggravation is affirmed and is to run consecutively to the sentence for making use of a firearm to commit a felony.

6. The sentences are to commence as of 20 December 2019, the date they were imposed.