[2013] JMCA Crim 57

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 99/2010

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MS JUSTICE LAWRENCE-BESWICK JA (Ag)

KENNETH HYLTON v R

Robert Fletcher and Mrs Nadine Atkinson-Flowers for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Melissa Simms for the Crown

4 and 6 November 2013

ORAL JUDGMENT

HARRIS JA

[1] On 24 September 2010, the applicant, Kenneth Hylton, was convicted in the High Court Division of the Gun Court of the offences of illegal possession of firearm and illegal possession of ammunition. He was sentenced to 15 years imprisonment for the illegal possession of firearm and 10 years imprisonment for illegal possession of ammunition. It was ordered that the sentences should run concurrently.

[2] An application by him for leave to appeal against conviction and sentence was refused by a single judge. Before us is a renewal of that application.

Case for the prosecution

[3] The facts are that on the morning of 22 January 2010, a team of police personnel was in Yallahs in the parish of Saint Thomas engaging in an operation in search of wanted men and illegal weapons. At about five o'clock, the police, armed with a search warrant, went to Abby Lobby Lane in Yallahs where the applicant lived with his nephew Ryan Hylton. Corporal Kevin Foster, a member of the police party, went to the side of the house, looked into a room through a partially opened glass louvre window, which he further opened, and saw the applicant who was dressed in a red mesh merino and a pair of black shorts.

[4] Corporal Foster was about 5 or 6 feet away from him. The light was on in the room. Corporal Foster shouted, "Police don't move". The applicant threw a firearm inside a wardrobe and then ran out of the room. During this time, Corporal Foster observed the applicant for about a minute. Soon after, Corporal Foster went to the front of the house where there were other policemen. There he saw the applicant again, he and his nephew having come to the entrance of the house. The warrant was read and handed to the nephew by Sergeant Bennett.

[5] The applicant was taken back to the room from which he had run. In the room, Corporal Dave Francis opened the wardrobe from which the gun was recovered. It was a GB 9mm pistol containing nine millimeter cartridges. The firearm was shown to the

applicant by the police and under caution, he said, "You dun si wah a gwaan areadi, boss, a my gun, mi nah rob and kill nobody wid it, nuh kill me." He admitted ownership of the gun.

The applicant's case

[6] The applicant gave sworn testimony in which he stated that on 22 January 2010, at about 4:35 in the morning he was asleep in his bed, dressed in his underwear. He said the light in his room was off. Having heard knocking on the door of his house, he went to the verandah and turned on the verandah light.

[7] The glass louvre windows in his house, which had curtains, were closed.

[8] He, and his nephew Ryan, who was also in the house, having gone to the verandah, he saw the police who told him that they had a search warrant. This search warrant was not shown to him. The police asked him to show them his room. When he arrived there, two other police personnel were already in the room and a female officer was conducting a search of it. He, having been dressed in underwear only, was told by the police to get dressed. In obedience to the command, he put on a red merino and a pair of black shorts.

[9] The wardrobe was searched, following which, he felt a blow to his neck. Turning around, he saw one of the policemen holding a firearm. This policeman asked him for the rest of the firearms. He denied that he told the police that the gun was his and he had kept it for his protection.

Grounds of appeal

[10] The original grounds of appeal were abandoned and the applicant was granted leave to argue the following supplemental grounds:

> "1. The sentence is manifestly excessive.
>
> 2. The learned trial judge failed to consider aspects of the evidence which could have raised the issue of motive to lie on the part of the officers and which would therefore have impugned their credibility."

Submissions

[11] Mr Fletcher argued that in sentencing, deterrence and prevention were the factors which the learned judge had taken into account, but although these factors may be relevant, rehabilitation is a requirement within the context of the sentencing process and ought to have been considered by the learned judge. The sentence should fit the crime and be tailored to fit the offender, he argued. It was his further submission that the applicant is 52 years old, had been actively employed and has a young child who is dependent on him and these factors ought to have been taken into account by the learned judge. All the relevant factors in the classical principles of sentencing can be accomplished by a reduction of the sentences which have been imposed by using a sentence of 10 years as the starting point for possession simpliciter, he submitted. In support of his submissions, Mr Fletcher cited the case of **Daniel Robinson v R** [2010] JMCA Crim 75, and made mention of the case of **R v Beckford and Lewis** (1980) 17 JLR 202 which was cited with approval in **Robinson**.

Ground one - Sentence

[12] It has long been recognized that a trial judge is charged with the responsibility of fixing an appropriate sentence. The determination of an appropriate sentence being a discretionary matter for him or her, this court will not interfere with a sentence imposed save and except it is found to be manifestly excessive – see **Alpha Green** (1969) 11 JLR 283.

[13] In **R v Beckford and Lewis**, Rowe JA (as he then was), carried out a review of the four classical principles of sentencing laid down by Lawton LJ in **R v Sergeant** (1974) 60 Cr App Rep 74 namely, retribution, deterrence, prevention and rehabilitation and stated that any sentence imposed must fit the offender and the offence.

[14] The gravamen of Mr Fletcher's complaint is that the learned judge, in sentencing, concentrated on deterrence and prevention but failed to pay due regard to the rehabilitation element. It is perfectly true that in sentencing, rehabilitation should be taken into account in conjunction with the other principles laid down in **R v Sergeant**. The concept of rehabilitation embraces an assurance that if a custodial sentence has to be imposed, the length of the sentence should be such that it affords the offender, on release from incarceration, the opportunity to return to enjoy a useful and worthwhile life.

[15] At the time of sentencing, two witnesses gave evidence on the applicant's behalf as to his character. One witness stated that the applicant is respectful and expressed surprise to have learnt that the applicant had a previous conviction. The other witness

said that the applicant was a quiet person. He also spoke of his consternation in learning that he had committed the offences for which he had been convicted.

[16] In sentencing, the learned judge said:

> "Mr Hylton, you have a previous conviction for firearm, sir. It is not very often that in these courts persons come here with previous convictions at all – generally, they are young persons, half your age. [It is] very unusual for someone of your age to be here in the first place and most unusual for you to be here the second time. One of the witnesses said in the box that he was surprised because he thought that you were reformed and this is clearly not an indication of any kind of reform .... In other words, it is not long after you came out that this offence was committed."

[17] It is without doubt that although the learned judge had made reference to the matter of reform he did not fully consider rehabilitation. The learned judge ought to have taken into account the evidence of the witnesses as to character which speaks to the applicant being respectful and quiet. The statement from one of the witnesses that he thought that the applicant had reformed was as a result of a query from counsel for the applicant about the witness' reaction on hearing that the applicant had committed the offence for which he was before the court. However, this does not mean that all other factors which enured to the applicant's benefit should not have been considered. The antecedent report shows that the applicant was 51 years old, he was always gainfully employed and has a 13 year old child dependent on him.

[18] Over the years, the courts have embraced a practice that upon the conviction of an offender, in determining an appropriate sentence, guidance is sought by making a

comparative review of sentences imposed for similar offences, in a particular case. Depending on the circumstances of the case, the court considers which, in the range of sentences would be appropriate for an offender. For the purpose of this exercise reference will now be made to the sentences imposed in a number of cases involving convictions in which firearms were involved.

[19] In **Devon Carter v R** [2010] JMCA Crim 97, the applicant was convicted of illegal possession of firearm and assault. He had no previous conviction. A sentence of 17 years was imposed on him for the firearm offence and five years for the assault. The sentence of 17 years was reduced to 10 years.

[20] In **Marvin Walker v R** [2010] JMCA Crim 96, the applicant was convicted of illegal possession of firearm and assault with intent to rape. He had no previous conviction. He was sentenced to 10 years imprisonment on the firearm charge which was upheld by this court.

[21] In **Selvin Thorpe v R** [2011] JMCA Crim 34, the applicant was convicted of illegal possession of firearm and assault at common law. The applicant had previous convictions. He was sentenced to 15 years for illegal possession of firearm. The sentence of 15 years imprisonment was affirmed by this court.

[22] In **Brian Williams v R** [2012] JMCA Crim 34, the applicant was convicted of illegal possession of firearm and wounding with intent. The sentence imposed for the firearm offence was 10 years and 15 years for wounding with intent. He had previous

convictions for illegal possession of firearm and wounding with intent. The sentences were not disturbed by this court.

[23] As shown above, on conviction for illegal possession of firearm the tariff ranges between 10 and 15 years. It is apparent that the trend is that a starting point of 10 years for illegal possession of firearm is the preferred tariff. As can be observed, in **Brian Williams v R**, the sentence of 10 years for illegal possession of firearm remained undisturbed despite the fact that he had previous convictions. In all the circumstances, in the present case, it would be just to reduce the sentences of the applicant despite his previous convictions.

[24] In this case, we are of the view that the sentence imposed on the applicant for illegal possession of firearm is manifestly excessive. Consequently, the court is driven to set it aside.

Ground 2

[25] Mr Fletcher submitted that the fabrication of the policemen's evidence was a critical issue in this case and the learned judge ought to have placed greater weight on the applicant's evidence. Corporal Foster, he argued, admitted in cross-examination that there was a curtain at the window of the house and Sergeant Bennett said that the applicant was previously known to him but he served the warrant on the applicant's nephew and thereafter wrote that he served it on the applicant, yet the learned judge did not address the risk of the concoction of their evidence. The police, he further argued, had a preconceived notion that the applicant was involved in the guns for drugs

trade and although, initially the learned judge excluded this piece of evidence from his consideration, he went on to state that it may be relevant to "the state of mind" but did not specify whether he was speaking to the state of mind of the police or that of the applicant.

[26] In his assessment of the evidence, the learned judge said:

> - "I have found no material contradictions in the evidence of the prosecution [sic] witnesses that would have any impact on their credibility.
>
> - The court accepts the prosecution [sic] witnesses as being truthful and rejects the accused [sic] version of events. Accordingly, the court finds that the accused was in possession of the firearm found in his wardrobe."

[27] The learned judge had before him the evidence of the prosecution's witnesses as well as that of the applicant. He saw the witnesses and would have assessed their demeanour. It was for him to have decided what evidence he accepted or rejected from the witnesses. Although there was evidence that the applicant was involved in the guns for drugs trade, this was not accepted by the learned judge as true. He went on to say, "I suppose the relevance is the state of mind but that is as far as it goes". This statement, however, would in no way affect the safety of the conviction. The learned judge's focus was on the evidence before him. Corporal Foster, in examination-in-chief did not state that there was a curtain at the window when he looked into the room but in cross-examination he admitted that a curtain was there. What is of importance is

whether Corporal Foster could have observed the applicant concealing the firearm which was found in the wardrobe.

[28] So far as the warrant is concerned, it was addressed to the applicant and although it was read and delivered to Ryan, the applicant was present and it can be taken that it had been effectively executed on him. The evidence adduced by the prosecution is cogent. No fault can be ascribed to the learned judge in accepting the witnesses for the prosecution as credible. It cannot be said that he was palpably wrong in doing so. He rightly rejected the evidence of the applicant and arrived at a verdict of guilty, as indicated.

[29] The application for leave to appeal against conviction is refused. The application for leave to appeal against sentence is treated as the hearing of the appeal. The appeal is allowed. The sentence of 15 years for illegal possession of firearm is set aside and a sentence of 10 years imprisonment is substituted therefor. The sentence of 10 years for illegal possession of ammunition is set aside and a sentence of six years is substituted. The sentences should commence on 24 September 2010. Sentences are to run concurrently.