**[2022] JMCA Crim 38**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MRS JUSTICE DUNBAR-GREEN JA**
**THE HON MR JUSTICE LAING JA (AG)**

**SUPREME COURT CRIMINAL APPEAL NO COA2020CR00022**

**KIMANI MCDERMOTT v R**

**Benjamin Fraser for the appellant**

**Miss Ashtelle Steele, Janek Forbes and Miss Sharelle Smith for the Crown**

**13 July 2022 and 18 July 2022**

**DUNBAR GREEN JA**

[1] This matter came before us as a renewed application for leave to appeal conviction and an appeal against sentence. Mr Kimani McDermott ('the appellant') was convicted and sentenced in the High Court Division of the Gun Court, holden at King Street in the parish of Kingston, following a trial by Palmer J ('the learned judge') between 24 and 26 September 2019. The indictment on which he was charged contained two counts. The first count charged him with the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act, and the second count charged him with the offence of shooting with intent contrary to section 20(1) of the Offences Against the Person Act ('OAPA').

[2] On 13 December 2019, the learned judge sentenced him to concurrent terms of imprisonment *viz*; eight years' imprisonment for illegal possession of firearm and 15 years' imprisonment at hard labour for the offence of shooting with intent. With respect to the

sentence for shooting with intent, the learned judge also issued a certificate pursuant to section 42K of the Criminal Justice (Administration) (Amendment) Act, 2015 ('CJAA'), on the basis that, in his opinion, the appellant should have received a sentence lower than the prescribed minimum penalty for that offence. No certificate was put before us, but that does not prevent us from considering the appeal (see **Paul Haughton v R** [2019] JMCA Crim 29 and **Lennox Golding v R** [2022] JMCA Crim 34).

[3] On 30 July 2021, a single judge of this court granted him leave to appeal his sentence primarily on the basis of the section 42K certificate. She, however, refused leave to appeal the conviction.

[4] At the commencement of the hearing of this appeal, counsel for the appellant, Mr Benjamin Fraser, pursuant to a notice of application for court orders, filed 8 July 2022, sought an extension of time within which to file skeleton submissions and a chronology of events. The application was supported by an affidavit filed on 11 July 2022. Counsel also sought leave to abandon the original grounds of appeal and argue, instead, these two supplemental grounds:

> "Ground 1- The Learned Trial Judge issued a certificate pursuant to section 42K of the Criminal Justice (Administration) (Amendment) Act 2015 with respect to count 2 which allows the defendant to seek leave to a Judge of the Court of Appeal against a prescribed minimum penalty.
>
> Ground 2- The Learned Trial Judge was correct in recommending that the exceptional circumstances existed to necessitate the reduction of the Appellant's sentence from the prescribed minimum to avoid a sentence that would be manifestly excessive or unjust."

[5] There being no objection from the Crown, we made the following orders:

> "1. Extension of time granted to the appellant to file and serve skeleton submissions.
>
> 2. The submissions filed, on 11 July 2022, [are] permitted to stand in good stead.

> 3. The applicant is granted permission to abandon the original grounds of appeal and, argue instead, two supplemental grounds as contained in skeleton submissions filed on 11 July 2022."

[6] The application for leave against conviction was not pursued.

[7] These are the material facts that gave rise to the offences. On 12 January 2018, at about 11:30 am, the appellant who was a pillion on a motorcycle and armed with an illegal firearm, shot at Inspector Keith Steele ('the complainant') while being chased by police travelling in a marked police service vehicle, along Molynes Road in the parish of Saint Andrew. The complainant was, at the time, in police uniform and on duty. The motor car in which he was a passenger was being driven by another police officer. The complainant did not return fire and the appellant made his escape via the public thoroughfare on Molynes Road. The appellant was previously known to the complainant.

[8] The appellant was later arrested and charged with the offences of illegal possession of firearm and shooting with intent. He was positively identified, by the complainant, on an identification parade. At trial, the appellant gave sworn evidence in which he raised the defence of alibi.

[9] The sole issue, on appeal, is whether 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 shooting with intent, manifestly excessive and unjust, and, if so, what would be the appropriate sentence to be imposed on the appellant.

[10] A conviction for shooting with intent to cause grievous bodily harm has, since 23 July 2010, attracted a prescribed minimum sentence of 15 years' imprisonment (see section 20(2) of the OAPA). Section 42K of the CJAA provides for an appeal to a judge of this court, from a sentence of the prescribed minimum penalty, where the sentencing judge forms the opinion that, based on the circumstances of the particular case, the prescribed minimum penalty would be manifestly excessive and unjust. That section provides:

"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.

(2) A certificate issued to a defendant under subsection (1) shall outline the following namely –

(a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;

(b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and

(c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may –

(a) impose on the defendant a sentence that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed by him, which

> the defendant shall serve before becoming eligible for parole."

[11] Sections 13 (1A) and (1B) of the Judicature (Appellate Jurisdiction) (Amendment) Act, 2015 ('JAJAA') give a "companion route" of appeal to this court, with leave of the court, in similar circumstances.

[12] Before us, Mr Fraser, on the appellant's behalf, submitted that this court has jurisdiction under section 42K of the CJAA to reduce the sentence imposed on the appellant for the offence of shooting with intent. On the question of whether the prescribed minimum sentence would be manifestly excessive and unjust, he urged the court to give weight to the fact that the learned judge would have seen and heard the appellant and exercised "wise judicial discretion" in issuing the certificate. More so, the court should consider the social value of the mitigating factors which the learned judge identified and applied, in arriving at the position that the appropriate sentence ought to have been 10 years' imprisonment.

[13] Those mitigating factors, Mr Fraser opined, characterise exceptional circumstances on which a case could be made for giving a sentence below the prescribed minimum penalty. Counsel placed heavy reliance on the decision of **Curtis Grey & Toussaint Solomon v R** [2018] JMCA App 30 wherein Morrison P indicated that the true range of sentences in cases of shooting with intent, where there are no exceptional features, is between 10-15 years' imprisonment. Counsel also submitted that the authorities made it clear that the appellant would be entitled to time spent on remand.

[14] Counsel for the Crown, Miss Steele, agreed that the clear intention of section 42K of the CJAA is that a person who has been sentenced to a prescribed minimum sentence in respect of which the sentencing judge has issued a certificate under that section, should have "a direct right of recourse" to the Court of Appeal. Counsel also indicated that sections 13(1A) and (1B) of JAJAA give an applicant who has been prescribed the minimum sentence and who has been granted a certificate by the sentencing judge, a similar right to appeal to this court. In relation to ground two, counsel for the Crown

contended that, in determining whether there were exceptional circumstances to warrant the reduction of the sentence from the prescribed minimum, on grounds that it was manifestly excessive and unjust, it is imperative to first ascertain whether the sentence imposed was appropriate: **Paul Haughton v R**.

[15] In that regard, Miss Steele argued that the mitigating factors were not sufficiently weighty to justify a deduction of 10 years from the learned judge's starting point of 20 years, in the context of the several significant aggravating factors. Counsel also argued that not even a further deduction of one year and a month for time spent in pre-sentence custody, by the appellant, would properly take the sentence below the prescribed minimum. This was so because the mitigating factors were outweighed by the aggravating circumstances (some of which were not expressly considered by the learned judge). The following aggravating factors were highlighted as having contributed to the seriousness of the offence and militated against a reduction in the prescribed minimum penalty: (i) the shooting took place in broad daylight on a busy thoroughfare; (ii) the firearm was not recovered; (iii) the complainant was previously known to the appellant; and (iv) the complainant was travelling in a marked service vehicle and on duty.

[16] Counsel contended that, in those circumstances, a sentence of 15 years' imprisonment could not be deemed manifestly excessive and unjust. She relied on the cases of **Deryck Azan v R** [2020] JMCA Crim 27 and **Anthony Gayle v R** [2021] JMCA Crim 30 to illustrate this court's approach to the treatment of this type of offence where police victims are involved. She also sought to distinguish the line of authorities which were decided prior to the inclusion of a prescribed minimum penalty in the law (in 2010), and submitted that they ought not to be relied upon to justify a reduction in the appellant's sentence.

[17] The appellant's antecedent report revealed that he was born on 26 September 1991. At the date of the offences he was, therefore, 26 years old and at the date of sentencing, 28 years old. He had no previous conviction nor a pattern of offending. In counsel's plea in mitigation, before the learned judge, it was revealed that the appellant

was skilled in carpentry and masonry and had received a favourable community report. He had three minor dependents and was the breadwinner of the family. The Aftercare Officer considered him to be a low-risk offender. He had also spent one year and a month on pre-sentence remand.

[18] At the start of the sentencing hearing, the learned judge remarked that possession of an illegal firearm, by itself, was serious, given the prevalence of firearm offences in the country; and that the allegations were made much more serious by the appellant having "fired a deadly weapon at the police, prior to making good [his] escape". The learned judge went on to say that without "the favourable aspects of the case", a sentence of 20 years' imprisonment would not have been considered excessive on facts where "a firearm [was] being fired at the police".

[19] With these considerations in mind, he adopted a starting point of 20 years' imprisonment. The learned judge then considered and applied the following mitigating factors: (i) the fact that the appellant had three young dependents; (ii) his previous good character; (iii) the fact that he had no previous conviction; (iv) his age; (v) the prospects for utilising his skills in the community; and (vi) his prospects for rehabilitation. The appellant's age and the fact that he had minor dependents were considered, by the learned judge, to be exceptional circumstances which warranted the issuing of the certificate under section 42K. In his discretion, these were sufficiently weighty to warrant a much lower sentence than the prescribed minimum penalty. 10 years' imprisonment was, therefore, suggested.

[20] It is necessary to examine the particular circumstances of this case in order to determine whether the learned judge was correct that there existed exceptional circumstances which would make the imposition of the prescribed minimum sentence manifestly excessive and unjust. This process will necessarily take account of like cases which have been decided since the inclusion of the prescribed minimum penalty into our law.

[21] We start with the assumption that a prescribed minimum penalty is generally applicable in cases where there is an absence of violence or aggravation beyond that inherent in the offence itself; where there is an absence of factors that would increase the level of culpability of the offender and the harm which results; and where the offender has good antecedents. In this case, we consider that there were multiple factors which made the circumstances of the offence more serious and increased the culpability of the offender. The specific aggravating factors included the fact that:

(i) the complainant was an on- duty police officer;

(ii) the shooting took place on a busy thoroughfare;

(iii) the shooting occurred in broad daylight; and

(iv) the firearm was not recovered.

[22] In accordance with the standard approach set out in **Meisha Clement v R** [2016] JMCA Crim 26, and refined in **Daniel Roulston v R** [2018] JMCA Crim 20, by McDonald-Bishop JA, at para. [17], the learned judge adopted a started point of 20 years' imprisonment within the range of 15 years-life imprisonment. In so doing, he took account of the fact that the complainant was a police officer and that firearm offences are prevalent in the society. There was, however, no indication that he had considered the time and location of the offence or the fact that the firearm was not recovered. These latter three factors, in our view, increased the seriousness of the offences and the level of culpability of the appellant. They would not have only justified a more serious view of the offences but an upward adjustment of the starting point from 20 years' imprisonment, that was utilised by the learned judge.

[23] Having adopted a starting point of 20 years' imprisonment, the learned judge then considered, in the appellant's favour, the mitigating factors enumerated above. The question arises whether - when those factors are considered alongside the significant and weighty aggravating factors - the mitigating effect is so strong as to warrant a sentence below the prescribed minimum penalty.

[24] Generally speaking, the mitigating value of certain mitigating factors is reduced depending on the seriousness of the offence. The learned judge seemed to have attached much weight to the appellant's age (26 years) but we pause to observe that many of the firearm offences in this country are, in fact, committed by the youth. So, a young age, without more, is of diminished mitigating value where offences like these are concerned. And there was nothing to connect the commission of the offence to the age of the appellant.

[25] The absence of any previous conviction and a good community report are commendable and of some weight as mitigating factors. However, the more serious the offence, the less weight is accorded these matters. The learned judge also gave weight to the fact that the appellant had three minor children and was the breadwinner of the family. This factor is generally of less weight, where the offence is of a more serious nature. In **R v Kathryn Nethersole** [2015] EWCA Crim 2174 at paragraph 14, the Court of Appeal of England and Wales opined:

> "…The interests of the applicant's children had to be balanced against society's interest in the proper enforcement of criminal law, having regard in particular to the seriousness of the offending, **but sole care of children is not a trump card. It cannot be seen as a licence to commit serious offences and avoid custodial consequences**." (Emphasis mine)

[26] Quite appropriately, the learned judge gave weight to the interests of the appellant's minor children as there was no dispute that he was the sole or primary provider for them. But, in our view, given the seriousness of the offending, the learned trial judge accorded too much weight to the appellant's age and his status as a provider for his dependants as mitigating factors, while failing to take account of some critical aggravating features in the commission of the offences.

[27] In the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Courts, December 2017, the normal range of sentences for shooting with intent is stated to be five-20 years' imprisonment with a usual starting point of seven years (save

in cases in which the prescribed minimum applies). In conducting our review of the circumstances of this case, we considered the aggravating circumstances mirrored in the learned judge's reasons – that is, the prevalence of firearm offences in the country and that the shooting offence was committed against the police. We also considered the additional aggravating factors - that the shooting took place on a busy thoroughfare in broad daylight and that the firearm was not recovered. Any attack on the police is not only personal; it is an attack on law enforcement itself.

[28] In the light of those additional aggravating circumstances, we believed that an upward adjustment, by two years, of the learned judge's starting point of 20 years' imprisonment was warranted. This would have increased the notional figure of 20 years to 22 years. Next, we took account of the mitigating factors. After balancing the aggravating factors with the mitigating factors, we determined that the aggravating factors outweighed the mitigating ones and, on that basis, assigned a value of one year and six months to the mitigating factors. This resulted in a downward adjustment of the notional figure by one year and six months. The provisional sentence arrived at was 20 years and six months' imprisonment.

[29] The last step was to apply the credit of one year and one month for the time spent in pre-sentence custody. After this was done, the resultant sentence was still above the prescribed minimum penalty. Such a sentence would not have been inconsistent with Morrison P's observation, at para. [33] in **Curtis Grey and Toussaint Solomon v R -** that based on his limited survey, "the true range in cases with no exceptional features is somewhere between 10-15 years. The only matter at the top of this range was a case involving shooting at police officers…".

[30] It would also have been consistent with this court's decision in **Deryck Azan v R,** in which one of the victims was a police officer, and a firearm and rounds of ammunition were recovered from the applicant. In that case, the sentence of 35 years' imprisonment at hard labour for the offence of shooting with intent was substituted, on appeal, with 17 years' imprisonment at hard labour. **Andre Brown v R** [2014] JMCA

Crim 44 was also considered. In that case, the appellant was convicted for the offence of shooting with intent at two police officers who were on foot patrol. His sentence of 15 years' imprisonment was affirmed, on appeal.

[31] Our conclusion, therefore, is that the mitigating factors, in the instant case, were not sufficiently weighty to cancel out the significant aggravating features of the offences and warrant the reduction of the prescribed minimum penalty, as the learned judge thought. Consequently, we disagree with the position that there are compelling reasons that would render the prescribed minimum penalty manifestly excessive and unjust. The appellant's age and the fact of him having minor dependants (cited by the learned judge), in our view, do not constitute exceptional circumstances that would justify a sentence below the prescribed minimum of 15 years' imprisonment for shooting at the police. Ground two, therefore, fails.

[32] Accordingly, the orders of the court are as follows.

(1) Leave to appeal conviction is refused.

(2) The appeal against sentence is dismissed.

(3) The sentence of 15 years' imprisonment imposed for the offence of shooting with intent, appealed against, is affirmed.

(4) The sentences are to be reckoned as having commenced on 13 December 2019, the date they were imposed, and are to run concurrently, as ordered.