JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 6/2009

BEFORE: THE HON. MR JUSTICE HARRISON J.A.
THE HON. MRS JUSTICE HARRIS J.A.
THE HON. MISS JUSTICE PHILLIPS J.A.

DWAYNE POWELL v R

Miss Gillian Burgess for the appellant

Mrs Sharon Millwood-Moore for the Crown

26 & 30 July 2010

HARRISON J.A

[1] Dwayne Powell was convicted by Morrison J., on 10 December 2008, in the High Court Division of the Gun Court held at King Street, Kingston on an indictment which charged him for the offences of illegal possession of a firearm and shooting with intent. He was sentenced to concurrent terms of 10 years and 20 years imprisonment at hard labour in respect of these counts. The single judge refused his application seeking leave to appeal against conviction but granted him leave to appeal against sentence on the basis that the sentence imposed with respect to the shooting with intent was manifestly excessive. We delivered our

decision on 26 July and promised then to put our reasons in writing. We now seek to fulfill that promise.

[2] Miss Gillian Burgess, who appears for the appellant informed us that the grounds of appeal in respect of the convictions were abandoned. We entirely agree with her and must say that the evidence against the appellant was very strong indeed. Counsel was granted leave however, to argue a supplemental ground with respect to sentence which reads as follows:

> "The Learned trial judge erred in imposing a sentence of twenty years upon the appellant on the charge of shooting with intent which was manifestly excessive having regard to the relevant matters to be taken into account for the purpose of sentence."

[3] The short facts which gave rise to the appellant's convictions were that on 13 May 2007, he was armed with a 9 mm pistol which he used to fire shots at Corporal Kirk Roach and Constable Carl Taffe of Guanaboa Vale Police Station, St. Catherine. Sometime in the evening, both officers were on mobile patrol traveling in an unmarked police vehicle in Byles District of Guanaboa Vale. They were armed and were dressed in plain clothes, wearing vests marked "Police". They approached certain premises in the vicinity of Sterling Lane where the appellant, known to them as "Pussman", was seen standing under a tree and appeared to have been speaking on the cell phone. The police officers alighted from

the vehicle and entered the premises from the rear. As they approached the appellant, who was a short distance away from them, said, "Who dat" about three times. The police officers did not answer but continued walking towards him. Detective Corporal Roach then called out to the appellant by saying "police" and thereafter gunshots were heard coming from the direction of the appellant. Both officers took cover and the appellant was seen shortly thereafter lying on his back holding a black 9 mm pistol in his left hand. He fired more shots in the direction of the policemen and they returned the fire. The appellant continued firing at them for a couple of minutes and he skillfully made good his escape from the premises by jumping over a ledge at the back of a house. He then ran into some bushes.

[4] The appellant was next seen by Corporal Roach in police custody at Spanish Town Police Station in December 2007. Corporal Roach had pointed him out to the Divisional Inspector as the man who had fired shots at him in May 2007. The appellant was subsequently arrested and charged by Detective Sergeant Dennis Arthurs for the offences of illegal possession of a firearm and shooting with intent.

[5] In his defence, the appellant made a statement from the dock and denied that he was in possession of a firearm and that he had used the firearm to shoot at the police. He said that he saw Corporal Roach for the

first time when he was in custody at Spanish Town Police Station and that the officer had asked him if he was called "Pussman". In further outlining his statement to the court the appellant mentioned other incidents which really had no bearing on the charges for which he was convicted.

[6] Miss Burgess was most economical in the time she utilized in presenting her arguments. She did not seek to challenge the appellant's convictions so she has confined herself to the question of sentence. The real point which she endeavoured to urge before us was that a sentence of 20 years for the offence of shooting with intent was manifestly excessive. Miss Burgess referred us to two cases which she argued could be useful in the court's determination of an appropriate sentence. They are: **Regina v Errol Brown** (1988) 25 JLR 400 and **Regina v Delroy Scott** (1989) 26 JLR 409.

[7] The facts in Brown's case are that the appellant was convicted in the High Court Division of the Gun Court of illegal possession of firearm and robbery with aggravation. He was sentenced to concurrent terms of thirty years and fifteen years at hard labour. It was alleged that he was among a group of men who had held up and robbed the proprietor and customers of a grocery shop. The appellant had three previous convictions one of which was for a Gun Court offence. The Court of Appeal found no merit in the grounds of appeal against conviction and

was concerned primarily with the question of sentence. The court held inter alia, that a trial judge even when imposing a deterrent sentence ought also to have in mind a possible rehabilitation of the accused. In light of the facts of the case the court said that the sentence on count 1 (the illegal possession of firearm) was manifestly excessive and accordingly reduced that sentence to one of 15 years.

[8] In Scott's case, the appellant, upon his plea of guilty, was convicted in the Gun Court for illegal possession of a firearm and wounding with intent. He was sentenced to seven years and five years imprisonment at hard labour respectively with the terms to run consecutively. The court held inter alia, that in criminal trials, where the accused pleads guilty to the charge(s), the court ought to take that fact into consideration in mitigation of sentence. However, in that case, the learned trial judge did not accord sufficient significance to the guilty plea in sentencing the appellant.

[9] We do believe that at first blush, a sentence of 20 years for the offence of shooting with intent would appear to be manifestly excessive but it may not necessarily be so. We pointed out to Miss Burgess the recent decision of **Tarick Mercurius v Regina** SCCA No. 169/06 (un-reported) delivered 21 July 2008, where this court held that a sentence of 20 years in that case with respect to a charge of shooting with intent, was

not manifestly excessive having regard to the circumstances of the case. The facts of that case reveal that the appellant was convicted in the Gun Court, of the offences of illegal possession of firearm, illegal possession of ammunition and shooting with intent. In respect of the firearm, he was sentenced to imprisonment for 10 years for the ammunition, two years and for the shooting with intent he was sentenced to 20 years imprisonment.

[10] A single judge of this Court granted Mr Mercurius leave to appeal against sentence on the 3rd count, for shooting with intent, but refused leave to appeal in respect of the other aspects of the case. The evidence in the case revealed that in May 2005, Superintendent of Police Delroy Hewitt, in uniform, accompanied by two constables who were not in uniform, were all in a vehicle which was unmarked. They went into an area of the Corporate Area in broad daylight where they saw the appellant. When the Superintendent came out of the vehicle, the appellant moved off from where he was standing and shortly thereafter he used a Ruger 9mm semi-automatic pistol and shot at the Superintendent. There was a chase, and during the chase the firearm fell from the hand of the appellant and it was retrieved by the Superintendent. The appellant however, made good his escape. Nine months later he was spotted by the Superintendent who radioed the

police for help and the appellant was held and subsequently identified by the Superintendent.

[11] On the question of sentence, Panton P., in delivering the judgment of the court had this to say:

> "Mr. Hines has sought to persuade us that in the circumstances, the appellant would not ordinarily have shot at the superintendent because the evidence by the Crown was to the effect that when the appellant was held he said that he did not know that the persons shot at were police officers. Mr. Hines has sought to suggest that, that is a mitigating factor. He also sought to suggest that because the car was unmarked and the other officers were not in uniform, the learned judge should not have treated the offence as seriously as he did. Although not totally expressed in those terms, he tried to say that the sentence was manifestly excessive.
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> To be accurate learned counsel has not really stressed that the sentence was manifestly excessive. He has merely said that it was excessive.
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> In accordance with the principles that guide us at this stage, we cannot disturb the sentence unless we are of the view that it is manifestly excessive.
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> In the circumstances that have been proven here, the shooting at a superintendent of police in uniform in broad daylight deserves a sentence of 20 years imprisonment and so the appeal against sentences are dismissed."

[12] In our judgment, the cases of **Errol Brown** and **Delroy Scott** referred to by Miss Burgess are clearly distinguishable on their facts from the instant case. However, the facts of the **Mercurius** case are definitely similar to those in the instant case. Both cases concern the shooting with intent at police officers whilst they are carrying out their lawful duties. The fact that the firearm was recovered in one case but not in the other would not, in our view, constitute of the former, a more serious crime, than the latter. What is being punished is the crime of illegal possession of the firearm and further offences committed with the use of that firearm. Of course, there is one further aggravating factor in the instant case. The appellant has recorded against him, a previous conviction for illegal possession of a firearm in 2003.

[13] In the circumstances of this case, we see no reason to disturb the sentence of twenty (20) years imposed by the learned trial judge in respect of the offence of shooting with intent. We take this opportunity to restate the principle enunciated in the **Tarick Mecurius** case that persons, who shoot at members of the security forces whilst they are executing their lawful duties, must be made to realize that such crimes will be punished with commensurate severity. It is our view that trial judges should endeavour to impose comparatively similar sentences for similar offences so that there can be a uniform approach in sentencing.

[14] The dicta expressed by Bernard CJ of the Court of Appeal in Trinidad and Tobago, in **Cudjoe (Mark) v The State** (1986) 43 WIR 367, are worthwhile repeating in this judgment. The learned Chief Justice stated inter alia:

> "In Farfan's case this court took the opportunity to deprecate the tendency on the part of people to commit violent crimes willy-nilly and very often in broad daylight. This is what the court said in that case:
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> > 'One final word. This court has viewed with alarm the escalation in the commission of this and other kindred offences as well as other offences involving violence in the society. Their prevalence is today matched only by the boldness and ferocity of their commission. We sound a reminder that the courts of the land have a duty to take all steps available to them to protect the community at large. We would hope that the judges of the land will be guided accordingly. To this end punishment, we think should be as severe as the circumstances warrant.'"

[15] We therefore conclude that the sentence which the appellant received was neither manifestly excessive nor wrong in principle. On 26 July 2010 we made the following order. The conviction is hereby affirmed and the appeal against sentence is dismissed. The sentence of ten (10) years imprisonment in respect of count 1 (illegal possession of firearm) will run concurrently with the sentence of twenty (20) years on count 2 (shooting with intent) and they will commence as of 12 March 2009.