JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO: 211/1999

BEFORE: THE HON. MR. JUSTICE P. HARRISON, J.A.
THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A. (Ag.)

R V COLLIN GORDON

Miss Jacqueline Cummings for the applicant

Mrs. Jeneice Nelson-Brown for the Crown

May 2 & November 3, 2005

P. HARRISON, J. A:

This is an application for leave to appeal against a sentence of twenty (20) years imprisonment at hard labour imposed on the applicant on December 12, 1999, in the High Court Division of the Gun Court, on each of two counts for the offences of illegal possession of firearm and wounding with intent, respectively. We dismissed the application on May 2, 2005, and ordered that the sentences run concurrently commencing from the 15th day of March 2000. These are our reasons in writing.

The relevant facts are that on December 18, 1997, at about 2:00 p.m. the complainant, Anthony Tyson stopped his car in front of his house at Big Lane, near Central Village, in the parish of St Catherine. He, along

with the eye witness Althea Hylton, his girlfriend, and a brother of his, came out of the car. The applicant walked towards him and called to him, "Ronnie, come here." The complainant turned and walked towards him and said "What do you and my brother have?" The applicant responded; "Not what mi and you brother have, is what me and you going to have." The applicant then pulled a firearm from his pocket and pointed it towards the complainant's chest. The complainant noticed the "serious" look in the applicant's eyes and the twitch of his lip and consequently he stepped backwards and turned to his left. He heard an explosion and felt a burning sensation to his side. He fell to the ground. Thereafter he heard three clicks, he looked up and saw the applicant over him with the firearm pointing at his head. The applicant said "Bwoy me a go kill you." The eye witness Althea Hylton screamed to the applicant "Muchie, don't kill him, don't kill him Muchie." The applicant then turned and ran down Big Lane. The complainant was placed in a car and taken to the police station, then to the Spanish Town Hospital and then to the Nuttall Hospital in Kingston, where he was treated and remained for two days. The complainant had been shot through his right arm below the elbow and in the right side.

The complainant had known the applicant since 1974. They grew up together since the complainant was a little boy. The applicant also lived at Big Lane.

The trial court heard the evidence of the complainant, the eye witness Hylton and the investigating officer and the prosecution closed its case. The applicant then changed his plea to one of guilty to both counts. The court thereafter heard the antecedent report and imposed the sentences stated.

Counsel for the applicant argued one ground of appeal, namely:

> "The sentence of 20 years on each count are manifestly excessive having regard to all the circumstances."

Miss Cummings argued that the learned trial judge failed to consider in the applicant's favour, his age, the fact that he was not considered to be a danger to society and was remorseful, the fact that he was the sole breadwinner for his family, that he had exhibited good conduct since 1978, and that the wound suffered by the complainant was not life-threatening. She submitted that the sentence of 20 years on each count was excessive and relied on ***R v Mowatt*** (1990) 27 JLR 32, ***R v Brown*** (1990) 27 JLR 34, ***R v Delroy Scott*** (1989) 26 JLR 409 and ***R v Brown*** (1990) 27 JLR 321.

The sentencing of an offender lies in the discretion of the court and the punishment must be imposed in relation to the facts and circumstances of the particular case. The well known classical principles of retribution, deterrence, prevention and rehabilitation have to be borne

in mind so that a court may determine which of them should be applied (***R v Sargeant*** (1974) 60 Cr. App. R 74, 77).

Some of these principles may overlap in their application to a particular case. In some cases, the paramount interest may be protection of the society, which is the ultimate aim. In others, it may be the rehabilitation of the offender. The circumstances of the case, including the conduct of the offender, are the determinant of the applicable principle.

A guilty plea by an offender must attract a specific consideration by a court. This Court, following ***R v Delroy Scott*** (supra), said in ***R v Everald Dunkley*** RMCA No. 55/01 delivered July 5, 2002:

> "A plea of guilty is an indication of repentance and a resignation to the treatment of the court. This act of pleading guilty must be a prime consideration in favour of the offender, who has admitted his wrong on the first opportunity to do so before the court. There ought to be some degree of discounting, that is, in a reduction of sentence." (Emphasis added)

The appellant in ***R v Delroy Scott***, (supra), had pleaded guilty to the offences of illegal possession of firearm and wounding with intent. The Court of Appeal in allowing the appeal against sentence, approved sentences of five (5) years imprisonment on each count, to run consecutively. Carey, P. (Ag.), at page 410, said:

> "The appellant in this case pleaded guilty and we think that some discount should be given in that regard. We are of opinion that the learned

> trial judge did not accord sufficient significance to that factor in mitigation of sentence."

The rationale in affording to an offender the consideration of discounting the sentence because of a guilty plea on the first opportunity is based on the conduct of the offender. He has thereby frankly admitted his wrong, has not wasted the court's time, thereby saving valuable judicial time and expense, has thrown himself on the mercy of the court and may be seen as expressing some degree of remorse.

In the instant case, there was no guilty plea entered "on the first opportunity." The plea of "not guilty" was changed to "guilty" after the close of the prosecution's case. The applicant may then well have viewed the prosecution's proven case as overwhelming. It was not a case of an offender frankly admitting his guilt. He was capitulating to the inevitable. Neither can he be seen, as it were, as saving judicial time or saving expense.

The facts of this case reveal a deliberate and persistent attempt to kill the complainant. But for the fact that the firearm failed to discharge a bullet after three tries, the complainant may have been fatally shot in the head. This revealed a callous disregard for human life.

In imposing sentence the learned trial judge at page 36 of the record correctly observed:

> "If that gun was not malfunctioning he would be a dead man. Anybody who can behave like that has no right in our society. ... It was a chilling

> experience to hear what you did. I was thinking of forty (40) years ... but you pleaded guilty. Miss Cummings has asked me for mercy, so I am going to divide it in two and reduce the forty (40) to twenty (20) ..."

The learned trial judge thereby applied the correct sentencing principles, by considering an appropriate custodial sentence, in the circumstances, and discounting it because of the plea of guilty, in order to arrive at the final sentence to be imposed.

There is nothing on the record, whether from the applicant or in the address of counsel to reveal any penitence on the part of the applicant. No remorse was revealed. No further discounting is applicable in this case.

The current high incidence of crime committed with the use of a firearm has reached almost epidemic proportions. The society must be protected.

The approach of the learned trial judge cannot be faulted. The sentences imposed cannot be described as manifestly excessive in these circumstances. For the above reasons we made the order described above.