

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 95/86

BEFORE: THE HON. MR. JUSTICE CAREY, PRESIDENT (AG.)
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MISS JUSTICE MORGAN, J.A.

REGINA

VS.

DELOROY SCOTT

L. Jack Hines for Appellant
Miss Carol Malcolm for Crown

May 29, July 24 and October 4, 1989

CAREY P. (AG.):

This was an appeal against sentence which comes before this court by leave of the single judge. The appellant pleaded guilty in the High Court Division of the Gun Court held in Kingston on 20th November, 1986 to two counts on an indictment which charged illegal possession of firearm and wounding with intent. He was sentenced to consecutive terms of seven years and five years imprisonment at hard labour respectively.

The question of substance before the court related to the propriety of imposing consecutive sentences where an offender is convicted of possession of a firearm and some other offence committed by or with that firearm e.g.

robbery with aggravation or, as occurred in the present case, wounding with intent.

We begin by referring to the historical fact, viz. that Parliament set up a special tribunal, viz. the Gun Court, for the purpose of disposing of cases involving the possession and/or use of what we may conveniently refer to as illegally obtained firearms. See the Gun Court Act. Indeed, so seriously did the legislature regard firearm possession simpliciter that in the beginning, it fashioned a special punishment i.e. indefinite detention. Although this was subsequently struck down as unconstitutional by the Privy Council in Hinds & Ors. v. R. 24 W.I.R. 326, Parliament enacted amending legislation providing for a sentence of imprisonment for life as a mandatory punishment. That too has been altered by removing the mandatory requirement and conferring a discretion on the trial judge. There is thus a manifest policy on the part of the legislature to treat possession of a firearm simpliciter as a grave offence.

Where that firearm is thereafter used in the commission of a criminal offence, we do not think it can properly be said that the possession charge becomes merged in the other offence, so that effectively there is only one activity, which merits punishment. We have in mind cases such as R. v. Brickligge 7 W.I.R. 45 where the charges were smoking ganja and possession of ganja or in a recent decision of this court R. v. Manderson-Jones (unreported) R.M.C.A. 33/89 dated 30th May 1989 where the charges were obstructing traffic and parking within 30' of an intersection. This genre of case is where one activity provides the prosecution with an option as to the charge to be preferred. The situation in respect of

charges under the Gun Court umbrella, is altogether different. It is the charge of possession simpliciter which gives the court its jurisdiction to proceed to hear and determine offences committed with the firearm. The charge of possession is, therefore, a substantive charge although it cannot be denied that possession of the firearm is incidental to its criminal user. We are of opinion, therefore, that as substantive charges, substantive penalties may be imposed and made to run consecutively.

But different considerations are brought to play when we come to deal with the quantum of sentence imposed. The court is concerned to ensure that whatever sentence or sentences are imposed, viewed globally, the punishment should not be manifestly excessive. With the assistance of the Clerk to the Gun Court, we were able to obtain some statistics showing the range of sentences imposed in that court over the last three years, where the second count is wounding with intent. The average for this period was about ten years. 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.

In the result, we reduced the sentence on count 1 to five years imprisonment at hard labour, affirmed the sentence on count 2 and as well the order for the sentences to run consecutively. These then were the reasons which led us to our decision which we had announced at the end of the submissions on 24th July.