[2012] JMCA Crim 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 152/2008

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

CLAYTON WILLIAMS v R

Leroy Equiano for the appellant

Mrs Caroline Hay and Mrs Denise Samuels-Dingwall for the Crown

30 April 2012

ORAL JUDGMENT

PANTON P

[1] The appellant was convicted on four counts of an indictment charging him with illegal possession of firearm in count one and robbery in respect of the other counts. There were two other counts but the evidence did not support the recording of convictions on them, and the learned judge accordingly returned not guilty verdicts in respect of them.

[2] Count one charged him with illegal possession of firearm, the particulars being that on 16 April 2008 in the parish of St Ann he had in his possession a firearm not under and in accordance with the terms and condition of a firearm user's licence.

Count two charged him with robbery with aggravation in that he robbed Fitzroy Edwards of a grey 2007 Toyota motor car valued at $1,900,000.00 and a black Motorola cellular phone valued at $3,000.00. Count three charged him with robbing Iofa Brown of a Motorola cellular phone valued at $36,000.00 and cash of $3,000.00. Count four charged him with robbing Shashom Mignott of a grey Nokia cellular phone and $4,050.00 in cash. In respect of these robbery charges, the particulars indicate that he was not only armed with a firearm but he was also with another person.

[3] The learned judge sentenced the appellant to eight years imprisonment in respect of the illegal possession of firearm and in respect of each of the other counts he sentenced him to seven years imprisonment. He ordered that the sentences on counts two, three and four were to run concurrently but they were to be consecutive to the sentence on count one and in doing so, the learned judge said, "That's 15 years so that society is protected from persons like you. You have one less gunman on the street of Jamaica". He also had earlier referred in his sentencing to three cases between 1985 and 2004 from the Court of Appeal in England. He said,

> "All those cases indicate that consecutive sentences may be utilized in the situation such as this, but the concern for the court is whether or not the overall sentence meets out to you, like I make them concurrent, all of them I don't think that would reflect adequately the seriousness of the matter here and the practice of releasing dangerous people after two thirds of the sentence, I am not happy with that at all."

[4] The single judge of this court who reviewed the application for leave to appeal indicated that the ruling made by the learned trial judge that the sentence imposed on

counts two, three and four were to run consecutively with the sentence imposed on count one is reviewable by the court. Accordingly the single judge granted leave to appeal against the sentences and that is why we are here referring to Mr Williams as an appellant.

[5] Now, the facts of the case are quite simple and common place in that on 16 April 2008, two men, one of whom was this appellant entered a restaurant known as the High Grade Restaurant and Bar in Windsor Heights, St Ann and one of these men proceeded to inquire as to what was on the menu. Of course, what followed did not indicate any serious interest in the menu because shortly thereafter, the other man said that it was a hold up and that no one was to move. Soon, a firearm came into play and cell phones and cash as indicated in the indictment were taken unlawfully from the persons named in the indictment as complainants.

[6] There was a car owned by Mr Fitzroy Edwards, parked outside. They demanded the keys to the car but were not able to get it started. Eventually, Mr Edwards started it against his wishes and he had to accompany them while they tried to make their escape. The police had been alerted; the car was chased and later abandoned. It became clear that these men, that is, the appellant here and his colleague, were novices in what they were doing because they did not know the area that they were driving in. They had to abandon the car and they sought refuge in bushes which, apparently, they were not even familiar with. Eventually, Mr Edwards made contact with the police again and this appellant was held. When he was arrested and charged,

he actually said that it was the first time he was robbing someone and that the other person who was with him was the one who had the gun.

[7] The appellant filed grounds of appeal indicating that he was not happy with the question of identification and also the quality of the evidence supporting the conviction. We have looked at the summation by the learned judge and we can find no fault with it, in that the learned judge addressed all the issues that called for treatment by the trier of facts, and so in respect of the convictions, the application for leave to appeal is refused.

[8] The position is different so far as the question of sentence is concerned. This court has on several occasions given guidance in no uncertain terms to trial courts as to how to approach the question of consecutive sentences. It is not within the right of any judge to seek to go outside those guidelines by citing cases dealt with by the English Court of Appeal. Trial judges in Jamaica are to be guided by the Jamaican Court of Appeal, not the English Court of Appeal, and this is something that we expect that trial judges will take seriously. So far as consecutive sentences are concerned, we will repeat that judges are to be guided by the case of ***R v Walford Ferguson***, SCCA No 158/1995 delivered 26 March 1999 reference to which is well-known and recently we had the decision in the case of ***Kirk Mitchell v R*** [2011] JMCA Crim 1. In the instant case, the circumstances were all one, and there is no basis whatsoever for consecutive sentences to be imposed. There is also a bar against a judge taking into consideration what is remitted, that is, the question of the two thirds. That is not a

matter for any trial judge to consider and there is authority of antiquity in that regard which I need not refer to at this point in time.

[9] The end result in this case is that by not following the guidelines, the learned judge has caused the sentences to be reduced in the sense that they are going to be made concurrent, and being concurrent it means that the appellant will serve eight years. We trust that we will not have to revisit this question of consecutive sentences in the near future. We expect compliance with the principles as stated by the Court of Appeal.

[10] In respect of the appeal against sentence, the appeal is allowed; all the sentences are ordered to run concurrently and the sentences are to commence from 16 January 2009.