Neutral Citation Number: [2022] CA (Bda) 23 Crim

Case No: Crim/2022/07

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CRIMINAL JURISDICTION
BEFORE THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2022: No. 007

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 23/12/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL GEOFFREY BELL

- -

Between:

CHRISTOPHER PERINCHIEF

Appellant

- and -

HIS MAJESTY THE KING

Respondent

Saul Froomkin, OBE, KC, Christopher E. Swan & Co., for the Appellant

Cindy E. Clarke (DPP) and Shaunte Simons-Fox, Office of the Director of Public Prosecutions, for the Respondent

Hearing date(s): 17 November 2022

- -

APPROVED JUDGMENT

BELL JA:

Introduction

1. The Appellant in this case, Christopher Perinchief, pleaded guilty to possession of ammunition without a licence, contrary to section 3(1)(a) of the Firearms Act 1973 ("the Act") on 21 June 2022, and was sentenced to 12 years' imprisonment by Subair Williams J on 4 October 2022. This appeal comes before the Court after I granted leave to appeal against sentence on 21 October 2022.

Background facts

2. The Appellant was apprehended on 13 February 2022 after the vehicle which he had been driving had crashed into a stone wall, leaving the front bumper and licence plate embedded. Police had traced the vehicle to the Appellant's home, where they had approached the Appellant, who confirmed that the vehicle (which was by then minus its front bumper) was his work van, which he had previously been driving. A search of the van produced a silver and green thermos, and a subsequent examination of this disclosed 32 rounds of ammunition. In his police interview the Appellant responded "No comment" to all questions put to him, but the probation officer who interviewed him for the purposes of preparing a Social Inquiry Report noted that the Appellant had told him that he had "agreed to hold the ammunition after being asked to do so by its owner".

The sentencing

3. The judge gave a written ruling on sentence in which she started by referring to the summary of evidence read to the court, and next turned to the range of penalties for the offence, which can be found in Schedule 1 Table 2 of the Act. This provides for a minimum penalty of 12 years and a maximum penalty of 17 years for a person found guilty of a first offence on conviction on indictment. The judge then turned to consider sections 53 to 55 of the Criminal Code Act 1907 and the need for proportionality contained in section 54, which provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The judge took into account the Appellant's early guilty plea and previous good character, and concluded her ruling with these words:

> *"In my judgment, I see no reason to impose a sentence lower than the mark which Parliament has set as a minimum sentence. Accepting that a sentence of 14-15 years would have been imposed if this matter had been tried and in the exercise of this Court's full sentencing powers (including its powers to determine a proportionate sentence under section 54) I hereby pass a sentence of 12 years imprisonment."*

4. There are two features about the judge's sentencing remarks on which I would comment. First, she made no mention of the circular ("the Circular") which she had signed on 25 April 2022 in her capacity as supervising judge of the Criminal Division of the Supreme Court. The Circular was said to mark the introduction of a temporary policy of sentencing discounts on guilty pleas entered between 25 April and 3 August 2022. So on its face the Appellant did at least potentially fit into the category of persons who might benefit from the temporary increase in discounts, colloquially referred to as the Covid discount, since it was the pandemic which led to the

backlog. I shall use that term. Yet while the Crown's sentencing submissions referred to the Covid discount, the judge's ruling on sentence did not.

5. Secondly, the judge made no reference to the submission made by Crown Counsel in the Crown's sentencing submissions that the sentence which the judge should impose in this case was one of 8 years and 6 months., and more particularly why she had chosen to impose a sentence well above that figure. The period recommended by the Crown purported to come from the combination of the Appellant's early guilty plea and "the 30 – 35%" Covid discount, as applied to the mandatory minimum sentence of 12 years. In fact, the Circular refers to "an additional discount of up to 30%", subject to other conditions to which I will come when considering the Covid discount. But even then, the arithmetic is wrong. It is well known that a discount of 30% is available for an early guilty plea - see *Davy v R* [2021] CA (Bda) 5 Crim, where the amount of the discount was not canvassed, and, for example, *R v Mallory* [2022] SC (Bda) 71 Crim, where the figure of a 30% discount was referred to by this judge as "the ordinary 30% discount". The Covid discount purports to be an additional discount, and while it is not possible to understand how the Crown reached its figure of 8 years and 6 months, one can see that a discount of 30% on 12 years gives a discount of just over 3 years and 7 months, or close to 8 years and 6 months as the appropriate sentence. But that arithmetic involves taking the statutory minimum sentence as a starting point, followed by the application of just the one discount, not including the additional discount envisaged by the Circular which the Crown had clearly had in mind, because it was referred to, even if the arithmetic on the appropriate sentence was flawed.

A closer analysis of the Covid discount

6. The heading of the Circular refers to a temporary increase in sentencing discounts, and in the fourth paragraph indicates that where the criteria are satisfied, the Court will strongly consider applying an additional sentencing discount of up to 30% in those cases where the Director of Public Prosecutions ("the Director") determines that it is appropriate to do so.

7. The first point to be made is that the additional discount can be applied in either of two ways; it can be added to the ordinary discount so as to give a discount of 60%, or it can be applied in stages, so that the additional 30% is not added to the original discount, but is applied against the original sentence after the first discount has been applied. This second method produces a total discount of 51% rather than 60%. It appears from the authority of *Mallory* that the judge chose to run the two discounts together and so reached a discount in that case of 60%. I do not say that by way of criticism, though it would have been helpful if the Circular itself had been clearer as to how the additional discount was to be calculated.

8. But it can also be seen that the new regime envisages a filter role to be played by the Director, without whose sanction the additional discount cannot, it seems, be made available. The Director thereby appears to play a critical role in the sentencing process, in a way which gives rise to fundamental questions as to the propriety of the additional discount scheme introduced by the Circular. Those accused persons wishing to benefit from the Covid discount are advised to make contact with the Director "for her determination on whether the case in question qualifies under the policy and whether she deems it suitable for an additional discount of up to 30%". Where the Director does determine that the case in question qualifies, then it is for the court to consider whether it is appropriate to apply the additional discount, although the Circular indicates that the court will strongly consider doing so. In the event, it transpired that the Director was very much alive to this issue, and she advised the Court that the exercise she

had undertaken did not involve any exercise of discretion, but rather was one of certifying whether the particular case fell within the relevant criteria.

9. The third point to be made is that there are five categories of offence which are excluded from the additional discount, one of which is using, possessing or carrying a firearm. Firearms and ammunition are of course two entirely different things, and are referred to separately in the Act, but it is to be noted that the Legislature chose to treat the two identically for the purpose of sentencing under the Act. This is no doubt intended to reflect the reality that the one without the other is of little utility. But in this case the apparent anomaly works in the Appellant's favour, so no question of injustice to him arises.

The grounds of appeal

10. The grounds of appeal are as follows:

> *"1) that the sentence is manifestly excessive;*
> *2) that the said sentence disproportionate to the gravity of the said offence;*
> *3) that the learned trial judge failed to consider or apply the sentence discount normally applied for an early guilty plea;*
> *4) that the learned trial judge failed to consider or apply the publicly announced policy of the Supreme Court to grant a discount of sentence to those who unequivocally pleaded guilty during the period April to August 2022;*
> *5) that the learned trial judge gave little or no weight to the positive social inquiry report provided to the court;*
> *6) that the learned trial judge ignored the recommendation of the crown with respect to the applicable discount;*
> *7) that the learned trial judge failed to consider or properly consider the sentence recommended by the Crown;*
> *8) that the learned trial judge gave no reasons for rejecting any of the above grounds."*

11. So it can be seen that while a number of these grounds are in what I might describe as standard form, both the customary discount and the Covid discount are brought into play, as is the judge's failure to follow the Crown's sentencing recommendation, and her failure to explain her reasons in relation to those matters. I will nevertheless deal with the items in turn, as counsel did, although a number of the grounds can be dealt with together.

Grounds 1 and 2 – that the sentence was manifestly excessive and disproportionate

12. Mr Froomkin began his submissions with reference to two cases involving possession of ammunition. The first was the case of a US resident who had brought 5 rounds of ammunition into Bermuda, and who had been given a conditional discharge in the Magistrates' Court. The facts are so completely different to those in this case that I derive no assistance from the case, and in any event the fact that the matter was dealt with summarily meant that the issue of a minimum sentence, relevant in this case, did not come into play. Next was the 2016 case of *R v Ralston Wright*, where a sentence of seven years' imprisonment had been imposed for possession of 15 rounds of ammunition. But the material we received did not include the Crown's sentencing recommendation or any reasons given by the judge for the sentence imposed. So there was no indication given as to how either counsel or the judge had approached the test to be applied where the court was being invited to (and in this case apparently did)

impose a sentence below the statutory minimum. But more to the point, the defendant in *Wright* was said to have come across the bag containing the ammunition by chance, whereas the Appellant knowingly held the ammunition for another. So little assistance can be derived from either of these cases. I would dismiss those grounds.

Grounds 3 and 4 - the ordinary discount and the Covid discount

13. Mr Froomkin clarified at this point (and the Director confirmed) that the Appellant had made an approach to the Director, as envisaged in the Circular, and that the Director had determined that the case qualified under the policy outlined in the Circular. He referred the court to *Davy* – see above, but the Director readily confirmed the practice of the courts referred to in *Davy*, and the other cases to which we were referred confirmed that the ordinary discount can be as much as 30%. I have indicated in paragraph 4 above that the judge made no reference to the Circular or the Covid discount, and although at paragraph 8 of her ruling, the judge referred to taking the Appellant's early guilty plea into account, and at paragraph 9 indicated her acceptance of a sentence of 14 to 15 years if the matter had gone to trial, it was not possible to determine from the judge's ruling on sentence where that range of sentence comes from. Nor was it possible on the basis of the Crown's sentencing submissions before the judge to determine how the Crown's sentencing recommendation of 8 years 6 months had been reached.

14. In the event, matters were clarified during the course of argument. The view that the Crown had taken was that the ordinary discount would not normally be applied so as to reduce the sentence for an offence of this nature, with a statutory minimum sentence applicable, below that statutory minimum. However, the Crown had been prepared to recommend the Covid discount up to the level suggested in the Circular, 30%, even though the consequent reduction had taken the resulting sentence below the statutory minimum. The figure of 14 to 15 years which appeared in the judge's ruling on sentence came from the Crown in response to an enquiry from the judge as to the appropriate sentence on the facts of this case following trial. I will come back to the judge's calculation in due course.

15. Mr Froomkin referred to the authority of *R v Mallory* (3 October 2022) to demonstrate that Subair Williams J had in that case added the two discounts together before applying the total discount to a starting figure, although she had used a discount of 25% instead of 30%, to give a total discount of 55%. This was accepted by the Crown. So in the case of two 30% discounts, it was accepted by the Crown that a discount of 60% would be used, as opposed to the 51% discount mentioned in paragraph 7 above.

Ground 5 – failure to give adequate weight to the Social Inquiry Report

16. Mr Froomkin referred to the Social Inquiry Report in some detail, pointing out that this was a highly favourable report, and that the Appellant had a low risk of re-offending. But that was something the judge recognised, when she noted that the case was "a most heart breaking one", and that the Appellant was not the kind of person one expected to see before the courts. So she clearly had the contents of the report very much in mind. I would dismiss this ground of appeal.

Grounds 6 and 7 – ignoring the Crown's recommendation as to sentence

17. Mr Froomkin essentially let these grounds speak for themselves, and clearly the judge declined to follow the Crown's recommendation, and apparently indicated as much during the course of argument on sentence before her. But it is also the case that the Circular recognises that while

the Director had a determination to make as to whether a particular case qualified under the policy (on which I have already commented), it is the case, as it must be, that it is a matter for the judge as to whether she accepts whatever recommendation is made to her.

Ground 8 – failure to give reasons for rejecting the grounds

18. This last ground can be based on paragraph 9 of the judge's ruling on sentence, set out in paragraph 3 above, and in truth it has been difficult to follow the judge's decision making. However, with counsel's assistance, the position is now clearer.

Findings – the statutory minimum

19. This is no doubt a convenient point at which to address the issue of the statutory minimum sentence, and more particularly the ability of the sentencing judge to sentence a defendant at a level below the statutory minimum. I have referred in paragraph 3 to the range of sentence provided for in the Act. The issue was dealt with by Ground CJ in the case of *Mallory v The DPP* [2011] SC (Bda) 27 Civil (6 May 2011), where he explained the position with reference to the Court of Appeal case of *Cox & Dillas v R* [2008] CA (Bda) 7 Crim, as follows:

> *"15. None of this means that the courts are entitled to ignore the mandatory minimum, as the Court of Appeal in Cox & Dillas explained:*
>
> > *"16. It does not follow that the Judge may disregard the minimum sentence provided for by section 315C(6) and similar provisions in the Code. The legislature is entitled to prescribe what it regards as the appropriate sentence for a particular offence, not least because its views are taken to reflect those of the society it represents. The law does not permit it to deprive judges of the power to determine the appropriate sentence in each individual case, but the judges must take account of the view it has expressed in prescribing the general rule. In determining, therefore, whether the appropriate sentence is a shorter term of imprisonment than the minimum period specified in the legislation, the judge should consider whether there are reasons why the specified term would produce a disproportionate result in the particular case. The judge must apply section 54 as well as section 315C(6)."*
>
> *16. I take that to mean that the mandatory minimum is the starting point. If the judge is going to go below it he can only do so on the grounds of disproportionality, and in my judgment good practice requires that he should state on the record why he considers that the specified term would produce a disproportionate result in the particular case. And it is only going to be an exceptional case where that will apply. As the Court of Appeal itself said:*
>
> > *"It appears that in those jurisdictions the provisions for mandatory minimum sentences allow for exceptional cases where the minimum may not apply. If our view of the Bermudian legislation is correct, there is a similar implied safeguard, though it is not expressed." [My emphasis]*

> *17. In this respect the discussion in Archbold at para. 5-260a, on the equivalent English provisions in section 51A of the Firearms Act 1968, is helpful, as is the decision in R v Rehman and Wood [2005] EWCA Crim 2056 which makes it clear that the concepts of proportionality and exceptionality are intimately linked:*
>
> > *"It is clear in our judgment that, read in the context to which we have referred, the circumstances are exceptional for the purposes of section 51A(2) if it would mean that to impose five years' imprisonment would result in an arbitrary and disproportionate sentence."*

20. Thus it can be seen that if a judge is going to impose a sentence below the statutory minimum, he or she can only do so on the grounds of disproportionality, and it is only going to be an exceptional case where that will apply. In this case the position is, unfortunately, not clear. The judge did not indicate what discount she was applying for the early guilty plea, which may not always be the full 30%, and made no reference whatsoever to the Circular or the Covid discount. It would have been helpful to all concerned had she done so. Looking at matters from the starting point suggested by the Crown of 14 to 15 years' imprisonment, which the judge appears to have accepted, a discount of 30% on 14 years would lead to a sentence of 9.8 years, and on 15 years would lead to a sentence of 10.5 years – in both cases significantly below the sentence the judge imposed of 12 years. No doubt the judge did accept the submissions of the Crown that it was inappropriate to apply the ordinary sentencing discount for an early plea if that has the effect of reducing the sentence below the statutory minimum of 12 years.

21. Sentencing is not of course a mathematical exercise, but where there is a discount to be applied, one needs to know both the starting point and where the application of a particular discount leaves one. And if the consequence of that exercise is that the sentence to be imposed falls below the statutory minimum of 12 years, then consideration needs to be given to whether the criteria for allowing a sentence to be imposed below the statutory minimum are met. In this case the judge does not appear to have given any consideration to the application of the Covid discount. And the application of that discount would necessarily reduce the sentence below the statutory minimum, because following the application of the ordinary discount for an early guilty plea, the minimum of 12 years' imprisonment had been reached.

The course to be followed in this case

22. Mr Froomkin said during the course of his submissions that the court should be required to say why there are not exceptional circumstances. That may be overstating the position, but it does seem to me that the judge should have addressed the question, and in the absence of her having done so, it is open to this Court to undertake that exercise and determine whether special circumstances do apply in this case, such as to require the application of the Covid discount to the sentence of 12 years, which had already been reached by the application of the ordinary discount to the starting point the judge had used of 14 to 15 years' imprisonment.

23. In this case the question whether exceptional circumstances exist justifying a sentence below the statutory minimum very much ties in with the creation of the further discount which was effected by the Circular, and made known to the criminal bar, and which led the Appellant to make contact with the Director for her determination whether the Appellant should be entitled to a further discount of up to 30%. The Director did support the application of the further discount in the Appellant's case. It seems to me that if the judge had addressed her mind to the question, she would have been entitled to conclude that the manner in which the grant of a

further discount had operated in this case could indeed be treated as a special circumstance. That is in reality what the Crown recommended, and although their submissions did not descend into the necessary detail, one can infer that had the Crown done so, they would have concluded that special circumstances and the need for proportionality justified a sentence below the statutory minimum. And if the judge were to have taken a different view, it was incumbent upon her to explain why she did so. In the circumstances I would find that special circumstances justifying a sentence below the statutory minimum of 12 years do exist, in the form of the Circular and the Covid discount, and the judge having failed to consider that aspect of matters, I would so find. Accordingly, I would allow the appeal to that extent and substitute a sentence of 8 years and 6 months for that imposed by the judge. I recognise that the discount produces a slightly different figure, but it seems to me that justice is served in this case by following the course I have set out above.

The failure to give reasons

24. This is effectively covered in what I have said above, but I would emphasise the importance of reasons being given so that all concerned – counsel on both sides and the defendant – can understand why the judge has chosen to follow the particular course which she did. That cannot be said to be the case from the judge's ruling on sentence.

Conclusion

25. Accordingly, I would allow the appeal against sentence and substitute a sentence of 8 and a half years for the sentence of 12 years passed by the judge.

KAY JA:

26. I agree.

CLARKE P:

27. I, also, agree. The appeal is therefore allowed.