[2015] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 86/2011

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE WILLIAMS JA (AG)

LEON BARRETT v R

Delano Harrison QC for the appellant

Mrs Suzette Sahai Whittingham-Maxwell and Ms Kelly-Ann Boyne for the Crown

12, 14 October and 13 November 2015

F WILLIAMS JA (AG)

[1] By this application, the applicant challenges his conviction and sentences in the High Court Division of the Western Regional Gun Court by a judge, sitting alone. He was convicted on 27 October 2011 at the end of a trial which began on 26 October 2011; and was sentenced on 1 November 2011.

[2] He was found guilty of the offences of: (i) illegal possession of firearm; (ii) assault; and (iii) indecent assault. The sentences imposed for the aforementioned

offences were: (i) 15 years; (ii) two years; and (iii) 10 years' imprisonment, respectively. The sentences were ordered to run concurrently.

[3] A single judge refused the applicant's application for leave to appeal against conviction and sentence on 5 May 2014 and, as is his right, he renewed his application before us.

[4] Because of a particular point that arose in relation to the court's jurisdiction; along with two of the sentences, it is useful to set out at this juncture the sections of the relevant statutes pursuant to which the applicant had been charged. In relation to the offence of illegal possession of firearm, the transcript discloses that he was charged pursuant to section 20(1)(b) of the Firearms Act. In relation to the second offence (assault), the same appears to have been preferred against him as a common-law offence; and in relation to the offence of indecent assault, he was charged pursuant to section 13 of the Sexual Offences Act of 2009.

The original and supplementary grounds of appeal

[5] By way of a notice filed on 18 November 2011, and supplementary grounds filed 5 October 2015, the applicant has sought to mount mainly four challenges to his trial, conviction and sentencing, which he averred in general terms in his original notice and grounds of appeal, to have been unfair. Counsel for the applicant, Mr Delano Harrison QC, sought (and was granted) leave to argue the four supplementary grounds of appeal (perhaps expanding on the original overarching ground that spoke generally to a

complaint of an unfair trial). This is how the four supplementary grounds of appeal were framed:

> "1. The learned trial judge erroneously invoked the doctrine of judicial notice in relation to a material aspect of the applicant's defence, namely, that he had not seen "a gun before". In the result, the learned trial judge's approach to the applicant's entire defence was wholly unfair and unbalanced.
>
> The applicant was accordingly deprived of the substance of a fair trial (**EVIDENCE**: pages 94-95 line 5; page 102 lines 7-19; cf. **SUMMATION**: page 114 line 9 to page 115 line 13).
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> 2. In his defence the applicant raised the issue of his good character in two discrete respects: (i) the defence was advanced upon oath; (ii) far from being a socializing layabout, he was, he swore, "a working person" (**EVIDENCE**: PAGE 90 lines 16-19; page 99 lines 5-14).
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> In his summation the learned trial judge erred in his complete failure to direct himself, respecting the significance of these aspects of the applicant's defence (cf. SUMMATION: page 113 lines 5-10).
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> 3. Respecting each of the offences, the sentence was manifestly excessive.
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> 4. The learned trial judge had no jurisdiction to have tried the applicant for the particular offence of indecent assault with which the applicant was charged, for that, that offence was not one contemplated by s. 25 of the Firearms Act."

The evidence

[6] Only the briefest recital of the facts of the case is necessary, because, as will be seen from the nature of the supplementary grounds that were argued, the challenges being mounted are not primarily fact-based. Or, perhaps better put, they hinge on certain limited parts of the evidence; and parts of the evidence of the applicant only.

[7] Although that is the case, in keeping with our duty, we have perused the transcript to see whether there were any other arguable grounds. However, we could find none.

The Crown's case

[8] The Crown called three witnesses: the virtual complainant, her cousin and the investigating officer. The virtual complainant testified to having been a front-seat passenger in a right-hand-drive motor car being driven by her friend, Akeem, on the night of 13 July 2011. She had just left a wake at Jerusalem Heights in the parish of Westmoreland. As they were driving along, the motor car was flagged down by the applicant who had a firearm in his hand. He boarded the motor car in the company of two other males. He sat in the right rear passenger seat – that is, behind the driver. The other men also sat to the rear. During the course of the journey the applicant pointed the firearm to the virtual complainant's side and later on, at the request of one of the men, passed the firearm to him, who in turn pointed it to her head. At some point, the other two men indecently assaulted her.

[9] The virtual complainant's cousin (who was not a passenger in the car at the time of the assault and indecent assault) testified to having seen the applicant with a firearm at the wake earlier in the night.

[10] The investigating officer testified to having received from the virtual complainant the report against the applicant and the other men. He also gave evidence of having

commenced investigations into the matter; and of taking the applicant into custody, later arresting and charging him with the commission of the three offences.

The defence

[11] The applicant gave sworn testimony. The defence was a denial of having committed any of the offences. The applicant admitted to having known the virtual complainant (as she had testified), before the night in question. He also admitted to having been in the motor car with her and Akeem and having sat behind Akeem that night. He also testified to the other two men being in the motor car that night.

[12] During the course of his evidence he testified that he had never seen a gun before. With some questioning (at times, by the learned trial judge), it was established that what he meant was that he had never seen a real gun, but had only seen guns on television. His evidence was also to the effect that he had left the Waterhouse area of Saint Andrew when he was about 10 years of age and, from that time, resided in Westmoreland. It was from these parts of the evidence and the learned trial judge's comments on them in his summation that the supplementary grounds have been developed.

[13] In all the circumstances, therefore, identification was not in issue. The only issue, in fact, was credibility – that is, whose evidence the learned trial judge felt that he could have believed – that of the appellant on the one hand, or that of the virtual complainant, on the other.

The arguments and submissions

[14] What follows is how the arguments in support of the said supplementary grounds were put in the applicant's skeleton submissions filed on 8 October 2015 and supplemented by oral submissions; as well as the Crown's response.

Re judicial notice and hearsay

[15] It is in paragraphs 5-9, 10 and 13 of the applicant's written submissions that the nub of this argument (relating to the applicant's knowledge of guns) is to be found:

> "5. Notwithstanding the clarifying exchange between the applicant and himself relating to 'gun'/'firearm' (page 102, **supra**), the learned trial judge nowhere in his summation adverts to the applicant's explanation/clarification as to what he "really" meant.
>
> 6. On the contrary, the learned trial judge flatly rejected the applicant's sworn defence that he had never seen a "real" firearm previously.
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> 7. The learned trial judge found it "very difficult to believe the [applicant] that he had never seen a gun before"; this was '**because having served in that parish and even now in the news I am aware that gun crime is a problem in Westmoreland'** (page 114 lines 17-22: emphasis supplied). The applicant had testified that he had grown up in Westmoreland (page 94)…
>
> 8. The basis that the learned trial judge proffered, in his summation, for the grave difficulty in believing this material aspect of the applicant's defence was, it is submitted, fundamentally flawed.
>
> 9. It is submitted that it is plainly based on (i) the erroneous invocation/application of the doctrine of judicial notice (importing personal experience into the case) and (ii) the egregious violation of the rule against hearsay ('knowledge', attained by way of 'the news'- applied to a case) (see:

> **Hopeton Morgan** (1986) 23 JLR 424E (**headnote**): **487H-488D**).
>
> 10. But there is more: the applicant had testified that he had left Kingston – Waterhouse, in fact – as a "little" boy of 'ten'. Treating with that evidence, the learned trial judge, in his summation, asserts, thus: 'Now, I am a man from the city and **I know the sort of community that Waterhouse is...**' (page 114 line 24 to page 115 line 1: emphasis supplied).
>
> 11. …
>
> 12. …
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> 13. It is submitted that the rejection of the applicant's defence was grounded on baseless speculation, conjecture and unwarranted invocation of the doctrine of judicial notice (page 114, **supra**, to page 115 line 13; and see **Neville Purrier** (1976) 14 JLR 97, **101B-F**)." (Emphasis as in original)

[16] In response to this submission, the Crown, through Mrs Whittingham-Maxwell, argued that, whilst the comments of the learned trial judge might have been "somewhat exuberant", what mattered at the end of the day was that, after dismissing the defence, the learned trial judge returned to a consideration of the Crown's case; and that was what guided him towards the conviction.

[17] Learned counsel for the Crown cited several cases in support of her arguments: among them, the case of **Regina v Rohan Ricketts and Errol Williams** [1993] 30 JLR 144. Among the issues considered by this court in that case was whether comments made by a judge during the course of a trial with a jury, including a reference to a witness as "a pathetic liar", had exceeded the bounds of permissible judicial comment. The court held that, although a trial judge has the right to make

comments, even strong ones on the evidence, in that case the judge had overstepped the applicable bounds by making comments that were unwarranted on the facts, which had the effect of prejudicing the appellants' case.

[18] It was submitted that the distinctions between that case and the instant case were that: (i) the instant case dealt with a trial by judge alone and there was, therefore, no likelihood of a jury being prejudiced; and (ii) in this case it cannot fairly be said that the judge's comments were unwarranted on the facts.

[19] Also cited was the case of **Byfield Mears v The Queen** (1993) 30 JLR 156, which was also a jury trial and in which the conviction was quashed on the ground, *inter alia*, that comments made by the trial judge rendered the summation unbalanced. The appellant had been convicted in that case largely on the basis of evidence that he had allegedly confessed to his estranged common-law spouse to murdering someone. Among the judge's comments, recited at page 158 of the Privy Council judgment, were these:

> "I recoil to think that any human being could be so degenerate, so wicked that they would concoct a story like this, especially a woman who has borne from her womb a child for a man. I am not saying, but to me it is inconceivable that a human being could do this, just to settle a score."

[20] It was sought to distinguish this case as well, on the ground that different considerations apply to a trial by judge and jury than to a trial by judge alone, as in the instant case.

[21] Reference was also made to **Allan Cole v R** [2010] JMCA Crim 67. This was done by way of attempting to provide an example of a case in which this court, despite finding the comments and the invocation of judicial notice by a Resident Magistrate to have been unfounded, highly speculative and used as evidence in the case, nonetheless upheld the appellant's conviction. The learned Resident Magistrate in that case had made observations as to holes and marks on a wall on a visit to a *locus in quo*; purported to take "judicial notice" of them; and used these observations as a basis for disbelieving the then-accused.

[22] In response to the cases of **R v Neville Purrier and Tyrone Bailey** (1976) 14 JLR 97 and **R v Hopeton Morgan** (1986) 23 JLR 484, cited by Mr Harrison QC, Mrs Whittingham-Maxwell argued that those cases were distinguishable primarily on the basis that in each of them the improper invocation of judicial notice was used to supplement an evidential deficiency. (In **Purrier** the trial judge invoked the doctrine of judicial notice to base his finding that an object was a firearm falling within the statutory definition. In **Morgan** the learned trial judge, in relation to a charge of taking steps preparatory to exporting ganja contrary to section 13(5) of the Dangerous Drugs Act, had held that in his experience the packaging used was similar to that employed when ganja was prepared for export, despite their being no direct evidence to support the charge.) In the instant case, in contrast, the comments were a manifestation of the judge's exercising his jury mind in weighing the evidence put forward by the then-accused, as he (the judge) was entitled to do.

Analysis

[23] In his summation, the learned trial judge highlighted the main points of the evidence given by all the witnesses (having first satisfied himself, of course, that he had jurisdiction to deal with the matter).

[24] His choice was between accepting the evidence of the virtual complainant that the applicant had been armed on the night in question; and that of the applicant that he was not in fact so armed. Another choice was either, on the one hand, to have accepted the applicant's evidence that he, the applicant, a man of 26 years, had never seen a real gun; but only those on television; or to have rejected this bit of his evidence.

[25] It is important as well in discussing this ground (and the other grounds, too) to bear in mind, not just the snippets of evidence that have been quoted; but also the wider context in which the bits of evidence emerged and how they were dealt with in the summation. For example, in his summation, the learned judge commented as follows at page 115, lines 1-8 of the transcript:

> "…to say he is from Waterhouse--- well, he left there at ten but even at ten he would have seen guns, I should say, very likely from the security Forces… but, certainly, I would love to meet a Jamaican who, truthfully, has not seen, has never seen a gun in 2011. So I utterly disbelieve him on that."

Judicial notice

[26] The matters of which a judge is permitted to take judicial notice have been discussed in a number of cases and by a number of authors. Several of these were set

out and discussed by K Harrison JA in the **Allan Cole** case at paragraphs [38] to [41] of that judgment as follows:

> "[38] I turn next to look at the concept of judicial notice. In Cross on Evidence, 6th Edition (1985) Chapter 11 which is entitled 'Matters not requiring proof and judicial findings as evidence', the author commences his approach thus:
>
> > 'The general rule is that all of the facts in issue or relevant to the issue in a given case must be proved by evidence testimony, hearsay statements, documents and things… There are a number of exceptions to this general rule. In some cases the judge, or trier of fact, is entitled to find a fact of his own motion, he may take judicial notice of it. In others a party may make a formal admission of relevant matters…'
>
> He continues:
>
> > 'When a court takes judicial notice of a fact, as it may in civil and criminal cases alike, it declares that it will find that the fact exists, or direct a jury to do so, although the existence of the fact has not been established by evidence…'
>
> [39] In a later section Professor Cross discusses the question of "Personal Knowledge" and observes that, "The general rule is that neither a judge nor a juror may act on his personal knowledge of facts." He observes that this rule has reference to particular facts, and further on "that the basic essential is that the fact judicially noticed should be of a class that is so generally known as to give rise to the presumption that all persons are aware of it".
>
> [40] Phipson on Evidence (1982) 13th Edition is to like effect. At paragraph 2-06 it states:
>
> > 'Courts will take judicial notice of the various matters enumerated below, these being so notorious or clearly established or susceptible of demonstration by reference to a readily

> obtainable and authoritative source that evidence of their existence is unnecessary …'

At paragraph 2 - 08:

> 'Judge or jury as witnesses: Although, however, judges and juries may, in arriving at decisions, use their general information and that knowledge of the common affairs of life which men of ordinary intelligence possess, they may not, as might juries formerly, act on their own private knowledge or belief regarding the facts of the particular case …'

[41] In Halsbury's, 4th Edition (1976) Vol. 17 at paragraph 108 the following appears:

> 'Notorious Facts: The court takes judicial notice of matters with which men of ordinary intelligence are acquainted, whether in human affairs, including the way in which business is carried on, or human nature or in relation to natural phenomena'."

[27] Bearing these statements in mind, we are unable to say that the matters to which the learned trial judge adverted could fairly be classified as properly falling within what judicial notice, as we know it, encompasses. That is, the matters of which he took notice could not fairly be said to be:

> "…so notorious or clearly established or susceptible of demonstration by reference to a readily obtainable and authoritative source that evidence of their existence is unnecessary …"

[28] However, we are of the view that the comments made by the learned trial judge in the instant case do not go as far and are not anywhere as strident or potentially prejudicial as those made in the **Byfield Mears** case.

[29] Concerning judicial notice and personal knowledge, it may assist to make two other observations about **Purrier**: (i) one is to state the offending words that were found to have amounted to an improper invocation of judicial notice in that case; and (ii) to refer to an example given in that case of the type of matters of which judicial notice could properly be taken.

[30] The offending words used by the judge in **Purrier** were:

> "No one in Jamaica with a scintilla of sense can fail to recognize a gun when he sees it, guns having received such publicity." (see page 101, paragraph B of the judgment)

[31] Also at page 101, at letter D of the judgment are the following examples of matters to which judicial notice might be applied:

> "Examples of the application of the doctrine by reference to facts which have been judicially noticed without inquiry indicate the nature and limitations of the doctrine, e.g. that Christmas Day is December 25, that a fortnight is too short a period for human gestation – **R v Luffe**…- that cats are kept for domestic purposes…"

[32] It is clear that the comments made by the learned trial judge in the instant case do not fall within the same category of notoriety as the fact that, for example, Christmas Day falls on 25 December. Some of the comments in this case might also appear to bear some similarity to those of the trial judge in the case of **Purrier**. It was also incorrect to have had regard to matters reported "in the news". Notwithstanding those perhaps troubling observations, however, there are some important differences, certainly between this case and the **Purrier** case. For one, there was no evidential deficiency in this case calling into question whether the court had jurisdiction to hear

the matter (as there was in the **Purrier** case). So that the effect of the improper invocation of judicial notice in the **Purrier** case would have been far more serious than in the instant one. We, therefore, accept the submissions of Mrs Whittingham-Maxwell in that regard; both in relation to **Purrier** and to the similar case of **Morgan**. (In relation to the comments made in **Purrier**, however, and the basis on which the judge's comments were rejected by this court then, it is an open question whether the comments of the judge in the instant case would not be of more significance and perhaps more acceptable in today's Jamaica, some 40 years after **Purrier** was decided. However, that is not a matter that we need decide.)

[33] Rather than dealing with the question of jurisdiction, the learned trial judge in the instant case was dealing with the matter of credibility. There does appear to be some merit in Mrs Whittingham-Maxwell's submission that the comments seem to be a reflection of the learned trial judge's exercise of his jury mind (sitting, as he was, in the High Court Division of the Gun Court as the tribunal of both fact and law). This occurred as he was trying to decide on the issue of credibility – the question being whether it was credible that a man of 26 years of age had never seen a gun except on television. Shorn of the questioned comments, that was the central question that he was attempting to resolve.

[34] So that, at the end of the day the learned trial judge rejected the evidence of the applicant, which amounted to the applicant's saying that as a labourer of 26 years who had lived both in Waterhouse and in Westmoreland he had never seen a real gun of

any description – whether legal or illegal; whether near or at a distance or even in the possession of members of the security forces – except for those he had seen on the television screen. This, in our finding, the learned trial judge was entitled to do and he had a sufficient basis for so doing. So that, even if he erred in making an improper invocation of the doctrine of judicial notice, there was otherwise a sufficient basis for him to have rejected the evidence of the applicant.

[35] Another important consideration is that, this case turning primarily on a question of fact and credibility, the learned judge no doubt would have had regard to the demeanour of the witnesses; and, in fact, in relation to the virtual complainant, he so observed (at page 119, lines 1-8 of the transcript), in his summation. These were his remarks in that regard:

> "In fact, as I observed her in the witness box, I was quite impressed with her and when the suggestions were being made to her, that she was not speaking the truth, I watched her carefully and noted not just her response -- her oral response but also her demeanour and I was convinced that this was a truthful witness."

[36] This observation calls to mind the approach to be taken by an appellate court when reviewing cases largely decided on questions of fact, according to the guiding principle in **Watt v Thomas** [1947] AC 484, conveniently stated thus in the headnote:

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his

> conclusions if the grounds given by him therefor are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen and heard the witnesses or has failed to appreciate the weight and bearing of circumstances admitted or proved."

[37] That, in our view, is sufficient to dispose of that supplementary ground. We find, therefore, that this ground cannot succeed.

[38] We may now look at the supplementary ground relating to the good-character direction.

Was the appellant entitled to a good-character direction?

[39] The case of **Teeluck (Mark) and John (Jason) v The State** (2005) 66 WIR 319, is a good starting point for a discussion of this supplementary ground, reminding us, as it does, of the main principles to be considered. At paragraph [33] thereof, it was stated as follows:

> "(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged."

[40] As a countervailing consideration, perhaps, it may also be useful to bear in mind the words of Lord Steyn in the case of **R v Aziz** [1995] 3 All ER 149, in which, at page 158 c, he observed as follows:

> "A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with *R v Vye* [(1993) 97 Cr App R 134, [1993] 1 WLR 471] in a case where the defendant's claim to a good

> character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give [such] directions…"

The submissions

[41] For the applicant, Mr Harrison submitted as follows, (at paragraphs 22 and 23 of his skeleton arguments):

> "22. …it is submitted, the situation fairly cried out for consideration of the good character of the appellant as basing his credibility – his being a person whose word **could** have been relied on vis-à-vis the complainant's, in determining guilt or innocence. As it emerged, the learned trial judge failed to demonstrate, beyond per adventure, in his summation, that either the credibility limb or the so-called "propensity" limb of the "good character" direction, was at all present in his mind.
>
> 23. It is submitted that this failure on the learned judge's part is fatal to the applicant's conviction. "

[42] Additionally, Mr Harrison at first also put forward the following oral submission:

> "The mere fact of the accused giving sworn evidence (whether or not he calls a witness of fact or character) without more he is entitled to a good-character direction."

[43] To his credit, however, he later sought to adjust that submission and also submitted as follows:

> "The applicant raised his good character in his sworn defence in that he testified effectively that, being an always-working person, he was not the type to have associated with the two men named as having participated with him in committing the offences with which he was charged.
>
> …

> Properly read together, the contents of pages 90 and 99 of the record make it plain that the appellant was swearing that he had no time to associate with the two persons named as having participated in the commission of the offences, for he was a working person…and inferably did not join them in the offences charged."

[44] In an attempt to counter this, Mrs Whittingham-Maxwell for the Crown argued that the words used by the applicant would not, without more, have earned him a good-character direction. Perhaps if he had used additional words, such as, for example, 'I am not a criminal'; or 'I am a law-abiding citizen', the position might have been different. Additionally, there was no evidence as to whether he was a man with previous convictions or otherwise. She further submitted that the words used do not speak to good character, and added that there might be persons who work, but are of bad character. She also submitted that there was no need for a good-character direction in this case. If she was wrong, however (she further submitted), giving such a warning would not have made a difference to the outcome of the case.

Analysis

[45] As was earlier observed, it is best to have regard to the context in which that portion of the evidence emerged in respect of which it has been argued that a good-character direction ought to have been given.

[46] It was during the course of his cross-examination that the applicant was asked about his association with the other two persons who the virtual complainant said were acting with him in assaulting her on the night in question. These were the questions and his responses (to be found at page 99 of the transcript, lines 8 to 14):

"Q. You and Davion and Ricardo are friends, right?

A. We socialize. We live in the area.

Q. But oonoo meet up sometimes together and do things together?

A. No. I am a working person. They hardly see me."

[47] We are, at the very least, doubtful that those words, spoken by the appellant in that context, could be interpreted as meaning that the appellant was raising the matter of what he perceived to be his good character. It seems to us that, at most, when asked if he associated with the others, he was in essence saying that he would not have the time to do so, as demands on his time through his employment did not permit him to do so.

[48] His statement, "I am a working person", is to be contrasted (for example), with the words of the appellant Golding in the case of **Bruce Golding and Damion Lowe v Regina**, SCCA Nos 4 and 7/2004, judgment delivered 18 December 2009. That appellant had used the words: "I am not a gunman, your Honour. I am a working youth". In that case it was accepted that, by the use of those words, the appellant had put the question of his good character in issue, where the appellant had been tried for the offence of a gun murder.

[49] This statement of this applicant, however, might also be seen as raising a credibility issue on his part, in light of what he stated about these persons in his evidence-in-chief (at page 92, lines 7 to 14):

"Q. Where you say you took the car?

A. On the roadside.

Q. Who, along with you, went into the car?

A. Two other else friend.

Q. You can recall them name?

A. Davion and Ricardo.

His Lordship: Davion and Ricardo?

The Witness: Yes." (Emphasis added)."

[51] From this discourse, the question naturally arises as to how he became friends with the others if not through associating or socializing with them.

[52] As indicated previously, it was at first submitted that an accused earns a right to a good-character direction by, without more, giving sworn testimony. No authority was cited in support of this submission. We have scanned the cases on the point, including such cases as **R v Vye** [1993] 3 All ER 241; and **R v Aziz**. Having done so, we can find no support for that submission. We consider the true and correct position to be reflected in the dicta of Morrison, JA, in **Golding and Lowe v Regina**. At paragraph 90 of the judgment, the following was stated:

> "It is now well established that, where a defendant's good character has been distinctly raised by him, the defendant is entitled to a standard good character direction containing two limbs, '…the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged'. (**Teeluck & John v The State** (2005) 66 WIR 319, 329 per Lord Carswell)."

[53] The possibility exists that the submission that was at first made in this regard might have been born out of a misreading or misremembering of the headnote to **Vye**, the first line of which reads as follows:

> "A direction as to the relevance of a defendant's good character to his credibility is to be given where he has testified or made pre-trial answers or statements."

[54] To our minds, implicit in this statement is the pre-requisite that the accused, applicant or appellant has first to be in fact someone of good character; and also that this good character has to be distinctly raised in the course of the trial. Were it otherwise, then someone of bad character could earn himself a good-character direction simply by giving sworn testimony.

[55] In fact, one of the cases referred to by learned Queen's Counsel supports our interpretation and understanding of the rules relating to the giving of a good-character direction. That case is **Norman Holmes v R** [2010] JMCA Crim 19. In that case, one of the bases for overturning the conviction of the appellant for firearm and robbery offences, among others, was the failure of the learned trial judge to have given a credibility good-character direction. This was so in spite of the fact that the appellant had given sworn testimony, distinctly raising his good character and also calling two witnesses who also testified to his being a person of good character. In our view, the good-character direction was earned by that appellant not by the simple fact of his giving sworn testimony, without more; but by the fact that he raised through his own testimony and that of his two witnesses, the matter of his good character. As we understand it, all that advancing a defence on oath does is to earn someone of good

character who has raised his good character in the course of a trial, a direction on both limbs: credibility and propensity; and not propensity alone – as is the practice in the case of someone who makes an unsworn statement.

[56] As was stated before, this initial submission was (in fairness to learned counsel for the applicant), subsequently adjusted. However, since it arose at all (apparently as a part of supplementary ground 2), we wish to state our understanding of the true position, for the avoidance of doubt.

[57] Further, it seems to us that, the applicant's words in this case could, perhaps, more properly have been construed as putting his good character in issue, had he been accused of a crime of dishonesty (such as robbery or larceny); rather than, as here, crimes of violence.

[58] However, even if we are wrong in this conclusion, as is well known, the failure to give a good-character direction will not necessarily result in the quashing of a conviction. The matter ought to be considered in its entirety to see whether the giving of a good-character direction would likely have made a difference: see, for example, **Michael Reid v R** SCCA No 113/2007, judgment delivered 3 April 2009, per Morrison JA (as he then was), who at paragraph 44 observed as follows:

> "(v) The omission, whether through counsel's failure or that of the trial judge, of a good character direction in a case in which the defendant was entitled to one, will not automatically result in an appeal being allowed. The focus by this court in every case must be on the impact which the errors of counsel and/or the judge have had on the trial and the verdict. Regard must be had to the issues and the other

> evidence in the case and the test ultimately must always be whether the jury, properly directed, would inevitably or without doubt have convicted (**Whilby v R,** [SCCA No 72/1999 judgment delivered 20 December 2000] per Cooke JA (Ag) at page 12, **Jagdeo Singh v The State** (2005) 68 WIR 424, per Lord Bingham at pages 435-436."

[59] It seems to us that, even if the learned trial judge had given consideration to any good character of the applicant, that would not have availed the applicant. The reason for this is that the learned trial judge accepted the evidence of the virtual complainant, having listened to her and having observed her demeanour (and she not having been discredited in cross-examination). The learned trial judge having done so, the applicant's conviction was virtually assured.

[60] In these circumstances, this aspect of his application for leave to appeal against his conviction must be refused.

[61] We turn now to the matter of the sentences that were imposed for the offences of assault and illegal possession of firearm and the offence of indecent assault.

The sentences

Assault

[62] In relation to the second count of the indictment (assault) the learned trial judge imposed a sentence of two years' imprisonment. That sentence will have to be reduced, as a result of the provisions of section 43 of the Offences against the Person Act. That section provides as follows:

> "43. Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily

> harm shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour; and whosoever shall be convicted upon an indictment for a common assault shall be liable, to be imprisoned for a term not exceeding one year, with or without hard labour." (Emphasis added).

[63] This court, giving effect to that provision, has already indicated that the maximum sentence for this offence is one year's imprisonment (see for example, **Denmark Clarke v R** SCCA No 153/2006, judgment delivered 9 July 2009). That ruling has received reaffirmation as recently as this year in this court's decision in the case of **Cornel Grizzle v R** [2015] JMCA Crim 15 (per Panton P).

[64] This sentence will, therefore, have to be set aside; and a sentence of one year's imprisonment substituted therefor.

Indecent Assault

[65] We may now look at the offence of indecent assault for which the applicant had been charged under the Sexual Offences Act. The maximum sentence for that offence being 15 years, the sentence of 10 years imposed in respect of a conviction that came after a trial could not normally be faulted – all things being equal. However, as it turns out, all things are not equal, as a challenge has been mounted to the court's jurisdiction to have heard this charge in the Gun Court in the first place and it is that deeper, more-fundamental issue that we need to resolve.

[66] The position taken by both sides in this matter was that the court had no jurisdiction to have tried this particular offence and that the trial of it was, therefore, a

nullity. It should, as a result, be remitted to the Resident Magistrate's Court for trial, as jurisdiction to try such a matter properly lies in that court.

[67] In seeking to resolve this issue, we have the benefit of the analysis of this court (per Phillips JA) in the case of **Everton Lloyd Lynton v R** [2014] JMCA Crim 17. In that case the appellant had been charged on an indictment charging him with (i) illegal possession of firearm, contrary to section 20(1)(b) of the Firearms Act; and (ii) indecent assault. The main difference between that case and the instant one is that the Sexual Offences Act (under which the applicant in the instant case had been charged) was not then in operation when the appellant, Lynton, was charged and tried. It was held in that case that the court had no jurisdiction to have tried the then-accused for that offence. The applicant in this case having been charged and tried with the offence of indecent assault pursuant to section 13 of the Sexual Offences Act (the Act), our task is to see if any change to the jurisdictional issue pronounced on in **Lynton** has been effected by the coming into force of that Act.

The statutory framework

[68] Section 13 of the Act reads as follows:

> "13. Any person who carries out an act of indecent assault on another person commits an offence and
>
> (a) on summary conviction in a Resident Magistrate's Court, is liable to imprisonment for a term not exceeding three years;
>
> (b) on summary conviction in a Circuit Court, is liable to imprisonment for a term not exceeding fifteen years."

[69] This provision is similar to its predecessor - section 53 of the Offences against the Person Act, which reads as follows:

> "53. Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under sixteen but not under twelve years of age, shall be liable to be imprisoned for a term not exceeding three years, with or without hard labour."

[70] In the **Lynton** case, the helpful analysis of Phillips JA included the observation of the facts that (i) the offence of indecent assault is not one of those offences listed in the First Schedule to the Firearms Act; (ii) the section stipulating the penalty (section 53 of the Offences against the Person Act in that case) did not create the offence; and (iii) having regard to section 49 of the Offences against the Person Act, the question of whether the offence of indecent assault was cognizable in the High Court Division of the Gun Court ultimately depended on whether the offence was to be regarded as a felony or a misdemeanor. The conclusion arrived at, after careful and detailed analysis, was that it was to be regarded as a misdemeanor; and so, not cognizable in the said court.

[71] This is how the relevant section (section 49) was worded:

> "49. (1) If upon the trial of any indictment for rape, the jury are satisfied that the defendant is guilty of an offence under section 48 or 50, or of an indecent assault, but are not satisfied that the defendant is guilty of the felony charged in the indictment or of an attempt to commit the same, the jury may acquit the defendant of such felony and find him guilty of an offence under section 48 or 50 or of an indecent assault, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted

> upon an indictment for such offence as aforesaid, or for the misdemeanour of indecent assault." (Emphasis added).

[72] In light of these observations, Phillips JA concluded at paragraph [30] of the judgment:

> "In our view, however, from the reading of section 49 above, as it stood at the material time, it is clear that indecent assault was considered to be a misdemeanour and not a felony. As a consequence, since the offence charged in this case was not a felony, and is not a first schedule offence, there would be no offence committed pursuant to section 25 of the Act… As a result there is no "firearm offence" committed and the High Court Division of the Gun Court would therefore have no jurisdiction contemplated by section 5(2) of the Gun Court Act to try the appellant."

[73] The analysis also led to the following conclusion at paragraph [26] of the judgment:

> "As agreed by all counsel "indecent assault" is not a first schedule offence... The advent of the Sexual Offences Act (October 2011) also would not have affected that position."

[74] In the Act, the successor provision to section 49 of the Offences against the Person Act is section 37. That section reads as follows:

> "If upon the trial on any indictment for rape or grievous sexual assault, the jury is satisfied that the defendant is not guilty of the offence charged in the indictment or of an attempt to commit the offence, the jury may acquit the defendant of the offence charged and find him guilty of an offence under section 10 or of an indecent assault under section 13, and thereupon the defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for an offence under either section 10 or 13."

[75] It should be readily apparent that the only significant difference for present purposes between section 49 in the old act and section 37 in the new act is that in the

new act no reference is made to the offence of indecent assault as a misdemeanour. There is, however, nothing to indicate that the nature or character of the offence has changed in any way. There is, therefore, nothing to suggest that we should regard the offence as being anything other than a misdemeanour. This would confirm (in this, an actual case brought under the Act), the applicability of the conclusion of Phillips JA in the **Lynton** case that the coming into force of the Act makes no difference to the position that the High Court Division of the Gun Court has no jurisdiction to try a case of indecent assault.

[76] That being the case, the trial of the applicant on that count was a nullity; and the matter will have to be remitted to the Resident Magistrate's Court for the parish of Westmoreland for him to be tried for that offence, if the Crown desires to proceed with that charge against him.

Illegal possession of firearm

[77] At page 126, lines 3-5 of the transcript, there is an indication that the learned trial judge, in passing sentence on the applicant for the offence of illegal possession of firearm, apparently felt himself bound to apply what he regarded as the statutory mandatory minimum sentence of 15 years for that offence. He said:

> "…the Court's discretion, as I understand it now, is to be commenced from a different point. Not from zero, but anywhere from fifteen upward."

[78] But was this so?

[79] We had a concern in respect of this sentence of 15 years' imprisonment for the offence of illegal possession of firearm imposed by the learned trial judge, he believing that this was the mandatory minimum. This led us, apart from our own research, to invite submissions on the point from both counsel for the Crown and the applicant. At the end of the day, we took the view that the mandatory minimum was not applicable in this instance, for reasons that will now be discussed. The Crown, quite appropriately, in our view, conceded that the mandatory minimum sentence ought not to have been applied in the instant case. We will briefly review why this is so.

Section 20(1)(b) of the Firearms Act

[80] As we observed earlier, the applicant was charged under section 20(1)(b) of the Firearms Act. That section reads as follows:

> "20. (1) A person shall not
>
> …
>
> (b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence."

[81] Subsection (2) exempts certain categories of persons such as firearms dealers; gunsmiths; customs officers and so on.

[82] The Firearms Act was amended by the Firearms (Amendment) Act of 2010 (Act no 23 of 2010). That amending Act came into effect on 23 July 2010 with much attendant publicity, its main aim being to impose certain statutory mandatory minimum sentences in respect of firearm offences. That mandatory minimum sentence is 15

years. It has been generally felt that the amending Act effected a change to all sections of the Act dealing with firearm offences, making the minimum sentence in each case 15 years. On closer scrutiny of the Act, however, it appears that that is not so. It will be seen that the amending Act amended only the following sections of the then-existing Act: section 4 (amended by section 2 of the amending Act); section 9 (amended by section 3 of the amending Act); section 10 (amended by section 4 of the amending Act); section 24 (amended by section 5 of the amending Act); and section 25 (amended by section 6 of the amending Act).

[83] Those were the only amendments to the principal Act.

[84] It is therefore apparent that section 20(1)(b), under which the applicant was charged, is to be read as it was before the amending Act took effect (and, in actuality, as it still now reads). Subsection (4) is that part of section 20 that imposes the penalty for breach of the section. It reads as follows:

> "(4) Every person who contravenes this section shall be guilty of an offence, and shall be liable-
>
> (a) if the offence relates to the possession of a prohibited weapon -
>
> (i) on summary conviction before a Resident Magistrate to imprisonment with or without hard labour for a term not exceeding five years;
>
> (ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour;"

[85] It will be seen, therefore, that the maximum punishment for illegal possession of firearm, when charged under section 20(1)(b) is life imprisonment (it so remains under the amended Act); but that no statutory minimum sentence exists under this section.

[86] Apart from being helpful in a discussion of whether the offence of indecent assault might be tried in the High Court Division of the Gun Court, the **Lynton** case is also of great assistance in this discussion. That is because, apart from considering the interaction of section 20(1)(b) of the Firearms Act with section 25 and the use of section 20(5)(c) to link both sections, it also reviews the cases of **R v Henry Clarke** (1984) 21 JLR 72 and **R v Jarrett, James and Whylie** (1975) 14 JLR 35, which discuss the proper interpretation that is to be given to these said provisions. It also discusses **Purrier** in which Watkins JA (Ag) said at page 100 F:

> " …in order to establish the commission of a s 25. offence, for example, a s 25(1) offence, it is necessary to prove not only the commission of a felony, but also that the person charged made, or attempted to make , use, whatever, of a firearm or imitation firearm with intent to commit or aid the commission of the felony or to resist or prevent the lawful apprehension or detention of himself or some other person."

[87] Recently in **Jerome Thompson v R** [2015] JMCA Crim 21, this court (in deciding that the mandatory minimum sentence of 15 years does not apply to the offence of robbery with aggravation) pointed out (per Brooks JA), that the mandatory minimum could only have been imposed if the appellant in that case had been charged under section 25(1) of the Firearms Act and not section 20(1)(b) as was the case (see paragraph [33] of the judgment). A similar approach was taken in **Stevon Reece v R**

[2014] JMCA Crim 56 (per McDonald-Bishop JA), in which the distinction between section 20(1)(b) and section 25 was discussed.

[88] The position is similar here. Section 20(1)(b) is the section that creates the offence of illegal possession of firearm. It is to that section that we must look in order to ascertain the applicable penalty. That penalty remains as it was before the principal Act was amended in 2010: the maximum sentence is life imprisonment. However, there is no mandatory minimum prescribed under this section.

[89] The learned trial judge was therefore not (as he believed), constrained by the statute to have imposed the sentence of 15 years' imprisonment that he did in respect of the first count of the indictment.

[90] We will now need to consider the matter from another perspective – that is, whether a sentence of 15 years' imprisonment, even though not mandated as a minimum sentence by the statute, was nevertheless appropriate in the circumstances of this case.

[91] In **Ian Wright v R** [2011] JMCA Crim 11, this court found that a sentence of 12 years' imprisonment for illegal possession of firearm simpliciter was manifestly excessive. It substituted a sentence of 10 years' imprisonment on the basis of that appellant having been found with a loaded firearm in a crowded area. At paragraph [12] of the reasons, this court (per Dukharan JA) observed in respect of the sentencing range for the offence of illegal possession as follows:

> "We are cognizant of the range which is between seven to ten years for similar offences when illegal firearms have been used to commit offences."

[92] In **Kenneth Hylton v R** [2013] JMCA Crim 57, Harris JA approved a tariff of 10 years' imprisonment for illegal possession of firearm after reviewing several judgments of this court. (See paragraphs [19] to [22] of the judgment).

[93] In these circumstances, it appears that, the error in relation to the understanding of the statutory minimum sentence apart, the sentence of 15 years' imprisonment that was imposed would not be in line with similar sentences for the offence and so must be regarded as being manifestly excessive. Having regard to the facts and circumstances of this case, it appears that a sentence of 10 years' imprisonment at hard labour would be more appropriate.

[94] In closing, we wish to commend the representatives of the Crown for, on their own initiative, having brought to the attention of the court the difficulties in relation to the conviction for the offence of indecent assault and the sentence for the offence of assault, citing the authorities that told against the affirmation of the said conviction and sentence. In doing so they acted as true ministers of justice.

[95] We observe, as well, that in most (if not all) of the matters that come before us that include a charge for illegal possession of firearm, the applicant or appellant is almost invariably and routinely charged pursuant to section 20(1)(b) and not under section 25 of the Firearms Act. We do not know why that is so; but, that, of course, is a matter for the Crown.

[96] In light of these considerations, the following are the orders that we make:

(i) The application for leave to appeal against conviction for the offence of illegal possession of firearm is refused. The application for leave to appeal against sentence for illegal possession of firearm is allowed. The hearing of the application for leave to appeal against sentence is treated as the hearing of the appeal. The sentence of 15 years' imprisonment is set aside and a sentence of 10 years' imprisonment at hard labour substituted therefor.

(ii) The application for leave to appeal against conviction for the offence of assault is refused. The application for leave to appeal against sentence for the offence of assault is allowed. The hearing of the application is treated as the hearing of the appeal. The sentence of two years' imprisonment is set aside and a sentence of one year's imprisonment substituted therefor.

(iii) The application for leave to appeal against conviction for the offence of indecent assault is allowed. The hearing of the application is treated as the hearing of the appeal. The conviction is quashed; the sentence is set aside and, in the interests of justice, the matter is remitted to the Resident Magistrate's Court for the parish of Westmoreland for mention, for the Crown to decide whether it wishes to proceed in the Resident Magistrate's Court with the charge against the applicant (the trial in the High Court Division of the Western Regional Gun Court having been a nullity).

(iv) The sentences in paragraphs (i) and (ii) are to be regarded as having commenced on 1 November 2011 and are to run concurrently.