JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 87/2014

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA

DENVER BERNARD v R

Leroy Equiano for the applicant

Miss Theresa Hanley and Miss Kelly Hamilton for the Crown

18, 21 February and 29 March 2019

MCDONALD-BISHOP JA

[1] This is a renewed application for leave to appeal brought by Mr Denver Bernard ("Mr Bernard"), consequent on the refusal of his application by a single judge of this court. Mr Bernard seeks leave to appeal the sentences imposed on him in the High Court Division of the Gun Court on 3 October 2014, following his pleas of guilty to a two-count indictment. The first count charged him with the offence of illegal possession of firearms and the second count, illegal possession of ammunition. He was sentenced to 18 years' imprisonment in respect of illegal possession of firearms and 10 years' imprisonment in respect of illegal possession of ammunition. The sentences were ordered to run concurrently.

Factual background

[2] The facts that formed the basis of the guilty pleas, as outlined by the Crown at the sentencing hearing, were that on 2 July 2013 at approximately 12:30 pm, Mr Bernard in the company of three men was travelling in a minibus along a main road in the parish of Portland. The minibus was signalled to stop by the police at a police checkpoint. The driver disobeyed the police, and instead, increased the speed of the vehicle. The police party gave vehicular chase and made further demands for the driver to stop, which were disobeyed. During the chase, a bucket was thrown from the left sliding door of the moving minibus. Mr Bernard was the person seated next to that door.

[3] The police then drove alongside the minibus and made further demands for it to stop. When this request was ignored, the police pointed a firearm at the minibus and it was then that the driver obeyed the instruction of the police.

[4] The minibus was searched by the police and two bags were found; one contained a loaded shot gun and the other contained five revolvers. The bucket, which was thrown from the moving vehicle, was recovered and also searched. It was found to contain a TEC-9 intratec firearm, 10 nine millimetre pistols as well as 1,395 assorted rounds of ammunition. In total, 17 firearms were found.

[5] The four men were immediately taken into custody by the police and subsequently charged. On 21 July 2013, Mr Bernard gave a cautioned statement to the police admitting his involvement in the commission of the offences.

The sentencing hearing

[6] Counsel who appeared for Mr Bernard at the sentencing hearing relied heavily on Mr Bernard's explanation, in his cautioned statement, of his involvement in the commission of the offences. Mr Bernard explained that his involvement was limited only to assisting in the transportation of the recovered firearms and ammunition, for which he was financially rewarded. He claimed that he was initially under the impression that the enterprise involved the transportation of ganja but that after he had embarked on the journey, he came to the realization that the objects being transported were firearms and ammunition. Upon making that discovery, he did not withdraw from the enterprise but willingly went along in the minibus, assisting in the conveyance of the firearms and ammunition.

[7] Counsel, whilst admitting the seriousness of the offences and that a custodial sentence was inevitable, urged the court to take into account, in Mr Bernard's favour, the nature of his involvement in the commission of the offences, in that, he was not part of the initial planning but had played a minimal role as "a worker". A distinction, counsel argued, should be made between Mr Bernard's role as "a worker" in the enterprise and the persons who were the "masterminds". He placed before the court, as mitigating factors, the absence of a previous conviction for similar offences and the guilty pleas, which he pointed out were offered at the earliest opportunity, thereby resulting in the saving of much judicial time. He asked that the previous conviction which Mr Bernard had for uttering forged document not be taken into account as an aggravating factor.

[8] The learned judge accepted Mr Bernard's account of his involvement in the incident, as stated in the cautioned statement, as part of the facts forming the basis of the pleas. This, he said he was bound to do, in the absence of a hearing to establish facts to the contrary. He then accepted the following factors as being in Mr Bernard's favour: the early admission of his involvement in the commission of the offences; the circumstances of his involvement as being a recruit for the mission; the early guilty pleas; the evidence of good character given by his cousin who was called as a character witness; and the favourable antecedent report. He did not take into account the previous conviction for a dissimilar offence. He expressly acknowledged that he had to give Mr Bernard, "a considerable amount of discount, in the circumstances" for the guilty pleas.

[9] Having indicated the matters favourable to Mr Bernard, the learned judge then took into account, as factors adverse to him: the seriousness of the offences; the need for deterrence of not only Mr Bernard but others; and his responsibility to society, at large, to protect it from such offending conduct.

[10] The learned judge, having highlighted what he considered to be the relevant factors for consideration, then stated at page 31 lines 8 to 25 and page 32 lines 1 to 13 of the transcript:

> "In considering sentence, I would have to consider the fact that you have pleaded guilty and that one would have to give a considerable amount of discount, in the circumstances. It is my view that were you to have been found guilty in this matter, after trial, the sentence would be somewhere in the region of between five to thirty years in

> relation to the Illegal Possession of Firearm and perhaps somewhere between fifteen and twenty years in relation to the Illegal Possession of Ammunition.
>
> Based on the factors given what would be, I think, a fairly large discount in these circumstances, considering your involvement and the factors that your attorney has indicated, in terms of the first count which deals with Illegal Possession of Firearms, the Court sentences you to eighteen years at hard labour.
>
> In terms of the second count which deals with the offence of Illegal Possession of Ammunition, the Court sentences you to ten years at hard labour. Those sentences will run concurrently, which means that you would serve a maximum of eighteen years.
>
> ... I believe that is the most lenient sentence that the courts can afford..."

The appeal

[11] Mr Bernard originally filed three grounds of appeal from the learned judge's decision. However, at the hearing of the application before us, Mr Equiano consolidated those grounds into a single ground, with the leave of the court. The solitary ground argued on Mr Bernard's behalf, is that the sentences imposed by the learned judge are manifestly excessive. This ground rests on two main planks, which have been distilled from the submissions of counsel and are summarised in these terms:

i. The learned judge erred by failing to apply the relevant principles of law in arriving at the appropriate sentences; and

ii. The sentences lacked parity with the sentences later imposed on Mr Bernard's three co-offenders who had not pleaded guilty but had gone through a lengthy trial.

The failure of the learned judge to apply the relevant principles of law

[12] Mr Equiano, in making his submissions on behalf of Mr Bernard, noted that the learned judge in sentencing Mr Bernard had failed to take into account:

i. established precedents, to include relevant case law and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines"), which were released officially in January 2018;

ii. the relevant discount that was to be given in accordance with the Criminal Justice (Administration) (Amendment) Act, 2015, where an offender pleads guilty at the first relevant date; and

iii. established common law principles as to the range of sentences to be imposed for these offences.

[13] Mr Equiano argued that the learned judge's reasoning that had Mr Bernard gone to trial and was found guilty, he would have been sentenced to 30 years, is without precedent. In this regard, learned counsel referred the court to the case of **Russell Robinson v R** [2016] JMCA Crim 34, a decision of this court. Mr Robinson, a former sergeant of police, was found in possession of 18 firearms and over 1000 rounds of ammunition, which were stolen from the police armoury. After a trial which lasted 13 days over several months, Mr Robinson was found guilty and was sentenced to 15 years' imprisonment at hard labour on each of the 18 counts that charged him for illegal

possession of firearm and 10 years' imprisonment at hard labour on the count for illegal possession of ammunition. On appeal to this court, the sentences were affirmed.

[14] Counsel also directed the court's attention to the related case of, **Garnett Pellington, David Blagrove and Anthony Morrison v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92/2010 and 4 and 5/2011, judgment delivered 11 May 2017. Mr Blagrove and Mr Morrison were charged with Mr Robinson but pleaded guilty to two counts which charged them for illegal possession of two rifles and 16 counts in respect of illegal possession of handguns. They were both sentenced to 13 years' imprisonment for the rifles and seven years' imprisonment on each count, which charged them for illegal possession of the handguns. The sentences were to run concurrently. These sentences were also affirmed by this court.

[15] We do not accept the argument that the learned judge erred in failing to follow the Sentencing Guidelines and the Criminal Justice (Administration) (Amendment) Act, 2015, since neither instrument was in force at the time of the sentencing. Therefore, the learned judge cannot be faulted for not having regard to the provisions of those instruments.

[16] We also acknowledge that the learned judge would not have had the benefit of the guidance of the court in **Russell Robinson v R** as well as **Garnett Pellington, David Blagrove and Anthony Morrison v R**, as the sentencing of Mr Bernard would have predated those cases. It cannot be said then that the learned judge failed to follow these cases as precedents.

[17] As Mr Equiano submitted, however, the learned judge was, nevertheless, obliged to follow the established principles of the common law and be guided by relevant authorities from this court, which treat with the issue of sentencing, particularly, in firearm offences.

[18] The learned judge showed his appreciation of some of the classical principles of sentencing, albeit not in formulaic terms. He expressly referred to matters going to deterrence, retribution and the protection of society, as counsel for the Crown was at pains to point out. He did not, however, demonstrate how he had balanced those principles whilst having regard to the need for rehabilitation. He also did not apply the relevant principles of law laid down by the authorities in deciding on the appropriate length of the sentences.

[19] Guidance is to be found in the case of **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Parish Court Criminal Appeal No 55/2001, judgment delivered 5 July 2002, in which P Harrison JA (as he then was) instructed that a sentencing judge's first task, in arriving at an appropriate sentence, is to make a determination of the length of the sentence as a starting point and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise.

[20] It is noted that although the learned judge had indicated what he regarded as the appropriate range of sentences for both offences, he did not specifically determine the length of the sentence he would have imposed had there been a trial, as a starting point, in keeping with the guidance of **Regina v Evrald Dunkley**. In **Meisha**

Clement v R, Morrison P helpfully directed attention to the dictum of Lord Judge CJ in **R v Saw and others** [2009] EWCA Crim 1, paragraph 4, as to what is meant by the "starting point". The "starting point", according to Lord Judge CJ, and as accepted by this court, is a notional point within a broad range of sentences, from which the sentence should be increased or decreased to allow for aggravating or mitigating factors. It is clear from the learned judge's reasoning that he had failed to identify a starting point, within the range of sentences he had selected, to which he would have applied the aggravating and mitigating factors he identified in order to arrive at a proper sentence.

[21] The learned judge also failed to demonstrate a balancing of the relevant considerations that he had identified as aggravating and mitigating factors and the relative weight he attached to them in arriving at his ultimate sentences. While it is evident from his reasoning that he had in mind some of the core principles that should inform his sentencing decision, he did not go far enough to demonstrate that, in arriving at the sentences, he had adopted the correct approach and applied the relevant considerations.

[22] The learned judge's reasoning was further materially flawed, when he failed to state the discount that was allowed as a result of the guilty pleas, having recognised, quite correctly, that Mr Bernard was entitled to a "considerable discount" for the early guilty pleas.

[23] By remaining inscrutably silent on these critical matters in the sentencing process, the learned judge has not placed this court in a position to confidently say that he had properly applied some critical principles of law in his sentencing of Mr Bernard and that the sentences are not manifestly excessive.

[24] For that reason, this court is obliged to reconsider the sentences, within the framework of the applicable law, in an effort to determine whether there is merit in the ground of appeal that the sentences are manifestly excessive. The sentences imposed in respect of each count will now be considered, in turn.

(a) Illegal possession of firearm

[25] The maximum sentence for illegal possession of firearm is life imprisonment. It is accepted that the maximum sentence is always reserved for the worst case. Although the possession of 17 firearms is, indeed, alarming and is a serious matter, this case cannot be said to be the worst case of its kind. The Sentencing Guidelines, having been informed by the sentences handed down by this court over the years, for firearm offences, have identified a normal range of sentences at anywhere between seven to 15 years for illegal possession of firearm, with a usual starting point of 10 years.

[26] Mr Equiano asked us to find that this case is less serious than the case of **Russell Robinson v R** in which the firearms were taken from the police armoury in breach of trust and for which the accused, a former policeman, was sentenced to 15 years. We have observed that the source of the firearms in **Russell Robinson v R** was known to be lawful (the police armoury), unlike in this case, where the source of supply

is not established to be legal and remains undisclosed. Although Mr Bernard had co-operated with the police, his cooperation had not gone far enough to lead the police to the source of those illegal weapons and the persons behind their acquisition and distribution. This renders the case to be as equally sinister as **Russell Robinson v R**, even though breach of trust would have been a significant aggravating element in the latter case. **Russell Robinson v R** cannot be used to justify a sentence of less than 15 years in this case had it gone to trial. In any event, it should be borne in mind that this court upheld the sentence of 13 years, which was imposed on Mr Robinson's co-offenders, Blagrove and Morrison, by a different judge, following their guilty pleas to the possession of 18 guns.

[27] Given the number of firearms in this case; the location and timing of the incident; the circumstances surrounding the discovery of the firearms, this is a case that would fall outside the usual range of seven to 15 years. It would attract a sentence anywhere between 16 and 25 years. Given Mr Bernard's role in the mission and his culpability as a paid worker and not as the mastermind or the bus driver who would have had greater control over the vehicle that tried to elude the police and in which the objects were found, a starting point of 20 years, as suggested by Mr Equiano, would be reasonable.

[28] There is no need to adjust the starting point upward on account of any aggravating factors, since those relevant aggravating factors have already been taken into account in identifying the starting point.

[29] In terms of mitigating factors, Mr Equiano has asked this court to note: (i) Mr Bernard's early co-operation with the police, he having given a cautioned statement shortly after his arrest; (ii) his early pleas of guilty; (iii) the absence of a relevant previous conviction; (iv) the fact that the previous conviction for uttering forged document occurred more than five years ago; (v) he being gainfully employed at the time of his arrest; and (vi) the early acceptance of responsibility, being indicative of remorse and his amenability to change.

[30] The early guilty pleas demand separate and distinct treatment and so have not been taken into in account in identifying the mitigating factors. We accept, however, as relevant mitigating factors, the early co-operation with the police (which is connected to the guilty plea as a demonstration of contrition) and the absence of a relatively recent and relevant previous conviction. We are of the view, contrary to the submissions of Mr Equiano, that Mr Bernard's employment status at the time of the commission of the offence ought not to be accorded any meaningful weight as a mitigaing factor in the context of this case. He was gainfully employed at the time of arrest but, nevertheless, considered it fit to embark on an unlawful mission, of such magnitude and gravity, for financial gains. If anything, his employment staus should have prevented him from engaging in such criminal activity.

[31] Having taken into account the relevant mitigating factors, we conclude that there should be a downward adjustment in the starting point to 17 years. This is the sentence that should have been imposed on Mr Bernard had he gone to trial having, regard to

the circumstances of the commission of the offence, his role in it (not being the mastermind) and his personal mitigating circumstances.

[32] We do accept, as the learned judge also did, that Mr Bernard is entitled to a substantial reduction in sentence on account of his guilty plea. Mr Equiano argued that Mr Bernard ought to have been given a discount of 60% in the light of the Criminal Justice (Administration) (Amendment), Act. Given that the Act was not in force at the time of sentencing, Mr Bernard would have had to be sentenced in accordance with the common law principles that had been accepted and applied by this court at the date of sentencing. The sentencing principle, which would have been applicable at the time, was that the discount was in the discretion of the sentencing judge but that a discount somewhere in the region of between ⅕ to ½ would have been acceptable, depending on the stage at which the plea of guilt was proffered. See **Meisha Clement v R** for a review of the older relevant authorities such as **Joel Deer v R** [2014] JMCA Crim 11; **Basil Bruce v R** [2014] JMCA Crim 10 and **Regina v Evrald Dunkley**.

[33] In determining the discount to which Mr Bernard is entitled, we have taken into account that he, having already co-operated with the police by giving an incriminating statement (for which he has already been credited in these proceedings), would not have had any reasonable option but to plead guilty and to do so at an early stage in the proceedings. As the learned authors of Arcbold: Pleading, Evidence and Practice in Criminal Cases 1992, Volume 1, at paragraph 5-153 explain:

> "The extent of the "discount" to be allowed in recognition of a plea of Guilty has never been fixed... In determining the

> amount of the discount in a particular case, the court may have regard to the strength of the case against the offender: an offender who pleads Guilty in the face of overwhelming evidence may not receive the same discount as one who has a plausible defence."

[34] In the situation in which Mr Bernard was placed at the time of his arraignment, with an inculpatory cautioned statement, he was not giving up any appreciable or reasonable chance of an acquittal. He was found in the bus and was the person closest to the door from which the bucket with most of the firearms was thrown. He had no discernibly plausible defence. In such circumstances, he would not be deserving of as much as 60% discount for the guilty plea. A discount in the region of ⅓ would be appropriate. Applying this discount, we have arrived at a sentence of 11 years' imprisonment.

(b) Illegal possession of ammunition

[35] Mr Bernard was sentenced to 10 years' imprisonment for illegal possession of ammunition. The maximum statutory penalty is life imprisonment as in the case of the offence of illegal possession of firearm. The normal sentencing range for this offence, according to the Sentencing Guidelines, is the same as the range for illegal possession of firearm, which is seven to 15 years. The usual starting point is 10 years.

[36] The same observations and reasoning applied in respect of the offence of illegal possession of firearms, relative to the circumstances of the commission of the offence and the role and culpability of Mr Bernard, also apply to this offence. The significant number of ammunition that were recovered, which were also assorted, and being transported along a public thoroughfare along with firearms over a far distance, would

in our view, warrant a starting point of 12 years, which is above the usual starting point.

[37] With there being no further aggravating factors applicable to this offence as in the case of the offence of illegal possession of firearms, there will be no upward adjustment to the starting point.

[38] The same considerations that have been taken into account, in mitigation of the sentence for illegal possession of firearms, are also applied in considering the appropriate sentence for the offence of illegal possession of ammunition. Having considered those factors, we conclude that a a downward adjustment in the starting point to 9 years is appropriate. After applying the ⅓ discount, on account of his early guilty plea, Mr Bernard's sentence on this count would be reduced to six years' imprisonment.

[39] Had the learned judge adopted this or a similar approach in determining the most appropriate sentence, it is difficult to appreciate how he would have arrived at the sentences he imposed of 18 and 10 years. It follows therefore that there is merit in the argument that the sentences the learned judge imposed were manifestly excessive as a result of his failure to apply the relevant principles of law.

The parity principle

[40] Mr Equiano has gone further to argue that quite apart from the principles that ought to have been applied by the learned judge in arriving at the sentences, Mr Bernard would be entitled to lesser sentences on the ground of parity.

[41] Learned counsel's argument is that Mr Bernard is entitled, on account of the guilty pleas, to sentences on par with those imposed on his co-offenders who subsequently went to trial, before a different judge of the Gun Court.

[42] Mr Equiano's complaint arose from the following circumstances, which were outlined to this court by him in his written submissions. Subsequent to Mr Bernard's sentence in October 2014, his three co-offenders were tried in the High Court Division of the Gun Court on an indictment containing 20 counts. Counts one to 18 charged them for illegal possession of firearms and count 19 and 20, for illegal possession of ammunition. (It seems that they were charged in respect of 18 firearms and not 17, as in the case of Mr Bernard.)

[43] The extract from the court sheet produced to this court (given the unavailability of the indictment) shows that all three co-offenders were found guilty, and, on 15 January 2018, sentenced to six years' imprisonment on each count that charged them with illegal possession of firearm and four years' imprisonment in relation to the charges for illegal possession of ammunition. The sentences were ordered to run concurrently.

[44] Mr Equiano contended that, in applying the parity principle, given that the offences arose out of the same incident, there is an unfair and manifestly excessive disparity between the sentences of the co-offenders and that of Mr Bernard. He maintained that the sentences of the co-offenders, who faced a lengthy trial, are far more lenient than those imposed on Mr Bernard, who co-operated with the police and

had pleaded guilty at an early stage in the proceedings. Learned counsel argued further that the need for equality before the law dictates that there should be some parity with sentences imposed on offenders for similar offences committed in similar circumstances. His contention was that this court should impose sentences of about eight years for the illegal possession of firearms and five years for the illegal possession of ammunition, to attain parity with the sentences of the other three co-offenders.

[45] These arguments were strongly opposed on behalf of the Crown by Miss Hanley, who submitted that the parity principle is inapplicable as, at the time of sentencing, the learned judge would not have had knowledge of the sentences of the three co-offenders, they having been sentenced subsequent to Mr Bernard. She brought to the court's attention various authorities in support of her arguments, such as, **Teerath Persaud v R** [2018] CCJ 10 (AJ) 1; **R v Dang, Duy Nghi** [2018] QCA 331 and **R v Seville Gordon** (1966) 9 JLR 320.

[46] Having assessed the authorities, we accept Miss Hanley's arguments and find Mr Equiano's submissions in this regard, unsustainable.

[47] In **Teerath Persaud v R**, a decision of the Caribbean Court of Justice ("CCJ"), a thorough review of the principle of parity in sentencing was undertaken by the court. In that case, two accused had been indicted for the offence of murder. On 3 February 2010, the first offender pleaded not guilty to murder but guilty to manslaughter and was sentenced to 16 years' imprisonment less 20 months for time spent on remand. On 11 September 2012, the second offender also pleaded not guilty to murder but guilty to

manslaughter. He was sentenced to a term of imprisonment of 25 years' imprisonment less four years and 26 days for time spent on remand. The second offender appealed his sentence on the basis that it was manifestly excessive. One of the grounds he relied on was that his sentence lacked parity with that of his co-offender.

[48] The CCJ noted that the principle of parity delineated that equality before the law requires that co-offenders, whose personal circumstances are similar and whose legal liability for an offence is relative, should normally receive comparable sentences. At paragraphs [32] to [34], the court gave invaluable guidance:

> "[32] We are satisfied that the concept of parity in sentencing has evolved from the bare proposition that an offender cannot be justifiably aggrieved if he receives an appropriate sentence simply because a co-offender has fortuitously received an unduly lenient sentence, [Broadbridge [1983] 5 Cr App R (S) 269] into an important principle in the law of sentencing. The principle of equality before the law requires that co-accused whose personal circumstances are similar and whose legal liability for the offence are relative should normally receive comparable sentences. Where the sentences are manifestly and unjustifiably disparate, the accused who has been dealt with more harshly may entertain a legitimate sense of grievance at that unfair treatment. It is also harmful to the public confidence in the administration of justice where significant disparity in sentences cannot be properly justified. Public confidence is eroded if, as it has often been put, a right-thinking member of the public, with full knowledge of all the relevant facts and circumstances would, on learning of the disparity in sentences, consider that something had gone wrong with the administration of justice.
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> [33] The parity rule is therefore to be regarded as fundamental to any rational and fair system of criminal justice. The rule is not antithetical to the principle of individualize sentencing and proportionality...because each accused has to be dealt with individually. Parity does not

necessarily mean equality. Different sentences may be proper and required where the individual circumstances and level of participation in the offence are markedly different. But if no real distinction can be drawn between the accused then the parity principle will require that the sentences be the same or at least comparable.

[34] **Where it is not desirable or possible for co-accused to be tried and if convicted or having pleaded guilty, sentenced together and instead they are tried separately, the judge who tries a second accused, if that accused is found guilty, must have regard to the sentence passed by the first judge. The second judge, whilst obliged to pass the sentence which in his or her view is proper in all the circumstances must also have regard to the fact that the sentence passed by the first judge is an established and relevant fact to which appropriate weight must be given. The rationale for the placing of weight on the first sentence was explained by Street CJ in R v Tisalandis [1982] 2 NSWLR] where he said that it was better:**

> "…to strive to avoid disparity when the second offender comes before the court at first instance than for the second judge to give effect to his own unfettered view and leave it to an appellate court to take the responsibility of reducing what might on its face be a proper sentence to one which is subjectively too lenient…The true rationalization from the point of view of the second judge in cases such as these is not that he is passing a sentence which appears to him to be too lenient but rather that he is passing the sentence which is shown to be appropriate having regard to the whole of the relevant circumstances including, very particularly, the established circumstances of an unduly lenient sentence already passed by a brother judge upon the co-offender.' [R v Tisalandis [1982] 2 NSWLR at page 435]" (Emphasis added)

[49] The guidance given by the CCJ demonstrates that the principle of parity underscores the necessity for a sentencing judge, when sentencing a second accused

who is tried separately from another who had been previously sentenced, to ensure that there is consistency in punishment. When the issue of parity arises, therefore, the question to be resolved by the court is whether an offender would be justified in his complaint about the disparity between his sentence and that of a co-offender previously sentenced. This means in essence, that in considering parity with co-offenders, a second sentencing judge would be required to consider the sentence of the offender who is being sentenced relative to that of a previously sentenced co-offender.

[50] The difficulty with Mr Equiano's contention, in the glaring light of the principles relating to parity, is that, at the time of Mr Bernard's sentence, his co-offenders had not yet been sentenced. They were sentenced some two years subsequent to him. The learned judge was the first sentencing judge and Mr Bernard, the first offender to be sentenced. The learned judge would therefore not have been in a position, in coming to his decision as to sentence, to have regard to any other sentence relating to co-offenders of Mr Bernard. He had the duty to look at sentences in like cases, generally, in determining the applicable range of sentences that should be used to assist him in arriving at an appropriate sentence. The duty would have been on the second judge, when sentencing the second set of offenders, to have regard to the sentences imposed on Mr Bernard and the need for parity as a relevant consideration.

[51] In our view, therefore, the question of parity with the sentences of the other offenders would not have arisen as a relevant consideration for the learned judge and so it cannot be said that the sentences he imposed were erroneous on the ground of

lack of parity. The learned judge's decision on sentence cannot therefore be disturbed on this basis.

[52] The remaining question for the consideration of this court is whether there is such an unjustifiable disparity in sentence that it ought to be remedied by this court in order to avoid a manifest injustice and to dissipate a grievance that Mr Bernard could justifiably harbour against the administration of justice. The more lenient sentences passed on Mr Bernard's co-offenders cannot be taken as the right sentences for Mr Bernard simply because he received harsher sentences than they did. This court cannot countenance a wrong sentence in order to achieve parity with a sentence that some may regard as lenient.

[53] The CCJ in **Teerath Persaud v R**, referred to the English cases of **R v Stroud** (1977) 65 Cr App Rep 150 and **R v Fawcett** (1983) 5 Cr App Rep (S) 158, which proved rather instructive. In **R v Stroud**, counsel had argued that his client should receive a reduction in sentence because a co-accused had received a lesser sentence. The court opined that the submission of counsel involved a proposition that "where you have one wrong sentence and one right sentence, the court should produce two wrong sentences". According to the court, that was a proposition that it could not accept.

[54] The CCJ, in referencing **R v Fawcett**, made the point that it is an objective test and not a subjective one that should be applied by the court, in determining the sense of grievance of the accused who is complaining of disparity in sentence. The CCJ noted, in paragraph [21] of the judgment that the person complaining of the disparity must

show that a reasonable person, looking at the entire circumstances of the case, would regard the grievance as justified. We say that a reasonable person could not regard the sentences arrived at as being unreasonable, in all the circumstances and that Mr Bernard's grievance is justified.

[55] In **R v Seville Gordon**, a decision of this court, the headnote reveals these facts. The appellant and his co-accused, Facey, were convicted of larceny of cows. Both men were equally implicated in the commission of the offence. They had no previous convictions. The appellant was sentenced to four months' imprisonment, while Facey was fined. On appeal brought by the appellant against sentence, it was argued on his behalf that there was no reason for the magistrate to have discriminated against him in the matter of sentence and that the justice of the case demanded that he be given the opportunity to pay a fine. The court dismissed the appeal.

[56] The court opined that the sentence of imprisonment imposed on the appellant was not manifestly excessive in the circumstances of the case and that it would not interfere with the sentence imposed, albeit that Facey had received a lesser sentence. In coming to its conclusion, the court reasoned at page 321, in so far as is relevant:

> "It has been submitted to us by Mr. Ramsay in his careful arguments that justice does not appear to have been done by these different and disparative sentences and he has asked this court to set aside the sentence of imprisonment imposed on [the appellant] and substitute a fine so that it would appear that he receives the same punishment or nearly equal punishment with the other accused.
>
> ...

> The question is should the court reduce or remove the sentence of imprisonment, which in our view was not manifestly excessive, and impose a fine so as to bring it in line with the sentence which in our view was perhaps manifestly lenient in respect of Facey.
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> We regret that we are unable to take the view of counsel in this matter that justice does not appear to have been done and that in those circumstances we should alter [the appellant's] sentence. Facey was perhaps fortunate in receiving that lenient sentence but we are hardly concerned now with the sentence which Facey received, we are only concerned with the sentence which [the appellant] received, and as we are unable to say that the magistrate was wrong in principle in ordering that sentence, or that it was manifestly excessive we must dismiss the appeal and affirm the conviction and sentence."

[57] We adopt the reasoning of the courts in the foregoing cases. We would say, like this court did in **R v Selville Gordon**, that perhaps Mr Bernard's co-offenders had received very lenient sentences but we are only concerned with the sentences imposed on him. In keeping with the reasoning in **R v Fawcett**, we can only say in addition, that we cannot envisage any right thinking member of the Jamaican society, knowing all the relevant circumstances of this case, and learning of the sentences that we have decided should have been imposed on Mr Bernard, saying that something has gone wrong with the administration of justice.

[58] In the light of the authorities, we would have no legal basis to consider a further reduction in the sentences at which we have arrived in order to ensure parity with the sentences imposed on Mr Bernard's co-offender. Mr Bernard fails on this aspect of his appeal.

Credit for time spent on remand

[59] In the light of the authorities subsequent to the sentencing of Mr Bernard, he would be entitled to credit for time spent in custody pending his sentence. See **Meisha Clement v R** at paragraph [34], accepting the guidance of the Privy Council in **Callachand and another v State** [2008] UKPC 9, a case from Mauritius. We note that Mr Bernard was on remand from his arrest on 2 July 2013 to the date of sentence, 3 October 2014, this would have been 15 months.

Conclusion

[60] We conclude that the learned judge erred when he arrived at the sentences he imposed, without applying some relevant and material principles of law. In this regard, the ground of appeal that the sentences he imposed were manifestly excessive has merit. He did not err, however, in imposing sentences on Mr Bernard that were not in parity with sentences subsequently imposed on his co-offenders by a different judge.

[61] The sentences arrived at by this court, after an application of the relevant principles of law that ought to have been applied by the learned judge, are the most appropriate in all the circumstances. Those sentences are 11 years' imprisonment for illegal possession of firearms and six years' imprisonment for illegal possession of ammunition. Mr Bernard is entitled to credit for the time spent on remand awaiting sentence, which is, 15 months in respect of both counts.

[62] The disparity between the sentences of Mr Bernard and his co-offenders cannot avail Mr Bernard to justify a further reduction in these sentences because they cannot be said to be manifestly excessive.

Order

[63] The order of the court shall be:

i. The application for leave to appeal sentences is allowed.

ii. The hearing of the application for leave to appeal is treated as the hearing of the appeal and the appeal is allowed.

iii. The sentence of 18 years' imprisonment for illegal possession of firearms is set aside and the sentence of 11 years' imprisonment at hard labour is substituted therefor, less 15 months for time spent on remand. The sentence is, therefore, 9 years and 9 months.

iv. The sentence of 10 years' imprisonment for illegal possession of ammunition is set aside and the sentence of six years' imprisonment at hard labour is substituted therefor, less 15 months for time spent on remand. The sentence is, therefore, 4 years and 9 months.

v. The sentences are to be reckoned as having commenced on 3 October 2014 and are to run concurrently.