JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 130/2007

BEFORE: **THE HON. MRS JUSTICE HARRIS JA**
THE HON. MRS JUSTICE McINTOSH JA (Ag)
THE HON. MR JUSTICE BROOKS JA (Ag)

RYAN LEWIS v R

Everton Bird for the appellant

John Tyme for the Crown

12, 13 July 2010 and 11 February 2011

HARRIS JA

[1] The appellant Ryan Lewis was, on 5 October 2007, convicted in the High Court Division of the Gun Court on an indictment containing three counts. On count one, he was charged with illegal possession of firearm and counts two and three charged him with shooting with intent and robbery with aggravation respectively. He was sentenced to a term of seven years imprisonment on count one, 12 years imprisonment on count two and 10 years imprisonment on count three. It was ordered that the sentences on counts two and three should run concurrently with each other but consecutively to the sentence on count one.

[2] His application for leave to appeal against conviction was refused by a single judge who granted leave in respect of sentence. He has now renewed his application in respect of conviction.

[3] The prosecution placed reliance on the evidence of its main witness, Mr. Michael McKoy, the complainant, who testified that, at about 6:50 pm on the evening of 5 October 2006, he rode a Honda motorcycle to a garage on Eighth Street in the area of Greenwich Farm where he had gone to see a mechanic, Chris. He and Chris were engaged in a conversation when he noticed another man enter the garage. This man, he said, was dressed in a white T-shirt and cream shorts and "was acting suspicious".

[4] A confrontation took place between this man and himself during which, the man accused him (the complainant) of watching him. This man, who the complainant later identified as the appellant, made several remarks indicating that the complainant who was not from the area ought to pay due regard to him as he (the appellant) was from that area. After enquiring of Chris as to who the complainant was, the appellant said to the complainant, "Lickle bwoy, you don't even know a who me", to which the complainant responded, "But you don't know me". The complainant went on to say that the appellant replied by saying that "me a run up me mouth and him wi kill me same place in there and Chris and nobody can save me". The appellant then left the garage.

[5] The complainant said that about four minutes later, the appellant returned accompanied by two men. In response to the question, "Weh him deh?", posed by one of the men who had accompanied him, the appellant pointed out the complainant. The man who had asked the question then pulled out a firearm and pointed it at the complainant. The men proceeded to interrogate the complainant about the area in which he resided. The complainant said that after the interrogation, the appellant told him that "if him kill me nobody can't save me". The men then left. The complainant said during the incident, he was able to see the appellant's face from a distance of "around seven feet" for ten minutes aided by a fluorescent light in the shed. He said he was able to see "his face, his hair, his built, body" and that he had a "scar over his left eye" and "afro hair".

[6] The complainant left the garage on his motorcycle, he having remained there until Chris and another man who was at the garage indicated "that it is okay" for him to go. On Chris' advice, he proceeded along West Avenue as the men had apparently gone east. He said that after travelling about 10 feet, he saw two men ahead of him, one of whom he identified as the appellant. These men ran into the road towards him and the appellant fired two shots at him. At first the men were eight feet away and he was able to see the appellant for about three to four seconds. The complainant said he was able to see "his hair, his clothing and his built, body" and "the image of his face". He was able to see the two men with the aid of a streetlight and the light from his motorcycle.

He said he was able to say that the appellant was one of the men because of "the clothes he was wearing, and his face". He said the appellant had been wearing the same clothes as he had been wearing at the garage.

[7] After the shots were fired, he lost control of the motorcycle which skidded resulting in him falling. By this time, he had reached the corner of West Avenue and Eighth Street, which was about 30 feet from the garage. While he was lying on the ground, he saw the two men running towards him. He saw them for about two seconds. At that time, the closest distance between him and the men was approximately 22 to 25 feet. He was able to see their hair and clothing and the appellant was still dressed in "cream shorts and white T-shirt".

[8] He got up from the ground and ran "up the road in some group of people" as two more shots were fired. He said the people pulled him into nearby premises where his chain was snatched. He then began running again until he got to Spanish Town Road where he used his cellular phone to call the police. The police asked him about "the description and clothes" of his assailant and told him to stay there but when they did not arrive, he took a taxi to the Denham Town Police Station where he was told to report the matter at the Hunts Bay Police Station. He made a report to the Hunts Bay Police Station after which the police visited Seventh Street and retrieved the motorcycle from some bushes. He later identified the appellant at an identification parade.

[9] In cross-examination, he said that the men had started running towards him before the shots were fired but he agreed with defence counsel that the actions of the men in running towards the bike and then firing happened "quick, quick". However, he denied that the appellant was not one of the men who had attacked him on West Avenue. It was at this stage of his testimony that the evidence relating to the charge of robbery with aggravation was elicited. This was as a result of the unwitting efforts of defence counsel who put to him that he had not seen the persons who took his motorcycle because it was only when he had been running that he had heard the engine of the motorcycle being started. This he denied, saying that he had seen the two men take up his motorcycle although he had not mentioned it in his statement to the police.

[10] Sergeant Dalphie Charlton testified that on 23 October 2006 she conducted an identification parade relating to the appellant, she having received instructions so to do. The parade was conducted in the presence of the then attorney-at-law for the appellant and there was no complaint about the manner in which it was conducted. She said the complainant was asked if he knew the reason he was attending the parade, to which he had responded that he was there to identify the person who had robbed and shot at him.

[11] Detective Corporal Leary Barrett testified that on 5 October 2006 at about 8:00 pm, the complainant attended the Hunts Bay Police Station and made a report. As a result of this report, he carried out investigations that led him to

Greenwich Town where he recovered a Honda motorcycle from bushes behind Seventh Street. He said the complainant identified the motorcycle as belonging to him. At about 10:30 pm on the following day, the appellant was brought to the Hunts Bay Police Station by another policeman who handed the appellant over to him. He said that he informed the appellant that he was investigating a case of shooting with intent, robbery with aggravation and illegal possession of firearm in which he was a suspect. The appellant, he said, told him that he was on Eighth Street when the incident happened. Later, on 23 October 2006, when he informed the appellant that he was charging him with these offences, the appellant gave the same response.

[12] The appellant gave an unsworn statement in which he said that he had been at Papine when the incident happened. He stated that at the time when he was apprehended, he had just returned from Papine and was at his gate awaiting the arrival of a taxi to go to a dance on North Avenue. While there, the police car drove up. He said he made no attempt to run or evade the police and suggested to the court that this would not have been the reaction of someone who had just committed an offence. He asserted that the actions of the police were motivated by malice or ill-will.

[13] The appellant filed four original grounds of appeal which were abandoned. With the leave of the court, Mr Bird argued four supplemental grounds:

Ground 1

> "The learned trial judge misdirected himself on the facts and was wrong in law in arriving at the conclusion that the evidence of visual identification adduced by the virtual complainant established the guilt of the defendant beyond reasonable doubt; and failed to give due judicial cognizance to aspects of the prosecution (sic) case that weakened the evidence of identification."

[14] Mr Bird submitted that there were two sets of circumstances arising on the evidence. The first set of circumstances, he argued, could be regarded as being irrelevant because those circumstances did not relate to the charges on the indictment. The second set of circumstances involved a shooting in which it was alleged that the appellant had shot at the complainant and it was noteworthy that the indictment related only to these circumstances, he argued. The learned judge, he submitted, had implicitly conceded that the conditions under which the purported identification was made by the complainant were far from ideal. He contended that in his summation, the learned judge erred in referring to the circumstances of the identification as being not too long, when, it was the time for the identification that was not too long and not the circumstances. He further submitted that the learned judge failed to focus on the difficult circumstances surrounding the identification and failed to advise himself that the difficulty consisted of the fleeting glance which the witness described in his evidence.

[15] It was also his submission that the learned judge conceded that the reason for the witness saying that the man who accosted him at the garage was one of the men who later shot him was because of the attire of that person. The learned judge, he argued, placed a disproportionate degree of reliance on the allegation that the man who had fired shots at the complainant later, was dressed in a cream shorts and white T-shirt, and had misconstrued the evidence of visual identification given by the complainant as to his observation at the garage as being probative of the accuracy of the complainant's subsequent evidence. There were certain contradictions, he argued, that were not considered by the learned judge such as the complainant's evidence that the mechanic told him that the appellant and his two cronies had gone east, yet the incident was alleged to have taken place west of the garage, that is, West Avenue.

[16] He submitted that no evidence was led as to the period of time which elapsed between the departure of the three men from the garage and the shooting incident that was alleged to have occurred later. The learned judge, he argued, in stating that the incidents happened within a few minutes of each other, had substituted his understanding of the time frame without any evidence being led to that effect by the prosecution and this may have had the effect of bolstering the evidence of visual identification which was challenged by the defence. He relied on **R v Wavel Richardson and Williams** SCCA Nos 240 & 241/2002 delivered 8 November 2006 to support this submission.

He further submitted that the learned judge had posed a question in terms of the "likelihood of two separate and distinct men, essentially within a few minutes, dressed in white t-shirt and cream shorts engaging in virtually, identical type of anti-social behavior" when he should have considered whether the prosecution had adduced evidence beyond reasonable doubt that the man who was alleged to have entered the garage was the same person who had fired at the complainant.

[17] It was also his submission that based on his testimony, the complainant was unable to identify anything other than the clothing of his assailants. The complainant, he argued, had resisted all the urgings of Crown Counsel to say that he had seen the face of his assailant. He submitted that the verdicts on all three counts were tainted with the defect that the decisions were based on a balance of probabilities rather than beyond reasonable doubt as visual identification was the issue at the root of the offences, since all three offences were alleged to have taken place at the same time and in difficult circumstances. To support these submissions, he relied on **R v Newton Clacher** SCCA No 50/2002 delivered 29 September 2003.

[18] Mr Tyme, for the Crown, submitted that the question as to whether an identification was of a fleeting glance nature, when considered within the context of **R v Turnbull** [1977] QB 224, must be viewed as directive rather than legislative. The circumstances of each case had to be considered in

determining whether the identification evidence had been sufficient, he argued. Relying on **R v Sangster and Dixon** SCCA Nos 70 & 81/1998 delivered 23 March 2000, he submitted that identification could be made in difficult circumstances. From the outset, he submitted, the witness had been paying particular attention to the appellant while at the garage because of the appellant's suspicious behavior and the incident lasted for 10 minutes there. He contended that the witness had left the garage with a sense of danger, that is, that he had to look out for the appellant because of what had transpired between the appellant and himself at the garage and he would therefore have been alert. By virtue of a streetlight and the light on the motorcycle the witness was able to see, from a distance of 8 feet, the appellant's hair, clothing and built for a total of three to four seconds. The issue, he submitted, was whether despite the particular sighting at the time of the offence being made under difficult circumstances, a proper identification could have been made. There was sufficient evidence before the learned judge on which he could have acted in arriving at his decision, after warning himself, he argued.

[19] The critical issue in this case is visual identification and the learned judge, as he was required to do, gave himself the appropriate warning in keeping with the **Turnbull** principles. Thereafter, he recounted the evidence taking into account the events which took place at the garage and then later on West Avenue. Then he proceeded to consider the identification evidence. At pages 62- 63 of the transcript, he said:

> "So the witness is saying now, as far as he is concerned it was the same man who came into the garage. He was one of the men who accosted him by West Avenue and the reason he gives for this is the clothes, that is the cream shorts and the white T-shirt. He recognised him by face and he never saw him before that evening.
>
> Now, he then gives some detail now concerning this sighting. He says he saw his face, saw the built of his body. (sic) Has a scar over the left eye. (sic) Saw him there for over ten minutes. 'About seven feet between me and him. Nothing prevent me from seeing his face. Man just have afro hair.' He said he heard explosion and he saw the light from the gun that was held by the man in the road.
>
> The prosecution is asking the court to draw the inference that having regard to the length of time and the circumstances under which the man was seen inside the garage, and the proximity, the lighting, the discussion, and, of course, they were talking and looking at each other, the prosecution is asking me to say that even though the circumstances of the identification at the time of the incident, that is the shooting, is (sic) not that long, the witness was still able to make a positive identification. Well, we will see what we make of that as we go along."

[20] Then at pages 68 – 69 he said:

> "Let us look at his evidence, generally, concerning the circumstances under which he said he saw the man that, by all account, he had an extremely good look at inside of the premises, and why it is that

> he would remember this man; because he is not likely to forget a man who comes up, and at some point, begins to tell you if you know who you looking at and who him is and, essentially, being a bad man. And, as the witness said, the man started acting suspiciously when he came into the premises and that is why he was looking at him. And so now, the question then becomes, what is the likelihood of two separate and distinct men, essentially within a few minutes, dressed in white T-shirt and cream shorts, engaging in virtually, identical type of anti-social behavior, mainly to prove how bad they are, one inside the premises and, according to Mr Fletcher, it may be a separate and distinct man dressed in white T-shirt and cream shorts who is now outside of the garage clearly waiting on the witness when he is leaving now on his motorcycle. And the witness is saying, "In the lighting that I saw there, I saw the persons because they were coming towards me."

[21] He continued at pages 69 and 70 by saying:

> "So when one looks at the evidence in its totality, it is true that the actual time of when these men were, the accused man was seen perpetrating the crimes for which he was charged, the time period there is not very long, but that is in the context of, according to the witness, that is the man who was inside the yard, went away, came back with, essentially, a gunman and obviously he was going to show the witness who is man and who is boy. So, he was obviously waiting out there for the witness and as the witness was about to, was actually riding off, they emerged from wherever they were, coming towards the witness shooting at him, and that, to my

> mind, is the explanation why he said he lost control of the bike and fell."

[22] The learned judge demonstrated that he was aware that the circumstances surrounding the identification during the commission of the offences were not ideal. However, in considering whether the identification evidence was sufficient, he took into account the circumstances surrounding the sighting at the garage. He was satisfied that the circumstances surrounding the sighting there, were of such a quality that the complainant would have been able to make a good identification. In those circumstances, this would have enhanced the complainant's ability to identify the perpetrator during the incident on the road.

[23] Although the incident at the garage occurred before the incident on the road, the sighting of the appellant at the garage could properly be taken into account in considering that which transpired subsequently. The learned judge, in making a determination as to whether the complainant was able to make a good identification, was therefore entitled to consider all the circumstances surrounding the identification including the complainant's evidence relating to that which occurred at the garage.

[24] The incident happened at a location that was a mere 10 feet away from the garage. Obviously, it happened in close proximity to the garage. The fact that the mechanic had told the complainant that the men had gone east is not necessarily inconsistent with the men being involved in the incident which

happened in the west. Surely, it was open to them to turn back, if in fact they had gone east.

[25] In light of the sequence and the timing of the events, the incident, it appears, happened within a short while after the men left the garage. The complainant said the confrontation between the men and himself at the garage lasted for about 10 minutes. He also said that the incident on the road happened sometime after 7:00 pm. After the incident on West Avenue, he began running, he was delayed on premises on which he had sought refuge and then he went to the Denham Town Police Station before going to the Hunt's Bay Police Station. The evidence was that he arrived at the latter at 8:00 pm. He, however, did not go to Hunt's Bay immediately. It is true that, as Mr Bird contended, the complainant did not indicate what time he got to the garage, but this was not challenged by the defence. That first confrontation in the garage was after 6:50 pm. The complainant also did not indicate how long he stayed at the garage after the appellant and the men had left. We are of the view that this information could have been elicited from the complainant. But the failure to do so would not prevent the learned judge making a determination. In light of the timeline and the sequence of events, there was sufficient evidence which gave room for the drawing of a reasonable inference that the time of departure of the complainant was shortly after the men left. Further, as Mr Tyme submitted, the complainant would have left with a

heightened sense of awareness of the appellant, due to the threat that the appellant had issued against him.

[26] The learned judge was correct in considering whether the proximity in the timing and location of the two incidents and the circumstances surrounding the identification at the garage were of such that the complainant could have made a good identification there, and he would have been able to identify the appellant later on the road even within a short period of time. When all the circumstances are taken together, the learned judge could have found that the complainant's opportunity to identify the appellant did not amount to a fleeting glance.

[27] The case of **R v Richardson and Williams** cited by Mr Bird is clearly distinguishable from the present case. In that case the learned judge had misrepresented a critical aspect of the evidence, giving the jury the impression that the bullets found at the scene of the murder had matched the firearm being carried by the applicants when there had been no evidence to that effect. The court was of the view that this may have had the effect of providing support to the visual identification evidence. However, in this case, there is nothing to suggest such misrepresentation of the evidence by the learned judge.

[28] It must be borne in mind that an identification can be made under difficult circumstances or in circumstances which are not ideal - see **R v**

Sangster and Dixon and **Larry Jones v R** (1995) 47 WIR 1. In the present case, the complainant was able to observe the appellant for 10 minutes at the garage. Before the shooting started, he saw them for three to four seconds and thereafter for two seconds during the shooting. He was able to observe him from a close distance with the aid of the streetlights.

[29] The case of **Newton Clacher** is also clearly distinguishable. In that case, although the witness stated in her evidence that she had had her eyes on the appellant throughout the incident, in her statement to the police she had not said that she had identified the robber. Further, it appears that no identification parade had been held. In the case under review, the complainant did not only identify the appellant at the two sightings but also at the identification parade at which there was no complaint of unfairness.

[30] The only other aspect of this ground which needs to be mentioned is the question as to whether the learned judge had found the allegations against the appellant proven to the required standard, he having posed the question in terms of the likelihood of the man at the garage being the man on the street. The learned judge did not use the answer to this question to determine the quality of the identification evidence; he considered this question only after he had considered that there had been identification, although brief, at the scene and after he had satisfied himself that the identification at the garage was good. The fact that the man on the road, wearing a white T-shirt and cream

shorts, was the man at the garage, was part and parcel of the circumstances which he was entitled to consider in coming to his conclusion that the men were one and the same person. In coming to his verdict of guilt, the language used by the learned judge indicated that he had found the allegations proved to the required standard. At pages 70-71, he said:

> "I am satisfied so that I feel sure that Mr Michael McKoy is speaking the truth…
>
> So, I am satisfied so that I feel sure that Ryan Lewis was one of the men shooting at Mr McKoy…"

[31] In our view, there was sufficient evidence on which the learned judge could have concluded and did so conclude that the allegations against the appellant were proved to the requisite standard. This ground therefore fails.

Ground 2

> "The learned judge erred on the facts and was wrong in law in his evaluation of the witness Michael McKoy as being both honest and reliable as his evidence cannot be relied on in support of the conviction as the credibility of the witness was compromised."

[32] Mr Bird's contention was that the credibility of the complainant was not able to withstand scrutiny and should not have been relied on because it was "mathematically impossible, in defiance of logic and the known movement of time". He made heavy weather of the seeming inconsistency in the complainant's evidence as to where he was when the first two shots were fired,

in that, the complainant had said in examination in chief that he had been at the corner or the intersection of Eighth Street and West Avenue when the men came running towards him whereas in cross-examination he said that he had not reached the corner when the first set of shots was fired and that he had fallen off the bike at the corner and at the intersection. Mr Bird also sought to impugn the complainant's account as to the street on which he had fallen from the motorcycle. His major argument to support his position was that the complainant's evidence could not be relied on because he was neither credible nor reliable based on the fact that he had been fired at from a very close range and he had not been injured. He also argued that the credibility of the complainant was further impugned because he had failed to give any evidence during examination in chief that his motorcycle had been taken. The learned judge, he submitted, fell into error in stating that nobody had asked the witness what had happened to his motorcycle when he was considering this complaint which had been raised by defence counsel in support of the argument that that fact had operated to the detriment of the appellant.

[33] It is a well-known rule that a judge, sitting alone, functions as a tribunal of law and fact. It is also without doubt that issues concerning the credibility of a witness are within the province of the tribunal of fact. Where findings of fact are concerned, an appellate court will not lightly disturb them – see **R v Joseph Lao**. 12 JLR 1240. The learned judge was entitled to consider the evidence of the complainant in order to determine if he believed him. It is true that in examining

the evidence, the learned judge did not consider the apparent inconsistency between his evidence in chief that as he reached the corner he was shot at and his evidence in cross-examination that he was shot at before he reached the corner. He seemed to have accepted that the complainant was shot before he reached the corner. There can be no dispute that the complainant was shot at. It is a well-accepted principle that a trial judge need not highlight all the inconsistencies in the evidence for the jury; it is sufficient if he brings the major ones to their attention - see **R v Omar Greaves & Ors** SCCA Nos 122, 123, 125 and 126/2003, delivered 30 July 2004. Doubtlessly, this principle is also applicable to a judge sitting alone. This inconsistency of which Mr Bird complains, does not seriously affect the complainant's credibility. It does not go to the root of the prosecution's case. Clearly, it concerns the peripheral issue of the location of the shooting. It did not affect the questions as to whether the appellant had been correctly identified and whether the offences were committed.

[34] The learned judge did, however, advert his mind to the other aspects of the complainant's evidence that could be regarded as more serious inconsistencies and which were relevant to a consideration of the complainant's credibility. At page 64, he said:

> "…if these two men had those two firearms and were firing at the witness from that distance, in all probability the witness would have been injured and the absence of injury would suggest that the witness is

> not being credible; if credible, certainly unreliable or, rather, if honest, certainly unreliable. Well, the witness goes on, so I will evaluate those arguments before long."

And at pages 67-68, he said:

> "He said, yes, he gave a statement to the police and he eventually accepted that it is not in the statement that he saw the men take up the bike. He said that is an omission and Mr Fletcher is saying, well, that is an omission that affects the credibility of the witness, but I would have to look at everything in context because up until that time, the witness really hadn't said what had become of the bike and that was because of how the questions were phrased, because throughout the entire examination in chief nobody asked the witness if, 'You know what happen to the bike after you ran off?'"

[35] The learned judge accepted that the failure of the complainant to inform the police that he saw the men take up the bike was an omission but he concluded that it was not one which made the complainant's evidence incredible. The complainant said he saw the appellant at the garage and he saw him at the time of the incident. It was open to the learned judge to determine whether the evidence was credible. He enjoyed the unique position of observing the complainant's demeanour as he gave evidence and it was certainly for him to decide whether he believed the complainant. We see absolutely no reason to disturb his finding. This ground also fails.

Ground 3

> "No evidence was led by the prosecution through its purported eyewitness Michael McKoy during examination (sic) in relation to the count of Robbery with Aggravation, and such evidence that emerged in limine did not reach the standard of proof beyond reasonable doubt."

[36] Mr Bird argued that the complainant had not given any evidence in examination in chief that would support the count of robbery with aggravation and such evidence that was given in cross-examination was insufficient to discharge the burden of proof. He submitted that the evidence that the motorcycle was found behind Seventh Street did not specify whether it was found on Eighth or Ninth Street and there was no evidence of the location of the bushes in which the motorcycle was found. He further submitted that the complainant had not stated in his evidence that the motorcycle was found in the appellant's possession. Despite the number of times the complainant's mind was adverted to the motorcycle, he failed to mention being robbed, he argued. The onus of proof under the relevant section of the Larceny Act had not been discharged, he submitted. He relied on **R v Donovan Grant & Ors** SCCA Nos 153, 155, and 156/2000 delivered 30 July 2004, in support of these submissions.

[37] It seems to us that Mr Bird's principal challenge relates to the element of possession of the motorcycle by the appellant as an ingredient of the offence. It

is true that no evidence was given during examination in chief to prove this. However, the evidence given by a witness in cross-examination forms a part of the total evidence to be considered by a tribunal of fact. In this case, in answer to defence counsel's question, "You saw the two men tek up your bike?", the complainant responded, "Yes". The complainant went on to explain that he did so while running away from the men. This response by the complainant, in our view, was sufficient evidence upon which it could be concluded that the motorcycle was in the appellant's possession for the purpose of establishing robbery. It was therefore unnecessary for the complainant to have given evidence that the motorcycle was found in the appellant's possession. Indeed, this would have brought the evidentiary material into the realm of the doctrine of recent possession and the prosecution did not purport to rely on this doctrine.

[38] The case of **Donovan Grant** is clearly distinguishable. In that case, there was no nexus between the three appellants and the murder for which they were convicted. In the case under consideration, it is clear that there is sufficient nexus between the appellant and the taking of the motorcycle. Once the other elements of the offence were established, it then became a matter for the learned judge to decide if he believed this aspect of the complainant's evidence. The learned judge accepted the evidence as to the taking of the motorcycle given in cross-examination and was of the view that the complainant had not mentioned the taking of his motorcycle in examination in chief because of the nature of the questions put to him.

[39] In our view, it was within the province of the judge, as the tribunal of fact, to arrive at this conclusion. His observation as to the matter of the complainant having not mentioned in his evidence in chief that he saw the appellant take the motorcycle is not unjustifiable, in the context of the way the trial unfolded. Although the appellant was charged for an offence which was not recorded in his statement to the police, the fact is, the determination of the guilt or innocence of an accused is dependent upon the evidence as adduced in court and not merely on the contents of a statement to the police. In our view, the statement to the police is relevant only to the subsidiary question of credibility and not to the question of whether the offence charged has been proved. There is therefore no merit in this ground.

Ground 4

> "The sentence of the court was manifestly excessive and the imposition of a period of imprisonment for Robbery with aggravation to run consecutively to the period of imprisonment for Illegal Possession and Shooting With Intent was inappropriate in the circumstances."

[40] In his written submissions, Mr Bird pointed out that the learned judge in supporting his decision to impose consecutive sentences sought to make "a distinction between imposing sentences which run concurrently in relation to each other in relation to the offences of shooting with intent and robbery with aggravation but that these two offences should run consecutively to the

offence of illegal possession of firearm". The effect of this, it was submitted, was that instead of serving a total of 12 years, the appellant would have served 19 years. He submitted that the offences arose out of one set of facts and therefore the sentences should all have been made to run concurrently. He referred us to **William Payne v R** RMCA No 5/2006 delivered on 28 July 2006.

[41] The learned judge, despite acknowledging the practice of concurrent sentencing, imposed consecutive sentences by ordering that the sentences on counts two and three should run consecutive to count one. It cannot be denied that there may be circumstances in which a court, has, or, may impose consecutive sentences and in **Delroy Scott v R** (1989) 26 JLR 409 this court imposed sentences for firearm offences to run consecutively. Despite this, the court must take into account "the total effect of the sentence on the offender" when imposing consecutive sentences. In **R v Walford Ferguson** SCCA No158/1995 delivered 26 March 1999 Langrin JA (Ag) (as he then was) outlined the sentencing criteria which are currently being followed. At page 8 he said:

> "When imposing consecutive terms the sentencer must bear in mind the total effect of the sentence on the offender. Where two or more offences arise out of the same facts but the offender has genuinely committed two or three distinct crimes it is often the general practice to make the sentences concurrent.
>
> If offences are committed on separate occasions there is no objection in principle to consecutive

> sentences. However, if one bears the totality principle in mind it is more convenient when sentencing for a series of similar offences to pass a substantial sentence for the most serious offence with shorter concurrent sentences for the less serious ones."

[42] In **William Payne v R**, the appellant was convicted on six informations for breaches of section 5 of the Unlawful Possession of Property Act. The Resident Magistrate imposed consecutive sentences on the charges on two of the informations. In allowing the appeal against sentence, Panton JA (as he then was) pronounced that the convictions were recorded in respect of a single set of facts and there was no justifcation for the learned Resident Magistrate to have imposed consecutive sentences.

[43] In this case, it is clear that the offences all arose out of one set of facts and obviously must be treated as one transaction. The learned judge therefore erred in imposing consecutive sentences in these circumstances.

[44] We dismiss the application for leave to appeal against conviction and allow the appeal against sentence. The order stipulating that the sentence on count one should run consecutive to the sentences on counts two and three is set aside. It is ordered that the sentences on all three counts should run concurrently, commencing on 5 January 2008.