[2011] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 131/2007

BEFORE: THE HON. MR JUSTICE HARRISON, JA
THE HON. MR JUSTICE MORRISON, JA
THE HON. MR JUSTICE BROOKS, JA (Ag)

KIRK MITCHELL v R

Leroy Equiano for the appellant

Miss Natalie Ebanks for the Crown

26, 27 April 2010 and 14 January 2011

BROOKS, JA (Ag)

[1] Mr Kirk Mitchell was, on 17 October 2007, convicted of the offences of illegal possession of firearm, shooting with intent and wounding with intent. The intent in each of the two latter charges was to cause grievous bodily harm. He was sentenced to seven years imprisonment on the first offence and 15 years imprisonment on each of the others. Although the latter two sentences were ordered to run concurrently, they were ordered to run consecutive to the sentence on the first offence; thus making a

total of 22 years. All this was in the High Court Division of the Gun Court, being then held in the parish of Clarendon.

[2] A single judge of this court has granted him leave to appeal against the sentences imposed but refused his application for leave to appeal against the convictions. Mr Mitchell has pursued his appeal against the sentences and has renewed his application for leave to appeal against the convictions. Mr Equiano, on his behalf, has argued five grounds of appeal. The grounds were:

> "1. The Learned Trial Judge erred in law when he failed to uphold the no case submission made by counsel for the Appellant.
>
> 2. The Learned Trial Judge in his summation failed to demonstrate that he identified, considered or appreciated the weaknesses in the identification evidence.
>
> 3. The inconsistencies and discrepancies in the identification evidence render the conviction unsafe.
>
> 4. The Learned Trial Judge in his summation failed to demonstrate how the inconsistencies in the identification evidence were reconciled.
>
> 5. The sentence of the court was manifestly excessive."

[3] In considering the arguments proffered we shall assess grounds 1 and 5 separately. Grounds 2, 3 and 4 will be considered together. Before doing so, however, we shall set out a brief outline of the evidence, with the hope that it will assist with understanding the issues.

Synopsis of the Evidence

[4] The convictions arose from an incident which occurred on 3 November 2004. Two police officers, Constables Nelson and Lindsay, acting on information, approached a group of three men. The men ran. The police officers gave chase and fired warning shots. Two of the men turned, with guns in hand, and fired in the direction of the police officers. The officers took cover but Constable Lindsay, unfortunately, was shot in the chest and leg. He was then, a recent graduate of the police training school. Happily, he survived to tell the tale of his ordeal. The gunmen made good their escape. The officers made a report to a Detective Sergeant Norman who, on the same day, secured a warrant of arrest for the appellant in the names "Kirk Mitchell" otherwise called "Round-Head".

[5] Constable Nelson testified that the appellant was a member of the group and that he was one of the two men who had fired at the police. He, Constable Nelson, had known the appellant and one of the other men, before. He said that more than two years after that incident, he saw the appellant at a police check point. He said he identified the appellant to other police officers, but that the appellant gave a false name at the time and denied that his name was Kirk Mitchell or that he was called "Round-Head". He was nonetheless taken into custody.

[6] Constable Lindsay testified that he did not know any of the men before. On 30 April 2007, he attended an identification parade where he pointed out the appellant as one of his assailants.

[7] The defence to the charges, as divined from the suggestions made to the witnesses for the Crown, was that the appellant was not at the scene when the offences were committed. It was also suggested that he did not give a false name to the police. The appellant, however, did not give evidence and made no statement in his defence. The defence rested on a submission that there was no *prima facie* case to answer.

[8] We now address the grounds of appeal.

Ground 1: The learned trial judge erred in law when he failed to uphold the no case submission made by counsel for the appellant.

[9] Mr Equiano submitted that the quality of the identification evidence and what, he said, were the numerous discrepancies in the evidence concerning the identification, were such that the learned trial judge ought to have ruled that there was no case for the appellant to answer. Learned counsel was particularly critical of the evidence of Constable Lindsay. He submitted that the evidence of that officer was such that it should not have been relied on at all.

[10] The issue for determination on this ground may be conveniently summarized by quoting from the judgment of this court in ***Brown and***

McCallum v R SCCA Nos 92 and 93/2006 (delivered 21 November 2008). After a careful review of all the major authorities on the issue concerning no case submissions, in the context of visual identification cases, the court concluded, at paragraph 38:

> "The essential question for the court's consideration was whether the quality of the identification evidence at the close of the prosecution's case was so poor or had a base which was so slender as to be unreliable and therefore not sufficient to found a conviction."

[11] Miss Ebanks, for the Crown, cited the judgment in ***Director of Public Prosecution v Varlack*** PCA 23/2007 (delivered 1 December 2008), where their Lordships sitting in the Privy Council approved the statement that, in considering a submission of no case, the trial judge, "is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence" (see paragraph 22).

[12] Mr Equiano comprehensively perused the evidence concerning the constables' opportunity for viewing the perpetrators of the offences. He sought to demonstrate that the opportunity, which the police officers had to view those persons, was of short duration. He also submitted that the sighting was made in difficult circumstances.

[13] What was the quality of the identification evidence before the learned trial judge? The evidence reveals, firstly, that the offences were

committed during the daytime, at approximately 10:00 o'clock. Secondly, that the time for viewing the appellant was, in the case of Constable Lindsay, a matter of seven seconds in the first instance, and on and off for eight to ten seconds thereafter. By Constable Nelson's evidence, the time for viewing the appellant was two minutes or thereabouts in the first instance and for ten to 12 seconds after the appellant had displayed his firearm and a further ten to 12 seconds during the firing. The face and upper section of the body were observed by both witnesses. The distances at which the sightings were done varied between 50 feet and 75 feet in the case of Constable Nelson and was as little as 25 feet in the case of Constable Lindsay. Thirdly, Constable Nelson knew the appellant for about three to four years, had seen him for about five to eight times over that period and had last seen him three or four months before the incident. Fourthly, this sighting was during an incident which, on one account, lasted approximately two minutes. Fifthly, Constable Lindsay pointed out the appellant at an identification parade.

[14] On the negative side, it must be said that the sightings were made from distances which could not be described as close quarters and were made, during the latter stages, in difficult circumstances. Firstly, the men were running away shortly after being initially observed and secondly, were soon thereafter, firing at the police. There were also differences in the timings given by the constables. In the case of Constable Lindsay,

there were inconsistencies between his written statement, given to the investigating officer, and his testimony. There were also discrepancies between his testimony and that of Sergeant Eric Williams, who conducted the identification parade.

[15] The weaknesses and inconsistencies, mentioned in the last paragraph, will be more closely examined below. We are however of the view that the evidence, as a whole, was such that we cannot agree that "the quality of the identification evidence at the close of the prosecution's case was so poor or had a base which was so slender as to be unreliable and therefore not sufficient to found a conviction". There was ample evidence upon which a tribunal of fact *could* have reached a conclusion of guilty after assessing whether the witnesses were truthful and reliable. The evidence was not so riddled with inconsistencies and discrepancies that it could reasonably be said that nothing of consequence remained of the Crown's case. In the circumstances we cannot fault the learned trial judge for ruling that the prosecution had presented a *prima facie* case for the appellant to answer.

Ground 2: The learned trial judge in his summation failed to demonstrate that he identified, considered or appreciated the weaknesses in the identification evidence.

Ground 3: The inconsistencies and discrepancies in the identification evidence render the conviction unsafe.

Ground 4: The learned trial judge in his summation failed to demonstrate how the inconsistencies in the identification evidence were reconciled.

[16] Mr Equiano submitted that the learned trial judge merely recited the evidence which was led in the case and failed to demonstrate that he appreciated that there were discrepancies and inconsistencies therein, especially in the critical area of identification. On this basis, learned counsel submitted, the conviction is "extremely unsafe".

[17] Mr Equiano pointed particularly to the following, as being among the discrepancies and inconsistencies:

a. Constable Lindsay said two different things on the matter of identification. He identified the attackers by name in his police statement and yet in his testimony only identified them by way of the clothing which they wore. The explanation given was that, although he did not know the men before, the names were supplied to him and included in the statement by the police officer who recorded it.

b. There were differences between Constables Lindsay and Nelson concerning the opportunities for identifying their attackers. These differences included the terrain of the ground that the police officers covered in pursuit of the men, the persons who fired, the distances from which the

men were observed and the time for which observation was possible.

c. There were differences between Constable Lindsay and Sergeant Eric Williams concerning, particularly, whether it was the sergeant who personally summoned Constable Lindsay to the identification parade room and as to what was the sergeant's place, having got to the room.

[18] Learned counsel submitted that whereas a trial judge does not have to go into detail in assessing the inconsistencies, he "must show that he [has] put his mind to it". In his skeleton submissions, Mr Equiano cited, in support, an excerpt from ***Archbold.*** It, however, spoke to the care that a judge should exercise when directing a jury, especially on the issue of identification. There is no doubt that a judge, sitting alone, does not have to engage in the same level of direction as in a trial with a jury.

[19] In ***R v Junior Carey*** SCCA No 25/1985 (delivered 31 July 1986), this court ruled on the question of the level of detail which a judge, sitting alone, need vocalise when addressing discrepancies in the evidence presented. The court said at page 8 of the judgment:

> "[Counsel] next complained that the learned trial judge did not consider adequately or at all the discrepancies in the Crown's case and that he did not consider and analyse in its entirety all the evidence given before him and this has resulted in a miscarriage of justice. This criticism does not appear to be justified, unless it is

> being suggested that a trial judge exercising jurisdiction to try cases summarily under the Gun Court Act, is obliged to take each piece of evidence, and *viva voce* minutely analyse it so that his analysis appears on the record. **The learned trial judge is not statutorily required to do any such thing even though a desirable practice has developed which it is hoped will be continued of setting out salient findings of fact** which is of inestimable value should an appeal be taken."

[20] That ruling was of similar import to that given by this court in ***R v Dacres*** (1980) 33 WIR 241. In ***Dacres***, the court drew a distinction between cases where there is a statutory requirement to record reasons and findings, and cases where there is none. It pointed out that in the High Court Division of the Gun Court, there is no statutory requirement, but that **in practice** a reasoned decision for arriving at a verdict is given. The court continued at page 248:

> "In this reasoned decision [the judge] is expected to set out the facts which he finds to be proved and, when there is a conflict of evidence, his method of resolving the conflict."

[21] Counsel for the appellant in the case of **R v Horace Willock** SCCA No 76/1986 (delivered 15 May 1987) made complaints which were very similar to those made before us by Mr Equiano. In particular, the trial judge in **Willock** was said not to have made any findings in his summation. On appeal, this court said, at page 5 of the judgment:

> "…the absence of reasons or findings in the summation would not necessarily provide a basis for disturbing the verdict of the learned trial judge, who as the tribunal of

> fact, had the clear and distinct advantage of seeing and hearing the witnesses at the trial and of weighing and assessing the demeanour of the witnesses….**Provided therefore, that on an examination of the printed record, there existed material evidence upon which there was a sufficient basis for the learned trial judge to come to the decision at which he arrived, there should be no reason for this court to interfere with the decision at which he arrived**." (Emphasis supplied)

[22] Miss Ebanks, in a comprehensive presentation, referred to, among other cases, ***R v Fray Diedrick*** SCCA No 107/1989 (delivered 22 March 1991). In ***Diedrick***, Carey JA in delivering the judgment of this court, said at page 9:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. **There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial**. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses." (Emphasis supplied)

[23] In the instant case the learned trial judge did address the fact that there were discrepancies in the evidence. He specifically made reference to (a) the matter of the perpetrators' names being in the statement (b) the differences between the accounts of the identification parade and (c) the differences between the accounts of Nelson and Lindsay. In respect of the latter accounts, the learned trial judge ruled that the discrepancies arose from the amount of time that had elapsed

since the incident and the difference in experience between the two constables (page 220).

[24] In respect of the occasion as a whole, the learned trial judge found that the incident had occurred. He was, apparently, impressed by the fact that Constable Lindsay had received a wound and by the fact that Constable Lindsay's billfold had been damaged by a bullet.

[25] In connection with the internal inconsistencies of Constable Lindsay's evidence, the learned trial judge repeated the explanations given by Constable Lindsay. At pages 206-207 of the record, he identified that Constable Lindsay testified that he had been told the names of the men before he gave the statement, that the statement did contain an incorrect assertion about Constable Nelson and himself throwing themselves on the ground and that his statement did not contain a lot of what was in his testimony. The learned trial judge also noted Constable Lindsay's testimony that he felt pressured to complete his statement.

[26] We note that, although cited as an inconsistency, the fact of the 'alteration' of the method of identifying the assailants was not completely unexpected. In his written statement, at one point, Constable Lindsay was recorded as saying "[w]hen I fired the two rounds at the men I noticed that the one **said to be** Deany Wright fell to the ground". The words "said to be", seems to add some credence to Constable Lindsay's

explanation, for the appearance of the assailants' names in the statement.

[27] On the matter of the discrepancies between Constable Lindsay and Sergeant Eric Williams, the learned trial judge, at page 204 of the record, identified the inconsistency between the two accounts. He stated that the integrity of the identification parade was not in issue, and that the attack was, instead, on Constable Lindsay's reliability. It seems that he preferred the evidence of the sergeant because he (the judge) identified that Constable Lindsay expressed an inability to remember much of what occurred on the occasion of the holding of the parade. The learned trial judge was entitled so to do, especially as the appellant was represented by counsel, at the holding of the parade.

[28] It is, in our view, apparent that although not giving an analysis of each discrepancy, the learned trial judge did address his mind to the discrepancies and made a decision about them. It is in the context of reciting all of those discrepancies that the learned trial judge found that the constables were "both witnesses of truth". The learned trial judge was also entitled to accept Constable Lindsay's testimony about the shooting and yet reject his testimony concerning the details of the holding of the parade.

[29] Before leaving these grounds, it must be pointed out that Mr Equiano submitted that the learned trial judge arrived at his decision, in part, on a misapprehension of the evidence. At page 216 of the record, the learned trial judge said that **both** police officers had known the appellant before. This apparently was, however, purely inadvertence, because he did, at page 185, recognize that the identification parade was held because Constable Lindsay did not know the appellant before the incident. The error is not material and is not fatal to the conviction (see ***Ian McDonald v Regina*** SCCA No 202/2001 (delivered 31 July 2003).

[30] In our view, the learned trial judge made use of the opportunity he had of seeing and hearing the witnesses. He correctly advised himself generally, at pages 188-189 of the record, on the matter of discrepancies. He correctly reminded himself of dangers inherent in visual identification evidence and the need for caution in that regard. He demonstrated his understanding of those principles in applying them to the identification evidence in the instant case. We cannot say that he was plainly wrong and we see no reason to disturb his findings.

[31] It must be said, however, that trial judges should endeavour to express themselves in terms so that their findings on the important issues in each case, are clear. It makes the job of the review court far easier. This

trial judge could have made his findings on the inconsistencies and discrepancies more specific and so aid the process of the review.

Ground 5: The sentence of the court was manifestly excessive.

[32] Mr Equiano submitted that no complaint could reasonably be made about the sentences for the individual offences. He said, however, that when looked at as a whole, the inclusion of a consecutive element made the sentence excessive. Learned counsel submitted that there was nothing in the character of the offences or the character of the offender which merited 22 years imprisonment. He said that the normal sentence for each of the latter two offences is 15 years. A sentence exceeding that level should be accounted for by a compelling reason. According to Mr Equiano, no such reason existed in this case. He pointed out that the offences arose out of one incident and there was no previous conviction, which compelled an increase in the penalty.

[33] In addressing the matter of sentence, the learned trial judge spoke to the seriousness of the offences. This is, we surmise, the reason for his having imposed the consecutive sentences. He said, at page 226:

> "I am aware of the effect that the gun has in this country and the police in particular are on the firing line. They are the first in the advance against criminals and elements like yourself, and when they are subjected to this, the court has to look at it. This is not just a case of shooting with intent. In fact, you actually achieved your objective in wounding the officer and as

> I have indicated, were it not for some intervention of some kind he would not have been with us."

[34] The imposition of consecutive sentences, in this context, is not consistent with the principle which this court has usually applied in recent times. The recent approach is that, where the offences committed, are a part of a single transaction, then all the sentences should run concurrently. This approach has been applied even in appeals where the convictions involve the possession and use of firearms.

[35] It was not always so in respect of firearm offences. In ***Regina v Delroy Scott*** [1989) 26 J.L.R. 409, Carey, P (Ag, as he then was), in a concise judgment, traced the development of sentencing in respect of offences involving the illegal possession and use of firearms. That learned jurist, in giving the judgment of this court said, at page 410 B-E:

> "There is thus a manifest policy on the part of the legislature to treat possession of a firearm *simpliciter* as a grave offence.
> Where that firearm is thereafter used in the commission of a criminal offence, we do not think it can properly be said that the possession charge becomes merged in the other offence so that effectively there is only one activity, which merits punishment….It is the charge of *possession simpliciter* which gives the court its jurisdiction to proceed to hear and determine offences committed with the firearm. The charge of possession is, therefore, a substantive charge although it cannot be denied that possession of the firearm is incidental to its criminal user. **We are of opinion, therefore, that as substantive charges, substantive penalties may be imposed and made to run consecutively**." (Emphasis supplied)

[36] The judgment did, however, and importantly so, go on to explain that there are also, other considerations to be applied:

> "But different considerations are brought to play when we come to deal with the quantum of sentence imposed. The court is concerned to ensure that whatever sentence or sentences are imposed, viewed globally, the punishment should not be manifestly excessive."

[37] The court then referred to what was said to be the average sentence imposed in the Gun Court for the offence of illegal possession where the second count was wounding with intent. That figure was said to have been ten years imprisonment, at that time. The court then reduced the sentence imposed for the illegal possession offence from seven to five years. This was on the basis that the offender had pleaded guilty to the offences. The sentence of five years imprisonment for the offence of wounding with intent, using the firearm, was affirmed, as was the order for the sentences to run **consecutively**. The total sentence was, therefore, one of ten years imprisonment.

[38] In a case decided almost a decade later, this court may be said to have modified its position somewhat. In ***Regina v Walford Ferguson*** SCCA No 158/1995 (delivered 26 March 1999), this court considered a complaint that two fifteen year sentences, ordered to run consecutively, were excessive. The convictions were for illegal possession of firearm, rape and

robbery with aggravation, committed during the course of a single transaction. In delivering the judgment of the court, Langrin JA (Ag, as he then was), explained the principles which ought to guide the imposition of sentences in the instance of multiple offences. He said, at page 8 of the judgment:

> "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 and shorter concurrent sentences for the less serious ones**." (Emphasis supplied)

Although that was a case involving the use of an illegally held firearm, there is no indication that the decision in ***Delroy Scott*** was brought to the court's attention in ***Walford Ferguson***.

[39] The approach recommended in ***Walford Ferguson*** concerning offences involved in the same transaction, has been extended to situations where the same type of offence is committed against the same victim over a short period of time (see ***R v Paddon*** (3 March 1971) Current Sentencing Practice A5.2(b)).

[40] Their Lordships, in the decision of the Privy Council, in ***Director of Public Prosecutions v Stewart*** (1982) 35 WIR 296 at page 302, made a brief ruling which may be relied upon for guidance in this area. That was a case involving breaches of the Exchange Control Act, but concerned a situation where more than one offence arose out of the same transaction. Fines had been imposed as the penalties for those breaches. It can be gleaned from their Lordships' judgment that in those situations "only one substantial sentence should be imposed". They agreed with the ruling of this court that in the circumstances of that case, "it [would] be manifestly excessive to impose substantial penalties on both counts".

[41] It is to be noted that the court in ***Walford Ferguson*** spoke to "the general practice" in the case where the offences arise out of the same set of facts. There was no specific contradiction of the position in ***Delroy Scott,*** concerning consecutive sentences, but, as in ***Delroy Scott,*** the issue of the quantum, "viewed globally", was pointedly considered. The principle to be drawn from both cases is that where consecutive sentences are considered appropriate, then the total effect of the sentence must be considered.

[42] In England, there has been occasion for a departure from the general principle, regarding concurrent sentences, where the offences arise from a single transaction. In **John Alistair *Faulkner v R*** (1972) 56 Cr.

App. R. 594, Mr Faulkner was seen on the roof of a warehouse. When he was pursued by a police officer, he pointed a gun at the officer and eventually struck the officer on the head with the butt of the gun, knocking him unconscious. He was sentenced to three years imprisonment for the assault and three years consecutive, for possession of a firearm with intent. The Court of Appeal took the view that "where an offender carries a firearm, with intent, when pursuing his criminal intention he can expect…a sentence of imprisonment consecutive to that which would otherwise be imposed…and this will be attributed to the use of the firearm". That view is similar to the opinion of this court expressed in ***Delroy Scott.*** Nonetheless, when the sentence is considered as a whole it must not be excessive. The learned judges said, in ***Faulkner,*** at page 596:

> "…at the end of the day, as one always must, one looks at the totality and asks whether it was too much."

[43] Since ***Faulkner***, the principle concerning the use of firearms in those circumstances, has, in England, not surprisingly, remained unchanged. In ***R v Warren Dean Greaves and Vincent Jaffier*** [2003] EWCA Crim 3229; [2004] 2 Cr. App. R. (S.) 41, the Court of Appeal of England and Wales ruled that imposing consecutive sentences was the correct approach when firearms were used in robberies. The court said:

> "As to the correct approach to sentencing where arms are used in the carrying out of a robbery, we have no doubt that it is proper sentencing policy, and indeed a policy which should be adopted particularly where a

> firearm is used, to impose a consecutive sentence. **That gives a clear message to those who commit crimes of this nature that if they carry a weapon when committing a robbery they will receive an additional sentence.** The length of the sentence should be apparent….**However, that does not mean that the court imposing the sentence should not look at the totality of the sentence**…" (page 46 - Emphasis supplied)

In that case the sentence of three years imprisonment for the offence of illegal possession of an imitation firearm was ordered to run consecutive to a nine year sentence for robbery.

[44] A variation to that theme was outlined in ***Attorney General's Reference Nos 21 and 22 of 2003 (Lee Hahn and Peter Webster)*** [2003] EWCA Crim 3089; [2004] 2 Cr. App. R. (S.) 63. In that case, the court took the view that despite the conviction for the use of an imitation firearm in pursuance of a robbery, it would not order that the sentences run consecutively. This is because it took the view that the sentencing judge took into account the totality principle in passing sentence. The court did, however, approve of the principle of consecutive sentences in such circumstances. It, however, did so with conditions:

> "The principle of consecutive sentencing is particularly desirable and appropriate when possession or use of a firearm is not the essence, or an intrinsic part of the other offence(s) charged; in such a case there is an 'add-on' or aggravating element which clearly requires such recognition by a consecutive sentence….**On the other hand, in many cases of robbery, the possession and use of firearms may…constitute the very violence or threat of violence which is an essential element of the offence charged.**

> **In such a case the requirement for consecutive sentencing falls to be more flexibly considered and applied."** (paragraph 29 - Emphasis supplied)

[45] The approach cited above seems to be less restrictive of the sentencer than that espoused in ***Walford Ferguson***, despite the use of the term, "general practice" in that judgment. It does, however, seem more limiting than the approach in ***Delroy Scott***, which gives the impression that consecutive sentences may be imposed as of course, when offences are committed with illegally held firearms. The possession and use of a firearm is, certainly, an intrinsic part of the offences of shooting and wounding with intent. All the cases refer, however, to the totality principle, to which we now turn our attention.

[46] The "totality principle" has been, in our view, accurately, explained by D.A. Thomas in the second edition of his work ***Principles of Sentencing***:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'." (page 56)

[47] The learned author submitted that having decided on the sentence for each offence the court should not, then, merely carry out an arithmetic exercise and pass the sentence which the addition produces.

The court should, instead, consider "the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences". He recommended that:

> "Where the totality of the sentences does appear to be excessive and some adjustment is necessary, it is usually preferable to make the adjustment by ordering sentences to run concurrently, rather than by reducing the length of individual sentences and allowing them to remain consecutive." (page 57)

[48] The learned author suggested, at page 58 that the totality principle has two limbs:

> "The first limb of the principle can be seen as an extension of the central principle of proportionality between offence and sentence, while the second represents an extension of the practice of mitigation."

[49] In respect of the first limb, the learned author suggested that:

> "A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender 'a crushing sentence' not in keeping with his record and prospects." (page 57)

The latter suggestion is endorsed by Nigel Walker and Nicola Padfield, the learned authors of ***Sentencing – Theory, Law and Practice*** (2nd Edition - paragraph 10.24). We find that the suggestion is correct in law.

[50] For the second limb, author Thomas explains that even where mitigating factors are taken into account in considering individual

sentences, they may again be considered when the total of the consecutive sentences is appraised. It is our view that these opinions are supported by authority and may be properly considered by judges who have the task of considering appropriate sentences for offenders.

[51] Based on all the above, what approach should sentencers use in considering the appropriate sentence to be imposed?

[52] Before attempting to answer that question, we examine two further situations in which the English Court of Appeal has found consecutive sentences to be justified. The first is where offences are accompanied by exceptional turpitude. In ***R v Sydney George Wheatley*** (1983) 5 Cr. App. R. (S) 417, a man pleaded guilty to driving while disqualified, driving with an excess alcohol level and driving without insurance. He was sentenced to 12 months imprisonment for driving while disqualified and six months for driving with excess alcohol. The sentences were ordered to run consecutively. On appeal, the Court of Appeal, after taking into account the offender's consistently outrageous behaviour, ruled that the consecutive sentences were justified. The court said, at page 419:

> "In these circumstances the practice of the Court operated in many cases, of passing two concurrent sentences for two offences arising out of the same facts, cannot apply. Otherwise this man would have a licence to drive with excess alcohol without any added penalty."

[53] Similarly, it ruled that those who commit offences while on bail may also expect, in principle, to receive consecutive sentences. In ***R v Gerald Hugh Millen*** (1980) 2 Cr. App. R. (S) 357, the court said at page 360:

> "Those who commit offences while they are on bail must expect to have their sentences on the second occasion made consecutive to the previous sentences. But, having said all that, and looking at the question of the totality, we think that the learned judge should have reduced the sentence from three years to 12 months consecutive….The total sentence will therefore be reduced from 10 to seven years."

[54] The reasoning in ***Wheatley*** was approved and applied in ***R v Paul Harvey*** [2006] 2 Cr. App. R. (S) 47. That also was a case involving driving offences. As in ***Wheatley,*** Mr Harvey demonstrated a callous disregard for the relevant road traffic regulations. He was sentenced to serve consecutive periods of imprisonment. The Court of Appeal ruled that in cases of that kind, "consecutive sentences are not only appropriate but should be regarded as usual" (page 51).

[55] It may be reasonably argued that that approach is required where the maximum sentences available for the offences are relatively short (in ***Harvey*** the offender was ordered to serve a total of two years imprisonment). Where long sentences are a part of the court's arsenal, it may well be unnecessary to adopt that approach.

[56] In Jamaica where the phenomenon of the use of illegally held firearms is a scourge affecting the land, the imposition of consecutive sentences, subject to the totality principle, is not past its time, especially in cases of atrocious behaviour on the part of the offender. We, however, must bear in mind that the maximum sentence for the offences of illegal possession of a firearm, shooting with intent and wounding with intent, is life imprisonment in each case. In the circumstances of the ordinary case, therefore, where the offences arise from a single transaction, there is, in our view, no need to resort to imposing consecutive sentences. We are not convinced that in the average case, there should be any departure from the recommendation made by this court in ***Walford Ferguson,*** which was cited above.

[57] From the above discussion, may be distilled the following principles:

a. Where offences were all committed in the course of the same transaction, including the average case where an illegally held firearm is used in the commission of an offence, the general practice is to order the sentences to run concurrently with each other - (***Walford Ferguson***).

b. Where the offences arise out of the same transaction and the appropriate sentence for each offence is a fine, only one substantial sentence should be imposed - (***DPP v Stewart***).

c. Where the offences are of a similar nature and were committed over a short period of time against the same victim, sentences should normally be made to run concurrently - (***R v Paddon).***

d. If offences were committed on separate occasions or were committed while the offender was on bail for other offences, for which he was eventually convicted, and in exceptional cases involving firearm offences, there is no objection, **in principle**, to consecutive sentences – (***Delroy Scott, R v Rohan Chin*** (SCCA No. 84/2005 (delivered 26 July 2005) and ***R v Gerald Hugh Millen*** (1980) 2 Cr. App. R. (S) 357).

e. In all cases, but especially if consecutive sentences are to be applied, the 'totality principle' must be considered, in application of which, the aggregate of the sentences should not substantially exceed the normal level of sentences for the most serious of the offences involved - (***Delroy Scott***, ***DPP v Stewart,*** D.A. Thomas – ***Principles of Sentencing*** – cited above).

f. Even where consecutive sentences are not prohibited, it will usually be 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 - (***Walford Ferguson***).

g. Although it is unlikely to be the case, in matters being tried in the superior courts, if the maximum sentences allowed by statute, do not adequately address the egregious nature of the offences, then consecutive sentences, still subject to the 'totality principle', may be considered – (***R v Wheatley, R v Harvey***).

[58] The instant case was one of using an illegally held firearm to shoot at, and wound, a police officer. This was done in a single transaction. There is no factor which indicates that the instant case is outside the norm of offences of that nature, so as to warrant it being deemed "exceptional". There is, therefore, no basis on which to impose consecutive sentences. Even if it could be so categorized, we are of the view, however, that the learned trial judge did not expressly consider the totality principle, in including the consecutive element in the sentences.

[59] We bear in mind, the principle guiding this court when considering sentences imposed at first instance. The following statement by Hilbery J in **R v Kenneth John Ball** (1952) 35 Cr. App. R. 164 at page 165 conveniently summarizes that principle:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses as to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy

> this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

[60] Having found that the learned trial judge did not expressly state his reason for ordering the sentences to run consecutively, we must consider whether his order may yet be preserved. In examining the sentence, based on the totality principle, and considering the fact that this was a first conviction for the appellant, we find that the sentence of 22 years imprisonment is manifestly excessive. Using the approach adopted in ***Delroy Scott***, we find that the current norm of 15 years, for the offence of wounding with intent (the most serious of the instant offences), should be used as the standard. Accordingly, as guided by the decision in ***Walford Ferguson***, we shall allow the individual sentences to stand and order that they should all run concurrently instead of having counts two and three run consecutive to count one.

Conclusion

[61] Having found no merit in the complaints against the convictions, the application for leave to appeal the convictions is therefore refused. The appeal against the sentence is allowed to the extent that the sentence requiring counts two and three to run consecutive to count one is quashed and it is ordered that the sentences on all three counts shall run concurrently and shall run from 17 January 2008.