[2022] JMCA Crim 50

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 47, 49 & 50/2014

JAHVID ABSOLAM
WINSTON HARRIS v R
GARNETT LINTON

Mrs Melrose Reid for the appellant Jahvid Absolam

Ms Karlene Afflick for the appellant Winston Harris

Leroy Equiano for the appellant Garnett Linton

Miss Natallie Malcolm and Mrs Kimberly Guy-Reid for the Crown

22, 23, 26 September and 14 October 2022

BROOKS P

[1] On 11 April 2014 Messrs Jahvid Absolam, Winston Harris and Garnett Linton ('the appellants') were convicted for the offences of illegal possession of a firearm, two counts of robbery with aggravation and one count of simple larceny. Their convictions followed a trial in the High Court Division of the Gun Court before a judge sitting without a jury. The learned trial judge, on 9 May 2014, sentenced each of them to serve 15 years' imprisonment for the illegal possession of a firearm, 20 years' imprisonment for each of the robbery offences and five years' imprisonment for the simple larceny. He ordered that the sentences run concurrently.

[2] A single judge of this court refused the appellants' leave to appeal against their respective convictions but granted leave to appeal against the sentences. The appellants have pursued that grant of leave but have also renewed their application to appeal against their respective convictions.

[3] Learned counsel for each of them has employed a different approach to the grounds of appeal. These will be set out after the facts have been outlined.

The evidence

[4] At the trial, the prosecution led evidence that on 6 April 2011 at about 11:00 am four men and a woman held up the staff of the Tropical Jewellers store in the Tropical Plaza in the parish of Saint Andrew, and robbed them, at gunpoint, of firearms and cellular telephones. The robbers also took away a large quantity of merchandise that was in the showcases in the store. This included rings, chains, and Movado watches.

[5] The robbery was reported to the police. On 7 April 2011, the investigations led the police to Mr Harris' house and a search produced a Movado watch, three gold chains and $185,000.00. The police took Mr Harris into custody, and, on 9 April 2011, he gave them a cautioned statement in which he admitted to having been complicit in the robbery. His involvement, he said, was to have waited for, and transported, the lookout man from the plaza where the store was.

[6] The police took Messrs Absolam and Linton into custody. After being cautioned, Mr Absolam stated that the robbery was a set-up, involving someone connected to the store. They were placed on identification parades but only one of the persons who were present in the store at the time of the robbery identified them as being among the robbers. He is Mr David Russell, a security guard who had been posted at the store.

[7] At the trial, defence counsel, on Mr Harris' behalf, unsuccessfully objected to the cautioned statement being admitted into evidence. Mr Harris gave sworn testimony and relied on an alibi. He said that he was at home at the time of the robbery. He was, he

said, also at home the following day when the police came, searched his house and took his cash, which he says was his "partner draw". They then took him into custody and seized his car. He contended that he did not voluntarily give the cautioned statement. Mr Harris called, as witnesses, some of the occupants of the store who had failed to identify anyone on identification parades held in respect of the case.

[8] Messrs Absolam and Linton both gave unsworn statements in which Mr Absolam denied being involved in the robbery and they both stated that they were elsewhere at the time of the robbery.

The appeal

[9] There were overlaps between the various grounds of appeal that the appellants relied on. Accordingly, the grounds will be assessed on the issues that they raised. The issues are set out below but not necessarily in the order in which they were argued:

a. the charging of two counts of robbery with aggravation in the indictment;
b. the inclusion of the count of larceny on the indictment;
c. the learned trial judge's treatment of the discrepancies and contradictions in the identification evidence given by the prosecution's witnesses;
d. the learned trial judge's treatment of Mr Harris' cautioned statement;
e. the learned trial judge's interventions during the taking of evidence;
f. the dock identification;
g. the appropriateness of the sentences; and
h. the delay in the appeal being heard.

Issue a: the charging of two counts of robbery with aggravation in the indictment

[10] Mrs Reid, on behalf of Mr Absolam, argued several points which, were not restricted to his case. The first of the general issues that she raised was that the prosecution ought not to have included two separate counts of robbery with aggravation in the same indictment because the offences arose from the same incident. The basis for learned counsel's complaint is that the indictment, in two separate counts, charged the appellants with having robbed two separate people of their respective firearms. Learned counsel submitted that there should only have been a single count of robbery with aggravation since the Crown's case was that the robberies were committed at the same time and place. Mrs Reid relied on, among others, **United States v Hope** 545 F 3rd 293 (2008) (5th Circuit) and **Jemmison v Priddle** [1972] 1 All ER 539.

[11] Miss Malcolm, on behalf of the Crown, submitted that the complaint was misplaced. Learned counsel submitted that each taking from the two victims was not a single transaction but a separate offence. She submitted that **Jemmison v Priddle** was distinguishable on the facts. Instead, learned counsel relied on **Elio Delgado v R** [2017] JMCA Crim 34.

[12] Mrs Reid's complaint is completely misplaced. Rule 3 in the Schedule to the Indictment Act allows for the joining of charges in a single indictment where those charges are founded on the same set of facts. The rule states:

> "3. Joining of charges in one indictment – Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of offences of the same or similar character."

[13] The two counts of robbery with aggravation fall within the contemplation of rule 3 as they arose out of the same facts. They can be dealt with in separate counts because they constitute separate takings against different individuals and therefore are separate offences. It would have been improper to include the separate takings in a

single count. Straw JA (Ag), as she then was, explained the point in **Elio Delgado v R**. The learned judge said, in part, in paragraph [42] of the judgment that "In **Rex v Thompson** [1914] 2 KB 99, the general common law view on duplicity was expressed that an indictment was bad if it charged more than one offence in each count".

[14] The cases which Mrs Reid cited are distinguishable by their facts. In **United States v Hope** the court ruled that Mr Hope was improperly charged twice for possession of a firearm when there was no evidence that he had parted with possession of the firearm between the two occasions that he was sighted with it. In **Jemmison v Priddle**, the court ruled that a single information against Mr Priddle for killing two deer on the same occasion did not charge more than one offence and was not bad for duplicity. In the present case, the indictment is not bad for duplicity. There were two complaints of robbery with aggravation and the indictment clearly outlines separate counts, for each complaint. Mrs Reid's submission, therefore, fails.

Issue b: the inclusion of the count of larceny on the indictment

[15] Mrs Reid complained that the count charging larceny of the merchandise from the store's showcases was improper as a judge of the Gun Court had no jurisdiction to try such a case. Ms Afflick, on behalf of Mr Harris, also adopted this submission.

[16] Learned counsel are on good ground with this submission, and Miss Malcolm unhesitatingly conceded its correctness. Learned counsel noted that the appellants had not been charged with an offence under section 25(2) of the Firearms Act and therefore a charge of larceny was inappropriate.

Issue c: the learned trial judge's treatment of the discrepancies and contradictions in the identification evidence given by the prosecution's witnesses

[17] Mr Equiano, on behalf of Mr Linton, advanced the arguments in respect of this issue. Learned counsel submitted that there were several differences between the testimonies of the various occupants of the store, who gave evidence. This was especially so in the aspects of the number of robbers and what they were wearing. Mr

Equiano argued that the learned trial judge merely accepted Mr Russell's evidence but did not give a reason for doing so. Learned counsel submitted that if the learned trial judge had carefully analysed the discrepancies, it would have raised doubt about the correctness of Mr Linton having been identified as one of the robbers. Mrs Reid adopted those submissions in favour of Mr Absolam.

[18] Miss Malcolm submitted that the learned trial judge's directions to himself were unimpeachable. She pointed out that the learned trial judge gave himself general directions as to inconsistencies and discrepancies and, as he reviewed the evidence, pointed out the differences between the various witnesses. She said that Mr Russell's evidence was the lynchpin in the prosecution's case and the learned trial judge was impressed by it. Learned counsel submitted that the major issue in the case was the identification of the perpetrators and the learned trial judge gave himself the correct **Turnbull** (**R v Turnbull and Another** [1977] QB 224; [1976] 3 WLR 445) directions in that regard.

[19] The learned trial judge, as Miss Malcolm submitted, did give himself general directions for addressing discrepancies and inconsistencies, and he did identify differences between the witnesses as to:

a. the number of robbers;
b. the order in which the robbers entered the store;
c. whether a woman was among them; and
d. whether they wore caps and police vests,

but he did not carry out an analysis of each difference and explain how he resolved them. However, the learned trial judge did explain his reason for accepting Mr Russell's testimony. He said, in part, on page 364 of the transcript:

> "…I find that the [witness] [Mr] Russell is a credible witness, a very truthful witness, a person trained to observe as a security guard of many years of experience. I find the identification by him when he said he observed [Mr Linton] for five seconds when he entered and three seconds when he was in the room and when he relieved him of his firearm

> there he was able to see. I find that the identification parade was fair and proper. I find that the lighting condition was good, the distance was good and I find that the witness David Russell made no mistake in identifying Mr. Garnett Linton…."

[20] It is expected that a senior judge would have done more in showing his method of resolving conflict in the evidence, but he was entitled to accept the evidence of one witness over another or others and, therefore, although the approach was less than stellar, it cannot be said that it warranted disturbing the conviction. There was material evidence that provided a sufficient basis for the decision at which he arrived (see page 5 of **R v Horace Willock** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 76/1986, judgment delivered 15 May 1987).

[21] The grounds underlying this issue must be rejected.

Issue d: the learned trial judge's treatment of Mr Harris' cautioned statement

[22] The genesis of this issue is the cautioned statement that was taken from Mr Harris on 9 April 2011. It was given at the police Flying Squad's office in the presence of two Justices of the Peace. In it, Mr Harris stated that he was requested to transport someone who would be a lookout person for the robbery. He said that, on that day, he drove to the mall, contacted the lookout by telephone and observed when the robbers entered the store. He also said that after they left the store, he picked up the lookout, transported him away from the mall and left him elsewhere.

[23] There are several complaints covered by this issue. Some of them may be very quickly disposed of as being without merit. Firstly, Mrs Reid submitted that the cautioned statement ought not to have been taken in the presence of only Justices of the Peace. Learned counsel asserted that duty counsel ought to have been called to oversee the exercise. Mrs Reid cited no authority to support that submission.

[24] It is noted that section 12(1) of the Legal Aid Regulations requires that "[w]here a person is detained at or charged with an offence and brought to a police station or

lock-up, the officer detaining the person or making the arrest shall inform him of his right to legal aid and to representation by a duty counsel". In this case Senior Superintendent Cornwall Ford ('SSP Ford') testified that he told Mr Harris of his rights in this respect and Mr Harris declined the offer. SSP Ford said that he then arranged for Detective Sergeant Lowe to take the cautioned statement from Mr Harris.

[25] Detective Sergeant Lowe did not give evidence at the trial because he had, by then, retired and migrated. There is therefore no evidence as to whether he gave Mr Harris any further opportunity to have duty counsel. The other police officer who witnessed the taking of the cautioned statement, Detective Constable Kevin Dallas, was not asked any questions about the presence of justices of the peace as opposed to duty counsel. There is therefore no evidential support for Mrs Reid's complaint in this regard.

[26] Mrs Reid also submitted that the cautioned statement was not properly edited and therefore implicated Mr Absolam. The submission is completely misplaced. The learned trial judge ensured that the cautioned statement was edited to remove any reference to any other person by name and expressly warned himself that it could not be considered as evidence against any of Mr Harris' co-accused. The learned trial judge said, in part, on page 342:

> "And I will now read the caution statement the edited version I instruct [sic] the Crown to do. Based on the fact that the evidence of a co-accused is not evidence against the other accused…."

[27] Thirdly, Mrs Reid submitted that the learned trial judge should have held a *voir dire* (trial within a trial) to determine the admissibility of the statement. This submission is also without merit. Not only did the learned trial judge offer that option to defence counsel, who declined the offer, but it is well established by the authorities that in cases where a trial is being conducted by a judicial officer, without a jury, it is "impractical and unnecessary" to hold a *voir dire*. Kerr P (Ag) so stated in **R v Craigie and Others** (1986) 23 JLR 172, on page 183G. Panton JA (as he then was) emphasised the point in **Roy Paharsingh and Michael Hylton v R** (unreported), Court of Appeal, Jamaica,

Resident Magistrate's Criminal Appeal No 32/2005, judgment delivered 10 February 2006. Lord Lane CJ stated the reasoning behind that principle. He did so in **S J F (an infant) v Chief Constable of Kent, ex p Margate Juvenile Court** (1982) Times, 17 June, which was a decision of the Divisional Court, and was an appeal by way of case stated. Lord Lane CJ's explanation was quoted in **R v Liverpool Juvenile Court, ex parte R** [1987] 2 All ER 668, on page 671, as saying, in part:

> "…But where the matter is being conducted by the magistrates' court, then there is no question of having a trial within a trial, because the magistrates are the judges both of fact and of law. They are the people who not only have to determine the question of admissibility, but also the question of guilt or innocence, namely the main issue of the trial…."

[28] There was, however, a complaint in respect of this issue which constitutes one of the two troubling issues raised in these appeals. Mrs Reid and Ms Afflick both complained about the circumstances of the taking of the cautioned statement from Mr Harris and the manner with which the court below treated it. The troubling aspect of the complaint in respect of this cautioned statement is that it was taken in the context of oppression.

[29] Ms Afflick argued that the statement should not have been admitted into evidence as it was taken from Mr Harris in circumstances where it must be said to have been involuntary. Learned counsel pointed to the fact that during the time that Mr Harris was in the Flying Squad's office, he was handcuffed to a chair.

[30] Ms Afflick pointed to Mr Harris' sworn testimony that he had been beaten on his knuckles by SSP Ford, the police officer who took him into custody, and promised that, if he gave a statement, he would be released and get back his car and his cash. Mr Harris testified that the details that he related about the robbery were based on what he had heard in his community.

[31] Miss Malcolm submitted that there was nothing to have prevented Mr Harris' cautioned statement from being considered as voluntary. She pointed to the evidence

of SSP Ford, who denied that he beat Mr Harris or made any promise to him. Learned counsel submitted that the two contending versions, concerning the interaction between SSP Ford and Mr Harris, were squarely placed before the learned trial judge who expressly preferred and believed the evidence of SSP Ford.

[32] On the matter of the handcuffing to a chair, Miss Malcolm said that it was Mr Harris who requested that he not be placed in a cell, since there would have been a perception there that he had been cooperating with the police.

[33] In considering the aspect of voluntariness, the learned trial judge believed SSP Ford's testimony in the areas where it conflicted with Mr Harris'. On page 364 of the transcript, the learned trial judge is recorded as saying, in part:

> "…I find that Mr Harris made that statement. I find that the statement is true. I find that he made that statement voluntarily. No one made any promise to him. That statement was made admitting his participation in that robbery…."

[34] The Privy Council in **Ricardo Williams v The Queen** [2006] UKPC 21; (2006) 69 WIR 348 cautioned that it is not only voluntariness, but overall fairness, that must be considered in considering the admissibility of a cautioned statement. It is, therefore, necessary to examine the overall circumstances under which Mr Harris is said to have given the cautioned statement.

[35] The learned trial judge, apart from recounting Mr Harris' testimony and that of SSP Ford about Mr Harris being handcuffed to a chair and the reason therefor, did not expressly consider the evidence in the context of oppression. He did say, however, on page 360, that Mr Harris must have been allowed to use the bathroom. That aspect was part of SSP Ford's testimony.

[36] It is also plain that Mr Harris was handcuffed to a chair from 7 April 2011, when he was taken into custody, to 9 April 2011, when he gave the cautioned statement. As troubling as that evidence is, the learned trial judge seems to have accepted that it was

occasioned by Mr Harris' request that he not be placed in a cell. The learned trial judge, in exercising his discretion, was entitled to find that the circumstances did not affect the voluntariness of the cautioned statement or the overall fairness of the circumstances of its collection. It must be said, however, that the situation was most unfortunate and should not be repeated. There must have been some other method of handling the situation while accommodating Mr Harris' request.

[37] For those reasons, the complaints that Ms Afflick highlighted cannot be found to invalidate the conviction.

Issue e: the learned trial judge's interventions during the taking of evidence

[38] Mrs Reid argued that the learned trial judge descended into the arena and played the role of the prosecutor during the trial. She argued that he asked so many questions that he, essentially, "took over the case", resulting in injustice to Mr Absolam.

[39] Miss Malcolm accepted that the learned trial judge intervened several times during the taking of evidence. She submitted, however, that the interventions did not prevent the witnesses from giving evidence and did not prejudice the case for the defence. She relied on **Carlton Baddal v R** [2011] JMCA Crim 6 in support of her submissions.

[40] In **Carlton Baddal v R**, criticism was also made of the conduct of the trial judge. Panton P, who delivered the judgment of this court, gave the following guidance in paragraph [17] of his judgment:

> "…We also take this opportunity to remind trial judges that it is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been

> given, or 'to clear up any point that has been overlooked or left obscure' (***Jones v National Coal Board*** [1957] 2 All ER 155 at 159G)." (Emphasis and italics as in original)

Those comments are fully applicable to the instant case. The learned trial judge's interventions did not unfairly prejudice the defence and there was no miscarriage of justice. The cases of **Haniff Miller v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 155/2002, judgment delivered 11 March 2005 and **R v Hulusi and Purvis** (1973) 58 Cr App Rep 378 are distinguishable on the facts. In both cases, the interventions were more numerous, exceeded permissible limits and were held to have prejudiced the defence. In **R v Hulusi and Purvis**, the trial judge's intervention was also held to have prevented the defendants and their witnesses from advancing their evidence.

[41] Based on the above reasoning, this ground also fails.

Issue f: the dock identification

[42] The circumstances from which these complaints emanate are that Mr Harris called as a witness, Mr Richard Grant, an employee of the jewellery store. Mr Grant testified as to the way the robbery was conducted and by whom. His evidence in chief was almost terse, except in terms of the number of robbers and their attire. The prosecutor then said that she had no questions for Mr Grant by way of cross-examination. He was the last witness taken for that day and the adjournment was taken shortly after his evidence was completed.

[43] The following morning, on the case being resumed, the prosecutor asked for Mr Grant and another witness to be recalled for cross-examination. The learned trial judge allowed it. During the cross-examination of Mr Grant, and despite strenuous objection from defence counsel, the learned trial judge allowed the prosecutor to ask Mr Grant if he saw any of the robbers in court and to point out that person. Mr Grant pointed out Mr Linton as being one of the robbers who had on a police vest and cap. The prosecutor also asked him about the circumstances under which he saw Mr Linton in

the store. All this was against the context that Mr Grant had attended a "visual identification parade", on which Mr Linton's image was portrayed, but failed to point him out.

[44] Both Mrs Reid and Mr Equiano were strident in their criticism of the prosecutor and the learned trial judge in respect of the recalling of a defence witness to provide that dock identification. Mrs Reid used very strong language to describe the conduct of that aspect of the trial. She relied in part on **The State v Joshi** (1967) 69 BOMLR 530, **R v William Sullivan** (1922) 16 Cr App Rep 121 and **Benedetto v The Queen; Labrador v The Queen** [2003] UKPC 27.

[45] The result of this untenable situation, Mr Equiano submitted, was that the learned trial judge not only improperly allowed a dock identification, but relied on it in convicting Mr Linton, without giving himself any warning as to the dangers of that type of identification.

[46] Miss Malcolm, to her credit, readily accepted that the prosecutor's action was unfair and that it ought not to have been allowed. Learned counsel submitted, however, that it was not enough to overturn the conviction because of the great reliance that the learned trial judge placed on Mr Russell's evidence. She submitted that this would be a proper case in which to apply the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act. She relied, in part on **Danny Walker v R** [2018] JMCA Crim 2 and **Dwight Gayle v R** [2018] JMCA Crim 34.

[47] This is the second troubling aspect of this case. It has several reasons for concern. The first is that, although no impropriety is being imputed to the learned prosecutor in terms of contact with Mr Grant, Mr Equiano is correct in saying some contact must have been made with him overnight, if even to request that he return to court on the following morning. The second is the leading of the evidence although Mr Grant had failed to identify Mr Linton at an identification parade that would have tested Mr Grant's ability to have made out the features of any of the robbers. The third aspect

is the learned trial judge's failure, having allowed the evidence to be admitted, to give himself a warning as to the dangers of dock identification.

[48] **Danny Walker v R** is authority for the principle that it is within a trial judge's discretion to allow a witness to be recalled. McDonald-Bishop JA, who delivered the judgment of this court in that case, said in paragraph [50]:

> "A trial judge always has the discretion to allow the recall of a witness at any stage of the trial prior to summing up and this court will not interfere with the exercise of that discretion unless there is some injustice done. In the circumstances of this case, we find that there was no injustice done by the learned trial judge in exercising her discretion to permit the prosecution, before closing their case, to recall the witness to correct his error."

The learned trial judge's exercise of discretion will not be disturbed unless there is a clear error of law, or the result is unfair in the circumstances. In this case, the learned trial judge did not require the prosecutor to state beforehand the reason for recalling the two witnesses, but the recall, by itself, was not improper.

[49] **R v William Sullivan** does not assist this analysis. It sets out the prohibition from recalling a witness merely to repeat his evidence in chief. **Benedetto v The Queen; Labrador v The Queen** deals, in part, with the impropriety of the prosecutor's actions. Their Lordships, in the latter case, repeated the admonition that the duty of prosecuting counsel is not to obtain a conviction at all costs but to act as ministers of justice. The guidance is appropriate, as is Mrs Reid's citing of the case.

[50] The law regarding dock identification, in a nutshell, is that although such evidence is not by itself inadmissible (**Pop v The Queen** [2003] UKPC 40), it has inherent dangers, and the jury should be warned of those dangers. The law was set out and assessed in **Dwight Gayle v R**. The facts of that case are distinguishable from this case, but the review of the law in the judgment included an assessment of **Jason Lawrence v The Queen** [2014] UKPC 2, in which the material circumstances were similar to this case. In **Jason Lawrence v The Queen**, a man was stabbed to death in

the vicinity of a gaming table, with several people present. Mr Lawrence was charged. Two of the eyewitnesses failed to point him out at the identification parades that were held, for which he was the suspect. Neither claimed to have known Mr Lawrence before the stabbing. However, one of them purported to point him out in the dock at the trial. Another witness, who, it was accepted, knew Mr Lawrence before, pointed him out at the trial as having been present at the scene of the stabbing, and described his actions at the scene. The trial judge failed to give a dock identification direction to the jury.

[51] On appeal to the Privy Council, their Lordships found that a dock identification direction was required, although one of the prosecution witnesses had properly pointed out Mr Lawrence. They said that the jury should have been warned of the undesirability and dangers of dock identification. Their Lordships' guidance is instructive. It has been repeated in other cases in this court, but it is apparent that a reminder is necessary. Their Lordships said, in part, in paragraph 9:

> "In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: *Aurelio Pop v The Queen* [2003] UKPC 40; *Holland v H M Advocate* [2005] UKPC D1, 2005 SC (PC) 1; *Pipersburgh and Another v The Queen* [2008] UKPC 11; *Tido v The Queen* [2012] 1 WLR 115; and *Neilly v The Queen* [2012] UKPC 12. Where there has been no identification parade, dock identification is not in itself inadmissible evidence; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. **But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care**…." (Italics as in original, emphasis supplied)

And most appropriately, for this case, in paragraph 11:

> "In this case the identity of Mr Madourie's killer was the central issue in the trial. Ms Linton's and Mr Smith's dock identifications took place without objection from the appellant's counsel. **But Crown counsel should have been at pains to avoid them occurring; he should not have invited them**. We do not know what use, if any,

> defence counsel made of their failure to identify the appellant at the identification parades; but that is not important where the principal challenge in relation to identification is the content of the judge's directions. **It is well established that judicial directions which meet the *Turnbull* guidelines on the dangers inherent in all identification evidence do not address the separate issue of the dangers of dock identification.** Such directions are insufficient for this purpose. In his summation the judge did not refer to Mr Smith's evidence, which placed the appellant close to the crown and anchor table at the time of the incident. He briefly mentioned Ms Linton's failure to identify the appellant at the identification parades. **But he did not refer to the advantages of an identification parade or warn of the heightened risk of a false identification when a witness, who had been unable to identify at an identification parade, made a dock identification. By failing to do so, he misdirected the jury**." (Italics as in original, emphasis supplied)

[52] It is fair to say that Miss Malcolm has accepted that the learned trial judge misdirected himself on this issue. The **Turnbull** warning that he gave to himself was inadequate for the case against Mr Linton. The question that remains is whether that misdirection warrants quashing Mr Linton's conviction.

[53] In **Jason Lawrence v The Queen**, it was not only the misdirection on the dock identification that caused their Lordships to quash the conviction. They explained that decision in paragraph 21 of their judgment:

> "The Board is satisfied that the misdirections on dock identification and on the alleged confession are sufficient to render the appellant's conviction a miscarriage of justice. It is not necessary therefore to deal at length with the other challenges…made on the appellant's behalf, as they do not raise issues of principle."

[54] Their Lordships of the Privy Council were invited in **Leslie Pipersburgh and Patrick Robateau v The Queen** [2008] UKPC 11; (2008) 72 WIR 108 to apply the proviso in a case where there was dock identification of those appellants by several witnesses, who claimed to have known them before. Their Lordships ruled that the

directions to the jury on identification were inadequate due to the failure to give the appropriate direction about the dangers of dock identification. They found that since the other evidence against those appellants, in particular, Mr Robateau, also suffered from an inadequacy (the failure to hold a *voir dire*), the proviso could not be applied, and the convictions were deemed to be unsafe.

[55] In **Maxo Tido v The Queen** [2011] UKPC 16, their Lordships ruled that there had been a misdirection on dock identification but did not quash the conviction. They applied the proviso because "[q]uite apart from the dock identification the evidence against the appellant was simply overwhelming" (paragraph 31). There was both visual identification testimony and physical evidence which linked Mr Tido to the murder.

[56] In this case, the learned trial judge was convinced by Mr Russell's testimony. He came to his conclusion about Mr Linton's guilt, only mentioning that testimony. He addressed Mr Grant's testimony, almost by way of an afterthought. The relevant portion of the summation is recorded on pages 364 – 365 of the transcript. After his statement accepting Mr Russell's evidence identifying Mr Linton, which was quoted above in paragraph [19], the learned trial judge went on to say:

> "…As such I find [Mr Linton] guilty also of all counts acting with the other gentleman. As it relates to Mr. Absolam I find – –- let me stop here before I go any further. There is one further finding I need to make as far as Mr. Linton is concerned. That is his witness Mr. Grant identified him in court also and I believe that witness…."

[57] The learned trial judge saw and heard Mr Russell. As the tribunal of fact, he was entitled to find Mr Russell credible. It may therefore be said that despite the misdirection, there was strong evidence against Mr Linton to allow the proviso to section 14 of the Judicature (Appellate Jurisdiction) Act to be applied. Mr Linton's convictions should, therefore, remain undisturbed as there was no miscarriage of justice.

Issue g: the appropriateness of the sentences

[58] Learned counsel for all the appellants complained that the sentences were manifestly excessive. Indeed, a single judge of this court granted each of these appellants leave to appeal their sentences on the bases that the learned trial judge did not specifically give credit to the appellants for the time spent in pre-trial remand and that the sentences for robbery with aggravation were just one year shy of the maximum statutory sentence.

[59] Miss Malcolm pointed out that the learned trial judge would not have had the benefit of the learning outlined in **Meisha Clement v R** [2016] JMCA Crim 26 or of the Sentencing Guidelines for Use by judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), as the trial pre-dated those authorities. Nonetheless, she conceded that he erred in not specifically granting the full credit for the three years that the appellants spent in pre-trial remand and that the sentences for robbery with aggravation were so close to the maximum statutory sentence that they were manifestly excessive.

[60] Learned counsel are correct that the learned trial judge erred in his approach to the sentences. He indeed reminded himself that the appellants had spent a long time in custody and that he was obliged to consider it, but he did not carry out the mathematical exercise that was required. It is, therefore, not known whether he gave full credit for the remand period. The court recognises that the learned trial judge would not have had the established guidelines as outlined in **Meisha Clement v R** and the Sentencing Guidelines. However, some guidelines were available to the learned trial judge, as outlined in the case of **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 55/2001, judgment delivered 5 July 2002. Additionally, at the time of the sentencing, the Privy Council had already pronounced that there should be full credit for time spent in custody (see **Callachand and Another v The State** [2008] UKPC 49). The guidance in **Meisha Clement v R** is now so well established that it is unnecessary to quote from the judgment, but it will be

necessary to guide this court's sentencing procedure. The learned trial judge, having erred in principle, means that this court must intervene and re-do the sentencing exercise (see **R v Ball** (1951) 35 Cr App Rep 164).

[61] Some general comments may be made before considering the individual cases.

[62] It is without a doubt that these offences require custodial sentences. There are aggravating factors that are common to these appellants. The prevalence of firearm offences in this country requires a signal aimed at deterrence. These offences were carefully planned and brazenly committed almost in the middle of the day. The offenders were operating in a group, with some of the perpetrators posing as police officers who would have been conducting a regular exercise of reporting a visit to the store. The goods stolen were valued at approximately $50,000,000.00, in addition to the two firearms that were taken from the security guards. Apart from the issue of the prevalence of firearm offences, the learned trial judge commented on all those matters, as well as the fact that neither of the firearms had been recovered. The victims of the event must have been badly shaken by the crime and the way it was committed. One of the occupants of the store was pregnant at the time and spoke of her concern for her unborn child during the incident. Strong condemnation of the crime was and is required.

[63] The common mitigating factor is that no one was physically hurt.

[64] The Sentencing Guidelines stipulate that the usual range for the offence of illegal possession of a firearm is seven to 15 years, with the usual starting point being 10 years. The usual range for robbery with aggravation is 10-15 years with the usual starting point being 12 years. In the instant case, considering the numerous general aggravating factors, and the single mitigating factor, the starting point for the illegal possession of firearm offence should be 14 years and the starting point for the robbery with aggravation should be 17 years.

[65] Those starting points would be consistent with the reasoning in the judgment in **Lamoye Paul v R** [2017] JMCA Crim 41, in which McDonald-Bishop JA, commenting on the sentencing range and starting point for the offences of illegal possession of firearm and robbery with aggravation, stated, in part, in paragraphs [18] and [22]:

> "[18]…Bearing in mind that this is not a case that involved the possession of a firearm simpliciter, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate….
>
> [22]…The usual starting point for [the offence of robbery with aggravation] is 12 years. **However, for a robbery executed with a firearm, and also by more than one perpetrator, the starting point must be higher. In this case, where there were at least two perpetrators, the range within which the sentence should fall should be anywhere between 15-17 years**…." (Emphasis added)

[66] It should be noted that there is no statutory minimum sentence for either the possession of firearm offence or that of robbery with aggravation (see **Jerome Thompson v R** [2015] JMCA Crim 21). Defence counsel for Mr Harris seems to have been of the view that there was such a statutory minimum, as he mentioned it twice in his submissions to the learned trial judge. However, the learned trial judge did not mention that concept. He will not be taken as being of the view that there was a statutory minimum sentence.

[67] It is necessary to now turn to consider the appellants individually.

Mr Absolam

[68] Mr Absolam was 28 years old at the time of sentencing. He had a history of being gainfully employed and was operating a taxi business at the time of his arrest. He was in a stable domestic union, and he has two children, who were dependent on him for support. He, however, had two previous convictions. One was for illegal possession

of a firearm and the other was for robbery with aggravation. Whereas his mitigating factors may not be considered significant, the aggravating factors are very much so.

[69] Starting at 14 years for the firearm offence and adding two years for the personal aggravating factor, which is that he has previous convictions for the same serious offences, results in a total of 16 years. A deduction of a year for the personal mitigating factors, which are that he was employed and had dependants (see **Troy Smith v R** [2021] JMCA Crim 9 at paragraph [136]), leaves a remainder of 15 years.

[70] In relation to the offences of robbery with aggravation, using the starting point of 17 years and adding two years for the personal aggravating factor results in 19 years. Deducting one year for the personal mitigating factors leaves a remainder of 18 years for each offence.

[71] He spent three years and three weeks in custody awaiting trial. The resultant sentence should be 11 years, 11 months and one week for the illegal possession of firearm offence, and for the robbery with aggravation, 14 years, 11 months and one week on each count.

Mr Harris

[72] Mr Harris was 48 years old at the time of his sentencing, and was, therefore, a mature man at the time of the commission of the offence. This is a personal aggravating factor (see paragraph 8.2 of the Sentencing Guidelines) for which one year should be added to his sentence. He had one previous conviction, which was for unlawful wounding and had been committed 15 years before. Since that conviction was so long ago it will not be considered against him for these purposes.

[73] His mitigating factors are that he was gainfully employed in that he owned and operated a taxi business. He was also said to be married with seven children, five of whom were minors and dependent on him for support. He had a good report from his community. Importantly, he admitted his involvement in these offences to the probation

aftercare officer who prepared the social enquiry report. Two years should be subtracted for his personal mitigating factors.

[74] Starting at 14 years for the firearm offence and adding one year for the personal aggravating factor, his maturity, results in a total of 15 years. A deduction of two years for the personal mitigating factors, which are that he was employed and had dependants, leaves a remainder of 13 years.

[75] In relation to the offences of robbery with aggravation, using the starting point of 17 years and adding one year for the personal aggravating factor results in 18 years. Deducting two years for the personal mitigating factors leaves a remainder of 16 years for each offence.

[76] He spent three years and four weeks in custody awaiting trial. The resultant sentence should be nine years and 11 months for the offence of illegal possession of a firearm, and, for the robbery with aggravation, 12 years and 11 months on each count.

Mr Linton

[77] Mr Linton was also a mature 46 years old at the time of sentencing. He has six previous convictions which included three for robbery with aggravation, and one conviction each for larceny from the person, possession of a prohibited article, and unlawful wounding. He was a fisherman and a vendor. He was in a common law relationship and has one child, who is dependent on him. All those factors will be considered for this exercise.

[78] In relation to the offence of illegal possession of a firearm, using the starting point of 14 years, two years should be added for Mr Linton's aggravating factors. He has multiple previous convictions, some of which are of the same nature as the present offences, although, importantly, none involved firearms. Additionally, he was a mature individual at the time of the commission of the offence. The addition of two years for the personal aggravating factors results in a sentence of 16 years. One year should

then be deducted for his mitigating factors which are that he was employed and he had a dependant. The subtraction leaves a remainder of 15 years.

[79] In relation to the offences of robbery with aggravation, using a starting point of 17 years, then adding two years for the personal aggravating factors, the result is 19 years. One year should then be deducted for the personal mitigating factors which leaves a remainder of 18 years on each count.

[80] He spent three years and three weeks in custody, for which he should be credited. The resultant sentences should therefore be 11 years, 11 months and one week for the illegal possession of firearm offence, and for the robbery with aggravation, 14 years, 11 months and one week on each count.

Issue h: the delay in hearing the appeal

[81] None of the appellants raised the issue of the delay in the hearing of their appeals, as a ground of appeal. Mrs Reid raised it during her submissions and Miss Malcolm accepted that there have been cases where this court, in cases of a long delay, and by way of constitutional relief, has reduced the sentences of appellants who have been so affected. The court will, in the circumstances, take the delay into account.

[82] Section 16(1) of the Constitution, being part of the Charter of Fundamental Rights and Freedoms ('the Charter'), stipulates a right to a fair hearing within a reasonable time, by an independent and impartial court. The authorities, such as **Taito v The Queen** [2002] UKPC 15 and **Tussan Whyne v R** [2022] JMCA Crim 42 highlight that a remedy should be given where the State must have caused an unreasonable delay. Where there is a breach of the right to a fair hearing within a reasonable time, the court may grant a reduction in sentence as one of the remedies for the breach. In **Techla Simpson v R** [2019] JMCA Crim 37, there was a delay of eight years before Mr Simpson's case came on for trial. He was granted a reduction of two years from his sentence for that breach of the constitutional right to a fair trial. It has already been established that there is no distinction between trials and appeals in the context of

assertions of such a breach (see **Carlos Hamilton and Another v The Queen** [2012] UKPC 37 at paragraph [15] and **Evon Jack v R** [2021] JMCA Crim 31 at paragraph [19]).

[83] In this case, the appeals were all filed in May 2014. The transcript of the trial was not produced until 15 June 2021. There is no part of that seven-year delay that can be attributed to any of the appellants. Similarly, the additional year since that time was due to the normal processes and schedule of this court. There has therefore been a delay of eight years for the appeal to have come on for hearing.

[84] These appellants are entitled to the benefit of similar constitutional redress for the breach. Two years' reduction in their respective sentences would also be appropriate.

Summary and conclusion

[85] The analysis of the issues raised in these appeals has shown that the conviction for larceny cannot stand and should be set aside. The convictions for the other offences should, however, not be disturbed. Although Mr Linton's convictions were tainted with unfairness, they should not be disturbed because there was no miscarriage of justice.

[86] The sentences for each of the appellants are, however, set aside because the learned trial judge failed to demonstrate that he gave the appellants full credit for the time that they spent on pre-trial remand. A reconsideration of the sentences and the application of constitutional relief for the unacceptable delay in bringing their appeals on for hearing, requires an additional reduction of their respective sentences.

[87] The orders are, therefore, as follows:

1. The applications for leave to appeal against the convictions by each of the appellants are granted, the hearing of the applications is treated as the hearing of the appeals and the appeals are allowed in part.

2. The appeals of each of the appellants against their respective convictions for the offence of larceny are allowed, the convictions for that offence are set aside and judgments and verdicts of acquittal are substituted therefor.
3. The appeals against the convictions for all the other offences for each of the appellants are dismissed, and the convictions are respectively affirmed.
4. The appeals of each of the appellants against their respective sentences are allowed, the sentences are set aside, and the following sentences are substituted, which sentences reflect credit for the time spent on pre-trial remand and relief for the breach of their respective constitutional rights to have their appeals heard within a reasonable time:

   Mr Absolam:

   Count 1. Illegal possession of a firearm – nine years, 11 months and one week.

   Count 2. Robbery with aggravation - 12 years, 11 months and one week.

   Count 3. Robbery with aggravation – 12 years, 11 months and one week.

   Mr Harris:

   Count 1. Illegal possession of a firearm – seven years and 11 months.

   Count 2. Robbery with aggravation - 10 years and 11 months.

   Count 3. Robbery with aggravation - 10 years and 11 months

   Mr Linton:

   Count 1. Illegal possession of a firearm – nine years, 11 months and one week.

   Count 2. Robbery with aggravation - 12 years, 11 months and one week.

   Count 3. Robbery with aggravation - 12 years, 11 months and one week.
5. All sentences are to run concurrently and are to be reckoned as having commenced on 9 May 2014, the date sentences were originally imposed.