JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS COA2019CR00085, 86 & 87

TARA BALL
MARVIN ALEXANDER
RICHARD SCARLETT v R

Keith Bishop and Andrew Graham instructed by Bishop & Partners for the appellant Tara Ball

Ms Karlene Afflick for the appellants Marvin Alexander and Richard Scarlett

Miss Paula Llewellyn QC and Ms Ana-Kaye Scott for the Crown

21, 22, 23, 24 February 2022 and 20 January 2023

STRAW JA

Introduction

[1] On 28 June 2019, the three appellants, Miss Tara Ball, Mr Marvin Alexander and Mr Richard Scarlett, were tried and convicted in the High Court Division of the Gun Court for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act and robbery with aggravation contrary to section 37(1)(a) of the Larceny Act. Messrs Alexander and Scarlett were sentenced to nine years and seven months' imprisonment for the offence of illegal possession of firearm and 11 years and seven months for robbery with aggravation. Miss Ball was sentenced to nine years and three months' imprisonment for illegal possession of firearm, and 11 years and three months' imprisonment for robbery with aggravation.

[2] Each appellant sought permission to appeal against their convictions and sentences. On 14 April 2021, a single judge of this court granted each leave to appeal against their convictions, noting that there were several issues that required further examination by this court. On the issue of the sentences, the single judge expressed the view that the learned trial judge had considered the relevant factors and that the sentences did not appear to be manifestly excessive. Nonetheless, the appellants, in addition to pursuing their respective appeals, also renewed their applications for leave to appeal against their sentences and were allowed to argue the appropriateness of the sentences during the course of the appeal. As such, this court will also consider whether the sentences imposed should stand.

Background

The case for the Crown

[3] The complainant, a taxi driver, and the sole witness for the Crown, testified that he was held up and robbed at gunpoint of his Toyota Corolla motor car by the three appellants and another man. His evidence was that on 3 July 2008, he was working as a taxi driver with Miracle Taxi Service. At about 2:00 pm that day, while he was in Westport, which is situated in Portmore, Saint Catherine, he received a telephone call from a female who requested a charter for 11:45 pm that night from Debbie Avenue, Edgewater in Portmore, Saint Catherine. On arrival at the location that night, he saw a female standing at the side of the road with three males. The female waved at him, and as a result, he stopped his vehicle, unlocked the doors and the female and three males entered the car. The female sat in the front passenger seat, and the three males sat at the back. The female then told him that they were going to Norbrook in Saint Andrew. They agreed on $2,000.00 for the fare, and he drove off.

[4] It took him 30 minutes to arrive in Norbrook. When they got to Norbrook Drive, on approaching a ditch in the road, he slowed down. He then felt a blow to the back of his head, on the left side. This blow caused him to swerve a little to the right, and he

was able to see a hand with a black gun right beside his face. He estimated the hand with the gun to be about 4 or 5 inches from his face.

[5] Immediately after receiving the blow, the vehicle came to a halt. This, according to the complainant, was as a result of the female passenger pulling up the hand brake. She also then proceeded to "pop down the speed sensor". One of the males then said, "hey boy, me want dah cyar yah". The three men then came out of the vehicle, and one of them pulled him out of it and put him face down on the ground. They then deliberated on what to do with him. Among the words the complainant heard the men say was, "Don't buss it Marvin". Upon hearing this, the complainant rolled over to the edge of the road and into a culvert. He then heard the doors of the car being closed and the vehicle driving off.

[6] Not long after, he exited the culvert and made his way back toward Constant Spring. He eventually went to a gas station at Constant Spring, where he was able to stop a police vehicle that was passing. He made a report to the police, and they requested the particulars and description of his vehicle, which he gave them. They then took him to the Constant Spring Police Station, where he gave a statement. Within an hour of being at the police station, he saw the police take the female and two of the males to the station. He said that upon seeing them, he pointed them out to the police officer that was taking his statement, as the persons who stole his vehicle. They were attired in the same clothing that they were wearing, whilst in the vehicle with him.

Defence

Marvin Alexander

[7] The appellant, Marvin Alexander, gave sworn evidence. He told the court that on 3 July 2008, he was at work at 26 Duke Street, Downtown Kingston, with co-appellant Richard Scarlett. On that date, he was carrying out work as a building and tiling contractor. He said he was at that location until about 11:00 pm or 12:00 am, after which he went to a 'dance' that was held at the intersection of Laws Street and Barry

Street, also in Downtown Kingston. He and Mr Scarlett attended the dance, and they left at around about 1:00 am or 2:00 am. They walked along Orange Street to Paradeand took a taxi that was destined for Portmore, Saint Catherine. However, they did not make it to Portmore, as a dispute developed between themselves and the taxi driver about the fare to be paid. As a result, according to Mr Alexander, he and Mr Scarlett were booted from the taxi after the taxi driver stopped the vehicle along Marcus Garvey Drive, close to the wharf, and accosted them with a machete.

[8] After the taxi left, they then began walking toward Portmore. Mr Alexander testified that a short while later, he heard explosions sounding like gunshots. He and Mr Scarlett started walking faster. He saw blue lights flashing in the distance ahead of him, and then a vehicle drove up to them from behind. Someone said, "none a oonu no move". He then observed that it was a police vehicle that had driven up to them. He jumped back with his hands in the air. The police ordered them to lie on the ground, which they both did. They were searched and later told to get up. Mr Alexander said that he took off his shirt and had it in his hand because there was a rubbish heap on which he had laid on the ground. They were then handcuffed and put in the back of the police vehicle. He told the court that he did not know why he was arrested.

[9] They were taken to the Constant Spring Police Station. It was about 3:13 am when they arrived at the station. They were taken to the CIB room, where there were three persons. Whilst inside the room, he was told that he was going to be charged for robbery, and the police asked him where was the gun. He said the police told him that he had robbed the man who was sitting with a female officer in a corner of the room, around a desk. He said that the CIB room was not far from the entrance door at the station.

[10] In response to the allegations by the police of robbery, he called one of his employers and asked her to call Mrs Valerie Neita Robinson, an attorney-at-law. He said that he did not know the man that they alleged he had robbed. This man was the complainant. He went on to tell the court that he did not rob anyone and he did not

have a firearm at any time. He also stated specifically, when asked by his counsel, that he did not rob anyone, nor did he have a gun on 3 July 2008.

[11] Under cross-examination, he denied all of the suggestions put to him that he had participated in the commission of the offences. He also denied seeing Miss Ball before 4 July 2008 and being in her company on the night of the incident. He said that she was taken to the CIB room after he and Mr Scarlett were already there. He denied that they were all apprehended together.

Richard Scarlett

[12] Mr Scarlett, like Mr Alexander, also gave sworn evidence. His account was similar to Mr Alexander's in that he also asserted that on 3 July 2008, he worked with Mr Alexander doing tiling work on a building at 26 Duke Street. He stated, however, that he left work at about 5:00 pm and returned to Portmore to get ready for the same 'dance' referenced by Mr Alexander. He then left Portmore at about 9:00 pm to head back to Kingston and met up with Mr Alexander at 26 Duke Street. They left out together to go to the dance at about 11:00 pm. However, Mr Scarlett could not recall the time that they left the dance to go home.

[13] Mr Scarlett also gave an account of a confrontation between himself and Mr Alexander on the one hand, and the taxi driver, with whom they endeavoured to travel back to Portmore, on the other hand. The outcome of that confrontation was that they were left stranded along Marcus Garvey Drive and proceeded toward Portmore on foot. They were then apprehended by the police whilst walking along Marcus Garvey Drive and taken to the Constant Spring Police Station.

[14] Mr Scarlett stated further that whilst he and Mr Alexander were at the police station, in what he believed to be the CIB room, the police pointed at them and said in the presence of the complainant, "a dem that, a dem that". He said that his hands were swabbed, and the police accused him of stealing a car.

[15] In relation to Miss Ball, he stated that she came into the CIB room about 20 minutes after he and Mr Alexander and that this was the first time he saw her. He testified categorically that he did not know Miss Ball before that night and denied that she was one of his associates. He also stated that she was pregnant at that time. He denied being involved in any robbery and denied having a firearm.

Tara Ball

[16] Miss Ball gave sworn evidence. She told the court that in 2008, she lived in Bridgeport, Saint Catherine, and at that time, she was 17 years old and living with her mother. She said that on 3 July 2008, she was preparing to go to evening classes and the doctor. She intended specifically to see a gynaecologist because she was pregnant at the time. She went to the doctor by way of a chartered taxi, but she did not see the doctor. She gave two reasons for not having been able to see the doctor. First, she said that she was underage and her sister did not arrive on time. She also said that after her sister came, she was unable to see the doctor because she could not find her medical card. After returning home from the doctor, she went to school.

[17] She returned home from evening classes at about 8:00 pm and did not leave her home for the rest of the night. She left her home the following day at around 4:00 am when the police arrived and took her to the Constant Spring Police Station. She was wearing a "maternal blouse, blue capri shorts, and a white tie head". She said that when she went to the police station, she was taken to a room where she saw about six persons, including the complainant, who, she learnt, was the taxi driver she had travelled with earlier in the day. She also saw the other two appellants, whom she referred to as "Marvin and Akeem". She was questioned by the police and then charged and taken to the Duhaney Park Police Station, where she remained for almost three months.

[18] She testified further that she gave birth to a child in January 2009 and that her child passed away in February 2009. Interestingly, belatedly in her examination-in-chief,

she testified that in July 2008, she also lived with her father in Westport, Saint Catherine, as her parents were going through a divorce.

[19] Under cross-examination, she denied telling the police on 4 July 2008 that Messrs Alexander and Scarlett were her associates. It was her evidence that she did not know them before seeing them at the Constant Spring Police Station. However, this evidence was undermined by the documentary evidence, namely, the CR4 Form (exhibit one), which recorded her personal information. She admitted to her signature being on the document, and the document recorded, among other things, that one "Richard Scarlett" and an "Alexander" were her associates.

[20] Miss Ball ultimately denied all suggestions of being involved in the robbery and denied making arrangements for the complainant to pick her up at Debbie Avenue in Edgewater.

Grounds of appeal

<u>On behalf of Messrs Alexander and Scarlett</u>

[21] Seven original grounds of appeal were filed on behalf of Messrs Alexander and Scarlett. Counsel, Ms Afflick, on their behalf, requested and was granted permission to abandon grounds four and five. The following are the grounds of appeal for consideration by this court:

> "1. The learned trial judge erred in relying on the inadequate identification evidence led by the prosecution.
>
> 2. The learned trial judge erred in convicting the [appellant] on the poor quality of the complainant's uncorroborated evidence as to identification.
>
> 3. The learned trial judge erred in law for the conviction of the [Appellants] for the offences of illegal possession of firearm and illegal possession of ammunition [sic] having regard to the following:
>
> > a) no firearm or object/instrument appearing to be a firearm was recovered or produced in court;

b) no evidence being adduced of any ballistics or swabbing of the hands of the [appellant];

c) on the description of what appeared to be a firearm by the complainant who could not say for sure what kind of firearm in the circumstances [sic].

4. …

5. …

6. The offence of robbery with aggravation was not made out beyond a reasonable doubt.

Sentence

i) The sentence was manifestly excessive in the circumstances."

It should be noted that although ground three speaks of illegal possession of ammunition, no such charge was laid against the appellants.

[22] Grounds one, two, three and six were ultimately subsumed by Ms Afflick into two questions:

1) Whether a charge of robbery with aggravation was warranted?

2) Whether there was an issue of identification?

On behalf of Miss Ball

[23] On behalf of Miss Ball, there was a reformulation of the original grounds of appeal that were filed, as well as the addition of a supplemental ground, with the result that the following grounds of appeal were argued:

"**(1) No case submission**

a. The learned Judge erred in law by failing to accede to the submission of no case on behalf of the appellant, Tara Ball, especially in light of the six admitted weaknesses by the prosecution on the prosecution's case along with lack of proper identification, insufficient primary evidence to ground joint

enterprise and the obvious danger of proceeding with a case that taken at its highest ought not to have resulted in a conviction;

(2) Excessive interference

b. The learned trial Judge erred in law and in so doing denied the appellant a fair trial when the said trial judge excessively interfered in the trial process at times when it was not necessary to clear up issues, better understand the evidence or bring to the fore points that have been [sic] overlooked;

(3) Lack of evidence to ground joint enterprise

c. The learned trial Judge erred in law in holding that the appellant, Tara Ball, was present on the scene of the crime and was properly identified by way of confrontation and that her presence at all material time [sic] was to assist the other offenders in the commission of the crime;

Sentencing

(4) Treatment of the Aggravating factors

d. The learned sentencing Judge erred in law when the said Judge wrongly concluded that the aggravating factors were premeditated [sic], the prevalence of gun crimes, involvement in a gang, impact on complainant [sic], and use of violence although the said Judge had absolutely no evidence of the appellant, Tara Ball's, involvement or connection to a gang and the prevalence of gun [sic] in the Portmore area of St. Catherine where the complainant operated his taxi or the Norbrook area of St. Andrew where the complainant was relieved of his motor vehicle;

(5) Treatment of the Mitigating factors and effect of delay

e. The learned sentencing Judge erred in law in almost totally ignoring the appellant's [Tara Ball's] submissions on mitigating factors such as the fact the [sic] appellant was deprived of a fair trial within a reasonable time, the case has lingered in the justice system for 11 years before trial and for 11 years the appellant had to report to the police three times per week; the fact that the appellant spent about six months in custody and lost a child as a result and subsequently went into depression; the fact that the appellant is now [time of sentence] the mother of two girls, ages 2 and 7;

f. The learned sentencing Judge erred in law when the said Judge concluded and commented in open court that, the fact that, the appellant did not admit guilt she should be penalized for not showing remorse; and

g. The learned sentencing Judge erred in law in the assessment of the aggravating and mitigating factors thus resulting in the appellant serving a sentence well in excess of the correct number of years."

Submissions

On behalf of Messrs Alexander and Scarlett

[24] As previously indicated, on behalf of Messrs Alexander and Scarlett, two issues were argued as follows:

1. Whether a charge of robbery with aggravation was warranted?

2. Whether there was an issue of identification?

[25] In relation to the first issue, Ms Afflick argued that the prosecution failed to prove beyond a reasonable doubt that a firearm was involved. This was so, as the evidence to support the use of a firearm was solely that of the complainant, who, according to counsel, "was evidently in a state of panic", thereby making his assertion that there was a firearm, inaccurate. According to counsel, the complainant's evidence gave "a clear indication that the presumed threat may have been a result of his state of mind". Counsel cited the case of **Dudley Willie v R** [2019] JMCA Crim 39.

[26] In her oral submissions, Ms Afflick expressed the view that based on the complainant's evidence that he was hit in the head from the left side, he would not have been able to see the weapon. She pointed to the other instances that may have presented an opportunity for the sight of a firearm and noted that he admitted to not having seen a gun on any other occasion during the incident. With respect to the words which he said were used after he was placed on the ground, "Don't buss it Marvin", Ms Afflick was astute to point out that the complainant did not know who used those

words, as he was lying face down. She agreed, however, that inferences could be drawn from the words used.

[27] Based on these submissions, Miss Afflick posited that the offence of illegal possession of a firearm was not made out and, therefore, the offence of robbery with aggravation should fall away, as no jurisdiction would have been established for the trial to take place.

[28] In relation to the second issue, Ms Afflick focused on the absence of any identification parade and the issue of identification by way of confrontation. Learned counsel contended that the appellants' case could have been prejudiced due to these undesirable circumstances.

[29] In oral submissions, counsel highlighted the circumstances under which the identification of both men was made, particularly the fact that it was night and the vehicle in which they travelled was dark. She pointed to the fact that the complainant mostly gave a description of the clothing worn by the men and could not give much other description, for example relating to features, such as complexion or hairstyle, except to say that one had "bulby" eyes. The next point at which the complainant made an identification was at the police station. Ms Afflick pointed to the contradiction between the evidence of the appellants and that of the complainant, who said he identified the appellants as they walked by along the corridor, whereas the appellants assert that they were taken into a room with the complainant. According to Ms Afflick, the appellants' evidence corroborates each other in this regard and points to confrontation. It was also Mr Scarlett's evidence that the police pointed at them.

<u>On behalf of Miss Ball</u>

No case submission

[30] In reliance on the seminal case of **R v Galbraith** [1981] 1 WLR 1039, counsel, Mr Bishop, submitted that the learned trial judge erred in not upholding the submission of no case to answer with respect to Miss Ball, in circumstances where the evidence

against her was of a tenuous character, arising from inherent weaknesses, vagueness and inconsistencies in the prosecution's case. Mr Bishop pointed to the submissions made in the court below that the complainant was unable to give a physical description of Miss Ball and further that the evidence demonstrated that the complainant could not have seen what he described as a firearm. Consequently, the evidence of a firearm was unreliable. As such, the learned trial judge should have acceded to the submission of no case to answer.

Excessive Interference

[31] On the issue of excessive interference, counsel contended that there were in excess of 500 interferences by the learned trial judge, during both the trial and the sentencing process. These interferences and comments amounted to an unusual departure from the requirement of promoting orderly elicitation of evidence. These interferences were tantamount to the learned trial judge descending into the arena. Reliance was placed on the cases of **Lamont Ricketts v R** [2021] JMCA Crim 7 and **Lamoye Paul v R** [2017] JMCA Crim 41.

Joint enterprise

[32] In contending that the learned trial judge applied the wrong principles of law when she found that Miss Ball was part of a joint enterprise, counsel submitted that the real question that should have been answered was whether or not Miss Ball assisted or encouraged the commission of a crime; or whether the evidence showed an intention to do so. Mr Bishop said that there was no such evidence. Counsel stated that there was little evidence of an agreed common purpose and still further little evidence that one of the appellants had a gun and intended to use it to commit a crime. Mr Bishop alluded to the fact that, for basically the entirety of the journey, there was no talking among the passengers in the vehicle, and furthermore, there was no evidence of where the three men were before they came into the complainant's vehicle. In relying on the case of **R v Jogee; R v Ruddock** [2016] UKPC 7 ('**R v Jogee**'), Mr Bishop asserted that the

learned trial judge was only concerned with the conduct of the parties but was concerned very little with the mental element.

On behalf of the Crown

[33] In opposing these appeals, the Crown made submissions in keeping with the broad issues raised in relation to the various grounds.

[34] With respect to visual identification, Ms Llewellyn QC, the learned Director of Public Prosecutions ('DPP') examined the evidence of the complainant relative to his opportunity to observe each appellant, together with the circumstances surrounding these observations. It was noted that the complainant was able to observe each appellant for at least 10 seconds, that nothing was obstructing the view of their faces, and that there was adequate lighting to facilitate these observations. The learned DPP also pointed to the distinctive features identified by the complainant in relation to the male appellants, namely the white shirt worn by Mr Alexander and Mr Scarlett's "bulby" eyes. This evidence, according to the learned DPP, constituted ample evidence in support of visual identification such that the learned trial judge was correct not to uphold the no-case submissions.

[35] It was submitted further that the learned trial judge adhered to the guidance provided in the well-known case of **R v Turnbull** [1977] QB 224 ('**Turnbull**') and took special caution in examining the evidence of the complainant and in assessing his credibility.

[36] On the issue of the confrontation identification, while acknowledging that the courts have condemned the practice of the police causing an accused to be identified in a confrontational manner, it was contended that such was not the case in the instant matter. Rather, the identification occurred spontaneously, through no engineering on the part of the police. Therefore, although the identification was not ideal, the fairness and honesty of the confrontation identification were never compromised.

[37] The learned DPP contended that there was sufficient evidence to support the charges of illegal possession of a firearm, robbery with aggravation, and the fact of a joint enterprise. She submitted that the learned trial judge properly directed herself as to the burden and standard of proof that was required and further considered the evidence in respect of each appellant. It was also submitted that, on the evidence led by the prosecution, the elements of the offences were satisfied. Therefore, it could not be said that the learned trial judge erred in finding that there was a joint enterprise. Miss Ball's and Mr Scarlett's presence was not accidental, and they were voluntarily and purposefully present at the scene. Miss Ball, in particular, lured the complainant to the pick-up location.

[38] On the point of whether the learned trial judge interfered excessively during the course of the trial, the Crown relied on the guidance of Lord Parker CJ in the case of **R v Hulusi** [1973] 58 Cr App Rep 378 and stated that although the interruptions by the learned trial judge may be viewed as excessive, they were not an unfair obstacle to the presentation of the cases on behalf of the defence. According to the learned DPP, the interruptions of the learned trial judge were mainly, "to get an accurate note, ensuring that the rules of evidence were observed and to clear up ambiguous points …". In the round, the conduct of the learned trial judge did not render the appellants' trial unfair.

[39] With regard to whether there was a breach of the appellants' constitutional rights arising from the delay of 11 years in the conclusion of the trial, it was submitted that the learned trial judge adequately addressed this issue; and concluded that the delay did not put the appellants to any disadvantage, in the trial of their case. As a result, the appellants did not receive an unfair trial.

Discussion and analysis

Identification (Messrs Alexander and Scarlett's ground 2; Miss Ball's ground 1)

[40] The complainant made plain that he did not know the appellants at any point prior to the incident. Therefore, this was not a case of recognition and this fact was

fully appreciated by the learned trial judge. The first opportunity that the complainant had, on his evidence, to observe the appellants, was at the point of picking them up at Debbie Avenue. He testified that there were streetlights on the road (page 12 of the transcript), which aided him to see the appellants and that the appellants were standing approximately 2 to 3 feet away from the nearest streetlight. Having been waved down by the female, the complainant stopped his vehicle at their feet (pages 31 and 32 of the transcript). He stated further that he looked at the male appellants' faces as they entered the vehicle, and he was assisted by the street light and the roof light of his car to see their faces. He stated that their faces were not covered and that as they entered the vehicle he was able to see their faces, their clothes and all of their bodies (page 35 of the transcript). One was tall, had on a white top, another was tall, wearing a dark shirt and had "bulby eyes". The third man also had on a dark shirt.

[41] In relation to Miss Ball, the complainant testified that he saw her face for about ten seconds when they were at Debbie Avenue and that for the duration of the 30-minute journey to Norbrook, he would have seen her face for a total period of 10 minutes (page 36 of transcript). Likewise, in relation to the male appellants, he testified to seeing their faces for about 10 seconds whilst picking them up at Debbie Avenue (pages 37 and 43 of the transcript).

[42] In relation to the male sitting in the back of the vehicle to the left-hand side and who was identified as Mr Alexander, he could also see his whole body whilst they were stopped along Norbrook Drive. He was aided in so doing by the headlights on his vehicle (page 38 of the transcript). Mr Alexander was the man who exited the vehicle from the rear left side, walked around the front of the vehicle, then came to the driver's door and pulled him out of the vehicle. At that time, Mr Alexander would have been facing him. He identified Mr Alexander as the male wearing the white T-shirt (page 41 of the transcript).

[43] As it related to Mr Scarlett, the complainant identified him as having "bulby eyes" and being dressed in dark-coloured clothing (page 43 of the transcript). Further, he was

seated in the middle of the back seat (page 43 of the transcript). On the other hand, in relation to the occurrences along Norbrook Drive, the complainant was frank in admitting that he was unable to properly observe Mr Scarlett and the third male (who is unknown), as everything happened very quickly and as soon as he was drawn from the vehicle, he was put on the ground face down.

[44] The learned trial judge, in her summation (pages 350 – 359 of the transcript), warned herself against the dangers of convicting on evidence of visual identification, in keeping with the guidance adumbrated in **R v Turnbull**. She then went on to assess the evidence in this case in light of the **Turnbull** guidelines. She noted that the identifications were made in close proximity, having been made within a motor vehicle, particularly a Toyota Corolla motor car. She noted the complainant's evidence that he was aided in observing the appellants by the streetlights that were some 2 feet away from where they stood, as well as the roof light of the car and that there was nothing obstructing his view of their faces.

[45] Particularly in relation to Miss Ball, the learned trial judge observed that the head tie that was being worn would have allowed the complainant to get an even better view of her facial features, as her hair would have been lifted from her face. The learned trial judge also noted the evidence of the complainant that he looked at Miss Ball the most, as she was in the front passenger seat, and he looked at her intermittently when he stopped at stoplights and stop signs. Under cross-examination by counsel for Miss Ball, and in refuting the suggestion that he did not look at Miss Ball for a period of 10 minutes during the journey, the complainant said expressly, "Mi stop at stoplight and stop sign and as part of the work, the taxi work, you look round on the passengers" (page 74 of the transcript). The learned trial judge noted and accepted this evidence.

[46] The learned trial judge also noted that Miss Ball spoke with the complainant, and they negotiated the fare. She then stated that the complainant would have been looking in Miss Ball's face as they made those arrangements. However, our review of the transcript does not reveal evidence from the complainant stating that he was

looking at Miss Ball's face at that time, although that may have been a reasonable inference. This inference, in our view, whether made correctly or incorrectly, would not have affected the learned trial judge's overall assessment of the identification evidence in relation to Miss Ball, as the opportunity for viewing could not be deemed to be insufficient.

[47] The learned trial judge stated that the complainant testified to having a view of the persons in the left rear and middle seats of the vehicle, that is, Messrs Alexander and Scarlett. Based on our review of the transcript, it is not clear whether the complainant would have been able to view Messrs Alexander and Scarlett during the journey to Norbrook Drive, as he was able to view Miss Ball. When asked by counsel for Messrs Alexander and Scarlett, "You could not see properly the faces of the males that were seated at the back of the car?" He responded, "No, sir" (page 67 of the transcript). What was clear, however, was the complainant's evidence that he looked at Mr Alexander for 10 seconds and at Mr Scarlett for 10 to 15 seconds, when they first entered the vehicle at Debbie Avenue.

[48] The learned trial judge also addressed the concern raised by counsel for Messrs Alexander and Scarlett that the tint on the motor vehicle may have affected the complainant's view of the appellants. She addressed this concern by noting that a tint usually prevents persons on the outside from looking into a vehicle, but it does not necessarily prevent persons inside a vehicle from seeing on the outside.

[49] The learned trial judge considered the identification evidence in relation to the occurrences along Norbrook Drive. It was noted that there were no streetlights, and the area was dark. However, when the car doors were opened, the roof light would have come on, and the complainant testified that he looked at Miss Ball to see her reaction in the circumstances, after he was hit with the gun.

[50] In relation to Mr Alexander, the learned trial judge noted the evidence from the complainant that he observed him with the aid of the headlights from the motor vehicle

as Mr Alexander walked from the left side to the front and then to the right side of the vehicle. Further, when he was dragged from the vehicle, he and Mr Alexander were face to face. After being put to lie face down, the complainant had no further opportunities to observe any of his assailants.

[51] The learned trial judge also considered the weaknesses of the identification evidence. She identified as a weakness the fact that a robbery at gunpoint would have been a traumatic experience. However, she noted that although the complainant admitted being fearful, he was nonetheless alert enough to take steps to preserve his life. Fear, therefore, did not lessen his ability to "see and properly identify his assailants" (page 357 of the transcript).

[52] Another weakness noted by the learned trial judge in respect of the identification evidence was the fact that the complainant had to focus on the road in order to maintain safety whilst driving. He would, therefore, not have been in a position to observe his passengers for the entire duration of the journey. Consequently, his attention was divided.

[53] In assessing the overall circumstances of the identification, the learned trial judge had this to say at pages 358 to 359 of the transcript:

> "Now, most importantly the complainant indicated that he did not know any of these persons prior to the 3rd of July. So this is not a recognition case. It is straight forward visual identification of strangers. So that, of course, is significant in terms of the assessment of the reliability of the witness' purported identification of these defendants because he said he did not know them before, so he would have had a very short opportunity to view them and accurately record their images and to be able to point them out. So, the sighting reportedly made by the complainant whilst assessing, they are not merely fleeting glances. [sic] There are certain weaknesses that I have to seriously contemplate to say whether or not the sightings would have been satisfactory. Certainly they were not ideal but to say whether or not they were satisfactory under the circumstances."

Ultimately, she concluded that the identification by the complainant was accurate and satisfactory, having regard to the lighting conditions and the length of time of the sightings, which she considered to be adequate, although not long (pages 367-368 of the transcript).

[54] Based on the evidence adduced, we are not of the view that the learned trial judge erred in her analysis of the identification evidence when she concluded that it was reliable, accurate and sufficient. The complainant's observation of his passengers was not a fleeting glance, albeit made at night. Of the three appellants, it was Mr Scarlett that the complainant would have had the least opportunity to view, but the initial observation of 10 to 15 seconds was made when he picked him up, along with the other appellants, at Debbie Avenue. We agree with the learned trial judge that the length of time for these sightings and the lighting conditions were adequate to enable the complainant to make proper identifications. Accordingly, we find these grounds of appeal to be unmeritorious.

"Confrontation identification" (Messrs Alexander and Scarlett's ground 1; Miss Ball's ground 3)

[55] As indicated earlier in this judgment, the complainant pointed out the appellants after they were taken to the police station. He testified specifically (pages 27 – 31 of the transcript) that whilst he was at the police station, he saw the police carry the female and two of the males. The identification at the police station took place within an hour of the complainant being at the police station. All three appellants were being escorted together into the compound of the Constant Spring Police Station.

[56] He was able to identify them as they were attired in the same clothing they were wearing whilst they were passengers in his vehicle, and he had looked at their faces. The female was wearing a pink blouse, blue shorts, and a head tie. One of the males wore a white T-shirt. He saw his face, and it was the same face and the same white shirt. He said this was the man who was sitting on the left side of the car. He identified this man to be Mr Alexander. The other male was the one with the "bulby eyes" who

was dressed in dark-coloured clothing. He indicated he was "looking straight through on the corridor there seeing his exact face, bulby eyes and dark-colour clothing". He identified this man as Mr Scarlett (page 43 of the transcript).

[57] Upon seeing the female, he pointed her out to the police. At that time, she was on the outside walking down "the aisle", and she did not come into the same room that he was in. He also pointed out the males. They were also walking along the walkway. He pointed them out to the police officer that was taking his statement as the persons who stole his vehicle.

[58] Notably, the complainant's evidence of the manner in which he pointed out the appellants, was not challenged under cross-examination. It was never suggested to the complainant that he pointed out the appellants after they were brought into the same room where he had been giving his statement and/or after they were brought to his attention by the police. It was only while giving evidence that the appellants put themselves in the same room with the complainant upon being brought to the police station. Also, based on their evidence, Miss Ball would have entered that room later than Messrs Alexander and Scarlett. One would have expected that if the complainant's evidence in this regard was being disputed, all these circumstances would have been plainly put to him under cross-examination. The learned trial judge noted this in assessing the credibility of the appellants.

[59] The learned trial judge also found that the time frame between the incident and the identification at the police station was of short duration. The time frame would add credence to the evidence of the complainant as to his presence at the station for the legitimate purpose of giving his statement. Based on the evidence before her, the learned trial judge cannot be faulted in her finding that the complainant's evidence of the circumstances under which he identified the appellants was credible and unchallenged.

[60] Unfortunately, there was no evidence forthcoming from any police officer in relation to the circumstances under which the appellants were apprehended and taken to the station. However, once the complainant's evidence was accepted by the learned trial judge, there was credible evidence that there had been no deliberate attempt at a confrontation by the police officers. Identification by confrontation is undesirable, but the authorities on the point are clear as to when such identification is to be rejected. In **R v Errol Haughton and Henry Ricketts** (1982) 19 JLR 116, this court examined this issue in its review of several cases, including **R v Gilbert** (1964) 7 WIR 53, **R v Hassock** (1977) 15 JLR 135 and **R v Trevor Dennis** (1970) 12 JLR 249 and, at page 121 stated the law as follows:

> "…. Where a criminal case rests on the visual identification of an accused by witnesses, their evidence should be viewed with caution and this is especially so, where there is no evidence of prior knowledge of the accused before the incident. Where an identification parade is held as is the case where there is no prior knowledge of the accused, the conduct of the police should be scrutinized to ensure that the witness has independently identified the accused on the parade. Where no identification parade is held because in the circumstances that came about, none was possible, again the evidence should be viewed with caution to ensure that the confrontation is not a deliberate attempt by the police to facilitate easy identification by a witness. It will always be a question of fact for the jury or the judge where he sits alone to consider carefully all the circumstances of identification to see that there was no unfairness and that the identification was obtained without prompting. In a word, the identification must be independent."

[61] This court also revisited this issue in the more recent cases of **Tesha Miller v R** [2013] JMCA Crim 34 as well as **Michael Burnett v R** [2017] JMCA Crim 11 ('**Burnett**'). In **Burnett**, at para. [27] McDonald-Bishop JA again distilled the principles relevant to a consideration of confrontation identification. It is pellucid that the assessment of each case depends on the factual circumstances that existed at the time of the confrontation identification.

[62] From a perusal of the summation, the learned trial judge considered all the circumstances and concluded that the identification of the appellants was spontaneous and independent (pages 363 to 366 of the transcript). She was entitled, therefore, to rely on it as providing proper identification of the appellants. Therefore, we see no merit in these grounds of appeal.

Whether there was adequate evidence to support the use of a firearm, and the offence of robbery with aggravation (Messrs Alexander and Scarlett's grounds 3 and 6; Miss Ball's ground 1) and Joint Enterprise (Miss Ball's ground 3)

[63] We see no merit in the submissions of counsel for the appellants on these issues. The complainant described the object that he saw as a black gun. He said he saw the point and the handle and indicated how he was able to see it. An inference could also be drawn, as admitted by counsel, Ms Afflick, from the words used by one of the assailants after the complainant had been put to lie on the ground. The words being, "Don't buss it Marvin", which, within the Jamaican vernacular, can be taken to mean "don't fire the gun" or "don't shoot him". The complainant, in giving evidence, stated that he took those words to mean "that Marvin have a gun" (page 47 of the transcript). There was sufficient description of the object for the learned trial judge to conclude, as she did, that, at the least, an imitation firearm was used at the time the robbery was being effected. She concluded that Mr Alexander was in possession of a firearm or imitation firearm and that this firearm was used to rob the complainant of his motor vehicle. This would have been sufficient to ground her jurisdiction. Some seminal cases on the sufficiency of the description of a firearm include **R v Jarrett, R v James, R v Whylie** (1975) 14 JLR 35 and **R v Christopher Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 169/1987, judgment delivered 21 March 1988.

[64] Further, there can be no dispute that the learned trial judge correctly determined that the offence of robbery with aggravation was made out. Section 37(1)(a) of the Larceny Act, under which the appellants were charged, provides that:

> "Every person who-
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> (b) …
>
> shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding twenty-one years."

The evidence against the appellants and accepted by the learned trial judge would have satisfied both the elements of, "being armed with any offensive weapon" and "being together with one other person or more".

[65] The learned trial judge concluded that Ms Ball and Mr Scarlett would have been deemed to be in possession of the firearm by virtue of section 20(5)(a) of the Firearms Act, which provides:

> "(5) In any prosecution for an offence under this section-
>
> > (a) any person who is in the company of someone who uses or attempts to use a firearm to commit-
> >
> > > (i) any felony; or
> > >
> > > (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,
>
> shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm;"

[66] There was sufficient evidence before the learned trial judge to make these findings. Despite these findings, Miss Ball has contended that the learned trial judge also erred in concluding that there was evidence of joint enterprise so as to find her liable. This will now be considered.

[67] We have determined that there was sufficient evidence placing all three appellants on the scene when the complainant was robbed of his motor vehicle. There was also compelling evidence that all three were in a common design or part of the joint enterprise to commit the offences. The learned trial judge considered that the pick-up was done by a chartered arrangement and that the four persons were picked up standing together (pages 319 to 320 of the transcript). The complainant's car was waved down by Miss Ball. It had no PPV plates to indicate it was available for taxi services. All four persons approached the car together and boarded together, and after the ordeal, all four drove away in the motor car. The learned trial judge extrapolated from the evidence the role played by each appellant. At pages 320 to 321, she considered, specifically, the role played by Miss Ball: the pulling up of the handbrake and her action in pulling down the speed sensor. The learned trial judge also noted the complainant's evidence that throughout the occurrences at Norbrook Drive, Miss Ball did not protest or in any way separate herself from the actions of the men.

[68] The learned trial judge considered all of the above evidence when determining whether Miss Ball could be said to be part of a common criminal enterprise or common design. She concluded that Miss Ball's presence in the car was not separate and accidental, but rather, "deliberate, purposeful and she was a part of the group". The learned trial judge drew the inference that all the appellants, "were known to each other and were acting together. Their presence in the car was not accidental or co-incidental". It was this conclusion that brought Miss Ball and Mr Scarlett within the ambit of section 20(5)(a) of the Firearms Act. In relation to this section, once the prosecution has established certain preconditions, the evidential burden shifts to the appellants to provide a reasonable explanation for their presence on the scene. The learned trial judge determined that the appellants had failed to discharge this evidential burden. Particularly, as they denied being present in the vehicle at all and relied on the defence of alibi.

[69] The learned trial judge's assessment of this aspect of the evidence and the law was thorough. We agree with her conclusion and find that Mr Bishop's reliance on **R v Jogee** is misdirected. The issue of the mental element of each appellant, in particular, would have been established on the findings made by the learned trial judge. It would have been inferred from their individual conduct during the incident. Further, the appellants, including Miss Ball, did not put themselves on the scene while disclaiming the criminal conduct or evincing an intention not to participate in the offences committed (see **Troy Barrett v R** [2022] JMCA Crim 24 paras. [77] to [82]).

[70] These grounds of appeal have no merit.

No case submission (Miss Ball's ground 1)

[71] This needs no deliberation based on our determination of the previous grounds. It is clear that the learned trial judge was correct in her ruling that a *prima facie* case had been made out against all the appellants.

[72] This ground of appeal therefore fails.

Excessive Interference (Miss Ball's ground 2)

[73] Although counsel, Mr Bishop, in his written submissions, referred to 500 interferences by the learned trial judge, these were not set out for any assessment by this court, except an aspect of the transcript at pages 223 to 224, where Mr Scarlett had indicated that he played football in Westport. The learned trial judge intervened in the cross-examination to ask him about the exact location.

[74] We also examined further portions of the transcript, as highlighted by the prosecution. These were on pages 16, 17, 20, 21, 23, 28, 29, 30 to 32, 34 to 38, 45, 50, 52 and 53. Having examined these portions, we would agree that these interruptions were essentially for clarification of the witnesses' evidence, clearing up ambiguous points and also ensuring that the witnesses could be heard. However, at page 28, the learned trial judge's intervention could be considered as assisting the

prosecution in eliciting evidence. While the complainant gave evidence during his examination-in-chief, he indicated that he had given a description of the clothes that the assailants were wearing to the police. The learned trial judge then intervened and asked if he remembered what the clothes were.

[75] Other portions of the transcript considered were on pages 170, 177 and 301. On page 170, the learned trial judge asked Mr Alexander what time he would leave the work site in the mornings when he functioned as a watchman. On page 177, she merely reiterated answers given by the said appellant. On page 301, she questioned Miss Ball about the school she attended, the years of her attendance, and her date of birth.

[76] In the round, these interruptions were innocuous. In **R v Hulusi**, Lord Parker CJ observed at page 382 that interventions to clear up ambiguities and to ensure that the judge is making an accurate note are perfectly justified. However, he also stated that it is wrong for a judge to descend into the arena and to give the impression of acting as an advocate. Further, he described the type of interventions that give rise to the quashing of a conviction. These were threefold:

> "… those [interventions] which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury . . . The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[77] In **Carlton Baddal v R** [2011] JMCA Crim 6 at paras. [17] and [18], this court assessed the interventions of the trial judge as largely unnecessary but concluded that there had been no unfairness to the appellant. The opportunity was also taken to remind trial judges that it was not part of their duty to lead evidence; that when interventions are overdone and are seen to have an impact on the conduct of the trial, this court would have no alternative but to quash the convictions.

[78] In **Peter Michel v The Queen** [2010] 1 WLR 879, the Privy Council found that there was excessive interference by the Commissioner. The Board determined that the questions were damaging to the defence case and were questions that prosecuting counsel could never have asked. The appeal against conviction was allowed, and the case was remitted to the Court of Appeal of Jersey to determine whether a retrial should be ordered.

[79] In **Lamont Ricketts v R**, F Williams JA, at paras. [21] to [23] considered the authorities in relation to this issue, including **Peter Michel v The Queen**, as follows:

> "[21] Also, in the case of **Peter Michel v The Queen** … Lord Brown, delivering the advice of the Board, gave the following guidance at paragraph 34:
>
> > '34. ….Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.'
>
> [22] Important as well is the case of **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005. In that case Panton JA (as he then was), writing on behalf of the court, made the following observations at paragraph 10 of the judgment:
>
> > 'It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute

> throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena.'.
>
> [23] **Christopher Belnavis v R** was also cited and discussed in the case of **Navado Shand v R**, in which this court (per P Williams JA (Ag), as she then was), observed, in allowing an appeal on grounds which included allegations of excessive and unfair interventions by a trial judge, as follows at paragraph [50]:
>
> '…when the final issue related to the learned trial judge's appreciation of the defence is considered, the line of questioning the learned trial judge embarked on, may well have contributed to the appellant being denied a fair trial.'"

Subsequently, at para. [30] of **Lamont Ricketts v R**, F Williams JA set out guidance in the way of the main points gleaned from the authorities. He stated:

> "The main points gleaned from the authorities relating to interventions might be summarized as follows: (i) trial judges should, as much as possible, limit their questioning to what is necessary to clear up issues, better understand evidence and bring to the fore points overlooked or not sufficiently addressed; (ii) their questioning should not be of such a nature or go to such an extent as to give the impression that they have taken sides or have descended into the arena and lost their impartiality; (iii) they should try not to interrupt the flow of evidence and, as much as possible, should not take over the elicitation of evidence from counsel (though the temptation is likely to arise when the evidence is being led less than competently); (iv) they should not cross-examine witnesses; (v) they should not display any hostility or adverse attitude or convey any negative view of a particular case or witness whilst hearing arguments and evidence, although they are, of course, entitled to test the soundness of arguments and submissions; and (vi) they are required at all times and so far as is humanly possible to maintain a balanced and umpire-like approach to the task of adjudication."

[80] The learned DPP has conceded that the interventions by the learned trial judge in the instant case might be viewed as excessive, but asserted that they did not fall into the category described in **R v Hulusi** and **Peter Michel v The Queen**. She submitted that when the referenced pages of the transcript are examined, it is seen that the

appellants' trial was not unfair. She also contended that the appellants have not pointed to any specific part of the record to ground an argument that the interferences by the learned trial judge have led to unfairness.

[81] In the round, having conducted the above assessment, we find that the submissions of the Crown are meritorious. We do not accept that the conduct of the learned trial judge in the instant case rendered the appellants' trial unfair, and as Mr Bishop has conceded, this was not his strongest ground. However, we would take this opportunity to remind trial judges of the guidance from the above cases and the need to be cautious before descending unnecessarily into the arena.

[82] This ground of appeal therefore fails.

[83] There was, among the original grounds of appeal of Ms Ball, one challenging the propriety of the Crown putting certain suggestions to Miss Ball, for which no evidence had been called in support. This issue was not raised by counsel on the reformulated grounds and neither was it addressed or argued during oral submissions. We would therefore treat it as abandoned. In any event, we note that the learned trial judge indicated that she appreciated that it is the answer that a witness gives that is the evidence in a case and not the suggestion that is put by counsel (page 340 of the transcript).

Sentencing (Messrs Alexander and Scarlett's ground 7; Miss Ball's grounds 4 and 5)

[84] Messrs Alexander and Scarlett were sentenced to nine years and seven months' imprisonment for the offence of illegal possession of firearm and eleven years and seven months for robbery with aggravation. Miss Ball, on the other hand, was sentenced to nine years and three months' imprisonment for illegal possession of firearm, and 11 years and three months' imprisonment for robbery with aggravation.

Submissions on sentencing

[85] Ms Afflick asked this court to reduce the sentences of Messrs Alexander and Scarlett on the basis that the learned trial judge ought to have given more consideration to mitigating factors than to aggravating factors.

[86] Mr Bishop highlighted that Ms Ball has a right to a fair trial within a reasonable time, in keeping with the Charter of Fundamental Rights and Freedoms ('the Charter'), as contained in the Constitution of Jamaica. The trial took place 11 years after the appellants were charged, and there is no indication that this delay was as a result of any action on the part of Miss Ball. This amounted to a breach of Miss Ball's rights. Mr Bishop stated that whilst awaiting trial, Miss Ball had to report to the police three times for the week, lost a child whilst in custody and had to carry the weight of a pending trial for 11 years. Although these things were pointed out to the learned trial judge, they were not addressed by her in passing sentence. Reliance was placed on the cases of **Melanie Tapper v DPP** [2012] UKPC 26, **Ann-Marie Williams v R** [2020] JMCA Crim 40 and **Julian Brown v R** [2020] JMCA Crim 42. This court has been asked to reduce Miss Ball's sentence by two years on account of this delay.

[87] Mr Bishop also took issue with the comments of the learned trial judge, suggesting that Miss Ball should have pleaded guilty and should be penalized for not showing remorse. Those statements, according to Mr Bishop, warrant strong condemnation from this court.

[88] With respect to the starting point that was used by the learned trial judge, Mr Bishop contended that the learned trial judge failed to make a proper assessment of the intrinsic seriousness of the offences when she chose the starting points. A more appropriate starting point for Miss Ball was seven instead of 10 years, presumably with respect to the offence of illegal possession of a firearm. No starting point was suggested in relation to robbery with aggravation.

[89] It was submitted that two of the aggravating factors used by the learned trial judge should not have been used. Namely, the prevalence of the offences in the society and Miss Ball being part of a gang. Further that there were additional mitigating factors that ought to have been considered, particularly the immaturity of the offender.

[90] The court was also asked to consider a further reduction in sentence by one year arising from the case of **R v Christopher Manning** [2020] EWCA Crim 592, in which the English Court of Appeal, in choosing to uphold a suspended sentence, considered the impact of COVID-19 on prisoners at a time when the pandemic was active and widespread.

[91] On the question of whether the sentences imposed were manifestly excessive, the learned DPP was keen to point out that the learned trial judge demonstrated an appreciation of the principles of sentencing and particularly those embodied in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). Therefore, the appellants had not demonstrated that the learned trial judge erred in failing to consider the proper principles of sentencing or erred in her assessment of the appropriate aggravating and mitigating factors. In any event, even if there could be said to have been any slight misdirection as to sentencing, there was no miscarriage of justice.

Discussion on sentencing

[92] It is now well established that in order for this court to interfere with a sentence imposed by a trial judge, it must be demonstrated that there was an error in the application of the principles relevant to sentencing and, further, that arising from such error, the sentence imposed was either manifestly excessive or manifestly lenient. This position was captured fully in the now oft-cited case of **Meisha Clement v R** [2016] JMCA Crim 26, in which Morrison P stated at paras. [42] and [43] as follows:

> "[42] Finally, in considering whether the sentence imposed by the judge in this case is manifestly excessive, … we remind ourselves, as we must, of the general approach which this court usually

adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R** [(1969) 11 JLR 283, 284], in which the court adopted the following statement of principle by Hilbery J in **R v Ball**:

> 'In the first place, 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 to character he may have chosen to call. It is only when a sentence appears to err in principle that this 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.'

[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[93] It is apparent that in passing the sentences, the learned trial judge had the principles relevant to sentencing, uppermost in her mind. The learned trial judge very clearly enunciated her awareness that the sentences imposed should be proportionate and fitting for the crime. She further stated her intention to ensure that the sentences were appropriate for each of the individual appellants, separately.

[94] This sentencing exercise, having taken place in 2019, after the Sentencing Guidelines were promulgated in 2017, the learned trial judge followed these guidelines closely. She first identified a starting point for each offence, and specifically, she used the usual starting points suggested in the guidelines for each offence. She indicated that it was 10 and 12 years, respectively, for the offences of illegal possession of firearm and robbery with aggravation. She then applied what she determined were the

appropriate aggravating and mitigating factors, in arriving at a final sentence, before giving full credit to each appellant for the time they had spent on remand.

[95] We are not of the view that the learned trial judge would have been obliged to consider separate starting points for each appellant, in particular Miss Ball, as urged by counsel, Mr Bishop. The starting point represents a provisional sentence which the sentencing judge considers to be appropriate, having regard to the seriousness of the offence, before adjustment, upward or downward, on account of aggravating or mitigating factors.

[96] We acknowledge that the role played by each offender in the commission of an offence could serve either to aggravate or mitigate the ultimate sentence imposed. However, this would be specific to the particular circumstances of each case. While it is inferred that Mr Alexander was the one in possession of the firearm, all the appellants were intricately involved in the proceedings from the point of pick up to the time of the incident in Norbrook. It would be artificial to ascribe lesser roles to Miss Ball and Mr Scarlett, as both, in any event, were deemed to be in possession of the firearm by virtue of section 20(5)(a) of the Firearms Act.

Aggravating factors

[97] The aggravating features which the learned trial judge considered relevant for all three appellants were (1) premeditation, (2) the prevalence of these types of gun-related offences in the society, (3) the fact that the appellants acted as part of a group or gang, (4) the effect of the ordeal on the complainant, and (5) the use of violence and an offensive weapon in the circumstances. For these five aggravating factors, the learned trial judge increased the starting point for each offence by a total of three years.

[98] Although this issue was not raised by any of the appellants, it may be thought that the learned trial judge would have compounded aggravating factors which were already intrinsic in the offence of robbery with aggravation when she considered the

fact that the appellants acted as part of a group or gang. Section 37(1)(a) Larceny Act, which is set out at para. [66] above, speaks to the offence of robbery with aggravation being committed, either by a person armed with an offensive weapon or being together with one other person or more.

[99] However, on the facts of this case, the appellants would have satisfied both alternate elements within section 37(1)(a). A firearm was used in the commission of the offence, and the three appellants and one other took part in the robbery. Therefore, in all the circumstances, it would not have been inappropriate for both those considerations to be used as aggravating factors. In **Lamoye Paul v R**, McDonald-Bishop JA, commenting on the sentencing ranges and starting points for the offences of illegal possession of firearm and robbery with aggravation, stated, in part, in paras. [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…."

There can be no complaint, therefore, aboutthe starting point of 12 years used by the learned trial judge before the application of the mitigating and aggravating factors. The learned trial judge also considered the use of the firearm in conjunction with the assault on the complainant as an aggravating factor, as she was entitled to do.

[100] Mr Bishop expressed concern with the learned trial judge's use of the words, "group" or "gang"; that she stated the appellants were operating in a group or gang within the context of the "Anti-Gang legislation" and treated this as an aggravating factor. Where offenders are found to have been operating in groups or gangs, this fact

may constitute an aggravating factor under the Sentencing Guidelines. We have already indicated that the learned trial judge would not have erred in utilizing the fact of the appellants operating in a group as an aggravating factor. However, the learned trial judge made reference to the appellants falling within the definition of a "gang" as defined in the "Anti–Gang Legislation" (pages 421 to 422 of the transcript).

[101] The learned trial judge was referring to the Criminal Justice (Suppression of Criminal Organizations) Act. That Act provides the definition of a criminal organization and lists several factors for consideration as to whether a person can be considered part of such an organization. There was no evidence to support the learned trial judge's conclusion that the conduct of the appellants fell within that definition. It has not been demonstrated, however, that the learned trial judge's reference to "Anti-Gang Legislation" had any additional effect on the sentences imposed, outside of the recognition that the appellants and the fourth man would have been operating as a group.

[102] With respect to Miss Ball, the learned trial judge commented on her lack of remorse and the effect that this may have had on her capacity for rehabilitation. She said at pages 424 and 425 of the transcript:

> "Counsel said she has the capacity to reform, but as far as I am concerned, reformation starts with an acknowledgment of guilty [sic], that you have fallen short, you want to redeem yourself, you want to make a change, that is what reformation or rehabilitation is about.
>
> So Miss Ball maintaining her innocence, this is not demonstrative that she has the capacity to reform, not as far as this Court is concerned."

[103] It would seem, based on these comments, that in arriving at her sentence, the learned trial judge did not give significant weight to the possibility of Miss Ball's rehabilitation, which is, in fact, a principle of sentencing that should be considered. Morrison P, in **Meisha Clement v R**, observed at para. [20]:

> "[20] It is a commonplace of modern sentencing doctrine that, in choosing the appropriate sentencing option in each case, the sentencing judge must always have in mind what Lawton LJ characterised, in his oft-quoted judgment in **R v Sergeant**, as the four 'classical principles of sentencing'. These are retribution, deterrence, prevention and rehabilitation. In **R v Everald Dunkley**, P Harrison JA (as he then was) explained that it will be necessary for the sentencing judge in each case to apply these principles, 'or any one or a combination of ... [them], depending on the circumstances of the particular case'."

[104] This court has already stated that the absence of remorse, as an aggravating factor, should be approached with some caution. In **Bernard Ballentyne v R** [2017] JMCA Crim 23, McDonald-Bishop JA examined this issue at para. [68] of the judgment. At para. [69] she concluded:

> "Although the principles in the case cited above would have emanated from a situation where release on parole was being considered they, nevertheless, prove useful in illustrating how the issue of remorse should be addressed during the course of sentencing, when a minimum period of parole is being contemplated. The principles do offer some insight into other reasons that may cause a defendant not to show remorse other than him being unrepentant. **It seems right to say, therefore, that while absence of remorse is a factor to be considered in appropriate circumstances, it must be approached with caution as it is not a conclusive indicator that the defendant is beyond rehabilitation and thus likely to reoffend, therefore justifying a longer period of incarceration.** The extent to which it should serve as an aggravating factor in sentencing, therefore, must depend on the circumstances of each case and it should only be one of many factors to be considered without undue weight given to it." (Emphasis added)

[105] There are appropriate occasions, therefore, where the lack of remorse could be assessed as an aggravating factor. Furthermore, a defendant who insists on his innocence in the face of an adverse verdict could not be expected to show remorse. A sentencing judge, therefore, must take care when treating with the issue of lack of remorse.

[106] In the instant case, it is not demonstrated that the learned trial judge adopted a balanced approach when considering this issue in relation to Miss Ball. In the circumstances, she may have been too abrupt in using Miss Ball's failure to admit guilt as a basis for determining that she was incapable of being reformed, especially within the context of her immaturity at the time the offences were committed. However, the lack of remorse was never used as an aggravating factor to adjust the starting point upwards as it related to Miss Ball. This is evident, as she fared no worse than her co-appellants in terms of the ultimate sentence, although the learned trial judge applied Messrs Alexander and Scarlett's remorse (as expressed in the social enquiry report) as a mitigating factor on their behalf. What the learned trial judge indicated on page 430 of the transcript is that the aspect of remorse or capacity to reform could not be used as a mitigating factor for Miss Ball.

[107] Also, notwithstanding these comments in relation to the lack of remorse, the learned trial judge took into account, as mitigating factors, the fact that Miss Ball had no previous convictions and had not re-offended between the time of being charged and the time of conviction. Most importantly, contrary to Mr Bishop's submissions, she took account of the fact that Miss Ball was a minor at the time of the commission of the offences (see page 430 of the transcript). There can be no complaint that the issues of her age and immaturity were not accorded consideration. One year was allotted for each of these three mitigating factors. In the circumstances, while the learned trial judge may have erred in using Miss Ball's failure to admit guilt as a basis for determining that she was incapable of being reformed (without a proper consideration of relevant issues), this occasioned no prejudice to her.

[108] As it related to both Messrs Alexander and Scarlett, the learned trial judge considered the same mitigating factors, with respect to each of them, to be relevant. These were (1) the men's expression of remorse and acceptance of their guilt for the offences (although very belatedly), (2) the absence of any previous convictions and (3) the fact that they had not re-offended and had led "commendable lifestyles" between

the time of their charge and conviction, which was approximately 11 years. These mitigating factors gave rise to a reduction in sentence of three years. Counsel for Messrs Alexander and Scarlett did not point to any other mitigating factors which were relevant and that the learned trial judge failed to take into account.

Prevalence of offences in the community

[109] The appellants have also complained about the learned trial judge's reference to the prevalence of gun crimes in the jurisdiction and have submitted that this should not have been tagged as an aggravating factor, as there should be some statistical report concerning the prevalence of the offence in the community.

[110] The learned trial judge acknowledged that she was unaware of any formal statistics but that she recognized that gun-related offences were prevalent in the jurisdiction and that this was why a special court was established for such matters. While we agree that the Sentencing Guidelines speak to prevalence in the community (and not specifically to prevalence in the jurisdiction) as an aggravating factor, this would not restrain the learned trial judge from taking note of the prevalence of gun crimes in the jurisdiction. This has frequently been done by this court on numerous occasions in reviewing sentences (see, for example, para. [19] of **Lamoye Paul v R**; para. [109] of **Julian Brown v R**). Unfortunately, gun crimes and violence are not restricted to specific communities in this jurisdiction, but criminals travel from community to community and across parish boundaries regularly. These acts of violence are widespread and reported daily by the media. If the arguments of Mr Bishop were to be given serious consideration, this would require evidence being led as to statistics at every sentencing hearing in relation to specific communities. We see no merit in this submission.

The issue of delay

[111] During the course of the hearing, it was suggested by counsel Mr Bishop that the pre-trial delay may have been as a result of the changing of attorneys by Messrs

Alexander and Scarlett and also because the investigating officer was no longer available. Counsel also contended that there was nothing to suggest that the delay was due to the fault of the appellant, Miss Ball, and that it was a breach of her constitutional rights to a fair trial within a reasonable time. Counsel, Ms Afflick, made no submissions on this point, nor was it pursued as a ground of appeal on behalf of Messrs Alexander and Scarlett. Crown Counsel, Ms Scott, merely stated that they were unable to access the digital records in relation to the file and so were unable to assist the court as regards the reasons for the 11-year delay prior to the trial.

[112] The delay of 11 years before a trial was held is of concern and does cause a level of discomfort to this court. We note that the learned trial judge properly addressed her mind to the effect of delay in relation to the fairness of the trial (pages 326 to 327 of the transcript). She concluded that despite the significant delay, it had not resulted in unfairness to the appellants. Miss Ball has not challenged this conclusion. The complaint has only been raised in relation to sentence.

[113] The issue of the delay was never raised before the learned trial judge as a breach of Miss Ball's constitutional right. During the sentencing hearing, counsel for Miss Ball merely asked the court to consider the emotional burden of waiting for the trial to take place and her reporting to the police station on bail for an extended period. He cited this, among other factors, for the court to consider when determining an appropriate sentence. There was also a failure on the part of Ms Ball to adduce any evidence as to the reasons for the delay in the court below.

[114] In **Julian Brown v R**, this court considered the issue of trial delay. McDonald-Bishop JA did an extensive review of several authorities at paras. [70] to [95] of the judgment. The general principles, as distilled, based on the applicable Charter right (section 16(1) of the Constitution) are set out below:

1. Any person charged with a criminal offence is entitled to a fair hearing, within a reasonable time. If a criminal case is not heard

within a reasonable time, this will constitute a breach of constitutional rights, whether or not the defendant has been prejudiced (see **Melanie Tapper v DPP** citing **Boolell v The State** [2006] UKPC 46). However, this court expressed at para. [92] of **Julian Brown v R**, that these pre-Charter authorities must now be carefully read in the light of the Charter. Therefore, delay without more, constituting a breach, has to be re-evaluated within the context of "the letter, sense and spirit of the Charter". This is further explained at items 5 and 6 below.

2. If a breach of the reasonable time requirement is established retrospectively, after a hearing, the appropriate remedy may be a public acknowledgement of the breach, reduction in the penalty imposed or payment of compensation to an acquitted defendant (see **Melanie Tapper v DPP**; **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72; **Jerome Dixon v R** [2022] JMCA Crim 2; and **Evon Jack v R** [2021] JMCA Crim 31).

3. In establishing whether a breach of the constitutional right has been made out, the Privy Council cited factors to be considered - the length of the delay, reason for the delay, the defendant's assertion of his right and prejudice to the defendant (see para. 45 of **Flowers v the Queen** [2000] UKPC 41).

4. The defendant asserting the infringement has a burden of proof – the civil standard (see para. [90] of **Julian Brown v R**, where reliance was placed on Professor Peter Hogg's text Constitutional Law of Canada, Fifth Edition, Volume 2 examining section 1 of the Canadian Charter of Rights which is similar to section 13(2) of our Charter relating to limitation of certain rights).

5. The reason for the delay must be demonstrated to be attributable to the State before an infringement of the right can properly be established for purposes of redress under the Charter (see para. [85] of **Julian Brown v R** citing **Taito v the Queen** [2002] UKPC 15; **Melanie Tapper v DPP**). There must be evidence that the delay complained of is due to the action or inaction of the State.

6. The right is not absolute and can be limited by the State if the breach is demonstrably justified in a free and democratic society (see section 13(2) of the Charter, and paras. [87] and [88] of **Julian Brown v R** citing **Flowers v The Queen**; **Bell v Director of Public Prosecutions** [1985] AC 937).

7. The applicant has to establish in the court below a *prima facie* infringement or breach of his or her constitutional right at the instance of the State. Once it is established that the State was responsible for the delay, then an evidential burden as well as the legal burden would shift to the State to demonstrably justify the breach, in accordance with section 13(2) of the Charter. Upon the failure of the State to justify the breach, then the issue of constitutional redress would arise for consideration (see para [93] of **Julian Brown)**.

[115] As stated previously, Miss Ball did not assert or establish a *prima facie* infringement of her constitutional right to a trial within a reasonable time in the court below. Therefore, the learned trial judge had no duty to raise the issue in law on her own motion (see **Julian Brown v R** para. [83]). The penalty imposed by the learned trial judge cannot, therefore, be attacked on the basis that she failed to properly adjust the sentence arising from a constitutional breach.

[116] Miss Ball is now requesting that this court consider an adjustment to her sentence on the basis of pre-trial delay. While this court is able to consider this issue, Miss Ball has failed to put forth any evidence as to the reasons for the delay over the course of the 11 years. Counsel, Mr Bishop's cryptic submissions would not be sufficient to establish this *prima facie* infringement. If this had been done, the Crown would have been duty bound to put forward evidence to justify the delay.

[117] These were the same circumstances arising in **Julian Brown v R**. Having conducted her analysis of the authorities, McDonald-Bishop JA concluded as follows:

> "[93] The foregoing analysis led this court to the conclusion that the length of the delay in the circumstances of the case, albeit regrettable, did not automatically mean a breach of the applicant's constitutional right under section 16(1) of the Charter, as contended by him. The court could not properly arrive at a finding that there was a breach because the reason for the delay was never disclosed to the court."

Also, at para. [94]:

> "This court was not placed in a proper position to conduct any 'functional analysis' of the applicant's right to a speedy trial 'in the particular context of the case', bearing in mind that his rights did not preclude the rights of public justice."

[118] We echo these same sentiments in the case at bar and conclude that we have been given no basis to adjust the sentence imposed by the learned trial judge by virtue of the length of delay in the trial.

The issue of the COVID-19 pandemic

[119] Mr Bishop referred us to the case of **R v Christopher Manning**, a judgment of the England and Wales Court of Appeal. The case concerned an appellant who pleaded guilty to certain sexual offences, where culpability had to be determined within the context of specific categories. The sentencing judge, having assessed the relevant categories, considered the prospects of rehabilitation and, taking into account a guilty plea, concluded that a term of imprisonment of 12 months, suspended for two years,

was appropriate. The learned judges of appeal concluded that, in all the circumstances of the case, it was not wrong in principle for a suspended sentence to be imposed, given the realistic prospect of rehabilitation. There were also several ancillary orders attached to the suspended sentence. It is within that context that the court then considered the impact of the COVID-19 pandemic and indicated that the conditions in prisons (at the time) represented a factor that could have been taken into account in deciding whether to suspend a sentence. It was acknowledged that the general principle remained that "where a court is satisfied that a custodial sentence must be imposed, the likely impact of that sentence continues to be relevant to the further decisions as to its necessary length and whether it can be suspended" (see para. 42 of the judgment).

[120] A sentencing judge, as part of the general principles of sentencing, should consider the likely impact of a custodial sentence on an offender (see **R v Barbury** (1976) 62 Cr App R, 248) This consideration must relate to the specific offender, with the result that circumstances which are unique to different offenders cannot be applied, as of right, to all offenders Manning was found to have an anxiety disorder, and the sentencing ranges for the offences for which he was charged were substantially lower than the sentencing ranges for the offences in the present case. The offences for which the appellants have been convicted are serious and require an appropriate custodial sentence. Further, there is no evidence at this juncture to suggest any sustained impact from the COVID-19 pandemic in the prisons, and no good basis has been established to reduce the sentences imposed. As far as any further reductions are concerned in light of the present COVID–19 pandemic, we do not think this is appropriate in all the circumstances. We would also use this opportunity to reiterate the general principle as stated in **R v Linton Miller** (1987) 24 JLR,179, where it was held that an appeal against an accused person who has been properly convicted and sentenced cannot be allowed merely on the ground that the physical condition of the prison is dehumanizing.

Conclusion

[121] Having considered the various issues raised on this appeal in respect of each appellant, we find there is no merit in any of the grounds raised, as the evidence of the complainant points clearly to a pre-planned joint enterprise carried out by the appellants and another man, with the primary objective of robbing the complainant of his Toyota Corolla motor car. The complainant had sufficient opportunity to observe the appellants, such that the identification evidence was sufficient and reliable. The evidence of his observation of a firearm was also adequate.

[122] It was noted that there were interferences by the learned trial judge during the taking of the evidence. However, these were not prejudicial to the appellants and did not result in a miscarriage of justice. We also found no reason to disturb the sentences imposed as they could not be said to have been manifestly excessive. Furthermore, no evidence having been put forward by the appellants to account for the delay in the hearing of the trial, it could not be determined by this court that there was a breach of the appellants' constitutional rights to a fair trial within a reasonable time. As a result, we make the following orders:

1. The appeals against convictions are dismissed.

2. The applications for leave to appeal sentences are refused.

3. The convictions and sentences are affirmed.

4. The sentences are to be reckoned as having commenced on 16 September 2019, the date when they were first imposed.