[2022] JMCA Crim 47

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NO 47/2015

ODEAN BLAKE v R

Sean Osbourne for the applicant

Miss Patrice Hickson for the Crown

12, 13 November 2020 and 7 October 2022

P WILLIAMS JA

[1] On 7 May 2015, after a trial in the High Court Division of the Gun Court held in the parish of Kingston, before Harris J, as she then was ('the learned trial judge'), sitting without a jury, Odean Blake ('the applicant'), was convicted on an indictment containing nine counts. The first count was for the offence of illegal possession of firearm, and the remaining eight counts were for wounding with intent. He had been indicted with four other persons, but they were acquitted. On 26 June 2015, he was sentenced to 15 years' imprisonment at hard labour for the offence of illegal possession of firearm, and 22 years' imprisonment at hard labour, on each of the other counts. The learned trial judge ordered that the sentences were to run concurrently.

[2] The applicant made an application for leave to appeal his conviction and sentence. On 29 November 2018, a single judge of this court considered his application and refused him leave to appeal, opining that the learned trial judge gave "immensely proper

directions", and it was her prerogative to accept the witnesses whom she felt were credible. As was his right, the applicant renewed his application for leave to appeal conviction and sentence before us.

[3] On 12 and 13 November 2020, we heard and considered the submissions from counsel and made the following orders:

> "1. Application for leave to appeal conviction and sentence refused.
>
> 2. Sentences reckoned to have commenced on the 26 June 2015."

[4] We promised then to reduce the reasons for our decision to writing. This judgment fulfils that promise, with profound apologies for the delay.

Background

[5] The basic factual background leading to the charges being laid against the applicant and the four co-accused was not disputed. On 14 February 2013, sometime after 8:00 pm, several persons were gathered outside an unfinished concrete dwelling house on a pathway located at Moore Town Way, Nannyville, in the parish of St Andrew. Some were playing cards around three separate tables near a lit streetlight, while others stood by watching the activity. The relative calm of the night was shattered when a group of five men armed with firearms came from the direction of a track that led to a nearby gully and fired a barrage of shots at the persons there. Eight persons were shot and injured. Mr Ian Smith Junior ('Mr Smith Jr') was shot in his side and back and left paralysed; Mr Clifford Smith ('Mr C Smith') was shot in the right hip; Ms Marlene Edwards ('Miss Vee') received injuries to her buttocks, left arm, right side and head (a bullet remains lodged in her head). Mr Cornell Kelly ('Mr Kelly') was shot to the right side of his back, and Mr Leon Reddick ('Mr Reddick') was shot in his left leg, which led to him walking with the aid of clutches at the time of the trial. Mr Alva Bryan ('Mr Bryan') was shot on his left thumb. Ms Shanoya Rowtham ('Ms Rowtham') was shot in her right foot. A young

child, Brandon Brown, who was only four years old at the time, suffered multiple gunshot injuries to his left leg.

The case for the Crown

[6] Of the nine witnesses who testified on behalf of the Crown about the incident, only four identified assailants: Mr Smith Jr, Mr C Smith, Mr Ian Smith Senior ('Mr Smith Snr') and Mr Bryan. Mr Kelly, Miss Rowtham and Miss Vee gave evidence of being among the group of persons playing cards that night and of how they came by their injuries. Mr Reddick testified that he was not a part of the group gathered in the pathway that night but was on his way home when he heard explosions and was shot as he tried to leave the area. Miss Sadonya Straw, the mother of Brandon Brown (the four-year-old child who was also injured that night), testified to his presence in the area when the shots were fired, leaving her son suffering from gunshot injuries.

[7] Mr Smith Jr gave evidence that he was engaged in a card game when he saw a group of five men "coming out of the lane" with what appeared to be handguns or pistols in their hands. He heard explosions and saw the five men moving around. He immediately felt "like [he] received a needle to the side…like [he] just got pricked to the side and the back as well". He eventually fell to the ground and realised he had no control over his lower limbs, leaving him paralysed.

[8] He said that after falling to the ground, he could continue observing the men with the aid of a streetlight about 3 feet away. He recognised the applicant and one other man. He had known the applicant for over eight years and would see him about four times weekly. He would occasionally exchange greetings with the applicant, who was older than he was. He indicated that during the shooting incident, the applicant and the other man he recognised wore a "mesh like stocking…something very thin, transparent" over their heads. All the men, including the applicant, were about 5½-6 feet away from him during the incident. He maintained that the "mesh like stocking" worn by the men over their heads during the incident did not prevent him from recognising them.

[9] After the men left, Mr Smith Jr was assisted to a car by his father and transported to the hospital, where he remained until 30 March 2013. On 26 February 2013, while still in the hospital, he pointed out the applicant on a video identification parade.

[10] Under cross-examination, Mr Smith Jr gave a full description of the area in which the incident occurred. He explained the location of the path that the men had taken to arrive at where he had been playing cards. The men, he said, exited the path "right under the light post". He insisted that he had "a fair amount of time to observe and saw who [he] was suppose [sic] to see and noticed who [he] was supposed to notice". He was questioned as to whether he had told the police that he could not recall whether the five men were armed and that although he was not sure all five men had guns in their hands, he was certain that he saw the applicant, the other man he recognised and a third man with guns. He maintained that he was unable to recall doing so. In addition, he was challenged as to his evidence that he had been standing while playing cards prior to the incident, given that it was recorded in his statement that he was seated. He stated that he could not recall telling the police that he was in shock after the guns were fired. He also could not remember telling the police that all five men ran up the lane, and then he heard another set of explosions. He refused to accept the invitation to look at his witness statement when confronted about possible inconsistencies with his testimony.

[11] Mr Bryan testified that he is the brother of Mr C Smith and Mr Smith Snr. That night he was among the group of people playing cards. He was at a table with Mr Smith Jr (his nephew) and two women. He said he heard "a little rush come from off the side of the gully" as if someone was rushing towards them, and then he heard two shots fired from the direction of the gully. He became frightened, heard a barrage of shots, and when he looked, he saw five men, about 5 or 6 yards from the streetlight. He said the men were standing beside each other; they all had guns and were firing shots. He ran into his house, and whilst in his house, he looked through a hole the size of a $20.00 coin in a sheet of zinc on his window and saw his brother (Mr Smith Snr), his nephew (Mr Smith Jr), Miss Vee and Miss Rowtham lying on the ground. He saw a man go to a table that Miss Vee was lying behind, pushed the gun underneath the table and fired about six

shots. Mr Bryan said he heard "click click" from the gun, and then the man ran away. Mr Bryan explained that after rushing to his house, he felt a burning on his left thumb and realised it had been "shot off".

[12] Mr Bryan said that he knew four assailants by name before that night. He did not know the applicant by name and said, "looking through the glass I couldn't really identify him". However, he pointed out the applicant as the person who fired under the table where Miss Vee was lying. At that point, Mr Bryan said the applicant was 11-12 feet away from him, under the streetlight, and had nothing on his head. He was able to see his face for approximately two minutes.

[13] During cross-examination, Mr Bryan agreed that the path beside the gully behind his house was dark. He was challenged on his evidence that he was unfamiliar with guns when, in his statement to the police, it was recorded that he had said one of the men had a black Glock 9mm pistol. He insisted that he did not know anything about any gun and did not know the name of any. When confronted with the contents of his statement, Mr Bryan maintained he had not given the police the name of any of the guns he had seen in the hands of the attackers.

[14] Mr Smith Snr said that on the night of the shooting, he was playing cards with three other men at a table about 10 feet away from the "bright streetlight" when he heard a sound like "a clapper burst". He jumped up and asked, "a who burst deh clapper", and when he turned around, he saw five men shooting. He jumped off his seat onto a step that had two walls and lay there. He looked down the street and saw when one of the men came up under the streetlight while the other four stood back. The man who came up to the streetlight started firing shots with a black gun.

[15] From his position, lying on his belly with his arms under his head and his head turned in the direction of where the man was standing, Mr Smith Snr identified the man under the streetlight firing shots as the applicant. He said he saw the applicant shoot at Miss Vee until he heard a "cruk cruk cruk" sound. Upon seeing this, he said, "Odean I see

you, and I am going to tell the police". The applicant then ran up the pathway, and he (Mr Smith Snr) got up and ran up the path. However, Mr Smith Snr explained that he turned back when he realised his son was lying down in the street injured.

[16] Mr Smith Snr testified that he had known the applicant for at least twenty-two years since he was "a small child growing up". He saw the applicant's face from a distance of 10 feet away whilst he fired shots at Miss Vee and saw him for about three to four minutes while firing the shots.

[17] On cross-examination, Mr Smith Snr acknowledged that he had given a statement to the police on the night of the incident. The statement was read to him, and he accepted that it was not recorded that he had told the police that he had said, "Odean, Odean me see you". He said he had not mentioned it in the statement but insisted that he was sure he saw the applicant that night. He denied suggestions he had planned with his brothers to fabricate lies about the person responsible for the shooting. He further denied that he had told the police that the incident lasted less than a minute and that he had only heard about persons being shot.

[18] Mr C Smith testified that while he did not live in the Nannyville community, he would visit often and had relatives who lived there. He also knew several persons who lived there, including the applicant. On the night of the incident, he was standing beside Miss Vee, 9 feet away from the streetlight, watching the card game. He said he heard sounds like persons walking, and then he heard one shot fired. After that single shot, he heard multiple shots and people started to run, jump, push and scream. He then looked in the pathway beside him and saw a man with a gun "right under" the streetlight. As he looked at the man, he felt "the force of something pitch [him]" at his right hip, and he fell to the ground. Whilst on the ground, he heard more shots being fired, he lay on his stomach, turned his head to the side and observed the man shooting at people. He identified that man to be the applicant. He said that the applicant went over to Miss Vee and fired multiple shots at her until the gun went "click click", then he ran off. After the

shooting, he was unable to walk, so he "draw" on his belly and went inside the house belonging to Mr Bryan, his brother.

[19] Mr C Smith said he had known the applicant for more than ten years. On the night of the shooting, the applicant was standing under the bright streetlight about 11½ feet from where he was. He described him to be a very tall person and taller than the other assailants. He said he was able to identify the applicant from his head to his feet. He said the incident happened very quickly; he estimated the time to be four to five minutes. He also stated that he was lying down while observing the applicant, was not frightened and spent several seconds looking at the applicant while he fired shots. He said it could have been five men who came there, but he did not count the group of persons he saw "running and firing wildly".

[20] Under cross-examination, Mr C Smith agreed that he had given a statement to the police on 26 February 2013. He denied that before going to the police, he spoke with other persons who told him the aliases of the persons involved in the incident. He, however, agreed that he heard persons naming the assailants but did not recognise those being named as the perpetrators. He also denied identifying the names of the assailants only after speaking with his family members.

[21] Detective Corporal Omar Belafonte was one of the police officers who visited the scene within hours of the incident. He was a trained crime scene investigator, and as such, he made observations and took photographs of the scene. These photographs were admitted into evidence. These included photographs of buildings, trees, wooden tables with playing cards, and a dark substance resembling blood on the ground. There were also photographs of a gully with a lit utility streetlight in the vicinity, several spent casings on the ground around the streetlight, as well as photographs of damaged expended bullets and bullet fragments in other areas.

[22] Detective Corporal Shawn Anderson was another officer who visited the scene that night. Whilst there, he spoke with Mr Smith Snr, recorded a statement from him, and

thereafter commenced investigations. He testified that Mr Bryan attended the police station the next day, 15 February 2013, and gave a statement to another police officer.

[23] On Saturday, 16 February 2013, Detective Corporal Anderson said that he received some information and went to the Half-Way-Tree lockup located on the compound of the Half-Way-Tree Police Station. He spoke with five persons in custody, one of whom was the applicant. The officer informed the applicant of the investigations and cautioned him. The applicant said nothing and was advised that he would be placed on an identification parade. Detective Corporal Anderson stated that he interviewed the applicant in the presence of an attorney-at-law on 20 February 2013, and three days later, he charged the applicant.

[24] On cross-examination, Detective Corporal Anderson testified that he was aware that the applicant had handed himself over to the police at the Half-Way-Tree Police Station on 16 February 2013. He acknowledged that investigations were ongoing at the time. He indicated that he was unaware that the names of all five men were called during the evening news of 15 February 2013 on Television Jamaica, specifically that of the applicant. He was also unaware that the applicant had attended the Gun Court on 18 and 19 February 2013, prior to him being placed on any identification parade.

[25] Detective Sergeant Desmond Roach testified that he conducted the video identification parade in relation to the applicant. This was done at the University Hospital of the West Indies, where the witness, Mr Smith Jr, was a patient at the time. In the presence of an attorney-at-law representing the applicant, Mr Smith Jr pointed out the applicant as the person who shot him. On cross-examination, Detective Sergeant Roach denied that he conducted eight identification parades concerning the applicant.

Case for the applicant

[26] In an unsworn statement from the dock, the applicant denied being involved in the incident on 14 February 2013. He said that he lived in Nannyville Gardens, but on that day, at about 7:00 pm, he was in the Half-Way-Tree area shopping with his girlfriend,

"walking around from shop to shop". He got a call from his mother informing him that shots were being fired in his community. He decided to go to his father's house for the night. The applicant said that the following day, he heard his name on the radio and turned himself over to the police to clear his name. He said he went on "around seven identification parades", and at one of those parades, "Bigga [Mr Smith Jr] -they call him Evan Smith, [turned] to the police that conducted the identification parade, in [his] presence, in the presence of Miss Andrea who was representing [him] at the time …said he know [he] lives in the community …because he plays football on the same football field". The applicant said that, on that parade, "no one really identified" him to say that he did "anything to anybody because [he] is not in no problem with anyone" and is not a troublemaker.

[27] On behalf of the applicant, Ms Alicia Murray ('Ms Murray') gave evidence that, on the day of the incident, they were in Half-Way-Tree looking at presents together for Valentine's Day when he received a telephone call. After the call, he told her his mother had called and told him "gunshot a fire". She said the applicant wanted to go home, but his mother told him he could not. He eventually said he would go to his father's house. Miss Murray said this conversation took place between 8:00 pm to 9:30 pm.

[28] Mr Gary Williams ('Jukie') also testified on behalf of the applicant. He gave evidence that he was one of the persons playing cards in the pathway on 14 February 2013 and named Mr Smith Snr as one of the persons playing at his table. He said he heard a loud explosion, and this caused him to bend down. Several more explosions followed, and when "[he] glanced up [he] saw fog and smoke all over the place and people scampering". After the explosions ceased, he got up and ran home. He did not see anything and "didn't really stick around to see anything else either". He estimated that the sounds of explosions lasted about 15 to 20 seconds. He returned to the scene sometime after and saw "people helping other people who say them get shot and so forth".

[29] Jukie testified that about two or three days after the incident, a group of people gathered and discussed what had happened. Among the group was Mr Bryan. Jukie said that Mr Bryan said that he had not seen anything at the time. He, in turn, told Mr Bryan that he had not seen anything. As the conversation continued, Jukie said that Mr Bryan eventually said, "is Odean them see did a fire shot". Jukie testified that "a conversation go on between us say everyone fi say them see Odean".

[30] It must be noted that counsel who appeared for the applicant at trial, Miss Zara Lewis, was able to elicit this evidence to rebut evidence given by Mr Bryan. Counsel, in seeking to obtain the learned trial judge's permission to pursue this course, read portions of the evidence given by Mr Bryan on cross-examination. Mr Bryan had agreed that Jukie was playing cards the night of the incident. She also read the following as being a part of the notes of evidence:

> "Did you not, sir, have a meeting with Jukie and asked him to testify in court? No. Did you have a meeting with Jukie as to what he should say when he comes to court? No, I did not tell Jukie I did not see what happened..."

The manner in which the learned trial judge acknowledged this portion of the evidence led us to note that it was missing from the transcript. However, we were satisfied that the absence of this portion did not result in any unfairness to the applicant in his application before us.

The issues at trial

[31] The applicant, having set up the defence of alibi, raised, as the core issue, the correctness of the witnesses' purported identification/recognition of him as well as their credibility. The learned trial judge found that there were two witnesses who purported to identify the applicant that were credible and not mistaken in their identification.

The appeal

[32] Mr Sean Osbourne ('Mr Osbourne'), who appeared before this court on behalf of the applicant, was permitted to abandon three of the five original grounds of appeal filed

by the applicant and to add a third ground to the remaining two. The grounds of appeal were, therefore, as follows:

> "**GROUND I**
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> **Misidentity [sic] by the witness:-that the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.**
>
> **GROUND II**
>
> **Unfair Trial:-that the evidence upon which the learned Trial Judge relied on [sic] for the purpose to convict me [sic] lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances.**
>
> **GROUND III**
>
> **The sentences imposed on the [applicant] is manifestly harsh and excessive having regard to the evidence.**"

Grounds I and II

Submissions

[33] Mr Osbourne, in making his submissions, dealt with grounds I and II together since they were both concerned with the issue of identification. It was his submission that the summation of the learned trial judge was deficient in certain material areas of visual identification, and these deficiencies denied the applicant a fair trial. Counsel contended that the learned trial judge failed to deal adequately with weaknesses in the identification evidence and failed to address sufficiently the material inconsistencies that cast doubt on the reliability of the visual identification evidence. Counsel complained that the learned trial judge failed to adequately consider the visual identification issue, given the evidence of Mr Smith Jr that the men he saw were masked. Counsel relied on the case of **R v Turnbull and Others** [1976] 3 All ER 549 ('**Turnbull**').

[34] Mr Osbourne contended that the evidence of recognition was no more than a fleeting glance made under difficult circumstances. He submitted that, in assessing the

reliability and cogency of the identification evidence, the learned trial judge failed to take into account the evidence that the virtual complainants' attention was divided between the observation of the firearm, the assailant and his attempt to secure himself. Counsel referred to **Dwayne Knight v R** [2017] JMCA Crim 3; **Jermaine Cameron** [2013] JMCA Crim 60; and **Andrew Stewart v R** [2015] JMCA Crim 4 in support of his submissions.

[35] Counsel identified the difficult circumstances that existed as, firstly, the fact that it was night, which would raise an issue with visibility. Secondly, he pointed to the fact that four or five men were involved in the shooting, which meant that the witnesses would have been terrified, shocked and in great fear. Further, he referred to the time that the incident must have lasted and submitted that it must have happened very quickly. He also contended that the witnesses would have been focused on making good their escape and would not have had sufficient opportunity to recognise anyone. Thus, he contended, the identification evidence was questionable and raised too many doubts throughout the trial for one to accept it. Further, he submitted that the conduct of the virtual complainants relied on by the learned trial judge was not consistent with the behaviour of persons injured in the circumstances of the case.

[36] Mr Osbourne urged that, on the evidence, it was apparent that all the witnesses had an opportunity to discuss and agree on whom to name as the assailants. He complained that the underlying difficulty with the case was that all the witnesses were related and had the time to reflect and concoct a story. He highlighted the evidence of Mr C Smith and noted that he had given a statement two weeks after the incident. It was Mr Osbourne's contention that this was done only after consulting with persons in the community and other family members. He submitted that the learned trial judge failed to reconcile such a delay with the evidence that the police "listed the applicant a day after the incident".

[37] He further contended that the Crown had been allowed to present two separate versions, one of which had the assailants masked and the other did not. This, he submitted, was not permissible in criminal litigation, and it was not sufficient for the

learned trial judge to say she rejected some of the evidence. Further, he submitted that there were critical inconsistencies that went to the root of the case presented by the Crown. His conclusion in this area was that there was so much confusion on the Crown's case that the matter should not have been resolved in its favour.

[38] Ms Patrice Hickson ('Ms Hickson'), on behalf of the Crown, contended that it was clear from the summation that the learned trial judge identified the critical issue in the matter as that of identification. Counsel submitted that the learned trial judge, in her summation, demonstrated that she had at the forefront of her mind the elements of **Turnbull**, which is now trite law.

[39] It was Crown Counsel's submission that the learned trial judge's summation was not deficient with respect to identification. Counsel highlighted the sections of the summation where the learned trial judge dealt with the evidence she accepted as credible and those she rejected. Crown Counsel further noted that the learned trial judge gave clear reasons why she rejected some evidence.

[40] Miss Hickson submitted that no inference could be drawn from the fact that it took 10 days for the statement of one witness, Mr C Smith, to be recorded. She contended that the learned trial judge was appropriately careful and thorough in her treatment of the evidence of all the witnesses and demonstrated that she assessed their credibility. Crown Counsel submitted that the learned trial judge was sitting as a judge of both law and fact and clearly demonstrated that she exercised her jury mind in assessing the evidence.

[41] Miss Hickson submitted that from the learned trial judge's lengthy and meticulous treatment of the evidence, highlighting various elements in keeping with the guidance from **Turnbull**, it could not be said that she did not treat with deficiencies in the identification evidence. Crown Counsel further submitted that there was no fault in the learned trial judge's assessment of the witnesses.

Discussion and disposal

[42] It is indeed now trite law that in **Turnbull**, Lord Widgery CJ set out the guidelines which should be used in cases concerning challenges to the identification evidence. The oft-cited guidelines were usefully summarised by Morrison JA (as he then was) in **Jermaine Cameron v R**, at para. [23], where he stated the following:

> "[23] … [W]henever the case against an accused person depends wholly or substantially on the correctness of one or more identifications of the accused which is alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of the identification. He should instruct them as to the reason for that warning and should make some reference to the possibility that a mistaken witness could be a convincing one and that a number of witnesses could all be mistaken. He should also direct the jury to examine closely the circumstances in which the identification by each witness came to be made, reminding them of any specific weaknesses which may have appeared in the identification evidence. Further, the jury should be reminded that, although recognition may be more reliable than identification of a stranger, mistakes in recognition of close relatives and friends are sometimes made."

[43] The duty of a trial judge, sitting as both judge and jury in the Gun Court, relative to his summation, is well settled. The judge is expected to indicate the principles applicable to the particular facts and demonstrate his application of those principles. In the case of **R v Clifford Donaldson and Others** (1988) 25 JLR 274, at page 280, Carey JA set out the duty of this court relative to reviewing such a summation, in this way:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorize the summation as a reasoned one."

[44] In cases concerning the issue of visual identification, a trial judge sitting alone must therefore demonstrate an awareness of the special and specific treatment that must be given to the evidence of identification, in keeping with the **Turnbull** guidelines.

[45] In this case, the learned trial judge, early in her summation, said this:

> "… So the critical issue that is now to be determined by the court is the identification of the person or persons who committed these offences. The case against each defendant depends wholly on the correctness of the identification of each of them which each accused has alleged to be mistaken. So to avoid the risk of any injustice in this case such as has happened in some cases in the past, the court warns itself of the special need for caution before convicting any of the accused persons in reliance on the evidence of identification. I bear in mind that a witness who is convinced in his own mind may give convincing evidence and may give me [sic] a convincing witness, but nevertheless he may be mistaken. I also bear in mind that mistakes as to the identification can be made in the recognition of someone known to a witness [sic] even of a close friend or relative and in this case in particular, the witnesses who are purporting to identify the alleged perpetrators are giving evidence that they have known them for some time, some prolong [sic] periods of time. Therefore, I am bound to examine carefully circumstances in which the identification by the witnesses were made, how long each witness said that they had [sic] the person they were able to identify as they said under observation, the distance, the lightning. Did anything interfere with the observation, whether or not these persons they are purporting to identify they have known them or seen them before, how often and so forth?..."

[46] The learned trial judge then considered, in detail, the evidence of the four complainants that purported to identify the applicant. She dealt firstly with the evidence of Mr Smith Jr. She considered the length of time he had known the applicant, the lighting condition, and the evidence that the applicant was about 5½-6 feet away from the streetlight and from where the witness was. She also noted that Mr Smith Jr indicated that the applicant was wearing "mesh or stocking" over his face at the time and that he saw him for a fair amount of time which he estimated to be five minutes and then two

minutes. She explored the inconsistencies and omissions that arose on his evidence. The learned trial judge said this:

> "The first inconsistency was that he had said to the police in the statement that he was not sure if all five men had guns in their hands but he was sure [the applicant] and Andrew had guns with a third person. He denied that he said that to the police. He refused to see, to be shown his statement. He also denied he had said to the police that when he heard the explosions he went into shock…
>
> And there was also some issue taken whether or not he was seated or standing at the time that he was playing cards. In evidence he said that he was standing. However, in his statement he said that he was seated. Now the evidence as to the men that he purported to identify, [the applicant] and Andrew Williams wearing stockings over their faces is a major discrepancy that has arisen on the crown's [sic] case as it relates to identification of these two men, because Mr. Alva Bryan who purported to identify all five men in the dock said that they were not wearing anything over their faces. Mr. Clifford Smith and Mr. Ian Smith snr who purported to identify [the applicant] said in evidence that [the applicant] was not wearing anything over his face."

[47] After observing the inconsistencies and discrepancies in the evidence of Mr Smith Jr, the learned trial judge ultimately rejected his evidence. She concluded that:

> "Now, as it relates to this witness Ian Smith Jr, I took particular note of his demeanour when he gave his evidence. I can only describe him as being very angry and to me he appeared quite reluctant, he indicated that he didn't want to be here to give evidence. Based upon my assessment of Mr. Ian Smith [Jr], I find that his evidence as to the identification of [the applicant] and Mr Williams ['Jukie'] grossly unreliable and I reject it accordingly."

[48] The learned trial judge considered the evidence of Mr Bryan, who indicated that he knew all five accused men, including the applicant. She considered his evidence that after some shots were fired, he ran into the house and looked through a hole in a sheet of zinc that covered his window, which was the size of a $20.00 coin. It was at this time

that he said he was able to see the persons on the ground and the applicant moving towards Miss Vee and firing several shots at her.

[49] The learned trial judge concluded that she had doubts as it relates to evidence of identification given by Mr Bryan. She said this:

> "Now, in cross-examination the accuracy of Mr. Alva Bryan could properly [sic] be at the time was tested by learned counsel for [Mr Andrew Edwards, applicant's co-accused] and he indicated in his evidence that it took him about 30 seconds to run from the table where he was to his house. When I observed in the scene of crime photos the distance of the table from where his doorway was it is clear to me that he couldn't have covered that distance in 30 seconds. Also, he indicated it was put to him [sic] about the time he took to walk from a school [sic] in court into the witness box and he indicated that this took him 40 seconds. However, the court timed it and it couldn't have taken him - it took him about one to two seconds to cover the distance in court that he estimated to be 40 seconds. What this shows me is that Mr Alva Bryan has a problem with time and the estimation of time. So therefore, as a matter of fact, I find that his observation of two or three minutes was exaggerating [sic]. Another issue has arisen in terms of his ability to see these five persons who he said he saw, he said that he made his observation through a hole in a zinc, in the zinc of the window about the size of a 20-dollar coin, the CD which is in evidence and learned counsel asked me to look at it and I did, and the truth of the matter is that when I zoomed in on that area of the window I was not able to find any hole in the zinc resembling the size of a 20-dollar coin. It is for these reasons that have caused me doubt, to have a serious doubt as it relates to the evidence of the identification of the five persons by Mr. Alva Bryan. So therefore, in [sic] respect to Mr Bryan's evidence as it relates to the identification of five men I am not satisfied so that I feel sure that he would have been in a position to identify the five men he saw."

[50] The learned trial judge, before announcing her verdict, reviewed equally carefully the evidence of Mr C Smith and Mr Smith Snr. She considered the lighting conditions as

well as the fact that the identification was made under difficult circumstances and said this:

> "Based upon the evidence of Clifford Smith and Ian Smith jnr [sic] and the evidence that they given [sic] as to identification, I am satisfied so that I feel sure…
>
> I am satisfied so that I feel sure that one, they had ample time and opportunity to observe and identify the [applicant]. I am satisfied that the lighting conditions were adequate, that they were in close proximity to [the applicant] and however I agree that the identification of him would have been made in what we call difficult circumstances because shots were being fired, I note that Mr Clifford Smith that he was not frighten [sic], that he was able to see [the applicant] because [the applicant] he said was the man who came out front under the streetlight and was firing on Miss [Vee] and firing several shots. Mr. Ian Smith snr also gave evidence that [the applicant] was the man out front under the streetlight and he made his observation of both of them from a very short distances [sic] of between ten to eleven and half feet under a very bright streetlight, this is a man Mr Ian Smith snr said he knew from a boy growing up as a case of recognition...."

[51] It is pellucid that the learned trial judge, in dealing with the crucial issue of identification, considered the terms of the warning, the need for caution and why such caution is necessary. She then proceeded to rehearse the evidence of all the complainants. She reminded herself of the most critical elements in this case, such as the lighting, the duration the complainants saw the applicant, whether their view was obstructed in any way, and the fact that they previously knew the applicant.

[52] The learned trial judge cannot be faulted for accepting that the time Mr Smith Snr and Mr C Smith had to observe the applicant was sufficient given that it was recognition of someone they had known before. In **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered 26 February 1996, this court recognised that in cases of recognition, the time for observation need not be as long as in the cases where the witness had no prior knowledge of the assailant.

[53] In these circumstances, we did not agree with counsel for the applicant that the learned trial judge fell in any error in her approach to the identification evidence. Grounds I and II were accordingly found to be without merit and failed.

Ground III

Submissions

[54] Mr Osbourne submitted that given that the applicant was a young man with no previous convictions, the sentence of 22 years' imprisonment at hard labour for wounding with intent was excessive. He contended that a range of 25-30 years would not meet the justice of this case. He submitted that the statutory minimum was appropriate. In relation to the count for illegal possession of firearm, counsel referred to **Kenneth Hylton v R** [2013] JMCA Crim 57, where Harris JA, after a brief review of some recent sentences, observed: "a starting point of 10 years for illegal possession of firearm is the preferred tariff".

[55] Crown Counsel pointed out that the applicant was charged under section 20 of the Firearms Act for the count of illegal possession of firearm. She noted that The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts ('the Sentencing Guidelines') indicates that there is no statutory minimum for this offence and set the normal range for this offence as being between seven to 15 years with the usual staring point being 10 years.

[56] In relation to the eight counts of wounding with intent, Miss Hickson pointed out that there is a statutory minimum of 15 years if the offence is committed with a firearm. The normal range is 15-20 years. Counsel recognised that at the time of sentencing, the learned trial judge did not consider the case of **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') as the judgment had not yet been handed down. She submitted that, in the circumstances, using **Meisha Clement**, the sentence could be adjusted.

[57] Crown Counsel submitted that it would not be unreasonable to accept a starting point of 18 years. Crown Counsel relied on the cases of **Deryck Azan v R** [2020] JMCA

Crim 27 and **Omar Brown v R** [2015] JMCA Crim 31 in support of this submission. She submitted that given the aggravating factors, including the fact that eight persons were shot and injured, one of whom is paralysed, the figure could be adjusted upwards by four years. She identified as the only mitigating factor that the applicant is a father of two children, which would reduce his sentence by one year, with a further two years' discount for time spent in custody. This would leave a figure of 19 years which would fall within the normal range.

Discussion and disposal

[58] In **Meisha Clement,** Morrison P in discussing the proper approach of this court where there is a challenge to the sentence which was imposed by a trial judge stated at para. [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."

[59] For the sentencing exercise, the learned trial judge had the antecedent report of the applicant and a social enquiry report. At the commencement of the exercise, she expressly took into account what she identified as mitigating factors: the applicant was twenty-nine years old; he was previously employed before being taken into custody; he was in a common law union with two children; had no previous convictions; and had spent two years in custody prior to trial. She indicated that she had read with care and had taken into account what was reported in the social enquiry report.

[60] The learned trial judge then made the following comment:

> "As you will have heard your attorney said Parliament has prescribed a minimum mandatory sentence for the offences for which you have been charged and even if Parliament had not prescribe [sic] that minimum sentence, this court is of the opinion that the offences for which you have been convicted are very very violent offences so very serious that only a custodial offence [sic] can be justified for the offences. I believe base [sic] on the report there is a minimum requirement."

[61] The learned trial judge indicated that, in her view, the applicant's continuous plea of innocence demonstrates a lack of remorse. She stated that she believed a custodial sentence would protect other persons in society. She further indicated that, on the evidence, she found that the applicant was "the pointing man,…the man out front with the firearm". She also found that he was the man who emptied his gun "until it went click click shooting Miss [Vee] while she lay helpless under that table". Thus, she went on to conclude as follows:

> "So, having considered both mitigating factors and having considered also aggravating factors of this case which I have outlined, I am of the view in relation to Count One of the Indictment for which you have been convicted that you should receive fifteen years imprisonment at hard labour and as to counts two to nine of the Indictment I had considered that a sentence of twenty-five years would [sic] an appropriate sentence in the circumstances. I am going to take into consideration that you have spent two years in custody. So on Counts Two to Nine of the Indictment you will serve twenty-two years in prison at hard labour. The sentences are to run concurrently."

[62] The learned trial judge clearly demonstrated an appreciation of the factors that should guide the sentencing exercise. It is acknowledged that she did not have the benefit of the guidance given by this court relating to the approach now expected as set out in **Meisha Clement**. However, it is also to be acknowledged that some guidance existed in older decisions, the most notable of which is **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment

delivered on 5 July 2002. In that case, Harrison JA, writing on behalf of the court at page 4, stated the following:

> "If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence as a starting point, and then go on to consider any factors that will serve to influence the length, whether in mitigation or otherwise."

[63] Whilst the learned trial judge did not expressly state it, it is apparent that she correctly used the statutory minimum sentence prescribed for the offence of wounding with intent, by virtue of section 20 of the Offences Against the Person Act of 15 years' imprisonment as the starting point. The mitigating and aggravating factors she identified were sufficiently appropriate, but she did not outline the mathematical calculation she utilised in arriving at the final sentence.

[64] In **Carey Scarlett v R** [2018] JMCA Crim 40, Brooks JA (as he then was), writing on behalf of this court, stated at para. [31]:

> "… The fact that there was a statutorily imposed minimum sentence necessarily means that, for wounding with intent, using a firearm the low end would be 15 years. The high end of the normal range, would of course be 20 years."

[65] Notably, in that case, the sentence imposed was 25 years, which was found to be well outside the normal range. In reducing the sentence to 18 years, it was stated that nothing in the case justified such a high departure from the norm. To our minds, the circumstances, in this case, warrant such a departure, given the unprovoked shooting at a group of people resulting in eight persons being injured, some more serious than others. Interestingly, the learned trial judge deducted three years for the time spent in custody before sentencing when the actual time was two years and four months. We were satisfied that there was no basis for disturbing the sentence of 22 years on the counts of wounding with intent.

[66] The learned trial judge did not clearly express the fact that there is no statutory minimum for the offence of illegal possession of firearm. She failed to identify a starting point before demonstrating the impact of the aggravating and mitigating factors and thereafter arriving at the sentence of 15 years. It was on this basis that this court could be able to interfere with the sentence imposed.

[67] The Sentencing Guidelines issued in 2017 provides that the normal range for this offence is seven-15 years, with the usual starting point being 10 years. This is a case where the nature and intrinsic seriousness of the offence were enough to serve as aggravating features justifying an increase in the starting point to between 13 and 17 years.

[68] The aggravating factors identified by the learned trial judge, especially the role that the applicant played in the attack, generally and his actions towards Miss Vee, in particular, would have operated to significantly increase the sentence to between 20-24 years. The mitigating features were minimal and would not have significantly reduced the sentence arrived at after the aggravating factors were considered. When both factors are balanced, the sentence proportionate with this offence falls within a range of 17-21 years. The applicant would then be entitled to receive full credit for time spent in custody before sentencing, which was two years and four months. The time the applicant would serve would be between 14 years and eight months and 18 years and eight months. The sentence imposed by the learned trial judge fell well within this range and could not, therefore, be regarded as excessive. In any event, the sentence for illegal possession would run concurrently with the sentences for the eight counts of wounding with intent, which is a mandatory minimum of 15 years. There was no basis for disturbing the sentence.

[69] It was for these reasons that we made the orders at para. [3] above.