[2019] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 81/2013

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

PETER CAMPBELL v R

Miss Zaieta Skyers and Ravil Golding for the appellant

Miss Paula Llewellyn QC and Rosheide G Spence for the Crown

12 February and 5 April 2019

EDWARDS JA

[1] On 5 October 2012, the appellant was tried and convicted by Daye J in the Western Regional Gun Court, in the parish of Saint James, on an indictment charging him with the offences of illegal possession of firearm and robbery with aggravation. The appellant was sentenced to nine years' imprisonment on the former and 15 years' imprisonment on the latter, to run concurrently.

The application for leave to appeal

[2] The appellant filed an application to this court for leave to appeal conviction and sentence, which was considered by a single judge of appeal on 18 October 2017. The

application for leave to appeal conviction was refused on the basis, inter alia, that the issues which arose at the trial were adequately dealt with by the learned trial judge and there was enough evidence to ground the convictions. With regard to the sentence imposed for the offence of illegal possession of firearm, the single judge found that the sentence of nine years' imprisonment could not be said to be unreasonable or manifestly excessive, in light of the fact that the appellant had a previous conviction for illegal possession of firearm, for which he had been sentenced to five years' imprisonment. With respect to the sentence imposed for the offence of robbery with aggravation, the single judge formed the view that the sentence of 15 years fell within the usual range of sentences imposed for that offence. However, the single judge granted leave to appeal sentence, on the basis, inter alia, that a reading of the relevant statute and authorities would suggest that the learned trial judge, who thought he was statutorily bound to impose a minimum sentence of 15 years for robbery with aggravation, was wrong to so conclude, as he was not so bound.

[3] At the hearing of the appeal, counsel for the appellant, Mr Ravil Golding, submitted that having perused the transcript, it appeared to him, that in so far as the convictions were concerned, he could mount no credible challenge. He noted that the main Crown witness had more than sufficient time to observe the appellant at the time of the incident, which lasted for about 25 minutes. Counsel noted also that, although the circumstances for identification were not ideal, the witness saw the accused for approximately four minutes at a distance of some 5-6 feet, and at the nearest point, some 2-3 feet, in good lighting conditions. Counsel pointed out that the complainant's cell phone was found in

the house occupied by the appellant. He also took the view that the line of questioning pursued by counsel at the trial, would suggest that the appellant was placing himself at the scene. Counsel submitted that at the end of the day, there was sufficient evidence of identification on which a jury properly directed could convict. Counsel also pointed to the fact that, although there had been an issue with an irregularity in the conduct of the identification parade, this had been adequately dealt with by the trial judge.

[4] Having perused the transcript ourselves, we are content that there is merit in counsel adopting this stance.

[5] Mr Golding, therefore, sought and obtained leave to abandon grounds (a), (b) and (d) of the original grounds of appeal against conviction and to only argue the supplemental grounds filed in respect of the appeal against sentence.

The facts

[6] The facts, briefly stated, are that on 1 March 2012, two men pounced upon the complainant, who had stopped along the Greenwood main road to examine his truck, which had broken down. One of the two men, who the complainant later identified as the appellant, had a gun. The appellant told him not to move. The complainant had no money on him and told the two men that he only had about $2,170.00 in the truck. The appellant told the other man to search the truck and said that he was going to kill the complainant. The appellant ordered the complainant to take off his pants and go into the sea. The complainant complied. Whilst the complainant was there with the appellant, the other man came over and said he only found $2,150.00 in the truck. The man then

took out two cell phones and some money and placed them on a stone. One of the phones, the blackberry phone, was the complainant's, the other was his work phone. The appellant told the complainant to swim out to sea, took the phones and monies and left with the other man. The complainant came out of the water, took a taxi and made a report to the police. On 9 March 2012, the appellant was pointed out on an identification parade.

The supplemental grounds of appeal

[7] At the hearing of this appeal, counsel for the appellant argued the following supplemental grounds:

> "1. The learned Trial Judge fell into error when he mistakenly took the position that he was bound by statute to impose a minimum sentence on the Appellant that is fifteen years, thereby depriving the Appellant of the possibility and or benefit of a lower sentence.
>
> 2. Further or in the alternative the sentence of fifteen years in the particular circumstances is manifestly excessive."

Counsel also left ground (c) of the original grounds to be subsumed in the supplemental grounds of appeal against sentence and which was as follows:

> "(c) sentence excessive."

Submissions

Appellant's submissions

[8] Counsel Mr Golding conceded that the sentence of nine years' imprisonment imposed on the appellant, for illegal possession of firearm, was not manifestly excessive, in view of the fact that he had been convicted in 2007 for similar offences of illegal possession of firearm and illegal possession of ammunition. At that time, counsel noted, a sentence of five years had been imposed on him and he had only been released in 2010.

[9] Counsel argued, however, that the sentence of 15 years for robbery with aggravation, using a firearm, was out of line with sentences for this offence but the trial judge wrongly felt himself constrained to impose it as the statutory minimum. Counsel submitted that the judge was not so constrained because the appellant was not charged under any section circumscribed by the amendments to the Firearms Act. Counsel cited **Leon Barrett v R** [2015] JMCA Crim 29, **Stevon Reece v R** [2014] JMCA Crim 56 and **Jerome Thompson v R** [2015] JMCA Crim 21 in support of his contentions.

[10] Counsel argued further, that it was clear from those decisions, that in so far as section 20(1)(b) of the Firearms Act is concerned, there is no applicable statutory minimum. Counsel also noted that the statutory minimum did not apply to the offence of robbery with aggravation, pursuant to section 37 of the Larceny Act. Counsel submitted, therefore, that in the appellant's case, the statutory minimum would only have been applicable if the appellant had been charged under section 25(1)(b) of the Firearms Act.

On that basis, counsel argued, the learned judge deprived the appellant of the benefit of his discretion.

[11] Counsel submitted that this court would now have to determine whether a sentence of 15 years' imprisonment was, nevertheless, appropriate in all the circumstances. Counsel cited the case of **Jerome Thompson v R** where the court noted that the usual sentence imposed for robbery with aggravation involving a firearm was 12 years. Counsel also pointed to the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, where the usual range of sentence for robbery with aggravation was listed as 10-15 years, with a usual starting point of 12 years.

[12] Counsel noted that an aggravating feature of the offence was the fact that the complainant was stripped, threatened with death and sent into the sea. This, he said, could result in an increase in the sentence by one year. He also pointed out that the complainant was not assaulted or injured in any way. In his written submissions counsel noted that the court could consider an increase in the sentence to take account of the fact that the appellant had a previous conviction. However, counsel seemed to have resiled from this position in his oral submissions, instead arguing that the trial judge, having taken the previous convictions into account in sentencing for the illegal possession of firearm charge, ought not to take it into account again, in sentencing for the robbery with aggravation charge. Counsel also noted that the appellant had shown some remorse

at the sentencing stage by saying he was sorry. Counsel submitted that a sentence of 13 years' imprisonment was more appropriate, in the circumstances.

Crown's submission

[13] Counsel Mr Rosheide Spence submitted, on behalf of the Crown, that the bone of contention was whether the 15 years' imprisonment was manifestly excessive. Counsel conceded that the judge was in error, to the extent that he felt himself bound to give the statutory minimum sentence of 15 years, as there was no statutory minimum sentence for a charge under section 37(1)(a) of the Larceny Act for robbery with aggravation, even with a firearm. He, therefore, concurred and supported Mr Golding's submission on the law and the authorities cited in support thereof.

[14] Counsel argued, nevertheless, that the sentence of 15 years was not manifestly excessive bearing in mind:

(a) the appellant had two previous convictions; and

(b) he was just released from prison and reoffended in a short space of time.

Counsel submitted that this could only be viewed as extremely aggravating circumstances.

[15] Counsel argued further that sentencing must be considered as a whole, and although the trial judge did not specifically mention the principles of sentencing such as deterrence, punishment, rehabilitation and the protection of society, he must have had them in his contemplation when passing sentence.

[16] Counsel noted that there were no mitigating factors for the court's consideration, in this case, except for the late statement of remorse made by the appellant at his sentencing hearing. Counsel also pointed out that the firearm used was not recovered and that such offences were far too prevalent. Counsel noted too, that it was correct for the judge to have taken into account the fact of the appellant's influence on the younger co-accused who had no previous convictions. Counsel relied on the case of **Michael Burnett v R** [2017 JMCA Crim 11 and **Delevan Smith et al v R** [2018] JMCA Crim 3.

Discussion and conclusion

[17] The single issue is whether the sentence imposed by the trial judge was manifestly excessive, in all the circumstances. However, before determining that issue, it is necessary to examine how the judge arrived at the sentence he imposed on the appellant.

[18] It is true that the judge expressed the erroneous view that he was bound by the statutory minimum of 15 years in sentencing the appellant for the offence of robbery with aggravation, using a firearm. This is an issue that has arisen from time to time following upon the amendments to the Firearms Act. Those amendments included the imposition of a statutory minimum sentence of 15 years for certain offences charged under that Act. The offence of illegal possession of firearm or ammunition, charged under section 20(1)(b) of the Firearms Act, is not affected by these amendments. Therefore, there is no statutory minimum sentence for persons convicted under that section and the judge still retains a discretion as to sentence for any conviction under section 20(1)(b).

[19] This issue has already been laid to rest by this court in the case of **Leon Barrett v R**. In that case the appellant challenged his conviction and sentence by the learned judge, who had imposed a sentence of 15 years for illegal possession of firearm, two years for assault and 10 years for indecent assault. This court confirmed that offences tried and convicted under section 20(1)(b) of the Firearms Act are not subject to the statutory minimum and that the amendments to that Act did not affect section 20 (1)(b). It was pointed out, in that case, that the amendments were made only to sections 4, 9, 10, 24 and 25. Reference was also made to the case of **Jerome Thompson v R**, as well as **Stevon Reece v R**, in which the distinction between section 20(1)(b) and section 25 was discussed. F Williams JA (Ag) (as he then was), who gave the judgment of the court in **Leon Barrett v R**, in concluding on the point, said:

> "The position is similar here. Section 20(1)(b) is the section that creates the offence of illegal possession of firearm. It is to that section that we must look in order to ascertain the applicable penalty. That penalty remains as it was before the principal Act was amended in 2010: the maximum sentence is life imprisonment. However, there is no mandatory minimum prescribed under this section."

[20] Section 25 of the Firearms Act introduced two separate and distinct offences from that provided in section 20(1)(b). For an explanation on that see **R v Henry Clarke** (1984) 21 JLR 72 at 74 and **Stevon Reece v R** at paragraph [29]. Those offences are in sections 25(1) and 25(2) of the Firearms Act.

[21] Section 25(1) states:

> "Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to

> commit or to aid the commission of a felony or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this subsection."

Section 25(2) states:

> "Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule, has in his possession any firearm or imitation firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly."

Section 25(3) states:

> "Any person guilty of an offence against subsection (1) or (2) shall be liable on conviction on indictment –
>
> ...
>
> (b) before a Circuit Court to imprisonment for life or such other term being not less than fifteen years, as the Court considers appropriate with or without hard labour ..."

[22] Section 25 of the Firearms Act, therefore, makes the possession and use of a firearm or imitation firearm in certain circumstances an offence. Section 25(1) of the Firearms Act makes it an offence to use or attempt to use a firearm or imitation firearm with the intent to commit or aid in the commission of a felony or to resist or prevent lawful apprehension or detention. Section 25(2) of the Firearms Act provides that any person who commits an offence listed under the first schedule to the Act, and at the time of committing that offence, had in his possession a firearm or an imitation firearm, is guilty of an offence under that section. Section 25(3)(b) of the Firearms Act stipulates a

mandatory minimum sentence of 15 years for persons found guilty on indictment in the Circuit Court of an offence against subsection (1) or subsection (2) of section 25.

[23] The minimum sentence may be imposed, therefore, where the charge is laid under either section 25(1) or section 25(2) of the Firearms Act. Where a charge is laid under section 25(1) for the use of the firearm or imitation firearm to commit a felony, which is an offence under that section, a separate charge may be laid for the felony itself, for example burglary or robbery with aggravation. If there is a conviction on both charges, the minimum sentence is applicable to the firearm offence only, but not to the offence of burglary or robbery with aggravation for which the sentence imposed would still have to be in accordance with that provided for under the relevant enacting statute.

[24] In the case of section 25(2) an indictment for illegal possession of firearm can only be laid under that section, if at the time of the use of the firearm or imitation firearm, an offence in the first schedule to the Firearms Act had been committed. Therefore, as an illustration, if a person has been found committing an act of simple larceny (that is pursuant to section 5 of the Larceny Act which is in the first schedule of the Firearms Act) and upon his apprehension he is found with a firearm or imitation firearm, unless he shows that he has the firearm or imitation firearm for a lawful purpose, he is guilty of an offence under section 25(2) of being in possession of a firearm at the time of committing or at the time of his apprehension for committing a scheduled offence. That offence of illegal possession under section 25(2) will carry the statutory minimum of 15 years' imprisonment. However, the original offence of simple larceny would still be subject to

the sentence provided for under section 5 of the Larceny Act and not the minimum sentence applicable to the section 25(2) offence.

[25] The seeming conundrum created by the amendments to the Firearms Act was also examined by this court in the case of **Jerome Thompson v R**. In that case, the appellant was convicted of the offence of illegal possession of firearm and robbery with aggravation. He was sentenced to seven years' imprisonment in respect of the count for illegal possession of firearm and 15 years' imprisonment in respect of the count for robbery with aggravation. In that case, the trial judge imposed a sentence of 15 years' imprisonment for robbery with aggravation, on the mistaken view that it was the statutory mandatory minimum sentence. At paragraph [29] of that case Brooks JA, in giving the judgment of the court, after referring to the learned trial judge's statement reflecting his mistaken view, said:

> "The Firearms Act does not support that statement. Whereas section 25(3) of that Act stipulates a minimum sentence of 15 years for certain offences, robbery with aggravation, for which Mr Thompson was charged, is not one of them."

[26] After referring to subsections (1), (2) and (3) of section 25 of the Firearms Act and the first schedule referred to in section 25(2), the learned judge of appeal said further at paragraph [32]:

> "Mr Thompson was charged with robbery with aggravation contrary to the provisions of section 37(1)(a) of the Larceny Act. It is therefore not one of the sections mentioned in the first schedule of the Firearms Act to which section 25(2) refers. The learned trial judge was, therefore, in error, in taking the position that she was bound to impose a minimum sentence on Mr. Thompson."

This court therefore substituted a sentence of 12 years for the sentence of 15 years, which was set aside.

[27] That issue was also visited by this court in **Michael Burnett v R** [2017] JMCA Crim 11. In that case McDonald-Bishop JA, in giving the judgment of the court, said at paragraph [47] that:

> "The only comment that we would wish to make is that the learned trial judge had erroneously stated that there is a statutory minimum of 15 years for the offence of robbery with aggravation given the use of the firearm. There is no statutory minimum under the Larceny Act, which provides the maximum penalty of 21 years for robbery with aggravation. The statutory minimum of 15 years would apply to an offence committed under section 25 of the Firearms Act. The applicant was not charged pursuant to that section. However, notwithstanding that error on the part of the learned trial judge, there is no basis on which to disturb the sentences imposed."

[28] The offences referred to in section 25(2) are listed in the first schedule to the Firearms Act. As noted in both **Jerome Thompson v R** and **Michael Burnett v R**, robbery with aggravation under section 37(1)(a) of the Larceny Act is not listed in the first schedule. The offences under the Larceny Act which, when committed whilst in possession of a firearm or imitation firearm, would create an offence under section 25(2) are offences against sections 5 to 7, 17 to 20, 38 to 41, paragraphs (2), (3) and (4) of section 42 and sections 43 and 44.

[29] Therefore, notwithstanding a conviction and the imposition of the mandatory sentence for possession of a firearm or imitation firearm with intent to commit, or to aid the commission of a felony under 25(1), or being in possession of a firearm or imitation

firearm whilst committing a scheduled offence under section 25(2); upon the separate conviction for any other felony charged or any of those offences in the first schedule, the only penalty that can be imposed is still only that provided for under the relevant section of the statute governing those offences. Also, for the avoidance of doubt, where the charge is for illegal possession of firearm under section 20(1)(b) of the Firearms Act, there is no lawful power to impose a mandatory minimum sentence for that offence and in the case of any other offence charged on the same indictment for which there is a conviction, the sentence imposed must be in accordance with the statute which created that offence.

[30] In the instant case, the appellant was not charged under either section 25(1) or section 25(2) of the Firearms Act, but under section 20(1)(b), therefore, he was not liable to be sentenced to the statutory minimum sentence for any firearm offence.

[31] In addition, the appellant was charged for robbery with aggravation pursuant to section 37(1)(a) of the Larceny Act and not only is that offence not listed in the first schedule to the Firearms Act, it provides for no statutory minimum sentence. The maximum penalty under section 37(1)(a) of the Larceny Act, for robbery with aggravation, is 21 years.

[32] In this case, the judge fell into error when he felt himself bound to apply the statutory minimum when imposing sentence on the appellant for robbery with aggravation. As a result, he failed to conduct the proper sentencing exercise in order to arrive at an appropriate sentence.

[33] In the light of this, this court must consider whether, after the application of the proper sentencing principles to the circumstances of this case, the sentence imposed by the judge is manifestly excessive, in all the circumstances.

Is the sentence of 15 years manifestly excessive?

[34] Counsel for the appellant maintained that there was no egregious feature to this robbery. However, in oral arguments he accepted that an aggravating feature of the case is that the complainant was stripped of his pants, threatened with death by shooting and sent into the sea, where he could also have drowned. For that, counsel concedes there could be an increase from the starting point of 12 years, upwards to 13 years.

[35] Whilst the statutory maximum for robbery with aggravation contrary to section 37(1)(a) is 21 years' imprisonment, the Sentencing Guidelines indicate that the normal range of sentence is 10-15 years, with the usual starting point being 12 years. These guidelines were established in 2018. The appellant was convicted in 2012. In **Jerome Thompson**, which was decided in 2015, the court indicated that the usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years, which may be increased or reduced according to the circumstances. The ranges in the Sentencing Guidelines were established from experience in the courts and previous sentencing decisions. See also **Joel Deer v R** [2014] JMCA Crim 33, where this court conducted a review of some of the cases emanating from this court on sentences involving the offences of illegal possession of firearm and robbery with aggravation.

[36] We take the view that the usual starting point of 12 years is applicable to this case. We also agree that the manner in which the complainant was treated, having been threatened with death, made to strip and go out into the sea, is an aggravating feature. To that we would only add the fact that the robbery involved more than one perpetrator. The sentence could thereby properly be increased to 13 years.

[37] Counsel for the appellant, in oral arguments, resiled from his position in his written submissions that the previous conviction was also an aggravating feature to be taken into account in sentencing on the count of robbery with aggravation. He maintained that the appellant's previous convictions having been taken into account in sentencing for the illegal possession of firearm, they should not be taken into account for increasing the sentence for robbery with aggravation.

[38] The appellant in this case had two previous convictions for illegal possession of firearm and illegal possession of ammunition; which had been imposed on him in May 2007. The incident which gave rise to his convictions in the present case took place in March 2012, five years later. In sentencing the appellant on both counts of illegal possession of firearm and robbery with aggravation, the judge took into account the previous convictions of the appellant. In imposing the sentence this is what the transcript reflects that the judge said:

> "Yes ... Mr. Peter, you face a difficulty and you know that because you know you have a previous conviction. The problem I am having with that is it's not so long ago. It is 2007, that is not so long ago. 2007, five years ago, that mean you come out of prison.

> The Accused, PETER CAMPBELL: 2010
>
> HIS LORDSHIP: And you back in this nonsense. Don't know what is wrong with you, sir. Don't know what wrong with you at all and it is for a similar gun offence and you got 7 years, right, already.
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> So that means you can't get less than 7 years for the gun because you got that already. So, for the Illegal Possession of Firearm, it's nine (9) years for that. And, then, for the Robbery, fifteen (15) years for that because you have a previous conviction and because you are a mature person now. You are not like this guy here. He is a much younger fellow than you. You supposed to be – even though you have a conviction already you shouldn't have carried that fellow with you. You should say to him, "I have been to prison. Listen, things are hard out there. People get themselves in trouble. Stay far from that". That is what you should be doing because as it stands now, you are a much mature man, big man and you carry this little fellow. He is a grown fellow now but carry him in terms of influencing him and he end up now with a prison term. Your conduct end up leading to a next man getting a prison term, which it shouldn't, Mr. Peter.
>
> That's the best I can do for you because you have a previous conviction and the influence of another young man and the law says the minimum is 15 years, especially when a man have a conviction before. I believe you are sorry for it but you have to stop and deal with your life. All right, sir, that's the best I can do for you."

[39] The approach of the courts in deciding whether previous convictions should be taken into account, is to determine whether the previous conviction was a relevant conviction. If it is a relevant conviction, then it is generally regarded as an aggravating feature. The appellant's degree of blameworthiness and his antecedent information is directly relevant to the issue of the appropriate sentence he deserves. In **R v Cecil Gibson** (1975) 13 JLR 207, Graham Perkins JA observed at pages 211 - 212 as follows:

> "…[I]t should never at any time be thought that a convicted person standing in a dock is no more than an abstraction. He is what he is because of his antecedents and justice can only be done to him if proper and due regard is had to him as an individual, and a real attempt is made to deal with him with reference to the particular circumstances of his case. To ignore these is to ignore an essential consideration in the purpose of punishment, namely, the rehabilitation of the offender."

[40] Aggravating features may relate to the offence and the offender. The previous conviction of an appellant relates to him as an offender and not to the offence itself. This means therefore, that in considering the appropriate sentence to be imposed on an offender, the character of that offender is important.

[41] Paragraph 8.1 of the Sentencing Guidelines warns against double-counting for aggravating factors which may have played a part in the choice of starting point, in that they should not be used again as aggravating features to move the sentence upwards. In this case, we did not take account of the appellant's previous convictions in determining the starting point.

[42] In the inexhaustive list of aggravating factors in paragraph 8.2 of the Sentencing Guidelines, some relate to the offence and some to the offender. See also the case of **Meisha Clement v R** [2016] JMCA Crim 26 at paragraph [32]. The maturity of the offender and his previous convictions which are listed in the Sentencing Guidelines, as well as in **Meisha Clement**, as aggravating features, are personal to the offender. It is part of his antecedents.

[43] In **Joel Deer v R**, Phillips JA, delivering the judgment of this court, examined a series of cases dealing with the range of sentences in cases involving illegal possession of firearm and robbery with aggravation. In the course of doing so Phillips JA observed:

> "In this case, the record of the proceedings discloses that the appellant had been convicted of four offences: two counts of illegal possession of firearm, one count of robbery with aggravation and one count of wounding with intent for which he was then serving his sentences. These offences took place on 12 June 2009, some 20 days prior to the commission of the offences under consideration, and it seems to us that this factor could be viewed as a compelling reason to take the sentences for the offences under consideration out of the normal range. Had it not been for that fact, the appropriate sentence of imprisonment to be imposed after trial in this case, would have been 15 years as was the case in Joel Deer v R [2014] JMCA Crim 11, where in relation to the offences committed on 12 June 2009, this court upheld a sentence of imprisonment of 15 years for the offence of robbery with aggravation."

[44] In **Daniel Roulston v R** [2018] JMCA Crim 20, this court accepted that relevant previous convictions are to be treated as aggravating factors. The fact that a previous conviction is related to the offender, it cannot be said that the judge was wrong to take the antecedent of the offender into account when sentencing him on all counts. It is difficult to see how a court can separate the appellant's conduct in this case and the effect of his previous conviction as an aggravating feature, by applying it to one count and not to the other. A sentencing judge need not 'cherry pick' the count to which consideration is to be given of the defendant's previous convictions.

[45] In this case, the previous convictions were for offences involving a firearm and ammunition. The robbery with aggravation in the instant case was conducted with a

firearm, in the company of another. The appellant was given an opportunity to be rehabilitated after his first conviction and only two years after gaining his freedom he reoffended, despite, as the judge observed, achieving a greater degree of maturity. I agree with counsel for the Crown that this is a most aggravating feature of the case which requires condemnation on the whole case and not just one aspect of it. Counsel for the appellant's contention, although an interesting and novel one, is plainly without merit.

[46] Counsel for the Crown asked that we also take into account the fact that the appellant was a bad influence on his younger co-accused. The appellant was 30 years old, the co- accused 19 years old at the time of the offence. There is no evidence that he acted as a father figure to his co-accused. Neither is there evidence that he was in any position as a mentor to or in a position of trust over his co-accused. We are not inclined to visit upon the appellant the sins of his co-accused, who, although a youth offender, was also an adult.

[47] In **Michael Burnett v R** a sentence of 15 years for robbery with aggravation (with a firearm) was imposed on the appellant and counsel conceded that the sentence was not manifestly excessive in all the circumstances. This court, in that case, agreed that the sentence was in keeping with the range of sentences for those offences, for an offender with a previous conviction for an offence against the person, notwithstanding that, in that case, as in the instant case, the judge erroneously thought he was bound by the statutory minimum. In **Delevan Smith et al v R** the appellants complained that their respective sentences were manifestly excessive. In the case of the appellant in that

instant, who had been identified as the "robber with the gun", he was sentenced to 15 years' imprisonment for the offence of robbery with aggravation. This court, in that case, took the view that the sentence was well within the usual range of sentences for that offence and there was no miscarriage of justice.

[48] Crown Counsel asked this court to note that in the case of **Delevan Smith et al v R**, the inference could be drawn that the appellants had no previous convictions, as arguments as to whether they were entitled to good character direction had been raised in the case. Counsel for the Crown maintained that, in the light of this, an argument that the sentence imposed on this appellant was manifestly excessive could not be maintained. We agree.

[49] Counsel for the appellant also asked this court to take account of the appellant's statement to the court expressing remorse. We did consider the statement read to the judge by the appellant's counsel during the plea of mitigation. However, we saw nothing in that expression of regret and plea for leniency, in the circumstances of this case and coming so late in the day, which could result in any further reduction in sentence.

[50] Counsel for the appellant also raised, albeit somewhat belatedly, the issue of the disparity between the sentence imposed on the appellant and that imposed on his co-accused. He maintained that the personal aggravating and mitigating circumstances between the two co-accused was not great enough to justify such a disparity in the sentence.

[51] Having examined the transcript with respect to the sentencing of the appellant's co-accused, we cannot say that there is no justification for the difference in the sentences imposed by the judge. In the case of the appellant's co-accused he was only 19 years old at the time of his conviction and sentence. Unlike the appellant, he had no previous convictions. Both of these factors were strong mitigating factors in his favour. The judge also considered that his role in the robbery was secondary to that of the appellant. Additionally, the judge took into account the personal circumstances of the appellant's co-accused in that he was lacking a certain degree of parental guidance. He was sentenced to 5 years' imprisonment for the offence of illegal possession of firearm and 9 years' imprisonment for the offence of robbery with aggravation.

[52] There is authority for the view that the youth of an offender is a mitigating factor which would likely result in the length of his sentence being shorter than the corresponding sentence of imprisonment of a much older co-accused. There is also authority for considering the previous good character of the offender as generally being a mitigating factor. First time young offenders are, therefore, usually treated with some leniency.

[53] The issue of parity in sentencing was dealt with by the Caribbean Court of Justice ("CCJ") in the case of **Teerath Persaud v R** [2018] CCJ 10 (AJ) 1. In that case the CCJ accepted that the general principle was that co-offenders whose personal circumstances are similar and whose legal liability for an offence is relative, should receive comparable sentences. It was accepted in that case, however, that some disparity in sentencing may

be justified in certain circumstances. See the case of **Denver Bernard v R** [2019] JMCA Crim 13, at paragraphs [39] – [57], for a more comprehensive discourse on the principle of parity in sentencing.

[54] It is clear from the circumstances of this case and the factors which the judge took into account, that the disparity in the sentences in this case, was justified. We do not see any basis for reducing the appellant's sentence on the grounds of achieving parity with the sentence imposed on his co-accused.

[55] Taking into consideration all the aggravating and the lack of mitigating features in this case, it nevertheless seems to us that the sentence of 15 years' imprisonment on the count of robbery with aggravation is appropriate, in all the circumstances. There is no reason for this court to disturb that sentence. The appellant made no complaint with regard to the sentence of 9 years for the offence of illegal possession of firearm and we see no reason to disturb that sentence.

Credit for time spent

[56] The incident took place on 1 March 2012 and by 9 March 2012 the appellant was placed on an identification parade. The trial begun on 1 October 2012 and he was sentenced on 5 October 2012. There is no evidence he was offered or was on bail prior to his trial and conviction. Based on the current authorities the appellant is entitled to credit for time spent in custody, which is seven months. This was never considered by the sentencing judge. His sentence should therefore reflect a reduction for the time spent in custody.

Order

[57] In the light of the above, the court orders as follows:

1. The application for leave to appeal against conviction is refused.
2. The convictions are affirmed.
3. The sentence of nine years' imprisonment for illegal possession of firearm is affirmed.
4. The appeal against the sentence of 15 years' imprisonment for robbery with aggravation is allowed and, giving credit for the seven months spent in custody, a sentence of 14 years 5 months substituted therefor.
5. The sentences are reckoned to have commenced from 5 October 2012, and are to run concurrently.