[2021] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN J (AG)

SUPREME COURT CRIMINAL APPEAL NO 113/2012

OKEIF CARTHY v R

Cecil Mitchell and Miss Venice Brown for the appellant

Mrs Kimberley Dell-Williams and Kemoy McEkron for the Crown

18, 21 May 2021 and 9 July 2021

DUNBAR-GREEN JA (AG)

Introduction

[1] On 31 July 2012, following a trial in the Gun Court before D Fraser J (as he then was), the appellant, Mr Okeif Carthy, was convicted for the offences of illegal possession of firearm and two counts of wounding with intent. On 27 August 2012, he was sentenced to 15 years' imprisonment at hard labour for illegal possession of firearm and 22 years' imprisonment at hard labour for each count of wounding with intent. The sentences were ordered to run concurrently.

[2] The appellant sought leave to appeal against his convictions and sentences. On 24 September 2018, a single judge of this court granted leave to appeal the convictions and sentences on the basis of concern about the learned trial judge's treatment of the identification evidence and the length of sentences imposed. The single judge was of the

view that the sentences were out of range for those offences and the learned trial judge did not demonstrate, arithmetically, how he had taken account of time spent on remand. In granting permission to appeal, she also took account of the fact that the transcript of the trial did not include parts of the evidence and the unsworn statement of the appellant. It was therefore recommended that the learned trial judge's notes be secured for the purposes of the appeal.

[3] The learned trial judge's notes of evidence, filed 6 October 2020, were produced at the hearing of the appeal. There was no objection to the transcript being supplemented by the notes.

[4] On 21 May 2021, having considered the evidence and the submissions of counsel, we made the following orders:

> "1. The appeal against conviction and sentence is refused.
>
> 2. The convictions and sentences are affirmed.
>
> 3. The sentences are to be reckoned as having commenced on 27 August 2012."

[5] We indicated then that our reasons would follow, in writing. We now fulfil that promise.

The prosecution's case

[6] On the afternoon of 20 August 2009, Constables Kevin Manning and Rapp Peart were shot and seriously injured, and the police service vehicle in which they were travelling, damaged. This happened on Red Hills Road, in the vicinity of Sunrise Crescent, in the parish of Saint Andrew. The uniformed police officers were on duty and proceeding in the direction of Half Way Tree, when they came under gunfire from several persons. The officers claimed to have recognized the appellant as one of the assailants.

[7] Constable Manning gave evidence that the police vehicle came under gunfire when it stopped to allow two pedestrians to cross the roadway. At that instant, he heard loud

explosions and saw flashes of light coming from a firearm in the possession of the appellant. He said the appellant, who was known to him as "Doggy" and "Okeif McClarthy", was standing in front of the service vehicle and firing into it. There was also gunfire coming from the right side of the vehicle. The shooting caused the windscreen on the driver's side to shatter, but he was able to see through it as nothing was obstructing his view. He was on the front passenger's seat. At a point during the attack, he was injured and took cover.

[8] His evidence was that the shooting lasted for about 20 seconds during which he observed the appellant's face for about five seconds at a distance of five to seven metres. He said at the time of observing the appellant's face, nothing was obstructing his view. He had known him for about a year and would see him approximately once per month but they had only spoken once. He could not recall the last time he had seen the appellant before the shooting incident. Constable Manning also stated that the incident happened very quickly and was a frightening experience. He was injured to the face and lost an eye.

[9] Constable Peart's evidence was that he began to hear a lot of explosions as soon as he brought the vehicle to a halt. He soon realized that he was shot and injured in both arms. Some of the explosions had come from the right of the vehicle and "somewhat behind" him. He had also seen a young man emerge from his left (apparently from the left side of the roadway). The young man pointed a handgun and fired several shots into the vehicle. He was about 12 to 15 feet away. Constable Peart said nothing was obstructing his view and he was able to see the man through the windscreen. He observed his face, hands and his whole body. He saw his face for one and a half to two minutes.

[10] Constable Peart also testified that at a point, he observed blood coming from the right side of Constable Manning's face and that he appeared unconscious. He had also taken up Constable Manning's firearm from the floor, pushed it through the window,

squeezed the trigger and heard one explosion after which the firearm 'jammed'. He then drove to another point along the same road and there called for assistance.

[11] He testified that the young man that he saw shooting at the vehicle, whom he identified as the appellant, was previously known to him as "Okeif Carthy" and "Doggy". He had come to know him from his being in custody for over two years. He, initially, saw him "practically on a daily basis over a protracted period of about four months". This was at "all times of daylight and evening". He would later see the appellant on a monthly basis at about 5:00 pm. Constable Peart was unable to recall the last time he had seen him before the shooting but indicated that he had spoken to him more than once.

[12] Constable Peart gave further evidence that he was frightened but not confused. He was taken to the Kingston Public Hospital along with Constable Manning where they were treated and hospitalised for four days and three weeks, respectively. He had received 11 wounds including those to his arms and legs. He made a report of the incident to Detective Sergeant Smith.

[13] Detective Sergeant Richard Smith testified that in the afternoon of 20 August 2009, he received a transmission and went to Red Hills Road, in the vicinity of 100 Sunrise Crescent. There he saw a service vehicle parked on the left hand side of the road in the direction of Half Way Tree. He stated that he observed further what appeared to be gunshot holes in the windscreen and passenger door. Nevertheless, he was able to see into the vehicle through the windscreen. He also took note of some damage to another motor vehicle as well as 9mm spent shells on the roadway. Before leaving for the hospital, he secured the scene and made arrangements for it to be processed by the scene of crime officer, Detective Corporal Delroy Matherson.

[14] Detective Sergeant Smith also gave evidence that he visited the hospital on the same day of the shooting. Constable Peart made a report to him but he did not receive one from Constable Manning until the following day. It was his testimony that on his return to the station, after Constable Peart's report, he made an entry in the crime diary.

Further, acting on the information he had received from the officers, he went in search of the appellant and another person.

[15] On 31 December 2009, he received pertinent information and visited the May Pen Police Station and spoke to the appellant, who, after being cautioned, stated that his name was "Okeif Carthy", but denied being called "Doggy". He also denied any involvement in the shooting or that he lived at 191 Sunrise Crescent.

[16] Under cross-examination, Detective Sergeant Smith accepted that he had made two entries about the incident in the crime diary on the same evening of the report from Constable Peart. He explained that the first entry was "a global summary" of the incident and included the names of two persons who had been arrested. The second entry was about the arrest of a specific accused. Neither entry included the appellant's name. He also said that no identification parade was held but gave no explanation for not arranging for one to be held for the appellant.

The defence's case

[17] The appellant made an unsworn statement from the dock in which he denied any involvement in the shooting or that he knew Constable Manning. He neither denied nor acknowledged knowing Constable Peart. He denied being in the area since leaving in 2007. The pith of his defence was that the Crown witnesses were either mistaken or untruthful in their evidence that he was one of the perpetrators.

[18] The appellant had been tried along with another man (Campbell), who was acquitted after a submission of no case to answer.

The appeal

[19] At the hearing of the appeal, the appellant was granted leave to abandon the original grounds. Several supplemental grounds, as filed on 11 May 2021, were advanced. During the course of argument, ground 9 was abandoned. The grounds were:

"1. That the Learned Trial judge erred in finding that the witness [sic] for the Prosecution were able to identify properly or at all the Appellant as one of their attackers in the shooting incident the subject matter of the charges preferred against the Appellant and the subject matter of this appeal.

2. That the duration of the observation by the Crown witnesses and the circumstances of the observation by the Crown witnesses were such that the Crown witnesses could not identify their assailants properly or at all.

3. That the fact that neither the name of [sic] the alias of the Appellant was included in the entry in the station diary which entry recorded the shooting incident gives the clearest indication that the Crown witnesses did not know or identify the Appellant as one of their assailants at the time the Crown witness spoke with the Police Officer who made the entry in the station diary. Additionally, no further entry was made in the station diary purporting to identify the Appellant as one of the assailants.

4. That the Learned Trial Judge erred in failing to deal adequately or at all with the portion of evidence in his summation.

5. That the Learned Trial judge failed to deal adequately or at all with the evidence of the Crown witness at one stage that Okeif Carty goes by the alias of Doggy while the witness Manning states that it was the accused Campbell who was called Doggy-page 7 of the transcript and page 14 of the additional Notes of Evidence.

6. That the Learned Judge erred in holding that the Police was justified in not holding an identification parade for the Appellant in so far as Constable Peart was concerned because of Peart's alleged prior knowledge of the Appellant.

7. That in view of the circumstances of the shooting incident and the glaring omission in the station diary it was incumbent and mandatory that an identification parade should have been held as regards Constable Peart.

8. That the previous sightings or knowledge of the accused alleged by Constable Peart were not sufficient to exclude an identification parade. R v Fergus, R v Kevin Williams.

9. …

10. That the sentence was manifestly excessive…"

Issues

[20] Four principal issues were extrapolated from the supplemental grounds of appeal. They are:

I. Whether the learned trial judge erred in finding that the witnesses for the prosecution were able to identify the appellant as one of their attackers (Grounds 1 and 2);

II. Whether the failure to include the appellant's name or alias in the diary entries meant that the complainants had not identified him as one of the assailants and the effect of the judge's failure to address this in his summation (Grounds 3 and 4);

III. Whether the learned trial judge erred in holding that the police were justified in not holding an identification parade for the appellant based on evidence of Constable Peart's alleged prior knowledge of him (Ground 5, 6, 7 and 8); and

IV. Whether the sentences were manifestly excessive (Ground 10).

I. Whether the learned trial judge erred in finding that the witnesses for the prosecution were able to identify the appellant as one of their attackers (Grounds 1 – 2)

[21] Mr C J Mitchell, appearing for the appellant, submitted that the identification was made in extremely difficult circumstances which made the evidence unreliable. These circumstances were:

"(1) The suddenness and intensity of the attack;

(2) Shooting from different directions;

(3) The injuries sustained by the Crown witnesses;

(4) The instinctive and instantaneous taking of cover by the Crown witnesses; and

(5) The short duration of the attack and the rapidity of the attack."

[22] Counsel contended that the learned trial judge fell into error by relying on the identification evidence of Constable Peart because at the time he said he made the identification, Constable Peart had already been shot in both arms and shots were being fired at the service vehicle from all directions. The implication was that the officer would have been distracted by those occurrences and could not have made a correct identification. These were difficult circumstances in which to identify anyone, counsel observed. He said that Constable Peart could not have seen the assailant for one and a half to two minutes as there was evidence that the incident happened quickly. It was so instantaneous, he argued, that it could be considered a fleeting glance. The evidence that Constable Peart had also taken cover during the incident, meant that he would not have had sufficient opportunity to view the assailant.

[23] Mr McEkron's response, on behalf of the Crown, was that in a case of recognition, as this one, the identification of the appellant could not be considered a fleeting glance or a longer observation made in difficult circumstances. Reliance was placed on **Separue Lee v R** [2014] JMCA Crim 12. Crown Counsel also asserted that the learned trial judge had satisfied himself that there was sufficient evidence as to prior knowledge of the appellant by Constable Peart. Also, the length of time and the distance between the appellant and Constable Peart, as well as the time of day, facilitated a correct identification.

[24] Crown Counsel went on to point out that Constable Peart's previous knowledge of the appellant was never challenged in cross-examination. The primary challenge to Constable Peart's evidence, counsel posited, was that he had been mistaken or lied about

the identification. This was in contrast to the cross-examination of Constable Manning in which it was suggested to him that he had not known the appellant.

[25] Counsel said that the witnesses' prior knowledge of the appellant lent support to the identification. Constable Peart, in particular, being a trained police officer, would have had his attention focused on the appellant, even in the difficult circumstances of the attack and this was a point to which the learned trial judge had adverted when he remarked that Constable Peart had the opportunity to focus his attention on the perpetrator. This point was buttressed by reference to **R v Ramsden** [1991] Crim LR 295 in which Lord Lane CJ observed that although the same rules should apply across the board, identification by a police officer might make some difference and there should be "a specific direction as to the likelihood of the police officer being correct, when a mere casual observer, not a police officer, might be incorrect".

[26] Crown Counsel submitted that **Ivan Fergus v Regina** (1994) 98 Cr App R 313, on which counsel for the appellant relied, was distinguishable. In the instant case, the learned trial judge had demonstrated an understanding of the specific weaknesses of the prosecution's case when he analysed the identification evidence, both at the no-case submission stage and throughout his summation. This was also evident in his warnings, the assessment of witnesses and their evidence and the rejection of particular evidence which he felt did not meet the **Turnbull** standard required for identification. The learned trial judge was entitled to accept or reject such evidence as he considered appropriate, counsel submitted.

[27] In concluding this point, it was argued that the fact of shots being fired did not make the circumstances difficult. The requirement, based on the authorities, was for the learned trial judge to assess the circumstances and determine whether the identification was poor. The test was whether Constable Peart could identify the assailant and the learned trial judge found that he had done so. Counsel said there was nothing in the evidence to suggest that Constable Peart's ability to identify the man who shot at him, was diminished at any point. The learned trial judge had also directed himself

appropriately in accordance with the guidance in **R v Turnbull and another** [1977] QB 224, he asserted. Crown Counsel suggested that the evidence that Constable Peart had taken cover, was in response to a question in cross-examination as to where the shots were coming from and not in relation to whether he could identify the appellant.

Analysis on Issue I

[28] The principle on how this court should treat a trial judge's findings of fact was expressed quite clearly in **Kamar Morgridge v R** [2011] JMCA Crim 7, an authority submitted by the Crown. Panton P, in delivering the judgment of the court, explained at para. [14] that:

> "In relation to findings of fact, it has to be stressed once again that an appellate court does not lightly interfere with a trial judge's findings of fact. The trial judge, having seen the witnesses give their evidence during examination-in-chief and under cross-examination, is regarded as best placed to determine issues of credibility in this regard…"

[29] The learned trial judge accepted the evidence of both police officers regarding how the incident unfolded but he expressed a preference for the identification evidence of Constable Peart and stated why. He found that Constable Peart had adequate time to make the identification of the assailant who stood in front of the vehicle and fired into it, although he doubted whether this was for one and a half to two minutes. He concluded that 20 to 30 seconds was more likely to be the period in which it would have taken place but it was, nevertheless, sufficient time within which to identify the appellant whom he knew well. The learned trial judge commented on Constable Peart's evidence that he attempted to return fire, as disclosing his state of mind whilst under pressure, noting that even after the shooting Constable Peart was able to see his attacker. The learned trial judge also considered that the incident took place in broad daylight and the appellant had been viewed at a relatively close distance by Constable Peart.

[30] In his summing up, the learned trial judge gave weight to the evidence that Constable Peart was focused on the man who was firing from the front of the vehicle. He

accepted that Constable Peart was truthful and his evidence was accurate and the man he recognised as the shooter, positioned in front of the service vehicle, was the appellant. He also accepted that this was a case of recognition and gave an adequate **Turnbull** direction.

[31] In addressing the quality of the evidence, the learned trial judge analysed the strengths and weaknesses of each witness' account and considered the discrepancies in the evidence, for example, as with the direction of the shooting and Constable Manning's use of the name "McClarty" for "Carthy" in reference to the appellant. However, these were not found to be critical. The learned judge had also given less weight to the identification evidence by Constable Manning. In particular, he noted Constable Manning's testimony that he had the appellant in his view for only five seconds, had sustained an injury to an eye while the shooting was in progress, his attention had been drawn to persons shooting from the right side and that he did not have the extensive prior knowledge of the appellant, as Constable Peart.

[32] We considered that these were relevant factors and that the learned trial judge's directions were comprehensive and consistent with the guidance enunciated in **Turnbull**. Clearly, he had before him, evidence on which he could determine that a correct identification had been made.

[33] In the light of these considerations, we found no merit in those grounds.

Issue II - Whether the failure to include the appellant's name or alias in the crime diary entries meant that the complainants had not identified him as one of the assailants and the effect of the judge's failure to address this in his summation (Grounds 3 and 4)

[34] Mr Mitchell's starting point was that it was crucial to the appellant's case that the diary entries did not mention his name or alleged alias, yet they were made on the very day of the incident, after Detective Sergeant Smith had spoken to Constable Peart. He said it was noteworthy that one of the entries addressed the issue of an arrest and named two persons and the other named a person who had been arrested. It was therefore

inescapable that if Constable Peart had seen and recognised the appellant he would have given Sergeant Smith the name, who, in turn, would have written it in the diary entries. We were also urged to consider that the learned trial judge had made no findings regarding that aspect of the evidence.

[35] In response, Crown Counsel submitted that the learned trial judge could have only speculated as to why the name of the appellant was not included in either of the diary entries and, had he done so, he would have fallen into error. The important point, he contended, was that the learned trial judge stated that he had carefully considered the totality of the evidence in coming to his findings and had also enquired of counsel whether he had omitted to consider any aspect of the evidence.

[36] Crown Counsel emphasised that there were multiple complainants and suspects and it was the evidence of Detective Sergeant Smith that he had written a "global summary" of the incident in the crime diary. He referred to page 43 of the transcript where Sergeant Smith stated that he began to seek out the appellant, among others, based on the information he had received. This issue went to credibility and the failure to write names in the crime diary could not by itself trump the identification evidence.

Analysis on Issue II

[37] There was no explanation as to why the appellant's name was not entered in the crime diary. Based on the judge's notes, Detective Sergeant Smith had confirmed under cross-examination that the names he had entered in the diary pertained to two men who were arrested but not charged. The learned trial judge could go no further with that issue, without the risk of speculating, as Crown Counsel contended. He went on to assess the complainants' evidence and made findings as he saw fit, without hinging their credibility and the reliability of their evidence on what Detective Sergeant Smith had done or omitted to do, in relation to the crime diary entries.

[38] We found no fault with the approach which was taken by the learned trial judge. The case turned on whether either or both of the complainants could be believed that

the appellant was the assailant who fired at them and the reliability of the identification evidence. The learned trial judge, having been satisfied that Constable Peart was a credible witness and his evidence accurate, could conclude as he did about that matter.

[39] Against that background, we found no merit in grounds 3 and 4.

Issue III Whether the learned trial judge erred in holding that the police were justified in not holding an identification parade for the appellant based on the evidence of Constable Peart's alleged prior knowledge of the appellant (Grounds 5,6, 7 and 8)

[40] Mr Mitchell submitted that the learned trial judge failed to deal adequately, or at all, with the evidence of Constable Manning in which the alias "Doggy" was ascribed to the appellant as well as the other accused. He also contended that it was an error for the learned trial judge to have concluded that Constable Peart's previous knowledge obviated the need for an identification parade, in circumstances where the identification evidence was not of the standard required. Furthermore, the appellant's name was not entered in the crime diary and there was only a dock identification of the appellant, by both witnesses.

[41] For his part, Crown Counsel contended that the learned trial judge had demonstrated that he clearly recognised the inconsistencies in the evidence of Constable Manning concerning the alias which was used for the appellant, and he had dealt appropriately with the issue by rejecting aspects of his evidence. With regard to the absence of an identification parade, **Kevin Williams v R** [2014] JMCA Crim 22 was referenced for the proposition that there should be exceptional circumstances for not holding an identification parade. But in relation to that point, counsel asserted that it would have been redundant to hold a parade because of the extent of previous knowledge by the witnesses.

Analysis on Issue III

[42] The Privy Council dealt with the importance of an identification parade in **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28 at para. 28:

> "28. It is now well settled that an identification parade should be held where it would serve a useful purpose – *R v Popat* [1998] 2 Cr App R 208, per Hobhouse LJ at 215 and endorsed by Lord Hoffmann giving the judgment of the Board in Goldson and McGlashan v The Queen (2000) 56 WIR 444. In *John v State of Trinidad and Tobago* [2009] UKPC 12, 75 WIR 429 addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice – see *Goldson* at (2000) 56 WIR 444, 450" (Italics as in the original)

[43] That approach was followed in **Kevin Williams v R**, where Brooks JA (as he then was) made the following observation at para. [19]:

> "…unless there are exceptional circumstances and unless the suspect is well known to the witness, an identification parade should be held for that suspect…"

[44] The question of whether an identification parade should have been held turns on how well the alleged assailant was known to the witnesses and whether that knowledge

was disputed. The learned trial judge accepted the evidence that Constable Peart knew the appellant well and that he had him in his view for an adequate time to have recognised him as the assailant. The learned trial judge also observed that Constable Peart was not challenged on his claim that he knew the appellant or as to the extent and particularization of that knowledge.

[45] **Kevin Williams v R** can therefore be distinguished on the facts. In that case, the prosecution alleged that Mr Williams and two other men were standing on Jones Avenue, Spanish Town in the parish of Saint Catherine, when two police officers approached them. Mr Williams and another man opened fire at the officers. The police officers returned fire and the three men ran and made good their escape. The sole eyewitness, a police officer, claimed to have known Mr Williams for two years prior to the shooting. He could only recall four occasions on which he saw Mr Williams and had spoken to him once. It was argued on Mr Williams' behalf that the reliance on the prior knowledge of the witness was unsafe as it was not established on the evidence. Counsel contended that even though the police officer said he had seen Mr Williams on "numerous" occasions, he could only particularise four such occasions. Those four sightings, counsel contended, were insufficient to support the learned trial judge's finding of a case of recognition.

[46] On appeal, this court found that the sightings could not have amounted to the applicant knowing the witness as the evidence was lacking in the specificity of time and circumstances. Therefore, it was held that the evidence in support of recognition was not strong enough to obviate the need for an identification parade.

[47] In this case, Constable Peart's evidence disclosed prior knowledge which did not lack specificity of time and circumstances. He knew the appellant for over two years and for the first four months would have seen him "practically on a daily basis", at various times of the day. Subsequently, he would have seen the appellant, monthly. He had also spoken with him on occasion. Constable Peart had also indicated where he had seen him. This evidence was not challenged.

[48] In our view, the evidence established a basis for finding that an identification parade would have served no useful purpose. This is so, notwithstanding the learned judge's conclusion, properly in our view, that weaknesses in Constable Manning's evidence justified the holding of an identification parade. It was not a compelling factor that the learned trial judge had not dealt specifically with Constable Manning's reference to both accused as having the alias "Doggy". No prejudice was caused because it was clear from the notes that he did not rely on Constable Manning's evidence in reaching the conclusion of guilt.

[49] For these reasons we found no merit in grounds 5, 6, 7 or 8.

Issue IV Whether the sentences were manifestly excessive (Ground 10)

[50] It was conceded by the Crown that the sentences imposed by the learned trial judge were manifestly excessive. Crown Counsel therefore calculated and proposed substituted sentences.

[51] For the counts of wounding with intent, Crown Counsel adopted a starting point of 15 years' imprisonment. He added a further 10 years for the aggravating factors. From this, he deducted eight years for the mitigating factors and time spent on remand. The recommended sentence was 17 years' imprisonment. For the offence of illegal possession of firearm, the starting point adopted was seven years, plus 10 years on account of the aggravating factors. From this, counsel subtracted seven years for time spent on remand and the mitigating factors. A sentence of 10 years' imprisonment was recommended.

[52] Mr Mitchell was content to accept those submissions by Crown Counsel having been of the view that the sentences were on the "high side" and not in line with those which were imposed for similar offences. He also said that the learned trial judge had not taken account of time spent in custody.

Analysis on Issue IV

[52] The antecedent report revealed that the appellant was 30 years old at the time of sentencing and that he had stopped schooling at the age of nine because of financial hardship. He was a labourer on a construction site, a higgler and had worked as a chef. He had two young dependents. The report also disclosed a previous conviction for illegal possession of ganja but this was not taken into account by the learned trial judge. Character evidence was given by Annette Pusey. She testified that the appellant was someone with whom she shared a business relationship. He was known to her for seven to eight years as someone to whom she sold baby clothes. She regarded him as a nice and jovial family man. In counsel's plea in mitigation, the learned trial judge was urged to give weight to the fact that the appellant was a productive member of society who had been gainfully employed since leaving school and that he had been in custody for two years as a consequence of the offences.

[53] Before us, the sentences were challenged on the basis that the learned trial judge had imposed them without demonstrating any regard to the ranges and starting points for those offences, resulting in them being manifestly excessive. The learned trial judge had also failed to demonstrate how he had accounted for time spent on remand in the calculation of those sentences.

[54] In his sentencing remarks, the learned trial judge acknowledged that he was not bound by the statutory minimum of 15 years' imprisonment for the offence of wounding with intent as prescribed in section 20 (2)(a) of the Offences Against the Person Act. The relevant amendment to that Act came into force after this offence was committed and was not retroactive to the date of the offence. He also observed that the offences were serious, brazen, heinous and had a grave impact on the victims as well as the wider society. He remarked at pages 145 to 147 of the transcript as follows:

> "…The result of the shooting is that one of the police officers Constable Manning among the injuries he suffered, he lost his right eye and the other police officer, Constable Peart suffered

> injuries to his upper body. Constable Manning spent three weeks in the hospital, Peart spent a shorter time. This incident occurred just in the vicinity of 2:00 p.m. [sic], broad daylight. So it is without question that this offence is very serious. Not only is it an offence committed with a firearm, but it is also a direct assault on members of the security forces…The court has to take into account the impact of the offences on the immediate victims as well as on the wider society… the high prevalence of these types of offences… mitigating factors there are… and I give full weight to the factors which emerged on your behaviour by your counsel… I also take into account the fact that you have spent just about two and a half years … in custody up to the time of today for sentencing..."

[55] In **R v Ball** (1951) 35 Cr App R 164, at page 165, Hilbery J said, in relation to how the appellate court should approach the review of a sentence imposed by the lower court:

> "…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 the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene."

[56] The principles which should guide the trial judge during the sentencing process and the approach that this court must adopt in its review of sentencing were summarised by Morrison P in **Jermaine McIntosh v R** [2020] JMCA Crim 28, at para. [29]:

> "(1) The four classical principles of sentencing are retribution, deterrence, prevention and rehabilitation.
>
> (2) It is for the sentencing judge in each case to apply these principles, 'or any one or combination of…[them], depending on the circumstances of the particular case'.
>
> (3) The now generally accepted practice is for the sentencing judge to identify a notional starting point within a broad range of sentences usually imposed for a particular offence, and to decide whether to increase or decrease the starting point to

allow for aggravating or mitigating features of the particular offence.

(4) Obtaining a social enquiry report as an aid to sentencing is generally regarded as good sentencing practice, though it will be for the sentencing judge in each case to determine whether to obtain a report in light of the circumstances of each case.

(5) This court will not lightly interfere with a sentencing judge's exercise of his or her discretion to fix an appropriate sentence, and will only do so where it can be shown that the sentencing judge (i) departed from the accepted principles of sentencing; and (ii) imposed a sentence outside of the range of sentences which the court is empowered to give, or the usual range of sentences imposed in like cases."

[57] In the earlier case of **Meisha Clement v R** [2016] JMCA Crim 26, para 41, the learned President had listed the steps to be followed by the trial judge, in arriving at an appropriate sentence, to be:

"(i) identify the appropriate starting point;

(ii) consider any relevant aggravating features;

(iii) consider any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, any reduction for a guilty plea; and

(v) decide on the appropriate sentence (giving reasons)."

[58] The principles have been applied, examined, elaborated on or otherwise expressed in a number of cases from this court, such as **Daniel Roulston v R** [2018] JMCA Crim 20), in which McDonald-Bishop JA said that the judge must also identify the sentencing range applicable to the offence, and emphasised the need to give credit for time spent on remand, while awaiting trial.

[59] Although the decision in the present case predated those to which we have just referred, as well as the Sentencing Guidelines for use by Judges of the Supreme Court

and the Parish Courts, December 2017, ('the Sentencing Guidelines'), earlier authorities would have pointed the learned trial judge in a similar direction. For example, as stated by Harrison JA (as he then was) in **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002, at page 4:

> "If … 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 of the sentence whether in mitigation or otherwise..."

[60] The reasonableness of the sentences would, therefore, have to be determined against the range of what had been imposed for similar offences. Crown Counsel put before the court, at our request, some cases to illustrate how this court has treated sentences for similar offences. The cases cited were: **Deryck Azan v R** [2020] JMCA Crim 27; **Kamar Morgridge v R** [2011] JMCA Crim 7; **Kirk Mitchell v R** [2011] [JMCA] Crim 1; **Andrew Cross v R** [2011] JMCA Crim 33; **Jessie Gayle v R** [2018] JMCA Crim 5; and **Norick Brooks v R** [2014] JMCA Crim 20. No cases were received from the appellant.

[61] In **Deryk Azan**, the offence occurred after the amendment imposing a statutory minimum sentence of 15 years' imprisonment for shooting with intent. The police had intercepted a shooting and robbery and were fired on but no injury resulted to any of them. The firearm was recovered. The applicant was sentenced to 15 years' imprisonment for illegal possession of firearm; 10 years' imprisonment for illegal possession of ammunition; and 35 years' imprisonment for shooting with intent. On appeal, the sentence for shooting with intent was found to be manifestly excessive and was reduced to 17 years' imprisonment at hard labour. The court adopted a starting point of 18 years and added two years on account of the previous bad character of the applicant. The 20 years' imprisonment was then adjusted downwards by three years on account of the mitigating factors and time spent on remand.

[62] In **Kamar Morgridge**, a police officer was shot and injured at home during a robbery. The applicant was sentenced to 10 years' imprisonment for illegal possession of firearm, 15 years' imprisonment for robbery and 15 years' imprisonment for wounding with intent. The convictions and the sentences were affirmed on appeal.

[63] In **Kirk Mitchell**, the brief facts were that two policemen approached a group of men and the applicant shot and injured one of them. He was convicted and sentenced to seven years' imprisonment for illegal possession of firearm and 15 years' imprisonment for shooting with intent and wounding with intent, respectively. The appeal against sentence was allowed to the extent that the sentence requiring counts two and three to run consecutive to count one was quashed and the sentences on all three counts ordered to run concurrently. The length of the sentences was affirmed.

[64] In **Andrew Cross**, the applicant was convicted and sentenced to 10 years' imprisonment for illegal possession of a firearm and 15 years' imprisonment for wounding with intent. In that case, a police officer was shot and injured by an occupant of a car that he had stopped, while on duty. On appeal, the convictions and sentences were affirmed.

[65] In **Jessie Gayle**, the appellant was sentenced to 12 years' imprisonment for illegal possession of firearm and 18 years' imprisonment for shooting with intent. The evidence was that he shot and injured two police officers while they were on duty. On appeal, the sentences were affirmed.

[66] The conviction was quashed in **Norrick Brooks**, so that case did not assist us.

[67] The range of sentences in these cases does not establish static markers. There can be deviations from them, if there is justification that in this case a longer or shorter sentence may be considered appropriate (see **Carey Scarlett v R** [2018] Crim 40 and **Radcliffe Allen v R** [2021] JMCA Crim 19). The point was expressed as follows, at para. [55] in **Radcliffe Allen:**

> "We are mindful that examples of how courts have treated similar cases provide a framework to assist judges in the exercise of their discretion on sentencing so that decisions are not arbitrarily disparate. This does not mean that the cases should be dealt with purely as an arithmetic comparison of the sentences imposed. It ought to be borne in mind that while judges aim for uniformity in sentencing, they take account of the particular circumstances of the case before them. Consequently, the sentencing outcome may differ, based on how much weight is accorded to the various relevant factors by the particular judge. So, when this court upholds a particular sentence it should be taken to mean that what the court is saying is that the applicable principles were applied (not necessarily expressed in the form of a checklist), and the sentence is not manifestly excessive."

[68] As was indicated earlier, in keeping with the guidance in **Evrald Dunkley**, the learned trial judge should have identified a starting point using as his reference, the range of sentences for each offence. We accept counsel's submission that the learned trial judge did not adopt this approach although he did consider relevant aggravating and mitigating factors, in arriving at the sentences. In the circumstances, it befell us to give fresh consideration to the appropriate sentence to be imposed.

[69] The normal range of sentences for wounding with intent, with the use of a firearm, as contained in the Sentencing Guidelines, is 15 to 20 years' imprisonment. This is not a wide deviation from the cases which were cited by the respondent. We adopted a starting point of 18 years for reasons that the attack was found to have been carried out as a joint enterprise, in broad daylight, evidently with some amount of planning and was characterized by violence beyond that inherent in the offence itself. We added 10 years for the fact that it was a savage attack on two uniformed police officers (persons tasked to uphold law and order in society), while they were on duty in a service vehicle, resulting in very serious injuries to them. This was one of the factors which the learned trial judge considered in imposing the sentences. This factor, in part, explains the gravity of the offence and increases the culpability of the appellant, thereby justifying a substantial increase in the sentence. Added to that, is the high incidence of this type of crime in the

society, an aggravating factor that did not elude the learned trial judge. Although not expressed, the sentence imposed was redolent of deterrence and punishment.

[70] We then took account of the mitigating factors, including the fact that the appellant had no previous conviction, was gainfully employed and had two dependent children. On account of those mitigating factors, we reduced the number of years by three and a half years. We also applied full credit of two and a half years for time spent on remand. The result is 22 years' imprisonment at hard labour for each count of wounding with intent.

[71] As regards the offence of illegal possession of a firearm, we agreed that the learned trial judge did not follow the guidance enunciated in **Evrald Dunkley**. We therefore had to consider an appropriate sentence for the appellant. Taking into account the Sentencing Guidelines and the authorities of this court, the range of sentences for that offence should be seven to 15 years' imprisonment and the usual starting point, 10 years. We determined that eight years was an appropriate starting point, given that the firearm contained ammunition and there was a level of premeditation. 10 years was added on account of the high incidence of this type of offence in the society, the fact that the firearm was not recovered and that it was used to commit two acts of felony. We then considered the mitigating factors and reduced the sentence by six months. A full credit of two and a half years spent on remand was applied and we arrived at a sentence of 15 years' imprisonment at hard labour.

[72] For all these reasons, we concluded that the sentences imposed by the learned trial judge were not disproportionate to the gravity of the offences, fit the circumstances of the case and the offender, and ought not to be disturbed. We did not agree with Crown Counsel that the sentences should be reduced.

[73] It is for these reasons that we made the orders stated at para. [4] above.