[2022] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00065

JERMAINE CHANNER v R

Mrs Delpharine Golding Jenkins for the appellant

Miss Donnette Henriques for the Crown

25 November 2021 and 11 March 2022

G FRASER JA (AG)

[1] This is an appeal by Mr Jermaine Channer ('the appellant') against sentences imposed on him by Wiltshire J ('the learned sentencing judge') on 12 July 2019, in the High Court Division of the Gun Court, holden at Mandeville in the parish of Manchester. He was convicted for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count 1), illegal possession of ammunition contrary to section 20(1)(b) of the Firearms Act (count 2) and shop breaking and larceny contrary to section 40 of the Larceny Act (counts 3 and 4). The appellant was subsequently sentenced to 13 years' imprisonment at hard labour each, with respect to counts 1 and 2 and eight years' imprisonment at hard labour on counts 3 and 4. The sentences were ordered to run concurrently.

[2] When the appellant was arraigned, on 30 May 2019, the indictment had initially contained six counts. He pleaded guilty to four of those counts. He pleaded not guilty in relation to counts 5 and 6, which averred the offence of shooting with intent contrary to

section 20(1) of the Offences Against the Person Act. The prosecution accepted the guilty pleas on counts 1 to 4 and elected not to further pursue the shooting with intent charges (counts 5 and 6).

The facts

[3] The particulars of the offences elicited by the prosecution are that on 16 May 2018, at about 2:20 am, police officers received intelligence regarding a shop breaking and proceeded to Sunny Lodge Hardware Farm and Variety Store situated at Walderston in the parish of Manchester. Upon their arrival, the policemen were greeted by gunfire and they reciprocated. The police observed two men fleeing from a Honda Civic motor car which was parked in close proximity to the hardware store. The men fled leaving the car behind. In the aftermath of the shooting, the police further observed that padlocks had been pried from the front metal door of the hardware and the entire building was ransacked. The car was searched by the police, who noted that it contained items pilfered from the hardware store and also items from a neighbouring building, which was also broken into.

[4] On searching the surrounding locale, the police found a Browning 9MM pistol, containing a magazine with four rounds of ammunition and further recovered 21 spent casings, two warheads and five bullet fragments. The Honda Civic motor car abandoned at the scene was registered to the appellant's cousin, but the vehicle was owned and used on a daily basis by the appellant. The appellant was subsequently arrested at his home and charged for the aforementioned offences.

[5] The appellant gave a written statement under caution. He confessed that he had met with two men, Jay and Shark and had discussions with them about robbing the hardware store. Shark had insider information about the operations of the hardware store and where the money was kept. According to the appellant, he left the discussion to attend to some domestic affair. On the morning of the offence, he received a phone call from Jay, at about 3:30 am, asking him to pick him up. The appellant drove to the hardware store and saw both Jay and Shark present there. He parked the vehicle, opened

the trunk and proceeded to assist Shark in loading items into it. He confirmed that on the arrival of the police, Jay fired shots at them, whereupon he fled from the scene and went home.

[6] On being charged with the several offences and after he was cautioned, the appellant made the following utterance, "I was there helping to put the things in the car, Jay fired the shots after the police".

The appeal

[7] The appellant's initial grounds of appeal, filed on 23 June 2019, cited some six grounds. A single judge of this court considered and granted his application for leave to appeal his sentences. On 25 November 2021, at the hearing of the appeal before us, Mrs Golding Jenkins, counsel for the appellant, indicated, quite candidly, that after careful consideration of the matter, she was unable to advance those grounds. With the permission of the court, counsel abandoned the original grounds and advanced instead the following five supplemental grounds:

> "1. In considering the sentence to be imposed, the learned Trial judge erred by failing to adopt the recommended approach to be used in arriving at a starting point. This failure denied the appellant a reasonable starting point and further led to a double up.
>
> 2. The trial judge erred by failing to give reasonable consideration and credit for all the facts forming the basis of the appellant's guilty plea. As a result part of the appellant's case was not considered by the trial judge.
>
> 3. The learned trial judge failed to grant the appropriate discount for an early guilty plea. Consequently, this amounted to the appellant receiving a sentence that is manifestly excessive, thereby resulting in a miscarriage of justice considering the circumstances of the case.
>
> 4. The learned trial judge failed to give valuable consideration to a number of mitigating factors.

Consequently very essential consideration in the purpose of the appellant's punishment was ignored.

5. The sentencing judge was silent on very critical matters considered in the sentencing process, and had failed to demonstrate a clear balancing of these considerations and the weight attached to them."

Submissions

Ground one

In considering the sentence to be imposed, the learned trial judge erred by failing to adopt the recommended approach to be used in arriving at a starting point. This failure denied the appellant a reasonable starting point and further led to a double up.

The appellant's submissions

[8] Counsel for the appellant strenuously argued that the learned sentencing judge failed to adopt the recommended approach for sentencing according to the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). She submitted that the appellant's previous similar offences were used as an aggravating feature in determining the starting point and again in determining the sentence, hence the addition of three years to the starting point of 15 years. Counsel submitted that this resulted in a double count. Counsel advanced that:

> "[t]he recommended approach that should have been adopted is that a clear starting point should have been identified, independent of any aggravating or mitigating factor, then after identifying the starting point, it is only then that the aggravating and mitigating factors should have been applied."

[9] In seeking to buttress her argument, counsel relied on several authorities, including **Regina v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Parish Court Criminal Appeal No 55/2001, judgment delivered 5 July 2002 and **Denver Bernard v R** [2019] JMCA Crim 13. Counsel also contended that the seminal case of **Meisha Clement v R** [2016] JMCA Crim 26, provided useful guidance for sentencing judges.

[10] Based on the foregoing, counsel contended that the appellant was deprived of a fair sentence.

The Crown's submissions

[11] Counsel for the Crown, Ms Henriques, in response, argued that the learned sentencing judge in identifying a starting point had a full appreciation of the relevant issues. She referred to **Meisha Clement v R**. In particular, counsel highlighted that this court, at paragraph [29], had enunciated that a sentencing judge in arriving at an appropriate starting point should take into account the seriousness of the offence, the offender's culpability in committing the offence and any harm which the offence has caused, was intended to cause, or might foreseeably have caused.

[12] Counsel continued that, in determining the seriousness of an offence, a 360-degree examination of the circumstances which include the offence and the offender had to be contemplated. As such, in considering the appellant's culpability as a part of the assessment of issues relevant to the starting point, the court was correct in not taking a one-dimensional view by only focusing on the appellant's level of participation, but also the character of the appellant as a participant which helped to inform his level of blameworthiness.

[13] Counsel submitted that the learned sentencing judge's reference to the appellant's previous record and community report went to his bad character. His previous offences spoke to his degree of culpability. The learned sentencing judge at that point did not treat the appellant's antecedent as an aggravating factor. According to counsel, all that she said, before identifying a starting point, was pertinent to her fixing the starting point.

[14] Counsel posited that the starting point utilized by the learned sentencing judge was entirely reasonable and that she "referenced the Sentencing Guidelines … when she identified the usual starting point as 10 years imprisonment". Counsel relied on a decision of this court, **Paul Lamoye v R** [2017] JMCA Crim 41, a case which involved more than "possession of a firearm simpliciter" where the court had enunciated that, "a starting

point, anywhere between 12 to 15 years would be appropriate". Counsel pointed out that the offences to which the appellant pleaded guilty included shop breaking and larceny. Further, the appellant had not disputed that the firearm in question had been fired at the police officers while they were attempting to foil the criminal activities of the appellant and his cronies. These, therefore, are aggravating factors relevant to the offence.

[15] According to counsel, aspects that relate to the offender, such as the dubious character of the appellant as outlined in his antecedent report , were appropriately weighed and the scale properly tipped away from the usual starting point. Regarding the double counting issue, counsel outlined that the learned sentencing judge had already identified the appellant's antecedent as an aggravating factor. She noted that, although the learned sentencing judge had demonstrated her awareness of the issue, the addition of three years on account of aggravating factors appears to have breached the Sentencing Guidelines. However, counsel maintained that "the Judge had latitude to address the offender's antecedent relative to his character" when determining a starting point.

Ground two

The trial judge erred by failing to give reasonable consideration and credit for all the facts forming the basis of the appellant's guilty plea. As a result, part of the appellant's case was not considered by the trial judge.

The appellant's submissions

[16] Mrs Golding Jenkins contended that in light of the appellant's guilty plea, the learned sentencing judge failed to sentence the appellant on the set of facts most favourable to him and in keeping with authorities such as **R v Pearlina Wright** (1988) 25 JLR 221. Counsel further highlighted that in the case of **Denver Bernard v R**, the trial judge accepted the appellant's account in relation to his involvement in the crime as forming the basis of his plea and in the instant case a similar approach ought to have been adopted in the absence of a Newton hearing.

[17] Counsel further argued that although the learned sentencing judge accepted the part of the appellant's confession that he was privy to a discussion prior to the incident, she did not accept the other part which stated that the appellant was not aware of the robbery and that his actions were limited to responding to a phone call to pick up Jay. According to counsel, the learned sentencing judge's failure affected the appellant's measure of culpability and, as such affected his opportunity of obtaining a lesser sentence.

The Crown's submissions

[18] Counsel for the Crown argued that the learned sentencing judge's utterances, in relation to the appellant's level of participation in the crimes, were not suggestive or indicative of circumstances that required the conduct of a Newton Hearing. Based on counsel's assessment, she submitted that there was no disagreement between the accounts given by the prosecution and the defence, considering that the appellant's caution statement was the primary basis of the case advanced by the prosecution. The real issue, she submitted, concerned the appellant's level of culpability. She posited that Mrs Golding Jenkins' submission that the appellant was a 'passive participant' is a characterization of the facts with which the court disagreed. Further, counsel added that by virtue of the Firearms Act and of the Criminal Justice (Administration) Act, the appellant was liable to be charged as a principal.

Ground three

The learned trial judge failed to grant the appropriate discount for an early guilty plea. Consequently, this amounted to the appellant receiving a sentence that is manifestly excessive, thereby resulting in a miscarriage of justice considering the circumstances of the case.

The appellant's submissions

[19] The Criminal Justice (Administration) (Amendment) Act ('CJAAA'), according to counsel for the appellant, provides that where a defendant on the first relevant date wishes to plead guilty his sentence may be reduced by 50%. In the instant case, counsel

stated that the appellant as early as the recording of his caution statement had accepted his culpability in the incident. Counsel referred to and relied on **Denver Bernard v R** to bolster her point that a guilty plea required a separate and distinct treatment and therefore a discount should be identifiable.

[20] Counsel contended that the learned sentencing judge only afforded minimum credit for the appellant's guilty plea. According to counsel, the learned sentencing judge was of the view that based on the appellant's previous convictions he was undeserving of a 50% discount. Counsel also highlighted that in several cases, namely: **Omar Brown v R** [2015] JMCA Crim 31 (10 years), **Jessie Gayle v R** [2018] JMCA Crim 5 (12 years), and **Travis McPherson and another v R** [2017] JMCA Crim 36 (seven years), the appellants did not plead guilty, had previous similar charges and their convictions included the more serious offence of shooting with intent. Those appellants had nonetheless received lower sentences.

[21] Counsel, in concluding her arguments on this issue, submitted that this was an appropriate case to award a 50% discount since:

a. the appellant's involvement in the crime was limited;

b. the reasons given for not affording the appellant the 50 per cent reduction were factors already taken into consideration;

c. the appellant showed remorse when he pleaded guilty and assisted the police in their investigations; and

d. the appellant's assisting the police in their investigations brought the matter to an abrupt end.

The Crown's submissions

[22] In her submissions on the Crown's behalf, Miss Henriques counsel contended that the learned sentencing judge identified the appellant's guilty plea as a mitigating factor in the sentencing process. She contended that it was undisputed that the appellant did

not plead guilty on the first relevant date. She highlighted from the transcript that the counsel who represented the appellant at the sentencing hearing had pointedly accepted that the appellant had not pleaded guilty on the first relevant date, and it was only after a change of counsel he had deigned to do so.

[23] According to the provision of section 42D(2)(a) of the CJAAA, sentences may be reduced by up to 50%. Counsel was of the view that the appellant did not fall within that first group, but within the second group categorised in subsection (b), since he pleaded guilty before the trial commenced, but after the first relevant date. Subsection (b) provides that the sentence may be reduced by "up to 35 per cent" in those circumstances.

[24] Counsel accepted the principle, as stated in **Denver Bernard v R**, that guilty pleas "demand separate and distinct treatment". She also acknowledged that the learned sentencing judge in the instant case had failed to adhere to this principle, when she failed to outline a mathematical calculation but argued, nonetheless, that such failure did not make the final sentence manifestly excessive or even excessive. Counsel asserted that it was not difficult to discern how the learned sentencing judge arrived at the sentences imposed. For the court's consideration, counsel set out the following calculations as representative of the formula utilised by the learned sentencing judge:

The starting point	15 years
Plus aggravating factors	3 years
	18 years
Minus mitigating factor (guilty plea)	1 year
	17 years
Minus time spent in custody	14 months
	15 years & 10 months
'minimum deduction' re guilty plea	2 years & 10 months * (15.7%)
Sentence	**13 years**

[25] In light of the aforementioned calculations, counsel submitted that (inferentially) a discount of 15.7% was accorded to the appellant, which translates to two years and 10 months. In the circumstances, she submitted that the learned sentencing judge did in fact give effect to section 42D(2)(b) of the CJAAA. Counsel emphasised that the CJAAA does not give the appellant an entitlement to the discount stated, but rather gives the learned sentencing judge a discretion as to the maximum percentage discount that may be allotted to a defendant in certain circumstances.

[26] Counsel did not seek to dispute the disparity in the appellant's sentences versus sentences imposed on appellants **Omar Brown**, **Jessie Gayle** and **Travis McPherson**. She noted, however, that in the referenced cases, the appellants were sentenced sometime before or around 2012, which was before the Sentencing Guidelines came into effect. Furthermore, counsel contended that this case involves facts, which are not dissimilar to the offence of shooting with intent and the learned sentencing judge could not have ignored those facts.

[27] Counsel argued that the level of the appellant's involvement was neither limited nor passive. In fact, the appellant was a part of the plan to commit the offence, he went to the hardware store after 3:00 am and actively participated in the theft. As such, the appellant's characterization of his participation does not accord with the facts and his plea to the indictment and ought not to be considered in light of section 42D(2)(a) of the CJAAA.

Ground four

The learned trial judge failed to give valuable consideration to a number of mitigating factors. Consequently, very essential consideration in the purpose of the appellant's punishment was ignored.

The appellant's submissions

[28] It is the contention of counsel for the appellant that, despite the plea in mitigation, the learned sentencing judge did not have due regard to the appellant as an individual.

Neither did she in the circumstances have regard to essential mitigating factors. Counsel relied on the authority of **R v Cecil Gibson** (1975) 13 JLR 207. Counsel complained that the learned sentencing judge had regard to only one mitigating factor, which was the appellant's guilty plea. Counsel further argued that there were important mitigating factors that were not taken into account by the learned sentencing judge. These factors included:

a) the appellant's early co-operation with the police, considering that he gave a cautioned statement shortly after his arrest;

b) the early acceptance of responsibility, being indicative of remorse and his amenability to change;

c) the appellant's limited involvement in the act;

d) the appellant being a family man with very young children whom he had a close attachment with;

e) the positive character evidence from the appellant's father and wife;

f) the 10-year gap between the two previous similar convictions; and

g) the appellant being gainfully employed at the time.

The Crown's submissions

[29] Counsel for the Crown submitted that the learned sentencing judge was correct not to have treated the grievances outlined by the appellant as mitigating factors and that she was correct in saying that the appellant being a "family man" ought to have

deterred him from participating in the offences and that the appellant had not learned his lesson from similar offences committed 10 years previously.

[30] Similarly, although the appellant was gainfully employed, the learned sentencing judge was correct in not treating this as a mitigating factor. In support of this submission, counsel relied on the authority of **Worrell Wint v R** [2019] JMCA Crim 11, at paragraph [61], which stated that "[i]n general, the previous good character of the offender carries little weight in sentencing, in very serious cases …".

Ground five

The sentencing judge was silent on very critical matters considered in the sentencing process and had failed to demonstrate a clear balancing of these considerations and the weight attached to them.

The appellant's submissions

[31] It is Miss Golding Jenkins' argument that the sentence imposed on the appellant is questionable, taking into account the enunciations of this court in **Denver Bernard v R**. Counsel contended that as a result of the learned sentencing judge's failure to demonstrate a balance of the relevant considerations and the weight attached to them, this court is deprived of the opportunity of confirming that the learned sentencing judge applied the correct sentencing principles.

[32] Counsel complained that the learned sentencing judge identified only one mitigating factor and one clear aggravating factor. The latter is the appellant's previous similar offences. In addition, counsel posited that there may have been other aggravating factors taken into account which were not clearly or explicitly identified by the learned sentencing judge as such. Counsel surmised that, after arriving at the 18 years, she gave a discount of one year regarding a single mitigating factor, thereby arriving at 17 years. However, according to counsel, it is unclear how she subsequently arrived at 13 years.

The Crown's submissions

[33] Ms Henriques commenced her submissions by outlining the sentencing process in paragraph 6 of the Sentencing Guidelines and ultimately accepted that the learned sentencing judge did not fully adhere to the stated guidelines. Counsel nonetheless argued that this did not make the sentences "questionable" (see **Jerome Thompson v R** [2020] Crim 18, at paragraph [113]). Counsel emphasised that this court should only interfere with a sentence where it appears that the judge erred in principle as per the enunciations of Morrison P at paragraph [42] of **Meisha Clement v R**. Counsel submitted that based on an overall assessment of what the learned sentencing judge had said, it showed that she had an appreciation of the relevant principles of sentencing and further the sentences are not excessive and do not require intervention from this court.

Discussion and analysis

Scope of review

[34] Notwithstanding the multiplicity of arguments and the five supplemental grounds of appeal advanced on the appellant's behalf, the central issue arising for this court's determination is whether the learned sentencing judge erred in principle in sentencing the appellant and whether the sentences imposed were manifestly excessive, thereby warranting the intervention of this court.

[35] In assessing the approach taken by the learned sentencing judge in sentencing the appellant, we are mindful of Hilbery J's guidance in **R v Ball** (1951) 35 Cr App Rep 164. At page 165, he said:

> "In the first place, this Court does not alter a sentence which is subject of an appeal merely because the members of the Court might have passed a different sentence. The learned trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed

> there was a failure to apply the right principles, then this Court will intervene."

[36] Similarly, in **Meisha Clement v R**, Morrison P in his usual erudite manner, at paragraph [43], underscored that:

> "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."

The sentencing process

[37] Counsel representing the appellant and counsel representing the Crown advanced diametrically opposed arguments as to whether or not the learned sentencing judge had the accepted sentencing principles in mind when she selected her starting point and when she sentenced the appellant.

[38] Counsel was of the view that the sentences imposed upon the appellant for the possession of firearm and ammunition offences were disproportionate when likened to similar fact cases, where those accused persons had opted for trial instead of pleading guilty and also had previous convictions recorded against them. Counsel did not see fit to apprise us as to whether or not there were any mitigating factors in those cases which gave rise to those lower sentences being imposed. Counsel for the Crown had not disputed those averments but she pointed out that all those cases had been decided prior to the Sentencing Guidelines and should not be used as comparisons, since when this appellant was sentenced in 2019, there were guidelines in place providing the learned sentencing judge with "a settled and established benchmark to work with".

[39] Mrs Golding Jenkins had also urged that in revisiting the sentences for the offences of illegal possession of firearm and ammunition, this court should impose a sentence of six years' imprisonment. She also posited, that, for the offence of shop breaking and larceny, this court should impose a sentence of three years' imprisonment and thereafter, in respect of all sentences, give full credit for the pre-sentencing custody period of 14 months.

[40] We agree with counsel for the Crown, and it is our view that a sentence will not be disproportionate merely because a lesser sentence was imposed on appellants in different cases. In each instance, the sentence will be dictated by the particular circumstances of the case. We will have to therefore closely examine how the sentencing process was executed in this instance.

[41] An examination of the transcript reveals that the learned sentencing judge had specifically alluded to the statutory maximum in relation to the firearm offences and noted that the normal range in respect to these offences was seven to 15 years. She also acknowledged that the usual starting point was 10 years.

[42] The learned sentencing judge specifically reviewed the information at hand (social enquiry and antecedent reports) and observed that the appellant was a repeat offender for similar offences which she regarded as serious. She highlighted that his community report was not a positive one, despite the character evidence that was elicited from the appellant's father and spouse. Having taken what counsel for the Crown termed a "360-degree" assessment of the offender and the circumstances of the offence. The learned sentencing judge saw it fit to depart from the usual starting point of 10 years, as recommended for illegal possession of firearm and ammunition. She instead selected a starting point of 15 years and ultimately sentenced the appellant to 13 years' imprisonment.

[43] Counsel for the appellant had urged this court to find that the sentencing process utilised in the instant case lacked "sufficient clarity" and that "the learned trial judge did

not go far enough to demonstrate the core principles used to guide her sentencing." After a thorough assessment of the transcript, we agree with counsel for the appellant that the learned sentencing judge was silent on some important matters concerning the sentencing process. The Crown, to an extent, conceded this point but was adamant that whatever shortcomings there were, this case did not warrant the intervention of this Court.

[44] At page 34 of the transcript, the approach utilized by the learned sentencing judge can be gleaned based on her utterances, there she had said:

> "So using the starting point of 15 years and applying the aggravating factors, carries the Court to 18 years and then applying the sole mitigating factor, reduces it to 17 years. And I take into consideration, as I said, it will be a minimum discount for the plea of guilty and I also have to take into consideration, the time spent in custody and the minimum deduction for the plea of guilty.
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> So, for the Illegal Possession of Firearm, count one Mr. Channer is sentenced to 13 years imprisonment at hard labour, count two for Illegal Possession of Ammunition, 13 years at hard labour and count three for the Shop Breaking and Larceny, he is sentenced to eight years at hard labour, and on count four Shop Breaking and Larceny, he is sentenced to eight years at hard labour. All sentences to run concurrently."

[45] Based on the above narrative, it is not clear to us how the learned sentencing judge arrived at the sentence she imposed in respect of each count. She did not indicate the percentage discount that she awarded for the guilty pleas and did not clearly demonstrate any arithmetical calculations of the same. Whilst we were able to discern a four-year difference between the ultimate sentence imposed on the firearm offences and up to when she calculated the one-year reduction for mitigating factors, it is not clear what portion was allotted to the discount for the guilty pleas and what portion credited for the pre-sentencing detention.

[46] As regards the offence of shop breaking and larceny (counts 3 and 4), neither counsel for the appellant nor the Crown raised any arguments or made any submissions in relation to the sentence of eight years' imprisonment imposed, but there is absolutely no indication at all as to how the learned sentencing judge arrived at that sentence. We find, therefore, that there is some merit in ground five of the appeal.

[47] As a result of all the shortcomings identified, this court must revisit the process employed by the learned sentencing judge and the sentences imposed upon the appellant and determine the appropriate sentence that ought to have been imposed after an application of the relevant principles

Identifying the normal range

[48] The sentencing process commences with the identification of the normal range of sentence applicable to each offence and reference to Appendix A of the Sentencing Guidelines affords great assistance. We have previously noted that the learned sentencing judge in this instance had in fact made reference to the relevant range of seven – 15 years in respect of the offences of illegal possession of firearm and ammunition. In the absence of any similar process relative to the offence of shop breaking and larceny, we feel it is necessary to address this issue and determine whether the learned sentencing judge had adopted a correct approach in sentencing the appellant to eight years' imprisonment.

[49] We observe that the Sentencing Guidelines are silent in terms of the offence of shop breaking, however, the offence of housebreaking is featured. We further observe that for the offence of "housebreaking and felony" (other than rape), pursuant to section 40 of the Larceny Act, the statutory maximum is 10 years' imprisonment (similar to that which obtains for shop breaking and larceny). The normal range as cited by the Sentencing Guidelines is three to eight years, with a usual starting point of four years.

[50] Counts 3 and 4 of the indictment, to which the appellant pleaded guilty, alleged the offence of "shop breaking and larceny" pursuant to section 40 of the Larceny Act,

and although the side note to section 40 speaks to "housebreaking and committing felony" nonetheless, sub-section (1), recites "shop" as one of the relevant buildings subject to the offence of a breaking and entering.

[51] For comparison, we also examined other offences within the Sentencing Guidelines, such as embezzlement, with a similar statutory maximum penalty of 10 years' imprisonment. The normal range stated is also three to eight years, with a usual starting point of four years. Therefore, we are of the view that there was ample guidance available to the learned sentencing judge to assist her in determining the range of sentences and in selecting an appropriate starting point in relation to the offence of shop breaking and larceny. How did the learned sentencing judge treat with the issue? The transcript is devoid of any reference to the process she employed. This may well give rise to the inference that she seemed to have completely ignored the Sentencing Guidelines and failed to carry out any assessment at all in relation to the offence of shop breaking and larceny.

[52] In failing to demonstrate that she had utilized the available guidance or to formulate any appropriate procedure, the learned sentencing judge fell into error and, therefore, the sentences imposed for the offence of shop breaking and larceny must also be revisited.

The starting point

[53] It is our view that ground one centers on the main issue of whether the learned sentencing judge erred in her assessment of the sentences she imposed on the appellant by selecting a starting point higher than that recommended by the Sentencing Guidelines.

[54] It would be judicious, therefore, at this point to determine what is meant by the "starting point". In **R v Saw and others** [2009] EWCA Crim 1, at paragraph 4, Lord Judge CJ observed that "the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features". This definition is echoed in

the Sentencing Guidelines and expressed as "a notional point within the normal range, from which the sentence may be increased or decreased to allow for aggravating or mitigating features of the case" (see paragraph 7.1 of the Sentencing Guidelines).

[55] The Sentencing Guidelines are, admittedly, not mandatory and a sentencing judge is at liberty to select a higher starting point than recommended. We, therefore, register our appreciation that the Sentencing Guidelines did not, in any way, interfered with the sentencing judge's exercise of her discretion with respect to sentencing. In fact, paragraph 7.6 of the Sentencing Guidelines makes it crystalline that:

> "… the usual starting points set out in Appendix A are intended to be indicative only. While it is expected that sentencing judges will generally find it convenient to adopt them, the starting point ultimately chosen in each case must be the product of the sentencing judge's fresh consideration of what the particular case requires."

[56] Mrs Golding Jenkins complained about the approach the learned sentencing judge used in arriving at the starting point. In her written submissions she stated, "in this given case, the learned trial judge deviated from the principle of first arriving at a starting point independent of the aggravating factors". We do not agree with counsel that this is a correct statement of the law. In fact, a sentencing judge is urged, in arriving at the appropriate starting point, to make assessments relevant to the particular case before him or her. We note at paragraph 7.2 of the Sentencing Guidelines that:

> "In arriving at the appropriate starting point in each case, the sentencing judge must make an assessment of the intrinsic seriousness of the offence, taking into account the offender's culpability in committing it and the harm, physical or psychological, caused or intended to be caused, or that might foreseeably have been caused, by the offence."

[57] According to Morrison P, in **Meisha Clement v R**, aggravating factors such as the level of premeditation and the use of gratuitous violence, would affect the starting point. Subjective factors which relate to the offender, such as youthfulness and previous good character, would affect his degree of culpability for commission of the offence.

[58] We, therefore, agree with counsel for the Crown to the extent that the learned sentencing judge was obliged to make a 360-degree assessment of the circumstances of the offence, when she took into consideration, as she was obliged to do, pertinent matters relating to the commission of the offence. In circumstances where a sentencing judge utilizes a higher starting point, he or she must, however, state precisely the reasons for departing from the usual. In so doing a sentencing judge could not be said to be acting contrary to the principles of sentencing.

[59] In light of the appellant's complaint, we must, therefore, scrutinize the approach and the particular words uttered by the learned sentencing judge in arriving at her starting point. After acknowledging that the offences for which the appellant was to be sentenced, did not fall within any statutory minimum, she said the following:

> "The Court, therefore, has the discretion, with respect to what would be deemed the lower end of the sentence applicable for these offences. The offence for Shop Breaking and Larceny carries a statutory maximum of ten years imprisonment. Regarding the Illegal Possession of Firearm and Ammunition the Court normally sentences within a range of seven to 15 years and the usual starting point used by the court is ten years.
>
> …
>
> Any starting point that the Court uses must reflect the serious nature or the seriousness of the offence for which the person stands before the Court. While, with respect to the offences of Illegal Possession of Firearm and Ammunition, the usual starting point is ten years. I find that, in this instance, the usual starting point of ten-years cannot be applicable to you, Mr. Channer, as you stand before the Court as a repeat offender and a repeat offender of a very similar type of offences and very serious offences, indeed. I, therefore, find that the appropriate starting point is, in fact, 15 years for this court to look at, the appropriate sentence for you."

[60] We have discerned that the two factors identified by the learned sentencing judge in setting the starting point are the seriousness of the offence and the appellant being a

repeat offender of similar types of offences (previous convictions). The argument could be made that the appellant's previous convictions for similar offences should be regarded as subjective and should properly have been reserved as a factor contemplated as aggravating, subsequent to the fixing of the starting point. Generally, in fixing a starting point it might be prudent to contemplate matters relative to the commission of the offence including harm and culpability, but this might be sometimes difficult as some aggravating factors may relate both to the offence and the offender. Ultimately, whatever consideration is utilized in determining the starting point even if it relates to the offender, such must not be used again as an aggravating factor. The fact that the learned sentencing judge utilized the appellant's previous convictions of similar types of offences, in determining the starting point, we do not regard this as fatal, so long as this factor was not further utilized as an aggravating factor to increase the sentence.

[61] The secondary argument the appellant had advanced regarding the starting point, was that it was too high. Counsel for the Crown had submitted, that the starting point utilized was not too high and that the learned sentencing judge, in this instance, could not have separated the circumstances in which a firearm was actively used from the process of her consideration. We agree with counsel's submission to the extent that, if the learned sentencing judge had ignored the circumstances of the offence, this would have been tantamount to her treating the offences of possession as possession simpliciter. This would have been at odds with the factual circumstances of the case and counts on the indictment to which the appellant pleaded guilty. We note that, although the appellant himself had not discharged the firearm, the weapon was nonetheless actively used in the commission of the offence of shooting at the police and was present during the commission of the shop breaking and larceny. In this sense, the possession of the firearm was not simpliciter and, therefore, the learned sentencing judge could not be censured for taking these facts into account when considering an appropriate starting point.

[62] We find, based on the relevant authorities, and having thoroughly considered the circumstances of the case, that a starting point of 15 years was an appropriate starting point in relation to the firearm offences (counts 1 and 2). In our review of the approach taken by her, we find that the learned sentencing judge was not in error in selecting such a starting point even though she elected one which deviated from the recommended starting point of 10 years. Furthermore, she had duly registered her reasons for so doing.

[63] Notwithstanding, the strong submissions of counsel for the appellant in relation to a double counting and an ambivalent stance taken by the Crown in that regard, we have no difficulty approving as appropriate, a starting point of 15 years for the offences of illegal possession of firearm and ammunition. We observe that the previous convictions which caused the learned sentencing judge to select a higher starting point for the illegal possession offences are also relevant in relation to the shop-breaking and larceny for reason that the appellant in two previous instances had been convicted for offences involving dishonesty. Based on the foregoing, we find that an appropriate starting point for shop breaking and larceny is four years.

[64] These are, however, just starting points, which may be increased or decreased to allow for aggravating or mitigating features of the case.

Aggravating features

[65] As gleaned from the transcript, the learned sentencing judge outlined features that she found to be aggravating. She said:

> "Starting with the 15 years, I take into consideration what would be deemed the aggravating factors. The aggravating factors, of course, being that you have similar offences, similar previous offences. And to ensure that I do not double count, it goes hand in hand with the fact that you are a repeat offender. So I will not count that as one of the aggravating factors. It is clear that you have a running association with persons of questionable character, very negative character. This was borne out by what was indicated to the Court, in respect to how you eventually found yourself

> in front of that hardware store on the morning in question. Also borne out from the information that was given to the Court, is the fact that there was planning and premeditiation with respect to the events to which you were privy.
>
> So while it is counsel acting on your behalf, submitted that you may have been a passive participant, and certainly at 37-years of age, given your history, having been privy to these discussions, the Court is of the view that your turning up on that morning, in question, in response to a phone call, does not make you as passive a participant as Counsel would want us to believe.
>
> It is obvious, in spite of the fact that you have been, with respect to the similar previous offences, they were some number of years ago. Again, it doesn't appear that you have learnt [sic] from your negative contact with the judicial system. As it would have been very prudent to stay as far away as possible from anything that even looked like illegal activity and you did not."

[66] Mrs Golding Jenkins endeavoured to identify an element of double counting based on the above passage. Ms Henriques argued that it was the appellant's misconception that a starting point should not take into consideration any aggravating factors at all which has led counsel to say there was double counting. She argued that it would appear that the learned sentencing judge had breached the Sentencing Guidelines when she counted the appellant's antecedents (subjective factor) as a factor towards a higher starting point. Counsel for the Crown was adamant that the learned sentencing judge had the latitude to do so, because what she did was to use as part of the starting point, the appellant's conduct and involvement in a conspiracy to commit crimes. In such circumstances, counsel posited that the learned sentencing judge was correct to consider the appellant's culpability.

[67] We are of the view that the learned sentencing judge did not, in fact, double count, because after considering the fact that the appellant was a repeat offender (five previous convictions based on the criminal record) and had similar previous offences as aggravating factors for the starting point, she did not again consider that same factor

when deciding whether to increase the number of years up from the starting point. Mrs Golding Jenkins was very selective in her reproduction of portions of the transcript, and had omitted in her selection, that portion where the learned sentencing judge, had explicitly warned herself against double-counting and heeded her own caution. This significant portion of the transcript seems to have eluded counsel.

[68] We note that when the learned sentencing judge acknowledged that the appellant's previous similar convictions were, in fact, an aggravating factor, she had specifically continued in that vein and said, "I will not count that as one of the aggravating factors". Having carefully read the transcript, we could not discern any indication, explicit or inferential, which supports the appellant's conclusion that the three years which the learned sentencing judge added to the starting point, on account of aggravating factors was "owing to said previous similar convictions". We, therefore, find that the appellant's complaints in this regard is without merit.

[69] We agree that the learned sentencing judge did not specifically itemize all the aggravating factors that she considered, but on a careful reading of the transcript and her comments we discern, that the aggravating factors identified by her relative to increasing the starting point, were:

1. bad character;
2. planning and premeditation;
3. Role played by the appellant in the commission of the offences – the appellant qualifies as a principal offender; and
4. lack of effort to reform – recidivism.

[70] In our review exercise, other applicable aggravating features identified and which ought not to have been ignored are:

1. the prevalence of the offences in the society;

2. the appellant's negative Social Enquiry Report;
3. operating in a group or gang (admittedly at least three persons were involved in the heist);
4. the presence and use of a firearm during the commission of the related offences. Although the appellant himself had not discharged the firearm, the weapon was nonetheless actively used in the commission of the offence of shooting at the police and was present during the commission of the shop breaking and larceny;
5. attempts to conceal his involvement, by fleeing the scene;
6. he was not a callow youth, suffering from immaturity, but was 36 years of age when he committed these offences. He was an adult and, therefore, should have been able to make better lifestyle choices, considering there was no allegation of coercion or duress; and
7. the goods stolen are of high economic value, and two separate establishments were broken into and items stolen therefrom.

Having found that there was no double counting where aggravating factors are concerned, we are of the view that the learned sentencing judge was justified in increasing the starting point by three years; in fact she could reasonably have increased it much higher, hence in this regard, she had not erred in principle.

[71] In answer to queries posed by this court, Mrs Golding Jenkins did not readily accept that the circumstances of this case gave rise to aggravating features that could have

merited the selection of a starting point of 15 years, nor indeed was she willing to accede that there were aggravating factors outside of the appellant's previous convictions, which would have justified the additional three years which the learned sentencing judge calculated. Having adopted the stated starting point of 15 years we have taken note of the aggravating features that the learned sentencing judge had inferentially identified. We have, in fact, also identified other aggravating factors which she could have quite properly taken into consideration. The amalgam of aggravating factors we identified at paragraphs [69] and [70] herein will be applied.

[72] On the totality of the aggravating features identified in the factual circumstances of this case, we deemed it appropriate to move the starting point upwards by nine years. This would take the calculations to 24 years for the offences of illegal possession of firearm and ammunition, (counts 1 and 2). In relation to the offence of shop-breaking and larceny (counts 3 and 4) if the full nine years was to be added to the starting point of four years this would result in a calculation that exceeds the maximum penalty that the law allows. We will therefore treat the addition of the aggravating factors as bringing the calculations to the maximum of 10 years. Therefore, the 18 years that the judge would have arrived at, after the adjustment of the starting point having taken into account what she viewed as aggravating factors, cannot be criticised.

Mitigating features

[73] As regards the mitigating features, the learned sentencing judge had this to say:

> "While, again, Counsel has made submissions to the fact that you are a family man, that you have children relying or depending on you. These are things you really ought to have taken into consideration before you found yourself on the outside of the hardware store on that morning.
>
> By and large, the only mitigating factor that this Court can identify is the fact that you did not waste the Court's time and put the court through a trial. You have entered a plea of guilty…"

[74] The appellant's counsel was of the view that there were some seven factors that the learned sentencing judge ought to have taken into account and on such basis, ought to have afforded him a greater discount for mitigating factors. We have examined these factors and determined that there is no merit in counsel's submissions. We do not agree that there was any early co-operation by the appellant, because he had fled the scene of the crime and it was the police's own industry that led them to the knowledge that he was the true owner of the vehicle that was left at the crime scene. He did not voluntarily submit himself to the custody of the law enforcers; the police went to his house and arrested him. He was arrested on 3 June 2018, some 18 days after the offence and it was then that he decided to co-operate and give a statement under caution.

[75] The appellant's giving of that caution statement, as far as we can discern, was not an "early acceptance of responsibility". In the caution statement, he attempted to downplay his involvement in the crimes and sought to implicate his cronies Jay and Shark as the principals. For example, he earmarked Shark as the mastermind and, while admitting he was privy to discussions to rob the hardware store, he said he left the discussion to go and attend to his sick spouse. He said it was Jay who shot at the police; it was Jay who called him for a pick-up at the location of the robbery; and it was Shark who instructed him to park the car and open the trunk. According to his narrative, the appellant is conveying the impression that he was an automaton who merely helped to load the items into the vehicle. In our view, the learned sentencing judge, armed with the facts as outlined by the prosecutor, was entitled to her determination that there was no early acceptance of responsibility by the appellant.

[76] We accept, as a sound statement of law, that when an accused pleads guilty, and there is a divergence of facts, he ought to be sentenced on the set of facts most favourable to him unless a Newton Hearing is held. Counsel for the Crown submitted, and we agree, that there was no disagreement relative to the factual circumstances of the crime at the time of sentencing. Actually, much of the narrative of the happenings was extracted from the appellant's caution statement.

[77] The learned sentencing judge was entitled to interpret the utterances made by the appellant and to assess his culpability from the surrounding context of the case. The facts are that the appellant at 3:30 am willingly left his warm bed, the comfort and consortium of his spouse and children to pick up Jay, a known wrongdoer. This is significant. The appellant did not claim to be operating a taxi service, in fact, he gave his trade as a mason. He was not going to pick up a legitimate passenger who needed transportation. He would have known based on the directions he said he received, that he was going to the location of the hardware store. At that time, in the wee hours of the morning, a reasonable and prudent man would have known this was for an illicit purpose.

[78] There is no evidence, nor is it apparent on the transcript, that the appellant did not know what was transpiring that morning. There is no evidence that he was not aware that a robbery was actively in progress. On the contrary, the admissions made by the appellant supports an interpretation that he well knew he was going to the location of the hardware store, nonetheless, he voluntarily drove there. In light of previous discussions he had participated in, to rob this place, his intentions were not innocent; he was no naïve youth. On his arrival, he would have seen that his cronies had broken and entered into two premises, yet he willingly lent his assistance to load the pilfered items into his vehicle. This does not support the view that his involvement was limited or passive.

[79] The learned sentencing judge's assessment that given the pre-plan, the appellant's age and history, when he turned up at the hardware store in answer to the phone call that morning, his participation was not passive, is entirely justified. Indeed, in an objective sense, the appellant's behavioural pattern and utterances could be looked at and interpreted in the way that she did. In our view, the learned sentencing judge was reasonably entitled to have taken the view that she took of the appellant's involvement being active and substantial.

[80] It was entirely within the learned sentencing judge's discretion, having seen and heard the character witnesses to determine how much weight, if any, to attach to their

evidence. She seemingly was not impressed by the utterances of his father that the appellant was "a disciplined boy growing up … a good boy growing up". His behaviour as an adult seems to have eclipsed any such positive tendencies exhibited in his early years. His spouse's acclaim of him as a good father and husband did not outweigh the negative regard that his fellow community members had for him. The learned sentencing judge weighed the evidence given in his favour versus the impact his conduct had on the community and the society at large and found him wanting.

[81] Counsel for the Crown conceded that the fact that the appellant was gainfully employed at the time of the offence was not addressed by the learned sentencing judge, but further submitted that this was justified. She sought to rely on **Worrell Wint v R** for the proposition that:

> "[61] …In general, the previous good character of the offender carries little weight in sentencing in very serious cases (see Blackstone's Criminal Practice 2002, paragraph B2.42, at page 181). In this case, the applicant had previous convictions, and though he had the opportunity to reform he eventually reoffended. We do not believe that the points raised by counsel for the applicant count as mitigating factors, in all the circumstances of this case."

[82] Whilst we agree that it is important that a sentencing judge, at the very least, demonstrate that she considered factors such as employment and good family relations as generally having some mitigating quality, we are of the view that the weight to be accorded to such factors is entirely a matter for her according to the circumstances as she knows them to be. It is apparent that the learned sentencing judge considered these factors but gave no weight to them. In the circumstances, it cannot be said that the learned sentencing judge erred in law in failing to treat the fact that he had young children as a mitigating factor. We would also add that the fact that the appellant was gainfully employed should have been a deterrent to engaging in firearm offences and offences involving dishonesty (stealing). There is no reason to treat it as a mitigating factor in the

circumstances of this case, especially having taken into account his previous convictions for kindred offences.

[83] The appellant's counsel submitted that he had greatly assisted the police and his assistance enabled a quick "wrap up" of the case. There is no indication of this in the transcript. Counsel also submitted that the guilty pleas were "indicative of his amenability to change". This also is not borne out in light of the appellant's recidivism and penchant to commit offences involving dishonesty. Counsel was misguided in thinking that "[t]he 10 years [sic] gap between the two previous similar convictions" counted as a mitigating factor. We make this observation because the appellant was not eligible to be treated as a rehabilitated offender.

[84] Section 3 of the Criminal Records (Rehabilitation of Offenders) Act makes it possible for "… a person who…has been convicted of an offence … at the expiration of the appropriate rehabilitation period, be treated as a rehabilitated person…". However, the further provisions of section 20A restrict eligibility of certain category of persons as follows:

> "(1) Where a person has been convicted of three or more -
>
> (a) indictable offences arising out of more than one incident; or
>
> (b) summary offences ...
>
> The person shall as of the third such conviction, notwithstanding that the applicable rehabilitation period may have elapsed in relation to any of those convictions, be dealt with in accordance with subsection (2).
>
> (2) A person described in subsection (1) shall not be eligible –
>
> (a) to be treated as a rehabilitated person in respect of the convictions referred to in subsection (1), neither shall any of those convictions be capable of being treated as spent;

> (b) to apply for the expungement from the records of any other conviction that had already become spent; or
>
> (c) to be treated as a rehabilitated person in relation to any subsequent conviction, neither shall any subsequent conviction be capable of being treated as spent."

[85] The appellant's antecedents revealed that on 6 June 2006, he had been convicted of the offences of illegal possession of firearm and robbery with aggravation. Similarly, in August of that same year he was, in a separate incident, convicted of illegal possession of firearm and robbery with aggravation. He further committed and was convicted for the offence of misprision of felony in 2016. The appellant has, therefore, committed five indictable offences in three separate incidents. In those circumstances, the appellant is by law a convict not eligible to be treated as a rehabilitated person.

[86] The appellant's guilty pleas were taken into consideration, assessed as a sign of remorse, and treated as the sole mitigating factor by the learned sentencing judge. We cannot fault her reasoning in this regard, especially since she was obliged to give separate consideration and a percentage discount for the guilty pleas. Further, the deduction of one year for mitigating factors, we believe is reasonable in the circumstance.

[87] Based on the foregoing, ground four as advanced is devoid of merit and, therefore, fails.

[88] In our reevaluated sentencing process, we have regarded the mitigating factors as well. Accordingly, we have scrutinized the transcript to determine whether any other mitigating circumstances exist that would enure to the appellant's benefit. We are satisfied that the learned sentencing judge had identified the sole relevant mitigating factor and we agree that the subtraction of one year which she made, is more than fair. This would, therefore, reduce our evaluated sentences for the offences of illegal possession of firearm and ammunition to 23 years, respectively, and shop-breaking and larceny to nine years.

Guilty plea and discount

[89] The above calculations represent the provisional sentences reevaluated by this court had the appellant engaged in a trial, but he had not. Account must therefore be taken of this guilty pleas.

[90] Based on the record of the transcript, it is clear that the learned sentencing judge contemplated awarding a discount to the appellant based on his guilty plea. She specifically commented that he had saved valuable judicial time and had not engaged in a trial. She also gave some thought to the amount of discount to be awarded, where she said "… this was not the first opportunity that permitted you to enter a plea of guilty, you are certainly not entitled to the discount of 50% for the plea of guilty". She, however, did not ultimately conduct an arithmetical calculation as to the percentage discount she had awarded him, she merely stated that "… it will be a minimum discount for the plea of guilty…".

[91] In light of the foregoing utterances, she clearly had the provisions of sections 42D of the CJAAA in mind. In failing, however, to state the specific percentage discount and the applicable tier in relation to the timing of the guilty pleas, and further, by not clearly demonstrating that she had, in fact, discounted the sentence on that account, the learned sentencing judge fell into error.

[92] The provisions of section 42D of the CJAAA dictate that the discount for a guilty plea ranges from 50% to 15% based on the nature of the offence and the stage of the proceeding the appellant pleaded guilty. Contrary to the insistence of the appellant's counsel, the appellant did not plead guilty on the first relevant date but pleaded guilty before the beginning of a trial. He, therefore, did not fall in the first tier contemplated by section 42D(2)(a) which affords up to a 50% reduction. Based on the factual circumstances of this case, section 42D(2)(b), in our view, is the applicable section of the CJAAA. That provision states that:

> "where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, **the sentence may be reduced by up to thirty-five *percent*;**" (Emphasis supplied)

[93] In determining the percentage by which a sentence is to be reduced, regard must also be had to section 42H, which requires a sentencing judge to give contemplation to the following factors:

> "(a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;
>
> (c) any factors that are relevant to the defendant;
>
> (d) the circumstances surrounding the plea;
>
> (e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;
>
> (f) whether the defendant has any previous convictions; and
>
> (g) any other factor or principle the Court considers relevant."

[94] Having considered the factors stated above and the provision of section 42D(2)(c) of the CJAAA, which provides for a reduction of up to 15% after the trial has commenced but before the verdict is given, we cannot sanction the inferential 15.7% calculation that was advanced by counsel for the Crown. This would relegate the discount to the third tier and, therefore, deny the appellant a percentage discount appropriate to his circumstances.

[95] In determining the discount that is appropriate, we have factored into the balance, the appellant's previous convictions as also the indicator of the very strong case against him, a significant portion of which was self-confessed. In the premises, a conviction would have been inevitable. Examining the factors as outlined in section 42H, we note that subsections (d), (e), and (f) are relevant considerations, and therefore a discount at the upper threshold of 35% would not have been warranted

[96] We have considered the appellant's complaint that his guilty plea was not adequately assessed by the learned sentencing judge, we find this to be not without merit. We consider that in the factual matrix of this case a 20% discount would have been fitting. We will now apply the same to our evaluated provisional sentences. The discount is calculated to be four years and six months with respect to the offences of illegal possession of firearm and ammunition when this is deducted from the 23 years the result is 18 years and six months. The percentage discount calculated for shop breaking and larceny is one year and eight months, when subtracted from the nine years the result is seven years and four months.

Time spent on pre-sentence remand

[97] Authorities such as **Micheston Burke v R** [2020] JMCA Crim 29 and **Lindell Howell v R** [2017] JMCA Crim 9 indicate that full credit is to be given for the time the appellant spent in custody pending prosecution and determination of his case. In this instance, time spent in custody was previously canvassed and indicated to be 14 months. The learned sentencing judge had indicated her awareness of this principle when during the calculation process she said, "… and I also have to take into consideration the time spent in custody…". So, she had clearly indicated that she had the intention to credit the appellant time spent in pre-sentencing detention as was his due. We have already indicated that we were not able to clearly identify that the learned sentencing judge had in fact done so, nor are we prepared to infer that she had done so to the full extent of 14 months.

[98] During the process of this review, we afforded the appellant full credit for the time he spent on the pre-sentence remand. After deduction of those 14 months the final sentences on our reevaluation would be; 17 years and four months imprisonment for the offences of illegal possession of firearm and ammunition (counts 1 and 2), and six years and two months imprisonment for the offence of shop breaking and larceny (counts 3 and 4).

[99] We note, that our evaluated sentences for the firearm and ammunition offences exceed those imposed on the appellant by the learned sentencing judge, but our calculations on the shop breaking and larceny offence are somewhat less than what she had imposed, this however was as a result of us not being able to give maximum effect to the aggravating factors. In all the circumstances, it cannot be said that the sentences imposed by the learned sentencing judge were manifestly excessive.

[100] In determining the proper approach in treating with the instant case, we would follow the dictates in the Privy Council decision of **Williams (Earl) v The State** [2005] UKPC 11, where at para. 10 their Lordships stated:

> " … an appellate court which has power to increase a sentence and is considering the exercise of that power should invariably give the applicant for leave to appeal against sentence or his counsel an indication to that effect and an opportunity to address the court on the increase or to ask for leave to withdraw the application… The Board indicated the need to follow such a course in Skeete v The State [2003] UKPC 82 at paragraph 44 of their judgment and their Lordships now confirm that failure to do so would in their opinion be unfair and a breach of natural justice. The arguments to be presented against an increase in sentence may vary from those advanced in favour of a reduction and the applicant should have the opportunity to put them before the court."

[101] This principle has been applied by this court in the cases of **Linford McIntosh v R** [2015] JMCA Crim 26, and **Ian Wilson v R** [2021] JMCA Crim 29. In the circumstances, therefore, it would not be fair or just to increase the sentences without having given a prior indication of this to the appellant or his counsel.

[102] Also, we are guided by the principle enunciated in **R v Ball**, as stated above at para. 35, that this court does not alter a sentence, that is the subject of an appeal merely because the members of the court might have passed a different sentence.

[103] As a result, we see no justifiable basis to disturb the sentences imposed by the learned sentencing judge.

Conclusion

[104] In sentencing, adherence to the Sentencing Guidelines by sentencing judges is critical. It cannot be over emphasized that sentencing judges must give clear indications of how they arrived at the respective sentence in relation to each count. It is also important to highlight that the CJAAA does not grant an automatic discount for a guilty plea. The court having regard to section 42D(2)(a), (b) or (c), must also have regard to the factors in section 42H. Although the statute gives guidance, a sentencing judge also has the latitude to choose an appropriate percentage to discount a sentence.

[105] In any event, as set out in Appendix A of the Sentencing Guidelines, the normal range of sentence for the offence of illegal possession of firearm and ammunition is between seven to 15 years. The sentence imposed on the appellant by the learned sentencing judge is 13 years' imprisonment (counts 1 and 2) and eight years imprisonment (counts 3 and 4) which are well within the recommended range. The sentences imposed, therefore, cannot on any reasonable construction be considered "manifestly excessive" or a "miscarriage of justice". We are not minded in the circumstances to interfere with such sentences and in dismissing the appeal we wish to emulate the approach of McDonald-Bishop JA in **Khoran Thomas v R** [2020] JMCA Crim 22 where she enunciated t that:

> [26] It would, therefore, be correct to say that the learned trial judge's approach was not in keeping with the prescribed method to sentencing that is now to be regarded as the norm. **As a result, she failed to demonstrate that she had applied the relevant principles and that she had adequately balanced the various factors (some of**

> **which she had highlighted) in arriving at the sentence imposed.** This omission on the part of the learned trial judge would have amounted to a misdirection in law, which would have justified interference from this court.
>
> [27] It was noted, however, that although the learned trial judge had erred in principle in failing to properly demonstrate how she had arrived at the sentence she had imposed, she did provide a perspicuous overview of the factors that were considered by her, to the benefit of this court. **She also demonstrated a general appreciation for some of the principles of sentencing and some of the factors to be considered in the sentencing exercise**." (Emphasis supplied)

[106] Similarly, in this case, although the learned sentencing judge erred in some regard, she had an appreciation of the core principles and factors to be applied. Further, in light of our review of the sentences outlined previously, we find that the appeal ought to be dismissed and the sentences affirmed.

Disposal of the appeal

[107] The court hereby makes the following orders:

1. The appeal is dismissed.
2. The sentence of 13 years' imprisonment at hard labour for the offences of illegal possession of firearm and illegal possession of ammunition (counts 1 and 2) is affirmed.
3. The sentence of eight years' imprisonment at hard labour for the offence of shop breaking and larceny (counts 3 and 4) is affirmed.
4. The sentences are to be reckoned as having commenced on 12 July 2019 and are to run concurrently.