[2012] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 127 & 128/2008 and 17/2009

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

PATRICK COMRIE
ORANDY BROWN v R
MICHAEL WALLACE

Mrs Melrose Reid for the appellants

Miss Joan Barnett and Mrs Denise Samuels-Dingwall for the Crown

13, 14 February and 4 May 2012

BROOKS JA

[1] The Crown's case against these appellants seemed to have been an open and shut one; a man was robbed at gunpoint by men who fled in a motor car, the police chased the car, caught the robbers and recovered a gun. They took the men to the police station where the victim was, coincidentally, on hand to point them out as they entered the police station. The appellants were arrested and charged as a result of that identification. As it turned out at the trial, however, a few other details in the scenario made the prosecution of the Crown's case, less smooth than would have been, initially, expected.

[2] Despite the difficulties encountered by the Crown, the appellants were each convicted in the High Court Division of the Gun Court on 31 October 2008 for the offences of illegal possession of firearm and robbery. On each of these counts, Mr Patrick Comrie was sentenced to serve 12 years imprisonment, while Messrs Orandy Brown and Michael Wallace were each sentenced to 10 years. The sentences were ordered to run consecutively to each other in each case. In addition, Mr Comrie was convicted for an additional count of illegal possession of firearm and a count of illegal possession of ammunition. He was admonished and discharged in respect of that additional count concerning the firearm. This was because it was the self-same firearm at both locations. In respect of the ammunition, he was, however, sentenced to two years imprisonment. The sentence, in respect of that latter count, was ordered to run concurrently with the sentence for the robbery.

[3] The appellants were refused leave to appeal against their respective convictions when their applications were considered by a single judge of this court. The learned judge of appeal, did, however, grant all three permission to appeal against the sentences imposed. The appellants have acted on that permission but have also renewed their application to appeal against their respective convictions.

[4] Mrs Reid, on behalf of all three, sought and obtained permission to abandon the grounds originally filed for Mr Wallace and to argue two supplemental grounds in his application. Those were the same grounds as had been filed by Mr Comrie and Mr Brown respectively. Thus the grounds argued in respect of all three were:

1. The evidence does not support the conviction.
2. The sentence is manifestly excessive.

The simplicity of the formulation of the first ground belied the far-reaching and comprehensive nature of learned counsel's able submissions thereon.

The evidence

[5] A fuller outline of the evidence will demonstrate the difficulties in the Crown's case on which Mrs Reid's arguments focussed. The relevant incident occurred on 21 August 2006. At about 1:35 pm that day, the complainant, Mr Carlton Planter, was riding a motor cycle along Red Hills Road in the parish of Saint Andrew. As he approached the intersection of Red Hills Road and the Washington Boulevard, he was knocked from his cycle by a red motor car.

[6] As it transpired, this was not an accident. It was a ruse to effect a robbery. Mr Planter had been on his way to the bank to lodge money for his employers. After the collision, the car stopped and three men alighted, including the driver. After offering to take him for medical treatment, which offer he refused, the driver of the vehicle lured him to the car on the pretext of providing him with the particulars relevant to the collision. Mr Planter leaned into the vehicle, head first. He saw only the driver therein. While in that position, one of the other men pointed a gun at him and demanded his bearer's bag. That demand was re-inforced by the third man whom, Mr Planter said, also brandished a gun.

[7] He relinquished the bag. The men boarded the vehicle, taking the bag with them. They drove off along a slip road, leading from Red Hills Road to the Washington Boulevard. As luck would have it, Mr Planter immediately saw a police patrol car. He stopped the police, pointed out the fleeing car to the police officers and made a brief report to them.

[8] The police chased the car, the patrol car's siren blaring. The police officers did not lose sight of the vehicle and followed it to nearby Molynes Road where it entered Harrilal's Plaza and stopped. The vehicle did not stop at any time during the chase. The three men, the appellants, who were in the vehicle when the police officers approached it at the plaza, were held by the police. The police also recovered a firearm from the seat where the appellant, Mr Comrie, had been sitting. There was live ammunition in the firearm.

[9] The first twist in the Crown's case occurred when it proved that, of the approximately $49,000.00 in United States currency which Mr Planter had been transporting, only about US$7,000.00 was found in his bag when it was taken to the police station by the police. Further, instead of two firearms, the police officers only produced one at the station.

[10] The explanation of the difference between Mr Planter's evidence and that of the police officers who were in the patrol car, concerning the firearm and the money, would seem to lie in the fact that the officers testified that there was a fourth man in the car

when it stopped at the plaza. That fourth man, they testified, ran from the vehicle. The man was not pursued and he escaped.

[11] One of the officers, Constable Spence, testified that he saw that fourth man with a bag. His account was that, some minutes after taking the three detainees to the police station, and acting on a tip, he went back to the scene. He further testified that he then went to the back of the plaza and there he found the discarded bag, with the contents mentioned above. He turned in the bag and contents to the police station.

[12] After hearing all the evidence, the learned trial judge totally rejected Constable Spence's testimony. He did, however, accept that there had been a fourth man, although he found that the fourth man did not have a bag when he ran. The learned trial judge also found that Mr Planter had not seen a second firearm.

[13] As far as the grounds of appeal are concerned, the relevant evidence surrounds the circumstances in which the three appellants were seen, at the police station, by Mr Planter. There was a discrepancy in the evidence as to whether it was he who spontaneously pointed the men out to the investigating officer, or whether there was an unfair confrontation. The rest of the details will emerge during the discussion of the grounds.

Ground one: The evidence does not support the conviction

[14] In her submissions, Mrs Reid highlighted a number of discrepancies in the evidence adduced by the Crown. She argued that the Crown failed to give any

explanation for the discrepancies and on that basis, the learned trial judge ought to have ruled that there was no *prima facie* case established against the appellants. Having failed to stop the case at the point of the no-case submission, counsel argued, the learned trial judge also erred in that he failed, in his summation, to adequately grapple with the discrepancies which surfaced in the Crown's case. Learned counsel pointed to six main discrepancies:

a. the number of men in the motor car;

b. the failure of the police to find a second firearm;

c. whether or not Mr Planter's bag was taken to the police station along with the men;

d. whether or not a man ran from the car when it stopped;

e. how much money was in the bag; and

f. whether or not Mr Planter was in the CIB room when the appellants arrived at the police station.

[15] Along with those submissions, learned counsel argued that the identification of the appellants was fraught with difficulty. She submitted that Mr Planter's purported identification of the appellants was due to "identification by association". She argued that the learned trial judge failed to adequately deal with that issue in his summation. The identification also amounted to confrontation, submitted Mrs Reid, and as a result, the appellants ought to have been acquitted.

[16] We shall first outline the essence of the submissions in respect of each discrepancy and, thereafter, analyse the issues raised by the submissions.

The number of men in the car

[17] As mentioned before, Mr Planter only saw three men. The police, however, saw four. Mrs Reid argued that, based on the evidence, the learned trial judge quite properly accepted that "there was no question of stopping somewhere and another man coming into the vehicle" (page 181 of the transcript). The learned trial judge promised to resolve the discrepancy but, on her submission, he never did. According to learned counsel, the learned trial judge merely accepted the existence of the fourth man without explaining why he did so. She pointed to page 198 of the transcript where the learned trial judge said:

> "I accept [Constable Roswess'] evidence that a man alighted from the car and ran, no chasing. Now, if I accept that evidence, what does that mean? It would mean that that fourth man had to have been in the car at the slip road albeit that Mr. Planter is saying no, no, no, fourth man inside there. The police is saying, no man, the fourth man jump out and I accept too that that fourth man did not have any bag...."

The failure of the police to find a second firearm

[18] Mrs Reid submitted that the evidence from Mr Planter, that there was a second firearm, was clear. On her submission, the Crown was obliged to explain why it is that the police did not find a second firearm. She argued that the Crown failed so to do. Learned counsel criticised the learned trial judge for having disbelieved Mr Planter instead of discerning that it was the identification of the men which was wrong.

Whether or not Mr Planter's bag was taken to the police station along with the men

[19] The evidence concerning the presence of Mr Planter's bag at the police station first came from Mr Planter. He testified that when he first saw the men at the police station, he pointed them out to the investigating officer Sergeant Morrison. He said that the sergeant then asked him if he was sure. His response then was, "[s]ee me bag there". The evidence from Constable Roswess, one of the police officers involved in the chase and apprehension, was that the bag was not taken to the police station with the men. His testimony was that the first time that he saw the bag was in the CIB office of the station and this was between 10 to 20 minutes after the men had been taken to the station (pages 79 – 80 of the transcript). Sergeant Morrision, for his part, testified that he first saw the bag when it had been brought into the CIB office while he was taking notes of Mr Planter's report. He saw it about three minutes after the men had been taken into that room.

[20] Mrs Reid argued that the Crown was obliged to explain the differences in the respective testimonies and that it failed so to do. The discrepancies, she argued, not only affected the issue of the time at which Mr Planter identified the appellants but also impinged on the quality of the identification. Learned counsel submitted that if the men had been taken to the station with the bag, then the probability was that Mr Planter could easily have made a mistaken "identification by associating the men with his bag". She went on to say that the learned trial judge did not deal sufficiently with these discrepancies.

Whether or not a man ran from the car when it stopped

[21] In her submissions concerning the issue of whether a man ran from the car, learned counsel incorporated the issues concerning the first discrepancy mentioned above (the number of the men), the third discrepancy (when the bag arrived at the station) and the sixth discrepancy (Mr Planter's location at the time the men were brought to the police station). She argued, as before, that the Crown had not given any credible explanation concerning this fourth discrepancy and that the learned trial judge had not adequately dealt with it.

The amount of money in the bag

[22] The discrepancy concerning the amount of money said to have been in the bag has already been outlined. Learned counsel outlined the evidence of Constable Spence and submitted that although the learned trial judge rejected Constable Spence's evidence, he should have gone further to deal with the discrepancy.

Whether or not Mr Planter was in the CIB room when the appellants arrived at the police station

[23] The discrepancies concerning Mr Planter's location, at the time that he identified the appellants, arose from the evidence of the three witnesses whom the learned trial judge deemed worthy of consideration. Learned counsel submitted that it directly impinged on the reliability of Mr Planter's identification of the appellants. She argued that the learned trial judge accepted one account and disregarded the others without revealing his thought process.

[24] On this issue, Mr Planter testified in his evidence in chief that he was on his way from one part of the police station to another when he saw a police radio car drive in. When he looked, he said, he saw the three appellants exit the radio car and he pointed them out to Sergeant Morrison, who was the officer investigating his report. In cross examination, however, it was revealed that Mr Planter had said, in his statement to the police, that he "was in the CIB Office making a report when [he] saw some police carry three men there and said that they held [sic] with a gun" (page 34 of the transcript).

[25] Detective Sergeant Morrison did not support Mr Planter's evidence in chief. The sergeant said that it was while he was taking Mr Planter's report that he saw Constable Roswess take the men into the CIB office of the police station. According to Sergeant Morrison, he was in the CIB office when that occurred. From the context of his evidence, it appears that he did not see where the men had come from before they came into the office. He said "[f]rom where I was sitting, I could only see when they go to the door of the CIB office" (page 104).

[26] Constable Roswess' account was more in line with Sergeant Morrison's. At page 64 of the transcript, Constable Roswess is recorded as saying, "[o]n entering the CIB Office I saw the said man [Mr Planter] who pointed out the motor car to us". Constable Roswess said that he had just brought the appellants into the CIB office when he saw Mr Planter.

[27] Mrs Reid submitted that this discrepancy goes to the very essence of the case as it affects whether the identification by Mr Planter at the police station was flawed. The identification issues being, on counsel's submission, "identification by association" and "confrontational identification". Either or both, she argued, would render the identification flawed.

Analysis

[28] A number of principles govern the manner in which a review tribunal asseses decisions of fact of the tribunal, at first instance, in charge of that arena. Firstly, it has long been established that the tribunal of fact is entitled to accept the evidence of one witness and reject that of another (see **R v Michael Rose** SCCA No 17/1987 (delivered 18 March 1987). Secondly, the tribunal of fact may also reject a portion of a witness' statement and accept the rest. This principle applies not only in respect of juries but also to judges sitting alone.

[29] The third principle is that where a judge is sitting alone, the judge should reveal his thought process in his reasons for judgment. In **R v Dacres** (1980) 33 WIR 241, Rowe JA (as he then was), in delivering the judgement of the court, said at page 249:

> "By virtue of being a judge, a Supreme Court judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict, whether of guilt or innocence. **In this reasoned judgment he is expected to set out the facts which he finds to be proved and, when there is a conflict of evidence, his method of resolving the conflict**..." (Emphasis supplied)

[30] Fourthly, it is also well established that this court will not interfere with the judge's finding unless the judge has made that finding on an incorrect principle or without an evidential foundation. The reason behind this principle is that the learned trial judge has had the opportunity to see and hear the witnesses and is in a better position, to assess credibility, than this court, which has only had the benefit of the transcript.

[31] In **R v Horace Willock** SCCA No 76/1986 (delivered 15 May 1987), this court also addressed the issue of summations by a judge sitting alone in the High Court Division of the Gun Court. Bingham JA (Ag) (as he then was) said, at page 5 of the judgment of the court:

> "...the absence of reasons or findings in the summation would not necessarily provide a basis for disturbing the verdict of the learned trial judge, who as the tribunal of fact, had the clear and distinct advantage of seeing and hearing the witnesses at the trial and of weighing and assessing the demeanour of the witnesses....**Provided therefore, that on an examination of the printed record, there existed material evidence upon which there was a sufficient basis for the learned trial judge to come to the decision at which he arrived, there should be no reason for this court to interfere with the decision at which he arrived**." (Emphasis supplied)

[32] The fifth principle, which is relevant to findings of fact by a trial judge sitting alone in the High Court Division of the Gun Court, is that such a tribunal is not expected to identify and resolve every discrepancy which arises on the evidence (see **R v Junior Carey** SCCA No 25/1985 (delivered 31 July 1986)). The learned trial judge should, however, address the material ones. Where a judge, sitting in the High Court Division

of the Gun Court, identifies a material discrepancy, he or she should explain the manner in which that discrepancy is dealt with. A decision either way, should however, be based upon the evidence. Guidance was given at page 8 of **Junior Carey**, as to what is considered the desirable practice:

> "The learned trial judge is not statutorily required to [take each piece of evidence and, *viva voce* minutely analyse it so that his analysis appears on the record] even though **a desirable practice has developed which it is hoped will be continued of setting out salient findings of fact which is of inestimable value should an appeal be taken**." (Emphasis supplied)

[33] Finally, for these purposes, there is the principle, that where an appellant complains that a finding of fact is against the weight of the evidence, for his appeal to succeed, it is not sufficient to show that some other finding may have been made in his favour on the relevant evidence. He must go on to show that the finding of fact, "is so against the weight of the evidence as to be unreaonable and insupportable" (see **R v Joseph Lao** (1973) 12 JLR 1238).

[34] This court has given guidance to trial judges as to the approach to be taken where there are inconsistencies in the evidence of a witness. In **R v Williams and Carter** SCCA Nos 51 and 52/1986 (delivered 3 June 1987), Kerr JA, in delivering the judgment of the court, said at page 7:

> "...unless [the inconsistency] is immaterial some explanation is essential before the evidence in Court can be accepted and relied on in relation to that particular point....**There may be a credible explanation but the explanation must come from the witness; it cannot be supplied by well-meaning conjecture**." (Emphasis supplied)

At page 8 of the judgment Kerr JA went on to say:

> "In our view the inconsistency [concerning identification] between the evidence in Court and the statement to the police was material in a vital aspect of the case and unexplained and standing by itself no positive finding of fact could be made on this point. Accordingly, the conviction cannot stand."

[35] In applying these principles to the instant case, it should first be recognised that the learned trial judge was impressed with Constable Roswess' testimony. On several occasions throughout his summation, the learned trial judge spoke of accepting Constable Roswess' evidence (see pages 197, 198, 199 and 200 of the transcript). That finding is relevant to assessing some of the various discrepancies identified by Mrs Reid.

[36] In respect of the discrepancy concerning the number of men in the motor car, the learned trial judge seems to have reasoned the existence of the fourth man at the scene, based on his acceptance of Constable Roswess' testimony that he saw a fourth man exit the vehicle. The learned trial judge's reasoning is evident when he considered, what he regarded to be, the circumstantial evidence in the case. He said at page 199:

> "What is circumstantial evidence? Man is robbed, a red car is pointed out to the police, the car is chased. The evidence: the car didn't stop, didn't turn off until it goes to Harrilal's, you have immediate picking up from the report by Mr. Planter by the police of this car, both of them, Mr Planter and the police seeing the car, the police gone in chase leaving Mr. Planter there **and so whomever it was that robbed Mr. Planter must necessarily have been in that car**..." (Emphasis supplied)

That statement was, admittedly, made in the context of the learned trial judge concluding that the appellants were the men who held up Mr Planter. It does, however, reveal his reasoning concerning the existence of a fourth man at the scene of the robbery. Accepting Constable Roswess' evidence on the point is an evidential basis for the learned trial judge's decision on that discrepancy. He was entitled to so find. We cannot accept Mrs Reid's submission that this finding was unsupportable.

[37] On the matter of the second firearm, the learned trial judge found as a fact that there was no second firearm. His summation on the point, at page 200 of the transcript, reveals his reasoning. He said:

> "Now, Mr Planter he was saying that Mr. Brown had a firearm. I don't accept that Mr. Brown had any firearm because according to him Brown juk him back and when him look he said 'Yuh no hear man say yuh fi gi him the bag,' and he said, "Everything cris," and he said Brown had gun also, it was shine.
>
> Comrie took the bag off him, that really isn't reliable evidence to suggest that Mr. Brown in fact had a firearm or an object looking like a firearm..."

He did not believe Mr Planter on that issue. That, with respect, the learned trial judge was fully entitled to do, based on the reason which he gave. Even if there were some other explanation, such as the fourth man, or some other person, taking the second firearm that Mr Planter said that he saw, this court is not permitted to make any finding in that regard. We also, respectfully, disagree with Mrs Reid's

submission that this finding, by the learned trial judge, affects the issue of identification. The two aspects are quite unrelated.

[38] It is of some consequence, we find, that Mr Planter's evidence concerning the position of the robbers as they boarded the vehicle, and the fact that the one in the front passenger seat had a gun, was borne out by the evidence of the police as to the position of the appellants in the vehicle at Harrilal's plaza. The consistency was identified by the learned trial judge at page 187 of the transcript. He said:

> "...and this corresponds to the position given by Mr. Planter and as I said based upon the evidence this is not a position given to the police by Mr. Planter before the vehicle was stopped. So this is why I say at the outset this is a case...of the eyewitness testimony and circumstantial evidence. The question then becomes: what is the likelihood of at least three men in a motor car in the position indicated by the witness? The car being pointed out to the police, car chased, the car stops and the men, three men, seated in the same position as indicated by the witness...."

[39] It should be noted that the link between the identification by Mr Planter and that of Constable Roswess, is the clothing each man was wearing at the time of the robbery. Mr Planter, in his evidence in chief, said that when the men arrived at the police station, they were wearing "the same clothes that they were wearing when [he] got hit off the bike" (page 23 of the transcript). These would be matters which would be helpful to the tribunal of fact on the issue of credibility.

[40] The question of whether Mr Planter's bag was taken to the police station, at the same time that the appellants were taken there, was not addressed by the learned trial

judge. The learned trial judge placed more stress on the circumstances in which Mr Planter identified the appellants to be the persons who had robbed him. The learned trial judge examined that evidence to determine whether there had been improper confrontation by the police and found that there had been none. He accepted that Mr Planter had been taken to the police station, by his boss, shortly after the robbery. This was to report the robbery. He found that there was no prompting by the police for Mr Planter to identify the appellants. Mr Planter spoke of the clothing and he said that he looked at the men and recognized them to be the persons who had robbed him earlier that afternoon.

[41] We do not find it fatal that the learned trial judge did not resolve this discrepancy about Mr Planter's bag. It may fairly be said that the issue of the time of the production of the bag by the police, would be more relevant to that of the amount of money in the bag, than it is to the critical issue of identification and the fairness of the manner in which the appellants were pointed out by Mr Planter. These will be addressed below.

[42] The next discrepancy is whether a man ran from the car. As mentioned above, this aspect, on Mrs Reid's submission, is part of the fabric of the discussion as to whether there had been a fourth man. Based on the rejection of Constable Spence's testimony, it is only Constable Roswess' evidence with which the learned trial judge was obliged to contend on this point. He accepted the latter's evidence. He said at page

198 of the transcript: "I accept [Constable Roswess'] evidence that a man alighted from the car and ran, no chasing". The learned trial judge was entitled so to do.

[43] In respect of the discrepancy concerning the money, the learned trial judge found that someone, other than the robbers, had removed the money from the bag before it was produced at the police station. The learned judge stopped just short of casting doubt on Constable Spence's honesty as distinct from his credibility. As far as the credibity was concerned, the learned trial judge found, in our view, rightly so, that he could not rely on Constable Spence's testimony for anything. The learned trial judge said, at page 192 - 193:

> "Clearly then someone else stole the money that is as plain as day so I won't say that Mr. Spence stole the money but I must confess that his evidence is really cause for concern. So that being the case I really do not rely on Mr Spence's testimony at all for anything really. So as far as I am concerned it is as if Mr. Spence had not testified in this case. So who we are really left with then are Mr. Planter and Mr. Roswess...."

[44] In our view, that the learned trial judge's reasoning and conclusion on this point cannot be faulted. We find that it is consistent with the evidence. In any event, we agree with Miss Barnett's submission, on behalf of the Crown, that the discrepancy, concerning the amount of money in the bag, did not affect the central issue in the case which was the identity of the persons who had robbed Mr Planter.

[45] It is the discrepancy concerning Mr Planter's location at the time the appellants were brought to the station, which most affects the issue of the reliability of the

identification which he purported to make. It may be noted, at the outset of this discussion, that the learned trial judge rejected that there had been any unfair confrontation of the appellants by Mr Planter. The learned trial judge accepted the evidence concerning the reason that Mr Planter was at the police station. He said at page 191:

> "So it's difficult then to sustain the thesis that the police set out on a course of conduct designed to procure an identification in circumstances where that ought not to have been done...because as I understand [the case] the police just picked up the men from the plaza, went straight to the police [station] and just taking the men in as a normal working day."

The learned trial judge made findings in a similar vein at pages 204 – 205 of the transcript.

[46] He accepted that there were inconsistencies in respect of this aspect of Mr Planter's testimony (see pages 182 and 185 of the transcript). It is true that he did not resolve the discrepancies on this point. He, however, found that he did not need to do so, based on the strength of what he referred to as the "circumstantial evidence". He made his findings concerning this matter at page 199 of the transcript:

> "...so in the final analysis, in this case, it matters not what happened at the police station because even [if] Mr. Planter did not turn up at the police station, the circumstantial evidence leads to the inevitable conclusion that the three men who came out of that car on the slip road talking to Mr Planter, got back in the car, drove off, the police saw the car, never loss [sic] sight of it, no one came in, no one came out of [the] car until Harrilal's Plaza, **the inescapable evidence is that the three men must necessarily have been in that car**." (Emphasis supplied)

[47] We find that the strength of the evidence against these appellants was sufficient for us to conclude that the learned trial judge's failure to resolve this discrepancy is not fatal to the conviction. In an otherwise comprehensive assessment, the learned trial judge analysed and decided on the various discrepancies and inconsistencies which Mrs Reid has identified. This decision on his part, not to resolve the issue of Mr Planter's position when the appellants arrived at the station, does not amount to "inscrutable silence" on the point. In our view, it should not be disturbed in the context of the evidence in this case.

[48] Based on what we have outlined to be the evidence profferred by the Crown, we cannot agree with Mrs Reid that, because of the discrepancies and inconsistencies, no *prima facie* case was established. Discrepancies and inconsistencies will occur from time to time in most cases. They will vary in the extent to which they are material. The existence of such discrepancies and inconsistencies does not mean, without more, that a *prima facie* case has not been made out against an accused. The question which arises is whether the Crown's case is so riddled with inconsistencies and discrepancies that it may fairly be said that nothing of consequence remains of it. That principle could not be successfully applied to the instant case. The effect of **Curtis Irving** (1975) 13 JLR 139, cited by Mrs Reid on this point, is this; where the sole witness for the prosecution has been so discredited that no reasonable tribunal could act on his testimony, the judge would be justified in withdrawing the case from the jury. **Curtis Irving** was, however, a case based on a sole eye-witness whose evidence had "admitted untruths and blatant and unexplained contradictions and inconsistencies".

Because of the stark difference between the facts in **Curtis Irving** and those in the instant case, we do not accept that the principle enunciated in **Curtis Irving** is applicable here.

[49] Based on all the above, we are of the view that this ground should fail.

Ground two: The sentences imposed were manifestly excessive.

[50] Mrs Reid, in submitting that the sentences imposed against these appellants, were manifestly excessive, relied on the principle cited in **Avis and Others** [1998] 1 Cr App R 420 to the effect (on learned counsel's synopsis) that "the appropriate level of sentence for a firearm offence will depend on all the facts and circumstances relevant to the offence and the offender". Mrs Reid then analysed a number of cases in which the sentences for similar offences demonstrated, on her submission, that the sentences in the instant case were, by comparison, and in the context of each appellant's antecedents, manifestly excessive.

[51] Learned counsel also cited cases dealing with the principles to be observed during the sentencing exercise. Among those, to which she referred, were **R v Errol Campbell** (1974) 12 JLR 1319, **R v Alpha Green** (1969) 11 JLR 238 and **R v Delroy Scott** (1989) 26 JLR 409. In **Alpha Green** the court said at page 284:

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

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

[52] The learned trial judge gave his reason for imposing consecutive sentences on these appellants. His stated reason for so doing was, "those who are subject to consecutive sentencing are out of circulation for a long time so you have two less gunmen to worry about" (see page 216). He formed that view because of the "acute problem [which Jamaica faces with] young men armed with firearms who go around committing all sorts of mayhem and drive fear into the citizens". In addition to that factor, he found that the method of planning and execution of this robbery was deserving of consecutive sentences. He also referred to the case of **R v Delroy Scott**, in support of his stance. He, however, did not expressly consider the principle of the totality of the sentence in respect of each offender.

[53] We agree with Mrs Reid that the learned trial judge erred in principle when he imposed consecutive sentences. Having decided that the learned trial judge erred in principle in applying consecutive sentences, considering that the offences of robbery and illegal possession of firearm, arose out of the same set of circumstances, this court may consider substituting a sentence of its own. We are of the view that the sentences, which were ordered to run consecutively, when viewed as a whole, are, in fact, manifestly excessive. The individual sentences were themselves consistent with sentences for offences of this nature but the addition of the consecutive element was unwarranted. That aspect of the sentence must be set aside.

[54] We are of the view that if the sentences had been ordered to run concurrently, in accordance with the established guidelines concerning sentencing, that would have resulted in an appropriate sentence (see **Kirk Mitchell v R** [2011] JMCA Crim 1). This ground should succeed.

Robbery with aggravation

[55] Before leaving this judgment we should, for general guidance, mention that the learned trial judge seemed to have found the appellants guilty of simple robbery although they were charged with the offence of robbery with aggravation. The relevant portion of the indictment read thus:

> " STATEMENT OF OFFENCE – COUNT 2
> Robbery with Aggravation contrary to Section 37(1)(A) of the Larceny Act.
>
> PARTICULARS OF OFFENCE
> Michael Wallace, Orandy Brown and Patrick Comrie, on the 21st day of August 2006, in the parish of Saint Andrew Robbed [sic] Carlton Planter of an undetermined sum of money and a canvas bag."

[56] In this regard, the learned trial judge made the following comment at page 205 of the transcript:

> "In respect of Count 2, the statement of offence says Robbery with Aggravation, particulars are Robbery, **there is nothing there about Robbery with Aggravation**, so I am satisfied that I feel sure that these three [named men] robbed Carlton Planter of the sum of money, called [sic] it undetermined, so they are guilty on Count 1 and Count 2." (Emphasis supplied)

If we have understood the learned trial judge correctly, he seems to have been of the view that the particulars of offence should have mentioned or made reference to the term "aggravation".

[57] Whereas, we accept that section 37(1) of the Larceny Act does not mention the term "aggravation", that term has been conveniently used to distinguish the offence, referred to in subsection (1)(a), from simple robbery, which is referred to in subsection (2). The relevant portion of the section states:

> "**37.** – (1) Every person who-
>
> *(a)* being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> *(b)* robs any person and, at the time of or immediately before or immediately after such robbery, uses any personal violence to any person,
>
> shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding twenty-one years.
>
> (2) Every person who robs any person shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding fifteen years."

[58] The 36th Edition of *Archbold, Pleading, Evidence and Practice in Criminal Cases*, at paragraphs 1759 – 1776, refers to the equivalent, and similarly worded, section in the English Larceny Act 1916. The learned authors use the term "robbery with aggravation" with reference to offences dealt with in subsection (1), while it uses the term "simple robbery" with respect to those outlined in subsection (2). It is our view,

that subsection (1)(a) does not require the use of the term "aggravation" in the statement of offence of the indictment. The aggravating feature, which makes those offences different from and more serious than, simple robbery, as comprised in subsection (2), is either the use of an offensive weapon or instrument or the presence of more than one person, at the time of the commission of the taking of the property.

[59] It is also important to note that the penalty for simple robbery is less than that for robbery with aggravation.

[60] Subject to what has been said above, in respect of the consecutive element in the sentences, the learned trial judge did not run afoul of the maximum sentence for, what could be considered the lesser offence of, simple robbery but in our view, his findings did support a conviction for robbery with aggravation. The evidence is that both aggravating features were present in the instant case.

Conclusion

[61] In conclusion, we find that the learned trial judge in the face of a strong case for the prosecution, dealt with the discrepancies and inconsistencies in a most competent fashion. This was a case in which he believed one witness' testimony, in respect of certain discrepancies, in preference to another's. He was entitled so to do. Where he failed to make a finding on one discrepancy, he explained his reason for so doing. We find that that decision was not fatal to the conviction, in the face of a strong case for the prosecution.

[62] Although we find that the convictions should be upheld, we are of the view that the learned trial judge, in imposing consecutive sentences, failed to consider the totality principle. We find that as a result the sentences imposed are manifestly excessive and that the consecutive element should be set aside and replaced by an order that the sentences should run concurrently.

[63] On these bases, we order that the applications for leave to appeal against the convictions are granted and the hearing of the applications treated as the hearing of the respective appeals. The appeals against the convictions are dismissed. The appeals against the sentences are, however, allowed. The consecutive element in the sentences, in each case, is quashed and all sentences shall run concurrently for each appellant and shall run from 3 February 2009.