[2021] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 2/2012

ANTHONY GAYLE v R

Mrs Valerie Neita-Robertson QC and Ms Kymberli Whittaker instructed by Robertson & Co for the applicant

Mrs Sharon Milwood Moore and Okeeto DaSilva for the Crown

4, 5 May and 24 September 2021

STRAW JA

Introduction

[1] Just a few days before Christmas, on 20 December 2011, the applicant was convicted by D McIntosh J ('the learned judge') in the High Court Division of the Gun Court, held in the parish of Saint Elizabeth, for the offences of illegal possession of firearm, illegal possession of ammunition, shooting with intent and robbery with aggravation. The applicant was sentenced on 10 January 2012 to serve 10 years' imprisonment in respect of the ammunition charge and 20 years' imprisonment in respect of each of the other counts. The sentences were ordered to run concurrently.

[2] Both the case for the Crown and defence, which could almost be described as cinematic, are summarised below. The learned judge, having considered the evidence, ultimately accepted the Crown's case.

The Crown's case

[3] The Crown called a number of witnesses in support of its case. These witnesses were, Constable Novelette James, Marvin Brown (who was also known as 'Bud Brown'), Constable Claudia Francis, Corporal Errol Montaque, Sergeant Donovan Forbes, Detective Corporal Eugene Mitchell, and Sergeant Kevon Chambers.

[4] It was the night of Friday 26 October 2007, and a "dance" was held in the Cheapside community in the parish of Saint Elizabeth. Constable Novelette James and her colleague, Constable Claudia Francis, decided to attend the dance. At the time of giving her evidence at trial, Constable Novelette James had been elevated to the rank of Corporal of Police. She will therefore be referred to as Corporal James and Claudia Francis as Constable Francis. It is worth mentioning that at the relevant time, they were both police constables stationed in the parish.

[5] In the early hours of Saturday morning, at about 1:30 am, Corporal James left the dance with another friend, Marvin Brown ('Bud Brown'), on his motorcycle. Bud Brown controlled the motorcycle, and Corporal James was his pillion passenger. They were heading to Corporal James' home in Top Hill, Saint Elizabeth. While on their way and reaching in the vicinity of Junction, Corporal James noticed a motor car, which had been travelling behind them for some time.

[6] Bud Brown made a sudden left turn on the Ballards Valley parochial road, and the motor car followed suit. The motor car then drove very close to them. Corporal James said that it started to try to "bank" them. By this, she explained that the motor car drove alongside them, steering to the left. This caused them to go more to the left, on the "bankin" (embankment). Corporal James told Bud Brown not to stop, and the motor car continued to drive alongside them. She then observed someone in the front left passenger side of the motor car pointing a firearm at them. The motor car then overtook them and blocked their path, causing them to stop.

[7] The motor car stopped, and the person pointing the firearm came out of the motor car, still pointing the firearm at them and demanded the motorcycle from Bud Brown. In response, Corporal James pulled her licensed firearm and fired at the man. She recalled seeing a flash of light coming from the man's hand that held the firearm.

[8] Corporal James also fired at the motor car. The driver of the motor car came out and the first man, the passenger, went into the driver's seat and drove off.

[9] Corporal James, having jumped off the motorcycle, left Bud Brown, telling him to run. She ran into the bushes and walked home. When she arrived home, she asked a relative to take her to the police station.

[10] Bud Brown went to the Junction Police Station, only to see the same motor car and the same man who had driven it away earlier. So he decided to leave and, instead, proceeded to Corporal James' home.

[11] Constable Francis received a report and went to the Junction Police Station. There, she saw a man whom she noticed was injured. He was the applicant, Mr Anthony Gayle. He identified himself to her as a police officer. Constable Francis took the applicant to the Mandeville Hospital, where he handed over to her a firearm, magazines and ammunition. Other police officers found an injured man walking on the road and also took him to the same hospital. Constable Francis heard this injured man speaking with the applicant and formed the view that he was involved in the incident. He later identified himself to Sergeant Kevon Chambers as Damion Barrett of a Weymouth Avenue address in Kingston. He was taken to the hospital and treated. During investigations by the Bureau of Special Investigations, a statement was collected from Damian Barrett ('Damion') and the applicant was eventually charged for the above- described offences. Damian was never charged in this matter.

[12] At the trial, Corporal James and Bud Brown identified the applicant as the passenger of the motor car, who had demanded the motorcycle. Corporal James also indicated that she was stationed at Mobile Reserve at some point and that she knew

that the applicant was also stationed there. However, she said that she was looking at the firearm and not his face at the time of the incident.

The defence's case

[13] The applicant gave sworn evidence. His account was that on 26 October 2007, he travelled in a grey Toyota motor car ('motor car') (owned by a friend) with his friend Damion from Kingston to Saint Elizabeth, the parish in which he grew up. The purpose of this journey was to visit his grandmother and other family members, but he also stopped by the dance in Cheapside at about 1:00 am.

[14] The applicant said that when he left the dance, Damion drove, and he was seated in the front passenger seat. They were heading towards the Junction Police Station, which was in the direction of Round Hill district, where he intended to spend the night.

[15] While travelling along the Junction main road, the applicant recalled sitting back in the front passenger seat, which was fully reclined. He sat up when he heard a motorcycle ride up behind the motor car. As the motorcycle passed the right side of the motor car, the applicant observed a male rider and a female pillion. He thought the rider resembled a friend (and in-law) of his, who was of a similar complexion.

[16] The applicant asked Damion to use the headlamp to signal to the rider, which he did. He also tooted the horn. The motorcycle continued to travel in front of them for a mile and a half and the motor car followed behind, as they were heading in the same direction. According to him, on reaching the Ballards Valley main road, Damion tooted his horn and the motorcycle stopped under a streetlight.

[17] After asking "waa gwan", the applicant realised that the rider of the motorcycle was not his friend. He indicated his error and, at the same time, noticed that the rider had his hand under the jacket he was wearing. The applicant then saw the rider with a firearm in his hands. This caused him to pull his service firearm, which was in his waist. He told Damion to drive. Immediately after that, the applicant said that he heard

several explosions coming from the direction of the motorcycle. He also heard glass breaking around him and felt that he was shot several times. As a result, he received injuries to his back, left side, right thumb and forefinger.

[18] The applicant stated that his firearm had become jammed when he tried to put a round in the breech, so he was unable to discharge it; also, he was shocked during the shooting. When the shooting stopped and he regained his composure, he noticed that Damion was not in the car. He did not know at what point Damion had exited the car. As a result, he went around the steering wheel and drove to the Junction Police Station. By this time, he did not see the rider, the pillion passenger or the motorcycle.

[19] The applicant denied coming out of the motor car at any time at Ballards Valley. He also denied pointing or firing his firearm at the rider and pillion passenger and demanding the motorcycle. Specifically, he denied uttering the words "gimmi da bike ya". At no time was the applicant asked whether he had known or recognised Corporal James.

The application for leave to appeal

[20] The applicant sought leave to appeal against his conviction and sentence. This was refused by a single judge of the court. What came before this court was a renewal of that application.

<u>The application to adduce fresh evidence</u>

[21] Additionally, at the outset of the hearing, an application was made on the applicant's behalf for fresh evidence to be adduced on appeal, pursuant to section 28(a) and (b) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). The evidence which was the subject of this application was an affidavit as well as a typed statement, both of which were attributed to the driver of the motor car, Damion. The application was opposed by the Crown.

[22] After hearing submissions on both sides, we concluded that the application to adduce fresh evidence must be refused. The reasons which were indicated at the time of refusal, may be briefly restated.

[23] We considered the proposed evidence as well as the cumulative criteria laid down in **R v Parks** (1961) 46 Cr App Rep 29, which has been followed in numerous cases decided by this court.

[24] It was our view that the applicant had failed to establish the first criterion, namely, that the evidence was not available at the time of the trial. In the instant case, the applicant knew the witness, Damion. They were friends and the applicant knew where he lived, as Damion's address had not changed between 2007 and the date of trial in December 2011.

[25] Damion, in his affidavit in support of the application, did assert, that at the time he gave his statement at the Bureau of Special Investigations in December 2007, he was instructed not to speak to the applicant, as he would be a witness in the case. Mrs Neita-Robertson QC, for the applicant, also referred the court to page 177, lines 18 to 19 of the transcript, where the applicant had given evidence that it had been a condition of his bail that he should not make contact with Damion. However, at the time of the trial, the applicant (who was represented by counsel), would have known that the Crown did not intend to call Damion as a witness. In fact, a certain exchange between the learned judge and defence counsel (at pages 177 to 179 of the transcript) demonstrated that there appeared to be minimal interest in securing Damion's attendance at trial.

[26] In that regard, we found the remarks of Lord Parker CJ in **R v Parks** (at page 634F) quite apt:

> "It is only rarely that this court allows further evidence to be called, and it is quite clear that the principles on which this court acts must be kept within narrow confines, otherwise in

> every case this court would be asked to carry out a new trial."

It is recognised that in appropriate cases, it may not be necessary to stringently apply the above criterion as set out in **R v Parks** (see **Calvin Reid v R** [2020] JMCA Crim 14, paragraph [19]), however, we were not persuaded that the interests of justice, in the circumstances of this case, required that the application be allowed.

Application for the production of exhibits and documents

[27] Queen's Counsel, Mrs Neita-Robertson, also made an application, pursuant to section 28(a) of JAJA, for certain exhibits and documents, which had been admitted as exhibits during the trial, but were missing from the transcript, to be produced for this court's consideration. These documents were (1) the scene of crime photographs on the compact disc (CD) served on defence counsel by the prosecution (exhibits 1A to D and 2A to H); (2) ballistics certificate dated 2 October 2009 (FL No. 46409) (exhibit 3); and (3) diary entry for Saturday 27 October 2007 for the Junction Police Station (exhibit 5). The Crown had no objection to the documents being examined by this court and all the above-mentioned documents were accepted as being part of the record of appeal.

The supplemental grounds of appeal

[28] On behalf of the applicant, Mrs Neita-Robertson sought and obtained leave to abandon the original grounds of appeal and to argue the supplemental grounds filed on 10 July 2015. We allowed her to proceed on the following four supplemental grounds, which are best restated verbatim:

> "GROUND 1
>
> The Learned Trial Judge imported into his assessment of the evidence conclusions, queries and opinions for which there was no evidential basis. This treatment distorted the evidence in ways prejudicial to the Appellant and in so doing, denied him both a fair trial and a fair chance of acquittal."

"GROUND 2

The Learned Trial Judge's treatment of critical discrepancies and inconsistencies in the case amounted to a substantial misdirection which denied the Applicant/Appellant a fair trial."

"GROUND 3

That the Learned Trial Judge erred in failing to uphold the submission of no case to answer in respect of Count 3 of the Indictment which charged the Applicant/Appellant with the Offence of Shooting with Intent."

"GROUND 4

That the sentence imposed by the Learned Trial Judge in relation to the Offence of Illegal Possession of Firearm is manifestly excessive even in circumstances where the offence is accompanied by aggravating features."

Ground 1 - The learned trial judge imported into his assessment of the evidence conclusions, queries and opinions for which there was no evidential basis. This treatment distorted the evidence in ways prejudicial to the [applicant] and in so doing denied him both a fair trial and a fair chance of acquittal.

[29] This ground is primarily concerned with the learned judge's treatment of various aspects of the evidence. There were three aspects which Mrs Neita-Robertson invited the court to consider: (i) the route taken by the applicant; (ii) the spent shell casing found in the motor car; and (iii) the trace level of gunshot residue ('GSR') on the hand of the applicant. The submissions and analysis on each aspect will be considered separately.

(i) The route taken by the applicant

Submissions on behalf of the applicant

[30] The applicant's first complaint surrounded the comments and assessment made by the learned judge in relation to the route he had taken when he followed the complainants (Corporal James and Bud Brown) onto the Ballards Valley main road. Mrs

Neita-Robertson's contention was that the learned judge improperly interpreted the applicant's effort to follow the complainants onto the Ballards Valley road as evidence supporting guilt. She referred the court to page 218, lines 6 to 23 and page 238, lines 1 to 10 of the transcript. These are referred to below.

[31] Mrs Neita-Robertson contended that the conclusion arrived at by the learned judge was based on his opinion regarding the route and that opinion could not be tested as to its accuracy. The applicant was the only witness who was asked (by the learned judge) whether the Ballards Valley road could be taken to get to Round Hill district; and the applicant's evidence that it could was unchallenged and uncontradicted (page 172, lines 11 to 12 and 20 of the transcript). It was submitted that the significance of this was that it went to credibility and the learned judge's assessment of the applicant as not being credible. Queen's Counsel submitted that the learned judge imported his view regarding the route taken by the applicant and that this stance was prejudicial to the applicant.

Submissions on behalf of the Crown

[32] On this issue, counsel for the Crown, Mrs Milwood Moore, expressed the view that the learned judge demonstrated that he had some knowledge of the vicinity when he assessed the applicant's chosen route. The learned judge was entitled to make the findings he did, as the judge of the facts. She submitted that the learned judge had no less latitude than a jury that would be directed to employ common sense and that since the jury would have been pulled from the area, they would have assessed the geography.

[33] Further, Mrs Milwood Moore submitted that the learned judge was not bound to accept the uncontradicted evidence of the applicant without more. On the other hand, even if the applicant could take the route that he did, the learned judge would have been expected to consider what was reasonable, having regard to the time of night.

Discussion and analysis

[34] The learned judge appeared to be sceptical about the applicant's motive in taking the route that he did. His assessment of the applicant is set out at pages 230 (lines 19 to 25), 231 (lines 1 to 3) and 240 (lines 6 to 9) of the transcript:

> "…So that, this court does not accept the accused as a witness of truth when he says that he was riding down this motor bike to speak to a friend; or that he was merely taking a longer route to go to Round Hill when he turned on the Ballards Valley Road, or that Bud Brown had a firearm and shot at him, or that what he says, how he says the incident took place, is the truth."
>
> "…the accused's evidence is rejected, except where it supports the case for the prosecution. This Court does not accept him as a witness of truth."

[35] In relation to whether the applicant was prejudiced, there is no basis to assert that unfairness had been demonstrated. Firstly, the learned judge questioned the conduct of the complainants and the applicant as part of his role as a judge of the facts. We see this demonstrated at page 218, (lines 6 to 22) of the transcript:

> "…Not only have I listened carefully to the evidence, I have also asked the questions, I have asked questions so that I can explore the thinking of persons involved. For instance, I had to ask why would somebody who is going through a hill [sic] in St. Elizabeth would be going on the Ballards Valley Road and that is because you don't go to Round Hill by Ballards Valley. I asked, for instance, why would somebody who knows that they have been trailed not go to the nearest police station and the thinking, of course, was shown that there wasn't any real thinking after all, there was a policewoman and she was thinking she was heavy, physically heavy but she also carries a heavy gun. So one looks at these things in assessing the witnesses and their credibility."

[36] Secondly, even if the learned judge relied on his personal knowledge of the route to assess the applicant's credibility, the applicant's guilt was not determined solely on

that basis. The learned judge's disbelief of the applicant, in totality, comes after assessing all the evidence. He stated thus at page 238, lines 1 to 21:

> "Then, it is clear, that the accused man is not a witness of truth. I say that because of his reason for going to St. Elizabeth. His adventures from the 26th to the 27th of October, 2007, his trailing of the motor cycle from Cheapside to the Ballards Valley Road, his purported story, his purported visit to stay with his grandmother and then going onto the Ballards Valley Road, the fact, that he has claimed that he was looking or trying to catch up with his relative or friend from Mandeville, who he thought was riding a bike, whom he could not recognize, because they travelled from Cheapside to Junction, or from Junction onto the Ballards Valley Road and could not recognize. Even if they were under a street light on the Ballards Valley Road that hour of the night or that hour of the early morning, why would you want to stop beside two people, on a lonely country road?"

[37] The learned judge also rejected the applicant's evidence that Bud Brown pulled a firearm and fired it at him, as all the spent shells found at the scene were discharged from Corporal James' firearm. He stated thus at page 230, lines 13 to 19 of the transcript:

> "... So that there really is nothing to suggest that this, Bud Brown, was the person who had a firearm that day. There were no - - there was no indication that he fired any gun and every indication is that from the bike, the only shooter was the pillion rider."

[38] The learned judge also considered the applicant's report to the police that "[t]wo men on a bike did this to me" (page 239, lines 5 to 6), when it should have been obvious that one of the persons on the motorcycle was female (Corporal James) (see page 239, lines 7 to 13 of the transcript). Further, during the evidence of the applicant, he actually stated that he observed a male rider and a female pillion (pages 144, lines 24 to 25 page and 145, line 1). There would have been evidence before the learned judge, that he gave a specific report to the police about the gender of the persons on the motorcycle, but was now asserting something contrary.

[39] These portions of the summation are demonstrative of the fact that there was a thorough assessment of all the evidence. The fact that the learned judge emphasised his disbelief of the applicant, based on the route he had taken to follow the motorcycle, would not be sufficient for the court to conclude that he distorted the evidence in a way that was prejudicial to the applicant.

(ii) The spent shell casing found in the motor car

[40] The issue raised by the applicant's second complaint in this context, is whether the learned judge wrongfully inferred that the 9mm casing found in the car was capable of supporting his conclusion that the applicant was outside of the motor car when he fired at the complainants.

Submissions of the applicant

[41] In taking issue with the learned judge's conclusion, Mrs Neita-Robertson highlighted the following exchange (which took place during the no case submission) between the learned judge and defence counsel:

> "HIS LORDSHIP: But counsel, don't you know that casings normally go backwards, so it would have gone behind him?
>
> [DEFENCE COUNSEL]: And where would it have gone?
>
> HIS LORDSHIP: In the car -- if he's standing outside the car at the door of the car…"
>
> (see page 136, lines 24 to 25 and 137, lines 1 to 6 of the transcript)

[42] It was submitted that there was no evidence (forensic, scientific or expert evidence) from which the learned judge could have reasonably concluded that the applicant's firearm would have ejected a spent shell, at the angle and in the manner that would have caused it to end up in the motor car. Further, Mrs Neita-Robertson regarded it as peculiar that the learned judge failed to address his mind to the absence of spent shells from the applicant's firearm, being found on the outside of the motor car, in what was described as a shootout by the Crown's witness, Bud Brown. She

referred the court to page 37, lines 19 to 20 of the transcript. She also contended that the scientific evidence, as well as the evidence of Constable Francis, supported the defence's version as to what took place. The evidence from the forensic certificate speaks to the fact that all the spent shells found on the road were fired from Corporal James' gun.

[43] Mrs Neita-Robertson also argued that the learned judge failed to adequately consider the case for the defence, which was that the applicant did not discharge his firearm. His evidence was that his firearm jammed when he attempted to put a round in the breech. She referred to page 162, lines 5 to 15 of the transcript. This was supported by the evidence of Constable Francis, to the effect that she was unable to clear the applicant's firearm when she took it from him, when he was at the hospital. Reference was made to pages 72, lines 18 to 25 and 74, lines 17 to 24 of the transcript. Despite the reasonable inferences to be drawn, the learned judge baselessly concluded that before the firearm was jammed, it was fired and that there was no definitive evidence that what was stuck was a bullet and not a spent shell. Reference was made to page 235, lines 12 to 25 of the transcript.

Submissions on behalf of the Crown

[44] Counsel for the Crown submitted that when the ballistic certificate was examined, there was a solid and conclusive scientific basis for the conclusion that the spent shell casing retrieved from the motor car was fired by the applicant when he discharged his firearm at the material time.

[45] Mrs Milwood Moore also referred to the evidence of Sergeant Kevon Chambers ('Sergeant Chambers') (page 118, line 24 and 119, lines 1 to 6 of the transcript), where he said that a bullet appeared to go through the left rear window of the motor car, and that when he searched the said motor car, he found one 9mm spent shell casing and two warheads. She candidly acknowledged that Sergeant Chambers did not say where in the car the spent shell casing was found but contended that, based on the relative positions, the applicant would have been on the outside of the motor car, with his back

to the motor car; and if he pointed the firearm at the complainants, then the spent shell casing could have reasonably ejected into the motor car.

Discussion and analysis

[46] It is important to have regard to what was not in dispute between the parties. Both the prosecution and defence are agreed that Bud Brown and Corporal James were travelling on the motorcycle that morning, and that they were followed by the motor car in which the applicant was a passenger. There is no dispute also that the motor car caught up with the motorcycle, somewhere on the Ballards Valley road; that the applicant spoke to the complainants; that the applicant was in possession of his service firearm; that shots were fired at the applicant, who eventually drove the motor car away after Damion left the vehicle; and that both the applicant and Damion received injuries. The issues to be determined by the learned trial judge were whether the applicant pointed a gun at the complainants, exited the vehicle and whether he fired at them before going back into the motor car and driving away.

[47] Was there probative evidence before the learned judge to support a conclusion that the applicant had left the motor car and fired at the complainants? The learned judge had the evidence of both complainants that the applicant did so. Further, there was evidence that a 9mm casing and two warheads were found in the said motor car by Sergeant Chambers the morning after (27 October 2007) (see page 119, lines 5 to 6 of the transcript). Unfortunately, there is no evidence as to where these items were found in the motor car. Also, there is no evidence of any testing of the warheads by the ballistic expert, Superintendent Sydney Porteous. However, the ballistic certificate revealed that it was concluded that the spent casing was fired from the weapon (firearm) of the applicant; and that the weapon could have been fired on 27 October 2007. The learned judge would have had before him all these separate pieces of evidence (which he considered at pages 235, lines 13 to 25 and 236, lines 1 to 25 of the transcript). In particular, the learned judge indicated at page 236, lines 11 to 25:

> "Now, defence attorney had been very good in suggesting that when the accused came out of the motor vehicle, if the accused came out of the motor vehicle then with an opened door, the bullet would have gone to the right, according to him, and if the door was open then it would have quite easily and conceivably had gone into the motor vehicle; but the presence of this nine millimetre spent shell is evidence which supports the case for the prosecution that the accused man did fire his firearm. Further, there is supporting evidence coming from the defence and that is, as to the presence of gun powder residue, albeit in trace form, on the hands or the palms of the accused man."

[48] We would agree that there was no scientific or expert evidence to support any view that the spent casing could have ejected into the car. However, the inference drawn by the learned judge was certainly reasonable, as he had accepted as credible the evidence of Bud Brown and Corporal James, that the applicant had fired while outside of the car.

(iii) Trace levels of gunpowder deposits

[49] The applicant also complained that the learned judge wrongly assumed that the trace levels of GSR found on him supported the evidence that he had fired at the complainants. He maintained that the learned judge erred in his hypothesis that the levels of GSR on his hand would have been reduced, as a result of the treatment of the wounds on his hands (being cleaned), when he was admitted to the hospital.

Evidence relevant to GSR

[50] The evidence concerning the GSR came from the prosecution's witness, Detective Corporal Eugene Mitchell ('Detective Corporal Mitchell'), forensic crime scene investigator and the defence witness, Ms Marcia Dunbar ('Ms Dunbar'), government analyst at the Forensic Science Laboratory.

[51] Detective Corporal Mitchell's evidence was that on 27 October 2007, sometime in the afternoon, he went to the Mandeville Public Hospital, where he swabbed the applicant's hands. The swab was secured, along with swabs taken from the hands of

Corporal James, that he had taken earlier that day. On 29 October 2007, he gave the envelopes, marked A and B, containing the swabs to Detective Constable Patroy Gayle.

[52] Ms Dunbar's evidence was that she received the envelopes marked A and B on 7 November 2007. She took possession of the contents of the envelopes and placed them in safe custody until it was time for testing.

[53] In relation to the applicant, Ms Dunbar recounted that she analysed five swabs in the envelope marked B - (1) right web, (2) right palm, (3) left web, (4) left palm, and (5) control sample. She found that the swabs revealed the presence of GSR at trace level on the swabs numbered (2) and (4), that is, the swabs taken from the applicant's palms. There was no GSR found on the others. She explained the various levels of GSR (elevated, intermediate and trace) and the significance of each. In relation to the finding of trace level, she stated that it could arise from: (a) firing a firearm or being in the direct path of GSR as it is emitted from a fired firearm, with an initial deposit of either elevated or intermediate and with activity and lapse of time, there is a loss of GSR to trace level; (b) being in the direct path of GSR, as it is emitted from a fired firearm within a distance of 24 inches; or (c) secondary transfer, that is, not firing or being in the direct path of GSR as it is emitted, but coming in contact with a space that has a deposit of GSR.

[54] Ms Dunbar also explained that her findings would depend on several variables, including activity occurring between the time of firing and the time the swabs were taken; that there is also a range of three to six hours, after which there could be a rapid loss and that this loss could depend on environmental conditions at the time of firing, as well as the type of firearm. Ms Dunbar also explained that there could be a loss in the amount of GSR found due to some activity, coupled with the passage of time (see pages 201 to 204 of the transcript).

Submissions on behalf of the applicant

[55] Mrs Neita-Robertson submitted that the learned judge's conclusion disregarded the expert evidence of Ms Dunbar concerning the secondary transfer of GSR. In particular, she highlighted the learned judge's conclusion that the presence of trace levels on GSR on the hands of the applicant could not have been present by the mere handling of the firearm, but could only make sense if the handling was after the firearm had recently been fired. She also noted his opinion that it was highly conceivable that the applicant's webbing would have been cleaned. She referred the court to page 237, lines 1 to 8 of the transcript.

[56] Queen's Counsel argued that the learned judge assumed the role of a scientific witness and concluded that the applicant fired the firearm; and further, that the wounds to the applicant's hands would have caused them to be cleaned, thus reducing the elevated level of residue to trace. The learned judge recognised that in the absence of evidence (direct or inferential), he was relying on a hypothesis, and he nonetheless used the hypothesis as a basis for rejecting the defence. This treatment of the evidence was biased, distorted and inaccurate, and as a consequence, the applicant did not receive a fair trial.

Submissions on behalf of the Crown

[57] As articulated by Mrs Milwood Moore, the Crown's position was that the learned judge could not be faulted as he faithfully applied the expert evidence; and considered whether it made sense having regard to the evidence as a whole. The learned judge formed his view based on the evidence of Ms Dunbar that there were three distinct means by which a deposit of GSR could be found at the trace level.

[58] It was submitted that the means of a secondary transfer was not supported by any evidence placed before the learned judge, and as such, he was correct in his finding on the point. In particular, it was contended that the learned judge rightly pointed out at page 237 of the transcript that the mere handling of a firearm would not

have given rise to the deposit, unless the firearm had recently been fired. This was in keeping with Ms Dunbar's evidence. Further, it was submitted that based on the location of the injuries sustained by the applicant, the webbing would have been cleaned, while he was receiving treatment at the hospital. Although the learned judge referred to it as a hypothesis, it was a plausible and reasonable inference that could have been drawn from the evidence.

Discussion and analysis

[59] It was open to the learned judge to assess the import of the trace level GSR on the applicant's palms within the context of all the evidence, including the fact that the applicant was taken to the hospital and his hand was treated for gunshot injuries. The learned judge made the following remarks at pages 236, lines 21 to 25 and 237, lines 1 to 16 of the transcript:

> "…Further, there is supporting evidence coming from the defence and that is, as to the presence of gun powder residue, albeit in trace from, on the hands or the palms of the accused man. Defence attorney's suggestion that mere handling of the gun would have resulted in this, certainly can only make sense if the handling was after the firearm had been recently fired and if one takes into consideration where the bullet wounds were on the accused hand, then it seems to be highly conceivable that his webbing would have been cleaned, and I'm merely saying that as a hypothesis because the evidence, as I said, which supports his having fired the firearm was firstly the evidence of the witnesses, the evidence of the spent shell, the evidence of the gun powder residue and the fact that when he was seen at the police station both by Bud Brown and by Constable Francis he still had the firearm in his hand."

[60] The learned judge commented that the mere handling of a firearm by the applicant, resulting in trace level GSR, could only make sense if he had handled the firearm after it had recently been fired. However, this is not a totally accurate reflection of Ms Dunbar's evidence. She spoke to the secondary transfer of GSR (the third method by which trace level deposits can be made), resulting from one coming into contact with

a space that has a deposit of GSR. It did not follow, therefore, that it had to be the applicant, who had fired the firearm.

[61] However, the learned judge had credible evidence before him to conclude that the presence of trace level GSR on the palms of the applicant supported his finding that the applicant discharged his firearm that morning. This included direct testimony from both Bud Brown and Corporal James. In relation to the learned judge's comment about the cleaning of the webbing of the applicant's hands, he, (the learned judge) admitted that it was only a hypothesis, that the webbing would have been cleaned. Also, as submitted by Crown Counsel, as a judge of the facts, the learned judge would have been at liberty to consider the evidence of the applicant's treatment at the hospital in order to determine if any reasonable inferences could be drawn relevant to the finding of trace level GSR. The applicant's complaint in this regard is without merit.

[62] The major issues in the instant case would have been the credibility of the witnesses and the supporting scientific and forensic evidence. It was the duty of the learned judge to determine the credibility of the witnesses, assess the impact of the evidence of the expert witnesses, and determine whether that expert evidence affected the reliability of the evidence of the other witnesses. Having considered all of the above, we conclude that on a totality of the evidence, the complaints contained in ground one are not sustainable

[63] Ground one therefore fails.

Ground 2 - The learned trial judge's treatment of critical discrepancies and inconsistencies in the case amounted to a substantial misdirection which denied the applicant a fair trial

[64] This ground pertained to the learned judge's treatment of critical discrepancies and inconsistencies. It was generally contended on the applicant's behalf that a judicious consideration of the case against the applicant required a more careful assessment than that by the learned judge. In particular, there were four areas of discrepancies and inconsistencies that were said to demonstrate inherent weaknesses

and went to the root of the Crown's case. These were (i) the evidence relevant to the banking of the motor car, (ii) the position of the motorcycle and occupants of the motor car when the firing took place, (iii) the shootout, and (iv) the applicant running back to the motor car.

[65] The issue of the banking of the motor car and its position vis a vis the motorcycle when the firing took place will be considered jointly.

The banking of the motor car and the relative position of the motorcycle to the motor car when the firing took place

Submissions on behalf of the applicant

[66] Mrs Neita-Robertson contrasted the evidence of the complainants on this issue. Corporal James' evidence was that the motor car came alongside them and then turned left into their path (pages 8, lines 9 to 10 of the transcript). The evidence of Bud Brown was that the motor car drove up alongside them, and they were forced to stop because of a pothole. She referred the court to pages 44, lines 13 to 25 and 45, lines 1 to 2 of the transcript. Her complaint was that the learned judge did not assess the discrepancy critically, as it was relevant to whether the Crown's case was credible.

[67] Mrs Neita-Robertson submitted that the position of the motorcycle and the motor car was important as it would: (i) provide the opportunity for Corporal James to see the applicant (who she knew before); (ii) explain the damage to the motor car as evidenced by the photographs; (iii) explain the injuries received by the applicant; (iv) determine whether the applicant was inside or outside of the motor car when the shots were fired at him; and (v) ultimately determine whether the complainants were speaking the truth or not.

[68] It was contended that the damage to the motor car (as seen in the photographs admitted into evidence) was consistent with the defence's case and supported a firing at the motor car as the complainants rode away. These photographs demonstrated damage to the car seat, the left rear window and to the upper left door panel, which

was inconsistent with the applicant firing at Corporal James outside the motor car and both facing each other.

[69] Also, she referred to Corporal James' evidence that the motor car was directly in front of her (page 15 of the transcript), the applicant was outside of the motor car (two to three arms lengths away) and that she fired at the front left passenger side, at a person and not a motor car (pages 14 to 17, 22, and 26 of the transcript); that this was inconsistent with Bud Brown's account that the motor car drove up alongside them, that he (Bud Brown) stopped, due to a pothole and that Corporal James fired over his right shoulder, while the car was at his side (as opposed to in front of them).

Submissions on behalf of the Crown

[70] Mrs Millwood Moore commenced her submissions by asking the court to consider the role of a trial judge when sitting alone; that it is not the duty of the trial judge to mention every single inconsistency; and that this court has to determine whether an evidential basis existed for the decision. She stated also that the learned judge had a critical role in the assessment of the witnesses and that this court is slow to interfere with findings of facts based on a credibility assessment.

[71] It was conceded that the learned judge erred in finding that both witnesses agreed that the motor car had turned across them and banked them. She referred the court to page 232, lines 16 to 18 of the transcript. It was acknowledged that the witnesses differed as to how the motor car "banked" their motorcycle; that Corporal James described the motor car as turning into the path of the motorcycle while Bud Brown said it was to their side. She conceded that the credibility of the witnesses would have been relevant to the learned judge's assessment, but the divergence did not undermine the overall reliability of their evidence, which remained overwhelmingly credible, in comparison to that of the applicant. The discrepancy was not a material issue to the case. Had the learned judge recognised this discrepancy, the overall impact of the evidence on the Crown's case was such that the result was unlikely to have been any different.

[72] In relation to the position of the motorcycle and occupants of the motor car when the firing took place, the overall significance of this evidence in assessing the credibility of witnesses was acknowledged. However, it was submitted that the divergence did not undermine the reliability of the evidence given. Counsel stated that the learned judge made a qualitative assessment of the Crown witnesses juxtaposed against the applicant; and that in a number of respects, he rejected the evidence of the applicant except where it supported the case for the Crown. She referred the court to page 240 of the transcript, where the learned judge indicated "[as] far as the prosecution witnesses are concerned, this Court finds that notwithstanding discrepancies, which are slight, this Court finds them witnesses of truth…."

[73] Counsel submitted further, that these inconsistencies and discrepancies which arose were not material, and their treatment would not have led to a different outcome when all the evidence was considered.

[74] In particular, she referred to the damage to the left side of the motor car and stated that this was consistent with the complainants' evidence. This evidence was that the applicant was outside the motor car, by the left passenger door, when he fired at them, and Corporal James returned fire. In relation to the applicant's injuries, it was submitted that although the applicant contended that all his injuries were from behind, the injuries on his right thumb and forefinger could have been sustained when Corporal James fired at the applicant while he was standing outside the motor car.

Discussion and analysis

[75] It is observed that the learned judge's review of the evidence, at page 232, lines 2 to 12 of the transcript, was not completely accurate, as he summarised the incident without, specifically, stating what each witness actually said:

> "They say that the motor car, on that road, sped up and banked the bike. They say that when they were banked -- the bike was banked – that the complainant -- the accused man, who was in the left front passenger seat, came out

> with his gun in hand and demanded the bike. They say that the accused opened fire and then ran back into the motor car; they say that the pillion rider, Constable Novelette James, opened fire on the man and on the motor car as it sped way [sic]."

[76] The evidence of Corporal James is that the motor car, tried to bank them, then came alongside them and turned left in their path (page 7, lines 19 to 25 and page 8, lines 1 to 15 of the transcript) and that the motor car was in front of her. Bud Brown's evidence supplied other specific details. He said the motor car drove up alongside them and banked them. At page 44 (lines 13 to 25) and page 45 (lines 1 to 2) of the transcript, he elaborated:

> "Q. I am suggesting that you were not banked, you stopped.
>
> A. A 'bank' him 'bank' me, if a never 'bank' him 'bank' me, me couldn't stop because Miss James she mi mustn't stop, him 'bank' mi, me can't move.
>
> Q. And you stopped because the car behind you was blowing the horn?
>
> A. Him don't blow no horn.
>
> Q. Was blowing the horn and flashing the headlights at you?
>
> A. Him don't blow and stop, him did bounce we off cause pothole down there that is why we stop, if the pothole never deh deh we go straight ahead."

Further at page 47, (lines 1 to 4):

> "Q. Was it in front of you to come over your right shoulder, was it in front of you?
>
> A. I told you at me side, at me side, you nuh, because dem 'bank' me and deh right beside me."

[77] This discrepancy, as to whether the motor car came to the side of the motor cycle or actually stopped in front of them, when considered in isolation, could not be such as would affect the root of the Crown's case, as both Bud Brown and Corporal

James agreed that the car did drive up alongside the motorcycle and there was manoeuvring of the motor car, which impeded the movement of the motorcycle. It was the applicant's case also, that the motor car drove up alongside the motorcycle and that the motorcycle stopped.

[78] There is an additional complaint, however, about the learned judge's failure to examine the above evidence critically, as Mrs Neita-Robertson contended that the damage to the motor car and the injuries to the applicant undermined the credibility of both complainants. The evidence of the applicant is that he received injuries to his back, his left side and his right thumb and forefinger. Mrs Neita-Robertson has queried how is it, that he did not receive any frontal injuries, if the motor car was in front of Corporal James, when she fired at the applicant (who was two to three arm's length from her). Is this, however, a proper assessment of the evidence? The pertinent aspects of the evidence will now be examined.

The evidence relevant to the damage to the motor car

[79] Sergeant Donovan Forbes ('Sergeant Forbes'), who visited the scene of the incident on the morning of 27 October 2007, gave evidence that he contacted the scene of crime technician, Detective Corporal Mitchell, who subsequently processed and photographed the scene; that he (Sergeant Forbes) then went to the Junction Police Station where he was shown the motor car (a grey Toyota Corolla motor car registered 1271FC). He noticed that the rear left-hand window was smashed, the headrest of both the passenger and driver's seat had (what appeared to be) bullet holes, and there were (what appeared to be) bloodstains on the left side of the motor car.

[80] This was supported, essentially, by Detective Corporal Mitchell's evidence. He testified that he photographed the said motor car. He observed what appeared to be gunshot holes to the left side of the motor car and that the glass window of one of the doors was broken out. He also saw what appeared to be blood on the inside of the motor car on the driver's side. On the passenger's side, he observed what appeared to be a gunshot hole in the front seat.

[81] Similarly, Sergeant Chambers, who visited the Junction Police Station that same day, stated that he observed the motor car and that the front passenger seat and left of the seat, had (what appeared to be) gunshot holes. He also saw (what appeared to be) blood on the driver's seat, and it appeared to him that a bullet had gone through the left rear window.

[82] From what could be made out visually, the photographs (which were photocopies) reflected the evidence set out above from these witnesses as to the damage on the motor car.

[83] We have considered the totality of the evidence that was before the learned judge. The discrepancies aside, the evidence of both complainants was that the applicant was standing in front of the left passenger door when the firing commenced. The bullet hole seen on that door could be consistent with that evidence. There is no expert evidence as to the position the applicant could have been in when he received the injury to his thumb and forefinger. However, there is nothing to negate an inference being drawn that the injury to his thumb and forefinger, and possibly also the injury to his left side, could have occurred as he stood outside.

[84] One does not get the impression that the scene was static. Indeed, the evidence indicates that the parties were moving reactively to what was taking place at different points in time. Bud Brown stated in reference to the applicant, "[a] shot put him back in the car" (see page 47, line 25 of the transcript). Corporal James also stated that the applicant fired and ran back inside the motor car; that she fired seven to eight shots in total. She fired at the applicant, who was three arm's length away, directly in front of her, outside the motor car. She also indicated that she fired at the motor car, after she had fired at the applicant. There is nothing to suggest that the movement by the applicant was not swift.

[85] At some point, Damion would have left the driver's seat and ran out of the car and the applicant would have driven it away. Blood was seen on the driver's seat and

bullet holes to the front passenger seat. The head rest of both these seats had bullet holes and it appeared that the left rear window had a bullet hole. So, if the evidence of Corporal James was found to be credible, the injuries to the applicant and Damion as well as the areas of damage to the motor car, could be substantially accounted for.

[86] Mrs Neita-Robertson also questioned whether it was credible that Corporal James did not recognise the applicant if the motor car was in front of the motorcycle and he came out of the car. However, Corporal James gave evidence that she did not look at the applicant in the motor car, but at the firearm. She also indicated that she was not able to see him that night by the light of the motorcycle shining on the motor car. Therefore, her failure to recognise the applicant was not inconsistent with the evidence that the applicant had exited the vehicle.

The shootout

[87] It is to be noted that various aspects of the submissions in relation to this issue would have already been reviewed in relation to the previous ground. There is much overlap of the evidence as one considers the complaints of the applicant.

Submissions on behalf of the applicant

[88] Mrs Neita-Robertson has emphasised the discrepancies that existed between the complainants as to this shoot out, as well as the discrepancies between their evidence and the scientific evidence, which would tend to support the applicant's narrative. She contended, therefore, that the learned judge erred, when he used the presence of the spent casing in the motor car, to support the evidence of the complainants.

[89] Queen's Counsel submitted that the evidence did not support a shootout. She asked the court to consider that there were no spent shells from the applicant's firearm on the ground, in the region where he is alleged to have alighted from the motor car. There were no missing rounds from his firearm. Neither of the complainants, who were in close proximity to the applicant were shot and injured. The applicant did not receive any frontal injuries; rather, he was shot from behind.

[90] Queen's Counsel also referred the court to the diary entry (exhibit 5), which showed that the written report did not contain any statement that the applicant came out of the motor car.

Submissions on behalf of the Crown

[91] The Crown's contention was that the learned judge had the benefit of observing the demeanour of the witnesses and that he considered, in a fair and balanced way, whether Corporal James fired shots out of mere panic or in a bid to return fire. Further, the damage identified to the left of the motor car was consistent with the evidence of Corporal James and Bud Brown that the applicant was outside of the motor car (by the left passenger door) when he fired at them, and Corporal James returned fire. Reference was also made to the applicant's injuries, particularly the two to the right thumb and forefinger. It was submitted that even though the applicant contended that all his injuries were sustained from behind, the two to his hand could easily have been sustained when Corporal James fired at him as he stood outside the motor car.

[92] Counsel conceded that there was a discrepancy between the evidence of the complainants and the forensic evidence, as to what had been termed by Bud Brown as a shootout. However, it was submitted that the learned judge had sufficient evidence before him to conclude that the applicant had discharged one round of his weapon, before the bullet became stuck in the breech.

Discussion and analysis

[93] Two highly disputed facts were whether the applicant had exited the motor car at any time and whether he fired at the complainants. Based on our considerations above, we have concluded that the totality of the evidence before the learned judge could support the conclusion that the applicant had left the vehicle. We also conclude that there was evidence from which the learned judge could make the reasonable finding that the applicant had discharged one round from his firearm.

[94] The remaining issue is whether the learned judge dealt adequately or at all with the discrepancies between the complainants and the forensic evidence in relation to the applicant discharging his firearm, as he stood outside the motor car. Bud Brown said that after the applicant came out, he opened fire (see page 37, lines 15 to 17); he then described the incident as "a pure fire" (see page 37, lines 19 to 20). He also said, he saw Corporal James with a gun and that, "shot did bus from the two sides that night" (page 45, lines 15 to 16 of the transcript).

[95] Corporal James, however, did not speak to shots (in plural) being exchanged. She said the gun in possession of the applicant, looked like a 9mm; and then very carefully maintained that what she saw, was a light flash coming from his hand, but she heard nothing. However, based on the ballistic certificate, all the spent casings collected at the scene were discharged from Corporal James' firearm.

[96] The evidence of the applicant is that he did not discharge his firearm at all, either outside or from within the motor car, as he was unable to do so. How did the learned judge reconcile this evidence?

[97] The evidence reveals that a 9mm spent casing was found in the motor car in which the applicant had been a passenger. The forensic evidence revealed that it came from the firearm that had been in the hand of the applicant. Constable Francis had stated that, when she took possession of this firearm, she could not clear it at the time. The learned judge considered all this evidence at page 235, lines 12 to 25 and page 236, lines 1 to 21 of the transcript. In particular, at page 23, lines 12 to 23:

> "…So that, is it that the accused man did not fire the shot because his firearm stuck? Now, defence attorney had suggested that it must have been stuck because there was a bullet in the breech. The fact is that nobody has told the court definitively whether it was a bullet or a spent shell which caused the sticking of the gun. We accept that the gun was stuck and one must accept that after it had stuck it could not be fired. But what the evidence shows is that before it got stuck it was fired."

[98] Bearing in mind the evidence that the spent shell was discharged from the applicant's firearm and that the firearm could have been fired on the date of the incident, the findings of the learned judge were supported by the evidence.

[99] Further, at pages 219 to 220 of the transcript, the learned judge, in reviewing the evidence, stated thus:

> "…they were aware that they were being followed by a particular gray Kingfish motor vehicle, which followed them from Cheapside or on the road from Cheapside to Junction and then from Junction on to the Ballards Valley Road, where this vehicle blocked their motorcycle and the passenger came out of the vehicle with a gun in his hand and demanded the bike that was being ridden by Bud Brown.
>
> Apparently they say that there was a refusal to hand over the bike, there was a flash from the muzzle of the gun held by this would-be assailant whereupon the pillion rider, Constable Novelette Brown, fired shots at the man who had come out of the motor vehicle."

[100] The learned judge also considered Bud Brown's evidence, that he was frozen after the firing and that Corporal James was firing over his shoulder. In light of the learned judge's reference to a flash from the muzzle of the gun, Bud Brown's description of a shootout cannot be said to have been what the learned judge accepted as reliable. He would have been entitled to consider one witness more reliable than another, in relation to certain aspects of the evidence. Corporal James was the person who fired at the applicant and could be said to have been more observant as to the extent of the shootout. This is even more so when one considers the state of mind of Bud Brown at the time the firing took place.

[101] Further, the applicant gave no evidence as to discharging his firearm in that motor car at any other time. Therefore, there was no explanation offered for the presence of the spent casing in the said motor car. Given all these circumstances and,

in particular, the tenor of Corporal James' testimony, the inference made by the learned judge was one that would have been open to him to make.

[102] Queen's Counsel also referred the court to the diary entry, which was made by Sergeant Forbes, that it did not reflect the totality of the evidence of the Crown witnesses. However, it also did not reflect the totality of the applicant's evidence, that the motor car had stopped and that he spoke to the persons on the motorcycle. It noted in part, "…the driver of the car pressed the motorcycle and tried to block the path of the motorcycle, the passenger pointed a gun at Cons. James and the rider, in fear of her life, Cons. James pulled her licenced Beretta pistol S/No. #19997Y and fired several shots in the man's direction. The car then sped off". The learned judge made no reference to this entry in his summation. His duty would have been to assess the credibility of the witnesses who gave a first-hand report of what actually took place. Accordingly, this complaint does not advance Mrs Neita-Robertson's submission that the learned judge failed to critically assess certain discrepancies.

<u>The applicant running back to the motor car</u>

Submissions on behalf of the applicant

[103] Mrs Neita-Robertson pointed out that Corporal James' evidence was that the applicant fired and ran back inside the car (she referred the court to page 30 of the transcript), and Bud Brown's evidence, that the man with the gun ran around to the driver's seat, when the driver jumped out and he backed up the motor car (reference was made to pages 37 to 38). She complained that these differing accounts were not dealt with by the learned judge.

Submissions on behalf of the Crown

[104] This complaint was not addressed specifically by the Crown.

Discussion and analysis

[105] Although there was no mention by the learned judge of this aspect of the evidence, that is, the route taken by the applicant to return to the car, we do not believe that it is material in all the circumstances. There is no dispute that the applicant did drive the car away, after the other man exited.

[106] Further, this variation in the evidence between the complainants could be accredited to a difference in their ability to recall what actually took place or even to recall a particular sequence of events. The learned judge reminded himself that differences between witnesses are to be expected when considering inconsistencies and discrepancies in the evidence. Corporal James gave no evidence concerning the driver (Damion) leaving the motor car before she left the scene. Bud Brown said that the driver had run out when the firing was taking place and that the applicant ran around to the driver's side. At that time, Corporal James ran off the motorcycle and told him to run and the car headed into the direction of Junction.

[107] The applicant supported both Bud Brown and Corporal James to some extent, as he indicated that the driver did exit the motor car but that he was in shock and he did not know when the driver did so. Thereafter, he jumped from the passenger seat (over the hand brake), went into the driver's seat and drove off. Bearing in mind, the sudden and traumatic event experienced by the complainants, this difference in testimony has to be viewed in that context.

[108] The learned judge examined the areas of disagreement between the witnesses (see page 232, lines 14 to 22 of the transcript) and considered some of the discrepancies. As far as the learned judge was concerned, the discrepancies did not go to the root of the case and had occurred because of the witnesses' level of intelligence, powers of observation and limitations (see page 231, lines 4 to 14 of the transcript). He also reminded himself that the incident took place over four years ago (at the time the witnesses were giving evidence) and that some memories were not as good as other memories (page 217, lines 1 to 5 of the transcript). Therefore, the failure of the learned

judge to specifically address this variation in the evidence could not be considered detrimental to his assessment of the complainants' credibility.

[109] It is the duty of a trial judge, in assessing the credibility of the witnesses as the judge of the facts, to weigh the inconsistencies and discrepancies in the evidence, in order to determine whether they are material or non-material, if they go to the root of the prosecution's case and, if in all the circumstances, a verdict of guilty can be maintained. However, there is no requirement for every single inconsistency and discrepancy to be isolated and identified. In **Morris Cargill v R** [2016] JMCA Crim 6, Brooks JA (as he then was) put it thus:

> "[30] In addressing the issues raised by these grounds, it must be pointed out that trial judges are required to explain to juries the nature and significance of inconsistencies and discrepancies and give them directions on the manner in which they should treat with those elements that occur in the evidence. **Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case.** Three previous decisions of this court assist in outlining the duties of a trial judge in this regard.
>
> [31] Firstly, Carey JA explained, in **R v Fray Deidrick** SCCA No 107/1989 (delivered 22 March 1991), the general obligation on the trial judge in respect of this aspect of a case. In addressing a complaint that a judge had failed to bring to the attention of the jury the fact that there were inconsistencies between a witness' testimony and a previous statement made by that witness, Carey JA said at page 9 of the judgment:
>
> > '...Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with

> other witnesses in the case. The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. **There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses**.'" (Emphasis supplied)

[110] This dictum of Carey JA was also referred to by Brooks JA in **Kirk Mitchell v R** [2011] JMCA Crim 1, at paragraph [22]. In that case, Brooks JA also made the point, in relation to the assessment of inconsistencies, that "[t]here is no doubt that a judge, alone, does not have to engage in the same level of direction as in a trial with a jury" (see paragraph [18]). In a similar vein, the Caribbean Court of Justice in **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) expressed as follows:

> "[29] Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language which belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[111] At the end of the day, we cannot agree that the discrepancies, whether considered or not by the learned judge, were of such a nature that they led to the root of the Crown's case being destroyed or undermined. The learned judge assessed the credibility of the Crown witnesses against the totality of the evidence and found them to be witnesses of truth, notwithstanding the discrepancies.

[112] He assessed the evidence of the Crown witnesses, and this would have been in contrast to the evidence of the applicant and clearly rejected the applicant's evidence. The learned judge clearly recognised that he was assessing two conflicting narratives but stated that he was able to get a better picture of what actually happened, "if one looks at the wider picture of the evidence of the other witnesses who were not on the scene" (page 222, lines 20 to 25 of the transcript). What this court has to consider is the overall evidence that the learned judge would have had before him and whether there was credible evidence offered by the Crown to sustain the conviction.

[113] Finally, Mrs Neita-Robertson's complaint (in oral submissions) that the learned judge referred to the applicant, that he "blocked out", instead of repeating the word used by the applicant himself, that he was in shock, is not an error that would change the trajectory of the evidence that the learned judge accepted as the truth of what took place. The submission that the learned judge misdirected himself cannot be sustained. We are satisfied therefore that the learned judge dealt adequately with the issues complained of under this ground and further that the learned judge had sufficient evidence before him to come to the conclusion that he did.

[114] We find no merit in this ground of appeal.

Ground 3 - That the learned trial judge erred in failing to uphold the submission of no case to answer in respect of count 3 of the indictment which charged the applicant with the offence of shooting with intent

Submissions on behalf of the applicant

[115] On behalf of the applicant, it was submitted that there was no evidence on which the learned judge could have found, beyond a reasonable doubt, that the applicant discharged his firearm at the scene and the learned judge erred in so concluding.

[116] Mrs Neita-Robertson argued that having regard to the burden and standard of proof, the Crown had failed to prove that the applicant shot at the complainants. She pointed to the absence of spent shells on the scene belonging to the applicant's firearm, in the circumstances of a shootout. It was also uncontradicted evidence that the

applicant was issued with a firearm and 40 rounds of ammunition and that he had all the rounds on his person. This was supported by the evidence of Constable Francis and Corporal Montaque. It was also corroborated that one round was stuck (jammed) in the breech, which was the reason the applicant said he was unable to discharge his firearm. The presence of a spent shell casing in the motor car was not conclusive and did not attain the required standard of proof that the applicant discharged his firearm on the scene, bearing in mind that he is a police officer.

[117] Additionally, the presence of trace levels of GSR did not attain the required standard of proof that the Crown was required to meet. This was supported by the expert evidence of Ms Dunbar in relation to secondary transfer.

Submissions on behalf of the Crown

[118] In response, Mrs Milwood Moore submitted that the learned judge had a basis on which to find that the applicant fired his firearm. This is so based on the findings of the ballistic expert as set out in the ballistic certificate; also the finding of the spent shell found in the motor car as well as the trace level GSR found on the applicant's palms. Further, the applicant's ability to return the same number of rounds (as put forward by the applicant) may not be conclusive evidence.

Discussion and analysis

[119] Based on a review of the evidence, it is clear that this ground is without merit. The evidence revealed that it would have been open to the learned judge to find that a prima facie case of shooting with intent had been made out. The evidence and rationale in relation to this count has been extensively considered under grounds one and two and there is no need for any further analysis.

[120] Ground three therefore fails.

Ground 4 - the sentence imposed by the learned trial judge in relation to the offence of illegal possession of firearm is manifestly excessive even in circumstances where the offence is accompanied by aggravating features

[121] This ground relates to the applicant's sentence of 20 years' imprisonment in respect of the offence of illegal possession of firearm (this was the first count on the indictment). Although it was stated earlier, it is convenient to set out the sentences imposed on the applicant in respect of each count.

count 1	illegal possession of firearm	20 years
count 2	illegal possession of ammunition	10 years
count 3	shooting with intent	20 years
count 4	attempted robbery	20 years

Submissions on behalf of the applicant

[122] Queen's Counsel's major area of focus was on the sentence imposed for the offence of illegal possession of firearm. In that regard, she submitted that the term of 15 years could be viewed as being high. This was so, even where there were significant aggravating features attached to the offence. She sought to demonstrate this by reference to a number of cases from this court, **Evon Johnson v R** [2014] JMCA Crim 43, **Kirk Mitchell v R** and **Andrew Mitchell v R** [2012] JMCA Crim 1. The sentences imposed in these cases for the offence of illegal possession of firearm were 10 years, 7 years and 10 years (respectively).

[123] It was contended that the learned judge's reasons for imposing the abnormally high sentence of 20 years were grossly exaggerated, namely, the fact that the applicant was a police officer and that he caused the Jamaica Constabulary Force to be perceived negatively. She also argued that the sentence was higher than sentences in other cases where members of the security forces were actually injured.

[124] After an exchange between the court and Queen's Counsel, Mrs Neita-Robertson indicated that she was in agreement with the Crown's position, that 15 years would have been more appropriate.

[125] The applicant's ground of appeal in respect of sentence did not encapsulate the other offences. However, during oral submissions, Queen's Counsel sought to widen the scope of her complaint in relation to the sentences for the remaining offences. We permitted her to extend her submissions in the interests of justice.

[126] She contended that the sentence of 10 years for illegal possession of ammunition could not stand if the court were to determine that the offence of shooting with intent had not been made out. She also submitted that the offence of attempted robbery should only attract a term of 10 to 15 years. Mrs Neita-Robertson made no further submissions concerning the offence of shooting with intent.

Submissions on behalf of the Crown

[127] Brief submissions were made initially, by Mrs Millwood Moore, in relation to the offences of illegal possession of ammunition and shooting with intent. She indicated that she was in agreement with Mrs Neita-Robertson, that the offence of illegal possession of ammunition could not stand if this court were to acquit the applicant of the charge of shooting with intent. Further, she submitted that, even if the conviction of illegal possession of ammunition was upheld, the sentence of ten years appeared to be excessive. This was so, as the applicant could only have been charged with possession of one round of ammunition (the round that he was found to have fired). He could not have been charged for illegal possession (of the remainder) of ammunition that was handed over to Constable Francis, as this was legally issued to him, by the Jamaica Constabulary Force; and that it was not used in the course of the incident. She submitted that an appropriate sentence would be a term of five years.

[128] Crown Counsel, Mr Dasilva, continued with comprehensive submissions on sentencing, which embraced all four counts. It was submitted that, even though the

sentences imposed by the learned judge reflected the seriousness of the offences committed by a police officer (who should have upheld the law), there could be a reduction of the applicant's sentence in respect of each of the counts, and the appropriate sentences would be:

count 1	illegal possession of firearm	15 years
count 2	illegal possession of ammunition	5 years
count 3	shooting with intent	18 years
count 4	attempted robbery	15 years

[129] Mr Dasilva helpfully referred the court to the various legislative provisions and decisions of this court relevant to each offence. Crown Counsel also referred to the normal range for each offence, as contained in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('Sentencing Guidelines'). He acknowledged that the learned judge would not have had the benefit of the Sentencing Guidelines, at the time of sentencing, but submitted that they could still be considered.

[130] The relevant aggravating features were that (i) the applicant was a police officer and should have been upholding the law, (ii) there was some premeditation on the part of the applicant, (iii) the applicant travelled from Kingston to Saint Elizabeth to commit a criminal act, (iv) the firearm was assigned to the applicant as a keep and care firearm, and (v) the firearm was used to shoot at two persons, including a police officer.

[131] The sole mitigating feature was that the applicant had no previous convictions.

[132] In respect of illegal possession of firearm, reference was made to section 20(1)(b) of the Firearms Act and the cases of **Lamoye Paul v R** [2017] JMCA Crim 41 and **Deryck Azan v R** [2020] JMCA Crim 27. Mr Dasilva submitted that the appropriate sentence would be 15 years. He arrived at this by using 15 years as the starting point,

increased the sentence to 17 years in recognition of the aggravating factors, and reduced this by two years, because the applicant had no previous convictions (the only mitigating feature).

[133] The same legislative provision was referred to in respect of illegal possession of ammunition, section 20(1)(b) of the Firearms Act, as well as **Deryck Azan v R** and **Curtis Grey & Toussaint Solomon v R** [2018] JMCA App 30.

[134] Mr Dasilva recommended five years as an appropriate sentence for illegal possession of ammunition. He referred to the fact that the ballistics certificate, revealed that only a 9mm lugar expended firearm cartridge (fired from the applicant's firearm) was tested. In that regard, he opined that seven years should be the starting point; and that this should be reduced by two years, in consideration of both the aggravating and mitigating features, bringing it to five years.

[135] In respect of shooting with intent, reference was made to section 20(2) of the Offences against the Person Act, as amended by section 2(c) of the Offences Against the Person (Amendment) Act, 2010, **Deryck Azan v R** and **Curtis Grey & Toussaint Solomon v R**. Mr Dasilva recommended 18 years as an appropriate sentence. He arrived at this by using 15 years (the mandatory minimum) as the starting point and adding five years in consideration of the aggravating features, bringing it to 20 years. He then subtracted two years for the mitigating feature.

[136] In respect of attempted robbery, reference was made to section 37(1)(a) of the Larceny Act, together with section 50 of the Interpretation Act, which provides that criminal attempts for all offences carry the same penalty as the substantive offence, unless there is a contrary intention. The cases of **Jerome Thompson v R** [2015] JMCA Crim 21 and **Lamoye Paul v R** were also cited.

[137] Mr Dasilva recommended 15 years as an appropriate sentence. He used the starting point of 12 years, increased it by five years to 17 years for the aggravating features, then reduced it by two years for the mitigating feature.

Discussion and analysis

[138] As it relates to sentence, the case at bar is unique for the reason that it is the Crown that has done the heavy lifting, in urging the court to consider a reduction over all of the sentences imposed on the applicant.

Illegal possession of firearm – 20 years' imprisonment

[139] The narrow issue to be determined based on the applicant's ground of appeal, was whether the sentence imposed by the learned judge, in relation to the offence of illegal possession of firearm was manifestly excessive, even in circumstances where the offence is accompanied by aggravating features. Crown Counsel conceded that the sentence of 20 years' imprisonment was manifestly excessive and has recommended a sentence of 15 years as appropriate.

[140] Even though it was common ground among counsel that the sentence was manifestly excessive, it is necessary to have regard to the general approach, which this court typically adopts on appeals against sentence. This principle was concisely stated by Morrison P, at paragraphs [42] and [43] of **Meisha Clement v R** [2016] JMCA Crim 26.

> "[42] … [In] **Alpha Green v R** [(1969) 11 JLR 283, 284]…the court adopted the following statement of principle by Hilbery J in **R v Ball** [(1951) 35 Cr App R 164, 165]:
>
> > 'In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that 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.'

> [43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[141] It falls to be determined whether it has been clearly demonstrated that the learned judge failed to correctly apply the applicable sentencing principles in accordance with the relevant authorities. In that regard, we are mindful that in 2011, the learned judge would not have had the benefit of **Meisha Clement v R** or the Sentencing Guidelines.

[142] In the case of **Kenneth Hylton v R** [2013] JMCA Crim 57, Harris JA reviewed the sentences imposed in a number of cases including **Devon Carter v R** [2010] Crim 97 where the applicant was convicted of illegal possession of firearm and assault. A sentence of 17 years was imposed for the firearm offence and this was reduced to 10 years. Following her review, she stated at paragraph [23]:

> "As shown above, on conviction for illegal possession of firearm the tariff ranges between 10 and 15 years. It is apparent that the trend is that **a starting point of 10 years for illegal possession of firearm is the preferred tariff**…"

[143] Further a spectrum between 12 to 15 years has been considered to be appropriate in cases that go beyond the mere possession of a firearm simpliciter (see dictum of McDonald-Bishop JA at paragraph [18] of **Lamoye Paul v R**). There is no doubt therefore, that the sentence of 20 years' imprisonment is outside of the normal range of seven to 15 years, as contained in the Sentencing Guidelines.

[144] The learned judge began his brief remarks on sentence, by stating that he was treating the applicant as a person with no previous convictions. He did not indicate a

starting point for any specific offence in his consideration. What followed is best set out:

> "HIS LORDSHIP: … Let's get that very clear, and a person without previous convictions found guilty of the offences for which you have been convicted, **the law says I have to give you 15 years minimum**." (Emphasis supplied)
>
> (Pages 257, lines 23 to 25 and 258, lines 1 to 2 of the transcript)

[145] It is not clear which offence the learned judge was referring to, which would have attracted a minimum sentence. The only offence which now attracts such a statutory minimum, is the offence of shooting with intent (count 3); and that minimum is 15 years' imprisonment, with the maximum being life imprisonment (per section 20(2) of the Offences against the Person Act, as amended by section 2(c) of the Offences Against the Person (Amendment) Act, 2010). However, at the time the offence was committed, the mandatory minimum would not have been applicable, it being committed prior to the amendment of the Act. So, the learned judge would have been incorrect in his reference to a mandatory minimum. The danger of this particular instance of imprecision, is that the learned judge may have also been of this view in relation to the offences of illegal possession of firearm (count 1) and attempted robbery (count 4).

[146] Therefore, it is possible that the learned judge used 15 years as his starting point and adjusted upwards, having regard to the aggravating features which he expressed in the following manner (which Queen's Counsel described as a gross exaggeration):

> "…You were a police officer at the time you committed these offences and that is absolutely abhorrent, because in the nature of things it shows firstly, that you ought not to have been a police officer, and secondly, that you have contributed to police officers being branded as corrupt, dishonest, and flagrant, flagrantly criminal."
>
> (Page 258, lines 3 to 12 of the transcript)

[147] We must express that we do not consider these remarks by the learned judge to be grossly exaggerated. The list of aggravating factors is not a closed one, and aggravating factors may vary in significance from case to case. The other aggravating features, which have been identified to by Mr Dasilva, were not specifically mentioned by the learned judge, but may very well have been a part of his contemplation, having regard to the obvious tone of rebuke in his sentencing remarks.

[148] In addition, the applicant had no previous convictions. The learned judge also considered mitigating features to be the fact that the applicant is "human" and that he had received injuries (page 258, lines 13 to 15 of the transcript). By this, we understand the learned judge to be acknowledging the classical principles of sentencing and endeavouring to regard the applicant as an individual, rather than an abstraction, and to deal with him in the context of the particular circumstances of his case (as Graham-Perkins JA observed in **R v Cecil Gibson** (1974) 13 JLR 207, 211 to 212).

[149] We are of the view that 13 years would be the appropriate starting point, since the firearm was a service firearm and so not obtained from an illegal source but, instead, was used to commit an offence, which rendered the possession illegal. It, however, caused no injury or loss to a person or damage to property. The aggravating features, that is, the breach of trust as a police officer and the location and time of the incident, warranted an increase of five years, increasing the sentence to 18 years. Then, the mitigating features, that the applicant had no previous conviction, he was injured during the incident and immediately reported to the police and his firearm taken are considerations that could result in a subtraction of three years. The result is that 15 years is an appropriate sentence. We are of the view that a sentence on the higher end of the range is appropriate, in light of the applicant's role in society as a police officer who ought to be trusted by the public, and the breach of that trust.

[150] In the circumstances, we would agree with both Queen's Counsel and Crown Counsel that the sentence of 20 years' imprisonment for the offence of illegal possession of firearm was manifestly excessive and should be set aside and that a

sentence of 15 years' imprisonment be substituted. This is more in keeping with the range of sentence for this offence, having regard to the particular circumstances (see **Russell Robinson v R** [2016] JMCA Crim 34 and **Deryck Azan v R**, wherein the sentences of 15 years for illegal possession of firearm was undisturbed, though not specifically challenged).

Illegal possession of ammunition – 10 years' imprisonment

[151] The considerations in respect of the offence of illegal possession of ammunition (count 2) are similar to those in respect of illegal possession of firearm. However, there is no risk that the learned judge erred in considering himself bound to impose a mandatory minimum sentence of 15 years since he imposed a term of 10 years' imprisonment. This sentence is also within the normal range of seven to 15 years as set out in the Sentencing Guidelines.

[152] Crown Counsel has suggested seven years as an appropriate starting point and contended that this should be reduced by two years after consideration of relevant factors.

[153] It is noted that in the two authorities relied on by Crown Counsel, **Deryck Azan v R** and **Curtis Grey & Toussaint Solomon v R** [2018] JMCA App 30, this court and also a single judge (in a review of the prescribed minimum penalty under section 42L(1) of the Criminal Justice (Administration) Act) did not disturb the sentences of 10 years and 5 years respectively, for the offence of illegal possession of ammunition. In both of these cases, the appeals were focused on the duration of the sentences imposed for the offence of shooting with intent.

[154] Similarly, in the case of **Russell Robinson v R**, where the applicant, a former sergeant of police, was found guilty of having over 1000 rounds of ammunition in his possession that were stolen from the police armoury. He was sentenced to 10 years' imprisonment on the count of illegal possession of ammunition. On his appeal to this court, he only mounted a challenge against his conviction. The sentence of 10 years'

imprisonment was, therefore, not disturbed by this court. The sentence is, however, considered for the limited purpose of establishing a range of sentences within which this offence would fall.

[155] In the same vein, guidance is also to be had from the sample of five cases referred to by Brooks P in **Ramon Seeriram v R** [2021] JMCA App 23, at paragraph [21]. In common with the instant case, these were cases where the offence of illegal possession of ammunition took place before the Sentencing Guidelines were established, and the range of sentences imposed was from one to 8 years. While these authorities assist in demonstrating the range of sentences usually given, more assistance is derived from looking at cases where the appropriateness of the sentence, in respect of the same offence was specifically raised and considered by the court. To that end, it is helpful to consider the fifth case mentioned in the sample, **Tyrone Headley v R** [2019] JMCA Crim 33 as well as the recent decision in **Denver Bernard v R** [2019] JMCA Crim 13.

[156] In **Tyrone Headley v R** the appellant, who was also a police officer, was travelling in a motor car in which a 9mm Smith and Wesson pistol with 10 cartridges was found on the floor at the rear. This was not his service firearm. He was convicted and sentenced to 12 years for the illegal possession of firearm and five years for the illegal possession of ammunition. On appeal, counsel urged a sentence of two years as appropriate for the illegal possession of ammunition as there were no aggravating factors and in light of the mitigating factors. It was also contended that the principle of rehabilitation was not sufficiently considered by the learned judge. While it was held that the starting point (20 years) was outside of the usual range for the illegal possession of firearm and the sentence of 12 years was reduced to 8 years, the court found that five years for illegal possession of ammunition was well within the normal range and thus affirmed that sentence without any further discussion (see paragraph [110]).

[157] In **Denver Bernard v R** it was observed that the usual starting point for illegal possession of ammunition is 10 years (see paragraph [35]), however 12 years was deemed appropriate in view of the significant amount of assorted ammunition recovered. Ultimately, the sentence of 10 years, in respect of that applicant was reduced to 9 years (and further discounted in view of a guilty plea, which is inapplicable to the case at bar).

[158] We have borne in mind the words of Rowe JA that "[t]here is no scientific scale by which to measure punishment, yet a trial judge must, in the face of mounting violence in the community, impose a sentence to fit the offender and at the same time to fit the crime" (**R v Beckford and Lewis** (1980) 17 JLR 202, 203).

[159] We consider that there was no indication by the learned judge that he took into account the quantity of ammunition (that is, at most two 9mm rounds which would include the spent shell casing and the round that was stuck in the breach suggesting that there was an attempt to fire a second round) for which the applicant would have been convicted. For completeness, the evidence did not reveal exactly how much ammunition was in the firearm. Constable Francis received three magazines and 40 rounds of 9mm cartridges from the applicant, which she handed over to Corporal Montaque, who in turn handed these over to Sergeant Forbes. The learned judge specifically asked Sergeant Forbes how many rounds were issued to the applicant and he stated that he did not check; the learned judge also asked Sergeant Chambers (who obtained the ballistics certificate) if he checked the firearm and he stated that he had not. However, it would appear that the other ammunition that the applicant handed over to the police, were legally issued and not used in the commission of the offence. In that event, although 10 years is the usual starting point, with the normal range being seven to 15 years, bearing in mind the circumstances, a starting point of five years would be appropriate. We considered that it should be adjusted downwards by two years after balancing the aggravating and mitigating circumstances identified in relation

to this offence and the illegal possession of firearm. The appropriate sentence would be three years' imprisonment.

[160] Accordingly, the sentence imposed by the learned judge is manifestly excessive and does warrant this court's intervention.

Shooting with intent – 20 years' imprisonment

[161] In support of his submission that the appropriate sentence is 18 years, Crown Counsel, Mr DaSilva, argued that the statutory minimum sentence of 15 years should be the starting point. He proposed that five years should be added in view of the aggravating features and two years subtracted for the mitigating features.

[162] Mr Dasilva also invited the court's attention to paragraph [44] of **Deryck Azan v R**, where it was suggested that it should be regarded seriously where a firearm is used with the intention of causing grievous bodily harm to police officers, who are persons appointed to uphold law and order in the society. This, under normal circumstances, justifies a starting point of 18 years.

[163] As mentioned earlier, the learned judge would have erred in considering that the statutory minimum sentence would have been applicable at the time of the sentence hearing. Therefore, Crown Counsel's reliance on the statutory minimum is also incorrect.

[164] We would also point out a slight nuance, that Corporal James was not shot at in her capacity as a police officer. Neither the applicant nor Corporal James gave evidence that they recognised one another that early morning. Therefore, we cannot accept the Crown's submission that 18 years is an appropriate starting point. We believe that 15 years' imprisonment is an appropriate starting point, although the statutory minimum is not applicable. The aggravating features noted above are, nonetheless, disturbing. They would mandate an addition of five years to the starting point. However, the mitigating factors should allow for a deduction of three years, having regard to the additional fact

that there was no repeated and sustained shooting at the complainants. The appropriate sentence should therefore be 17 years' imprisonment.

Attempted robbery – 20 years' imprisonment

[165] The same risk looms large; that is, the learned judge may have mistakenly thought there was a mandatory minimum of 15 years' imprisonment in respect of this offence. The imposition of 20 years' imprisonment is outside the normal range, which is between 10 to 15 years.

[166] While Crown Counsel is correct that the offence of attempted robbery attracts the same sentence as that of robbery, by virtue of section 50 of the Interpretation Act, the learned judge failed to take into account some relevant factors and the applicable principles of law in imposing almost the maximum sentence on the applicant.

[167] Bearing in mind that the maximum term of imprisonment for robbery with aggravation is 21 years (per section 37(1)(a) of the Larceny Act), and the usual starting point for robbery with aggravation involving a firearm was considered to be 12 years (see paragraph [34] of **Jerome Thompson v R**, and **Lamoye Paul v R**), we are of the view that the sentence imposed is manifestly excessive.

[168] Having regard to the circumstances of the case, which in some aspects could be described as egregious, we would accept Crown Counsel's submission that the usual starting point of 12 years be used. We would adjust it upwards by five years having regard to the aggravating features that have been noted in dealing with the offence of illegal possession of firearm. A downward adjustment of three years is considered appropriate in view of the mitigating features identified in the circumstances of the commission of the offence and the offender. Accordingly, we conclude that in the circumstances, the appropriate sentence is 14 years' imprisonment for the offence of attempted robbery.

[169] There is no indication that the applicant was entitled to any credit for time spent in pre-trial custody in respect of any of the charges.

Conclusion

[170] Based on the foregoing, these are the orders of the court:

1) The application for leave to appeal against conviction is refused.

2) The application for leave to appeal against sentence is granted.

3) The hearing of the application for leave to appeal sentence is treated as the hearing of the appeal against sentence.

4) The appeal against sentence is allowed.

5) The sentences imposed by the learned judge for all three offences are set aside and substituted therefor are the following sentences in respect of each offence:

    (i) illegal possession of firearm (count 1) - 15 years' imprisonment at hard labour;

    (ii) illegal possession of ammunition (count 2) – three years' imprisonment at hard labour;

    (iii) shooting with intent (count 3) - 17 years' imprisonment at hard labour; and

    (iv) attempted robbery with aggravation (count 4) - 14 years' imprisonment at hard labour

6) The sentences are to be reckoned as having commenced on 10 January 2012, the date they were imposed, and are to run concurrently as ordered by the learned judge.