[2022] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 1/2018

LENNOX GOLDING v R

Kemar Robinson for the appellant

Ms Shauna-Kaye James for the Crown

30 May, 3 June and 1 July 2022

LAING JA (AG)

[1] The appellant was tried on an indictment that contained two counts, before George J ('the learned trial judge'), sitting without a jury, in the High Court division of the Gun Court for the parish of Kingston. On 4 July 2017, he was convicted on both counts, which were for illegal possession of firearm (count one), and wounding with intent (count two). On 15 December 2017, he was sentenced to 15 years' imprisonment on each count. The sentences were ordered to run concurrently.

[2] The appellant filed a Criminal Form B1 seeking leave to appeal his convictions and sentences. A single judge of this court considered and refused his application for leave to appeal his convictions but granted leave to appeal the sentences. The appellant, as he is entitled to do, renewed his application for leave to appeal his convictions in relation to both counts of the indictment, before us.

[3] On 3 June 2022, after previously hearing submissions from both parties in relation to that application for leave and appeal against sentence, we made the following orders:

1. The application for leave to appeal against conviction is refused.
2. The appeal against sentence is allowed.
3. The sentences are set aside and substituted therefor are the following:
    (a) Illegal possession of firearm: nine years' and three weeks' imprisonment at hard labour, (with 11 months and one week spent in custody on pre-sentence remand having been credited);
    (b) Wounding with intent: 14 years' and three weeks' imprisonment at hard labour, (with 11 months and one week spent in custody on pre-sentence remand having been credited).

5. The sentences are to run concurrently and are to be reckoned as having commenced on 15 December 2017.

At that time, we promised to put our reasons in writing. This is a fulfilment of that promise.

Background facts

[4] The case for the prosecution was that on 16 September 2015, at about 12:30 pm, Michael Calder, ('the complainant'), was driving his taxicab ('the taxi'), which was a Toyota Corolla motor car. He was heading in the direction of the Gregory Park community in Saint Catherine. There were three female passengers in the taxi. He pulled the taxi to the left of the roadway and stopped in front of the Watson Grove community in the same parish to allow a passenger (subsequently confirmed to be Ms Sharlene Smith), to disembark. After Ms Smith got out of the taxi, and before it moved off, the complainant heard the sound of a motorbike behind the taxi. He looked in his right door mirror of the taxi and noticed the appellant riding a motorbike ('the bike') with a pillion passenger,

almost at the back door of the taxi, a distance which was estimated at between 8 – 10 feet. The complainant said he saw the face of the appellant, and having recognised him, he did not bother to drive off, but instead waited for him to approach the driver's side window, which was down. When the bike came up to the window next to him, and was about 6 inches away, he was looking through the window, when he heard a loud explosion that sounded like a gunshot, and he immediately experienced a numb feeling in his right shoulder. He saw the pillion passenger pointing a gun at him and so he sped off. The bike was being driven slowly behind the taxi and the complainant increased his speed and went on his way.

[5] When the complainant reached a roundabout, the two remaining passengers disembarked. The complainant saw two police officers and after telling them of the incident, they escorted him to the Spanish Town Hospital where he was treated and remained for approximately a month.

[6] The complainant's evidence in chief was that from the time he saw the appellant and the pillion through his side mirror to the time he sped off after the shooting was about 45 seconds and of that period, he saw the appellant's face for the majority of the time. The complainant, subsequently, on 30 September 2015, identified the appellant, by way of a video identification parade.

[7] At the trial, the appellant gave sworn evidence and called three witnesses in his defence, Ms Sharlene Smith, Corporal Marvin Senior and Wayne Reeves. He deployed a defence of alibi. He accounted for his whereabouts on the day of the incident and stated that on 16 September 2015, at approximately 11:30 am, he was at the Spanish Town Hospital where he went to remove a pin from his injured thumb. He had reached the hospital at some "minutes to 11" and had ridden a motorbike that he had borrowed from his friend Dwight Richards. The doctors were on strike and after waiting between 30 to 45 minutes, he left the hospital and went to Tawes Pen in the same parish to visit his friend Wayne Reeves at a cook shop and grocery where he worked. The appellant

remained there for about two hours "reasoning", drinking and smoking until about 2:00 pm when he left and went to Gregory Park to a food shop.

[8] Wayne Reeves gave evidence that the appellant rode a bike and visited him at his place of work at approximately 12 noon and they were together until the appellant left at 2:00 pm.

[9] Ms Sharlene Smith was the passenger for whom the complainant had stopped, just before the shooting, to allow to disembark the taxi. She testified that after she alighted from the taxi, she heard the sound of a bike. As her back was turned to the main road, she did not know where the bike came from. After hearing the sound of the bike, she heard the sound of a gunshot and then she saw the taxi skidding. She then walked home. It was her estimation that from the time she heard the sound of the bike to when she saw the car skid, was not more than three seconds.

[10] The evidence of Corporal Senior was that on the day of the incident, he interviewed the complainant at approximately 12:20 pm and he was not given the name of any of the two men who were on the bike.

The application for leave to appeal

[11] Counsel for the appellant, Mr Robinson, sought and was granted permission for the appellant to abandon the original grounds of appeal. The renewed application for leave to appeal, before this court, proposed four supplemental grounds as contained in Mr Robinson's skeleton submissions, namely:

> "1. The Learned Trial Judge erred in her analysis of the evidence in relation to the identification by the complainant which resulted in her misdirecting herself that the opportunity for identification was good.
>
> 2. The Learned Trial Judge erred in her analysis of the reliability and credibility of the Prosecution's case which resulted in her returning a verdict of guilty.

> 3. The Learned Trial Judge's rejection of the appellants' case, without analysis, was unreasonable and she failed to give fair consideration to the appellant's case without providing sufficient reason as to why his case was rejected despite his evidence being consistent and credible.
>
> 4. [T]he prescribed minimum sentence of fifteen years for the offence of wounding with intent, in the circumstances of this case, is manifestly excessive and unjust."

The issue of jurisdiction of the court and joint enterprise

[12] Before addressing the appeal, we noted that there was no issue joined between the parties as to the applicable provision under which the appellant had been charged. Section 20(1)(b) of the Firearms Act ('the Act') prohibits a person from being in possession of a firearm or ammunition except under and in accordance with the terms and conditions of a firearm user's licence. For the offence of wounding with intent, the relevant provision is section 20(1) of the Offences Against the Person Act. Section 20(2) states the punishment where a firearm is used and provides that a person who is convicted before a circuit court of wounding with intent with the use of a firearm, shall be liable to imprisonment for life or such other term not being less than 15 years, as the court considers appropriate.

[13] It was undisputed that the appellant was not the person who did the physical act of shooting at the complainant and wounding him. This, on the case for the prosecution, was done by the pillion passenger.

[14] Section 20(5)(a) of the Act provides as follows:

> "20. - (5) In any prosecution for an offence under this section-
>
> (a) any person who is in the company of someone who uses or attempts to use a firearm to commit-
>
> (i) any felony; or

> (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,
>
> shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm; …."

It is now settled by cases such as **R v Clovis Patterson**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 81/2004, judgment delivered 20 April 2007, that the effect of this section is that where a person is found to be present to aid and abet the principal offender who is in unlawful possession of a firearm, and the principal offender uses or attempts to use that firearm in the commission of a felony, such as the offence of shooting with intent, the aider and abettor is deemed to also be in unlawful or illegal possession of that firearm.

[15] Although it was not raised as a ground of appeal, we considered whether the learned trial judge was required to make an express declaration that she was relying on section 20(5) of the Act. We accordingly invited counsel to address us on this issue. Mr Robinson highlighted the fact that the appellant has denied being present at the material time and place of the commission of the offence. As a consequence, this restricted the extent to which the appellant could have advanced, in a fairly robust manner at trial, that the circumstances of this case did not give rise to a reasonable presumption that the person riding the bike was present to aid and abet the pillion passenger, in the commission of the offence of wounding with intent. Mr Robinson conceded that the point was not taken at the trial in the court below for that reason, and it would similarly not be advanced before us.

[16] We have observed that the learned trial judge considered the principle of joint enterprise and concluded that the person who was riding, knew that the pillion passenger was armed and had the intention to shoot the complainant. Her summation, at page 261 lines 11 to 29 of the transcript, is as follows:

> "… I find as a fact that the prosecution has proven beyond a reasonable doubt that the accused was the rider of the motorbike, he had a pillion, the rider- who is the accused – drove slowly up to the side window of the motor vehicle and in doing so facilitated the pillion in carrying out the act of shooting the complainant. Thus, riding slowly up to the vehicle and stopping at the driver's window was part of the plan. After shooting, the reaction of the accused was to remain stationary. There is no evidence of him being shocked, afraid or bewildered. He was not taken by surprise as this was part of the plan and the common intention to shoot and wound the complainant, hence his reaction or non-reaction."

[17] However, despite these findings, the learned trial judge made no specific reference to section 20(5) of the Act nor did she indicate that this section was the basis on which the conviction of the appellant for the offence of illegal possession of firearm was grounded. Nevertheless, notwithstanding this omission, we formed the view that the conclusions reached by the learned trial judge on the evidence were inescapable. In view of that, we did not find that any miscarriage of justice had occurred by the learned trial judge neglecting to refer to section 20(5) of the Act.

Ground 1: The Learned Trial Judge erred in her analysis of the evidence in relation to the identification by the complainant which resulted in her misdirecting herself that the opportunity for identification was good

The submissions

[18] The appellant sought to impugn the learned trial judge's finding that he was guilty of the offences of illegal possession of firearm and wounding with intent on the basis that she erred in her analysis of the evidence as to identification. The crux of the complaint is that the learned trial judge did not properly take into consideration how quickly the incident occurred and the difficulties that the complainant would have had in identifying the appellant.

[19] It was submitted on behalf of the appellant that the learned trial judge ought not to have accepted the evidence of the complainant that the bike took 15 seconds to go from the back of the taxi to the driver's window because it was not logical that a moving

motorcycle would take 15 seconds to cover a short distance of 10 feet. It was argued that, as a consequence, the learned trial judge erred in accepting that the complainant had 20 seconds within which to observe the appellant and that this would have given sufficient opportunity for recognition.

[20] Mr Robinson highlighted the fact that the learned trial judge accepted a weakness in the evidence in respect of the identification of the appellant which was revealed when the complainant said the rider came up to the car window, since the complainant would have had only a side view of the rider's face. Accordingly, the time that the rider was approaching the window was critical to the opportunity for the complainant to have identified him and, for this reason, the time that the bike took to travel from the rear of the taxi to the window is of vital importance. It was further argued that the learned trial judge's analysis of the time for recognition of the rider was flawed, based on the narrative of the events. Furthermore, the learned trial judge improperly discounted the value of the evidence of Sharlene Smith, that from the time she heard the sound of the bike to when she saw the car skidding after she heard the explosion, she did not "think it reach even three seconds to how it happen fast".

[21] On the contrary, Crown Counsel, Ms Shauna-Kaye James, contended that there was sufficient evidence which supported the learned trial judge's conclusion that the complainant had ample opportunity to observe the appellant and identify him, especially because this was a case of recognition.

[22] It was conceded that there was an inconsistency in the evidence of the complainant because, in examination-in-chief, he said that the period from first seeing the appellant in the side mirror until he sped off in the car was 45 seconds, whereas, during cross-examination, he stated that when he first saw the bike until it stopped at his car window would probably be about 15 seconds. Then, from the time the bike stopped until he heard the explosion was maybe about another 5 seconds. Ms James submitted that the learned trial judge identified the inconsistency but accepted that the incident lasted for a total of 20 seconds and not 45 seconds.

[23] It was also accepted by the Crown that the learned trial judge did not address the discrepancy between the complainant's estimate of 20 seconds and that of Ms Sharlene Smith of less than three seconds. Nevertheless, the learned trial judge was entitled to assess the sequence of events as described in the narrative given by the complainant and to have concluded that the observation by the complainant was not a fleeting glance and unreliable.

Discussion and analysis

[24] There was no express criticism by Mr Robinson of the learned trial judge's directions on identification. The principles to be considered in cases in which the correctness of the identification evidence is in issue, were discussed in the case of **R v Turnbull** [1976] 3 All ER 549 ('**Turnbull**') and have been applied in numerous cases before this court. They constitute two main approaches which were identified by Lord Widgery CJ at pages 551 and 552 as follows:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material

> discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[25] The learned trial judge specifically warned herself of the dangers associated with identification evidence and then proceeded with a detailed analysis of the evidence of the complainant, in accordance with the guidance provided in **Turnbull**.

[26] The focus of the appellant's complaint is the learned trial judge's treatment of the complainant's evidence relating to the identification of the appellant and the application of the guidance offered in **Turnbull** to that evidence. The essence of the complaint was that the conditions under which the complainant observed the appellant, and the time during which he could have had the appellant under observation, constituted a fleeting glance in difficult circumstances and was such as to render the evidence of identification weak, and unreliable, and ought not to have been accepted by the learned trial judge.

[27] We noted that the learned trial judge considered the evidence of the prior knowledge of the appellant by the complainant and that this was a case of recognition. Her analysis was therefore informed by the warning she gave herself, that mistakes can also be made in the recognition of a close friend or relative.

[28] As it relates to the discrepancy between the 45 seconds given by the complainant in examination-in-chief and the 20 seconds he said in cross-examination, the learned trial

judge addressed it in the following manner (page 254 lines 18 to 27 and page 255 lines one to nine):

> "The Crown did not seek to clarify what would appear to be an inconsistency in relation to the time as 45 seconds for the whole incident to happen and what would amount to 20 seconds - being 15 seconds to get up to the car door and 5 seconds before he was shot. However, I find the witness honest and that his sense of time, as it relates to the entire ordeal, is inaccurate. By his calculation, the ordeal would have lasted for a total of 20 seconds and not 45 seconds; however, what is clear is that from the time of riding up to the car window to the point of being shot would have been sufficient time in which to recognize someone that is familiar. I accept this time as being 20 seconds in total."

[29] The learned trial judge resolved the discrepancy in favour of the appellant by using the shorter time. The learned trial judge accepted the period of 20 seconds in the context of the complainant's narrative of the events. Nevertheless, she concluded that this provided a sufficient opportunity for observation. Notably, the learned trial judge considered the evidence of the complainant that while the bike was riding up to his window, it did so slowly. In this regard, we did not find to be convincing, the submissions of Mr Robinson that there was something illogical in the bike taking 15 seconds to travel from the rear of the taxi to the window. The evidence of the complainant was that the bike was traveling slowly. There are a myriad of reasons, tactical and otherwise, why persons on a motorbike who intend to do harm to the driver of a vehicle that is stationary, may be slow and calculating in their approach to the driver, having regard to their intention. A motorcyclist causing the motorcycle to creep forward in a controlled manner is not beyond the realm of possibilities. Therefore, we are of the view that there is nothing unlikely or incredulous about the 15 seconds of which the complainant spoke, which would lead us to the conclusion that the learned trial judge ought to have found it unreliable.

[30] Thus, we concluded that it was quite open to the learned trial judge to have accepted the complainant's evidence of having viewed the appellant's face for 15 seconds as the bike approached from the rear, as being reliable.

[31] Mr Robinson sought to juxtapose the evidence of Ms Sharlene Smith against that of the complainant to support his assertion that the time given by the complainant was exaggerated. However, there are a number of reasons why this reliance on the evidence of Ms Smith is misconceived. The first is that there is no evidence that would tend to support a reasonable conclusion that Ms Smith's powers of observation, and her ability to estimate the passage of time, and to compare intervals of time, were more acute than those of the complainant's, so as to make her evidence on the matter of time superior to his. To the contrary, her evidence when dissected suggests that she may have underestimated length of time from she heard the bike, until she saw the car skid after hearing the explosion. In her words, she did not "think it reach even three seconds to how it happen fast".

[32] Secondly, Ms Smith stated that she heard a bike sound but did not "know where the bike was coming from" because her back was turned to the road. If the bike was not present at the rear of the taxi when she disembarked, it would be unreasonable to conclude that the point at which she first heard the 'bike sound' was, and could only have been, when it was near the back of the taxi. It would be similarly inaccurate to extrapolate from this and to conclude that the three seconds or less she mentioned is the time that it took for the bike to travel from the back of the taxi to the window, where the explosion originated.

[33] A major weakness in the defence's theory of Ms Smith's estimate diminishing the accuracy of the complainant's, lies in the fact that it is premised on the assumption that Ms Smith and the complainant both noticed the sound of the bike at exactly the same time. There is no basis on which to justify such a conclusion. Therefore, if they each noticed the sound of the bike at a different point in time, then it stands to reason that they naturally would have arrived at different results as to how long it took from the point

they noticed the bike, up to the point of the sound of the gunshot being heard (even if one assumes that they each had the same concept of time – which is unlikely).

[34] Because the evidence of the complainant as to time depended on his concept of the passage of time, his estimate of 15 seconds must be considered in that light. It is our conclusion that the learned trial judge cannot be faulted to have found that the evidence of Ms Smith was of little assistance to the defence. We do not agree that her evidence was sufficiently cogent and logical to have caused the learned trial judge to question the complainant's evidence as to time, and we do not find that the learned trial judge erred in not giving additional weight to her evidence.

[35] As it relates to the conditions under which the complainant said he observed the appellant, it was suggested to the complainant during cross-examination, which he denied, that he could not have seen the men through the side mirror based on where he said they were. The complainant also did not agree with the suggestion that the height at which the men were on bike was higher than the car. In analysing this issue together with the evidence of the 15 seconds during which the complainant observed the appellant by using the side mirror, the learned trial judge, in her comments, recognized the use of the side mirror as a weakness, but concluded that the complainant had sufficient opportunity to view the appellant. This appears in the transcript as follows (page 249 lines 22 to 29 and page 250 lines one to 10):

> "The complainant was looking through the side door of his car when he first heard the bike, and so although he said that he could see Patoosh, I take judicial notice of the fact that the side mirror of the car is small in size, and therefore would have restricted the width or the full image of the person the complainant claims to be Patoosh. This is clearly a weakness in the identification evidence, but this is countered by the fact that the focus on the complainant's evidence was in relation to the face of the person that he said was the rider that day, not the whole image. I accept as a fact that the complainant could see the face of the rider of the bike through his side mirror."

We found no fault with the learned trial judge's analysis and conclusion in this regard.

[36] It was noted that heavy weather was made by the defence, at the trial, about the complainant's description of the bike and his description of the bike which he knew belonged to the appellant. The learned trial judge adequately addressed this evidence.

[37] It is our opinion that, whereas the complainant's description of the bike he saw on the day of the incident is a collateral fact that may be used to assess the complainant's credibility, the relevance of the complainant's description of the bike only becomes important if he was asserting, which he was not, that the appellant was riding the bike he owned at the time of the incident. As the appellant disclosed in his evidence, on the day in question he was riding another bike. Accordingly, we were of the view that the issue of the description of the bike used on the day in question was not important in assessing the complainant's credibility.

[38] In assessing the totality of the evidence of identification, we arrived at a similar conclusion as reached by McIntosh JA in **Separue Lee v R** [2014] JMCA Crim 12, at para. [21]. In adopting (and paraphrasing) her language, we concluded that on the totality of the identification evidence, the circumstances amounted to more than a fleeting glance, and were substantial enough to entitle the learned trial judge to conclude that, there was sufficient opportunity for the complainant to identify the appellant, and that the complainant's identification of him was accurate.

[39] The learned trial judge carefully assessed the evidence in respect of the issue of identification, and also in respect of all the relevant issues. She gave herself an adequate warning about the dangers of convicting on evidence of visual identification, and found that the circumstances of the observation were sufficient for the complainant to have made a reliable identification of the rider of the bike, who had acted in concert with the pillion passenger who shot him. Accordingly, we found that there was no merit in this ground.

Ground 2: The Learned Trial Judge erred in her analysis of the reliability and credibility of the Prosecution's case which resulted in her returning a verdict of guilty

The submissions

[40] Mr Robinson submitted that the learned trial judge erred in her analysis of the reliability and credibility of the evidence of the complainant particularly, as it related to the point at which he had first mentioned that the appellant was riding the bike. Counsel highlighted the fact that the evidence of Corporal Senior, who was called as a witness for the defence, was that he interviewed the complainant at the hospital and the complainant did not name the appellant as a person who was on the bike. Counsel argued that in her analysis, the learned trial judge misdirected herself in relation to this evidence.

[41] The Crown has countered these submissions by highlighting the evidence of the complainant in examination-in-chief, that he spoke to other officers other than the two that accompanied him to the hospital, but he could not recall how many more. In cross-examination (at page 39, lines 13 to 30 of the transcript) he stated that the investigating officer Constable Williams was not the first person who he told that the appellant was riding the bike. Importantly, if the complainant did not give the name of the appellant to Corporal Senior, that did not negate the possibility that the complainant spoke to another officer to whom he gave the appellant's name.

Discussion and analysis

[42] The essence of the submission in support of this ground was that the naming of the appellant as the rider of the bike was an afterthought. Corporal Senior's evidence on behalf of the defence, as indicated at para. [10] above, was that he spoke to the complainant on the day of the incident, and he did not tell him the name of the appellant. It was posited by Mr Robinson that Corporal Senior was the only police officer to whom the complainant made a report on the day of the incident and following this to its logical conclusion, any subsequent report purporting to identify the appellant was an afterthought.

[43] Mr Robinson in supporting his submissions on this point, relied heavily on his cross-examination in which the complainant said, the first officer whom he advised that the appellant was involved was an officer to whom he spoke about 10 or 20 minutes after he arrived at the hospital, and it was a male police officer. We were not convinced by Mr Robinson's arguments that that officer must have been Corporal Senior and that he was the only officer to whom the complainant spoke. The evidence of the complainant was that he spoke to officers other than the two that escorted him to the hospital, but he could not recall how many more. He stated that the investigating officer was not the first officer he told of the appellant's involvement. Mr Robinson made the following suggestion to the complainant (page 43 lines 24 to 33):

> "I am suggesting to you that the first police officer that you gave a statement to, I am not talking about the written statement now. At the hospital you told him that two men were on the bike and you did not tell them Patosh, I am suggesting that to you.
>
> A: Well again I am suggesting that is not the case."

[44] In analysing the evidence of the complainant in which he admitted in cross-examination that he gave a name to the police in his witness statement that was taken two days after the incident, the learned trial judge, at pages 236 - 237 of the transcript, made the following observation:

> "He said he was still in hospital [sic] and of significance is his evidence that, 'I gave it 2 days later, as I was in hospital. I thought I was finished with the police. I thought I'd finished giving statements.' To my mind, the inference to be drawn from this evidence is that the complainant had given verbal statements before. He had told the police all he could already and thought the process was over. In telling the police all he could to the point that he thought he had finished would include naming the person whom he believes he saw on the bike."

[45] Contrary to Mr Robinson's submission, we did not find that this passage supports a conclusion that the learned trial judge misconstrued the evidence. It is consistent with the complainant's position that he had orally advised a police officer while in the hospital.

[46] The learned trial judge carefully analysed and accepted the evidence of the complainant as to his naming of the appellant while he was at the hospital as true. We have not been directed to any evidence which demonstrates that the judge misconstrued the evidence on this point. Neither have we been shown any evidence which would lead us to conclude that the reliability and credibility of the prosecution's case was so discredited as to have made the conviction unsafe. We were, therefore, unable to find any merit in this ground of appeal.

Ground 3: The Learned Trial Judge's rejection of the appellants' case, without analysis, was unreasonable and she failed to give fair consideration to the appellant's case without providing sufficient reason as to why his case was rejected despite his evidence being consistent and credible

The submissions

[47] Counsel for the appellant contended that the appellant was not discredited, and his case remained consistent at the end of the trial and, therefore, due consideration was not given to his case by the trial judge.

[48] In response, it was submitted on behalf of the Crown that the learned trial judge clearly explained why she did not accept the defence as was advanced before her. It was submitted that she made a thorough assessment of the case for the defence and gave the appellant the benefit of both the credibility and propensity limbs of the good character directions. The learned trial judge considered the evidence of the appellant's alibi and that of his witness as to his alibi, Mr Reeves. The learned trial judge concluded that Mr Reeves was merely recounting the information that was told to him by the appellant.

[49] As it related to the appellant's evidence of the interaction he had with the investigating officer, Corporal Williams, on the day after the shooting, the learned trial judge found it difficult to believe that the officer would have so casually dismissed the

report of the appellant's involvement in such a serious offence by sending him home. The learned trial judge found that in any event, even if the appellant's account of the day after the incident were true, it would not undermine the Crown's case unless the complainant had not called the appellant's name up to that point. If the complainant had not done so, this would leave the question open as to why the appellant would have voluntarily attended the police station in the first place.

Discussion and analysis

[50] The learned trial judge, in assessing the evidence of the appellant, gave herself the standard good character directions on the credibility and the propensity limbs. She demonstrated by her summation that she appreciated the defence of alibi and more importantly understood that the disproof of an alibi does not support identification evidence and she needed to go back to the prosecution's case to examine the possibility that the complainant may have made a genuine but mistaken identification of the accused.

[51] The learned trial judge did not accept the evidence of the appellant that he attended the Spanish Town Hospital and waited for some 30 to 45 minutes. She found that if the hospital staff was on strike, as the appellant asserted, it was unlikely that it would have taken him that length of time, to become aware that he would not be treated that day. The learned trial judge considered the evidence of his good character as given by the witnesses but found that notwithstanding that evidence, in considering his demeanour, she found that his body language was shifty and he appeared to be rehearsed.

[52] In considering the evidence of Mr Reeves in support of the appellant's alibi, the learned trial judge concluded that much of the detail provided by Mr Reeves was information that had been relayed to him by the appellant. She did not accept that he was being truthful when he said he knew that the appellant left at 2:00 pm because his phone rang at that time and he looked at it.

[53] We found the judge's analysis of the defence to have been fair and exhaustive. The learned trial judge carefully explained the bases on which she rejected the defence. We found no merit in this ground of appeal.

Ground 4: The prescribed minimum sentence of fifteen years for the offence of wounding with intent, in the circumstances of this case, is manifestly excessive and unjust

The submissions

[54] It was further noted by Mr Robinson that, although the learned trial judge orally indicated an intention to issue a certificate under the Criminal Justice (Administration) Act, (as amended in 2015) ('the CJAA'), to permit the appellant to obtain leave to appeal his sentence to a judge of this court, she did not do so. She stated that she would have indicated that the sentence that she would have imposed in relation to the offences, would have been three years at hard labour on each offence, suspended for three years.

[55] Mr Robinson relied on the decision of **Kerone Morris v R** [2021] JMCA Crim 10 in which it was confirmed that the lack of a certificate pursuant to section 42K of the CJAA did not preclude this court from considering the sentence anew and reducing it.

[56] Counsel initially urged the court to adopt the sentences suggested by the learned trial judge. However, evidently in recognition of the fact that those sentences would be unreasonable, it was submitted in the alternative, that having regard to the favourable social enquiry report of the appellant, a sentence of 10 years' imprisonment would be appropriate for the offence of wounding with intent. Mr Robinson further submitted that a sentence of five years' imprisonment would also be appropriate for the offence of illegal possession of firearm.

[57] The Crown conceded that the learned trial judge made an error in her treatment of the offence of illegal possession of firearm by concluding that the mandatory sentence of 15 years for the offence of wounding with intent involving the use of a firearm, applied equally to the illegal possession of the firearm involved. Support for this assertion was

suggested to be evident by the learned trial judge's statement (page 282 lines 18 to 24) as follows:

> "Counsel, as you are aware, there is a minimum sentence for conviction [sic] of this nature where the accused is convicted of Illegal Possession of Firearm and Wounding with Intent."

[58] Ms James noted that throughout the sentencing process, the learned trial judge did not deal with the count of illegal possession of firearm separately from the count of wounding with intent and imposed the same sentence in respect of each offence. Counsel also highlighted the learned trial judge's statement (page 284 lines 16 to 22) that:

> "The starting point for a custodial sentence for the offences of Illegal Possession along with Wounding with Intent is 15 years, that is the statutory minimum which means that is the period that the court is obliged to start with."

[59] The court was urged by the Crown to find that the learned trial judge's suggested sentences of three years' imprisonment at hard labour suspended for three years for each offence, was not permitted for offences involving the use of a firearm having regard to section 6 of the Criminal Justice (Reform) Act. It was further submitted by the Crown that the sentence of 15 years imposed by the learned trial judge, for the offence of wounding with intent was appropriate. However, it was conceded that it is not evident that the learned trial judge gave the appellant credit for the time spent on remand awaiting trial and accordingly there should be a deduction of six months from his sentence to account for this.

[60] It was suggested by Miss James that a sentence of 10 years' imprisonment at hard labour was appropriate for the offence of illegal possession of a firearm to which a similar deduction of six months should be made to give the appellant credit for the time spent in pre-trial remand.

Discussion and analysis

[61] Although the offence of illegal possession of firearm attracts a maximum sentence of life imprisonment, it is not subject to a minimum sentence (see **Leon Barrett v R** [2015] JMCA Crim 29 and **Michael Burnett v R** [2017] JMCA Crim 11). The learned trial judge was, therefore, under a misapprehension that it was subject to a minimum sentence of 15 years' imprisonment as was the position in respect of the offence of wounding with intent. The 2010 amendment to the Offences Against the Person Act, mandated a minimum sentence of 15 years' imprisonment for the offence of wounding with intent.

[62] Section 42K (1) of the CJAA provides for the learned trial judge to issue a certificate in respect of an appeal in certain circumstances as follows:

> "42K (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall –
>
> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence."

We have considered the recommendation of the learned trial judge for a sentence of three years' imprisonment at hard labour, suspended for three years in respect of both offences of illegal possession of firearm and wounding with intent. Miss James quite correctly identified the fact that section 6 of the Criminal Justice (Reform) Act precludes the imposition of these suspended sentences since a firearm was involved. We have, therefore, deemed the learned trial judge's recommendation to be only in respect of a reduction in the sentences. Both counsel agreed that the case of **Kerone Morris v R** supports the position that, notwithstanding the statutory minimum sentence, by

operation of the CJAA, this court can review the sentence in order to honour the spirit of the legislation, even in the absence of an actual certificate signed by the judge in the court below.

[63] Having regard to the learned trial judge's error in respect of the sentence available to her for the offence of illegal possession of firearm, it is open to this court to consider the matter of sentencing in respect to that offence, anew. In respect of that sentence, the normal range as indicated in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the sentencing guidelines') is seven to 15 years. The usual starting point is indicated to be 10 years.

[64] In **Lamoye Paul v R** [2017] JMCA Crim 41, McDonald-Bishop JA, identified a sentencing range of 12 to 15 years in cases of illegal possession of firearm, where the firearm is used, a position with which we wholly agree. At para. [18] she stated:

> "In respect of illegal possession of firearm … [t]he learned judge was required to choose a starting point and a range for the offence, which she did not. Bearing in mind that this is not a case that involved the possession of a firearm *simpliciter*, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate. …"

[65] Having regard to the facts of this case, in which the appellant facilitated a premeditated and unprovoked attack on the complainant, we were of the view that an appropriate starting point was 12 years. We did not consider any aggravating factors and having regard to the sole mitigating factor of the appellant's favourable social enquiry report, we arrived at a sentence of 10 years' imprisonment. From this we deducted eleven months and one week spent on pre-sentencing remand. This is comprised of the six months which Mr Robinson advised us, and which we accepted, is the time the appellant spent in custody before he took advantage of his offer of bail, plus, the five months and one week he spent in custody, between the handing down of the verdict on 4 July 2017, and his sentencing on 15 December 2017.

[66] During the sentencing exercise, in respect of the offence of wounding with intent, the learned trial judge expressed that it was a serious and grave offence. She also correctly bore in mind that the appellant was not the shooter, although he participated in a joint enterprise. She noted that he had a previous conviction, but it being for a minor drug offence she indicated that it would not be considered an aggravating factor. In the appellant's favour, the learned trial judge appreciated that generally, his social enquiry report was favourable. Consequently, having considered the aims and objectives of sentencing, she imposed the minimum sentence of 15 years' imprisonment.

[67] It needs to be appreciated that the issue which arises when this court is reviewing a statutory minimum sentence, pursuant to its power to do so granted by the CJAA, as identified by Morrison P in **Paul Haughton v R** [2019] JMCA Crim 29 at para. [13] is:

> "…whether, as the learned judge thought, the circumstances of the case are such as to make the imposition of the minimum sentence of 15 years' imprisonment for the offence of [wounding with intent] manifestly excessive and unjust; and, if so, what is the appropriate sentence to be imposed on the appellant instead."

[68] In this case, the appellant was a participant in a premeditated attack on the complainant who was known to him, in the early afternoon, on a public thoroughfare, while the complainant was plying his trade as a taxi operator, with innocent passengers in his vehicle. The complainant suffered injuries that required him to be hospitalised for one month. We agreed with the submissions of Miss James that in the light of the statutory mandatory minimum sentence, which the learned trial judge imposed, the sentence was, in principle, appropriate in all the circumstances. We considered that the appellant received a good social enquiry report and was previously of good character, and as Mr Robinson highlighted, even the complainant agreed to this. In our view, it was the deduction for this mitigating factor that would cause us to reduce his sentence from a starting point of 17 years. Such a starting point in our view is justified having regard to the matters identified in the beginning of this paragraph.

[69] It was, therefore, our considered view that, in all the circumstances of this case, there were no compelling reasons which render the prescribed minimum sentence manifestly excessive and unjust. However, although the methodology employed by the learned trial judge in arriving at the sentence of 15 years' imprisonment for the offence of wounding with intent, followed the general principles, we agreed that no credit was given for time spent in custody prior to sentencing, for which the appellant is entitled to a full credit (see **Callachand and another v State** [2008] UKPC 49). We deducted the eleven months and one week spent on pre-sentence remand, which resulted in the sentence of 14 years and three weeks' imprisonment at hard labour.

[70] It is worth noting that because we were considering the sentence pursuant to section 42K of the CJAA (notwithstanding the absence of a certificate as previously explained), we were at liberty to reduce the sentence below the statutory minimum in order to give effect to the time spent by the appellant on remand prior to his sentencing.

[71] In **Paul Haughton v R** [2019] JMCA Crim 29 at para. [50] Morrison P explained the justification for this course as follows:

> "…it is clear from the authorities that, however short the period spent on remand may be, the appellant is entitled to have it reflected in the sentence. Happily, once a certificate has been granted by the sentencing judge pursuant to section 42K(1) of the CJAA, it is open to this court to reduce the sentence below the prescribed minimum sentence. This factor serves to distinguish this case from **Ewin Harriott v R**, in which the appeal did not come before this court through the section 42K gateway and the court was therefore powerless to dis-apply the prescribed minimum sentence in order to reflect the time spent on remand."

[72] Accordingly, we made the orders at para. [3] above for the reasons stated herein.