[2021] JMCA Crim 49

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEAL NO 40/2017

ANDRA GRANT v R

Chad Lawrence instructed by Samuda and Johnson for the appellant

Miss Natallie Malcolm and Miss Monique Scott for the Crown

4 October and 17 December 2021

FOSTER-PUSEY JA

[1] Mr Andra Grant, the appellant, was charged on an indictment for the offences of illegal possession of firearm and assault. On 23 March 2017, he was convicted on both counts by Straw J ('the trial judge'), sitting without a jury, in the Western Regional Gun Court held at Montego Bay in the parish of Saint James. On 5 April 2017, the appellant was sentenced to serve 10 years' imprisonment at hard labour for the offence of illegal possession of firearm and 12 months' imprisonment for the offence of assault, with the sentences to run concurrently.

[2] By an application for leave to appeal filed on 23 April 2017, the appellant sought permission to appeal his convictions and sentences. He set out four grounds of appeal, namely that: the sentence imposed was manifestly excessive; the verdict was unreasonable given the evidence; the trial judge misdirected herself when she found the appellant had discarded a gun; and the trial judge failed to properly address the weaknesses, contradictions and inconsistencies in the case for the prosecution.

[3] On 5 November 2020 a single judge of this court granted the appellant leave to appeal his conviction and sentence. In granting leave to appeal, the single judge stated that the trial judge's treatment of the witness called by the appellant as a witness with an interest to serve, needed to be assessed as to whether it was a proper approach in law, and if not, whether the appellant received a fair trial. In addition, the single judge stated that consideration should be given to whether the sentence of 10 years imposed for the offence of illegal possession of firearm, was excessive.

[4] On 2 May 2017, the appellant filed an application in which he requested the court to order a witness, Mr Michael Smith, to attend the court and be examined on his behalf. At the commencement of the hearing of the appeal on 4 October 2021, counsel for the appellant, Mr Lawrence, informed the court that he would no longer be pursuing that application. In addition, he would not be pursuing any ground of appeal in respect of how the trial judge treated the appellant's witness, although the single judge had raised a concern in this regard. We granted permission for counsel to abandon the grounds originally filed, and to pursue the three grounds outlined in the written submissions he filed on behalf of the appellant.

[5] After hearing the submissions of counsel on the appeal, we reserved our decision. We had indicated that we would give our decision and reasons as soon as possible and we now do so.

Background

The prosecution's case

[6] The main witness for the prosecution was the complainant, Mr Aldane Barrett. He testified that at about 9:30 pm on 3 April 2015, he was in a go-go club in Duncans in the parish of Trelawny. The club was well lit. He was sitting beside S, a go-go dancer, talking with her at the bar, when the appellant entered the club with a black school bag in his hand, and headed straight to the bar. He had been seeing the appellant in the club at least three times a week over a three-month period. The appellant then came to him, and told him to move away from S, because he was not buying sex from her, and was preventing her from making money. He moved away from S, and went to stand on the other side of the club. The appellant nevertheless

told him to go outside so that he could "deal" with "his case". He responded to the appellant saying that it was not the appellant's place, and that anyone could visit a go-go club. The appellant told him to "watch whey him a go do wid" him.

[7] It was then that, according to the complainant, the appellant went over to the bar, took a gun out of his bag and pointed it at him as if he was going to shoot him. S held on to the appellant and told the complainant to run. He ran to the Duncans Police Station nearby, gave a statement reporting the incident, and stayed there for about 25 minutes. The police accompanied him when he returned to the club and identified the appellant as the person who had assaulted him.

[8] In cross-examination, the complainant admitted that, while he bought sex from other women, it was primarily S from whom he did so. He admitted that in his statement taken by the police, it was written that the appellant walked up to him with his bag in his hand and pointed the gun at him. He however denied giving the police that information. The complainant stated that he saw when the police questioned the appellant and walked with him over to his house.

[9] In re-examination, the complainant stated that the owner of the club, when he saw that the appellant had approached him with the gun, told the appellant to "cool".

[10] On 3 April 2015, at about 10:45 pm, Sergeant Ewart Smith was on mobile patrol in the Rio Bueno area when he received a telephone call. He proceeded to the Duncans Police Station where he spoke with the complainant. Sergeant Smith, along with other policemen, went to the go-go club. The complainant showed him where he had been standing in the club talking to S, and also showed him someone (the appellant) who was entering the club from a side door. Sergeant Smith conducted a search of the appellant and inside the club, but did not find a gun.

[11] Detective Corporal Kirk Lawrence received the complainant's sworn statement on 4 April 2015, and also met with him at the Duncans Police Station. He made an entry of a case of illegal possession of firearm and assault at common law in the station diary. Corporal Lawrence went to Falmouth Police Station where he informed the appellant of the report which the complainant had made against him. He asked

the appellant whether he had a firearm user's licence or permit, and he said he did not. On 8 April 2015, Corporal Lawrence returned to the Falmouth Police Station and charged the appellant for the offences of illegal possession of firearm and assault. When cautioned, the appellant stated "Boss a mi pass dem a use judge mi" and "Boss, a church mi did a come from".

[12] In cross-examination, Corporal Lawrence stated that he had also gone to the club on the same day when he received the report and had spoken to the owner of the club.

[13] Counsel representing the appellant at the trial made a no case submission but this was not upheld.

The case for the defence

[14] The appellant gave sworn evidence. He testified that he was a bartender at Tropical Bliss, a club which was owned by Mr Michael Smith. He stated that, apart from assisting with bartending, he would sometimes watch over the bar for Mr Smith, and would also collect from ladies when they used the rooms and served customers. He was also an assistant teacher at William Knibb High School. At his aunt's invitation, on 3 April 2015, he had attended a memorial for Jehovah's Witnesses, and afterwards, he went to the club.

[15] On his arrival at the club, at approximately 9:00 pm, he went to the bar, and some of the women at the club spoke with him about the complainant. As a result of what they told him, he told the complainant to move away from the bar "because the girl needs to do some work and he is slowing her up…". It was only after he repeated this request for the third time that the complainant went across the room. The complainant began to "act wild" and was walking around as if he was looking for bottles. The owner went to speak with the complainant, and the appellant said he then went over to join him, and started speaking with the complainant which led to an argument between them. The appellant denied that he at any time had a gun, took a gun out of a bag or pointed a gun at the complainant. He stated, however, that during the argument he had pointed his finger at him.

[16] He further stated that he did not leave the club before the police came. He sat on a stool and only went "around the back to do a 'pee'". The appellant testified that when he walked back in, he saw the police. He cooperated with the police who searched him, asked him for the school bag and also searched the school bag. He also took the police to his house, which they also searched.

[17] In cross-examination, the appellant stated that he lived next door, a one-minute walk, to the club. He agreed that if he needed anything from his house it would take him a few seconds to go over to it. He explained that he had a bag with him that night as he was coming from the Jehovah's Witness memorial with his Bible and publications which his aunt, who he described as "mom", had given him at the memorial. The appellant stated that, although the Kingdom Hall was also next door to his home, he made the decision to walk to it with a bag.

[18] The appellant testified that he saw persons push the complainant out of the club. He saw the complainant run up the road, and then return approximately five or seven minutes later. The appellant stated that he had a relationship with S, and the complainant was jealous of it. He again denied having a gun in his bag or pointing a gun at the complainant.

[19] Mr Michael Smith testified on the appellant's behalf. He stated that, on 3 April 2015, the appellant and the complainant had an altercation. He told them to stop arguing. While the appellant stopped and went to sit by the bar, the complainant continued. Some of the persons in the club pushed the complainant out of the building and told him to go home. The complainant fell down some stairs, got up and ran off. About 15 minutes later, approximately four car loads of police officers came to the club along with the complainant. The police spoke with him, searched inside and outside the building, and took the appellant away in one of their cars. Mr Smith stated that he did not see the appellant pointing a gun at the complainant during their altercation. He however saw that, before the police came, the appellant went outside for about two minutes and then returned. He stated that the club had a bathroom facility inside the building and another outside at the back of the building.

[20] In cross-examination, Mr Smith agreed that he was a friend of the appellant and had known him from he was young. Mr Smith stated that he and some of the patrons pushed the complainant outside and told him to go home. He agreed that he had discussed the court matter with the appellant. Mr Smith stated that he did not see the appellant with a bag on the night of the incident. He stated that he had seen the appellant going "out back" and agreed that he could not say where he went. He stated that the appellant's aunt lived about 200 metres away from the club, and the appellant was at his aunt's house "most of the time".

[21] Mr Smith acknowledged that if there was an allegation that a gun was found at his premises, that could affect his getting a club licence. He stated that he had not seen the appellant pointing his finger at the complainant. Mr Smith stated that he did not want to see the appellant go to jail. He acknowledged that the appellant had come to the premises from church at Kingdom Hall, but stated that he did not recall seeing him with a bag either on his way to or return from church. He also said he never saw a bag when the police came.

The supplemental grounds of appeal

[22] The appellant has challenged his conviction and sentence on the following grounds:

> (i) The Learned Trial Judge failed to properly address her jury mind as to the issue of previous inconsistent statements and further failed to relate the inconsistency to material issues that would affect the complainant's credibility and which deprived the Appellant of a real chance of acquittal.
>
> (ii) The Learned Trial Judge erred in fact and law in finding that the Complainant did not have the intelligence to fabricate a story about the Appellant.

(iii) The Learned Trial Judge omitted to follow sentencing guidelines and handed down a sentence that was manifestly excessive in the circumstances.

Issues

[23] To dispose of this appeal, we have distilled the following issues:

1. Did the trial judge adequately address previous inconsistent statements made by the complainant? (Ground 1)

2. Did the trial judge err when she found that the complainant did not have the intelligence to fabricate a story about the appellant? (Ground 2)

3. Was the sentence imposed manifestly excessive? (Ground 3)

Issue 1 - Did the trial judge adequately address previous inconsistent statements made by the complainant? (Ground 1)

Appellant's submissions

[24] Mr Lawrence focused on one previous inconsistent statement which the complainant made. While in his testimony at the trial the complainant stated that the appellant took the gun out of his bag and pointed it at him, his statement recorded by the police indicated that the appellant walked with the bag in his hand, and then pulled the gun from the bag and pointed it at him. Counsel submitted that although the trial judge referred to the previous inconsistent statement, the inconsistency went unexplained. He submitted that the trial judge did not properly scrutinize or address the complainant's evidence, and did not adequately address the fact that the complainant denied saying certain lines which appeared in his statement but did not explain what he meant by that denial. Counsel argued that the inconsistency could not be overlooked, as the complainant's exposure to any alleged firearm was directly

relevant to the case and contradicted the testimony of other witnesses. In addition, the inconsistency was material as it cast doubt on the complainant's version of events.

[25] Counsel submitted that although the trial judge did not adequately address the previous inconsistent statement, she nevertheless concluded that the bag carried by the appellant featured in a compelling way in the story. This, counsel further submitted, gave the impression that the jury mind of the trial judge had accepted the complainant's version of the events without more. Counsel relied on **Taibo v R** (1996) 48 WIR 74 and submitted that evidence must be scrutinized and not simply rehearsed so that a verdict founded on it can be safe. Relying on **R v Flett** (1943) 2 DLR 656, counsel argued that a judge must ensure that a jury realizes that unexplained substantial and significant contradictions adversely weaken the credibility of a witness and the weight of his evidence. Counsel argued that the trial judge's summation in respect of the previous inconsistent statement was inadequate, and denied the appellant a real chance of acquittal.

The Crown's submissions

[26] Miss Malcolm submitted that the appellant's complaint in this regard was without merit. Counsel argued that the trial judge, in her summation, meticulously considered the inconsistency about which the appellant complains, weighed it against the material issues of the case and considered the effect it had on the credibility of the witness. After referring to particular aspects of the trial judge's summation, counsel submitted that it was not in dispute that the appellant had a bag with him on the night in question. The previous inconsistent statement made by the complainant related to the sequence of events leading up to the central issue in the case, which was whether the appellant had a gun which he pointed at the complainant. The trial judge found the complainant credible and reliable when he maintained that the appellant took a gun out of a bag and pointed it at him. Counsel relied on **R v Lenford Clarke** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 74/2004, judgment delivered 29 July 2005, in which Smith JA stated that a discrepancy may be in respect of a material issue, but is insignificant, and can be regarded as slight or immaterial. Counsel also referred to **Patrick Comrie and others v R** [2012] JMCA Crim 16 in which Brooks JA (as he then was) highlighted that a tribunal of fact

is entitled to accept the evidence of one witness and reject that of another, and is entitled to reject a part of a witness' statement and accept the rest. Brooks JA also noted in addition, that a judge sitting alone should give a reasoned decision in which he ought to set out the facts which he finds to be proved, and where there is conflict of evidence, his method of resolving the conflict.

[27] Counsel submitted that in the case at bar, the trial judge indicated how she resolved the inconsistency. Counsel argued that there was other credible evidence on which the trial judge relied to find the appellant guilty. This included the fact that the trial judge found that the appellant had the opportunity to dispose of the firearm when he went outside the club. Counsel submitted that in all the circumstances the appellant was not denied his right to a fair trial.

Discussion

[28] We reviewed the cases of **Taibo v R** and **R v Flett** on which counsel for the appellant relied, but did not find them helpful. In **Taibo v R**, their Lordships in the Privy Council stated that the trial judge needed to have explained to the jury why the simple case presented by the prosecution could have been open to doubt. It was in that context that their Lordships stated that in such a marginal case the evidence needed to be scrutinised, and not simply rehearsed, if a verdict founded on it was to be safe. Since the evidence in that case had not been scrutinised, their Lordships concluded that the verdict could not stand (see page 84 paragraphs D-G of the judgment).

[29] In **R v Flett**, the appellant had robbed a bank and pleaded insanity. O'Halloran JA made comments as to whether there was some evidence to support the submission of the appellant's counsel that, although the appellant was not legally insane, yet he had temporarily lost the mental capacity to form a legal intent to commit the crime charged. He concluded that there was no evidence to support that submission. It was in that context that O'Halloran JA, at pages 663-664, made comments on the distinction between "no evidence whatever" and "some evidence". He stated that the former is a question of law for the judge. However, once he finds that there is "some evidence," the credibility and weight of that evidence is for the jury.

[30] On the other hand, we found the cases to which counsel for the Crown referred quite helpful. In **Patrick Comrie and others v R**, Brooks JA highlighted a number of useful principles which govern the manner in which this court reviews decisions of fact of a first instance tribunal. At para. [28] he wrote:

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

[31] Brooks JA also highlighted that where a judge is sitting alone, the judge should show his thought process in his reasons for judgment. Importantly, Brooks JA also wrote at para. [30]:

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

[32] On the question as to the approach which trial judges should take when there are inconsistencies in the evidence of a witness, Brooks JA stated at para. [34] of the judgment:

> "This court has given guidance to trial judges as to the approach to be taken when there are inconsistencies in the evidence of a witness. In **R v Williams and Carter** SCCA Nos 51 and 52/1986 (delivered 3 June 1987), Kerr JA in delivering the judgment of the court, said at page 7:
>
> > '... unless [the inconsistency] is immaterial some explanation is essential before the evidence in Court can be accepted and relied on in relation to that particular point…**There may be a**

> **credible explanation but the explanation must come from the witness; it cannot be supplied by well-meaning conjecture.'**

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

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

[33] Where there are inconsistencies in a witness' evidence, it is important for the fact-finding tribunal to determine whether, even if it touches and concerns a material issue in the case, it is significant. In **R v Lenford Clarke**, Smith JA at page 12 of the judgment, in considering the submissions of counsel for the appellant in that case, wrote:

> "Counsel for the appellant complained that the learned trial judge having told the jury that whether inconsistencies were slight or serious, should be determined by reference to the central issue, wrongly defined the central issue as whether the appellant shot the deceased while acting in self defence.
>
> In our view restricting the consideration of inconsistencies to the so-called central issue is not helpful and may indeed be confusing to the jury.
>
> Invariably the so-called 'central issue' in a case involves many material issues. A witness might speak to one or more of these issues. Whether or not an inconsistency is material would, we venture to think, depend on the nature, degree and relevance of the inconsistency. Where, for example, credibility is in issue, discrepancies in respect of peripheral matters may be relevant and thus, we think, material. On the other hand a discrepancy or conflict may be in respect of a material issue but its degree de minimis and so insignificant that the discrepancy may properly be regarded as slight or immaterial."

[34] In the case at bar, the trial judge acknowledged early in her summation that no gun was recovered, and there was no supportive witness of the complainant. The trial judge stated that the appellant had given sworn evidence denying the allegations, and had called a witness who supported his version of events to the effect that he did not have a firearm, and had not pointed a firearm at the complainant. The trial judge stated that the complainant's evidence had been challenged, and so she had to decide whether he was a credible and reliable witness on whose evidence she could rely to come to a finding that the appellant had a firearm in his possession, bearing in mind that the appellant was not under a duty to prove his innocence.

[35] The trial judge noted that the following issues had been agreed between the parties:

> i. An incident took place between the appellant and the complainant in Michael Smith's club on 3 April 2015;
>
> ii. The quarrel concerned the complainant's monopolization of S, one of the dancers in the club, with whom the appellant said he had a sexual relationship; and
>
> iii. The appellant had a bag with him that night in the club.

[36] The manner in which the trial judge treated with the inconsistencies in the complainant's evidence is linked with her assessment of his intelligence. At pages 163-164 of the transcript the trial judge stated:

> "I say all of that to say, that I have to assess what type of witness Mr. Barrett is. And I will say this, that having heard and seen Mr. Barrett, it's my assessment that he has some challenges in terms of his intelligence level and his ability to process and to answer questions with clarity. And this is based on the fact that he has given answers out of context. So, when I am assessing him, I have to bear that in mind,

that I have to assess him as a witness with some intelligence challenges."

[37] The trial judge identified the major inconsistency and issue of concern in the complainant's evidence. This related to the sequence of events leading up to when the appellant pointed the gun at him. At pages 165-167 the trial judge stated:

> "Mr. Reid challenged him that when he actually gave the statement to the police that he used these words to the police officer…the man go for his bag around the counter and the man then walked with the bag in his hand and came over to him. He has denied telling that statement to the police and that section is put in evidence as Exhibit 1.
>
> So, Mr. Reid is saying that here this is an area of inconsistency, because it is quite a big difference between the man taking the gun from out the bag at the bar and the man taking up the bag and walking over to him. But [the complainant] has maintained he didn't tell that to the police officer. It was also clear that in that statement given to the police, following right from that section that he said he didn't tell the police, it was said right after that he then took a gun from the bag and came up to me and pointed the gun at me. So, in the very same statement, you see, coming over, coming up to, and he agreed that he, yes, he did say that but the taking of the gun was inside the bar. He did not walk up to him with the bag. So this is his explanation, and in looking at this inconsistency, I bear in mind that the words used in the next part of the statement which I have just read, that is, he then took the gun from the bag and came up to me and pointed the gun at me is also suggestive of some inconsistencies of what was really said with coming over to me with the bag in his hand and then came up to me, took a gun from the bag and came up to me. So, there is even some lack of clarity in the coming over or coming up to him in the police statement itself.
>
> **So, when I examine it, there is some merit to his explanation that he did not tell the police that, because I have already found the witness, I found, struggle to express what happened at the particular time and sequence.** So, I say this to say, the inconsistencies, including that inconsistency by itself, does not lead me to reject material aspects of his evidence. I am also of the view, that in spite of the above

> shortcomings he has stayed consistent with what he says [the appellant] did. He had stayed consistent. He has maintained [the appellant] had a gun taken out of a bag pointed at him. He ran out of the club." (Emphasis supplied)

[38] The trial judge also took into account the fact that the appellant acknowledged that he had a bag, and when the police came to the club, they questioned him about it. The trial judge stated that this showed that whatever report the complainant made to the police involved a bag. In relation to the fact that the police did not find a firearm, the trial judge, at page 168 of the transcript, stated:

> "Now, the police did search, nothing was found. However, both on the Crown's case and the Defence's case there is evidence that [the appellant] left the club before the police came. The officer, Sergeant Ewart, said when he went in the club he spoke with somebody, and then he saw the accused man come back through a door in the club, and [the complainant] point him out and say. "See him there". He was coming from an exit door. When Mr Ewart gave the evidence he said [the appellant] said that he had gone outside to pee…. As the Crown said [the appellant] would have had some opportunity to get rid of any weapon because he was outside, that door leads to outside, it's around the back, so there was some opportunity."

[39] Counsel for the defence at trial had put the inconsistent account of events to the complainant. At pages 39-41 of the transcript the evidence reflects the following during cross-examination of the complainant:

> "Q. Listen to what I am reading to you. The man I do not know by name go for his bag around the counter, the man then walked with the bag in his hand and came over to me?
>
> A. No, I didn't put to the police anything like that.
>
> …
>
> Mr. DALTON REID: Then walked with the bag in his hand and came over to me.
>
> I didn't tell the police anything like that.

Q. You didn't tell the police that?

A. No, so I don't know….

…

Q. He then took a gun from the bag and then came up to me and pointed the gun at me, you never tell the police that?

A. No, I never tell the police that.

…

Q He then took a gun from the bag and came up to me and pointed the gun at me, you didn't tell the police that?

A. Yes.

Q. You are saying you tell the police that now?

A. He was, yeah.

…

HER LADYSHIP: What you are saying that you told police that, was that he took the gun from the bag inside the bar.

THE WITNESS: From inside the bar."

[40] The complainant insisted that he did not "say some [of the] lines" which appeared in his police statement (see page 44 of the transcript).

[41] After the prosecution concluded its re-examination, the judge revisited the complainant's account of the events. At page 64 of the transcript the following is reflected:

HER LADYSHIP:…You told Mr. Reid, you know, Mr. Reid ask you how you saw the man when him took the gun from the bag and you said you were sitting on a high stool?

A: That's not what I said.

HER LADYSHIP: That's what you said. Remember you indicated that you were that distance from him standing, and he was in the bar, how were you able to see him take the gun out of the bag, did you actually see him take the gun out of the bag?

THE WITNESS: Yes.

HER LADYSHIP: You say the bag was under the counter?

THE WITNESS: He take it out, and came straight to me.

HER LADYSHIP: He lifted up the bag, took the gun from out of the bag?

WITNESS: Yes, your Honour.

HER LADYSHIP: All right, thank you very much.

[42] In our view, the trial judge identified the inconsistency relating to the sequence of events leading to when the appellant was alleged to have pointed the gun at the complainant, and demonstrated how she resolved it. The trial judge assessed the complainant as having "intelligence challenges" and so had a difficulty processing and answering questions with clarity. Having carefully reviewed the complainant's testimony, the trial judge accepted his evidence that he had not told the police some of the lines that appeared in the police statement. Contrary to the submissions of the appellant's counsel, the trial judge did not overlook the inconsistency, but instead directly addressed it and indicated how she resolved it.

[43] In any event, although the inconsistency touched on a material issue, that is, the pointing of the gun at the complainant, it was not a significant or material inconsistency, especially in light of the fact that the complainant explained that he had not told the police what was recorded in the statement, and was found by the trial judge to be consistent in his account to the court that the appellant had taken the gun from the bag, left the bag behind and walked towards the complainant pointing the gun.

[44] This ground of appeal therefore fails.

Issue 2 - Did the trial judge err when she found that the complainant did not have the intelligence to fabricate a story about the appellant? (Ground 2)

The appellant's submissions

[45] Mr Lawrence acknowledged that the assessment of the credibility of a witness was within the province of a finder of fact, and such a decision is to be arrived at after an assessment of the witness and the evidence as a whole. He submitted, however, that this power was not unfettered. Counsel submitted that the trial judge failed to consider that even if the complainant had a challenge expressing himself, he was able to read and understand what he read. He submitted that this meant that the appellant was more intelligent than the average person. Counsel argued that there was no evidence suggesting that the complainant's level of intelligence prevented him from fabricating a story against the appellant. He further submitted that persons of low intelligence are capable of misinterpreting situations and conflicts. Counsel also argued that the complainant's assertion that the appellant took a gun out of a bag and pointed it at him was not complex, but was, instead, simple to fabricate.

[46] Counsel submitted that the trial judge should have placed more weight on the fact that there was no inconsistency between the defence witnesses, no gun was recovered in spite of the extensive search which the police carried out within 30 minutes of having received the complainant's allegations, and the complainant did not have a supporting witness. He argued that the trial judge erred in finding the appellant guilty beyond a reasonable doubt.

The Crown's submissions

[47] Ms Malcolm submitted that it was open to the trial judge to find that the complainant did not have the intelligence to fabricate a story about the appellant. Counsel emphasized that the trial judge had the benefit of observing the complainant's demeanour, assessing his intellect, ability to express himself and his level of understanding while he testified in examination-in-chief, and responded to questions

in the course of being cross-examined. After this assessment, it was open to the trial judge to find the complainant and his evidence credible and reliable.

[48] Counsel argued that it was also open to the trial judge to reject the evidence of the defence witnesses and thereafter consider whether the Crown had proved its case beyond a reasonable doubt. On the fact that no gun was recovered, counsel submitted that the evidence revealed that although the police were quick on the scene after the report was made, the appellant had the opportunity to dispose of the firearm, and so the police did not find the firearm when they conducted their searches. Counsel submitted that the trial judge did not err when she found that the prosecution had proved its case beyond a reasonable doubt.

Discussion

[49] It is accepted that a trial judge enjoys an important advantage at first instance, as he or she is able to observe the witnesses while their evidence is given. This puts the trial judge in the best position to assess the demeanour of witnesses and ultimately their credibility or reliability. In the case at bar, the appellant seeks to, nevertheless, challenge the trial judge's assessment of the demeanour, credibility and reliability of the complainant. At pages 168-170 of the transcript the trial judge stated:

> "In continuing to assess the evidence and the credibility of [the complainant], I also have to consider what happened that night. [The appellant] is saying, 'Leave S alone, because of you she can't mek no money, leave har alone'. There was a quarrel between them, and his version, the gun was pointed at him and he ran out and Mr Grant runs off; he was push out of the club and then he ran to the police station. And the evidence is that he comes back. Within twenty minutes he would have been back…I have to ask myself, bearing in mind [the complainant's] intelligence what would, in all of that, would have focused [the complainant's] attention on a bag? Why, why would the bag feature so violently in this case. His focus is on S, [the appellant] saying, 'Leave S alone', there is a quarrel, **so why would [the complainant] really have the intelligence within fifteen minutes; to go to the station, to fabricate a story about a gun in a bag? I don't think [the complainant] is capable of that at all. I am saying,**

> **[the complainant] is a very simple man.** Although Mr. Smith and [the appellant] is saying that even when the case is over he was still asking for S, I have to ask myself, would [the complainant] come and tell a lie about [the appellant] in Mr. Smith's club and asking [the appellant] about S? **I don't believe [the complainant] has that capability at all. I find his intelligence is not capable of coming up with such a lie for such a short length of time. And as I said, I find him credible.**" (Emphasis supplied)

[50] Later in the summation the trial judge stated that in her assessment of the complainant as a witness, he was not able to maintain a lie for long and was not the "most intelligent witness in his ability to express himself". She reiterated that she did not accept that the complainant, within the short period of time, fabricated a lie on the appellant. The trial judge therefore accepted the complainant's evidence that the appellant had a gun that day and pointed it at him, which made him afraid.

[51] It is clear that the trial judge took advantage of hearing and seeing the complainant and assessed his credibility, reliability and intelligence in light of what she observed. It is noted that more than once during his evidence, she encouraged the complainant to answer specifically the questions asked. It was entirely open to her, and she was in the best position to make that assessment. There is no basis shown to us on which it would be appropriate for this court to find that the trial judge was in error when she made her assessment.

[52] In addition, the trial judge directly addressed the issue that the gun was not found and spoke to the fact that the appellant had time within which to hide the gun before the police arrived at the premises. This finding was clearly open to the trial judge on the evidence before her.

[53] Counsel for the appellant submitted that there was no inconsistency between the defence witnesses, and the judge expressed the same view. It is correct that Mr. Smith supported the appellant's evidence that he did not point a gun at the complainant that evening. However, it is important to note that Mr Smith was not able to assist on some aspects of the appellant's evidence which related to the incident that evening. For example, the appellant testified that he had a bag with him when

he was going to Kingdom Hall, and Mr Smith stated that he saw the appellant when he was going to the church. The appellant also stated that he had a bag with him at the club and that the police searched it. Mr Smith, however, stated that he did not see the appellant with a bag at any time and never saw a bag when the police came. His evidence did not assist the judge in resolving the main inconsistency in the complainant's evidence with which the judge wrestled. In addition, the appellant stated that he pointed his finger at the complainant while he was arguing with him in Mr Smith's presence (see page 117 of the transcript). However, Mr Smith denied seeing the appellant doing so. In the light of these facts, we are not persuaded that the judge should have, as the appellant's counsel argued, placed more emphasis on the consistency between the defence witnesses.

[54] In the circumstances this ground fails. This means that the appellant's conviction is upheld.

Issue 3 - Was the sentence imposed manifestly excessive? (Ground 3)

[55] Mr Lawrence submitted that the trial judge failed to follow sentencing guidelines and handed down a sentence that was manifestly excessive in the circumstances. He relied on **Meisha Clement v R** [2016] JMCA Crim 26. Counsel submitted that the trial judge erroneously stated that there were no mitigating factors although the following were relevant in the case:

a. Youth of the offender;

b. The mental state of the offender;

c. The previous good character of the offender;

d. Absence of premeditation;

e. The offender's capacity for reform;

f. Family background of the offender; and

g. No previous convictions.

[56] Counsel submitted that the trial judge did not identify any aggravating factors that would warrant an increase in the starting point of 10 years. He argued that, had the trial judge taken into account the mitigating factors, she would have arrived at a sentence of approximately seven years, which would have been appropriate in all the circumstances.

[57] Counsel referred to **Curtis Grey v R** [2019] JMCA Crim 6, in which this court considered the delayed hearing of the appeal and reduced the sentence by one year. He submitted that there was delay in hearing the appeal at bar and a similar consideration should be given in respect of the appellant's sentence.

The Crown's submissions

[58] Ms Malcolm conceded that the trial judge did not take a proper approach in determining the sentence she imposed for illegal possession of firearm. Counsel noted that the trial judge did not acknowledge any mitigating factors to be taken into account. Counsel referred to the appellant's previous good character, the fact that he had no previous conviction, and did voluntary work as mitigating factors which ought to have been taken into account. Counsel submitted that a sentence of seven years could be considered appropriate in the circumstances, if the court sees it fit to consider a reduction in sentence due to a delay in the hearing of the appeal. She referred to **Daniel Roulston v R** [2018] JMCA Crim 20, **David Gray v R** [2021] JMCA Crim 4 and **Patrick Green v R** [2020] JMCA Crim 17.

Discussion

[59] The case of **Meisha Clement v R** is very instructive in outlining a systematic approach to determining the appropriate sentence to be imposed. Morrison P, at the following paragraphs, outlined:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines, derives clear support from the authorities to which we have referred:

i. identify the appropriate starting point;

ii. consider any relevant aggravating features;

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

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

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

[42] Finally, in considering whether the sentence imposed by the judge in this case is manifestly excessive, as Mr Mitchell contended that it is, we remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R** 43, in which the court adopted the following statement of principle by Hilbery J in **R v Ball** 44:

> '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."

[60] At the time of sentencing, the trial judge did not have the guidance provided in the Sentencing Guidelines for use by judges of the Supreme Court of Jamaica and the Parish Courts which were officially released in December 2017. However, the trial judge was still required to approach the issue of sentencing in a systematic manner in keeping with established principles and guidelines available to her at the time in cases such as **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 55/2001, judgment delivered 5 July 2002, page 3, and **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202, 203 referred to with approval in **Meisha Clement v R**.

[61] Phillips JA, in **Joel Deer v R** [2014] JMCA Crim 33, has provided a useful review of the normal sentencing range for the offence of illegal possession of firearm. She stated:

> "[12] A review of several cases from this court reveals that the range of sentences imposed for the offence of robbery with aggravation after conviction is between 10 and 15 years, although the maximum allowed by statute is 21 years. Of course, the length of sentence imposed within the range would be determined by the circumstances of the case. In **Jermaine Cameron v R** [2013] JMCA Crim 60 at para [54], Morrison JA noted that '**[s]entences of 10 years' imprisonment for illegal possession of a firearm** and 15 years' imprisonment for robbery with aggravation **are well within the usual range of sentences imposed at trial and approved by this court for like offences**'. In **Kemar Palmer v R** [2013] JMCA Crim 29, **sentences of 10 years** and 15 years imprisonment respectively were imposed for **illegal possession of firearm** and robbery with aggravation; in **Wayne Samuels v R** [2013] JMCA Crim 10, the sentences of imprisonment were 10 years, **seven years** and 12 years for robbery with aggravation, **illegal possession of firearm** and shooting with intent respectively; and in **Andrew Mitchell v R** [2012] JMCA Crim 1, sentences of 10 years, **10 years** and 17 years imprisonment were imposed for the offences of robbery with aggravation, **illegal possession of firearm** and shooting with intent respectively. In our view, unless the circumstances of a

> case of robbery with aggravation are extremely reprehensible or unless there are other compelling reasons to do otherwise, the sentence imposed should be in the range of 10-15 years." (Emphasis supplied)

[62] In **Paul Lamoye v R** [2017] JMCA Crim 41, McDonald-Bishop JA, in dealing with the issue surrounding the sentence of illegal possession of firearm, expressed the view that since that case did not involve the possession of a firearm "simpliciter", a starting point of anywhere between 12-15 years was appropriate. She then utilized a starting point of 12 years.

[63] Arising from the survey of sentences imposed for the offence of illegal possession of firearm, it will be seen that sentences of seven years to 10 years and upwards have been imposed, depending on the circumstances. Furthermore, where a firearm was used in the commission of an offence, and was not simply found in the possession of an individual, a starting point of anywhere between 12 and 15 years has been seen as appropriate.

[64] According to the Sentencing Guidelines, upon conviction for a charge of illegal possession of firearm or ammunition, pursuant to section 20 of the Firearms Act, the statutory maximum is life imprisonment, the normal range of sentence is seven to 15 years and the usual starting point is 10 years. These guidelines were developed bearing in mind relevant case law. It will be seen that, what has been outlined in the Sentencing Guidelines as regards the sentence for the illegal possession of firearm is fairly consistent with the range and trend seen upon the short review of cases which was outlined earlier in this judgment.

[65] In **David Gray v R**, the appellant was found guilty of the offences of illegal possession of firearm, forcible abduction and rape. He was sentenced to 15 years' imprisonment for the offence of illegal possession of firearm. This court upheld the sentence due to a number of aggravating features of the offence, including that the appellant had a previous conviction for illegal possession of firearm. That case is therefore distinguishable from the case at bar.

[66] In **Patrick Green v R**, the appellant pleaded guilty to eight counts of illegal possession of firearm, as well as a number of counts for the offences of rape, robbery

with aggravation and grievous sexual assault. He was sentenced to 10 years' imprisonment for each count of illegal possession of firearm. At the hearing of the appeal counsel for the appellant did not complain about that sentence. The focus of the appeal related to the sentences imposed for rape and grievous sexual assault in light of the appellant's guilty plea.

[67] In the case at bar, the trial judge correctly referred to the four factors which the court balances in passing sentence: retribution, deterrence, prevention and rehabilitation. She noted that illegal possession of a firearm is a serious and prevalent offence in our country, and so retribution and deterrence was key. The trial judge stated that there was nothing to suggest that the appellant was a danger to society and it appeared that he could be rehabilitated. She observed, however, that the appellant appeared to have an anger problem, which, along with access to a firearm, was problematic. The aspect of the trial judge's approach about which the appellant complained is revealed in the following excerpt from the transcript at pages 185-186:

> "But I bear in mind also that you have no previous convictions, but I don't have any mitigating factors to say that I am going to subtract a certain amount of a prison term, because you didn't plea to it, which is your right. That is not an issue, it is your right. But I don't have any other mitigating factors to say that I need to reduce what I would consider to be the starting point of the sentence. The firearm, as I said, was used and pointed at the witness. The threats being made to him.
>
> Bearing in mind the individual before me, and the efforts now of the justice system to ensure a fair consistency in sentencing there is a usual range that is considered. Of course, the range is usually at the lower end if there is a guilty plea, which there is not. So there is a usual range and somewhere in the middle is what I would determine to be the best for you, bearing in mind the nature and the seriousness of the offence.
>
> … It is the Illegal Possession that is the most serious matter, and as I said, I have to straddle the line there now, because of the seriousness of the offence.
>
> So in relation to Count One, Illegal Possession of Firearm, that is ten years imprisonment …"

[68] The trial judge referred, in general terms, to a usual range of sentences, and stated that somewhere in the middle of the range would be best for the appellant, bearing in mind the nature and seriousness of the offence. While noting that the appellant did not have any previous convictions, the trial judge nevertheless stated that there were no mitigating factors which would allow for her to reduce the starting point of the sentence. This was erroneous. There were clearly mitigating factors which the trial judge ought to have taken into account with a view to, after establishing the usual starting point, deducting some years. The question, nevertheless, is whether the sentence of 10 years which was imposed was excessive in the particular circumstances. In order to determine that question we now consider afresh the appropriate sentence to be imposed on the appellant.

[69] In these circumstances we believe that the usual starting point of 10 years is appropriate. The prevalence of the offence of illegal possession of firearm was correctly noted by the trial judge. While this could be seen as an aggravating factor, which would allow for us to add time to the usual starting point, we note that the trial judge felt that 10 years was nevertheless an appropriate starting point, and we do not believe that this was so unreasonable as to merit an addition to it.

[70] Turning to the mitigating factors, we do not agree with counsel for the appellant that a mitigating factor of youth at the time of the offence would apply to the appellant, who was 34 years old at the time of sentencing, and 32 years at the time that the offence was committed. The lack of premeditation would only apply to the assault charge, the sentence in respect of which no challenge has been mounted, and which is correct in law. The appellant's possession of a firearm, in the instant case, was clearly intentional. In addition, the issue of the appellant's family background would not come into play in these circumstances.

[71] On the other hand, the mitigating factors of his having had no previous conviction, his having a capacity for reform and his contribution to the community are relevant. For these mitigating factors we would reduce the period of 10 years, by two years, arriving at eight years. It is important to note that the appellant was on bail throughout the trial and so, from our perusal of the transcript, it does not appear that

any issue arises in respect of pre-trial custody. In all the circumstances it appears that, arising out of the trial judge's error in her application of the sentencing principles, the 10 years sentence imposed on the appellant was excessive.

[72] Mr Lawrence had, however, also raised the issue of the delay in the hearing of the appeal. He relied on **Curtis Grey v R** in submitting that the appellant's sentence should be reduced due to the delay in the hearing of the appeal. In that matter, Edwards JA, in delivering the judgment of the court, noted that there was a four-year delay in the hearing of the appeal due to the unavailability of the transcript, and stated that consideration should be given to that fact in arriving at the appropriate sentence. A reduction of one year was seen as appropriate in that matter.

[73] In the case at bar, the appellant was convicted and sentenced in 2017 and, due to the delay in the acquisition of the transcript of his trial, his appeal came up for hearing four years later, in 2021. In agreement with the approach taken in **Curtis Grey v R**, we will apply a reduction of one year from the sentence to which we arrived. As a result, the appellant is to serve a sentence of seven years for the offence of illegal possession of firearm.

Order

[74] By majority (Edwards JA dissenting) the order of the court is that:

(1) The appeal against the convictions is dismissed.

(2) The appeal against the sentence imposed for the offence of illegal possession of firearm is allowed.

(3) The sentence of 10 years' imprisonment at hard labour in respect of count one, illegal possession of firearm, is set aside and a sentence of seven years' imprisonment at hard labour is substituted therefor.

(4) The appeal against the sentence imposed for assault is dismissed. The sentence of 12 months' imprisonment at

hard labour imposed for count two, the offence of assault, is affirmed.

(5) The sentences are to be reckoned as having commenced on 5 April 2017 and are to run concurrently.