[2025] JMCA Crim 19

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00079

JOHN JUNIOR GRIFFITHS v R

Miss Tamika Harris for the appellant

Miss Kathy-Ann Pyke and Miss Andrene Hutchinson for the respondent

6 December 2023 and 31 July 2025

Criminal Law – Identification – Recognition – Appellant identified through a small space – Whether the identification was so weak that the appellant should not have been called upon to answer

Criminal Law – Summation – Whether the misquoting of evidence by the trial judge led to a miscarriage of justice

Criminal Law – Sentence – Illegal possession of a firearm

SIMMONS JA

[1] On divers days between 24 November and 13 December 2021, the appellant, John Junior Griffiths, was tried in the High Court division of the Gun Court for the parish of Saint Elizabeth before Gayle J ('the learned judge'). The offences for which he was charged were illegal possession of a firearm and wounding with intent. He was convicted on all counts and, on 16 December 2021, he was sentenced on each count to 15 years' imprisonment at hard labour. The sentences were ordered to run concurrently.

[2] On 22 December 2021, the appellant filed an application to this court for leave to appeal the convictions and sentences, on the following grounds:

"(a) The learned judge erred in deciding that the evidence of identification/recognition was of the quality/standard required, [and that the appellant] had a case to answer in the face of material inconsistencies and discrepancies in the Crown's case.

(b) The verdict was unreasonable having regard to the state of the evidence on behalf of the Crown.

(c) The sentence was manifestly excessive in the circumstances."

[3] On 1 December 2022, a single judge of this court, refused his application for permission to appeal the convictions. He was, however, granted leave to appeal the sentence imposed for illegal possession of firearm as the learned judge failed to apply the appropriate methodology outlined in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') and the cases of **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston**'). The sentence imposed for wounding with intent was the minimum prescribed by section 20 of the Offences Against the Person Act and, as such, leave was not granted to appeal that sentence.

[4] The appellant has renewed his application for leave to appeal the convictions before this court, as is his right. At the hearing, counsel for the appellant sought and was granted leave to abandon the original grounds of appeal and to argue three supplemental grounds. They are as follows:

" 1.The learned trial judge misquoted the evidence.

2. The Learned Trial Judge erred by not himself recognising that the weakness of the identification evidence was such that [the appellant] ought not to have been called upon to answer the case against him. With this failure [the appellant] was denied a real chance of acquittal.

3. The sentence is manifestly excessive."

The case at the trial

A. The prosecution's case

[5] The evidence led by the prosecution was that, on 9 October 2020, at about 9:00 pm, the complainant, Mr Jason Lawrence, was asleep at his home, in the parish of Saint Elizabeth, when he was awakened by the sound of explosions. He got up and realised that he had been shot in the hand. He then looked outside through a space in the door of his board house and saw the appellant standing with a "high power" weapon in his hand. He said that it was about 3 feet long. At the time, the appellant was about 10 feet away. The appellant was known to him for several years, as he said, "we a little youth run up and down, a grow. We grow as little youth". He would see him "more than five, six, seven, eight time" for the month. He was able to see the face of the appellant with the aid of an electric light that was situated on his sister's house at the front of the premises. He described it as "very bright". The appellant, he said, was standing under the light. The witness said that he observed him for about two to three minutes.

[6] The hole in the door through which the witness said he was able to see and identify the appellant was described as being about the size of one-half of a clothespin.

[7] Detective Corporal Sherry-Ann Christian ('Det Cpl Christian'), who visited the scene, gave evidence that she observed five live 7.62 cartridges and eight 7.62 casings at the scene. The bullets, she said, were all over the house and are used in AK-47 rifles. She also observed what appeared to be droplets of blood on the floor of the storage area of the complainant's board house. There were also droplets of what appeared to be blood on the bed and the floor of the bedroom area.

[8] Where the lighting is concerned, the officer's evidence was that there was a light on a nearby house that lit up "the entire front area of [the complainant's] board house". She also stated that there was a small hole to the right side of the house that was "big enough so that you could look through it from the inside to see on the outside, as well as on the outside to see on the inside".

[9] In cross-examination, she stated that the hole was about one to one and a half inches wide. No mention was made in her statement of either the hole or the position of any lighting. She, however, stated that she had made the relevant notes in her notebook when she had visited the scene.

[10] Detective Corporal Jeffrey Charlton ('Det Cpl Charlton'), the investigating officer, stated that, on 10 October 2019, he went to the Black River Hospital, where he saw and spoke with the complainant. As a result, he had an interest in finding the appellant, who is also called 'Tapau'. He visited the scene the next day and observed that there was a gap between two boards of the complainant's house. The gap, he said, was about 4 feet from the ground to the left of the door jamb when facing the door from the inside of the house.

[11] When Det Cpl Charlton learned that the appellant had been taken into custody, he visited him at the Black River Police Station. He introduced himself to the appellant and informed him of the allegations made by the complainant. On caution, the appellant said that on the day in question, he was at the Kentucky Fried Chicken ('KFC') outlet in Mandeville.

[12] In cross-examination, Det Cpl Charlton stated that he had not included his observations about the complainant's house in his statement. He, however, stated that he had made notes in his notebook. His evidence was that there was a gap between the ply board and the groove and tongue in a section of the wall of the complainant's house near the door. He confirmed that the complainant in his statement had said that the gap was in the door.

[13] Dr Lawrence Junior Nalty, who examined the complainant, gave evidence that he had injuries to the base of his right little finger and his forearm. There were five wounds in total. He opined that the complainant's injuries were gunshot wounds, and some would cause permanent disfigurement and impairment.

B. The appellant's case

[14] The appellant gave sworn evidence and called two alibi witnesses and one character witness.

[15] The appellant said that he was at the KFC outlet in Mandeville with three persons at the time of the incident and denied being involved. He gave their names as Den Den (Deneisha Dawson), George and Pinky. After they purchased their meals, he went to the home of Denisha Dawson, who he said was his sister-in-law, at Comfort in Manchester. When he was asked why he was living in Mandeville at the time, he stated that in July 2019, the police had asked him to leave Brompton and stay in Mandeville. He said that he would visit Saint Elizabeth once per month to take money to his children. His evidence was that he would arrive in the parish between 9:00 am and 10:00 am and leave by 1:00 or 2:00 pm. He did not go to Saint Elizabeth in October and specifically denied being there at the time of the incident.

[16] He recalled going to KFC at about 9:00 pm on the day in question. He also recalled how he was dressed. The appellant also gave evidence of how Deneisha, Pinky and George were dressed. He did not remember the amount of the bill as he was not the one who paid for it. When asked about his earnings for the work he did in October, he could not remember. He could not recall what he wore on the day when Inspector Higgins told him to leave Brompton. He did, however, recall how his sister was dressed.

[17] The appellant denied being in the complainant's yard on the night of the incident and also denied being the person who shot the complainant. He could not remember what time the conversation with Inspector Higgins took place. He maintained that he was not in Saint Elizabeth that night and asserted that the complainant was lying.

Deneisha Dawson

[18] The witness stated that the appellant is her brother-in-law and had been living with her and her family since July 2019. Ms Dawson indicated that the appellant was a

construction worker. He was also a livestock farmer and would sometimes go to tend to his farm in Brompton on a Saturday.

[19] Ms Dawson stated that on the night in question, she, the appellant and two other persons went to KFC at about 9:00 pm. They were travelling by car and the appellant was seated in the back on the right.

Tafeca Thomas

[20] Ms Thomas stated that she and the appellant have been in a relationship for about 15 or 16 years. He is the father of her children. Her evidence was that up to July 2019, the appellant lived at Brompton. She indicated that she was present when Inspector Higgins told the appellant to leave the area. Her evidence was that he would come to Saint Elizabeth and take money for the children. After he left in July, he returned in September and October. She stated that he would normally come on a weekday. When asked if she would find it strange if someone said that the appellant would go to his farm every weekend to tend to his cows and goats, she said that she was responsible for tending to the animals.

Renod Brown

[21] Mr Brown testified that he has known the appellant since he was a child and that the apellant has been working for him since he left high school some 15 years before the trial. He stated that he does not know the appellant as someone to be involved in the kind of activities for which he was charged. He testified that he knew some of the appellant's friends but could not recall most of their names. He knew the name of the appellant's girlfriend and knew that he has two children. He did not interact with the appellant outside of work.

[22] The witness stated that in September and October 2019, the appellant was working for him and he had construction projects in Saint Elizabeth.

The appeal

Supplemental ground one: The learned trial judge misquoted the evidence

Submissions

For the appellant

[23] Miss Tamika Harris, counsel for the appellant, submitted that the learned trial judge misquoted the evidence regarding the size of the hole through which the complainant said he was able to see his assailant. This, she said, caused him not to appreciate the weakness in the identification evidence and ultimately led to a miscarriage of justice. In this regard, counsel referred to the two portions of the trial judge's summation in which he referred to the hole being the size of a clothespin. She also pointed out that although he was corrected on the second occasion by Miss Farquharson, on behalf of the prosecution, that the complainant had said that half a clothespin could fit in the hole, the learned judge later in his summation repeated the error. The learned judge, it was submitted, acted on the belief that the hole was larger than it was.

[24] Counsel also pointed out that Mr Jason Lawrence, in his evidence, stated that half of a clothespin could fit in the hole. Miss Harris said that this error is material as it affected the trial judge's assessment of the complainant's ability to recognise his assailant. Counsel stated that, based on **Mikal Tomlinson v R** [2020] JMCA Crim 54, the misquoting of the evidence, on a material aspect of the case, was fatal to the conviction. Reference was also made to **Bertram Clarke and Arthur Robinson v R** [2021] JMCA Crim 51 in support of this submission.

For the Crown

[25] Miss Hutchinson, on behalf of the Crown, submitted that the issue is whether the learned trial judge's error resulted in an unsafe verdict. Reference was made to **Rupert Anderson v R** [1972] AC 100, in support of the submission that the error was not fatal to the conviction. Counsel also referred to **Germaine Smith, Daniel Edwards, Andrew Thomas, Jimmy Ellis v R** [2021] JMCA Crim 1, in which the misquoted evidence

touched and concerned identification. That was a case of recognition, and this court found that, in the circumstances, the error was not fatal. Miss Hutchinson submitted that even if Crown Counsel had not reminded the learned judge of the evidence, the totality of the circumstances was sufficient for the identification to meet the required standard. She stated that the learned judge, in his summation, clearly considered all the factors that caused the complainant to identify the appellant and was satisfied with the quality of the identification evidence. It was submitted that the learned judge would have inevitably arrived at the same conclusion, even if he had not misquoted the evidence.

[26] Alternatively, it was suggested that if this court views the misquoting of the evidence as a material irregularity, the proviso in section 14(1) of the Criminal Justice (Administration) Act could be applied.

Discussion

[27] In **Mikal Tomlinson v R**, the applicant sought leave to appeal his conviction and sentence for the offences of illegal possession of a firearm and wounding with intent. One of the grounds of appeal was that the trial judge had misquoted the evidence. Paras. [9] to [11] of the judgment are relevant. They state:

> "[9] The investigating officer testified that when he cautioned Mr Tomlinson, and questioned him, Mr Tomlinson's response was "Officer, is a little misunderstanding happen between them". The officer also said, at page 81 of the transcript:
>
> > '...I further enquired of him the firearm that was used by him. I enquire[d] of the whereabouts of the firearm.... [u]se[d] in commission of the crime and he replied, 'officer, mi nuh know nothing bout nuh gun. Mi nuh shoot nobody'...."
>
> [10] Unfortunately, the officer was not asked any question, by either Crown Counsel or defence counsel, to clarify those statements, and so it is not known whether that use of the word 'them' was a mangling of reported speech. It is apparent, however, the learned trial judge had a different understanding of the evidence. He quoted the officer twice in the course of his summation. His quote was 'Officer is a little

> misunderstanding between **us**' (emphasis supplied). The learned trial judge said that at pages 151 and 161 of the transcript. He relied heavily on the quote, at pages 162 and 163, in finding that Mr Tomlinson had essentially admitted to being involved in an altercation with Mr Townsend. As a result, and largely on that basis, he convicted Mr Tomlinson, having rejected his alibi, and accepted Mr Townsend as a witness of truth.
>
> [11] The misquoting of the evidence, therefore, is a material aspect of the case, and therefore is fatal to the conviction…"

[28] In **Bertram Clarke and Arthur Robinson v R**, one of the grounds of appeal filed by Mr Robinson, who had been convicted of murder, was that the trial judge had misdirected the jury on the facts when he said that Mr Robinson had assisted Mr Clarke to dispose of the items that were used in the commission of the offence. The details of his complaint and how this court treated with it, are set out in paras. [172] to [179] of the judgment, which state:

> "[172] Mr Robinson said, in his unsworn statement from the dock, that he had just completed the task of packing away cylinders for Mr Clarke and was waiting for 'a small change', on the date Mrs Clarke was injured, when he heard Mrs Clarke arguing with Mr Clarke that his girlfriend had attacked her in Brown's Town. He then heard Mrs Clarke say, 'Tony' and something smashed. He said Mr Clarke then called him and told him to dispose of some things. He refused and Mr Clarke 'draped him up', shoved a sharp instrument into his side and threatened to kill him and his family if he spoke about the incident. He then took the baton and other things from Mr Clarke and left. He eventually threw them into the pit toilet.
>
> [173] The contention in this ground pertains to the following extract of the summation at pages 3784 – 3786 of the transcript where the learned trial judge directed the jury as follows:
>
> > 'If having considered all the evidence in the case you are not satisfied to the extent that you feel sure that Arthur Robinson was a part of a joint plant [sic], or agreement to kill Mrs. Floris Clarke, then you would have to return a verdict of not

> guilty against him for the offence of murder. You would then have to go on to consider whether or not he was, what is known as an accessory after the fact. This is a person who knowing that a serious crime has been committed either comforts, perceives or assist the person who committed the crime. To make a personal [sic] accessory, the assistance must be given to the person committing the crime personally in order to prevent or hinder that person from being apprehended, or try [sic], or suffering punishment, or to escape arrest, or conviction. This offence is committed only if the accused has one of its objects, the assistance of the person who committed the crime to a void [sic] apprehension. There must be the following elements: There must be knowledge that a serious crime was committed. There must be an active step to assist the person who committed the crime, and thirdly, that the assistance was given for the purpose noted or intention of hindering the arrest or prosecution of the person committing the crime. In other words, Madame Foreman and Members of the Jury, if you find that the object was to assist Mr. Bertram Clarke to escape arrest by disposing of the items that may have been used in the commission of this crime, then it would be open to you to convict Mr. Arthur Robinson of being an accessory after the fact. Because he is saying that he did not take part in any plan, or any agreement to kill Mrs. Floris Clarke, all he did was to assist Mr. Clarke to dispose of the items that were used in the commission of the offence. And you will recall he was the one who had taken the police and Mr. Harris to retrieve those articles which are in evidence from the pit latrine at the Watt Town All Age School.' (Emphasis added)

[174] Mr Equiano complained that the learned trial judge's statement that Mr Robinson was saying that all he did was to 'assist Mr Clarke to dispose of the items that were used in the commission of the offence' amounted to a misdirection. Counsel argued that at no time in his unsworn statement did

Mr Robinson state that the objects he disposed of were used in the commission of the crime. What he stated was that he was given the objects to dispose of under threat, and at no time alluded to knowing that a crime was committed and that he was being asked to dispose of objects used in the commission of a crime. Counsel submitted that Mr Robinson's case was, therefore, erroneously placed before the jury and the fact that it came so close to the end of the summation, seriously eroded Mr Robinson's chance of an acquittal and affected the fairness of his trial.

[175] Miss Pyke acknowledged that a misstatement of the facts of the case can be a material irregularity, depending on the nature of the error, the nature of the evidence generally and the issues in the case. It was her submission, nevertheless, that where a judge misquotes the evidence, a conviction should not be disturbed 'if a reasonable jury, properly directed would nonetheless have convicted'. In support of this submission, she referred us to the authority of **Norick Brooks v R** [2014] JMCA Crim 20 where, at para. [20], submissions were advanced in reliance on the case of **Rupert Anderson v R** (unreported), Privy Council No 51 of 1970, from the Court of Appeal of Jamaica, judgment delivered 13 July 1971.

[176] Counsel, however, disagreed that the statement by the learned trial judge was a mistake of fact, and suggested that what the learned trial judge did in her direction to the jury was to merge the evidence from the prosecution witnesses with the out of court statements and the unsworn statement made by Mr Robinson, with regard to items disposed of. By so doing, counsel posited, the learned trial judge had usurped the function of the jury by drawing a conclusion which was for them to make if they found the particular facts proven.

[177] We wish to state that the case of **Norick Brooks v R** does not assist the Crown. The decision of this court, in that case, was that the proposition in **Rupert Anderson v R** would not apply if the defence's case had not been fairly put to the jury. This was expressed at para. [24] of the judgment where Brooks JA (as he then was) stated:

> '[24] It cannot be said that Mr Brooks' case received fair consideration. In those circumstances, the fairness of the trial was

> compromised. The question as to whether the learned trial judge would have convicted Mr Brooks even if he had properly understood the case for the defence cannot be definitely answered in the affirmative. This is a different situation from that in a case such as **Rupert Anderson v R**, where a misquoting of a portion of the prosecution's case results in the strengthening of the prosecution's case. The difference is that, in this case, the defence's case has not been fairly put to the tribunal of fact.'
>
> [178] We agree with Mr Equiano that at no time did Mr Robinson state that the objects he disposed of were used to commit the crime. This blunder resulted in Mr Robinson's defence having not been fairly put before the jury. Not only was Mr Robinson's defence not properly placed before the jury, but the learned trial judge also directed them on an alternative offence of accessory after the fact which did not arise on the evidence, was not charged in the indictment, and was not an offence that could have been left to the jury on a charge of murder. As a matter of law, that offence cannot be left to a jury without it having been charged in the indictment; it is not a lesser offence to murder (see generally, section 36 of the Criminal Justice (Administration) Act).
>
> [179] This is not a case in which it could be said that the outcome was inevitable and the learned trial judge's remarks would have had no effect on it. The direction given to the jury had the risk of planting in the jury's mind that Mr Robinson had knowledge that the items for disposal had been used to commit the murder of Mrs Clarke. In outlining Mr Robinson's defence in that way, the learned trial judge compromised his case. We cannot, therefore, say that Mr Robinson's case received fair consideration."

[29] The issue, in the instant case, is whether the learned judge might have reached a different verdict had the evidence been accurately recounted. The learned judge, in his summation at page 172, stated:

> "Said he looked through a hole to the front of the house outside there, from inside. Then he said the whole of the front lit up from the light from his sister's house.

> Said the hole that he looked through, it's a long hole, he said this is because where the groove and tongue meet the playboard, it don't join too well or proper way, According to him. So it's through that space - he said that space, that a clothespin can fit into it.
>
> He said when you look through that space this long space, the size of a clothespin, and the light out there, he says he saw this accused man, John Griffiths and John Griffiths was about ten feet from where he was looking through."

And at page 175:

> "He says 'clothespin can fit in the space I look through.' He said, 'the accused was standing in front of my house. He was about ten feet away.'
>
> MISS FARQUHARSON: Half of the clothespin, m' Lord.
>
> HIS LORDSHIP: Yes. Yes. He was under the open space, under the bright light."

At pages 195 – 196, the learned judge stated:

> "When I consider the evidence of the complainant, who I saw and observed, the description he gave of the hole in the wall where he peep through, the size, it was so that a clothespin could fit in, that's what he said. He saw the - he saw the accused some ten feet away for two to three minutes and lighting was there."

[30] In the instant case, the evidence in question relates to the ability of the complainant to identify the appellant as his assailant. The complainant was unwavering in his assertion that he recognised the appellant on the night in question. He knew the appellant, and the area was well lit. His evidence concerning the lighting was supported by the evidence of Det Cpl Christian, who visited the scene that night. The officer also gave evidence that a person could see through the said hole from inside the room and vice versa. In addition, on the morning after the incident, the appellant's name was given to Det Cpl Charlton, who recorded the complainant's statement while he was in hospital.

[31] The learned judge's misquoting of the evidence raised the issue of whether it influenced his assessment of the identification evidence as a whole. Even if the learned judge was operating on the mistaken belief that the hole was larger than indicated by the complainant, he still had the evidence of Det Cpl Christian, whose evidence he could either accept or reject.

[32] Based on the totality of the evidence, the learned judge's misquoting of the evidence regarding the size of the hole through which the complainant was able to identify the appellant was not fatal. This ground, therefore, fails.

Supplemental ground two: The learned judge erred by not himself recognising that the weakness of the identification evidence was such that the appellant ought not to have been called upon to answer the case against him. With this failure the appellant was denied a real chance of acquittal

Submissions

For the appellant

[33] Miss Harris submitted that the learned judge ought to have analysed the following with more care:

> (a) the difficult circumstances under which the identification was made;
>
> (b) the omission of the hole from the statement of [Det Cpl Christian];
>
> (c) the fact that no photograph was taken of the hole;
>
> (d) the fact that no measurements were taken of the hole; and
>
> (e) the fact that the locus was not visited to demonstrate whether it was possible to make an identification through the hole.

[34] Counsel submitted that, ultimately, the quality of the identification evidence was so poor that the appellant should not have been called upon to answer. In this regard, she relied on **R v Turnbull** [1976] 3 All ER 549 ('**Turnbull**').

For the Crown

[35] Miss Hutchinson submitted that the inherent power of a judge to withdraw a case from the jury should only be exercised where there is no evidence upon which a *prima facie* case has been made out (**Ovando Anderson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 133/2004, judgment delivered 8 November 2006).

[36] The Crown, at our request, provided additional authorities on identification. They are **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered 26 February 1996 and **R v Gavaska Brown and others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos. 84, 85 and 86 /1999, judgment delivered 6 April 2001. In their written submissions, counsel stated that these cases could be distinguished. In **Jerome Tucker and Linton Thompson**, the incident occurred in broad daylight, and in **Gavaska Brown**, the period of observation was shorter than in the instant case.

Discussion

[37] There is no dispute that the appellant and the complainant knew each other. The appellant has, however, raised the defence of alibi and, as such, the case turned on the correctness of the complainant's recognition of his assailant.

[38] Where the identification evidence is deficient and there is no other evidence which supports the identification, based on the principles in **Turnbull**, a trial judge has a duty to stop the trial. This is not a determination of whether the witness is truthful. It is an acknowledgment that the evidence is insufficient, and the accused ought not to be exposed to the risk of a conviction. In **Turnbull** Lord Widgery CJ stated at page 553:

> "When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions…[t]he judge should then withdraw the

> case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

(See also **Junior Reid v R** [1993] 4 ALL ER 95)

[39] In the instant case, the complainant purported to identify the appellant as his assailant through a hole that was about the size of one-half of a wooden clothespin. The scene was visited by Det Cpl Christian on the very night of the incident. When asked if she made any observations of the exterior of the house, she stated that there was a small hole to the right. Det Cpl Christian's evidence was that the "hole was big enough so that you could look through it from the inside to see on the outside, as well as on the outside to see on the inside". In cross-examination, she said that it was between an inch to an inch and a half wide. She also stated that there was a light affixed to a nearby house that "lit up the entire front area of [the complainant's] house".

[40] Det Cpl Charlton visited the scene and observed "a gap between two boards in [the complainant's] house…about four feet from the ground up to the left of the door jamb" when looking at the door from the inside of the house. He did not indicate the size of the gap, which he agreed was a horizontal slit. He also agreed that the complainant in his statement had said that he "peeped through a hole in his door".

[41] In **Jerome Tucker and Linton Thompson v R**, one of the witnesses said that she was able to identify the appellants through a split in the door that was about one inch wide. Both men were known to her, and the incident occurred at approximately 7:00 am. She observed the appellants for about eight seconds and six seconds respectively. The men were also identified by another witness. The court stated that it being a recognition case, "the length of time for observation need not be as long as in a case where the assailant was unknown to the witness at the time of the offence". The court stated that the issue of the sufficiency of the identification was to be determined by the jury based on the warning that the judge was obliged to give as to the "dangers of relying on visual identification".

[42] In **Gavaska Brown**, the incident took place at about 1:10 am. At the time, the witness and the deceased were in bed when the witness heard a bang on the door. He stood on the bed and looked through the window. He recognised the appellant, Gavaska Brown, who was armed with a gun. He also saw Kevin Brown standing at the front of the premises by a wall. He then went to his front window and looked through a hole and saw a third man, Troy Matthews, whom he also recognised. The issue of identification loomed large at the trial. The witness, who had been shot and was hospitalised as a result of the injuries he received, did not name his assailants until some time after he had been discharged from the hospital.

[43] On the day of the incident, photographs were taken of the house to include the window through which the witness was able to see Mr Matthews. At the trial, the witness was unable to identify, from the photograph, the said hole through which he purported to make the identification. The court was also concerned about the length of time that he said he had observed Mr Matthews, which was stated to be "a speck of time". The court stated at pages six to seven:

> "…the witness was not able to show the jury the hole through which he said he saw the appellant. The following excerpt from his re-examination indicates that the witness was not sure whether he looked through a hole in the window or through a partly closed window.
>
> Q. In respect of the hole, counsel in cross-examination asked you about the window that you were looking through you had said that there is a hole in the window which is one inch and you had said something about it not being fully closed?
>
> A. Yes. My window as you can see in the photograph I don't know if you were noticing that my window wasn't fully closed.
>
> His Lordship. Just answer the question in relation to that.
>
> Q. You say your window was not fully closed?

A. Yes.

The evidence referred to above discloses:

(1) that the time of observation by the witness of the person whom he identifies as the appellant Matthews was at the best very brief.

(2) that the witness' brief view of that person was gained through a small aperture in the window which he was unable to point out when shown the photograph and which indeed was not discernible.

(3) that just as the witness saw the person a stone was thrown through the window and gunshots were fired in the house.

It is our view, that the base of the prosecution's case, which depends wholly on the identification of the appellant Matthews by the witness is very slender. This being so the trial judge should have withdrawn the case from the jury. In such circumstances a case is withdrawn from the jury not because the judge considers that the witness is lying but because the evidence has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: See **Wilbert Daley v. The Queen** 30 JLR 429 at 436 which applied **R v.Turnbull** 1977 QB 224. The **Turnbull** doctrine protects a jury from acting upon the type of evidence which experience has shown to be a possible source of injustice **Daley v R** (supra)." (Emphasis supplied)

[44] The witness had known Mr Gavaska Brown for some 20 years and had observed him for about two to three minutes from approximately 4 feet away. The area was well-lit by streetlights. The court found that this was not a case of a fleeting glance and was a "classic case of recognition" by a witness who had "ample opportunity to positively identify the appellant" (see page 20).

[45] In the instant case, the learned judge recognised that identification/recognition was the main issue. He described the evidence of the complainant as "cogent". He also considered the conditions in which the complainant identified the appellant. The issue is

whether based on the quality of the identification evidence, the appellant should have been called upon to answer the case against him. In our view, when the identification evidence is viewed as a whole, within the framework of the **Turnbull** guidelines, it was open to the learned judge to accept the complainant's evidence that the hole was large enough, whether it was the size of a clothespin or one half of a clothespin, and the lighting sufficient for him to see and recognise the appellant. Ground two, therefore, fails.

Supplemental ground three: The sentence is manifestly excessive

Submissions

For the appellant

[46] Miss Harris submitted that the approach of the learned judge was highly irregular and contrary to the well-established methodology outlined in **Meisha Clement**, **Daniel Roulston** and the Sentencing Guidelines. In this regard, she directed the court's attention to the following passage in the sentencing remarks:

> "And I have thought about it all, and I have listened to your lawyer, and I won't do any calculation, I won't choose any range. I am not going there. The law says I mustn't give a sentence that shocks the public. And I have decided that I'll stick to the mandatory minimum. So for illegal possession for firearm that's not a mandatory, but I am choosing 15 years imprisonment hard labour. For wounding with intent, it is 15 years imprisonment at hard labour. Sentence to run concurrent and he is to serve 10 years before being eligible for parole."

[47] Counsel stated that, in light of the learned judge's error, this court is empowered to determine the appropriate sentence (see **Lincoln McKoy v R** [2019] JMCA Crim 35). Miss Harris submitted that based on **Lamoye Paul v R** [2017 JMCA Crim 41, a range of 12-15 years was appropriate with a starting point of 12 years. She stated that when the aggravating and mitigating factors are considered, a sentence of 12 years' imprisonment would be appropriate for the offence of illegal possession of a firearm.

For the Crown

[48] Miss Pyke submitted that the crux of the matter is whether the sentence arrived at by the learned judge for the offence of illegal possession of a firearm was appropriate in light of the fact that the established sentencing methodology was not followed. She pointed out that the maximum penalty for the offence is life imprisonment, and that the sentencing guidelines specify that the normal range is seven to 15 years' imprisonment with the usual starting point being 10 years. She submitted that, based on the case of **Lamoye Paul v R**, a range of 12-15 years was appropriate with a starting point of 13 years.

[49] The aggravating factors were stated to be as follows:

1. The complainant was sleeping when he was shot;
2. The prevalence of the offence in Jamaica; and
3. The shooting was done from outside, thereby constituting a burglary or unlawful entry.

[50] The mitigating factors, she said, were:

1. No previous convictions; and
2. The mixed social enquiry report.

[51] Based on Miss Pyke's calculations, the sentence of 15 years' imprisonment was submitted to be appropriate. In the circumstances, it was submitted that the appeal against sentence ought to be dismissed and the sentence affirmed.

Discussion

[52] Section 14(3) of the Judicature (Appellate Jurisdiction) Act provides:

> "14 (3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or

> less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[53] However, as indicated by Hilbery J in **R v Kenneth John Ball** (1951) 35 Cr App R 164 at page 165:

> "…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 as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the 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**." (Emphasis added)

[54] The above statement of principle by Hilbery J in **R v Ball** was adopted by this court in **Alpha Green v R** (1969) 11 JLR 283, **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') and, more recently, in **Patrick Green v R** [2020] JMCA Crim 17.

[55] In **Meisha Clement**, the approach which is to be adopted by this court was stated thus:

> "[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."

[56] The methodology to be employed by the sentencing judge was stated to be as follows:

> "[41] (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)."

[57] In this matter, the appellant has taken issue with the sentence imposed for the offence of illegal possession of a firearm. No submissions were made on his behalf for the offence of wounding with intent, for which the mandatory minimum sentence of 15 years' imprisonment was imposed.

[58] The learned judge in his sentencing remarks, indicated that at page 210, lines 15 to 21 of the transcript:

> "I must also look at the principles of sentencing: Deterrence and rehabilitation is where I will be looking, and protection of the public, as a member of the public that got shot. Retribution, to some extent, because you must expect to be punished if found guilty."

[59] He also identified the aggravating and mitigating factors. He, however, failed to indicate the appropriate range of sentence or a starting point in respect of the offence of illegal possession of a firearm. This was clearly an error.

[60] The appellant was found guilty of the offence of illegal possession of a firearm contrary to section 20(1)(b) of the Firearms Act, for which the maximum penalty of life imprisonment. The learned judge was correct when he stated that there is no minimum sentence prescribed for this offence. The Sentencing Guidelines state that the normal range of sentences for this offence is seven to 15 years' imprisonment with a usual starting point of 10 years' imprisonment. This was not a case of possession of a firearm simpliciter and based on **Lamoye Paul v R,** a starting point which is above the usual starting point, would be more appropriate.

[61] Det Cpl Christian stated that she observed 7.62 casings at the scene and that those rounds were used in AK47 rifles. Based on the cases and the type of gun used to

injure the complainant, we are of the view that an appropriate starting point is 13 years' imprisonment. The aggravating factors are:

(1) the prevalence of firearm offences in Jamaica;

(2) the complainant was shot while asleep in his bed; and

(3) the complainant was seriously injured.

[62] The mitigating factors are:

(1) the appellant has no previous convictions; and

(2) the appellant's mixed social enquiry report.

[63] An examination of cases in which firearms have been used in the commission of other offences reveals that sentences of 10 to 15 years' imprisonment are within the range of sentences usually imposed for those offences. In **Joel Deer v R** [2014] JMCA Crim 33, Phillips JA, who conducted a review of such cases, stated at para. [12] of the judgment that:

> "[12]… 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."

[64] When the aggravating factors are balanced with the mitigating factors, we are of the view that the sentence of 15 years' imprisonment is not manifestly excessive.

Disposal

[65] In all these circumstances, we, therefore, make the following orders:

(1) The application for leave to appeal the convictions is refused.

(2) The appeal against sentence is dismissed.

(3) The sentence of 15 years' imprisonment, for the offence of illegal possession of a firearm, is affirmed.

(4) The sentence is to be reckoned as having commenced on 16 December 2021, the date on which it was imposed.