[2022] JMCA Crim 61

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 27/2014

AAMIR HANSON V R

Miss Venice Brown for the appellant

Miss Donnette Henriques and Miss Debra Bryan for the Crown

8, 11 November and 2 December 2022

LAING JA (AG)

[1] On 20 February 2014, Mr Aamir Hanson ('the appellant') was convicted of the offences of illegal possession of firearm (count 1), wounding with intent (count 2) and, robbery with aggravation (count 3). The convictions followed a trial in the High Court Division of the Gun Court before a judge ('the learned trial judge'), sitting without a jury. The learned trial judge, on 21 March 2014, sentenced him to eight years' imprisonment at hard labour for the offence of illegal possession of firearm, 15 years' imprisonment at hard labour for the offence of wounding with intent and 10 years' imprisonment at hard labour for the offence of robbery with aggravation. The sentences were ordered to run concurrently.

[2] A single judge of this court refused the appellant's application for leave to appeal against his conviction but gave him leave to appeal sentence. As is his right, the appellant

renewed before us his application for leave to appeal against his conviction, whilst also pursuing his appeal against sentence.

[3] We heard this appeal and on 11 November 2022 we made the following orders:

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

2. The convictions are affirmed.

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

4. The appeal against sentence is allowed in part.

5. The sentence of 15 years' imprisonment at hard labour for the offence of wounding with intent is affirmed.

6. The appeal against the sentences for illegal possession of firearm and robbery with aggravation is allowed.

7. The sentences of eight years' imprisonment at hard labour for the offence of illegal possession of a firearm, and 10 years' imprisonment at hard labour for the offence of robbery with aggravation are set aside and substituted therefor are the following sentences:

    a. six years' and 17 days' imprisonment at hard labour for the offence of illegal possession of firearm, credit having been given for one year 11 months and 14 days spent on pre-trial remand.

    b. eight years' and 17 days' imprisonment at hard labour for the offence of robbery with

aggravation, credit having been given for one year 11 months and 14 days spent on pre-trial remand.

8. The sentences are reckoned to have commenced on 21 March 2014, the date they were originally imposed.

9. It is hereby declared that the right of the appellant under section 16(8) of the Constitution of Jamaica to have his conviction and sentence reviewed by a superior court within a reasonable time, has been breached by the excessive delay between his conviction and the hearing of his appeal.

[4] At the time of making the above orders we promised to give written reasons for our decision and this is a fulfilment of that promise.

The evidence

[5] At the trial, the prosecution led evidence from two witnesses as to fact, Mr Donovan Solomon ('the complainant') and Mr Donovan Neilson ('Mr Neilson'). The evidence of the complainant was that on 26 September 2011, at about 8:05 pm, he was a bus conductor on a Hiace bus ('the bus'), being driven by Mr Neilson, which was plying its usual route between Spanish Town and Bayside in the parish of Saint Catherine. The bus stopped in the vicinity of the train line at Gregory Park in that parish and two females entered the bus.

[6] The bus continued on its journey and shortly afterwards was signalled to stop by two men who entered the bus. One man sat in a seat in the row behind the one in which the complainant was sitting, and the other man sat in the back of the bus. The bus continued on its journey until a male voice said "one stop". The bus stopped and the complainant stood in order to allow the passengers behind him who desired to disembark to do so. The man who was sitting behind the complainant went in front of the

complainant and pulled a gun from behind him. The complainant said the man "ratchet up" the gun which, he said, was done by pulling on a component of the gun. The man was standing at the door of the bus at that point. He pointed the gun at the complainant and told him to give him the money. The complainant threw the money at the man which he estimated to be about $9000.00. The second man exited the bus, grabbed the complainant's shirt pocket and said "gimmi me deh rest a deh money". The complainant said he did not have any more and the man in front with the gun pushed the gun towards him. There was a loud explosion and the shattering of one of the windows of the bus. The complainant noticed that he was bleeding and told the driver that he got shot. Both men then ran away.

[7] Mr Neilson drove the bus to the Independence City Medical Centre and about 15 minutes later, the complainant was taken to the Spanish Town Hospital where he received medical treatment. He was released from the hospital the following day.

[8] On 20 October 2011, the complainant went to the Portmore Police Station where he gave a statement to the police. He attended a video identification parade and after viewing photographs on a screen, identified the appellant as being the man with the gun who had shot him on 26 September 2011.

[9] The complainant estimated that from the time the men came on the bus to the time he got shot was about four or five minutes and of that time, he saw the face of the appellant for almost a minute. He explained that when the appellant "pulled" the gun at him, he was able to see his face because there was a small light inside the bus and there was also light from a streetlight.

[10] The evidence of Mr Neilson was consistent with that of the complainant. He stated that after the two ladies boarded the bus, the bus continued on its route and was stopped by two men who boarded the bus. As he continued on his journey, a voice said "bus stop" and he stopped the bus. He heard a sound like a ratchet knife opening and turned around. He heard the words "gi me di money". The complainant said, "mi a go gi you, mi a go gi

you". Mr Neilson said he could see the faces of the two men by the roof light in the bus. He saw the appellant with a gun in his hand and there was a loud explosion after which the complainant said that he got shot. Mr Neilson said that after the men came off the bus, he could see the men from where he was seated and at that point he saw the face of the appellant for roughly a minute and a half. The distance from where he was seated to where the men were at the door, was about 6 to 7 feet.

[11] Mr Neilson said that he recognized the appellant as one of the two men and knew him by the name 'Pastor'. He first recognized that it was 'Pastor' when he entered the bus and sat on a cross seat. He stated that he had probably seen him more than 10 times before that night. He said he had seen the face of the accused from the time he stepped into the bus and about four or five minutes had passed from that time to the moment when he heard the complainant say "mi a go gi you mi a go gi you".

[12] In cross-examination, Mr Neilson said that at the point when he heard the man say "gi mi de money", one man was outside the bus and the appellant was standing on the step of the bus over the complainant and had the gun pointed at the complainant. The man without the gun came off the bus first. In cross-examination, he also explained that there are four rows of seats in the bus. The first row of seats is immediately behind him. The complainant was seated in the second row and the appellant was on the cross seat of the third row.

[13] The appellant gave an unsworn statement in which he admitted to being on the bus coming from the Mandela Highway on the night in question, but stated that he exited the bus at the bus stop at the train track hardware. He said that two men entered the bus at that point. About 15 minutes later, he heard an explosion and about four days later he was picked up by the police. He asserted that he was exposed prior to the identification parade, because on the day he was doing a question and answer statement a police officer took a photograph of him. He also stated that on the day of the identification parade, he asked for his photograph to be placed at number one and they placed it at number four.

The appeal

[14] Counsel for the appellant was permitted to abandon the original grounds of appeal and to argue the following supplemental grounds of appeal:

> "1. That the evidence regarding identification led by the Crown was insufficient to support a conviction on all three (3) counts on the indictment which charged Illegal Possession of Firearm, Wounding with Intent and Robbery with Aggravation.
>
> a) That the Applicant was not identified in court by the complainant;
>
> b) That the complainant failed to identify the Applicant as the man who attacked him;
>
> c) That there was a discrepancy with the evidence regarding the description in court and the information given to the Police by the complainant;
>
> d) That the learned trial Judge omitted the essential exercise of considering the discrepancy in the evidence of the second witness, Donovan Neilson.
>
> 2. That the learned trial Judge erred in relying on the evidence of the witness, Donovan Neilson
>
> a) The identification was made under difficult circumstances;
>
> b) The witness was on the other side of the vehicle;
>
> c) There were 8 other persons in the bus;
>
> d) That the witness gave evidence that he told the police he drove off before he heard the gunshot;
>
> e) The witness did not give a proper explanation as to the reason for him changing his account of the sequence of events;
>
> f) The learned trial Judge erred by descending into the area [sic] and thereby preventing [sic] the witness, Donovan Neilson from adequately explaining the reason

for the discrepancy between his evidence and what he said to the Police.

3. That the learned trial Judge failed to deal adequately with the specific weaknesses in the identification and assess their collective effect on the adequacy of the identification evidence

   a) That the learned trial Judge failed to address the fact that the complainant did not identify the Applicant in court;

   b) The learned trial judge failed to adequately address the discrepancy with [sic] description of the assailant given to the Police by the complainant and his evidence;

   c) That the learned trial Judge did not sufficiently address the discrepancy with the information told to the Police by the bus driver and his evidence in court;

   d) That the bus driver only gave an alias for one of the would-be assailants and there was no evidence led by the prosecution that an identification was done.

4. That the Learned trial Judge failed to consider time already served by the applicant when handing down the sentence

5. That there was an inordinate delay in the hearing of the appeal

   a) The delay was excessive,

   b) The delay was unreasonable and;

   c) Prejudicial to the applicant."

The submissions on behalf of the appellant

[15] Ms Brown, counsel for the appellant made submissions which expanded on the issues raised by the grounds and her written submissions. Grounds one, two, and three raised issues in relation to the manner in which the learned trial judge addressed the weaknesses in the identification evidence, and in relation to his treatment of the appellant's alibi. There is, therefore, a measure of overlap in respect of the identification

evidence and the defence of alibi and we treated with these issues together to the extent that it was possible to do so, for the sake of efficiency.

[16] Counsel submitted that the quality of the identification evidence was poor because of the difficult circumstances under which the witnesses purported to have been able to see the face of the perpetrator at night and with limited lighting. This was compounded by the weaknesses in the evidence of the witnesses. In the case of the complainant, there was an inconsistency between the description he gave of the perpetrator in his witness statement, as being dark brown complexion, whereas in cross-examination he said he was of clear complexion. Counsel submitted that, furthermore, the complainant did not identify the appellant in court.

[17] Ms Brown advanced the position of the appellant, that the learned trial judge erred in treating the case as one of recognition because there was insufficient evidence of Mr Neilson's prior knowledge of him. She highlighted the fact that no evidence was elicited from Mr Neilson as to:

> (a) The precise circumstances which led to the conversation in which he said the appellant told him that he is also called Pastor;
>
> (b) Over what period of time were the potentially more than 10 occasions on which he saw the appellant and at what time of the day;
>
> (c) Approximately how long did he observe the appellant on each of these occasions, at what distance and in what circumstances, for example was he seen in a crowd; and
>
> (d) When was the last occasion on which he saw the appellant.

[18] It was submitted that there is no evidence that Mr Neilson gave a description of the appellant, only an alias, which could apply to anyone, and his ability to identify the appellant was not tested by an identification parade. Therefore, his identification in court amounted to a dock identification and the learned trial judge did not give himself the appropriate warnings in respect of dock identification. Counsel argued that the evidence of Mr Neilson as to the extent of his knowledge of the appellant was not sufficiently strong so as to negate the need for an identification parade.

[19] Counsel also highlighted the inconsistency between Mr Neilson's assertion in his witness statement that "I was scared for Donovan so I drove off and heard the sound of gunshot", whereas in court he said he drove off after hearing the explosion. Counsel also submitted that that the learned trial judge interfered in the trial and erred in that he did not allow Mr Neilson to adequately explain the reason for this inconsistency and as a consequence, this specific weakness in his evidence as it relates to this inconsistency was not adequately addressed by the learned trial judge.

[20] In respect of the time spent in custody before trial and sentencing, Ms Brown submitted that the learned trial judge failed to consider this period when handing down the sentences. She argued, that the appellant was in custody from 2011 to 2014 when he was sentenced. Of this period, he served a sentence of six months' imprisonment for the offence of escaping custody. There was no indication from the transcript of the trial that he was given credit for the time spent in custody prior to his sentence for these offences, or for the time he spent serving his sentence for escaping custody.

[21] On the issue of a possible breach of the appellant's constitutional rights, counsel submitted that the appellant filed his application for leave to appeal in 2014 and accordingly, there was an inordinate, excessive, unreasonable and highly prejudicial delay in the hearing of his appeal. Counsel posited that as a consequence of this this delay in the hearing of his appeal, the appellant may have been deprived of an opportunity of an early release.

The submissions on behalf of the Crown

[22] It was submitted by the Crown that the learned trial judge adequately warned himself when assessing the identification evidence and that he expressly accepted the evidence of Mr Neilson on the issue of identification. It was advanced that the learned trial judge correctly treated the case as one of recognition having regard to the evidence of Mr Neilson as to his knowledge of the appellant. However, it was conceded that detailed interrogation of the factors which were identified by counsel for the appellant as providing the basis and support for a case of recognition, was less than desirable.

[23] It was also acknowledged that there was no evidence that Mr Neilson attended an identification parade and, therefore, the first time he was pointing out the appellant was when he was seated in the dock. Nevertheless, it was submitted that a dock identification is not necessarily inadmissible and in support of this proposition, reliance was placed on the Privy Council cases of **Aurelio Pop v R** [2003] UKPC 40 and **Max Tido v R** [2011] UKPC 16.

[24] Counsel for the Crown conceded that the learned trial judge did not deal with the identification of the accused by Mr Neilson as 'dock identification'. Crown Counsel, however, went on to argue that the quality of the identification was good having regard to Mr Neilson's prior knowledge of the appellant, the length of time he had him under observation that night, in conditions of adequate lighting, a short distance away and with no obstruction.

[25] As it relates to the main inconsistency identified by counsel for the appellant in respect of the evidence of the complainant, counsel for the Crown submitted that it was appreciated by the learned trial judge who found it to be a blemish on the identification evidence given by the complainant. It was argued that the learned trial judge's treatment of the complainant's evidence shows that he was attuned to the effect of a material inconsistency on a witness' credibility.

[26] In respect of Mr Neilson's evidence, it was admitted that the learned trial judge did not specifically address the inconsistency highlighted by counsel for the applicant, that is, the conflict between his evidence and his witness statement, as to whether he drove off the bus before or after the complainant was shot. However, it was argued that this inconsistency did not affect the credibility of Mr Neilson, since it was not an issue which went to the root of the case and it was not substantial enough to undermine the quality of the identification evidence.

[27] Counsel posited that the learned trial judge did not interfere in the trial in a manner that was of such a quality or quantity that would render the trial unfair. Furthermore, the learned trial judge did not prevent the prosecution from asking additional questions in respect of the explanation by Mr Neilson for the difference between his witness statement and his evidence from the witness box, as to whether he drove off before or after the complainant was shot.

[28] Crown Counsel conceded that there was no indication that the learned trial judge gave the appellant credit for time spent in custody on pre-trial remand. It was advanced, that in any event, he could not have received any credit in respect of his sentence for the offence of wounding with intent since that would have reduced his sentence below the statutory minimum and this would have been impermissible based on the judgment of this court in **Kerone Morris v R** [2021] JMCA Crim 10.

[29] In responding to the complaint of the delay in the hearing of the appeal, it was submitted that no document has been tendered to support the allegation of inordinate delay, and, that it would be necessary to show that the appellant had complied with the rules concerning the appeals process. Furthermore, there was no 'substantial prejudice' to the appellant's case that would cause the court to consider a remedy to include a reduction of the appellant's sentence.

Analysis

[30] The main issue in the case at trial was the identification of the appellant. The appellant sought to challenge his conviction based on the alleged weaknesses in the identification evidence.

Weaknesses in the identification evidence

[31] It was convenient to address the complaints of the appellant in respect of the evidence of the complainant and Mr Neilson, separately.

The learned trial judge's treatment of the evidence of the complainant

Failure of the complainant to identify the appellant in court

[32] The complainant was not invited to identify the appellant in court in keeping with the usual practice. However, having regard to the learned trial judge's view of the complainant's evidence on identification, which will be discussed below, the importance of this issue is moot.

Inconsistency in the evidence of the complainant in respect of the description of the appellant

[33] An inconsistency arises when a witness is proved to have said something different in relation to a particular aspect of the evidence on a previous occasion. A discrepancy arises where there is a conflict in the evidence given by witnesses on behalf of either the prosecution or the defence in relation to the same subject matter. In **Dwayne Brown v R** [2020] JMCA Crim 31, Simmons JA (Ag) (as she was then), in explaining the distinction between an inconsistency and a discrepancy, correctly stated at para. [60] that:

> "… At this juncture we wish to highlight the difference between an inconsistency and a discrepancy as those terms are oftentimes been [sic] used interchangeably. An inconsistency occurs when there is a difference in the evidence of a particular witness in respect of the same subject. A discrepancy arises where the evidence of witnesses in relation to a particular thing is different."

We did not understand counsel for the appellant to be saying that there were any material discrepancies between the evidence of the complainant and that of Mr Neilson. The crux of the complaint related to an inconsistency between the complainant's evidence from the witness box and the witness statement that he had given to the police.

[34] The complainant, during cross-examination, said that when the appellant came off the bus he noticed something strange about his face which was that he had a low haircut, big mouth, big nose and clear complexion. He initially denied that he had told the police in his witness statement that the man who shot him is about 5 feet 5 inches tall, medium built, dark brown complexion, not clear or light skin. However, on being confronted with his witness statement, he said "dark brown means clear, clear complexion".

[35] The learned trial judge addressed this evidence (at page 112) and stated that the court would have to take this into account in assessing the credibility of the complainant. At (page 122) the learned trial judge found that this was a blemish on the complainant's evidence of identification. Having characterised this inconsistency and its effect on the complainant's evidence in this manner, there is no indication from the learned trial judge that he utilised the evidence of the complainant in respect of his purported identification of the appellant. In fact, (at page 123) he again noted the following:

> "… on the question of the recognition and identification, it is a fact that the complainant has given a description of the complexion of the accused on [sic] the location in his statement and given another on his evidence but this Court accepts the evidence of Donovan Neilson on the question of identification parade, [sic] the opportunity or [sic] recognizing the accused, the nature of the lighting, the fact that they have not been questioned [sic] of Mr Neilson as to his evidence that he had known the accused before, spoken to him and seen him several times and on the question of identification this Court finds that Mr. Neilson's evidence is evidence that the Court finds convincing and credible that the person that night was Aamir Hanson."

[36] The appellant's dissatisfaction with the learned trial judge's treatment of the complainant's identification evidence concerning the appellant is therefore of no

assistance in advancing the appeal in his favour because the appellant's position, is that the learned judge did not accept the identification evidence of the complainant. Consequently, it could not have been reasonably argued that it was used to bolster the evidence of Mr Neilson. That being the case, the arguments in respect of the weaknesses in the identification evidence of the complainant were academic and did not require any additional interrogation by this court.

The leaned trial judge's treatment of the evidence of Mr Neilson

[37] The learned trial judge, at page 121 of the transcript, gave the following directions and warning to himself which is substantively in accordance with the guidelines in **R v Turnbull and others** [1976] 3 All ER 549 ('**Turnbull**'):

> "Now as I said, this case depends on visible [sic] identification and that has been disputed by the defense [sic]. Now whenever a case against a defendant depends wholly or substantially on the correctness of one or more identifications of that defendant and the defendant has alleges [sic] that it is mistaken, the Court should warn itself of the special need for caution before convicting the defendant and this Court now does, the Court should also indicate to itself the reason or reasons for this caution. It is essential because many a mistaken witness is honestly mistaken, so this Court will have to examine closely the quality of the identification to make sure it is good, assess the value of the evidence before it comes to its conclusion as to whether or not the Crown has proven its case."

[38] The court in **Turnbull** stated that, provided this warning is done in clear terms, the judge need not use any particular form of words. The learned trial judge did not make express reference to the guidance offered by the court in **Turnbull** as to the factors to be considered in assessing the quality of the identification, which was suggested by the court in the following terms at page 552:

> "Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness

> came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[39] Nevertheless, it is patently clear from the learned trial judge's summation that he analysed the evidence of Mr Neilson in detail and in accordance with the **Turnbull** principles. The learned trial judge noted the following key elements in particular, when he recounted the evidence of Mr Neilson:

a) He had seen the appellant more than 10 times prior to the night of the incident and this was not contradicted or questioned;

b) He had seen the face of the appellant from the point he stepped in to the bus and from that time to the point when the complainant said "mi a go give you the money" about four to five minutes had passed;

c) He saw the gun in the hand of the appellant and knew his name to be Pastor, because it was the appellant who told him that was the name by which the appellant was known; and

d) He saw the appellant's face for about one and a half minutes from his vantage point where he was seated in the driver's seat.

[40] The learned trial judge considered the seating arrangement in detail and the position of the appellant seated on the cross seat in the bus. He noted the evidence of Mr Neilson that there were three persons seated in the first row of seats immediately behind him. The complainant was seated in the second row and the appellant was on the cross seat of the third row. The learned trial judge, therefore, considered the relative positions of these persons and the ability of Mr Neilson to have observed the face of the appellant as he asserted that he did. Having reviewed the evidence of Mr Neilson, the learned trial judge made the specific findings to which we previously referred at para. [33] herein.

Inconsistency in the evidence of Mr Neilson

[41] As it relates to the evidence of Mr Neilson regarding the sequence of events, heavy weather was made by counsel at the trial of the fact that Mr Neilson admitted under cross-examination that he had told the police, as evidenced in his witness statement that was put to him and which he admitted, that "I was scared for Donovan so I drove off and I heard the sound of gunshot". This is in contrast to his evidence-in-chief that the shot was fired before he drove off. When asked in re-examination to explain this inconsistency, Mr Neilson said that maybe at the time of giving the statement his mind "flash back a little", which he sought to explain by saying "during the time giving the statement not everything was in place at the time because me a think differently, that is what I am saying". Crown Counsel admitted that she did not understand what that meant

but did not pursue the point after the judge is recorded as saying "Madam Crown, it is your witness?"

[42] Counsel for the appellant complained that this intervention by the learned trial judge prevented the witness from adequately explaining the reasons for the inconsistency in respect of this area of the evidence.

[43] The more common complaint about the intervention by a judge is that the judge has asked too many questions of a witness or witnesses (see the cases of **Haniff Miller v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 155/2002, judgment delivered 11 March 2005 and **R v Hulusi** (1973) 58 Cr App Rep 378. In **Carlton Baddal v R** [2011] JMCA Crim 6 Panton P, who delivered the judgment of this court, gave the following guidance in para. [17] of his judgment:

> "…We also take this opportunity to remind trial judges that it is no part of their duty to lead evidence, or to give the impression that they are so doing. Where interventions are overdone and they are seen to have had an impact on the conduct of the trial, this court will have no alternative but to quash any resulting conviction. Trial judges should therefore be always mindful of the likely result of their conduct. However, the judge is not expected to be a silent witness to the proceedings. There is always room for him to ask questions in an effort to clarify evidence that has been given, or 'to clear up any point that has been overlooked or left obscure' (***Jones v National Coal Board*** [1957] 2 All ER 155 at 159G)." (Emphasis and italics as in original)

[44] Notwithstanding the fact that the nature of the alleged interference in the instant case is different in form from the multiple interventions of which Panton P warns, his guidance is applicable in highlighting the critical principle that the intervention should not be seen to have had an impact on the trial. We noted the submission of counsel for the Crown, that the intervention of the learned trial judge in this case, was not in the terms of an express order prohibiting Crown Counsel from further exploration of the issue. However, it was our view, that the learned judge's words directed to Crown Counsel, "Madam Crown, it is your witness?", could reasonably have been construed by her to be

a tacit indication that she should not go any further with that line of questioning. The implied reason is that further questions would tend to fall within the ambit of cross-examination and not re-examination since the witness had already proffered an explanation, albeit a rather cryptic one. Arguably, the learned trial judge ought to have given Crown Counsel a bit more latitude to try to unravel exactly what the witness meant by his response, but he was entitled to take the view which he did, that any further re-examination on that specific point was exceeding the permissible limits of re-examination.

[45] At page 116 of the transcript, the learned trial judge stated in respect of this inconsistency, that:

> "…then again this court must remember that the evidence is what is given in this court and not what may have been said on a previous occasion and this particular case he said that the reason for saying one thing at one time and saying something else is when he was giving his statement he had flashbacks but what he knows, he knows who do it and that everything was not in place when he was giving his statement, that is what he says."

[46] The learned judge did not proffer an opinion as to what he understood by the explanation given by Mr Neilson. We were therefore left to conclude that what the learned judge was left with, was an inconsistency that was not adequately explained. His findings at page 124 to 125 are that:

> "… I find that Donovan Neilson was the most credible and convincing witness. I accept his evidence that it was the accused man whom he saw that night, that he saw the accused man with a gun and the accused man pointed the gun at the complainant, that there was an explosion and the glass shattered, that the complainant indicated that he was shot and he saw blood coming from an area of the chest of the complainant. I found that his cross-examination did not shake him and found him to be a totally convincing witness."

[47] It was clear to us from this, that he resolved the inconsistency by accepting the evidence of Mr Neilson during the trial in preference to what was contained in his witness statement. However, he did not demonstrate how he reconciled the obvious conflict.

[48] We were of the view that whether the bus drove off immediately before, or after the complainant was shot, would not have significantly affected the evidence of Mr Neilson as to his identification of the appellant. This is so because given the narrative, and the sequence of events related by him, there would have been a close connection in time between the shooting and the bus driving off, whichever was first. In any event, the evidence of the complainant in examination-in-chief is clear, that he was shot and then the bus drove off. He also confirmed in cross-examination that the man fled after he had been shot and this was before the bus had driven off. His evidence was not challenged on this point.

[49] We did not accept the submission made on behalf of the appellant that this inconsistency was sufficient to have caused the learned trial judge to question the credibility of Mr Neilson and to reject the remainder of his evidence in which he detailed the sequence of events on the night in question, said that he recognized the appellant, and explained how he was able to do so. In light of the totality of Mr Neilson's evidence, we accepted the submission of counsel for the Crown that this inconsistency was not sufficiently material to affect the credibility of Mr Neilson or to undermine the quality of his identification evidence. Accordingly, we found that the acceptance of the evidence of Mr Neilson in respect of the identification of the appellant, despite this unexplained inconsistency, did not result in any prejudice to the appellant.

Failure to hold an identification parade for Mr Neilson to attend

[50] It was undisputed that there was only one identification parade held in relation to the appellant and it was the complainant who attended. There was none held for Mr Neilson to identify the appellant. Lord Hoffman in **Goldson and McGlashan v R** [2000] UKPC 9, at para. 14 made the following observation in respect of the function of an identification parade:

> "14. The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of Claudette Bernard's assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still have been mistaken in identifying them as the gunmen. But, as Lord Devlin remarked in his *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (26th April 1976) (at page 99 para. 4.96), that is 'not a claim that could be tested by a parade'."

[51] In that case, the complainant was shot in her face by one of three men who invaded her home early one morning and who also killed her partner. She gave a statement to the police in which she stated that she knew the men before the incident and gave their aliases. No identification parade was held and she identified the appellants McGlashan and Goldson in the dock. McGlashan's counsel suggested that she did not know him whereas Goldson's counsel accepted that she knew him but challenged whether she recognized him when he was in the room. They were both convicted and one of the main issues on appeal was whether the failure to hold an identification parade caused a serious miscarriage of justice.

[52] The Board rejected the submission that the trial judge should have given the jury a specific direction about the absence of an identification parade and the dangers of a dock identification. It was held by their Lordships that such directions were unnecessary because the judge told the jury that they should first consider whether the witness was credible and that if they thought she was lying, the accused had to be acquitted. If she was credible, then there would not have been any need for an identification parade and the dock identification would have been merely a formal confirmation that the men in the dock were the men she said she knew.

[53] The Privy Council case of **Jason Lawrence v The Queen** [2014] UKPC 2, is also instructive. The Board, after referring to several cases that were previously decided by it, made a number of observations in relation to the admissibility and treatment of dock identification at para. 9 of its advice in the following terms:

> "9. In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: *Aurelio Pop v The Queen [2003] UKPC 40; Holland v H M Advocate [2005] UKPC D1, 2005 SC (PC) 1; Pipersburgh and Another v The Queen [2008] UKPC 11; Tido v The Queen [2012] 1 WLR 115; and Neilly v The Queen [2012] UKPC 12. Where there has been n*o identification parade, dock identification is not in itself inadmissible evidence; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care. In *Tido v the Queen* Lord Kerr, in delivering the judgment of the Board, stated (at para 21): '…Where it is decided that the evidence [i.e. the dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged'."

[54] In exercising its discretion whether to admit such identification, the learned trial judge was required to consider whether there was any reason for not holding an identification parade. There was an abundance of evidence from Mr Neilson as to his prior knowledge of the appellant and the circumstances under which he came to know him.

The learned trial judge, at page 114, found that the evidence as to Mr Neilson having seen the appellant more than 10 times was not contradicted or questioned. He also noted that Mr Neilson said that he was told by the appellant that he was also known as Pastor. This evidence was also not challenged.

[55] In the instant case, the purpose of the identification parade would have been to test the honesty of Mr Neilson's assertion that he knew the appellant. It was our view that having found that Mr Neilson was a credible witness, and that this was a case of recognition, it was not necessary for the learned trial judge to have specifically warned himself about the absence of an identification parade and the dangers of dock identification. In these circumstances the learned judge was not required to give himself this warning, as this was not a "dock identification"; and so there was no prejudice to the appellant or any miscarriage of justice. Accordingly, we did not find any merit in this complaint.

The defence of alibi

[56] At page 70 line 2, defence counsel suggested to Mr Neilson that the appellant did not enter the bus on the night of the incident. However, in his unsworn statement the appellant admitted that he was a passenger and he exited at the bus stop where two men entered the bus. He said he heard an explosion about 15 minutes later to which he "paid no mind", and went straight home. The learned trial judge (at page 124 of the transcript), found that his defence was alibi because he was asserting that he was elsewhere when the incident occurred. As a consequence, the learned trial judge was required to consider the alibi and warn himself appropriately, which he did.

[57] The learned trial judge acknowledged that the appellant has no obligation to prove anything to the court and even if the court does not believe him it would have to return to the Crown's case to see whether or not the Crown has proven its case.

[58] The learned trial judge heard the appellant's unsworn statement in which he placed himself on the bus at a short time before the complainant was shot. The learned trial

judge went back to the evidence of Mr Neilson and accepted his evidence and in particular his identification of the appellant as the person who shot the complainant. He rejected the appellant's alibi that he was not on the bus (and impliedly, not in its immediate vicinity) at the time he heard an explosion, which the appellant said was approximately 15 minutes after he had exited the bus. It was, therefore, our conclusion that there was no miscarriage of justice as the learned trial judge sitting alone accepted and acted on what he found to be credible evidence of the prosecution.

[59] For the reasons identified herein, we concluded that grounds 1, 2 and 3 failed.

Ground 4- Time spent on pre-sentencing remand

[60] The appellant was given a term of imprisonment for the three offences that he was convicted of. Notably, he was given the mandatory minimum sentence that could be imposed for the offence of wounding with intent involving the use of a firearm.

[61] We were advised and counsel were agreed that the applicant was detained on 12 October 2011 in respect of the incident which led to him being charged and tried. He was sentenced on 21 March 2014. However, he did not spend this entire period in custody because on 25 October 2012, he escaped custody and on 11 December 2012, he was sentenced at the Saint Catherine Resident Magistrate's Court (now the Saint Catherine Parish Court), to six months' imprisonment at hard labour for escaping custody and malicious destruction of property. He finished serving this sentence on 10 April 2013 and remained in custody until 21 March 2014. He accordingly spent a period of 21 complete and identifiable calendar months plus 86 cumulative days, (which we will round up to three months for ease of calculation), in remand prior to his trial and sentencing. He was not given credit for this period of two years in accordance with the pronouncement of the Judicial Committee of the Privy Council, that there should be full credit for time spent in custody on pre-trial remand connected with this case (see **Callachand and Another v The State** [2008] UKPC 49).

[62] In considering how to treat with the mandatory minimum sentence and the appellant's right to have time spent on remand deducted from his sentence, we are guided by the decision of this court in the case of **Kerone Morris v R** in which the court observed at para. [8] that:

> "The principle of giving full credit for time spent on remand, as established in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), and followed in **Jeffrey Ray Burton v The Queen** and **Kemar Anderson Nurse v The Queen**, cannot override the clear contrary intention of this country's Parliament."

A consequence of this is that the appellant would not be able to benefit from a reduction in the sentence for the offence of wounding with intent, for which he was sentenced to the mandatory minimum period. However, the sentences for the offences of illegal possession of a firearm and robbery with aggravation may be adjusted, and accordingly we deducted two years from the sentence for each of these offences.

Ground 5

[63] In the recent case of **Jahvid Absolam and others v R** [2022] JMCA Crim 50, Brooks P made the following observation in respect of the effect of an unreasonable delay between the trial and the hearing of the appeal at para. [82]:

> "Section 16(1) of the Constitution, being part of the Charter of Fundamental Rights and Freedoms ('the Charter'), stipulates a right to a fair hearing within a reasonable time, by an independent and impartial court. The authorities, such as **Taito v The Queen** [2002] UKPC 15 and **Tussan Whyne v R** [2022] JMCA Crim 42 highlight that a remedy should be given where the State must have caused an unreasonable delay. Where there is a breach of the right to a fair hearing within a reasonable time, the court may grant a reduction in sentence as one of the remedies for the breach. In **Techla Simpson v R** [2019] JMCA Crim 37, there was a delay of eight years before Mr Simpson's case came on for trial. He was granted a reduction of two years from his sentence for that breach of the constitutional right to a fair trial. It has already been established that there is no distinction between

> trials and appeals in the context of assertions of such a breach (see **Carlos Hamilton and Another v The Queen** [2012] UKPC 37 at paragraph [15] and **Evon Jack v R** [2021] JMCA Crim 31 at paragraph [19]).”

[64] In this case, the notice of appeal was filed on 31 March 2014. The transcript of the trial was received by this court on 19 May 2022. We note the submission on behalf of the Crown that no document had been submitted to support the allegation of inordinate delay, however, in these circumstances, the facts speak for themselves. The production of the transcript of the trial was wholly the responsibility of the State and there is no part of that eight-year delay that could be attributed to a failure on the part of the appellant to have done any act.

[65] In such circumstances, we were of the view that the appellant is entitled to the benefit of constitutional redress for the breach. The issue was, therefore, what was an appropriate remedy for the breach in this case. We considered the fact that the appellant was serving a sentence of 15 years' imprisonment for the offence of wounding with intent during this period of delay in the hearing of his appeal, and accordingly, the prejudice to him should be constrained by that reality. Furthermore, the appellant was sentenced to the mandatory minimum sentence of 15 years' imprisonment for the offence of wounding with intent and could not benefit from a reduction of the length of his sentence as a remedy for the breach of his constitutional rights.

[66] In the circumstances we were of the opinion that a reduction in his sentence for wounding with intent was not an appropriate remedy. As a consequence, there was no benefit to applying a reduction of the sentences for the other offences.

[67] We concluded that a declaration would be an appropriate remedy for the breach of the appellant's constitutional rights in this case and we made an appropriate declaration.

Disposition

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