**[2019] JMCA Crim 33**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 67/2016**

**BEFORE: THE HON MISS JUSTICE PHILLIPS P (AG)**
**THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE P WILLIAMS JA**

**TYRONE HEADLEY v R**

**K D Knight QC and Miss Tessa Simpson for the appellant**

**Miss Paula Llewellyn QC and Miss Paula-Sue Ferguson for the Crown**

**8, 9, 10, 11 April and 5 November 2019**

**P WILLIAMS JA**

[1] Between 20 and 21 July 2016, the appellant, Tyrone Headley, was tried and convicted in the High Court Division of the Gun Court holden at King Street on an indictment containing two counts. The first count charged him with the offence of illegal possession of firearm and the second with illegal possession of ammunition, both contrary to section 20(1)(b) of the Firearms Act. On 28 July 2016, he was sentenced to imprisonment at hard labour for 12 years and five years on counts one and two respectively. The sentences were ordered to run concurrently. His application for leave

to appeal was considered on paper by a single judge of this court and was refused in relation to his conviction but was granted in relation to his sentence. Before us, he renewed his application for leave to appeal the conviction while pursuing the appeal against the sentence.

**Background**

[2] There are some facts in this case that are undisputed. On 8 August 2015 at about 6:48 am, Corporal Tyrone Daley and Constables Nichol Sharpe and Horace Brooks were on patrol in a police service vehicle, travelling along Hagley Park Road in Kingston. Corporal Daley was the driver. They heard a radio transmission that caused them to proceed to the Cockburn Pen area.

[3] The appellant's case was that he was at a party in the Cockburn Pen area when he heard shots being fired. He quickly got into a blue Honda Civic with four other men aboard, in an effort to leave the area. The officers intercepted and stopped this vehicle. After the men exited the vehicle on the instructions of the police officers, a 9mm Smith and Wesson pistol with 10 cartridges was found on the floor at the rear of the vehicle.

[4] The issue at trial was therefore whether, in all the circumstances, the police officers were correct in having deemed the appellant as being the person in possession of the firearm.

**The prosecution's case**

[5] The prosecution relied on two witnesses to provide the details as to what transpired that morning. Constable Sharpe and Corporal Daley testified as to what

occurred after the Honda Civic was stopped. Constable Sharpe said he quickly alighted from the police vehicle and "observed the three males in the back, in the rear of the motor vehicle, shuffling". He instructed the person sitting at the rear passenger seat on the right side to put both hands through the window, open the door, and exit the car.

[6] The appellant was the person sitting there and he complied with the instructions. Constable Sharpe asked him if he had anything illegal or offensive to declare and he answered "no". Constable Sharpe searched the appellant and whilst doing so the appellant identified himself as a police officer and produced an identification card.

[7] Upon completing the search, Constable Sharpe testified that he asked the other men to exit the motor car. After all the occupants were out of the vehicle, Constable Sharpe moved closer to the vehicle and looked directly into it. At this time all the doors of the vehicle were open. Constable Sharpe said that as he was looking through the driver's door at the right side he looked to his left and saw the appellant trying to get back into the rear of the motor vehicle through the rear right door. At just about this time, Constable Sharpe sighted the firearm "on the floor of the vehicle; in the middle of the rear of the vehicle". He held on to the right shoulder of the appellant to prevent him from entering the vehicle.

[8] Constable Sharpe then enquired of the appellant, who was the owner of the firearm and the appellant indicated that it was his licensed firearm. The appellant was unable to provide an explanation as to why the firearm was on the floor of the motor car.

The appellant was also unable to produce the licence for the firearm, which he said that he had left at his home.

[9] Constable Sharpe said he then called Corporal Daley's attention to the firearm. Corporal Daley retrieved it from the vehicle and inspected it. After inspecting the firearm, Corporal Daley indicated to the appellant that it was not a licensed firearm and cautioned him. The appellant responded, "Squaddy, mi know seh a nuh licence [sic] gun but you can jus' buss mi".

[10] Constable Sharpe under cross-examination agreed that the appellant also at that time said "Squaddy, nuh loud up di ting, suh man". He however denied that the first thing the appellant had said upon exiting the motor car was "Officah, mi ah police. Ah me fire di shot dem".

[11] Constable Sharpe accepted that at some point the other occupants of the motor car had been in the immediate vicinity of where the appellant was. He also agreed that when they went to the Hunts Bay Police Station after the incident, he observed that one of the five men, who had been in the motor vehicle, was then missing. He agreed that only the appellant had travelled in the vehicle he was in to the station and the other four men had travelled in a separate service vehicle.

[12] Constable Sharpe initially denied making any enquires regarding the whereabouts of the fourth man. After he was shown his statement, he accepted that he had recorded there that when they got to the police station, he "made enquiries regarding the

whereabouts of the fourth [man] and was told that he was missing". He accepted that, when he said that, he was speaking the truth.

[13] Corporal Daley's account of what transpired that morning was largely consistent with the account given by Constable Sharpe. He however said he was the one who shouted instructions to the men to exit the vehicle with their hands up. He said he was searching the persons who had exited the left side of the Honda Civic while, on his instructions, Constable Sharpe searched the ones who had exited on the right.

[14] Corporal Daley said that when he completed his search of the men, he went to the side where Constable Sharpe and the appellant were. Constable Sharpe showed him the firearm on the floor of the vehicle. He said before he went into the motor car to retrieve the firearm, the appellant had said, "Harvey a my gun, a mi licensed gun". When asked for the licence or permit for the firearm, the appellant said he left it at his yard. After examining the firearm, because of its condition, Corporal Daley informed the appellant that he did not believe that it was a licensed gun. The appellant responded, "Yes, Harvey, a true you a talk mi a beg you a blight [sic], police to police".

[15] Corporal Daley explained how other police officers arrived on the scene and were tasked with the responsibility of escorting the other four men from the vehicle to the Hunts Bay Police Station. He and Constable Sharpe escorted the appellant, who was placed in their service vehicle, whilst the other men were placed in another service vehicle. On arrival at the police station, he observed that only three men arrived there in the other service vehicle.

[16] Under cross-examination, Corporal Daley described his feeling upset when he realised that one of the occupants of the Honda Civic was missing. He got no satisfactory answer as to the whereabouts of this man. Corporal Daley said that the man was the first person he had searched and that the man had been sitting beside the driver. He denied suggestions that the man exited from the back of the car.

[17] Also under cross-examination, Corporal Daley admitted that the appellant had also said, "Corporal, a true a nuh licenced [sic] gun". This Corporal Daley said was said after he had examined the firearm and at a time when the other police officers had come on the scene.

[18] Detective Sergeant Nicholas Prendergast, who at the time was a detective corporal, was the officer who arrested and charged the appellant. He testified that after receiving the report from Corporal Daley and Constable Sharpe, he cautioned the appellant and asked him, if there was any truth to what the officers had reported. He testified that he "told him that the officer said that a gun was recovered from a Honda Civic motor car and he told the police that it was his licenced [sic] firearm", to which the appellant responded 'yes'.

[19] Detective Sergeant said he then cautioned the appellant and asked if he had a licence or permit to be in possession of this firearm. The appellant responded, "Straight up, me tell the police a mi licenced [sic] gun, because gun find in a car with a man a straight charge".

[20] Under cross examination, Sergeant Prendergast accepted that the appellant had told him that "he was in a car with four other men and one of them fired shots and that one, was the one that walked away from the scene". However, Sergeant Prendergast explained, this was what the appellant said when a "document was being done" some two days later, on 10 August 2015.

**The appellant's case**

[21] The appellant gave sworn evidence. He testified that on 8 August 2015 he was at a party in the Cockburn Pen area in the company of two friends. After he heard the gunshots, he boarded the Honda Civic motor car with four other men. He explained that he was familiar with the men but knew the name of only one, Kimani Brown, who he regarded as a friend.

[22] He stated that he saw a police vehicle heading in their direction as they were leaving the scene. At about this time he observed "one of the men start to shuffle" and "fondled something from his waist and drop on the floor". He knew this man as 'Shut Pan'. The object he said resembled a firearm.

[23] The police vehicle blocked the car in which he was travelling and the police officers alighted and shouted orders for them to exit the Honda Civic motor car. He observed that the officers had M-16 rifles and Glock pistols, which caused him to feel fearful. He heard officers saying, "Come out, shots just fired at a party". The appellant said he alighted, held his hands up and said "Officer, mi a police, mi fire shot outta mi licence [sic] firearm gun".

[24] The appellant explained that he had lied about his firing from his licensed firearm because he was fearful of the other men in the car. He said that it was also due to the fact that when Shut Pan had dropped the gun, he cursed a bad word and asked, "Wha dat?" Shut Pan responded, "You pussy, you better nuh sey nothing".

[25] The appellant testified that he was on the right side of the vehicle when he was speaking to Constable Sharpe while the others from the vehicle were on the left side. He, however, was not paying attention to the exact distance that they were away from where he was. When asked why he did not tell Constable Sharpe what he had observed in the car before he got out, he said "[he] wanted to but [he] didn't tell him because [he] was in fear for [his] life and for [his] family". He did not "want to speak out so the other man hear".

[26] The appellant said he was trying to beckon to Constable Sharpe that something was in the back of the car. He tried to do so by eye contact and by using his head and then by walking back to the car. Constable Sharpe followed him and saw the firearm.

[27] The appellant said he saw Shut Pan on the left side of the motor car but whilst Corporal Daley was questioning him, he saw Shut Pan coming behind the police officer. He said the last time he saw Shut Pan was when Corporal Daley had pulled him aside and was questioning him. When asked specifically by his counsel if he had told Corporal Daley what he had observed in the car before it came to a halt, the appellant said he had done so while they were still at the scene. He denied that the gun found in the car was his.

[28] Under cross-examination, he said that Shut Pan was sitting on the left side of the motor vehicle to the back. His friend, Kimani Brown, was sitting immediately next to him with Shut Pan on the other side of Kimani. He explained that Shut Pan had dropped the firearm in the back nearer to the middle on the hump. This would have been closer to where his friend Kimani was sitting.

[29] He denied saying that it was his licensed firearm. He however agreed that Constable Sharpe asked him for his firearm licence but denied saying he had left it at home. He said he did not remember Corporal Daley telling him that he did not believe that it was a licensed firearm. Neither did he remember telling Corporal Daley "yes Corpie, a true you a talk, beg you a bligh thru mi a police". He denied telling Sergeant Prendergast "because gun find inna car with man a straight charge".

**The grounds of appeal**

[30] The grounds of appeal were as follows:

> "1. The learned trial judge heard out of court statements from the prosecution, no foundation having been laid for their admissibility, thereby occasioning prejudice to Mr. Headley and the possibility of a substantial miscarriage of justice; and constitutes ground for quashing any subsequent conviction.
>
> 2. The learned trial judge failed to point out or to properly address inconsistencies in the evidence of the prosecution witnesses as well as how he resolved these inconsistencies in arriving at the verdict.
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> 3. The learned trial judge failed to properly assess the evidence in totality, in particular, he failed to adequately deal with the applicant's defence and failed to consider critical evidence given by the applicant.

4. In circumstances where an issue of lies told by the accused had arisen, the learned trial judge failed to direct himself on the issue and failed to give a critical warning in law, which amounts to a material misdirection.

5. In any event, the sentence imposed would be manifestly harsh and excessive in all the circumstances, having regard to the evidence, the applicable sentencing principles and in terms of the applicant's antecedents and therefore would not met [sic] the justice of the case.

6. By declining to make a closing address at the end of the case, defence counsel denied the applicant/appellant of a facility, which is a critical part of the obligation of counsel in representation, one which the client is entitled to expect. By so choosing, counsel significantly failed to properly represent the applicant; resulting in unfairness to him and consequently a substantial miscarriage of justice.

7. Based on the cumulative effect of the hearsay evidence and the treatment thereof, the omission to take into account the inconsistencies and conflicts in the evidence of the prosecution witnesses, the failure to consider the reason why an accused person may lie out of court, the absence of any assistance to the court by way of a final address by counsel for the accused, the verdict of the LTJ is rendered unsafe and unsatisfactory."

**Ground 1**

**The learned trial judge heard out of court statements from the prosecution, no foundation having been laid for their admissibility, thereby occasioning prejudice to Mr. Headley and the possibility of a substantial miscarriage of justice; and constitutes ground for quashing any subsequent conviction.**

**The submissions**

[31] Mr Knight QC submitted that the evidence of a prosecution witness explaining that he overheard a transmission about a robbery was prejudicial to the appellant. The

appellant "would not have wanted to hear evidence, which may have caused the court to form the view that he participated in any criminal act that was discussed via radio transmission and that he was involved in some sort of criminal activity from the outset".

[32] Mr Knight pointed to the fact that the prosecutor had sought to stop the Constable from giving evidence about what he had heard in the transmission but the learned trial judge had intervened, resulting in the officer repeating his having heard about shots being fired.

[33] Mr Knight submitted that the learned trial judge had seemingly come to a belated recognition of the admission of hearsay, when later he said the following, as recorded at page 6 of the transcript:

> "You're telling us about a transmission - what was said in the transmission. You can't tell us what was actually said in the transmission, because that is hearsay."

[34] Queen's Counsel complained that the learned trial judge did not heed his own warning and follow up to stop Corporal Daley from explaining about having heard of a robbery. It was after the officers had heard the transmission that they acted upon what they had heard. Mr Knight's complaint was that this evidence might have invited prejudicial inferences and detract from the court's ability to determine what happened based on the admissible evidence.

[35] Mr Knight contended that this in itself should have "caused the learned trial judge to make a side-note that when he comes to his summation it would be necessary for him

to make it clear that he would be placing no weight on that hearsay evidence". However, he noted that it was apparent that no such thing was done.

[36] Mr Knight further submitted that whilst there is a presumption that the learned trial judge knows the law, there is no presumption that the application of it is correct. He pointed to pages 129 to 130 of the transcript where the learned trial judge, in sentencing the appellant, said:

> "…this particular morning, police officers responded to reports of gunshots being fired in a particular area and were alerted to a particular motor car, which they subsequently saw and stopped. You were a passenger in this vehicle."

Further, at page 131, the learned trial judge said:

> "…You might have caused others or yourself to do harm to the persons that you were protecting since you seem to have been, on that morning, in the company of undesirables. Because if they were in a car and shots were being fired from a firearm which was not licenced [sic], then I could only get the impression that all these persons were of like mind."

Thus, Mr Knight submitted that it was pellucid that the learned trial judge used the hearsay evidence in coming to his decision.

[37] Mr Knight further noted that the influence of the hearsay evidence is seen when the learned trial judge in his summation at page 100 stated the following:

> "The next witness called by the prosecution was Corporal Tyrone Daley, and he mentioned that on 8th of August, 2015 at about 6:48a.m., he was driving along Hagley Park Road in a marked service vehicle. He said he was the driver, and he spoke of the transmission and what they did as a result."

[38] Mr Knight relied heavily on the case of **Delroy Hopson v R** (1994) 45 WIR 307, a judgment of the Privy Council on appeal from a decision of this court, which he submitted demonstrated the impact of the admission of hearsay evidence. Mr Knight invited this court to note in particular how the Board had found that the admission of hearsay evidence, which was highly prejudicial and wholly inadmissible, factored in their Lordships' conclusion that they could not exclude the possibility that a substantial miscarriage of justice occurred.

[39] Mr Knight submitted that the hearsay evidence here did not fall within the exceptions, which made it inadmissible. He concluded on this ground that it could not be said that the judge did not have the hearsay evidence in his contemplation when he was assessing the evidence of the police officers. Further, the learned trial judge failed in his duty to indicate that he excluded it from his mind in determining the guilt of the appellant. Hence, Mr Knight contended that the learned trial judge's reliance on hearsay evidence was in all the circumstances highly prejudicial and it was inevitable that the conviction should be set aside.

[40] In response to the appellant's submission, learned Queen's Counsel Miss Llewellyn submitted that although this aspect of the evidence given by both prosecution witnesses amounted to hearsay, it was not evidence that could be considered prejudicial to the appellant, as there was no indication that this evidence had any impact on the finding of guilt of the applicant. Further, she submitted, the transmission did not ascribe to the appellant any involvement in the acts being reported. This aspect of the evidence of the

police officers was merely to indicate the events that led to the interception of the motorcar with the appellant and others.

[41] Miss Llewellyn further submitted that the learned judge demonstrated that he was aware of the law in relation to the treatment of that particular piece of evidence, when he said " …You can't tell us what was actually said in the transmission because that is hearsay". Thus, it was too great a presumption to say the learned trial judge, in applying his jury mind, would take this aspect of the evidence into consideration or that he would take it to mean that it was the appellant who was involved in either the shooting or robbery incidents that were reported.

[42] Miss Llewellyn noted that the significant issue was that of credibility. She contended that part of the consideration of the credibility of the witnesses was what caused them to go to Cockburn Pen, stop this particular car, and act in the manner that they did. She pointed to the cross-examination of the witnesses that sought to explore the behaviour of the police officers when they intercepted the vehicle and questioned the positions of their firearms. Thus, she submitted, without the evidence of the transmission, the state of mind and the actions of the police officers up to the time they came upon the car would have to be at large.

[43] Miss Llewellyn submitted that the narrow issue was whether the appellant was in illegal possession of the firearm. There was no contest that the police officer found the firearm in the back of the car where the appellant had been sitting. She highlighted the fact that the appellant himself created the nexus between himself and the firearm, so

evidence of possession and control came from him. In these circumstances, there was no miscarriage of justice from the admission of the hearsay evidence.

[44] Miss Llewellyn concluded her submissions by considering the case of **Hopson v R** on which Mr Knight had relied. She contended that that case was distinguishable. Ultimately, it was her submission that the evidence here was not at all prejudicial to the appellant given the narrow issues before the learned trial judge.

**Law and analysis**

[45] It is perhaps useful to commence a consideration of this ground by briefly revisiting the rule against hearsay in criminal cases. In the case of **Cullen v Clarke** [1963] IR 368, Kingsmill Moore J made the following statement on this rule:

> "In view of some of the arguments addressed to the court, it is necessary to emphasise that there is no general rule of evidence to the effect that a witness may not testify as to the words spoken by a person who is not produced as a witness. There is a general rule, subject to many exceptions that evidence of the speaking of such words is inadmissible to prove the truth of the facts, which they assert; … this is the rule known as the rule against hearsay. If the fact that the words were spoken rather than their truth is what it is sought to prove, a statement is admissible."

[46] In **Ratten v R** [1972] AC 378, Ratten was charged with the murder of his wife. He asserted the defence of accident in that he was cleaning his gun and it accidentally went off, injuring his spouse. There was nobody else present when this incident occurred. The prosecution sought to tender evidence from someone who worked with the telephone exchange who said that a call had been made from the accused's house at about the time

of the murder. This witness said that the female voice on the phone betrayed emotion and was begging for the police to be called but before the witness could connect the caller with the police, the phone was hung up. The Privy Council held that the evidence of the telephone operator was not hearsay evidence and was admissible as evidence of a fact relevant to an issue. At page 387, paragraphs C-E, Lord Wilberforce in delivering the judgment stated:

> "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e., as establishing some fact narrated by the words. Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in **Subramanian v. Public Prosecutor** [1956] 1 W.L.R. 965, 970:
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> > 'Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.' "

[47] The witnesses, Constable Sharpe and Corporal Daley, were giving evidence of the situation which obtained before they intercepted the motor car in which the appellant was travelling in the manner they did. This evidence provided the necessary and relevant factual background explaining the actions of the police officers and as such could not be

said to be relied on "testimonially". It would not have been permissible for this evidence to be led for seeking to establish the truth of the report.

[48] In any event, the appellant himself accepted that shots had in fact been fired and, on his account, his first words to the police were an admission of being the one who fired from his licensed firearm. The assertion that shots had been fired was therefore not in issue. Although the appellant sought to explain why he made this statement, which he said was false, the fact of shots being fired became part of the entire narrative of what had happened that morning.

[49] It is noted that in reviewing the evidence the learned trial judge did not rehearse the fact that Corporal Daley gave evidence about overhearing a transmission about a robbery. The learned trial judge spoke merely to the fact that Corporal Daley "spoke of the transmission and what they did as a result". This treatment supports Miss Llewellyn's contention that the details of what Corporal Daley said he had heard did not apparently have any impact on the finding of guilt of the appellant. The learned trial judge clearly demonstrated a consideration of only the admissible evidence. There is no basis to conclude that the learned trial judge formed the view that the appellant had participated in a criminal act or was involved in criminal activity from the outset.

[50] Mr Knight complained about comments and observations made by the learned trial judge as set out at paragraphs [29] and [30]. These comments were made during the sentencing exercise. The learned trial judge was then carrying out a function which was different from that done when determining the guilt of the appellant. There was ultimately

no dispute that the appellant was in fact a passenger in a motor car stopped by the police, who had been responding to reports of gunshots being fired.

[51] Mr Knight placed heavy reliance on the case of **Hopson v R**. In that case, the investigating officer had given evidence that he attended the hospital and spoke to the victim. He said he was "told something" after which he made a decision to look for a particular person as part of his investigation. The victim subsequently died and there was no suggestion when the evidence was elicited from the officer, that the victim's statement was treated as a dying declaration. The officer went on to say that after leaving the hospital, he spoke to two witnesses and the following morning, he obtained a warrant for the arrest of the appellant. The evidence from the police officer tended to imply that the victim had named the appellant as his attacker. The Privy Council found that the evidence was hearsay, highly prejudicial and wholly inadmissible. The finding of their Lordships is understandable given that the issue of identification was of primary significance.

[52] Miss Llewellyn is correct that the narrow issue in this case concerned possession and control of a firearm. The evidence of the transmission that led to the interception of the vehicle in which the appellant, along with the weapon, was found cannot be viewed as prejudicial to him. In the circumstances, there is no merit in this ground and it must therefore fail.

**Ground 2**

**The learned trial judge failed to point out or to properly address inconsistencies in the evidence of the prosecution witnesses as well as how he resolved these inconsistencies in arriving at the verdict.**

**The submissions**

[53] Mr Knight, in arguing this ground, submitted that the learned judge failed to point out and properly address the inconsistencies in the testimonies of the police officers and demonstrate how he resolved them. This he contended amounted to an insufficient analysis. The cases of **R v Locksley Carroll** (1990) 27 JLR 259, **Leroy Sawyers and others v The Queen** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 74/1980, judgment delivered on 30 July 1980 and **R v Clifford Donaldson and others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 70, 72 and 73/1986, judgment delivered 14 July 1988, were referred to in support of the submissions.

[54] It was submitted that, in circumstances where the case turns on credibility, the conduct of the police throughout is important. In the written submissions, the inconsistencies between the statements of the prosecution witnesses, Constable Nichol Sharpe and Corporal Tyrone Daley were identified as follows:

> "i. Constable Sharpe's evidence is that he overheard transmission on base radio about shots being fired in the Cockburn Pen area (pages 5-6 of transcript). On the other hand, Corporal Tyrone Daley who was with Constable Sharpe and Constable Horace Brook [sic] said he overheard a transmission on radio from Corporal Henry about a robbery (page 42 of transcript).
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> ii. Constable Sharpe gave evidence in cross-examination that he shouted some instructions to the driver (pages 26/27-1 of transcript) and was shouting, Corporal Daley said he shouted clear instructions to the men to exit the vehicle (page 43 of transcript). He also gave evidence that he knew nothing about one missing

occupant; he recanted when he was shown his written statement (pages 33-36 of transcript).

iii. In examination-in-chief, Constable Sharpe's evidence is that, after he alighted from the service vehicle, he informed the person sitting in the rear passenger seat of the motor car, to put both hands through the window, open the door and walk- get out of the motor car and walk towards him (Page 9, lines 26-29 and page 10, lines 1-29 of transcript).

Constable Sharpe also said that after he had searched and questioned the applicant who had come out of the vehicle before, he Constable Shape then asked the other persons sitting in the rear of the vehicle to step out. (page 12 at line 22 of the transcript). However; Constable Sharpe's evidence is that the Applicant had come out of the vehicle first and he was questioned and searched, while the other men remained in the vehicle (pages 10-12 of transcript), whereas Constable [sic] Daley told the Court that all the men exited the vehicle initially when it was stopped and he shouted clear instructions for the men to exit the vehicle and they complied (page 43 of the transcript).

iv. Constable Sharpe testified that he was the one that called Constable[sic] Daley's attention to the firearm in the back of the vehicle (Page 16, line 3 of transcript), whereas, Constable [sic] Daley's evidence is that the Applicant told him that he Constable [sic] Daley would find the firearm in the car."

[55] Mr Knight submitted that in relation to matters that are not supportive of or connected to the main case, the witnesses' reliability in respect of these matters is still important in determining their credibility and there must be an indication as to how any conflicts were resolved. The case of **Ashwood, Gruber and Williams v R** (1993) 43 WIR 294 was relied on in support of this submission.

[56] It was Mr Knight's submission that for the learned trial judge to have said he assessed the demeanour of the witnesses and accepted one to be credible was not sufficient. He contended that whilst the demeanour test was of the utmost importance, it is not the only test. He further submitted that this was a case that called for the greatest consideration and transparency as to how issues were resolved. He contended that the whole issue of inconsistencies in this case is of paramount importance because there is no direct evidence as to who owned or had custody and control of the weapon that was found. He concluded that the gravamen of his submission was that the learned trial judge did not consider the inconsistencies, neither was there any record of him having considered them and so there is no awareness of how he reconciled them.

[57] Ultimately, Queen's Counsel submitted that when the appellate court cannot say, with any degree of certainty, that the proper application of the law took place and where it cannot be so determined, then the conviction would be unsafe or unsatisfactory.

[58] In response to this ground, Miss Llewellyn submitted that the first three discrepancies highlighted by the appellant did not go to the root of the case and were not material. She said that in respect of the fourth discrepancy highlighted, there was in fact no discrepancy between Corporal Daley's account and Constable Sharpe's account of how the firearm was brought to Corporal Daley's attention.

[59] She noted that Corporal Daley's evidence was that "… when I reached around that side before anything was said to me, Constable Sharpe showed me a firearm what was on the floor on the back seat of the vehicle". Constable Sharpe's evidence was:

> "A: He came over, and I pointed out my observation to him
>
> Q: Which was what?
>
> A: Which was the firearm on the floor as well as [the appellant] not having a firearm licence."

There was therefore no difference in the testimonies of the men.

[60] Miss Llewellyn submitted that there is no doubt that a judge sitting alone does not have to engage in the same level of direction as in a trial with a jury. She relied on **R v Junior Carey** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/1985, judgment delivered 31 July 1986 and **R v Horace Willock** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 76/1986, judgment delivered 15 May 1987. She concluded that the learned trial judge thoroughly went through the evidence of both witnesses and stated that he believed both witnesses to be credible. Hence, he did not believe any inconsistency in their evidence would be significant enough to discredit them.

**Law and analysis**

[61] One of the early observations of this court on the proper approach of trial judges sitting without a jury is in **R v Junior Carey**, where Campbell JA, writing on behalf of the court, had this to say at page 8:

> "[Counsel] next complained that the learned trial judge did not consider adequately or all the discrepancies in the Crown's case and that he did not consider and analyse in its entirety all the evidence given before him and this has resulted in a miscarriage of justice. This criticism does not appear to be justified, unless it is being suggested that a trial judge exercising jurisdiction to try cases summarily under the Gun

> Court Act, is obliged to take each piece of evidence, and viva voce minutely analyse it so that his analysis appears on the record. The learned trial judge is not statutorily required to do any such thing even though a desirable practice has developed which it is hoped will be continued of setting out salient findings of fact which is of inestimable value should an appeal be taken."

[62] The issue of what is required of a trial judge sitting without a jury when confronted with conflicts in the evidence of witnesses, was also considered by this court in **R v Locksley Carroll** where Rowe P, at page 265, had this to say:

> "… In **Leroy Sawyers and Others v The Queen** [1980] R.M.C.A. 74/80 (unreported), we endeavoured to give some of the practical reasons why a reasoned judgment was necessary. An accused person, we said, was entitled to know what facts were found against him and where there were discrepancies and inconsistencies in the evidence, just how the trial judge resolved them. We did not then refer to the public which has an equal interest in understanding the result of a trial so that it can have confidence in the trial process. Ultimately the Court of Appeal which has the duty to re-hear the case based on the printed evidence and the judgment of the trial judge wishes to be assisted by the thought processes of the trial judge."

[63] It is a fact that the learned trial judge did not give the usual directions to himself on the issue of discrepancies and inconsistencies. Mr Knight is correct in his complaint that the learned trial judge did not specifically identify the discrepancies or inconsistencies that arose from the evidence of the witnesses. Having identified the issue in the case to be credibility, the learned trial judge went directly to conducting a review of all of the evidence of the witnesses including that of the appellant.

[64] The learned trial judge, at page 114, is recorded as saying the following:

> "I took careful note of the demeanor of all the witnesses in this case. That is, the three (3) witnesses called by the Prosecution and the accused man himself…"

In addition, at page 115, he said:

> "As I said, I took into consideration and paid careful note to the demeanor of all the witnesses. Having seen and heard Constable Sharpe, I accept Constable Sharpe as a witness of truth. He impressed me, he gave his evidence in a frank and forthright manner without hesitation or without any apparent [sic] of concocting anything. He answered the questions asked of him promptly and precisely."

[65] The learned trial judge indicated which aspects of the evidence of Constable Sharpe he believed in arriving at the decision he did. Without actually saying so, in carrying out the exercise in this manner, he demonstrated preferring Constable Sharpe's evidence to that given by Corporal Daley where any conflict arose.

[66] He clearly demonstrated that in accepting the evidence of Constable Sharpe on certain issues, he rejected the evidence of the appellant. At page 117 of the transcript, the learned trial judge said the following:

> "Having listened to the evidence of the accused man and Constable Sharpe, and having noted the demeanour of the accused man when he gave this evidence how hesitant he was and how long he took to answer the questions, I reject his testimony on these issues and accept as truthful and reliable the evidence of Constable Sharpe."

[67] The learned trial judge made findings based upon his assessment of the credibility and reliability of the witnesses he had seen and heard. This is a clear and distinct advantage, which this court in reviewing his decision does not enjoy. It is well established that this court must be slow to reverse any findings based on these considerations. It is

only if it can be shown that in the totality of the case the finding is plainly wrong that this court will interfere (see **The Queen v Crawford** [2015] UKPC 44, **R v Horace Willock** and **Everett Rodney v R** [2013] JMCA Crim 1).

[68] There was agreement between the prosecution and the defence that there was a shooting following which the police intercepted a motorcar, ordered the occupants to exit the vehicle and the occupants complied. Significantly, there was also agreement that a firearm was found in the motorcar in the general area the appellant had been sitting. Whether it was a robbery or shooting as reported in the transmission on the radio; whether it was Constable Sharpe or Corporal Daley who instructed the men to exit the vehicle; whether the appellant exited the vehicle before the other occupants or not, were ultimately not material to the finding of guilt of the appellant. The inconsistencies and discrepancies were not of such a nature to render the conviction unsafe. This ground fails.

**Ground 3**

**The learned trial judge failed to properly assess the evidence in totality, in particular, he failed to adequately deal with the applicant's defence and failed to consider critical evidence given by the applicant.**

[69] Miss Simpson, in advancing this ground, relied largely on the written submissions. It was submitted that the learned trial judge failed to afford the appellant due process, which is evidenced by his unbalanced treatment of the case for the defence when compared to his analysis of the prosecution's case. Further, it was submitted, the appellant was entitled to the right of "equality before the law", which is promised to him under the Charter of Fundamental Rights and Freedoms ('the Charter') in section 13(3)

(g). He was also entitled to trial by an impartial court as per section 16(1) of the Charter. The submission was that the unsatisfactory, incomplete and unequal treatment given to the case for the defence, when compared to the treatment of the case for the prosecution, deprived the appellant of his rights at common law and his rights under the Charter, resulting in a substantial miscarriage of justice.

[70] It was also submitted that, given that the case turned on the credibility of the witnesses, this court has to consider whether the learned trial judge approached the appellant's evidence with caution and whether he cross-checked the evidence of the prosecution and the defendant. The instances where the learned judge failed to treat with certain aspects of the evidence were identified as follows:

> "The learned trial judge failed to:
>
> i. Consider the effect of the missing passenger who was said by the [appellant] to have removed the firearm from his waist and placed it on the floor of the car. (This would corroborate the [appellant's] evidence);
>
> ii. Consider the [appellant's] evidence that the man who fled had threatened him not to speak about what he saw and the resulting fear of the [appellant];
>
> iii. Make enquiries as to how the apprehended man became missing;
>
> iv. Consider fingerprint evidence. Although the [appellant] was fingerprinted, there was no fumigation evidence called, so that the judge had no way of knowing whose prints were on the firearm. It was therefore possible that the gun was placed in the car by the occupant who fled. The learned trial judge ought to have taken account of this possibility. The way the judge dealt or not, with this issue was faulted;

v. Make enquiries of the prosecution's evidence that they saw 'men' shuffling in the back seat. Was it all four men that they saw shuffling? If not, who were the men shuffling?

vi. Accurately and thoroughly recount the details of the defence in his summation, excluding critical facts as to the disappearance of the man who the [appellant] said had placed the gun in the car and who caused (by threatening him to be quiet about it) the [appellant] to tell a lie that the firearm belonged to him the [appellant]. It is submitted by his conduct (i.e. 'Shut Pan'), he clearly had something to hide; he had knowledge of the firearm which had been in his possession. He was meticulous in placing the object in the car and serious about what may happen should the [appellant] say a word about, he Shut Pan having put the firearm there."

[71] Miss Simpson contended that the learned trial judge had failed to make any analysis of the appellant saying that he was in fear, which was an important aspect of the appellant's case.

[72] In response to this ground, Miss Ferguson contended that the learned trial judge had recounted the evidence of the prosecution witnesses as well as the appellant's sworn evidence. She submitted that he assessed the appellant's evidence and compared and contrasted it with the evidence of the prosecution witnesses. Further, she said, the learned trial judge in his summation spoke to the fact that the appellant said that he was fearful of the men who were in the car with him. She brought the court's attention to two instances where this was done:

(i) At page 109 of the transcript:

"He said when he dropped the firearm he cursed a bad word and said 'wha' dat?' And the man said 'yuh betta nuh sey nothin'."

(ii) At page 109 line 20:

"He said he did not tell Constable Sharpe what he had observed because he feared for himself and his family."

Miss Ferguson submitted that it cannot be said that the learned judge ignored the appellant's defence. He addressed his mind to the evidence and clearly rejected it.

**Analysis and discussion**

[73] It is necessary to bear in mind that there is no contention that the learned trial judge was not correct in identifying the single issue in this matter as that of credibility. The complaint is that the learned trial judge's failure to consider critical evidence given by the appellant and to adequately deal with his defence resulted in a miscarriage of justice. Given the nature of the complaint, it is perhaps useful to rehearse certain relevant aspects of the learned trial judge's treatment of the evidence of the appellant.

[74] From the outset of the summation, having identified the issue as credibility, the learned trial judge reviewed in detail the evidence of the prosecution witnesses and did an equally thorough review of the evidence of the appellant. He noted that the appellant had admitted to firing shots from his licenced gun and the fact that the appellant said "he was not speaking the truth and he said so because he was fearful of the men who were in the car with him". He rehearsed the evidence relating to the activity and words of "Shut

Pan" and noted that the appellant said he did not tell Constable Sharpe what he had observed because he feared for himself and his family.

[75] The learned judge recounted the responses of the appellant to suggestions thoroughly. At pages 111 to 114 of the transcript the learned trial judge said:

> "There was a series of suggestions put to [the appellant] and answers given by him. He said he agreed that Constable Sharpe asked if he had anything illegal or offensive to declare and he said no. He said it was not true that it was when Constable Sharpe was searching him that he said he was a police officer. He said it is not true that he tried to enter the car after speaking to Constable Sharpe. He said he don't remember Constable Sharpe putting his hands on his shoulder when he went back to the car.
>
> He said he don't remember if Constable Sharpe asked him whose gun it was. He said that it was not true what Constable Sharpe asked him what was his licensed firearm doing on the floor. He said it was true that Corporal Sharpe asked him for his firearm users license [sic]. Again, I will make a comment at this stage, because if he didn't say that he had a licensed firearm one would wonder then why would Constable Sharpe asked him for his license [sic]. This is something that I would have to consider in this case, that he denied that he told this to Constable Sharpe. He said he did not tell Constable Sharpe that he left it at home.
>
> He said that it was not true that he was cautioned by Corporal Daley. He said it was not true that he told Corporal Daley, 'Squaddy, mi kno sey a nuh licence gun, but you can jus' burs' mi'. He said it is true that he told Constable Sharpe that he fired two (2) shots from his licenced [sic] firearm.
>
> Again, we have to wonder about this, because he said when he noticed the car he was not armed, yet he said he told Constable Sharpe that he fired two (2) shots from his firearm. He said he said this because he was fearful.
>
> He said it is not true that he told Corporal Daley that he left his license [sic] at home. He said he don't remember whether

> or not Corporal Daley said he did not believe that it was a licenced [sic] firearm. He said he don't remember saying so to Corporal Daley, 'a true you a talk, beg you a bligh thru' mi a police'. He said it is not true that he told Sergeant Prendergast that he told the police it was his licenced [sic] gun. He said he did not say that to Sergeant Prendergast, 'because gun find inna car with man a straight charge'."

[76] The learned judge then looked back at the evidence of prosecution witness Constable Sharpe whom he found to be credible and he continued at pages 114 to 117:

> "Now, as I indicated earlier, in agreement with Counsel for the prosecution, and Counsel for the accused man, this case concerned credibility of witnesses. I took careful note of the demeanor of all the witnesses in this case. That is, the three (3) witnesses called by the Prosecution, and the accused man himself. I note and bearing in mind that in giving evidence, the accused man did not take any burden of proving anything. And even if I do not believe a word that he had said, I cannot because of that alone, say he is guilty of any of the offences. I can only say so if the prosecution has satisfied me to the extent that I feel sure on the basis of the evidence produced on behalf of the prosecution, that this accused man committed any of the offences that for which he is charged.
>
> I also take into consideration that there were two separate offences or charges on the indictment, therefore, I have to look at the evidence as it relates to each count of the indictment to see whether or not the prosecution has satisfied me to the extent that I feel sure.
>
> As I said, I took into consideration and paid careful note to the demeanor of all of the witnesses. Having seen and heard Constable Sharpe, I accept Constable Sharpe as a witness of truth. He impressed me, he gave his evidence in a frank and forthright manner without hesitation or without any apparent [sic] of concocting anything. He answered the questions asked of him promptly and precisely. I believe him when he said that this accused man did not indicate that he was a police officer until he was being searched.
>
> Having said that I believe Constable Sharpe in this regard, I reject the evidence of the accused man when he said from

the car was stopped he declared that he was a police officer, I do not believe him. I do not believe him also when he said that he came out and went to the officer having declared first of all that he was a police officer.

I believe Constable Sharpe when he said that having spoken to this accused man and searched him he went to the vehicle. I believe him when he said he started looking in the right section of the vehicle at the front and that is when he observed the accused man trying to enter the vehicle through the right rear door. I believe Constable Sharpe when he said that happened. I believe Constable Sharpe when he said that he was the one who prevented the accused man from entering the vehicle, therefore I reject the evidence of the accused man when he said he was not trying to enter the vehicle and he was prevented.

I believe Constable Sharpe when he said he saw no signals being made by the accused man either to himself or anybody else to indicate that there was a firearm in the car. I believe him when he said having seen the firearm he asked the accused man whose it was. I believe him when he said that the accused man said it was his licenced [sic] firearm. I reject the evidence of the accused man that he didn't say that to the officers.

I believe him, that is Police Constable Sharpe, when he said that he said to the accused man 'what is your licenced firearm doing on the floor of the car'. I believe him when he said the accused man didn't answer. I believe Constable Sharpe also when he said that he asked the accused man for this licence and the accused man said he had left it at home. I believe Constable Sharpe also when he said Corporal Daley cautioned the accused man and the accused man said, 'Squaddy, mi kno' sey a nuh licence gun but you can jus' burs' mi'.

Having listened to the evidence of the accused man and Constable Sharpe, and having noted the demeanour of the accused man when he gave this evidence how long he took to answer the questions, I reject his testimony on these issues and accept as truthful and reliable the evidence of Constable Sharpe."

[77] In all the circumstances, it cannot fairly be said that the learned trial judge paid unequal attention to the appellant's evidence. The learned trial judge conducted an exercise of reviewing the entire case and considered that of the defence in a manner that was balanced and fair. The learned trial judge found the appellant not to be credible and he was at liberty to do so.

[78] The issue of the role of Shut Pan arose solely on the appellant's case and it is true that the learned trial judge did not specifically indicate that he rejected this evidence. However, implicit in his finding that the appellant was not credible was his rejection of it.

[79] In any event, the evidence did not clearly reveal that the person who went missing was the same person that the appellant said had dropped the firearm in the car. Corporal Daley said the man who disappeared had been sitting at the front of the car beside the driver. While being cross-examined counsel for the appellant had at first suggested to the officer that the person was at the back. The following exchange took place as recorded at pages 54 and 55 of the transcript:

> "Q: And this man that was missing, do you accept that the [sic] was dress in T-shirt and a pair of black jeans?
>
> A: Yes, sir.
>
> Q: You remember that, thank you. And finally, do you accept that he actually came from the back of the car, as well?
>
> A: No, he was not from the back of the car, he was beside the driver.
>
> Q: You sure about that?

> A: Very sure, he was in a brown T-shirt, back [sic] jeans, he was beside the driver.
>
> Q: I crave your indulgence M'Lord. I am just seeking to confirm certain instructions, I am grateful. I am just seeking to confirm, M'Lord, if it is that I suggested to the witness that the person came [sic] the back, I withdrawn [sic] that suggestion?
>
> His Lordship: Yes, very well."

[80] This meant that left as unchallenged, was the evidence that the missing passenger had been sitting in the front beside the driver. In his evidence, the appellant testified that the person who he said dropped the firearm, Shut Pan, had been sitting at the back of the vehicle. Hence, it seems there was no basis for the learned trial judge to have safely concluded that it was indeed Shut Pan who was the missing passenger.

[81] In respect of the complaint that the learned trial judge did not consider fingerprint evidence, the evidence from Sergeant Prendergast was that the firearm had not been tested for any. He explained that he had been told that the machine in relation to fumigation of guns was not working. The learned trial judge was obliged to consider the evidence presented and not speculate about what evidence there might have been.

[82] Having properly considered the issue of credibility, there was sufficient basis, on the evidence for the learned trial judge to make the findings that he did. There is therefore no basis, based on this ground to disturb the verdict. This ground also fails.

**Ground 4**

**In circumstances where an issue of lies told by the accused had arisen, the learned trial judge failed to direct himself on the issue and failed to give a critical warning in law, which amounts to a material misdirection**.

[83] Mr Knight noted that the appellant's case was that he did not speak the truth about whose firearm it was because he was fearful of his life and in those circumstances an issue of lie had arisen, therefore a **Lucas** direction was necessary. He submitted that a **Lucas** direction should be given, where the prosecution seeks to show that something said, either in or out of court, was evidence of guilt in relation to the charge they sought to prove against the appellant.

[84] Further, it was contended that the "lie" was at the core of the prosecution's case because other than the lie the appellant told that the firearm was his, there is no other evidence to buttress a conviction. The appellant said he believed that he could not have spoken the truth that it was the missing passenger, Shut Pan, who had placed the firearm in the car and had threatened him into silence. The lie was therefore deliberate and related to what the appellant believed was a material issue.

[85] Additionally, it was submitted that Constable Sharpe gave evidence that he observed the males in the rear of the motorcar shuffling. This, it was submitted, was corroboration of the appellant's evidence that the missing man had removed the firearm from his waist, placed it on the floor of the back seat, and threatened the appellant.

[86] The cases of **Eaton Douglas v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 180/1999, judgment delivered 8 October 2001, **R v**

**Lucas** (1981) Q B 720, **R v Goodway** (1993) 4 All ER 894 and **R v Burge and Pegg** (1996) 1 Cr App Cr Rep 163, were relied on in advancing the submissions on this ground.

[87] Miss Llewellyn submitted that a **Lucas** direction could have been given in the circumstances. She submitted that, even though the learned trial judge did not explicitly give a verbal warning to himself, he clearly accepted the Crown's witnesses as credible, and rejected the appellant's defence, which included that he lied out of fear. She pointed the court to the summation at page 119:

> "…having rejected the evidence of the accused man as to the circumstances under which the firearm was found and what he told the police officers and looking at the evidence for the Prosecution, I am satisfied to the extent that I feel sure…"

[88] Learned Queen's Counsel ended her response to this ground by submitting that if the court finds that in the circumstances, a **Lucas** direction ought to have been given, no miscarriage was caused by its omission. In the circumstances, she said, the matter would be an appropriate case for the application of section (14)(1) of the Judicature (Appellate Jurisdiction) Act, which provides that the court may:

> "…notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

**Law and analysis**

[89] The English Court of Appeal in **R v Goodway** amplified the pronouncements that had been made in the case that had given rise to the requirements for directions, which

came to be known in law as the **Lucas** direction. Lord Taylor, writing on behalf of the court at pages 900-902, stated:

> "It is well established that where lies told by the defendant are relied on by the Crown, or may be relied upon by the jury as corroboration, where that is required, or as support for identification evidence, the judge should give a direction along the lines indicated in **R v Lucas** [1981] 2 All ER 1008 at 1011, [1981] QB 720 at 724. That is to the effect that the lie must be deliberate and must relate to a material issue. The jury must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. In regard to corroboration, the lie must be established by evidence other than that of the witness who is to be corroborated….
>
> However, [counsel for the appellant] goes further and contends for a broader proposition. He submitted that a **Lucas** direction should be given wherever lies are relied upon by the Crown, or might be used by the jury to support evidence of guilt as opposed to merely reflecting on the appellant's credibility.
>
> Accordingly, we consider [counsel for the appellant's] broader proposition is sound and that a **Lucas** direction should be given, save where it is otiose as indicated in **R v Dehar**, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt."

[90] Lord Taylor highlighted the passage in **R v Dehar** [1969] NZLR 763 at 765, where North P stated:

> "We do not say that in every case in which lies are put forward in aid of the Crown's case to reinforce the other evidence it is always necessary for the trial judge to give any specific form of direction. How far a direction is necessary will depend upon circumstances. There may be cases where the rejection of the explanation given by the accused almost necessarily leaves the jury with no choice but to convict as a matter of logic."

[91] A further useful exposition on the **Lucas** direction was given in **R v Burge and Pegg** where Kennedy LJ stated at page 173:

> "As there seems to be a tendency in one appeal after another to assert that there has been no direction, or an inadequate direction, as to lies, it may be helpful if we conclude by summarising the circumstances in which, in our judgment, a *Lucas* direction is usually required. There are four circumstances but they may overlap:
>
> 1. Where the defence relies on an alibi.
>
> 2. Where the judge considers it desirable or necessary to suggest that the jury should look for support or corroboration of one piece of evidence in the case, and amongst that other evidence draws attention to lies told, or allegedly told, by the defendant.
>
> 3. Where the prosecution seek to show that something said, either in or out of the court, in relation to a separate and distinct issue was a lie, and to rely on that lie as evidence of guilt in relation to the charge which is sought to be proved.
>
> 4. Where although the prosecution have not adopted the approach to which we have just referred, the judge reasonably envisages that there is a real danger that the jury may do so.
>
> If a *Lucas* direction is given where there is no need for such a direction (as in the normal case where there is straight conflict of evidence), it will add complexity and do more harm than good."

[92] On the Crown's case, the appellant was alleged to have admitted ownership of the weapon and at first claimed that it was licensed. When pressed he admitted that he did not have a licence for it. He ultimately, when being charged with the offence, explained why he had lied but did not deny that the gun was his. The lie therefore was

in saying that the gun was licensed. Thus, on the Crown's case, the appellant not only accepted being in illegal possession of the firearm but also in effect asked or begged his colleague officers not to charge him. On this analysis, the case for the Crown was not relying on his lie as being evidence of his guilt, in light of his acceptance, explanation and admission.

[93] The appellant gave evidence that upon the police officers alighting from the service vehicle and advancing towards his vehicle with firearms and shouting, he said "Offica mi a police, mi fyah two (2) shots outa mi licence [sic] gun". He testified that when he said this to the police officer he was not speaking the truth. He said he lied because he was fearful of the police officers and the men who were in the car with him. The appellant therefore, on his case, denied possession of the gun and explained why he had said what he claimed he did.

[94] Thus, on either case, the appellant admitted to lying to the police. On the Crown's case, the appellant would have accepted possession of the firearm, lied about it being a licensed firearm and offered an explanation for the lie. On his case, the appellant would have accepted being in possession of the firearm which, he said, was a lie and offered to the court an explanation for the lie. The learned trial judge had to decide whom he believed and thus this was a case where there existed a straight conflict of evidence. The learned trial judge having resolved the conflict and being satisfied on the case presented by the Crown, had little choice but to convict the appellant.

[95] In the circumstances of the case, it seems a **Lucas** direction would have added more complexity and done more harm than good. It cannot be said that the failure of the learned trial judge to give himself a **Lucas** direction was a mis-direction that amounted to a substantial miscarriage of justice. This ground of the appeal therefore fails.

**Ground 5**

**In any event, the sentence imposed would be manifestly harsh and excessive in all the circumstances, having regard to the evidence, the applicable sentencing principles and in terms of the appellant's antecedents and therefore would not met [sic] the justice of the case.**

**The submissions**

[96] Miss Simpson advanced the submissions on this ground and relied largely on the written submissions. It was firstly submitted that the learned judge appeared to have wanted to punish the appellant whereas he ought to have considered rehabilitation.

[97] It was contended that given the appellant's positive antecedents, personal circumstances and the fact that there was no evidence before the court that he had developed anti-social habits and could not be rehabilitated, there was no apparent basis for the learned judge to have chosen the starting point he did. Further, it was submitted that there was no evidence to suggest that the appellant was irredeemable and, in this particular circumstance, a sentence of 12 years would have been more than enough time to demonstrate the court's abhorrence of illegal possession of firearm. Counsel relied on **R v Beckford and Lewis** (1980) 17 JLR 202 where it was held that "a trial judge must impose a sentence to fit the offender as well as the crime".

[98] It was submitted that the learned trial judge failed to choose a starting point and a range for the offence, as he was required to do. A starting point between seven to 15 years was appropriate for the offence of illegal possession of firearm simpliciter. It was observed that the learned trial judge seemingly started at 20 years' imprisonment when he said the following:

> "I would not think it would be unreasonable in all the circumstances to impose a sentence of 20 years imprisonment…"

[99] This, Miss Simpson complained, was done without reference to the normal range or the appropriate/usual starting point in keeping with the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). She submitted that the learned trial judge failed to demonstrate that he applied the correct sentencing principles in accordance with the relevant authorities but was pre-occupied with the appellant's occupation, which led him to impose sentences that were manifestly excessive and harsh.

[100] It was submitted that given the deficiencies in this case, namely the discrepancies in the evidence of the prosecution witnesses and the question of whether the appellant was the perpetrator in actual possession as distinct from being in the company of a person in possession at the time of the commission of the offence, an appropriate starting point for count one would be seven years. It was contended that there were no aggravating factors and given the mitigating factors, the seven years should be discounted by two years, hence a sentence of five years for count one and two years for count two, would be appropriate.

[101] In the alternative, it was noted that the approach of the learned trial judge was to use a starting point of 20 years, applied a discount of about three-fifths of that to arrive at 12 years. It was submitted that if the starting point was 10 years and a similar discount was applied, the appropriate sentence would then be six years.

[102] Miss Ferguson advanced the submissions on behalf of the Crown, relying on their written submissions. It was accepted that the normal range for the offence of illegal possession of firearm as stated is between seven and 15 years with a usual starting point of 10 years. She indicated that the learned trial judge in sentencing said that he considered several factors. He noted the plea in mitigation, the evidence from the appellant's father, the fact that the appellant has children dependent on him and that he had no previous convictions. She contended that the learned trial judge found that what the appellant did was very serious and deserved significant punishment, which was an aggravating factor. He also considered the fact that the appellant was not just an ordinary police officer but was one in the protective services. He commented on the fact that instead of admitting his guilt, the appellant begged for a chance, then came to court, and said the police officers were liars and perjurers.

[103] Crown Counsel submitted that the failure of the learned trial judge to state expressly that the possibility of rehabilitation was taken into consideration does not necessarily mean that he did not advert his mind to that factor when imposing the sentences.

[104] She submitted that the learned judge gave a sentence, which is within the normal range of sentences for this type of offence. She relied on the case of **Shanor Bertram v R** [2019] JMCA Crim 19, where at paragraph [25] it was stated:

> "…. Notwithstanding the learned trial judge having failed to identify the sentence range or an appropriate starting point within the range, there can be no legitimate complaint in respect of the sentences which were ultimately imposed. The sentences are well within the usual range of sentences imposed for these offences."

[105] Counsel concluded that the sentences imposed were appropriate and ought not to be disturbed.

**Discussion and analysis**

[106] At the time he imposed sentence, the learned trial judge did not have the benefit of the guidance given in the Sentencing Guidelines. Neither did he have the assistance of the authorities that have now clearly set out the methodology to be employed in arriving at an appropriate sentence, in particular, **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20. In reviewing the sentence imposed therefore, we will consider whether the learned trial judge demonstrated an appreciation of the relevant sentencing principles and whether the sentence imposed fell within the range of sentences imposed for similar offences.

[107] The learned trial judge sufficiently demonstrated an appreciation of the principles applicable to the sentencing process. He quite properly identified what could be considered the mitigating and aggravating factors that ought to influence the sentence imposed. The fact of the appellant's occupation could not be ignored and, in these

circumstances, the learned trial judge ought not to be faulted for considering it in the sentencing exercise against him. However, the fact that he did not plead guilty was not a factor to be considered to his detriment.

[108] The normal range of sentences for both the offences of illegal possession of firearm or ammunition, as now stated in the Sentencing Guidelines, is between seven and 15 years, with a usual starting point of 10 years. The complaint therefore that the 20 years which the learned trial judge seemed to have used as his starting point, was well outside of the usual range, clearly has merit.

[109] There is nothing in these circumstances that justify a departure from the starting point of 10 years. There are no relevant aggravating factors that could lead to an upward movement of the starting point. Considering the mitigating factors the learned trial judge himself identified, as well as the circumstances of the finding of the weapon, a deduction of two years, bringing the sentence to eight years' imprisonment for the illegal possession of firearm seems appropriate.

[110] The sentence of five years imposed for the illegal possession of the ammunition on the other hand is well within the normal range of sentences imposed for this offence and therefore need not be disturbed.

**Ground 6**

**By declining to make a closing address at the end of the case, defence counsel denied the applicant/appellant of a facility, which is a critical part of the obligation of counsel in representation, one which the client is entitled to expect. By so choosing, counsel significantly failed to properly represent the**

**appellant; resulting in unfairness to him and consequently a substantial miscarriage of justice.**

[111] The complaint under this ground was that the refusal of counsel to put the appellant's case before the judge, especially a judge who is acting both as tribunal of fact and law was a significant breach of the duty that counsel owed to both the court and also to his client. Mr Knight was keen to stress that the complaint was not that defence counsel, who was Mr Peter Champagnie, was incompetent but that he failed to do something that he could have competently done.

[112] Mr Knight referred to the Legal Profession (Canons of Professional Ethics) Rules, canon III(g), which provides:

> "An Attorney in undertaking the defence of persons accused of crime shall use all fair and reasonable means to present every defence available at law, without regard to any personal views he may hold as the guilt of the accused."

The submission therefore was that the defence counsel had breached this obligation to the appellant.

[113] It was submitted that the closing address is a historic and hallowed opportunity afforded to every accused to have his counsel place before a tribunal, such perspectives on the evidence, which may persuade a judge in his favour. Mr Knight submitted that defence counsel appeared to have assumed that, because the matter was one of credibility and that the case had been a short one, there was no need for defence counsel to highlight matters in the interest of his client. In matters of credibility, Mr Knight submitted, counsel's perspective on the evidence may take on even more critical

importance in assisting a trial judge to sift the evidence and may be even more important when the trial judge is sitting alone.

[114] It was noted that the prosecution addressed the learned trial judge for approximately 16-17 minutes; and assuming that the address must have invited the judge to convict, it is against this background that defence counsel's management of the appellant's case ought to be examined. It was further noted that the appellant had given evidence on oath and in spite of this defence counsel "decided that not one scintilla of address was necessary to be made in relation to the appellant's case". Defence counsel failed to invite the judge at the very least, to find that his client was credible; thereby accepting his evidence and acquit him.

[115] Mr Knight submitted that it is reasonable to conclude that the prosecutor was advancing reasons why a conviction was in order and, in light of that, the decision of counsel not to address the court becomes very questionable. It was contended that in some circumstances, declining to address a court is by implication, and often is interpreted, as a concession to the opponent, in our adversarial system, that their case should succeed.

[116] It was further submitted that the expressed decision of defence counsel not to make a final address to the judge to enter a verdict in his favour, exposed the appellant to an unfair process, resulting in a miscarriage of justice. The appellant's right to due process included his right to address the court in law and/or facts at the end of the case.

The failure of counsel, without good reason, to address the court deprived the appellant of this right without justification.

[117] It was contended that, in these circumstances, the appellant was deprived of a fair trial and the conviction should be set aside on the ground that it was unsafe and unsatisfactory. The authorities of **Kenyatta Brown v R** [2018] JMCA Crim 24, **R v Clinton** [1993] 1 WLR 1181 and **Leslie McLeod v R** [2012] JMCA Crim 59 were relied on in support of the submissions.

[118] Miss Llewellyn submitted that representation is not confined to only addressing the learned trial judge but one has to look throughout the transcript to properly assess the representation. She contended that in this case such an assessment revealed that defence counsel's conduct was within the professional boundaries. The failure to address the court could not be viewed as so egregious to occasion a miscarriage of justice. She also relied on **R v Clinton** as well as **Bethel v The State of Trinidad and Tobago (No 2)** (2009) 59 WIR 451.

[119] Miss Llewellyn submitted that although Mr Champagnie said he would not be addressing the court, what he went on to say was sufficient assistance in the circumstances, given the fact that it was a short case with one central issue that revolved around credibility. She contended that it is apparent that defence counsel decided that in terms of strategy it was sufficient to alert the learned trial judge that the issue was that of credibility. In any event, she submitted, it cannot be said that on the evidence, if a

lengthy closing submission had been given a different outcome would have been achieved.

[120] Miss Llewelyn's submissions continued that at the time defence counsel was to make the closing address, the evidence would have been fresh in the mind of the learned trial judge. She contended that this was not a case that had complex issues or lengthy evidence and additionally, it was a case tried by a judge alone and, as such, there was no jury to try to persuade or to explain or remind of the evidence. She urged that it therefore could not be said that no reasonably competent counsel would have adopted that approach. **R v Doherty and McGregor** [1997] 2 Cr App Rep 218 was relied on to support this submission.

[121] She concluded by submitting that the learned trial judge in his summation thoroughly went through the evidence of the prosecution witnesses as well as that of the appellant and demonstrated an appreciation of all the evidence. She submitted that it is unlikely that he would have arrived at a different verdict had defence counsel made a closing submission. There was therefore no injustice occasioned by the failure of defence counsel to make a closing submission.

**Law and analysis**

[122] In **R v Leslie McLeod** this court considered the proper approach to be taken by the appellate courts regarding complaints of incompetence or inadequate representation on the part of counsel. After conducting a review of a number of authorities on the issue, Morrison JA (as he then was) had this to say at paragraph [54] – [56]:

"[54] Few would dispute Lord Hope of Craighead's observation in **Benedetto v R** [2003] UKPC 27, [2003] 1 WLR 1545, that "A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought." However, the common law has been slow to admit error or even incompetence of counsel as a ground of appeal and in **R v Clinton** [1993] 1 WLR 1181, 1187, the English Court of Appeal, in a judgment delivered by Rougier J, reiterated the traditional position:

> '…cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional…During the course of any criminal trial counsel for the defence is called upon to make a number of tactical decisions not the least of which is whether or not to call his client to give evidence. Some of these decisions turn out well, others less happily.'

[55] It will therefore ordinarily be difficult to impugn successfully decisions made by counsel 'in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client' (**Clinton**, per Rougier J, at page 1187).This is how Judge LJ (as he then was) stated the position in **R v Doherty & McGregor** [1997] 2 Cr App R 218, 220:

> 'Unless in the particular circumstances it can be demonstrated that in the light of the information available to him, at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced. In **Clinton** itself it was emphasised that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defence counsel's conduct would 'of necessity be extremely rare'."

[123] In **Daryeon Blake and Vaughn Blake v R** [2017] JMCA Crim 15, in revisiting this issue, Morrison P stated at paragraph [58]:

> [58] In **McLeod**, after a review of a number of modern authorities on the issue, the court considered that the proper approach was 'to consider (i) the impact which the alleged faulty conduct of the case has had on the trial and the verdict; and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as to result in a denial of due process to the appellant'. And, in **Lashley & Campayne**, in which the appellants complained on appeal of 'the flagrant incompetence of their retained counsel' at trial, the majority of the CCJ (from whose judgment there was no dissent on this point) stated the position in this way:
>
> > '... the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather this Court is guided by the principles of fairness and due process. There is no need for any sliding scale of pejoratives to describe counsel's errors...This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court may yet consider ... that the ineptitude or misconduct may have become so extreme as to result in a denial of due process ...'"

Further at paragraph [59]:

> "[59] The common thread running through both cases is therefore that a court of appeal in considering a complaint as to the quality of the representation which the defendant received at trial will not generally approach the matter on the basis of the extent or degree to which counsel's conduct fell short of acceptable standards, save in those cases — hopefully rare — where counsel's conduct has been so egregiously inept as to have resulted in a denial of due process. But, in general, the court will approach the matter by reference to the impact which the alleged default of counsel has had on the outcome of the trial..."

[124] The question therefore must be what impact, if any, Mr Champagnie's failure to make a closing submission had on the fairness of the trial. After Crown Counsel had made her submissions, he made the following statement:

> "M'Lord, I will not address you, I think it is a question of credibility, and this case is relatively a short one and your Lordship heard from the witnesses, and your Lordship heard from the accused himself, so I am also saying that the case turns on credibility as well I submit, M'Lord."

[125] Miss Llewellyn's submission, that in this narrative Mr Champagnie did in fact address the court, has some merit. It could only be true that Mr Champagnie failed to address the court at the close of the case if counsel had said, "I will not address you", without more. He identified the issue as being one of credibility. He acknowledged that the learned judge had heard from the witnesses and from the accused himself. He then again said the case turns on credibility. Mr Champagnie, being the experienced counsel he is accepted to be, would have been expected to properly assess the case and determine what was best in his representation of the appellant.

[126] This court has not had the benefit of hearing from either the appellant or Mr Champagnie. It may well be that the appellant had been advised of his counsel's intention to not embark on a lengthy address and made to understand the reason for this strategy being adopted.

[127] The learned trial judge, in summing up the case, clearly acknowledged what Mr Champagnie had said. From early in his summation he stated:

> "…As Counsel for the prosecution has said, this case turns on the credibility of these witnesses."

After reviewing the evidence and before making his findings, the learned trial judge again referred to what Mr Champagnie had said when he stated:

> "Now, as I indicated earlier, in agreement with Counsel for the prosecution, and Counsel for the accused man, this case concerned credibility of witnesses."

[128] Ultimately, there was evidence before the court, from which the learned trial judge was entitled to believe that the appellant had admitted that the firearm was his and had acknowledged it was not licenced and being aware of the consequences, he had lied and eventually begged his colleague officers not to charge him. It cannot be concluded that the failure of his counsel to make a lengthy closing address had any impact on the outcome of the trial.

[129] In the circumstances, this is not a case in which the default of counsel was so extreme that it resulted in a denial of due process. This ground also fails.

**Ground 7**

**Based on the cumulative effect of the hearsay evidence and the treatment thereof the omission to take into account the inconsistencies and conflicts in the evidence of the prosecution witnesses, the failure to consider the reason why an accused person may lie out of court, the absence of any assistance to the court by way of a final address by counsel for the accused, the verdict of the LTJ is rendered unsafe and unsatisfactory.**

[130] Mr Knight submitted that in determining whether a verdict is unsafe and/or unsatisfactory, the appellate court is not confined to the consideration of discrete grounds of appeal but it is open to the court to examine the trial process in its totality. If there

are strands of weaknesses which, when taken together, affect the manner in which the trial was conducted, then the fairness of the trial can be seen to be affected, leading to a verdict of being unsatisfactory.

[131] Mr Knight submitted that the case of **Christopher Belnavis v R**, (unreported), Court of Appeal, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005 demonstrates the effect of this cumulative point, where at page 13 the court held:

> "…we are of the view that the interruptions and the disparaging remarks, coupled with the threat to cite the attorney for contempt of court, taken cumulatively resulted in the appellant having been deprived of a fair trial."

[132] Mr Knight contended that in the present case the court could properly conclude that the verdict is unsafe and/or unsatisfactory. In such circumstances, if the court so determines, there is no place for the application of section 14(1) of the Judicature (Appellate Jurisdiction) Act, neither is there any good reason that can be advanced for the court to take the position of ordering a retrial.

[133] Miss Llewellyn summarily submitted that this ground was without merit. She said the evidence presented by the Crown was so powerful in not only its credibility but also its cogency and reliability that this appellate tribunal cannot fault the appreciation of the relevant law as applied by the learned trial judge. Given the weight of the evidence, one could not say the learned trial judge was not entitled to find the verdict that he did. The minutiae of the case, she submitted, are not where one looks to find if the learned trial judge erred. Cumulatively the evidence of the prosecution destroys this ground.

**Disposition of ground 7**

[134] Of the other six grounds of appeal, only the one relating to sentence has been found to have merit. The evidence was reviewed carefully and in a manner that demonstrated that the learned trial judge was sufficiently mindful of the legal principles applicable for such a case as this. It cannot be said that the verdict is unreasonable and unsustainable, having regard to the evidence. The grounds of appeal have no more merit when taken cumulatively than when taken individually. This ground accordingly fails.

**Disposition**

[135] For these reasons therefore, the following orders are made:

(i) The application for leave to appeal against conviction for the offences of illegal possession of firearm and ammunition is refused.

(ii) The appeal against sentence is allowed.

(iii) The sentence of 12 years' imprisonment on count 1 for the illegal possession of firearm is set aside and a sentence of eight years' imprisonment at hard labour substituted therefor.

(iv) The sentence of five years' imprisonment at hard labour on count two for illegal possession of ammunition is affirmed.

(v) The sentences are to be reckoned to have commenced on 28 July 2016 and are to be served concurrently.