[2023] JMCA Crim 44

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00085

HOWARD HUGHES v R

Paul Gentles for the appellant

Ms Kathy-Ann Pyke and Miss Carolyn Wright for the Crown

2 and 6 October 2023

Criminal law-Sentencing-whether sentences are manifestly excessive-whether credit given for time spent on pre-sentence remand -whether the trial judge may make a recommendation on eligibility for parole following sentencing pursuant to section 20(1)(b) of the Firearms Act - Section 20 of the Offences Against the Persons Act - Section 6 of the Parole Act

LAING JA (AG)

Introduction

[1] On 17 July 2019, Howard Hughes was convicted after a trial by a judge sitting without a jury (hereinafter referred to as 'the learned trial judge'), in the Western Regional Gun Court in the parish of Saint James, for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count 1) , wounding with intent contrary to section 20(1) of the Offences against the Person Act ('OAPA') (count 2), and shooting with intent contrary to section 20(1) of the OAPA (count 3). He was sentenced on 30 July 2019, to 20 years' imprisonment at hard labour for illegal possession of firearm, 25 years' imprisonment at hard labour for wounding with intent and 15 years' imprisonment at hard labour for shooting with intent. The sentences were ordered to run concurrently with a stipulation that the appellant serve 20 years before becoming eligible for parole.

[2] The appellant filed an application for leave to appeal against his convictions and sentences which was considered by a single judge of this court. The application for leave to appeal his conviction was refused, and the application for leave to appeal against sentence was allowed.

The prosecution's case

[3] The convictions arose from an incident which occurred on 18 June 2017. The evidence is that on 17 June 2017, after 11:00 pm, the complainant Graham entered a club and saw the appellant whom he knew before as "Chubby" and other men. He failed to greet the applicant who commented, "Yuh don't si mi? A A1 badness dis". At about 4:20 am on 18 June 2017, the complainant went outside the club and two motor cars drove up to where he was. The appellant and seven other men emerged from the two motor cars. The appellant was armed with a firearm and so were some of the other men in the group. There was a verbal exchange between the complainant Graham and one of the men during which the complainant Graham pleaded with him not to go inside the club and "shoot up di place and shoot up innocent people". While the complainant Graham was speaking to this other person the appellant pointed a firearm at the complainant Graham and shot the complainant twice in his chest and once in his foot. The complainant Graham's evidence was that he lost a kidney, and suffered damage to his liver, pancreas and lungs.

[4] The area was well lit, and the shooting and wounding were witnessed by Cons Dawson, the second complainant, who testified that he knew the appellant before. Cons Dawson drew his service pistol at that time and shouted, "Chubby drop di gun". The appellant fired two shots in the direction of Cons Dawson and fled. Despite the attempts of Cons Dawson and a security guard to apprehend the appellant, he escaped.

[5] On 18 July 2017 the applicant was seen at the Whithorn Police Station in Westmoreland by the investigating officer Detective Corporal Bailey and on caution for wounding the complainant Graham he said, "A Dester man, Gagon give him two million dollars fi kill mi". On caution for wounding the other man at the time of the incident he

said, "How mi fi shoot mi fren?" On being cautioned for shooting at Cons Dawson he replied, "All him get money outta Gagon. Two million dollars fi kill mi, and mi step to dem before dem kill mi".

The defence's case

[6] In his unsworn statement the appellant denied saying the words under caution and stated that the police did not know him but only got his name when he was taken into custody.

Submissions for the appellant

[7] Mr Gentles, admirably, conceded that there was no legal basis to renew his application to challenge the appellant's conviction, but he pursued the application for leave to appeal against the sentences. Counsel, on behalf of the appellant, requested and was granted permission to abandon the original grounds of appeal filed against conviction and sentence save and except for ground c, "sentence excessive".

[8] In support of the sole ground being advanced, that the sentence was excessive, Mr Gentles filed written submissions in which he identified four grounds. However, he conceded that they should properly be stated as sub-grounds of ground c and requested that they be so reflected. These were as follows:

> "**Ground [c] 1**: The sentence passed by the learned trial judge failed to demonstrate an application [of] the principles of sentencing see: **R v Ball [1951] 35 Cr App Rep 164**
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> **Ground [c] 2**: Additionally the Learned Trial Judge erred when he failed to sentence the applicant in accordance with the guidelines as stated in the case of **Meisha Clement 2016 JMCA Crim 26** by **failing to identify a starting point** after having determined that a custodial sentence is the only option available in the circumstances of the case.
>
> **Ground [c] 3**: Further the Learned Trial Judge erred when he failed to sentence the Applicant in accordance with the established **Sentencing Guideline for use by Judges of 2017** [sic] when he

> **failed to identify the respective range of sentence** that may be imposed relevant to the particular offence
>
> **Ground [c] 4**: Also the Learned Trial Judge erred when he failed to show a clear reduction in sentence of the two (2) years **pretrial time spent on remand**. **Romo Dacota** [sic] **Hall v The Queen** 2011 CCJ 6 hence rendering the sentence imposed manifestly excessive see: **Carey Scarlett v R [2018] JMCA Crim 40**" (Emphasis as seen in the original)

[9] These sub-grounds were self-explanatory and counsel in his oral presentation briefly reinforced the appellant's position in respect of each. He, however, conceded that [c] 1 could not be reasonably advanced and instead concentrated on [c] 2, c [3] and [c] 4.

[10] Counsel identified seven aggravating factors, namely (a) the firearm was used to commit another offence; (b) the offences occurred at night; (c) the offences occurred in a public place; (d) the appellant committed the shooting and wounding despite the pleas of the complainant; (e) the injuries to the complainant Graham were severe; (f) the appellant had a prior conviction for a relevant offence; and (g) the shooting was at a police officer. Counsel argued that the appellant's age was a mitigating factor. He suggested a starting point of 10 years for the illegal possession of firearm and 15 years for wounding with intent and shooting with intent respectively. He proposed that one year be applied for each aggravating and mitigating factor. He commended for the court's consideration a reduction of the sentences for illegal possession of firearm to 14 years' imprisonment and for wounding with intent to 19 years' imprisonment. Counsel submitted that this would be the result of the proper application of the methodology suggested by **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston**').

Submissions for the Crown

[11] The overarching submission by Miss Wright for the Crown, in response, was that the appeal did not have any merit as the sentences are not manifestly excessive. Mr

Gentles having conceded that there was no merit in respect of sub-ground [c] 1, counsel for the Crown concentrated on the other sub-grounds.

[12] Counsel stated that sub-ground [c] 2 and sub ground [c] 3 are inextricably linked and addressed them together. She acknowledged that the learned trial judge failed to identify an appropriate starting point in considering the sentences that he imposed. This was particularly relevant in the context of offences for which there was a statutory minimum sentence. Consequently, she argued, the learned trial judge did not demonstrate the methodology he employed in arriving at the sentences in accordance with the now accepted guidance provided by McDonald-Bishop JA in **Daniel Roulston.**

[13] Counsel conceded that because of this deficiency, the learned trial judge had erred in his approach to the sentencing process and, accordingly, it was appropriate for this court to conduct its own sentencing exercise in order to determine whether the sentences are manifestly excessive.

[14] Counsel advanced the position that the following were relevant aggravating mitigating factors.

> "(i) the Accused had an unfavorable [sic] Social Enquiry Report;
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> (ii) the offence was committed with the use of an illegal firearm;
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> (iii) the Accused had a previous conviction for a gun related offence in the year 2017, only two years prior to the commission of the offences in question;
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> (iv) the offence of shooting with intent was committed against a police officer;
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> (v) the Complainant (Graham) suffered extensive life altering injuries;
>
> (vi) the circumstances surrounding the commission of the offences were such that it revealed an intention on the part of the Accused to 'shoot up' the night club with innocent civilians.

(vii) Prevalence of the firearm offence in society

(viii) Firearm was not recovered"

It was also acknowledged by counsel that the only mitigating factor which was discerned was the youthfulness of the appellant.

[15] It was not contested by the Crown that the appellant had spent two years on pre-sentence remand. In responding to sub ground c 4, it was argued that, whilst there is no mathematical demonstration that the sentence of the appellant was reduced by a deduction of the time the appellant spent on pre-sentence remand, the learned trial judge did consider it and took that period in to account. It was submitted that this is evident from page 164 lines 7-9 of the transcript where the learned trial judge said, "Now, how long he's in custody? We must take that into consideration". Furthermore, at page 164 lines 11-12 of the transcript, the learned trial judge said, "The two years will be taken into consideration and, at page 165 line 9 of the transcript, he is recorded as saying "…having subtracted what I subtracted because I was going in the 30's …". However, when counsel was directed to para. [34] of **Meisha Clement** (to which reference will be made in greater detail in our analysis), counsel conceded that the learned trial judge did not demonstrate an arithmetical deduction and erred in this regard.

[16] Miss Wright commended to the court the methodology contained in **Meisha Clement** and **Daniel Roulston**. As it relates to the offence of illegal possession of firearm, counsel argued that the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Court, December 2017 ('the Sentencing Guidelines') has identified a normal range of sentence between seven and 15 years with a usual starting point of 10 years. In support of this position counsel relied on **Radcliffe Allen v R** [2021] JMCA Crim 19 ('**Radcliffe Allen**'), in which this court declared that the range for illegal possession of firearm should be between 10 to 15 years. Counsel suggested that a starting point of 12 years is appropriate in this case, as it was in **Radcliffe Allen**. Counsel referred to the written submissions of the respondent, in which it was contended that ascribing two years for each of the previously identified aggravating factors would result

in a sentence of 24 years for which a deduction of two years should be made for the sole mitigating factor. From the sentence of 22 years' imprisonment the appellant would be entitled to a credit of two years for the period spent on pre-sentence remand which when deducted would result in a sentence of 20 years.

[17] During Miss Wright's oral arguments, it was also pointed out to her by the court that there was no support for the separate aggravating factor being proposed that the offence of shooting with intent was committed against a police officer when there was no evidence that the appellant knew that the complainant Dawson was a police officer. Counsel acknowledged that this could not constitute a separate aggravating factor.

[18] Miss Wright also conceded that the mathematical formula recommended in the respondent's written submissions was flawed. She argued that in order to increase the sentence by 12 years as a consequence of the aggravating factors, the suggested methodology would require an adjustment by giving a weight of two years for some aggravating factors and one year for others.

[19] Counsel maintained that the respondent's proposed approach demonstrates that the 20 years' imprisonment imposed by the learned trial judge was not manifestly excessive and that it was well within his discretion to impose a sentence outside the usual range, having regard to the circumstances of the case.

[20] Regarding the offences of wounding with intent and shooting with intent, Miss Wright indicated that the Sentencing Guidelines have identified a normal range of 15-20 years for both offences. In written submissions, it was proposed that the statutory minimum of 15 years be used as a starting point, to which would be added two years for each aggravating factors, resulting in a sentence of 31 years' imprisonment. Two years should be deducted for the appellant's age which is the sole mitigating factor, and an additional credit given to the appellant for the two years spent in remand. This will result in a final sentence of 27 years' imprisonment at hard labour for each of these two offences.

[21] However, during oral arguments, Miss Wright conceded that the use of two years for each aggravating factor was flawed. Counsel was assisted by Miss Pyke who argued that by weighting some factors more heavily than others, and in particular the seriousness of the injuries suffered by the complainant Graham, the aggravating factors would total 14 years which will take the sentence to 29 years. If a deduction of two years for the appellant's age is made and credit given for the two years spent on pre-sentence remand, the result will be a sentence of 25 years' imprisonment. This is the same sentence that was imposed by the learned trial judge. On this analysis, it was argued by Miss Pyke that the sentence of 25 years' imprisonment for wounding with intent was demonstrably not manifestly excessive, although it was outside the normal range.

[22] In addressing the stipulation for eligibility before parole, Miss Wright accepted that that is clearly an error because the court was making an order for a determinate sentence and not life imprisonment with a period for eligibility for parole. Counsel noted that section 6(1) of the Parole Act provides that every inmate is eligible for parole. Furthermore, section 2 of the Parole (Amendment) Act, 2010 stipulates that those persons convicted for an offence under section 20(2) of the OAPA for wounding with intent or shooting with intent shall be eligible for parole after having served a period of not less than 10 years.

Analysis

[23] This court's review of sentences is guided by the principle set out by Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164, at page 165. His Lordship opined that:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

[24] The current approach to sentencing is now well established. It has been the centre of focus time and time again in our courts. A comprehensive guide on sentencing is contained in the case of **Meisha Clement**, which sets out the considerations that ought to guide sentencing judges. Morrison P, who delivered the judgment of the court, identified the process, at para. [41] of the judgment, to be:

> "(i) identify the appropriate starting point;
>
> (ii) consider any relevant aggravating features;
>
> (iii) consider any relevant mitigating features (including personal mitigation);
>
> (iv) consider, where appropriate, any reduction for a guilty plea; and
>
> (v) decide on the appropriate sentence (giving reasons)."

[25] In explaining the concept of the starting point, the learned President referred to the case of **R v Saw and Others** [2009] EWCA Crim 1, at para. 4, where Lord Judge CJ observed that "the expression 'starting point' ... is nowadays used to identify a notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features".

[26] In **Daniel Roulston v R** [2018] JMCA Crim 20, McDonald-Bishop JA developed and expanded on the guidance offered in **Meisha Clement** and at Para. [17] stated:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);

> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

The Sentencing Guidelines support this approach as set out in **Roulston**.

[27] The learned trial judge was, therefore, required to identify a range within which the sentences should have fallen for each offences and a starting point within that range, which he did not do. Critically, the learned trial judge failed to demonstrate the methodology he employed to arrive at the sentences imposed for the offences.

[28] The correct approach in cases where the judge has not demonstrated the methodology employed in arriving at a sentence is illustrated in the case of **Lincoln McKoy v R** [2019] JMCA Crim 35, in which McDonald-Bishop JA explained the process as follows at para. [43]:

> "[43] We note that the learned trial judge did not expressly set out the methodology in sentencing that the court now routinely employs by choosing a range of sentences, a starting point and by making the necessary adjustments for aggravating and mitigating factors through the application of an acceptable mathematical formula. There is, therefore, no demonstration of how he had arrived at the sentence imposed. For this reason, the court cannot hold, without more, that the learned trial judge did not err in principle in sentencing the applicant. It, therefore, falls on this court to determine the appropriate sentence that ought to have been imposed after an application of the relevant principles."

[29] Counsel for the Crown was, therefore, quite accurate in anticipating that on that basis, this court would give fresh consideration to what are the appropriate sentences to be imposed on the appellant for the offences, and whether the sentences imposed by the learned trial judge are manifestly excessive, which is the crux of this appeal.

[30] However, a further issue is also raised as to whether, in addition to stating that full credit was given for the time spent by the appellant on pre-sentence remand, the learned trial judge had sufficiently demonstrated that this was done. The relevant portions of the transcript were identified by Ms White in support of the argument that learned trial judge did take the period into account, to which reference has previously been made.

[31] The view of this court is that the approach adopted by the learned trial judge discloses an error in principle because the authorities indicate that the time served must be fully accounted for and is not a discretionary discount in the mitigation of the sentence. This was clearly stated by Morrison P in **Meisha Clement** at para. [34] as follows:

> [34] This list is now largely uncontroversial. However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** [2008] UKPC 49], an appeal from the Court of Appeal of Mauritius –
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> > `... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing.'"

[32] The time spent in custody prior to sentencing is to be taken into account and deducted after the sentence is decided. We understood the statement by the learned trial judge "…having subtracted what I subtracted because I was going in the 30's …" to mean that he contemplated and would have given a sentence of over 30 years' imprisonment, but having regard to the deduction he applied for the time spent in custody (and possibly other matters), the sentence of 25 years' imprisonment was imposed. The learned trial judge failed to demonstrate what considerations led him to be "going in the 30's" in the first place and, secondly, it is not clear on an objective assessment, nor can it be reasonably inferred, that there was the application of a two-year deduction which resulted in the sentence of 25 years.

[33] Therefore, the learned trial judge erred in principle in that he failed to identify a range of the sentences for each offence and a starting point within that range. This provides a basis for this court's review of the sentences. Additionally, the learned trial judge did not expressly demonstrate the arithmetic deduction given for time served on pre-sentence remand, and in circumstances where it cannot be objectively discerned that the appellant received a full credit for this period, then it falls to this court to make its assessment in order to ensure that the appellant receives this benefit to which he is entitled.

Illegal possession of firearm

[34] The Sentencing Guidelines indicate that the normal range of sentences, for the offence of illegal possession of firearms, is seven to 15 years' imprisonment with a usual starting point of 10 years. However, it must be noted that this sentencing range and starting point is applicable to cases of possession of a firearm simpliciter. This point was recognised in **Lamoye Paul v R** [2017] JMCA Crim 41, in which McDonald-Bishop JA identified a sentencing range of 12 to 15 years in cases of illegal possession of firearm where the firearm is used in the commission of another offence. The learned judge of appeal stated at para. [18] that:

> "In respect of illegal possession of firearm, we have concluded that the sentence is manifestly excessive after an application of the relevant principles of sentencing. The learned judge was required to choose a starting point and a range for the offence, which she did not. Bearing in mind that this is not a case that involved the possession of a firearm simpliciter, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate. …"

[35] It is necessary to declare at this juncture that the circumstances of the appellant's possession of a firearm justify a custodial sentence. In considering the appropriate starting point within the sentencing range, we have considered the nature and intrinsic seriousness of the offence. The appellant had a loaded firearm in a public place, specifically, outside a night-club where members of the public had gone for entertainment

with a reasonable expectation of safety in the club and its environs. The possession of an illegal firearm in that space exposed members of the public to risk.

[36] In our view, in these circumstances an appropriate starting point ought to be at the upper end of the sentencing range, and we are of the opinion that 14 years is an appropriate starting point. We acknowledge the observation of Dunbar Green JA (Ag) (as she then was) in **Radcliffe Allen v R** [2021] JMCA Crim 19, at para. [22], which was commended to us by Miss Wright, and with which we agree, that: "…the usual range in like cases should not be seen as establishing static markers, but rather a guide for use by the sentencing judge in determining the appropriate sentence".

[37] In embarking on the process of balancing the aggravating and mitigating factors, we identified several aggravating factors as follows:

a) the appellant exited the nightclub and returned along with seven other men, some of whom were also in open possession of firearms;

b) the appellant's possession of the firearm outside the nightclub was not impulsive, it was deliberate and premeditated;

c) the firearm was used in the commission of other offences;

d) the prevalence of the offence of illegal possession of firearm;

e) the firearm was not recovered;

f) the appellant, had a previous conviction for a relevant offence which is an offence against the Firearms Act, namely illegal possession of ammunition, in May 2017, one

month prior to the commission of the offence of illegal possession of firearm.

g) The appellant also did not have a positive social enquiry report.

[38] In relation to the appellant's age, he was born on 8 August 1994. On the date of the offence, he was 22 years and 10 months of age, just shy of his 23rd birthday. The youthfulness of an offender is a potential mitigating factor, because of presumed immaturity and greater prospects for rehabilitation. However, age as a benefit is not automatic. It depends not only on the personal circumstances of the offender but also circumstances and nature of the offence. In this case, the appellant had a previous encounter with the justice system for illegal possession of ammunition and was fined but continued to offend. In these circumstances, the eligibility of the appellant to benefit from a reduction in his sentence solely on account of his age is borderline. Nevertheless, counsel on both sides have treated the age of the appellant as a mitigating factor and the court has adopted a similar position, but did not attach much weight to this factor.

[39] We utilised a starting point of 14 years and we determined that the aggravating factors would take the sentence to 21 years. When all these aggravating factors are balanced against the sole mitigating factor of the appellants age, a sentence of 20 years' imprisonment is the result.

[40] Accordingly, we have determined that the sentence of 20 years' imprisonment at hard labour imposed by the learned trial judge is not manifestly excessive and should not be set aside solely on the basis of its duration. However, for the reasons which have been earlier addressed, the appellant is entitled to full credit for to the two years spent in custody prior to sentencing. This will result in a reduction of his sentence of 20 years' imprisonment and a final sentence of 18 years' imprisonment at hard labour.

Wounding with intent

[41] Where a firearm is used in the commission of the offence of wounding with intent, there is a statutory minimum sentence of 15 years' imprisonment, by operation of section 20(2) of the OAPA. The normal sentencing range for the offence is 15 to 20 years. In the case of **Carey Scarlett v R** [2018] JMCA Crim 40, Brooks JA (as he then was), examined the sentences in a number of cases involving the use of a firearm and, at para. [36], stated:

> "[36] The normal range of 15-17 years for the offence of wounding with intent, using a firearm, as suggested by learned counsel for the Crown, would not be an inaccurate assessment using that limited analysis. The Guidelines must, however, have been informed by a wider canvass of the relevant cases and therefore should not be ignored or undermined. The normal range for that offence must, therefore, be considered to be 15-20 years."

[42] In determining the starting point, we have considered the intrinsic seriousness of the offence. The consequences to the complainant Graham were serious in that he suffered severe injuries to his major organs requiring him to be hospitalised for one month. In our opinion, a starting point of 19 years, which is near the upper end of the sentence range for this offence is justified.

[43] In the process of balancing the aggravating and mitigating factors relative to the circumstances of the offence, we identified aggravating factors of the offence which did not feature in the fixing of the starting point. These are:

a) the offence involved the use of a firearm;

b) the offence was the result of an unprovoked attack on the complainant Graham while he was attempting to dissuade a person in the company of the appellant from going inside the nightclub to "shoot up di place and shoot up innocent people";

c) the offence occurred at night;

d) the offence occurred outside a night-club in a public space where the complainant Graham had a reasonable expectation of safety;

e) the serious injuries suffered by the complainant Graham;

f) the appellant's poor social enquiry report; and

g) the appellant's previous conviction for illegal possession of ammunition.

[44] We utilised a starting point of 19 years and, having considered all the aggravating factors, we determined that they would increase the sentence to 26 years. We have balanced these aggravating factors against the sole mitigating factor, that is, his age, and we concluded that this would reduce his sentence to 25 years' imprisonment.

[45] Based on our assessment, we have decided that the sentence of 25 years' imprisonment at hard labour imposed by the learned trial judge for the offence of wounding with intent, although it is outside the usual range of sentences for this offence is not manifestly excessive in light of the features of this case which we have identified. Accordingly, the sentence of the learned trial judge should not be set aside by reason only of its length.

[46] However, as we have previously explained the appellant is entitled to a deduction of two years on account of the time he spent on pre-sentencing remand and this will result in a sentence of 23 years' imprisonment at hard labour.

Shooting with intent

[47] According to the Sentencing Guidelines, the sentencing range of 15-20 years' imprisonment and the statutory minimum sentence of 15 years are applicable to the offence of shooting with intent as they are to the offence of wounding with intent. As a consequence of this statutory minimum, the sentence of 15 years' imprisonment at hard

labour imposed by the learned trial judge for shooting with intent cannot be said to be manifestly excessive as it represents the minimum sentence that may be imposed by him for this offence.

[48] Although the learned trial judge provided no demonstration of how he arrived at the minimum sentence of 15 years, no issue is raised as to whether it is the appellant's right to have time spent on pre-sentence remand deducted from his sentence for this offence. In this regard it is helpful to acknowledge the guidance of this court in the case of **Kerone Morris v R** [2021] JMCA Crim 10 in which Brooks P, 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."

[49] The effect of this is that, although the learned trial judge did not demonstrate that the appellant benefited from a credit of two years for the time served on pre-sentence remand in respect of the offence of shooting with intent, the appellant is unable to benefit from such a credit because its effect would be a reduction in the sentence below the mandatory minimum period of 15 years which was imposed by the learned trial judge.

Parole

[50] Although the stipulation as to a parole period was not the subject of the ground of appeal, it is an irregularity that we must address. On this issue we find that the submissions of the Crown, as to the applicable law are accurate. These submissions were adopted by counsel for the respondent. We are fortified in this conclusion by the decision in the case of **Adrian Clarke v R** [2023] JMCA Crim 27, where at para. [95], Brown Beckford JA (Ag) stated:

> "[95] We will now take this opportunity to point out that the learned trial judge incorrectly stated a minimum period of 12

> years for both offences to be served before the appellant will become eligible for parole. The offence of illegal possession of firearm is contained in section 20(1)(b) of the Firearms Act and wounding with intent is contrary to section 20 of the Offences against the Persons Act ('OAPA'). Similarly to section 6 of the OAPA (the offence of manslaughter), those sections do not confer on the trial judge, the jurisdiction to stipulate a minimum period to be served before being eligible for parole. The parole period for illegal possession of firearm and wounding with intent is determined in accordance with section 6 of the Parole Act. For all of the above reasons, we have found merit in ground nine."

[51] It is, therefore, patently clear and incontrovertible, that the statutory regime governing the offences of illegal possession of firearm, wounding with intent or shooting with intent, did not give jurisdiction to the learned trial judge to stipulate a minimum period to be served by the appellant before becoming eligible for parole. Accordingly, the learned trial judge erred when he incorrectly recommended that the appellant must not be eligible for parole until he has served 20 years, which presumably was intended to apply to the sentence of 25 years' imprisonment at hard labour for wounding with intent.

[52] For the reasons stated herein, we make the following orders:

1. The appeal against sentences is allowed in part.

2. The sentence of 20 years' imprisonment at hard labour for the offence of illegal possession of firearm is set aside and substituted therefor is a sentence of 18 years' imprisonment at hard labour, credit having been given for the two years spent on pre-sentence remand.

3. The sentence of 25 years' imprisonment at hard labour for the offence of wounding with intent, with the stipulation that the appellant serve 20 years before being eligible for parole, is set aside and substituted therefor is a sentence of 23 years'

imprisonment at hard labour, credit having been given for the two years spent on pre-sentence remand.

4. The sentence of 15 years' imprisonment at hard labour, for the offence of shooting with intent, is affirmed.

5. The sentences are to run concurrently and are reckoned to have commenced on 30 July 2019, the date they were originally imposed.