[2020] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 86/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

MARVRICK MARSHALL v R

Mrs Hannah Harris Barrington for the applicant

Ms Maxine Jackson for the Crown

6 February 2018, 9 and 15 June 2020

PHILLIPS JA

[1] Mavrick Marshall (the applicant) has sought leave to appeal his convictions and sentences. He was tried and convicted before Thompson-James J for the offences of illegal possession of firearm (count one) and wounding with intent (count two), and sentenced to seven and 10 years imprisonment at hard labour, respectively, to run concurrently.

[2] His application for leave to appeal his conviction and sentence was first considered by a single judge of this court, and on 9 August 2016, it was refused. In refusing the application for leave to appeal the applicant's convictions, the single judge

indicated that the learned trial judge had analysed all the evidence and the issues raised by the evidence, and was not wrong in her assessment of the same. He stated that:

> "[i]n a clinical summation, the learned trial judge analysed the evidence and the various issues which had been raised by it. She dealt with the issues of jurisdiction, identification, credibility, alibi, good character, inferences, discrepancies and the burden and standard of proof."

He refused leave to appeal the applicant's sentences on the basis that, in his view, they could not be considered manifestly excessive, and in respect of the sentence for wounding with intent, stated that it was "somewhat lenient".

[3] That application was therefore renewed before us on grounds that the learned trial judge had: (i) misdirected herself by shifting the burden of proof to the applicant; (ii) erred in her assessment of the evidence given by the defence witnesses; (iii) failed to give adequate consideration to the issue of identification; (iv) erred in her treatment of the applicant's alibi defence; and (v) imposed sentences that were manifestly excessive.

[4] After hearing the appeal, we made the following orders on 9 June 2020, by majority (Sinclair-Haynes JA dissenting):

> "1. The application for leave to appeal convictions and sentences is refused.
>
> 2. The sentence is reckoned as having commenced on 4 October 2013."

These are the promised reasons for our decision.

The case for the Crown

[5] The Crown called two witnesses but only Mr Merrick Barnes, otherwise called "Chaplin", was a witness as to fact. Mr Barnes testified that on Saturday, 29 January 2011, at about 8:15 pm, he was travelling in a taxi (car) en route to Bowden Hill District in the parish of Saint Andrew, along with "Carman, John and John woman and the driver", whom he knew as "Dane". Mr Barnes was seated on the rear left passenger seat, beside the rear left door and window (which was down); Carman was seated in the middle of the backseat (between Mr Barnes and John); John was seated on the rear right passenger seat beside the door and the window (which was also down); and "John's woman" was seated on the front passenger seat beside the driver.

[6] At the request of one of the passengers, the car stopped "as you pass [the applicant's] gate" to "pick up [John's] stepdaughter". Mr Barnes testified that he saw the applicant, whom he knew before, from a distance of "one to two feet", as he walked past the car on the left hand side of the road, which is also the side that he was seated on. He was able to see the applicant's face for about 10 seconds, with the aid of a streetlight that was 13-15 feet away from where the car had stopped. The applicant, he said, was dressed in a "dark blue pullover", that "was not yet over his head" and "a dark blue half a pants". They waited for about 10-15 minutes before driving off.

[7] The car proceeded along Airy Castle Road. It was being driven slowly as the condition of the road surface was poor. Mr Barnes said while doing so, the applicant approached the driver from the right front side of the car with a gun in his right hand, "stoop down little" and told the driver not to move or he would shoot him. The

applicant's stooping position, Mr Barnes said, allowed him to see the applicant's "face features". The car stopped in the vicinity of DeSouza's Farm. Mr Barnes saw the applicant with the help of a streetlight that was about five to six feet away from where the car had stopped. The applicant had been wearing the pullover on his head but it was not covering his forehead and face.

[8] Mr Barnes testified that while he was looking at the applicant through the windscreen of the car (which was untinted), the applicant then "walked around in front" of the car, to the rear left passenger side of the car where he was sitting. The applicant pointed the gun at Mr Barnes and told him to come out of the car. Mr Barnes hesitated, and so the applicant stretched his left hand through the rear left window of the car (which was down at the time), where Mr Barnes was seated. He attempted to reach for Mr Barnes' one strap bag that was across his right shoulder, and started to pull the bag towards him. The applicant failed to relieve Mr Barnes of the bag, and so he attempted to fire a shot at Mr Barnes but the gun apparently malfunctioned. At that time, Mr Barnes saw the applicant's face for about 30 seconds. Thereafter, Mr Barnes stated that "Carman" eased up "round pon the driver's side" and John looked "panic". He indicated that he was not paying attention to what "John's woman" was doing. He then jumped through the right passenger side window (which, as indicated, was also down), past Carman and John, with the bag still around his shoulder.

[9] When Mr Barnes leapt through the window, the applicant was still on the left side of the car. Mr Barnes stood up on the right side of the car and looked at the applicant for 20 seconds, who once again pointed the gun at him and fired another

shot. This time Mr Barnes heard a loud explosion. Mr Barnes ran and the applicant pursued him, firing several shots at him, with the firearm occasionally malfunctioning. The applicant stopped to fix the malfunctioning firearm, and Mr Barnes attempted to run towards Bowden District. During this part of the ordeal, Mr Barnes said he saw the applicant's face for about 10 seconds.

[10] While running, the bag fell from Mr Barnes' shoulder. Mr Barnes said that he felt his right hand burning and he fell down on his back at DeSouza's gate, under a street light, that was about seven to eight feet away from where he fell. The applicant then approached him, and while he was about seven feet away from Mr Barnes, shot him once on the right side of his chest. The applicant tried to fire other shots at Mr Barnes but the gun continued to malfunction and so he walked off. On this instance, Mr Barnes was able to see the applicant's face for about three minutes with the help of a streetlight "below DeSouza's gate" that was seven to eight feet away from where he fell. He said it was three minutes because:

> "Him a fire a shot because like the gun a jam pon him, so him fire a shot inna the air and test it again and rack it again and fire a next shot."

[11] The applicant was assisted to the Kingston Public Hospital by three persons. He received wounds that bled to his left upper arm, chest and side. He has been confined to a wheelchair since the incident, and was so confined during the trial.

[12] Mr Barnes knew the applicant for 16-17 years before the incident. He indicated that the applicant lived on Airy Castle Road and he lived in the neighbouring district. He would see the applicant about two to three times per week on Airy Castle road, at his (the applicant's) gate, under a streetlight, at about 7:00 pm to 8:00 pm when he was coming from work. He saw the applicant about one week prior to the incident.

[13] Detective Constable Logan Gobay was the other Crown witness. He was the investigating officer in the matter. He testified that when he went to the scene of the incident he saw seven expended 9mm casings and two live rounds. He described the road on which the incident occurred as being narrow and in poor condition with a "very rocky terrain". He indicated that there was a street light in the vicinity of DeSouza's Farm. He also tried to obtain information from several persons at the scene but they refused to provide him with any assistance. The area, he said, was processed by the Scenes of Crime Unit of the Jamaica Constabulary Force. He visited the applicant at the Kingston Public Hospital and spoke to him on 29 January 2011. However, he recorded a statement from Mr Barnes on 1 February 2011 and he arrested the applicant on 13 February 2011. He made an application for an identification parade but the identification parade was not held. He thereafter proceeded to charge the applicant for the offences mentioned at paragraph [1] herein.

[14] In cross-examination, Detective Constable Gobay said that he made an error when he referred to the person he saw taking the applicant to the hospital as a "man" instead of a "woman". He accepted that Mr Barnes had named the applicant as the person who had injured him on 29 January 2011. But indicated that he did not charge

the applicant until 13 February 2011 because he wished to first obtain Mr Barnes' statement. After collecting a statement from Mr Barnes, the applicant had not been known to him, and so he had to do investigations to ascertain his whereabouts, and when he did, he took the applicant into custody.

The case for the defence

[15] Five witnesses were called on the case for the defence. The first was the applicant who gave sworn testimony on his own behalf. He denied being present when Mr Barnes was injured as he was playing bingo at Miss Norma's shop, on Airy Castle Road, between 6:00 pm and 9:00 pm. Miss Norma's shop, he said, "don't open during the week only on weekends... Fridays and Saturdays". He was playing bingo with a number of persons to include: Devon Gordon, Nathan Brown, Ricky, "Ricky's wife", Jason Brown, Cassie and a lady named "Nikki". There were more than 10 but less than 20 people at the shop that night. He did not move from the shop at all that night. While playing bingo, the applicant indicated that he did not move from the table at all, and stopped playing bingo at about 9:00 pm, shortly after receiving news that Mr Barnes had been shot. He stated that he did not win any bingo game that night. He was dressed in a purple t-shirt and jeans and denied wearing a pullover.

[16] The applicant agreed that there were two lights in the area where the incident occurred: "[o]ne being by DeSouza farm and one being past [his] gate" which illuminated an area of "16 by 28" feet or "20 footsteps from the gate of DeSouza Farm".

[17] Mr Ernest Liscombe, otherwise called John, was the second witness. He testified that he was an acquaintance of the applicant for three years, and a friend of the applicant's family including: the applicant's uncle "Rucum", his grandmother, aunties and other uncles. He also testified that he was one of the passengers in the car that night. While he corroborated much of Mr Barnes' testimony, points of divergence between the two related to: (i) whether Mr Liscombe's stepdaughter was picked up and was in the taxi at the time the incident occurred; (ii) whether the attacker had pointed the gun at Mr Liscombe's baby mother and his stepdaughter; and (iii) most importantly, who was the attacker that night. Mr Liscombe stated that while he was not able to see the face of the "figure" that attacked Mr Barnes, because that person had "a big pullover sweater over his head", the "build" of the person he saw did not match that of the applicant, as the "figure" he saw was much bigger. He testified that there were two light posts in the vicinity of DeSouza's Farm gate: one wooden and one concrete.

[18] Initially, Mr Liscombe had said that the light by DeSouza's Farm gate had not been working at the time, but later in his examination-in-chief, he indicated that he had found Mr Barnes lying on his back, under a light by DeSouza's gate. He said in further examination-in-chief that there was no light where Mr Barnes got shot, but there was light in the area where he saw Mr Barnes lying on his back. He then went on to say that there was no light by DeSouza's gate.

[19] Mr Devon Gordon and Miss Nicole Brown were called in support of the applicant's alibi that he was at Miss Norma's shop playing bingo at the time of the incident. They both testified that they were with the applicant at the shop between 6:00 pm and 9:00

pm playing bingo. They also stated that he had nothing to drink and did not move from the bingo table throughout that period.

[20] Mr Gordon is the applicant's cousin and knows the applicant and his father very well. He testified that there were about 13 persons playing bingo that night including: Miss Norma, Nicole Brown, Ricky, "this lady name fatty" and Mr Brown. He indicated that he knew it was a lie that the applicant had injured him, as the applicant was playing bingo with him at the time, and he "couldn't sit down and see an innocent youth go down". He stated that no one left the bingo table and no one else came into the shop at that time. He knew that the applicant was wearing a purple t-shirt and jeans, but he could not say what Miss Brown was wearing because he was "pennying" the applicant, but not Miss Brown. He also said that he knew that the applicant won more than one bingo game that night. He said that he played bingo almost every night at Miss Norma's shop which is normally open from Sunday to Sunday. He also stated that after receiving news of the shooting all the persons at Miss Norma's shop continued to play bingo "after a while".

[21] Miss Brown stated that Miss Norma's shop is normally open during the week but, bingo was only played on weekends "Friday, Saturday and Sunday". She stated that she was testifying on the applicant's behalf because he was innocent and she did not want to see an innocent person go to prison. Although she could not remember what the applicant was wearing, or whether Mr Gordon had had anything to drink, she indicated that the applicant had not left the shop that night, nor had he had anything to drink in the three hours he was there. Also, the applicant had been seated right in front of her

from 6:00 pm to 9:00 pm. In fact she said her "concentration" was on the applicant and Jason (another person identified as being present at the shop). She accepted that persons were coming in and out of the shop while playing bingo, but said that she could not remember how many persons were in the shop. She further testified that after receiving news of the shooting, all the persons in the shop continued playing bingo. She knew the applicant's family well, but denied having a close relationship with the family.

[22] The applicant's mother, Mrs Cynthia Marshall, gave evidence as to his good character. She testified that he was a well mannered child and never got into trouble or hurt anyone. She further stated that he grew up in church and had no reason to steal from anyone. Although she agreed that she could not account for the applicant's whereabouts between 6:00 pm and 9:00 pm that night, nor was she at Miss Norma's shop that night, "[she] knew for sure that he was at Miss Norma's shop". However, in cross-examination, she also accepted that District Constable Bogle had spoken to the applicant, on her instructions, about his behaviour.

The appeal and the issues therein

[23] The applicant was convicted and sentenced as indicated at paragraph [1] herein and now seeks to challenge the same. The grounds of appeal on which counsel relied were not clearly stated, nor were they easily ascertainable. In fact, counsel for the applicant filed a document called "Notice and Grounds of Appeal" that contained only a basic recital of the facts and a regurgitation of the evidence that was favourable to the defence. Another document called "Legal Grounds" was filed which contained three grounds of appeal: two which argued that the learned trial judge misdirected herself by

shifting the burden of proof to the applicant; and another which said the learned trial judge failed to consider the "illogic" of the case, which referred to aspects of the evidence which should have been rejected and/or accepted by the learned trial judge.

[24] In order to do justice to the applicant's case, we were forced to decipher what the actual grounds of appeal were, by examining counsel's purported notice and grounds of appeal; skeleton arguments; "Legal Grounds" and her oral submissions. We were ultimately able to discern that there were four issues which require determination in this appeal:

1. Did the learned trial judge misdirect herself with regard to the burden of proof by shifting it to the accused? (grounds 1 and 3)
2. Did the learned trial judge err in her consideration of the testimony given by the witnesses? (ground 2)
3. Did the learned trial judge fail to give adequate consideration to identification evidence that had been led? (grounds 1 and 2)
4. Did the learned trial judge err in her treatment of the applicant's alibi defence? (ground 2)
5. Were the sentences imposed manifestly excessive?

The burden of proof

[25] The applicant's counsel, Mrs Hannah Harris-Barrington, submitted that the learned trial judge had misdirected herself with regard to the burden of proof as she had shifted the burden to the applicant. She cited **Clive Mullings v R** [2013] JMCA Crim 53 in support of her contention that a judge must make reference to the burden and standard of proof in his/her summation, and must apply it correctly when making a determination as to guilt. Miss Maxine Jackson, for the Crown, submitted that the learned trial judge had not misdirected herself as to the burden of proof, nor had she shifted the burden of proof to the applicant. In fact, she stated that the learned trial judge had quite early in the summation, advised herself as to the requisite burden and standard of proof, and had applied the same throughout her assessment of the evidence.

[26] In our view, Crown Counsel's submissions in that regard were indeed correct. After combing through the transcript, it was void of any misdirection on the burden and standard of proof, nor was there any instance of the learned trial judge shifting the burden of proof to the applicant. In fact, at the outset of her summation, at page 489 of the transcript, this is what the learned trial judge said:

> "The Prosecution must prove the guilt of the accused to the extent that I feel sure, that is a duty which rests on the Prosecution from the start of the case to the end of it and this burden never shifts. **The accused man has nothing to prove**. In this case the accused Mavrick Marshall has gone into the witness box and gave evidence on oath, therefore I must treat his evidence in the same fair way of that of the evidence of the Prosecution witnesses. I must weigh it in the same balance. I must not discredit him

> merely because he is the accused, same applies to the evidence given by his witnesses. The evidence that he gives may convince me of his innocence, then I must acquit him. If there is any reasonable doubt in my mind, then I must acquit him or it may strengthen the case for the Prosecution. It is for me to say what effect it has. If in the result I am left in doubt as to where the truth lies, then I shall find him not guilty. **It is for the Prosecution to satisfy me as to his guilt**." (Emphasis supplied)

[27] The summation was replete with other instances of the learned trial judge applying the burden and standard of proof to her consideration of the evidence that was adduced by both the prosecution and the defence (see, for example, pages 488-498 of the transcript). She gave particular attention to the burden and standard of proof when considering the applicant's defence of alibi (see pages 528-529 of the transcript). The learned trial judge continuously reminded herself of the burden and standard of proof in spite of dicta from this court in **R v Phillip Gillies** (1992) 29 JLR 167 which indicates that a judge presiding at the Gun Court is not required to expressly state where the burden of proof lies and what is the standard to discharge that burden. Wolfe JA, in that case, said "[t]o hold otherwise would make it incumbent upon a judge in a summary trial to address himself as if he were summing-up to a jury".

[28] Accordingly, in our view, the learned trial judge gave adequate directions on the burden and standard of proof, and there was no indication that she had ever stated that the burden had shifted to the applicant, or treated the evidence, in any way, to suggest that the burden of proof was on the applicant. Counsel's argument to the contrary, is without merit and fails.

Assessment of the evidence given by the witnesses

[29] Counsel for the applicant indicated that she was unable to see the basis upon which the learned trial judge entered a finding of guilt against the applicant. This, she said, was because of the number of instances of "illogic of the case" that were before the learned trial judge which she failed to consider. She cited several such instances as follows:

1. The Crown called no witnesses of fact other than Mr Barnes, although he had testified that other persons were present during the incident.
2. The learned trial judge ought to have placed greater weight on the evidence given by the defence witnesses because:
   (a) one was a witness of fact who it is agreed was travelling in the car at the time the incident allegedly occurred;
   (b) the alibi witnesses (one of which is Mr Barnes' cousin) were not discredited; and
   (c) the applicant's mother had testified that the applicant had a good character and so had no motive to commit the offence.
3. The learned trial judge did not state why she preferred the evidence of one witness over the other.

4. The police had delayed charging the applicant for two weeks despite being told by Mr Barnes who his attacker was.

5. Mr Barnes' assertion that the applicant was wearing a pullover that was on his head but not covering his face is illogical, because his assailant would have been wearing the pullover as a mask.

[30] Crown Counsel characterised complaints made by Mrs Harris-Barrington in this regard as attacks on findings of fact made by a learned trial judge. She cited **Everett Rodney v R** [2013] JMCA Crim 1 as a reminder to the court of the established principle that an appellate court will not interfere with findings of fact made by a trial judge unless the findings by the judge are shown to be plainly wrong. She further argued that there is no requirement in law for the learned trial judge to comb the evidence to indentify all the inconsistencies and discrepancies which occurred at the trial, but it is sufficient if a judge gives examples of the internal conflicts in a witness' evidence, and external conflicts between one witness and another. It is clear, she submitted, that the learned trial judge was not at all impressed with the defence's case, as she had examined and identified all the material inconsistencies and discrepancies in the instant case, and where they existed, resolved them in the Crown's favour. Additionally, she argued, when one looks at the strength of the identification evidence led, and the fact that there was no evidence that Mr Barnes had been labouring under any defect at the

time the incident occurred, the learned trial judge's findings against the applicant could not be faulted.

[31] We once again find ourselves agreeing with Crown Counsel's submissions in this regard. It does seem that counsel for the applicant had been endeavouring to challenge findings of fact, made by the learned trial judge, on the basis that they were, in her view, "illogical". It is not the remit of this court, and we must be careful not to impose our views on that of the judge in the court below, or indicate that we saw the facts differently, although that is not the position in this case. To intervene in that way, simply put, is not the role of the appellate court.

[32] Our learned brother Brooks JA in **Everett Rodney v R** stated that "[w]here findings of fact are made by the tribunal entrusted with that duty, this court is reluctant to disturb such findings, as long as there is credible evidence to support such a finding". The Judicial Committee of the Privy Council in **Paymaster (Jamaica) Limited and Another v Grace Kennedy Remittance Services Limited; Paymaster (Jamaica) Limited and Another v Grace Kennedy Remittance Services Limited and Another** [2017] UKPC 40 referred to the fact that there are "constraints on an appellate court when called on to review findings of fact of the judge at first instance who has heard and seen the witnesses give oral evidence in court". The Board referred to the dictum of Lord Thankerton in **Watt or Thomas v Thomas** [1947] AC 484, at pages 487-488 where he said:

> "[T]he principle … may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is

> no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakeably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then be at large for the appellate court."

[33] The Board also relied on the dictum of Lord Reed in **Henderson v Foxworth Investments Ltd and Another** [2014] UKSC 41, a case from the United Kingdom Supreme Court, at paragraph [67], where he said:

> "...in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[34] Accordingly, an appellate court does not lightly interfere with findings of fact made by a trial judge, and will only do so if there is a material or demonstrable error in the finding made or it cannot be reasonably explained or justified. Therefore, this court

must make an assessment as to whether the findings made by the learned trial judge are demonstrably wrong or cannot reasonably be justified.

[35] In the instant case, the learned trial judge first indentified various inconsistencies in the case for the Crown. She stated that there were inconsistencies in Mr Barnes' evidence with regard to the distance of the lighting where the car had stopped; whether the applicant said to the driver "don't move" or "anyhow you move mi ago shoot you"; and the length and number of times he saw the applicant. He also denied telling the police that the applicant had placed the gun through the front left side of the vehicle, and indicated that the police had made a mistake when that was recorded in his statement.

[36] However, on an evaluation of all the evidence, the learned trial judge resolved these inconsistencies in Mr Barnes' favour as she accepted his explanation that he was not good at measurements; that "he was not keeping check on the time" and only stated times in response to questions he had been asked; and he was not counting the number of times he saw the applicant because "when onnu a do when a do the counting me only a tell what happen". She accepted Mr Barnes' account of his observation of the applicant, and found that the various sightings were sufficient to identify the applicant as his assailant.

[37] Detective Constable Gobay's evidence, she said, was inconsistent as it related to whether the driver of the car that took Mr Barnes to the hospital was a man or a woman. She noted that he had accepted that he referred to the driver as a man in his

statement, but stated that this was an error, as an "s" should have been added to "he", and so should have been recorded as "she" in his statement.

[38] On the case for the defence, she identified inconsistencies in the applicant's evidence with regard to the days when Miss Norma's shop was open. She had indicated that there was an inconsistency as to the time when the applicant said that he went to shop, since "initially he had said that he went to the shop about 7:45 pm, but later in his testimony said that he went to the shop after 6:00 pm". At first blush, this perceived inconsistency by the learned trial judge may seem to be an error since the applicant had maintained that he was at the shop between the hours of 6:00 pm and 9:00 pm that night. However, in the applicant's cross-examination, Crown Counsel had made enquiries of the applicant as to his whereabouts and actions at 7:45 pm, to which the applicant gave responses. Accordingly, the learned trial judge's reference thereto does not, in our view, affect the fairness of the applicant's trial, as it does not undermine the applicant's alibi defence that he was playing bingo at the time the incident occurred, which Mr Barnes had said was at about 8:15 pm.

[39] It was evident that the learned trial judge was not at all impressed with Mr Liscombe's evidence. She explored his testimony in detail and indicated that she would place no reliance on it due to the number of matters he could not recall and the inconsistencies therein. The inconsistencies she identified related to whether he was actually looking at the struggle between Mr Barnes and his attacker; whether he saw Mr Barnes' one strap bag; whether the head of the attacker was in the car when he was pointing the gun; and whether the gun was in the vehicle. She also commented on the

fact that in cross-examination, he could not remember whether the gun was pointed at his baby mother or the driver; whether there was a light where he found Mr Barnes; nor could he remember what he had said in his testimony the day before.

[40] The inconsistencies on Miss Brown's evidence considered by the learned trial judge related to whether the applicant and Mr Liscombe were friends; whether people were going in and out of the shop; whether she (Miss Brown) could see Miss Norma, who she had testified was standing behind her during the bingo game; whether, while in the shop, she had been focusing on the applicant or Mr Gordon; whether she had been paying attention to everyone in the shop; and whether she was only focusing on the applicant.

[41] The learned trial judge also made note of the fact that Mrs Marshall had testified that she had never had anyone counsel her son about his behaviour, but in cross-examination she admitted that a District Constable had done so at her request. The learned trial judge had also considered her evidence in the context of her directions on the applicant's good character and gave adequate directions in that regard (see pages 529-530 of the transcript).

[42] The learned trial judge thereafter identified the discrepancies on the Crown's case. The first related to the difference in testimony between Mr Barnes and Detective Constable Gobay with regard to the size of the area illuminated by light where Mr Barnes was found. She stated that this discrepancy was not fundamental as Mr Barnes had said that the applicant was nine feet away when he shot him, and from the

evidence of both witnesses it would seem as if the area was well illuminated. She indicated that she preferred the investigating officer's statement in this respect because he had more experience, and Mr Barnes had admitted that he was not good at giving time and measurements. Another discrepancy she examined was whether Detective Constable Gobay made a mistake when he recorded in Mr Barnes' statement that the applicant had pushed the gun through the front left passenger side of the vehicle (as against the rear) left passenger side of the taxi. Detective Constable Gobay had said that if there was a mistake it would have been recorded in the statement.

[43] The discrepancies identified on the case for the defence were numerous and had been described by the learned trial judge as "interesting", some of which are as follows:

1. the difference between the testimony of Mr Liscombe and Mr Gordon as to whether the light at DeSouza's farm was working at the time the incident occurred;
2. Mr Gordon failed to mention that the applicant lived in close proximity to this light;
3. the applicant had testified that after the shooting the bingo game ended, but Mr Gordon and Miss Brown stated that the game had continued;
4. the applicant had said that he won no games that night, but Mr Gordon said that the applicant had won more than one game that night; and

5. the applicant had said that Miss Norma's shop was only open on weekends, Fridays and Saturdays, but Mr Gordon stated that it was open every day and that he played bingo every day, while Miss Brown stated the shop was open during the week, but bingo is only played on weekends: Fridays, Saturdays and Sundays.

[44] After doing these assessments the learned trial judge stated that the issues in the case related to identification and credibility, and on the totality of the evidence she accepted Mr Barnes' testimony and that of Detective Constable Gobay, and rejected that of the applicant and his witnesses. The learned trial judge noted as interesting the fact that, based on Miss Brown's testimony, it was Miss Norma who organized a group of persons to go to the police, and also the fact that Mrs Marshall could not account for her son's movements that night, but she knew that between 6:00 pm and 9:00 pm he was at Miss Norma's shop. She concluded her analysis of the inconsistencies and discrepancies, in the instant case, in this way:

> "I appreciate that there are inconsistencies, discrepancies and contradictions on both sides, but I am prepared to rely on the evidence of the Prosecution witnesses because I believe that they are speaking the truth. In relation to the contradictions on the Prosecution's case I am aware that portions of a witness's statement can be accepted and rejected. The Prosecution has satisfied me with [sic] the extent that I feel sure of the [applicant's] guilt." (See pages 518-519 of the transcript)

[45] In the light of the foregoing, it cannot be said that the learned trial judge was plainly wrong in the findings of fact that she had made. These findings were all based on the evidence that she deemed credible after making her own assessment. Additionally, there was no demonstrable error nor was there a misunderstanding of the relevant evidence. There were indeed inconsistencies and discrepancies on the case for the prosecution. However, the learned authors of Stairs Memorial Encyclopaedia, Reissue, Volume 5, at paragraph 305 remind us, that does not destroy the case for the prosecution, "because a judge or jury is entitled not only to select which witness he or it will regard as credible and reliable, but also to select which parts of a witness's testimony he or it will accept or reject".

[46] For our own part, we must say, that certain aspects of the defence's case did seem incredible. For instance, Mr Liscombe, who it was accepted was travelling in the car at the time the incident occurred, saw the gun and Mr Barnes' bag, and yet he could not see who the attacker was (bearing in mind that he initially said that there was light in the area, and also that he was acquainted with the applicant for over three years, and knew the family well). Yet, he claimed that he saw the applicant for "just eye glimpse" (one second) at Miss Norma's shop playing bingo with twenty other persons before the incident occurred. For an incident that Mr Liscombe recalled so well, there were a number of important factors that he simply could not recall. Additionally, the only thing that Mr Gordon and Miss Brown clearly recalled was that the applicant was present at Miss Norma's shop, playing bingo, between 6:00 pm and 9:00 pm that night.

We should also note that the applicant's mother was not present at Miss Norma's shop and could not speak to his whereabouts.

[47] When one examines the learned trial judge's summation, it is clear that she did consider and assess the evidence of every witness that testified during the trial and made findings of fact in relation thereto. Accordingly, there was nothing "illogical" about the learned trial judge accepting the case for the prosecution, and rejecting that of the defence, and hence, there is no basis to disturb the findings of fact she made in that regard.

Identification

[48] The applicant's counsel submitted that the learned trial judge failed to properly assess the evidence of identification that had been led. She stated that the learned trial judge had no regard for the fact that Mr Barnes would have bled profusely as a result of injuries and would have been labouring under a defect at the time he named the applicant as his assailant. She stated that the learned trial judge did not consider the "illogic" on Mr Barnes' testimony that his assailant had the ability to hide his face with the pull-over but neglected to do so. Crown Counsel, in response, argued that the identification evidence that had been led was good. She pointed the court to the numerous instances and opportunities that Mr Barnes had to see the applicant. She also stated that during the trial, there was no evidence that Mr Barnes was labouring under a defect nor was there any issue taken during the trial as to his mental state.

[49] This court, in **Craig Thompson and Another v R** [2019] JMCA Crim 21, stated in reliance on the Privy Council case of **Mills and Others v R** (1995) 46 WIR 240, that when assessing whether a learned trial judge's directions on identification were adequate, regard must be had to whether those directions complied with the "sense and spirit" of the guidelines in **R v Turnbull and Others** [1976] 3 All ER 549, or whether there was a significant failure to apply these guidelines. We will now make that assessment.

[50] The learned trial judge gave herself adequate directions as it relates to identification. At page 521 of the transcript, she indicated that the case was dependent wholly on the correctness of the identification of the applicant who alleged that Mr Barnes was mistaken. She warned herself of the special need for caution before convicting the applicant on the correctness of identification evidence. She reminded herself that an honest witness can be mistaken, and so she examined closely the circumstances in which Mr Barnes identified the applicant; the length of time that he had him under observation; and the light that he claimed enabled him to see the applicant.

[51] She stated that there was no issue that the applicant and Mr Barnes were known to each other as the applicant admitted that he knew Mr Barnes "from he was small growing up". He was someone who Mr Barnes would see on the roadside occasionally. Mr Barnes said that he had seen the applicant about a week prior to the incident, and he had seen his face for about four to five minutes. She stated that this was "really a

case of recognition" and that "recognition may be more reliable than identification of a stranger".

[52] She recited Mr Barnes' evidence as to the number of times he said that he had seen the applicant; the length of time he had him under observation; and the quality of the lighting. She noted that when Mr Barnes first saw the applicant that night, "a light post was right there, brighten up the area where the car first stopped". She referred to Mr Barnes' evidence that the applicant passed him about two feet away on his left side, and he saw his face for about 10-20 seconds as nothing was covering his head. The second time he saw the applicant, the pullover was on his head but not covering his face, and he was able to see him with the aid of a streetlight that was top side DeSouza's gate. That light was in front of the car, about five feet away. Mr Barnes stated that when he came out of the car he was looking directly at the applicant who had been firing at him. She stated that by her calculation, the length of time that Mr Barnes had the applicant under observation was no less than two minutes. The last time he saw the applicant he did so with the aid of the light from DeSouza's gate, and while Mr Barnes was on the ground, the applicant pointed the gun at him while he (the applicant) was standing about seven to eight feet away from him.

[53] The learned trial judge referred to the fact that Detective Constable Gobay had stated that there was a street light in the area where the shooting took place. She also noted the fact that the applicant, himself, had said that there were two lights in that area, "one past his gate and the other at DeSouza's farm" which "illuminated an area of

about 16 times 28 Feet". Additionally, she mentioned Mr Liscombe's testimony that the light illuminated that area at "24 times 11 feet".

[54] The learned trial judge thereafter acknowledged that there were inconsistencies and specific weaknesses on Mr Barnes' evidence with regard to the conditions under which his identification of the applicant was made. These were with regard to the length of time the incident had occurred and the length of time in respect of which he had seen the applicant's face; and the occasions on which he had seen the applicant's face, but she accepted Mr Barnes' explanation that he was not good at assessing measurement and time. She also examined some weaknesses in the identification. The first was that the incident occurred at night, somewhere around 8:15pm and the second time Mr Barnes saw the applicant he had a pullover on his head, but noted that Mr Barnes could still see the applicant's face and forehead. Another was that on the third occasion when he saw the applicant, Mr Barnes would have already been injured and lying on his back. She warned herself with regard to the fact that no identification parade had been conducted, but cited authority in support of her finding that since the applicant and Mr Barnes were so well known to each other, "it would serve no useful purpose to hold such a parade".

[55] The learned trial judge found that despite these inconsistencies and discrepancies, "the quality of the identification evidence was good and [remained] good at the close of the Crown's case and it was made after a long period of observation and the lighting was satisfactory". The applicant, she said, was identified by someone who knew him, and "the quality of the identification evidence did not depend solely on a

fleeting glance. Having regard to the several sightings described by Mr Barnes, the lighting and the length of time he had observed the applicant's face, it could not be said that the observation was only made in "difficult circumstances".

[56] However, absent from the learned trial judge's summation in the instant case, was an explicit acknowledgment that mistakes in recognition cases can be made. The Privy Council in **Beckford and Shaw v R** (1993) 42 WIR 291 has indicated that the need to give the general warning in recognition cases is obvious, particularly, where there are questions before the jury as to whether the witness is honest, and whether an honest witness can be mistaken (see page 298). In that case, the failure to give the general **Turnbull** warning as to the possibility of mistake and the danger of acting on identification evidence, rendered the convictions "fatally flawed" and so they were quashed.

[57] In the instant case, as indicated, although the learned trial judge did not explicitly acknowledge that mistakes can be made in recognition cases (where the parties know each other), she had, nonetheless, given the general **Turnbull** warning as to the possibility of mistake, and the danger of relying on identification evidence. She had also stated the principle of law relative to visual identification, alerted herself to the issues critical thereto, and reminded herself, throughout her summation, of its importance. She also highlighted, in concrete terms, the factors relevant to assessing the quality of the identification evidence adduced by the Crown, and whether it could be accepted. Of significance, in **Beckford and Shaw v R**, the judge was summing up to a jury, whereas in the instant case, it was a judge alone trial and so the directions

need not be as extensive. As a consequence, her failure to explicitly state that mistakes can be made in recognition cases would not, in our view, render her summation, unfair or inaccurate.

[58] For these reasons, it is clear that the learned trial judge adhered to the "sense and spirit" of the **Turnbull** guidelines, and had appropriately applied them. It cannot therefore be said, that her consideration of the identification evidence was flawed to such an extent, that it would render the applicant's convictions unsafe. The grounds of appeal related to the issue of identification must therefore fail.

Alibi

[59] Mrs Harris-Barrington indicated that the learned trial judge erred in rejecting the applicant's alibi since it was supported by witnesses who, in her view, were not discredited.

[60] However, Crown Counsel submitted, and we accept, that the directions given on alibi were indeed sufficient. This court, in cases such as **Sheldon Brown v R** [2010] JMCA Crim 38, and the Privy Council in **Mills and Others v R**, has given guidance as to the correct formula to utilise when giving alibi directions. The learned trial judge has, in our view, complied with those guidelines. We will quote her directions in that regard below:

> "Now Mr. accused and the witnesses are saying he was not at the scene of the crime that night, they were at [the] bingo game when the incident occurred therefore he has set up his defence of alibi. He is saying he was not at the area when the crime was committed, I was not at the scene, he

> said. As the Prosecution must prove the accused (sic) guilt so that I feel sure. The accused does not have to prove that he was somewhere else at the time. On the contrary the Prosecution must disprove the alibi. Even if I conclude that his alibi is false, that does not by itself entitle me to convict Mr. Mavrick Marshall. It is a matter that I must take into account, but I should bear (sic) in mind that an alibi sometimes will go to booster (sic) otherwise genuine defence. The accused does not have to prove that he was at the bingo that night, it is the Prosecution who is to disprove that alibi. The Prosecution has to prove to me that he was at the scene that night. If I accept the testimony of the [applicant] and his witnesses that he was not there, then I would have to acquit him. If I am in doubt then I have to acquit him. I am aware that if I reject his alibi it does not mean I have to stop there, he does not prove his alibi. The Prosecution must disprove it. Even if I reject the alibi I do not automatically convict. I then have to go to the Prosecution's case and ask myself whether or not I am satisfied to the extent that I feel sure that the accused was at the scene. I considered the evidence and I reject the [applicant's] alibi. The Prosecution has satisfied me to the extent that I feel sure that the [applicant] was at the scene that night".

[61] The learned trial judge had indicated in her assessment of the evidence in the instant case that she had rejected the evidence from the defence and she stated her reasons for so doing. But she reminded herself that that alone was not sufficient, and therefore satisfied herself, yet again, that the evidence from the Crown that she had accepted was sufficient to disprove the applicant's alibi. She gave herself the appropriate direction, and she rejected the applicant's alibi. She cannot be faulted for so doing. Therefore, the ground of appeal challenging her alibi directions is without merit and must fail.

Were the sentences imposed manifestly excessive

[62] As indicated at paragraph [1] herein, the applicant was sentenced to seven years imprisonment at hard labour for illegal possession of firearm, and 10 years imprisonment at hard labour for wounding with intent. Both sentences were to run concurrently. Counsel for the applicant submitted that these sentences were manifestly excessive without more. Crown Counsel stated that the sentences imposed were appropriate.

[63] In our view, the learned trial judge did not adopt the correct approach and methodology employed in sentencing as established in **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20. She failed to identify the range of years for sentencing a particular offence, and a starting point within the range for the offence, before considering the aggravating and mitigating factors for each offence. She also paid no regard to an amendment to section 20 of the Offences Against the Person Act, promulgated on 22 July 2010, which prescribes a mandatory minimum sentence of 15 years for wounding with intent using a firearm.

[64] The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts indicate that the normal sentencing range for illegal possession of firearm is seven -15 years, with a usual starting point of 10 years. So the fact that the applicant was sentenced to seven years for illegal possession of firearm places him at the lower end of the range. As indicated, a conviction for wounding with intent using a firearm, carries a mandatory minimum sentence of 15 years imprisonment. The fact that the applicant was sentenced to 10 years indicates, as was stated by the single

judge of appeal, that the learned trial judge imposed a sentence that was "somewhat lenient", being five years less than the amount stipulated by statute.

[65] Therefore, the sentences imposed are not manifestly excessive and should not be disturbed.

[66] In all these circumstances, we made the orders (by majority) as stated at paragraph [4] herein.

[67] Finally, I wish to apologise profusely to the parties on behalf of the court for the lengthy delay in delivering this judgment. It was unavoidable in the circumstances and is indeed regrettable.