[2020] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 36/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

TAFARI MORRISON v R

Ricardo Sandcroft for the appellant

Miss Donnette Henriques for the Crown

Miss Althea Jarrett, Director of State of Proceedings (on the invitation of the Court)

13, 15 February 2018 and 31 July 2020

PHILLIPS JA

[1] This is an appeal by the appellant, Tafari Morrison (TM), against sentences imposed on him for the offences of illegal possession of firearm, robbery with aggravation and wounding with intent. He pleaded guilty to the said offences, after a trial in the matter had commenced, and during testimony from the complainant. Having stated that 15 years is the minimum sentence he could impose pursuant to statute, the learned judge sentenced TM to 15 years' imprisonment on each count, set to run concurrently. TM was 16 years old at the time of the commission of the offences and 17

years old at the time he was sentenced. He therefore sought to challenge the sentences imposed on him on the basis that they were manifestly excessive, and also based on what he alleged to be the unconstitutionality of the imposition of a mandatory minimum sentence upon a child.

Background facts

[2] The trial in this matter commenced on 10 April 2013 before Marsh J sitting in the High Court Division of the Gun Court in Kingston. As indicated, TM was charged with illegal possession of a firearm, robbery with aggravation and wounding with intent. He initially pleaded not guilty to those charges.

[3] The complainant testified that on 28 August 2012, at about 10:00 pm, he was walking on the sidewalk on the left side of Russell Heights Road, in the parish of Saint Andrew. While walking, he was talking on his Blackberry Bold cell phone valued at $40,000.00. He then noticed a young male in a "white t-shirt" leaning on the side of a 1998 BMW motor car "Model 215 Series or 52A5". The car was parked on the left side of the road, facing the direction in which the complainant was walking. It was about 12-15 feet away from the complainant. As the complainant approached the motor car, its right rear door flew open, and TM alighted from it with a "black short gun in [his] hand" and pointed it at the complainant. At that time, TM wore a "red T-shirt" and "short blue jeans", and sported a "corn-row hairstyle" that touched the back of his neck. Both TM and the male in the "white t-shirt walked towards [the complainant]". The male in the white t-shirt also had a gun in his hand.

[4] TM and the other male in the white t-shirt approached the complainant about an arm's length away with guns still pointed at him. TM repeatedly said to the complainant "[g]uh wey bwoy", while gesticulating with the firearm and pointing at the complainant's phone. The complainant interpreted TM's actions to mean that TM wanted him to throw the phone to him (TM). The complainant complied by tossing the phone to TM, who caught it and placed it in his front jeans pants pocket.

[5] TM then pointed the gun at the complainant's face, so the complainant attempted to run away. Several shots were fired at the complainant after he ran, causing a wound that bled to the right side of his back and a grazed upper lip. The complainant collapsed twice while running. On the second occasion, he collapsed next to a Mercedes Benz C-Class motor car where he noticed TM and the other male "picking up spent shells". TM and the other male then fired two more shots at the complainant. The BMW motor car, "spun around and parked directly behind the Mercedes motor car", and both TM and the other male jumped into the BMW motor car and drove off. The complainant ran to a security post along Russell Heights Road where he made a phone call and was assisted to the hospital.

[6] The complainant was able to identify TM because the area in which the incident occurred was well lit with streetlights and lights emanating from multiple houses. The nearest source of light came from a house closest to the complainant. He saw TM's face for about two minutes as nothing was covering his face. However, he was only able to see the eyes of the man in the white t-shirt as he was wearing a mask. The complainant was also able to identify TM at an identification parade.

[7] When evidence was being elicited about the identification parade, counsel for TM objected on the basis that he had not been served with any statements related thereto. After making enquiries, Crown Counsel confirmed that TM's counsel had indeed been served with a statement related to the identification parade. The court thereafter took the luncheon adjournment. When it resumed, counsel for TM indicated to the court that TM wished to change his plea. TM thereafter changed his plea to guilty on all three counts. The learned judge requested a Social Enquiry Report (SER) and set another date for sentencing.

The sentencing hearing

[8] In sentencing TM, the learned judge referred to the seriousness of the offences, and the fact that a firearm had been utilised in the commission of these offences and also to injure the complainant, which had resulted in him being hospitalised. He referred to TM's pleas of guilt, and indicated that in those circumstances, "the Court would have been obliged to discount whatever sentence would have been imposed on [TM] by, of course, to a third of that sentence". However, he said, where a firearm has been used in the commission of the offence of wounding with intent, the statute had removed from his hands, the ability to reduce the sentence on account of TM's pleas of guilt. The learned judge also stated that, ordinarily, he would have taken TM's tender years into account, and, as indicated, the fact that he had pleaded guilty. However, his hands were tied since he was effectively bound by the statute, and so would, accordingly, act as the statute had directed. He, therefore, proceeded to impose a sentence of imprisonment, on all three counts, for a period of 15 years, which was the

minimum which he said that he could "extend at this stage". The sentences were ordered to run concurrently.

The appeal

[9] It is important to note that there was no mention or submission made before the learned judge, at any time, that the mandatory minimum sentence of 15 years' imprisonment, imposed on TM, was in breach of the Charter of Fundamental Rights and Freedoms (the Charter), and the provisions of the Child Care and Protection Act (the CCPA). However, on 24 May 2013, when TM filed his application for permission to appeal against the sentences imposed on him, his sole ground of appeal stated that:

> "The appellant who is a child wishes to appeal the mandatory minimum sentence of fifteen years (15yrs.) as being inconsistent with the provisions of the [Charter of Fundamental Rights and Freedoms] & the Child Care & Protection Act [2004]. The sentence is manifestly burdensome."

[10] That application was reviewed by a single judge of appeal who, in granting leave to appeal, ruled as follows:

> "The sentence imposed in relation to count III [wounding with intent] was the statutory minimum prescribed and the Learned Trial Judge correctly informed counsel and [TM] that he was bound to impose it. However, there was no such obligation to impose 15 years for counts I & II [illegal possession of firearm and robbery with aggravation], which in light of the guilty plea, may be attacked as being excessive even though they are to run concurrently, in any event.

> The issue of the constitutionality of the statutory minimum on a child may then be explored."

Submissions

On behalf of TM

[11] Counsel for TM submitted that when regard was had to relevant legislation, various international instruments, and several authorities decided in the jurisdiction and outside of the region, the imposition of a mandatory minimum sentence on a child is unconstitutional and hence, manifestly excessive.

[12] With regard to relevant legislation, counsel explored several provisions of the Charter and the CCPA. He stated that section 13(3)(k)(i) of the Charter, for the first time, has recognised the rights of a child, and the need to protect that child against the undue exercise of authority. The CCPA, he said, provides a range of sentences that can be imposed on children and makes the best interest of the child the overriding principle when deciding the most appropriate sentence to be imposed.

[13] Accordingly, counsel submitted, these pieces of legislation reflect an acknowledgement by Parliament that children deserve special protection under the law, due to their psychological vulnerability, which makes them especially susceptible to external forces, and may impact their full moral accountability. He further argued that, when read together, both statutes require an "individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that the mandatory minimum

sentencing entails". This, he said, places a real constraint on Parliament's ability to impose severe penalties on children.

[14] Counsel stated that upon an examination of various international instruments, namely, the United Nations Convention on the Rights of the Child, 1989 (CRC), the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines), and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), the protection of the rights of a child are of paramount importance. He argued that the most important instrument, for these purposes, was the CRC, which had been incorporated into the CCPA and the Charter. He referred specifically to article 37 of the CRC, which protects children from, *inter alia*, torture, or other cruel and inhuman treatment. The Riyadh Guidelines, he stated, urges governments to implement various methods to reduce juvenile delinquency. Counsel also asserted that the Beijing Rules support the view that mandatory minimum sentences ought not to be imposed on children. The Beijing Rules, he said, also stipulate that children are to be sentenced in a manner appropriate to their well-being, the circumstances of the offence and the needs of the society, and imprisonment should be a measure of last resort, for the shortest possible period of time.

[15] Counsel, in further submissions on the inappropriateness of a mandatory minimum sentence on a child, canvassed several authorities. He cited well-known cases such as **R v Peter Hughes** [2002] UKPC 12; **Patrick Reyes v R** [2002] UKPC 11; **Lambert Watson v R** [2004] UKPC 34; **Pratt and Morgan v The Attorney General for Jamaica and another** [1993] UKPC 1; and **Neville Lewis and others v The**

Attorney General of Jamaica and another [2001] UKPC 35, in support of his contention that in many Caribbean countries, save and except in Trinidad and Tobago, the Judicial Committee of the Privy Council has rejected the legitimacy of the mandatory nature of the death penalty. He also cited cases from South Africa (**Jan Hendrik Brandt v The State** [2005] 2 All SA 1 (**S v B** 2006 (1) SACR 311 (SCA)); Canada (**R v DB and another** [2008] 2 SCR 3); and the United States of America (**Roper, Superintendent, Potosi Correctional Officer v Simmons** No 03-633, delivered 1 March 2005, in the Supreme Court of the United States), which tend to show that the imposition of adult sentences on children is unconstitutional, and had been struck down by those courts.

[16] Counsel submitted further that when the legislation, international instruments and authorities are all examined, it is clear that children are regarded as immature, and youthfulness is a mitigating factor, unless the viciousness of the crime ruled out the child's immaturity. He asserted that the younger the offender, the more important it is that information should be obtained and considered regarding his background, education, level of intelligence, and mental capacity in order to determine blameworthiness. The degree of blameworthiness of a child is less, he said, because of immaturity, their susceptibility to negative influences and a natural tendency towards "ill-considered behaviour".

[17] Counsel argued that a mandatory minimum sentence has the effect of obliterating any special protection of the child, and, without justification, takes away the individuation of sentences, which is the prerogative of the court. Counsel also argued

that "high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Charter" and the CCPA. Accordingly, he urged this court not to impose a mandatory minimum sentence upon TM.

[18] Counsel also sought to urge upon this court the sentences that he thought would have been more appropriate in the circumstances. He stated that incarceration for an unusually long period of time was not in TM's best interest, as he was a vulnerable offender, who had been expelled from school, resided in a turbulent community and had been subjected to a myriad of negative influences. He indicated that TM's sentence ought to have been reduced by one-third as a result of his guilty plea. Additionally, TM should have received a reduction of one year, which is the approximate time he was in custody prior to being sentenced. Counsel submitted that when regard was had to all the aggravating and mitigating factors, a sentence of 10-12 years' imprisonment at hard labour would have been appropriate.

On behalf of the Crown (Director of Public Prosecutions)

[19] Crown Counsel submitted that sections 63-84 of CCPA address certain aspects of the treatment of children, and section 78 imposes restrictions on the court when punishing a child. Indeed, section 78 prescribes a sentence of imprisonment for up to 25 years for children under 14 years for particular offences. Section 72(6) stipulates that a child who has attained the age of 14 years and has committed an offence found in the Fourth Schedule to the CCPA (which is triable in the Circuit Court or the Gun Court), is potentially subject to a sentence of imprisonment for life. She stated that

section 20 of the Offences Against the Person Act is in the Fourth Schedule, which includes the mandatory minimum provisions. It is therefore clear, she said, that the legislature had contemplated the issue of the constitutionality of the imposition of mandatory minimum sentences on children, and yet, had made no provisions in the CCPA indicating that mandatory minimum sentences ought not to be imposed on them for specific offences.

[20] Although Crown Counsel accepted that the provisions of the CRC had been incorporated into the CCPA and the Charter, she submitted that the relevant provisions of the CRC had no higher status than any other legislation. Additionally, Crown Counsel argued that the CCPA and section 13(3)(k)(i) of the Charter conclusively represent Parliament's full intent with regard to its treaty obligations under the CRC. She further argued that the fact that Jamaica is a signatory to the CRC, does not mean that all the CRC provisions have been incorporated into domestic legislation. Crown Counsel therefore argued that counsel for TM was wrong to superimpose the specific wording of the CRC, and the other international instruments he had cited, onto the CCPA, in an effort to boost the rights of a child, contrary to Parliament's legislative intent.

[21] Crown Counsel referred to the dicta of the Law Lords in **Lambert Watson v R** and **Director of Public Prosecutions v Patrick Nasralla** [1967] 2 AC 238 in support of her contention that the presumption of constitutionality of the mandatory minimum sentence had not been displaced. She further argued that, in any event, section 13(7) of the Charter would save any challenge to the unconstitutionality of mandatory minimum sentences promulgated before the passage of the Charter.

[22] Crown Counsel, thereafter, sought to distinguish the authorities cited by counsel for TM. She indicated that in the Privy Council cases cited by him, such as **Lambert Watson v R** and **Hughes v R**, the court was dealing with provisions which authorised a mandatory sentence of death, which the court found was not saved when the sentence was "required" by amending legislation subsequent to the Constitution of Jamaica (the Constitution) and that of Saint Lucia, respectively. She further argued that in those cases, the Privy Council had frowned upon the inflexibility of a requirement to impose a sentence of death, which left no room for consideration of the individual circumstances of an accused charged with murder. In the instant case, Crown Counsel submitted, there was room for mitigation and consideration of the individual circumstances of an accused, however, the sentence imposed could not go below the minimum stated in the particular statute.

[23] Counsel for the Crown stated further that the Privy Council decisions cited by counsel for TM had received great notoriety when they had been delivered, and have played an integral role in the development of Jamaica's jurisprudence. Accordingly, those decisions would have been at the forefront of Parliament's deliberations when considering the promulgation of any further amending legislation vis-a-vis the Charter or otherwise.

[24] Crown Counsel also challenged TM's reliance on authorities emanating out of other jurisdictions. She maintained that the provisions of the Charter were not synonymous with provisions of the South African, United States or Canadian constitutions. She argued that "the law in each jurisdiction is applied differently and is

subject to different legislative constraints". Each provision in different constitutions may limit or enhance a particular right, and would have to be interpreted accordingly. Specific reference was made to the South African Constitution which was then compared to the Jamaican Constitution, which revealed that in South Africa, the rights of a child are far more detailed. She therefore submitted that those cases were unhelpful and should not be utilised.

[25] With regard to whether the sentences imposed on TM are manifestly excessive, Crown Counsel conceded that only the offence of wounding with intent would have been subject to the imposition of a mandatory minimum sentence. She therefore accepted that the learned judge had indeed erred when he imposed sentences of 15 years' imprisonment, as being mandatory minimum sentences applicable to illegal possession of firearm and robbery with aggravation. Nevertheless, she sought to convince the court that the imposition of the mandatory minimum sentence for wounding with intent was appropriate, constitutional and ought not to be disturbed.

[26] Crown Counsel referred to the oft-cited case of **Meisha Clement v R** [2016] JMCA Crim 26, which set out the principles applicable to sentencing, and argued that the learned judge had given consideration to those principles. She argued that the learned judge had considered the fact that TM would have also been entitled to a reduction in sentence on account of his guilty plea, and the one year spent in custody prior to being sentenced. She accepted that the principle of proportionality is accepted as a part of Jamaica's judicial landscape (see **Kirk Mitchell v R** [2011] JMCA Crim 1), and also the overarching principle of imprisonment being a measure of last resort (see

section 3 of the Criminal Justice (Reform) Act). However, Crown Counsel submitted, the fact that Morrison P in **Meisha Clement v R** circumscribed the application of those principles to "those cases in which [the court] is at liberty to impose a non-custodial sentence", indicated "the court's signal of the separation of powers and the legislature's right to make laws which limits the principle", as in the instant case.

[27] Crown Counsel expressed concern with regard to the different position adopted by TM in the SER, as against the complainant's sworn testimony about who shot and wounded him. She stated that the learned judge appeared to have accepted the complainant's testimony in the sentencing process, but counsel queried whether TM appeared to be resiling from the guilty plea, and whether a hearing, as prescribed in **R v Newton** (1982) 77 Cr App Rep 77, would therefore have been required. She further queried whether section 20(5)(a) of the Firearms Act addresses the particular circumstance, or whether the principles of joint enterprise would address that enquiry, in any event.

[28] Crown Counsel submitted that, in all the circumstances, the sentence imposed for wounding with intent was indeed correct and appropriate, and ought not to be disturbed.

On behalf of the Attorney General

[29] The Attorney General was specifically invited to provide submissions to assist the court regarding the constitutionality of the imposition of mandatory minimum sentences on a child. In addressing that issue, the Director of State Proceedings (DSP), appearing

for the Attorney General, explored the mandatory sentencing regime in Jamaica, the Charter and the protection and special treatment afforded to children.

[30] With regard to the mandatory minimum sentencing regime in Jamaica, the DSP said that it was generally accepted that it had been imposed by the government in an attempt "to tackle the high crime rate in the country and to reduce the threat to national security and public safety imposed by the increasing use of illegal firearms". So, the amendments to both the Firearms Act and the Offences Against the Person Act (under which TM had been charged), to prescribe mandatory minimum sentences for offences committed using a firearm, targeted the unlawful use of firearms. She argued that, on the one hand, critics of the mandatory minimum sentencing regime argue that it removes the exercise of a judge's discretion when imposing a sentence, and places little or no consideration on the nature and gravity of the offence, the mitigating circumstances relating to the offence and the offender, and may be disproportionate. However, on the other hand, she argued, a mandatory minimum sentence guards against the decision of an unfettered judge which may result in a lack of consistency in sentencing.

[31] The DSP maintained the position that the Attorney General had taken in **Leroy Anthony Fearon v R** [2013] JMCA Crim 61 and **Norick Brooks v R** [2014] JMCA Crim 20, that the courts had tended to defer to the legislature in the matter of mandatory sentencing. This, she said, was because Parliament has knowledge of the existing circumstances in the country, the prevalence of the type of offences, the public's abhorrence and dismay in relation thereto, and the need for measures to curb

and deter the scourge of crime. So, it was her contention that mandatory minimum sentences are not unconstitutional *per se*, and Parliament has the power to prescribe them. However, that does not mean that, in any particular case, the sentence imposed may not be unconstitutional amounting to cruel, inhuman or degrading treatment contrary to section 13(6) of the Charter. She stated that whether the sentence imposed on TM in this case falls under that description, is a matter for the Court of Appeal.

[32] Counsel canvassed several authorities, including, **Edward Dewey Smith v R and another** [1987] 1 RCS 1045 (from the Canadian Supreme Court), and **State v Vries** [1997] 4 LRC 1 (from the Namibian High Court) in support of her contention that in determining whether a mandatory minimum sentence is unconstitutional, regard must be had to whether the sentence imposed was grossly disproportionate to the gravity of the offence, the personal circumstances of the offender, and the particular circumstances of the case. She also referred to the Privy Council cases of **Hughes v R**, **Reyes v R** and **Lambert Watson v R** to argue that while the death penalty was protected by the savings clause, the mandatory nature of that sentence was not, and was, therefore, unconstitutional.

[33] In order to properly assess the appropriateness of imposing mandatory minimum sentences on child offenders, the DSP argued that the court must examine, in detail, the provisions of the Charter. She indicated that by virtue of **Reyes v R**, the interpretation of constitutional provisions must be generous and purposive, and the court must not impose its own moral predilections and values, nor focus solely on public

opinion when conducting that exercise. She thereafter proceeded to interpret the Charter having regard to those principles.

[34] Section 13(3)(k)(i) of the Charter, she said, reflects a modified version of article 24 of the International Covenant on Civil and Political Rights 1976 (ICCPR), which has been ratified in Jamaica. She submitted that the ICCPR stipulates that "children are to be viewed and treated as human beings with a distinct set of rights by virtue of their status as children, and given their vulnerability and dependence". Counsel argued that in Jamaica, there has always been a separate legal regime for children "due to their age, heightened vulnerability, lack of maturity and reduced capacity for moral judgment". The Juveniles Act, which has now been repealed and replaced by the CCPA, is indicative of this regime. The DSP further contended that the recognition and acknowledgement by Parliament of the need for special treatment of children under the law, can also be seen in the Memorandum of Objects and Reasons to the Child Care and Protection Bill, the Child Justice Guidelines issued by the Office of the Children's Advocate, and in the debate on the Juvenile Bill stated in the Jamaica Hansard, Proceedings of the Legislative Council of Jamaica, Sessions 1948, 9 January 1948 – 19 November 1948.

[35] The DSP reminded this court of its own decision in **R v Williams** (1970) 11 JLR 538, about three decades ago, where the court utilised the individuated approach with regard to sentencing a child, and examined the special and peculiar circumstances relating to the child, in order to ascertain whether the sentence imposed was manifestly excessive. She also said that this approach has been demonstrated in the Caribbean

Court of Justice case of **Lashley and Campayne v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ).

[36] After citing **R v DB**, the DSP noted that several courts in other jurisdictions have had to grapple with the issue of whether the imposition of a mandatory minimum sentence on a child is constitutional. Although she accepted that the legislation and constitutional provisions in those jurisdictions were different, she indicated that the Jamaican Constitution and other legislation relevant to children gives similar protection to, and preserves individuation in sentencing children.

[37] She therefore argued that in the light of the foregoing, the right to individuation in sentencing children is a guaranteed right under the Constitution. A mandatory minimum sentence deprives a child of that right, and would therefore be "constitutionally vulnerable".

Discussion and analysis

[38] Before we can embark upon a determination as to whether the sentences imposed on TM by the learned judge were manifestly excessive, we must first assess whether the learned judge had erred in the approach he took in sentencing him. The principles applicable to sentencing have been canvassed in a number of cases before this court, most notably **Meisha Clement v R** and **Daniel Roulston v R** [2018] JMCA Crim 20. Indeed, in **Daniel Roulston v R**, this court summarised the approach and methodology to the applied to sentencing 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)."

[39] The instant case was decided before the methodology applicable to sentencing was summarised in **Meisha Clement v R** and **Daniel Roulston v R**. However, nothing prevents the application of these principles to the instant case, as the sentencing methodology stated therein was extrapolated from earlier cases which gave guidance to that effect.

[40] On a review of the transcript, there is no clear demonstration of how the learned judge arrived at the sentences he had imposed. He had commented on the seriousness of the offence, the use of a firearm and the injury to the complainant as aggravating factors, and stated that TM's age and guilty plea were mitigating ones. However, he failed to identify any appropriate sentencing range for the said offences, a starting point within the ranges he had identified, or give any consideration to the fact that TM had no previous convictions, or that he had spent eight months in custody (beginning in September 2012) prior to being sentenced (on 19 May 2013).

[41] The learned judge would have also erred in his imposition of sentences of 15 years' imprisonment for illegal possession of firearm and robbery with aggravation, as being the mandatory "minimum that [he] could extend at this stage", as those offences did not attract mandatory minimum sentences, pursuant to any statutory regime, at the time TM was being sentenced.

[42] Count one charged TM with illegal possession contrary to section 20(1)(b) of the Firearms Act, which provides that:

> "A person shall not:
>
> ...
>
> (b) subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence."

Section 20(4) states that any person found guilty under that section is liable on conviction before a Circuit Court to imprisonment for life with or without hard labour. In fact, it is sections 24 and 25 of the Firearms Act that prescribes mandatory minimum sentences of 15 years' imprisonment with or without hard labour on conviction before a Circuit Court, which relate, *inter alia*, respectively, to using the firearm with intent to endanger life or cause serious injury to person or property, or using an imitation firearm (which is not applicable to the case at bar).

[43] On count two, TM was charged with robbery with aggravation contrary to section 37(1)(a) of the Larceny Act. That section also does not stipulate a mandatory minimum sentence. It states that:

> "Every person who-
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> ...
>
> shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding twenty-one years."

[44] Count three charged TM with wounding with intent contrary to section 20(1) of the Offences Against the Person Act. It provides that:

> "Subject to subsection (2), whosoever, shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid, to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or 'with intent to resist or prevent the lawful apprehension or detainer or any person, shall be guilty of felony, and, being convicted thereof, shall be liable, to be imprisoned for life with or without hard labour."

Section 20(2) stipulates a mandatory minimum sentence. It states that:

> "A person who is convicted before a Circuit Court of-
>
> (a) shooting with intent to do grievous bodily harm or with intent to resist or prevent the lawful apprehension or detainer of any person; or
>
> (b) wounding with intent, with use of a firearm,
>
> shall be liable to imprisonment for life, or such other term, not being less than fifteen years, as the Court considers appropriate."

The learned judge would therefore have been correct in stating that 15 years' imprisonment was the mandatory minimum sentence he could impose on that count.

[45] As a consequence, on account of the learned judge's errors, with regard to the application of the sentencing principles and the mandatory minimum sentence to the offences of illegal possession of firearm and robbery with aggravation, the sentences imposed for those offences should be set aside and new sentences substituted therefor.

[46] However, there remains an issue in this appeal as to whether the imposition of the mandatory minimum sentence of 15 years' imprisonment for wounding with intent was correct, having regard to the fact that TM was a child at the time of the commission of the offence and at trial. To facilitate a discussion on this issue, it is necessary to explore the relevant provisions of the Constitution, authorities which have been decided on the issue, and local legislation related to children.

The Constitution

[47] It is important to recognise that in Jamaica, the Constitution is the supreme law, and prevails over any other law if that law is inconsistent with it. Any such law which is inconsistent with the Constitution is void to the extent of that inconsistency (see section 2 of the Constitution and **de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing and Others** (1998) 53 WIR 131). The rights afforded to Jamaica's citizens are contained in the Charter, which was promulgated on 7 April 2011 within an act to amend Chapter III of the Constitution.

[48] The rights which TM claims have been engaged are contained in sections 13(3)(k) and 13(6)of the Charter. Section 13(3)(k) provides that there is:

> "the right of every child -
>
> (i) to such measures of protection as are required by virtue of the status of being a minor or as part of the family, society and the State;
>
> (ii) who is a citizen of Jamaica, to publicly funded tuition in a public educational institution at the pre-primary and primary levels."

While there is a right in section 13(6) that:

> "No person shall be subjected to torture or inhuman or degrading punishment or other treatment."

It is TM's claim that the imposition of a mandatory minimum sentence of 15 years' imprisonment for wounding with intent, pursuant to section 20(1) of the Offences Against the Person Act, infringes on his right as a child to special protection, and his right not to be subject to torture, inhuman, degrading or other treatment.

[49] We should note, however, that the rights contained in the Charter are not absolute. They are guaranteed "to the extent that those rights and freedoms do not prejudice the rights and freedoms of others" (section 13(1) of the Charter), and are "demonstrably justified in a free and democratic society" (section 13(2)). In our view, it is unnecessary to venture into an interpretation of the restrictions stated in sections 13(1) and (2) of the Charter, as section 20 of the Offences Against the Person Act has been excluded by virtue of another restriction on those guaranteed rights, stipulated in section 13(7) of the Charter, which provides that:

> "Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (6) to the extent that the law in question authorizes the infliction of any description of punishment which was lawful in Jamaica immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011."

[50] The Judicial Committee of the Privy Council in **DPP v Nasralla** and **Watson v R** has given guidance on how to interpret an excluding law clause, and the true effect of such a clause in a constitution. In **DPP v Nasralla**, an issue arose as to whether section 20(8) of the Constitution (as it then was, reformulated in section 16(9) of the Charter), which provides that no person shall be tried again for an offence with which he has been acquitted, had declared the common law position on the subject. Lord Devlin in response to this issue at pages 247-248, said:

> "All the judges below have treated [section 20(8) as declaring or intended to declare the common law on the subject. Their Lordships agree. It is unnecessary to resort to implication for this intendment, since the Constitution itself expressly ensures it. Whereas the general rule, as is to be expected in a Constitution and as is here embodied in section 2, is that the provisions of the Constitution should prevail over other law, an exception is made in Chapter III [as it then was]. **This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law. The laws in force are not to be subjected to scrutiny in order to see whether or not they conform to the precise terms of the protective provisions.** The object of these provisions is to ensure that no future enactment shall in any matter which the chapter covers derogate from the rights which at the coming into force of the Constitution the individual enjoyed." (Emphasis supplied)

[51] In **Watson v R**, a majority of the Law Lords were of the view that the observations made in **DPP v Nasralla** would have had force in that case if the law under which the appellant was sentenced to death was a law which was "in force immediately before the appointed day". In that case, since the law mandating the death penalty for certain offences was amended after the appointed day in the Constitution, it ceased to be such law when it was amended and so was not protected. Indeed, in their postscript, at paragraph 51, the majority indicated that as the supreme law clauses and excluding law clauses in various Caribbean constitutions are plain and unambiguous, their task has been to construe them as they find them and apply them accordingly. At paragraph 54, they also stated that the true effect of the supreme law clause and the excluding law clause in the Constitution was to "exclude existing laws from constitutional guarantees as it preserves then from inconsistency". The Law Lords went on to state that if existing laws are found to be inconsistent with a country's international obligations, it is for Parliament to provide the remedy, which thereafter has the effect of removing the exclusion which applied to existing law, and opens them up to scrutiny.

[52] In adopting that same approach, it is evident that section 13(7) of the Charter is plain and unambiguous. In fact, pursuant to section 13(7), the protection afforded to laws passed prior to the commencement of the Charter, which may infringe on the right not to be subjected to torture, inhuman or degrading treatment, is even greater than that canvassed by the Law Lords in **DPP v Nasralla** and **Watson v R**. It states, explicitly, that laws passed before the commencement of the Charter are not to be

subject to scrutiny on the basis that they are inconsistent with or contravene the provisions of section 13(6) of the Charter (being subjected to torture, inhuman or degrading treatment). It further stipulates, unequivocally, that this is so "to the extent that the law in question authorizes the **infliction of any description of punishment** which was lawful in Jamaica immediately before the commencement of the Charter".

[53] In the instant case, the amendment to section 20 of the Offences Against the Person Act, which provided for the imposition of a mandatory minimum sentence of 15 years imprisonment, was effected on 22 July 2010, which predates the commencement of the Charter on 7 April 2011. It is of note, for these purposes, that the provision did not exclude or in anyway carve out its application to children. It is therefore preserved from any inconsistency with the Charter, is constitutional and is saved from scrutiny by the court.

Relevant authorities on the issue

[54] The Privy Council decision in **Gangasing Aubeeluck v The State of Mauritius** [2010] UKPC 13 accepted that the effect of section 7 of the Mauritius Constitution (the prohibition against subjection to torture, inhuman or degrading or such other treatment) "is to wholly outlaw disproportionate penalties". In that case, the main issue was "whether, and in what circumstances, a court is entitled to pass a lesser sentence than the minimum sentence provided by law for the commission of a criminal offence". It was recognised, that in the circumstances of that case, the court should examine the requirement of proportionality imposed by the section of the Constitution that provides for protection from torture, inhuman or degrading or other such treatment (section

13(6) of the Charter). This was a principle argued by counsel for TM and on behalf of the Attorney General. Several cases were relied on by them to support the principle of proportionality in the challenge to the imposition of a mandatory minimum sentence as being contrary to section 13(6) of the Charter.

[55] We agree with the Board in **Gangasing v The State of Mauritius** that in assessing whether a sentence is grossly disproportionate, regard must be had to "the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case". However, that principle must be viewed against the backcloth of our finding in paragraph [53] that if the imposition of the sentence predates the Charter, it is saved from scrutiny by the courts.

[56] In **Gangasing v The State of Mauritius**, the appellant was convicted of possession of, trafficking in and smoking gandia (cannabis akin to ganja). While he was fined on all three counts, he was also sentenced to a "minimum term of penal servitude for three years" (ordinary imprisonment) for possession and trafficking in gandia. His appeal against those convictions was dismissed by the Mauritius Supreme Court, and so he sought and obtained leave from the Board to appeal to Her Majesty in Council.

[57] In an effort to assess the issue of whether the sentence imposed was grossly disproportionate, the Board examined the legislation which prescribed the mandatory minimum sentence. It referred to various decisions from Mauritius, **State v Vries** from the High Court of Namibia, and its own decision in **Reyes v R**, which cited with approval the decision of the Supreme Court of Canada in **Edward Dewey Smith v R**.

By virtue of those authorities, the Board accepted Lord Bingham's pronouncement in **Reyes v R**, that the need for proportionality and individuation in sentencing is not confined to capital cases. They also accepted Lamer J's statement in **Edward Dewey Smith v R** that when assessing whether the sentence is grossly disproportionate, regard must be had to "the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case".

[58] In applying that principle to the facts in **Gangasing v The State of Mauritius**, the Board concluded that the "sentence of three years imprisonment would be wholly disproportionate to the offences committed by the appellant". They stated that although the appellant was a drug trafficker, he was dealing in very small quantities of gandia, he had no previous convictions, he was a person of good character, and under the current amendment to the Dangerous Drugs Act, he would not have been charged as a trafficker. The Board found that it would have been grossly disproportionate to disregard all mitigation in the appellant's favour. The Board accepted that it had the option to declare the provision as being void and of no effect in all or particular cases and to read it down accordingly. Consequently, the Board held that the sentence was not compatible with section 7 of the Mauritius Constitution as it would have been grossly disproportionate. The sentence was quashed, and the case was remitted to the Supreme Court for consideration of the appropriate sentence.

[59] We should note, however, that the issue of the applicability of the excluding law clause did not arise in that case. In any event, the impugned legislation was passed several decades after the enactment of the Constitution.

[60] **Centre for Child Law v Minister for Justice and Constitutional Development and others** [2009] ZACC 18 was a case decided before the Constitutional Court of South Africa. The South African government had passed the Criminal Law Amendment Act in 1997 that made mandatory minimum sentences applicable to children 16 years and older but under the age of 18 years. The interpretation of that Act sparked serious debate and resulted in conflicting High Court decisions. However, it was ultimately struck down by the Supreme Court of Appeal of South Africa in **Jan Brandt v The State**. The South African legislature once again amended the Act by the Criminal Law (Sentencing) Amendment Act 2007 to provide for the imposition of mandatory minimum sentences "notwithstanding any other law". The High Court of South Africa had declared the provisions relative to imposition of mandatory minimum sentences on children 16-18 years to be inconsistent with sections 28(1)(g) and (2) of the South African Constitution, and referred the matter to the Constitutional Court for confirmation of this declaration. By a majority decision, that court granted those declarations as prayed.

[61] The relevant provisions of section 28 of the South African Constitution state that:

> "Every child has the right—
>
> (g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age."

Section 28(2) of that Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child".

[62] In interpreting those sections, Cameron J, on behalf of the majority. said that:

> "[31] ... [W]hile the Bill of Rights envisages that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate, resort; and when the child is detained, detention must be 'only for the shortest appropriate period of time'. The principles of 'last resort' and 'shortest appropriate period' bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time.
>
> [32] In short, section 28(1)(g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest 'appropriate' period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence. It does not import a supervening legislatively imposed determination of what would be 'appropriate' under a minimum sentencing system."

[63] In striking down the relevant provisions of the Act, Cameron J commented on the effect of mandatory sentences on children, which, he said, takes away options other

than incarceration during sentencing, de-individuates sentencing by prescribing a starting point, and may result in heavier longer sentences being imposed. These are all strictures that are required, pursuant to the Constitution, as it draws a distinction between children and adults, not because of sentiment, but because they are physically and psychologically more vulnerable and less mature than adults. They are also more vulnerable to influence and pressure from others. He therefore concluded at paragraph [60] that "high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights".

[64] The rights afforded to children in the South African Constitution are far greater, more detailed and expansive than those contained in the Jamaican Charter. The South African Constitution specifically states that imprisonment of children should only be a measure of last resort, and should only be imposed for the shortest possible time, and specifically makes a consideration of the best interests of the child of paramount importance in every matter concerning the child. In Jamaica, the CCPA also stipulates that the best interests of the child are of paramount importance. However, the Jamaica Charter does not state that a child's best interest is of paramount importance in every matter concerning the child, nor is there any provision that imprisonment of children is a measure of last resort and should only be for the shortest possible time. As, those provisions are not reflected in the Jamaican Charter, we would not be entitled to apply these principles to the instant case, to arrive at a finding that the sentence imposed on TM is contrary to the Charter, and unconstitutional.

[65] In **R v DB**, the Supreme Court of Canada also addressed the issue as to the constitutionality of the imposition of adult sentences on children. DB (who was 17 years old) and R had a fight during which DB knocked R to the ground, punched him and fled. R died as a result. DB pleaded guilty to manslaughter. Under the Youth Criminal Justice Act (YCJA) in Canada, manslaughter is a presumptive offence which attracts an adult sentence. However, pursuant to that Act, a young person may make an application for an order that he is not liable to an adult sentence, and the burden is placed on that young person to justify why an adult sentence should not be imposed. Pursuant to that provision, DB sought the imposition of a youth sentence, but this was opposed by the Crown. DB therefore filed a constitutional challenge to the reverse burden placed on him under the YCJA, in that, it deprived him of his liberty without regard to principles of fundamental justice contrary to section 7 of the Canadian Charter, and violated the privacy provisions of the YCJA, as the imposition of an adult sentence would result in the publication of his name. His challenge was allowed, and he was sentenced to the maximum youth sentence, which included intensive rehabilitative custody and supervision for three years.

[66] The Crown's appeal to the Ontario Court of Appeal was dismissed and so it lodged an appeal before the Canadian Supreme Court. In dismissing that appeal, the court noted that in Canada the clear purpose of the YCJA was to send a clear message restricting the use of custody for young offenders. The court emphasized that young persons should be dealt with separately from adults based on their age, heightened vulnerability, reduced maturity and reduced capacity for moral judgment. The court

found that these differences entitle a young person to "a presumption of diminished moral blameworthiness or culpability", which, the court said, was a legal principle that had been consistently acknowledged by Canadian courts and statutes that predated the YCJA. The court also said that the imposition of the reverse burden deprives a young person of the benefit of that presumption based on his age, as it placed the burden on him to justify his continued entitlement to that presumption. That burden, the court said, ought to be on the Crown. As a consequence, the court found that the reverse burden in the YCJA was inconsistent with the Canadian Charter, was not saved by that Charter, and was therefore unconstitutional.

[67] We would also exercise caution before embarking upon a wholesale adoption of the principles in **R v DB**, as the legislative provisions in Jamaica relating to the sentencing of children, are not as extensive, nor are they as generous as those in Canada. As we will later demonstrate, in Jamaica, a child is not given a right to apply to opt out of an adult sentence, and although Parliament has acknowledged their diminished moral capabilities, it has, nonetheless, made them subject to adult sentences and incarceration at adult correctional facilities.

[68] **R v Williams** was a case decided in this court on 4 June 1970 (before the passage of the CCPA). In that case, the appellant and five other boys used knives to menace and rob a young girl, and he was also violent to her. He was convicted of robbery with aggravation and was sentenced to five years imprisonment, which was the minimum penalty provided by the Prevention of Crime (Special Provisions) Act 1963 and a flogging. At the time of the commission of the offence, the appellant was 16 years of

age. He sought and obtained leave to appeal his sentence on the basis that it was manifestly excessive.

[69] His appeal was allowed and his sentence varied. This was because the court accepted that there were other sentencing alternatives available to the learned judge, pursuant to the now repealed Larceny Law. That Act stated that in addition to any other punishment, the court may order the offender to pay a fine or require him to enter into recognisances to keep the peace and be of good behaviour. Pursuant to the Juvenile Law, a juvenile could not be sentenced to penal servitude or imprisonment, in default of payment of a fine, damages or costs. As a result, the court found that the sentence imposed was "not right" and justice would not be done by the imposition of a mandatory minimum sentence.

[70] In considering the sentence to be imposed, the court had regard to the appellant's peculiar circumstances, such as the fact the he was illiterate, the absence of a father figure in his life, a mother who lacked the ability to give him any guidance, the deplorable conditions in which he lived, the fact that he had no strength of character and was easily swayed, and that it was his first conviction. The court found that imprisonment and flogging would have a detrimental effect on his character that would far outweigh the deterrent effect. Accordingly, in consideration of the appellant's peculiar circumstances as a child, the court sentenced him to enter into recognisance in his own surety in the sum of $20.00, to be of good behaviour, to keep the peace for a period of three years, and to be present at court for sentence, if and when called upon to do so.

[71] In that case, the judge at first instance erred by failing to recognise that there were other sentencing options open to him. Those sentencing options included the imposition of a fine and precluded him from imposing a sentence of imprisonment or penal servitude on a child. It is interesting also to note that the learned judges of appeal indicated that they were not in a position to say whether a minimum sentence of imprisonment, fixed by law, was manifestly excessive, as it had not been argued before them. It would therefore seem that the individuation in sentencing that was conducted in that case was done by virtue of the circumstances of that case, and could not be used as a basis for universal application.

[72] The cases we have identified do not seem to provide any guidance for our consideration as to whether the imposition of the mandatory minimum sentence on TM, for wounding with intent, in any event, was grossly disproportionate. It is incumbent on us now to explore whether any legislative provisions related to the sentencing of children could impact our decision.

Relevant legislative provisions

[73] The Jamaican Parliament has, for some time, recognised the need to treat children differently from adults when they come in conflict with the law. This acknowledgment can be seen in the passage of the Juveniles Act in 1951, which has since been repealed and replaced by the CCPA, promulgated in 2004. The Memorandum of Objects and Reasons for that Act stated that in May 1991 Jamaica had ratified the CRC and, therefore, took a decision to "enact legislation to combine and reinforce existing child protection legislation with new legislative provisions to protect

children from abuse". The Child Care and Protection Bill sought to enable Jamaica to fulfil its CRC treaty obligations and to fully incorporate them into national legislation.

[74] What then are the relevant CRC treaty obligations? A child is defined in article 1 of the CRC as "every human being below the age of eighteen years", unless legislation stipulate otherwise. In all actions concerning children, article 3 provides that "the best interests of the child shall be a primary consideration". Article 37 recognises the right of every child not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and also states that children shall not be subjected to capital punishment or imprisonment for life without the possibility of release. That article also recognises that a child can be deprived of his or her liberty, but prescribes that where that is done, *inter alia*, they are to be treated with humanity and respect, and are to be separated from adults. By article 40, states are mandated to, among other things, promote laws, procedures, authorities and institutions, specifically applicable to children accused of crimes; establish an age of criminal responsibility; devise appropriate measures for dealing with children without resort to judicial proceedings, such as supervision, probation and counselling orders, and enrolment in educational and vocational training programmes.

[75] Provisions were made under the CCPA to ensure compliance with Parliament's CRC obligations. A 'child' is defined in section 2 of the CCPA, as in the CRC, as a person below the age of 18 years. Parts I, II and III of the CCPA detail provisions with regard to the care and protection of children. They speak to the creation of the Office of the Children's Advocate to act in legal matters on behalf of children; the creation of a

Children's Register and Children's Registry to report the abuse of children; principles related to the treatment of children; and the proper function of places licensed to house children. Part V deals with the administration and enforcement of CCPA provisions.

[76] However, the most relevant part of the CCPA for these purposes is Part IV. It relates to children who are detained or brought before the court. According to section 63, it is conclusively presumed that children under the age of 12 years cannot be guilty of an offence. Where a person is brought before the court, and it appears to the court that that person is a child, an enquiry shall be made into that person's age (section 64). In dealing with any child brought before the court, the court must have regard to the best interests of the child (section 65). Pursuant to section 66, children are to be separated from adults when they are detained. Section 68 empowers any court to remand a child who has attained the age of 14 years to facilities, including adult correctional centres, if that child is of so unruly or depraved character that that child cannot safely be detained in a juvenile remand centre. Where a child is placed before the court for any reason, the parent or guardian of a child must be in attendance at court (section 69).

[77] Section 71 speaks to the establishment and constitution of the Children's Court. That section further states that where a child pleads or is found guilty in the Children's Court, in sentencing that child, the court must have regard to that child's best interests. A charge made jointly against a child and a person who has attained the age of 18 years cannot be heard in the Children's Court (section 71(1)).

[78] The CCPA makes a distinction between a child below and above the age of 14 years. Section 72(6) provides that a child below 14 years who commits an offence, and a child who has attained the age of 14 years, but has not committed an offence specified in the Fourth Schedule, shall have their matter finally determined in the Children's Court, without prejudice. The offences in the Fourth Schedule are:

> "1. Murder or manslaughter.
>
> 2. Treason.
>
> 3. Infanticide.
>
> 4. **Any offence under sections** 8, 13, 14, 15, 16, 17, 18, 19, **20,** 23, 24, 25, 29, 30, 31, 44, 48, 50, 51, 55, 56, 58, 59, 60, 61 or 69 **of the Offences Against the Person Act**.
>
> 5. Any offence under section 37 or 43 of the Larceny Act,
>
> 6. **Any firearm offence as defined in the Gun Court Act**." (Emphasis supplied)

Where a child who is 14 years and older is charged with an offence in the Fourth Schedule, committal proceedings are to be held in the Children's Court. The Children's Court should commit the child for trial in a court of competent jurisdiction once it is satisfied that the child should be so committed.

[79] Where a child is tried before any court, which is not a Children's Court, that court shall have all the powers of the Children's Court (section 74). A child charged with offences other than murder, may have his matter remitted to the Children's Court for trial or for further consideration, with the Children's Court acting either for or in place of the remitting court.

[80] We shall now deal with the provisions of the CCPA that specifically relate to the sentencing of children. Section 76 provides that where a child has been found guilty of any offence before a Children's Court, that court may, subject to the provisions of the Act, make orders:

1. dismissing the case;
2. for probation;
3. for supervision not exceeding three years;
4. committing the child to the care of a fit person;
5. with the consent of a parent or guardian, imposing a curfew, mediation or community service order;
6. sending the child to a juvenile correctional centre;
7. for the payment of a fine, damages or costs by the child's parent or guardian;
8. for the parent or guardian to enter into a recognisance of good behaviour of that child; and
9. directing that the child be detained in places including adult correctional centres for such time not exceeding the period in which that chid could have been detained in a juvenile centre.

[81] In spite of the provisions of article 37 of the CRC, section 78 of the CCPA provides that although the death sentence is not to be imposed on a child, "in place thereof", that child shall be liable to be imprisoned for life. Once that child has attained

the age of 14 years, he or she can be detained in an adult correctional facility, and "the court **may** specify a period which that child should serve before becoming eligible for parole". A child cannot be imprisoned for failing to pay a fine, damages or costs. Interestingly, where a child under the age of 14 years has committed any offence specified in the Fourth Schedule, and in the court's view, there is no other suitable method of sentencing the child, the court may sentence the child to be detained in such place (including an adult correctional centre) for a period not exceeding 25 years (see sections 78(5) and (6)). A child under the age of 12 years can be sent to a juvenile centre if the court is satisfied that that child cannot suitably be dealt with otherwise.

[82] In the light of the provisions of the CCPA discussed above, it is clear that the legislature has given due and important consideration to the vulnerability of children in order to afford them special treatment under the law. It is also clear that the legislature considered the provisions of the CRC, and adopted or reformulated certain provisions of the CRC to accord with our own Jamaican reality. Even before the CRC, Parliament would have been cognisant of the Beijing Rules which stipulate that imprisonment is a measure of last resort and only for the shortest possible time; and yet, that principle has not been given special statutory force in Jamaica in the CCPA.

[83] Indeed, the most significant factor of the CCPA, for these purposes, is that it clearly defines numerous instances in which imprisonment or detention of children (even at adult correctional facilities) for extended periods of time may be appropriate. While the CRC makes a blanket consideration with respect to all persons under the age of 18, the CCPA recognises a distinction between children under the age of 14 years,

and those 14 years and over. A child under the age of 14 years can be imprisoned for up to 25 years. Children 14 years and older can be imprisoned for life, and it is within the court's discretion to specify a time period before the child would be eligible for parole, and the length of time before the child is so eligible. The CCPA accepts that children may be subject to different sentences than adults, and, where imprisoned, should be separated from adults, but it enables court's to detain children at adult correctional facilities. The CCPA has also removed from the jurisdiction of the Children's Court, offences specified in the Fourth Schedule that are committed by a child 14 years and older (see paragraph [78] herein), and murder, where it is committed by a child of any age (see section 75).

[84] Since TM was 16 years old at the time he committed the offence, and has been charged with two offences specified in the Fourth Schedule to the CCPA (wounding with intent and illegal possession of firearm), he is liable to a sentence of imprisonment for life. In the light of Parliament's stipulation that children under the age of 14 years may be imprisoned for up to 25 years and those over the age of 14 years may be imprisoned for life, we cannot say that the imposition of a mandatory minimum sentence of 15 years on a child for a firearm related offence (as stated in the Fourth Schedule) is grossly disproportionate.

[85] The Gun Court Act is yet another example of Parliament's restriction on the special consideration that ought to be given to children. Section 5(4) of the Gun Court Act stipulates that:

> "Subject to section 8, the provisions of this section [with regard to the jurisdiction of the Gun Court], shall have effect **notwithstanding anything to the contrary contained in the Child Care and Protection Act** or any other enactment." (Emphasis supplied)

This provision is restated in sections 8C(4) and 8F(4) with regard to any division of the Gun Court throughout Jamaica.

[86] Section 8 of the Gun Court Act provides that:

> "(1) **Notwithstanding anything to the contrary in the Child Care and Protection Act or any other enactment but subject to subsections (2) and (3), any person who is guilty of an offence under section 20 of the Firearms Act, or an offence specified in the Schedule shall, upon conviction thereof by the Court, be liable to imprisonment, with or without hard labour, for life**.
>
> (2) Where a child is charged before the Court with any offence referred to in subsection (1), then unless he is charged jointly with a person who has attained the age of fourteen years, the Court shall remit the case to a Children's Court to be dealt with in accordance with the provisions of the Child Care and Protection Act.
>
> (3) Where a child is charged jointly with a person who has attained the age of fourteen years with an offence referred to in subsection (1), the Court shall, in dealing with the child, have only such powers as are exercisable by a Children's Court under the Child Care and Protection Act.
>
> (4) If a young person is, pursuant to subsection (1), sentenced to imprisonment, the Court may order that he be detained in such place, other than an adult correctional centre, and on such conditions, as the Minister may direct and, while so detained, he shall be regarded as being in legal custody.
>
> (5) The trial of any person, and its determination, in pursuance of the foregoing provisions of this section shall

> be without prejudice to his being charged, proceeded against, convicted or punished for any offence whatsoever for which he could not have been convicted on such trial.
>
> (6) The Minister may, by order, amend the Schedule and any such order shall be subject to affirmative resolution.
>
> (7) In this section the expression 'child' has the t meaning assigned to it in the Child Care and Protection Act." (Emphasis supplied)

The true effect of section 8 was discussed in **CP v R** [2018] JMCA Crim 43 and **NF v R** [2020] JMCA Crim 4, both decisions of this court.

[87] In **CP v R**, it was held that pursuant to section 8(2) of the Gun Court Act, the judge of the Gun Court had no jurisdiction to deal with that child, since that child had not been charged jointly with anyone for the offence of illegal possession of firearm, simpliciter. The matter was therefore remitted to the Children's Court to be dealt with in accordance with the provisions of the CCPA, which stipulate that that court must conduct proceedings for the child's committal to the Gun Court (section 72(7) of the CCPA).

[88] **NF v R** was a referral to this court from a judge in the High Court Division of the Gun Court. He posed two questions having regard to the decision in **CP v R**. The first related to whether the Gun Court had jurisdiction to hear cases involving children 14 years and older, regardless of whether they were charged alone. In answer to that question, the court found that the Gun Court had jurisdiction to determine matters involving children 14 years and older, who are charged with firearm offences, whether charged alone or jointly with another person also 14 years and older. As was the

situation in **CP v R**, where a child who is 14 years and older is charged alone with a firearm offence, that child must be placed before the Children's Court for it to hold proceedings for committal to the Gun Court. The Children's Court retains jurisdiction over a child who is under 14 years old and is charged alone with certain firearm offences. But where the child is charged with a person 14 years and older, the Gun Court would have jurisdiction over that case.

[89] The second question was whether the Children's Court has the jurisdiction to determine matters involving children 14 years and older, who have committed offences under the Firearms Act. In answer thereto, the court found that the Children's Court has no jurisdiction to determine 'firearm offences', which is among the offences listed in the Fourth Schedule of the CCPA, which had been committed by a person who had attained the age of 14 years (see sections 72(6) and (7) of the CCPA). 'Firearm offence' is defined in section 2 of the Gun Court Act as:

> "(a) any offence contrary to section 20 of the Firearms Act;
>
> (b) and any offence whatsoever involving a firearm and in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act."

[90] In relation to sentencing a child, section 8(1) of the Gun Court Act stipulates that a child who is 14 years and older, whether charged alone or jointly with another child who is 14 years and older or with an adult, with an offence contrary to section 20 of the Firearms Act or one specified in the Schedule to the Gun Court Act, and has been

committed to the Gun Court for trial, if convicted, is liable to imprisonment for life with or without hard labour, "no provision having been made exempting such a child in sections 8(2) or (3) of the Gun Court Act" (see paragraph [39] of **NF v R**).

[91] TM was charged alone with, *inter alia*, the offence of illegal possession of firearm pursuant to section 20 of the Firearms Act. He is therefore liable to a sentence of imprisonment for life with or without hard labour "notwithstanding anything to the contrary in the Child Care and Protection Act". Section 8 of the Gun Court Act would also be excluded from scrutiny, pursuant to section 13(7) of the Charter. In those circumstances, we cannot say that a sentence of 15 years imprisonment is grossly disproportionate.

[92] Interestingly, it is the Firearms Act which provides a specific exemption to children. Section 51 makes imprisonment compulsory for adults found guilty of an offence under that Act related to a prohibited weapon (as defined in section 2), but specifically excludes children from compulsory imprisonment for those offences. However, children are not excluded from the mandatory minimum sentence of 15 years imprisonment that would be imposed if that child was charged under sections 24 or 25 of the Act. This is therefore an undeniable expression of Parliament's intent to make mandatory minimum sentences applicable to children.

[93] No doubt, in response to public outcry with regard to the imposition of the mandatory minimum sentences, Parliament passed legislation that would enable a court to prescribe sentences below the mandatory minimum stipulated in a statute. That

statute is the Criminal Justice (Administration) (Amendment) Act, 2015 (CJAAA) promulgated on 27 November 2015. Section 42K states as follows:

> "(1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall-
>
> (a) sentence the defendant to the prescribed minimum penalty; and
>
> (b) issue the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.
>
> (2) A certificate issued to a defendant under subsection (1) shall outline the following namely –
>
> (a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;
>
> (b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating reasons therefor; and
>
> (c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.
>
> (3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may-

(a) impose on the defendant a sentence that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed on him, which the defendant shall serve before becoming eligible for parole."

[94] It is evident from a perusal of section 42K of the CJAAA that the process to obtain a sentence below the mandatory minimum is rather stringent. The first stage of that process does not permit the sentencing judge to impose a sentence below the mandatory minimum but gives that power to a judge of the Court of Appeal. If the sentencing judge believes that having regard to the particular circumstances of that case, the mandatory minimum sentence is manifestly excessive and unjust, then the sentencing judge must impose the prescribed minimum penalty but issue a certificate to the defendant to seek leave to appeal to a judge of the Court of Appeal. The certificate issued must state that the defendant had been sentenced to the prescribed minimum penalty for the offence; the reasons why the court believes that in the circumstances of the particular case, the imposition of a mandatory minimum sentence would be unjust; and the sentence that that judge would have imposed on the defendant had there been no prescribed minimum penalty. If the judge of the Court of Appeal believe that there are "compelling reasons" that would render the mandatory minimum sentence unjust or manifestly excessive, then he or she **may** reduce the sentence below the prescribed minimum period to a sentence that is not less than two-thirds of the sentence imposed on the defendant.

[95] Section 42H stipulates other restrictions relative to reducing a sentence on account of a guilty plea. It states that in deciding the reduction the court must have regard to:

> "(a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;
>
> (c) any factors that are relevant to the defendant;
>
> (d) the circumstances surrounding the plea;
>
> (e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;
>
> (f) whether the defendant has any previous convictions;
>
> (g) any other factors or principles the Court considers relevant."

[96] Section 42L(1) makes provision for a person convicted of an offence punishable by a prescribed minimum penalty, and who has been sentenced to a term that is equal to the prescribed minimum penalty for that offence, before the appointed day of 27 November 2015, to apply to a judge of the Court of Appeal to review his sentence. This application should be made on grounds that having regard to the particular circumstances of his case, the sentence imposed was manifestly excessive and unjust. However, section 42L(2)(a) states that this application must be made within six months after the appointed day or such longer period as the minister may by order prescribe.

TM was sentenced long before the promulgation of this piece of legislation. Additionally, TM's case is now being decided at a time that is well outside the six months stipulated in the CJAAA, and so he would not be able to avail himself of the procedure stated therein.

[97] It therefore seems that the CJAAA added, to a limited extent, a discretionary component to the imposition of mandatory minimum sentence. It seems to us, that this is a recognition by Parliament that the element of the court's discretion to apply a sentence below the mandatory minimum prescribed was an option that had not existed before. As indicated, the strict manner in which the benefit of a reduction in sentence may be sought by a defendant, the stipulation that a reduction cannot be given that would be less than two-thirds of the sentence imposed, and the fact that when there is a plea of guilty, regard must be had to the factors in section 42H, represent other indications by Parliament to limit the circumstances and instances in which the reduction of sentences is given.

[98] In our opinion, it is fair to say, in the light of all the statutory provisions, Jamaica's laws with regard to the sentencing of children may be described or criticised as being rather archaic, strict and not in conformity with modern pronouncements of children's rights, which have been accepted internationally. There may yet come a time when these laws have to be reviewed and changed. But, as the Privy Council stated in **Watson v R**, it is within Parliament's prerogative whether to make those changes, and it is not for the court to impose its own moral predilections.

Consideration of proportionality having regard to the offence, the offender and the particular circumstances of the case

[99] The issue of proportionality can only be considered against the backcloth of what the appropriate sentence would have been in the circumstances of this case. The mandatory minimum sentence imposed was only relevant to the offence of wounding with intent and inapplicable to the offences of illegal possession of firearm and robbery with aggravation. For the charge of wounding with intent we wish to give some indication as to what the sentence would have been if individuation and proportionality were considered. That approach is applicable to our consideration of the appropriate sentences to be imposed on the charges of illegal possession of firearm and robbery with aggravation.

[100] Although not available to the learned judge at the time of sentencing, the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines), nonetheless reflect the range of sentences normally imposed for particular offences. The Sentencing Guidelines stipulate that the starting point for wounding with intent using a firearm is 15 years and the maximum sentence is life imprisonment. In **Carey Scarlett v R** [2018] JMCA Crim 40, Brooks JA, on behalf of the court, after analysing a number of cases in which sentences were imposed for wounding with internet using a firearm, opined that the normal range for that offence is 15-20 years. We would also adopt that range.

[101] The next course would be to choose a starting point within that range. In **Carey Scarlett v R**, Brooks JA stated that on conviction for wounding with intent using a

firearm, a sentence of 15 years was at "the low end", and a sentence of 20 years was "the high end of the normal range". In this case, we would choose a starting point of 15 years, since TM was a child at the time he committed the offences, and having regard to the provisions of the CCPA.

[102] There are many aggravating features in the instant case. TM was charged with three offences, two of which involved violence. The incident occurred at night while the complainant was on his way home. TM was together with another person who was also armed with a firearm. In fact, in relation to robbery with aggravation, he used the firearm to threaten the complainant into giving him his cellular phone. There was a deliberate intent to cause harm as after stealing the complainant's phone, and the complainant ran, TM used the firearm to fire several shots at the complainant which caused injury and resulted in him being hospitalised. He continued to fire shots at the complainant even after he had fallen to the ground while running. TM was seen collecting spent shells after the shooting in a perceived attempt to cover his tracks. The impact that this incident had on the complainant is not to be overlooked, as the complainant is suffering from psychological distress and a disruption in his studies as a result of the incident. These aggravating features have the effect of increasing TM's sentence substantially.

[103] However, we must also consider mitigating features in the light of the provisions of sections 71(10) and 74 of the CCPA. TM was 16 years at the time of the commission of the offence. He lived with his mother who is blind and unable to walk, and he had assumed responsibility for her. He had no father figure. He had not completed his high

school education having been expelled from school, for having consensual sexual intercourse with a student. He lived in a rather vulnerable community, and that may explain why the community and his mother had raised concerns in the SER with regard to his associations in that community and the Grants Pen Community. Although they had agreed that those associations have had negative influences on him, they also said that they had spoken to TM about his associations on numerous occasions. TM also had no previous convictions. These factors would result in a reduction of his sentence.

[104] After balancing the aggravating and mitigating factors, we found that the aggravating factors far outweighed the mitigating factors. As a consequence, we find that a provisional sentence of 17 years' imprisonment, had TM gone to trial, would have been proportionate and appropriate in the circumstances of the offences and of TM.

[105] TM pleaded guilty to all three offences after a trial had commenced but before verdict was given. He was charged, pleaded guilty to all three offences and sentenced before the enactment of the CJAAA. He would therefore have been entitled to a discount of up to one-third of his sentence on the basis of his guilty plea. However, the fact that he had not pleaded guilty at the earliest opportunity, indeed, he did so after the trial had commenced, he would be "entitled to less than the usual one-third" (see **Joel Deer v R** [2014] JMCA Crim 33). Additionally, the transcript is silent with regard to the circumstances of TM's arrest and charge, and whether the complainant's cellular phone had been found in his possession. We are therefore unable to make a full assessment as to the true extent of TM's culpability and the full circumstances resulting

in his change of pleas. In these circumstances, and having regard to the effect on the complainant, we would afford him a discount of 20% on his sentence.

[106] The sentence that would therefore have been imposed on TM was imprisonment for 13 years and six months.

[107] However, TM ought to receive a further reduction in sentence on account of time he had spent in custody prior to being sentenced. In his plea in mitigation, his counsel stated that he had been in custody since September 2012 up to the time of sentencing on 10 May 2013. That is a period of eight months. This would mean that TM's sentence should be further reduced by eight months. So, a sentence of imprisonment for 12 years and 10 months would have been appropriate in all the circumstances.

[108] In all those circumstances, and after consideration of all these factors, we could not therefore say that, in any event, the mandatory minimum sentence of 15 years imprisonment on count three, imposed for wounding with intent, using a firearm, was "grossly" or "wholly" disproportionate, nor was it manifestly burdensome or excessive.

Sentences to be imposed for illegal possession of firearm and robbery with aggravation

[109] As indicated, the sentences imposed for illegal possession of firearm and robbery with aggravation, must be set aside on account of errors in sentencing by the learned judge.

[110] There is no basis for us to deviate from the normal range for sentencing for illegal possession of firearm pursuant to the Sentencing Guidelines, which is 7-15 years,

with a starting point of 10 years. On account of the factors stated above with regard to the aggravating features, we would also increase his sentence substantially, and reduce it on account of the mitigating features. The 20% discount for TM's guilty plea would further reduce his sentence. The resulting sentence would therefore be nine years and eight months. With consideration being given to the eight months in custody, the sentence to be imposed would be nine years' imprisonment on count one for illegal possession of firearm.

[111] We would also utilise the normal range for sentencing for robbery aggravation which is 10-15 years, with a starting point of 12 years, as stated in the Sentencing Guidelines. The aggravating features would also increase this sentence substantially, and reduce it somewhat on account of the mitigating factors stated above. A 20% reduction would be afforded TM for his guilty plea. The resulting sentence would be 11 years. When the eight months that TM spent in custody prior to being sentenced is deducted, the sentence to be imposed on him in respect of count two for robbery with aggravation would be 10 years and four months' imprisonment.

Should a hearing have been held in keeping with R v Newton?

[112] At the end of the Crown's submissions, counsel queried whether a hearing pursuant to **R v Newton** was required. This was because there was a divergence of accounts given by the complainant in his evidence and by TM in the SER. The complainant's account is stated at paragraphs [3]-[7] herein. However, in the SER, TM told the probation officer that he was travelling in a motor car with his cousin and another person on their way to a party when his cousin signalled that person (who was

the driver) to stop. TM and his cousin came out of the car and it was the cousin who pointed the gun at the complainant's head and demanded his cellular phone, and fired several shots at the complainant when he ran causing him to be injured. He, TM was not the shooter.

[113] Pursuant to **R v Newton**, one of the options open to a judge who is faced with divergent accounts is to hear evidence on both sides and decide on the issue. The learned judge heard the complainant's evidence, and Crown Counsel is correct in her assertion that the learned judge seemed to have accepted it as that was the evidence he had used in sentencing TM. Additionally, this alternative view stated as having been given by TM in the SER was not proffered to the court by TM's counsel at the time the plea was taken or in mitigation. In any event, section 20(5) of the Firearms Act also addresses this issue. By virtue of that provision, once TM was in the company of a person who used a firearm to commit a felony, in the absence of a reasonable excuse, he must be deemed to also have been in possession of the firearm if the circumstances give rise to the reasonable presentation that he was present to aid or abet the commission of that felony. That section would have applied to TM in conjunction with the common law principle of joint enterprise.

[114] Accordingly, there would have been no requirement for the learned judge to conduct a formal hearing to decide which version he should accept, because TM did not advance his account of the incident that contradicted the complainant's evidence that was placed before the learned judge. The basis of the pleas was therefore the version of events as advanced by the prosecution through the evidence of the complainant.

Disposition

[115] In the light of the foregoing, we make the following orders:

1. The appeal against sentence is allowed in part.
2. The sentence of 15 years' imprisonment imposed on count one for illegal possession of firearm is set aside, and substituted therefor is a sentence of nine years' imprisonment.
3. The sentence of 15 years' imprisonment imposed on count two for robbery with aggravation is set aside and substituted therefor is a sentence of 10 years' and four months' imprisonment.
4. The appeal is dismissed with regard to the sentence imposed on count three for wounding with intent, and the mandatory minimum sentence of 15 years imprisonment is affirmed, it not being unconstitutional and or disproportionate.
5. The sentences are reckoned as having commenced on 10 May 2013, the day on which they were originally imposed, and are to run concurrently.