[2021] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 38/2017

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

DAL MOULTON v R

Mr Richard Lynch for the applicant instructed by Bailey Terrelonge Allen

Mr Jeremy Taylor and Janek Forbes for the Crown

29, 30 October 2019 and 22 April 2021

EDWARDS JA

[1] We heard this matter as a renewed application for leave to appeal conviction and sentence, the applicant having been refused leave by a single judge of appeal. For the reasons set out below, we have refused the application for leave to appeal conviction, but, have set aside the sentences imposed by the learned trial judge, and substituted therefor, the sentences set out at paragraph [104] of this judgment. The circumstances leading to the applicant's conviction and sentence are set out below.

Background

[2] The applicant, Dal Moulton, was tried and convicted on an indictment containing two counts for the offences of illegal possession of firearm and wounding with intent.

This was before a judge sitting alone at the Western Regional Gun Court, in the parish of Saint James. He was sentenced to 20 years' imprisonment at hard labour on each count, to run concurrently.

[3] The evidence led at the trial was that, on 3 May 2016, at about 5:30 pm, after visiting a relative in Crawle District, Salt Spring in the parish of Hanover, the complainant was driving out of a lane when he saw a silver Toyota Corolla motor car coming into the said lane. The car stopped, then reversed out of the lane. As the car was about to disappear from view over a hill, the complainant increased his speed to keep it in sight, as his suspicions were aroused having previously been shot in the same community. The car turned and headed in the same direction in which the complainant was going. The complainant drove slowly behind this car, but when the car reached the intersection to turn onto the main road, it pulled over to the left and stopped. The complainant then saw the applicant and another man exit the car from the left side - the other man from the front and the applicant from the back. The applicant had a firearm which he fired at the complainant as he was about to drive past their vehicle. The complainant received gunshot wounds to both hands as he sped away.

[4] The complainant did not know the applicant before, but was able to identify him having seen his face for about ten to 15 seconds, from about 15 to 20 feet away, when the applicant emerged from the car, and before he had pointed the gun at the complainant. The complainant did not see the second man clearly as that man had gone towards the front left of the car, whilst the applicant had gone to the back near to

the trunk of the car. However, the complainant was able to say that the other man was shorter than the applicant.

[5] The complainant drove to the Green Island Police Station in Hanover, and from there, the police took him to the Lucea Public Hospital. He subsequently gave a statement to the police in which he described the man who had come from the back left of the motor vehicle and shot him.

[6] On 10 June 2016, the applicant, along with his cousin Andre Clarke, was taken into custody. The complainant later identified the applicant at an identification parade as the man who had shot him on 3 May 2016. The applicant was, thereafter, charged in relation to the incident.

[7] At his trial, the applicant gave sworn evidence, in which he claimed to have been elsewhere at the time the complainant said the incident occurred. The applicant's evidence was that, on 3 May 2016, he was in Alexandria, in the parish of Saint Ann assisting with construction work being done on his cousin's house, from in the morning until about 6:00 pm in the evening. He said that he had gone there to live from sometime in 2015, in order to assist his cousin, Adrian Clarke, who had had a broken leg. He denied shooting at the complainant or being in the company of anyone who shot at the complainant, and said that he has never been to Crawle District, even though his cousin, with whom he was close, grew up there.

[8] He also gave evidence that on 31 May 2016, he had gone to court with his cousin Adrian Clarke, who had been charged in relation to another matter involving the

same complainant, and that it was after the complainant saw him there, interacting with Mr Clarke, that the complainant later pointed him out at the identification parade held on 16 June 2016.

Grounds of appeal

[9] At the hearing of this matter, counsel for the applicant, Mr Lynch, was permitted to abandon the original grounds of appeal and to argue supplemental grounds of appeal as follows:

> "1. The learned trial judge failed to deal, adequately, with specific weaknesses in the visual identification evidence and failed to address, sufficiently, the material inconsistencies that cast doubt on the reliability of the said visual identification evidence. Consequently, the learned trial judge failed to assist the jury mind adequately or properly and this deprived the Applicant of a fair trial and resulted in a miscarriage of justice.
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> 2. The learned trial judge [sic] directions on alibi were inadequate coupled with the basis for the rejection of his defence amounts to a non direction resulting in inevitable prejudice to the Applicant resulting in a miscarriage of justice.
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> 3. The learned trial judge erred in law by permitting inadmissible hearsay evidence to be led as it relates to information received to support the arrest and investigation of the [applicant] and the learned trial judge failed to give any or adequate directions as to the effect of that evidence and how it should be approached. As a result, the [applicant] suffered a grave miscarriage of justice.
>
> 4. The sentence of the court was manifestly excessive."

[10] These grounds raise issues regarding the manner in which the learned trial judge dealt with the weaknesses in the identification evidence, alibi, inadmissible hearsay evidence and sentence, all of which will be considered separately.

[11] Section 14(1) of the Judicature (Appellate Jurisdiction) Act (JAJA) empowers this court when dealing with criminal appeals as follows:

> "14 - (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or **that on any ground there was a miscarriage of justice**, and in any other case shall dismiss the appeal:
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> Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." (Emphasis added)

Weaknesses in the identification evidence (ground one)

[12] The main complaint in this ground surrounds how the learned trial judge dealt with the inconsistencies in the complainant's evidence. The learned trial judge was sitting alone without a jury, but, nonetheless, was required to show in plain language that she applied the relevant law, took into account relevant aspects of the evidence, and resolved any inconsistency and discrepancy existing in the evidence. What she could not do was remain 'inscrutably silent' (see this court's decision in **Andrew Stewart v R** [2015] JMCA Crim 4 at paragraph [27] and the Privy Council decisions on the point cited therein).

[13] In her summation, the learned trial judge correctly identified that the main issue in the case was the identification of the shooter. At page 233 of the transcript, she said this:

> "The major issue surrounds the identification of the shooter. And I have to consider that identification evidence of [sic] [the complainant] of Mr. Moulton…was the only evidence put forward by the Crown in relation to the attack, because there was no supporting evidence of the [sic] this identification."

[14] Immediately following that statement, the learned trial judge warned herself that the identification evidence was to be treated with 'special caution', and correctly considered that the crux of the matter was whether the complainant had had an opportunity to properly view his assailant, in order to later be in a position to correctly identify him. No complaint was made to this court in that regard.

[15] Indeed, Mr Lynch agreed that the main issue in the case was the correctness of the visual identification of the applicant by the complainant. He submitted, nevertheless, that although the material inconsistencies in the evidence given by the complainant were dealt with by the learned trial judge, she fell into error when she incorrectly proffered an explanation for the inconsistencies. This explanation, he said, did not come from the witness. Counsel argued that those inconsistencies, that is, the complainant's position when the men came out of the car, as well as the length of time he had to observe them, went to the root of the Crown's case as it related to the correctness of the identification.

[16] It was submitted that the complainant's evidence in court about the sequence of events that would have given him an opportunity to view the men he said came out of the left side of the car, was different from the statement he had given to the police. Counsel argued that based on the complainant's statement to the police, he would not have had an opportunity to see the men, as it would have amounted to a fleeting glance.

[17] Counsel contended that there was stark conflict between what was said in evidence and what had been said in the statement to the police, and that the explanation provided by the judge amounted to "well-meaning conjecture". In addition, he said, the evidence was misquoted by the learned trial judge. This, counsel submitted, caused substantial prejudice to the applicant and resulted in a miscarriage of justice.

[18] Counsel further contended that the learned trial judge erred in her conclusion that the inconsistency did not affect the complainant's credibility. He submitted that the learned trial judge failed to appreciate the magnitude of such an inconsistency and the impact it would have had, in that, it meant that there was less time for the complainant to view the man who had come out of the back of the car, and it cast doubt on his credibility and the reliability of his identification evidence.

[19] We do not agree with counsel's contentions. The learned trial judge was cognizant of what was required of her in assessing the complainant's evidence as evidenced by her statement at page 239 of the transcript, where she stated:

> "As I have indicated the issue, the major issue is identification, you have to consider the weaknesses and the strengths, and Mr. Paris [counsel for the accused] has strenuously pointed out to the court, what he terms weaknesses in the identification evidence, for this court to consider in assessing his evidence. As I say, [sic] before Mr Moulton was [not] known to [the complainant] before. So, I have to now assess what [the complainant] has said about the circumstances on [sic] which he saw Mr Moulton."

[20] The learned trial judge thoroughly examined the complainant's evidence as to his description of his assailant, the length of time for which he saw the applicant, and the sequence of events up to the time the complainant said the shooting started. She also dealt with the complainant's state of mind before the shooting started, and the fact that he became suspicious when he saw the assailant's car. In relation to his state of mind whilst driving behind the car the learned trial judge stated at page 245:

> "...he said he was suspicious, so he would have been on high alert and the Court has to bear that in mind in also assessing the state of mind of [the complainant]."

[21] The judge correctly discerned the significance of the inconsistency between the evidence of the complainant in court and his statement to the police. This is how she put it at page 245 of the transcript:

> "However, Mr. Paris also mounted an objection or should I say mounted a challenge to [the complainant's] version of how he said the issue, the sequence occurred. Because of statements, inconsistent statements made to the police. And this challenge had to do, one, with where he was when the men came out of the vehicle, because Mr. Horn has told this Court he was not yet beside the vehicle and this is what would have given him the opportunity to view the man in particular that he said came from the back. Because, based on his evidence he would have seen the two men come out

> and the accused, the taller one, then as he was about to pass, raised his hand with the gun and then the firing."

[22] The learned trial judge noted that this evidence given in court, on oath, was inconsistent with what was contained in the statement given to the police by the witness. This, she said, was even more challenging to the issue of his credibility as it impacted the strength of the identification evidence. She identified the fact that, in court, he had said the men came out of the car before he reached to them at the intersection, but in his statement to the police he had said that he reached up to the car, and as he was about to turn right at the intersection, the two men alighted from the car. The learned trial judge showed that she understood the impact of this inconsistency on the identification evidence, when she said at pages 249 to 250 of the transcript, that:

> "...Mr. Paris is asking the court to scrutinize that very carefully because if that is so, he would not have had sufficient opportunity to view any of these men before the firing started. It would have been just one rapid thing, he drive [sic] up by the car, the men came out, fire at him, he speeds away to get away…"

[23] The learned trial judge then looked for and examined the explanation given by the complainant as to this inconsistency. At pages 250 to 251 of the transcript, she said:

> "In the explanation for that inconsistency he said the man did not raise the gun as he came out of the car, he raised the gun when he reached at the back of the vehicle and started to fire. And what he said in the police statement is not that sequence, he came out and raise the gun and fire, and Mr. Paris put to him, 'you didn't mention about seeing the man first before you saw the gun', and his answer was,

> 'there was no sequence, I didn't give the full sequence. I did, however, tell the police about which hand, not hands. "I don't know what the police write'…The issue is the inconsistency as to where he was when the men came out the car. So, this is crucial."

[24] The learned trial judge agreed with the submission that if the men had come out of the car and started firing as the complainant pulled up beside them, he would have had less than a fleeting glance at them. However, in resolving this inconsistency, the learned trial judge considered the physical evidence, the amount of spent shells on the scene, and the bullet holes found in the complainant's car, which she found supported that a shooting had taken place, and which was consistent with the account given by the complainant that he was shot at as he drove past the parked car. She found, however, that it did not assist with the issue of identification. The learned trial judge then applied her jury mind in resolving the inconsistency in the complainant's account, and said at page 255 of the transcript that:

> "So, this takes me back to [the complainant's] evidence itself and what is [sic] inconsistent statements, he gave credible explanation that it was not a sequence, he said he didn't give the full sequence to the police. In examining this, I consider this, that if it were the intention of men in the 'King fish' to shoot or shoot at [the complainant] they would not have waited until he came alongside them to position themselves out the car, because if this car is now pulling up beside theirs and they are coming out at that point to shoot at him, the possibility is that [the complainant] could have moved away without being injured, because he is in a moving car and they would just have come up, they would have to come out and position themselves with the firearm to fire at him. So, I consider that it makes no sense that you are going to lay-waiting [sic] someone and you wait until he is passing you before you actually emerge from the car."

[25] This did not amount to "well-meaning conjecture" by the learned trial judge, but was a simple application of common-sense, which juries are constantly asked to apply. Based on that, she accepted the complainant's evidence as to how the "events had unfolded", and accepted that based on that sequence, he had sufficient time to properly identify the applicant.

[26] Counsel for the applicant also argued that the inconsistency in the evidence concerning the presence and the role played by the man who came out of the front passenger side of the vehicle was material to the case. Counsel pointed to the fact that the complainant, in his evidence, said he did not see the second man properly, but in his statement to the police, he had said that this man had fired a gun at him as well. Counsel also pointed to the fact that, in cross-examination, the complainant said that the second man did not have a gun and did not fire at him, and he maintained that he had never said that before. The applicant contended that this was a material inconsistency that substantially affected the credibility of the complainant and should have caused some doubt as to who shot the complainant.

[27] Once again, we do not agree with counsel's contentions. The learned trial judge did examine that inconsistency in the complainant's evidence. She reviewed the complainant's evidence concerning the man who came out of the front of the vehicle, and the fact that the complainant had told the police, in his statement to them, that "[t]he man who came out of the front also had a gun and fired at my car". She then compared that with the complainant's evidence in court, that the second man was

shorter and had gone towards the front left side of the car, and that he could not see what that man was doing. She considered that the complainant had denied telling the police that the second man also had a gun and fired at him.

[28] After reviewing that part of the complainant's statement to the police, which had been tendered into evidence, in relation to this inconsistency, the learned trial judge stated the following, at pages 246 to 249 of the transcript:

> "And so, this is directly in contrast to what he is telling this Court. But he also indicated that he did say that he would not be able to identify the second man and neither the colour of his clothing. So, yes, it is an inconsistency and it is either reflecting his ability to recall what he described to the police or it can be general unreliability.
>
> So, in examining whether it's an inconsistency you have to examine what he has told the court as he has told the police that the man, he is saying is Mr Moulton was the taller one, he appear [sic] to be focusing on the taller one... And he told the court the other man was shorter and he did give a description of the taller one to the police but was unable to give a description of the second one...
>
> It's not in dispute that he did give the police a description of the one that he described as the taller one and so I do not find that this inconsistency, about the second man, did prove to be any barrier to my assessment of his credibility."

[29] She accepted that the complainant had been able to properly identify the applicant and give a description of him, but had been unable to identify the shorter man or give a description of him. She also examined the description of the applicant given to the police by the complainant, and found that "the description is one that is generally applicable to Mr Moulton". Having examined the various challenges to the complainant's

evidence on the identification of the applicant, the learned judge said, at page 263 of the transcript, that:

> "When I consider the evidence of [the complainant] I accept him as a witness; I saw and I observed him based on the fact that he gave a description of this man, based on the time of day, based on the circumstances of his observation, I do not find that it was a fleeting glance, or at the time he would have seen the man would have been in difficult circumstances..."

[30] We accept as correct, the submission by counsel for the Crown, that the learned trial judge, in accepting that the identification of the applicant was properly made, was not in error, as she highlighted the aspects of the evidence which supported it, as well as the weaknesses, and warned herself appropriately based on the circumstances. We found also that, the submission of counsel for the Crown that the issue of the complainant's credibility was a matter to be resolved by the learned trial judge whilst being mindful of the appropriate warnings, is also correct. The learned trial judge examined the applicant's defence and then revisited the prosecution's case, demonstrating how she resolved the issues in coming to her findings of fact.

[31] We further agree with counsel for the Crown that the learned trial judge did a thorough examination of the complainant's evidence and the challenges to it raised by the defence. The learned trial judge also demonstrated how she resolved several other issues raised by the defence. One such issue was that there was a truck parked along the road in the Scene of Crime photos of the area. She explained thus, at page 241:

> "I note, however, that there is no evidence that that truck was parked there at the time when [the complainant]

> indicated. The Scene of Crime photo was taken after 10:00 pm. [The complainant] is saying the incident took place at about 5:30, so I am just saying that that in itself does not negative what [the complainant] has said he saw, because there was a good gap between where the truck was and where the intersection was."

[32] With regard to the challenge to the identification parade in which it was suggested that the complainant had seen the applicant before the identification parade was held, the learned trial judge said this, at page 268:

> "So, when I looked at that I accept what [the complainant] has said. You know, he said, I didn't see this man, I didn't see this man at all on the 31st. So, I do not find that the identification evidence at the parade has been affected or its cogency in any way can be called into question.
>
> So, the issue of [the complainant] pointing him out on the basis of malice, I do not accept that at all, I reject that."

[33] The learned trial judge went on to state, at pages 270 to 271, that:

> "...I must say that when I consider the identification evidence, the cogency of the evidence by [the complainant], in view of the time of day, the distance he would have been away, his alertness at the time, in relation to this vehicle and its occupants, the circumstances under which he would have viewed Mr Moulton, the description he gave of Mr Moulton, I am satisfied that he is not making a mistake.
>
> I am also satisfied that he is not being malicious and telling a lie on Mr Moulton ..."

[34] In our view, it cannot be said that the learned trial judge did not fairly and properly deal with the identification evidence in this case. The learned trial judge's summation in relation to the **Turnbull** guidelines (**R v Turnbull** and others [1976] 3 All ER 549) was adequate, in that, she considered the possibility of mistake as well as

the motive of malice. With respect to the inconsistences, the judge, who was both judge of fact and law, adequately demonstrated how she resolved the inconsistencies identified by her. She demonstrated her recognition of the fact that the inconsistencies could affect the reliability of the identification, and resolved them by resort to the fact that a description had been given to the police which had generally fit the applicant, and that from the evidence, it could be inferred that the complainant had been focused on the applicant who was described as the taller of the two men. Her approach was in keeping with what was required of her, that is, to identify the conflicting evidence, determine if it was material, and resolve the conflict based on any explanation given by the witness.

[35] It was a matter for the learned trial judge, using her jury mind, to determine whether the witness was so discredited that he could not be relied on at all. The trial judge in this case determined that the complainant was not so discredited and we see no reason to impugn that decision.

[36] The cases relied on by counsel for the applicant did not support his contentions, as the circumstances in those cases were different from those in the instant case. For example, the decision in **Negarth Williams v R** [2012] JMCA Crim 22, which involved a trial by jury, was based on the fact that this court was of the view that the witness had been "totally discredited". At paragraphs [5] and [6], Brooks JA (as he then was) stated:

> "[5] ...[the witness] was totally discredited by evidence of what he had said at a previous trial about the events at the time of the incident leading to Mr Green's death.
>
> [6] The aspects on which he was discredited are very important. The first was whether he had had a firearm on the evening before the incident and the second was whether he had had a firearm at the time of the incident. At this trial he denied that he had had a firearm and at a previous trial he had admitted that he had had a firearm. An enormous part of the cross-examination of [the witness] centred on his previous inconsistent statements. His lack of credibility, it could be said, was the thrust of the defence."

[37] In that case, the witness, who was the sole eyewitness to a murder, had given several inconsistent statements for which no explanation had been given. The inconsistencies were material to the case and to the defence, especially in respect of the issue as to whether or not he had a firearm in his possession on that fateful day. This was plainly material to the defence because, of all the persons from whom swabs had been taken for the presence of gunpowder residue, the witness was the only one who had tested positive for elevated levels of gunpowder residue. This contradicted his evidence that he did not have a firearm in his possession that day. This court found that the learned trial judge did not sufficiently emphasise the magnitude and gravity of this inconsistency, and that he ought to have stopped the case and directed the jury to return a verdict of not guilty. This court also found that the appellant in that case, did not benefit from having the deficiencies adequately placed before the jury. The conviction, therefore, could not stand.

[38] In the instant case, the trial was before a judge sitting alone, and the complainant, cannot be said to have been "totally discredited". Nor could it be said that

the learned trial judge failed to recognise and emphasise the magnitude and gravity of the inconsistencies in his evidence.

[39] In **R v Williams and Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 &52/1986, judgment delivered 3 June 1987, the victim was shot inside his apartment in Wilton Gardens whilst he was sleeping. His girlfriend was awake at the time. There was also a witness from another apartment building who said, at the trial, that he had seen the accused men leaving the complainant's apartment at the material time. The witness admitted to giving two separate accounts about the same incident. He was never given an opportunity to provide an explanation for this inconsistency. This court held that, unless the admitted inconsistencies are immaterial, explanations should be given by the witness before the evidence in court can be accepted and relied on. In commenting on the inconsistency in that witness' evidence and what he had said in his statement to the police, this court stated at page 670 of its judgment, that:

> "It is clear that the judge was impressed by the witness Morris. However, having in his own words admitted the inconsistency, then unless it is immaterial some explanation is essential before the evidence in Court can be accepted and relied on in relation to that particular point. It seemed to us that [the witness'] evidence that when he ran out on his verandah he saw two men rushing from under the verandah of Apartment 'E' is clearly inconsistent with his statement to the police that when he rushed out on the verandah 'Mark' [Williams] was standing at the eastern corner of the building. If that is so then the sequence of events is certainly shaken. There may be a credible explanation but the explanation must come from the witness; it cannot be supplied by well-meaning conjecture."

[40] In the instant case, the witness denied giving two different accounts. He explained that he did not outline the events in any sequence when giving his statement to the police, and he denied telling the police that the second man had a gun which he also fired at him. The learned trial judge took great care in her summation and showed why she accepted the complainant's explanation that he did not outline the sequence in the statement he had given to the police. She also found that based on the evidence, it was clear that the complainant was focusing on the taller of the two men and, therefore, the inconsistency regarding the second man did not prove to be a barrier to her finding the complainant a credible witness. Based on the fact that the complainant gave evidence describing the applicant, but stated that he was unable to see the shorter of the two men or what that man was doing, this finding by the judge was reasonable.

[41] Counsel further argued that in finding as she did, the learned judge did not appreciate the significance of the second man also having a firearm, in that, it would show that there was a doubt as to who had shot the complainant. However, the judge having accepted the evidence that the applicant was seen with the gun and had fired at the complainant, in light of the doctrine of common enterprise, it would not matter, in the final analysis, if the other man also had a firearm and had also shot at the complainant. She accepted the evidence of the complainant that he did not see what the second man was doing.

[42] It is our considered view that the learned trial judge demonstrated that she took into account all the circumstances of the case and recognised that the credibility of the complainant was important in relation to whether or not she accepted his evidence. She also examined the inconsistencies in relation to the identification evidence and explained how she resolved them. Whilst we accept counsel's submissions that the witness must be deemed credible before his evidence on identification can be accepted as true, as referenced in **Denhue Harvey v R** [2011] JMCA Crim 22 at paragraph [17], there was no basis shown for the complainant, in this case, to be found not credible.

[43] In the light of the evidence and the learned trial judge's approach, it cannot be said that the applicant did not receive a fair trial in this respect. The inconsistencies in the complainant's evidence did not render his evidence so manifestly unreliable that no reasonable tribunal could safely act on it. No miscarriage of justice was demonstrated and this ground must, therefore, fail.

Alibi (ground two)

[44] In this case the applicant gave sworn evidence and raised the defence of alibi. In his evidence he told the court that on 3 May 2016 he was in Alexandria in the parish of Saint Ann working until about 6:00 pm and that he did not leave the parish that day. Once the defence of alibi was raised the learned trial judge was required to address her mind to the issues relating to that defence. She was also required to demonstrate that she appreciated the principles and applied them to the circumstances of this case.

[45] Mr Lynch's complaint in this ground is two-fold. The first aspect of the submission is that the learned trial judge did not give adequate directions as regards the applicant's evidence of alibi. The second aspect is that the learned trial judge rejected the alibi evidence for a demonstrably unfair reason, that is, on the basis of what, counsel said, the learned trial judge wrongly viewed as the "cogency" of the identification evidence.

[46] Counsel argued that the learned trial judge did not give herself the requisite 'false alibi' warning that a false alibi is "sometimes invented to bolster a genuine defence". He contended that there was nothing to suggest that the applicant had been discredited as to where he said he was when the shooting took place. Counsel asked this court to note that when the applicant was told that he was pointed out on the identification parade, his response was consistent with his evidence that he had been in Alexandria, Saint Ann. Counsel argued that the learned trial judge did not show any analysis which tended to demonstrate that the applicant was not being truthful in relation to his alibi but rather, the learned trial judge made a wholesale acceptance of the complainant's evidence.

[47] Counsel further submitted that as a result, the learned trial judge's treatment of the applicant's alibi was manifestly unfair and prejudicial to the applicant, thereby rendering the conviction unsafe.

[48] Counsel for the Crown argued that, in relation to the applicant's defence of alibi, the learned trial judge reminded herself of the prosecution's burden, to not only

disprove the defence of alibi, but to prove the case against the accused to the required standard. Having warned herself, it was further argued, the learned trial judge rejected the applicant's alibi and gave a number of reasons for doing so. Counsel submitted that the alibi was rejected because the learned trial judge did not find the inconsistent material to be a barrier to accepting the complainant as a credible witness. In addition, counsel submitted that the alibi direction was adequate when one considers the totality of the evidence.

[49] The learned trial judge did reject the applicant's alibi given in his sworn evidence. She assessed the applicant's evidence and the defence of alibi, at page 238, as follows:

> "Now in looking at his alibi in relation to what is legally required, he is saying he was never present; and he is saying [the complainant] is either mistaken or lying. And, while he is giving his alibi, the burden remains on the Prosecution to disprove the alibi, that is, he don't [sic] have to prove the alibi, he only have [sic] to raise it. So, once the accused has raised an alibi, it is incumbent on the prosecution to disprove it to the extent that this Court feels sure that he was at the scene of the crime...If I do not believe his alibi, I still have to go back to the Prosecution's case because these offences revolve around identification, so I will still have to answer the question even if I disbelieve Mr Moulton, if I am sure that [the complainant] has correctly identified him as the man who committed the offence. And so, I have to bear that in mind."

[50] The learned trial judge went on to state that:

> "So, the Crown in disproving of the alibi will depend greatly on the cogency of the identification evidence. So, it is to be of such a state that I can say, 'Yes, [the complainant] had sufficient opportunity to view and to properly identify Mr Moulton on a subsequent occasion'."

[51] Then, at page 270, the learned trial judge said further:

> "But, even if I find he is not speaking the truth, that doesn't really indicate that his alibi is not worthy of belief. He has said he wasn't there. As I have said, the Crown has to disprove that alibi and I must say that when I consider the identification evidence, the cogency of the evidence by [the complainant], in view of the time of day...
>
> I am also satisfied that he [the complainant] is not being malicious and telling a lie on Mr Moulton and I say that to say, that having been so satisfied I must say that I do reject what he [Mr Moulton] has told this court about being in Alexandria that day and at that time, I do reject it."

[52] With regard to the applicant's first complaint that the learned trial judge did not give what counsel terms as the 'false alibi warning', we agree that, since the applicant did give sworn evidence, and did raise the defence of alibi, in those circumstances the learned trial judge was required to consider the alibi and warn herself appropriately. This she did, before ultimately rejecting the alibi. Although she did not warn herself that a false alibi was sometimes given to bolster an otherwise good defence, such a warning is not necessary in every case where alibi is raised and is only necessary where evidence is adduced suggesting or in support of an alibi that is shown or proven to be false (see **R v Harron** [1996] Crim LR 581). The learned trial judge's acceptance of the cogency of the prosecution's evidence was the simple basis upon which the alibi was rejected. In such a case, a false alibi warning is also not necessary (see also **R v Patrick** [1999] 6 Archbold News 4 CA). In **Oniel Roberts and Christopher Wiltshire v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 37 & 38/2000, judgment delivered 15 November 2001, it was said, at page 21, that:

> "…where the only rational basis for the rejection of the alibi is the fact that the jury is otherwise convinced of the correctness of the identification evidence, a warning about false alibi would be, in our view, at the least confusing. Of course the judge would have told the jury that there is no burden on the defendant to prove the alibi, that it was for the prosecution to disprove the alibi and the prosecution would have succeeded in doing so if the jury were sure on the evidence, of the correctness of the identification by the prosecution witnesses."

[53] The court, in the case of **Oniel Roberts and Christopher Wiltshire v R**, at pages 19 and 20, addressed the question of when a warning concerning the rejection of an alibi which may have been found to be false should be given, in keeping with the **Turnbull** guidelines. In **Turnbull**, at page 553, Lord Widgery CJ, in giving guidance as to the directions a trial judge ought to give as to whether there was independent supporting evidence of identification, said this with regard to false alibis:

> "Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was."

[54] Smith JA (Ag) (as he then was), in **Oniel Roberts and Christopher Wiltshire v R**, outlined, at page 20, the circumstances in which he thought that warning was

applicable as: (a) where the judge has identified the rejection of the alibi as capable of supporting the evidence of identification; (b) where the alibi evidence is so discredited there is a risk that the jury may conclude that a rejection of it necessarily supports the identification evidence; and (c) where the alibi evidence has collapsed so that it raises the risk that the jury would regard that collapse as confirming the identification evidence.

[55] Those circumstances have no relevance to the instant case, where the rejection of the alibi was not based on the applicant's alibi being proved to be false, either by it being totally discredited or by the evidence of it having collapsed. Nor did the learned trial judge identify the rejection of the alibi as supporting the identification evidence. In this case, the inevitable consequence of an acceptance of the complainant's evidence as being true, is a rejection of the applicant's evidence, as no one can be in two places at once.

[56] With respect to the second aspect of the applicant's complaint, the learned trial judge, having heard the defendant's evidence and having gone back to the prosecution's case, accepted the complainant's evidence and his identification of the applicant as the person who had fired the shots at him. The learned trial judge found the complainant to be a credible witness and rejected the appellant's alibi. There was no miscarriage of justice, as she, being a judge sitting alone, acted on the strength of the evidence presented by the prosecution.

[57] Counsel for the applicant pointed this court to the decisions of **Navado Shand v R** [2018] JMCA Crim 45 and **Oniel Roberts and Christopher Wiltshire** in support of his contention that the judge erred. The circumstances in those cases, however, are entirely different from the instant case. In **Navado Shand**, the defendant, at the trial, had said that he was at home at the time of the incident for which he was being tried. The police had gone to an area where they thought he lived but could not locate him because they did not know exactly where his house was.

[58] One of the complaints, in that case, was that the learned trial judge had misunderstood the evidence regarding the accused's alibi, and had wrongly formed the view that the police had gone to the home of the appellant on the night of the incident. It was on that basis that the trial judge took the view that the appellant's alibi had been proven to be false and rejected it. This court took the view that it was an omission by the trial judge to have failed to consider the warning that a false alibi could support a genuine defence, in the circumstances of that case. This was especially damning since the trial judge had treated, that which he wrongly took to be a proven false alibi, as having bolstered the identification evidence.

[59] At paragraphs [65] to [66] this court held that:

> "[65] The learned trial judge's treatment of the defence was flawed in two respects. The first was that he did not fairly and accurately consider it due to his misunderstanding of the Crown's case. This led him to reject the defence as being a false alibi and a purported alibi to which he attached no weight. The second flaw is that having rejected the alibi, for a demonstrably unfair reason, the learned trial judge failed to give himself the appropriate warning. This was especially

> necessary since the learned trial judge ultimately concluded, at pages 130-131 of the transcript, that the appellant had 'assisted the prosecution in his identification of him. One of the things that led the learned trial judge to that conclusion was what he described as "the efforts [the appellant] made at manufacturing that alibi…
>
> [66] In these circumstances, the fact that the warning that the learned trial judge gave himself in respect of the visual identification was deficient provided another reason why cumulatively, the conviction would not stand."

[60] The distinction between the instant case and the **Navado Shand** case is clear. The learned trial judge, in the instant case, unlike in **Navado Shand's** case, did not misunderstand the evidence, and did not use her rejection of the appellant's defence of alibi to bolster the identification evidence. This court, in giving its decision in **Navado Shand**, considered the case of **Oniel Roberts and Christopher Wiltshire v R**, specifically pages 19 and 20.

[61] In the instant case, in accepting the cogency of the prosecution's evidence against the applicant that it was he who had shot the complainant, thereby rejecting the applicant's evidence that it was not him because he was elsewhere, the learned trial judge did not err.

[62] This ground would necessarily fail.

Inadmissible hearsay evidence (ground three)

[63] In this ground, the applicant complained that the arresting officer and the investigating officer both gave hearsay evidence in relation to the circumstances under which the applicant came to be arrested and placed on the identification parade. The

Crown denied the evidence was hearsay, and contended that, in any event, even if it were hearsay, it was not prejudicial to the applicant as the evidence was not critical to the issues, and had no bearing on the learned trial judge's findings.

[64] The arresting officer, Sergeant Spence, gave evidence that he was on patrol along the Montpelier main road in the parish of Saint Elizabeth when he saw a Toyota Delta motor car and signalled the driver to stop. The driver complied. There were two men in the car, the applicant and his cousin. They told him their names, amongst other things, based on his enquiries. At trial, after Sergeant Spence pointed out the applicant in the dock, the following exchange took place during his examination in-chief (page 109 of the transcript):

> "Q. Speak to me in relation to Mr Moulton.
>
> A. I then made further enquiries and was told that both men ...
>
> Q. Who told you that, the two of them?
>
> A. Yes, ma'am.
>
> Q. The two men told you something or somebody else? Don't tell us what somebody else said. You made enquiries and was told something?
>
> A. Yes, ma'am.
>
> Q. As a result of what you were told, did you do anything in relation to Mr. Dal Moulton?
>
> A. Yes, he was arrested and brought to the Ramble Police Station.
>
> Q. Yes?
>
> A. And was later handed over to the Lucea police."

[65] During cross-examination the following exchange took place between the officer and defence counsel (page 111):

> "Q. Now, as far as you are aware there was nothing to say that the police had an interest in Mr. Moulton?
>
> A. I wouldn't know the circumstances, if he was wanted by the police. I just, I was given some instructions."

[66] The investigating officer, Sergeant Garfield Francis, in his evidence, stated that on 12 June 2016 whilst on duty at the Green Island CIB he received "certain information", as a result of which, he went to the Lucea Lock-up in the parish of Hanover and informed Mr Moulton that he was going to be placed on an identification parade.

[67] During cross-examination the following exchange took place (at page 116):

> "Q. What steps or what clues you gave during the course of the investigation, you would put that in your statement as to what you did in the matter?
>
> A. Yes, sir.
>
> Q. And you will agree with me that the statement you gave in this matter commenced from the 12th of June, 2016?
>
> A. Yes, sir.
>
> Q. And, there is no mention at all of [the complainant] that you were investigating any matter concerning [the complainant]?
>
> A. You are correct, I was assigned to, I was not the initial investigator."

[68] He also told the court that he did not ask the initial investigator for a statement, and he had spoken to the complainant on the 7th or 8th of May.

[69] Counsel submitted that Sergeant Spence's evidence that he had arrested the applicant based on what he was told, is inadmissible hearsay evidence that would have had a prejudicial effect on the learned trial judge's mind, because it would have given the impression that the applicant was being sought by the police. Counsel argued that there is no evidence as to the reason for the applicant's arrest or why he was placed on an identification parade. This, was significant, counsel said, because the complainant did not know the applicant before the incident, and did not provide the name or location of his assailant.

[70] Counsel also submitted that the evidence of the investigating officer, Detective Sergeant Francis, that on 12 June 2016 he got "certain information" and as a result he made arrangement for an identification parade to be held, is hearsay and is entirely inadmissible, as the effect of it would have been to convey the impression that information had been received by some known or unknown source or sources who identified the applicant as the person who had shot and wounded the complainant on 3 May 2016. Further, it was submitted that this evidence carried no probative value and could only have had a prejudicial effect as the complainant did not know the applicant before, and there is no evidence that he had provided a name to the police. Counsel pointed out further that the learned judge also did not address this in her summation, and argued that the positive identification did not cure the prejudice suffered by the applicant in the circumstances.

[71] Counsel for the applicant referred the court to a number of cases in support of the submissions made, which will be discussed below.

[72] In **Delroy Hopson v R** (1994) 45 WIR 307, the evidence that was led implied that the victim, before he died, named the appellant as the person who had injured him. In that case, the Privy Council commented on the evidence, at page 310, of its judgment as follows:

> "This evidence was, of course, hearsay, highly prejudicial, and wholly inadmissible. There was no suggestion that the victim's statement to the corporal was a dying declaration."

[73] The Privy Council found that the learned trial judge had erred in failing to tell the jury not to consider that part of the officer's evidence in their deliberation. At page 311, the Board held that:

> "The foreman of the jury must surely have had this implication in mind when he asked the judge why the jury could not be told what the victim had said. The judge's reply, including the words 'suffice it to say that the next day he got a warrant for [the appellant]' left it open to the jury to conclude that the statement of the victim to the corporal could be added to the evidence of [the two eyewitnesses] identifying the appellant as the murderer. In the light of the acknowledged inconsistencies in the evidence of [one of the eyewitnesses] [sic] it may well be that this was a critical factor in the decision reached by the jury. Consequently, their lordships cannot exclude the possibility that a substantial miscarriage of justice occurred."

[74] In **Gregory Johnson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 53/1994, judgment delivered 3 June 1996, the eyewitness had not known the appellant very well. He testified to having seen him on a few

occasions, as well as on the day before the incident. The incident took place on 3 September 1991. The appellant was apprehended in the United States of America in July 1992. The witness did not give a statement to the police until some 19 months after the murder, and 10 months after the appellant had been arrested. After the incident, the next time the witness saw the appellant was in the dock in court.

[75] The evidence from the police officer was that he had received a report and started an investigation, and as a result, two days later, he obtained warrants for the arrest of the appellant. In relation to the indirect hearsay evidence, the court stated its views, at pages 7 to 8, thus:

> "In our judgment, the instant case cannot be distinguished from **Hopson's** case [supra]. The evidence of Detective Sergeant Cecil Lewis went no further than to show that he obtained warrants for the arrest of the appellant on two charges of murder. His evidence had no probative value whatsoever, it was hearsay, inadmissible and must have conveyed to the jury that the appellant had been identified by person or persons other than [the witness] as the murderer. The prejudicial effect of such evidence could not be cured in the judge's summation, and for that reason alone, the conviction could not stand."

[76] It is also important to point out that, in relation to the evidence presented regarding the identity of the person who was responsible for the murder, the court held, at page 5:

> "...the identification of the appellant by the witness amounted to no more than a dock identification."

[77] In **Regina v Winston Blackwood** (1992) 29 JLR 85, the sole witness seeking to identify the appellant did not know his name, and so could not have named him to

the police. At the trial, Crown Counsel elicited from the investigating officer that, some five days after the murder, he begun looking for two persons, including the appellant, both of whom he identified by name. This was held to be hearsay evidence. None of the prosecution's witnesses testified to having supplied the names to the police. The court found that the main witness' evidence regarding the identification of the appellant was a fleeting glance, and that the evidence was unsatisfactory. In addition, no identification parade had been held and the witness had pointed out the appellant some two years later in the dock. This court found, in essence, that a *prima facie* case had not been made out, and made the following observation, at page 90:

> "The mischief with which this complaint deals arose in a rather subtle manner. [The witness], as the evidence shows, is the only prosecution witness who purported to identify the appellant in circumstances which could give rise to the inference that he was one of the killers. But, as he testified, he had only seen the appellant over a period of four months as he, the witness, traversed the area in his bread-van. He did not know his name and so could not have named him to the police. Crown Counsel elicited from [the investigating officer] that on March 18, that is five days after the murder, he was looking for two persons, viz., Ronald Anderson otherwise called 'Danny Prep' and Winston Blackwood. No witness called by the prosecution testified to having supplied those names to the police. Accordingly, the evidence complained of was patently hearsay and ought not to have been allowed."

[78] In **Norman Holmes v R** [2010] JMCA Crim 19, the complainant, who was a special constable was held up whilst trying to start her motor vehicle on 1 November 2007 at Central Plaza at about 9:00 pm. The complainant did not know any of the robbers before. However, about 7 weeks later, she was asked to attend an identification

parade where she identified the applicant as the man with the gun who had first come upon her and who had subsequently driven her car out of the plaza.

[79] In relation to how the applicant came to be arrested, the investigating officer told the court that she had received "certain information" which had led her to go in search of the applicant. She also said that she arrested him '[b]ased on the description that was given'.

[80] At the hearing of the application for leave to appeal the conviction and sentence of the applicant, this court observed, at paragraph [30], that:

> "Not only was the applicant unknown to Corporal Jennings before she took him into custody at Twickenham Park, but nothing was found on his person or at his home (which was neither searched nor even visited by the police) that could have linked him in any way to the offences for which he was charged. There were no eyewitness reports of the crime, the firearm allegedly deployed by the complainant's assailant was never recovered, nor was her car ever recovered. In all the circumstances, the [Director of Public Prosecutions'] comment, that this gap in the police investigation had been plainly filled at the trial by resort to hearsay and otherwise inadmissible evidence, was entirely apt."

[81] The court then proceeded to examine the authorities, and held, at paragraph [37], that:

> "In our view, the evidence given by Detective Corporal Jennings in this case (which passed completely without comment by the judge either at the time it was given or in his summing up) clearly falls into the same category, with the result that it was, as Mr Harrison contended, hearsay and entirely inadmissible. **It could have had no other effect than to convey the impression that information had been received by her from some unnamed and**

> **unknown source or sources that the applicant was the person who had held up the complainant at gunpoint on the night of 1 November 2007 in Central Plaza. It accordingly carried absolutely no probative value and could have had no effect other than prejudice, which the judge made no attempt whatsoever to dispel or mitigate in his summing up.**" (Emphasis added)

[82] In **Blackwood**, Wright JA cited, at page 91, the following passage from **Glinski v McIver** (1962) AC 726 at pages 780 to 781, in relation to the avoidance or evasion of the rule against hearsay evidence:

> "The defendant's case is that from then on his actions were governed by the advice he received from Mr. Melville, a solicitor in the legal department at Scotland Yard, and from the counsel whom Mr. Melville instructed. No suggestion of malice or bad faith is made against either solicitor or counsel. Since the defendant's state of mind was in issue, evidence of what he was told by the solicitor and counsel would in the ordinary way have been admissible. But it was thought, rightly or wrongly, that privilege would be claimed, either Crown privilege or the client's privilege that protects communication between himself and his legal advisers, to prevent the disclosure of what passed between the defendant and solicitor and counsel. **So the customary devices were employed which are popularly supposed, though I do not understand why, to evade objections of inadmissibility based on hearsay or privilege or the like. The first consists in not asking what was said in a conversation or written in a document but in asking what the conversation or document was about; it is apparently thought that what would be objectionable if fully exposed is permissible if decently veiled**. So Mr. Melville was not asked to produce his written instructions to counsel but was asked without objection whether they did not include a request for advice 'on the Glinski aspect of the matter.' **The other [device] is to ask by means of 'Yes' or 'No' questions what was done.** (Just answer 'Yes' or 'No': Did you go to see counsel? Do not tell us what he said but as a

> result of it did you do something? What did you do?) This device is commonly defended on the ground that counsel is asking only about what was done and not what was said. **But in truth what was done is relevant only because from there can be inferred something about what was said. Such evidence seems to me to be clearly objectionable. If there is nothing in it, it is irrelevant; if there is something in it, what there is in it is inadmissible**." (Emphasis added)

[83] In this case, the main issue was that of identification. There was strong and cogent evidence from the complainant that the applicant was the person who fired the shots at him on 3 May 2016, and injured him. Despite the Crown's disavowals, there was a gap in the police investigation as to why the applicant had been taken into custody. The evidence of the arresting officer that he had made enquiries and was told something, as a result of which he took the applicant into custody, clearly offended the rule against hearsay. It had no probative value. However, in cross-examination, the arresting officer said he had no knowledge as to whether the applicant had been wanted by the police, he was just given instructions and all he did was to take the applicant into custody. Furthermore, the applicant gave evidence on his case that he was told by the officer who took him and his cousin into custody, that they were being taken into custody based on the instructions of the superintendent of police at the Lucea Police Station, who wanted to see them. He also said that the investigator had told him that he was going to be charged for murder, and that it was after he was placed on the identification parade that he knew that the matter involved a shooting.

[84] The evidence of the investigating officer that he had received certain information as a result of which he caused the applicant to be placed on an identification parade, is

also hearsay. However, this officer was not the original investigating officer, and at the time he was given the file on the case, the applicant was already in custody.

[85] Whilst the evidence of both police officers was hearsay and irrelevant, there was no prejudice to the accused as was found to have occurred in the cases relied on by the applicant. Neither of the officers' statements could have given the impression that the applicant had been identified, as the perpetrator, by anyone not called as a witness. We agree with counsel for the Crown that the authorities cited by the applicant can be distinguished. In all the cases, the evidence led tended to show that the appellants were possibly identified by persons not called as witnesses. No such inference can be drawn from the impugned evidence in this case. The arresting officer merely followed instructions to take two men into custody and the investigating officer merely acted on information to place a person already in custody, on an identification parade. The applicant was not charged for the offences until after the identification parade had been held. The complainant gave a statement to the police with a description of his attacker which generally fitted the applicant, and the applicant was subsequently placed on an identification parade and pointed out by the complainant.

[86] In the instant case, the learned trial judge did not address this issue in her summation. However, it is common ground that (perhaps with the exception of the identification warning) the summing up of a judge sitting alone requires different treatment from that of a judge summing up to a jury (see **Regina v Alex Simpson and Regina v McKenzie Powell** (unreported), Court of Appeal, Jamaica, Supreme

Court Criminal Appeal Nos 151/1988 & 71/1989, judgment delivered 5 February 1992, at page 8, per Downer JA).

[87] Having examined the learned trial judge's careful assessment of the evidence, it cannot be said that these bits of evidence had any bearing on her well-reasoned decision. The learned trial judge focused on the complainant's evidence, and being deemed to know the law, would have been mindful that she was not allowed to speculate. Furthermore, when the learned judge's summation is assessed, it cannot be said that she relied on the hearsay evidence of the arresting and investigating officers to support the complainant's identification evidence.

[88] However, even if she had done so, we would have been minded to apply the proviso, as, in our view, no miscarriage of justice was occasioned by this evidence having been led. In **Stafford and Carter v The State** (1998) 53 WIR 417, the Privy Council stated, at pages 422 to 423, the basis on which an appellate court should apply the proviso as follows:

> "The test which must be applied to the application of the proviso is whether, if the jury had been properly directed, they would inevitably have come to the same conclusion upon a review of all the evidence; see *Woolmington v Director of Public Prosecutions* [1935] AC 462 at page 482, *per* Lord Sankey LC. In *Stirland v Director of Public Prosecutions* [1944] AC 315 at page 321 Lord Simon said that the provision assumed 'a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict'. As he explained later on the same page, **where the verdict is criticised on the ground that the jury were permitted to consider inadmissible evidence, the question is whether no reasonable jury, after a proper summing-**

> **up could have failed to convict the appellant on the rest of the evidence to which no objection could be taken on the ground of its inadmissibility** ..." (Emphasis added)

[89] At paragraph [14], in **Dookran and another v The State** [2007] UKPC 15, the Privy Council held that:

> "... the Court of Appeal were entitled to apply the proviso and uphold [the appellant's] conviction only if they could be satisfied that, without that evidence, a reasonable jury would inevitably have convicted [the appellant]."

[90] In the instant case, based on the cogency of the complainant's evidence and the learned judge's approach, we are able to say that, without the hearsay evidence, the applicant would have inevitably been convicted.

[91] This ground, therefore, is without merit.

Was the sentence excessive (ground four)

[92] The learned trial judge sentenced the applicant to 20 years' imprisonment at hard labour on each count. Counsel for the applicant complained that this was excessive in view of the fact that the applicant had no prior convictions. Counsel contended that, in any event, the learned trial judge failed to take into account the time spent in custody by the applicant prior to trial. In the light of that, counsel submitted that an appropriate sentence for each count would be 15 years, taking account of time spent.

[93] Counsel for the Crown was of the view that the sentences imposed were reflective of the consideration of well-established principles of sentencing, and had

regard to the applicant's antecedents and the nature of the offences. Counsel also maintained that the learned trial judge's sentencing comments were reflective of the principles in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines), although they had not been published at the time she handed down her sentence. Counsel, however, conceded that no deduction was made for pre-trial remand or time spent in custody, which was approximately 10 months. It was also conceded that the sentence imposed for count one was outside the range of sentences normally imposed for illegal possession of firearm. It was argued, however, that having regard to the aggravating features of the case, the sentence was not manifestly excessive.

[94] This court will not interfere with the sentence imposed by a trial judge which is the subject of an appeal, unless it appears to us to have been imposed as a result of an error in principle. If the sentence imposed is as a result of a failure to apply the proper principles, this court will intervene to correct the error, if necessary (see the case of **Alpha Green v R** (1969) 11 JLR 283 at page 284, applying the dicta of Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164).

[95] The learned trial judge, in her sentencing remarks, concluded that she had to sentence the applicant above the minimum sentence based on the seriousness and prevalence of the offences, and because the attack was premeditated. This was said with respect to the offence of wounding with intent. No separate specific indication was given as to the starting point used for the offence of illegal possession of firearm.

However, it would appear from the trial judge's remarks just before announcing the sentence, that this was the starting point for both counts. At pages 296 to 297 of the transcript, the learned trial judge stated:

> "...[T]he issue now is how far do I go beyond, above the 15 years. I have to add on to the 15 years because of the type of offence and how it was committed. I have to, but I do throw into the mix that you have no previous convictions, so at the end of the day the sentence of this court is in relation to both counts 1 and 2 is, that you serve a period of 20 years imprisonment on both and these sentences are to run concurrently."

[96] In relation to the firearm, where the offence is illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act, as in this case, there is no statutory minimum. Based on the Sentencing Guidelines, the usual range is seven to 15 years. The usual starting point is 10 years and the maximum sentence is life imprisonment. If the learned trial judge started at 15 years for that offence, she would have started at the top of the range.

[97] Starting at 15 years and then taking account of the aggravating factors, as she said she would do, it is unclear where in the sentencing tariff she ended up before the mitigating factors were applied. If she added, for example, five years for the aggravating circumstances, then that would have taken her to 20 years before the mitigating factors were thrown, as she said "into the mix". This necessarily means the sentence ought to have been less than 20 years. If she had added, for example, 10 years for aggravating factors to take the sentence to 25 years, a deduction of five years for the mitigating factors would have to have been made for her to properly arrive at a

sentence of 20 years. This would still have resulted in a sentence outside the usual range and no reason was given by the learned trial judge as to why this should be so. The imposition of a sentence outside the usual range may be necessary in the circumstances of a particular case, but it is expected that a judge who thinks it is necessary to do so in an individual case, will so state and give sufficient reasons for so doing.

[98] In accordance with the case of **Meisha Clement v R** [2016] JMCA Crim 26 and the Sentencing Guidelines, a more mathematical assessment is required and one should no longer be left guessing as to how a sentencing judge arrived at a particular sentence. We should also point out that the value to be placed on a particular aggravating or mitigating factor is usually for the determination of the sentencing judge.

[99] Although this court does not lightly interfere with a sentence imposed by a judge, in this case it is necessary to do so. With respect to the sentence imposed by the learned trial judge for the offence of illegal possession of firearm, it is unclear what the starting point was or how she arrived at the sentence of 20 years. We will have to therefore, give fresh consideration to the matter to see if her approach resulted in the sentence being manifestly excessive.

[100] In this case, the learned trial judge was not dealing with a case of possession 'simpliciter'. The firearm was used with the intention to cause serious bodily harm. A starting point nearer the top of the range was, therefore, not unjust or unreasonable.

However, in our view, starting at the top of the range was not called for in the circumstances of this case, and a starting point of 13 years would have appropriately reflected the intrinsic seriousness of the case. The aggravating features of the case are those identified by the learned trial judge. Gun crimes, as she pointed out, are far too prevalent. This offence was premeditated, as the applicant armed himself with a firearm in order to ambush the complainant and shoot him with it. When considered with the number of spent shells found at the scene, it can be inferred that it was meant to be a deadly attack. This would justify an increase of the sentence to 18 years. The mitigating features were that the applicant was of a young age and had no previous convictions. This would justify a reduction of the sentence to 16 years, which would be an appropriate sentence in this case. Accounting for the time spent in custody of about 10 months, the sentence would be reduced to 15 years and two months.

[101] In relation to the offence of wounding with intent (with the use of a firearm), the statutory maximum sentence is life imprisonment and the minimum is 15 years. The learned trial judge, in this case, clearly used that as the starting point. Although 15 years is the minimum sentence, it is not a rule of thumb that in every case it has to be the starting point. In **Carey Scarlett v R** [2018] JMCA Crim 40 Brooks JA (as he then was) held, at paragraph [31], that:

> "The Guidelines state that the usual range of sentences for this offence is 5-20 years. That range would also include non-firearm offences. The fact that there was a statutorily imposed minimum sentence necessarily means that, for wounding with intent, using a firearm, the low end would be

> 15 years. The high end of the normal range, would, of course, be 20 years."

So based on the above, the usual range for this offence would be 15 to 20 years and a starting point may be chosen anywhere within this range, depending on the circumstances of the particular case.

[102] The learned trial judge started at 15 years and we see no reason to interfere with that figure. She indicated that an increase above that starting point was warranted based on the way the offence was committed. As stated earlier, this was a shooting by ambush after which 35 spent shells were recovered. The complainant's car was shot up and he was shot and injured, although it was not life threatening. However, the fact that the intended consequence was far greater than that which was achieved can be viewed as an aggravating feature. Those aggravating factors would justify an increase in the sentence to 20 years, as was stated by the learned trial judge. However, applying the mitigating factors it would justifiably result in a reduction to 18 years. Eighteen years imprisonment at hard labour would therefore have been a more appropriate sentence. The applicant was in custody for about 10 months which should be deducted. The sentence for the offence of wounding with intent would, therefore, be 17 years and two months taking into account time served.

[103] This ground, therefore, is not without merit.

Disposition

[104] The application for leave to appeal conviction is refused. The application for leave to appeal sentence is granted. The hearing of the application for leave is treated

as the hearing of the appeal against sentence. The sentence of 20 years for the offence of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act is set aside. Substituted therefor is a sentence of 15 years and two months' imprisonment at hard labour, accounting for time spent in pre-trial custody. The sentence of 20 years' imprisonment at hard labour imposed for the offence of wounding with intent is set aside and substituted therefor is a sentence of 17 years and two months' imprisonment at hard labour, accounting for the time spent in pre-trial custody. The sentences are to run concurrently and are reckoned to have commenced from 6 April 2017.