[2022] JMCA Crim 56

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 89/2017

TERRENCE O'GILLVIE V R

Cecil J Mitchell for the appellant

Mrs Kameisha Johnson-O'Connor for the Crown

10, 11, May and 11 November 2022

SIMMONS JA

[1] This is an appeal brought by Mr Terrence O'Gillvie ('the appellant') against his conviction following a trial, before Brown-Beckford J ('the learned trial judge') in the High Court division of the Gun Court held at King Street in the parish of Kingston.

[2] The appellant was tried between 30 August and 7 September 2017 on an indictment containing two counts. The first count charged him with the offence of illegal possession of a firearm. The particulars of the offence are that on 7 June 2015, in the parish of Saint Catherine, the appellant unlawfully had in his possession a firearm not under and in accordance with the terms and conditions of a firearm users licence. The second count charged him with the offence of shooting with intent, contrary to section 20 of the Offences Against the Person Act. The particulars of the offence are that on 7 June 2015, in the parish of Saint Catherine, the appellant shot at Mr Olando Fearon ('the complainant'), with intent to do him grievous bodily harm.

[3] On 27 September 2017, the appellant was sentenced to five years' imprisonment at hard labour, in respect of the offence of illegal possession of a firearm. He was sentenced to 17 years' imprisonment at hard labour, in respect of the offence of shooting with intent. Both sentences were ordered to run concurrently.

[4] By an application dated 2 October 2017, filed in this court, the appellant sought leave to appeal his conviction and sentence. He was granted leave to appeal his conviction by a single judge of appeal on 19 June 2019. We noted that although the appellant was not granted leave to appeal his sentences, no ground was advanced or submissions made challenging the sentences imposed.

The prosecution's case

[5] The prosecution relied on the evidence of the complainant and Detective Corporal Debbie-Ann Sinclair. The statement of Detective Corporal Sinclair was admitted in evidence by consent.

[6] The complainant's evidence was that on 7 June 2015, in the parish of Saint Catherine, at around 2:15 pm, he left his home to go to a shop in the community. When he entered the lane en route to his destination, he saw a group of about 10 men sitting under a tree, talking. He identified three of them. They were, the appellant's cousin Bob and two others known to him as 'Demon' and 'Puppy String'. The appellant, who he knew as 'Boxer', approached him from behind. At the time, the appellant was about 20 to 30 metres away. The appellant then joined the men. In addressing them, the appellant said, "Ah dis big king queer batty boy deh unno a talk? Ah da bleach out face batty man deh?". The complainant turned back and said, "Ah who you a talk to big waste batty man? Ah who you a talk waste man?". The appellant in response said, "Ah kill mi want kill one a unno, you a chat chat". The two men exchanged some more words until a friend of the complainant came on the scene, and the complainant continued on his journey.

[7] The second encounter occurred later that afternoon when the complainant, who had returned to his home, was accompanying his girlfriend to the bus stop. As he entered

the lane, he saw the appellant and the same group of men. The appellant stood up and stared at him. At that time, the appellant was about 45 metres away. The complainant decided to take a different route to the bus stop through his mother's yard but encountered the appellant for a third time as he was exiting his mother's yard. On that occasion, the appellant walked towards the complainant, took a firearm from his waist and pointed it in the complainant's direction. The complainant ran off. He said he heard explosions and shots "whistling" over his head. The appellant and others chased the complainant to the Gregory Park main road. The complainant ran to his cousin's house and then went to the police station, where he made a report.

The appellant's case

[8] The appellant, in his evidence, stated that he was not involved in any incident with the complainant and that he was elsewhere when the incident occurred. He also asserted that the complainant was not speaking the truth and was motivated by malice.

[9] The issues for the learned trial judge's determination were credibility, malice, identification, and alibi.

The grounds of appeal

[10] The grounds of appeal as stated in the notice of appeal dated 2 October 2017, are as follows:

i. Lack of evidence;

ii. Conflicting testimony;

iii. Personal vendetta [sic?];

iv. Poor legal representation;

v. Unfair trial; and

vi. Miscarriage of justice.

[11] In this court, Mr Mitchell, on behalf of the appellant, sought and obtained leave to abandon those grounds and to argue the following seven supplementary grounds of

appeal. The supplementary grounds challenge the learned trial judge's treatment of the inconsistencies in the complainant's evidence in relation to identification, her findings that the appellant was in possession of a firearm, that he shot at the complainant as well as her preference of the complainant's evidence over that given by the appellant. They are as follows:

> "1. That the evidence given by the Complainant as to the possession of the firearm by the Appellant and as to the shooting at the complainant by the Appellant was insufficient to lead to the conviction of the Appellant on the charges of Possession of Firearm and Shooting with Intent.
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> 2. That the evidence of the Complainant that he saw the firearm in the possession of the Appellant and the time frame and circumstances in which the complainant testified that he saw the firearm were so frought [sic] with inconsistencies and omissions that the evidence of the complainant ought not to have been believed or accepted.
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> 3. The Learned Trial Judge fell into error in finding that the evidence of the complainant as regards the description of the firearm and other pieces of evidence was such that the Court felt that the matter fell within the definition of the Firearm Act [at] page 142 of the transcript.
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> 4. The Learned Trial Judge misdirected herself and fell into error when at page 149 of the transcript at lines 6 to 16 she stated as follows:-
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> In his evidence here, there were several discrepancies relating to the time that he saw the accused. The time he saw the gun. And the time that the incident may have lasted. Safe [sic] however for these inconsistencies and omissions the complainant was not shaken in cross-examination. He presented as forthright and frank. And I am however mindful of his admitted malice towards the accused, in view of their families [sic] history. And that his evidence could be tainted for this reason.
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> That the very essence of the case against the Appellant was contained and focused in the above areas alluded to by the Learned Trial Judge.

> Accordingly, therefore the Learned Trial Judge had a clear duty to catalogue and detail the inconsistencies and omissions and to resolve them before arriving at a verdict adverse to the Appellant.
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> 5. That there was no clear and credible evidence that the Appellant shot at the complainant [at] page 27-28 of the transcript-the complainant also stated that the estimated some ten shots were fired but he was not hit.
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> That although the Learned Trial Judge identified the sparsity of evidence regarding the matter of the shooting [at] page 155 of the transcript-the Learned Trial Judge failed to direct herself properly or at all as to how the evidence of the shooting should be treated.
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> 6.That altogether it was the sworn testimony of the complainant against the sworn testimony of the Appellant. The evidence of both parties were pari passu and there was nothing alluded to by the Learned Trial Judge to show why she would have preferred the evidence of the complainant against the evidence of the Appellant.
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> 7.That the evidence of the purported identification of the Appellant by the complainant was eroded by the conflicting nature of the complainant's evidence as to the time period in which he was able to see the face of the Appellant.
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> Further it is contended that the reason that the complainant gave such conflicting evidence as regards the various time periods in which he was able to see the face of the Appellant was that the complainant was fabricating and adjusting the evidence of the time period as the evidence progressed."

[12] These grounds raise the issues of whether the evidence pertaining to the firearm and the shooting was sufficient and whether the complainant's evidence relating to his identification of his assailant could be relied on based on the inconsistencies in his testimony. They also raise the issue of whether the learned trial judge properly treated with those inconsistencies in her assessment of his credibility.

Appellant's submissions

[13] At the hearing, Mr Mitchell focused his efforts on supplementary grounds one, four, five and seven. In addressing supplementary ground one, counsel submitted that the complainant's evidence was so filled with inconsistencies that it ought to have been rejected. In this regard, he reminded the court that the complainant was the only witness as to the facts and that no firearm or spent shells were recovered. There was also no evidence of any injury or damage having been caused by the firearm. The quality of the complainant's evidence, he submitted, should also be viewed in light of the malice that existed between the families of the complainant and the appellant.

[14] It was further submitted that the evidence of the complainant was unreliable as he was unable to give a fulsome description of the firearm and there were inconsistencies in his evidence pertaining to the firearm, especially in respect of the length of time that he saw the firearm.

[15] In respect of supplementary ground four, counsel acknowledged that this court will not lightly interfere with a trial judge's findings of fact based on the learned trial judge's assessment of the credibility of the evidence. It was, however, submitted that whilst the learned trial judge identified the inconsistencies in the evidence presented by the prosecution, she failed to demonstrate how they were resolved; and that, in any event, they ought to have been resolved in the appellant's favour. This, he argued, was a fatal flaw in the conviction.

[16] Where supplementary ground five is concerned, counsel pointed out that although 10 shots were said to have been fired by the appellant at the complainant, there was no evidence of any damage. He reiterated that the only evidence of fact presented by the prosecution, was that given by the complainant. He stated that whilst the learned trial judge identified the sparsity of the evidence regarding the shooting, she failed to direct herself properly or at all, on how to treat with the evidence.

[17] On the final ground, supplementary ground seven, counsel submitted that the evidence was not sufficient to discharge the prosecution's burden of proof. It was submitted that the complainant's evidence in relation to identification was eroded by the inconsistencies in his evidence. In particular, there were inconsistencies pertaining to the time period for which he was able to view the appellant's face. Counsel submitted that these inconsistencies arose because the complainant was not telling the truth and was adjusting the evidence as the trial progressed.

Respondent's submissions

[18] Mrs Johnson-O'Connor submitted on behalf of the Crown that supplementary grounds one to four and six have no merit. She argued that based on the complainant's description of the firearm, there was sufficient evidence which enabled the learned trial judge to find that she had the requisite jurisdiction, and to conclude, that it was the appellant who chased and shot at the complainant. In support of that submission, reference was made to **R vs Phillip McKenzie** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 99/1985, judgment delivered 24 October 1988; **Eric Samuda and Anthony Miller v The Queen** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 55/1979 and 57/1979, judgment delivered 18 July 1980; **The Queen v Christopher Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 169/1987, judgment delivered 21 March 1988; and **Regina v Paul Lawrence** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/1989, judgment delivered 24 September 1990.

[19] Counsel submitted that based on the above cases, the fact that no firearm or spent shells were recovered, there was no evidence of injury or damage, and there was no evidence independent of that given by the complainant, did not vitiate the convictions. She stressed that each case should be assessed on its own facts and circumstances.

[20] Where the inconsistencies in the evidence presented by the Crown are concerned, it was submitted that the evidence must be looked at cumulatively. Specific reference was made to the evidence pertaining to the length of time that the complainant saw the

appellant's face and the firearm in the appellant's possession. In assessing the evidence, counsel submitted that it must be borne in mind that the complainant knew the appellant for several years as they lived in the same community and their families had a history of feuding.

[21] The cumulative effect of the evidence, it was submitted, proved that the complainant was able to see the face of the appellant clearly. Counsel pointed out that the complainant's evidence was that on the day of the incident, he saw the appellant's face on three separate occasions within a short period of time. These encounters occurred in the afternoon, and as such, the complainant was in a position to make proper observations. Further, whilst no spent casings were found, the complainant had seen the firearm and heard the explosions. In the circumstances, the description that the complainant was able to provide was sufficient and capable of supporting the convictions for the offences of illegal possession of firearm and shooting with intent.

[22] In addressing supplementary ground five, counsel submitted that there was no merit in this ground, as a trial judge is not required to identify every inconsistency which arises on the evidence. Reference was made to **Anthony Gayle v R** [2021] JMCA Crim 30 ('**Anthony Gayle**'), **Morris Cargill v R** [2016] JMCA Crim 6 and **Tyrone Headley v R** [2019] JMCA Crim 33 ('**Tyrone Headley**'), in support of that submission.

[22] It was submitted that the learned trial judge properly identified credibility and identification as the issues that arose for her consideration. Mrs Johnson-O'Connor pointed out that the learned trial judge had referred to the omissions and discrepancies and the need to exercise care in the assessment of the identification evidence and had warned herself of the need for caution, even in cases of recognition.

[23] Counsel also pointed out that the learned trial judge had highlighted the following difficulties in the Crown's case:

i. The fact that the complainant was running away when the shots were fired;

ii. That at least three people were chasing the complainant and he was unable to observe sufficiently if any of them had anything in their hands;

iii. The fact that the complainant did not give evidence of seeing anything in the appellant's hand as he ran away; and

iv. That the complainant gave several accounts of the times he observed the appellant, ranging from a couple seconds to several minutes.

[24] The learned trial judge, she said, examined the inconsistencies and omissions and demonstrated how she resolved the inconsistencies. The learned trial judge concluded that, based on the complainant's prior knowledge of the appellant and the totality of the identification evidence, she could rely on the complainant's evidence and she found him to be a credible witness. It was further submitted that, despite the inconsistencies and omissions in the complainant's evidence, when it is assessed in its totality, they were not sufficient to discredit him.

[25] In respect of supplementary ground seven, it was submitted that this was a clear case of recognition as the appellant was well-known to the complainant for many years. Counsel again referred to the complainant's evidence that he saw the appellant's face on three separate occasions on the day in question and that nothing impeded his view.

[26] It was submitted further that, although there were conflicts in the time periods of observation, there was ample opportunity for the complainant to make a proper identification of the appellant.

[27] Counsel also submitted that there was no merit to the contention that the learned trial judge failed to consider the malice between the families of the two parties. In this regard, counsel referred to page 149, lines 13 to 16 of the summation, where the learned

trial judge stated, "[a]nd I'm mindful of his admitted malice towards the accused, in view of their families' history and that his evidence could be tainted for this reason". This statement, counsel said, demonstrates that the learned trial judge properly addressed her mind to the issue of malice and how it could have affected the credibility of the complainant's evidence.

[28] In concluding, counsel submitted that the learned trial judge demonstrated that she was cognizant that the burden of proof was on the Crown and, having assessed the evidence, found that it had discharged that burden. Counsel argued that the learned trial judge, as the tribunal of fact, had the opportunity to observe both the complainant and the appellant whilst they gave evidence; she did not accept the appellant's evidence and returned to that presented by the Crown before making her decision. Credibility, she argued, is within the purview of the finder of fact and the learned trial judge indicated her preference for the evidence given by the complainant over that given by the appellant.

Analysis

Whether based on the inconsistencies in the complainant's evidence, the learned trial judge had sufficient evidence on which to ground the jurisdiction of the court as well as to convict the appellant of the offence of illegal possession of firearm (Supplementary Grounds 1, 2, 3 and 4)

[29] The complainant's evidence-in-chief was that he saw the appellant pull a firearm from his waist. He saw the firearm for "about ten seconds or eight seconds". The appellant held the firearm by the handle while pointing it at him, and he saw the "mouth" of the firearm. He described it as a handgun but could not state the colour. Nothing blocked his vision. He indicated that he was able to say that the object was a firearm as he had seen the police and security guards with firearms. He also heard explosions. He described it as "a revolver type; is a 'matic'…It is not a semi-automatic" and maintained that he saw the appellant with a handgun. The complainant stated that about 4 or 5 minutes elapsed between when he saw the appellant pull the firearm and he ran off.

[30] In cross-examination, the complainant stated that he was about 40 to 50 metres away when the appellant pulled the firearm from his waist. When asked the length of

time that had elapsed between when the appellant pulled the firearm from his waist and pointed it in his direction, the complainant's response was that it was a "couple seconds". He then said, in clarification, that it could have been two or three seconds. Later in his testimony, when questioned further, the complainant said that it was about "five, four seconds". When defence counsel indicated to the complainant that he had changed his evidence, he said, a "couple seconds".

[31] In further cross-examination, the complainant said that when the appellant pulled the firearm, he immediately ran off, as he was frightened and afraid. He described the firearm as a handgun and that it was a revolver but admitted that it was the first time that he was saying it was a revolver. He also admitted that due to the distance between him and the appellant, he could not identify the make or type of firearm. He agreed that he did not tell the police that the person who shot at him had a revolver or that he had seen the "mouth" and handle of the firearm. He, however, maintained that he was being truthful.

[32] In **R vs Phillip McKenzie**, Carey P (Ag), in dealing with the issue of the nature of the proof required to show that the object was a firearm within the meaning of the Firearm's Act, stated on page 3 of the judgment:

> "…in **R. v. Jarrett & Ors.** [1975] 14 J.L.R. 35 which dealt with the question as [to] the nature of proof required to show that the object was a firearm as defined or an imitation firearm. Luckhoo, P. (Ag.) said this at page 43:
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> > '…it is not possible to lay down any hard and fast rules. It is indeed for the resident magistrate or the jury as the case may be to decide whether as a matter of fact the object in question has been shown to be a firearm as defined or an imitation firearm'."

[33] Carey P also stated at page 5, that each case was dependent on its particular facts, the inferences to be drawn from those facts and "it is more a matter of common sense than abstruse reasoning".

[34] The learned trial judge, in the instant case, dealt with the issue of jurisdiction at pages 141 to 142 of the transcript. She considered the complainant's description of the firearm and his evidence that shots were fired at him and concluded that the object he described was a firearm. We find no fault with her reasoning and conclusion.

[35] Based on the complainant's evidence, which was accepted by the learned trial judge and **R vs Phillip McKenzie**, there were, in our view, sufficient facts on which a judge could find that the object described by the complainant was a firearm within the meaning of the Firearm's Act. In the circumstances, we find that these grounds have no merit.

Whether the learned trial judge gave due consideration to the evidence pertaining to the shooting (supplementary ground 5)

[36] The complainant's evidence was that after the appellant pulled the firearm, the appellant started to chase him and fire shots in his direction. He said that he "…heard the explosion and shot was whistling over [his] head". The appellant, through his counsel, challenged the complainant's evidence pertaining to his identification of the appellant. The learned trial judge accepted that the appellant was armed with a firearm although the complainant was unable to state the type of firearm or its colour. She accepted that shots were fired at the complainant. She found that his evidence regarding the identification of the appellant and the appellant's possession of the firearm was not shaken in cross-examination.

[37] Whilst the learned trial judge did not conduct a detailed examination of the inconsistencies in the complainant's evidence, she indicated that she was aware of them. She accepted that the appellant had a firearm, which he pointed at the complainant and accepted inferentially, that it was the appellant who fired shots at the complainant. We noted that just before arriving at that conclusion, the learned trial judge stated:

> "I find that shots were fired at the accused. Having regard to the number of shots fired, the complainant said was over ten. I am sorry, shots were fired at the complainant. Having regard to the number of shots fired over ten, that the complainant

was being chased by at least two others. That the complainant was unable to say whether the other men had anything in their hands. The complainant did not say that the accused fired shots at him. And that the gun identified was identified as a revolver, that the inference can be drawn equally consistent with the accused firing, as well as with others.

In fact, a reasonable inference from the above stated is that someone other than the accused had to have been firing. Nonetheless, given the accused possession of the firearm, given his raising and pointing it at the complainant, I find that he did in fact shoot at the complainant."

[38] The role of this court when reviewing the decision of a trial judge based on his findings of fact is well settled. In **R v Crawford** [2015] UKPC 44, the principle was stated in the following terms:

"*THE ROLE OF AN APPEAL COURT*

[9] There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in *The Hontestroom* [1927] AC 37 at 47-48:

'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of statute. … It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge,

> and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1860) 14 Moo PC 210, 235 Lord Kingsdown says: 'They, who require this Board, under such circumstances to reverse a decision of the court below upon a point of this description undertake a task of great and almost insuperable difficulty. … We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'

This passage has often been approved at the highest level since; see for example Lord Wright in *Powell v Streatham Manor Nursing Home* [1935] AC 243, 265 and Lord Edmund-Davies in *Whitehouse v Jordan* [1981] 1 WLR 246, 257. In *Benmax v Austin Motor Co Ltd* [1955] AC 370 at 375 Lord Reid added the following:

> '… it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse

> any finding which appears to be based on any such considerations.'
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> The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone, with, of course, appropriate consideration being given to the different standard of proof."

[39] The issue of what is required of a trial judge sitting without a jury, where there are conflicts in the evidence of witnesses, was addressed by this court in **Tyrone Headley**. At paras. [62] – [67], P Williams JA addressed the issue thus:

> "[62] The issue of what is required of a trial judge sitting without a jury when confronted with conflicts in the evidence of witnesses, was also considered by this court in **R v Locksley Carroll** where Rowe P, at page 265, had this to say:
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> > '**In Leroy Sawyers and Others v The Queen** [1980] R.M.C.A. 74/80 (unreported), we endeavoured to give some of the practical reasons why a reasoned judgment was necessary. An accused person, we said, was entitled to know what facts were found against him and where there were discrepancies and inconsistencies in the evidence, just how the trial judge resolved them. We did not then refer to the public which has an equal interest in understanding the result of a trial so that it can have confidence in the trial process. Ultimately the Court of Appeal which has the duty to re-hear the case based on the printed evidence and the judgment of the trial judge wishes to be assisted by the thought processes of the trial judge.'
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> [63] It is a fact that the learned trial judge did not give the usual directions to himself on the issue of discrepancies and inconsistencies. Mr Knight is correct in his complaint that the learned trial judge did not specifically identify the discrepancies or inconsistencies that arose from the evidence of the witnesses. Having identified the issue in the case to be credibility, the learned trial judge went directly to conducting a review of all of the evidence of the witnesses including that of the appellant.

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

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

In addition, at page 115, he said:

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

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

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

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

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

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

[40] In the instant case, the learned trial judge found that despite the inconsistencies, she could still rely on the complainant's evidence. She accepted the complainant's evidence that the appellant pulled a firearm from his waist and pointed it at him. She did, however, bear in mind the fact that the complainant did not say that he saw the appellant fire at him. She stated at 160 of the transcript:

> "…given the [appellant's] possession of the firearm, given his raising and pointing it at the complainant, I find that he did in fact shoot at the complainant."

[41] In **R vs Phillip McKenzie**, the appellant was found guilty of shooting with intent based on the evidence of the police officer that he shot at him. No firearm was recovered. The court found that if the judge accepted the complainant's evidence that the appellant held up and robbed the complainant with a firearm and fired at the police who were pursuing him, those were sufficient facts on which a judge could find the offence of shooting with intent, proved. On that basis, the application for leave to appeal was refused.

[42] In the instant case, at page 141 of the summation, the learned trial judge stated that "[t]he issue … for adjudication by the Court is credibility. That is whether the complainant or the accused is to be believed and whether in the circumstances of the case, the complainant could have identified the person whom he said pulled a gun at him, as he said and shot at him".

[43] When the evidence in this case is considered in its entirety, we are of the view that there were sufficient facts on which the learned trial judge could find that the appellant had a firearm in his possession which he fired at the complainant. On the totality of the evidence, it cannot be said that the learned trial judge was plainly wrong in her

finding that the appellant shot at the complainant. In the circumstances, we find that this ground has no merit.

Whether the learned trial judge demonstrated why she preferred the evidence of the complainant over that given appellant (supplementary ground 6)

[44] The learned trial judge first addressed this issue at page 151 of the transcript. In treating with the appellant's evidence, she stated:

> "I remind myself that the evidence is to be treated in the same manner as other testimony in this case, and the same standard of credibility or otherwise must be applied and that his testimony must not be treated differently, because he is the accused."

She then examined his evidence in detail.

[45] The learned trial judge's assessment of the evidence is to be found at page 158 of the transcript. She stated:

> "…in relation to the defendant, that in his demeanour he was soft spoken. However I do not find his account to be credible. It is true as submitted by the prosecution counsel that he seeks to remove himself entirely by one only acknowledging a meeting earlier than the time the incident was said to occur but also by his unlikely failure to acknowledge his friends.
>
> He also sought to down play the feud between the families in all this [sic] 31 years he is saying he has not heard the feud discussed in his family."

[46] The learned trial judge had the opportunity to observe the witnesses in this matter and as such was better able to assess their credibility. She recognized that there were inconsistencies in the complainant's evidence and found that despite those inconsistencies she could rely on his evidence. Ultimately, she rejected the evidence of the appellant. This was a matter for her as the tribunal of fact. It is well established that an appellate court should be slow to interfere with the findings of a trial judge based on that judge's assessment of the credibility of the witnesses (see paras. [65] to [67] of **Tyrone Headley** at para. [45] above).

[47] Having considered the evidence presented and the learned trial judge's treatment of that evidence, we are unable to identify any basis on which her preference of the complainant's evidence over that given by the appellant can be impugned. Accordingly, this ground also fails.

Whether the evidence adduced in support of what was said to be a case of identification by recognition, was adequate or credible, bearing in mind the inconsistencies in the complainant's evidence (supplementary ground 7)

[48] We observed from the transcript, that there were inconsistencies in the evidence of the complainant pertaining to the period of time that he saw the appellants face; the time that elapsed between when he saw the appellant pull the firearm and when he, the complainant, ran off; and the duration of the incident.

[49] The evidence- in- chief of the complainant was that about seven to eight minutes had elapsed between when he saw the appellant pull the firearm and when he, the complainant, got to the main road. He said: "[a]bout seven to eight minutes or eight to ten minutes, somewhere in ah dat region". When asked again, he said, "[a]bout seven to eight minutes". The question was repeated and his response was "[a]bout four minutes, about four or five minutes".

[50] Concerning the length of time the complainant saw the appellant's face, the complainant said that on the first occasion when the appellant was with the group of men, he saw the appellant's face for a "couple seconds". When asked to explain what he meant by "couple", he said 15-20 seconds.

[51] The complainant stated that on the second occasion, he saw the appellant's face for about "25 seconds or so" before he ran off.

[52] In cross-examination, the complainant said that he immediately ran off when the appellant pointed the firearm in his direction. When asked if about 10 minutes had elapsed between when he saw the appellant pull the firearm and when he pointed it in his direction, the complainant said that he saw the appellant's face for a "couple seconds".

When counsel for the appellant asked if he meant two seconds, the appellant said, "[y]ou can call it that, two, three seconds". Counsel then asked, "So you said it was about two, or three seconds". The complainant responded, "[i]t was around five, four seconds". In response to counsel's assertion that he had changed his testimony, the complainant said, "[i]t was a couple seconds".

[53] When counsel sought greater clarity, the complainant agreed that he had said that he saw the appellant's face initially for two to three seconds when he pulled the firearm from his waist. When asked if he had also said that it was four to five seconds, the complainant said "No". When questioned further, the complainant agreed that he had said that he saw the appellant's face for five seconds. The following extract from the transcript is relevant:

> "Q Now, do you agree, sir, that when you tell this Honourable Court in one breath that you saw his face for two to three seconds and then in another breath that you saw his face, at the same time, for five seconds, both are not the same, do you agree? Do you agree, sir, that they are not the same?
>
> A No, no.
>
> Q You don't agree that they are not the same or you agree that they are not the same?
>
> A **I agree that they are the same, because a couple minutes, couple seconds, sir.**
>
> Q I'm suggesting to you, sir, that they are not the same. Do you agree with that suggestion?
>
> A No, sir.
>
> Q You don't agree with that suggestion?
>
> A No.
>
> Q Did you make a mistake when you gave us one of the times?
>
> A No, sir" (Emphasis added)

[54] At that stage, counsel suggested to the complainant that he was not being truthful when he said that he saw the face of the man who pulled a firearm and fired at him. The complainant disagreed with that suggestion. He did, however, indicate that at the time he was frightened and afraid.

[55] When he was cross-examined further, the complainant agreed that he did not tell the police that he saw the appellant's face for two to three seconds. He also agreed that he did not tell the police that he saw the appellant's face for five seconds. He, however, disagreed that this was the first time that he was saying that he saw the appellant's face for two to three seconds. When asked if he had said that to someone, he said, "[i]t wasn't seconds, it was minutes". The transcript then reads at page 58:

> "Q No, I am working with what the evidence is here, sir. Did you tell someone in writing, any at all, that you saw this accused, that you saw this accused man's face for two to three seconds? That is the evidence that I am referring to.
>
> A Sir…
>
> Q Yes or no, sir?
>
> A As I said, I give a statement about a couple minutes when the incident happen.
>
> Q I didn't ask you about that.
>
> Her Ladyship: No, you have to answer the question as it is asked of you. The question is whether you had said to anyone before today two to three seconds? Seconds is the important part.
>
> A No, ma'am.
>
> Her Ladyship: So, you are saying today is the first time you are saying it?
>
> A Yes, ma'am."

[56] When the complainant was asked if in his statement to the police he had said that he saw the appellant's face for 25 seconds, he agreed that he did not and stated that it

was the first time that he was making that assertion. He disagreed with the suggestion that his failure to give the police that information meant that he was being untruthful.

[57] The complainant agreed with the suggestions that he did not tell the police that he saw the appellant's face for two to three seconds or four to five seconds when he was pulling the firearm from his waist. It was suggested to the complainant that he never told the police that he saw the appellant's face for four minutes and he agreed. By way of explanation, he said, "[t]he four minutes from the time he pull the gun from his waist".

[58] The complainant stated that three men were chasing him and whilst the shots were being fired, he was moving away from them. He indicated that, although his back was turned, he was able to identify the person who was shooting at him and disagreed with counsel's suggestion that he could not.

[59] At pages 148-149 of the transcript, when dealing with the inconsistencies in the complainant's evidence, the learned trial judge stated:

> "He gave some times concerning the time that the gun was pulled [to] when he reached the main road. The time at which he saw the accused[']s] face, which he says was for a couple of seconds about fifteen to twenty seconds and the time that he was able to see the gun which was for about eight to ten seconds. And he said he saw the face of the accused for about twenty five seconds before he ran off.
>
> All this took place on a sunny afternoon and he was able to see the accused man clearly.
>
> In cross-examination it was borne out that it was the first time in evidence that he gave any indication of the time lines. The times that he would have seen the gun and the accused for how long. He contends that he was not mistaken in relation to who he saw pull the firearm.
>
> And he said in cross-examination that the firearm that he saw was a revolver. So, in cross-examination it became clear, that he had omitted in the prior accounts to mention the time that he had observed the perpetrator and the gun….there were several discrepancies relating to the time that he saw the

> accused. The time he saw the gun. And the time that the incident may have lasted. Safe [sic] however for these inconsistencies and omissions the complainant was not shaken in cross-examination. He presented as forthright and frank. And I am however mindful of his admitted malice towards the accused, in view of their families [sic]history. And that his evidence could be tainted for this reason."

[60] The learned trial judge further stated at pages 156-157 of the transcript:

> "He had earlier, that day, had an altercation which involved the accused, whom he knew very well and saw regularly, up to several times per day. At the time of the incident nothing impede [sic] his view when the accused, he said, pulled the firearm. However, he was running away when the shots were fired. At least three persons were chasing him and he was not able to observe well enough to see if any of them had anything in their hands.
>
> He had also given no in [sic] evidence of seeing anything in the accused['s] hands as he run away. He has also given several accounts of the times he observed the accused, from couple seconds to several minutes. It is clear, however, that the time could be no longer than a few seconds as several times in examination and cross-examination, he said he ran off immediately when he saw the gun, these witnesses I am mindful of.
>
> While the inconsistencies at the time are daring, (sic) the clear evidence of the complainant, is that, he would have been looking at the accused before the gun was pulled and he said the accused was staring at him and that he ran off after the gun was pointed…I find that I can still rely on his evidence of identification of the accused."

[61] From the above passage, it is evident that the learned trial judge found that the complainant observed the appellant for a few seconds and that the time was sufficient for him to have recognized him. At page 158 of the transcript the following exchange took place between the learned trial judge and counsel for the appellant:

> "MR. P. GENTLES: M'lady, I note where you indicated the inconsistencies in regards to the time that include[s] the time

> where he had engaged for three to four seconds then four to five seconds in terms of where he saw the accused's face.
>
> HER LADYSHIP: I think I would have dealt with it that whilst the inconsistencies are there I accept them that it is clear that he would have seen the accused before the gun was pulled because he said he was staring at him and in view of the knowledge of the accused the earlier sighting I find that I can still rely on his evidence."

[62] Where a trial judge is sitting without a jury, there is no requirement to identify every inconsistency or discrepancy that arises during the trial, unless they are particularly damaging to the Crown's case. This issue was addressed by P Williams JA in **Tyrone Headley**, at paras. [61] and [62] (see para. [45] above).

[63] This issue was also addressed in **Anthony Gayle** by Straw JA, who stated thus:

> "[109] It is the duty of a trial judge, in assessing the credibility of the witnesses as the judge of the facts, to weigh the inconsistencies and discrepancies in the evidence, in order to determine whether they are material or non-material, if they go to the root of the prosecution's case and, if in all the circumstances, a verdict of guilty can be maintained. However, there is no requirement for every single inconsistency and discrepancy to be isolated and identified. In **Morris Cargill v R** [2016] JMCA Crim 6, Brooks JA (as he then was) put it thus:
>
> > '[30] In addressing the issues raised by these grounds, it must be pointed out that trial judges are required to explain to juries the nature and significance of inconsistencies and discrepancies and give them directions on the manner in which they should treat with those elements that occur in the evidence. **Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case.** Three previous decisions of this court assist in outlining the duties of a trial judge in this regard.

> [31] Firstly, Carey JA explained, in **R v Fray Deidrick** SCCA No 107/1989 (delivered 22 March 1991), the general obligation on the trial judge in respect of this aspect of a case. In addressing a complaint that a judge had failed to bring to the attention of the jury the fact that there were inconsistencies between a witness' testimony and a previous statement made by that witness, Carey JA said at page 9 of the judgment:
>
> > '...Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with other witnesses in the case. The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. **There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses**'." (Emphasis as in original)

[110] This dictum of Carey JA, was referred to by Brooks JA in **Kirk Mitchell v R** [2011] JMCA Crim 1, at paragraph [22]. In that case, Brooks JA also made the point, in relation to the assessment of inconsistencies, that "[t]here is no doubt that a judge, alone, does not have to engage in the same level of direction as in a trial with a jury" (see paragraph [18]). In a similar vein, the Caribbean Court of Justice in **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) stated as follows:

> '[29] Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language which belongs to a jury trial (with lay jurors) and not to a bench trial

> before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand'."

[64] This principle was also applied in **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008, where at pages 15-16 it was stated that:

> "It is sufficient that the learned trial judge points out some of the major discrepancies, as illustrations of such discrepancies, give proper directions of the manner of identifying such discrepancies and further advising the jury to decide whether they are material or immaterial and the way in which they should be treated."

[65] The circumstances of the identification on the third occasion that the complainant said he saw the appellant, were, indeed, difficult. However, having considered the totality of the identification evidence, we cannot agree that the inconsistencies were of such a nature to undermine the Crown's case. This was a case of recognition, and the complainant's evidence was that he saw the appellant three times on the day in question in broad daylight. They even had what can be described as a heated exchange on the first occasion. In addition, the parties who were known to each other lived in the same community, the complainant knew the appellant's family and the complainant testified that he would see the appellant several times each day.

[66] The inconsistencies arose in relation to the time that the complainant saw the face of the appellant after the firearm was pulled and the complainant ran. Based on the evidence, it was a minimum of two to three seconds and a maximum of four to five seconds. The complainant stated, "[w]hen mi look back behind mi, I saw him clearly and I see it is Mr. O'Gilvie". He never wavered during cross-examination. Based on the complainant's evidence in relation to time, it was open to the learned trial judge to infer as she did, that a few seconds elapsed between when the complainant saw the appellant

pull the firearm to when he ran off. She accepted that he ran as soon as he saw the firearm.

[67] When the evidence and the learned trial judge's summation are closely examined, it is clear that the learned trial judge correctly identified the main areas in which there were inconsistencies. In dealing with the evidence pertaining to identification, she addressed the issue of recognition. She stated at page 155 of the transcript:

> "[The complainant] has also raised the issue of the correctness of the identification. As the complainant and the [appellant] would have already been known to each other, this is a case of recognition. I, therefore warn myself of the special need of [sic] caution, before convicting the [appellant] in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistake in identification and an apparently convincing witness can be mistaken.
>
> Mistakes can also be made in recognition, and mistakes in recognition even of close friends and relatives are made. I, therefore, have to examine carefully the circumstances in which the identification was made."

[68] The learned trial judge then proceeded to examine the evidence pertaining to the purported identification of the appellant. Her directions on this issue cannot be faulted.

[69] The learned trial judge did recognize that the credibility of the complainant's evidence was in issue. She indicated that in assessing the evidence of the complainant she bore in mind "his admitted malice towards the accused", and also noted that no spent shells were recovered from the scene.

[70] The learned trial judge then proceeded to analyse the evidence of the appellant and dealt with the issues of alibi, identification and good character. Her directions to herself and analysis of the evidence in respect of those matters cannot be faulted. She found that the evidence given by the appellant was not credible and gave reasons for that finding.

[71] The learned trial judge rejected the appellant's alibi and, ultimately, found the complainant to be a credible witness and the evidence sufficient to ground a conviction. Based on the foregoing, we find there is no merit in this ground.

Conclusion and disposal of the appeal

[72] Based on the above, we have concluded that there is no merit in the appeal.

[73] As stated in para. [4] above, although the appellant had indicated in the Criminal Form B1 that was filed on his behalf, his desire to appeal conviction and sentence, and no permission was given by the single judge to appeal the sentences, no ground of appeal or submission was made before us challenging the sentences imposed. However, having considered the circumstances of the case, we are of the view that counsel's approach was quite prudent, as the sentences imposed fell within the normal range of sentences for those offences. As such, the application for leave to appeal the sentences has no merit. In the circumstances, we make the following orders:

1. The appeal against the convictions is dismissed.

2. The convictions are affirmed.

3. The application for leave to appeal the sentences is refused.

4. The sentences are to run concurrently and are to be reckoned as having commenced on 27 September 2017 (the date when they were imposed).