[2021] JMCA Crim 45

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00106

FERDINAL PHIPPS v R

Ms Melrose Reid for the appellant

Mrs Sharon Millwood-Moore for the Crown

15 October and 19 November 2021

G FRASER JA (AG)

[1] This is an appeal by Mr Ferdinal Phipps ('the appellant') against sentences imposed on him in the High Court Division of the Gun Court, holden at King Street in the parish of Kingston for the offences of illegal possession of firearm and robbery with aggravation. He was sentenced to 12 years' imprisonment with respect to the former offence and 14 years and eight months' imprisonment for the latter. The sentences were ordered to run concurrently.

[2] On 15 October 2021, this court heard submissions from counsel for both parties, and at the conclusion of the hearing, we made the following orders:

1. The appeal against sentence is refused.
2. The sentences imposed by the court below are affirmed and shall be reckoned as having commenced on 15 November 2019.

[3] At that time, we promised to put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[4] The appellant was charged on an indictment for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count 1), and robbery with aggravation contrary to section 37(1)(a) of the Larceny Act (count 2). The conjoined particulars of the offences are that on 23 May 2015, in the parish of Kingston, the appellant, armed with an illegal firearm, robbed Mrs Aline Cheung ('the complainant') of her handbag containing $1,000,000.00, and a Samsung Galaxy cellular phone valued at $50,000.00.

[5] It was the prosecution's case that the robbery occurred at about 7:30 pm after the complainant, accompanied by her husband, had exited their business place located at the intersection of Barry Street and Peters Lane in the parish of Kingston. The complainant had entered the passenger side of her car, which was parked on Peters Lane, but before she managed to close the door, the appellant, armed with a gun, grabbed her handbag, which was slung around her neck and shoulders. His action resulted in the complainant being dragged along with the handbag out of the car and caused her to fall to the ground. The appellant struggled with the complainant until the strap of the bag came loose from her neck. The appellant pointed his firearm in the direction of the complainant and her husband before running off with the handbag.

[6] The complainant's husband, a licensed firearm holder, fired at the appellant, who momentarily fell to the ground but got up and continued to flee the scene. The melee attracted the attention of Detective Sergeant Kirk Roache of the City Centre Police Station. This policeman was, at the time, at the back gate of the police station along Oliver's Place, which is situated between Barry Street and Tower Street. Detective Sergeant Roache had witnessed what transpired, and when the appellant ran off, he gave chase until the appellant disappeared into a crowd at South Parade.

[7] The appellant was later seen, by another police officer along Church Street in the parish of Kingston, bleeding from what appeared to be gunshot wounds to his legs and back and was taken to the Kingston Public Hospital ('KPH'). Whilst undergoing treatment at the KPH, the appellant was identified by another policeman as the person whom he had seen fleeing on a motorcycle and holding a grey handbag.

[8] The appellant was subsequently arrested and charged for the offences of illegal possession of firearm and robbery with aggravation. The complainant's handbag, money and cell phone were never recovered, and neither was the firearm which the appellant was in possession of at the time he committed the robbery.

[9] On 16 October 2019, the appellant pleaded guilty to both offences. His guilty plea came on the second day of trial after five of the eight prosecution witnesses had already given evidence. On 15 November 2019, as indicated at para. [1] above, he was sentenced to 12 years' imprisonment with respect to the offence of illegal possession of firearm and 14 years and eight months' imprisonment for the offence of robbery with aggravation. The sentences were ordered to run concurrently.

[10] The appellant sought and was granted leave to appeal his sentences by a single judge of this court, on the basis that the learned trial judge in relation to both offences, had not given any reasons for preferring higher starting points than those recommended in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, 2017 ('the Sentencing Guidelines'). The original grounds of appeal stated in his filed application were:

> "1. Unfair Trial: that based on the fact [sic] presented the sentences are harsh and manifestly excessive and cannot be justified when taken into consideration.
>
> 2. Unfair Trial: That the learned trial judge did not temper justice with mercy as my guilty plead [sic] was not taken into consideration."

[11] At the hearing of the appeal before us, Ms Melrose Reid, counsel for the appellant, sought leave to abandon the original grounds filed by the appellant. She indicated, quite candidly, that after careful consideration of the matter, she was unable to advance the grounds originally filed. Accordingly, counsel obtained our leave and argued, instead, the following supplemental grounds of appeal:

> "**GROUND 1** - The Learned Sentence Judge (LSJ) erred in Law in believing that a conviction under section 20(1) (b) of the Firearms Act requires a mandatory minimum of 15 years imprisonment.
>
> **GROUND 2** - The LSJ erred in principle by imposing a minimum sentence of 15 years outside of the Sentencing Guidelines in Sentencing the Appellant.
>
> **GROUND 3** - The LSJ varied from the Sentencing Guideline [sic] for **Robbery with Aggravation** without positing any reason for the variation." (Emphasis as in original)

Ground 1

Whether the learned trial judge erred in law in believing that a conviction under section 20(1)(b) of the Firearms Act requires a mandatory minimum sentence of 15 years' imprisonment

[12] Ms Reid contended that the learned trial judge "was under the misguided position that the amendment to the Firearms Act in 2010 cast a blanket minimum mandatory penalty of 15 years for offences under the Firearms Act". Although Ms Reid noted that the learned trial judge, in referring to 15 years, had said "**MY** starting point" (emphasis as in Ms Reid's written submissions), she argued that the learned trial judge "might have uttered those words under the misguided notion that the amendment affected section 20(1)(2) [sic] of the Firearms Act…". She further submitted that section 20(1)(b) of the Firearms Act was not amended, and neither was the penalty and, therefore, the learned trial judge "erred when she made the starting point to be 15 years".

[13] Counsel for the Crown, Mrs Millwood-Moore, in her written submissions, had made short thrift of this ground when she submitted that "this ground was without merit" and

unsupported by the utterances of the learned trial judge at the relevant time. Counsel pointed out that at no time, in her utterances, did the learned trial judge make any mention of a mandatory minimum sentence or, indeed, any reference to the provisions of the Firearms Act as amended. Counsel further contended that the use of the pronoun "my" was indicative of the starting point that the learned trial judge had herself selected and not a starting point stipulated or mandated by any statute.

[14] The submissions made by Ms Reid on behalf of the appellant found no favour with this court. It is correct that the learned trial judge chose a starting point of 15 years with respect to the offence of illegal possession of firearm, but when she clearly indicated "my starting point is 15 years", we do not find that these words were meant to indicate any notion of a statutory mandatory minimum. The learned trial judge's subsequent actions of reducing the starting point by 5% on account of the appellant's belated guilty plea, granting a further reduction of two years based on mitigating factors, and giving full credit of four months for time spent in custody prior to trial and sentencing, and her consequent imposition of a sentence of 12 years' imprisonment, clearly demonstrated that she was not misguided as to a mandatory sentence.

[15] On a careful reading of the transcript, this court could not identify any indication, either expressed or implicit, that the learned trial judge was misguided as to the provisions of the Firearms Act, nor is it manifested that she imposed a mandatory minimum sentence in relation to the offence of illegal possession of firearm. Therefore, we agreed with the submissions made by counsel for the Crown that this ground was without merit. Providentially, counsel, Ms Reid, having appreciated that there was no reasonable basis on which she could have successfully continued to advance this argument, was judicious in abandoning this ground of appeal.

Ground 2

Whether the learned trial judge erred in principle by imposing a minimum sentence of 15 years outside of the Sentencing Guidelines in sentencing the appellant

[16] Although Ms Reid belatedly conceded that the learned trial judge had not imposed a mandatory minimum sentence of 15 years' imprisonment, she, nonetheless, submitted that the learned trial judge erred when she acted contrary to the Sentencing Guidelines and selected a starting point of 15 years. The Sentencing Guidelines, she said, provided for the imposition of imprisonment within a normal range of seven – 15 years, with a usual starting point of 10 years for the offence of illegal possession of firearm. Counsel admitted that the Sentencing Guidelines were not mandatory and that the learned trial judge could have imposed a sentence of 15 years' imprisonment or, indeed, one that was higher. Counsel, however, argued that the learned trial judge acted contrary to the principles of sentencing when she failed to state precisely the reasons for her departure from the usual starting point.

[17] Counsel further sought to impress upon this court that the learned trial judge not only sentenced the appellant for illegally being in possession of the firearm but had then gone on "to sentence him for subsequent offence with which he used the firearm to commit [sic]". This counsel submitted amounts to "double counting". Ms Reid contended that it is only if the appellant had committed "another offence under the schedule of the Firearms Act, that the [learned trial judge] ought to move on to sentence for that offence **which constitute the usage of the firearm**, and not imposing a sentence for use of the firearm vide Section 20(1)(b)" (emphasis as in the original). In support of this argument, counsel relied upon the authorities of **Stevon Reece v R** [2014] JMCA Crim 56; **R v Henry Clarke** (1984) 21 JLR 72; and **R v Jarrett and others** (1975) 14 JLR 35. Counsel contended that these decisions established "similar facts and distinctions between a charge under section 20(1)(b) and section 25 of the Firearms Act". In conclusion, on this ground, Ms Reid submitted that the sentence of 12 years'

imprisonment imposed by the learned trial judge for the offence of illegal possession of firearm should be overturned.

[18] Counsel for the crown, Mrs Millwood-Moore, agreed that falling prey to double counting would be an incorrect approach, but submitted that the learned trial judge, in this instance, had not employed such a methodology. Counsel posited that "a sentencing judge could not reasonably be expected to divorce the circumstances in which a firearm is used from the process of consideration". Counsel further submitted that if the learned trial judge had ignored the circumstances of the offence, this would have been tantamount to her treating count one as an offence of possession simpliciter, which would have been in conflict with the factual circumstances of the case. She pointed out that although the appellant did not discharge the firearm, it was nonetheless actively used in the commission of the offence of robbery with aggravation and to assault the complainant's husband. In this sense, the possession of the firearm was not simpliciter and, therefore, the learned trial judge could not be censured for taking this fact into consideration.

[19] Mrs Millwood-Moore strenuously disagreed that the sentence of 12 years' imprisonment imposed for the offence of illegal possession of firearm ought to be disturbed. Counsel submitted that the focus of the arguments advanced on behalf of the appellant ought to be concentrated on the starting point that was selected by the learned trial judge, and what would be the implication of the departure from the Sentencing Guidelines. Counsel, in buttressing her position, referred to previous decisions of this court, such as **Alpha Green v R** (1969) 11 JLR 283 (applying **R v Ball** (1951) 35 Cr App Rep 164), and **Dal Moulton v R** [2021] JMCA Crim 14.

[20] We understand Ms Reid's complaint to be that the learned trial judge, by imposing a sentence of 12 years' imprisonment for the offence of illegal possession of firearm, had factored into her consideration the use of the firearm in the commission of the offence comprised in the second count of the indictment and which has resulted in the sentence being inflated. Counsel also submitted that the learned trial judge having gone on to

impose a separate sentence for the offence of robbery with aggravation, this has led to "double sentencing." We do not agree with Ms Reid's contentions and, further, the cases relied upon by her, in our view, did not support her arguments in this regard.

[21] Having examined those cases, our appreciation of the legal principles derived therefrom is as follows:

(i) To ground the jurisdiction of the Gun Court, the prosecution must establish the commission of a firearm offence.

(ii) In circumstances where a firearm is not recovered during police investigations, there must be some other evidence establishing the possession of a firearm by the perpetrator of the alleged gun crime(s).

(iii) Where the only evidence of the presence of a firearm is a description given by witnesses that the object seen in the hand of an assailant resembles or has the appearance of a gun, then such evidence cannot support a conviction for the offence of illegal possession of a firearm simpliciter.

(iv) However, where the evidence goes further to show that the object appearing to be a firearm was possessed by the accused in circumstances where an offence specified in the First Schedule of the Firearms Act ('a scheduled offence') had been committed then, pursuant to section 20(5)(c) of the Firearms Act, it would be sufficient to sustain a conviction for the offence of illegal possession of firearm.

[22] The factual matrix of the instant case did not evince that the object seen in the hand of the appellant was discharged. Neither was there any forensic or ballistic evidence to support that the object was a firearm within the meaning of section 2(1) of the

Firearms Act, which defines a firearm to mean "any lethal barreled weapon from which any shot, bullet or other missile can be discharged…". Since the prosecution could not have proven that the object in this instance, was a firearm as defined in section 2 of the Firearms Act, it would, therefore, have been incumbent on them during the trial process, to have established that a scheduled offence, such as robbery with aggravation or assault, had been committed. The only provision the prosecution could have prayed in aid in the circumstances was section 20(5)(c) of the Firearms Act, which provides that:

> "20. (5) In any prosecution for an offence under this section –
>
> > (c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section."

[23] How is this provision to be treated by a trial judge? The decision of this court in **R v Jarrett and others** (at page 42 D), as enunciated by Luckhoo P (Ag), is that:

> "…When the provisions of s. 20 (5) (c) are invoked by the prosecution in proof of an offence charge under s. 20 (1) (b) of the Act if the defendant did in fact have possession of the firearm (as defined by s. 25) … he is deemed to have had possession of a firearm (as defined by s. 2) and to have had it at the material time not under lawful authority…"

[24] Luckhoo P (Ag) then went on to explain that the provision of section 20(5)(c) of the Firearms Act makes it "abundantly clear that [it is] evidential and [does] not create any offence…". It is a statutory fiction that was created by the use of the word "deemed", whereby an imitation firearm was to be regarded as satisfying the definition requirements of a firearm under section 2(1) of the Firearms Act. Luckhoo P (Ag) at page 42 F then went on to enunciate that:

> "A charge alleging contravention of s. 20 (1) would in such a case be proved by adducing such evidence as would be

> necessary to show that the defendant committed a s. 25 offence."

[25] In the case of **Stevon Reece v R**, the learned trial judge had convicted the accused of illegal possession of firearm based on the description of the object given by the witness. The learned trial judge had, however, acquitted the accused for the offence of robbery with aggravation. In keeping with the law as established in **R v Jarrett and others** and in allowing the appeal, the court, after examining the interplay between sections 20 and 25 of the Firearms Act, indicated that:

> "[43] It follows that the prosecution, of necessity, would have had to successfully invoke the statutory fiction created by section 20(5)(c) in order to ground a conviction for the section 20(1)(b) offence for which the applicant was charged. To do so, there would have had to be proof beyond a reasonable doubt that he had committed the robbery with aggravation as charged."

[26] In the instant case, although the appellant pleaded guilty to the offences of illegal possession of firearm and robbery with aggravation, the learned trial judge was still required to assess the circumstances of the offences, in order to determine whether the offences were in fact made out and the appropriate sentences to imposed. As posited by counsel for the Crown, the learned trial judge, in sentencing the appellant, could not have divorced the possession of the object deemed to be a firearm, from the circumstances and use of the "firearm" in the commission of a scheduled offence, that is, count two of the indictment which averred a robbery with aggravation. In determining the appropriate sentence to impose, the learned trial judge would have considered, given the circumstances of the case, that the firearm was used to assault the complainant and her husband, although no charges were preffered for this offence. More significantly, she must have contemplated the companion scheduled offence which was in fact committed, that is, robbery with aggravation. Count 1, therefore, was not to be treated as an offence of illegal possession of firearm simpliciter. Consequently, we rejected Ms Reid's submission on ground two as devoid of merit.

Ground 3

Whether the learned trial judge varied from the Sentencing Guideline for robbery with aggravation without positing any reason for the variation

[27] We have noted that, obliquely, the submissions posited by Ms Reid in relation to this ground also relate to the sentence imposed for illegal possession of firearm. As indicated earlier, the learned single judge of this court had also highlighted, as a consideration, the fact that the learned trial judge had not given any reasons for preferring higher starting points, in relation to both offences, than those recommended in the Sentencing Guidelines. We have, therefore, found it necessary to address this ground also in relation to the offence of illegal possession of firearm, albeit it did not form part of ground three as drafted by the appellant.

[28] Counsel for the appellant had initially complained that the sentences imposed on the appellant were manifestly excessive, as the learned trial judge chose a starting point of 15 years for the offence of illegal possession of firearm, and 18 years for the offence of robbery with aggravation, which are higher than the usual starting points recommended by the Sentencing Guidelines, and without providing any explanation for preferring higher starting points. Counsel, however, subsequently agreed that the sentences were not manifestly excessive and that the learned trial judge was at liberty to choose the starting points, which she did. She, nonetheless, contended that the learned trial judge failed to apply the accepted principles of sentencing due to her failure to give reasons for her selection of higher starting points.

[29] Mrs Millwood-Moore conceded that the learned trial judge departed from the Sentencing Guidelines insofar as she chose higher starting points than those recommended by the Sentencing Guidelines. She also agreed that the learned trial judge had expressed no reasons for so doing. Counsel, however, disagreed that the sentences were manifestly excessive or even excessive and that although there was deviation from the usual starting points, the learned trial judge ultimately "calculated and determined sentences" that were within the accepted ranges. Counsel noted that "[s]trictly speaking

the [Sentencing] Guidelines require that the selected starting point be adjusted for both aggravating and mitigating factors". She noted that the learned trial judge did not proceed to make any adjustments to her preferred starting point in relation to aggravating factors relevant to both offences.

[30] In light of the concessions made by counsel on both sides, and having regard to how we have treated with the issue of "double counting" raised by the appellant in ground two, the issues for this court's determination have now been narrowed considerably. It is our view that this ground centers around the main issue of whether the learned trial judge erred in her assessment of the sentences she imposed on the appellant by selecting starting points higher than those recommended by the Sentencing Guidelines.

[31] This court's concern, therefore, is to determine the following issues:

> (i) whether the sentences imposed by the learned trial judge on the appellant were arrived at by applying the usual, known and accepted principles of sentencing; and
>
> (ii) whether the said sentences fall within the range of sentences which the court is empowered to impose for the particular offence, and which is usually given for like offences in like circumstances (see **Meisha Clement v R** [2016] JMCA Crim 26 at para. [43]).

[32] We have borne in mind several authorities, including the principles established in **Meisha Clement v R**, and the guidance provided by the Sentencing Guidelines, with regard to the approach to be taken in relation to sentencing. We also have considered in mind the principles emanating from **R v Ball**, that this court ought not to intervene with the sentence imposed by the learned trial judge unless "the sentence is excessive or inadequate to such an extent as to satisfy this court that when it was passed there was a failure to apply the right principles". This tenet was succinctly articulated by Brooks

P in **Wayne Lewis v R** [2021] JMCA Crim 3 at para. [13] in this manner, "this court will not overturn the sentence unless it finds that it is one that no reasonable judge could have arrived at in the circumstances".

[33] It would be prudent at this point to determine what is meant by the "starting point". According to the Sentencing Guidelines, "the starting point is a **notional point within the normal range**, from which the sentence may be increased or decreased to allow for aggravating or mitigating features of the case" (emphasis added) (see para. 7.1 of the Guidelines). Appendix A of the Sentencing Guidelines indicates that the normal range of sentence for the offence of illegal possession of firearm is between seven – 15 years, with the usual starting point being 10 years, while for the offence of robbery with aggravation, the normal range is between 10 – 15 years with the usual starting point being 12 years.

[34] We must note, however, that the Sentencing Guidelines do not, in any way, interfere with the sentencing judge's exercise of his or her discretion with respect to sentencing. Actually, para. 7.6 of the Sentencing Guidelines makes it clear that:

> "…the usual starting points set out in Appendix A are intended to be indicative only. While it is expected that sentencing judges will generally find it convenient to adopt them, the starting point ultimately chosen in each case must be the product of the sentencing judge's fresh consideration of what the particular case requires."

[35] The sentencing judge is further urged that, in arriving at the appropriate starting point, he or she must make assessments relevant to the particular case before her. In **Natalie Williams v R** [2020] JMCA Crim 19, Phillips JA, commenting on the approach to be taken when choosing an appropriate starting point, stated at para. [20] that:

> "[20] As indicated in the [Sentencing Guidelines], once the normal range for the particular offence has been identified, the sentencing judge's first task is to choose the appropriate starting point. To do that, the judge must make an assessment of the 'intrinsic seriousness of the offence', taking

> into account the offender's culpability in committing it, and the harm, physical or psychological, caused or intended to be caused, or that might foreseeably have been caused, by the offence (see **Meisha Clement v R** at paragraph [29]). The starting point, therefore, represents provisionally what the sentencing judge considers to be appropriate for the offence before adjustment in relation to the aggravating and mitigating factors."

[36] It is indeed important that sentencing judges adhere to the recommended starting points so as to promote and achieve consistency and coherence in sentencing. We recognize, of course, as was enunciated by Edwards JA at para. [97] in **Dal Moulton v R**, that:

> "[97] …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 necessary to do so in an individual case, will so state and give sufficient reasons for so doing."

[37] Notwithstanding that the learned trial judge did not specifically indicate her reasons for selecting a higher starting point than is recommended by the Sentencing Guidelines, it is our view that she adequately demonstrated her appreciation of the well-known and accepted principles of sentencing, including the factors to be considered in determining an appropriate starting point as highlighted by Phillips JA in **Natalie Williams v R**. The learned trial judge took into consideration, as she was obliged to do, pertinent matters relating to the commission of the offence and the circumstances of the applicant's previously unblemished antecedents and good social inquiry report. These were all factored into the equation, to his credit. In her assessment of an appropriate starting point, the learned trial judge highlighted that the offences for which the appellant had re-pleaded guilty were prevalent crimes in the society; that even after the complainant fell to the ground, the appellant was struggling with her to remove the bag; and that he also stole $1,000,000.00 from her. The learned trial judge also considered and referred to the social enquiry report in determining how the crime had impacted the complainants.

[38] In the social enquiry report, the complainant is reported to have said that the appellant's firearm jammed and discharged the bullets on the ground, and this might have been what spared her life. We note, however, that, by reference to the transcript, there was no indication of bullets recovered at the scene, nor indeed any evidence given of the same by the complainant or any other witness. The complainant further expressed that the incident scared her and her family to the point where her family relocated to another country. She and her husband remained in Jamaica due to the investments made in their business which they were divesting themselves of and were looking to relocate as soon as that task was accomplished. She also noted that after the robbery, she developed several illnesses, including hypertension and had difficulty sleeping.

[39] From the learned judge's reasoning, it can be discerned that the starting points she utilized was arrived at after considering the aggravating features. This is borne out by the fact that she did not inflate the starting points for any aggravating factors, which she was entitled to do. She, however, reduced the sentences by one year due to what she described as a good social enquiry report and further by another year due to the appellant having no previous convictions.

[40] In **Shanor Bertram v R** [2019] JMCA Crim 9, the learned trial judge, in imposing sentence on the appellant, had failed to identify the sentence range and an appropriate starting point within the range. However, despite this failure, this court found that the sentences imposed were well within the usual range of sentences imposed for the offences charged, and stated at para. [25] that "[n]otwithstanding the learned trial judge having failed to identify the sentence range or an appropriate starting point within the range, there can be no legitimate complaint in respect of the sentences which were ultimately imposed".

[41] Therefore, despite the learned trial judge preferring starting points that were higher than the usual starting points stated in the Sentencing Guidelines, the appellant's sentences of 12 years' imprisonment for the offence of illegal possession of firearm, and 14 years and eight months' imprisonment for the offence of robbery with aggravation are

within the normal range of sentence stated in the Sentencing Guidelines in respect of these offences. Additionally, the learned trial judge, having chosen 15 years as her starting point in relation to the offence of illegal possession of firearm, while veering to the upper limit of the range did not exceed it, having regard to the starting point being defined as "notional point within the normal range". Therefore, it cannot be said that she erred by choosing 15 years as her starting point in relation to the offence of illegal possession of firearm.

[42] Further, a review of other cases from this court, where appellants pleaded guilty to charges of illegal possession of firearm and robbery with aggravation, reveal that similar sentences, as those imposed in the instant case, were not found by this court to be manifestly excessive. For example, in **Joel Deer v R** [2014] JMCA Crim 33, sentences of 10 years and 16 years' imprisonment at hard labour were imposed, to run concurrently, for the offences of illegal possession of firearm and robbery with aggravation, respectively; and in **Michael Evans v R** [2015] JMCA Crim 33, the appellant was sentenced to 10 years and 15 years' imprisonment at hard labour for the offences of illegal possession of firearm and robbery with aggravation, respectively, with the sentences to run concurrently.

[43] Ultimately, counsel for the appellant and the Crown both agreed that this court could look afresh at the sentences imposed by the learned trial judge and in accordance with the relevant principles, adjust them as the court deems fit. Indeed, the court has the power, under the Judicature (Appellate Jurisdiction) Act, to vary the sentence, whether by decreasing or increasing it. Section 14(3) provides that:

> "14. – …
>
> > (3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

[44] Ms Reid submitted that "a sentence of 7 – 10 years be substituted by this court, on count one and 12 years on count two". She argued that the maximum sentence for robbery with aggravation is 21 years and, albeit, that the learned trial judge finally settled on a sentence of 14 years and eight months; this was "almost the maximum" sentence that could be imposed for that offence. The learned trial judge, Ms Reid contended, had gone to the higher end of the spectrum without giving due regard to the fact that the appellant had not discharged the firearm nor had he caused any physical injury with the weapon. Counsel submitted that a sentence of 12 years' imprisonment would have been more appropriate in the circumstances and in keeping with the known authorities. In this regard, counsel sought to rely on the enunciations of Brooks JA (as he then was) in **Jerome Thompson v R** [2015] JMCA Crim 21; where he said that "the usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years".

[45] We have examined the authorities cited by Ms Reid and have made the following observations. In **Jerome Thompson v R**, the learned trial judge had erroneously stated that she was bound by statute to impose a statutory minimum sentence of 15 years in respect of the charge of robbery with aggravation. On appeal, Brooks JA enunciated that:

> "[34] In light of the learned trial judge's error, we revisit the sentence imposed in respect of the robbery with aggravation. **The usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years. This may be increased or reduced according to the circumstances of the case**.
>
> [35] There was no egregious aspect to this robbery which would warrant any increase to the sentence usually imposed for this offence. Mr Thompson had no previous conviction and he was said to have been gainfully employed at the time of the commission offence. The usual sentence should therefore be applied. The sentence imposed by the learned trial judge should therefore be set aside and a sentence of 12 years imposed in substitution therefor." (Emphasis added)

[46] We understand the phrase "usual sentence", as used in the context of the excerpt above by Brooks JA, to have been in reference to an appropriate starting point, now

referred to in the Sentencing Guidelines as the "usual starting point". This is buttressed by the significant words which followed that "[t]his may be increased or reduced according to the circumstances of the case". Any other interpretation, in our view, would be perverse.

[47] Ms Reid also sought to bolster her argument as to an appropriate sentence in relation to the offence of robbery with aggravation by relying on the authority of **Toussaint Solomon v R** [2020] JMCA App 9 ('**Solomon v R**'), where this court, in allowing that appeal, reduced Mr Solomon's sentence for robbery with aggravation from 15 to seven years. Counsel did, however, acknowledge that Mr Solomon was not the principal offender and that there were other mitigating factors that were taken into consideration as it relates to the circumstances of that case. The circumstances of the appellant, in the instant case, is different to that of **Solomon v R** since he was the principal and sole perpetrator, and no other mitigating factors had been identified relative to his personal circumstances. A sentence on the lower side of 12 years' imprisonment would, therefore, be wholly inappropriate.

[48] Mrs Millwood-Moore helpfully provided the court with a number of authorities and a summary of the facts of those cases, as demonstrating the usual range of sentences for robbery with aggravation. These include the decisions in **Joel Deer v R**; **Jermaine Cameron v R** [2013] JMCA Crim 60; **Kemar Palmer v R** [2013] JMCA Crim 29; and **Wayne Samuels v R** [2013] JMCA Crim 10. This court observed that in all, except the latter case, the approved sentence for the offence of robbery with aggravation was 15 or 16 years' imprisonment. As it relates to **Wayne Samuels v R**, we have noted that a sentence of 10 years' imprisonment was imposed on the appellant for the offence of robbery with aggravation, but this sentence was determined before the promulgation of the Sentencing Guidelines.

[49] Mrs Millwood-Moore also posited an approach that could be utilized by this court in revisiting the sentences imposed by the learned trial judge. She suggested that in revisiting the sentence for the offence of illegal possession of firearm and utilizing a

starting point of 10 years, the aggravating factors identified by the learned trial judge would increase this figure to 14 years. She further posited that after crediting the appellant four months as time spent on pre-trial remand, making allowances for mitigating factors and taking into account the 5% reduction for the guilty plea, this would result in a final sentence of 11 years.

[50] In relation to the offence of robbery with aggravation, counsel suggested a starting point of 12 years, which would be increased to 20 years based on the aggravating factors. Consideration of the mitigating factors, the reduction of 5% by way of discount allowed for the guilty plea, and crediting the appellant full time spent on remand prior to trial; counsel submitted that the outcome would be some 15 years and eight months. This would, in effect, result in a higher sentence than that imposed by the learned trial judge. On this basis, Mrs Millwood-Moore submitted, "that there is no basis on which to reduce the sentence for the offence of robbery with aggravation as invited by counsel for the appellant".

[51] We have considered the approach posited by Mrs Millwood-Moore. We have no difficulty accepting that the appropriate starting point for the offence of illegal possession of firearm is 10 years, and 12 years for the offence of robbery with aggravation, as recommended in the Sentencing Guidelines. These, however, are just starting points, which may be increased or decreased to allow for aggravating or mitigating features of the case.

[52] In answer to queries posed by this court, Ms Reid accepted that the fact that the incident occurred in close proximity to a police station (City Centre) and that the complainant's husband had been assaulted, the appellant had thereby shown a wanton disregard for law and order, as well as the health and safety of the complainant and other citizens. These, she agreed, would also be aggravating features that could have moved the starting point upwards. Counsel, however, was hesitant in agreeing that since the learned trial judge had not increased her selected starting points by taking account of any aggravating factors, it could be inferred that this was what had influenced the higher

starting points preferred by the learned trial judge. Ms Reid insisted that there should be strict adherence to the Sentencing Guidelines by judges and that failure to faithfully follow the Sentencing Guidelines should not be excused by this court. Neither should it be left for this court nor appellants to infer anything. Judges, she said, should clearly indicate the methodology and process employed in any sentencing exercise.

[53] We have taken note of the aggravating features that the learned trial judge had identified, and we have, in fact, identified other aggravating factors which she could have quite properly taken into consideration, including the following:

i. The incident occurred in close proximity to the City Centre Police Station, the Court of Appeal, and Office of the Director of Public Prosecutions. This is indicative to this court of a wanton disregard for law and order on the part of the appellant.

ii. The firearm was used to assault the complainant's spouse, putting him in fear of not only his life but the life of his spouse. The complainant was dragged out of the car along with her handbag, causing her to fall to the ground, as the appellant was in the process of removing her handbag from around her neck. This use of violence is a blatant display of wanton disregard for the health and safety of the complainant. The appellant admitted to the Probation Aftercare Officer that "his offence caused physical harm to the complainant as she fell".

iii. The firearm used in the furtherance of the robbery was never recovered and, therefore, is at large and can be used to commit further crimes, even more serious than has happened in the instant case.

iv. The stolen property was never recovered so that there has not been any restitution made to the complainant in circumstances where significant losses were sustained.

v. The offence was premeditated, as indicated from the appellant's own mouth. During his interview by the Probation Aftercare Officer, he indicated that, on the day in question, he had been visiting with friends who had revealed their intention to "rob a Chinese person in the area but needed someone with who [sic] they were unfamiliar", whereupon he "volunteered" for the position.

vi. The appellant was apparently operating in a group or gang. Again, this is evident from his own admissions to the Probation Aftercare Officer, and the fact that when he was seen on Church Street, neither the bag nor the firearm was seen. Therefore, it could be inferred that one or more of his cronies had spirited away the bag with the money and phone and also the firearm.

vii. Based on the appellant's family background and upbringing and the information imparted by his mother, he was not a person in "need of anything". He was not a callow youth, suffering from immaturity, but was 28 years of age and should have been able to make good lifestyle choices and not susceptible to peer pressure.

viii. His role in the offence was that as principal and not merely an accomplice or an accessory.

[54] On the totality of the aggravating features identified in the factual circumstances of this case, we deemed it appropriate to safely move the calculations upwards by eight

years. This would take the sentences to 18 years and 20 years for the offences of illegal possession of firearm and robbery with aggravation, respectively.

[55] However, the court must have regard to the mitigating factors as well. Accordingly, we have scrutinized the transcript to determine whether any other mitigating circumstances exist that would enure to the appellant's benefit. We are, satisfied that the learned trial judge had identified all the relevant mitigating factors and agree that the downward movement of two years to the calculations, which she made, is entirely appropriate. This would, therefore, reduce our evaluated sentences for the offences of illegal possession of firearm and robbery with aggravation to 16 years and 18 years, respectively.

[56] As it relates to the appellant's complaint that his guilty plea was not taken into consideration by the learned trial judge, we find this to be baseless. The appellant's guilty plea came after the trial had commenced, and five of the eight prosecution witnesses had already given evidence. Section 42D of the Criminal Justice (Administration) Act, as amended in 2015, ('the Act'), makes provisions for discounts following guilty pleas and subsection (2)(c) provides that "where the defendant pleads guilty to the offence after the trial has commenced, but before the verdict is given, the sentence may be reduced by up to fifteen *per cent*". Section 42H of the Act outlines the factors to be considered by the court in "determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in section 42D(2)…" In these circumstances, the relevant factors would be the circumstances of the offence, including its impact on the victims (42H(b); and the circumstances surrounding the plea (42H(d)).

[57] We agree with the learned trial judge's assessment that the appellant did not deserve the maximum 15% reduction that she could have accorded him in her discretion for the reasons she provided. These were that he only pleaded guilty after the significant witnesses had already given their evidence, on the weight of the evidence a conviction appeared inevitable, and further the impact of the crimes on the victims as highlighted in

the social enquiry report. A review of the transcript shows that the learned trial judge accorded a 5% discount to the appellant as a result of his guilty plea. The discount was calculated to be seven and a half months with respect to the offence of illegal possession of firearm, which the learned trial judge "rounded off" to eight months. In relation to the offence of robbery with aggravation, the discount was calculated to be nine months which she "rounded off to one year.Therefore, the appellant's guilty plea was taken into consideration, and the discount given was within the percentage of discount provided for by the Act. We find this discount to be appropriate in the circumstances and have applied same to our evaluated sentences.

[58] A review of the transcript also shows that the learned trial judge gave the appellant full credit for the four months he spent in custody awaiting trial and sentencing as required, which we have also done.

[59] On our evaluation of the sentences within the framework of the applicable principles of law, we find that a sentence of 14 years and 10 months for the offence of illegal possession of firearm, and 16 years and nine months for the offence of robbery with aggravation, would have been appropriate sentences. We conclude, therefore, that the learned trial judge made no error in principle that could be taken to be so fundamental as to undermine the reasonableness of the sentences she imposed. The sentences are well within the range of sentences for offences of this nature, having regard to the particular circumstances of the case.

[60] We note, however, that our evaluated sentences exceed those imposed on the appellant by the learned trial judge. Accordingly, in determining the proper approach in treating with the instant case, we would follow the dictates in the Privy Council decision of **Williams (Earl) v The State** [2005] UKPC 11, where at para. 10 their Lordships stated:

> "10. … an appellate court which has power to increase a sentence and is considering the exercise of that power should invariably give the applicant for leave to appeal against

> sentence or his counsel an indication to that effect and an opportunity to address the court on the increase or to ask for leave to withdraw the application… The Board indicated the need to follow such a course in *Skeete v The State* [2003] UKPC 82 at paragraph 44 of their judgment and their Lordships now confirm that failure to do so would in their opinion be unfair and a breach of natural justice. The arguments to be presented against an increase in sentence may vary from those advanced in favour of a reduction and the applicant should have the opportunity to put them before the court."

[61] The above principle has been applied in our jurisdiction in the cases of **Linford McIntosh v R** [2015] JMCA Crim 26, and **Ian Wilson v R** [2021] JMCA Crim 29. In the circumstances, therefore, it would not be fair or just to increase the sentences without having given a prior indication of this to the appellant or his counsel. As a result, we have refrained from increasing the sentences.

Conclusion

[62] For the reasons we have sought to explain, there is no basis on which it can successfully be argued that the sentences of 12 years' imprisonment for the offence of illegal possession of firearm, and 14 years and eight months' imprisonment for the offence of robbery with aggravation, are manifestly excessive, or unreasonable. Consequently, we made the orders outlined at para. [2].