[2025] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00054

TIMOTHY TULLOCH v R

Oswest Senior-Smith for the appellant

Ms Kathy-Ann Pyke and Sean Nelson for the Crown

7, 8, 27 November 2023 and 17 March 2025

Criminal law – Wounding with intent – Advance sentence indication given by trial judge – Plea of guilt - Whether the trial judge's departure from advance sentence indication justified – Whether appellant had a legitimate expectation to advance sentence indication – Whether appellant was given a chance to change his plea

Criminal Law – Sentence – Consecutive sentences – Whether sentences manifestly excessive - Totality principle applied

DUNBAR GREEN JA (G FRASER (AG) CONCURRING)

Introduction

[1] On 20 January 2021, the appellant pleaded guilty to two counts of wounding with intent (counts two and three in the indictment), in the Circuit Court held in the parish of Saint Catherine, subsequent to an advance sentence indication ('ASI') given by Daye J ('the learned judge') in Chambers.

[2] The ASI was 10 years' imprisonment on each count to be served concurrently, qualified by the condition - if "everything was good" in the social enquiry and antecedent reports, which had not yet been obtained. On 2 July 2021, in contravention of the ASI,

the learned judge sentenced the appellant to consecutive terms of nine years' imprisonment for the two counts of wounding with intent.

The factual basis for the pleas

[3] A summary of the facts outlined by the prosecution was that the appellant was the intimate partner of the eldest sister of the complainants, who were 11 and 13 years old. The younger of the complainants, RB, indicated that, on 28 January 2020, after she had come from school to the house which they all occupied, the appellant called her to his section, but she did not go. When her sister, EB (the other complainant), arrived home, RB went inside her room and wrote a letter to the appellant (whom she called "Timothy"), telling him "that if he do it again she is going to tell her parents, the police and he is going to see it on the news and she is serious". She then went over to the appellant's section of the house, gave the appellant the letter, and left. She, EB, and other siblings went to the neighbour's house to play.

[4] At some point in the night, after the siblings had retired to bed, RB heard EB scream loudly, and then saw the appellant in front of EB with a machete. The appellant slapped EB and then used the machete to "chop up" EB in her face and head. He also choked her with his left hand while he chopped her to the head. EB managed to escape through a door.

[5] The appellant then went over to RB and began to chop at her. She used her right and left hands to block the chops. Consequently, she lost three fingers. She fell between the beds in the room, and the appellant "chopped her up", to the point where she lost consciousness. He closed the door and left the house.

[6] Subsequently, the complainants' parents arrived home and rushed both complainants to the hospital.

[7] The medical report of RB listed her injuries as: "two lacerations to palm of right hand and distal one-third of forearm. Laceration to left hand, four and five digits fracture...left forearm bone broken, fracture...right forearm bone broken, amputated

right fifth finger, amputation left fourth and fifth digital finger". The medical report also indicated that RB sustained injuries to her ears, nose and throat, and required intervention from a neurosurgeon. Plastic surgery and paediatric surgery were undertaken, and the injuries were classified as "serious and likely to be permanent".

[8] The medical report for EB listed her injuries as: "multiple-lacerations to face, head, arms, multiple facial bone fractures, left mandible and left orbit". Her injuries were classified as "serious and likely to be permanent".

[9] After some effort by the police to apprehend him, the appellant surrendered to the police. He gave a caution statement in which he admitted to wounding the complainants, and was later charged with wounding with intent and buggery. On 20 January 2021, he pleaded not guilty to buggery (count one in the indictment), and the prosecution offered no evidence in respect of that count. He, however, pleaded guilty to the two counts of wounding with intent and was sentenced on 2 July 2021, as indicated above.

The chronology of circumstances leading up to the imposition of the sentences

The plea hearing – 20 January 2021

[10] At the plea hearing, at which the appellant was represented by counsel, the appellant pleaded guilty to the two counts of wounding with intent, after which the circumstances of the offence were outlined by counsel appearing for the prosecution. The learned judge then adjourned the sentencing to 5 February 2021, indicating that he would await reports about the appellant's character "because the injuries [were] serious". He requested a social enquiry report ('SER') and an antecedent report. There was no mention of an ASI.

The first sentence hearing – 5 February 2021

[11] At the first sentence hearing, defence counsel was again present. The SER was ready, but not the antecedent report. The learned judge then indicated that the extent of injuries inflicted on the complainants constrained him to consider substituting the concurrent 10-year terms of imprisonment previously indicated (the ASI), with

consecutive sentences. At page 12 of the transcript, the following exchange between defence counsel and the learned judge is recorded:

> "HIS LORDSHIP: One of the things also I wanted to look at, Mr Smith ---[suspension points] well, I will hear what the complainants ----they can come inside and say what they want to say, right, and that is ---[suspension points] **I want to give you an opportunity**, because when I ---[suspension points] you had asked for sentence indication and that remains the same, but am thinking it is two complainants separate and I wanted to just explain to you that after giving the sentence indication which remains, the question of two complainants is something that I have to consider.
>
> MR S SMITH: Understood, m' Lord.
>
> HIS LORDSHIP: In sentence and consecutive, I just wanted to mention that and **for you to address your mind**, not now, we have to come back. So what I will have to hear is [sic] the probation officer, she can advance the matter by giving her report, then I hear what the complainants are saying…." (Emphasis added)

[12] Aspects of the SER were then read into the record. The victim impact statements (individually penned letters from the complainants to the appellant) were also read into the record. Each complainant was allowed to read into evidence the letter to the appellant in which she set out the devastating impact of the injuries on her life.

[13] The sentence hearing was then adjourned to 19 March 2021.

The second sentence hearing – 19 March 2021

[14] There is no indication in the record as to what exactly transpired on 19 March 2021. It is apparent from the learned judge's comments, on the following sentencing date, that defence counsel was absent, and that the learned judge had requested the prosecutor's assistance in finding authorities on the principle of consecutive sentences.

The third sentence hearing – 9 April 2021

[15] The prosecutor, defence counsel and the appellant were present at the third sentence hearing. The antecedent report was read into the record. The learned judge went on to request a psychological/psychiatric report. The sentence hearing was adjourned to 10 May 2021, with the expectation that a plea in mitigation and submissions on the matter of consecutive sentences would be made.

[16] Before the adjournment, the learned judge indicated that he had received authorities related to the principles of consecutive sentences from the prosecutor and would make arrangements to send them by e-mail to defence counsel. Defence counsel, in turn, alerted the learned judge to his search for authorities in respect of that type of sentence and adverted to his view "that a meeting of the minds [was] best in respect of the authorities".

The fourth sentence hearing – 10 May 2021

[17] The sentence hearing was again adjourned because the psychologist's report was outstanding.

The fifth sentence hearing – 2 July 2021

[18] At the sentence hearing, on 2 July 2021, it was indicated that a psychiatrist's report had been furnished to the court and received by defence counsel. The appellant was then called upon to indicate if he had anything to say, and defence counsel made a plea in mitigation, focusing on the plea of guilt at the "first opportune moment"; the appellant's age (25 years) and relative youthfulness; the appellant's statement of remorse; and the appellant's good prospects for rehabilitation.

[19] On pages 42-43 of the transcript, during the learned judge's sentencing remarks, he again mentioned the ASI in the following terms:

> "Your lawyer had asked for a sentence early, early in the day if you plead guilty, which you did, at the first opportunity. I indicated to your lawyer if everything is good, subject to the

> Social Enquiry Report, even the psychiatrist report, which wasn't available at the time, if everything was good, then you could get a sentence of 10 years. That is what I said to him. But it was conditional.
>
> My concern now is to the two young ladies, that is what I see. …And the problem I'm having now ---ten years for---I heard it was two, but I didn't realize, right, the severity of each, that is what I didn't realize, its when I saw it, I say, yes, I did say ten, but subject to that, the sentence has to reflect the injuries to these two young ladies, right. So it gives me a problem with that ten years. I have to go over that for these two young ladies. And normally, you do ten years , in terms of it was one young lady, and to give you ten years for each person, concurrent, but that would not reflect the gravity of the offence in respect to each person, right. So I have to consider this whole issue of consecutive to reflect for each person, right.
>
> **And I brought it -- indicated to your lawyer that I have to look at one and two authorities to assess the type of sentence, right. It is not normal that I have to consider consecutive sentences**…." (Emphasis added)

[20] And on page 48, the learned judge continued:

> "[S]o I have to consider your case, what sentence for each of the victims in the circumstances, but its [sic] two separate infliction of wounds, far-reaching. And I have to give a sentence---as I said, I told your lawyer ten years, okay, if you plead guilty, which you did, but I also have to apply the consecutive principle because I think that the sentence must reflect..."

[21] After considering authorities and principles applicable to the imposition of consecutive sentences and sentencing generally, the learned judge departed from the ASI and imposed a sentence of nine years' imprisonment on each count to run consecutively, as indicated above. That meant that the appellant was required to serve an aggregate of 18 years' imprisonment as against the 10 years' imprisonment (concurrently) previously indicated.

The appeal

[22] By Criminal Form B1, filed 30 July 2021, the appellant gave notice of his application for permission to appeal his sentence solely on the basis that the "sentence was excessive".

[23] On 4 January 2023, a single judge of appeal granted an extension of time for his application, and also leave to appeal on the basis that there were issues to be determined by a panel of this court, including whether (a) the learned judge treated the appellant fairly when he resiled from the ASI; (b) the appellant ought to have been permitted to reconsider his plea, (referencing **Adrian Brown v R** [2022] JMCA Crim 3 (`**Adrian Brown v R**'); (c) the consecutive sentences were appropriate in light of the fact that the two complainants were injured in the same transaction; and (d) the learned judge approached the sentencing process correctly.

[24] It was also a concern of the single judge whether the ASI of 10 years' imprisonment would have been "sufficient" in light of the gravity of the injuries inflicted on the complainants.

[25] On 3 November 2023, the appellant filed a single supplementary ground of appeal that "[t]the consecutive sentences imposed resulted in the punishment being manifestly excessive".

Summary of submissions

For the appellant

[26] Mr Senior Smith, appearing for the appellant, was granted permission to abandon the original ground of appeal and argue, instead, the single supplementary ground of appeal. Although counsel made submissions as to the procedure adopted by the learned judge in giving and departing from the ASI, in our view, there was no real challenge to the procedure adopted.

[27] Initially, counsel submitted that although the learned judge erred in his application of the procedure, the appellant did not raise any complaint, by way of a ground of appeal, since it could be argued that, in the circumstances, the appellant was provided with the opportunity to withdraw his plea. However, after considering the guidance in **Adrian Brown v R**, counsel made further oral submissions, arguing that the appellant would have had a legitimate expectation of the sentence of 10 years' imprisonment at the time of sentencing, as had been previously indicated in the ASI. Counsel also made submissions in relation to whether the consecutive sentences would have been disproportionate. These latter submissions will be summarised later in this judgment.

For the Crown

[28] Not surprisingly, counsel for the Crown did not agree that the appellant had a legitimate expectation to the ASI, at sentencing, and placed reliance on the chronology of events leading up to the sentencing as well as **Regina v Shane Newman** [2010] EWCA Crim 1566 ('**Regina v Shane Newman**'), and **R v Nottingham Magistrates' Court, ex parte Davidson** [2000] 1 Cr App Rep (S) 167, ('**R v Nottingham Magistrates' Court**').

Discussion

The governing regime for granting an ASI in this jurisdiction

[29] The governing regime is set out in The Supreme Court of Judicature of Jamaica Practice Direction (Criminal), Advance Sentence Indication Practice Direction No 2 of 16 ('the Practice Direction'). This is based on the principles set out in **R v Goodyear** [2005] EWCA Crim 888 ('**Goodyear**').

[30] The approach by the learned judge was not compliant with the following provisions, in particular.

> "3.5. A sentence indication should be confined to the maximum sentence, to be imposed if a plea of guilty is tendered at the stage of the proceedings at which the indication is sought....

3.6. Subject to direction 3.7, the judge may grant a sentence indication if he or she is satisfied that the information available at that time is sufficient for that purpose.

3.7. Without limiting direction 3.6, the judge shall be in receipt of the following information before granting a sentence indication:

> 3.7.1. a summary of the facts agreed on by the prosecution and the defence on which the sentence indication is granted; and
>
> 3.7.2. information as to any previous conviction(s) of the defendant.

3.8. The judge may request a probation or social enquiry report, a psychiatric evaluation or any other report considered useful to assist in granting a sentence indication.

.....

3.15 Unless an oral application for a sentence indication is permitted by a judge, an application for a sentence indication should be in writing, signed by the defendant and by counsel for the defendant, stating that counsel has clearly explained the consequences of the application to his or her client. Where an oral application is permitted the fact that counsel has clearly explained the consequences of the application to his or her client should be confirmed to the judge by both the defendant and counsel for the defendant and noted in the official record of the court.

….

5.1. A sentence indication shall be granted in open court with a full recording of the entire proceedings.

....."

The appellant's revised complaint in oral arguments

[31] As indicated above, the appellant's revised complaint that he had a legitimate expectation, at the time of sentencing, to the ASI, was never formalised into a ground of appeal. Also, up to the end of oral submissions counsel maintained that he was not contending that nine years' imprisonment on each count of wounding with intent, served concurrently, would have been sufficient to punish the crime. In fact, his final recommendation was a sentence of 15 years' imprisonment on each count, to be served concurrently.

[32] However, we considered it necessary to examine the aspect of the case dealing with the granting of the ASI, in particular whether there were exceptional circumstances that justified the learned judge's departure from it, and whether any unfairness was caused to the appellant as a consequence of the departure from it. We took this approach for two main reasons. Firstly, because the single judge of appeal expressed concerns about potential unfairness to the appellant due to the learned judge's departure from the ASI. Secondly, we believe that the procedure followed by the learned judge, in granting the ASI, and the ultimate sentences are intertwined. Undoubtedly, it was the learned judge's failure to fully ascertain the factual basis for the plea before giving the ASI that led to the quagmire, which he sought to ameliorate when he changed the sentences to have them run consecutively, contrary to the ASI.

The granting of the ASI

[33] The transcript does not disclose any detail about the circumstances in which the ASI was given. However, it is apparent from affidavits filed in this appeal by then prosecuting and defence counsel, and a letter from the learned judge, that: (i) the request for the ASI was made orally, on 20 January 2021, in the learned judge's chambers; (ii) at the time, allegations were read by the prosecutor; (iii) defence counsel was heard on the matter; and (iv) the learned judge, thereafter, gave the ASI of 10 years' imprisonment on each count to be served concurrently, subject to any adverse report.

[34] There is no indication in the transcript, or by anyone, as to the factors which the learned judge considered in arriving at the ASI, and it is apparent that the learned judge was not seized of all the facts. After the ASI, the parties returned to open court, and the appellant was pleaded on the indictment. The prosecutor then outlined the factual circumstances of the case (including the medical reports), some of which seemed to have caught the learned judge by surprise. Although one of the prosecutors, Ms Bernard, averred that, on their return to open court, "the matter was formally addressed before the court", there is no such indication in the transcript. The ASI was only mentioned subsequently, at the various sentence hearings, as the learned judge grappled with the issue of whether the sentence indication could sufficiently punish the crime.

[35] Quite clearly the learned judge did not follow the procedure laid down in the Practice Direction, which in its preamble, states that the primary purpose of an ASI is to ensure that a defendant is in a position to make an informed decision as to his plea. Also, contrary to para. 3.7.1 of the Practice Direction, the learned judge seemed not to have been sufficiently advised of the facts. Such facts should have been agreed upon by the prosecution and defence before an ASI was given. There are provisions in direction 3 of the Practice Direction for an ASI to be deferred until the facts are determined or the judge is sufficiently familiar with the case. Additionally, there was no adherence to direction 3.15 which provides, in part, that [w]here [as in this case] an oral application is permitted the fact that counsel has clearly explained the consequences of the application to his or her client should be confirmed to the judge by both the defendant and counsel for the defendant and noted in the record of the court".

[36] Defence counsel appearing at the various sentence hearings seemed not to have challenged the procedure adopted by the learned judge in granting the ASI or departing from it. In fact, his affidavit reveals that, having discussed with the appellant the learned judge's intention to depart from the ASI, he was instructed to proceed. This was the effect of part of para. 11 of defence counsel's affidavit, as follows:

> "On the 5th day of February, the Learned Trial Judge stated that the indication remains but was question [sic] of it being two complainants is something that he will have to consider in sentence and consecutive[sic]. **After hearing this I advised Mr Tulloch once more on what concurrent and consecutive sentences meant was [sic] instructed to proceed**." (Emphasis added)

[37] We believe that although the learned judge failed to adhere to the procedure set by the Practice Direction, unlike the situation in **Adrian Brown v R**, which was cited by counsel on both sides, the omission had no serious effect on the instant case. **Adrian Brown v R**, although important for its authoritative guidance on the interpretation of the Practice Direction, and the effect of a trial judge's failure to adhere to an ASI, is distinguishable on the facts. In that case, the defendant was granted an ASI following a guilty plea to rape. He was sentenced to five years' imprisonment at hard labour. One of the grounds on which he applied for leave to appeal was that the sentence contravened the ASI - that if the appellant pleaded guilty and his social enquiry report was favourable, a probation order would be imposed; but if the report was not favourable, a suspended sentence would be given. As it turned out, the judge forgot that she had given an ASI, and no one reminded her of it. She ultimately imposed a custodial sentence following the defendant's guilty plea.

[38] Unlike that case, all persons in the instant case were kept aware of the ASI up to the point of sentencing. Further, the instant appellant was afforded many opportunities, between the plea of guilt and the sentencing, to re-consider his plea of guilt, based on the learned judge's indication that he was contemplating consecutive instead of concurrent sentences.

Were there exceptional reasons that justified the learned judge's departure from the ASI?

[39] In **Adrian Brown v R**, this court took the view that, barring exceptional reasons, a defendant has a legitimate expectation to the promised sentence. Consequently, it was determined that the sentence of five years' imprisonment at hard labour should be substituted by a sentence of three years' imprisonment at hard labour suspended for

three years, in keeping with the ASI. The court also established that in circumstances where a sentencing judge was of the view that a departure from the ASI was appropriate, after a guily plea, the defendant should be given a chance to vacate the plea. An important consideration emphasised was fairness to the particular defendant, in all the circumstances of the case. For a comprehensive review of some cases on advance sentence indications, see also **Orlando Alexis v The State**, Cr App No P033/2019.

[40] Further, on the question of legitimate expectation, is **Regina v Shane Newman**, from the Court of Appeal of England and Wales. That case considered, on appeal, whether the sentencing judge was entitled to pass a particular sentence having previously given a **Goodyear** indication (similar to an ASI) with a lower maximum than the sentence which was passed. The **Goodyear** indication was given on 15 January 2010. The sentencing judge summarised the facts of the offence and then indicated the maximum sentence he would impose were the defendant to plead guilty on that date. When the case returned to court some weeks later, the sentencing judge acknowledged that, in giving the **Goodyear** indication, he had made an error with the type of sentence and had not seen a pre-sentence report when he gave it. He expressed, among other things, that having seen the report it had raised "grave disquiet", and indicated a revised sentence. He, however, added that if defence counsel was instructed to withdraw the plea of guilt, he would give leave to do so.

[41] After the matter was discussed with the defendant, it was conveyed to the court that the defendant did not wish to vacate his plea, and was content, albeit disappointed, to proceed to sentencing.

[42] At paras. 19-20 of the case, the court reasoned as follows:

> "19. In the present case, the judge was plainly in error, as he himself acknowledged…The judge was understandably anxious about the facts he had subsequently discovered in the pre-sentence report, and the questions which then arose as to whether the case merited a determinate or some other sentence. Had the judge left the matter as set out in the

> Goodyear indication, first there would have been the unfortunate consequence of an inadequate sentence being passed contrary to the public interest and, secondly, there would have been a risk of an Attorney General's Reference to the benefit of no one.
>
> 20. The course the judge adopted, namely offering the appellant the chance of vacating his plea, was one which was entirely fair to the appellant. The applicant realistically and prudently, if we may say so, chose not to vacate his plea – but he maintained his plea knowing full well that the judge would no longer be bound by the initial Goodyear indication. In these circumstances, we are not persuaded that any injustice resulted or that the appellant now has any legitimate grounds for complaint."

[43] This case exemplifies the proper procedure to be followed. Direction 11.1 of the Practice Direction provides that: "[s]ubject to direction 8, a sentence indication once given is binding on the judge who gave it and on any judge who subsequently assumes conduct of the case, save in exceptional circumstances. Direction 11.2 is also relevant as it states that: "[i]n circumstances where the judge proposes to depart from a sentence indication, this must be done in a way that does not give rise to unfairness".

[44] These provisions make it plain that questions of fairness, justice, and legitimate expectation at the time of the actual sentencing are paramount considerations, for a judge who is contemplating revisiting an ASI. A revision of the sentence indication should be an exception and done in a manner that is fair to the defendant, that is, "without the defendant sustaining any prejudice than mere disappointment" (**Regina v Shane Newman**, para. 18).

[45] To similar effect is the reasoning in **R v Nottingham Magistrates' Court** that there should be reasons that justify a departure from an earlier sentence indication. Otherwise, the appellate court will be obliged to intervene. Lord Bingham supported the principle in this way:

> "The principle which governs legitimate expectation of this kind is not in doubt…If a court at a preliminary stage of the

> sentencing process gives to a defendant any indication as to the sentence which will or will not be thereafter passed upon him, in terms sufficiently unqualified to found a legitimate expectation in the mind of the defendant that any court which later passes sentence upon him will act in accordance with the indication given, and if on a later occasion a court, without reasons which justify departure from the earlier indication, and whether or not it is aware of that indication, passes a sentence inconsistent with, and more severe than, the sentence indicated, the court will ordinarily feel obliged, however, reluctantly, to adjust the sentence passed so as to bring it into line with that indicated..."

[46] In the instant case, the prevailing view, including that of counsel appearing for the appellant, was that concurrent terms of nine years' imprisonment would be insufficient to punish the crime despite the plea of guilt at the first relevant date. The facts, as accepted by the learned judge, were that the children were chopped multiple times to the head, face and throat in a pre-meditated attack upon them after they had retired to bed. One of them lost three fingers while blocking her face from the appellant's savage attack. The indication, therefore, is that the intention of the appellant was to cause more serious injuries than those which resulted. It follows from the nature and extent of the injuries inflicted upon the complainants that had the learned judge maintained concurrent terms of 10 years' imprisonment, the appellant would have been inadequately punished in light of the normal range of sentences for similar offences.

[47] In those circumstances, it was submitted, a reasonable argument could be made that there were exceptional reasons why the learned judge did not consider himself bound by the ASI, and the process, though irregular, did not result in unfairness to the appellant.

[48] It has been established that inadequate punishment (see **Regina v Shane Newman**) is an exceptional factor that could justify a departure from an ASI. The learned judge, therefore, in the public interest, could depart from the ASI with the necessary safeguards, that is without causing unfairness or undue prejudice to the appellant.

Whether the appellant was given a chance, by the learned judge, to re-consider his plea of guilt

[49] The authorities on this point suggest that when a sentencing judge is contemplating a departure from an ASI, the chance should be given to the defendant to vacate his plea, if he so desires. Counsel for the Crown has argued that, in the instant case, the defence had an opportunity to consider the learned judge's intention to revise the sentence as he made it plain from as early as 5 February 2021, ahead of the sentence hearing on 2 July 2021. It was also highlighted that from defence counsel's affidavit, filed in this appeal, the learned judge's possible departure from the ASI was discussed with the appellant, and defence counsel received instructions to proceed.

[50] We do not understand the authorities, including **Adrian Brown v R**, to be saying that the sentencing judge must instruct a defendant to make an election whether he would wish to maintain his plea of guilt or proceed to trial when he, the judge, indicates a departure from the ASI. At para. [31] of **Adrian Brown v R**, McDonald-Bishop JA (as she then was) states the duty imposed on the sentencing judge in this way: "[W]here a defendant pleads guilty to an offence after a sentence indication, then, if, for whatever reason, a judge deems it necessary to depart from that indication, he or she must inform the parties of this, and the **defendant must be offered the choice of vacating his guilty plea** (emphasis added)".

[51] To similar effect was the reasoning in **R v Shane Newman**. At para. 20 Gross J, in commending the approach taken by the judge, states: "[t]he course the judge adopted, namely offering the appellant the chance of vacating his plea, was one which was entirely fair to the appellant". In that case the judge told counsel to talk to the defendant, and promised that if counsel was instructed to apply to withdraw the plea, the leave would be given to do so (para. 12).

[52] Whilst the approach taken by the judge in **R v Shane Newman**, is clearly desirable, and should be the practice, the absence of any such direct instruction from the learned judge, in the instant case, did not, in our view, result in unfairness to the appellant

since the opportunity to withdraw his plea was expressed by the learned judge in terms that were understood by the defence to mean that the appellant could withdraw his plea, if he so desired. The learned judge had mentioned five months prior to imposing the sentence that he was considering giving consecutive sentences in light of the grave circumstances of the offence, which had come to light after the ASI and the guilty plea. He had also indicated that he was giving defence counsel the "opportunity" to consider the matter.

[53] If there was any confusion about the learned judge's intention initially, the proceedings on 9 April 2021 should have clearly established to all concerned that the ASI was no longer in his contemplation. On that date, the learned judge did not only reiterate his intention to depart from the ASI, but confirmed that counsel would be permitted to make submissions on the law regarding consecutive sentences. Further, the learned judge's sentencing remarks immediately preceding the imposition of the sentences on 2 July 2021 should have left no doubt that a departure from the ASI was imminent.

[54] The learned judge did not explicitly invite counsel to seek instructions from the appellant as to whether he would want to vacate his plea, but the substance of what he said and meant was not lost on defence counsel who acted upon what the learned judge said. Defence counsel not only had a discussion with the appellant but received instructions to proceed. Ultimately, we believe, it is the circumstances that will determine whether, in any given case, the language used or the manner in which the revision of the sentence indication was done caused unfairness or prejudice to a defendant beyond mere disappointment.

[55] Although, in the instant case, there was no specific directive to the appellant or counsel by the learned judge, the words used were clearly understood by defence counsel to mean that he should speak to his client, which he deposed he did, and received instructions to proceed. Consequently, there would have been no unfairness to the appellant above mere disappointment.

[56] In **Adrian Brown v R**, at para. [32], McDonald-Bishop JA indicated that the overriding consideration is whether there was any "unfairness to the appellant, which was over and above just mere disappointment, on his part, that the … judge did not impose the sentence [he] had indicated in keeping with his legitimate expectation". In our view, there was no unfairness caused to the appellant by the learned judge's departure from the ASI, and no merit in the argument that the appellant had a legitimate expectation, at sentencing, to the ASI. There is no merit in this aspect of the appellant's complaint, conveyed through the submissions of his counsel, regarding the sentences imposed on him.

Whether the consecutive sentences resulted in the punishment being manifestly excessive

[57] The sole issue which arises from this ground of appeal is whether the consecutive sentences imposed on the appellant resulted in the punishment being manifestly excessive, and if so, what would be an appropriate sentence?

Further submissions for the appellant

[58] Mr Senior Smith submitted that although the transcript reveals an admirable endeavour by the learned judge for an appropriate and well-suited sentencing of the appellant, and a consideration by him of the applicable principles, he fell into error in concluding that a just outcome was not likely without recourse to consecutive sentences. Counsel referred to **Jermaine Barnes v R** [2015] JMCA Crim 3 ('**Jermaine Barnes v R**'), in which consecutive sentences were upheld, and pointed to material distinctions in the facts, including that the applicant had previous convictions, one of which was committed while he was on a suspended sentence, and his late plea of guilt during the trial. By contrast, the appellant, counsel argued, pleaded guilty at the first opportunity, took responsibility for his actions, and had no previous convictions.

[59] Counsel contended that the learned judge erred in relation to the starting point that was utilized, and "after the allowances for the impacting factors, his eventual

intention for the sentences was clearly upended, with him awarding sentences not attributable to the reasoned approach he initially embarked upon". Counsel also complained that the learned judge did not apply the correct methodology in his computation of the sentences, resulting in each sentence exceeding the intended 10 years' imprisonment. He argued that the 'totality' principle could not salvage the departure from the long-established norms in sentencing. Counsel argued that even on the application of the 'totality' principle the sentences would be out of alignment with cases such as **Worrel Wint v R** [2019] JMCA Crim 11.

[60] Counsel further indicated that he was not advocating for concurrent terms of nine years' imprisonment, given the egregious nature of the case. He, however, was of the view that the learned judge could have used an even higher starting point than the 18 years indicated, and arrive at concurrent terms of 15 years' imprisonment, after the relevant deductions, discount, and credit for time spent in pre-sentence custody.

[61] Finally, counsel submitted that in the event this court was inclined to maintain the consecutive element of the sentences, consideration should be given to reducing each term to bring it within the range of sentences that is applicable to the circumstances.

Further submissions for the Crown

[62] Ms Pyke submitted that the learned judge had been meticulous and balanced in his application of the law. Further, he demonstrated a correct and careful assessment of the authorities and the appropriate legal principles. Counsel, therefore, disagreed with the submission, on behalf of the appellant, that the learned judge fell into error when he imposed consecutive terms having regard to the nature of the offence, the circumstances of its commission, the appellant's relationship to the complainants, the appellant's character, and his antecedents. She argued that the total sentence of 18 years' imprisonment was within the range of sentences for the offence ordinarily, but the situation was made worse by the disfiguring and debilitating injuries which were meted out to two complainants (as against only one), who were minors.

[63] Ms Pyke cited **Jermaine Barnes v R** for the proposition that where offences arise out of the same incident, consecutive sentences, though not generally appropriate, would not be disturbed if the total effect on the offender does not amount to a manifestly excessive sentence.

[64] Ms Pyke conceded that when viewed against the guidance in **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement v R**'), and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston v R**'), the learned judge had erred in the sequencing of the factors he took into account, and his calculation of the sentence. However, she contended that it was plain he had directed his mind to the relevant factors and correct legal principles. Counsel relied on **Worrel Wint v R**, which, she argued, established that sentences to be imposed in egregious circumstances fall within the range of 17 years' imprisonment to life imprisonment. She concluded that the total of 18 years' imprisonment was not manifestly excessive when the several aggravating factors enumerated in the Crown's written submissions are weighed against the mitigating circumstances.

The learned judge's sentencing approach

[65] The learned judge considered the 'one-transaction' rule, the 'totality' principle, and other factors which are germane to a sentencing judge's choice between concurrent and consecutive terms of imprisonment. Among the authorities considered by him were **Jermaine Barnes v R** and **Kirk Mitchell v R** [2011] JMCA Crim 1, which in turn referred to several authorities. Notwithstanding, his approach to calculating the sentence was fraught with errors, not least of which was the failure to follow the guidance from this court in **Meisha Clement v R**, **Daniel Roulston v R**, and **Jermaine McIntosh v R** [2020] JMCA Crim 28 ('**Jermaine McIntosh v R**'), on the appropriate steps in the sentencing procedure, and the importance of giving reasons along the way.

[66] In addition to taking account of the guilty plea before arriving at the sentence that would have been imposed had the matter been tried, there was no indication that the learned judge considered sections 42 E and H of the Criminal Justice Administration

Act ('CJAA'), which set out, respectively, how the learned judge's discretion should be exercised relative to the time of the plea, and the factors to be considered in deciding the level of discount, if any. Neither was any explanation given for the two-year discount given by the learned judge. His sentencing approach is set out in more detail below.

> "(a) A starting point of 18 years was used by the learned judge. He indicated that it was influenced by the nature and number of serious injuries sustained by the two complainants and, at points, mentioned their ages. Beyond that, the sentencing remarks were bereft of any specific reference to the other aggravating factors disclosed by the circumstances.
>
> (b) Two years were then subtracted from 18 years for the guilty plea; another two years for the absence of any previous conviction; and another two years for the good community report. The result was 12 years.
>
> (c) The appellant's good prospects for rehabilitation were mentioned with a comment by the learned judge that he was 'still reducing', but no mathematical value was assigned to that factor nor any deduction expressly made.
>
> (d) Having been reminded, by defence counsel, of the length of time spent by the appellant on pre-sentence remand (one year and five months), the learned judge indicated that he would subtract it from "14 years" (instead of 12 years which would have been the last figure indicated after his previous deductions). The result indicated by him was 13 years and five months.
>
> (e) The error in calculation having been pointed out by defence counsel (who indicated that the figure should have been 12 years and seven months), the learned judge remarked: 'But at the same time, because I am considering consecutive sentence [sic] and I do not wish to violate the principle I have to give a sentence that does not go beyond the range that I said of twenty years, right....So what I am going to give you is a sentence...is nine years for the first complainant and nine years for the second complainant, consecutive. It don't [sic] go beyond 20 years, it add [sic] up to 18'."

[67] In making a determination as to the appropriateness of the consecutive sentences in this instance, we will first consider the legal basis for imposing consecutive sentences. Secondly, in keeping with the 'totality' principle, we will consider whether an aggregate of 18 years' imprisonment would be outside the normal range of sentences for two counts of wounding with intent after a guilty plea, and if so, whether the imposition of a sentence outside the normal range would have been justified in the circumstances.

The legal basis for imposing consecutive sentences

[68] We adopt the relevant principles outlined by Brooks JA (as he then was) at para. [57] in **Kirk Mitchell v R:**

> " a. Where offences were all committed in the course of the same transaction…the general practice is to order the sentences to run concurrently with each other – (**Walford Ferguson**)
>
> b. ...
>
> c. Where the offences are similar in nature and were committed over a short period of time against the same victim, sentences should normally be made to run concurrently – (**R v Paddon**).
>
> d. ...
>
> e. In all cases, but especially if consecutive sentences are to be applied, the 'totality principle' must be considered, in application of which, the aggregate of the sentences should not substantially exceed the normal level of sentences for the most serious of the offences involved – (**Delroy Scott, DPP v Stewart,** DA Thomas **– Principles of Sentencing-**cited above).
>
> f. Even where consecutive principles are not prohibited, it will usually be more convenient, when sentencing for a series of similar offences, to pass a substantial sentence for the most serious offence, with shorter concurrent sentences for the less serious ones – (**Walford Ferguson**).
>
> ..."

[69] These principles were elaborated on by Brooks JA (as he then was) in **Jermaine Barnes v R**, at para. [19], to recognise that consecutive sentences may be upheld if the total sentence is not excessive:

> "…it is the totality of the sentences that should be considered by the sentencing judge and the appellate court. Despite what has been said above, however, it is to be noted that consecutive sentences will not be disturbed, even if arising out of the same transaction, if the total effect on the offender does not amount to a manifestly excessive sentence."

[70] The authorities make it plain that, generally, when two or more offences are committed in the course of a single transaction, all sentences in respect of these offences should be concurrent rather than consecutive. However, courts will sometimes uphold consecutive sentences, which appear to offend the rule, when the aggregate sentence is appropriate. It was suggested by the learned editor, DA Thomas, in Principles of Sentencing, second edition, page 54, that "[t]he [one transaction] concept will not normally apply to a series of similar offences involving different victims, even though the offences are of a similar character". However, "simultaneous assaults on a number of different people in the course of the same fracas are likely to be treated as a single transaction" with consecutive sentences being upheld because the total sentence is not excessive (page 55). Also, the 'totality' principle applies to "all situations in which an offender may become subject to more than one sentence: where sentences are passed on different counts in an indictment" (page 57).

Whether the consecutive element in the instant case made the sentences excessive

[71] Although the simultaneous wounding of the two complainants comprised a single invasion and therefore arose from the same facts, there would be no basis to disturb the consecutive element of the sentences provided that (a) the sentences were properly calculated in relation to the offence, the counts, the offender, and in accordance with the principles regarding sentences generally; and (b) the total sentence was not excessive

(this is the import of the 'totality' principle) or manifestly excessive in keeping with section 14 of the Judicature (Appellate) Jurisdiction Act.

[72] Accordingly, we will examine the appropriateness of the sentences imposed by the learned judge in light of the nature and seriousness of the offence, the appellant's conduct and level of culpability, and his antecedents, among any other relevant factors, including the errors made by the learned judge, in calculating the sentence. We will then determine whether the aggregate of 18 years' imprisonment could be considered manifestly excessive when viewed in the context of sentences that the court is empowered to give or impose in like cases.

[73] We are guided by Morrison P's exhortation, at para. [29] of **Jermaine McIntosh v R**, that this court should not lightly interfere with sentencing unless the judge "(i) departed from the accepted principles of sentencing; and (ii) imposed a sentence outside of the range of sentences which the court is empowered to give, or the usual range of sentences imposed in like cases" (see also Hilberry J in **R v Kenneth John Ball** (1952) 35 Cr App R 164, at page 165). It stands to reason that errors in principle, by the learned judge, as identified earlier, will not automatically result in the sentences being set aside on the basis that they are manifestly excessive. Errors in principle, however, give this court a basis to consider the sentences afresh.

[74] Section 20 of the Offences Against the Persons Act states that the maximum penalty for wounding with intent is life imprisonment. Case law, however, has established that such a sentence is reserved for the worst examples of that offence likely to be observed in practice (see **Kurt Taylor v R** [2016] JMCA Crim 23). Appendix A to the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the sentencing guidelines') indicates that the normal range is five to 20 years, with a usual starting point of seven years. 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 (see guideline 7.1 of the sentencing guidelines).

[75] We are mindful of the guidance outlined in **Daniel Roulston v R**, at para. [17], as to the steps that a sentencing judge should adopt in calculating an appropriate sentence, namely:

> "(a) identify the sentence range;
>
> (b) identify the appropriate starting point within the range;
>
> (c) consider any relevant aggravating factors;
>
> (d) consider any relevant mitigating features (including personal mitigation)
>
> (e) consider, where appropriate, any reduction for a guilty plea;
>
> (f) decide on the appropriate sentence (giving reasons); and
>
> (g) give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[76] At para. [29] of **Meisha Clement v R**, this court stated that " …in arriving at the appropriate starting point in each case, the sentencing judge must take into account and seek to reflect the intrinsic seriousness of the particular offence".

[77] The learned judge considered the normal range of five to 20 years which is applicable to this type of offence, after a trial, and, in calculating the sentence relative to each count, adopted a starting point of 18 years, indicating that it was influenced by the nature and number of serious injuries sustained by the complainant. However, there were several aggravating factors that he did not expressly take into account.

[78] Having settled on 18 years, he went on to make deductions. As indicated earlier, this was not in accordance with the established principles. It behoves us, therefore, to re-calculate the sentences. However, given that only one offence was charged, albeit two counts, and the effect of the 'totality' principle, we do not consider it necessary to re-calculate the sentence for the individual counts. Rather, it seems more appropriate to

consider the sentence afresh in light of the cumulative sentence of 18 years' imprisonment imposed on the appellant.

[79] Given that each complainant sustained extremely severe disfiguring and debilitating wounds, as evidenced by the medical reports, we consider as appropriate a starting point of 14 years' imprisonment, rather than the usual starting point of five years' imprisonment. That starting point reflects the intrinsic seriousness of the offence, including the fact that there were two victims.

[80] An upward adjustment of 16 years is then made based on the following additional aggravating factors:

(a) the complainants were young minors (11 and 13 years at the time they were injured);
(b) they were savagely attacked while at least one of them was asleep and defenceless;
(c) a dangerous weapon was used (a machete) in the commission of the offence;
(d) the children were attacked while their parents were not at home;
(e) the appellant was an occupant of the home in which the complainants resided which indicates that there was a breach of the children's trust;
(f) the conduct of the appellant after injuring the children was to leave them for dead when he closed the door to the house and left; and
(g) there was a level of pre-meditation in that the attack was perpetrated some time after the letter which apparently infuriated the appellant, was delivered to him.

The result is 30 years.

[81] In addition to the mitigating factors (the absence of any previous conviction and a good community report) identified by the learned judge, we give weight to the following ones, bearing in mind that the more egregious the circumstances the less weight is given to previous good character (see Blackstone's Criminal Practice 2012):

(a) previous good character;

(b) good prospects for rehabilitation;

(c) cooperation with the police by giving a caution statement; and

(d) statements of contrition on his behalf.

[82] These allow for a downward adjustment by six years, resulting in a figure of 24 years, which would have been the cumulative sentence, for two counts of wounding with intent, had the matter been tried.

[83] In consideration of the parity principle, we examined the cases below which concerned sentencing for a similar offence, but, importantly, concerned one victim only. In **Raymond Hunter v R** [2011] JMCA Crim 20, a police officer was attacked by a recidivist who used a sharp instrument to inflict multiple injuries to the officer's chest and legs while at a police lock-up. A sentence of 25 years' imprisonment at hard labour, after trial, was reduced on appeal to 17 years' imprisonment at hard labour.

[84] In **Sylburn Lewis v R** [2016] JMCA Crim 30 a machete was used to inflict injury to the victim's hand, severing three fingers. The victim was also chased and chopped again, multiple times. The sentence of 28 years' imprisonment, after trial, was reduced on appeal to 17 years' imprisonment.

[85] In **Worrel Wint** [2019] JMCA Crim 11, the complainant was hit in the head and then stabbed several times after he fell to the ground. The sentence of 25 years' imprisonment, after trial, was reduced, on appeal, to 19 years' and 10 months' imprisonment.

[86] The sentences in those cases ranged from 17 to 19 years in relation to one count of wounding with intent, after a trial, but would likely have been greater had there been multiple victims. We were not referred to any case with disfiguring and debilitating injuries to two minors in similar circumstances, and our research did not produce any. However, using the referenced cases as guides, we are of the view that a greater sentence would be warranted, in the instant case, given that there are two victims with serious disfigurement and delibitating injuries.

[87] Having determined that for two counts of wounding with intent, in the circumstances described, a sentence of 24 years' imprisonment, after a trial, would not have been dispropotionate, the next step is to consider an appropriate level of discount. Section 42D(2)(a) of the CJAA, permits a discount of up to 50%, on a plea of guilt, for this type of offence, on the first relevant date. The appellant is, therefore, entitled to a consideration of a discount of up to 50%, having pleaded guilty on the first relevant date. Section 42H indicates the factors which should be considered to set the level of discount. These include whether the reduction of the sentence would be "disproportionate to the seriousness of the offence, or so inappropriate in the case of the [appellant]…[to] …shock the public conscience"; the circumstances of the offence; factors relevant to the appellant; the circumstances surrounding the plea; and whether the appellant had any previous convictions.

[88] Having considered those relevant factors, we are of the view that a discount of 50% would be disproportionate to the seriousness of the offence and would likely shock the public conscience. It bears repeating that this case concerns a vile, depraved and vicious attack on two young children by a machete-wielding adult. Most of the injuries were to the head, face and throat, which suggests that there was an intention on the appellant's part to commit more harm than actually resulted. It is also noteworthy that after the appellant wounded the children, he closed the house and went away, leaving them for dead. When these factors are weighed against the mitigating factors, we believe that a 20% discount would be appropriate.

[89] On application of the discount to 24 years, the result is a sentence of 19 years' and two months' imprisonment. A credit of one year and five months for time spent in pre-sentence custody would bring the sentence close to the aggregate of 18 years' imprisonment imposed by the learned judge. This sentence would also compare favourably with the sentence in **Romaun Murray v R** [2022] JMCA Crim 72, in which the applicant pleaded guilty to one count of wounding with intent on the first relevant date. The victim had received multiple stab and chop wounds. The sentence for one count of wounding was reduced, on appeal, to nine years' and four months' imprisonment, after a discount of 25%, on account of the guilty plea, and a credit for time spent on pre-sentence remand.

[90] It follows that we do not accept Mr Senior Smith's submission that a sentence of 15 years' imprisonment on each count, to be served concurrently, should be substituted for the consecutive sentences of nine years' imprisonment, imposed by the learned judge. Concurrent sentences of 15 years would not appropriately reflect the seriousness of the offending as he would, in effect, serve only 15 years as against the aggregate of 18 years. Moreover, when the 'totality' principle' is considered, the aggregate sentence of 18 years' imprisonment would not be disproportionate for two counts of wounding with intent of two minor defenceless victims.

Conclusion

[91] So, applying the aforementioned principles to the facts of the instant case, we believe the aggregate of two nine-year terms of imprisonment, imposed by the learned judge, would not have been disproportionate or manifestly excessive. The consecutive element of the sentences, does not make the sentences manifestly excessive. Accordingly, the single ground of appeal fails and the appeal must be dismissed. We, therefore, make the following order:

By majority (Foster- Pusey JA dissenting)

1. The appeal against sentence is dismissed.

2. The sentences imposed by the court below are affirmed and shall be reckoned as having commenced on 2 July 2021, the date they were imposed, and shall run consecutively as ordered by the learned sentencing judge.