[2023] JMCA App 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 4/2016

APPLICATION NO 71/2016

TROY WALKER v R

Miss Melrose Reid for the applicant

Mrs Sharon Millwood Moore and Paulio Williams for the Crown

21 February and 21 March 2023

IN CHAMBERS

FOSTER-PUSEY JA

[1] The applicant was tried on an indictment that contained two counts, before Campbell J ('the learned trial judge'), sitting without a jury, in the High Court division of the Gun Court for the parish of Kingston. On 29 October 2015, he was convicted on both counts, count one - for illegal possession of firearm, and count two - for wounding with intent contrary to section 20(1) of the Offences Against the Person Act ('the OAPA'). On 18 December 2015, he was sentenced to five years' imprisonment at hard labour for illegal possession of firearm and 15 years' imprisonment at hard labour, the prescribed minimum penalty, for wounding with intent with a firearm. The sentences were ordered to run concurrently.

[2] By application dated 11 March 2016, the applicant, pursuant to section 42L of the Criminal Justice (Administration) Act ('the CJAA'), asked the court to review the prescribed

minimum sentence of 15 years' imprisonment on the ground that the sentence was manifestly excessive and unjust, having regard to the circumstances, and, had his matter been heard in the Court of Appeal, his sentence would have been reduced on the principle of "proportionality and reasonableness". He asked that the court also specify the period, not being less than two thirds of the sentence imposed, for him to serve before becoming eligible for parole.

[3] The applicant's attorney-at-law swore an affidavit in support of the application. Para. 8 of the affidavit is of particular interest, although it does not require me to make a ruling on or consider it. It is instead a matter for the applicant and his attorney-at-law to consider and discuss. The applicant's attorney-at-law deposed:

> "That the Applicant is also hereby giving to this Court an irrevocable undertaking to file Notice of Abandonment of his Appeal were this application to succeed. Attached hereto is a DRAFT copy of the Notice of Abandonment of Appeal and marked 'MGR5' for reference."

[4] At para. 11 of the affidavit, the applicant's attorney-at-law asked that this court "reduce his sentence by two thirds of the fifteen years … by virtue of section 42L(3)(b)".

[5] The application came up for hearing in May, June and December 2016 as well as April and May 2017. Unfortunately, it was adjourned as the court had not yet received the transcript of proceedings, which was essential for a review of the sentence.

[6] The court received the transcript in the matter on 23 June 2022.

[7] The applicant had also sought leave to appeal his conviction and sentence. A single judge refused the application on 6 September 2022. The judge opined that the sentence for illegal possession of firearm was not excessive and that imposed for wounding with intent was the prescribed statutory minimum. The single judge ordered that a date be scheduled for the hearing of the application for a review of the prescribed minimum sentence.

[8] The matter came up on 13 December 2022. At that time, the applicant and the Crown expressed the view that the applicant did not qualify to make the application under the provisions of the CJAA. It turned out, however, that both parties were wrong on this point as the applicant was in fact so qualified. The matter was adjourned to 21 February 2023 and the applicant was ordered to file amended submissions. I heard the application on that date, and, at the end of the hearing, ordered both parties to file submissions on the following additional issue:

> "Whether a single judge conducting a review of sentence pursuant to section 42L of the Criminal Justice (Administration) Act has the power to grant credit to the applicant for a period spent in pre-trial remand."

[9] The hearing of the renewed application for leave to appeal conviction and sentence is set for 13 November 2023. In light of that upcoming hearing, I suggested that, but counsel for the applicant did not agree for, the application to review the sentence being scheduled for hearing at the same time as the renewed application for leave to appeal. This procedure was open to the court. In **Kerone Morris v R** [2021] JMCA Crim 10 the court noted that although section 42K of the CJAA, similar to section 42L of the CJAA, contemplates that the certificate for the review of the prescribed minimum penalty is to be placed before a single judge of the court, the section 42K certificate may be considered by the court. It is a similar position in respect of a section 42L review. Perhaps counsel took the above stance in light of the undertaking previously mentioned.

[10] I now proceed to undertake the review. The facts of the case are important in a review of the sentence.

The prosecution's case

[11] The complainant, Courtney Wright, testified that on 31 August 2014, he was about to use a handcart to fetch some water. He gave some instructions to his son about water buckets, then his son shouted "Daddy, watch it! Daddy, watch it"! He held down his head and saw a man "back out a gun" in front of him. The man pointed the gun at him and fired. The complainant ran into his yard and the man chased him to the back of the house

where there was a dead end. He felt his foot swing away, he had nowhere else to run, so he bent and the man came right upon him, in touching distance, and then the gun went "click, click, click", but did not fire any further. The complainant looked up into the man's face and shouted "[h]old him, hold him nuh". He identified the applicant at an identification parade as the shooter. The complainant was injured during the attack. He remained in the hospital for a night and a day, x-rays were carried out and a cast placed on his foot. The complainant testified that the applicant also shot and killed his dog during the attack at his home.

[12] The applicant gave an unsworn statement. He said "my name is Troy Walker. I am [sic] did not shoot anybody".

The legislative framework

[13] Section 20 of the OAPA mandates a prescribed minimum penalty for wounding with intent with a firearm. It states:

> "(1) Subject to subsection (2), whosoever, shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid, to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or … shall be guilty of felony, and, being convicted thereof, shall be liable, to be imprisoned for life with or without hard labour.
>
> (2) **A person who is convicted** before a Circuit Court **of-**
>
> (a) shooting with intent to do grievous bodily harm … or
>
> (b) **wounding with intent, with use of a firearm shall be liable to imprisonment for life**, **or such other term, not being less than fifteen years**, as the Court considers appropriate.
>
> (3) …". (Emphasis supplied)

[14] Section 42L of the CJAA provides for the review of a prescribed minimum penalty in certain circumstances. It provides:

> "(1) Subject to subsection (4), **a person** who -
>
> (a) has been **convicted before the appointed day of an offence that is punishable by a prescribed minimum penalty**; and
>
> (b) upon conviction of the person, **the trial judge** i**mposed a term of imprisonment that was equal to the prescribed minimum penalty for the offence**,
>
> **may apply to a Judge of the Court of Appeal to review the sentence** passed on his conviction on the ground that, **having regard to the circumstances of his particular case, the sentence imposed was manifestly excessive and unjust.**
>
> (2) An application under subsection (1) shall -
>
> (a) be made within six months after the appointed day or such longer period as the Minister may by order prescribe;
>
> (b) outline the circumstances of the particular case which, in the opinion of the person, rendered the sentence imposed on him manifestly excessive and unjust; and
>
> (c) contain such other particulars (if any) as may be prescribed.
>
> (3) **Where the Judge of the Court of Appeal**, reviews an application made pursuant to subsection (1) and **determines that**, having regard to the circumstances of the particular case, **there are compelling reasons which render the sentence imposed on the defendant manifestly excessive and unjust, the Judge may-**
>
> **(a) impose a sentence on the person that is below the prescribed minimum penalty;** and

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

(4) Subsection (1) shall not apply to a person who is serving a term of imprisonment for the offence of murder." (Italics as in the original) (Emphasis supplied)

[15] The amendment to the CJAA, which led to the insertion of section 42L, came into force on 30 November 2015, the appointed day. The applicant was convicted of wounding with intent on 29 October 2015, which was before the appointed day. The learned trial judge sentenced him to a term of imprisonment that was equal to the prescribed minimum penalty on 18 December 2015. He applied for a review of his sentence by application dated 11 March 2016. This fell within six months after the appointed day. He, therefore, fulfilled all the procedural requirements for consideration of the application.

[16] Section 42L of the CJAA provides that the applicant must outline the circumstances that render the sentence imposed on him manifestly excessive and unjust.

[17] Importantly, the single judge of appeal must determine that, in light of the particular circumstances, there are "compelling reasons" that render the sentence imposed on the defendant manifestly excessive and unjust, before imposing a sentence that is below the prescribed minimum penalty.

[18] Section 13 of the Judicature (Appellate Jurisdiction) Act is also relevant. It states:

"(1A) Notwithstanding subsection (1)(c), a person who is convicted on indictment in the Supreme Court may appeal under this Act to the Court with leave of the Court of Appeal against the sentence passed on his conviction where the sentence was fixed by law, in the event that the person has been sentenced to a prescribed minimum penalty in the circumstances provided in -

(a) section 42K of the *Criminal Justice (Administration) Act*, and has, pursuant to that section, been issued with a certificate by the Supreme Court to seek leave to appeal to the Court of Appeal against his sentence; or

(b) section 42L of the *Criminal Justice Administration Act*.

(1B) For the purposed of subsection (1A), the reference to "Supreme Court" shall include the High Court Division and the Circuit Court Division of the Gun Court established under the *Gun Court Act*." (Italics as in the original)

[19] The amendment also came into force on 30 November 2015.

The application and affidavit evidence

[20] I note para. 7 of the application in which the applicant asserts that "there would be the likelihood that had his matter been heard in the Court of Appeal that the Court would have reduced his sentence on the principle of proportionality and reasonableness". At para. 4 of counsel's affidavit in support of the application she also stated:

> "That the circumstances of the case was: On or about August 31, 2015 in the parish of Kingston, the convict Troy Walker being armed with a firearm shot a man at about 11:30-12.00 noon (in the day). He was pointed out at an Identification Parade. The matter was tried and Walker was found guilty. At the time of this trial he had no previous conviction. He will rely on his transcript if necessitated to further outline his circumstances; but he is of the strong view that his sentence is manifestly excessive and unjust and that this review will allow him a lesser sentence."

The submissions

<u>The applicant's submissions</u>

[21] Miss Reid, counsel for the applicant, outlined the facts of the incident. She emphasized that the role of the single judge in applications of this nature, is not to examine the grounds of appeal, instead, it is to examine the circumstances of the case in order to determine whether, in the particular circumstances, the sentence imposed

was excessive and unjust. Counsel submitted that the single judge of appeal has to undertake the role of the trial judge, and is to impose a reasonable sentence that he or she would have imposed had there not been the amendment to the OAPA mandating a prescribed minimum penalty. She relied on **Curtis Grey and Toussaint Solomon v R** [2018] JMCA App 30, **Curtis Grey v R** [2019] JMCA Crim 6 and **Collin Coyle v R** [2020] JMCA App 47.

[22] Having emphasized the relevant principles, counsel pursued a somewhat contradictory path, as she submitted that the circumstances that warrant a reduction in the sentence are that it is a fleeting glance case and pointing out a person at an identification parade is insufficient for the evidence of the complainant to be convincing.

[23] Miss Reid provided written submissions on the additional issue, as I requested. She submitted that the single judge conducting a review pursuant to section 42L of the CJAA does not have the power to remedy any defect in sentencing or any error made by the learned trial judge insofar as he failed to take into account the time that the applicant spent in pre-trial custody. Counsel stated that the learned trial judge, in failing to do so, made an error in principle. She referred to **Meisha Clement v R** [2016] JMCA Crim 26, **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002 and **Callachand and another v The State** [2008] UKPC 49. However, counsel reiterated that the single judge conducting a review pursuant to section 42L of the CJAA is not examining whether the learned trial judge erred in sentencing. The single judge is considering, had there not been the requirement to impose a mandatory minimum, what would have been a reasonable sentence to impose.

[24] Counsel stated that any issue regarding credit to the applicant for time spent in pre-trial custody would be for the consideration of the full court in hearing the applicant's appeal or application for leave to appeal. She relied on the relevant statutory provisions. Counsel referred to **Ewin Harriott v R** [2018] JMCA Crim 22 and **OP v R** [2022] JMCA Crim 19 in which the court stated that it cannot reduce a prescribed minimum sentence

even if the sentencing judge did not have regard to the time a defendant spent in pre-trial custody.

[25] Counsel noted that, on the other hand, if a section 42K CJAA certificate is granted, such as occurred in **Paul Haughton v R** [2019] JMCA Crim 29, **Kerone Morris v R** and **Miguel Moss v R** [2022] JMCA Crim 10, the court may reduce the sentence below the mandatory minimum.

[26] In closing, counsel referred to **Andrae Michael Jackson v R** [2019] JMCA Crim 31, a case in which the appellant's sentence of 14 years for wounding with intent was confirmed on appeal.

The Crown's submissions

[27] Mrs Millwood Moore, on behalf of the Crown, submitted that while the applicant's sentence for wounding with intent with a firearm qualified for a review under section 42F of the CJAA, the sentence imposed was neither manifestly excessive nor unjust, as it fell within the usual range of sentences where a firearm is used.

[28] Counsel referred to **Carey Scarlett v R** [2018] JMCA Crim 40 in which the applicant was sentenced to 25 years' imprisonment at hard labour for wounding with intent. Brooks JA (as he was then) stated that the normal range for sentencing for the offence is 15 - 20 years, however, the court imposed a revised sentence of 18 years bearing in mind the nature of the complainant's injuries and the fact that he was attacked at his home. Counsel submitted that the case at bar is similar in that the complainant was shot at his home and had to run while being chased by the applicant. Counsel stated that the circumstances were also aggravated by the fact that the shooting took place in the daytime, and family members, including the complainant's 13-year-old son and 15-year-old nephew were present. In addition, the applicant had a previous conviction. In contrast, Carey Scarlett did not have any previous convictions. Counsel also noted that had there not been an apparent challenge with the firearm the complainant might not

have "lived to tell the tale" and it appeared that the applicant wanted to do more than maim the complainant.

[29] Counsel for the Crown submitted that the circumstances that the single judge ought to take into account in conducting the review relate to the matters concerning the offender or how the offence was committed. She noted that this was the approach taken in **Curtis Grey and Toussaint Solomon v R**.

[30] Counsel submitted that the circumstances in the case at bar differed from those in **Curtis Grey and Toussaint Solomon v R** in which the issue was a review of the sentence of shooting with intent, where the applicants were also convicted on the same indictment for the offences of illegal possession of firearm, illegal possession of ammunition, robbery with aggravation and assault. Counsel noted that Morrison P found that, in those particular circumstances, a 15-year sentence for the offence of shooting with intent was excessive in light of the good social enquiry reports for both applicants, the fact that the gun was recovered and the respective roles that the applicants played in the offence. **Curtis Grey v R**, counsel reiterated, was also distinguishable as it concerned an application for leave to appeal the sentence for robbery with aggravation.

[31] **Collin Coyle v R**, in counsel's view, was also distinguishable, as it was not a review of a sentence for wounding with intent, but was a matter in which the sentencing judge had erroneously believed that a prescribed minimum penalty applied to the offences of robbery with aggravation and illegal possession of firearm.

[32] Counsel highlighted the fact that the learned trial judge in the instant matter stated that he would not have gone below the minimum even if he had a discretion to do so.

[33] Counsel for the Crown, in their written submissions, indicated that the applicant was in custody over the period 25 September 2014 until he was sentenced on 18 December 2015, a period of approximately one year and three months. In their written submissions in response to the question posed by the court, counsel for the Crown submitted that the single judge reviewing a prescribed minimum penalty pursuant to

section 42L of the CJAA, has the power to give credit for a period spent in pre-trial remand even if this brings the sentence below the prescribed minimum penalty. Counsel referred to **Paul Haughton v R**, **Lennox Golding v R** [2022] JMCA Crim 34, **Kerone Morris v R** and **Ewin Harriott v R**.

The sentencing process

[34] It is important to examine the material before the learned trial judge as well as his handling of the sentencing process. The learned trial judge was provided with the applicant's antecedent report that indicated that the applicant spent five years at Denham Town High school and was literate. After leaving high school, he started "higglering" in the down town Kingston area, where he sold shoes and clothes. He was working as a higgler when the police arrested him for the offences in question. He was single with no dependant, and had one previous conviction recorded against his name, that of making a "false declaration".

[35] Counsel for the applicant urged the learned trial judge to not take into account the conviction for false declaration, but acknowledged that the applicant had been convicted of a very serious offence that, in the normal course of things, would attract a custodial sentence "of some length". Counsel asked the learned trial judge to take into account the fact that at the time of the offence the applicant was gainfully employed and had no previous conviction. The learned trial judge declined to request a social enquiry report.

[36] In sentencing the applicant, the learned trial judge stated, at pages 131-132 of the transcript:

> "I am sure you are of the view that there is a mandatory minimum in respect of the second Count that is fifteen years.
>
> Could you stand Mr Troy Walker. You have been found guilty of two serious charges, Illegal Possession of a firearm. Using that firearm to inflict serious injuries on somebody, the Legislation, Parliament in this country has … as consequences of actions like these have found it necessary to relief the judge of any discretion as to the minimum sentence in respect of

> the Wounding with Intent. I can't say I am in agreement but having said that, the facts of this case is not easy and I am not aware as I am here now, that my sentence if I had a discretion, of course, I would go beyond that what Parliament has said but I don't think of the fact I would have gone any lower. It is the kind of conduct that I don't think it is unfair to say, is peculiar in certain community, where one individual feels that he is sufficiently strong, the strength that comes from just perhaps the gun he has and the social standing in the area to meet out this sort of justice or any sort of things he wanted to do, no society cannot harbour and nurse that. He is in the middle, it is against everything that an orderly society demands.
>
> The sentence of this Court in respect of Count 1, Illegal Possession of Firearm is to serve a sentence of five (5) years imprisonment and in respect of Count 2, Wounding with Intent to serve fifteen (15) years imprisonment. The sentences are to run concurrently, you will therefore have to serve fifteen (15) years."

Discussion

Are there compelling reasons that render the prescribed minimum penalty manifestly excessive and unjust? - Section 42L of the CJAA

[37] Section 42L of the CJAA outlines the basis on which a single judge may impose a sentence below the prescribed minimum penalty. There must be compelling reasons for the single judge to do so. The language in the statute makes it clear that Parliament's intention that a prescribed minimum penalty apply to the offence of wounding with intent with a firearm, should not be lightly set aside. Against the backdrop of Parliament's clear intention, it is easy to see that Miss Reid's proposed approach to the application of section 42L is incorrect. Miss Reid submitted that a single judge of the court, conducting a review under section 42L of the CJAA, is put in the place of the sentencing judge at first instance, and is to consider what sentence he or she would have imposed had there not been a prescribed minimum sentence. In my view, a single judge of appeal can only arrive at the destination to which Miss Reid points, if he or she is persuaded that there are compelling reasons why the imposition of the prescribed minimum penalty would result in a sentence that is manifestly excessive and unjust.

[38] Upon a close examination of Miss Reid's oral and written submissions, at no point has she identified any compelling reasons why the prescribed minimum that Parliament intends to be applied in the circumstances, should be "disapplied". Counsel outlined the facts of the incident but did not highlight any aspect of it as reflecting any compelling reasons.

[39] In contrast, it is understandable why Morrison P, in **Curtis Grey and Toussaint Solomon v R**, concluded that the mandatory minimum imposed for shooting with intent was manifestly excessive. At para. [34], Morrison P stated:

> "In this case, neither applicant had any previous convictions. They were both in gainful occupations at the time of their arrest. Members of their respective communities spoke well of both of them. No-one was injured and the firearm involved in the shooting was recovered. In the case of the second named applicant, it is clear that the judge considered that he had to some extent been led into the criminal adventure by the first named applicant."

[40] **Lennox Golding v R** is apposite. The court reviewed the prescribed minimum sentence for wounding with intent, in light of the oral intention that the judge expressed to issue a certificate for the review of the sentence. The court proceeded to review the sentence although the judge had failed to issue a physical certificate pursuant to section 42K of the CJAA. At the following paras. the court stated:

> "[68] In this case, the appellant was a participant in a premediated attack on the complainant who was known to him, in the early afternoon, on a public thoroughfare, while the complainant was plying his trade as a taxi operator, with innocent passengers in his vehicle. The complainant suffered injuries that required him to be hospitalised for one month. We agreed with the submissions of Miss James that in the light of the statutory minimum sentence, which the learned judge imposed, the sentence was, in principle, appropriate in all the circumstances. We considered that the appellant received a good social enquiry report and was previously of good character ... In our view, it was the deduction for this mitigating factor that would cause us to reduce his sentence

> from a starting point of 17 years. Such a starting point in our view is justified having regard to the matters identified in the beginning of this paragraph.
>
> [69] It was, therefore, our considered view that, in all the circumstances of this case, there were no compelling reasons which render the prescribed minimum sentence manifestly excessive and unjust."

[41] In his sentencing remarks in the case at bar, the learned trial judge remarked that:

a. The applicant had inflicted serious injuries on the complainant;

b. Parliament mandated consequences for such actions in respect of the minimum sentence;

c. Even if he had a discretion to give a lower sentence he would not have done so;

d. The applicant carried out the attack as a way of meting out justice because he felt he was sufficiently strong perhaps due to the gun that he had and his social standing; and

e. Society could not "harbour and nurse" such behaviour as that is "against everything that an orderly society demands".

[42] I am in full agreement with the comments made by the learned trial judge and would add a few of the other aggravating circumstances to which counsel for the Crown referred. This attack was carried out brazenly in the presence of younger members of the complainant's family. The complainant was preparing to procure some water for his household when the applicant turned up, in the middle of the day, and chased the complainant in his own yard until the complainant was cornered and had nowhere else to run. It does appear as if the complainant could have been fatally injured if the firearm being used by the applicant had not malfunctioned. The applicant had a previous conviction. The fact that he was gainfully employed was not sufficient to justify a sentence

below the prescribed minimum in light of the facts of the case. I have not seen any compelling reason why the prescribed minimum sentence of 15 years is manifestly excessive and unjust in the case at bar. On the contrary, I believe that a higher sentence could well have been justified.

The period that the applicant spent on pre-trial remand

[43] The question remains whether I am empowered to grant the applicant credit for the period he spent in custody prior to being sentenced. I agree with the submissions of the Crown that, as a single judge conducting a review of a prescribed minimum penalty pursuant to section 42L of the CJAA, I can do so.

[44] In **Ewin Harriott v R**, Mr Harriott was convicted of a number of offences including grievous sexual assault and was sentenced to 15 years' imprisonment for that offence, the prescribed minimum penalty provided for in the Sexual Offences Act ('the SOA'). Upon his application for leave to appeal a single judge refused leave to appeal against conviction but granted leave to appeal against sentence to allow for consideration to be given to the question whether Mr Harriott should be given credit for time spent in custody, notwithstanding the prescribed minimum penalty.

[45] On hearing the application, this court highlighted a lacuna in the law that ought to be addressed. It noted that giving full credit for time spent is now established in our jurisprudence (see **Meisha Clement v R**, **Callachand and another v The State**, **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ) and the Sentencing Guidelines for Use By Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017). Mr Harriott had remained in custody two years prior to trial. The court highlighted the difficulty in the case, as the SOA removed a judge's discretion to give credit for time spent. The court noted that this was in contrast with the circumstances of a person who pleads guilty, in which instance, the court may reduce the sentence without regard to the prescribed minimum penalty. This does not apply to the offence of murder pursuant to section 2(2) of the OAPA, in respect of which, in spite of a guilty plea, the court cannot impose a sentence below the prescribed minimum penalty. The court noted at para. [20]:

> "In our view, this is an unintended consequence of the mandatory minimum provision of the legislation which will unwittingly lengthen the mandatory minimum sentence, contrary to the intention of Parliament. It may be that legislative intervention is necessary to ameliorate this apparent oversight."

[46] The court went on to highlight, however, that an option open to a defendant who faces this problem is to seek recourse through the application of sections 42K and 42L of the CJAA. The court noted that, pursuant to section 42K of the CJAA, a trial judge could make a referral by way of a certificate indicating that he would have imposed a sentence less than the prescribed minimum penalty if he were allowed to give credit for the time served. It was also noted that, in addition, section 42L permits a defendant to apply to the court for the reduction of a prescribed minimum penalty.

[47] In **Paul Haughton v R**, the appellant was convicted of rape and sentenced to 15 years' imprisonment, the prescribed minimum penalty under the SOA. The sentencing judge issued a certificate pursuant to section 42K of the CJAA as he did not believe that the appellant deserved that sentence. The court noted that the appellant did not use a firearm, but noted that he used personal violence to subdue the complainant. The court concluded that, in the circumstances of the case, it could not be said that there were compelling reasons that rendered the prescribed minimum penalty manifestly excessive and unjust. This court, however, went on to note that the issue of the period that the appellant spent on remand before sentence as well as the appellant's eligibility for parole remained outstanding. At para. [50] the court stated:

> "… On the first issue, it is clear from the authorities that, however short the period spent on remand may be, the appellant is entitled to have it reflected in the sentence. Happily, once a certificate has been granted by the sentencing judge pursuant to section 42K(1) of the CJAA, it is open to this court to reduce the sentence below the prescribed minimum sentence. This factor serves to distinguish this case from **Ewin Harriott v R**, in which the appeal did not come before this court through the section 42K gateway and the court was therefore powerless to dis-apply the prescribed

> minimum sentence in order to reflect the time spent on remand. On this point, therefore, we will allow the appeal and reduce the sentence of 15 years' imprisonment which the judge imposed by three months and 19 days to reflect the time spent on remand before sentencing…".

[48] In the case at bar, the applicant having come before this court through the "gateway" of section 42L of the CJAA, it is open to me to dis-apply the prescribed minimum penalty to reflect the one year and three months that the applicant spent on pre-sentence remand. This reduces the applicant's sentence to 13 years and nine months.

[49] It now remains for me to, as required by section 42L(3)(b) of the CJAA, specify a period, of at least two thirds of the sentence, that the applicant will serve before becoming eligible for parole. I calculate two thirds of 13 years and nine months to be nine years and two months.

[50] I thank counsel for their very useful submissions.

[51] The application for review of the prescribed minimum sentence is therefore granted to the extent that the applicant is given credit for the period of one year and three months that he spent on pre-sentence remand. The applicant will serve a sentence of 13 years and nine months for the offence of wounding with intent and must serve nine years and two months before he is eligible for parole. The sentence of 13 years and nine months is to run concurrently with the other sentence imposed by the learned trial judge, and both are reckoned to commence on 18 December 2015.