[2024] JMCA Crim 37

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTCE BROWN JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS COA2022CR00001 & 2

SHACKERA WHYTE
MARIO BROWN v R

Ms Melrose Reid for the appellants

Ms Claudette Thompson, Director of Public Prosecutions (Ag), and Kemar Setal for the Crown

18, 19 July and 8 November 2024

Criminal law - Accessory liability - Principles to be applied to the offence of shooting with intent where there is only one shooter

Sentencing - Whether sentences are manifestly excessive - Whether a trial judge may make a recommendation on eligibility for parole following sentencing pursuant to section 20(1)(b) of the Firearms Act and Section 20 of the Offences Against the Persons Act - Section 6 of the Parole Act

LAING JA (AG)

[1] Mr Shackera Whyte ('Whyte') and Mr Mario Brown ('Brown') (together referred to herein as 'the appellants') were jointly charged on an indictment for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count one) and shooting with intent contrary to section 20(1) of the Offences Against the Person Act (count two). On 3 December 2021, the appellants were convicted on both counts, following a trial in the High Court Division of the Gun Court held in the Circuit Court for the parish of Saint Elizabeth by a judge sitting without a jury ('the learned trial judge'). On 15 December 2021, the appellants were each sentenced to serve 20 years'

imprisonment at hard labour on each count and ordered to serve 15 years before becoming eligible for parole. The sentences were also ordered to run concurrently.

[2] The appellants filed applications for leave to appeal both conviction and sentence. A single judge of this court refused the applications for leave to appeal against convictions but granted leave for the appellants to appeal against sentence.

[3] The appellants, as is their right, renewed their applications for leave to appeal against their convictions, however, Brown did not pursue his application. Ms Reid, counsel for the appellants, was permitted to abandon the grounds of appeal which were originally filed on behalf of Whyte in respect of his conviction, and to argue the following ground:

> "Ground 1- The [learned trial judge] failed to address his legal mind to the law of joint enterprise and convicted Shackera Whyte, the rider of the motor vehicle without more."

[4] Counsel argued the following grounds concerning sentence on behalf of both appellants:

> "A. The [learned trial judge] erred in law when he sentenced the appellants to 20 years each for illegal possession of firearm when they were both indicted vide Section (20)(1)(b) of the Firearms Act.
>
> B. The sentences of 20 years for Illegal Possession of Firearm are manifestly excessive.
>
> C. The [learned trial judge] erred in law, when he imposed 15 years before eligibility for parole."

The case for the Crown

[5] The case for the Crown was that, on 23 August 2019, at 8:30 pm, Constable Denham Sinclair, Constable Jerome Perry, and Corporal Paul Williams were on patrol in the Black River police area in the parish of Saint Elizabeth. They were travelling in a Toyota Hilux service vehicle driven by Corporal Williams, which was equipped with flashing blue lights affixed to the top of the vehicle ('the service vehicle'). While the police officers were patrolling along the Spring Park Road, they observed a motorcycle which

had a rider and a pillion passenger ('the pillion'), turned across the roadway. The men on the motorcycle looked in the direction of the service vehicle, and when the service vehicle got closer to the men, the rider of the motorcycle sped off. The pillion pulled a firearm from his waistband, drew the slide of the firearm, and released it. He then looked in the direction of the service vehicle, pointed the firearm over his left shoulder, and discharged several rounds in the direction of the service vehicle. Constable Sinclair returned fire by discharging five rounds in the direction of the motorcycle from his M16 rifle while inside the service vehicle. He then exited the service vehicle while it was still in motion. The service vehicle stopped, and the other two police officers exited. Shots were discharged by the officers in the direction of the motorcycle as it continued on its way, and away from the police officers. This returned fire included one additional shot fired by Constable Sinclair from his M16 rifle, two shots that were discharged by Constable Perry from his M16 rifle, and shots fired by Corporal Williams from his glock service pistol. Whyte was subsequently identified as the rider of the motorcycle and Brown was later identified as the pillion.

The defence

[6] Both appellants raised the defence of alibi. Whyte asserted that at the time of the incident, he was at home in Spring Park District. Brown stated that at the time of the incident, he was with his girlfriend in Whitehouse.

The submissions

<u>Submissions on behalf of the appellants</u>

[7] In respect of ground one, counsel argued that the learned trial judge failed to address his mind to the law of joint enterprise and convicted Whyte the rider of the motorcycle without more. She advanced the position that the case of **R v Jogee, R v Ruddock** (2016) 87 WIR 439 ('**Jogee**') overturned the principle of parasitic accessory liability that had been established in **Chan Wing-Siu v The Queen** [1985] AC 168 ('**Chan Wing-Siu**') and there was no evidence that Whyte did anything to aid and abet the shooting at the police by the pillion.

[8] Counsel complained that the learned trial judge did not sufficiently demonstrate that he understood the law relating to joint enterprise as is reflected in **Jogee**. Furthermore, she argued that he did not perform an analysis of the evidence in which he applied the relevant law to the facts as found by him, to demonstrate why he was led to the conclusion that there was a common design to shoot at the police to which Whyte was a party.

[9] Counsel highlighted the fact that the evidence of the prosecution witnesses was that Brown drew the firearm from his waistband and there was no evidence that Whyte knew that Brown had a firearm until he discharged the first shot. She contended, that there was no evidence that there was a pre-arranged plan which might involve shooting at the police. She submitted that because this was a spontaneous act on the part of Brown, the conduct of Whyte thereafter has to be considered in the context of the circumstances as they unfolded. In this regard, counsel noted that Whyte was already riding away when the shooting by Brown started. She urged the court to accept that since the police returned the fire, it would have been unreasonable to expect Whyte to stop at that point, considering the potential risk of him being wounded by the bullets that they were firing. Accordingly, she reasoned that his action of continuing to ride away ought not to be considered conduct done with the intention of aiding Brown but was a natural act of self-protection.

[10] In respect of the sentences for count one, it was submitted that the learned trial judge was under the misguided impression that the minimum sentence for the possession of a firearm is 15 years, and that led him to erroneously determine that a sentence of 20 years' imprisonment for the appellants was appropriate.

[11] It was also submitted that the learned trial judge did not adopt the methodology suggested by cases such as **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston**') and as a consequence arrived at a sentence that was manifestly excessive having regard to the circumstances of the case.

[12] As it relates to Whyte, counsel argued that if his conviction is upheld, a sentence of seven years' imprisonment would be appropriate for the offence of illegal possession of firearm. Counsel urged the court to impose a sentence of 15 years' imprisonment, which is the statutory minimum, instead of the 20 years imposed by the learned trial judge for the offence of shooting with intent.

[13] Concerning Brown, Counsel submitted that since he was the person in physical possession of the firearm, 10 years' imprisonment would be appropriate for the offence of illegal possession of firearm. For the offence of shooting with intent, it was advanced that the sentence of 15 years' imprisonment, which is the statutory minimum sentence, would be appropriate in respect of Brown. She also urged the court to remove the stipulation in respect of the time which Brown should serve before being eligible for parole.

[14] Counsel relied on several cases of shooting with intent at police officers to support her submission that a sentence of 15 years' imprisonment for shooting with intent is appropriate for the appellants. These included **Davin McDonald v R** [2016] JMCA Crim 31, in which a sentence of 15 years' imprisonment at hard labour was upheld by this court for shooting with intent at two police officers.

[15] Ms Reid also raised the question of whether the learned trial judge was purporting to impose a period to be served before eligibility for parole for both offences of illegal possession of firearm and shooting with intent, but in any event, she urged the court to remove this stipulation in its entirety, in respect of both appellants.

<u>Submissions on behalf of the Crown</u>

[16] In response, the Crown also relied on **Jogee** and in particular, the statement that "[o]nce encouragement or assistance is proved to have been given, the prosecution does not have to go as far to prove that it had a positive effect on D1's conduct or on the outcome". It was argued by Mr Setal for the Crown, that by riding the motorcycle away from the police, the applicant assisted Brown in shooting at the marked service vehicle

with the police officers inside it. It was posited that without Whyte continuing to ride away, Brown would not have been able to continue to shoot at the police and escape. It was advanced that, Whyte was the person in control of the motorcycle, and his conduct in speeding off and continuing to ride away from the police, while Brown was shooting at the police, gave rise to the reasonable presumption that he was present to aid and abet Brown in shooting at the police in a joint enterprise. Accordingly, it was advanced that Whyte was also guilty of shooting with intent.

[17] It was also submitted that there was no conduct by Whyte which could be interpreted as him disassociating himself from the actions of Brown. It was submitted that based on Whyte's conduct, in circumstances which give rise to the presumption that he was present to aid and abet Brown in the shooting at the police and escaping custody, Whyte was in possession of the firearm that was used by Brown by the application of section 20(5)(a)(i) of the Act, and is guilty of the offence of illegal possession of firearm.

[18] Concerning the sentences, the Crown conceded that the learned trial judge did not apply the methodology suggested in cases such as **Meisha Clement** and **Daniel Roulston**. However, it was argued that the sentences of 20 years' imprisonment for illegal possession of firearm are not manifestly excessive. Concerning Whyte, it was advanced that although the learned trial judge did not explain why he used 25 years as the starting point, that figure was justified having regard to the seriousness and prevalence of the offence and because the firearm was used to shoot at the police. The fact that Whyte did not have any previous convictions, and his mixed social enquiry report was submitted as mitigating factors, which would justify a reduction in this figure to 23 years. The Crown contended that the fact that he had dependents should not be considered a mitigating factor. Using this formula counsel concluded that when a credit is applied of one year and five months for the time spent on pre-trial remand, the resulting sentence would be 21 years and eight months. Accordingly, it was argued that 20 years' imprisonment was not manifestly excessive.

[19] Regarding Brown, using the same starting point of 25 years, Mr Setal argued that this should be increased by the aggravating factors that he was the actual shooter. It was highlighted that, additionally, he had two previous convictions for robbery with violence and malicious destruction of property, and this should result in an increase in the sentence of two years, that is, one year for each previous conviction. This would result in a sentence of 28 years. When he is credited for the two years and two months he spent in custody, this would result in a sentence of 25 years and 10 months. For this reason, it was submitted that the sentence of 20 years' imprisonment for the illegal possession of firearm by Brown is not manifestly excessive.

[20] The Crown conceded that a sentence of 20 years' imprisonment for shooting with intent is excessive having regard to the sentences usually imposed for wounding with intent, which is a more serious offence considering the consequences to the victim in each case. It was submitted that in the case of Whyte, a starting point of 15 years is appropriate. This, counsel urged, should be aggravated by one year as it was done in the process of evading the police, and two years should be added since it involved shooting at police officers. When he is credited the one year and five months for time spent on pre-sentence remand, the resulting sentence will be 15 years' and seven months' imprisonment which counsel suggested is appropriate.

[21] As it concerns Brown, the Crown suggested a starting point of 15 years' imprisonment to which the aggravating factors should be taken into account as follows; one year for the fact that he committed the offence to evade the police, three years for the fact that the shooting was at police officers, and one year for each of his two previous convictions. This would result in a sentence of 21 years' imprisonment. The Crown argued that there were no mitigating factors and after he receives a credit of two years and two months for the time spent on pre-sentence remand, the resulting sentence would be 18 years and 10 months' imprisonment, which is wholly appropriate.

Analysis

Ground one

The law in relation to accessory liability

[22] The case of **Jogee** is considered a seminal decision because it has restated the law relating to the application of parasitic accessory liability. This is a term that is accepted as having been coined by Professor Sir John Smith (see Law Quarterly Review (Criminal liability of accessories: law and law reform [1977] 113 LQR 453) to describe a doctrine laid down by the Privy Council in **Chan Wing-Siu**, which has been developed in subsequent cases. In para. 1 of **Jogee**, this principle was explained as follows:

> "…In *Chan Wing-Siu* it was held that if two people set out to commit an offence (crime A), and in the course of that joint enterprise one of them (D1) commits another offence (crime B), the second person (D2) is guilty as an accessory to crime B if he had foreseen the possibility that D1 might act as he did. D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it."

[23] It is to be noted that although counsel for the appellants made submissions in respect of **Jogee** overturing the principle of parasitic criminal liability, the defence deployed by both appellants was one of alibi and there was no assertion that there was an intention to commit a particular offence, but that another was committed. Accordingly, this concept is not applicable to this case.

[24] In para. 1 of **Jogee**, the concept of accessory liability is introduced as follows:

> "1. In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow,

> ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence…."

[25] The court stated that the necessary mental element in cases of secondary liability arising out of a joint criminal venture is an intention to assist or encourage the commission of the crime. However, the court has also, quite helpfully, summarised the essential principles applicable to all cases of accessory liability in paras. 8, 12, 14 and 16 of the judgment.

[26] It was also confirmed by the court that "[t]he requisite conduct element is that D2 has encouraged or assisted the commission of the offence by D1". In respect of crimes that require a particular intent, the court stated that "D2 must intend to assist or encourage D1 to act with such intent. D2's intention to assist D1 to commit the offence, and to act with whatever mental element required of D1 for the offence, will often be co-extensive on the facts with an intention by D2 that that offence be committed". This intent of D2 may also be conditional. The point was also reinforced that in assessing the intention of D2, his foresight should not be equated with an intent to assist; but it may be treated as evidence of intent.

[27] The court opined that in cases where there is an allegation of secondary participation, there are likely to be two issues, namely whether the accessory defendant was, in fact, a participant, "that is, whether he assisted or encouraged the commission of the crime". The second is "whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1".

The offence of shooting with intent

[28] In assessing whether Whyte could be considered an accessory to the shooting with intent by Brown, there are several important elements of the evidence that need to be considered. There was no evidence of the commission of a crime by Whyte or Brown before the motorcycle sped off. Accordingly, there was no factual support for a case

premised on the argument that the liability of Whyte could be considered to be a case of secondary liability arising from a prior joint criminal venture. No doubt for this reason, the scope of the common design which was asserted by the Crown before this court was a common design to escape from the police which involved the use of a firearm by Brown.

[29] There was no evidence that the police were pursuing Brown and or Whyte to arrest them for a previously detected offence from which it could be inferred that the initial speeding off by Whyte on the approach of the police was aimed at foiling that effort. Additionally, because the moment that the firearm was first discharged by Brown was the first point at which Whyte could be fixed with knowledge of Brown's possession of the firearm, it would also not be reasonable to infer that Whyte rode off on the approach of the police to prevent Brown from being apprehended in possession of a firearm. Understandingly, the Crown did not pursue this angle of placing heavy reliance on the initial speeding off by Whyte as evidence supportive of his guilt, but instead concentrated on his act of continuing to ride after Brown discharged the first shot.

[30] When one examines the allegation that Whyte was a part of a plan to escape the police which involved the use of a firearm to shoot at the police, this is predicated on it being established that Whyte knew that Brown had a firearm. The undisputed evidence was that the firearm was taken from the waistband of Brown and, consequently, there was insufficient factual platform from which it could reasonably be inferred that Whyte knew that Brown was in possession of a firearm before the moment when Brown first discharged it.

[31] If, as posited by the Crown, the scope of the common design was to escape from the police by Brown using the firearm to shoot at the police, the surrounding circumstances and the conduct of Whyte may give rise to the reasonable presumption that he was an accessory to the shooting must be dissected. The only relevant conduct of Whyte which was capable of pointing to his intention to assist or encourage Brown to shoot at the police was the fact that he continued to ride the motorcycle after hearing the first shot fired. There was no evidence that Whyte saw the direction in which Brown

pointed the gun when he first discharged it, but it is reasonable to conclude that Whyte ought to have appreciated that the shot was being fired at the police who were pursuing them in the service vehicle.

[32] The evidence of Constable Sinclair, at page 29 of the transcript, was that he heard several explosions but was not sure of the amount at the time. He also explained that he discharged five rounds from his M16 rifle from inside the service vehicle then exited and fired one more round, but "the driver of the motorcycle continued driving away and the pillion keep [sic] firing in our direction… until they were out of sight" (page 31 of the transcript).

[33] The court appreciates that this was a case of trial by a judge alone and the approach of this court is to analyse the reasoning of the learned trial judge as opposed to the situation where a judge is sitting with a jury in which case this court's assessment is of the sufficiency of his directions. The observations made by the Caribbean Court of Justice in **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) at paras. [28] and [29] highlight the significance of this distinction and is expressed as follows:

> "[28] The Court of Appeal in Northern Ireland stated in *R v Thompson* [[1977] NI 74] with respect to the duty of the judge giving judgment in a bench trial:
>
>> He has no jury to charge and therefore will not err if he does not state every relevant legal proposition and review every fact and argument on either side. His duty is not as in a jury trial to instruct laymen as to every relevant legal aspect of the law or to give (perhaps at the end of a long trial) a full and balanced picture of the facts for decision by others. His task is to reach conclusions and give reasons to support his view and, preferably, to notice any difficult or unusual points of law in order that if there is an appeal it can be seen how his view of the law informs his approach to the law.

> [29] Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[34] However, in our view, the unusual facts of this case required the learned trial judge to indicate clearly that he had a full appreciation of the law in this area and to apply the law to the facts. The danger inherent in a misunderstanding of the applicable law in this area was identified in **Jogee**, at para. 77, as follows:

> "The rule in *Chan Wing-Siu* is often described as 'joint enterprise liability'. However, the expression 'joint enterprise' is not a legal term of art. As the Court of Appeal observed in *R v A* [2010] EWCA Crim 1622, [2011] QB 841, [2011] 2 WLR 647 (at [9]), it is used in practice in a variety of situations to include both principals and accessories. As applied to the rule in *Chan Wing-Siu*, it unfortunately occasions some public misunderstanding. It is understood (erroneously) by some to be a form of guilt by association or of guilt by simple presence without more. It is important to emphasise that guilt of crime by mere association has no proper part in the common law." (Italics as in the original)

[35] At page 158 to page 159 of the transcript the learned trial judge correctly indicated that the offence of shooting with intent required an intention to do serious bodily harm to the persons fired. He asserted that the prosecution sought to have the court infer that the appellants had such an intention when "these two men used a gun to shot [sic] at these persons, these the complainants; they intended to do grievous bodily harm when they did that…". Furthermore, at page 159 of the transcript, the learned trial judge identifies the case of the prosecution in the following manner:

> "The prosecution must prove all two counts on this indictment. First the prosecution must prove that these accused men were there when this incident took place and that they were armed with a firearm. In this case, it is only one person that is said was armed. In this case the prosecution is saying also that the two accused men were acting in concert or what you would call a joint enterprise; meaning that they were together, and were acting together when these offences on the indictment were committed."

[36] After reviewing the case for the Crown, the learned trial judge elaborates on it further, starting on page 169 and ending at page 171 as follows:

> "I had also said that this case rests upon what we call joint enterprise, in other words, common design, or what we sometimes call acting in concert. The Prosecution is saying that the two accused men, Brown and Whyte, were present and acting together or in concert with each other. So they are asking the Court to say that each is liable for the acts done in pursuance of that joint enterprise. That both accused men were there to aid and abet each other.
>
> The law is quite clear, especially when it comes to Gun Court cases, where Section 25 (5) (a) (1), what it really says is that a person who is in the company of someone who uses or attempts to use a firearm to commit an offence in circumstances that give rise to the reasonable presumption-- it is saying that while present, aid and abet the commission of the offence, that's what the Crown is saying. And they are saying that Whyte was the rider or driver of the motorcycle who rode off the bike while the pillion was firing.
>
> And also what the Crown is saying, that they enter the lane there and it made good their escape from the police.
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> They say Whyte was the rider, so they are asking the Court to draw the inference that he was part and parcel of the commission of this offence."

[37] The learned trial judge then recounted the evidence of the prosecution witnesses and, at page 194, examined the evidence of Corporal Paul Williams relating to the police approaching the men, and of the driver and the pillion looking in the direction of the police and thereafter the driver of the motorcycle sped off. At this point the learned trial

judge interjected the following comment, "I spoke about aiding and abetting and common design and all that" before immediately returning to the narrative as given by Corporal Williams. At the end of his examination of the evidence of the events and the process by which Whyte and Brown were identified as the person on the motorcycle. At page 202 of the transcript, the learned trial judge concluded by saying:

> "I find that Whyte was part and parcel of the joint enterprise. I find that the accused man, Mario Brown, took a firearm, which was positively identified, which gives the court jurisdiction, gunshot, explosion, fire from it."

[38] In performing the analysis of whether Whyte was a participant in the shooting at the police using the principles enunciated in **Jogee**, on the first issue of whether Whyte assisted the commission of the crime, we have concluded that it cannot be gainsaid that by not stopping after he heard the first shot being fired by Brown, Whyte afforded Brown the opportunity to discharge additional rounds of ammunition at the police. The answer is less clear with the second issue of whether Whyte intended to assist Brown in committing the offence of shooting at the police and had the same mental element for the offence as was required of Brown, that is, the intent to cause the police officers grievous bodily harm. In our view, it is not clear from the summing up that the learned trial judge sufficiently dissected this issue by examining the evidence with the degree of analysis that was required in the circumstances. We acknowledge that Whyte did not give evidence of his state of mind as the events unfolded and, consequently, we are limited in our assessment of the facts to our knowledge of human conduct based on our collective learning and experience. In that regard, in assessing the chronology of the events, it is our opinion that the human instinct for self-preservation should not be underestimated.

[39] We agree with the submission of Ms Reid that Whyte's failure to stop must be viewed against the backdrop of the initial encounter between the police and the men when Whyte rode off. It is relevant that Whyte was already riding at the time of the first shot, and it was open to him to stop and raise his hand in the air in an act of surrender which would also serve to dissociate himself from the actions of Brown. However, we find

considerable force in the position Ms Reid advanced, and we agree that it may not have been practical or reasonable for him to stop. This is because the police were returning the fire from firearms including powerful M16 rifles and, in all likelihood, would have ceased firing only if they were convinced that the threat to themselves had dissipated. This incident took place at night and such a risk assessment by the police would take at least a few seconds after the motorcycle stopped and the men alighted. Furthermore, Whyte could not have anticipated that Brown might himself have also similarly surrendered to cause the police to stop firing. If Brown had not surrendered, by audible and/or visible unequivocal acts such as discarding the firearm and raising his hands in the air in full view of the police, then the police would likely have continued firing. In any event, it was very probable that Whyte, in stopping, may have been injured by the bullets that the police were justifiably firing in self-defence.

[40] In our opinion, the learned trial judge failed to adequately demonstrate an appreciation of the law relating to accessory liability and did not indicate the process and reasoning by which he concluded that Whyte was part and parcel of the specific joint enterprise to shoot at the police. For the reasons to which reference has already been made, we are of the view that there was an absence of sufficient evidence that the shooting at the police was in furtherance of a joint criminal venture. Consequently, the learned trial judge was obligated to explain why he concluded that by continuing to ride, after Brown on the 'spur of the moment' started firing, Whyte not only aided Brown but more importantly, shared the necessary mental element of an intent to shoot at the police with intent to cause them grievous bodily harm. The necessity for the learned trial judge to explain his reasoning is critical given the possibility that by stopping Whyte may have been injured by the gunfire that was being returned by the police. Having regard to the failure of the learned trial judge to explain his analysis and based on our finding that there was insufficient evidence that could support a finding that Whyte was an accessory to Brown's shooting at the police, the conviction of Whyte for shooting with intent cannot stand.

The offence of illegal possession of firearm

[41] Where a person who is in illegal possession of a firearm uses it to commit an offence such as shooting with intent, another party, such as Whyte in this case, may also be found to be in illegal possession of that firearm contrary to section 20(1)(b) of the Firearms Act ('the Act'), by the operation of section 20(5)(a) of the Act which is in the following terms:

> "20. (5) In any prosecution for an offence under this section-
>
> (a) any person who is in the company of someone who uses or attempts to use a firearm to commit-
>
> > (i) any felony; or
> >
> > (ii) any offence involving either an assault or the resisting of lawful apprehension of any person,
>
> shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm; …."

It is important to note that section 20(5)(a) of the Act can only be relied on to support a charge of illegal possession of firearm. It is of no relevance to the count for shooting with intent.

[42] In **R v Clovis Patterson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 81/2004, judgment delivered 20 April 2007 ('**Clovis Patterson**'), Smith JA, in commenting on the operation of this section, made the following observation at pages 11 and 12 of the judgment:

> "Where the specified offence committed by the actual possessor, that is the principal offender, is one to which the principle of joint enterprise or common design is readily applicable, for example robbery, then the voluntary presence of an accused as a companion of the principal will normally be sufficient to raise a prima facie case against him on a charge of the specified offence. In such a situation on a charge under

> section 20 of the Act, the prosecution need not prove, prima facie, that the accused knew that the actual possessor had a firearm. By operation of subsection (5) (a) he shall be treated as being in possession in the absence of reasonable excuse. In other words, once it is established that there are circumstances which give rise to a reasonable presumption that he was there to aid and abet the commission of the specified offence, then he shall be treated, in the absence of reasonable excuse, as jointly in possession of the firearm with the actual possessor. It is therefore a question of fact in each case."

[43] In **Romario Gordon v R** [2022] JMCA Crim 27 ('**Romario Gordon**'), this court recently examined whether a person in the company of a shooter could be found liable for illegal possession of the firearm that was used. In that case, the evidence led by the prosecution was that the applicant and another person were traveling in a motorcar when they approached the two complainants in Cross Roads, Saint Andrew. The applicant alighted from the vehicle armed with a firearm which he pointed at the complainants and robbed them. He returned to the motor vehicle and entered the front passenger seat. The vehicle sped off in the direction of New Kingston in the said parish. Approximately five minutes later, the attention of two police officers, who were on patrol in a marked service vehicle, was drawn to the motorcar as it pulled out of the line of traffic on Balmoral Avenue and disobeyed the red traffic light. The officers pursued the motorcar onto Maxfield Avenue with the beacon and emergency lights of the service vehicle activated. The motorcar eventually crashed into a median on Constant Spring Road which caused one of its tires to explode and, shortly thereafter, the driver stopped the motorcar on Seaward Drive after hitting a parked motor vehicle. The driver emerged from the car with a firearm in his hand and started shooting in the direction of the police officers. He ran off and escaped.

[44] The police officers approached the motorcar, and the applicant exited from the front passenger side. On searching the motorcar, a chrome .38 revolver loaded with three live rounds was found under the front passenger seat where the applicant had been seated. The firearm was shown to him, and he denied that it was his. He was cautioned,

arrested, and taken to the Half Way Tree Police Station where he was identified by the complainants who were there making a report, as a person who had robbed them.

[45] The applicant was tried in the High Court division of the Gun Court and convicted on five of the counts contained in the indictment, namely for, illegal possession of firearm (count one), illegal possession of ammunition (count two), robbery with aggravation (counts four and five) and shooting with intent (count six). On his appeal against his conviction and sentence for shooting with intent (count six), this court considered the case of **Clovis Paterson** regarding the effect of section 20(5)(a) of the Act.

[46] This court in **Romario Gordon** found that the absence of a second count on the indictment against the applicant for illegal possession of firearm meant that a nexus could not be established between the illegal possession of the firearm and the shooting with intent at the police which the principal offender used the firearm to commit. Accordingly, the charge of shooting with intent could not be made out against the applicant. The process used by the court in analysing the evidence is illustrative of the kind of interrogation of the facts and analysis of the conduct of the alleged accessory that is necessary in cases of this type. The court found at para. [22] as follows:

> "[22] We agree with the Crown that the applicant's presence in the car was not accidental, and it is pellucid to us that he and the driver were both trying to evade lawful apprehension by the police following the robbery. However, we observe that the applicant was seated in the car's front passenger seat and was not saddled with the vehicle's manoeuvring. He was also armed with a firearm. Yet, during the pursuit of the car by the police, he did not use his firearm to point or shoot at the police. He had ample time and opportunity to do so, were this his intention or part of any agreed plan between him and the driver. Neither was there any direct or inferential evidence that he shared the intention of the driver to shoot at the police. The undisputed evidence was that the driver shot at the police after hurriedly leaving the car following the crash and just before he escaped into the lane. In other words, the evidence is supportive of the conclusion that the driver committed the offence of shooting with intent on the spur of the moment to facilitate his own escape. It is also worth

> mentioning that when the driver was shooting at the police, the applicant remained in the car and did not attempt to escape or join him in the shooting. His firearm was subsequently found secreted beneath the seat he was sitting on in the car. It seems to us that this evidence contradicts any notion that the applicant was engaged in a joint enterprise with the driver to shoot at the police or that he aided and abetted him in the commission of the offence. Regrettably, the learned trial judge failed to demonstrate that she considered these factors in her analysis of the evidence."

[47] The court, in para. [23] of the judgment, referred to and adopted the statement of Smith JA at page 13 of **Clovis Patterson** as follows:

> "However, where the specified offence committed by the possessor of the firearm was committed on the spur of the moment and **the doctrine of common design or joint enterprise in the commission of the offence is not readily applicable,** it is normally difficult for the prosecution to prove a charge under section 20 against a person in the company of the actual possessor at the time." (Emphasis as in the original)

In determining Whyte's liability for the offense of shooting with intent, given that Brown executed the shooting, the legal principle of common design or joint enterprise would have to be employed to establish Whyte's guilt for that offence. The effect of section 20(5)(a) is that only if Whyte is found to be present to aid and abet the principal offender Brown, the shooter, in the absence of a reasonable explanation, would he be deemed to be in possession of the firearm used. In other words, to borrow the language of the court in **Delroy Wilson v R** [2023] JMCA Crim 43 at para. [22], there is a "legal umbilical cord between the offences of shooting with intent and illegal possession of a firearm" and the effect of the section is, as Smith JA surmised in **Clovis Patterson** at page 15, to "lighten the burden of the prosecution".

[48] In **Attorney General's Reference No 1 of 1975** [1975] QB 773 at page 779 Lord Widgery CJ opined that the words 'aid', 'abet', 'counsel', and 'procure' must be given their ordinary meaning. It is generally not disputed that to aid means to give assistance

and to abet means to encourage. In this case, it can be said with a reasonable degree of certainty that "the doctrine of common design or joint enterprise in the commission of the offence is not readily applicable". Therefore, the learned trial judge needed to identify the circumstances that gave rise to a reasonable presumption that Whyte was present to aid or abet the commission of the shooting at the police or the resisting of the lawful apprehension of Brown by the police to find him guilty for illegal possession of a firearm.

[49] We have at para. [35] herein quoted the portion of the transcript at which the learned trial judge referred to section 25(5)(a)(1) and stated that the Crown was asserting that Whyte was the rider of the motorcycle who rode off the motorcycle while the pillion was firing, and the Crown was asking the court to draw the inference that he was "part and parcel of the commission of this offence". However, the learned trial judge did not analyse the presence of Whyte in the context of the surrounding circumstances and explain how the section applied to justify the finding that he was guilty of illegal possession of firearm. In our view, the learned trial judge needed to perform an analysis of the evidence similar to that undertaken in **Romario Gordon** (at para. [22] thereof which we quoted at para. [46] herein), to explain the process by which he arrived at the verdict of guilty of illegal possession of firearm for Whyte.

[50] We acknowledge that the defence of Whyte was an alibi and, accordingly, he did not provide a reasonable excuse for his presence on the motorcycle with Brown. The evidence clearly shows that he was voluntarily in the company of Brown. However, on our analysis of the evidence, his failure to stop (in the circumstances which we have addressed when we were dealing with the offence of shooting with intent), does not give rise to a reasonable presumption that he was present to aid or abet the shooting at the police or to aid and abet Brown in resisting his lawful apprehension. The fact that Whyte rode off on the initial approach of the police is not sufficient to impute an intention to aid Brown in resisting his lawful apprehension prior to Brown shooting at the police. Additionally, Whyte's conduct following the discharge of the first shot by Brown must be viewed in the light of the circumstances as they existed with the police returning the fire.

These two elements of Whyte's conduct, viewed singly, or even if taken together, would still not be sufficient to find him guilty of illegal possession of a firearm.

[51] The failure of the learned trial judge to explain his analysis of the evidence and the basis or bases on which he concluded that Whyte was guilty of illegal possession of a firearm constitutes a deficiency that renders the conviction unsafe. Accordingly, the conviction of Whyte for illegal possession of firearm cannot stand.

Conclusion with respect to ground one

[52] For the reasons explained herein, the convictions of Whyte cannot be supported. The Crown has sought to rely on the Privy Council case of **Lescene Edwards v The Queen** [2022] UKPC 11 ('**Lescene Edwards**') to support their submission that there was sufficient evidence on which the learned trial judge being properly directed could have found Whyte guilty of both offences for which he was tried. However, as the Board noted, **Lescene Edwards** was a case involving fresh evidence and, for that reason, the appeal did not only involve an assessment of the evidence which was available at the trial. The Board highlighted the distinction between such cases involving fresh evidence and other cases where the evidence available at the trial is being considered. At para. 52 of the judgment, Sir David Bean, on behalf of the Board, stated as follows:

> "…It will be seen from the passages we have cited that the Court of Appeal placed much reliance on *R v Lao*. However, as Mr Poole rightly accepted in argument, cases such as *Lao* (or, in England and Wales, *R v Pope* [2012] EWCA Crim 2241; [2013] 1 Cr App R 21) deal with the situation where the sole ground of appeal is that the verdict is unreasonable or against the weight of the evidence. In such cases it has always been exceptional for an appellate court to intervene. There are some notable examples of the jurisdiction being exercised, such as *R v Wallace* (1931) 23 Cr App R 32, but they are few and far between."

It should be noted that the ground of appeal in the case before us in respect of Whyte is not that the verdict is unreasonable and against the weight of the evidence. The crux of the appeals is that the learned trial judge failed to properly consider the law of joint

enterprise. It was advanced that had he done so, he would not have convicted Whyte, because there was insufficient evidence. For the reasons we have indicated, we agree that the evidence is insufficient to support the convictions of Whyte.

The sentencing of Brown

[53] Based on our conclusion that the conviction of Whyte cannot stand, there remains only the need to consider the sentences imposed on Brown. There is no dispute between counsel for Brown and counsel for the Crown that the learned trial judge did not apply the guidance offered by cases such as **Meisha Clement** and **Daniel Roulston** as to the methodology to be employed in sentencing. We agree with their conclusion.

[54] In instances where the judge has not explained the methodology used to determine the sentence, this court is required to "to determine the appropriate sentence that ought to have been imposed after an application of the relevant principles" (see **Lincoln McKoy v R** [2019] JMCA Crim 35, at para. [43]).

[55] In **Lamoye Paul v R** [2017] JMCA Crim 41, McDonald-Bishop JA (as she then was) identified a sentencing range of 12 to 15 years in cases of illegal possession of a firearm, where the firearm is used to commit an offence. At para. [18] she opined as follows:

> "In respect of illegal possession of firearm … [t]he learned judge was required to choose a starting point and a range for the offence, which she did not. Bearing in mind that this is not a case that involved the possession of a firearm simpliciter, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate…"

[56] The case before us is not one of possession simpliciter but one in which the firearm was used to shoot at the police. We completely endorse the opinion of McDonald-Bishop JA and consider a starting point of 13 years to be appropriate. We find the previous convictions of Brown to be aggravating factors, and we found no significant mitigating factors. When he is credited for two years and two months spent on pre-sentence remand, this would result in a sentence of 12 years and 10 months. Accordingly, we are

of the view that the sentence of 20 years' imprisonment imposed by the learned trial judge is manifestly excessive and should be set aside.

[57] As it relates to the sentence for the offence of shooting with intent, the relevant provision is section 20(2) of the Offences Against the Person Act which provides that a person who is convicted before a circuit court for shooting with intent shall be imprisoned for life or such other term not being less than 15 years, as the court considers appropriate.

[58] We are of the view that a starting point of 15 years is appropriate. We agree with the submissions of the Crown that the following are aggravating factors:

a) Brown's previous convictions;

b) the offence was committed while Brown was evading his lawful apprehension by the police; and

c) the shooting was at police officers.

However, we are of the view that these aggravating factors should only increase the sentence by five years. We have not identified any mitigating factors. Accordingly, when he is given a credit of two years and two months for the time spent on pre-sentence remand, the resulting sentence would be 17 years and 10 months' imprisonment.

[59] It is not patently clear on our reading of the transcript whether the stipulation by the learned trial judge that Brown will not be eligible for parole until he has served 15 years was intended to apply to both offences of illegal possession of firearm and shooting with intent, although we are inclined to conclude that it was restricted to the latter. However, for practical purposes, it does not matter, since such a stipulation is not permissible in respect of either offence and, consequently, the learned trial judge erred in this regard. This issue was explored by this court in **Howard Hughes v R** [2023] JMCA Crim 44 in which the court cited with approval Brown Beckford JA (Ag) in **Adrian Clarke v R** [2023] JMCA Crim 27, where at para. [95] she stated the following:

> "[95] We will now take this opportunity to point out that the learned trial judge incorrectly stated a minimum period of 12 years for both offences to be served before the appellant will become eligible for parole. The offence of illegal possession of firearm is contained in section 20(1)(b) of the Firearms Act and wounding with intent is contrary to section 20 of the Offences against the Persons Act ('OAPA'). Similarly to section 6 of the OAPA (the offence of manslaughter), those sections do not confer on the trial judge, the jurisdiction to stipulate a minimum period to be served before being eligible for parole. The parole period for illegal possession of firearm and wounding with intent is determined in accordance with section 6 of the Parole Act…"

The court in **Howard Hughes v R** then concluded, at para. [51], as follows:

> "It is, therefore, patently clear and incontrovertible, that the statutory regime governing the offences of illegal possession of firearm, wounding with intent or shooting with intent, did not give jurisdiction to the learned trial judge to stipulate a minimum period to be served by the appellant before becoming eligible for parole…"

[60] The stipulation as to the period to be served before Brown can be eligible for parole must be removed from his sentence.

Conclusion

[61] For the reasons disclosed herein, we make the following orders:

<u>Shackera Whyte</u>

(1) The application for leave to appeal conviction is granted.

(2) The hearing of the application in respect of conviction is treated as the hearing of the appeal.

(3) The appeal against convictions and sentences is allowed. The convictions and sentences, imposed on 15 December 2021 for the offences of illegal possession of firearm and shooting with intent,

are set aside and a judgment and verdict of acquittal entered in respect of both offences.

Mario Brown

(4) The appeal against sentence is allowed, in part. The sentences of 20 years' imprisonment for illegal possession of firearm and 20 years' imprisonment for shooting with intent, imposed on 15 December 2021, with the stipulation that he serves 15 years before becoming eligible for parole, are set aside and substituted therefor are sentences of 12 years' and 10 months' imprisonment for illegal possession of firearm, and 17 years' and 10 months' imprisonment for shooting with intent, account having been taken for the two years and two months spent in pre-sentence custody.

(5) Both sentences are to run concurrently and are reckoned to commence on 15 December 2021, the date that they were imposed.