JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 81/2015

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

SHANOR BERTRAM v R

Ms Jacqueline Cummings instructed by Archer Cummings & Co for the applicant

Miss Theresa Hanley and Miss Kelly Hamilton for the Crown

18, 21 February and 22 March 2019

P WILLIAMS JA

[1] The applicant, Mr Shanor Bertram, was convicted on 21 August 2015 in the High Court Division of the Gun Court held at Saint Ann's Bay, in the parish of Saint Ann, by Harris J sitting without a jury. The offences for which he was convicted were illegal possession of firearm, illegal possession of ammunition and robbery with aggravation. He was, on the same day, sentenced to serve 10 years' imprisonment in respect of the charge of illegal possession of firearm, five years' imprisonment in respect of the ammunition, and 12 years' imprisonment for the offence of robbery with aggravation. The sentences were ordered to run concurrently.

[2] Mr Bertram's application for permission to appeal against the convictions and sentences were considered by a single judge of this court, who refused his application. Mr Bertram has sought to renew his application before this court, as is his right.

[3] On 21 February 2019, after hearing and considering the submissions from counsel, we made the following order:

> "1) Application for permission to appeal against conviction and sentence is refused.
>
> 2) Sentences are to be reckoned as having commenced on 21 August 2015."

We promised, then, to reduce into writing our reasons for the decision. This is a fulfilment of that promise.

[4] The evidence led by the prosecution, was that on Saturday 25 January 2014, at about 9:00 am, the complainant and her young son, got into a taxi at Priory in the parish of Saint Ann. Only the driver and a male passenger were in the vehicle. When the taxi got to the vicinity of Chukka Cove, also in the parish of Saint Ann, the passenger produced a gun, pointed it at the complainant and demanded her possessions. At the same time, the driver held on to the lock on the door, by which her son was seated. This prevented her son from opening the door. The driver told him not to move.

[5] The gunman took the complainant's cellular telephone and her purse containing $20,000.00. The driver then asked the gunman if he could release them. The gunman said yes and the driver allowed them to go. The car then drove off.

[6] As soon as the complainant and her son got out of the car, they saw a police highway patrol vehicle. The young boy made a report to the police and the vehicle drove off in the direction that the taxi had gone. The complainant and her son eventually went to the Saint Ann's Bay Police Station, where they later saw the police bring in the two men. They identified the men to the police as being the robbers and the complainant identified her cellular telephone and purse.

[7] Detective Corporal Shamar McFarlane was the person to whom the two men were turned over by the police highway patrol personnel. She received the reports from both the complainant and her son. When she charged the two men, they both denied being involved in any robbery. Mr Bertram is the person identified as the driver of the taxi.

[8] At the trial, Mr Bertram gave sworn testimony. He admitted that he was the driver of the vehicle but denied being involved in the robbery. He said that a male passenger had chartered his vehicle in Montego Bay in the parish of Saint James. The man chartered him to go to Ocho Rios in the parish of Saint Ann to pick up some money. However, Mr Bertram said before they got to Ocho Rios and when they were somewhere in Saint Ann, the man told him to turn back because the person from whom the money was to be collected had moved.

[9] Mr Bertram said he decided to pick up the complainant and her son to "carry them down ... [to] mek up a little gas money". He also gave an explanation for not

asking the male passenger for the money. His explanation in his own words was "...we no reach a full destination so me nuh collect yet".

[10] Mr Bertram said that he did not know that the male passenger had a gun. He said that when the man produced the gun he became afraid. He obeyed when the man, after robbing the complainant and her son, knocked him on his leg and told him to drive. He said that prior to the gun being produced, he was not threatened in any way nor did he have any reason to feel fearful.

[11] Mr Bertram called the male passenger who was the gunman, Douane Salmon, as a witness. Mr Salmon testified that his sole reason for chartering the taxi was to rob someone in Saint Ann. He explained that he decided to abandon this plan because there was "a lot of police on the road". However, shortly after Mr Bertram picked up the complainant and her son, he told Mr Bertram to stop and he brandished the gun. Mr Salmon admitted that he had robbed the complainant and insisted that Mr Bertram had nothing to do with the robbery.

[12] Mr Salmon explained that he could not drive. He also said he wanted to wait until they were at a lonely road before robbing Mr Bertram. Mr Salmon testified that prior to this trial, he had pleaded guilty to the offences of illegal possession of firearm, illegal possession of ammunition and robbery with aggravation and had been sentenced in respect of them.

[13] Before us, Ms Cummings, on behalf of Mr Bertram, requested and was given permission to make submissions on only one of the four grounds of appeal that were

filed. The sole ground was simply "lack of evidence". She did not formally abandon the other three grounds, but no arguments were advanced in relation to them. We do appreciate counsel's position in respect of those grounds because they had no prospect of success.

[14] Ms Cummings submitted that the sole question in this appeal and the case is whether Mr Bertram was a participant or an innocent bystander, potential victim or pawn in the commission of this offence.

[15] Ms Cummings contended that there was only one bit of evidence from which the learned trial judge could draw the inference that Mr Bertram was a participant in the robbery. This was the evidence from both the complainant and her son that Mr Bertram did something to prevent the young boy from opening the door. She contended that none of the witnesses gave evidence of Mr Bertram saying anything or doing anything in furtherance of the robbery. Counsel submitted that this bit of evidence relied on by the learned trial judge was insufficient to prove beyond a reasonable doubt that Mr Bertram was a participant in the robbery.

[16] Miss Hanley, in her submissions on behalf of the Crown, countered that there were other bits of evidence of Mr Bertram's involvement. She pointed out that not only did the witnesses testify that Mr Bertram had prevented the complainant's son from exiting the vehicle but that this was accompanied by the order for him not to move. Additionally, she noted that Mr Bertram had enquired of the gunman, whether it was

time to permit the complainant and her son to leave the vehicle. In addition, it was Mr Bertram who eventually ordered them to leave.

[17] Counsel submitted that this level of involvement of Mr Bertram in no way supports the assertion that he was an innocent bystander but rather was evidence, if accepted, that he was acting jointly with the male passenger. Counsel referred to **R v Coney and others** (1882) 8 QBD 534, **R v Dennie Chaplin, Howard Malcolm and Peter Grant** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3 and 5/1989, judgment delivered 16 July 1990, **R v Norris Taylor** (1991) 28 JLR 124 and **Alton Heath and others v R** [2012] JMCA Crim 1 for an exposition on the doctrine of joint enterprise/common design.

[18] The learned trial judge was faced with a straight issue of credibility. She identified the differences between the prosecution's case and that of the defence. At page 164 of the transcript, she had this to say:

> "Now, it is my view that the narrow issue which is to be decided is whether or not Mr Bertram was in fact Mr Solman's [sic] accomplice. Whether or not they embarked to go on a joint enterprise to rob [the complainant]. It turn [sic] on the credibility of [the complainant] and her son.... Because it is they who have given evidence that the driver prevented them from leaving the car, both of them say that he held on to [the son]'s door, told them not to move and the robbery took place. After the robbery Mr Bertram asked Mr Solman [sic] if he should let them out now, whereupon he was instructed so to do and he complied.
>
> And if I accept that portion of the evidence, it would be open to me to say that that is sufficient evidence that tends to show that Mr Bertram was in fact acting in concert with Mr Solman [sic]."

[19] She believed the complainant and her son as to what they said Mr Bertram had done. She, therefore, found that the evidence of the witnesses demonstrated that Mr Bertram was acting in concert with Mr Salmon.

[20] It cannot be said that the learned trial judge, who saw and heard the witnesses, was plainly wrong in her assessment of the evidence and in her ultimate finding that Mr Bertram was part and parcel of the joint enterprise to rob the complainant. For those reasons, the convictions cannot properly be disturbed.

[21] Ms Cummings submitted that the sentences handed down by the learned trial judge, in the circumstances of this case, could be considered excessive. She noted that given the role that Mr Bertram was found guilty of playing, his sentence ought not to have been more than the gunman who received seven years' imprisonment for the illegal possession of the firearm, five years' imprisonment for illegal possession of ammunition, and ten 10 years' imprisonment for robbery with aggravation.

[22] The appropriate approach to sentences and the relevant principles were discussed in **Meisha Clement v R** [2016] JMCA Crim 26. Further, there is now the guidance set out in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017.

[23] The learned trial judge would not have benefitted from either of these but she demonstrated an appreciation of the general principles in carrying out the sentencing exercise. She took into consideration the prevalence of offences of this nature and thought that a period of incarceration was appropriate. She considered the plea in

mitigation made on his behalf and his antecedents, including the fact that he was said to be hardworking. She noted that he had previous convictions involving the use of a firearm, as well as an offence of dishonesty; namely for the offences of illegal possession of firearm, wounding with intent and assault with intent to rob. She chose to treat it as one incident and that he was therefore not a serial offender. These can all be properly considered as aggravating and mitigating factors.

[24] The learned trial judge did not identify the sentence range nor an appropriate starting point within the range. She, therefore, did not apply the methodology in calculating the term of imprisonment she ultimately imposed. She did, however, note the maximum sentences for each count. Significantly, she noted that for the robbery with aggravation she would have imposed a sentence of between 13 to 14 years but said that she took into account the almost two years Mr Bertram had spent in custody and thus arrived at the sentence of 12 years.

[25] The 10 years' imprisonment for illegal possession of firearm and the five years' imprisonment for ammunition, could be regarded as being lenient, given Mr Bertram's previous convictions for offences involving the use of a gun. Notwithstanding the learned trial judge having failed to identify the sentence range or an appropriate starting point within the range, there can be no legitimate complaint in respect of the sentences which were ultimately imposed.

[26] The sentences are well within the usual range of sentences imposed for these offences. They cannot be said to be manifestly excessive. Given his previous

convictions, and the fact that Mr Salmon had pleaded guilty, Mr Bertram could not have been given a sentence similar to Mr Salmon. Furthermore, the role he played in driving the taxi to attract unsuspecting victims is almost as egregious as the actions of Mr Salmon.

[27] It was for these reasons that the decision at paragraph [3] was given.