[2018] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 8 & 9/2011

BEFORE: THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

ANDRE DOWNER &
DARREN THOMAS v R

Mrs Ann-Marie Feurtado-Richards for the applicant Andre Downer

Miss Nancy Anderson for the applicant Darren Thomas

Miss Patrice Hickson for the Crown

29 November 2016 and 27 July 2018

F WILLIAMS JA

[1] We heard these two applications for leave to appeal against convictions and sentences on 29 November 2016. At the conclusion of the hearings, we dismissed both applications and ordered that the sentences were to be reckoned as having commenced on 18 January 2011. We then stated that written reasons were to follow. These are our promised reasons.

Background

[2] The applicants were tried jointly before D McIntosh J ("the learned trial judge") on 10 January 2011, in the Western Regional Gun Court holden at Montego Bay in the parish of Saint James. They were tried on an indictment containing three counts against each applicant for the offences of: (i) illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act; and (ii) two counts of robbery with aggravation contrary to section 7(1)(a) of the Larceny Act. At the conclusion of the trial each applicant was convicted of all three counts. On 18 January 2011, they were each sentenced to 15 years' imprisonment at hard labour on each count, with the sentences to run concurrently.

The case for the prosecution

[3] At the trial, three witnesses gave evidence for the prosecution. Mr Andre Gillings testified that on 16 February 2009, at about 1:35 am, he had driven his 2005 Honda Civic motor car to Capital Heights, Saint James. He had stopped in the area with the car engine running as he was dropping off a female companion at her home. While standing by the car door and conversing with the said female companion, he saw two men approaching. Shortly thereafter he heard the "cranking" of a gun behind him.

[4] He testified that when he turned around he saw the same two men, one of whom pointed a gun at him and ordered him and his female companion to back away from the vehicle. He stated that the other assailant ordered Mr Richard Thompson, who was a passenger in the back seat of the Honda Civic, to exit the car. Mr Thompson then came out of the car. At that time, the man pointed the gun at them both while the

other man searched through their pockets and tied their hands. They were then robbed of their valuables and ordered to lie on the ground, which they did. The robbers then drove off in the Honda Civic motor car. The incident was thereafter reported to Constable Larvel West at the Freeport Police Station.

[5] Mr Thompson gave evidence corroborating in most material respects the evidence of Mr Gillings. In court, he identified the applicants as the two men who had robbed him and Mr Gillings on the morning in question. He testified that while he had not known the applicants prior to the morning of the robbery, during the robbery, he was able adequately to observe them. He testified that he subsequently saw both men together on two separate occasions, and that on the second occasion, he was able to have them apprehended by the police.

[6] Constable West gave evidence that on 16 February 2009, he had received a report concerning the robbery. He testified that on 20 March 2009, at about 5:30 pm, he was on duty in Montego Bay, Saint James when he received a telephone call from Mr Thompson, one of the complainants. He testified that he thereafter proceeded to Saint Clavers Avenue where he apprehended two men fitting the description that Mr Thompson had given him. He identified himself as a police officer to the two men, who in turn identified themselves as Andre Downer and Darren Thomas. He identified the men sitting in the dock as the two men whom he had apprehended.

[7] He testified that a search of their person revealed nothing incriminating, but that on the scene, Mr Thompson had identified both men as being those who had robbed

him and Mr Gillings. He testified that on being cautioned, the applicant, Andre Downer, said: "[o]fficer, a weh dis fah?" and that the applicant, Darren Thomas, said: "[m]i nuh know 'bout dis'". He then arrested both men on reasonable suspicion of robbery with aggravation and illegal possession of firearm. An identification parade was later arranged but Mr Gillings did not attend. Further, none of the stolen items were recovered.

The case for the defence

[8] The two applicants made unsworn statements from the dock.

Andre Downer

[9] In his unsworn statement, the applicant Andre Downer stated that he was 25 years of age, that he was employed as a mason, and that he had a child dependent on him. He further stated that at the time that he was taken into custody, he had been coming from work with two other men. He was instructed by Constable West to "spit out his false teeth", which he did. He stated that after Constable West had accosted him, he then started to beat him and asked "[w]hich part di man Honda is". He further stated that at the time he was taken into custody, he did not see any of the complainants. He stated that his house was searched but no stolen item was found. He denied having a cut on the left side of his face, and also denied that he had robbed the complainants. He stated in relation to the complainants, that: "[i]s the first time mi see them".

Darren Thomas

[10] The applicant, Darren Thomas, in making his statement, stated that: "[t]his is the first time I have been seeing these two gentlemen" and that "[t]he first time mi seeing these two gentlemen is in court, don't know anything about any robbery". He further stated that a search of his home had been conducted and that no stolen items were found. He also stated that he had been informed that an identification parade was to have been held but that none was conducted.

The appeal

[11] On 25 January 2011, the applicants, by use of criminal form B1, gave notice of appeal against their convictions and sentences. The applications were considered by a single judge of this court, who, on 28 November 2012, refused them. In refusing the applications, the learned single judge of appeal found the single issue in the case to have been that of identification, and that the learned trial judge had given himself the appropriate directions, and had found the single identifying witness to be credible. As is their right, the applicants renewed their applications before this court.

Grounds of appeal for Andre Downer

[12] On 29 November 2016, counsel for Andre Downer filed amended supplemental grounds of appeal. We gave permission for the two grounds of appeal contained therein to be argued, and for the original grounds to be abandoned. These were the grounds of appeal argued before the court:

Ground 1:

> "The Learned Trial Judge erred in accepting the identification evidence as credible as the identification evidence of the witness [Richard] Thompson was weak and ought to have been considered as an honest but mistaken witness".

Ground 2:

> "That in passing sentence for the offences of Illegal Possession of Firearm and two (2) counts of Robbery With Aggravation, the period of fifteen (15) years on each count, sentences to run concurrent [sic] is manifestly excessive in all circumstances of the case."

Grounds of appeal for Darren Thomas

[13] Counsel for this applicant also sought and was granted leave to abandon the original grounds of appeal and to rely on five supplemental grounds of appeal contained in the skeleton submissions filed on 22 November 2016. During the hearing of the applications, counsel withdrew supplemental ground 5 which complained that the applicant's constitutional right to a fair hearing was breached, due to the delay in having the application heard. That decision was taken after the court observed that the application had come before it on 17 December 2013, and was taken out the court's list on the application of defence counsel who was then in the matter, acting on the instructions of the applicant. Accordingly, these were the four grounds argued:

Ground 1

> "The Learned Trial Judge erred in that he failed to demonstrate that he was satisfied beyond reasonable doubt that the applicant, Thomas, was in unlawful possession of a firearm."

Ground 2

"The Learned Trial Judge erred in accepting the identification evidence as credible as the identification evidence of the applicant Thomas was weak and was made by only one of the three persons allegedly at the scene at the time."

Ground 3

"The Learned Trial Judge erred in his treatment of statements made in the unsworn statements of the applicants concerning the searches carried out at both applicants' homes and the lack of recovery of any of the items said to be stolen."

Ground 4

"The sentences imposed on the applicant, Darren Thomas are manifestly harsh and excessive having regard to the evidence and the good character of the applicant, Thomas."

[14] In essence both applicants argued grounds of appeal in relation to: (i) the learned trial judge's treatment of the identification evidence; and (ii) the contention that the sentences are manifestly excessive. Accordingly, the arguments advanced for the applicants on those issues will be considered together.

Whether the learned trial judge erred in his treatment of the identification evidence (ground 1 for Andre Downer and ground 2 for Darren Thomas).

Summary of submissions for Andre Downer

[15] Mrs Feurtado-Richards submitted that the identification evidence given by Mr Thompson amounted to a fleeting glance, and that the prosecution had not met the standard of proof of beyond a reasonable doubt in attempting to establish that the applicant was correctly identified. Counsel argued that several discrepancies arose in the evidence of the complainant, Richard Thompson, and that, while the learned trial

judge had dealt with those discrepancies, the likelihood of Mr Thompson's being an honest but mistaken witness was not cured by the directions of the learned trial judge.

[16] Counsel further submitted that the possible mistaken identification of the applicant is evident from the fact that Mr Thompson stated that there was a scar on the left side of the applicant Andre Downer's face, when that was not so. The possibility of a mistaken identification, counsel argued, was further bolstered by the fact that the applicant's house was searched and none of the stolen items was found. Counsel also argued that the identification evidence was further weakened by Mr Gillings' not having identified the applicants on an identification parade, the sole identifying witness being Mr Thompson.

Summary of submissions for Darren Thomas

[17] On behalf of the applicant Darren Thomas, Miss Anderson submitted that the learned trial judge had erred when he found that there was no challenge to the descriptions given by both witnesses to the police, when that evidence was not elicited at the trial. Counsel also argued that, in a case in which he, Mr Thompson, was the sole identifying witness, the evidence in relation to his ability to have seen and identified the applicant on the night in question was weak.

Summary of submissions for the respondent

[18] On behalf of the Crown, Miss Hickson submitted that the learned trial judge had properly directed himself on the issue of identification and that it was open to him to have drawn reasonable inferences from the evidence. Crown Counsel argued (in light of

an omission by Crown Counsel at the trial to have led evidence in relation to the actual distance of the assailants from the complainants), that the learned trial judge had properly exercised his "jury mind" in finding that "...a man who is taking things out of your pocket... common sense ought to be clear that he must be closer than an arm's length".

[19] Counsel for the Crown submitted that the learned trial judge was mindful of the fact that no identification parade had been conducted, and that the identification in court of the applicants by the witness would have amounted to a dock identification. She also submitted that, in the summation, the learned trial judge had properly directed himself on the need for special caution, as the crucial question of identification had to be resolved only on the evidence of Mr Thompson. Counsel further argued that there was no reason for the learned trial judge to have speculated on the reasons for no identification parade having been held.

[20] Counsel for the Crown further argued that it was clear from the summation that there was no dispute that Andre Downer had a scar to his face, in circumstances in which the witness had used the scar as a distinguishing feature, although erring in stating on which side of his face the scar appeared.

Discussion

[21] At this point, we find it useful to reiterate the well-established principle of law stated in **R v Joseph Lao** (1973) 12 JLR 1238. Succinctly stated, this principle is to the effect that the findings of fact of a tribunal of fact will not be overturned unless

demonstrated to be unreasonable and unsupportable. Accurately summarizing the principle, the head note of **R v Joseph Lao** states that:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which fell for and against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable." (Emphasis added)

[22] The above dictum sets out the standard that both applicants were required to meet, in order to have succeeded in their applications. Although the applicants were not convicted in a jury trial, these dicta are still relevant, as the learned trial judge, in making his findings of fact, would have exercised what we often refer to as his "jury mind". A judge sitting alone in the Gun Court (as occurred in the trial giving rise to this appeal) is the tribunal of both fact and law.

Identification

[23] At page 95 of the transcript, the learned trial judge, in his summation, observed that, when the resolution of a case rests significantly on the correctness or otherwise of visual identification by a single witness, the court must look particularly carefully at the evidence of identification before convicting on the strength of that evidence alone. There is, however, no express caution in the summation that an honest witness may be a mistaken witness. We have therefore considered the effect of this omission on the safety of the convictions.

[24] In the case of **Arthur Mills and Others v R** (unreported), Judicial Committee of the Privy Council, United Kingdom, Privy Council Appeal No 4/1993, judgment delivered 20 February 1995, the effect of the very same omission was considered in the context of a jury trial. There, the Board observed at page 6 of its advice that:

> "The judge, of course, did not use the words 'a mistaken witness can be a convincing one'. Counsel suggested that it is always incumbent on a judge to say to a jury that a mistaken witness can be a convincing one. Their Lordships emphatically reject this mechanical approach to the judge's task of summing up. *Turnbull* is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in *Turnbull* as restated by the Privy Council in *Reid (Junior) v The Queen* [1990] 1 A.C. 363."

[25] The principles stated in the case of **R v Dacres** (1980) 33 WIR 241 are also of some importance to a consideration of this issue. Those principles reaffirm the position that, in the absence of a statutory requirement, a trial judge sitting alone in the Gun Court is not required to explicitly direct himself on the law of identification. Neither is the judge required to expressly analyse the weakness and any other features of the identification evidence which would operate to affect its reliability. In that case, this court rejected the submission of counsel for the appellant that, where identification is in issue, an onerous duty ought to be placed on a trial judge sitting alone in the Gun Court. Rowe JA (as he then was) writing on behalf of the court opined that:

> "In legislating as it did to simplify the procedure for the trial of 'gun crimes' by authorising trial by judge alone instead of

> the time-honoured method of trial by judge and jury, Parliament ought not to be presumed to have intended that the courts should declare new technical rules of procedure which would add to the length of the trials without necessarily improving the standard and quality of the administration of justice. It is not to be lightly suggested that the judges who preside in the Gun Court (who are all judges of the Supreme Court, some with many years of experience as judges of fact and of law and others with many years of experience at the private Bar) will not have in mind the substantive rules of law in relation to identification evidence in any given case."

[26] So, clearly, while in a jury trial a duty is placed on the trial judge to adequately and expressly direct the jury in relation to the law, the position is somewhat different for the judge sitting alone. To be certain, the judge sitting alone must direct himself adequately in relation to the law. However, there is no requirement for detailed express directions where a judge sits alone in the Gun Court. Therefore, no detailed directions on the law are necessary.

[27] On the other hand, there must be, on the part of the trial judge sitting alone, a sufficient demonstration of the principles applied, and of the treatment of the relevant issues. In **R v Clifford Donaldson and Others** (1988) 25 JLR 274, this court (per Carey JA) at page 280 I, is reported as offering the following guidance:

> "It is the duty of this Court in its consideration of a summation of a judge sitting in the High Court Division of the Gun Court to determine whether the trial judge has fallen into error either by applying some rule incorrectly or not applying the correct principle. If then the judge inscrutably maintains silence as to the principle or principles which he is applying to the facts before him, it becomes difficult if not impossible for the Court to categorise the summation as a reasoned one."

[28] Similarly, in **R v George Cameron** (1989) 26 JLR 453, this court, at page 457 H, also observed (per Wright JA), that:

> "He (the trial judge) must demonstrate in language that does not require to be construed that in coming to the conclusion adverse to the accused person he has acted with the requisite caution in mind. Such a practice is clearly in favour of consistency because the judge will then be less likely to lapse into the error of omission whether he sits with a jury or alone."

[29] In the case of **R v Locksley Carroll** (1990) 27 JLR 259, this court yet again (per Rowe P) at page 266 H, observed that:

> "...findings of fact unaccompanied by reasoned assessment of all relevant evidence are unlikely to be sustained on appeal."

[30] A balance must therefore be struck, so that, whereas detailed express directions are neither expected nor required, there must yet be reflected on the transcript a sufficient demonstration by the trial judge of his or her appreciation of the main issues, and of the process of reasoning by which those issues are resolved. We took the view, having perused the transcript, that the learned trial judge sufficiently demonstrated his resolution of the main issues in this case.

[31] Further, any complaint about the lack or inadequacy of the learned trial judge's caution or directions must be viewed against the background of the quality of the identification evidence. Attention must therefore be directed to the quality of the identification evidence which was before the court below.

The identification evidence

During the robbery

[32] Mr Thompson testified that there was a utility pole with a street light about 12 feet away from where the car was parked, and that there was also light coming from a nearby house. He stated that: "it was clear as daylight". He testified that he was sitting in the back of the motor car when he noticed the two young men walking towards the car. He stated that he then had a full view of the men and that, at that time, he was able to observe them for about five seconds. He stated that the entire incident lasted for about "one to ten minutes" and that he had seen the faces of the men for about seven minutes altogether (about three minutes each).

Subsequent sightings

[33] He further testified that on 17 March 2009 at about 7:00 pm, while he was in the Bay West Shopping Mall, in Montego Bay, he saw the two applicants again but that, by the time he had been able to alert the police, they were gone. He stated that he had noticed, however, that one of the men was wearing his chain which they had stolen from him, and that the other man had a scar on his upper lip. He stated that he was also able to recognise Darren Thomas by his voice.

[34] He testified that he saw both applicants again on 20 March 2009, about 5:30 pm while he was on Market Street, in Montego Bay. He then telephoned Constable West and followed the two men to Saint Clavers Avenue, where Constable West accosted them. Mr Thompson testified that he then pointed out the men to Constable West as the men who had robbed him.

[35] In court, he identified Andre Downer as the man who had ordered him out of the vehicle and had proceeded to search him. He also identified Darren Thomas to be the robber who had carried the gun.

[36] A review of the evidence indicates that the learned trial judge acknowledged the important fact that the identification evidence came solely from Mr Thompson, and that he cautioned himself that the issue of the correctness or otherwise of the identification could only be resolved on his evidence. Against the background of the foregoing discussion, we found this to be adequate. We rejected the submission of counsel for the applicant that the identification evidence was weakened by Mr Gillings' not having attended an identification parade or identified the applicants. In the particular facts and circumstances of this case, an identification parade would have served no useful purpose, as it was the witness Richard Thompson who had seen the applicants, called the police and indicated where they could be found; and had identified them to the police as the persons who had robbed him when they were apprehended. The witness, Thompson's, pointing them out in court would therefore not have amounted to a dock identification in the usual sense of the term, as he was not pointing them out for the first time since the commission of the offences.

[37] The learned trial judge sufficiently demonstrated his cognizance of the fact that the issues to be considered included whether the applicants were previously known to the witness prior to the date of the incident; how long they were under his observation; the distance; lighting; and any other matter that could affect the quality of the identification evidence (see, for example, page 96 of the transcript).

[38] Having assessed the identification evidence, we found it to be of a sufficiently-high quality for the learned trial judge properly to have accepted it, having found Mr Thompson to be a credible witness. In summary, the identification evidence was reliable. Additionally, at the trial, there was no challenge by the applicants' counsel during the course of cross-examination as to the lighting described by Mr Thompson or his opportunity to have observed the applicants. Further, the learned trial judge dealt with the more important discrepancies, such as whether the vehicle had been tinted or whether there was a scar on the left cheek of one of the robbers. The learned trial judge observed that the witness, Mr Thompson, although stating that the scar was on the left side of Darren Thomas' cheek, was gesturing to the right side of his face. He further noted that, while Mr Thompson's testimony that the car windows were not tinted, contradicted Mr Gillings' testimony, it could be explained by there being greater visibility looking through the windows of a tinted vehicle from inside the vehicle rather than outside. That, in the view of the learned trial judge, may give the impression that there is no tint when someone is inside the vehicle.

[39] Additionally, at page 107 of the transcript, the inferences made by the learned trial judge in relation to the closeness of the applicants to the complainants during the robbery cannot be deemed to have been unreasonable in the circumstances of the case, based on the evidence which had unfolded.

[40] The applicants have failed to demonstrate that the learned trial judge erred in finding that he could rely on the evidence of identification in relation to each of them. This ground accordingly fails.

Whether the learned trial judge failed to demonstrate that he was satisfied beyond reasonable doubt that the applicant Darren Thomas was in unlawful possession of a firearm (ground 1 for Darren Thomas)

Summary of submissions for the applicant

[41] Counsel submitted that, in circumstances in which the weapon used to commit the offence was not recovered, the onus was on the prosecution to provide sufficient evidence to satisfy the court that the weapon involved complied with the statutory definition of a firearm pursuant to section 2(1) of the Firearms Act. Counsel argued that the prosecution failed in that regard, and the learned trial judge made assumptions concerning the instrument allegedly held by one of the applicants.

[42] Counsel relied on several authorities in support of the submission that the description of the firearm did not meet the statutory definition. Among those cited were: **Julian Powell v R** [2010] JMCA Crim 14, in which Morrison JA (as he then was) cited and considered **R v Neville Purrier and Tyrone Bailey** (1976) 14 JLR 97, **R v Paul Lawrence** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/1989, judgment delivered 24 September 1990 and **R v Christopher Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 169/1987, judgment delivered 21 March 1988.

Summary of submissions for the respondent

[43] On the other hand, counsel for the Crown submitted that the description given was adequate. Crown Counsel further submitted that the learned trial judge had properly established his jurisdiction to try the offences (as recorded in his summation at

pages 96 and 97 of the transcript) and as he had, on the evidence, rightly found that at least one of the applicants had had a gun.

Discussion

[44] The relevant issue to be determined is whether there was evidence before the court below to base the learned trial judge's finding that the weapon used in the incident fell within the statutory definition of a firearm.

[45] At page 96 of the transcript, the learned trial judge dealt with the matter frontally as follows:

> "The other issue which was taken by the Defence was the evidence in respect to the firearm, whether it was sufficiently described. And, the first witness, and I will deal with this aspect of the matter because unless there is a finding that there was a firearm, then this Court has no jurisdiction in any of the charges before it. The fact is that the witness did say that the firearm held by one of the two men who assaulted him on the 16th day of February, in the year 2009, came up to him and pointed the firearm at him. He was sure that it was a firearm and he was looking for the first time down the barrel of a gun. Nobody bothered to ask him what he called barrel. Because if one knows firearm, it probably is unlikely that what he was looking down was the barrel, but that is being technical... I will assume that he meant the nozzle of the gun."

[46] As a follow up to the above, the learned trial judge accepted the evidence of Mr Gillings that one of the assailants had a gun which was pointed at him. The learned trial judge noted that the evidence before him was sufficient to find that "there was a firearm present at least one firearm present that night when this assault took place" (at

page 99 of the transcript), and that "the person who held whatever it was at him, was holding a firearm as is intended by the Firearm's Act" (see page 98 of the transcript).

[47] Several other extracts of the evidence in relation to the description of the instrument used in the incident are stated below:

> The evidence of Andre Gillings - (page 7 of the transcript, lines 16 to 23):
>
> "A. And before I knew it, I heard the cranking of a gun behind me.
>
> ...
>
> A. I turned around and when I turned around, I was looking in the barrel of the gun.
>
> ...
>
> A. I know it was a black hand gun, it was a black handgun.
>
> ...
>
> A. It was in one of the young man's hand. He was pointing it in my face."

[48] In answer to the question of whether he had ever seen a gun before, he responded as follows (at page 8 lines 5 to 8), demonstrating his familiarity with firearms:

> "A. Not so close.
>
> ...
>
> A. I would normally see police officers with guns or on the television."

Richard Thompson's evidence - (recorded at page 20, lines 10 to 11)

> "A. Yeah, it was more looking like 9-millimeter pistol, a black gun or dark."

[49] In light of the evidence before the court, we find that the description of the firearm was satisfactory and that the jurisdiction of the learned trial judge was properly founded. It is clear on the evidence that there could have been no uncertainty or ambiguity that a firearm was used by the applicants to rob the complainants. This ground accordingly fails.

Whether the learned trial judge erred in his treatment of the unsworn statement (of Darren Thomas - ground 3)

[50] Counsel took the position that the learned trial judge's treatment of the unsworn statement of the applicant, Darren Thomas, improperly devalued its importance and weight. Counsel also argued that the learned trial judge incorrectly interpreted the unsworn statement of Darren Thomas to mean that he was seeing the complainants for the first time (on that trial day). That misinterpretation, counsel contended, improperly tainted the "credibility" of Darren Thomas; or lessened the weight that ought to have been attached to his unsworn statement.

Discussion

[51] At pages 90 and 91 of the transcript the learned trial judge in his summation stated as follows:

> "In this case, the accused men as I said before pleaded not guilty, and at the end of the case, that is the end of the

> Prosecutions case, they gave unsworn statements, that is statements from the dock. Statements which when put before the court to accept that statement. And if the Court does accept this statement which indicates that they are saying that they did not commit any offence at all, on the 16th of February, in the year 2009, then certainly they must be found not guilty. And in [sic] that statement raises in the mind of the Court a reasonable doubt of the commission of any of these offences, they must also be found not guilty.
>
> And if this Court does disregard the statement and places no weight on it, [sic] that does not mean that they must be found guilty. It means that the Court must look to see whether the Prosecution has satisfied the onerous responsibility placed on it of proving the guilt of these two men beyond a reasonable doubt.
>
> Now, I propose to look at the statements made by the two accused persons. Because both of them are saying that they never saw any of the two civilian Prosecution witnesses before today. This of course might merely be a matter of how they speak, that is in the limited way that most of us Jamaicans speak. Because the record [indicates] that these men, the two complainants, the two civilian complainants have been coming to Court in this matter before today's trial today.
>
> And everybody knows the procedure of call up of witnesses when a case is being postponed. But of course, I place no weight on it, because as I said, it might merely be the careless manner in which we are accustomed to speak."

[52] In no part of the summation is there recorded any indication that the learned trial judge found the unsworn statements to have been devalued in their effect by the particular statements made by the applicants. On the contrary, the extract shows that, in at least two places, the learned trial judge recognized that the interpretation of which counsel complained was not the only possible conclusion, and that a careless manner of speaking could be a reasonable explanation for what might otherwise have appeared to

be an untruth. Further, he expressly stated that he would have drawn no adverse inference from it against the applicants.

[53] In the Privy Council decision of **Director of Public Prosecution v Walker** [1974] 1 WLR 1090, Lord Salmon at page 1096, in relation to the evidential value of an unsworn statement and the proper direction to be given to a jury in this regard observed that:

> "The jury should always be told that it is exclusively for them to make up their minds whether the unworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

[54] It is noted that this dictum relates to a trial by a judge and jury. However, even with this fact and the guidance from **R v Dacres** in mind, it is apparent that it was clearly within the purview of the learned trial judge to decide what, if any, weight was to have been accorded to the unsworn statements. In discharging his function as the tribunal of fact in the case before him, the learned trial judge was entitled to have decided (as he did) that he would place no weight on the unsworn statements of the applicants. As such, we rejected counsel's submissions that the learned trial judge failed to give the unsworn statements due weight. Additionally, as recorded at page 95, lines 11 to 12 of the summation, the learned trial judge properly found that, even though he placed no weight on the unsworn statements, it would still be necessary to return to the

prosecution's case to determine whether the required evidential burden resting on the Crown had been discharged.

[55] The criticisms levied against the learned trial judge's treatment of the applicant's unsworn statement as to the first time when he saw the complainants are therefore unsupported by the evidence and without merit. This ground of appeal, therefore, also fails.

Whether the sentences imposed are manifestly excessive (Ground 2 for Andre Downer and ground 4 for Darren Thomas).

Summary of submissions for Andre Downer

[56] In relation to the sentences imposed, counsel submitted that the learned trial judge, in sentencing the applicant, failed to take into account the usefulness of rehabilitation when he considered the appropriateness of the sentences to be imposed. It was argued that, in the light of the applicant's age, prior employment, and his character put forward in the unsworn statement, the sentences imposed were manifestly excessive.

Summary of submissions for Darren Thomas

[57] On behalf of the applicant, Darren Thomas, it was argued that the learned trial judge had relied heavily on the unsubstantiated inference that the applicant had committed the crime while on bail for another offence, and that that reliance resulted in the sentences imposed being manifestly excessive.

Summary of submissions for the respondent

[58] Counsel for the Crown submitted that the learned trial judge's failure to expressly state the applicants' age and that the possibility of rehabilitation was taken into consideration for the purpose of sentencing, does not necessarily mean that he did not advert his mind to those factors when imposing the sentences. That omission, counsel argued, would not warrant the quashing of the sentences imposed. Counsel for the Crown also submitted that, moreover, the summation of the learned trial judge (at page 107, lines 6-11 of the transcript) sufficiently took into consideration the seriousness of the offences and the deterrent effect that the sentences imposed were meant to have. In the circumstances, counsel submitted, the sentences imposed were appropriate.

Discussion

[59] We did not agree with the submission that the sentences imposed on the applicants are manifestly excessive as counsel for the applicants would have had us find.

The applicant Andre Downer

[60] Andre Downer's antecedent report revealed that he had two previous convictions for assault with the intention to commit robbery and robbery with aggravation, for which he received a sentence of 12 months' imprisonment at hard labour for each offence. At the trial, counsel, in his plea in mitigation, frankly stated that "there is not much really to present him positively to you" and further asked the court to consider the "possibility of reformation" (at page 132 of the transcript).

The applicant Darren Thomas

[61] There was no good-character issue raised before the trial court on behalf of Darren Thomas. Nor could there have been, as his antecedent report disclosed that he had one conviction for the offence of robbery with aggravation for which he had been sentenced to six months' imprisonment at hard labour. The applicant himself confirmed that conviction and sentence. Further, in his plea in mitigation to the court, counsel who represented Darren Thomas at the trial admitted that his client could not be thought of as having an exemplary or good character due to his previous conviction, and its similarity to the type of offences for which he was being sentenced.

The sentences

[62] The learned trial judge, in his pre-sentencing remarks, commented that the offences had been committed while the applicant Darren Thomas was on bail. Defence counsel for the applicant, in discussions with the learned trial judge, disputed the accuracy of that statement but stated that he was unable to verify the information as he was without those records (see page 135 of the transcript). The learned trial judge found that remorse could not arise if, whilst on bail, the applicant had committed the offence.

[63] Admittedly, on the face of the transcript (having regard to the summation and counsel's discussions with the judge) there was a lack of clarity as to whether the offences for which the applicant (Darren Thomas) was being sentenced were committed while he was on bail for another offence. However, what is certain is that the applicant

had a prior conviction for a similar offence. That would have to have been taken into account by the learned trial judge as an aggravating factor.

[64] In the case of **Michael Evans v R** [2015] JMCA Crim 33, the appellant complained that his concurrent sentences of 10 and 15 years' imprisonment at hard labour for the offences of illegal possession of firearm and robbery with aggravation respectively were manifestly excessive. The appellant in that case argued that the learned trial judge failed to consider the factor of rehabilitation and that her preoccupation with his "previous convictions for similar offences" led her to impose sentences that were manifestly excessive. This court did not agree.

[65] With respect to the offence of robbery with aggravation, the case of **Jerome Thompson v R** [2015] JMCA Crim 21 is helpful. In that case, Brooks JA, writing on behalf of this court, opined at paragraph [34] as follows:

> "[34] ...The usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years. This may be increased or reduced according to the circumstances of the case."

[66] Of course, the previous convictions of both applicants would have warranted an increase from the starting point of 12 years.

[67] In **Michael Evans v R**, this court took the view (per McDonald-Bishop JA) that the relevant issue in this regard is whether the sentences "when looked at globally, will reflect all the offending behaviour before it and is just and proportionate."

[68] We are of the view that, in all the circumstances of this case, the sentences imposed are appropriate and not manifestly excessive. The grounds of appeal in relation to sentence are therefore rejected, as they are wholly without merit.

[69] It was in the light of the foregoing that we found that there was no basis to disturb the convictions and sentences and made the orders set out at paragraph [2] hereof.