[2019] JMCA Crim 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 82/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

ANTONIO M^{C}INTOSH v R

Leonard Green and Makene Brown instructed by Chen, Green & Co for the appellant

Miss Sophia A Thomas for the Crown

25, 26 February and 10 May 2019

STRAW JA

[1] On 21 October 2016, the applicant, Mr Antonio McIntosh, was convicted of the offences of illegal possession of firearm and wounding with intent in the Western Regional Gun Court by Stamp J. He was sentenced for both offences on 27 October 2016. For these offences, he received a term of eight years imprisonment and 18 years imprisonment respectively at hard labour. The sentences were ordered to run concurrently.

[2] The application for leave to appeal against his conviction and sentence was considered by a single judge of appeal on 4 May 2018. The application was refused in

respect of the conviction but granted in relation to the sentence for the single purpose of exploring whether the learned trial judge, having expressly noted that the appellant spent seven months in custody pending trial, in fact gave credit for that period in arriving at the sentence to be imposed.

[3] On 26 February 2019, at the conclusion of the hearing of the renewal of the application for leave against conviction and the appeal against sentence, the court made the following orders:

> "1) The application for leave to appeal against conviction is refused.
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> 2) The appeal against sentence is dismissed.
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> 3) The sentences imposed are affirmed and are to be reckoned as having commenced on 27 October 2016."

[4] The court promised to provide reasons for its decision, this judgment is a fulfilment of that promise.

Background

[5] It is useful to briefly outline the facts of the case. The case for the prosecution was that on 3 April 2016 at about 1:15 am in the parish of Westmoreland, the appellant was an attendee at a round robin party which was being held at a bar operated by Rupert Broderick ('the complainant') and his girlfriend, Samantha Powell o/c Maxine. ('Miss Powell').

[6] The complainant was managing the sale of jerked chicken and was approached by the appellant for something to eat. The complainant refused to give the appellant

any chicken. Another man by the name of "Scatta" approached the man who was cooking the chicken, "Deafy". After speaking with Deafy, Scatta threw the liquor in his cup in Deafy's face. Shortly thereafter a fight ensued between the complainant and Scatta. The fight was parted by Miss Powell and some party attendees.

[7] Both the complainant and Miss Powell gave evidence that Scatta left the party with the appellant and that they walked in the direction of the appellant's house. About five minutes later, the appellant returned. As he walked across the road towards the complainant's bar, the complainant observed that the appellant had a "shine gun" in his hand. The complainant stated that the appellant turned to him and said, "how mi gwaan like say mi want dis the youth, suh."[1] The appellant raised the gun to the complainant's face and the complainant heard a loud explosion. The complainant fell to the ground. He stated that he started "fi carry up some teeth and blood".[2]

[8] According to the complainant, at that time, the appellant "turn back 'cross the road".[3] Scatta was across the road. He (the complainant) spoke to his girlfriend. His girlfriend picked him up and put him on his bike. The evidence is that at some point shortly after, Scatta also appeared with a gun, pointed at the complainant and fired two shots at him. He was subsequently taken to the hospital. The complainant stated that he was treated for gunshot wounds to his left jaw, left shoulder and left chest. The trial

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[1] Page 21 of the transcript (lines 10-11)
[2] Page 25 of the transcript (line 15)
[3] Page 24 of the transcript (lines 7-8)

judge noted scars to the complainant's left jaw, the left upper part of his back and the front of his chest to the left.[4]

[9] Miss Powell's evidence is that after the incident with Scatta, Deafy and the complainant, Scatta and the appellant went over to the appellant's yard. She indicated that she told the selector to "Lock off di bomboclaat music, if yuh noh si wha' a gwaan."[5] She then said she went back inside the bar to pack up. She indicated that the complainant was in the kitchen (outside) with Deafy. While she was packing up, she heard a gunshot, she thinks it was one. She then ran outside and she saw the complainant lying down with blood on his mouth and the appellant walking away from the kitchen area. The complainant was lying right at the kitchen area beside the bar. She indicated she saw the appellant 6 to 7 feet away from the complainant walking away from him. While trying to put him on the bike, she saw Scatta coming down the road in their direction. She said Scatta pulled out something from his front. Scatta fired two shots. She did not see what Scatta pulled but she saw the fire come out of something and she heard the shots. Scatta then walked down the road.

[10] In his unsworn statement at the trial, the appellant admitted that he did attend the round robin party, but left at about 9:00 pm to his home. He did not shoot the complainant nor was he involved in the dispute between the complainant and Scatta. While he was at home, he heard an explosion. When he went out, he saw people

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[4] Page 285 of the transcript (lines 16-22)
[5] Page 126 of the transcript (lines 19-21)

running. After making enquiries, he learned that there was a fight between the complainant and Scatta. The appellant contended that he was not a friend of Scatta, nor was Scatta a friend of his. He denied being involved in the shooting of the complainant.

[11] It is not disputed that all the parties were known to each other before the incident.

The grounds of appeal

[12] The grounds of appeal as filed are as set out below:

> "1. The Learned Trial Judge failed to properly identify the discrepancies in this case and in particular the material discrepancy which impacted the critical issue as to wether [sic] the complainant could make a proper identification of the shooter who fired the first shot that inflicted the wound to the face of the complainant.
>
> 2. The Learned Trial Judge wrongly imported evidence where none existed that the complainant shifted/moved his head as an explanation for the wound to the 'Left Jaw' of the complainant at the time the first & only shot was said to have been fired by the accused/Appellant."

[13] In his written submissions and at the hearing of the appeal, Mr Leonard Green, counsel for the applicant, also relied on three supplemental grounds:

> "3. The learned trial judge erred when he failed to uphold the no case submission made on behalf of the Appellant at the close of the prosecution's case.
>
> 4. The learned trial judge wrongly allowed the prosecution to ask questions of the witness Rupert Broderick (R.B.) after cross-examination and wrongly

ruled that the questions were in the nature of re-examination. In allowing the prosecution to do so the trial judge acted unfairly and deprived the Appellant of an opportunity to cross-examine the complainant on the new material introduced during that period of questioning. In ruling as he did the Appellant was deprived of the benefit of a fair trial.

5. The learned trial judge failed to fairly state and analyse the case and instead of doing so he came to conclusions that are inconsistent with any credible account of what transpired at the time the complainant R.B was shot by the assailant."

Ground 1

The learned trial judge failed to properly identify the material discrepancies in the case and in particular the material discrepancy which impacted the critical issue as to whether the complainant could make a proper identification of the shooter who fired the first shot that inflicted the wound to the face of the complainant.

Submissions on behalf of the applicant

[14] At the outset, Mr Green submitted that the main thrust of the appeal concerned the credibility of the Crown witnesses. He stated that the appellant is not denying being at the party and so this would take this case outside the realm of traditional identification cases.

[15] It was emphasised that the primary issue to be resolved was whether the complainant gave a credible account of what took place at the round robin party which eventually led to him being shot by assailants and whether that account received support from the evidence of Miss Powell. Counsel submitted that the secondary issue would be the question of visual identification at the time the complainant was shot.

[16] Mr Green referred the court to several inconsistencies and discrepancies which, in his view, were not adequately assessed by the trial judge. He stated that these would have had an impact on the credibility and reliability of the Crown witnesses and the trial judge had a duty to examine the evidence fairly. Counsel referred the court to **Peter Michel v The Queen**[6] and **Omar Grieves and others v The Queen**[7]. He identified several areas of the evidence where he contends these inconsistencies/discrepancies arose.

[17] Reference was made to the evidence in chief of the complainant that he received three shots but only heard one explosion. However, counsel submitted that under cross-examination the complainant denied saying that he had only heard one shot and stated, "I don't, told you I heard one shot…I do not get to explain how it goh[8]...I was going to tell you dat 'Scatta' fire shot at mi because 'Scatta' fire shot."[9]

[18] Counsel contended that the trial judge, while identifying the above as an inconsistency, erred when he concluded that it was an inconsistency that arose on the way the evidence was led in chief. Mr Green stated that the trial judge commented that the prosecution failed to lead certain aspects of the evidence but he stated that an examination of the transcript does not support any such contention. He submitted further that the trial judge did not examine why this inconsistency occurred and, in failing to do so, it resulted in a deficiency on the prosecution's case that ought to have

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[6] [2009] UKPC 41
[7] [2011] UKPC 39
[8] Page 75 of the transcript (lines 6 and 9)
[9] Page 77 of the transcript (lines 6-8)

been taken into account. Further, he submitted that it was not sufficient for the trial judge to state that he did not find that this issue affected the overall credibility of the witness and in particular as it related to the central issue of identification. Counsel submitted that the trial judge further erred in this regard as the central issue was not identification but the credibility of the witnesses which ought to have been examined in light of all these inconsistencies. In the written submissions, counsel relied on the Bahamian case of **Durad Munroe v The Attorney General**[10], as well as the case of **Omar Grieves**.

[19] Counsel also submitted that a major discrepancy arose on the evidence in relation to the injuries the complainant stated that he received when compared to the evidence contained in the medical certificate of Dr McPherson-Walsh. The complainant testified that he received three injuries, one to the left jaw caused by the appellant, one to his left shoulder and one to the left chest. The medical certificate, however, spoke only to two injuries which were described as entry wounds. Mr Green submitted that the trial judge described this as a material discrepancy but failed to adequately treat with it, failed to make any judicial analysis and did not resolve it in favour of the appellant. Mr Green stated that this was crucial as the two entry wounds noted in the medical certificate were situated to the left of the body of the complainant. This aspect of the evidence would affect the identification of the assailant by the complainant.

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[10] SCCrApp No 152/2011, judgment delivered 12 November 2013

[20] Counsel posed the questions that ought to have been considered by the trial judge, particularly in circumstances where an entry wound was said to have entered the back (left shoulder) of the victim - where was the attacker at the time the shots were fired? Was he directly in front of the victim, or was he somewhere to the left of the victim? If it is that he was somewhere to the left of the victim, could it have been someone else?

[21] Counsel further submitted that the positioning of the injury to the left jaw would also suggest that the complainant could not have been shot in the way he said with the shooter standing in front of him. In this regard therefore, whether or not he had an opportunity to see the shooters as well as the impact on his credibility would be live issues.

[22] In a continuation of this theme, counsel submitted also that the trial judge failed to (1) relate the presence of Scatta on the scene as having any effect on the issue of credibility; and (2) examine the material discrepancy described above, in the context of the possibility that the other shooter was engaged in the attack. He contended that there was evidence of two armed men on the scene, however, the witness Miss Powell did not see a gun in the hand of the appellant when she ran outside and saw him moving away from the complainant, who was lying wounded on the ground. He contended that all of the above pointed to a lack of judicial analysis of the evidence and

reiterated that the trial judge would have erred when he stated in his summation[11] that the central issue in the case was one of correctness of identification of the appellant.

[23] Counsel submitted that the lack of judicial analysis would be further exacerbated by the evidence which suggested that something was happening at the time Miss Powell said they were packing up. He pointed firstly to the discrepancy in the evidence as the complainant denied hearing Miss Powell using any expletive when she told the sound man to lock down the music. However, Miss Powell did admit using the words "Lock off di bomboclaat music, yuh noh si wha' gwaan."[12] Secondly, counsel stated that this aspect of the evidence should also have been scrutinized by the trial judge in his assessment of the overall credibility of the witnesses as there ought to have been some assessment as to what was happening that caused Miss Powell to use those words. The issue is whether the witnesses were credible when they indicated that they were merely packing up at that time to go home.

[24] Based on the prosecution's case, counsel submitted that it could be asked also whether there was one, two or three shots. It is his submission that the combined effect of this narrative of events ought to have been analysed by the trial judge in order to determine whether the shooting took place as alleged by the complainant.

[25] It is also Mr Green's submission that Miss Powell's description of the venue would be somewhat inconsistent with the circumstances surrounding her ability to see and

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[11] Page 248 of the transcript (lines 11-14)
[12] Page 126 of the transcript (lines 19-21)

recognize the appellant after the complainant was shot. He also challenged the trial judge's acceptance of her evidence in relation to her ability to see the appellant who, according to her, would have been walking away from the complainant when she ran outside. In this regard, he complained that Miss Powell gave evidence that she saw the face of the appellant at this time however she admitted that it was not in her statement to the police. Counsel submitted that what is in her statement was that she was able to identify the appellant because of the clothes he had on and the light shining.

Submissions on behalf of the respondent

[26] Crown Counsel, Miss Thomas, submitted that the trial judge identified the central issues of identification, credibility and the defence of alibi and addressed his mind to the strengths and weaknesses of the prosecution's case. She stated that he gave himself the requisite warning as to how to approach the issue of identification in keeping with **R v Turnbull and another**[13] and applied same in considering the evidence. She stated that both witnesses gave evidence that the area was well lit and the appellant was known to them before. She stated also that the appellant himself admitted that he was on the scene earlier, as stated by both Crown witnesses, although he denied being present when the complainant was shot. The prosecution had to disprove alibi and the judge satisfied himself in relation to the quality of the identification.

[27] Counsel submitted, however, that the abovementioned considerations did not subtract from how the trial judge dealt with the issue of credibility. Having dealt with

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[13] [1977] QB 224

the issue of identification, she stated that the judge went on to consider the issue of credibility, identified the inconsistencies and clearly stated his view of each and whether it affected the credibility of the main witnesses for the prosecution. She referred the court to **R v Alex Simpson and Regina v Mckenzie Powell**[14] where Downer JA expressed that the summation as a whole is to be looked at to see whether there was a demonstration of an appreciation of the standard of proof required in the case of a judge sitting alone.

[28] Counsel submitted that the trial judge described the discrepancy in relation to the number of injuries received by the complainant as being of "great weight" but he concluded that it did not affect his credibility as it was not in issue that he had received injuries, in particular the injury to his left jaw. It was also not in issue that he had been shot by Scatta.

[29] In relation to the position of the wound to the left jaw, counsel submitted that the fact that the wound was not at the place where the appellant's counsel thought it should be, did not weaken the case presented by the prosecution. In relation to whether the witness, Miss Powell, had seen a gun in the hand of the appellant, she submitted that this also did not weaken the case for the prosecution. She stated that Miss Powell did not have to see a gun as the appellant would have been in the process of moving away from the scene. She submitted that based on the evidence, the

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[14] (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 151/1988 and 71/1989, judgment delivered 5 February 1992

appellant would have been 6 to 7 feet away from the witness and he could have done a number of things with the gun. She submitted also that the witness was not focused on his hands.

[30] Miss Thomas submitted further that the trial judge was able to reconcile the part of the evidence as to how Miss Powell was able to identify the appellant by the scene of crime photographs which were exhibits and were viewed by him. She referred the court to page 298 of the transcript where the trial judge clearly made reference to the support given to the evidence of Miss Powell by the photographs taken of the scene.

Discussion and analysis

[31] It is necessary to set out certain aspects of the evidence in order to consider whether the trial judge dealt properly with the inconsistencies and discrepancies that Mr Green has complained about.

[32] During the examination in chief of the complainant, he was asked by the trial judge how many explosions he had heard. At page 30 of the transcript (lines 2 - 4), his answer is recorded:

> "I only hear one explosion, because the one I get here, from mi get it, it come in like mi knock away for a while."

[33] The court notes also that the Crown Counsel completed her examination in chief when the complainant indicated that the appellant went back across the road and then he saw Scatta coming back "like him coming back over to the shop". While the

complainant was being cross-examined, the transcript at page 75 (lines 5 - 16) reveals the following evidence:

> "Q. So you only heard one shot?
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> A. I don't, told you that I heard one shot. After I get the shot in my mouth—mi want to explain, mi want to explain an' mi tell how it goh. I do not get to explain how it goh. After I get the one shot, an' I fell, I turn to Maxine an' sey, "Help mi, put mi pon di bike an' see if I can reach to hospital...when I go on the bike like this, my foot down here couldn't move...'Scatta' come -- "

[34] The complainant was then stopped from continuing this aspect of the evidence and asked again how many shots he heard that night. He then said three shots. It was suggested to him that during examination in chief, he never gave evidence that Scatta shot him. The witness indicated that Scatta "fire shot".[15] He indicated that after the appellant shot him, Scatta came back across the road with the gun. Under re-examination, the complainant indicated that it was after he was on the bike that Scatta came and fired two more shots. He stated also to the trial judge that he could not say if any of these shots hit him as he was in pain. He felt his mouth bleeding; blood was coming from his stomach and his mouth. But before Scatta fired, he only felt pain in his face. It is only when he reached the hospital that he realized he got a shot in the area he termed as his stomach.

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[15] Page 76 of the transcript (line 7)

[35] The trial judge, in a very detailed summation, made reference to the inconsistencies, contradictions and omissions in the evidence and reminded himself of his duty as the arbiter of the facts in treating with these. He identified the inconsistency in the evidence of the complainant in relation to whether he had heard one or three shots. He stated at page 266 of the transcript (lines 12-20):

> "However, having regard to the way the evidence developed and the questions which he was asked and how he was asked, this really is an inconsistency that arises on the way the evidence was led in chief, in that the second shooting by "Scatta", the second event of shooting...was omitted and not led in chief."

[36] From an examination of the transcript, the Crown Counsel did not pursue any questioning of the complainant in examination in chief as to how and when he had received the other injuries described. In treating with the issue of the failure of the complainant to give the evidence in relation to 'Scatta' during his examination in chief, the trial judge took into consideration that the complainant went on to say, during cross-examination, that he was going to explain that Scatta fired shot too, but he had been stopped.

[37] It is also noted that during a certain aspect of his cross-examination, the complainant stated that "'Scatta' don't shoot me , 'Scatta' don't do it."[16] The trial judge had identified this as a potential inconsistency in the evidence of the complainant as the complainant had stated that "Scatta fired shot". The trial judge treated with this aspect

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[16] Page 76 of the transcript (line 6)

of the evidence by acknowledging that it could be seen as an inconsistency with his evidence because he said "…Scatta shot at him, at least, but he does not know when he got the shot to the chest and the shot to his back, because his body was so numb..."[17]

[38] The evidence of the investigating officer, Detective Constable Michael Matthews is that he had commenced investigations in this matter against the appellant as well as one "Scatta". There was evidence from which it could be concluded the complainant was shot at least two times and that there were two individuals involved. The trial judge cannot be criticised therefore for his assessment of this matter and his conclusion that the above-described inconsistency did not affect the overall credibility of the witness.

[39] In relation to the discrepancy between the medical certificate (which was admitted into evidence by agreement pursuant to section 31CA of the Evidence Act) and the evidence of the complainant as to injuries received, this aspect was dealt with by the trial judge at pages 285 to 286 of the transcript (lines 13-25 and 3-23):

> "There is, in my view, discrepancy here of some weight, because Mr. Broderick...refer [sic] to three injuries and the doctor referred to two. Mr. Broderick showed us three scars, three holes, which he said were entry wounds...The doctor, however, was not called to testify, and there is not much before this Court to revolve [sic] this inconsistency.
>
> However, I do find Mr. Broderick, to be a witness of truth in respect to his description of the injuries he received, and I find and accept that he got Three [sic] injuries that night. I

[17] Page 267 of the transcript (lines 6-9)

> also find that although this is a discrepancy of some moment, and would be a serious discrepancy if it was in issue, whether or not he was shot...my assessment is that there is no real live issue as to whether or not Mr. Broderick was shot, and certainly not a live issue that he was shot in his left jaw. He said so, and the doctor confirms that, and that is what this case is about, the shooting to the left jaw.
>
> So, although this is an inconsistency of some moment, I do not find that it detracts from the overall credibility of Mr. Broderick in respect of his injuries, nor to say it detracts from the integrity of the Prosecution case, that he was shot in his face by an assailant who he describes as Mr. McIntosh."

The trial judge dealt extensively with this matter and it was open to him to come to the conclusion which he did in relation to this issue.

[40] The trial judge also identified the inconsistency in the evidence of Miss Powell as to whether or not she told the police she had seen the appellant's face as he was walking away. He indicated during the summation[18] that this was an omission or inconsistency which required careful analysis but that he would deal with the matter at the time he was analysing the identification of the accused along with the photographs of the scene. The trial judge then reviewed her evidence as to what parts of the appellant she was able to see, he spoke to the time she would have had an opportunity to see him, he identified the areas of weakness and concluded it would have been in frightening and difficult circumstances. The trial judge then reviewed her evidence along with the crime scene photographs[19] and concluded[20] as follows:

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[18] Page 277 of the transcript
[19] Page 298 of the transcript

> "And it is in those circumstances she said she had the opportunity to see the side of his face.
>
> Whether it is in her statement, or not, in her statement, it is not evidence before the court unless she says so.
>
> She says she told the police that she saw his face at that time but she did not see it in her statement. The police was never asked, apart from being asked about taking her statement Ten [sic] days later. He was never asked if she said so Ten days after the incident. He was never asked if she said so.
>
> However, on the basis of her evidence in court, the meaning is quite clear that she identified the accused man when he walked across the front of the fence, and as she stood the light on the verandah and another light shining on him.
>
> He had on the same shirt she had seen him wearing earlier in the day.
>
> She knew him, well, she knew his built, she knew his limp, and I take all of that into consideration, including the weaknesses that I have identified."

[41] Again, there can be no valid complaint that the judge did not properly consider and assess this inconsistency/omission.

[42] In relation to the issue of whether Miss Powell indicated she had seen a gun in the hand of the appellant, the judge expressed[21] that whether or not she saw a gun in his hand as he walked away, he found that to be of little significance in explaining the credibility or reliability of her evidence. The court accepts Crown Counsel's submission on this aspect of the evidence as being of merit, as Miss Powell would not have seen the appellant at the time the complainant was shot in the jaw. Therefore, there is no

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[20] Pages 300 to 301 of the transcript (lines 2-25, and line 1)
[21] Page 301 of the transcript (lines 22-25)

basis to suggest that the judge failed to properly consider the inconsistencies and discrepancies as it related to the evidence of Miss Powell and that he erred in coming to the conclusion that he did.

[43] Essentially, except for the question of whether or not the complainant would have had an opportunity to see the person who shot him in the left jaw, (which is dealt with under a separate ground) and whether or not Miss Powell saw the face of the appellant at the time she ran outside, Mr Green has not attacked the quality of the identification evidence as led by the Crown. The identification evidence was analysed in detail by the trial judge and in line with the **Turnbull** guidelines. Counsel's main complaint related to the credibility of the Crown witnesses in relation to their version of what took place. However, based on an examination of the summation and the evidence there is no merit in the submissions of counsel for the appellant in respect of this ground.

[44] This ground of appeal therefore fails.

Ground 2

The learned trial judge wrongly imported evidence where none existed that the complainant shifted moved his head as an explanation for the wound to the left jaw of the complainant at the time the first and only shot was said to have been fired by the accused/appellant.

Submissions on behalf of the appellant

[45] Mr Green submitted that the trial judge erred by attempting to reconcile the site of the injury to the left jaw of the complainant with the complainant's evidence that the assailant was standing in front of him. He complained that the comment of the trial

judge about "natural human reaction" is an importation of evidence which did not exist. This is coupled with the absence of judicial analysis in relation to evidence which spoke to two shots from the left. It is his submission that the doctor's evidence would therefore be crucial as it goes to the critical issue of identification. Based on his questions posed at paragraph [19] of this judgment, Mr Green submitted that the analysis of the shot to the left cheek was not done and that factor impacted the issue of identification.

Submissions on behalf of the respondent

[46] Crown Counsel agreed that the trial judge could not assume evidence that was not said, that is, whether the complainant moved his head or not. Miss Thomas submitted however that the judge addressed the fact that it was not clear on the evidence and applied fair reasoning to the issue as to the possibility of a natural human reaction. She contended that the comment was fair given the totality of the evidence. She stated also whereas it cannot be clear to this court where the injury was sighted on the left cheek, the trial judge would have had the area pointed out to him. She stated further that the judge noted that the injury on the jaw was to the left side of the cheek and expressed to this court that the cheek is an area covering the frontal part of the face. She also referred to the evidence of the complainant where he said the appellant "rise up the gun, mi just hear 'blow' and me hear a loud explosion and mi drop"[22]. She

[22] Page 22 of the transcript (lines 6-7)

contended that this issue, in relation to the location of the wound, did not affect the credibility of the complainant.

Discussion and analysis

[47] The trial judge made the following remarks when reviewing this aspect of the evidence at page 301 of the transcript (lines 10-16):

> "It is said that this does not support the evidence. **I do not see any inconsistency in that. Not only is it possible for somebody to be shot on the left side of the face by the assailant who is standing in front of him**, but the normal natural human reaction—athletes. [sic] And I see no inconsistency with that evidence." (emphasis added)

[48] It is the assessment of this court that the trial judge did not import any evidence into the testimony of the complainant. He clearly indicated that it was possible for the complainant to receive the injury to his jaw in the circumstances he described. He then went on to comment about "natural human reaction". We also agree with the submission of Crown Counsel that the trial judge would have had the area of the injury pointed out to him and would have been in a position to come to the conclusion he did that the injury was received in the circumstances described. This ground is clearly without any merit and must fail.

Ground 3

The learned trial judge erred when he failed to uphold the no case submission made on behalf of the appellant at the close of the prosecution's case.

[49] Counsel for the appellant did not advance any submissions in relation to this ground.

Submissions on behalf of the respondent

[50] In written submissions, Miss Thomas submitted that based on the well-established principles as set out in **R v Galbraith**[23], a judge has a duty to stop a case (1) if there is no evidence that the person charged as committed the crime; or (2) if the evidence is tenuous and the judge concludes that the prosecution's evidence taken at its highest was such that a properly directed jury could not properly convict. She stated however that, where the prosecution's evidence was such that its strength or weakness depended on the view to be taken of the reliability of a witness or other matters, this was within the province of the jury; that since one possible view of the facts was that there was evidence sufficient for a jury's consideration to properly conclude that the person charged was guilty, the matter should be left to the jury.

[51] She submitted also that the existence of contradictory statements in the evidence of the prosecution does not mean without more that a prima facie case has not been made out. She referred the court to **Steven Grant v R**[24]. Miss Thomas stated that the identification evidence was sufficiently strong. She submitted also that the trial judge heard all the available evidence, observed the demeanour of the witnesses and addressed his jury mind to the several issues impacting credibility and resolved all of them in favour of the prosecution. He therefore had a sound basis on which to call upon the appellant to answer.

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[23] [1981] 1 WLR 1039
[24] [2010] JMCA Crim 77

[52] We would agree with the assessment of counsel for the Crown and conclude that this ground of appeal is without merit. There was sufficient evidence before the court to establish a prima facie case against the appellant and all the issues impacting credibility would have had to be assessed by the jury mind of the learned judge.

Ground 4

The learned judge wrongly allowed the prosecution to ask questions of Rupert Broderick after cross-examination and wrongly ruled that the questions were in the nature of re-examination. In allowing the prosecution to do so the trial judge acted unfairly and deprived the appellant of an opportunity to cross-examine the complainant on the new material introduced during the period of questioning. In ruling as he did the appellant was deprived of the benefit of a fair trial.

Submissions on behalf of the appellant

[53] Mr Green stated that in examination in chief, the complainant had stated that he heard one explosion. However, under cross examination, he was asked how many shots he heard fired that night. The answer was three. He contended however that the trial judge was in error when he allowed Crown Counsel to re-examine the witness on that point, even though he attempted to object on the basis that re-examination did not arise. He complained also that the trial judge deprived him of an opportunity to further cross-examine the witness on the evidence that was then adduced by the Crown under the guise of re-examination.

Submissions on behalf of the respondent

[54] Miss Thomas submitted that the issue was a relevant area for re-examination, that one of the purposes of re-examination is to allow clarification on evidence that arises for the first time under cross-examination. She submitted also that re-

examination is allowed to clear up ambiguities which arise under cross-examination. The trial judge was therefore correct when he allowed the Crown to ask the particular questions of the complainant. Counsel also submitted that the trial judge left it open to defence counsel to ask further questions in light of the re-examination but that counsel did not explore the issue.

Discussion and analysis

[55] The transcript revealed[25] the following exchange between prosecuting counsel, the complainant, defence counsel and the trial judge:

> "HIS LORDSHIP: No, your objection is overruled. I see a clear ambiguity.
>
> MR. L. GREEN: Let me tell you why – I am not finished with my submission.
>
> HIS LORDSHIP: I don't need submissions for that objection.
>
> MR. L. GREEN: I have not completed the basis for my – I am submitting to you that this question is not a proper one. I am sure you are with me at that point.
>
> HIS LORDSHIP: Mr. Green, it is not every objection to a question that I need to hear submission on.
>
> MR. L. GREEN: You are saying that you will not hear a submission.
>
> HIS LORDSHIP: This is one, Mr. Green, clearly.
>
> MR. L. GREEN: If you won't hear me, you won't hear me. I will take my seat. I follow you sheepishly.
>
> HIS LORDSHIP: I do not want you to follow me.

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[25] Pages 90 to 94 of the transcript (lines 4 – 24, 1- 25, 1 -25, 1-25, 1-11)

MR. L. GREEN: Why not, sir? You are in charge, you know, sir.

HIS LORDSHIP: No, no, no, I am, but you know…

MR. L. GREEN: I have been in court, you know, sir, where the judge says take your seat and I follow him and take my seat.

HIS LORDSHIP: Mr. Green, I am not going to get there today. That objection is overruled.

MR. L. GREEN: It is overruled, sir?

HIS LORDSHIP: Yes.

MR. L. GREEN: You don't want to hear me?

HIS LORDSHIP: No.

MR. L. GREEN: If you won't hear me, I will take my seat.

HIS LORDSHIP: Will you repeat the question or should I?

Q. Counsel asked you how many shots you heard that night and you said three shots. When I was questioning you earlier in relation to when you said that the accused, Mr. McIntosh fired at you, you said you heard one shot and you fell, so I am asking at what point in time…

A. I hear the next two shots?

Q. Right.

A. Because…

Q. Hold on, hold on. So, at what point did you hear the other two shots, Mr. Broderick?

A. After I get the first one here so, I drop. I turn to my girlfriend and say, 'Help me up on the bike. Let me see if I can reach the hospital.' After mi go on the bike, that is the time when the next guy come 'cross the road.

Q. Which next guy?

A. 'Scatta', and fire two more shot. When him come and him guh bow, bow; when him bust two, mi hear click, click.

MR. L. GREEN: M'Lord, this cannot be re-examination, and I will state why it cannot be re-examination, because my friend is seeking to adduce fresh evidence, new evidence in an area, which I have been deprived of an opportunity to cross-examine.

HIS LORDSHIP: If you would like an opportunity you can ask. However, Mr. Green, the witness said to her, I heard one shot.

MR. L. GREEN: Yes.

HIS LORDSHIP: And he said to you I heard three, she is just asking the witness to explain where the other two shots come from. That is something clearly arising.

MR. L. GREEN: Let me just finish, nuh, sir. Remember you know, sir, I have been around.

HIS LORDSHIP: Yes, Mr. Green, tell us what you are saying.

MR. L. GREEN: I am saying, sir, if she gives him an opportunity through that question in re-examination, it deprives counsel of an opportunity to cross-examine on that issue, when you adduce new evidence. This is why we make a clear distinction between matters which arise in re-examination and leave granted by the Tribunal, because if you grant leave, I will be entitled to cross-examination.

HIS LORDSHIP: I do not grant leave. I overrule the objection. The issue as to the two additional shots arose in cross-examination and I rule that she can re-examine on that.

MR. L. GREEN: Re-examine but not adduce fresh evidence.

HIS LORDSHIP: Yes, please continue.

MISS K. GILLIES: Yes, m'Lord.

HIS LORDSHIP: Yes, Miss Gillies.

Q. The next guy, what you mean by the 'next guy'?

A. 'Scatta'.

HIS LORDSHIP: Yes.

MISS K. GILLIES: Might it so please you m'Lord, I believe that has clarified it.

HIS LORDSHIP: Can you say if any of those two shots you heard fired by 'Scatta' hit you?

THE WITNESS: I don't know if any hit me. I really don't know if any of them hit me, because the pain what me was in."

[56] It is clear from the above that the complainant had made two contradictory statements and the Crown was entitled to clear up any ambiguity that had arisen on his evidence. The answer also introduced new evidence that was never previously adduced by the prosecution. This is also within the context that the complainant had testified that he received more than one injury that morning, however his evidence was to the effect that the appellant was only responsible for an injury to his left jaw.

[57] In Murphy on Evidence, 12th edition, pages 632 to 633 at paragraph 17.16, the authors describe re-examination in the following terms:

"It is the process whereby a party calling a witness may seek to explain or clarify any points that arose in cross-examination and appear to be unfavourable to his case. Re-examination is, therefore, possible only where there has been cross-examination and is limited to matters raised in cross-examination: it is not an opportunity to adduce further evidence in chief. But cross-examination opens the door to re-examination on matters raised for the first time in cross-examination...The re-examiner may deal with all matters relevant to those raised in cross-examination, even if not dealt with expressly by the cross-examiner.

A witness is entitled to explain any apparent contradiction or ambiguity in his evidence or damage to his credit arising

> from cross-examination, and this may involve reference to facts which have not previously been given in evidence, if they are properly relevant in order to deal with the points put in cross-examination."

[58] Mr Green's submissions on this point are clearly without merit. The line of re-examination arose because of the two conflicting statements made by the complainant, one in examination in chief, the other under cross-examination. Crown Counsel rightly asked him to explain when it was that he had heard the next two shots. The narrative given by the complainant sought to put that evidence into perspective. The trial judge had also indicated to defence counsel Mr Green, as submitted by Crown Counsel, that he could make a request for further cross-examination. Counsel failed to do so.

[59] This ground of appeal therefore fails.

Ground 5

The learned judge failed to fairly state and analyse the case and instead of doing so he came to conclusions that are inconsistent with any credible account of what transpired at the time the complainant was shot by the assailant.

Submissions on behalf of the appellant

[60] In written submissions, counsel stated that the analysis of the trial judge was deficient as he had stated the following in the summation at page 251 (lines 9-13) :

> "The account of the complainant was that the accused or the perpretrator [sic], pointed the gun at him, discharged it, and immediately he felt like he was hit in his mouth or in his jaw."

[61] Mr Green contended that the complainant never used the word "perpetrator" but stated clearly that it was the applicant who fired a single shot at him.

Submissions of counsel for the respondent

[62] Counsel submitted that the trial judge merely used the word "perpetrator" as a description of the appellant and that there is no basis to suggest that the word was used to describe someone else other than the appellant.

Discussion and analysis

[63] This court agrees with the submissions of counsel for the respondent. In fact, an examination of the transcript reveals that the trial judge used the word "perpetrator" at various times during his review of the law relevant to the indictment. In particular, he stated that "...the complainant says that the perpetrator approached him with something looking like a firearm, raised it, and pointed it in his face and fired it".[26]

[64] There can be no doubt that the trial judge used the title "perpetrator" as an alternative method of describing the appellant as he progressed through the summation. What he would have to satisfy himself about is that the complainant had properly identified the appellant as the perpetrator, the one who shot him in his jaw. He clearly spent time analysing the evidence in relation to identification and concluded, at pages 303 to 304 of the transcript, that the complainant had sufficient time to make a clear and correct identification of the appellant as the man who shot him.

[65] There is no misunderstanding or confusion in relation to this issue and this ground of appeal fails.

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[26] Page 250 of the transcript (lines 11-14)

The sentence

Submissions of counsel for the appellant

[66] Counsel made no submissions as to what an appropriate sentence would be, but he contended that the learned trial judge failed to adjust the actual sentence to reflect time spent in custody pending trial. He stated that the appellant would have been in custody for seven months awaiting trial. Mr Green also submitted that the injuries were not life threatening and it was unclear as to whether the trial judge took into account the appellant's age. He contended that the appellant was an elderly person and that this was not reflected in the sentence.

[67] Without reference to any particular source, Mr Green submitted that the language of the law suggests that a sentence should be appropriate and fit the particular circumstances. He contended that the very youthful and the very old ought to be treated differently and that in the case of the latter, if a very long sentence was imposed on an old person this may lead to what would be in essence a life sentence.

Submissions of counsel for respondent

[68] In written submissions, Miss Thomas commended the principles as distilled in **Daniel Roulston v R**[27] by McDonald-Bishop JA and conceded that the trial judge did not strictly adhere to these principles:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:

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[27] [2018] JMCA Crim 20

a. identify the sentence range;

b. identify the appropriate starting point within the range;

c. consider any relevant aggravating factors;

d. consider any relevant mitigating features (including personal mitigation);

e. consider, where appropriate, any reduction for a guilty plea;

f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[69] Counsel acknowledged that there was no indication of a sentence range and a starting point within the range. She referred however to the Sentencing Guidelines[28] and contended that the trial judge took into consideration the fact that the appellant had spent six months in custody for the offence. She submitted that this could be inferred as the normal range for the offence of wounding with intent involving the use of a firearm is 15 to 20 years.

[70] She stated that the learned trial judge also took into account relevant mitigating factors as he considered that the appellant was, at one time, a public servant by virtue of his involvement in the community. She further contended that the antecedents of the appellant, particularly his convictions for gun related offences must have weighed on the trial judge's mind as an aggravating factor, albeit that they were of some vintage.

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[28] Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017.

[71] Miss Thomas noted, by way of reference to the Sentencing Guidelines, that the normal range for the offence of wounding with intent is 15 to 20 years. However, the decided cases suggested that the normal range for the offence of wounding with intent using a firearm is 15 to 17 years. She also referred to section 20(2) of the Offences Against the Person Act, which provides that the minimum sentence for the offence of wounding with intent with the use of a firearm is 15 years.

[72] By way of comparison, counsel referred to the decision of this court in **Carey Scarlett v R**,[29]- where the applicant was sentenced to 15 years imprisonment for illegal possession of firearm and 25 years for wounding with intent. On appeal, this court reduced the sentence for wounding intent to 18 years. She submitted that the facts in the instant case were more serious than in **Carey Scarlett**.

[73] In the round, counsel contended that the sentence imposed by the judge was reasonable having regard to the facts that were before him.

Discussion and analysis

[74] In relation to the offence of illegal possession of firearm, according to the Sentencing Guidelines, the normal range is seven to 15 years. After a compendious review of a number of cases involving wounding with intent by the use of a firearm, together with the Sentencing Guidelines and the statutory minimum, this court

[29] [2018] JMCA Crim 40

concluded in **Carey Scarlett** [30] that the normal range for that offence must be considered to be 15 to 20 years.

[75] In examining the transcript, it is clear, as acknowledged by Crown Counsel, that the trial judge did not apply the basic methodology laid down by this court in various cases including **Meisha Clement v R**[31] and **Daniel Roulston v R** in regards to the sentencing process. There was no reference to the normal range nor identification of a starting point.

[76] The learned judge noted that there were few mitigating factors but took account of the appellant's public service in the community. He did consider the issue as to whether the age of the appellant - 61 years - should also be treated as a mitigating factor but concluded it could not be as the complainant could have died and that he had been shot over "a piece of chicken"[32]. He also had regard to the effect of the offences on the Crown witnesses, that they had not worked in the community since the incident.

[77] The antecedent report had revealed that the appellant had seven previous convictions including three for gun related crimes. The judge expressed that he could not ignore the record of gun crimes although he had regard to the fact that the last conviction was about 27 years ago.

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[30] Paragraph [36]
[31] [2016] JMCA Crim 26
[32] Page 320 of the transcript (lines 7-8)

[78] In considering that the minimum mandatory sentence is 15 years for the offence of wounding with intent carried out with a firearm and in light of the factors identified by the judge, it cannot be concluded that the sentences would give cause for concern. Both sentences of eight and 18 years imposed by the trial judge are clearly within the normal range for the offences of illegal possession of firearm and wounding with intent using a firearm, respectively. Particularly in relation to the first offence, eight years is on the lower end.

[79] As previously mentioned, the application for leave to appeal against the sentence was granted for the single purpose of exploring whether the trial judge, having expressly noted that the appellant spent seven months in custody pending trial, in fact gave credit for that period in arriving at the sentence to be imposed.

[80] Bearing this in mind, the scope of consideration for this court is narrow. Included in the "correct approach and methodology" to sentencing, set out in **Daniel Roulston v R**, is giving credit for time spent in custody, awaiting trial for the offence.

[81] It is noted that at the close of the plea in mitigation made by Mr Green, the trial judge asked to be reminded[33] by counsel when the appellant was arrested and whether he had been in custody since that time. Mr Green responded that the appellant had been arrested on 9 April 2016 and that he had spent seven months in custody. Having had the benefit of this information, the judge then proceeded with sentencing. When

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[33] Page 319 of the transcript (lines 10-17)

the judge came to the portion in which he expressed his consideration of the mitigating factors he said at page 321 of the transcript (lines 19-21):

> "There are very few mitigating factors. I take into consideration that you have been in custody for Six months…"

[82] The time between 9 April 2016 and 27 October 2016 is six months and 18 days. As such the judge could not be seriously faulted for using six months instead of adopting counsel's rounded calculation. It is conceded by the Crown that there was no mathematical subtraction of the time spent in custody from the actual term imposed. In the round, 18 years is reasonable for the offence of wounding with intent and, based on the transcript and the relevant factors outlined above, this court is prepared to accept that the time spent was applied by the judge in arriving at the actual sentences imposed.

[83] It is for these reasons that we made the orders that were set out at paragraph [3] herein.