[2026] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE G FRASER JA
THE HON MRS JUSTICE TIE POWELL JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2022CR00015

SANTINA BERRY v R

Paul Gentles for the appellant

Miss Claudette Thompson, Director of Public Prosecutions, and Miss Nailah Bishop for the Crown

2 and 27 March 2026

Criminal law – Joint enterprise - Illegal possession of firearm – Robbery with aggravation – Sufficiency of evidence – Whether verdict unreasonable and against the weight of the evidence

F WILLIAMS JA

Background

[1] In this matter Miss Santina Berry ('the appellant') was, on 20 May 2021, convicted on both counts of an indictment which charged her with illegal possession of firearm (count 1) and robbery with aggravation (count 2) after a trial by a judge alone ('the learned judge') in the High Court Division of the Gun Court held at King Street in the parish of Kingston. The case against her was to the effect that, on 7 April 2018, she and three others (two men and another woman), at gunpoint, robbed the virtual complainant of a motor car being driven by him as a taxi in the parish of Kingston. Convicted of the offences, she was sentenced on 18 March 2022, to three years' imprisonment on each count, with the sentences ordered to run concurrently.

[2] It was the Crown's case that, although she was not herself in physical possession of the firearm, she was at first observed by the virtual complainant to be standing and interacting with the other persons who were a part of the common design in a manner that led him to form the impression that they were two couples. Further, after they all boarded the taxi together, the man who sat on the right rear seat behind the virtual complainant asked him to stop and let him off, and he complied. The other man, who was sitting at the rear in the middle, pulled a firearm and pointed it at the virtual complainant. When the virtual complainant protested, the appellant then shouted the following words at him: "Shut up yuh mouth and nuh do nothing funny, nutten". Those words, the virtual complainant said, were uttered in an angry tone. The virtual complainant exited the taxi, and the man who had requested the stop, then re-entered the taxi, sat in the driver's seat and drove the taxi away with all the other persons aboard, whilst the driver (the virtual complainant) ran away.

[3] The virtual complainant's further evidence was that there was a noticeable lack of alarm or concern on the part of the women in the taxi when the firearm was drawn and pointed at him. He later saw the appellant at the police station, where he pointed her out to the police as one of the occupants of the car at the time the offences were committed.

[4] The appellant denied that she had been present in the taxi, stating that she was in Portmore, Saint Catherine, at the time. However, at the trial, she admitted that she was present but denied that she had used the words attributed to her by the virtual complainant. In respect of her first denying that she had been present in the taxi at the material time, she explained that by saying that she had been warned and threatened not to go to the police by the men, whom she denied knowing. She also denied being a part of any common design.

[5] The learned judge analysed all the circumstances and found them sufficient to make a finding that the appellant was a part of a joint enterprise to rob the virtual complainant of the taxi, thus arriving at verdicts of guilty in respect of the two offences.

Her conduct, he found, was sufficient to amount to assistance or encouragement to the men in the commission of the crime.

[6] The delay between the conviction and the sentencing was caused by the somewhat unusual route that the matter took after the recording of the conviction. Having found the appellant guilty, the learned judge then attempted to refer the matter to this court as a case stated, pursuant to sections 55 and 56 of the Criminal Justice Administration Act ('the Act'). On initially referring the matter to this court as a case stated, and again after sentencing the appellant, the learned judge granted her bail pending the hearing of the matter in this court. Page 168, lines 14-19 of the transcript discloses the learned judge's formulation of the question for the consideration of this court thus:

> "So what we are going to be doing now, is getting the Court of Appeal … to decide this question as to <u>whether the words that I found that you said in all the circumstances are sufficient to make you liable for these offences</u>." (Emphasis added)

[7] In the learned judge's sentencing remarks, it is stated that when the matter initially came before this court, it was directed that it be sent back for the learned judge to complete the trial by sentencing the appellant. That was done. A single judge of this court, in remitting the matter for it to be completed, did so on the basis that it had not properly been placed before this court as a case stated. There were two reasons for that ruling: (i) that the proposed question was one of fact, instead of (as required by the Act) one of law; and (ii) the referral was not made by way of a signed case stated, as the Act also requires. The case stated procedure was, therefore, brought to an end at that point. No further attempt was made to again refer it to this court after the sentencing of the appellant was completed.

[8] The appellant having been sentenced, filed a criminal form B1 dated 25 March 2022, challenging both her conviction and sentence. This was done on the following grounds:

"(a) Verdict unreasonable having regards [sic] to the evidence.

(b) The learn [sic] trial judge failed to have proper regard to the case from the defence.

(c) Sentence excessive."

[9] With that background, the matter proceeded before us as any regular appeal would.

Summary of submissions

For the appellant

[10] On the appellant's behalf, Mr Gentles made several submissions, which may be summarised as follows:

(i) The learned judge erred when he found that the appellant was a party to a common design to rob the virtual complainant of the car.

(ii) It was not established on the Crown's case that the appellant knew that the culprit in the back seat was armed with a firearm.

(iii) The learned judge erred when he found that the words that he determined that the appellant had uttered were uttered to aid and/or abet the commission of the offences.

(iv) The words that the learned judge found were uttered were at best ambiguous, as they could have been uttered in a desperate attempt to avoid a shooting in the car by invoking submission by the virtual complainant (citing **Derek Bentley v R** (1999) Crim LR 330).

(v) The interpretation that best suits the defence should have been the preferred version of interpretation (citing **R v Pearlina Wright** (1988) 25 JLR 221).

For the Crown

[11] On the Crown's behalf Miss Bishop made submissions that may be summarised as follows:

> (i) The main issue in the case was credibility, which went to the jury mind of the learned judge, sitting alone, and there was no error on his part.
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> (ii) The evidence satisfied the requirements of section 20(5)(a) of the then Firearms Act (citing **R v Clovis Patterson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 81/2004, judgment delivered 20 April 2007).
>
> (iii) The evidence in the case supported the finding that the appellant acted pursuant to a common design (citing **R v Jogee and Ruddock v The Queen** [2016] UKPC 7).
>
> (iv) The words found by the learned judge to have been used by the appellant did not stand by themselves but were accompanied by other conduct that, in the circumstances, together amounted to evidence of a common design.
>
> (v) The appellant has failed to establish that the verdict is so against the weight of evidence that it is unreasonable and insupportable (citing **Craige Williams v R** [2026] JMCA Crim 1).

Discussion

[12] It is common ground that, in addition to a consideration of the law relating to common design, credibility was the main issue in the case.

[13] A summary of the law relating to common design that is relevant to this case may be seen in paras. 1, 9 and 10 of the case of **R v Jogee and Ruddock v The Queen** [2016] UKPC 7 ('**Jogee**'). They read as follows:

> "1. In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence…"
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> …
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> 9. Subject to the question whether a different rule applies to cases of parasitic accessory liability, the mental element in assisting or encouraging is an intention to assist or encourage the commission of the crime and this requires knowledge of any existing facts necessary for it to be criminal: **National Coal Board v Gamble** [1959] 1 QB 11, applied for example in **Attorney General v Able** [1984] QB 795, **Gillick v West Norfolk and Wisbech Area Health Authority** [1986] AC 112 and **Director of Public Prosecutions for Northern Ireland v Maxwell** [1978] 1 WLR 1350 per Lord Lowry at 1374G-1375E, approved in the House of Lords at 1356A; 1358F; 1359E; 1362H and echoed also at 1361D.
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> 10. If the crime requires a particular intent, D2 must intend to assist or encourage D1 to act with such intent. D2's intention to assist D1 to commit the offence, and to act with whatever mental element is required of D1, will often be co-extensive on the facts with an intention by D2 that that offence be committed. Where that is so, it will be seen that many of the cases discuss D2's mental element simply in terms of intention to commit the offence. But there can be cases where D2 gives intentional assistance or encouragement to D1 to commit an offence and to act with the mental element required of him, but without D2 having a

> positive intent that the particular offence will be committed. That may be so, for example, where at the time that encouragement is given it remains uncertain what D1 might do; an arms supplier might be such a case."

[14] In this case, as both sides acknowledge, credibility was the central issue at trial. The learned judge, sitting without a jury, was, therefore, the arbiter of fact – finding, having seen the witnesses and heard their testimony, whose evidence and which parts of their evidence to accept and to reject. The transcript makes it clear beyond peradventure that he conducted a detailed analysis of the testimony of each witness, but, in particular, that of the virtual complainant and the appellant. He conducted a careful assessment of the appellant's conduct whilst standing with the other persons before they entered the taxi, along with the words that she denied uttering but which he found she did in fact say. Having done so, he found that the requirements for proof of the existence of a common design were satisfied, and that she was a part of the common design to rob the virtual complainant of the motor car that he was driving. These were findings clearly open to him based on the evidence. We can discern no error on his part in making them.

[15] Mr Gentles' submission that no evidence was led as to the appellant's prior knowledge of the possession of a firearm by the man who remained seated in the car is countered by the consideration that the words that the learned judge found were said by the appellant, were said after the gun was produced and pointed at the virtual complainant.

[16] We must also reject his submission, that was based on the case of **R v Pearlina Wright** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 17/1988, judgment delivered 13 June 1988, to the effect that the interpretation of the words that was favourable to the appellant, was to have been preferred to the interpretation that led to her conviction. In fact, the very case cited by Mr Gentles makes this clear: that approach is only taken when there is a plea of guilty; not where, as here, there is an issue joined on the meaning of the words and in the circumstances before the

learned judge in which the appellant denied using the words at all. In **R v Pearlina Wright**, at page 2 of the judgment, Rowe P is recorded as stating:

> "The rule of law is that when a person pleads guilty, the learned trial judge, as the tribunal of fact, should sentence on the set of facts which are most favourable to the accused." (Emphasis added)

[17] On the other hand, we find the well-presented submissions of Miss Bishop for the Crown to be irresistible. To take her last submission first, we agree that it cannot fairly be said that the verdicts are so against the weight of the evidence that they are unreasonable and insupportable. The law in relation to the overturning of a verdict on the basis that it is against the weight of the evidence was recently set out in the case that Miss Bishop cited – that of **Craige Williams v R** [2026] JMCA Crim 1. In that case, Tie Powell JA (Ag) reviewed several cases and, at paras. [33] and [34], the learned judge of appeal (Ag) delivered herself thus:

> "[33] ... An applicant who seeks to overturn a conviction on evidential grounds must demonstrate that the verdict was 'so against the weight of the evidence as to be unreasonable and insupportable' (see **Everette Rodney v R** [2013] JMCA Crim 1 at para. [22], where the court cited with approval **Joseph Lao v R** (1973) 12 JLR 1238).
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> [34] This court is also guided by the principle affirmed in **Patrick Comrie and others v R** [2012] JMCA Crim 16, where Brooks JA (as he then was) reiterated that an appellate court will not interfere with a trial judge's findings of fact unless those findings were made on an incorrect principle or were unsupported by any evidential foundation. His Lordship explained that such restraint reflects the distinct advantage enjoyed by the tribunal of fact, which has the opportunity to see and hear the witnesses and is therefore better placed to assess credibility. This principle was earlier expressed in **R v Horace Willock** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No. 76/1986, judgment delivered 15 May 1987, where the Court observed that the absence of detailed reasons or findings in a summation does not, without more, justify disturbing the verdict of a judge sitting alone, provided that the printed record contains

> material evidence capable of supporting the decision reached. These authorities reinforce the principle that this court must not substitute its own view for that of the trial judge unless the verdict is unsupported by the evidence or is otherwise rendered unsafe."

[18] In this case, there was detailed analysis of the evidence by the learned judge, and conclusions and findings based on that analysis. In the circumstances of this case, it cannot fairly be said that the verdict is not supported by the evidence, or that it was based on any incorrect principle.

[19] We note as well that section 20(5)(a) of the Firearms Act as it then stood was brought to the learned judge's attention and was argued by both sides. That section was worded as follows:

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

[20] The case of **R v Clovis Patterson**, cited by Crown Counsel, was also helpful, with the convenient review that it contains of the elements necessary to be proven for a conviction under that section. At page 10 of that judgment, Smith JA opined that:

> "The subsection sets out the requirements to be met before a person who was not found to be in actual possession of a firearm, may be treated as also in possession contrary to section 20 of the Firearms Act.
>
> The requirements are:

(1) He must be in the company of the principal offender.

(2) The principal offender must have used the firearm to commit an offence specified in (a)(i) or (ii) of subsection 5.

(3) The existence of circumstances which give rise to the reasonable presumption that he was present to aid and abet the commission of such offence specified in a (i) or (ii).

(4) The absence of reasonable excuse."

[21] On the learned judge's analysis of and findings on the evidence and the law, all these requirements were met. It has not been demonstrated that he erred in this regard.

[22] The case of **R v Clovis Patterson** also provides a further rebuttal to the submission made by Mr Gentles concerning what he argued was the failure of the prosecution to prove that the appellant knew that the person in physical possession of the gun, had it. At page 12 of the judgment, Smith JA further opined that:

> "…In such a situation on a charge under section 20 of the Act, the prosecution need not prove, prima facie, that the accused knew that the actual possessor had a firearm. By operation of subsection (5)(a) he shall be treated as being in possession in the absence of reasonable excuse."

[23] This review of the evidence and the law and the learned judge's treatment of them should make it readily apparent that the appellant's grounds of appeal were not made out.

[24] It should be noted that, although there was a ground seeking to challenge the sentences imposed as being manifestly excessive, that ground was not advanced by counsel. This was perhaps due to the fact that the maximum sentence for robbery with aggravation is 21 years and that for illegal possession of firearm is life imprisonment, whilst the sentences imposed in this case were for three years on each count, to run concurrently. In addition, it is useful to have regard to the usual starting points and normal ranges of sentences for these offences, as set out in the Sentencing Guidelines

for Use by Judges of The Supreme Court of Jamaica and The Parish Courts, December 2017 ('the Sentencing Guidelines'). The Sentencing Guidelines were in force at the time that the appellant was sentenced. For illegal possession of firearm, the normal range is seven to 15 years, with a usual starting point of 10 years (see section 5.22 of the Sentencing Guidelines and Appendix A – Sentencing Guidelines – Quick Reference Table A-15). For robbery with aggravation, the normal range is 10 to 15 years with a usual starting point of 12 years (see section 5.22 of the Sentencing Guidelines and Appendix A – Sentencing Guidelines – Quick Reference Table A-12).

[25] In any event, however, there are several long-standing principles which guide appellate courts in reviewing sentences passed in lower courts. In the well-known and often-cited case of **R v Ball** (1951) 35 Cr App R 164, Hilbery J (as he then was) reviewed what should be an appellate court's approach with respect to appeals against sentences. He said:

> "… [T]his Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

[26] A review of the learned judge's sentencing remarks does not disclose any error in principle or any basis for concluding that the sentences are excessive in any way. It is clear, therefore, that a challenge on this ground could not have succeeded.

[27] Neither with respect to conviction nor sentence has the appellant demonstrated that the learned judge erred in any way in the trial of the appellant, warranting our intervention.

[28] In the result, the appeal against conviction and sentence is dismissed and the convictions and sentences are affirmed. The appellant is to commence serving the sentences immediately.