[2025] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NOS 29 & 30/2018

Havalon Burnett
Roderick Burnett v R

Pierre Rogers for the applicant Havalon Burnett

Ms Hazel Gordon for the applicant Roderick Burnett

Andre Wedderburn and Miss Debra Bryan for the Crown

13 and 15 March 2024 and 17 October 2025

Criminal Law – Evidence – Illegal Possession of Firearm – Robbery with Aggravation – Firearms Act, section 20 (5) – Larceny Act, section 37 (1)(a)

Criminal Law – Alibi – Whether the learned trial judge erred in considering the defence of alibi

Sentence – Whether sentence manifestly excessive – Consecutive sentence – totality principle – Whether the aggregate sentence is manifestly excessive

P WILLIAMS JA

[1] Messrs Roderick Burnett ('Roderick') and Havalon Burnett ('Havalon') ('the applicants') were tried on divers days between 31 October and 8 November 2017, by a judge ('the learned trial judge') sitting alone in the High Court Division of the Gun Court for the parish of Kingston, on an indictment containing four counts. On 8 November 2017, the applicants were convicted for the four counts namely illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count 1), robbery with aggravation contrary to section 37(1)(a) of the Larceny Act (count 3) and two counts of assault

(counts 2 and 4). Because of their common surname, the applicants will be referred to by their first names, this is for convenience only.

[2] On 23 February 2018, Havalon was sentenced to eight years' imprisonment at hard labour on count one, one year on counts 2 and 4, and eight years on count 3. As it relates to Roderick, he was sentenced to eight years' imprisonment at hard labour on count one, one year on counts 2 and 4, and 10 years on count 3. The learned trial judge ordered that the sentences run concurrently. The learned trial judge further ordered that the sentences of both applicants were to run consecutively with sentences for illegal possession of firearm and wounding with intent, for which they both had been previously convicted in the High Court Division of the Gun Court on 5 December 2014. They were both sentenced to 10 and 15 years' imprisonment, respectively. The consequence of this was that Havalon would serve a cumulative sentence of 23 years' imprisonment, and Roderick would serve a total of 25 years' imprisonment.

[3] On 18 April 2018, the applicants, by separate applications, filed a criminal form B1 seeking leave to appeal their convictions and sentences. A single judge of this court considered and refused the applications. As is their right, they renewed their applications before us.

The case for the prosecution

[4] The first witness for the prosecution, Mr Oniel Chin-Sue ('Mr Chin-Sue'), testified that on 2 November 2011 at about 7:15 pm, he and his friend Mr Jevaughn Andrews ('Mr Andrews') travelled in a motor vehicle to Price Lane on Slipe Road in the parish of Saint Andrew to collect $45,000.00. When they got to Price Lane, Mr Chin-Sue went to collect the money, while Mr Andrews drove further up the lane, turned the motor vehicle around, and returned to stop at the entrance of the lane. After collecting the money, Mr Chin-Sue was about to open the front passenger door of the motor vehicle when he heard a voice saying, "you violate me friend Monday night".

[5] He turned around in the direction of the voice and recognised a man known to him as Ziggy (who was not before the court), who he knew to be a friend of the applicants. Mr Chin-Sue testified that he knew that the friend Ziggy was referring to was Havalon. Mr Chin-Sue replied to Ziggy, stating he had "nothing to do with this waste argument". Ziggy pushed him, and Mr Chin-Sue responded by punching Ziggy. This led to a fight between the two men. Whilst on the ground tussling, Mr Chin-Sue heard when Mr Andrews said "dem a come, dem a come". He did not see who Mr Andrews was referring to. However, he and Ziggy continued to tussle until they reached Slipe Pen Road near the street lights (notably, Mr Chin-Sue used Slipe Road and Slipe Ren Road interchangeably in testifying about where the incident took place).

[6] Whilst on Slipe Pen Road, Mr Chin-Sue said he saw three men: Hardy, Karka (the alias name he knew for Havalon), and Dogman (the alias name he knew for Roderick). Both Hardy and Havalon had guns which they pointed at him, and Mr Chin-Sue became afraid. Roderick had a knife and used that knife to stab Mr Chin-Sue seven times, once to the back of his shoulder, three times to his chest, once to his side, once to his waist, and lastly once to his left hand, in which he held the money. After stabbing him on the left hand, Roderick relieved Mr Chin-Sue of the money. Mr Chin-Sue said Ziggy held him while Roderick was stabbing him, and Havalon continued to point the gun at him. Whilst he was being stabbed, Mr Chin-Sue heard Havalon utter the words "pull him in the lane mek we kill him" to which he responded "you have to kill me here so mek the people them see".

[7] Mr Chin-Sue testified that Mr Andrews came out of the motor vehicle and shouted out "a wha dat". Havalon pointed his firearm at Mr Andrews, who drove off. Eventually, a crowd descended, and the men all ran back onto Price Lane. After the attack, Mr Andrews assisted Mr Chin-Sue to the Kingston Public Hospital ('the KPH') where he was admitted for seven days and treated for the injuries he sustained.

[8] Mr Chin-Sue said that the applicants were previously known to him for some time, as they all grew up in the Orange Villa community. He had known Havalon for about 25

years and Roderick for over 15 years. He would speak occasionally to both men, and they played football together in the community. He knew that they were brothers. He estimated that the entire incident that night lasted about four minutes, and he was able to see the faces of the applicants for the entire time. He was assisted in doing so by streetlights that were in the area.

[9] During cross-examination by counsel Mr William Hines ('Mr Hines') then appearing for Roderick, Mr Chin-Sue said that it took five minutes during the tussle between him and Ziggy to reach onto Slipe Pen Road from Price Lane. Before moving onto Slipe Pen Road, they wrestled on Price Lane for about three minutes. When asked how long they were wrestling on Slipe Pen Road before he saw the men approaching, Mr Chin-Sue said it was for about four minutes. When further questioned, he said they had been wrestling before reaching Slipe Pen Road before the men came up for about two minutes. He explained that after he punched Ziggy, Ziggy held him, and they both fell to the ground. However, they soon got up from the ground, still holding each other as the fight continued, with them moving onto Slipe Road. By the time the three men arrived on the scene, it was approximately 7:30 pm to 7:45 pm. He was adamant that there were street lights in the area, so it was not dark.

[10] It was suggested to Mr Chin-Sue that he did not see Roderick there that night. It was further suggested to him that there was a dispute between the applicants' father and Mr Chin-Sue's brother, which was before the court, and that this was the reason he was saying it was Roderick who stabbed him. Mr Chin-Sue stated that he was not aware of any dispute, and he denied that naming Roderick as one of his assailants because of any dispute. He also disagreed with the suggestion that "he was in a state" that night during the fight that prevented him from recognising the person who stabbed him. He also rejected the suggestion that Roderick was nowhere in the area that night.

[11] During cross-examination by counsel who appeared for Havalon, Mr Paul Gentles ('Mr Gentles'), it was also suggested to Mr Chin-Sue that he had claimed he saw Havalon because of the dispute between his brother and the applicants' father. In denying that

suggestion, Mr Chin-Sue went on to disagree with the possibility of his being mistaken about the identity of his assailants. Whilst acknowledging that he had heard that Havalon had been stabbed the Monday before the incident, he was unaware that Havalon had been hospitalised for two days and had been discharged on the same evening of the incident. During cross-examination, in response to a query from the learned trial judge, Mr Gentles acknowledged that there was no issue that the parties were known to each other; however, the issue of identification related specifically to the incident.

[12] The second witness for the prosecution was Mr Andrews, who gave evidence which was largely supportive of that of Mr Chin-Sue. Mr Andrews testified that he was in the driver's seat of the motor vehicle positioned at the corner of Price Lane and Slipe Road when Mr Chin-Sue returned from collecting the money. Mr Andrews heard "some talking" when Mr Chin-Sue was attempting to open the door, so he came out of the motor vehicle and saw Ziggy and Mr Chin-Sue fighting on the left side of the motor vehicle. He heard a bike coming out of Price Lane and coming towards the motor vehicle. He ran back to the right side of the motor vehicle and, while running, shouted, "they coming". Mr Andrews said he drove out of Price Lane onto Slipe Lane, where he stopped. He looked in the direction of Price Lane and saw three men, namely: Hardy, Havalon (who he also knew by the alias "Caucau" or "Ka-Ka"), and Dogman, whom he identified as Roderick. When he drove out of Price Lane, the fighting between Ziggy and Mr Chin-Sue was still ongoing, and they tussled and wrestled until they ended up on Slipe Road.

Whilst on Slipe Road, the applicants and Hardy went to where Mr Chin-Sue was being held by Ziggy. Hardy and Havalon both had firearms, which they pointed at Mr Chin-Sue. Roderick had a knife with which he started to stab Mr Chin-Sue. Mr Andrews remained in the motor vehicle but he shouted out, "dawg weh you a do". Havalon came to the motor vehicle and pointed the gun at him. Fearful, Mr Andrews drove away but later returned and assisted Mr Chin-Sue to the hospital.

[13] Mr Andrews testified that he had known Havalon for more than two decades. He, too, lived in the Orange Villa community. They would play football and "build parties

together, events". In relation to Roderick, Mr Andrews testified: "from I born, I grow up and see him", in all for about 25 years. He also played football and went to parties with Roderick. He was able to see the men on that night of the incident with the assistance of the street lights , which were in the area.

[14] During cross-examination by Mr Hines, Mr Andrews explained that when he first saw the three men approaching, he was on the outside of the motor vechicle, facing the intersection of Price Lane and Slipe Road, but looking in the direction of Price Lane. He explained that he had driven off a short distance before stopping in time to see when Roderick started stabbing Mr Chin-Sue. He had left the scene when Havalon pointed the gun at him. He denied suggestions that he had not seen Roderick since 2009, when Roderick had left Orange Villa. He maintained that he was there and saw when Roderick started stabbing Mr Chin-Sue.

[15] Under cross-examination by Mr Gentles, Mr Andrews said that he saw the bike as it approached, and he saw that Hardy was the driver and Havalon was the pillon. He was able to see Havalon's face at that time for about six to seven seconds. Mr Andrews was confronted with his statement to the police, in which there was no mention made of his seeing Havalon's face on the bike as it was coming from Price Lane onto Slipe Road, or that he had seen his face for six to seven seconds whilst the bike was in motion. Mr Andrews agreed that this was absent from his statement and explained that the reason for this absence was that he was never asked by the police about the time that he saw the man's face; he was just asked about whether he saw the men on the bike. He denied suggestions that he was mistaken when he claimed he saw Havalon on the bike and that it was Havalon who pointed a gun at him.

The case for the defence

Roderick's case

[16] Roderick gave an unsworn statement from the dock, in which he stated that he had nothing to do with the robbery and assault on Mr Chin-Sue. He said that on the night

of 2 November 2011, he was not in the vicinity of Slipe Road. He denied being in the company of other men with guns and denied stabbing and robbing Mr Chin-Sue. He said the only thing he knew was that his father and Mr Chin-Sue's brother had a case in court for over a year.

Havalon's case

[17] Havalon gave sworn evidence, in which he denied any involvement in the incident, and raised the defence of alibi. He stated that he was admitted to the KPH for a stab wound that he received to his left side, which punctured his lung. On the date of the incident, he was discharged from the KPH at about 5:00 pm, and he left the hospital between 6:00 pm to 6:30 pm. Miss Shadae Reid ('Miss Reid'), his girlfriend, was with him as he was discharged, and a friend, Mr Mark Hunter ('Mr Hunter'), came to pick him up and gave him a lift home. One of his cousins also accompanied them. Havalon said he got a registration and appointment card from the hospital when he was leaving. He could not remember where he was when he received the card, but he thought it was given to him by a doctor named Dr Dock. A card that he identified as what was given to him was tendered into evidence as an exhibit. He explained that he went straight home to Independence City in the parish of Saint Catherine. He arrived home about an hour after leaving the KPH. After arriving home, he went to bed at about 7:00 pm to 7:30 pm as he was in pain. He said he never left the house as he had stitches to his left side and his lung was punctured.

[18] He denied being on Slipe Road on the date of the incident. He also denied being on the back of the bike with Hardy and having a gun pointed at Mr Chin-Sue, nor did he encourage the other men who were allegedly there to draw Mr Chin-Sue onto Price Lane, "mek we kill him".

[19] In cross-examination, Havalon denied going by the alias Caucau. Crown Counsel, after laying the necessary foundation, confronted him with a CR 12 form. He acknowledged that he had signed the form and admitted that he supplied the police with the information recorded in the document. He said that even though it was stated on the

form that Caucau was his alias, he had not given that information to the police. He was unable to recall if the document had been read over to him.

[20] Havalon explained that on being discharged from the hospital, he went downstairs where he met with his girlfriend, and they both waited for Mr Hunter. His girlfriend then assisted him to where Mr Hunter had stopped the car. Upon arrival home, his girlfriend helped him out of the car and into the house, where he went straight to bed. He remained there while his girlfriend left the house and returned with their daughter. He eventually fell asleep at "about a quarter to eight or so".

[21] Mr Hunter gave evidence that he was a co-worker of Havalon. They had worked together for two years, and he considered Havalon a good friend. On the day of the incident, at about 6:30 pm, he picked up Havalon and his girlfriend from the KPH and took them straight home. Mr Hunter knew Havalon's girlfriend as Shadae. They arrived at Havalon's home at about 7:00 pm, where he assisted in taking Havalon out of the car before going home. Miss Reid, the girlfriend of the applicant, also testified on his behalf. She described Havalon as her "baby father" and explained that she "was with him … about five to six years". She gave evidence that she was present at the KPH on 2 November 2011, at about 5:45 pm, when Havalon was discharged and waited with him for the driver who assisted in putting Havalon in the car and took them straight home. She knew the driver only as Markie. She said Markie held onto Havalon as he exited the car while she had Havalon's bag. They got home at about 7:45 pm. She went next door to get her daughter. Havlaon went straight to bed, falling asleep almost immediately, before even seeing his daughter, and he never left the house that evening.

The application for leave to appeal

[22] In seeking to challenge their convictions and sentences, the applicants each filed an application for permission to appeal. The grounds set out therein were the same in each case and read as follows:

> "1. Misidentity by the witness: that the prosecution witness wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> 2. Lack of evidence: that the prosecution failed to present to the court any material, scientific or forensic evidence to justified [sic] and substantiate the alledge [sic] charges against me of which I was subsequently convicted therefor.
>
> 3. Unfair trial: that the evidence and testimonies upon which the learned trial judge relied on [sic] for the purpose to [sic] convict me lack facts and credibility thus rending [sic] the verdict unsafe in the circumstances. That the learned trial judge failed to give consideration to my alibi [sic] who testified about my true whereabout [sic] on the date and time of the alledge [sic] crime to substantiate the fact that I could not have committed the crime when the facts are taken into consideration.
>
> 4. Miscarriage of justice: that the prosecution failed to recognised the fact that I had nothing to do with the alleged crime for which I was wrongfully convicted for."

Grounds of appeal for Havalon

[23] It must be acknowledged that Mr Pierre Rogers ('Mr Rogers') accepted an assignment to appear on behalf of Havalon on 13 March 2024, which was the day the matter was set to be heard. However, given the time that had already elapsed, Mr Rogers agreed not to further delay the applications and was permitted to make submissions on 15 March 2024. On 15 March, though not applying to abandon the original grounds, Mr Rogers was permitted to advance the following as supplemental grounds:

> "1. The conviction for robbery with aggravation is unsustainable on [the] evidence.
>
> 2. The learned trial judge erred in rejecting the defence of alibi on the basis of the cogency of the Crown's case.
>
> 3. The sentence was manifestly excessive".

Ground of appeal for Roderick

[24] On 13 March 2024, counsel for Roderick, Ms Hazel Gordon ('Ms Gordon'), sought and was granted permission to abandon the original grounds of appeal and to argue a single ground of appeal, namely:

> "The sentences imposed on [Roderick] for the offence of Illegal possession of Firearm, Robbery with Aggravation and Assault was [sic] manifestly excessive."

[25] Arising from all the grounds, we have distilled that the critical issues which were raised can adequately be dealt with under the following headings:

1. Whether the learned trial judge erred in finding that there was sufficient evidence to convict Havalon for robbery with aggravation.

2. Whether the learned trial judge failed to adequately address the issue of alibi raised by Havalon.

3. Whether the learned trial judge failed to properly apply the relevant principles of sentencing.

4. Whether the learned trial judge failed to give due regard to the totality principle, thus imposing sentences which were manifestly excessive.

Issue 1: Whether the learned judge erred in finding there was sufficient evidence to convict Havalon for robbery with aggravation.

Submissions for Havalon

[26] Counsel, Mr Rogers, in brief but pointed submissions, complained that the conviction of robbery with aggravation was rendered unsafe and unsustainable, as the learned trial judge acted in error when she found Havalon guilty of the offence based on the evidence presented. He pointed out that the evidence showed that it was Roderick who committed the robbery and did so, not being armed with any firearm, but rather

with a knife. Havalon was said to have pointed a gun at the complainant whilst Roderick stabbed and then robbed him. Mr Rogers contended that the deeming provision of section 20(5) of the Firearms Act would not apply to Havalon in these circumstances, as, on the evidence, it was he who had actual possession of the illegal firearm. Mr Rogers submitted that the deeming provision was applicable in joining participants in the criminal act to the holder of the firearm and not the holder to the other offenders. In the circumstances, counsel contended that Havalon, being the person who allegedly had the firearm but did not rob the complainant, was not a part of the robbery.

Submissions for the Crown

[27] For the Crown, Mr Andre Wedderburn posited that he has been unable to unearth any authority that supports a conviction, where the person who is in actual possession of the firearm does not commit the felonious act (the robbery in this case). He further submitted that the only offence this applicant committed was an assault with a gun. Therefore, the conviction for robbery with aggravation would not be safe in light of the provisions of the Firearms Act. Counsel concluded that for the conviction to be rendered safe, the applicant would have been required to have committed the felonious act.

Discussion/analysis

[28] Section 37(1)(a) of the Larceny Act, under which Havalon was charged for the offence in count 3, provides, in part, the following:

> "Every person who-
>
> (a) Being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> (b) …
>
> shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding twenty-one years."

[29] The learned trial judge outlined the ingredients of the offence, and there was no challenge from counsel with the manner in which she did so. Notably, during her assessment of the law and the evidence, she stated the following:

> "[t]he prosecution in this case is alleging that three out of four men were armed with offensive weapons, two with firearms and one with a knife…
>
> The prosecution must therefore prove that at the time of the intended robbery the complainant was in actual fear as a result of each of the [applicant's] action [sic] or that violence was used against him as a result to induce him to depart with his property or money. And if I accept the evidence of Mr Chin-Sue that he was being stabbed with the gun pointing at him, that he was cut on his left hand in which he had the money and then the money was removed from his hand, then it is for me to say that the prosecution has proven its case of the ingredients of the offence."

[30] It is indisputable that Havalon was not the person who took the money from Mr Chin-Sue. It was Roderick who, armed with a knife, actually did so while Havalon stood by, pointing the gun at Mr Chin-Sue. Counsel is correct that section 20(5) of the Firearms Act is applicable in circumstances where a person in the company of someone who uses a firearm to commit a felony was present to aid or abet the commission of the felony and is therefore deemed to be in possession of the firearm. It would be inapplicable to Havalon since he was the person in actual possession of the firearm. However, in the circumstances of this case, the inapplicability of the deeming provision would only be in relation to the offence of illegal possession of firearm, as Havalon would have been in actual possession, so section 20(5) would not apply to him. However, the inapplicability of section 20(5) does not negate his culpability for robbery with aggravation. The basis upon which culpability could have been found depends on whether Havalon was a secondary party or an accessory to the commission of the offence. This basis for culpability does not require resort to section 20(5) of the Firearms Act.

[27] The United Kingdom Supreme Court and the Judicial Committee of the Privy Council re-stated the principles concerning the liability of secondary parties in **R v Jogee;**

Ruddock v The Queen [2016] UKSC 8; [2016] UKPC 7 ('**Jogee and Ruddock**'). McDonald-Bishop JA in **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25 indicates, at para. [77] that:

> "… The core of the principle, as restated in **R v Jogee**; **Ruddock v The Queen**, is that a person who assists or encourages another to commit a crime (the secondary party or the accessory) is guilty of the same offence as the actual perpetrator of the crime (the principal) if he 'shares the physical act', that is, through assisting and encouraging the physical act. In their Lordships words, '[h]e shares the culpability precisely because he encouraged or assisted the offence'."

[31] In **Troy Smith, Precious Williams and Andino Buchanan v R** [2021] JMCA Crim 9, at para. [44], Edwards JA also explained the principle in this way:

> "It has been well accepted that, where two or more persons embark on a plan to commit a crime, and act in furtherance of that plan, each will be liable for the acts to which they have agreed or assented, whether expressly or by implication. Even where there is no prior agreement and the parties come together spontaneously to commit the offence, the intentional giving of support or encouragement is sufficient to attract secondary liability…"

[32] Therefore, the question to be answered, in the instant case, is whether Havalon participated, encouraged, or assisted in the commission of the crime. The evidence in this case revealed that Havalon rode onto the scene of the attack. He was armed with a gun that he pointed at Mr Chin-Sue, whilst his brother repeatedly stabbed Mr Chin-Sue and ultimately took the money. The approach of the learned trial judge demonstrated the basis on which she assessed whether Havalon was a part of the felony of robbing Mr Chin-Sue. After conducting a comprehensive review of the case presented by the prosecution, she stated:

> "Now, the prosecution's case rests upon the doctrine per se of joint enterprise. The prosecution is saying that the two [applicants] were engaged in a joint enterprise with Ziggie and Hardy to assault and rob Mr Chin-Sue and assault Mr Andrews. They committed the offences together. It is the prosecution's case that it all started with

Ziggie; he was the man who approached Chin-Sue and accused him of violating Havalon the Monday night and he was the man who held on to Chin-Sue until the other men arrived on the scene where they were. They remained at the scene together [sic] they were present during the assault, they were present during the alleged robbery and then they left the scene together. And even the words that were spoken by [Havalon] the prosecution is alleging shows [sic] clearly that this was a joint enterprise, because [Havalon] said 'draw him in di lane mek we kill him'. And the prosecution is asking me to draw the inference from that that clearly shows the joint enterprise between these men that was taking place.

So I remind myself that where a criminal offence is committed by two or more persons each of them may play a different part as the prosecution is alleging in this case. The prosecution is alleging that Hardy and Havalon were the gunmen there, pointing the gun ensuring that Chin-Sue was kept there under gunpoint. Ziggie was the man holding on to Chin-Sue, the prosecution is saying, so that what took place could take place and [Roderick] was the knife man stabbing Chin-Sue under gunpoint and assaulting him and robbing him under gunpoint. That is what the prosecution is saying and also that [Havalon] when Andrews, Juvaun Andrews called out to them when they were attacking Chin-Sue he walked over and pointed the gun at Mr Andrews, putting him in fear, Mr Andrews said. So I remind myself that while each may play a different part in the joint plan if they are all in it together as part of the joint agreement to commit offences they are all guilty. And I remind myself as I have just indicated that the agreement can be inferred of [sic] the behaviour of the parties and I have identified the component that the prosecution has said that I am to draw the inference of joint enterprise and that there maybe no formality about it. And the essence of joint enterprise, I remind myself, is that each defendant share[s] a common intention to commit the offence and took some part in it, however great or small to achieve the aim. So if at looking at the case in its totality and looking in particular at each case of the [applicants] separately I am sure that each [applicant] acted with intention that I just spoke about whether to commit the offence on his own or that he took some part in committing the offence each [applicant] will be guilty as charged."

[33] The learned trial judge cannot be faulted for the manner in which she assessed Havalon's participation in the robbery, and she was correct to find that there was evidence of an intention to participate, encourage, or assist in the offence. The submissions proffered by Mr Rogers and supported by Mr Wedderburn are flawed. Accordingly, there is no merit in challenging the sustainability of the conviction for robbery with aggravation.

Issue 2: Whether the learned trial judge failed to adequately address the issue of the alibi

Submissions for Havalon

[34] Mr Rogers also challenged the convictions on the ground that the learned trial judge erred in her rejection of Havalon's defence of alibi. The complaint was buttressed by the assertion that the learned trial judge failed to demonstrate any reason for rejecting the alibi. Mr Rogers submitted that the learned trial judge, in rejecting the alibi on the basis of the cogency of the Crown's case, raised the question of whether this rejection contemplated the adverse evidence of identification elicited on cross-examination. Mr Rogers contended that the learned trial judge accepted Mr Chin-Sue's evidence that the incident lasted for four minutes but failed to appreciate that that time became three minutes and then one minute during cross-examination.

Submissions for the Crown

[35] On the Crown's behalf, Mr Wedderburn argued that it was clear from the learned trial judge's summation that she properly directed herself on the issue of alibi; as such, this ground should also fail. Mr Wedderburn, in response to queries from the court, demonstrated how the learned trial judge dealt sufficiently with the issue of alibi by directing the court to a portion of the transcript. Counsel said that the learned trial judge properly considered the relevant issues when she concluded that the applicants were the assailants.

Discussion and analysis

[36] It is accepted that there is a difference between the requirements of how a judge directs herself when sitting alone and how a judge gives directions when there is a jury trial. In the decision of the Caribbean Court of Justice in the case of **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ). Wit JCCJ at para. [29], observed that:

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

[37] This dictum is in keeping with the approach taken in an earlier judgment of this court, **R v Dacres** (1980) 33 WIR 242, that a judge sitting alone is required to give a well-reasoned judgment. At page 249, this court said as follows:

> "By virtue of being a judge, a Supreme Court Judge sitting as a judge of the High Court Division of the Gun Court in practice gives a reasoned decision for coming to his verdict whether of guilt or innocence. In this reasoned judgment he is expected to set out the facts which he finds to be proved and, when there is a conflict of evidence, his method of resolving the conflict."

[38] Once the defence of alibi is raised, a trial judge is required to demonstrate that she appreciated the principles relative to the defence and apply them to the circumstances of the case. The trial judge is not required to use particular words. She, should in "clear and unequivocal terms", demonstrate an appreciation that the accused does not have to prove that he was elsewhere at the material time (see **R v Gavaska Brown, Kevin Brown and Troy Matthews** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 84, 85 & 86/1999, judgment delivered 6 April 2001).

The learned judge must be satisfied, to the requisite standard, that on the prosecution's case, the accused was where they alleged him to be.

[39] The gravamen of this ground is that the learned trial judge did not treat the evidence in a balanced and fair manner, in that there was no reasonable analysis by the learned trial judge to substantiate or demonstrate why she rejected the defence of alibi or why she found the witnesses for the defence to be witnesses "of convenience". In other words, counsel argued that the learned trial judge did not show why it was that she felt constrained to reject the alibi.

[40] To consider whether there is merit to this ground, we must look at how the learned trial judge dealt with the issue of alibi. In the summation, the learned trial judge stated that:

> "The case for the crown was put to [Havalon] and he denied it. So both [the applicants] have raised the defence of alibi, and by raising this defence each [applicant] is saying that he was not present during [the] commission of the offences and therefore, the prosecution's witness who identified each of them as the assailants [is] either mistaken or lying. In this case it is lying because he is motivated by malice.
>
> While each [applicant] has raised an alibi the burden remains on the prosecution to disprove the alibi, I remind myself of each of them. Each [applicant] does not have to prove the alibi, each of them only has to raise it and in doing so each [applicant] does not have to prove that the prosecution witnesses have not been truthful. Once each of the [applicant] has raised an alibi it is incumbent on the prosecution to disprove their alibi to the extent that I can feel sure that each [applicant] was at the scene of the offence plus the prosecution must prove to me that each [applicant] committed the offence and therefore, that each of their alibi is untrue. If I conclude that the alibi of each [applicant] is true or maybe true then, each of them could not have been the assailant in the offence as charged and I must acquit each of them, because no person can be in two places at one time…"

[41] She went on to specifically note Havalon's defence and addressed the issue further in the following manner:

> "[Havalon] who was at home coming in from the hospital, [sic] If I should find myself in the middle ground where I am not sure whether or not I should accept each of the alibi present where I think that each of the alibi could be true I also must acquit [the applicants], because it would mean that the prosecution has not satisfied me beyond a reasonable doubt that [the applicants] was at the scene of the offence committing the offence. If I am in the middle ground it means the prosecution did not disprove each of the alibi raised by each [applicant] and therefore, I would do no favour of them by acquitting each of them because the law say they must be delegating some alibi is disproved by the prosecution. So if I should find that it is possible that each of the alibi that they gave maybe true, I must acquit each of them. So what happens now if I don't believe each [applicant's] alibi?"

[42] The learned trial judge also gave considered the matter of a false alibi:

> "Well, even if having considered the evidence carefully I am sure the alibi that each [applicant] has given is false, I cannot convict him because of that.
>
> Because a false alibi is not equal to guilt. I can only convict each of the [applicant] having considered their case separately I am sure that I have no reasonable doubt that they were each at Slipe Road in the vicinity of Price Lane on the 2nd of November, 2011 as the prosecution said that the witnesses said [sic] doing what Mr. Chin-Sue said they did as well as Mr. Andrews, even if I believe that it took place."

[43] The learned trial judge then considered the relevant evidence of the witnesses who testified regarding Havalon's defence, which she had already reviewed in greater detail. She noted the variance between their evidence. She expressly stated that "the critical issue in this case that has arisen is that of identification, reliability and credibility". She considered the issue of identification, and there is properly no complaint as to how she addressed the issue, adhering closely to the guidelines **R v Turnbull and others** [1976] 3 All ER 549. She took into account evidence as to distance, lighting, time, the duration of the witnesses' observation of the applicant, how long the witnesses had the applicant under observation, and the length of time the parties had known each other. Ultimately, the learned trial judge stated:

> "Now, having considered the evidence and listened carefully to the submissions and having looked and assessed the demeanour of the prosecution witnesses as well as the demeanour of [Havalon] and his witnesses when they gave evidence I am convinced, I have no reasonable doubt that Mr Chin-Sue and Mr Andrews are speaking the truth. They came across to me as witnesses who were forthright and honest, but I bear in mind that even though they appeared to be honest and forthright that they could still be mistaken of the identification of these men."

[44] Thus, the learned trial judge correctly noted the evidence as to the circumstances of the identification, and found that the witnesses were truthful and that the evidence was such that they could have recognised their assailants, especially in circumstances where it was agreed that the men were all known to each other for several years. She concluded:

> "What this means is that I have rejected what [the applicants] have said. I find that they are witnesses of convenience of [sic] his girlfriend who [came] here to give evidence to protect him and I also reject that he left the hospital and went straight home on the 2nd November. Not because I have rejected what they have said, I have to look at their case separately. I am convicting them because I believe Mr. Chin-Sue and I believe Mr Andrews. I find them not only to be honest witnesses, but also reliable in terms of identification...".

In the circumstances, the learned trial judge sufficiently and appropriately dealt with the issue of alibi as raised by Havalon, before ultimately rejecting the alibi.

[45] Counsel further contended that the learned trial judge should have shown why she felt constrained to reject the alibi. The learned trial judge recognised that the central issue was that of credibility and that that issue revolved around the question of whether she could have accepted that the complainants knew the men who assaulted them and robbed Mr Chin-Sue. She demonstrated a sufficient appreciation of the alibi evidence, and that the burden rested on the prosecution. Her decision was sufficiently reasoned in that, having acknowledged the applicant's alibi and having gone back to the prosecution's case, the learned trial judge accepted the complainants' evidence and their identification of the applicants as the individuals who had robbed and assaulted them. We find that in

this aspect of the summing up, taken as a whole, the learned trial judge adequately and fairly dealt with Havalon's defence of alibi.

[46] It is also necessary to bear in mind the approach of this court when dealing with the issue of the credibility of witnesses. Several authorities from this court acknowledge that deference must be given to a trial judge's assessment of a witness's credibility, as the judge had the advantage of seeing and observing the witness's demeanour first-hand. In one of the earlier decisions of this court, **Charles Salesman v Regina** [2010] JMCA Crim 31, McIntosh JA (Ag) (as she then was) expressed the principle in terms which remain relevant:

> "… As the tribunal of fact, it was entirely a matter for the trial judge to assess the evidence and to decide who or what he believed. There was cogent evidence before him on which he could and clearly did rely and it is not the function of this court to substitute any findings of fact for those arrived at by the trial judge, especially without the benefit of the opportunity which he had to see and to assess the witnesses as they testified".

[47] The learned trial judge conducted a sufficiently careful assessment of the witnesses and made findings of fact which are not assailable on the evidence presented. Therefore, there was no miscarriage of justice, as the learned trial judge, being a judge sitting alone, acted on what she found to be the strength of the evidence presented by the prosecution and rejected the defence. In so doing, she properly recognised that the burden was on the prosecution to prove that Havalon was where they alleged him to be. This ground also fails.

Issue 3: Whether the learned trial judge failed to properly apply the relevant principles of sentencing

Submissions for Havalon

[48] Mr Rogers contended that the sentences for illegal possession of firearm and robbery with aggravation were manifestly excessive, in light of the learned judge's order to have them run consecutively to the sentences Havalon was already serving. Counsel acknowledged that the imposition of a consecutive sentence was within the court's

discretion; however, he challenged its application in the circumstances of this case. He submitted that the totality principle was not considered at the time of sentencing, leading to a sentence that was excessive.

Submissions for Roderick

[49] In her challenge to the sentence imposed on Roderick, Ms Gordon submitted that the sentences imposed on all counts were manifestly excessive. In relation to the count for illegal possession of firearm she submitted that the usual range for cases of illegal possession of firearm is seven to 15 years' imprisonment with a usual starting point of 10 years 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'). She noted that, in this case, it is clear that the learned trial judge had started at the higher end of the usual range of sentences and in so doing erred. She contended that a starting point of 10 years would have been reasonable in these circumstances. Further, she argued that there were no aggravating factors as Roderick was never in possession of a firearm. She also submitted that a reduction of seven years should be applied due to the delay in the case.

[50] As it relates to the offence of robbery with aggravation, counsel contended that the learned trial judge had departed from the usual starting point of 12 years as recommended in the Sentencing Guidelines, and as was imposed in **Jerome Thompson v R** [2015] JMCA Crim 21. She argued that the learned trial judge should have adopted a starting point of 12 years' imprisonment instead of 15 years' imprisonment. After deducting seven years for the delay and adding two years to account for the aggravating circumstance of the stabbing, the resulting sentence would have been seven years, not 10 years.

[51] In relation to the sentence of one year imprisonment for assault, counsel acknowledged that the usual sentence for assault at common law is one year, by virtue of section 43 of the Offences Against the Person Act. She relied on the cases of **Denmark Clarke v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal

No 153/2006, judgment delivered 9 July 2009, and **Cornel Grizzle v R** [2015] JMCA Crim 15. She, however, contended that the learned trial judge did not take into consideration the time spent on remand, and thus the time for these counts should be considered as time served.

[52] Counsel also contended that the order for the sentences to run consecutively to Roderick's previous sentence resulted in a manifestly excessive sentence. Reliance was placed on **Troy Rogers v R** [2021] JMCA Crim 32.

Submissions for the Crown

[53] On the other hand, Mr Wedderburn submitted that there was no dispute that the learned trial judge correctly identified and outlined the mitigating and aggravating factors, as well as stated the normal range of sentence and the starting point for the offences. This, he noted, was in keeping with the principles laid down in **Meisha Clement v R** [2016] JMCA Crim 26, and the Sentencing Guidelines. He contended that it could not be said that the sentences were *per se* manifestly excessive, bearing in mind the mitigating and aggravating factors and the fact that the learned trial judge gave full credit for time spent on pre-trial remand.

[54] Mr Wedderburn acknowledged that it is permissible for an order for sentences to run consecutively pursuant to section 14 of the Criminal Justice Administration Act. He also acknowledged that ordering consecutive sentences may be appropriate where an offence is committed while the offender is on bail; however, he emphasised that the court should always be guided by the totality principle when deciding whether to impose such sentences. Counsel argued that the applicants' convictions for these offences, committed while they were on bail for firearm-related charges, could not be ignored and that the full extent of their criminal conduct, in these circumstances, justified the order for the sentences to run consecutively.

[55] Mr Wedderburn, however, agreed with the submissions made on behalf of the applicants that the learned trial judge did not appear to have considered the totality

principle. He submitted that this warranted an adjustment of the sentences. He recommended that in the circumstances, the sentences should be adjusted in the following manner, for the count of illegal possession of firearm, five years' imprisonment for both applicants, on the two counts of assault, one-year imprisonment on each count, on the count of robbery with aggravation, six years' imprisonment for Roderick, and, in respect of Havalon, a sentence of five years' imprisonment. He further recommended that an order be made that all the sentences were to commence on 5 December 2024, the date on which the applicants would become eligible for parole in respect of their first conviction. Reliance was placed on **Kirk Mitchell v R** [2011] JMCA Crim 1 and **R v Gerald Hugh Millen** (1980) 2 Cr App Rep 357.

The sentencing exercise

[56] In sentencing Havalon, the learned trial judge commenced by bearing in mind the maximum sentences for the offences for which they had been convicted. She then noted the mitigatory matters raised in the social enquiry report, but noted that the community report was mixed. She acknowledged that he was the father of a six-year-old child. She indicated that she took into account that there had been a delay of six years from the time of his arrest to the date of trial and that he had been awaiting sentence since 8 November 2017. She stated that this delay of six years "will be discounted in terms of sentence as is required by the law". She considered the existence of aggravating factors, specifically referring to the fact that it was he who had the gun and that he had previous convictions for illegal possession of firearm and wounding with intent, and that this offence was committed while he was on bail. She correctly identified the normal range of sentences for each offence. She expressly stated that in light of the aggravating circumstances, she would "start at the higher range and discount downwards for the time spent in custody." For the offence of illegal possession of firearm, she considered the appropriate starting point of 15 years. She gave a discount of six years for time already spent on remand, the delay in getting the matter to trial, and a further year for the delay in sentencing. Thus, she determined there should be "seven years discounted from the 15 years" and sentenced him to eight years. For the offence of assault, she noted that

there were two complainants assaulted with the firearm and indicated that she was not prepared to reduce the sentence further than the one year the law allows. For the offence of robbery with aggravation, she chose to start at the higher end of the normal range at 15 years, in light of the aggravating features identified and applied the same discount to arrive at the sentence of eight years.

[57] In relation to Roderick, the learned trial judge again considered the mitigating factors, including the fact that a report that came from the prison where he was serving time stated that he was "somewhat of a model prisoner". She noted that in addition to previous convictions similar to that of his brother, Roderick had a third for receiving stolen property. She further noted that the community report of him was unfavourable, and as a further aggravating feature, she noted the violence he inflicted on the complainant by stabbing him several times. For the offence of illegal possession of firearm, she used a starting point of 15 years and "discounted that period for six plus years and round[ed] it off to seven [years] for the delay". Therefore, the sentence she arrived at was eight years. For the offence of robbery with aggravation, the learned trial judge used a starting point of 15 years and gave a discount similar to that given to Havalon of seven years. However, the learned trial judge found a further aggravating feature to be the stabbing of the complainant and the subsequent injuries suffered. As a result, she increased the sentence from eight years to 10 years.

[58] The learned trial judge found that since the offences were committed while the applicants were on bail for a previous offence, the sentences she imposed were to run concurrently but consecutively to the term of 15 years they were then serving. Our review of the relevant records revealed that the applicants were convicted on 5 December 2014, for the offences of illegal possession of a firearm and wounding with intent, which were committed in June 2009. They were at that time sentenced to 10 years' imprisonment for illegal possession of firearm and 15 years' imprisonment, the mandatory minimum, for wounding with intent, with the sentences to run concurrently. In this case, at the conclusion of the exercise, the learned trial judge stated that Havalon "will serve

eight years after [he]…completed serving 15 years", and for Roderick, she stated that after he "completed [his] 15 years [he] shall serve an additional 10 years".

Discussion and disposal

[59] It is first essential to consider the basis upon which this court may interfere with a sentence imposed by the sentencing judge. The principle established in **R v Kenneth John Ball** (1951) 35 Cr App Rep 164 at page 165, which has been frequently cited and applied by this court, sets out the relevant standard. It states:

> "… In the first place, this 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."

[60] The need to bear this in mind is especially important when considering the sentence for assault, which was imposed on the applicants. The learned trial judge found that, given that there were two complainants, the circumstances of the assault warranted the imposition of "the one year the law allows". The learned trial judge cannot be faulted for that conclusion, and the sentence can hardly be viewed as excessive. In the authorities relied on by Ms Gordon, **Denmark Clarke v Regina** and **Cornel Grizzle v R,** a reduction in the sentence for assault from four years and three years respectively to one year was necessary since the sentencing judge in those cases had exceeded his jurisdiction in imposing a sentence in excess of what was allowed. There is no basis in law for disturbing the sentences in the manner prayed by Ms Gordon by reducing them to time served.

[61] In **Troy Rogers v R**, this court referenced **Daniel Roulston v R** [2018] JMCA Crim 20, where McDonald-Bishop JA (as she then was) reviewed several authorities from this court that dealt with sentencing, including the seminal decision of **Meisha Clement**

v R. She also considered relevant authorities from other jurisdictions noting that they offer an amalgamation of principles that should be employed by judges in the sentencing process. At para. [17] she stated that:

> "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:
>
> 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)."

[62] It is recognised that the learned trial judge demonstrated an awareness of the relevant methodology. She, nevertheless, deviated somewhat from the now accepted approach in that while she considered the relevant factors, she identified a starting point and then applied the discount for the time spent on remand before sentence. She failed to demonstrate the adjustments made to the starting point, having taken into account aggravating and mitigating factors in arriving at the sentence, which is the approach in keeping with the recognition of the need for greater objectivity, transparency, predictability, and consistency in sentencing (see **Meisha Clement v R**). The deviation from the now established approach is sufficient for this court to conduct its own assessment in determining whether the sentence imposed was manifestly excessive.

[63] It is accepted that in cases of illegal possession of a firearm, where the offence involves more than mere possession, a starting point of between 12 to 15 years is considered appropriate (see **Lamoye Paul v R** [2017] JMCA Crim 41). In the

circumstances of this case, a starting point at the higher end would be appropriate, given the number of perpetrators and the different acts facilitated by the use of the firearms. A significant aggravating factor for both applicants is that they were on bail for another firearm related offence when these offences were committed. In relation to Havalon, it is noted that the learned trial judge correctly acknowledged that it was he who had a firearm and that he had a previous conviction. Given the circumstances, a starting point of 13 years should be increased by three years to reflect the aggravating factors. In relation to Roderick, the aggravating factors of his prior convictions would justify a similar starting point to be increased by three years also.

[64] The learned trial judge correctly identified mitigating factors as the relatively favourable things said about the applicants as recorded in their antecedent and social enquiry report. In relation to Havalon, she noted that he had taken steps to go to school and acquire a skill, but noted that the community report was "mixed". Thus, when the aggravating and mitigating factors are balanced, the former far outweighs the latter. Ultimately, 16 years' imprisonment is an appropriate sentence. For Roderick, she noted that he had attended Kingston College and was gainfully employed, but his community report was unfavourable. Consequently, the aggravating factors outweighed the mitigating factors, and a sentence of 15 years' imprisonment would be appropriate. The 15 years' imprisonment, which the learned judge utilised as her starting point for illegal possession of firearm, was, therefore, not manifestly excessive.

[65] In relation to the count of robbery with aggravation, the normal range is between 10-15 years, with the usual starting point being 12 years. Once again, due to the involvement of multiple perpetrators and the use of firearms during the commission of the offence, a higher starting point is entirely justified. For both applicants, a starting point of 13 years is appropriate. A consideration of aggravating features as previously identified would justify an increase to 15 years for both applicants. A further upward adjustment to this would be justified in relation to Roderick, given that it was he who inflicted several wounds on the complainant before relieving him of the money, during

the commission of the robbery. It is noted that the learned trial judge adopted a somewhat curious approach by first allowing credit for the time the applicant spent in pre-sentence remand, but subsequently increased the sentence by two years to reflect this aggravating factor. The correct approach would be to first include the aggravating factor in calculating the appropriate sentence before applying the requisite credit. Nonetheless, even after considering the mitigating features, the aggravating factors still outweigh the mitigating ones, making a sentence of 15 years' imprisonment appropriate for Havalon and 17 years' imprisonment appropriate for Roderick. Hence, the sentences arrived at before applying the discount for time spent on pre-trial remand, and described as her starting point of 15 years for Havalon and 15 years for Roderick, cannot be regarded as manifestly excessive.

[66] It is now well established that an offender is entitled to credit for time spent in pre-sentence remand. Equally settled is the principle that such credit does not extend to periods spent in pre-sentence remand for offences unrelated to the offence for which the offender is being sentenced (see **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) and **Charley Junior v R** [2019] JMCA Crim 16). As has already been noted, as of 5 December 2014, the applicants were sentenced to 10 years' and 15 years' imprisonment. Therefore, they are not entitled to be credited for the period spent serving that sentence. The applicants were taken into custody for these offences in November 2011 and were therefore entitled to credit from that date to 5 December 2014. Thus, the learned trial judge erred when she credited the applicants for seven years as representing the entire time they spent in pre-sentence remand. They were entitled to credit for three years and one month. There were no submissions made to this court relative to this error.

Issue 4: Whether the learned trial judge failed to have regard to the totality principle, thus imposing sentences that were manifestly excessive

[67] It is apt to begin with a consideration of principles which should guide a sentencing judge in determining whether sentences should be ordered to run consecutively,

identified by this court in **Kirk Mitchell v R**. After conducting a review of several relevant authorities, Brooks JA (Ag) (as he then was) usefully distilled the principles as follows:

> "[57] …
>
> a. Where offences were all committed in the course of the same transaction, including the average case where an illegally held firearm is used in the commission of an offence, the general practice is to order the sentences to run concurrently with each other - ([**Regina v Walford Ferguson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 158/1995, judgment delivered 26 March 1999]).
>
> b. Where the offences arise out of the same transaction and the appropriate sentence for each offence is a fine, only one substantial sentence should be imposed - ([**Director of Public Prosecutions v Stewart** (1982) 35 WIR 296]).
>
> c. Where the offences are of a similar nature and were committed over a short period of time against the same victim, sentences should normally be made to run concurrently - (**R v Paddon** [(3 March 1971) Current Sentencing Practice A5.2(b)]).
>
> d. **If the offences were committed on separate occasions or were committed while the offender was on bail for other offences, for which he was eventually convicted, and in exceptional cases involving firearm offences, there is no objection, in principle, to consecutive sentences** – (**Delroy Scott, R v Rohan Chin** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 84/2005 judgment delivered 26 July 2005] and **R v Gerald Hugh Millen** (1980) 2 Cr. App. R. (S) 357).
>
> e. **In all cases, but especially if consecutive sentences are to be applied, the 'totality principle' must be considered, in application of which, the aggregate of the sentences should not substantially exceed the normal level of sentences for the most serious of the offences involved** - (**Delroy Scott, DPP v Stewart**, D.A. Thomas – Principles of Sentencing – cited above).
>
> f. Even where consecutive sentences are not prohibited, it will usually be more convenient, when sentencing for a series of similar offences, to pass a substantial sentence for the most serious offence, with

shorter concurrent sentences for the less serious ones - (**Walford Ferguson**).

g. Although it is unlikely to be the case, in matters being tried in the superior courts, if the maximum sentences allowed by statute, do not adequately address the egregious nature of the offences, then consecutive sentences, still subject to the 'totality principle', may be considered – (**R v Wheatley** [(1983) 5 Cr. App R (S) 417; **R v Harvey** [2006] 2 Cr. App. R (S) 47])." (Emphasis added)

[68] From these now accepted principles, it is apparent that the learned trial judge properly and correctly exercised her discretion in imposing the consecutive sentences, given the fact that the applicants had committed a firearm offence whilst on bail for another firearm offence. Certainly, this could be regarded as an example of an exceptional case. The challenge here is how a consideration of the totality principle would impact the aggregate sentences.

[69] Brooks JA (Ag), in **Kirk Mitchell v R**, found that the totality principle has been accurately explained by D A Thomas, in the second edition of his work, the Principles of Sentencing, as follows:

> "The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentence, to review the aggregate sentence and consider whether the aggregate is 'just and appropriate'."

[70] In **Linton Pompey v The Director of Public Prosecutions** [2020] CCJ 7 (AJ) GY, Saunders P at para. [16] puts it this way:

> "…The sentence imposed upon a convicted person should ultimately be neither too harsh nor too lenient. It must be proportionate. The totality principle requires that when a judge sentences an offender for more than a single offence, the judge must give a sentence that reflects all the offending behaviour that is before the court. But this is subject to the notion that, ultimately, the total or overall sentence must be just and proportionate. This remains the case whether the individual sentences are structured to be served concurrently or consecutively."

[71] This court is obliged, bearing in mind the totality principle, to consider whether the aggregate of the sentences imposed substantially exceeds the normal level of sentences for the most serious of the offences involved. It is not immediately apparent from the sentences imposed which of the offences the learned trial judge considered the most serious, since her starting point for both illegal possession of firearm and robbery with aggravation was 15 years. The aggregate sentence for all offences, before the deduction of any credit for time spent on pre-sentence remand, would amount to 30 years' imprisonment. Given that the learned trial judge added two years to Roderick's sentence after calculating the credit for time spent on pre-sentence remand, while Roderick would serve 25 years while Havalon would serve 23 years. The offence of robbery with aggravation under section 37(1)(a) of the Larceny Act attracts a maximum sentence of 21 years' imprisonment and the maximum sentence for illegal possession of firearm is life imprisonment. However, it must be noted that the normal range for sentences for usage of an illegal firearm to commit an offence is 12 to 15 years, and for robbery with aggravation, 10 to 15 years. Hence, the sentences imposed exceeded the normal range for such offences.

[72] Some 14 years ago, in **Kirk Mitchell v R**, Brooks JA (Ag) made an observation which is just as relevant today. At para. [56], he stated:

> "In Jamaica where the phenomenon of the use of illegally held firearms is a scourge affecting the land, the imposition of consecutive sentences, subject to the totality principle, is not past its time, especially in cases of atrocious behaviour on the part of the offender. We, however, must bear in mind that the maximum sentence for the offences of illegal possession of firearm, shooting with intent and wounding with intent is life imprisonment in each case. In the circumstances of the ordinary case therefore, where the offences arise from a single transaction, there is, in our view no need to resort to imposing consecutive sentences. We are not convinced that in the average case, there should be any departure from the recommendations set out in **Walford Ferguson**, which was cited above."

The recommendations in **Walford Ferguson** referred to are captured in the distilled principles set out above.

[73] This is not an ordinary case in which the offences arose from a single transaction. In these circumstances, the use of illegal firearms, especially by assailants who had been previously charged for similar conduct shortly before the commission of these offences, renders the case exceptional. The fact that there were multiple assailants, coupled with the manner in which the complainants were assaulted, with one being brutally stabbed and robbed, places the conduct within the category of atrocious behaviour. Therefore, even bearing in mind the totality principle, the sentences imposed can properly be regarded as necessary to reflect the egregiousness of the applicants' conduct. Accordingly, the sentences are proportionate and should not be disturbed, save a consideration of whether there should be an adjustment to reflect credit for time spent on pre-sentence remand.

[74] As has already been noted, the learned trial judge erred in the calculation of the years credited for time spent on pre-sentence remand. We, however, recognise that an adjustment to reflect the correct years to be credited would result in an increase in the remainder of the time the applicants would have to spend in custody. There is no dispute that on an appeal against sentence, this court has the statutory jurisdiction to impose a sentence which is more severe than the sentences passed at the trial, if we think a different sentence ought to have passed (see section 14(3) of the Judicature (Appellate) Act). This provision has been described as involving the exercise of a discretion which is "circumscribed by principles of natural justice and, therefore, cannot be arbitrarily exercised" (see **Cornel Dawns v R** [2022] JMCA Crim 17 ('**Cornel Dawns'**)). This court has been mindful of the guidance given in **Earl Williams v The State** [2005] UKPC 11 ('**Earl Williams**') that in an application for leave to appeal sentence, if an appellate court is giving consideration to utilising its power to increase a sentence, it should give the applicant or his counsel an indication to that effect and an opportunity to address the

court or to withdraw the application. Their Lordships confirmed that failure to do so would, in their opinion, be "unfair and a breach of natural justice" (see para. 10).

[75] In this case, although we are not seeking to increase the actual sentences which were imposed, the fact that the impact of the adjustment of the credit for time spent in custody would impact adversely the remaining time the applicants would have to serve caused some concern. This is especially so since this is an application for permission to appeal in which we heard no submissions on the issue. In **Cornel Dawns,** this court considered the applicability of **Earl Williams** in circumstances where there was an appeal against sentence and the error of the sentencing judge identified was such that if this court intervened, whilst not disturbing the sentence of life imprisonment which was imposed for the offence of murder, would mean an increase in the time the appellant would have to spend in custody before being eligible for parole. This court found that despite the fact that **Earl Williams** concerned an application for leave to appeal, the general principles expressed there were "inescapably applicable". At para. [54] Brown JA (Ag) (as he then was), writing on behalf of the majority, stated:

> "The actuation of the statutory power to increase the sentence of an appellant is subordinated to the time-hallowed principles of natural justice. In particular, the appellant must be afforded an opportunity to be heard, which presupposes notice being given of the court's intention to vary his sentence to his disadvantage."

It was concluded that although this court was hearing an appeal, since no notice was given to the appellant or his counsel that the sentence stipulated to be served before becoming eligible for parole would be increased, the appellant got no opportunity to be heard on the issue. Accordingly, this court felt constrained from disturbing that stipulated sentence.

[76] Thus, being mindful of the practical effect of adjusting the credit for time spent in custody in this application for leave to appeal, it would have been just for the applicants to have been given notice and afforded an opportunity to be heard on the issue. As such, we feel similarly constrained from making this adjustment that would vary their sentences

to their disadvantage. Therefore, we are obliged to refuse the applications for leave to appeal the sentences such that the sentences imposed will remain.

Conclusion

[77] There was sufficient evidence before the learned trial judge to support the finding that Havalon participated in the offence of robbery with aggravation. The learned trial judge also properly addressed the issue of alibi raised by Havalon, and, having found the prosecution's evidence to be cogent and credible, and having accepted that the complainant's identification of the applicants was not mistaken she properly rejected the alibi defence. Having found no merit in the grounds of appeal advanced by Havalon in relation to his convictions, the application for leave to appeal the convictions is refused. Although Roderick did not actively pursue his application for leave to appeal his conviction, that application is likewise refused. While the learned trial judge deviated from the accepted approach to calculating the appropriate sentence, on our assessment, the sentences she arrived at were not manifestly excessive. The applications for leave to appeal against sentence are refused. The circumstances of these offences warrant the order that the sentences run consecutively to sentences imposed on 5 December 2014.

[78] Accordingly, it is ordered as follows:

1. The applications of both Havalon Burnett and Roderick Burnett, for leave to appeal against convictions and sentences, are refused.

2. As ordered by the court on 23 February 2018, the sentences are to run concurrently but consecutively to the sentences previously imposed on 5 December 2014. Therefore, the sentences are to commence after the applicants have served the previous sentences imposed on 5 December 2014.