[2026] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO COA2021CR00023

ROHAN DIXON v R

Mrs Melrose Reid for the appellant

Ms Paula Llewellyn KC, Director of Public Prosecutions, and Ms Carolyn Wright for the Crown

4 July 2023 and 8 May 2026

Criminal law – Illegal possession of firearm – Shooting with intent – Whether evidence sufficient to support convictions – Sentencing – Methodology – Time spent in pre-sentence custody – Effect of pre-trial delay – Whether breach of constitutional right to trial within a reasonable time – The Firearms Act, section 20(1)(b) – The Offences Against the Person Act, section 20(1) – Constitution of Jamaica, sections 13(2), 16(1) & 20

D FRASER JA

Background

[1] The appellant, Rohan Dixon, was convicted on 4 February 2021, in the High Court Division of the Gun Court, in the parish of Kingston, for the offences of illegal possession of firearm (count 1) and shooting with intent (count 2). This followed a trial before Morrison J (the 'learned trial judge'). He was sentenced on 15 April 2021 to imprisonment for 15 years on count 1 and 20 years on count 2, with the sentences ordered to run concurrently.

[2] On 18 March 2022, he was granted leave by a single judge of this court to appeal against his sentence, while leave to appeal his convictions was refused. He

now renews his application for leave to appeal conviction and pursues his appeal against sentence.

The prosecution's case

[3] The prosecution's case is that on 29 July 2015, at some time after 7:30 am, police officers on an operation in Mannings Hill District in the parish of Saint Andrew arrived at a targeted house. They found the house empty, but there was evidence that its occupants had left in a hurry. The police hid in the area and kept watch, in the event of the occupants' return.

[4] The complainant, Detective Inspector (then Sergeant) Franz Morrison, was one of the police officers on the operation. He testified that whilst positioned at the rear of the house, looking through a window that overlooked "down the hill", he observed two armed men "coming up the hill" at the rear of the premises. He went to hide at the left side of the house behind a wall and saw a man approaching his location with a firearm pointed in his direction. When the man was at a distance from him of "12 feet at maximum", he shouted, "Police, don't move!". The man fired at him, but he was not hit. He returned fire, and the man turned, ran from the yard and escaped into bushes. When he went in search of the man in the bushes, he saw "blood trails at different sections".

[5] The evidence of Detective Corporal Desmond Brown was that, acting on information received on 13 August 2015, whilst on operation with a team, he apprehended the appellant at a dwelling house situated at 160 Hatfield Avenue, Gregory Park, Saint Catherine. He previously knew him as "Knockie, o/c Indian, o/c Nicko" for approximately five years or more. He observed a wound to the appellant's ankle. On being cautioned the appellant's response was, "[O]fficer Brown a site me go pan round a Mexico and steel run inna mi foot". Subsequently, at the Portmore lockup, the appellant allegedly made an oral admission to Detective Corporal Brown that he was present on the scene. He said that he followed Shortman uptown, the police came, shots were fired, and he got shot in his foot.

[6] Sergeant Andrea Murray's statement, which was received in evidence, outlined that, on 20 August 2015, a video identification parade was conducted at the Portmore Video Identification Unit in Saint Catherine. There, Detective Inspector Morrison pointed out the appellant as the shooter he had observed at the time of the incident.

[7] Sergeant Patrick Henry, the investigating officer, testified that he visited the scene on the day of the incident and spoke to several police officers, including Detective Inspector Morrison. Further, that on 18 August 2015, he saw the appellant at the "hundred man" police station and observed a "wound to his left foot". Upon his enquiry about the cause, the appellant indicated that his attorney advised him not to answer any questions.

[8] He further testified that, on 24 August 2015, the appellant was cautioned for the offences of shooting with intent and illegal possession of firearm based on the appellant being identified as the perpetrator during a visual identification. The appellant's response was, "[M]e nevah do nothing; ah run me run… ah run me run outta di house and got shot. God know, star" and "[M]e nevah have nuh gun and dem thing deh. Ah dem shoot offa mi". Sergeant Henry further testified that he charged the appellant with the two offences. He also outlined that three other police witnesses, who had recorded statements, had resigned their posts and migrated.

The defence case

[9] The appellant gave sworn evidence. He denied that he was involved in the shooting. He, however, indicated that he was unsure where he was at the relevant time. He denied making the admissions as alleged by the prosecution witnesses, but agreed he told Detective Corporal Brown that steel had run into his foot.

Evidence in rebuttal

[10] The prosecutor successfully applied to reopen the prosecution's case and call evidence in rebuttal of the accused man's denial of being present at the crime scene. The learned judge granted the application relying on the authorities of, inter alia, **R v Sullivan** [1923] 1 KB 47; **R v Crippen** [1911] 1 KB 149, (1910) 5 Cr App Rep 255;

R v Levy; R v Tait (1966) 50 Cr App R 198, **R v Scott** (1984) 79 Cr App R 49 and, **R v Frost** (1839) 9 Car & P 129 . That evidence was given by Ms Ellisa Dawkins, chief investigator from the Independent Commission of Investigations (INDECOM). She stated that, on 11 September 2015, she interviewed the appellant at the Spanish Town Police Station Lock-up. He told her that, on 29 July 2015, he was shot by police during an incident in the Stony Hill area, and was later arrested by the police. She recorded a voluntary statement to this effect, which he signed.

Grounds of appeal

[11] Counsel for the appellant was granted leave to abandon the original grounds of appeal and rely on the following three supplementary grounds, which the court necessarily reformulated for clarity, based on how the case was argued:

a) The learned trial judge failed to analyse the prosecution's case and to note that there was a lurking doubt as to whether the appellant had a firearm and failed to note that the evidence did not meet the criminal standard to establish that the appellant was in possession of a firearm.

b) The learned trial judge failed to properly analyse the evidence of Inspector Franz Morrison, which evidence has not met the criminal standard, that the appellant fired at the police, to have constituted the offence of shooting with intent.

c) (A) The learned trial judge failed to establish how he arrived at the sentences for illegal possession of firearm *vide* section 20(1)(b) and for shooting with intent, bearing in mind the applicable sentencing guidelines for illegal possession of firearm. The learned trial judge also failed to apply the two month's pre-trial time spent in custody (albeit minimal but "one one cocoa full basket").

(B) The learned trial judge failed to grant time for the six years the appellant waited before his trial was heard and determined, which amounts to a

breach of the appellant's constitutional right to a fair hearing within a reasonable time.

The submissions

Counsel for the appellant

[12] In respect of ground 1, counsel advanced that the learned trial judge erred in not realising that there was no evidence supportive of a gun being present, particularly since the gun and its spent shells were not recovered and it was not described. She cited the cases of **Purrier v Bailey** [1976] 14 JLR 97; **R v Paul Lawrence** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/1989, judgment delivered 24 September 1990; **R v Christopher Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 169/1987, judgment delivered 21 March 1988; and **R v Kirk Manning** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 43/1999, judgment delivered 20 March 2000. Hence, she contended there was a "lurking doubt". She cited in support **R v Cooper** [1969] 1 All ER 32, Archbold Criminal Pleading, Evidence and Practice (2006) para. 7-47 to 7-49 and the case of **R v Jarrett, James**, **R v Whylie** (1975) 14 JLR 35.

[13] On ground 2, the basis of the complaint was that there was nothing to indicate that the appellant saw the officer, who was hiding behind a wall, and no proof that he fired at the officer, and therefore, he intended to shoot him. She pointed to section 20(1)(a) of the Offences Against the Person Act and noted that the officer never said the appellant shot at him. She contended the evidence did not support the conviction.

[14] On ground 3A (styled by counsel as sentence segment 1), counsel reminded the court that a sentence may be overturned where a sentencing judge does not follow the principles of sentencing. She cited the case of **R v Kenneth Ball** [1951] 35 Cr App R 164.

[15] She complained that the learned trial judge did not address each count separately during sentencing. She said there was a deviation from the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts,

December 2017 ('the Sentencing Guidelines'), and the learned trial judge failed to give reasons showing how he arrived at 15 years for illegal possession of firearm, the top of the range, and 20 years for shooting with intent. Counsel outlined a number of factors which she submitted showed that the case was not one which warranted the sentences being of the magnitude imposed. She relied on the cases of **Leon Barrett v R** [2015] JMCA Crim 29; **Michael Burnett v R** [2017] JMCA Crim 11; **Natalie Williams v R** [2020 JMCA Crim 19 **Meisha Clement v R** [2016] JMCA Crim 26; **Daniel Roulston v R** [2018] JMCA Crim 20; and **Callachand & Anor v The State of Mauritius (Mauritius)** [2008] UK PC 49.

[16] Counsel also cited several cases for comparison where the sentences for illegal possession of firearm were below the Sentencing Guidelines upper range of 15 years. Regarding the count for shooting with intent, counsel similarly cited cases for reference where the sentence passed was less than 20 years.

[17] Counsel additionally complained that the learned trial judge failed to credit the appellant with the two months he spent in pre-trial custody, when he was not on remand for any other offence. Counsel cited in support the cases of **Romeo Da Costa Hall v The Queen** [2011] CCJ 6; **Curtis Grey v R** [2019] JMCA Crim 6; **Toussaint Solomon v R** [2020] JMCA App 9; **Cornelius Robinson v R** [2022] JMCA Crim 16; and **Troy Walker v R** [2023] JMCA App 9 on this point.

[18] On ground 3B (referred to by counsel as sentence segment 2) counsel submitted that the appellant's constitutional right to a fair trial within a reasonable time was breached by the six-year delay in his trial commencing. A delay which from his affidavit, the appellant contended he had not contributed to. Instead, he averred that the fault was wholly that of the State. Counsel relied on the cases of **R v Jordan** [2016] SCC 27; **Tussan Whyne v R** [2022] JMCA Crim 42, **Taito v R** [2002] UKPC 15; **Darmalingum v The State (Mauritius)** [2000] UKPC 30; **Mervin Cameron v R** [2018] JMFC FULL 1; **Techla Simpson v R** [2019] JMCA Crim 37; and **Lloyd Forrester v R** [2023] JMCA Crim 20.

[19] Based on grounds 3A and 3B, counsel submitted that the sentence of 15 years on count 1 should be reduced to seven to 12 years and that on count 2, 12 to 15 years.

Counsel for the Crown

[20] Ms Wright, submitting for the Crown, stated that there was sufficient evidence to substantiate the decision of the learned trial judge who was justified in his conviction and sentencing of the appellant. Counsel argued that in the learned trial judge's summation, he carefully examined the evidence that was given through the prosecution witnesses. Counsel for the Crown also pointed out that the learned trial judge applied **R v Turnbull** [1976] 3 All ER 549 and **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008, in assessing the identification evidence. The Crown relied on **R v Christopher Miller**, indicating that there was sufficient evidence proving the presence of a gun. It was submitted that if someone fires in a person's direction with no other party present the shooter is firing at that person.

[21] It was further submitted that the sentences were just and appropriate for the offences in the circumstances of the case and that the usual principles of sentencing were considered by the learned trial judge. As such, the court should not disturb the sentences. Reliance was placed on **Meisha Clement v R** [2016] JMCA Crim 26; **Ryan McLean, Richard Gordon & Christopher Counsel v R** [2021] JMCA Crim 21; **Danny Walker v R** [2018] JMCA Crim 2; **Troy Barrett v R** [2022] JMCA Crim 24; and **Lincoln v Mckoy v R** [2019] JMCA Crim 35 at para. [54].

[22] Regarding the complaint alleging a constitutional breach of the appellant's right to a fair trial within a reasonable time, counsel for the Crown relied on the affidavit of Carolyn Angeline Wright in response to the appellant's affidavit. In that affidavit, a table compiled from the minute sheets on file was utilised to explain the reasons for delay, and ground the submission that the delay was not wholly or mainly the fault of the State. Counsel submitted that in all the circumstances, the delay, which included

seven adjournments at the instance of the defence, should not result in any deduction from the sentences imposed.

Discussion and analysis

Ground 1

[23] The complaint on this ground is that the evidence does not support the finding of the presence of a firearm. The court agrees with counsel for the Crown that the learned trial judge was very thorough in his assessment of the prosecution's case. The evidence revealed that Detective Inspector Morrison saw the appellant walking into his view and proceeding into the yard with a short gun in his hand. He, however, gave no description of the gun. At the time of the shooting, Detective Inspector Morrison who was then a maximum 12 feet from the appellant said, in relation to the firearm, "I then heard a loud explosion and saw a flash of light coming from the nuzzle [sic] of his firearm". He said the explosion sounded like a gunshot.

[24] In **R v Neville Purrier and Tyrone Bailey**, it was held that there needed to be evidence to prove that the appellant had used or attempted to use a firearm or imitation firearm as defined in section 25 of the Firearm's Act. It was not permissible for judicial notice to be taken of the knowledge of guns to find section 25 satisfied, in the absence of credible factual evidence.

[25] Whether the evidence given in a case in proof of a firearm is adequate is a question of fact in every case. Subsequent cases have demonstrated that the threshold for proving the use of a firearm is not very high. In **R v Christopher Miller**, the firearm was found to be sufficiently, in fact, amply described in these terms, "[t]he mouth was brown coloured resembling small arms that policemen carry". Carey JA, giving the judgment of the court, stated:

> "The point maintained is that, that is not enough. In our view that is ample evidence. It is not necessary to give detailed descriptions of the firearms, because it must depend on the intelligence and power of observation of the witness: it must be extremely difficult nowadays to find a person who does not know

,

> a gun when he sees a gun. Insofar as we are concerned the evidence that was put forward...was more than ample"

[26] For emphasis, a passing reference is made to the case of **Paul Lawrence v R**. In that case, the witnesses all saw the handle of the firearm in the appellant's waist. One witness felt something at her neck, which she thought was a firearm, and another was particularly familiar with firearms, as she had relatives who were police officers. This court agrees with the trial judge that such evidence supported the reasonable inference that the appellant was armed with either a real or an imitation firearm. See also **Kamar Morgridge v R** [2011] JMCA Crim 7 and that case's reliance on **R v Christopher Miller** and **Regina v Paul Lawrence**.

[27] In keeping with the reasoning in **R v Christopher Miller**, the evidence of the presence of a firearm coming from Detective Inspector Franz Morrison is, in this case, ample. The learned trial judge was satisfied he made adequate and unobstructed observation from 12 feet away. The indication that he saw a short gun coupled with the sound of the explosion sounding like a gunshot along with the flash of light is sufficient evidence and ample proof, accepted by the learned trial judge, that Detective Inspector Franz Morrison, in fact saw the appellant with a short gun. Additionally, the witness is a police officer who at the time of trial had almost two decades' service. The reasonable and inescapable inference is that he was thus very familiar with guns. That familiarity goes beyond the point made with respect to civilians in **R v Christopher Miller** that "it must be extremely difficult nowadays to find a person who does not know a gun when he sees a gun". Once the learned trial judge found the evidence credible, which he was entitled to and clearly did, the evidence of the proof of a firearm was substantial. Accordingly, this ground has no merit and must fail.

Ground 2

[28] The gravamen of the complaint on ground 2 is that, as the witness was hiding behind the wall at the house corner, there is no evidence that the appellant saw and shot at the witness with intent to do him grievous bodily harm. Further, counsel

submitted that nowhere in the evidence does Detective Inspector Morrison, a police officer of 19 years' experience, clearly state that the appellant fired at him. Counsel further submitted that had the Crown indicted in the alternative, that the shooting was with intent to resist or prevent the appellant's lawful apprehension, there may have been a higher probability of the conviction being valid.

[29] Counsel advanced that to convict the appellant, the learned trial judge focused on the multiple versions of how he sustained his injury which the court accepted he gave — he ran out of the house and got shot *(*said to the investigating officer Sergeant Patrick Henry*);* steel ran into his foot; and, that it was Shortman who had the gun and left it in the bushes, police came and fired shots and he got shot in his foot *(*said to Corporal Desmond Brown*);* he brought food to Mike who was hiding from the police, and whilst there the police came and they ran from the house and heard lots of gunshots (said to INDECOM investigator Ms Ellisa Dawkins); and his alibi — and not on the "flimsy" evidence of the prosecution's witness to convict the appellant.

[30] It is, however, clear from the transcript that the learned trial judge carefully considered the positioning of the appellant and Detective Inspector Morrison at the time of the shooting. When reviewing the evidence, he noted the following at page 208:

> "He had walked into the area very slowly, and as he kept his eyes on him. When I say that he had walked to the area slowly, that was in reference to the [appellant], he the witness kept his eyes on him and nothing obstructed his view of him. He says his chest area was to the wall and he was facing the back gate. Said the wall which was there did not obstruct him or impeded him of [sic] the view of the [appellant]. He placed himself at an angle where he had an unobstructed view of the gate. He looked at him, by putting his head out from time to time, obviously he would not have presented himself as a target, so he put his head out, pulled it back in, put his head out and pulled it back in from time to time. But he looked at him whilst he was in the yard, beyond the gate, he saw his face continuously for four seconds."

[31] Further, the evidence indicates that Detective Inspector Morrison saw the appellant holding the gun with both hands, pointed forward in the direction he, Detective Inspector Morrison, was. When the appellant was a maximum 12 feet away from him Detective Inspector Morrison shouted, "Police, don't move". Then he heard a loud explosion sounding like a gunshot and saw a flash of light coming from the "nuzzle" of the appellant's firearm. This was reviewed by the learned trial judge at page 206 of the transcript and later accepted as fact.

[32] According to the Inspector's evidence, he was the only police personnel in the vicinity where he was. It is necessary to draw a reasonable inference concerning intention, for the offence of shooting with intent to be completed when the evidence supports such a finding. That inference is capable of being drawn when a firearm, a deadly weapon, is pointed by an assailant in the direction of a person and discharged. In fact, as a witness cannot go into the mind of an assailant, witnesses are often only able to say that the firearm was pointed in their direction; not that the person fired at them. It is from the evidence of a firearm (a lethal weapon) being pointed in the witness' direction and discharged, that the reasonable inference can be drawn, and was drawn by the learned judge in this case, that the appellant fired at the witness with the specific intention to cause him really serious or grievous bodily harm.

[33] The success or failure of the count of shooting with intent does not depend on whether the intended victim has some cover behind which to shelter. It depends on whether the evidence discloses that the assailant discharged a firearm, a deadly weapon, in the direction of the intended victim. From that evidence, the intent to cause grievous bodily harm can have been inferred. That is so, as, but for the cover, or should the intended victim emerge from cover, or the cover prove inadequate to protect the intended victim, grievous harm could be caused. Accordingly, on the evidence accepted by the learned trial judge, the fact that the witness had the presence of mind to protect himself behind cover, in no way undermines the making out of the offence of shooting with intent. This ground, therefore, also has no merit and fails.

Ground 3

[34] The complaint against the sentences on both counts 1 and 2 is in three conceptual parts. Firstly, it is contended that the learned trial judge failed to establish how he arrived at the sentences for illegal possession of firearm and shooting with intent, bearing in mind the sentencing guidelines for those offences. Secondly, counsel argued that the appellant was not credited with the time he spent in pre-sentence custody. Thirdly, counsel submitted that the delay in the appellant coming to trial breached his constitutional right to a fair trial within a reasonable time, for which he should receive a reduction in his sentences.

[35] Counsel contended that there were factors in favour of the reduction in sentence on count 1. She argued as follows:

i. The learned trial judge perhaps thought the 15 years was mandatory.

ii. The learned trial judge failed to note that the appellant was indicted under section 20(1)(b) of the Firearms Act and not section 25(2).

iii. The appellant received a gunshot to his foot.

iv. None of the police officers was injured.

v. The learned trial judge failed to:

a) Apply the sentencing guidelines and show how he arrived at the top of the range;

b) Credit the appellant for the two months spent in pre-trial custody; and

c) Consider the six years' delay in the appellant's trial which amounted to a breach of his constitutional right to a fair trial within a reasonable time (see discussion of the third complaint).

[36] The following cases where the defendant received a sentence of less than 15 years for illegal possession of firearm, were relied on by counsel: **Kimani McDermott v R** [2022] JMCA Crim 38 (eight years); **Ferdinand Phipps v R** [2021] JMCA 45 (12 years); **Joel Deer v R** [2014] JMCA Crim 33 (10 years); **Michael Evans v R** [2015] JMCA Crim 33 (10 years); and **Michael Burnett v R** [2017] JMCA Crim 11(eight years).

[37] Regarding shooting with intent (count 2), the factors in favour of the reduction of sentence outlined by counsel included the following:

i. No officer was shot;

ii. There were no special or exceptional circumstances about this shooting, and it was not in a public place where others could have been put in jeopardy;

iii. Only one shot was fired; and

iv. The appellant ran after firing and did not engage the police in cross firing.

[38] Counsel relied on the following cases where the defendant received a sentence of 15 years or less for shooting with intent at police officers: **Travis McPherson and Odean Samuels v R** [2017] JMCA Crim 36 (10 years); **Kimani McDermott v R** (15 years'); **Andre Brown v R** [2014] JMCA Crim 44 (15 years) and **Kirk Mitchell v R** [2011] JMCA Crim 1 (15 Years). The following cases were also relied on where the defendant was convicted of shooting with intent at civilians and received similar sentences: **Wayne Samuels v R** [2013] JMCA Crim 10 (12 years); **Davin McDonald v R** [2016] JMCA Crim 31 (15 years) and **Michael Ewen v R** [2016] JMCA Crim 19 (10 years).

[39] In relation to the first challenge, we note that the learned trial judge adverted to the four classical principles of sentencing: retribution, deterrence, protection of society and reformation. He stated that he would not focus on retribution and that the other three could be combined in the sentence he would pass. He indicated that

he would look at the mitigating and aggravating factors. He mentioned that the appellant played football and that he was young. He noted that the appellant had a bad social enquiry report, as the community feared him, and that he had engaged the lawfully constituted authority in a shootout. He then pronounced the sentence of 15 years for illegal possession of firearm and 20 years for shooting with intent

[40] The learned trial judge did not, however, disclose his mind following the steps outlined in cases such as **Meisha Clement v R** and **Daniel Roulston v R**. He did not determine the usual range for offences of that nature, although he did say he had done a case some time ago and a sentence of 20 years for shooting with intent had been upheld. Neither did he choose an appropriate starting point nor specifically indicate what mitigating and aggravating features led to the sentence moving to a point higher or lower along the range. He also failed to specifically give credit for time spent in pre-trial custody. Accordingly, the learned judge erred in principle, and it is the responsibility of this court to set aside the sentences and resentence the appellant.

[41] The circumstances of this offence show that the appellant was armed and had the gun in a position ready to be used if necessary. In those circumstances, considering the usual range of seven – 15 years, a starting point of 12 years is appropriate for count one. The main mitigating factor is the appellant's youth. The learned trial judge mentioned as well that he was known for playing football. Being generous, that would take the sentence down to 11 years.

[42] The aggravating features are significant. As noted by the learned trial judge, the appellant had a very poor social enquiry report showing that he was feared in his community. Further, he had two previous convictions for illegal possession of firearm and illegal possession of ammunition, offences committed after he had been charged for the offences, the subject of this appeal. At the time of sentencing, he had just recently concluded his sentences for those two previous convictions. Those aggravating factors together move the sentence back to at least the 15 years imposed by the learned trial judge.

[43] In relation to count 2 for shooting with intent, there is a mandatory minimum sentence of 15 years. Again, his youth is the mitigating factor of note, which was considered by the learned trial judge. The aggravating factors already outlined, additionally include the fact that he was shooting at the lawfully constituted authority. Considering the mitigating and aggravating factors in the round, takes the sentence back to at least the 20 years imposed by the learned trial judge.

[44] We now turn to the second challenge to the sentences imposed on the appellant. It can be easily disposed of. The learned trial judge had noted that the appellant was in custody for two months following the expiration of his previous sentences. There was, however, no indication that, as required by case law, a mathematical deduction was made of the two months. This deduction may however only be made on one count. As stated in **Callachand & Anor v The State of Mauritius** [2009] 4 LRC 777 at para. 10, "a defendant who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once". See also **Adrian Campbell, Rushane Goldson and Fabian Smith v R** [2026] JMCA Crim 2 at para. [208] on this point. To enable the appellant to benefit from the deduction, it will be applied to count 2 on which the higher sentence was imposed. Therefore, those two months should be deducted from the sentence determined on count 2, to arrive at a final sentence.

[45] The third challenge requires more consideration. This court has accepted that where the constitutional rights of an appellant to a fair trial within a reasonable time has been breached by delay, in an appropriate case, a reduction in sentence is one of the remedies open to be granted by the court. See cases such as **R v Jordan** [2016] SCC 27 (Canadian authority that has informed some of our local jurisprudence on the matter); **Mervin Cameron v Attorney General of Jamaica** [2018] JMFC FULL 1; **Techla Simpson v R** [2019] JMCA Crim 37; **Tussan Whyne v R** [2022] JMCA 42; and **Lloyd Forrester v R** [2023] JMCA Crim 20.

[46] On the face of it, five and a half years is a long time to wait for trial, even considering that for a significant portion of that time the appellant was serving

sentences for two previous convictions. The critical determinant is who was to blame for the delay. The appellant in his affidavit averred that he was on bail for these charges then he was taken into custody on separate charges of illegal possession of firearm and illegal possession of ammunition. In seeking to account for the delay he noted that he had one lawyer and then another, that sometimes the police did not come to court, and that at times his lawyer, Mr Gentles, was doing other trials. He lamented that his trial took almost six years to start and, in his words, "the system nuh pretty cause I still don't see why the system tek so long to try my case".

[47] Counsel for the Crown prepared an affidavit showing from the minute sheets on file, the reasons for all the adjournments granted in this matter, prior to the trial commencing. The process of disclosure, bail application and plea and case management hearing was concluded by 11 December 2015. Thereafter, there were 16 trial dates when the matter did not proceed. A review of the reasons for adjournments shows that the State and the defence both share responsibility for the delay.

[48] The defence was ready, but the prosecution was not, on 31 May 2016, 9 May 2017, and 13 November 2018, as the prosecution's witnesses were unavailable due to illness and resignation from the Jamaica Constabulary Force. The prosecution was ready on 29 November 2016 and defence counsel was present. However, another matter was set to start. That situation was repeated on 2 December 2016. These were two examples of administrative delay within the system. The prosecution was also ready on 16 November 2020, but defence counsel was absent and the appellant was not brought.

[49] The appellant had been remanded on both sets of charges, and eventually was serving sentences for the second set of offences committed while on bail for the offences now under review. There were actually four occasions when he was not brought on trial dates, between 5 February 2018 and 13 January 2021. However, on none of those occasions was the appellant's absence the sole factor preventing the trial from proceeding. Due to the absence of defence counsel and witnesses, neither

side was ready to proceed on 11 April 2016 (the first trial date), 21 February 2017, 5 February 2018 and 23 November 2020. On one occasion, 5 October 2016, an Act of God, a hurricane, necessitated an adjournment.

[50] Over the life of the case there were also seven requests for adjournments made on behalf of the defence spread across both mention and trial dates This was due, in part, to two changes of legal representation by the appellant between 2015 and 2020, counsel being engaged in another matter, counsel being absent ill and new counsel wishing to take instructions and have "mature discussions" with the appellant.

[51] The matter did not come before the court in 2019.

[52] Having examined the minute sheets, delays occasioned by the Crown and administrative delays account for approximately 60% of the delay, while the defence is responsible for the remaining 40%. The question, therefore, is whether the period of delay of approximately three years and four months, for which the State is responsible, breached the appellant's constitutional right to a fair trial within a reasonable time?

[53] Section 16(1) of the Constitution of Jamaica provides:

> "16. -(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[54] In determining whether the appellant's constitutional right to a fair hearing within a reasonable time has been breached the court has to consider the role played in the delay by the State; whether the appellant has contributed to the delay; the institutional realities of Jamaica's justice system, bearing in mind our economic and socio-cultural conditions; and, importantly, whether the delay has prejudiced the appellant's presentation of his defence. The applicable principles were summarised in the case of **Lloyd Forrester v R** as follows:

"[55] It is necessary, therefore, to examine the reasons for the delay as advanced by the appellant in his affidavit and by the State in the table provided. McDonald-Bishop JA, in **Julian Brown v R**, having considered several authorities, concluded at para. [86] of her judgment that '... for there to be a breach of section 16(1) of our Charter, there must be evidence that the delay complained about is due to the action or inaction of organs of the State'.

[56] Also, at paras. [87] and [88], she stated:

> '[87] Furthermore, the right is not absolute and, so, can be limited by the State if the breach is demonstrably justified in a free and democratic society as provided by section 13(2) of the Charter. Section 13(2) of the Charter states:
>
> > 'Subject to sections 18 and 49, and to subsections (9) and (12) of this section, **and save only as demonstrably justified in a free and democratic society** –
> >
> > a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, **16** and 17; and
> >
> > b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights....' (Emphasis added)
>
> [88] Indeed, the Privy Council, in **Flowers v The Queen**, in speaking of the right as it was then under section 20(1) of the Constitution, affirmed its dicta in **Bell v The Director of Public Prosecutions** [1985] AC 937 that '...the right of an individual accused to be tried within a reasonable time [was] not an absolute right but must be balanced against the public interest for the attainment of justice'. In this regard, Lord Templeman, speaking on behalf of the Board in **Bell v Director of Public Prosecutions**, stated, in part, at page 953:
>
> > 'Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by section 13 and 20 of the Constitution

> of Jamaica, **the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica**.' (Emphasis as in original)
>
> [57] Also at para. [89], McDonald-Bishop JA stated that the investigation of the issue of delay must involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case. It is within this context that the reasons for the delay will be considered."

[55] In both **Techla Simpson v R** and **Tussan Whyne v R,** each appellant was given a reduction of two years for an eight-year delay in the commencement of their trials. In **Techla Simpson v R,** the Crown was found to be responsible for most if not all of the delay, while in **Tussan Whyne v R**, the delay was equally contributed to by the Crown and the defence. A delay of nine years and two months attributed to the State in **Lloyd Forrester v R**, yielded a reduction in sentence of one year.

[56] The case of **Germaine Smith and others v R** [2021] JMCA Crim 1, is perhaps most useful for comparison. In that case, there was a delay of approximately three years and four months in the commencement of trial. This court concluded that there was no breach of the constitutional right to a fair trial within a reasonable time, arising from this delay. A similar conclusion is indicated in the instant case. The appellant has not stated that his defence was prejudiced in any way by the overall delay or the delay, which is the responsibility of the prosecution. Thus, the interest of having justice done far outweighs any prejudice in the case at bar - see **Maitland Reckford v R** [2022] JMCA Crim 5. Further, the period of three years and four months attributable to the State is not egregious, considering the institutional realities of Jamaica's justice system. It follows that the delay attributable to the State in this

matter coming to trial did not breach the appellant's constitutional rights to a fair trial within a reasonable time.

Conclusion

[57] A careful review of this matter has confirmed that the convictions are safe. Regarding count 1, there was a more than adequate description of the firearm given by Detective Inspector Franz Morrison. In relation to count 2, based on his evidence being accepted by the learned trial judge, the reasonable and inescapable inference is that the appellant fired at Detective Inspector Franz Morrison with the specific intention to cause him grievous bodily harm.

[58] The learned trial judge erred in principle in his conduct of the sentencing exercise. However, the resentencing carried out by this court has yielded no change in the sentences, save the deduction of the two months, which the appellant spent in pre-sentence custody after he concluded serving his sentences on the first set of offences for which he was convicted. The court has specifically found that the delay in this matter coming to trial, for which the State is responsible, did not breach the appellant's constitutional rights to a fair trial within a reasonable time. Therefore, the appellant is not entitled to a reduction in sentence on account of any alleged constitutional breach.

[59] It remains for the extension of a sincere apology to the parties and counsel for the delay in the delivery of this judgment, and any inconvenience occasioned thereby.

[60] In light of the conclusion, this court makes the following orders:

a) The application for leave to appeal against conviction is refused.

b) The appeal against sentence on count 1 (illegal possession of firearm) is refused. The sentence of imprisonment of 15 years is affirmed.

c) The appeal against sentence on count 2 (shooting with intent) is allowed. The sentence on count 2 is set aside. Substituted therefor is a sentence of

imprisonment of 19 years and 10 months, credit having been given for the two months the appellant spent in pre-sentence custody.

d) The sentences are to run concurrently as ordered by the learned trial judge and are reckoned as having commenced on 15 April 2021.