[2023] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00109

LLOYD FORRESTER v R

Ms Melrose Reid instructed by Melrose G Reid & Associates for the appellant

Mrs Christine Johnson Spence for the Crown

12 December 2022 and 26 May 2023

Murder – wounding with intent – home invasion – sentencing errors – section 3 Offences Against the Person Act – whether sentences imposed were manifestly excessive – section 16(1) Constitution of Jamaica – breach of constitutional right to a fair hearing within a reasonable time – pre-trial delay – remedies for pre-trial delay

STRAW JA

Background

[1] On 26 June 2019, following a trial in the Home Circuit Court, Lloyd Forrester, the appellant, was convicted for the offences of murder contrary to common law and wounding with intent On 10 December 2019, he was sentenced to life imprisonment without eligibility for parole before serving 25 years for the offence of murder and 25 years' imprisonment for wounding with intent. The sentences were ordered to run concurrently.

[2] The circumstances that gave rise to these convictions occurred on 10 March 2005, when the appellant and another man invaded the home of Valentine Stephens, the deceased, where he resided with his common-law wife and young children. The evidence led was that the appellant was armed with a gun and, on the instructions of the other

man, shot the deceased multiple times. A daughter of the deceased was also injured by one of the bullets, hence the charge for wounding with intent.

[3] The appellant was apprehended by the police as he attempted to flee the scene in a motor vehicle. A firearm was found by the police on the seat from which the appellant alighted. Scientific evidence confirmed that the firearm recovered was the one used to carry out the shootings.

Grounds of appeal

[4] The appellant sought this court's permission to appeal both his convictions and sentences. Upon consideration by a single judge on 10 January 2022, leave to appeal conviction was refused. However, the appellant was granted leave to appeal against his sentence. In pursuing this appeal, an application was made to abandon the original grounds of appeal that were filed and to argue supplemental grounds. This application was granted, and the following grounds of appeal were argued:

> "**GROUND 1** - The Learned Trial Judge (LTJ) failed to consider the delay of ten (10) years before the case was heard and determined on the following grounds:-
>
> (a) That the LTJ should have on his own volition, dismiss [sic] the case on the principle of delay.
>
> (b) That the LSJ [sic] should have given credit for the breach of the Appellant's constitutional right to a fair hearing within a reasonable time, which credit is distinct from the credit given for the pre-trial day of 10 years before the Appellant's case was heard and determined.
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> **GROUND 2** - The LSJ [sic] erred when he stipulated a period of 25 years before parole for murder, as the Appellant was indicted under common law.
>
> **GROUND 3** - The LSJ [sic] failed to appreciate the proportionality in sentencing for different offences and sentenced the Appellant to 25 years for murder and the 25 years for wounding with intent.
>
> **GROUND 4** - The LSJ failed to apply the principles of sentencing.

> **GROUND 5** – The LSJ failed to appreciate the Appellant's good character and good Social Enquiry Report (SER) and apply them to sentencing the Appellant."

[5] While there has been no application to renew the appeal against conviction, counsel for the appellant argued that the learned trial judge ought to have dismissed the case against the appellant due to the delay before the trial was heard and determined (ground 1(a)). In relation to this, we had the affidavit of the appellant filed on 11 November 2022, as well as the chronology of events provided by the Crown, for our consideration.

Affidavit evidence

[6] In his affidavit, the appellant sought to set out, from his recollection, the circumstances that caused his case to be determined some 14 years after he was charged. He stated that, on 10 March 2005, he was charged for murder, illegal possession of firearm and illegal possession of ammunition. He remained in custody until 2007, during which period the firearm charges were tried. The appellant did not detail the outcome of those charges.

[7] In 2007, the murder trial commenced but ended in a hung jury, thereby necessitating a re-trial. In or around 2008 to 2009, another trial started in the Saint James Circuit Court, but was aborted. The appellant stated that it was reported that he was seen signalling to the jury. The appellant denies this and asserts that he did not know anyone in Montego Bay. The case was consequently transferred to the Home Circuit Court in Kingston. He remained in custody from that time until June 2019, when the matter was finally determined.

[8] The appellant indicates that he could not recall all the reasons that prevented his trial from proceeding, as the period spanned some 13 to 14 years. It was his position, however, that the failure to complete the trial within a reasonable time was not due to any fault on his part. Some of the reasons proffered by him were that witnesses or police officers were not in attendance, the pathologist's report was incomplete, one police officer

got a stroke and another died and, on other occasions, the court had other matters set for trial or did not have enough jurors.

[9] It was the appellant's contention, in all the circumstances, that his right to a fair trial within a reasonable time was breached. He also indicated that arising from the delay, he was saddened and stressed. He also described the terrible prison conditions that he endured over those 13 to 14 years.

GROUND 1 - The Learned Trial Judge (LTJ) failed to consider the delay of ten (10) years before the case was heard and determined on the following grounds:-

a) That the LTJ should have on his own volition, dismiss [sic] the case on the principle of delay.

b) That the LSJ [sic] should have given credit for the breach of the Appellant's constitutional right to a fair hearing within a reasonable time, which credit is distinct from the credit given for the pre-trial day of 10 years before the Appellant's case was heard and determined.

Submissions on behalf of the appellant

[10] With respect to ground of appeal 1(a), Ms Reid submitted that the learned trial judge should have dismissed the case, even without any submissions from defence counsel, based on the delay of 10 years. She indicated that the appellant stated in his affidavit that it was 10 years and eight months, but that in reality, it would have been 13 years. She stated that an accused person cannot be held at ransom, due to the inadequacies of the justice system and that it is the court's duty to secure fair treatment for those who are brought before it. Further, that the right to a fair hearing within a reasonable time, aims to prevent oppression, limit the chance of impairment of an accused person's defence and minimize anxiety to an accused. A delay of 10 years is therefore unreasonable, and the appellant need not show that he was prejudiced arising therefrom.

[11] Ms Reid asserted that the appellant could not be responsible for the hung jury and neither was he responsible for the case being moved to another location. She contended that the murder trial should have been conducted within the same time period as the trial for the firearm offences or, at least, by the second circuit in keeping with section 5 of the Criminal Justice (Administration) Act ('CJAA').

[12] Ms Reid also posited that it was irrelevant that the learned trial judge may have credited the appellant for the time spent in custody when passing sentence, as that is different from the issue of delay. In any event, Ms Reid contended that the appellant ought properly to have been credited for 13 years for pre-trial detention and not 10 years. In all the circumstances, Ms Reid has asked this court to quash the appellant's convictions on account of the breach of his rights under section 16(1) of the Constitution.

[13] As an alternative remedy, and with respect to ground 1(b), Ms Reid initially argued that the appellant's sentence should be reduced to 15 years, being the mandatory minimum sentence for the offence of murder. Reliance was placed on several authorities including **Techla Simpson v R** [2019] JMCA Crim 37 ('**Techla Simpson**'), sections 5 and 6 of the CJAA, **Connelly v DPP** [1964] AC 1254, **Barker v Wingo** 407 US 514 (1972), **Bell v DPP and another** [1985] AC 937, **Darmalingum v The State** [2000] 1 WLR 2303, **Flowers v The Queen** (2000) 57 WIR 310, **Attorney General's Reference (No 2 of 2001)** [2003] UKHL 68, **Lescene Edwards v R** [2022] UKPC 11 and **Melanie Tapper v DPP** [2012] UKPC 26.

[14] Further submissions, filed on 11 November 2022, sought to amplify and clarify the original written submissions, particularly in light of the appellant's affidavit. In these submissions, Ms Reid requested that in the alternative, the appellant be granted a four-year reduction in his sentence arising from the length of the delay. Also, that taking account of the full credit of 13 years owed to the appellant, the sentence for murder should be reduced to 18 years *simpliciter*. She highlighted the case of **Mervin Cameron v The Director of Public Prosecutions** [2019] JMCA App 11, in which she pointed to examples of how a defendant may contribute to the delay in his trial.

Submissions on behalf of the Crown

[15] In direct opposition to the appellant's first ground of appeal, Mrs Johnson-Spence highlighted the duties of an appellant alleging breach of his constitutional rights, to raise the issue in the court below and to establish that the delay was the fault of the State. She cited the cases of **Julian Brown v R** [2020] JMCA Crim 42 and **Timothy Smith v R** [2022] JMCA Crim 40 and pointed to the absence of any evidence that the appellant sought to establish any *prima facie* breach of his constitutional rights in the court below.

[16] The Crown, through Mrs Johnson-Spence, provided this court with a table, in the nature of a chronology of events, giving some of the details of what occurred on the various hearing dates between 5 April 2009 and 29 November 2019. On the basis of that information, together with the information supplied by the appellant in his affidavit, Mrs Johnson-Spence sought to highlight instances in which the appellant would have contributed to the delay in the conclusion of the matter. Suffice it to say that Mrs Johnson-Spence submitted that the learned trial judge did not err in failing to dismiss the matter on his own volition.

[17] Mrs Johnson-Spence also highlighted that, as a result of the state of the law at the material time, the Crown would not have been permitted to try the firearm offences along with the offences of murder and wounding with intent.

Analysis and determination of ground 1(a)

[18] Ground 1(a) has no merit. The learned trial judge would have had no basis in the circumstances to dismiss the case against the appellant solely on the basis of delay. The issue of delay or breach of the appellant's constitutional rights was never raised before the learned trial judge at the trial in June 2019. There were no submissions that the delay in proceeding with the trial prevented the appellant from properly advancing a defence in the matter, or that he was unable to locate required witnesses because of the length of time that it took for the matter to proceed to trial.

[19] Furthermore, there had been three previous attempts to try the appellant, based on the table supplied by the Crown. This table only commenced in April 2009, so the assertions of the appellant that a trial took place in 2007 (resulting in a hung jury) cannot be verified. On the first listed trial date of 21 September 2009, it is recorded that the appellant refused to plea. In relation to the second trial date, indicated as 16 March 2010, that trial was aborted (at the stage of the summation) as one of the jurors had to be discharged (her brother was gunned down the night before). This was actually the second discharge of a juror in the matter. On the third trial date, recorded as 20 September 2010, it is stated that the appellant was seen signalling a member of the jury after empanelling was completed. The fourth and final trial date was in June 2019, which would have been about nine years after the third failed attempt. While the delay of nine years could be considered egregious, based on the history and circumstances as outlined above, we do not accept that the case should have been dismissed without a trial proceeding.

[20] Ms Reid referred to section 5 of the CJAA. That section merely indicates that a defendant who is committed for trial before a Circuit Court "shall be brought before the Court for trial not later than the second Circuit held … unless the Court or a Judge otherwise orders". The date on which the appellant was committed for trial is unknown, as are the dates for the Circuits following his committal. It can be reasonably inferred, however, that the court ordered the appellant's trial to be set for further dates, as the various trials set did not proceed for a number of reasons. As such, there was no breach of section 5 of the CJAA and there is no stipulation for a trial not to proceed, if not reached by the second Circuit. Ground 1(a) therefore fails.

[21] The issue of the delay, however, will be considered later in this judgment as it relates to whether the constitutional right of the appellant to a fair trial within a reasonable time has been breached and, if so, what remedy ought to be granted (ground 1(b)). The information distilled from the table provided by the Crown and the affidavit of the appellant will be examined in the analysis of that ground.

GROUND 2 - The LSJ [sic] erred when he stipulated a period of 25 years before parole for murder, as the Appellant was indicted under common law.

Submissions on behalf of appellant

[22] Ms Reid contended that since the appellant was indicted for murder under common law and not under the Offences Against the Person Act ('OAPA'), he should have been sentenced under common law. In the result, the learned trial judge erred in requiring the appellant to serve the entire 25 years before eligibility for parole and, thereby, deprived the appellant of a potential one-third remission in his sentence under the Parole Act and the Correctional Institution (Adult Correctional Centre) Rules, 1991. This outcome, Ms Reid contended, amounts to "harsh punishment". No case was cited in support of these submissions.

Submissions on behalf of Crown

[23] Mrs Johnson-Spence asserted that the learned trial judge did not fall into error in respect of the sentence imposed for murder. Although murder is not an offence created by statute in Jamaica's legal system, as the penalty for murder is stipulated in section 3 of the OAPA, there is no need to resort to common law in passing the penalty. In the circumstances, the learned trial judge properly passed his sentence in keeping with the OAPA.

Analysis and determination

[24] Counsel for the Crown is correct in her submissions. Although the offence of murder in this jurisdiction is based on the common law, the penalties are set out in section 3 of the OAPA. The learned trial judge was not empowered to deviate from the OAPA. Section 3(1) of that statute is set out as follows:

> "3-(1) Every person who is convicted of murder falling within –
>
> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;

(b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

[25] As acknowledged by Ms Reid, there are specific requirements relating to parole where a person is convicted of murder. Section 3(1C)(b) of the OAPA provides:

> "3(1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> (a) …
>
> (b) where, pursuant to subsection (1)(b), a court imposes-
>
> (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
>
> (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years,
>
> which that person should serve before becoming eligible for parole."

Subsection (1)(b) there mentioned, refers to section 3(1)(b) cited immediately above. Given section 3(1)(b) is the applicable section in the instant case, and the learned trial judge having exercised his discretion to impose a sentence of life imprisonment, the learned trial judge was mandated by the OAPA to set the parole period of not less than 15 years, as provided by section 3(1C)(b)(i) of that Act. The learned trial judge did not err in that regard. Ground of appeal two fails.

GROUND 3 - The LSJ [sic] failed to appreciate the proportionality in sentencing for different offences and sentenced the Appellant to 25 years for murder and the 25 years for wounding with intent.

GROUND 4 - The LSJ failed to apply the principles of sentencing.

GROUND 5 – The LSJ failed to appreciate the Appellant's good character and good Social Enquiry Report (SER) and apply them to sentencing the Appellant.

Submissions on behalf of the appellant

[26] On ground three, Ms Reid challenged the sentence imposed for wounding with intent, positing that, in sentencing the appellant to 25 years, the learned trial judge was sentencing the appellant for murder twice. Although acknowledging that the sentencing range prescribed by the OAPA is similar to that for murder, she stated that when the gravity of the two offences is considered, it is only reasonable to impose a lesser sentence for wounding with intent. In the circumstances, this court was asked to impose the mandatory minimum sentence of 15 years.

[27] With respect to grounds four and five, Ms Reid argued that the learned trial judge failed to apply the principles of sentencing and failed to take account of the appellant's good character and favourable social enquiry report ('SER'). Resultantly, the sentences imposed were manifestly excessive.

[28] Ms Reid highlighted the sentencing remarks of the learned trial judge and asserted that he had not demonstrated how he arrived at his sentence or otherwise adhered to the considerations propounded in the case of **Meisha Clement v R** [2016] JMCA Crim 26. The learned trial judge did not consider any aggravating or mitigating factors and did not say how he arrived at 35 years as a starting point in relation to the offence of murder.

[29] Counsel stated that the learned trial judge paid mere lip service to the SER when he said, "[t]he Social Enquiry Report is a good one. The community spoke well of you. No previous conviction". This, she said, rendered the SER null and void. Whilst acknowledging the absence of authority requiring a sentencing judge to take account of character and SERs arithmetically, she pointed to authorities which she said, demonstrated their purpose in sentencing. In this vein, she referred to the cases of **R v Moustakim** [2008] EWCA Crim 3096, **R v Patrick James** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 68/1993, judgment delivered 23 September 1993. She also cited the cases of **R v Odain Campbell** [2020] JMSC Crim 2 and **R v Anthony Bailey** [2020] JMSC Crim 5 in which judges of the Supreme Court, demonstrated arithmetically how account was taken of good character and SERs.

Submissions on behalf of the Crown

[30] In relation to grounds three, four and five, learned Crown Counsel highlighted the range of sentences as provided for in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). With respect to murder, the range is 15 years to life imprisonment, with a statutory minimum of 15 years in some instances. This statutory minimum is applicable in the instant case. In reliance on the cases of **Troy Barrett v R** [2022] JMCA Crim 24, **Lincoln McKoy v R** [2019] JMCA Crim 35 and **Ian Gordon v R** [2012] JMCA Crim 11, Mrs Johnson-Spence submitted that the sentence imposed for murder in the instant case is well within the range established for offences of this kind and is therefore not manifestly excessive.

[31] With respect to the offence of wounding with intent, Mrs Johnson-Spence acknowledged that the learned trial judge appeared to have conflated this offence with the offence of murder and also failed to account for the 10 years which the appellant spent in pre-trial remand. Notwithstanding that, she urged upon this court to consider the gravity of the offence, especially in light of the long-term effect on the victim (the daughter of the deceased), who continued to experience pain from the injury even years later. As such, she has asked this court to impose the mandatory minimum of 15 years. Reliance was placed on the case of **Sheldon Moscoll v R** [2021] JMCA Crim 24.

[32] Mrs Johnson-Spence also posited that although the learned trial judge did not strictly follow the Sentencing Guidelines or the case of **Meisha Clement v R**, the sentencing remarks expressed the spirit of those guidelines.

[33] In the round, it was submitted alternatively that this is a case in which the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act would properly apply, as the cumulative effect of the reasoning of the learned judge in relation to sentence would prevent any miscarriage of justice.

Analysis and determination

[34] As grounds three, four and five all relate to the learned trial judge's exercise of his discretion in passing sentence, these grounds will be considered together. In so doing, we bear in mind that this court will not lightly interfere with a sentencing judge's exercise of his or her discretion and will only interfere, if it can be shown that arising from an error in principle, a sentence was passed that was outside of the usual range of sentences for similar offences (see **Jermaine McIntosh v R** [2020] JMCA Crim 28, at para. [29]).

[35] Ground five may be easily disposed of. The learned trial judge made reference to both the SER and the fact that the appellant had no previous conviction. In the context of this reference, we accept that the learned trial judge took these mitigating factors into consideration. In that regard, we find that ground five is unmeritorious.

[36] As acknowledged by both counsel, the seminal authority from this court, **Meisha Clement v R**, provides ample guidance to trial judges on the proper approach to sentencing. At para. [41] Morrison P explained the approach as follows:

> "(i) identify the appropriate starting point;
>
> (ii) consider any relevant aggravating features;
>
> (iii) consider any relevant mitigating features (including personal mitigation);
>
> (iv) consider, where appropriate, any reduction for a guilty plea; and
>
> (v) decide on the appropriate sentence (giving reasons)."

[37] Also useful is the case of **Daniel Roulston v R** [2018] JMCA Crim 20, in which McDonald-Bishop JA stated at para. [17]:

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

[38] The sentencing exercise in the instant case having taken place in 2019, after both **Meisha Clement v R** and **Daniel Roulston v R**, the learned trial judge would have been expected to have regard to and to demonstrate an awareness of the guidance from these cases. A review of his sentencing remarks reveals that although consideration was given to the classical principles of sentencing (ie prevention, deterrence, rehabilitation and retribution), and that he gave reasons for arriving at his sentences, he failed to identify the sentencing range or an appropriate starting point with respect to either offence. Further, although underlying his remarks was a deliberation of relevant aggravating factors, these factors were not specifically identified as such, and it was not demonstrated what effect, if any, these factors had on the sentences passed. In essence, the learned trial judge did not follow an arithmetical or methodical approach. This may be seen from pages 750 to 752 of the transcript where the learned trial judge stated:

"For want of a better word, the only word that jumps out at me, really, the manner in which this murder was committed, I can only say it is egregious.

This is a murder, where a gentleman in Montego Bay had just finished assisting his two children with their homework, went to the bathroom, coming back to his lady friend there, his children's mother, and he was shot in their presence, so much so, that one of his children got shot. That is how the wounding take [sic] place. You journeyed all the way from Kingston to Montego Bay and committed such a serious crime. They say, that a man's house is his castle. He intend [sic] to live in there peacefully and quiet and happy.

…

> At the end of the day, this is what I describe as 'execution style'. You came with an objective and you executed it. The deceased man had no choice, had no chance, but the good thing about it, is that the police just happened to be patrolling the area and caught you and your other colleague red handed, leaving a lady to grow two girls without a father. That's why I say it is egregious.
>
> …
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> And I think hard about this case … for murder, it will be life imprisonment, and since as [sic] I must take into consideration and subtract the ten years, I was thinking of 35 years before parole. I have taken off ten years, so it would be 25 years. No parole until you have served 25 years, and for the wounding with intent, the little girl could have lost her life, too. She is lucky to be alive. The sentence of 25 years also. Sentence [sic] to run concurrent."

[39] Based on these remarks, Ms Reid's complaint that the learned trial judge appeared to have "plucked" the figures out of the air, may not be entirely unfounded, particularly as it related to wounding with intent. We find merit in grounds three and four.

[40] In all the circumstances, this court is obliged to review the sentences afresh, in order to determine whether and to what extent the failings on the part of the learned trial judge resulted in the passing of sentences that were manifestly excessive.

[41] The Sentencing Guidelines indicate a usual range for the offence of murder between a minimum of 15 years and a maximum of life imprisonment. As stated above at para. [23], section 3(1)(b) of the OAPA applies in the instant case.

[42] We agree with the learned trial judge that murder, especially of the nature committed in this case, and involving the use of a firearm, demands a sentence of not less than life imprisonment. The real issue before this court is whether the period of 35 years before eligibility for parole is excessive.

[43] In the case of **Paul Brown v R** [2019] JMCA Crim 3, on a review of several decisions cited by counsel before this court, it was noted that there was a range of 25 years to 45 years before eligibility for parole in respect of murder. Sentences at the higher

end of the range are typically stipulated in cases involving multiple counts of murder. Brown himself was sentenced to life imprisonment with a stipulation to serve 35 years' imprisonment before becoming eligible for parole in circumstances where he gunned down the deceased, who ran in an attempt to escape. The pre-parole period was reduced by this court to 29 years and then to 23 ½ years to account for the time spent in pre-trial custody.

[44] **Paul Brown v R**, notably, was not a case of a home invasion. In **Massinissa Adams and Others v R** [2013] JMCA Crim 59, the appellant was convicted along with two others on one count of murder. The deceased was an Assistant Commissioner of Police, who had been lured to a home by the ex-girlfriend of the appellant Adams. Whilst there, he was shot and killed by Adams and his service pistol stolen. In relation to Adams, this court substituted a sentence of life imprisonment with a pre-parole stipulation of 30 years instead of the death penalty.

[45] In the case of **Germaine Smith and Others v R** [2021] JMCA Crim 1, the applicants invaded the home of the deceased, at night, where he resided with his mother and four siblings, and shot and killed him. This court affirmed the life sentences imposed on each applicant. With respect to Smith, who shot the deceased and Edwards who also entered the home and fired shots, this court stipulated a period of 35 years' imprisonment before eligibility for parole, from which was deducted the time spent by each in pre-sentence custody. Ultimately, it was stipulated that both Smith and Edwards should serve 31 years and six months before being considered eligible for parole.

[46] In our view, a reasonable starting point, having regard to the egregious nature of the offence, is 30 years. Taking account of the aggravating factors, being premeditation, more than one intruder, breaching the home of the deceased, the use of a firearm, the manner of the killing, that is, by firing several gunshots at the deceased in the presence of his family members, as well as the fact that the deceased was, from all indications, defenceless, warrants an increase by seven years. For the mitigating factors: no relevant

previous convictions and a good community report, two years could be subtracted. We would therefore arrive at the same sentence contemplated by the learned trial judge.

[47] The time spent on pre-trial remand was stated by the appellant in his affidavit and by Ms Reid to be 10 years and nine months. Counsel in the court below had indicated to the learned trial judge that it was 10 years. It is now well established that an offender should receive full credit for time spent in custody pending trial unless there is good reason to do otherwise (see **Callachand & Anor v The State** [2008] UKPC 49 ('**Callachand**') at para. [9]). His Lordship Sir Paul Kennedy stated at para. [10] of **Callachand**:

> "Their Lordships recognise that there may be unusual cases where a defendant has deliberately delayed proceedings so as to ensure that a larger proportion of his sentence is spent as a prisoner on remand. In such a case it might be appropriate not to make what would otherwise be the usual order. **Similarly, 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**." (Emphasis added)

[48] In the circumstances, we would not be obliged to give the appellant credit for the full 10 years and nine months, as he had been serving sentences for illegal possession of firearm and illegal possession of ammunition between 7 April 2006 and 15 August 2009. In those circumstances, the appellant would not have been entitled to be credited for that period. We will, however, credit the appellant with 10 years for pre-trial detention, as did the learned trial judge, since were we to do otherwise, we would arrive at a higher sentence than that imposed by the learned trial judge.

[49] In the final analysis, although we had to engage in the resentencing process for the offence of murder, we do not find that the sentence of life imprisonment with 25 years before eligibility for parole could be said to be manifestly excessive.

[50] Regarding the offence of wounding with intent, the normal sentencing range is between 15 and 20 years, with 15 years being at the low end of the range and 20 years

being at the high end. The circumstances of this case do not justify a starting point above the usual range, as would have been used by the learned trial judge. Our starting point would therefore be the statutory minimum of 15 years. Taking account of the aggravating and mitigating factors, together with a consideration of the time already spent in custody, the appellant will be sentenced to the statutory minimum of 15 years. The appellant's ground three succeeds.

Analysis and determination of ground 1(b)

[51] We now return to the issue of the breach of the appellant's constitutional rights to trial within a reasonable time. 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."

[52] Brooks JA (as he then was) in **Techla Simpson**, reiterated the factors to be considered relevant to such a breach, as set out in the Privy Council decision of **Flowers v The Queen** at paras. [37] and [38] of his judgment:

> "[37] **Flowers v The Queen** is also a decision of the Privy Council on an appeal from this jurisdiction. In that case, their Lordships examined the factors they considered to be relevant when addressing a complaint that there has been a breach of constitutional rights. They are:
>
> a. the length of delay;
>
> b. the reason for the delay;
>
> c. the defendant's assertion of his right; and
>
> d. the prejudice to the defendant.
>
> [38] The factor of prejudice has three further considerations, namely, the need to:
>
> d1. prevent oppressive pre-trial incarceration;

> d2. minimise anxiety and concern of the accused; and most importantly
>
> d3. limit the possibility that the defence will be impaired.
>
> Their Lordships emphasised that the fairness of the entire system will be skewed if a defendant is unable to adequately prepare his case."

The length of the delay and the reasons for the delay

[53] The appellant was arrested and taken into custody for this offence on 10 March 2005. He was tried and convicted in June 2019 and sentenced on 10 December 2019. Therefore, on the face, the pre-trial delay was 14 years and three months.

[54] He applied for leave to appeal conviction and sentence on 27 December 2019. As indicated previously, that application was considered by a single judge of this court on 10 January 2022. The renewed application before us was heard in December 2022. Much of the delay between 27 December 2019 and December 2022 arose due to the length of time to procure the transcript, which was received by the court on 5 November 2021. In any event, we do not consider that the post-conviction delay was excessive, bearing in mind the exigencies of the court's list. Additionally, nothing was urged upon us by counsel for the appellant in respect of post-conviction delay. However, the seeming delay of 14 years and three months prior to trial is alarming.

[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.

[58] As stated previously, the Crown's table detailing the chronology of events, commences in April 2009 and does not assist with the period prior to that. We do know,

however, that the appellant would have been serving sentences for other offences between 2006 and 2009. The serving of these sentences, however, would not have precluded the Crown from proceeding with the trial for murder during that time period.

[59] The appellant speaks to a trial commencing in 2007 which resulted in a hung jury. It is not clear whether this recollection is reliable, as the Crown's table details three previous attempts at trial for the relevant offence of murder, before the trial in June 2019 that resulted in the appellant's conviction. The endorsement in relation to a hung jury is not seen or available from any documentation provided to this court. However, to the best of our ability, we have assessed the period of delay to tally with the further information in the affidavit of the appellant and the table provided by the Crown.

[60] We have taken account of the fact that the Crown would have been precluded from trying the appellant for the murder alongside the firearm offences, based on the law at the material time. Prior to the 2015 amendment to the Jury Act, 12 jurors were required for the trial of a murder whereas only seven jurors were required for the trial of other offences (see **Jerome Dixon v R** [2022] JMCA Crim 2 at paras. [52] and [53]). In those circumstances, the Crown having elected to proceed with the firearm offences first, and, those offences having been disposed of in April 2006, the delay to be accounted for will be considered from April 2006, when the Crown would have been in a position to proceed with the murder trial.

[61] On 21 September 2009, the first trial of the appellant for the offence of murder commenced. At this stage, there would have already been a delay of approximately three years subsequent to the conclusion of the trial for the firearm offences. This first trial had to be aborted, as the appellant (as noted in the table), refused to plea, and the matter was set back on the mention list. This delay of three years must be attributed to the State.

[62] Between October 2009 and January 2010, there were several mention dates, as arrangements had to be made in relation to evidence to be received under section 31D

of the Evidence Act and also arising from defence counsel's request for the results of the forensic analysis in relation to gun powder residue.

[63] The matter was set for trial twice in January 2010 and then rescheduled to March 2010. The matter proceeded to trial in March 2010. However, during the summation, the entire jury had to be discharged, for the reasons indicated at para. [19] above. The trial was, therefore, aborted. Several mention dates followed thereafter, to allow for the transcript of the aborted trial to be prepared and served on defence counsel. Up to this point, apart from the first three years between 2006 and 2009, the appellant must take responsibility for the first aborted trial and the time to have the matter rescheduled. In relation to the cause of the aborting of the second trial, it cannot be said to be due to the actions of the State and must be considered "against the public interest in the attainment of justice in the context of the prevailing system of legal administration" (see para. [53] above).

[64] The matter was again set for trial on 20 September 2010. It, therefore, took a period of six months for the matter to be put back on the trial list within the Saint James Circuit (the original place of trial). Six months, within the context of a circuit sitting outside of the Home Circuit Court, cannot be considered to be a lengthy period as the Saint James Circuit is gazetted to sit at specific times during the calendar year. This issue, again, must be considered "in the context of the prevailing system of legal administration". At the trial in September 2010, after the jurors were empanelled, the appellant was observed signalling to one of the jurors. The matter was, thereafter, transferred from Montego Bay (the Saint James Circuit Court) to the Home Circuit Court in Kingston. This would have required new counsel being assigned to the appellant in Kingston.

[65] Several mention dates were set for legal aid assignment to be made between October 2010 to February 2011. Counsel was eventually assigned but failed to attend court on 18 February 2011 and 18 March 2011. On 27 May 2011, when the matter was set for plea and case management, counsel was again absent, despite confirming acceptance of the assignment. This assignment was revoked on 3 June 2011. Several

mention dates were again set, until a new assignment was made on 16 September 2011. Thereafter several mention dates followed, to ascertain the status of witnesses. In July 2012, it was indicated that the transcript was still unavailable. On 27 July 2012, the matter was set for trial to commence on 5 November 2012. Most of the delay between September 2011 to November 2012 has to be attributed to the State as the status of witnesses and the previous trial transcript were among the outstanding issues. This will be accounted for as one year. The appellant must, however, be taken to have contributed to the prior delay between September 2010 and February 2011, as it was his actions that necessitated the transfer of the matter to Kingston and the subsequent attempts to procure new counsel.

[66] The trial did not proceed on 5 November 2012, as defence counsel was engaged in a part-heard matter; and also complained that she had not yet received the transcript. The matter was set for trial in January 2013, but could not proceed as the assigned court was engaged in a part-heard matter. The matter, thereafter, remained on the mention list until a new trial date was set for 25 September 2013. During that period, it is noted that there were pages missing from the transcript. The State would have to bear responsibility for some of this delay. I would estimate the responsibility of the State at five months as the prevailing conditions and exigencies of the courts must be taken into consideration as well (see **Julian Brown v R** at para. [89]).

[67] On 5 July 2013, the appellant was offered bail. Apparently, he was unable to take up the bail at this time. In September 2013, the trial did not commence and no substantive reasons are noted for the delay. Eventually, the matter was set for trial on 20 January 2014. The State must, therefore, bear responsibility for this continuing default (approximately four months). The January trial date, and several other trial dates set, up to 29 October 2014, did not proceed and can only be attributed to the actions of the State. This accounts for a further delay of approximately 10 months. The matter was then set for 20 April 2015, on which date the appellant's counsel was absent and no witnesses were present. The next trial date was 22 February 2016. In the meantime, the bail offered

to the appellant was reduced from $2,000,000.00 to $800,000.00 on 19 June 2015. At this time, the appellant was able to take up his bail offer. It appears that the inaction of the State would be responsible for this further period of delay of 16 months.

[68] Several trial dates followed between February 2016 to June 2017. The matter was not reached as other trials were in progress and the Crown was in dialogue with the witnesses. This accounted for a further delay of 16 months. The matter was set for trial on 25 October 2017. However, on that date, new counsel appeared to have come into the matter, but requested that his name be removed from the record. The State cannot be blamed for these circumstances as the appellant is entitled to legal representation. Again, several mention dates were set up to March 2018 for new legal aid assignments. Again, this would have to be reckoned as part of the exigencies of the system as there are challenges in relation to having legal aid assignments made. Several mention dates followed up to May 2018, to allow for disclosure that was made to previous counsel to now be made to new counsel. New counsel then requested time to review documents and take instructions. The matter was then set for mention on 20 July 2018. There are no other endorsements on the table provided. The trial commenced in June 2019. This court assumes that the burden for this last period of delay between July 2018 and June 2019 (11 months) must be, by default, laid at the feet of the State.

[69] The appellant (in his affidavit) speaks to a trial in either 2008 or 2009 and denies that he was seen signalling to any juror. But he confirms that the matter was transferred to the Home Circuit Court at some point. He takes no responsibility for any delay in the matter. At para. 6. of his affidavit, he states that on several occasions witnesses and/or police officers were absent, the pathologist report was incomplete, or the court had other matters to be tried. The court has, however, assessed all the above information to tally with the Crown's endorsement. We acknowledge that some of the reasons proffered by the appellant are borne out on the Crown's table, however, we find the said table to be more reliable, as it would have been created from the Crown's file which would have been a contemporaneous record of the occurrences on each court date.

[70] We have concluded that the State would be responsible for nine years and two months of delay. A delay for such a lengthy period is egregious.

Defendant's assertion of his rights and prejudice to the defendant

[71] The appellant has asserted before us that his constitutional right to a fair trial within a reasonable time has been breached. This breach was never asserted in the court below. He has, however, now raised it before this court for our consideration. He is entitled to do so. We are mindful that a long delay, even in the absence of any specific evidence of prejudice, could constitute prejudice (see **Flowers v The Queen**). Brooks JA at para. [45] of **Techla Simpson** and also made reference to **Bell v DPP and another** at page 952 as follows:

> "... Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account. The fact that the applicant in the present case did not lead evidence of specific prejudice does not mean that the possibility of prejudice should be wholly discounted."

[72] The appellant has not indicated that he was restricted or hindered in the trial due to the delay. He spoke to his emotional state of sadness and stress, based on the long delay, as well as, suffering in custody arising from the terrible prison conditions. These issues cannot be discounted. However, Brooks JA stated in **Techla Simpson**, that it is the prejudice in the trial process that carries the most weight and none has been alleged.

[73] We must give consideration to the fact, also, that the appellant would have been serving sentences in relation to other charges between 2006 and 2009. This would account for three years of his incarceration awaiting trial in the case at bar, although there is no denying that the major portion of delay would be due to pre-trial delay in

relation to the charge of murder. The breach of his constitutional right to a fair hearing within a reasonable time has been established. Ground 1(b) is therefore meritorious.

Remedies available

[74] It is becoming trite law that this court has jurisdiction to grant an appropriate remedy for the breach of an appellant's constitutional rights arising from delay, whether or not the issue was raised in the court below. The remedies can take a number of forms. In **Evon Jack v R** [2021] JMCA Crim 31, Brooks P identified several potential remedies for breaches of a person's constitutional rights as follows:

> "[44] Redress for breaches of constitutional rights may take a number of forms, ranging from a public acknowledgment of the breach to a quashing of the conviction. Public acknowledgment of the breach, reduction of the sentences and quashing of the convictions are remedies that this court can grant, in appropriate circumstances, without the appellants having to apply to the Supreme Court, pursuant to section 19 of the Constitution. This court has previously granted redress for delays in the hearing of appeals. It reduced the respective sentences in **Tapper v DPP**, in **Techla Simpson v R** [2019] JMCA Crim 37 and in **Alistair McDonald v R** [2020] JMCA Crim 38. …"

[75] Brooks P noted, as the Privy Council in **Melanie Tapper v DPP** stated, that quashing a conviction would not be the normal remedy. Citing Lord Carswell in **Boolell v The State** [2006] UKPC 46 at para. [32], it was reiterated that a hearing should not be stayed or a conviction quashed on account of delay alone, unless it may be demonstrated that the hearing was unfair or it was unfair to try the defendant at all. Ultimately, the appropriate remedy will be dependent on the particular circumstances of each case.

[76] In **Techla Simpson**, a case of murder, Mr Simpson was given a two-year reduction in sentence for a period of eight years' pre-trial delay. In **Tussan Whyne v R** [2022] JMCA Crim 42, also a case of murder, there was an eight-year pre-trial delay, resulting in a reduction in sentence of one year. In **Absolam and others v R** [2022] JMCA Crim 50, a case of illegal possession of firearm and robbery with aggravation, there

was a seven-year post-conviction delay. The appellants were granted a two-year reduction in their sentences.

[77] As regards these particular circumstances, we considered that the appellant is subject to a lengthy period of imprisonment and received more credit for pre-trial custody than he was properly entitled to (see para. [48] above). This is because the learned trial judge assessed the pre-trial delay as 10 years without having any regard to the time spent in custody for the firearm convictions. We would, therefore, afford the appellant a reduction of one year in his murder sentence as an appropriate remedy. The sentence would therefore be reduced to 24 years before eligibility for parole. Bearing in mind that the sentence on count two is to run concurrently and, indeed, is a mandatory minimum sentence, the term of 15 years imposed by us will remain.

[78] In concluding, we find that the learned trial judge erred in regard to sentencing by his failure to demonstrate how he arrived at the penalty imposed for murder. He also erred in regard to the sentence imposed on the appellant with respect to wounding with intent. Further, that the appellant's right to a trial within a reasonable time, as guaranteed under section 16(1) of the Constitution was breached as a result of the lengthy period that it took for him to be tried for the offences of murder and wounding with intent.

[79] In the result, these are the orders of the court:

1. The appeal against sentence is allowed in part.

2. It is hereby declared that the right of the appellant under section 16(1) of the Constitution of Jamaica, to be afforded a hearing within a reasonable time, has been breached by the excessive delay between his arrest and charge on the one hand and his trial on the other hand.

3. In respect of the offence of murder, the sentence of life imprisonment is affirmed. However, the stipulation that the

appellant is to serve 25 years' imprisonment before becoming eligible for parole is set aside and substituted therefor is the stipulation that the appellant should serve 24 years before becoming eligible for parole, the appellant having received a one-year reduction in his sentence arising from the breach of his right under section 16(1) of the Constitution.

4. The sentence of 25 years' imprisonment for wounding with intent is set aside; substituted therefor is the sentence of 15 years' imprisonment.

5. The sentences are to be reckoned as having commenced on 10 December 2019, the date they were imposed, and are to run concurrently.