[2025] JMCA Crim 17

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 82/2014

STEPHEN FRANCIS v R

Oswest Senior-Smith for the appellant

André Wedderburn, Mrs Dainty Davis and Kemar Setal for the Crown

29 and 30 June 2023 and 25 July 2025

Criminal Law – Sentence – Standard of review – Post conviction delay – whether there was a breach of the right to a fair hearing within a reasonable time – Remedies for breach of Constitutional rights due to delay – the Constitution (Charter of Fundamental Rights and Freedoms) section 16(1), (7) and (8)

Statutory interpretation – Interpretation of section 16(8) of the Constitution – Implying words into a statute

BROWN JA

[1] This appeal challenged the sentences imposed by the trial judge and complained that they were manifestly excessive. The appellant also sought constitutional redress in the form of a reduction of the sentences for alleged breaches of his right to be provided with the record of the trial proceedings and to the hearing of his appeal within a reasonable time.

[2] On 8 July 2023 we heard the appeal and, after due consideration, we made the following orders:

> "1. The appeal against sentence is allowed.

2. It is hereby declared that the right of the appellant under sections 16(1) and 16(8) of the Constitution of Jamaica to be afforded a fair hearing within a reasonable time, has been breached by the excessive delay between the date his sentence was imposed and the hearing of his appeal.

3. It is hereby declared that the right of the appellant under section 16(7) of the Constitution of Jamaica to be given for his own use, within a reasonable time after judgment, a copy of the proceedings made by or on behalf of the court, has been breached by the excessive delay in the production of the transcript of the notes of evidence and summation.

4. The sentence of 15 years' imprisonment for illegal possession of firearm is set aside. A sentence of six years and 10 months' imprisonment is substituted therefor, credit of one year and two months having been given for time spent in pre-trial custody and a reduction of two years having been granted for the breaches of the appellant's constitutional rights.

5. The sentence of 15 years' imprisonment for robbery with aggravation is set aside. A sentence of eight years and 10 months' imprisonment is substituted therefor, credit of one year and two months having been given for time spent in pre-trial custody and a reduction of two years having been granted for the breaches of the appellant's constitutional rights.

6. The sentences are to run concurrently and are to be reckoned as having commenced on the 25 July 2014, the date on which they were imposed and are to run concurrently."

[3] On that date we promised to put our reasons in writing. We now fulfil that promise.

Background

[4] The appellant was tried by judge alone ('the learned judge') on an indictment which charged him in consecutive counts for the offences of illegal possession of firearm and robbery with aggravation, in the High Court Division of the Gun Court, between 19 May and 13 June 2014. He was found guilty on both counts. On 25 July 2014, the learned

judge sentenced the appellant to concurrent terms of 15 years' imprisonment on each count.

The trial

[5] The prosecution's case was that, on 2 June 2012, the appellant was the driver of a motor car being operated as a taxi. The complainant boarded his taxi at the Portmore bus stop, in Half Way Tree, for him to take her to Three Miles. He drove off with her as the sole passenger. A short while after he drove off, he stopped at a location and picked up a man, whom he greeted in a friendly manner according to the complainant. The man sat in the back, he passed a firearm to the appellant, and they held up and robbed the complainant of a camera and the contents of her handbag. Her handbag contained, amongst other things, a dress, an unspecified amount of cash and a cellular telephone. The complainant later jumped from the taxi whilst it was motion.

[6] The complainant made a report to the police. The appellant was seen shortly after driving the same taxi. He was apprehended and searched by the police. During the search two cellular phones were taken from his pants pocket, one of which belonged to the complainant. When cautioned in relation to the offences the appellant denied robbing the complainant.

[7] The appellant gave sworn evidence at the trial, and he gave a different account from the complainant as to what transpired. Based on his account, both he and the complainant were the victims of a man posing as a passenger, who brandished a gun when he tried to collect his fare. This man, he said, instructed him where to go and he complied, because the man had a gun.

The appeal

[8] On the date he was sentenced (27 August 2014) the appellant applied for leave to appeal against his sentence only. His application for permission to appeal was considered and granted by a single judge of this court on 27 September 2022.

[9] Before us, the appellant applied for and was granted permission to abandon the original grounds of appeal and to argue in substitution two supplemental grounds against sentence. The supplemental grounds argued were:

> 1. The appellant's right under section 16(1), 16(7) and 16(8) of the Jamaica Constitution have been abrogated.
>
> 2. The imposed sentences were manifestly excessive.

[10] The appellant sought the following orders:

> (A) Constitutional redress.
>
> (B) That his sentence be reduced.
>
> (C) Such further and other relief that this Honourable court deems just.

The fresh evidence application

[11] On 28 July 2023, the appellant filed an application to adduce fresh evidence in support of his appeal and for constitutional redress. The fresh evidence was contained in an affidavit filed along with the application, in which the appellant outlined the delay in having his appeal heard, because the transcript was not produced until 2022 and the consequences that flowed or the prejudice that resulted.

[12] We granted the application to adduce fresh evidence and reviewed the affidavit evidence. The contents of the affidavit will be summarised immediately below.

Summary of affidavit evidence

[13] In his affidavit the appellant stated that the sentence was imposed on 25 July 2014 and he began serving his sentence. However, he considered the sentences to be overly long, and so, on 27 August 2014, he applied for permission to appeal the sentences principally on the basis that they were harsh and excessive.

[14] He averred that, since that time he has been awaiting the hearing by this court in relation to the sentences imposed. The hearing was, therefore, in abeyance until 2022 when the transcript of the trial was produced. During those approximately eight years (2014 to 2022), he experienced agony, according to his affidavit.

[15] He labelled the eight years to produce the transcript as "egregious delay" and complained that no credible reason had been advanced for it. He averred that his right to receipt of the transcript of the trial was "trampled" and his entitlement to a fair hearing within a reasonable time was breached. This, he asserted, had unfairly and adversely impacted his potential early release from incarceration, and also severely prejudiced his welfare.

[16] He complained that although he upskilled and acquired certification in anticipation of resuming a reformed life with his children and family, the delay deprived him of the potential early resumption of family life and reintegration into society. He went on further to assert that the inexplicable wait was inordinate, oppressive, unreasonable and caused him excruciating anxiety and concern, resulting in impairment of his well-being. He sought redress on the basis that he has suffered incertitude for that number of years.

Ground 1

[17] Ground one concerned a claim for breaches of his constitutional rights pursuant to subsections (1), (7) and (8) of section 16 of the Charter of Fundamental Rights and Freedoms ('the Charter') to have his appeal heard within a reasonable time.

Appellant's submissions

[18] The appellant argued that there was an eight-year delay between his sentencing and the provision of the notes of evidence and summation. The appellant contended that the sentences imposed were manifestly excessive, and that the delay in the provision of the transcript of the trial egregiously impacted his constitutional guarantees. It was also submitted that the lapse was inexcusable and irreconcilable.

[19] The appellant relied on the cases of **Orville Watson v R** [2023] JMCA Crim 25, **Evon Jack v R** [2021] JMCA Crim 31 and **Melanie Tapper v The DPP** [2012] UKPC 26 in support of this ground.

[20] In oral submissions, the appellant pointed out that this ground is a separate basis for the reduction of his sentence than the bases argued in ground 2. It was submitted that the appellant had provided adequate evidence that his constitutional right for the sentence imposed to have been reviewed by this court within a reasonable time has been abrogated by the inordinate delay of eight years, due to the unavailability of the transcript. The appellant sought a reduction in his sentence, as the remedy for this breach and the opprobrium in the excessive delay.

Crown's submissions

[21] The Crown conceded that the applicant's rights under sections 16(7) and (8) of the Charter had been breached.

[22] Having conceded that there was a breach of the appellant's constitutional rights, the Crown focused on the remedies available and, in particular, the power of this court to quash the conviction. The Crown argued that the cases of **Watson v R** and **Evon Jack v R** are distinguishable, as the transcripts produced in those cases were incomplete, and this court had concluded that crucial aspects of the trial necessary for its assessment were absent, and so the convictions were quashed and no re-trial was ordered, in both cases.

[23] The Crown cited Brooks P's judgment in **Evon Jack v R** where he cited the Privy Council's decision in **Tapper v DPP** and highlighted the principle established in that case that the quashing of a conviction would not be the normal remedy for even a case of extreme delay. The court's attention was also drawn to Brooks P's reference to a passage from **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72, where it was stated that if the breach was established post-trial or after there had been a hearing it

would only be appropriate to quash the conviction if the hearing was unfair or it was unfair to try the defendant at all.

Discussion

[24] In this ground, the appellant complained of the inordinate delay of eight years in the production of the transcript, which was vital for the hearing of the appeal. As a result, the appeal could not be heard before eight years had elapsed.

Whether there was a breach of the appellant's constitutional right under subsections 16(7) and (8) of the Charter

[25] To determine whether there was a breach of the appellant's constitutional right to get a copy of the record of the proceedings at his trial within a reasonable time, and to have the sentences imposed reviewed by a superior court, several factors will have to be assessed.

The law

[26] This right is enshrined in the Constitution as one of the fundamental rights. Section 16 of the Charter reads, insofar as is relevant:

> "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.
>
> …
>
> (7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced.

…"

[27] The appellant has invoked these three subsections of section 16 of the Charter, although it is subsections (7) and (8) that deal with appeals.

Was there a breach of the appellant's right to be provided with a copy of the record of the trial proceedings or section 16(7) of the Charter?

[28] The appellant was sentenced on 25 July 2014 and the transcript was provided 29 June 2022. Section 16(7) explicitly states that a person is entitled to a copy of the record of the proceedings at his trial "within a reasonable time", abridged only by the requirement to pay reasonable fees prescribed by law. In this appeal, the reason for the delay was the failure of the trial court to make the transcript available for the appeal within a reasonable time.

[29] It was clear that there was a lengthy delay in the production of the transcript. A delay of almost eight years is inordinate, as delays lasting six years have been held to be unreasonable in relation to a constitutional right (see **Lloyd Forrester v R** [2023] JMCA Crim 20). The delay in producing the transcript in the instant case is a breach of section 16(7) of the Constitution.

[30] The appellant has also asserted that this breach has negatively impacted his attempts to have his sentences reviewed by this court, which he is entitled to under section 16(8) of the Constitution. This will be discussed below.

Was there a breach of subsection (8) of section 16

[31] The appellant's right to have his sentences reviewed are enshrined in section 16(8) of the Charter. This provision does not state that the review must be done within a reasonable time as is explicitly provided in section 16(1), in relation to hearings or trials. This has given rise to the question as to whether there are two discrete rights under subsection (8) similar to subsection (1).

Is there a "reasonable time" requirement or guarantee under subsection (8)?

[32] The importance of subsection (1) is the "reasonable time guarantee", which was not repeated in subsection (8) of the section. In treating with this issue in **Evon Jack v R**, Brooks P pointed out that although prior to the amendment to the Constitution, when there was no specific provision dealing with appeals or reviews of trial decisions, this court, in **Tapper v DPP**, accepted that 'hearing' included post-conviction proceedings. The learned President stated at para. [19]:

> "… The term 'hearing' has been accepted as incorporating, not only trials, but also post-conviction proceedings. That interpretation was established even before the promulgation of the Charter. The Privy Council, in **Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26; [2012] 1 WLR 2712 ('**Tapper v DPP'**), endorsed that position, saying at paragraph 9 of its judgment:
>
> '…the Court of Appeal [of Jamaica] accepted, and there is no dispute, that [the right to a fair hearing within a reasonable time by an independent and impartial court established by law] extends to post-conviction delay.'
>
> The subsequent promulgation of the Charter does not affect that principle. There is no doubt, therefore, that [the appellant] was, and is, constitutionally entitled to have his appeal heard within a reasonable time."

At para. [21] the learned President dealt specifically with subsection (8) and observed that:

> "... It addresses the right to the hearing of an appeal from a conviction …
>
> The provision does not specifically include a reference to a time period, but it would be unarguable, considering the requirement of a "reasonable time" in subsection (1), quoted above, and its applications to appeals, that subsection (8) does not incorporate the element of a reasonable time for the hearing of an appeal. The inherent interrelationship between subsections (1) and (8), given the length of the delay in this case, necessarily means that the "reasonable time" aspect of

> the right conferred by subsection (8), has not been afforded to [the appellant]."

[33] It is an obvious omission by Parliament in failing to include the reasonable time guarantee or requirement in this subsection. Suffice it to say, we agreed with Brooks P's conclusion, concerning the interpretation of section 16(8), that it is implicit that the review by the superior court must be "within a reasonable time". This court has consistently treated the reasonable time requirement or guarantee as applicable to subsection (8) of section 16. Also, there is support for Brooks P's conclusion from the principles of statutory interpretation that empowers a court to imply words into a statute, in order to give effect to Parliament's intention. This also applies to the Constitution.

[34] The duty of a court interpreting a statute is well known and accepted as being to give effect to the intention of Parliament. This is also underscored by the doctrine of separation of powers. In **Tomlinson v Television Jamaica Limited** [2020] JMCA Civ 52 Phillips JA, in dealing with the approach to statutory interpretation, at para. [86], observed:

> "It is important, in this discourse, to start with the general approach to the interpretation of any instrument or statute, namely, that one is to ask, what is the natural and ordinary meaning of the words or phrases in its context in the statute."

[35] In **Patrick Reyes v The Queen** [2002] UKPC 11 the Board in dealing with the proper approach when construing rights guaranteed by the Constitution opined at para. 26:

> "… As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the [C]onstitution. But it does not treat the language of the [C]onstitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights …"

It is widely accepted that a court interpreting a statute can, if certain conditions are satisfied, add words or delete words by necessary implication, in order to give effect to

the clear intention of Parliament. An obvious omission is one such condition, as in this case.

[36] The appellate review process is no less important than the trial process and would require a similar guarantee to avoid delay. Delay in both instances would have the same impact. Further, all the other subsections in section 16 dealing with access to the courts and the obligations of the court, require performance within a reasonable time. The prime example is section 16(1) which deals with hearings at first instance, where it is explicitly stated that it must be within a reasonable time. There is no discernible reason for the omission of the reasonable time guarantee in relation to the right under section 16(8).

[37] The right to have convictions and sentences reviewed could essentially be meaningless if there is no requirement concerning the time within which it must be adjudicated on by this court. The language used in subsection (1) would be appropriate to convey the same right for the review process, avoid absurdity and bring the provision in line with the hallowed legal principles that reflect the necessary abhorrence for delay. We would therefore recommend that the words "within a reasonable time" be inserted into section 16(8), to give efficacy to Parliament's intention.

[38] The effect of this is that section 16(8) should be read as if the words '***within a reasonable time***' have been included immediately before "by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced".

Whether there was a breach of section 16(8) of the Constitution

[39] A number of factors were accepted by the Privy Council, in **Flowers v The Queen** [2000] UKPC 41, as relevant to the assessment of whether there has been a breach of the right to a fair hearing within a reasonable time. In **Techla Simpson v R** [2019] JMCA Crim 37 ('**Techla Simpson**') Brooks JA (as he then was) summarised and applied the principles in **Flowers v The Queen** as follows at paras. [36], [37] and [38]:

> "[36] … In determining whether the remedy of a reduction of sentence, ought to be afforded …, it is necessary to examine

> and apply some of the factors set out in **Flowers v The Queen**.
>
> [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."

[40] This court has consistently applied these principles. We did not depart from them. The considerations in relation to prejudice would be modified to those relevant to an appeal, where necessary.

Length of the delay

[41] In this case, the delay complained of was almost eight years. There is no expressed methodology to determine what period would constitute a breach of the reasonable time requirement. In **Maitland Reckford v R** [2022] JMCA Crim 5 this court addressed the reasonable time guarantee and opined, at para. [23]:

> "A fair hearing within a reasonable time, as a concept, is not susceptible to precise definition, on account of its symmetry or organic relationship with disparate circumstances and points in time. Their Lordships at the United Kingdom Privy Council ('UKPC') in **Herbert Bell v Director of Public Prosecutions** (1985) 32 WIR 317; (1985) 22 JLR 268 … recognised as much."

[42] The delay of almost eight years, based on the authorities, is a sufficient period that will result in a breach of the appellant's rights under the Charter. It is now important to examine the reason for the delay.

The reason for the delay

[43] In the instant case the appellant complained that the hearing of the appeal was delayed for almost eight years due to the unavailability of the transcript of the trial. He submitted that "no reason worthy of consideration" was given for the arguably egregious delay in the production of the transcript.

[44] For there to be a breach of the appellant's right, "[t]he reason for the delay must be demonstrated to be attributable to the State before an infringement of the right can properly be established for the purposes of redress under the Charter" (see **Julian Brown v R** [2020] JMCA Crim 42 para. [85]). The production of the transcript is the responsibility of an agent of the State, the trial court, in this case the Supreme Court (see paras. [23] – [27] of **Evon Jack v R**, where Brooks P outlined the relevant rules in the CAR and the ostensible duty on the trial court to provide the record of the proceedings). Accordingly, the reason for the delay must be laid at the feet of the State.

[45] At para. [45] of **Techla Simpson**, Brooks P pointed out that "Their Lordships in **Flowers v The Queen**, accepted that a long delay, even in the absence of any specific evidence of prejudice, could constitute prejudice". There is no requirement or need to prove prejudice of any kind. However, the delay in the production of the transcript resulted in undue delay in the hearing of his appeal. This resulted in breaches of the

appellant's constitutional rights guaranteed pursuant to subsections (7) and (8) of section 16 of the Charter. The delay in this case was egregious.

Remedies

[46] In **Evon Jack v R**, Brooks P enumerated the various types of remedies that this court is competent to grant for breaches of the Charter due to delay: (i) a public acknowledgment of the breach; (ii) a reduction in sentence; and (iii) the quashing of the conviction. At para. [44] Brooks P explained:

> "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 ..." (Emphasis added).

[47] The general rule is that the quashing of the conviction is not the normal remedy. The delay complained of here is post-conviction and, unlike the situation in **Evon Jack v R** where the court was unable to review the conviction, the court is not similarly hamstrung in this case. Therefore, the quashing of the conviction in this case would be unwarranted. In our view, a reduction in the sentence imposed is the most appropriate remedy to address the breach that occurred.

[48] In **Techla Simpson v R** the appellant was convicted for murder, and this court awarded a two-year reduction for eight years of pre-trial delay. In **Absolam (Jahvid) et al v R** [2022] JMCA Crim 50, the appellants were convicted for illegal possession of a firearm and robbery. For post-conviction delay of seven years this court awarded a two-year reduction in the sentences imposed.

[49] In the light of the authorities from this court, where the sentences were reduced by two years for delay of eight-years, we would also reduce the appellant's sentence by two years for the breaches of his constitutional rights.

Ground 2

[50] In the second ground, the appellant complained that the sentence imposed was manifestly excessive.

Appellant's submissions

[51] The appellant argued that "the sentences defied the linear proportionality approximated in earlier decisions." The appellant also argued that although the trial predated the promulgation of the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Courts, December 2017 ('the Sentencing Guidelines'), extant principles were not formally applied.

[52] The main challenge in this ground was that the usual sentence in 2014 was seven to 12 years' imprisonment, for illegal possession of firearm (15 years were imposed in this case). The appellant relied on **Leon Barrett v R** [2015] JMCA Crim 29 and drew the court's attention to paras. [90] – [96]. It was also submitted that given the appellant's good antecedents this court should consider a reduction that would take the sentence closer to seven years.

[53] The appellant also relied on **Jerome Thompson v R** [2015] JMCA Crim 21, in particular paras. [27], [34] – [36]. In that case the appellant was charged for the offences of illegal possession of firearm and robbery with aggravation. He was sentenced to seven and 15 years respectively.

The Crown's submissions

[54] The Crown submitted that the appellant's sentence should be reduced by one year and two months for the time spent in custody and one year for the delay in the hearing of the appeal.

Standard of review

[55] The standard of review was eloquently and precisely restated in **Tara Ball, Marvin Alexander and Richard Scarlett v R** [2023] JMCA Crim 2 by Straw JA, citing **Meisha Clement v R** [2016] JMCA Crim 26. At para. [92] Straw JA declared:

> "It is now well established that in order for this court to interfere with a sentence imposed by a trial judge, **it must be demonstrated that there was an error in the application of the principles relevant to sentencing and, further, that arising from such error, the sentence imposed was either manifestly excessive or manifestly lenient**." (Emphasis added)

[56] In **Meisha Clement v R**, Morrison P adumbrated the primary principles engaging this court's consideration on an appeal against sentence. These are:

> "… whether the sentence imposed by the judge (i) was arrived at by applying the usual known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for like offences in like circumstances …"

This court's reluctance to interfere with the exercise of the sentencing judge's discretion is anchored in the establishment of these principles.

[57] As we previously observed, the trial in this case took place in 2014. That is significant for two reasons, based on the complaint in this ground. Firstly, the sentence was imposed before the new methodological approach was introduced by the issuance of the Sentencing Guidelines and the decision in **Meisha Clement v R**. Secondly, the usual sentence imposed for these offences was less than the 15 years handed down by the learned judge.

[58] Notwithstanding that, we note that the principles we adverted to above were applicable at that time (see for example, **R v Evrald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrate's Criminal Appeal No 55/2001, judgment delivered 5 July 2002). It was against this background that McDonald-Bishop JA (as she then was)

in **Daniel Roulston v R** [2018] JMCA Crim 20, at para. [16], made the following observation:

> "Although the learned judge did not have the benefit of the methodology set out in **Meisha Clement v R** and the Sentencing Guidelines, she was, however, not without guidance, as this court has, over the years, laid down, in various cases, some fundamental principles of law and a basic methodology that should be used by judges to assist them in the sentencing process. In **Meisha Clement v R**, Morrison P, after a thorough examination of several relevant authorities from this court as well as from outside the jurisdiction, provided an amalgam of those principles that should be employed by judges in the sentencing process."

[59] The learned judge of appeal then finessed the methodology laid down in **Meisha Clement v R**. At para. [17] she said:

> "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)."

Sentencing judge's remarks

[60] The learned judge, at the outset, made it clear that she was cognisant of her duty to apply the sentencing principles. The learned judge considered the offence and the way

it was committed, the fact that the complainant escaped and that was what ended her ordeal. The learned judge opined that the complainant was "lucky", as, no one now knew the ending the appellant and his co-conspirator had in mind.

[61] The learned judge observed that a custodial sentence was usually imposed for those offences. Further, there was nothing in the appellant's history that would cause her to give him a non-custodial sentence. From her remarks it was also clear that deterrence was uppermost in her mind.

[62] The learned judge stated that illegal possession of firearm attracted a maximum sentence of imprisonment for life, and 21 years for robbery with aggravation.

[63] As was customary before the Sentencing Guidelines and **Meisha Clement v R**, the learned judge did an analysis of the mitigating and aggravating factors by stating that she took them into consideration. She stated that there were "a number of positive things in the social enquiry report and the antecedents" and that she took them into account. That the appellant had children that were dependent on him and the fact that he had no previous convictions also formed part of her consideration of sentence. In pronouncing sentence, the learned judge opined:

> "Having taken all those things into account, I am not going to send you to spend twenty years, I am going to send you for fifteen years, I think it is one you deserve, I think it is one that is commensurate for the offence for which you committed. Fifteen years on each count to run concurrently."

[64] In this case the learned judge referred to the general principles, at the beginning of her sentencing remarks, as follows:

> "… Now, Mr. Francis, there are a number of things I have to take into account, sir, in sentencing you. Now, I also have to ensure that whatever sentence you are given, sir, is one that is commensurate, one that fits the crime, commensurate to the offence. In looking at that, sir, I have to take into account, not just what you are charged for, but all the circumstances surrounding it."

However, she at no point demonstrated that she applied these principles in any coherent or meaningful way in determining the sentences she imposed.

[65] The issue to be determined was whether the sentences imposed were manifestly excessive. The appellant was correct in his submission that the usual sentence in 2014 was below 15 years. In fact, the normal range for illegal possession of firearm was between seven and 12 years' imprisonment.

[66] The authorities suggest that the sentences for illegal possession have been distinguished based on whether the circumstances of the case are in relation to possession of a firearm only (simpliciter) or the use of the firearm in the commission of an offence, as in this case where the complainant was robbed at gun point. In addition, the sentence imposed for illegal possession of firearm is not in line with the sentences imposed in other cases for this offence. See **Kenneth Hylton v R** [2013] JMCA Crim 57, as cited in **Barrett v R**, where a sentence of 10 years' imprisonment at hard labour was imposed for illegal possession of firearm by this court after a review of some decided cases. In **Barrett v R**, the court cited and adopted the dicta in **Ian Wright v R** [2011] JMCA Crim 11 that:

> "We are cognizant of the range which is between seven to ten years for similar offences when illegal firearms have been used to commit offences."

10 years' imprisonment at hard labour was imposed in both **Barrett v R** and **Ian Wight v R** (as cited in **Barrett v R**).

[67] In our view, the sentence of 15 years' imprisonment, imposed in this case, was manifestly excessive as there is nothing in the circumstances to warrant a sentence outside the normal range for illegal possession of a firearm, when it is alleged to have been used in the commission of an offence. Accordingly, we utilised the range of seven to 12 years. Since, the firearm was used in the commission of a robbery, we were of the view, that a sentence of 10 years would be appropriate.

[68] The appellant was entitled to credit of one year and two months for the time spent on pre-trial custody. We further reduced the sentence by the two years, as redress for the breaches of the appellant's constitutional rights. For the offence of illegal possession of firearm, we therefore imposed a sentence of six years and 10 months' imprisonment at hard labour.

[69] We then shifted our focus to consider the sentence imposed for robbery with aggravation. The learned judge used a starting point of 20 years and then reduced it to 15 years based on the mitigating and aggravating factors she discussed.

[70] In **Jerome Thompson v R**, this court stated that the usual sentence for robbery with aggravation involving a firearm is 12 years. At para. [34] Brooks JA said that:

> "… The usual sentence imposed for robbery with aggravation involving a firearm is one of 12 years. This may be increased or reduced according to the circumstances of the case."

The circumstances of the instant case involved the use of firearms, while in the company of another person. We were of the view that a sentence of 12 years would be appropriate. The appellant was entitled to similar reductions in his sentence, as applied to the offence of illegal possession of firearm. Accordingly, we imposed a sentence of eight years and 10 months' imprisonment at hard labour, for the offence of robbery with aggravation.

[71] It is for the above reasons that we made the orders at para. [2] above.