

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR GREEN JA**

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00017

DERVAN GAYLE v R

Sanjay Smith for the appellant

Ms Debra Bryan and Ms Andrene Hutchinson for the Crown

29 June 2026

Criminal law – Conviction – Identification evidence – Discrepancies and omissions in evidence – Identification parade – Sentence – Whether sentences manifestly excessive – Failure to set minimum term to be served before pre-parole eligibility – Sexual Offences Act, section 6(2)

ORAL JUDGMENT

MCDONALD-BISHOP P

[1] This is an appeal against conviction and sentence by the appellant, Dervan Gayle, brought with the leave of a single judge granted on 14 November 2022.

[2] The case presented at trial is accurately recorded in the skeleton arguments of counsel for the appellant, Mr Smith, which the court gratefully adopts for convenience.

The prosecution's case

[3] The prosecution's case, in brief, was that on 16 January 2017, at about 7:00 pm, in the parish of Saint Thomas, the complainant was outside her home at the front door, attempting to use a hammer to knock off the lock in order to re-enter her house. She mistakenly left her keys inside and locked herself out. She sought help from a neighbour, but the neighbour did not offer any material assistance.

[4] While the complainant was attempting to enter her house, a man in a hoodie, whom she had seen earlier, entered the yard by way of a shortcut. The man approached her with a firearm in his hand and offered to help her. When she refused, he pulled her into the shortcut and demanded sex from her. She told him that she was not in a state to engage in sexual intercourse, after which he forced her to perform oral sex on him. He then stole her cellular phone and left.

[5] The complainant reported the incident to her boyfriend that same night. She made a report to the Morant Bay Police Station the following day and gave a description of her attacker. On 20 January 2017, the appellant was arrested as a suspect in connection with the incident, and on 25 January 2017, he was pointed out at an identification parade. He was subsequently charged with the offences of illegal possession of firearm (count 1), robbery with aggravation (count 2) and grievous sexual assault (count 3).

[6] At trial, the prosecution relied on two witnesses: the complainant and the investigating officer. The complainant gave a description of her alleged attacker, which did not include that he wore dreadlocks at the time.

[7] It was put to the investigating officer that the appellant's identity had been exposed on the day of the parade, and that the exposure compromised the identification parade. The suggestion was not accepted. The statement of the sergeant who conducted the identification parade was agreed, along with the documents forming part of the identification parade procedure. Those documents formed part of the record of the court and were available to the learned trial judge.

The appellant's case

[8] A detailed no-case submission was made by defence counsel at the trial, but it was not upheld.

[9] The appellant gave an unsworn statement from the dock denying his involvement in the commission of the offences. In his unsworn statement, the appellant said that he did not know what the complainant was talking about, and that, since coming home from

prison, he had begun to focus on art and fishing and was trying to conduct himself properly. The appellant called one witness, his brother, who spoke to his character.

The convictions and sentences

[10] The learned judge found the appellant guilty and, on 5 February 2020, sentenced him as follows: on count 1, for the offence of illegal possession of firearm, 12 years' imprisonment; on count 2, for the offence of robbery with aggravation, 12 years' imprisonment; and on count 3, for the offence of grievous sexual assault, 15 years' imprisonment. The learned judge ordered all the sentences to run concurrently.

The grounds of appeal

[11] The appellant was granted leave to appeal his convictions and one of his sentences by a single judge of this court. Before us, counsel for the appellant, Mr Smith, abandoned the original grounds of appeal that had been filed, and on which the learned single judge had granted leave to appeal. The appellant was granted leave to argue four grounds of appeal, namely:

- (1) the complainant wrongly identified the appellant;
- (2) the identification parade was compromised due to the exposure of the appellant;
- (3) the learned judge erred in finding the complainant's evidence credible; and
- (4) the sentences are manifestly excessive.

The appeal against conviction

[12] Having heard counsel for the appellant, the court did not find it necessary to call upon the Crown to respond, because it found nothing of material substance in the grounds of appeal warranting interference with the convictions. The court agrees with the ruling of the single judge that the learned judge adequately addressed the issues of

identification, the allegation as to the appellant's exposure before the identification parade, the inconsistencies and discrepancies, as well as the omissions in the evidence.

[13] Having examined the evidence, the court finds that there is no basis on which it can be said that the learned judge was plainly wrong, or that he erred in law, when he found that the appellant was correctly identified by the complainant. The learned judge conducted what the court finds to be a very comprehensive analysis of the evidence before him, and he carefully applied the law, as he ought, to the facts. There is, therefore, no basis to disturb the convictions. Accordingly, the appeal against conviction must be, and is, dismissed.

The appeal against sentence

[14] In respect of sentence, Mr Smith asked the court, if the convictions were upheld, to reduce the sentences as follows: on count 1, to nine years' imprisonment; on count 2, to nine years' imprisonment; and on count 3, to 12 years' imprisonment, on the ground that they are manifestly excessive. Mr Smith also argued that the learned judge ought not to have taken the previous convictions into consideration, on the basis that they were dated, in the sense that sufficient time to allow rehabilitation had passed. Reference was made to the 10-year rehabilitation period stipulated under the Criminal Records (Rehabilitation of Offenders) Act. Therefore, Mr Smith submitted that the appellant ought to be regarded as a person with a "clean slate".

[15] The court granted leave for counsel to argue that all the sentences imposed are manifestly excessive. The court, however, rejects that submission. To the contrary, the court is of the view that the sentences are unduly lenient in the circumstances, given the possession and use of a firearm and the use and threat of violence. Furthermore, the present offences are similar to those for which the appellant had been previously convicted.

[16] The court finds, however, that although the sentence of 15 years' imprisonment for grievous sexual assault is not manifestly excessive, and indeed ought to have been

harsher, the learned judge erred in failing to comply with section 6(2) of the Sexual Offences Act, which required him to stipulate a minimum period to be served before the appellant would become eligible for parole. The court must therefore set aside that sentence in order to correct the error and bring the sentence into conformity with the law. On that basis, the court finds that the appeal against sentence must be allowed, in part, so that a period of parole eligibility may be stipulated.

[17] In setting the minimum period to be served before eligibility for parole, the court considers a term of 14 years' imprisonment to be appropriate. In arriving at that minimum term, the court has taken into account that the grievous sexual assault was committed not only with the use of a firearm, but was also accompanied by threats to kill the complainant. Those circumstances further aggravated the offence, as did the appellant's previous convictions. A longer period before parole eligibility is therefore warranted, having regard to the appellant's now established propensity to commit offences involving the use of a firearm, his dangerousness, and the need to protect the public.

Disposition

[18] For the foregoing reasons, the court orders:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is allowed, in part.
3. The sentences imposed for the offences of illegal possession of firearm (count 1) and robbery with aggravation (count 2) are affirmed.
4. The sentence imposed for the offence of grievous sexual assault (count 3) is set aside, and substituted therefor is the following sentence: 15 years' imprisonment, with the stipulation that the appellant shall serve 14 years before becoming eligible for parole.
5. The sentences are to be reckoned as having commenced on 5 February 2020, the date on which they were imposed, and are to run concurrently.