[2021] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00008

SADIKI HESLOP v R

Richard Small for the applicant

Ms Patrice Hickson for the Crown

10, 11, 12 November 2020 and 10 December 2021

FRASER JA

Background

[1] On 13 December 2018, the applicant Sadiki Heslop and his co-defendant Leiton Shirley were both found guilty of illegal possession of firearm and illegal possession of ammunition, in the High Court Division of the Gun Court. They were tried by Straw J, the learned trial judge ('LTJ'), as she then was. On 20 December 2018 the applicant was sentenced to imprisonment for six years and 11 months for each offence. The sentences were ordered to run concurrently. He seeks leave to appeal against his conviction and sentence.

The prosecution's case

[2] The prosecution's case is that, on 17 August 2017 at about 3:00 am, Sergeant Troy Irons and Inspector Rohan Ritchie were on mobile patrol. They stopped a Range Rover motor vehicle on Lincoln Avenue, off Maxfield Avenue in the parish of Saint Andrew. The left rear door of the Range Rover opened and the applicant exited and began shouting, "Mi a police, Mi a police". The applicant gave his name when asked, but was unable to provide his identification card for inspection, as he indicated it was

expired and at home. When asked by Sergeant Irons if he had a firearm in his possession, he said yes. He was then asked where it was and he indicated it was in the motor vehicle. While he was being escorted to the motor vehicle, he appeared hesitant to accompany the two policemen back to it.

[3] When they got to the motor vehicle, two females were observed sitting in it; one in the right rear passenger seat and another in the right front passenger seat. A male, later identified as Mr Shirley, was sitting in the driver's seat. Sergeant Irons observed a silver and black firearm with attached magazine, on the left rear passenger seat. The firearm was later found to contain one round of ammunition. The magazine was empty. When asked by Sergeant Irons if this was the firearm he was speaking about, he replied, "Mek mi level wid yuh. Mek mi level wid yuh". Sergeant Irons immediately stopped and cautioned him and he responded, "A di driva slip it gi mi. A di driva said fi give mi because mi a di police to control the situation. Mi nuh waan lose mi work".

[4] When asked, all four persons said they did not have a firearm license.

[5] When cautioned, Mr Shirley's response was, "A 2 yout wi drop off on di lane, one a dem left it in here". The two females, when cautioned both said, "Mi never know seh gun when ina di car". They were all informed of the offences of illegal possession of firearm and illegal possession of ammunition and arrested. They were then escorted to the Hunt's Bay Police Station. On 22 August 2017, after a question and answer interview, the applicant was informed that he was now jointly charged with Mr Shirley and the two females for illegal possession of firearm and illegal possession of ammunition. When cautioned he made no statement.

The defence case

[6] The applicant gave sworn evidence. His case was that on 17 August 2017 at 3:00 am, he, a police officer, was in the company of Mr Shirley and two females off Maxfield Avenue in the Kingston Corporate Area. He was seated in the back of the Range Rover behind the driver. The vehicle was being driven by Mr Shirley. The

vehicle turned onto Lincoln Avenue and the applicant heard a siren and saw blue lights flashing. Immediately, Mr Shirley pulled to the left of the road, stopped and "reached round and put a gun on the back seat and asked if he could deal with it for him". The applicant indicated he was never in possession of the gun. He exited the vehicle with his hands in the air and on seeing Sergeant Irons with his rifle pointing, advancing to the Range Rover, he shouted "Mi a police" and proceeded to identify himself as Sadiki Heslop. He gave his number – 13510, his rank – Constable and his assigned police station.

[7] When asked if he had a firearm in his possession he said he told the officer no, he had none in his possession but that one was in the vehicle. He was asked for his ID to which he replied, he left it at home as it had expired. When asked if he had a permit he said he told the officer that "it's my friend just put it on the backseat".

[8] He stated he was then placed in handcuffs and the officer retrieved the firearm. The other occupants were asked to exit the vehicle. He was taken to the Hunts Bay Police Station. He said on 22 August 2017 a question and answer was conducted.

The application to adduce fresh evidence

The nature of the material sought to be adduced as fresh evidence

[9] At the commencement of the hearing before this court, Mr Richard Small, on behalf of the applicant, made an application to adduce fresh evidence of a note/letter ('letter') written by Mr Shirley. After hearing and considering evidence and submissions, we refused the application and promised to give the reasons for the refusal, in our decision on the appeal. We now do so.

[10] The letter was brought to the attention of the LTJ and counsel for the applicant, who also appeared below, after the applicant was convicted and sentenced. The terms of that letter are as follows:

> "Good Day my lady From the first day I came to court I wanted to Plead Guilty But I was Instructed by my lawyer to Plead not

> Guilty. Mr. Sadiki Heslop did Not know anything about the gun in the car He know about it when we were pull over by the police on August 17, 2017 about 3:00 am it was me, Sadiki an two female in the car my lady I am the one who know about the Gun in the car I am sorry for wasting your time and the court time. my lady, am asking you for some leinecy please for a Next Chances to show you and my love one's that I wont make this mistake again I have 3 kids two girls and one boy my son is 13 years of age and is going to high school and my oldes[1] daughter is 5 she is going to primy school and the smallest one is going to base school, am asking you For some leinecy on me please my lady.
>
> X [Signature affixed] 20/12/2018
>
> X Leiton D, Shirley"

[11] Had it been allowed into evidence, counsel for the applicant had intended to rely on that letter to support an additional ground of appeal, calling for a review of the soundness of the verdict returned against the applicant. That call would have been on the basis that, had the letter been available before verdict, it would have caused the LTJ to reconsider the issues before her, may have altered the position taken by the Crown and affected additional submissions advanced on behalf of the applicant.

The evidence in support of the application

[12] By affidavit of the applicant sworn on 24 January 2019, to which the letter was exhibited, the letter was placed before the court for review and consideration. Apart from the documentary evidence of the letter itself, the court also heard oral testimony from Mr Shirley, its purported author, and from Mr Hugh Thompson, attorney-at-law, counsel who appeared for Mr Shirley at trial.

a) Leiton Shirley

[13] Mr Shirley, in sworn testimony, indicated that he was jointly charged with the applicant and convicted of illegal possession of firearm and illegal possession of ammunition. At trial, he was represented by Mr Hugh Thompson and the applicant by Mr Richard Small. He said he gave the letter to Mr Thompson on the morning that he

[1] It is uncertain if this word is correctly transcribed from the original.

was to be sentenced. He indicated that he authored the letter and he stood by its contents. He stated that the sworn evidence to the contrary that was tested on cross-examination in his trial, "was lies" and he was sorry about that. He also stated that he was wrongly advised by his lawyer, as he had wanted to plead guilty, but his lawyer said that he should not. He denied that there was any fear that caused him to write the letter.

b) Hugh Thompson, attorney-at-law

[14] In his sworn testimony, Mr Thompson indicated that he was the erstwhile attorney-at-law for Mr Leiton Shirley. That he appeared for him at his trial in 2018 when he was jointly charged with the applicant Sadiki Heslop, for the offences of illegal possession of firearm and illegal possession of ammunition.

[15] He indicated that he received the letter in question from his client Mr Leiton Shirley after the judge had given her verdict on 20 December 2018 and he noticed that there was some shuffling and talking in the dock, which seemed to have irritated the court. Mr Thompson said he advised the court that his client wanted to hand him a note or a letter, and asked if he could take it. The judge gave him permission to collect it and hand it up to her. He read it before handing it up.

[16] Mr Thompson stated that it was a 'diabolical lie" that Mr Shirley had wanted to plead guilty but he told him to plead not guilty. Mr Thompson indicated that he took instructions from Mr Shirley and, at all material times, Mr Shirley pleaded his innocence from day one and wanted to proceed to his trial. Mr Thompson further stated that there came a time when Mr Shirley started complaining to him that he was coming under pressure from [the applicant] to change his plea to guilty. Mr Thompson outlined that he told Mr Shirley that his position was that, 'you have given me certain instructions but you are entitled to change your plea at any time before the trial or even during the trial". Mr Thompson indicated that Mr Shirley was adamant that he was not changing his plea as, 'he was not guilty of any offence as he was not aware that there was a firearm in the vehicle at the time when the vehicle was stopped". Mr Thompson said, 'He was pellucid about that".

[17] He was cross-examined by Mr Small. He agreed that on the day the letter was produced, the LTJ had said to him words to the effect that, she saw his client had been trying to get his attention for some time. He however did not recall an earlier occasion on 13 December 2018 when his client had wanted to say something and the LTJ had said that he, Mr Thompson was going to allow him to say it and his client had thanked the LTJ.

c) Leiton Shirley

[18] Mr Shirley was asked if he wished to respond to the assertion made by Mr Thompson that he told him that he was coming under pressure from the applicant to change his plea to guilty. He denied saying that to Mr Thompson. He said he told Mr Thompson that, "I was coming under pressure but it wasn't from [the applicant]. It was that they were saying that [the applicant] didn't know about the gun, why am I trying to tell the court that I don't know about it? So I felt bad in myself that this man was going down for something he doesn't know about".

[19] Throughout the taking of evidence, counsel for the Crown did not ask any questions of either Mr Shirley or Mr Thompson.

The submissions

[20] Counsel for the applicant submitted that, under section 28 of the Judicature (Appellate Jurisdiction) Act, the overriding consideration that should guide the exercise of the court's wide discretion, was whether the admission of the fresh evidence was necessary or expedient in the interests of justice. He advanced that the court's first duty was to read the documentary evidence annexed to the application. He relied on the cases of **Benedetto v R** (2003) 62 WIR 63, **Bernal and Moore v R** 51 WIR 241 at pages 257 e-f and 260 c-d, and **R v Parks** [1961] 3 All ER 633.

[21] Counsel acknowledged that the burden of proof to establish that the fresh evidence should be admitted, lay on the applicant. He maintained that all the criteria for admissibility of the fresh evidence had been satisfied. He argued that the time at which the letter was produced, after verdict, made it self-evident that it was

unavailable during the trial. It had been in the possession of the co-accused who was separately represented throughout the trial, and Mr Shirley explained in the letter why it had not been produced or made available to the applicant or his defence team, before. Then, in relation to the question of relevance, as the letter represented the applicant's then co-accused making an admission of guilt, and claiming sole responsibility for the gun, that was clearly relevant to the issues the trial court had to resolve.

[22] Regarding the issue of credibility, counsel invited the court to consider that, concerning the differences in the evidence of Mr Shirley and Mr Thompson, there was evidence on the transcript that prior to the date of sentencing, Mr Shirley had made attempts to communicate with the court independently of his counsel. That fact, he submitted, might call into question the authenticity of the allegations that have been made against Mr Shirley by Mr Thompson. Also, that although Mr Shirley gave sworn testimony at his trial which was inconsistent with the contents of the letter, he had given a plausible explanation for that inconsistency. Counsel further posited that the court does not have to determine what happened between Mr Shirley and Mr Thompson. The evidence does not need to be infallible. He argued that the test is whether there is an interpretation, that allows the evidence to be considered credible.

[23] Counsel therefore contended that the applicant had satisfied the criteria that the fresh evidence was unavailable at trial, relevant to an issue the LTJ had to determine, credible, and constituted material that may have caused the LTJ to come to a different verdict.

[24] Counsel for the Crown, Ms Patrice Hickson, in her submissions aligned herself with the defence. She indicated that she was of the view that the tests set out in **Palmer v The Queen** [1980] 1 SCR 759, had been satisfied and given his sworn testimony, Mr Shirley was well capable of belief. She advanced that had the evidence been available at trial, it was palpably clear that the tribunal may have come to a different conclusion. Ms Hickson also cited **R v Pendleton**, **Benedetto v R** and

The law and analysis

[25] Section 28 of the Judicature (Appellate Jurisdiction) Act states in part that:

> "28. For the purposes of Part IV and Part V [which deal with the jurisdiction in criminal cases], the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and
>
> (b) if they think fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in [sic] manner provided by rules of court before any Judge of the Court or before any officer of the Court or justice or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and
>
> ..."

[26] Several authorities have provided guidance on how the court should exercise this discretion. In **R v Parks**, Lord Parker CJ interpreting the power given to the court while construing a section similar to section 28, stated at page 634 that:

> "As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable

> doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial." (Emphasis supplied)

[27] Significantly, it was noted by Harrison JA in **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, judgment delivered 18 June 2008 at page 3, that the guidelines laid down in **R v Parks** are cumulative.

[28] **In R v Sales** [2000] 2 Cr App R 431, guidance was given concerning how an appellate court should approach attempts to adduce fresh evidence of a documentary nature. At page 438 B-C the court stated:

> "Proffered fresh evidence in written form is likely to be in one of three categories: plainly capable of belief; plainly incapable of belief, and possibly capable of belief. Without hearing the witness, evidence in the first category will usually be received and evidence in the second category will usually not be received. In relation to evidence in the third category, it may be necessary for this Court to hear the witness de bene esse in order to determine whether the evidence is capable of belief. That course is frequently followed in this Court. It was a course which we followed in this appeal, in relation to the evidence of the appellant himself and the three witnesses called in support of his appeal to whom we have referred."

[29] In **Benedetto v R** while construing similar legislation to section 28 from the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80), it was noted by the Judicial Committee of the Privy Council at paragraph 63 that:

> "[U]nder these provisions, the court has a discretionary power to receive fresh evidence, to be exercised when the court thinks it necessary or expedient to do so in the interest of justice."

[30] The court is therefore aware that even when all the criteria outlined in cases such as **R v Parks** and **R v Sales** are not met, in an appropriate case, in the interest of justice the fresh evidence should be admitted.

[31] Applying the law to the facts of this case, the court made the following observations. While the letter passed the tests of being unavailable at the time of trial

and that it would be relevant to the issue of possession which the court had to determine, the application faltered on the credibility test. This is so, given Mr Shirley's contrary sworn testimony at trial, in which he strenuously denied any knowledge of the firearm being in the vehicle and the fervent countervailing testimony of his former attorney-at-law, Mr Hugh Thompson, adduced during the hearing of the application. As the requirements of the admission of fresh evidence are cumulative, even if the evidence had been credible, which it was not, the application would still have been unsuccessful, as it failed the final test concerning the likelihood that it could have altered the outcome at the trial, had it been adduced. The reasons for that conclusion are as follows:

a) Both the Crown and defence are *ad idem* that at the point when the applicant spoke to the police, the applicant knew the firearm was in the vehicle;

b) The narrow issue that the LTJ had to determine, was whether the applicant admitted being in possession of the firearm, when he came out of the Range Rover and engaged the policemen in conversation. It is immaterial how long before exiting the vehicle he knew the firearm was in the vehicle. The question is, did he admit possessing it at the time the crown witnesses alleged he did?

c) The letter from the Mr Shirley could not have assisted the court in resolving that issue. That remained the situation after his testimony on the application.

[32] Accordingly, the application failed on the bases that the note was not credible, and further that, if it had been placed before the trial court, together with the other evidence led at the trial, it would not have altered the outcome of the trial.

Grounds of appeal

[33] Before this court, counsel for the applicant sought and was granted leave to abandon the initial grounds of appeal, and instead relied on additional and supplementary grounds which are set out below with some consolidation:

a) The LTJ erred in not upholding the no case submission made on behalf of the applicant.

b) The LTJ also erred in law in finding the applicant guilty without identifying and resolving the internal conflict in the Crown's case between the two prosecution witnesses' claim to having heard the applicant admit to being in possession of a firearm yet he still was not charged without delay, but was charged some five days later after he was subjected to a question and answer interview.

   This internal conflict undermined the credibility of the witnesses for the Crown and required identification and resolution before a tribunal of fact could return a verdict of guilt based on a finding beyond reasonable doubt.

   The issue was therefore central to the judicial function of the LTJ and in those respects the LTJ erred.

c) The LTJ erred in finding the accused guilty in light of evidence which tended to undermine the prosecution's case.

d) The verdict is unreasonable and unreasoned.

e) The sentence passed is manifestly excessive.

The summary submissions

Submissions from counsel for the applicant

[34] In summary, Mr Small argued that there were crucial issues of law and fact that arose for determination which the LTJ either did not, or did not adequately

address in her ruling on the submission of no case to answer or in her summation. Counsel identified, complained about and submitted on the following:

a) The failure of the LTJ to rule on the inconsistency of the two police officers claiming to have heard a man admit to being guilty of committing the offence of illegal possession of a firearm and not charging him without delay and instead questioning him in circumstances which are inconsistent with the **Practice Note (Judges' Rules)** [1964] 1 WLR 152 ('Judges' Rules'). Counsel argued that the fact that the applicant was not charged without delay tended to establish and raise a reasonable inference in favour of the applicant that there was in fact no admission made by him. The fact that there was no answer to this inference, meant that the prosecution had failed to discharge the burden to prove its case beyond reasonable doubt and the no case submission should have been upheld.

   Mr Small advanced that the additional contradiction of the unexplained omission of any record of the alleged offer of an alternative way of recording the applicant's cautioned statement and the unresolved issue of whether this lately added evidence was a recent concoction, supported the case for the no case submission to have been upheld.

b) Counsel contended in the alternative that even if the matter was properly for the LTJ's jury mind, the LTJ was required to consider, rule on and resolve every issue of fact that undermined the prosecution's case before she could properly find beyond a reasonable doubt that the applicant was guilty of these offences. Mr Small argued that the LTJ having failed to so examine each of the weaknesses in the Crown's case and the prosecution having failed to answer the defence's inference at the end of the case,

based on all the matters of law and fact advanced in support of the no case submission, meant that the prosecution had failed to discharge the burden of proof and the LTJ was obliged to have returned a verdict of not guilty (see **Andrew Stewart v R** [2015] JMCA Crim 4 applying dicta in **Ellis (Taibo) v The Queen** (1996) 48 WIR 74). Counsel additionally advanced that the fact that an attorney-at-law was present at the question and answer session did not cure any breach committed in the attorney-at-law's presence. This was so as an attorney-at-law has a right to choose not to advise his client and to allow the breach to continue and to later raise the issue at trial for the judge to rule on.

c) Counsel advanced that Sergeant Irons breached rule 1 of the Judges' Rules and also did not act in accordance with paragraph d of Annex A (Preamble) to the Judges' Rules. He argued that even if the Judges' Rules are only rules of fairness they still have considerable importance in governing the conduct of police officers (see **Shabadine Peart v R** [2006] 1 WLR 970). Mr Small argued that the LTJ declined to make a ruling on whether the Judges' Rules were breached, which was not properly open for her to do. He submitted that the Judges' Rules were tendered by the defence to show the inherent inconsistency and unfairness of the Crown's case. Mr Small posited that the nature of the questioning tended to confirm the applicant's testimony that he never admitted to having the firearm and negatived the credibility of the evidence that he had admitted to being in possession of the firearm.

d) Counsel contended that the LTJ misunderstood the defence submission that the evidence of the two prosecution witnesses was inconsistent with the applicant having made an admission. Instead, counsel complained, the LTJ used each of these suspect witnesses to confirm each other, and elevated their evidence, by

indicating that they gave consistent evidence. It was further contended that if the applicant had been charged, the police would have been prohibited from questioning him as they did, as none of the questioning fell within parameters that were allowed in the circumstances.

e) Counsel maintained the LTJ erred in her rulings that: (a) The question and answer had no relevance to the issues that she had to determine; (b) she was "not going to be making any pronouncements on the [question], whether or not the police were correct in conducting a question and answer interview with [the applicant] Mr Heslop"; and (c) "I will be making no comments on whether the police were entitled to ask any questions of the witnesses". Mr Small submitted that these issues on which the LTJ failed to rule were critical to the credibility of the prosecution's case. He submitted that in essence, the LTJ abdicated her responsibility to rule, which was far more fundamental than having made a ruling with which counsel disagreed. In those circumstances counsel insisted the verdict could not stand.

f) Mr Small additionally argued that the LTJ erred in relying on an explanation concerning the option for the applicant to give a narrative cautioned statement rather than a question and answer, which was never given and which the LTJ was unable to refer to or to explain why she accepted such an explanation. It was the defence submission that the evidence about the applicant having been given an option was a recent concoction proffered in cross-examination or re-examination, to circumvent the suggestion that Sergeant Irons had set out to cross-examine the applicant.

g) Counsel further argued that the LTJ used the wrong test by stating that the issue did not go to the root of the matter, as it is sufficient

if it affects an important matter in the case (see **Andrew Stewart v R**). This contradiction did affect an important matter in the case, that of whether the investigator was seeking to question the applicant to his disadvantage. Counsel submitted that Sergeant Irons' evidence that he offered the applicant an option was also contradicted by the evidence of Inspector Ritchie that Sergeant Irons stated his intention to question each of the suspects from the morning of 17 August 2017. Further, counsel noted, the several contradictions relate to the failure of the witnesses to have made any note of these several events in circumstances where a note would be expected to have been made;

h) Mr Small ultimately advanced that in essence the LTJ declined to:

   i) consider the governing principles;

   ii) rule on them;

   iii) apply the governing principles to the factual issues that the defence called on her to consider;

   and thereby failed to analyse or scrutinise the evidence before coming to a verdict. This was a failure by the LTJ to perform an essential function of her judicial role. Counsel contended that the combined effect of these various errors and omissions by the LTJ, meant that she had not disposed of issues that she was required to dispose of, before she could find that the prosecution had discharged its burden to prove its case beyond reasonable doubt.

[35] Learned counsel for the applicant did not advance any separate submissions on ground d, indicating that it was covered by the submissions made on the earlier grounds, particularly grounds b and c. He also made no submissions on ground e.

Submissions from counsel for the Crown

[36] Ms Hickson submitted that the LTJ was very detailed and patient in her summation and treated all the issues adequately. Counsel argued that there is nothing on the transcript of the case which indicates that the question and answer session or the document that was put into evidence breached the Judge's Rules.

[37] She further submitted that the LTJ dealt with the issues raised by the applicant's attorney-at-law made in support of the no case submission and ably addressed the defence presented by both the applicant and Mr Shirley which tended to discredit them rather than the crown witnesses. She argued that the LTJ stated clearly that the credibility of the crown witnesses was the main issue in the case and applied the law in relation to possession of a firearm by citing the case of **R v Maduro** (2008) 72 WIR 225 in support. Concerning how inconsistencies should be resolved, Ms Hickson submitted that the case of **R v Maduro** provided more assistance than **Andrew Stewart v R** which was relied on by counsel for the applicant.

[38] Counsel highlighted that the LTJ noted that Mr Shirley denied knowledge of the firearm, bearing in mind that the Crown's case was that the applicant told the police that it was Mr Shirley, who had given the firearm to him to "control the situation" as he was a police officer. Counsel also invited the court to consider that the LTJ accepted Sergeant Iron's evidence that he had given all four suspects the option to do a question & answer or a "narrative" but he had not written that in his statement because they opted for a question and answer. Ms Hickson submitted that the LTJ highlighted the inconsistency between both Crown witnesses as Inspector Ritchie's evidence was that Sergeant Irons indicated to the suspects his intention to ask them questions, before dismissing it as a slight discrepancy that did not go to the root of the issues in the trial and did not destroy the credibility of the Crown's case.

[39] Counsel also advanced that the LTJ recounted and accepted Sergeant Irons' explanation for asking question 22 as the firearm had not been taken from the person of any of the suspects, but rather from the vehicle in which all four were travelling. Ms Hickson argued that the LTJ correctly dismissed Mr Small's contention about the

effect of that question, by stating that question 22 by itself did not suggest any internal inconsistencies that could cause her to conclude that the prosecution witnesses were not credible. This, in light of the fact, that both prosecution witnesses gave evidence of the applicant's utterance admitting possession.

[40] Counsel submitted that it was clear from the LTJ's reasoning, that the basis of defence counsel's grouses did not go to the root of the issues that the LTJ had to try. She further advanced that a reading of the transcript bolstered the prosecution's case, as both accused were seeking to lay blame at the feet of each other, with the applicant's co-accused denying that he had said the words the applicant said he did.

[41] Counsel pointed out, in her submissions, that the LTJ highlighted the consistencies in the accounts of the prosecution witnesses on the one hand and the applicant's on the other, indicating that the only differences in the accounts were whether he was taken to the Range Rover at the time the firearm was recovered and also whether he told the police officers that he was in possession. Ms Hickson emphasised that the LTJ rejected the applicant's account and accepted the account of the prosecution witnesses. Counsel submitted that the reasoning of the LTJ could not be faulted in relation to the contentions raised by counsel for the applicant.

The issues

[42] Having considered the grounds of appeal and the submissions made by both counsel, the issues that the court has to resolve may be summarised as follows:

1. Should the no case submission, made on behalf of the applicant, have been upheld?

2. Did the LTJ fail to make critical rulings on law/fairness issues and to conduct critical assessment concerning alleged breaches of the Judges' Rules, thereby abdicating her judicial function, resulting in an inadequate assessment of the credibility of the prosecution witnesses, thus rendering her findings of fact unreasonable and unsupported having regard to the evidence?

3. Did the LTJ err in finding the accused guilty in light of evidence which tended to undermine the prosecution's case? and

4. Was the sentence imposed on the applicant manifestly excessive?

Issue 1: Should the no case submission made on behalf of the applicant have been upheld?

Issue 2: Did the LTJ fail to make critical rulings on law/fairness issues and to conduct critical assessment concerning alleged breaches of the Judges' Rules, thereby abdicating her judicial function, resulting in an inadequate assessment of the credibility of the prosecution witnesses, thus rendering her findings of fact unreasonable and unsupported having regard to the evidence?

[43] The central concern in this case was and has always remained credibility, particularly in relation to the alleged admission of the applicant — the lynchpin of the prosecution's case. The grounds argued by counsel for the applicant, accordingly have to be viewed against that background. The issues flowing from the grounds overlap and the approach to their analysis throughout the judgment will reflect that reality.

The law

[44] Lord Parker CJ's **Practice Note** [1962] 1 WLR 227 has long been accepted as outlining the appropriate test to be applied, on a submission of no case to answer being made, when a judge sits alone and the tribunals of law and fact are therefore the same. The guiding principles were stated in this way:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
>
> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it. If, however, a submission is made that there is no case to answer, the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at

> that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it, there is a case to answer."

[45] In dealing with matters where there is a judge and jury, the later formulation of Lord Lane CJ in **R v Galbraith** [1981] 2 All ER 1060 at page 1062, has also stood the test of time. The learned Lord Chief Justice stated:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[46] Both formulations counsel a restrained judicial approach to dealing with any perceived weaknesses in the case against a defendant; where at the close of the prosecution's case a no case submission is made, based on challenges to the credibility of the prosecution's witness or witnesses. Therefore, absent situations where there is no evidence to prove an essential element or elements of the offence charged, a submission of no case to answer should only be upheld, if a reasonable jury properly directed, or in a judge alone trial, a reasonable judge applying the appropriate legal principles, could not form a view of the evidence on which a conviction could properly be returned.

[47] It is based on those principles that in both **Andrew Stewart v R** and **Ellis (Taibo) v The Queen,** cases relied on by the defendant, though the convictions were overturned, it was held that the no case submissions had been rightly rejected. **Ellis (Taibo) v The Queen** is authority for the proposition that on a submission of no case to answer, the criterion to be applied by the trial judge is whether there is material on which a jury (in this case it would be the LTJ herself), could, without irrationality, be satisfied of guilt; if there is, the trial judge is required to allow the trial to proceed. That statement of principle is important; especially considering that the Board of the Judicial Committee of the Privy Council described the evidence against the appellant in that matter as 'thin, and perhaps very thin ″and the prosecution's case as "not only weak but confusing, and confusing in a way which tended to obscure its weakness".

[48] The nub of the submissions made on behalf of the applicant on the issue whether the no case submission should have been upheld, is that on the prosecution's case, breaches of the Judges' Rules occurred in a manner and context that raised an unanswered reasonable inference in favour of the applicant. This meant, it was argued, that the prosecution had not satisfied its burden of proof against the applicant to the requisite criminal standard.

[49] The preamble to the Judges' Rules states as follows:

> "These rules do not affect the principles
>
> …
>
> (d) That when a police officer who is making inquiries of any person about an offence has enough evidence to prefer a charge against that person for the offence, he should without delay cause that person to be charged or informed that he may be prosecuted for the offence;"

[50] Rules I to IV of the Judges' Rules are also relevant to the submissions advanced on behalf of the applicant. They provide in part:

> "I. When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that

useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged with the offence or informed that he may be prosecuted for it.

II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.

…

When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present.

III — (a) Where a person is charged with or informed that he may be prosecuted for an offence he shall be cautioned in the following terms:

…

(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.

Before any such questions are put the accused should be cautioned in these terms:

> 'I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do the questions and answers will be taken down in writing and may be given in evidence.'

Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer.

(c) When such a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which

any questioning or statement began and ended and of the persons present.

IV. All written statements made after caution shall be taken in the following manner:

(a) If a person says that he wants to make a statement he shall be told that it is intended to make a written record of what he says. He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write or that he would like someone to write it for him a police officer may offer to write the statement for him. If he accepts the offer the police officer shall, before starting, ask the person making the statement to sign, or make his mark to, the following:

…"

[51] In the case of **Shabadine Peart v R** Lord Carswell, delivering the advice on behalf of the Board of the Judicial Committee of the Privy Council, at paragraph 24, distilled four propositions concerning the Judges' Rules:

"(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.

(ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted, notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.

(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of

> admitting it, notwithstanding a breach of the Judges' Rules; but the court may rule that it would be unfair to do so even if the statement was voluntary."

[52] The submissions made by counsel for the applicant, concerning alleged breaches of the Judges' Rules, all surround the impact counsel argued they should have had on the LTJ's assessment of the cogency of the prosecution's case. One major thread of complaint running throughout the submissions of counsel for the applicant, is that the LTJ failed, both to adequately consider the inconsistencies and discrepancies in the prosecution's case, as well as the effect they should have been determined to have, in undermining the credibility of the prosecution witnesses.

[53] In **Andrew Stewart v R** this court quashed the conviction of the appellant, where the trial judge failed to properly address the defence assertion that the identification of the appellant as the person who shot the complainant, was tainted by an improper motive. This motive it was alleged, stemmed from the fact that the complainant had been previously robbed by a friend of the appellant called "Bad Indian" against whom the complainant had testified and who was then serving time in prison. Further the complainant was recorded in his statement to the police as stating that the appellant was, 'Involved in a lot of wrongs and keep a lot of bad company'. Despite giving those details in his statement to the police, under cross-examination the complainant denied knowledge of them and of having given that information to the police. Writing for the court Sinclair-Haynes JA (Ag), as she then was, stated at paragraph [23] that:

> "It is settled law that notwithstanding the presence of inconsistencies in the Crown's case, depending on the particular facts, a tribunal of fact is entitled to convict. In the absence of any reasonable explanation for the inconsistencies, a jury must be informed that the previous inconsistent statements are not substantive evidence. A judge is required nevertheless to tell the jury that the presence of the previous inconsistent statement might lead them to conclude that the testimony is unreliable. (See **Mustapha Ally v The State** (1972) Criminal Appeal No 45/1972 (Guyana))."

[54] In pointing out the failure of the trial judge, in that case, to deal with the inconsistencies and address their effect, Sinclair-Haynes JA (Ag) further stated at paragraph [26] that:

> "…Whilst it is true that a judge sitting as both judge and jury is assumed to be conversant with the legal principles, he must nevertheless demonstrate that he applied those principles. The learned judge failed to demonstrate that he was cognizant of the adverse effect of the unexplained inconsistencies in the complainant's evidence. No indication is given as to whether he considered the weakening effect the unexplained inconsistencies may have had on the complainant's evidence. Indeed there is not the slightest indication that his mind was adverted to those vital issues."

[55] In considering the effect of the trial judge's non-direction Sinclair-Haynes JA (Ag) had this to say at paragraph [29]:

> "The inconsistencies in the instant case are not in respect of what transpired the night the complainant was shot and wounded. They do however concern motive. The applicant asserts that he stands accused because of the 2006 incident which involved 'Bad Indian'. Although it cannot be considered a core matter, it is nevertheless a vital issue which deserved more than the perfunctory attention it was accorded by the learned trial judge. The issue of the complainant's motive was put forward by the applicant and the judge was obliged in the circumstances to address it."

[56] Ultimately, the court in **Andrew Stewart v R** concluded that the conviction could not stand, as, although the trial judge had adequately given himself the identification warning, he had, 'failed to properly assess the evidence in its totality by failing to consider the impact of the complainant's impugned credibility on the veracity of his identification evidence*".*

[57] The complaints made by counsel for the applicant in the instant case and the value of the case of **Andrew Stewart v R** in the assessment of those complaints, should, however, be properly located within the wider discourse concerning the duty of a judge sitting alone.

[58] In the case of **Tyrone Headley v R** [2019] JMCA Crim 33, P Williams JA at paragraphs [61] – [67] stated:

> "[61] One of the early observations of this court on the proper approach of trial judges sitting without a jury is in **R v Junior Carey**, where Campbell JA, writing on behalf of the court, had this to say at page 8:
>
> > '[Counsel] next complained that the learned trial judge did not consider adequately or [at] all the discrepancies in the Crown's case and that he did not consider and analyse in its entirety all the evidence given before him and this has resulted in a miscarriage of justice. This criticism does not appear to be justified, unless it is being suggested that a trial judge exercising jurisdiction to try cases summarily under the Gun - Court Act, is obliged to take each piece of evidence, and viva voce minutely analyse it so that his analysis appears on the record. The learned trial judge is not statutorily required to do any such thing even though a desirable practice has developed which it is hoped will be continued of setting out salient findings of fact which is of inestimable value should an appeal be taken.'
>
> [62] The issue of what is required of a trial judge sitting without a jury when confronted with conflicts in the evidence of witnesses, was also considered by this court in **R v Locksley Carroll** where Rowe P, at page 265, had this to say:
>
> > '… In **Leroy Sawyers and Others v The Queen** [1980] R.M.C.A. 74/80 (unreported), we endeavoured to give some of the practical reasons why a reasoned judgment was necessary. An accused person, we said, was entitled to know what facts were found against him and where there were discrepancies and inconsistencies in the evidence, just how the trial judge resolved them. We did not then refer to the public which has an equal interest in understanding the result of a trial so that it can have confidence in the trial process. Ultimately the Court of Appeal which has the duty to re-hear the case based on the printed evidence

> and the judgment of the trial judge wishes to be assisted by the thought processes of the trial judge.'

[63] It is a fact that the learned trial judge did not give the usual directions to himself on the issue of discrepancies and inconsistencies. Mr Knight is correct in his complaint that the learned trial judge did not specifically identify the discrepancies or inconsistencies that arose from the evidence of the witnesses. Having identified the issue in the case to be credibility, the learned trial judge went directly to conducting a review of all of the evidence of the witnesses including that of the appellant.

[64] The learned trial judge, at page 114, is recorded as saying the following: -

> 'I took careful note of the demeanor of all the witnesses in this case. That is, the three (3) witnesses called by the Prosecution and the accused man himself…" In addition, at page 115, he said: "As I said, I took into consideration and paid careful note to the demeanor of all the witnesses. Having seen and heard Constable Sharpe, I accept Constable Sharpe as a witness of truth. He impressed me, he gave his evidence in a frank and forthright manner without hesitation or without any apparent [sic] of concocting anything. He answered the questions asked of him promptly and precisely.'

[65] The learned trial judge indicated which aspects of the evidence of Constable Sharpe he believed in arriving at the decision he did. Without actually saying so, in carrying out the exercise in this manner, he demonstrated preferring Constable Sharpe's evidence to that given by Corporal Daley where any conflict arose.

[66] He clearly demonstrated that in accepting the evidence of Constable Sharpe on certain issues, he rejected the evidence of the appellant. At page 117 of the transcript, the learned trial judge said the following:

> 'Having listened to the evidence of the accused man and Constable Sharpe, and having noted the demeanour of the accused man when he gave this evidence how hesitant he was and how long he

> took to answer the questions, I reject his testimony on these issues and accept as truthful and reliable the evidence of Constable Sharpe.'
>
> [67] The learned trial judge made findings based upon his assessment of the credibility and reliability of the witnesses he had seen and heard. This is a clear and distinct advantage, which this court in reviewing his decision does not enjoy. It is well established that this court must be slow to reverse any findings based on these considerations. It is - only if it can be shown that in the totality of the case the finding is plainly wrong that this court will interfere (see **The Queen v Crawford** [2015] UKPC 44, **R v Horace Willock and Everett Rodney v R** [2013] JMCA Crim 1)."

[59] The court concluded at paragraph [68] that "[t]he inconsistencies and discrepancies were not of such a nature to render the conviction unsafe". Ultimately, therefore, in considering the complaints made by Mr Small, the court will have to assess the nature of the inconsistencies and discrepancies and the manner in which the LTJ reviewed the evidence, to determine whether, on the totality of the case, the LTJ erred. It is only on that basis that this court may interfere.

Discussion and analysis

Issue 1: Should the no case submission have been upheld?

[60] Counsel for the applicant successfully had the question and answer admitted into evidence, though not for the truth of its contents, it being self-serving as the answers aligned with the defence case. The defence it appears had two overlapping purposes for seeking its admission. Firstly, to suggest and demonstrate that the prosecution's witnesses acted unfairly towards the applicant in the pursuit of the investigations and secondly, that both the fact of the conduct of the question and answer and the nature of the questions asked, called into question the veracity of the admission attributed to the applicant, at the time of the finding of the firearm. Together, both of these purposes were aimed at undermining the credibility of the prosecution's case, the acknowledged central issue around which it was built.

[61] In rejecting the submission of no case to answer made on the applicant's behalf by Mr Small the LTJ stated as follows at page 173 - 176 of the transcript:

> "It is Mr. Small's submission that the Crown [sic] has been so discredited that [the applicant] ought not to be called upon. He, in support of his contention, he first of all submitted that the Judges' Rule, in relation to the question and answer interview done with [the applicant], based on his remarks to the police, he ought to be charged without delay and was not so charged until 5 days later and the tenable question and particular question 22, supports the defence contention that the witnesses are discredited because he was not [sic] asked that question. If he had made such admission, the first [sic] of question 22 is seeking to guard [sic] evidence against the [applicant] which is, again, indicative of the abuse of process involved. In essence, the entire evidence of both police officers proved basically consistent who basically give consistent evidence speak to certain things said by [the applicant] and so the issue that I have to decide is whether, can I agree with Mr. Small that the witnesses have been so discredited that the case should not go forward for consideration by any directive jury.
>
> The issue of whether the question and—answer ought to have been conducted is not relevant to my determination of this matter; whether the judges' rule is in breach for following reasons:
>
> 1: The Crown is not relying on anything as contained in the question and answer. In other words, I do not have to determine issue of fairness for voluntariness, or to rely on anything contained therein.
>
> 2: In so far as Mr. Small argues that [question] 22 in particular and his answer, is cogent evidence of the unreliability of the police witnesses. I cannot agree with this submission because both officers have given evidence as to what the [applicant] said and in relation to that aspect of the evidence, one cannot say they have been so manifestly discredited. Basically, they have given consistent evidence. What I will have to do is assess their overall credit and weigh it in light of the entire evidence and this would include this question and any answer given.
>
> In essence, the case is to go forward and it will be a matter for the jury mind of the tribunal to assess all these issues as it relates to credibility. So I also call upon [the applicant] to answer the charge."

[62] Counsel for the applicant's main complaint, in relation to this issue, is that the LTJ failed to address her mind to the defence contention that the conduct of the question and answer was in breach of the Judges' Rules to charge a defendant without delay, where there was enough evidence to proffer a charge; and thereby, raised the reasonable inference that the prosecution evidence that the applicant had admitted the offence, was unworthy of belief, given that the applicant had been questioned instead of being charged without delay. Further, that the nature of the questions, in particular question 22, was inconsistent with the prosecution evidence that the applicant had admitted possession of the firearm.

[63] While, therefore, the question and answer exercise was not relevant in terms of establishing the prosecution's case, the fact that it was done and a particular answer given within it, were relevant from the perspective of the defence to undermine the cogency and credibility of the prosecution's case. The defence also contended that the absence of any record of the applicant having been given a choice as to the manner in which he could have made his statement, suggested evidence to that effect was a recent concoction, which further undermined the prosecution's case and should have been found by the LTJ as support for upholding the no case submission.

[64] The LTJ's indication that she did not have to determine any issue of fairness or voluntariness in relation to the question and answer, as the prosecution was not relying on it in proof of the case against the defendant, addressed the prosecution's stance. What though of the defence position? This is where the nature of the Judges' Rules and the principles to be applied on the consideration of a submission of no case to answer, have to be considered in tandem. The case of **Shabadine Peart v R** makes it clear that while "[t]he Judges' Rules are administrative directions, not rules of law", they "possess considerable importance as embodying the standard of fairness which ought to be observed". Lord Parker CJ's **Practice Note** establishes that unless the prosecution's evidence has been so manifestly discredited that no reasonable tribunal could rely on it, the submission of no case to answer should be rejected.

[65] Given the inherent character of the Judges' Rules, the fact that they may have been breached is not automatically fatal to the prosecution's case, where the prosecution relies on those rules in substantive proof of the charges against a defendant. In this case, the prosecution obtained no evidential advantage from the conduct of the question and answer and did not rely on it. The question therefore is, did the LTJ's omission to specifically address the inference the defence sought to advance from the conduct of what turned out to be, from the prosecution's point of view, an inert evidential exercise, compromise the ruling made on the submission of no case to answer? In considering that query, it is also important to examine question 22, the answer to it and the LTJ's treatment of their effect.

[66] Question 22 asked, "On Thursday August 17, 2017, at about 3 am, along Lincoln Avenue, in the vicinity bridge, did you inform the police that you had a firearm in your possession?" Answer: "I informed the police that there was a firearm in the vehicle"

[67] The LTJ explicitly found that she did not agree with the defence submission that question 22 and its answer provided cogent evidence of the unreliability of the police witnesses. Her finding was that both officers had given evidence of what the applicant said and in relation to that aspect of the evidence, one could not say that they had been manifestly discredited. She found that "[b]asically, they have given consistent evidence", a finding that will bear further detailed scrutiny later, given some of the submissions made by Mr Small in relation to other grounds and issues. It is clear, however, that it was open to her to so find at the stage of the ruling on the submission of no case to answer, given her conclusion that they had not been manifestly discredited.

[68] Question 22, was a leading question. By its very nature it assumed the admission of the offence, when coupled with the fact, that it is common ground the applicant did not have a licence to possess the firearm, which was admittedly found in the vehicle. The answer of the applicant admitted knowledge but not possession of the firearm. Inherent in the LTJ's treatment of that question and answer and the

finding that the police witnesses had not been manifestly discredited, was a rejection of the inference that the defence relies on, that given the admission attributed to the applicant by the police witnesses, the fact of the conduct of the question and answer in circumstances proscribed by the Judges' Rules, calls into question the veracity of that admission.

[69] The questions of whether the applicant had been given a choice as to the manner in which he could make his statement and whether that assertion of an offer made to him was a recent concoction, given the absence of any such record were not specifically addressed by the LTJ in her ruling. Those omissions however, do not detract from the fact that on the central issue of what the police witnesses said the applicant admitted to them, the LTJ found that the police witnesses were not manifestly discredited. Viewed in that light it cannot be successfully maintained that the LTJ erred in rejecting the submission of no case to answer.

Issue 2: Did the LTJ fail to make critical rulings on law/fairness issues and conduct critical assessment concerning alleged breaches of the judge's rules, thereby abdicating her judicial function, resulting in an inadequate assessment of the credibility of the prosecution witnesses, thus rendering her findings of fact unreasonable and unsupported having regard to the evidence?

The particulars of alleged failings are:

a) i) The ruling that the question and answer had no relevance to the issues that the LTJ had to determine (page 174 - 175 of the transcript); ii) The statement by the LTJ that she was "not going to be making any pronouncements on the [question], whether or not the police were correct in conducting a question and answer interview with [the applicant]" (pages 267-268 of the transcript); iii) The statement by the LTJ that "I will be making no comments on whether the police were entitled to ask any questions of these witnesses (page 269 of the transcript).

b) The LTJ failed to appreciate the inconsistency of Sergeant Irons not charging someone that he claimed had admitted committing an offence yet still he proceeded to do a question and answer with the appellant five days later by

means of cross examining him. This unfairness and inconsistency was repeated in the evidence of Inspector Ritchie. The LTJ failed to identify or scrutinise this issue before coming to a verdict.

c) The LTJ erred in law in holding that the fact the appellant had a legal representative present was relevant to a ruling not to consider the breaches of the Judges' Rules (page 269 of the transcript).

d) The LTJ erred in failing to apply the Judges' Rules to the circumstances of this case.

[70] Counsel for the applicant expressly adopted the arguments made in support of the submission of no case to answer while contending in the alternative, that even if the matter was viewed as one for the LTJ's jury mind, the prosecution had failed to answer the defence's inference at the end of the case. This meant, he argued, that the prosecution had failed to discharge the burden of proof it bore and the LTJ should therefore have returned a verdict of not guilty.

[71] Counsel for the applicant also advanced that the LTJ abdicated her judicial responsibility to uphold the common law and failed to use the Judges' Rules as criteria to assess whether the police witnesses could be believed, especially given that Sergeant Irons had indicated that he agreed that when a police officer has enough evidence to proffer charges he should, without delay, cause the person to be charged. In these circumstances he submitted the verdict of the LTJ could not stand.

[72] On this issue and supporting sub-issues, the court has to consider whether the manner in which the LTJ handled the concerns raised by counsel for the applicant about possible breaches of the Judges' Rules was plainly wrong and requires the verdict to be set aside. As noted in **Tyrone Headley v R** the totality of the case should be considered in determining whether the duties of the trial judge have been adequately discharged. It is important on this issue to set out aspects of the LTJ's summation in some detail.

[73] At pages 265 to 272 of the transcript the LTJ said:

> "Mr Irons is the one who said [the applicant] told him, yes, he was in possession of a firearm. So therefore, why would Sergeant Irons ask [the applicant] such a question. So what Mr Small has asked me to do, apart from emphasizing the unfairness of the question and answer, is to say the questions, question 22 in particular and other questions that he alerted me to in his submissions to this court, indicates that what Mr. Irons was trying to do was to elicit evidence in relation to the possession of the firearm and it shows therefore that the Crown witnesses ought not to be believed when they said that [the applicant] made such an admission to them.
>
> In relation to the question and answer and Mr. Small's submission, I will just say first of all, that the Judge's rules do indicate when questions can be asked of suspect; Judge's rules two and three are instructive in the matter. Judges-- the Judge's rule speaks to — at two says; as soon as a police officer has evidence which would have reasonable grounds for suspecting that a person has committed an offense, he shall caution that person or cause him to be cautioned before putting to him any questions or further questions relating to that offense. Judge's rule 3 (a) states, where a person is charged with or informed that they may be prosecuted for an offense, he shall be cautioned in the following terms and the caution is given and then 3 (b) says, it is only in exceptional cases that questions relating to the offense should be put to the accused person after he has been charged or informed that he may be prosecuted and such questions may be put where they are necessary for the purpose of preventing or minimizing harm or loss to some other person or to the public and the clearing up of an ambiguity in a previous answer or statement. Well, first of all, let me just say that five days later when [the applicant] was being questioned by the police he had not yet been charged, so technically speaking, it would be Judge's rule two that would apply. What Mr Small has said, they had enough evidence to charge him. So it was just a ruse; but am not going to be making any pronouncements on the--whether or not the police were correct in conducting a question and answer interview with [the applicant]. I do not have to make any such decision here, because frankly speaking, the crown is not relying on any evidence in that question and answer interview. It was actually introduced into evidence by the defence. So it is not that I have to decide whether there was any unfairness in terms of how it was conducted, because the crown is relying on no evidence on

it. As such I would also just say that I bear in mind also that all four suspects were questioned by the police in the context that four occupants were found in a vehicle where a firearm was found, were seen in a vehicle where a firearm was found and that each of them used words to the police after cautioning in relation to the firearm. The two female suspects said they did not know a gun was in the car. Mr. Shirley, according to the police witnesses, said a two youth him pick up. One of them leave it in there. And [the applicant] said apart from saying he was in possession of the firearm, said that the driver pass it to him to control am just using my own words now, as he's the police officer control the situation. So the police were in a situation where they had four occupants, a gun being found and different statements being made. So there's no agreement between the occupants as to the firearm or how it came to be there. I just say that to say, I will be making no comments on whether the police were entitled to ask any questions of these witnesses. What I will also say is that the question and answer interview of [the applicant] was done in the presence of his attorney and as such he had the right and could have been advised to answer none of the questions and to say no comment, if he so wished to do so.

But, be that as it may, the essence of the thing, Mr. Small's submission, is that the questions are evidence of the internal inconsistencies in the Crown's case, Sergeant Irons and Mr. Ritchie cannot be believed about what they said[the applicant] said and so that is what I have to examine whether the questioning, the types of questions, that in particular question 2 [sic], speaks to this internal inconsistency which could ask me to say, has the Crown made me feel sure of what Mr. Irons and Mr. Ritchie has said [the applicant] said.

Sergeant Irons indicated the reason why he asked Question 22 -- Sergeant Irons said, there was a need to ask Question 22 because the firearm was not taken from his person, although he did say to me, when asked, if he was in possession of a firearm and his response was, yes, and when further asked he said it was in the car and I wanted to inspect the firearm he was talking about. So, that is Sergeant Irons' reasoning for asking the question and Mr. Small submitted that it is nonsensical, it makes no sense at all.

In looking at this issue, the court puts it this way, well, the issue could also be considered with the opposite as assumption, the question could be asked why could the question be framed in

> that way if there was no prior communication in that regard. In other words, if -- it could be asked if Sergeant Irons had not had any conversation with [the applicant] about whether he was in possession of a firearm to which he said yes, one could actually say that the question that could have been asked, were you in possession of the firearm found in the car? And Sergeant Irons said, 'Did you tell the police that you were in possession?' So, as I said, when I looked at it, the question by itself, in my opinion, has no evidential value to suggest any internal inconsistencies. The police are known to ask all types of questions in these interviews, but that question by itself could not cause me to conclude that the witnesses are not credible. And I say this in light of the fact that Sergeant Irons is not the only one saying [the applicant] made a statement about being in possession, Inspector Ritchie is also saying that, so the question by itself has no evidential value to assist in that assessment. So what I have to do, is to examine all the evidence that I have heard having considered the inconsistencies and discrepancies to see whether or not I can accept what Sergeant Irons and Inspector Ritchie said [the applicant] told them, because if I accept what Sergeant Irons and Inspector Ritchie said, what he told them is a clear case of admission, he was in possession of the firearm and given an explanation of being in possession, if I accept what they have said. So, that is a crucial issue."

[74] What this long extract shows, is that the LTJ was acutely aware of, considered and rejected the argument in support of the inference supporting innocence, involving breach of the Judges' Rules — the centrepiece of the applicant's defence. She correctly identified rule 2 of the Judges' Rules as applicable in the circumstances of the case. That rule indicates in part that:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence."

[75] On the scene of the recovery of the firearm, based on the prosecution's case, Sgt Irons acted in accordance with Judges' Rule 2. Sergeant Irons' evidence is that the applicant was asked if he was in possession of a firearm and he said yes. The applicant was then taken back to the motor vehicle and the firearm was found inside. Having been asked by Sergeant Irons if this was the firearm he was referring to, the

applicant then said "mek mi level wid yuh, mek mi level wid yuh". Sergeant Irons then cautioned him as rule 2 of the Judges' Rules requires. The applicant gave the explanation that he had been given the gun by the driver Mr Shirley to control, as he was the police and indicated that he did not want to lose his "work". The applicant was then informed of the offences of illegal possession of firearm and ammunition and arrested.

[76] Given the posture of the defence, also relevant to the circumstances of the case were the following elements of the Judges' Rules: 1) the principle preserved in paragraph d of the preamble whereby, when a police officer who is making inquiries of a person about an offence, has enough evidence to charge that person for the offence, he should cause that person to be charged or informed that he would be prosecuted for the offence without delay; 2) Rule 1 of the Judges' Rules which permits a police officer who is trying to "discover whether, or by whom, an offence has been committed to question any person, whether suspected or not who has not been charged, from whom he thinks that useful information may be obtained "; and 3) Rule 3(a) which requires that where a person is charged with or informed that he may be prosecuted for an offence, he should be cautioned in particular terms, as well as rule 3(b) which indicates that it is only in exceptional cases that questions relating to the offence should be put to the accused person, after he has been charged or informed that he may be prosecuted. Such questioning is permitted, where necessary, to prevent or minimize harm or loss to some other person or to the public or where there is need to clear up an ambiguity in a previous answer or statement.

[77] Paragraph d of the preamble to the Judges' Rules was at least partially observed, when, on the day of the recovery of the firearm, after the applicant was cautioned he was informed of the offences of illegal possession of firearm and ammunition. The subsequent questioning five days after the recovery of the firearm and the admission of the applicant on the prosecution's case would however not have been in keeping with rule 1, as at that point the police were no longer trying to find out in relation to the applicant "whether or by whom an offence has been committed".

[78] Just before indicating that she would be making no comments on whether "the police were entitled to ask any questions of these witnesses [sic]", (clearly she meant suspects or accused), the LTJ noted in her summation that "the police were in a situation where they had four occupants, a gun being found and different statements being made. So there's no agreement between the occupants as to the firearm or how it came to be there.". That was the context in the Crown's case in which the various suspects were questioned.

[79] However, even if in keeping with rule 1 the applicant had been informed that he would be prosecuted for the offences of illegal possession of firearm and ammunition prior to the conduct of the question and answer, there is no indication that he had been cautioned in the terms required by rule 3(a); or that the LTJ's observations on the state of the information available to the police witnesses prior to the question and answer, constituted exceptional circumstances, which provided a basis for questions to be asked of the applicant, pursuant to rule 3(b).

[80] The complaint of the applicant is that the LTJ declined to specifically rule on whether, in light of the alleged admission made by the applicant: i) the police witnesses were entitled to have delayed charging and then ii) questioned the applicant, or iii) if these actions were in breach of the Judges' Rules. She declined so to do, on the basis that the prosecution was not relying on the question and answer in proof of the charge. In retrospect, it may have been better if the LTJ had specifically made a finding, given the thrust of the defence. Especially since, by necessary implication, her acceptance of the evidence of the admission, means that there had been a breach or breaches of the Judges' Rules, after the admission, and by the conduct of the question and answer.

[81] Here again, as stated in **Shabadine Peart v R**, the nature of the Judges' Rules as administrative directions, breach of which is not automatically fatal to admission of evidence in proof of a charge obtained through their breach, is of significant moment. That case is authority for the principle that, if evidence obtained in breach of the Judges' Rules is to be relied on in proof of a case against a defendant, the trial judge

should assess whether it would be unfair to permit such reliance. However, in this case it was not the prosecution that sought to utilise the question and answer, but rather the defence — to support consideration of the effect of i) the fact that it was done as well as ii) the terms of question 22 in particular.

[82] Therefore, the determination the LTJ had to make was not the usual consideration of whether it was fair to deploy the question and answer against a defendant, based on the circumstances in which it was recorded. Rather, the issue was whether in light of the concerns raised by the defence which adduced the question and answer, she believed the prosecution witnesses that the applicant had made an admission on the scene, where the firearm was recovered?

[83] It is critical to note at this point, that all the concerns — the applicant not being charged without delay; the inherent inconsistency in the applicant being questioned after the alleged admission; and the treatment by the LTJ of the applicant having the benefit of counsel to advise him during the question and answer, as relevant to a ruling not to consider the breaches of the Judges' Rules — should be viewed in the context of one vital fact. The applicant suffered no actual prejudice occasioned by any breach of the Judges' Rules. No evidence was elicited in the conduct of the question and answer process that was deployed against him at trial. Rather, it provided an unintended benefit; the basis for the main plank of the defence challenge to the credibility of the prosecution's case.

[84] Viewed against that reality, in assessing the manner in which the LTJ conducted her analysis, of seminal importance is that her reasoning, clearly demonstrated that neither the fact of the holding of the question and answer in all the circumstances, nor the terms of question 22, caused her to doubt the veracity of the evidence of the admission given by the prosecution witnesses. In fact, she specifically observed that the terms of question 22 could be interpreted as supporting a finding that a previous admission had been made by the applicant and hence did not establish the defence theory that it was evidence of an internal inconsistency in the prosecution's case. That observation also addresses the defence complaint that the LTJ failed before coming

to a verdict, to identify or scrutinise the inconsistency that the police witnesses proceeded to question the applicant, despite maintaining that he had previously admitted the offence.

[85] Additionally, we consider that the LTJ's statements concerning the role of the attorney-at-law at the question and answer were ultimately of no moment. The main issue raised by the defence was that the mere fact of the conduct of the question and answer (in breach of the Judges' Rules), supported an inference of innocence. A consideration that was not accepted by the LTJ and which was unaffected by the presence of, or any advice given by, the attorney-at-law.

[86] Ultimately, the LTJ recognised that she was required to examine all the evidence, including the inconsistencies and discrepancies, to determine if she accepted the evidence of the police witnesses that the applicant had made an admission to them. That was a correct approach in law which cannot be faulted (see **Tyrone Headley v R**). The LTJ's assessment of the critical aspects of the evidence before her, will later be examined in relation to issues arising under ground c.

[87] Therefore, in conclusion on this issue, we find that the analysis of the LTJ plainly demonstrated that the purpose of the admission of the question and answer at the instance of the defence — to support a challenge by inference, to the credibility of the evidence of the admission — was achieved and fully considered by the LTJ before coming to her verdict. Thus, although the LTJ did not actually rule on whether the question and answer exercise was obtained in breach of the Judges' Rules, the applicant was not prejudiced by that omission. Accordingly, the applicant cannot succeed on this issue.

Issue 3: Did the learned trial judge err in finding the accused guilty in light of evidence which tended to undermine the prosecution's case?

The particulars of complaint are that the LTJ's analysis revealed her:

a) failure to appreciate the significance of inconsistencies within and between the evidence of the prosecution witnesses regarding the

conduct of the question and answer, even if they did not go to the root of the issues, compounded by her view that the evidence of these witnesses was consistent in the relevant material particulars;

b) misstatement of the applicant's defence (see pages 213 and 265 of the transcript); and

c) failure to adequately consider the defence contention that the prosecution witness Sergeant Irons' evidence that the applicant had been given an option to give a narrative cautioned statement, was a recent concoction especially in light of the following:

    i) the LTJ's finding that Sergeant Irons had given an explanation for contradictions regarding whether he had given an option when he gave no explanation;

    ii) there was no explanation offered for the failure to make any record of the purported option offered to the applicant regarding his giving a narrative caution statement or question and answer cautioned interview. Nor did Sergeant Irons make any record of having given the option in the question and answer, in his statement, or in his evidence in chief;

    iii) the evidence of Sergeant Irons that he gave an option was contradicted by Inspector Ritchie testifying to hearing Sergeant Irons inform the suspects of his, Sergeant Irons' intention to ask them questions surrounding the seized weapon (see page 90 of the transcript); and

    iv) the LTJ failed to analyse or scrutinise the contradictions set out above and to consider that if she found that the above particulars were such as led her to doubt the evidence of

> Sergeant Irons and Inspector Ritchie that the applicant had admitted being in possession of a firearm, then there was no evidence of the appellant being in possession of the firearm and she was bound to return a verdict of not guilty against the applicant.

[88] Before examining the particulars of complaint, it is important to acknowledge that, in his oral submissions, counsel for the applicant outlined a long series of detailed questions. Questions which he posited the LTJ should have sequentially considered and resolved on the record, before she could properly have come to the adverse finding against the applicant which she did. It must however be remembered that, as stated in **Junior Carey v R** and relied on in **Tyrone Headley v R**, a trial judge sitting in the Gun Court is not "obliged to take each piece of evidence, and viva voce minutely analyse it so that his analysis appears on the record". What is required, is for the trial judge, who, unlike the appellate court, has had the advantage of seeing and hearing the witnesses, to give some indication of his view of their credibility and reliability. On appeal, that indication is assessed for its cogency, which will be established if evidence existed at trial which provided a sufficient basis for the trial judge to form the view or come to the conclusion which he did (see **R v Horace Willock** and **Eugene Douglas v R** [2019] JMCA Crim 28). Therefore, on matters of fact, in keeping with long established principles, it is only if the factual findings of the trial judge are unreasonable and cannot be supported having regard to the evidence, that this court will interfere.

Re a and c

[89] At page 261 to page 263 of the transcript the LTJ had this to say:

> "Mr Richard Small, both in his cross-examination and in his submission to this Court, indicated that Sergeant Irons, was not a credible witness and he highlighted and omission from the statement and that issue had to do with whether or not Sergeant Irons who conducted the question and answer interview with all four persons who were in the vehicle, whether he had given

> them a choice between the narrative statement or just requested a question and answer.
>
> Now, Sergeant Irons indicated that he did give [the applicant] a chance to do a narrative, but he agreed that that choice is not indicated in the statement and he gave an explanation for it, why it is omitted from his statement. He said, 'I did offer the option to the other three suspects, the same option, they chose the question and answer, and I made no reference in my statement to any such option, but the option is given, they chose the question and answer, that is why it is mentioned in my statement. I did not record the choice by any suspect, but Mr Small is also indicating that it is not just a matter of omission by Sergeant Irons, Mr Small indicates that Inspector Ritchie's evidence also contradicts Sergeant Irons evidence, in that, Inspector Ritchie said Sergeant Irons gave – he told the four suspects of his intention to ask them questions. He said it was clearly his intention.
>
> So, Mr Small is submitting that Irons therefore is not a reliable witness and also that his treatment of [the applicant] in this matter was unfair.
>
> So, the first thing I have to ask myself, is that an inconsistency or discrepancy, is it material, in other words, does it go to the root of the Crown's case to destroy the credibility of Sergeant Irons. And I have to say in relation to that issue, I don't find that it goes to the root, bearing in mind that Sergeant Irons isn't the only witness who spoke as to what happened on the day, but Inspector Ritchie also gave evidence and Inspector Ritchie basically supported what Sergeant Irons had to say about what was said and who said it on the day.
>
> So the fact that I cannot say whether or not Sergeant Irons offered [the applicant] the choice does not destroy the credibility of the Crown."

[90] One of the challenges made by counsel for the applicant to those directions is that, based on the case of **Andrew Stewart v R**, the LTJ used the wrong test by considering that to affect the outcome of a case, an inconsistency had to go to the root of the case; not recognising that it is sufficient for consideration if it affects an important matter in the case. Counsel maintained that the inconsistency did affect an important matter in the case, that of whether the investigator was seeking to question the applicant to his disadvantage.

[91] It is important first to note that the failing to address inconsistencies in **Andrew Stewart v R,** was wholly different from that complained of in the instant case, in at least two ways. Firstly, in **Andrew Stewart v R**, a recognition case, in the face of i) a possible strong motive for the complainant to untruthfully identify and implicate the appellant, coupled with ii) a denial of parts of his statement to the police that could support the existence of that motive, the trial judge omitted to address and resolve the defence assertion that the complainant's identification of the appellant as his attacker was tainted by an improper motive.

[92] That is not the situation in the instant case. The LTJ did consider the potential impact on the credibility of Sergeant Irons, of the inconsistency relating to whether Sergeant Irons had given the suspects, including the applicant, the option to give a statement instead of submitting to a question and answer. In fact, her consideration of the inconsistency was both from internal as well as external perspectives. Internal in relation to the fact that the giving of the option was not contained in Sergeant Irons' statement, but he testified that he did give all suspects including the applicant the option. External, in that Inspector Ritchie's evidence contradicted that of Sergeant Irons', as he stated that Sergeant Irons told the suspects of his intention to ask them questions.

[93] Secondly, despite the characterisation by the learned judge of appeal who wrote on behalf of this court in **Andrew Stewart v R**, that the inconsistencies in relation to motive could not, "be considered a core matter", they were of significant moment, in a case where the issues were recognition and credibility. The credibility of the complainant in that matter — in relation to the possibility that it was because of the negative view held by the complainant of Mr Stewart, why he named Mr Stewart as his attacker — loomed large. By contrast, in our considered view of the instant case, the credibility issue concerning whether the appellant was given an option to write a statement, could not reasonably have affected the decision of the LTJ to accept or reject the evidence of admission as true. The more significant issue was the decision to question the applicant, instead of charging him without delay, subsequent to the admission accepted by the LTJ; an issue that has already been addressed.

[94] Viewed in the light of the above analysis, the fact that the LTJ did not specifically pronounce on whether the evidence of Sergeant Irons that he given the applicant the option to give a narrative statement was a recent concoction, does not elevate the significance of the inconsistency. Once any matter that is testified to in court is not reflected in the witness' previous account of the incident, there is always the possibility that what is stated in evidence is a recent concoction.

[95] Ultimately, the LTJ chose not to resolve the inconsistency; on the basis that, "whether or not Sergeant Irons offered [the applicant] the choice does not destroy the credibility of the Crown". Inherent in that statement is the fact that the LTJ fully appreciated the possibility, that the indication by Sergeant Irons that he gave the applicant a choice, was a recent concoction. However, in her view either way it did not matter. The LTJ's analysis showed that she did not find the inconsistency of sufficient moment to undermine the credibility of the main plank on which the prosecution's case rested. In essence, she concluded that it was unremarkable in relation to her determination of the matter. We find that, in the context of the evidence in the case, the LTJ was entitled to treat the inconsistency identified in the way she did. The inconsistency neither went to the root of the matter nor was it even "a vital issue", or put another way, a matter of significance. Further, it cannot be said the LTJ gave the issue, only "perfunctory attention".

[96] There is similarly no basis for a successful criticism of the LTJ's finding that the evidence of the prosecution witnesses was consistent in the relevant material particulars. At page 273 of the transcript, she stated that, 'both Ritchie and Irons have materially supported each other as to what took place that morning". That is in fact true. They corroborated each other on the applicant being the first to exit the vehicle when it stopped, what he said on exiting, that he was taken back to the vehicle and present when the firearm was recovered from the vehicle — the kernel of the prosecution's case. Where they differed, was in relation to whether or not a choice was given to the applicant in how his statement would be made. It is manifest therefore, that these two complaints are without merit.

Re b

[97] The complaint here is that on page 265 of the transcript the LTJ misstated the defence. The LTJ is recorded as saying:

> "The question and answer document of [the applicant] was actually put into evidence and question 22 which is the last question reads as follows: On Thursday August the 17th, 2017 about 3:00a.m., along the Lincoln Avenue vicinity. Did you inform the police that you have a firearm in your possession? [The applicant's] answer was, I inform the police that there was a firearm in the vehicle which actually is consistent with what he's telling the court today, that, that's what he told the police that **he had** a firearm in the vehicle." (Emphasis added)

[98] The LTJ obviously misspoke based on the words highlighted in the above extract, when compared with what the applicant actually said. At page 213 of the transcript it is recorded the applicant testified that when Sergeant Irons asked him if he had a firearm in his possession, he told Sergeant Irons no.

[99] Where a trial judge seriously misdirects a jury (or herself) by misquoting the evidence in a way that assists the prosecution or prejudices the defence on matters of significance in the case, an appellate court considering the matter has to determine the effect of the misdirection. The proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act should be applied to sustain the conviction, on the basis that no substantial miscarriage of justice has occurred, where the appellate court concludes, that a jury properly directed on the evidence would inevitably have come to the same conclusion: see **Anderson (Rupert) v R** (1971) 43 WIR 286.

[100] In this matter however, no consideration need be given to the application the proviso. The LTJ's summation must be taken as a whole. Other previous and later extracts, reveal an accurate statement of the applicant's defence. At page 251, in summarising the applicant's defence she stated:

> "As I indicated, [the applicant] is a police officer and he indicated to this Court that, in his evidence, that the firearm was put on the backseat by Mr Shirley. He was never in possession of this

> firearm and that what he told the police officers was that there was a firearm in the car. He was not in possession of it: and he told how it came to be on the backseat. So he's basically denying what the police officer has said in this case about – words that indicated he used, saying that he was in possession."

[101] In further outlining the applicant's evidence at page 272 she stated:

> "[I]n giving his evidence, he said that after Sergeant Irons asked him if he had a firearm in his possession, he said no, but he told him there was one in the vehicle."

[102] Then at page 273 after indicating that the applicant denied being taken to the vehicle while it was being searched, she completed the recount of his evidence by saying:

> "The first time he would have seen the firearm is when he [sic] was placed on the seat and the police did not show it to him until they were at the station."

[103] At page 274 while conducting her analysis of the evidence she stated in relation to the applicant:

> "As I said, his account is somewhat not totally similar to the police witnesses, the difference is whether he was taken to the Range Rover at the time the firearm was recovered and also whether he told the police officers that he was in possession."

[104] Then at page 275:

> "I must say in assessing the evidence as to whether I can rely on the police officer's [sic] evidence, I bear in mind that [the applicant] comes out of the cars, because, based on [the applicant's] story, Mr Shirley would have just before, just before the car stopped, Mr. Shirley would have just put the gun on the back seat and told him to deal with it, so [the applicant] is saying he knew nothing about this firearm, it was just put on the back seat he did not know about it, he had no knowledge of it, no control no custody of it."

[105] From the above extracts it is manifest that, but for the first outlined occasion on which the LTJ is recorded as having misspoken, the LTJ accurately and fully outlined the applicant's defence. This complaint is without merit.

[106] Having considered the issues that arose from all the grounds of appeal challenging the applicant's conviction, we have concluded that none of the complaints, including those contained in ground d, have merit.

Issue 4: Was the sentence imposed on the applicant manifestly excessive?

[107] Learned counsel for the applicant declined to advance any submissions on ground e, which gave rise to this issue. Undoubtedly, due to his honest assessment that it is unmeritorious. However, as he did not formally abandon the ground, we have to address it. We do so briefly.

[108] The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Court, December 2017, indicate that the usual range for the offence of illegal possession of firearms or ammunition is 7 – 15 years with 10 years as the usual starting point. The LTJ in her sentencing remarks, considered the goals of sentencing the difficult task sentencing entails, and outlined mitigating and aggravating factors which influenced her decision. Regarding mitigating factors, she highlighted the applicant's previous unblemished criminal record and the fact that he would lose his employment as a police officer. That second factor, was however balanced by the aggravating factor that he had breached a position of trust.

[109] She also considered that he had still not attained the age of 30 and that his conviction had resulted from a trial not a guilty plea. The LTJ indicated that she was sentencing him at the "lowest level" concurrently on both counts, which resolved to six years and 11 months, after he had been credited with the month that he spent in custody, prior to obtaining bail. In all the circumstances, after a full trial, the breach of trust involved and the undisputed menace that illegal firearms and ammunition cause in our society, the sentence of the applicant at the "lowest level" is decidedly not manifestly excessive. Accordingly, the ground on which this issue rests also fails.

[110] In the premises, with apologies for the delay in the delivery of this judgment, the order of the court is as follows:

i) The application for leave to adduce fresh evidence is refused;

ii) The application for leave to appeal against conviction and sentence is refused;

iii) The sentences imposed are reckoned to have commenced on 20 December 2018.