[2025] JMCA Crim 3

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NOS 2 & 3/2017

SHAQUILLE POWELL
KIMANI WALTERS v R

Mrs Ann-Marie Feurtado-Richards for the applicant Shaquille Powell

Kemar Robinson for the applicant Kimani Walters

Ms Tamara Merchant and Ms Lori-Ann Tugwell for the Crown

2, 3, 5 October 2023 and 14 February 2025

Criminal Law - Identification evidence - Police officers as witnesses - Difficult circumstances of identification - Judicial interventions - Trial judge descending into the arena - Duty of trial judge when dealing with discrepancies and inconsistences in the evidence when sitting as a judge alone - Adequacy of good character directions - Effect of failing to give full good character directions - Treatment of unsworn statement

Criminal Law - Sentencing exercise - Illegal possession of firearm - Shooting with intent - Mandatory minimum sentence - Whether credit to be given for time spent on remand when a mandatory minimum sentence is imposed - Absence of s 42K certificate - Offences Against the Person Act, s 20 - Criminal Justice (Administration) (Amendment) Act, s 42K

STRAW JA

Introduction

[1] Having been tried on indictment in the Gun Court (before a judge sitting alone) for the offences of illegal possession of firearm, illegal possession of ammunition and shooting with intent, the applicants, Shaquille Powell and Kimani Walters, were, on 13 December 2016, found not guilty of illegal possession of ammunition (the Crown offered no evidence) but guilty of illegal possession of firearm and shooting with intent. On 16 December 2016, they were both sentenced to 10 years' imprisonment for illegal possession of firearm and the statutory minimum of 15 years' imprisonment for shooting with intent, with both sentences ordered to run concurrently.

[2] Both applicants sought leave to appeal against their convictions and sentences. On 16 February 2023, a single judge of this court refused their applications for leave to appeal. This court was therefore called upon to consider renewed applications for leave to appeal conviction and sentence, in respect of both applicants.

[3] On 5 October 2023, having heard and considered the submissions of counsel, we made the following orders with the promise to provide our reasons thereafter:

> "1. The applications for leave to appeal convictions are refused.
>
> 2. The applications for leave to appeal sentences in relation to the illegal possession of firearm are allowed.
>
> 3. The hearing of the applications is treated as the hearing of the appeal.
>
> 4. The appeals in relation to the sentences for illegal possession of firearm are allowed.
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> 5. The sentences of 10 years' imprisonment for illegal possession of firearm are set aside and substituted therefor are seven years and nine months, the pre-sentence custody of two years and three months having been deducted.

6. The sentences of 15 years' imprisonment for shooting with intent are affirmed.

7. The sentences are to run as of 16 December 2016, the date they were imposed."

[4] We now fulfil our promise to provide the reasons for our decision.

Background

The Crown's case

[5] The evidence in support of the Crown's case was provided exclusively by three police officers, two of whom were the primary witnesses to the incident giving rise to the charges and convictions. These primary witnesses were Constables Kemar Hutchinson and Beres Hamilton.

[6] Constable Hutchinson testified that on 30 August 2014, at about 4:20 pm, he, along with Constable Beres Hamilton and three other constables, were on foot patrol in the Fletchers Land community. Upon reaching the intersection of Love Lane and North Street, he heard several explosions sounding like gunshots coming from the direction of King Street. Upon investigating, he observed a motorcycle coming along North Street. The motorcycle headed in their direction and slowed down. The motorcycle was being operated by the applicant, Shaquille Powell, otherwise called "Bruk up" who was previously known to him. There was also a pillion passenger on the motorcycle. The men alighted from the motorcycle and he observed that the pillion passenger had a firearm in his right hand. He identified the pillion passenger as the applicant, Kimani Walters. He had seen Mr Walters earlier that day, at about 10:00 am at a premises along Mark Lane. Constable Hutchinson then observed Mr Powell pull a firearm from his waistband, after which both applicants opened fire in the direction of the police officers. Constable Hutchinson then crouched to the ground and returned fire. The applicants ran off. He saw when the firearm fell from Mr Powell. He retrieved the firearm and chased Mr Powell, who ran up King Street and eventually climbed over a fence, after he (Constable

Hutchinson) was fired upon by a third gunman. Mr Powell escaped and was not found despite searches of the area.

[7] Constable Hamilton's evidence largely corroborated that of Constable Hutchinson's, and, in particular, the recognition of the two applicants, Mr Powell as the driver of the motorcycle and Mr Walters as the pillion passenger. Constable Hamilton testified that he had spoken to Mr Powell earlier that same day in a yard on Mark Lane. At that time, Mr Powell was amongst a group of men. Constable Hamilton said that upon seeing the men on the motorcycle, he shouted, "police, don't move", after which the men opened fire in his direction, and he returned fire. When returning fire, he was flat on his belly. He saw when the firearm fell from Mr Powell's hand and saw when Constable Hutchinson retrieved it. He then contacted Police Control for assistance.

[8] Both applicants were subsequently arrested and charged for the above-described offences.

Case for the defence

[9] Mr Powell gave an unsworn statement from the dock. He indicated that on the date of the incident, he was at Glengoffe and not in Kingston. He got news from his mother that day that his younger brother had died and that he (Mr Powell) was a person of interest. He turned himself into the police. He told the police that he knew nothing of the shooting incident.

[10] Mr Walters, on the other hand, gave sworn evidence. He testified that on the date of the incident, he was in Spanish Town with his girlfriend. He denied being the pillion passenger on the back of a bike, denied having a firearm in his hand and denied shooting at the police. He also denied knowing either of the police officers or speaking to them on the date of the incident. He denied knowing his co-accused, Mr Powell, before being taken into custody. He admitted under cross-examination, however, that prior to the date of the shooting incident, he had been to Fletchers Land and Mark Lane and, in particular,

that he knew the premises along Mark Lane where he was said to have been seen by the police earlier in the day, as his mother previously lived there.

[11] Additionally, further to questions asked by the learned judge, Mr Walters stated that he was taken into the custody of the police when he was in the hospital as, on the night of the incident, he was robbed by two armed men and shot.

Grounds of appeal - Shaquille Powell

[12] On behalf of Mr Powell, Mrs Feurtado-Richards sought and was granted leave to abandon the original grounds of appeal and to argue the following supplemental grounds of appeal:

> "Ground one (1):
> The Learned Trial Judge erred by not giving proper and sufficient directions in respect of the identification evidence because:
> 1. The opportunity afforded to the identifying witnesses to make an identification was very short.
> 2. The identification opportunity afforded to the witnesses was under very difficult circumstances.
> 3. The surrounding circumstances under which the observation was made rendered the identification unsafe.
> 4. The judicial note taken by the learned Trial Judge as to the time of day could have been garnered from the witnesses present.
> 5. The witnesses first identified [Mr Powell] in court and there was no direction as to the way in which [Mr Powell] was first identified in a 'confrontational manner' at the Kingston Central Police Station on September 4, 2024, by the two (2) police witnesses.
> 6. The Learned Trial Judge having allowed the dock identification of [Mr Powell] failed to give adequate and cogent direction [sic] on how to treat with this evidence.
> 7. The Learned Trial Judge failed to give sufficient directions on the identification evidence.
>
> Ground two (2):
> The Learned Trial Judge erred by not giving proper and sufficient directions on inconsistencies and discrepancies as it

related to the following inconsistencies and discrepancies, namely:

1. Inconsistency # 1- the distance of twenty-five (25) metres away when the Applicants came off the motorcycle versus twenty (20) feet. This inconsistency then impacted the treatment of identification of [Mr Powell].
2. Inconsistency # 2- in court [sic] said that the entire incident from the men came around onto North Street on the motorcycle to when Mr. Powell allegedly went over a fence was three (3) to four (4) minutes versus agreed in his statement which said that the entire incident from the time he saw the men on the red motorcycle until he chased Bruk Up up King Street where he escaped was two (2) to three (3) minutes.
3. Discrepancy- the time, 5pm versus 6pm, in which the police officers all saw each other at Kingston Central Police Station on September 4, 2014, which enabled Constable Kemar Hutchinson and Constable Beres Hamilton to 'point out' [Mr Powell] on September 4, 2014, to Corporal Samuel Blackwood and say 'Mr. Blackwood, 'Bruk-up' nuh shoot after we Saturday.'

Ground three (3):
The Learned Trial Judge denied [Mr Powell] a fair trial by his excessive interference in the giving of evidence by the crown witnesses and effectively becoming a participant at the bar instead of from the bench.

Ground four (4):

The Learned Trial Judge erred by not giving proper and sufficient directions on [Mr Powell's] unsworn statement.

Ground five (5):
When sentencing [Mr Powell], the Learned Trial Judge did not take into consideration, the time spent on remand."

Grounds of appeal - Kimani Walters

[13] Similarly, Mr Robinson, on behalf of Mr Walters, sought to abandon the original grounds of appeal that were filed and to argue supplemental grounds of appeal. There being no objection from the Crown, this application was also granted. The following were the grounds argued on behalf of Mr Walters:

> "Ground 1- the learned trial judge failed to adequately direct himself on the Turnbull Guidelines in circumstances where the main issue was that of identification. This non-direction resulted in a miscarriage of justice.
>
> Ground 2- the learned trial judge failed to demonstrate how he resolved the material inconsistencies which arose on the prosecutions' case.
>
> Ground 3- the learned trial judge deprived [Mr Walters] of a good character direction by failing to give one in circumstances where he was entitled to a full good character direction.
>
> Ground 4- Unfair Trial: the constant interference by the trial judge and the allowance of leading questions by the prosecution rendered the trial of [Mr Walters] unfair.
>
> Ground 5- The learned trial judge failed to conduct a proper sentencing exercise and failed to take into consideration the pre-trial remand of [Mr Walters] resulting in a sentence which was manifestly excessive."

[14] It is noted that the grounds of appeal of both applicants gave rise to the consideration of similar issues in certain respects. In particular, both applicants challenged the sufficiency of the learned judge's directions with respect to identification and his treatment thereof. They also argued that the learned judge failed to properly address the material inconsistencies and discrepancies that arose on the Crown's case and that the learned judge constantly interfered in the taking of evidence and thus descended into the arena. There were also challenges raised to the sentences imposed upon each applicant. As such, these matters are discussed below based on the common issues raised; thereafter, the grounds unique to each applicant are discussed.

Identification (ground one for each applicant)

Submissions on behalf of Mr Powell

[15] Mrs Feurtado-Richards submitted that although the learned judge correctly stated the evidence that was presented by the prosecution, he failed to adequately analyse the

evidence with respect to the weaknesses in the identification evidence. She recited the points numbered one to seven set out under Mr Powell's ground one at para. [12] above. She stated that at no point in his summation did the learned judge address the different distances from which the two witnesses made the identification and thereby resolve that weakness in the identification evidence. She acknowledged that the learned judge took note of the different distances set out in the police officers' statements as opposed to their testimony before the court as well as the explanation for those discrepancies. She asserted that the learned judge's treatment of that issue was inadequate.

[16] As it related to the time frame during which the identifications were made, counsel submitted that the learned judge failed to analyse how the time of 10 to 15 seconds for viewing the men was diminished by the sequence of events. She submitted further that the identification opportunity was made under very difficult circumstances but that this was not addressed by the learned judge.

[17] Counsel also took issue with the fact that the learned judge took judicial notice of the time of day of the incident. She submitted that it was inappropriate in this case, as the evidence should have been garnered from the prosecution witnesses.

[18] Counsel asserted that the learned judge failed to address his mind to the way Mr Powell was identified by the police officers at the police station on 4 September 2014, as well as to the dock identification during the trial. She cited the importance of an identification parade to ensure fairness to Mr Powell. She maintained that the learned judge failed to demonstrate that he understood the nuances and issues that arose with respect to a confrontation identification and the absence of an identification parade. It was contended that the trial was rendered unfair, in all the circumstances.

Submissions on behalf of Mr Walters

[19] Mr Robinson underscored that since identification was the principal issue arising in the case, the learned judge was required to give himself the full directions in accordance with the guidelines enunciated in **R v Turnbull and others** [1977] 1 QB 224 ('the

Turnbull directions'). He submitted that whilst the learned judge considered some of the **Turnbull** directions, he failed to demonstrate in his summation that he fully appreciated those directions and applied them to the case. In particular, according to Mr Robinson, the learned judge failed to appreciate that the identification was made in difficult circumstances and further failed to address certain weaknesses in the identification. These were, (i) the fact that the first observations were made when the men were on a moving motorcycle; (ii) the observations were made during the course of a shootout during which the witnesses must have been fearful; (iii) the observation over 10 seconds had to be shared between observing both perpetrators; (iv) the inconsistency between the witnesses as to the distances from which the observations took place; and (v) the failure of both witnesses to indicate their prior knowledge of Mr Walters in their statements.

[20] In making these submissions, reliance was placed on the cases of **Vernaldo Graham v R** [2017] JMCA Crim 30, **R v Ivan Fergus** (1994) 98 Cr App R 313, and **Scott v R; Barnes v R** [1989] AC 1242.

[21] Mr Robinson submitted further that police officers did not have superior powers of observation to civilian witnesses and referred the court to **Junior Reid v The Queen** [1989] 3 WLR 771.

Submissions on behalf of the Crown

[22] In opposing the submissions of both applicants, Ms Merchant submitted that the learned judge adequately warned himself in accordance with the **Turnbull** directions, and, that the directions were operating on the mind of the learned judge at the time that he was making his decision. Further, the learned judge assessed the weaknesses in the identification evidence and also assessed the full circumstances of the observations. The cases of **Omar Fear & Dwayne Donaldson v R** [2020] JMCA Crim 16, **Raymond Hunter v R** [2011] JMCA Crim 20 and **R v Ramsden** [1991] Crim LR 295 were cited in support of these submissions.

[23] Reliance was also placed on the cases of **R v Ramsden** and **Raymond Hunter v R** to support the point that the trained officers were in a better position to recognise and later identify their assailants.

[24] On the issue of confrontation identification, the Crown relied on the cases of **Jermaine Kesson v R** [2022] JMCA Crim 66 and **Tesha Miller v R** [2013] JMCA Crim 34 to make the point that the police officers pointing out the applicants to their co-worker could not be said to be confrontation. There was nothing about the identification that had the appearance of being unusual or contrived.

Analysis

[25] This case turned solely on the issue of identification. The learned judge gave himself the full **Turnbull** directions relevant to identification and recognition evidence (see pages 166 to 167 of the transcript). He also rehearsed the evidence in relation to the opportunity for Constables Hutchinson and Hamilton to observe the faces of each applicant, the distance from which the observations took place, the length of time and the lighting.

[26] Constable Hutchinson indicated that he first saw the applicants when they were 30 feet away but that they came down to within 20 feet from him. He saw Mr Powell's face for 15 to 20 seconds as well as Mr Walters'. They alighted from the bike 20 feet away about five to six seconds after he had first seen them. They opened fire four to five seconds after they came off the bike. After the men opened fire, he crouched to the ground to make himself a smaller target and returned fire in the direction of the men. Whilst crouched, he was on one knee and looking at his targets.

[27] Constable Hamilton testified to having seen both men's faces for about 15 seconds and stated that the entire incident, from the first time he saw the men, until he did not see them anymore, was about 15 seconds. He said the time between when the men came onto North Street to when they came off the bike was about three seconds. One more second elapsed before they opened fire. They were facing the police officers as they

opened fire. He was on the other side of the road from Constable Hutchinson and about 15 feet behind him. He was about 60 feet from the applicants at that time (distance pointed out and estimated by defence counsel below). The learned judge indicated that he took note of that distance. A further 10 seconds elapsed between when the men began firing and when they ran off. When both applicants opened fire, he indicated that he went into a crouched position which he described as lying on the ground. When the firearm fell from Mr Powell's hand, Mr Powell ran up King Street, while Mr Walters ran down King Street.

[28] Even if this court considered that their observation of the applicants was divided, the period of 15 seconds to 20 seconds could not be deemed to be a fleeting glance. The narrative reveals that both witnesses first saw and recognised the applicants while they were still on the bike. At that time, there was no firing. The applicants were close together for at least three to four seconds (according to Constable Hutchinson), and five to six seconds (according to Constable Hamilton) of the period of observation before opening fire. Further, both witnesses indicated that they continued to observe the faces of the applicants during the firing which, according to Constable Hamilton, lasted about 10 seconds.

[29] In relation to the observations having been made under difficult circumstances, the evidence from Constable Hamilton was to the effect that he would not describe being in a shootout as being under much pressure. He testified that he was "calm and collective [sic]" during this period and that he did not agree that it was more difficult to identify someone when he was lying in a crouch. Further, the evidence from this witness was that a period of four seconds passed before the applicants opened fire. His evidence, also, was that both applicants were firing in his direction as they were in the middle of the road and were facing his direction as well as the direction of Constable Hutchinson. For his part, Constable Hutchinson indicated that he made a detailed observation of their faces and that he was concerned with the target while he was firing. He said that he was firing at the target, so he was looking at the men.

[30] Both police officers also gave evidence of their prior knowledge of each applicant. Constable Hutchinson testified to knowing Mr Powell for about four years prior to the incident and to seeing him as often as four times per week. These sightings were both during the daytime and nighttime. He also spoke to Mr Powell during those interactions and he knew where he lived. He also knew some of his relatives. In respect of Mr Walters, he testified to having seen him previously, on the same morning of the incident, at about 10:00 am, at a premises along Mark Lane. He recalled that Mr Walters was wearing a black T-shirt both in the morning and at the time of the incident. Further, he had seen Mr Walters in the Fletchers Land community on various occasions prior to the incident, about twice per week and that he would stop to search and interview him. This was for about "four to five or six months" prior to the incident. On 11 September 2014, he identified Mr Walters on a video identification parade.

[31] For Constable Hamilton's part, he too testified to knowing Mr Powell prior to the incident. He said that he had known him for five years previously and that he had also seen him and spoken to him on the day of the incident. He spoke of seeing Mr Powell two to three times per week and speaking to him on most of those occasions, which were both day and night. He knew where Mr Powell lived and knew his brother and sister. He also testified to having seen Mr Walters on the morning of the incident and having spoken to him. He said that prior to that date he had seen Mr Walters regularly in the Fletcher's Land area for about a year, about once per week. He too identified Mr Walters on a video identification parade.

[32] At page 166 of the transcript, the learned judge gave himself the usual **Turnbull** directions. He examined the distances between the witnesses and the applicants and referred to the fact that Constable Hamilton pointed out a little longer distance than Constable Hutchinson. He also looked at the time for viewing of the applicants and the lighting (see page 167). Having rehearsed these significant aspects relating to the identification evidence, the learned judge remarked at page 167 of the transcript:

> "So what we have here therefore is two officers, two trained police officers who said they observed two persons and could see their faces clearly from about 20 feet away and they saw their faces for about 10 to 15 seconds. If this should be accepted I think they would therefore have ample time and opportunity to see and subsequently identify the person they say shot at them. Now this leaves [sic] along with it as to the credibility of these two witnesses."

[33] Concerning the lighting, the learned judge noted that the incident took place at 4:20 in the afternoon in August 2014 and remarked, "[h]aving been living in Jamaica for all of my life and bearing in mind my present age I can say that 30th August which is the middle of summer would be daylight in Jamaica" (see page 167 of the transcript). Mrs Feurtado-Richards complained that the learned judge was wrong to have taken judicial notice of the time of the year and stated that the witnesses ought to have been asked about the lighting. While this may have been the proper course to adopt by the prosecution, we found this complaint to have been of little moment considering all the circumstances, including the fact that there was no issue taken in relation to how the witnesses were able to observe the faces of the applicants at that time of the day.

[34] A subsequent issue was whether the learned judge had regard to any weaknesses that arose that could affect the quality of the identification evidence. Did he properly assess whether it was an identification or recognition made in difficult circumstances? The learned judge took note of this when he considered the fact that the police officers were being fired upon. He made note of the evidence given by both officers as to their ability to observe at that specific time (see pages 156 and 161 of the transcript). However, the evidence demonstrated that both police officers had sufficient opportunity to view and recognise the applicants before the firing started.

[35] In all the circumstances, there could be no valid contention that the learned judge did not have regard to the full **Turnbull** directions. Further, we agreed with the assessment of the learned judge that there was sufficient opportunity for the police officers to observe the men who fired shots at them. Even more so, in a case of

recognition, it is well established that less time would be needed to view and recognise the face of persons who are known beforehand (see **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered on 26 February 1996 and **Separue Lee v R** [2014] JMCA Crim 12).

[36] Mr Robinson complained that the learned judge was wrong to have indicated that trained police officers were better placed to make observations of persons for the purpose of identification. In the case of **Raymond Hunter v R**, this court accepted as a general principle stated in **R v Ramsden** that police officers, while obviously subject to the same rules as lay witnesses, were "likely to have a greater appreciation of the importance of identification" (see **R v Ramsden** at page 296). This principle, for obvious reasons, could not be taken too far and if there were issues with the sufficiency and reliability of the identification evidence, then the fact that the witnesses were police officers would be of no moment. In the present circumstances, there was sufficient opportunity to view the applicants, and, in any event, the learned judge did not state that the police witnesses had a greater ability than civilian witnesses to identify assailants. The fact that they were trained officers only added weight to the strong identification evidence, in particular as they engaged the applicants, who were in front of them, in a shoot-out. As Constable Hutchinson explained, "I was looking at the target". The inference was open to the learned judge to conclude that this witness was paying careful attention to the applicants as they fired at him.

Confrontation identification

[37] In relation to the identification of Mr Powell, there was no identification parade. Both police officers pointed out Mr Powell to Corporal Samuel Blackwood at the Kingston Central Police Station on 4 September 2014. Mrs Feurtado-Richards contended that this amounted to confrontation identification, to which the learned judge gave no regard.

[38] Constable Hutchinson's evidence in this regard was to the effect that he was at the Kingston Central Police Station at 6:00 pm on the aforementioned date. He was

speaking to Constable Hamilton, when he observed Detective Corporal Blackwood escorting a man who he recognised to be Mr Powell. Upon recognising Mr Powell, he mentioned the same to Constable Hamilton that this was "Bruk Up". At this time, Mr Powell was about 15 feet away. He then went over to Corporal Blackwood and pointed out that Mr Powell was the one who fired shots at him on King Street and that he was the one riding the bike. This was in Mr Powell's hearing.

[39] Likewise, Constable Hamilton testified to the same sequence of events, save that he stated that both he and Constable Hutchinson went to Corporal Blackwood and identified Mr Powell to him as one of the shooters.

[40] Detective Corporal Blackwood stated that he arrived for duty at the Kingston Central Police Station at 5:00 pm on 4 September 2014. On entering the CIB office, he saw Mr Powell. He identified himself to him and told him that he was wanted for the offences of shooting with intent and illegal possession of firearm. He told him that he was required to do a question-and-answer interview and would be held in custody at the Half Way Tree Police Station. He was in the process of escorting Mr Powell to a service vehicle when Constables Hutchinson and Hamilton spoke to him and identified Mr Powell as "Bruk Up" who shot at them on "Saturday".

[41] Even if it could be contended that it was Constable Hutchinson who brought Mr Powell to Constable Hamilton's attention, the learned judge had evidence before him on which to accept that Mr Powell was known to both police officers prior to 4 September 2014. The concern would, however, be the circumstances under which the identification of Mr Powell occurred. Did the learned judge fall into error by the failure to direct himself as to whether the identification was contrived and ought not to be relied upon? No suggestions were made to that effect to Corporal Blackwood. He was not cross-examined by Mr Powell's attorney as to the circumstances existing at the time of the identification. In fact, Mr Powell, in his statement from the dock, indicated that he heard that he was a person of interest, and he turned himself into the Kingston Central Police Station. He, therefore, attended the station on that day and time on his own volition. When Corporal

Blackwood attended at the station, he saw him there. This certainly weakens and, indeed, nullifies any inference that Mr Powell was deliberately taken to the station by the police on that day and time, to facilitate the identification by both witnesses. Further, he did not deny that his alias was "Bruk Up" or that both witnesses referred to him by that alias on that day.

[42] Confrontation identification, which arises by a deliberate attempt on the part of the police to facilitate an easy identification by a witness, is undesirable and will lead to the rejection of the evidence of identification, especially where there is no prior knowledge of the accused before the incident (see **Tesha Miller v R** and **Michael Burnett v R** [2017] JMCA Crim 11). There was no evidence before the learned judge in the case at bar to suggest that there was any contrivance on the part of the police. We found that there was no basis for the learned judge to consider and direct himself on the point raised by counsel.

[43] Further, there would have been no value in the holding of any subsequent identification parade, since Mr Powell was previously identified (see **R v Trevor Dennis** [1970] 12 JLR 249). An identification parade is desirable where the suspect disputes prior knowledge by a witness (see **David Ebanks v R** (2006) 68 WIR 390) or it will otherwise serve a useful purpose (see **Ronald John v The State of Trinidad and Tobago** (2009) 75 WIR 429). In that regard, the dock identification of Mr Powell by both police officers could not be the basis for any miscarriage of justice. The issue is whether the learned judge was correct to have found that Mr Powell was known to both witnesses prior to the date of the incident and whether they had sufficient opportunity to make a correct identification.

[44] This court must be alert to all the factual circumstances in a particular case, to ensure that the identification of suspects is an independent process. However, the circumstances of the case at bar did not give rise to any conclusion that the identification of Mr Powell was unfair for the reasons set out above.

[45] Ground one for both applicants, therefore, failed.

Treatment of inconsistencies (ground two for each applicant)

Submissions on behalf of Mr Powell

[46] Mrs Feurtado-Richards submitted that the learned judge failed to deal adequately with the inconsistencies and discrepancies that arose in the case and that these inconsistencies and discrepancies went to the heart of the major issue of identification. She stated that the learned judge did not indicate how he treated with the inconsistencies. He merely highlighted them.

Submissions on behalf of Mr Walters

[47] It was Mr Robinson's submissions that there were material inconsistencies on the Crown's case concerning the witnesses' previous knowledge of Mr Walters and their previous interactions and sightings of him on the morning, prior to the incident. The learned judge failed to demonstrate how he resolved those inconsistencies, save for an indication that he found the witnesses to be truthful. Mr Robinson submitted that the approach by the learned judge in this regard was flawed and rendered Mr Walters' conviction unsustainable.

[48] Reliance was placed on the case of **Vernaldo Graham v R**, regarding the duty of the trial judge to direct the jury concerning inconsistencies and discrepancies, together with the case of **Sherwood Simpson v R** [2017] JMCA Crim 37 as it relates to the role played by demeanour in assessing a witness' credibility. Mr Robinson asserted that the findings of the learned judge were not based on an analysis of the inconsistencies, but rather on his observations of the witnesses' demeanour, which is an incorrect approach.

Submissions on behalf of the Crown

[49] Ms Merchant posited that the learned judge directed his mind to the omissions and inconsistencies in the evidence of the two police officers. The learned judge specifically highlighted the inconsistency in relation to the distances from which the officers observed

the applicants. He took into consideration the explanation provided by Constable Hutchinson for the inconsistencies.

[50] The learned judge also assessed the omissions in the statements of the police officers with respect to their prior knowledge of the applicants, description of the applicants and the length of time that the applicants were under observation. The learned judge assessed the evidence and the demeanour of the officers whilst giving their evidence and concluded that they were speaking the truth.

[51] With respect to the fact that Constable Hamilton gave an estimated distance of 60 feet while Constable Hutchinson said 20 feet, counsel submitted that the evidence was that Constable Hutchinson was closer in proximity to the applicants and that Constable Hamilton was about 20 to 15 feet behind Constable Hutchinson. As a result, Constable Hamilton's observation was from a greater distance. Further, reliance was placed on the case of **Jermaine Kesson v R** in submitting that it was possible for the officers to recognise the applicants from 60 feet away.

Analysis

[52] Counsel highlighted several inconsistencies, discrepancies and omissions for both police officers. Constable Hutchinson had said in his written statement that the applicants were 25 metres away from him when they alighted from the bike. In his evidence-in-chief, he pointed out a distance in court that was estimated at 20 feet. In resolving this inconsistency, he explained that he was not an expert with distances, and he was not familiar with the measurement of meters as opposed to feet, which was why he used the court room to demonstrate the actual distance. The learned judge considered this at pages 156 and 167 of the transcript and indicated that this was one of the inconsistencies he had to take into account in assessing Constable Hutchinson's credibility and reliability. There were also several omissions from the statements of both officers. In their evidence-in-chief, Constables Hutchinson and Hamilton spoke of knowing both applicants prior to the date of the incident. Both admitted, however, that these details, among others, were omitted from their statements. In respect of the omission to set out any description and

prior knowledge in relation to Mr Powell, Constable Hutchinson admitted to having prepared part of his statement after he saw Mr Powell with Corporal Blackwood. When challenged, however, he maintained that he knew Mr Powell prior to the incident. He also agreed that he did not record in any statement, his prior knowledge of Mr Walters. He had, however, given a description in his statement that he was wearing "a black t-shirt"", was "slim built, light complexion with a bleach out face". Also omitted from his statement was the fact that he saw the faces of both applicants for 15 to 20 seconds. In re-examination, he said the description he gave of the pillion passenger in his statement was that which he was thinking about at the time he gave his statement. He also indicated that he did not realise that he had left out the fact that he had seen Mr Walters on Mark Lane on the same day.

[53] Constable Hamilton admitted that he failed to include in his statement any details of his prior knowledge of Mr Powell and his knowledge of Mr Walters before the incident. He acknowledged that he did not describe Mr Powell in his statement that was prepared on 5 September 2014. He was unable to provide any explanations for these omissions. He also admitted that he did not say in his statement that he saw Mr Walters' face for 10 to 15 seconds; neither did he say he recognised the pillion passenger as Mr Walters; nor that he was one of the men he had seen earlier that day in the Fletcher's Land community. He agreed it was prudent to have said he had seen him in Fletchers Land before. He indicated he had no reason for not putting in his statement that he had seen Mr Walters' face for about 10 to 15 seconds.

[54] Concerning alleged discrepancies in the distance of both police officers from the applicants, the learned judge had before him the evidence of Constable Hamilton that Constable Hutchinson was on the opposite side of the road and a little ahead of him as the police party was proceeding along North Street. How did the learned judge deal with these inconsistencies, discrepancies and omissions? Concerning the evidence of the distance of the police officers from the applicants, he stated at page 167 of the transcript:

> "Constable Hamilton who he is saying was travelling behind Constable Hutchinson pointed out a distance of a little longer than that. Although they pointed out a particular distance I also have to take into consideration what was contained in their statement that initially he said it was 25 meters. However, when asked to point out 25 meters it was then that he pointed out a distance of 20 about approximately 20 feet. I also have to take into consideration any explanation that might have been given. Constable Hutchinson gave an explanation that he was not really fully abreast of measurement being done in meters as oppose [sic] to feet and this is what could have contributed to his misstatement of 25 meters, I have to look at it to see what I make of it. And this I will have to look at when I come to look at his credibility and reliability."

[55] He then turned to the credibility of both witnesses (see pages 167 to 169 of the transcript):

> "Now this leaves [sic] along with it as to the credibility of these two witnesses. Now I take into consideration when I view the omission from their statement as it relates to descriptions and details as to how long they knew these persons before. Now the question that I must ask myself is this. Is it because the evidence that they had given or they have given is untruthful or is it because of the laxity in the way which they wrote their statements. Now I have observed both witnesses as they gave their evidence and I must say that I was impressed by the manner in which Constable Hutchinson in particular gave his evidence. He gave his evidence in a very forthright manner, very positive in his evidence, this I have to look at bearing in mind the omission from his statement. Now when I look at these, what he said in court and what was contained in his statement I have to determine whether or not I can accept him as a witness of truth. Having made my observation of him, having observed how he gave his evidence, having observed his demeanor [sic], I find him to be a witness of truth. I accept his testimony as being truthful and reliable when he said he knew the accused man Powell for some time. I find that he was a truthful and reliable witness when he said he had seen this accused man Powell on several occasions before in the Fletchers Land area and have [sic] even spoken to him. I find him to be truthful and reliable when he said yes,

he had seen the accused man Powell earlier that day in the region of about 10 o'clock when he said he saw them with a group of men in a yard along Mark Lane. I find him to be truthful and reliable when he said he saw the accused man Powell riding a motor cycle coming from King Street onto North Street. I accept him to be truthful and reliable when he said he saw the accused man Powell fired at him then dropped his firearm, that he gave chase and the accused man Powell escaped over a fence. As it relates to the accused man Walters, again I take into consideration the inconsistencies that were in his statement, between his statement and his evidence court [sic]. I take into consideration the deficiencies in his statement and the omissions made therein which he claimed to be omission [sic] because he was concentrating on particular areas, but I also find that he was speaking[sic] truth when he had seen the accused man Walters in the Fletchers Land area on the occasion. I find that he is speaking the truth and was reliable when he said he saw the accused man Walters in premises along Mark Lane earlier that day and that he was wearing the same dark clothing that he saw him later that afternoon [sic]. I find that he was speaking the truth when he said he saw the accused man Walters as a pillion passenger along North Street. I find that he had ample time and opportunity to be able to see and subsequently recognize both the accused man Powell and the accused man Walters and the persons who were on this motor cycle. I find that he was speaking the truth in regards in relation to the time of the estimated time of which he was able to see them and that he was speaking the truth when he said these were the two persons who were present on this motor cycle. Now the witness Mr. Hamilton, Constable Hamilton was not as impressive in my view as Constable Hutchinson but I also find that he was a witness of truth in relation to knowing these two persons before, having seen them prior to this occasion on the 30th of August, 2014 and that he had seen him even before that and he had ample time and opportunity also to be able to recognize him. I find that there was no collusion between them in order to give evidence that they gave. And I will find that he is a truthful and reliable witness when he said these were the two persons who shot at him. I find also in relation to Constable Hutchinson and Constable Hamilton that this accused man Powell dropped a firearm in making his escape from that area."

[56] There was no general reference to a direction on inconsistencies but it is clear that the learned judge was sensitive to the fact of inconsistencies and how they might affect credibility and reliability. A major issue was the omissions from the statements of both police officers. Counsel contended that the learned judge made up his own explanations for those omissions. In the excerpt set out above, the learned judge asked the question whether the omissions were because the evidence of the witnesses were untruthful or due to laxity? We did not form the view that he was making up his own explanations, but it showed a recognition that unfavourable inferences could be drawn from the absence of those material facts and that this was an issue that he had to resolve. In doing so, he did rely substantially on the assessment of the demeanour of both police officers, in particular, Constable Hutchinson.

[57] That is, however, part of his function as the trier of fact. In **R v Crawford** [2015] UKPC 44, the Privy Council commented on the role of the appeal court when reviewing the decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. Lord Hughes stated at para. 9:

> "There has been no dispute before the Board as to the proper role of an appellate court when reviewing a decision of a trial judge which amounts to a finding of primary fact based upon his assessment of the credibility and reliability of witnesses whom he has seen and heard. It is well established that an appellate court should recognise the very real disadvantage under which it necessarily operates when considering such a finding only on paper. There are many statements of this principle. It is enough to set out the formulation of it by Lord Sumner in *The Hontestroom* [1927] AC 37 at 47-48:
>
> > 'What then is the real effect on the hearing in a Court of Appeal of the fact that the trial judge saw and heard the witnesses? I think it has been somewhat lost sight of. Of course, there is jurisdiction to retry the case on the shorthand note, including in such retrial the appreciation of the relative values of the witnesses, for the appeal is made a rehearing by rules which have the force of

> statute. … It is not, however, a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation. None the less, not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1860) 14 Moo PC 210, 235 Lord Kingsdown says: 'They, who require this Board, under such circumstances to reverse a decision of the court below upon a point of this description undertake a task of great and almost insuperable difficulty. … We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.'

This passage has often been approved at the highest level since; see for example Lord Wright in *Powell v Streatham Manor Nursing Home* [1935] AC 243, 265 and Lord Edmund-Davies in *Whitehouse v Jordan* [1981] 1 WLR 246, 257. In *Benmax v Austin Motor Co Ltd* [1955] AC 370 at 375 Lord Reid added the following:

> '… it is only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness. But the advantage of seeing and hearing a witness goes beyond that: the trial judge may be led to a conclusion about the reliability of a witness's memory or his powers of observation by material not available to an appeal court. Evidence may read well in print but may be rightly discounted by the trial judge or, on the other hand, he may rightly attach importance to evidence which reads

> badly in print. Of course, the weight of the other evidence may be such as to show that the judge must have formed a wrong impression, but an appeal court is and should be slow to reverse any finding which appears to be based on any such considerations.'
>
> The advantage enjoyed by the trial judge applies equally to those comparatively rare criminal cases tried by judge alone, with, of course, appropriate consideration being given to the different standard of proof."

[58] The learned judge did not rely solely on the issue of demeanour. He found that aspects of the case for the applicants supported the testimony of the police officers. The learned judge indicated, on page 169 of the transcript, "[i]t is to be noted in the statement of the accused man Powell that in no part of his statement did he deny that he was called 'Bruk Up' in his unsworn statement. There is nowhere in his statement that he denies that he was somebody who was also in the Fletchers Land area". Having said that, the learned judge reminded himself that it was the duty of the prosecution to satisfy him in relation to the burden of proof. As far as Mr Walters is concerned, the learned judge indicated that in his evidence, he had mentioned that he had been to the Fletchers Land area and that the police officers have said that they have seen him there. At page 170 of the transcript, the learned judge is recorded as stating:

> "The police officers said that they had seen him in a yard along Mark Lane that morning and a particular address was mentioned that is 27 Mark Lane. He agrees that he knows that address and that is an address where his mother resides. Again, is it coincidental that the police officers would have said that they have seen him in Fletchers Land? Is it coincidental that the police have said that they saw him at a premises in Mark Lane because he himself said that he had visited Fletchers Land and that is premises on 27 Mark Lane where his mother resides? I reject the statement given by Mr. Shaquille Powell. I reject the evidence given by Mr. Walters as to his whereabouts on the day of the 30th of August..."

[59] The learned judge obviously formed a view of the police officers and indicated that he found them essentially to be witnesses of truth. He also indicated, which he was entitled to do, that Constable Hutchinson was the more reliable witness of the two. He was entitled to assess and consider the entire evidence that was before him.

[60] In **Vernaldo Graham v R**, Edwards JA (Ag) (as she then was) set out the basic principles to be considered in a summation dealing with inconsistencies and discrepancies:

> "[106] Based on the authorities, the duty of the trial judge in directing the jury in the case of inconsistencies and discrepancies appearing in the evidence at trial may be summed up as follows:
>
> > 1. There is no duty to comb through the evidence to find all the inconsistencies and discrepancies there may be, but the trial judge may give some examples of them or remind the jury of the major ones.
> >
> > 2. The trial judge should explain to the jury the effect a proved or admitted previous inconsistent statement should have on the evidence.
> >
> > 3. The trial judge should point out to the jury what the result may be if the inconsistency or discrepancy were to be found by them to be material and how it may undermine the evidence.
>
> Once this approach is taken, it is then a matter for the jury whether they consider the witness to be discredited."

[61] When the court considered the summation in its totality, we saw no basis for interfering with the learned judge's factual findings in this regard.

[62] Ground two for each applicant, therefore, had no merit.

Excessive interference (Shaquille Powell's ground three and Kimani Walters' ground four)

Submissions on behalf of Mr Powell

[63] Mrs Fuertado-Richards contended that the learned judge descended into the arena and acted as prosecuting counsel. She submitted that the learned judge made several interruptions that went to material aspects of the trial and went beyond the bounds permissible for a trial judge. She stated that the interventions were not done to clear up ambiguities or to allow the learned judge to take accurate note of the proceedings. It was specifically submitted that the intervention during the cross-examination of Constable Hutchinson, by counsel for Mr Powell resulted in Mr Powell's case not being properly presented. As a result of the interventions by the learned judge, Mr Powell did not receive a fair trial. Reliance was placed on several cases to include **Jones v National Coal Board** [1957] 2 All ER 155, **R v Matthews and Matthews** [1984] 78 Cr App R 23, **R v Haniff Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 155/2002, judgment delivered 11 March 2005 and **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005.

Submissions on behalf of Mr Walters

[64] Mr Robinson submitted that there were over 100 interferences by the learned judge during the trial, some of which were material and prejudicial to Mr Walters. The nature of these interferences ranged from taking over the questioning of witnesses, providing explanations for prosecution witnesses, cross-examining Mr Walters and preventing him from giving evidence in his manner and providing answers for prosecution witnesses. These interferences, according to Mr Robinson, denied Mr Walters a fair trial as the learned judge descended into the arena. Reliance was placed on the cases of **Omar Bolton v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/2002, judgment delivered 28 July 2006, and **Lamont Ricketts v R** [2021] JMCA Crim 7 ('**Lamont Ricketts**') to support these submissions.

Submissions on behalf of the Crown

[65] It was counsel's submission that whilst one might view the learned judge's interruption of the trial process as excessive, it could not be said that the cumulative effect of his interventions hampered the fairness of the trial process or in any way prevented the applicants from advancing their defence. Rather, the learned judge, who sat as judge and jury, was only trying to clear up ambiguities and guide the court process. Based on a review of the transcript, it is clear that in doing so, there was absolutely no depiction of bias or hostility towards either party.

[66] With particular reference to Mr Walters, it was submitted that he was permitted to speak freely and that the only interruptions by the learned judge were to avoid the wastage of time due to the asking of unnecessary questions. Reference was made to the case of **Randeando Allen v R** [2021] JMCA Crim 8 as well as the case of **Christopher Belnavis v R**, which was used for juxtaposition.

Analysis

[67] What was relevant for our consideration was the purpose of the interventions and their overall impact on the fairness of the proceedings as they related to the applicants. These issues were addressed by this court in **Tara Ball and others v R** [2023] JMCA Crim 2 ('**Tara Ball**'), where the authorities, including **R v Hulusi and Purvis** (1974) 58 Cr App Rep 378 and **Lamont Ricketts v R,** were considered. At para. [76] of **Tara Ball**, it was stated thus:

> "… In **R v Hulusi**, Lord Parker CJ observed at page 382 that interventions to clear up ambiguities and to ensure that the judge is making an accurate note are perfectly justified. However, he also stated that it is wrong for a judge to descend into the arena and to give the impression of acting as an advocate. Further, he described the type of interventions that give rise to the quashing of a conviction. These were threefold:
>
> > '… those [interventions] which invite the jury to disbelieve the evidence for the defence which is put

> to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury ... The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[68] The learned judge descended into the arena on various occasions. Having examined the transcript, we concluded that some of these interruptions were fairly innocuous. Some were made by the learned judge to clear up ambiguities and to repeat answers made previously for the purpose of the recording process. For example, the learned judge interrupted the examination-in-chief of Constable Hutchinson in order that he could repeat his previous answer concerning the hand of the pillion rider that was holding the firearm (see page 25 of the transcript).

[69] There were also questions by the learned judge for specific clarifications. These latter interventions could be subsumed under the function of the learned judge as jury to weigh the evidence carefully. For example, Constable Hutchinson was asked how long he had known Mr Walters. Constable Hutchinson answered "[f]or months" and the learned judge intervened to ask how many months. This exchange is recorded at page 33 of the transcript as follows:

> "MISS HANLEY: Prior to the date of the incident for about how long had you been seeing him in the Fletchers Land community about twice per week?
>
> A: For months.
>
> HIS LORDSHIP: Like about how many months?
>
> A: About four to five or six months."

[70] Interventions were made to ascertain the distance the applicants were from the police witness when the applicants came off the bike. While this could be considered as taking over aspects of the examination-in-chief, the learned judge, as the trier of fact, was entitled to ensure that he could assess the quality of the identification evidence. However, there were also examples of the learned judge marshalling the evidence outright (see pages 25 to 29 of the transcript). In this regard, he appeared to have been impatient with the methodology of the prosecutor in securing the chronological flow of the relevant evidence.

[71] During the cross-examination of Constable Hamilton by defence counsel for Mr Powell, the learned judge intervened to: (1) ensure that the witness understood the specific question that counsel wished to be answered (see page 104 of the transcript); (2) ascertain what the witness meant by a particular answer (see page 105 of the transcript); (3) press the witness to answer the question posed; and (4) clarify particular dates, and guide counsel to consider whether he was putting Mr Powell's case correctly to the witness. Overall, these interventions were not demonstrative of any devastating effect on the case for Mr Powell.

[72] In relation to Mr Walters, counsel submitted that the interventions were material and prejudicial. He complained that the learned judge took over the questioning of witnesses. He referred the court to pages 116 to 118 of the transcript. On examination of those pages, it was seen that the learned judge intervened in the cross-examination of Constable Hamilton to ascertain whether the witness actually knew when Mr Walters had been taken into custody prior to the identification parade. Thereafter, the learned judge admonished the witness to listen to the question being asked and then rephrased defence counsel's question to the witness. The intervention was, therefore, appropriate in the circumstances. In any event, this intervention could not be described as either material or prejudicial, as the propriety of the identification parade was never challenged.

[73] Counsel also complained that the learned judge provided explanations for prosecuting witnesses and referred the court to page 86, lines 16 to 30 of the transcript as follows:

"Q:	Why you didn't write a statement until five (5) days later after the accused came into the custody …?
A:	(No answer)
Q:	Why?
A:	(No answer)
Q:	Or you don't have an explanation?
A:	I don't have an explanation.
Q:	Very well.
HIS LORDSHIP:	The unfortunate situation is that oftentimes you see statements write long after something …
MR GENTLES:	Yes M'Lord, it does open up a lot of room for certain amount …
HIS LORDSHIP:	If [sic] certainly does.
MR GENTLES:	For questions to be asked." (Ellipsis as in original)

[74] Although counsel contended that this was an explanation given by the learned judge for the omission from the witnesses' statement (which ought not to be done), it appeared to us that this was a comment of the learned judge as to the frequency with which this issue arises; and the learned judge appeared to have appreciated the potential negative effect on the reliability of a witness' evidence. This issue was weighed by the learned judge in considering the credibility and reliability of the witnesses (see page 162 of the transcript).

[75] At pages 118 and 119 of the transcript, defence counsel questioned Constable Hamilton about the description of Mr Walters he gave in his statement and then put to him that the description was not that of Mr Walters in the dock. The learned judge intervened by reminding defence counsel that the description was given by the witness of someone in 2014 (the evidence was being given in 2016). We accepted that the learned judge ought to have allowed the witness to answer the query of counsel. However, in the final analysis, the learned judge, as the trier of the facts, was entitled to weigh this evidence and draw reasonable inferences from all the evidence, including the time that had passed between the incident and the date of trial. Again, he saw Mr Walters in the dock and weighed the reliability and credibility of the witness in this regard.

[76] Mr Robinson also complained that the learned judge provided answers for the prosecution witnesses. We looked at the various passages referred to the court. These had to do with clarifications in relation to geographical descriptions of a particular street (this was not a matter in issue); the reminder to counsel of answers previously given by the witness to the same question; the reason that the witness had given for describing the applicants as targets; and reminding counsel as to a clarification the witness had made previously, including the evidence given of a group of men that he had spoken to that morning prior to the incident.

[77] In the round, these were examples of the learned judge managing his court and not allowing counsel to waste time with unnecessary repetitions. We were unable to agree that defence counsel was unable to carry out his duty in representing Mr Walters in the trial.

[78] Counsel referred to two passages in the transcript and contended that the learned judge was engaged in cross-examination of Mr Walters and prevented him from giving evidence or telling his story in his own way. Mr Walters gave sworn evidence. At page 140, lines four to six and page 148, line 20 to page 149, line 32, we see the following interactions between the learned judge and Mr Walters:

"HIS LORDSHIP: The witness says he was never there, anything that supposed to have happened there? He was never there."

"HIS LORDSHIP: Mr. Walters, you said on the morning of 30th of August, you were in Angella Farm?

A: Yes, M'Lord.

HIS LORDSHIP: What time did you get there?

A: I was there maybe about after 7:00 in the morning, can't be exact but it was before 10 o'clock.

HIS LORDSHIP: What you can't remember, 7:00, 8:00, 9:00?

A: Can't remember but it was before 10 o'clock.

HIS LORDSHIP: What time did you leave there?

A: What time?

HIS LORDSHIP: Yes.

A: Went just before night was coming down.

HIS LORDSHIP: In the evening just before night fall.

A: Just before night. At the time I was living at 80 Balcomb Drive next door.

HIS LORDSHIP: You said you were taken into custody on the 2nd of September?

A: Yes, M'Lord.

HIS LORDSHIP: Where?

A: In Spanish Town.

HIS LORDSHIP: Where in Spanish Town?

A: At the hospital.

HIS LORDSHIP: From [sic] were you a patient at the hospital, to visit or what?

A: I was a patient.

HIS LORDSHIP: When did you become a patient at the hospital?

A: After I left my girlfriend yard.

HIS LORDSHIP: The same night?

A: Yes, the same night after I left my girlfriend yard.

HIS LORDSHIP: What?

A: On robbery, shot by two armed men, don't know them; unknown.

HIS LORDSHIP: What caused you to be a patient in the hospital?

A: I was robbed and shot by two armed men, don't know them.

HIS LORDSHIP: By two armed men you said?

A: Yes, M'Lord.

HIS LORDSHIP: Your girlfriend came to look for you at the hospital?

A: No M'Lord, only my mother and my son, M'Lord."

[79] The learned judge, as the trier of fact, was entitled to ask questions of a witness in order to properly understand his evidence on a point. In **Lamont Ricketts**, F Williams JA, in examining the issue of excessive interference, quoted from two authorities as follows:

> "[21] Also, in the case of **Peter Michel v The Queen** [2009] UKPC 41, Lord Brown, delivering the advice of the Board, gave the following guidance at paragraph 34:

> '34. ….Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.' (Emphasis added)

> [22] Important as well is the case of **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005. In that case Panton JA (as he then was), writing on behalf of the court, made the following observations at paragraph 10 of the judgment:

> > 'It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena.'"

[80] The complaints of both counsel on this issue did not demonstrate the prejudicial effect of the interventions described in the authorities cited above.

[81] These grounds of appeal, therefore, failed.

Adequacy of directions on unsworn statement (Shaquille Powell's ground four)

Submissions on behalf of Mr Powell

[82] Mrs Feurtado-Richards submitted that the learned judge's directions did not indicate that Mr Powell's unsworn statement was a matter of weight. She asserted that the learned judge brushed aside the statement without more. She conceded that the learned judge followed up with statements on the burden and standard of proof but that the directions on the unsworn statement were insufficient. Counsel stated that the learned judge simply recited the unsworn statement and then commented on what Mr Powell did not deny in the statement. No indication was made on the weight given to the statement with a conclusion that the statement was not accepted.

Submissions on behalf of the Crown

[83] The Crown submitted that the learned judge took Mr Powell's unsworn statement into consideration on pages 164 and 170 of the transcript.

Analysis

[84] Mr Powell gave a short statement from the dock alleging that he was in Glengoffe at the time of the incident. Further, that his mother told him that his brother had died on the day of the incident and that she heard he was a person of interest. He, therefore, turned himself in to the police. The learned judge summarised the statement at page 164 of the transcript and directed himself properly on the alibi defence raised (see page 170). He then examined the reliability of the two police officers with respect to identification and credibility. Having accepted the credibility and reliability of the officers, the learned judge indicated that it was noteworthy that Mr Powell did not deny that he was known by the alias of 'Bruk Up', or that he had an association with the Fletchers Land community. The learned judge also stated that there was nothing in Mr Powell's statement to say he had not come into contact with the two officers on the morning of 30 August 2014. Thereafter, the learned judge reminded himself of the burden and standard of proof; that even if he rejected Mr Powell's statement, he would still have to look at the evidence

presented by the prosecution to satisfy himself to the extent that he felt sure. He thereafter indicated that he rejected Mr Powell's statement.

[85] The summation was absent of the usual enquiry on whether the unsworn statement had any value and, if so, the weight to be attached to it (see **DPP v Leary Walker** [1974] 1 WLR 1090 at page 1096 A - F). However, this was a learned judge of great trial experience. As a judge sitting without a jury, he could not be impeached for failing to use the formulaic direction, as long as he demonstrated an awareness of the salient factors (see **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) at paras. [28] and [29] and **Sherwood Simpson v R** at paras. [19] to [22]). He did not brush aside the unsworn statement. It is evident that he considered its weight before rejecting it, as he assessed it in juxtaposition to the entire evidence that was before him.

[86] This ground of appeal, therefore, failed.

Adequacy of good character directions (Kimani Walters' ground three)

Submissions on behalf of Mr Walters

[87] Mr Robinson highlighted that Mr Walters, having given sworn evidence, was entitled to a full good character direction (**R v Aziz** [1995] 3 WLR 53*)*. As such, given that the main issue at the trial was credibility, the full directions were paramount. The learned judge failed to give the directions. Mr Robinson acknowledged that a failure to give a good character direction is not always fatal to a conviction. He submitted, however, that it rendered Mr Walter's conviction fatal in the circumstances of this case. He relied on the cases of **Chris Brooks v R** [2012] JMCA Crim 5 and **Marlon Campbell v R** [2023] JMCA Crim 9 and further pointed to the absence of any scene of crime evidence or ballistic certificate to support the Crown's case. Reference was also made to the cases of **Patrick Forrester v R** [2010] JMCA Crim 71 and **Norman Holmes v R** [2010] JMCA Crim 19, in which both convictions were quashed where there was a failure to give full good character directions. Mr Robinson contended that the issue of good character would

have definitely assisted Mr Walters in the circumstances of this case, and the verdict might have been different.

Submissions on behalf of the Crown

[88] The Crown conceded that the learned judge failed to give a good character direction in circumstances where Mr Walters was deserving of one. However, counsel submitted that the evidence against Mr Walters was so overwhelming that it would not have changed the outcome. Reliance was placed on the case of **Horace Kirby v R** [2012] JMCA Crim 10. The facts of this case were also juxtaposed to the case of **Tino Jackson v R** [2016] JMCA Crim 13 ('**Tino Jackson**'). It was submitted that the stark inconsistencies of the nature which arose in the **Tino Jackson** case did not arise in the instant case. As such, the need for the good character directions does not rise to the level as it did in the **Tino Jackson** case. In the circumstances, the failure to give the good character directions did not amount to an injustice, as the outcome would have been the same.

[89] It was submitted alternatively that, in the event that this court disagreed and found that the omission was fatal, a retrial ought to be ordered as opposed to a total acquittal, as the fatality was due to a technical blunder by the learned judge in his summing up (**Dennis Reid v The Queen** (1978) 16 JLR 246).

Analysis

[90] Good character is not a defence to the charge. It counted in Mr Walter's favour in two ways:

> (i) His good character supported his credibility and so was something which a jury should take into account whether they believed his evidence (credibility);

(ii) His good character may mean that he was less likely to have committed the offence with which he was charged (propensity).

[91] The weight of it is for the jury. Morrison JA (as he then was) stated in **Chris Brooks v R** [2012] JMCA Crim 5:

> "[54] As this court pointed out in ***Patricia Henry v R*** [2011] JMCA Crim 16, para. [50], the giving of such a direction in a case in which it is called for by the evidence is an aspect of the trial judge's duty to put the accused person's defence in 'a fair and balanced way' (per Lord Steyn in ***R v Aziz***, at page 156). A failure to give the direction in an appropriate case can therefore have an impact on the issue of whether a defendant has been afforded a fair trial and may result in the quashing of the conviction. However, as the Board made clear in ***Noel Campbell***, which we have been discussing in another context, 'The absence of a good character direction is by no means necessarily fatal' (para. [42]), since, as the Board had earlier observed (in ***Jagdeo Singh v The State*** (2005) 68 WIR 424, para. [25]), 'Much may turn on the nature of and issues in a case, and on the other available evidence'. (See also ***Michael Reid***, para. [44(v)], and ***Kevaughn Irving v R*** [2010] JMCA Crim 55, para. [12]).
>
> [55] There are cases to be found on both sides of the line. In ***Jagdeo Singh***, the Board's conclusion (at para. [26]) was that, even when all other factors were taken into account, it could not be said that, 'properly directed on the appellant's credibility, the jury would inevitably or without doubt have convicted'. In ***Teeluck and Anor v The State of Trinidad & Tobago*** [2005] UKPC 14, where the appellant's credibility was said to be 'a crucial issue', the Board felt unable to conclude 'that the verdict of any reasonable jury would inevitably have been the same if [the direction] had been given' (para. [40]). Similarly, in ***Noel Campbell*** itself, in which the credibility and reliability of the single prosecution witness 'stood effectively alone against the credibility of the appellant's denial [on oath] of any involvement', the Board considered (at para. [45]) that 'The absence of a good character direction…deprived him of a benefit in precisely the kind of case where such a direction must be regarded as being

> of greatest potential significance'. ***Patrick Forrester v R*** [2010] JMCA 71 was an identification case in which the appellant gave evidence of his good character, but the trial judge failed to give a good character direction. Speaking for this court, Harris JA considered that had the judge done so, 'this would certainly have been of some value as it would have been capable of having some effect on the outcome of the trial…she might have viewed the evidence in a different light' (para. [22]). In all these cases, the convictions were quashed as a result of the trial judge's failure in each to give an appropriate good character direction.
>
> [56] …
>
> [57] The test is therefore whether, having regard to the nature of and the issues in the case and taking into account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at verdict of guilty."

[92] During his examination-in-chief, Mr Walters stated that he had no previous convictions. He, therefore, raised the issue of his good character. A good character direction ought to have been given during the summation. In weighing whether the absence of the good character direction would be fatal to the conviction, we considered that there were aspects of Mr Walters' evidence that the learned judge found to have bolstered the credibility of the police officers, in relation to the issue of recognition. Apart from the fact that both police officers had sufficient opportunity to view Mr Walters, both indicated that they had known him prior to the incident. They had seen him earlier that day around 10:00 am in a premises along Mark Lane. Constable Hutchinson indicated that he had been seeing him in the Fletchers Land community for five to six months prior to the date of the incident. He had stopped and searched him at least on one occasion. Mr Walters, while giving evidence, indicated that he had been to Fletchers Land before the date of the incident. He had been to Mark Lane, and he knew premises 27, as it was a yard in which his mother used to live. The learned judge, having satisfied himself of the sufficiency of the evidence for recognition, turned to the issue of credibility. In particular, he said he was impressed with the forthright manner of Constable Hutchinson, having considered the omissions from his statement (see page 168 of the transcript). The

learned judge, having observed Constable Hutchinson's demeanour and how he gave evidence, found him to be a witness of truth. At page 169 of the transcript, with reference to Mr Walters, he stated:

> "… I also find that [Constable Hutchinson] was speaking [sic] truth when he [sic] had seen the accused man Walters in the Fletchers Land area on the occasion. I find that he is speaking the truth and was reliable when he said he saw the accused man Walters in premises along Mark Lane earlier that day and that he was wearing the same dark clothing that he saw him [sic] later that afternoon. I find that he was speaking the truth when he said he saw the accused man Walters as a pillion passenger along North Street. I find that he had ample time and opportunity to be able to see and subsequently recognize both the accused man Powell and the accused man Walters as the persons who were on this motor cycle. I find that he was speaking the truth in regards [sic] in relation to the time of [sic] the estimated time of which he was able to see them and that he was speaking the truth when he said these were the two persons who were present on this motor cycle. Now the witness Mr. Hamilton, Constable Hamilton was not as impressive in my view as Constable Hutchinson but I also find that he was a witness of truth in relation to knowing these two persons before, having seen them prior to this occasion on the 30th of August, 2014 and that he had seen him even before that and he had ample time and opportunity also to be able to recognize him. I find that there was no collusion between them in order to give evidence that they gave. And I will find that he is a truthful and reliable witness when he said these were the two persons who shot at him."

And at pages 170 and 171:

> "Now interestingly in the evidence of Mr. Kimani Walters he himself mentioned that he had been to the Fletchers Land area, the police officers have said that they have seen him there. The police officers said that they had seen him in a yard along Mark Lane that morning and a particular address was mentioned that is 27 Mark Lane. He agrees that he knows that address and that is an address where his mother resides. Again, is it coincidental that the police officers would have said that they have seen him in Fletchers Land? Is it coincidental

> that the police have said that they saw him at a premises in Mark Lane because he himself said that he had visited Fletchers Land and that is premises on 27 Mark Lane where his mother resides? ... I reject the evidence given by Mr. Walters as to his whereabouts on the day of the 30th of August and I pay special attention and something which has struck me is that he was at pains to make out that he was in Angels before 10 o'clock. I note that the police officers say that they saw him at about 10 o'clock. He could not say how long before 10 o'clock he was at Angels Palm…."

[93] The learned judge considered and totally rejected the alibi evidence of Mr Walters, having also reminded himself that it was the duty of the Crown to disprove Mr Walters' alibi (see page 171 of the transcript). He had assessed the police officers as credible and reliable. So, while there was no other evidence led by the Crown to support the testimony of the police officers, the learned judge found that aspects of Mr Walters' testimony supported the reliability and credibility of the police officers. Under these circumstances, we were not of the view that had the learned judge directed himself in relation to the good character of Mr Walters, the outcome would have been different such that it would have been of value to Mr Walters.

[94] This ground of appeal, therefore, failed.

The sentencing exercise (ground five for each applicant)

Submissions on behalf of Mr Powell

[95] Mrs Feurtado-Richards submitted that the learned judge, when imposing the sentences, failed to take into consideration the time that Mr Powell had spent in pre-trial custody. Further, that the learned judge failed to demonstrate the methodology that was applied in arriving at the sentences, as stipulated by the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). In particular, the learned judge did not set out a starting point. It was also her contention that the learned judge should have given more consideration to the rehabilitation component of sentencing instead of focusing on deterrence and

prevention. Reliance was placed on the cases of **Jason Palmer v R** [2018] JMCA Crim 6, **Meisha Clement v R** [2016] JMCA Crim 26, **Richard Brown v R** [2016] JMCA Crim 29 and **Daniel Roulston v R** [2018] JMCA Crim 20. Mrs Feurtado-Richards asked this court to take into consideration the time that was spent by Mr Powell in pretrial remand.

[96] In relation to the offence of shooting with intent, she submitted that although the penalty was a mandatory minimum sentence of 15 years, the learned judge had the power to have this court consider granting a lower sentence, if he disagreed with the mandatory minimum penalty. She pointed to the notes of evidence which indicated that the learned judge was dissatisfied with the strictures of mandatory minimum sentences.

Submissions on behalf of Mr Walters

[97] In written submissions, Mr Robinson submitted that the learned judge failed to undertake a proper sentencing exercise and that had this been done, the learned judge would have appreciated that to impose the sentences which he did would have resulted in the imposition of a sentence that was manifestly excessive. He stated further that whilst it was appreciated that the offence of shooting with intent is one that attracts a mandatory minimum sentence, Mr Walters should have been credited for the time spent on pre-trial remand. As such, the learned judge should have issued a certificate pursuant to section 42(K) of the Criminal Justice (Administration) Act, (as amended in 2015) ('the CJAA').

[98] When asked by our panel whether this court could reduce the sentence in the absence of a certificate, Mr Robinson ultimately indicated that he had not seen any authority to show that this court could reduce the sentence in the circumstances. He nevertheless asked the court to use its discretion.

Submissions on behalf of the Crown

[99] The Crown conceded that the learned judge failed to apply the principles of sentencing in arriving at his decision but noted that the case of **Meisha Clement v R** was handed down only a few months prior to the sentencing exercise in this case. The

Crown maintained, however, that despite the failings of the learned judge in outlining the methodology, the sentences that were imposed on the applicants for illegal possession of firearm were within the normal range for sentences for that offence.

[100] In assisting the court to assess the sentences imposed on the applicants for illegal possession of firearm, Ms Merchant submitted that an appropriate starting point was 10 years and that four years should be deducted to account for mitigating factors. The mitigating factors that were identified were the fact that the applicants had no previous convictions, were gainfully employed and were young. An increase of six years was suggested to take account of the aggravating factors. This exercise derived a sentence of 12 years for both applicants. The Crown acknowledged, however, that the applicants were entitled to be credited for the two years and three months that were spent in pre-trial remand, which would make the suggested sentences nine years and nine months.

[101] In relation to the offence of shooting with intent, Miss Merchant submitted that the applicants were sentenced to the mandatory minimum sentence that was prescribed by law, which this court could not disturb, in the circumstances.

Analysis

[102] Section 14(3) of the Judicature (Appellate Jurisdiction) Act sets out this court's power to change a sentence that was previously imposed. It provides:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case, shall dismiss the appeal."

[103] In examining the approach of the court on consideration of an appeal against sentence, Morrison P in **Meisha Clement v R**, at para. [43], made the following statement:

> "[o]n an appeal against sentence, … this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[104] Prior to **Meisha Clement v R,** the approach to be taken by this court was also addressed in the matter of **R v Alpha Green** (1969) 11 JLR 283 wherein the following statement of principle from Hilbery J in **R v Kenneth John Ball** (1951) 35 Cr App R 164 at page 165 was adopted:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. **It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene.**" (Emphasis supplied)

[105] A review of the learned judge's sentencing remarks indicated that he failed to apply an arithmetical approach in arriving at the sentences and particularly in relation to the sentences for illegal possession of firearm. He failed to identify a starting point and resultantly did not show what effect the mitigating factors and aggravating factors had on the sentence. Furthermore, the learned judge failed to take account of the time that the applicants had spent on pre-trial remand. Morrison P in **Meisha Clement v R** stated:

> "[34] … in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** [[2008]

UKPC 49, para. 9], an appeal from the Court of Appeal of Mauritius –

> '... any time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing.'"

[106] In the circumstances, it appeared that the learned judge erred in principle, which justified this court embarking upon a reconsideration of the sentence in respect of illegal possession of firearm. The Sentencing Guidelines set out the normal range of sentences for this offence as between seven to 15 years' imprisonment, with a usual starting point of 10 years' imprisonment.

[107] In the case of **Lamoye Paul v R** [2017] JMCA Crim 41, McDonald-Bishop JA (as she then was) stated that, since the case did not involve the possession of a firearm "*simpliciter*", but involved the actual use of the firearm in the commission of an offence, a starting point of anywhere between 12 to 15 years was appropriate. Therefore, in the instant case, we considered that a higher starting point was indicated, given the use of the firearms. As such an appropriate starting point was determined to be 12 years.

[108] We noted, as aggravating factors, the fact that the applicants discharged their firearms at agents of the State, and acted as a group. For these, we added five years. As mitigating factors, we noted that the applicants did not have any previous convictions, were young and, therefore, had the capacity for reform. For these, we subtracted two years. This derived a sentence of 15 years. The sentence imposed by the learned judge could not, therefore, be classified as manifestly excessive. In the circumstances, we saw fit not to disturb the sentence of 10 years that was imposed by the learned judge, save to subtract two years and three months for the time spent on pre-trial remand.

[109] With respect to the sentence of 15 years for shooting with intent, this is the mandatory minimum sentence under section 20(2)(a) of the Offences Against the Person Act. The learned judge, during his sentencing exercise, expressed:

> "… in 2010, the offence against the Person's Act was amended, and there is a mandatory minimum that was given in relation to offences of shooting with intent and wounding with intent where a firearm was used, I cannot go below that mandatory minimum. I for one do not like mandatory minimums, but that is what the law says, and this is what I am bound by."

[110] The learned judge did not issue a certificate under section 42K of the Criminal Justice (Administration) (Amendment) Act indicating his view that the mandatory minimum sentence was manifestly excessive in relation to these applicants. In the matter of **Kerone Morris v R** [2021] JMCA Crim 10 ('**Kerone Morris**'), Brooks P categorically rejected an argument that this court was empowered to reduce a mandatory minimum penalty to take account of time spent on pre-trial remand. He stated:

> "[8] Before commencing a detailed assessment of the submissions, it is convenient, at this stage to reject, as incorrect, Ms Cummings' submission that, even in the absence of a certificate, this court is entitled to reduce a statutorily imposed minimum sentence, by the time spent on remand. The error was pointed out to learned counsel during the course of argument by reference to **Tafari Morrison v R** [2020] JMCA Crim 34. However, the position was clearly stated by Morrison P in **Paul Haughton v R** [2019] JMCA Crim 29. The learned President said at paragraph [50]:
>
> > 'But the issues of the period spent on remand by the appellant before sentence and the appellant's eligibility for parole remain outstanding. On the first issue, it is clear from the authorities that, however short the period spent on remand may be, the appellant is entitled to have it reflected in the sentence. Happily, once a certificate has been granted by the sentencing judge pursuant to section 42K(1) of the CJAA, it is open to this court to reduce the sentence below the prescribed

> minimum sentence. This factor serves to distinguish this case from **Ewin Harriott v R** [[2018] JMCA Crim 22], in which the appeal did not come before this court through the section 42K gateway and **the court was therefore powerless to dis-apply the prescribed minimum sentence in order to reflect the time spent on remand**….' (Emphasis supplied)
>
> The principle of giving full credit for time spent on remand, as established in **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ), and followed in **Jeffrey Ray Burton v The Queen** and **Kemar Anderson Nurse v The Queen**, cannot override the clear contrary intention of this country's Parliament."

[111] This court found nevertheless that the judge erred in failing to issue a section 42K certificate, despite her inclination toward a lower sentence. However, it was concluded that this court had the power to cure that error. The judge had indicated orally during the sentence hearing that she would have credited Mr Morris with his pre-sentence period on remand, if she had not been bound to impose the mandatory minimum sentence. The facts in **Kerone Morris** were, therefore, distinguishable from the present case as the learned judge did not express an inclination toward a lower sentence. He merely expressed a dislike for mandatory minimum sentences. This court could not, therefore, adopt the approach that was taken in **Kerone Morris** with the result that the sentence of 15 years imposed for shooting with intent was upheld.

[112] For the reasons outlined above, we refused the applicants leave to appeal against their convictions, granted leave to appeal against the sentence for illegal possession of firearm and made the orders outlined at para. [3] above.