[2020] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 2/2010

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

HORACE ROBERTS v R

Robert Fletcher and Miss Sasha-Kaye Shaw for the appellant

Mrs Karen Seymour-Johnson for the Crown

21, 22, 25 July 2016 and10 July 2020

MORRISON P

[1] On 31 December 2009, after a trial before Daye J ('the judge') in the High Court Division of the Gun Court, the appellant was convicted on seven counts of illegal possession of firearm, 12 counts of robbery with aggravation and 2 counts of illegal possession of ammunition. That same day, the judge sentenced the appellant to seven years' imprisonment on the counts of illegal possession of firearm, 12 years on the counts of robbery with aggravation and five years on the counts of illegal possession of ammunition. The judge also ordered that the sentences on all counts should run concurrently.

[2] The appellant applied for leave to appeal against his conviction and sentence on 8 February 2010 and the application was considered on paper and refused by a single judge of appeal on 7 January 2013.

[3] This is therefore the appellant's renewed application for leave to appeal against his conviction and sentence. We heard arguments on the application on 21 and 22 July 2016 and, on 25 July 2016, we made the following orders:

> "1. Leave to appeal against conviction granted.
>
> 2. Appeal allowed in part.
>
> 3. The convictions on counts 2, 3, 4, 12, 13, 15, 17, 20, 21, 23, 25, 30, 33, 40, 41, 43 and 44 are quashed, the sentences set aside and verdicts and judgments of acquittal entered on those counts.
>
> 4. Convictions and sentences on counts 45, 46 and 47 affirmed and the sentences on these counts are to be reckoned from 31 December 2009."

[4] The net result of this order was that the appellant was acquitted of all counts of robbery with aggravation and all but one count of illegal possession of firearm. The convictions and sentences on one count of illegal possession of firearm and two counts of illegal possession of ammunition were affirmed.

[5] With profuse apologies for the delay, these are the promised reasons for our decision.

The case for the prosecution in summary

[6] The appellant was a constable of police at the material time. The charges against him (and two others) arose out of a series of armed robberies which took place between August 2005 and October 2005. The main victims of these robberies were persons who had arrived at the Norman Manley International Airport ('the airport') on flights from London.

[7] In the first incident, which took place on 8 August 2005, an elderly couple and their adult daughter, Mrs RK, who had arrived from London at around 8:00 pm, were picked up at the airport by their daughter's husband. On arrival at their home in Kingston, and while they were in the process of unloading their luggage from the car, they were accosted by three unknown men armed with handguns. The men robbed them of a number of items, including suitcases, cash and other valuables. After the men left, the police were called and attended the scene. Descriptions of the men were given by Mrs RK in a statement given to the police, but no identification parade was held in relation to this incident. Some 10 weeks after the robbery, Mrs RK was invited to the police station, where she was shown some items, one of which she identified as a pair of slippers belonging to her which she had packed in her suitcase before leaving London for home on 8 August 2005.

[8] The second incident took place on 17 August 2005. On that occasion, Mr and Mrs M, another elderly couple, were picked up at the airport by a friend and driven to their home in Saint Catherine. There, while their luggage was being unloaded from the vehicle, three men rushed into the house and ordered Mr and Mrs M to lie face down on

the ground, which they did. They were unable to see the men from that position. But while there, they heard sounds suggesting that the luggage was being searched and one of the men removed Mr M's wallet from his pocket. After a while, everything got quiet. Mr and Mrs M got up from off the floor and saw no sign of the men. They then realised that a number of items had been removed from their luggage, including a hand bag, a bag containing medication, cash and a video camera. On a subsequent visit to the police station, they identified the video camera with associated paraphernalia which were stolen from their home on the night in question.

[9] The third incident took place on 25 August 2005. At around 8:00 pm, Mr and Mrs P were collected from the airport by their neighbour, Mr BT, who was accompanied by his brother-in-law. They were driven to their home in Clarendon, where they arrived at around 10:50 pm. After the house was unlocked and the luggage was unloaded from the car, Mr BT noticed a champagne-coloured Toyota Corolla motor car slowly driving past the gate. It appeared to him to be a 1999 model. The numbers on the registration plate of the vehicle were four, eight, one and two, but he was unable to make out the letters. Mr BT then drove out of the gate and waited outside for his brother-in-law to close the gate. He then saw three men coming from the direction in which the Toyota Corolla had gone. One of the men appeared to have something which looked like a gun at his side. One of the men held on to him and ordered him to call Mr and Mrs P, which he did. Mr and Mrs P reopened to grille gate to the house and the men entered and ordered them all to lie on the ground face down. The men then proceeded to take a cellular telephone and cash from Mr BT, as well as various items belonging to Mr and

Mrs P, including a gold chain. On a subsequent visit to the police station, Mrs P identified a gold chain as the one which had been stolen from her home on the night of 25 August 2005. Mr BT's evidence was that he would not be able to recognise any of the three men if he saw them again.

[10] In a fourth incident on 28 September 2005, Mr AE, accompanied by Mr and Mrs WP, arrived at the airport on a flight from London. Mr AE and the others left the airport by minicab and travelled to a house in Bull Bay in Saint Thomas. Upon their arrival there, their luggage was removed from the vehicle and taken into the house. While there, three men, two armed with guns, entered the house. They took his phone, his chain and his wallet, which had money in it, from him. On a subsequent visit to the police station in Kingston, Mr AE was shown and identified the wallet which had been taken from him in the robbery. In his evidence at the trial, Mr AE identified the appellant in the dock as one of the men who he had seen armed with a gun during the robbery. But under cross-examination, when his first statement to the police after the robbery was put to him, Mr AE agreed that he did not tell the police that he was in a position to identify any of the robbers, because he could not do so.

[11] And, in a fifth incident on 10 October 2005, Mr MH, a taxi driver, collected a number of persons and their luggage at the airport. He drove them to a house on Lyssons Road in Saint Thomas, arriving there just as night was coming down. After they got there, Mr MH assisted in removing the luggage from the car. When that was done, and as he was about to leave, a man with a gun came from behind him, held on to his

collar and told him to go inside the house with the other people. While inside, he saw two other persons enter the house, one armed with a knife. Mr MH saw them "taking things"[1], and one of them also took about "$6,000 and some dollars" from him[2]. One of the men also took a chain from the neck of one of the ladies in the group.

[12] Evidence of other robberies with the same basic modus operandi was also given through the medium of statements admitted into evidence in the absence from Jamaica of the witnesses, pursuant to section 31D of the Evidence Act.

[13] On the night of 21 October 2005, as a result of a surveillance operation at the airport, a team of police officers set out from the airport following a brown[3] Toyota Corolla motor car, with the registration number 4812 EM. At about 8:00 pm, the police team, with the assistance of another team which had been alerted by radio, intercepted the Toyota on Lower South Camp Road in Kingston. The occupants of the car were the appellant, who was the driver, and the two other men who would later be jointly charged with him as the perpetrators of the series of offences committed between August and October that year. One of the three men, who was seated in the back seat, was seen stretching towards the appellant in the driver's seat with a firearm in his hand. But, in response to a police officer's shout to "drop the gun", the man dropped it beside the hand-brake and came out of the car. The appellant shouted "police" and he

---

[1] Transcript, vol. 2, page 526
[2] Ibid, page 527
[3] The Toyota Corolla was variously described in the evidence as "champagne", "brown" and "beige", but nothing at all turned on this, given the coincidence of the registration number.

too alighted from the car. A .38 revolver was taken from the appellant and he told the police that he was on vacation leave and had been given permission to keep and care the firearm. A 9mm Glock pistol was also removed from beside the handbrake. The appellant, who had already identified himself as a police constable, indicated that it was a licenced firearm. Both firearms contained several live rounds of ammunition.

[14] The men and the vehicle were taken to the Flying Squad headquarters, where the vehicle was searched. Bags found in the back and in the trunk of the car yielded, among other things, a charcoal bar, items of men's and women's clothing, cologne, jewellery, two mobile phones, two ladies' wrist watches and two silver chains. A grey and black mobile phone was also taken from the right side of the appellant's waistband and a black leather wallet containing various currencies was also found in his pocket.

[15] A subsequent search of the appellant's mother's home also produced several rounds of unexpended 9mm and .38 cartridges, as well as a quantity of 5.56 cartridges of the type used in M16 rifles. According to the police evidence, the possession by a police officer of ammunition for an M16 rifle at his private residence would be a breach of force policy. A pair of bedroom slippers matching the description of the pair which Mrs RK had referred to was also found.

[16] At the time of the trial, Miss PJ, who was the mother of the appellant's daughter, had known him for eight to nine years. She testified that, on 12 October 2005, the appellant had given her a gold chain for herself, telling her that a friend had given it to him. On another day, he gave her a pair of gold earrings with an anchor pendant for

their daughter. On two subsequent occasions, the appellant also gave her a big black suitcase, a green bag and a "camp recorder" for safekeeping[4]. All these items were later taken from her by the police.

[17] Subsequent checks revealed that the .38 revolver was police firearm, which was issued to the Mandeville Police Station and assigned to the appellant. The 9mm Glock pistol was a licenced firearm which had been issued to the appellant from the Saint Catherine South Division.

[18] On 28 October 2005, the police conducted an identification parade for the appellant. The appellant was not pointed out.

The case for the defence

[19] After an unsuccessful no-case submission had been made on his behalf, the appellant made an unsworn statement from the dock. He denied participating in any of the robberies, assaulting anyone, or having any firearms or ammunition in his possession illegally. As regards, the firearm which was found in his possession, he stated that he had been given permission by his immediate commanding officer to keep and care it.

The judge's summation

[20] The judge began his summation by reminding himself of the law in relation to joint trials, joint counts, common design, burden of proof, standard of proof,

---

[4] Ibid, page 424

inconsistencies and discrepancies, previous inconsistent statements and admissibility of statements.

[21] Turning next to visual identification, the judge then said this[5]:

> "The issue of identification arises generally and particularly, to some counts of this indictment. I therefore must give the Turnbull/Oliver Wiley warning hereunder …"

[22] The judge then proceeded to set out, more or less verbatim, the major part of the iconic guidance of Lord Widgery CJ in **R v Turnbull and others**[6]:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the

---

[5] At pages 1759-1760
[6] [1976] 3 All ER 549, 551-552

> subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence ..."

[23] In a further passage not quoted by the judge, Lord Widgery CJ went on to say[7] that –

> "If the quality [of the identification evidence] is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger …
>
> When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal **unless there is other evidence which goes to support the correctness of the identification** …" (Emphasis ours)

[24] As regards dock identification, the judge then made this lengthy statement[8]:

---

[7] At pages 552-553
[8] At pages 1762-1766

"The nature of the evidence led by the Prosecution in this trial was dock identification of one or more of the accuseds [sic] for the counts for which they were charged; plus evidence of, physical evidence of recent possession and other cumulative circumstantial evidence.

DANGERS OF DOCK IDENTIFICATION

I therefore direct myself that there is a danger in dock identification in that the very presence of the accused in the dock will suggest to the witness that he is the person who committed the crime (per *Smith JA, the Queen and Jeffrey Sutherland, Supreme Court SCCA, 116 of 200 page 30 paragraph 2*). I further direct myself that there may be factors which are capable of minimizing or nullifying the usually grave risk of dock identification ...

Where there is other evidence pointing to the accuracy of the identification evidence, a failure to hold an identification parade is not necessarily fatal. Again, from the same case page 29, paragraph (1). The evidence in the case, may be of a tribulative [sic] character. And I add that the same principle is applicable where an identification parade is held but the witness did not point out anyone on the identification parade, the authority for this view, is found in the case of **Holland versus Her Majesty Advocate.** Citation is PC 1 of 2004. And I hold myself bound by these principles. And this is the quote from this case, "the board is concerned only with issues in a case where identification is a live issue at the trial and the Crown witness who identified the accused in court have previously failed to pick out any of them at an identification parade. Therefore, the appeal does not touch the case of dock identification in other cases or where the witness knows the accused or identification is not in dispute ...

Lastly, the case is not concerned with questioning by defence counsel especially, in cases involving several accused which is designed to show the counsel's client was not the person to whom the witness was referring, paragraph 46 of that judgment. And in this judgment which I rely on, the Privy Council said and I am summarizing, a judge should give an appropriate and authoritative direction in all cases of this kind. The general line of such direction depend [sic] on the particular case. But the general line

> should be and I am quoting, 'where a witness is invited to identify a perpetrator in court, there must be considerable risk that his evidence will be influenced by seeing the accused sitting in the dock.' In this, [sic] way dock identification is criticized in two complimentary aspect [s] not only does it lack the safeguard that are offered [sic] at an identification parade but the accused position in the dock positively includes the risk of wrong identification.' And in paragraph 47 of that same case. The judge of fact should look to see, as I am, if there was any corroborative evidence of the dock identification. The fact that no identification parade had been held in respect to the witness identifying the appellant when he was in the dock does not make the identification evidence inadmissible ... A judge does not discharge his duty to give proper identification, proper direction on the special dangers of dock identification without a prior identification at an identification parade by giving appropriate direction on the approach to be adopted. The eye witness identification in general.
>
> Though related, the issues are different. Where they both arise, the trial judge, which I am, should address them both. And, as I said at the beginning, both issues arise in this trial; particularly dock identification ..."

[25] The judge then directed himself on other matters upon which nothing turns for the purposes of this appeal (including jurisdiction, definition of firearm and other such matters). And, after giving a very general overview of the evidence, he proceeded to make a number of findings of fact, at the end of which he accepted the prosecution's case in its entirety in relation to the 21 counts on which he entered verdicts of guilty against the three men, including the appellant. In arriving at that conclusion, the judge placed explicit reliance on more than one dock identifications of the appellant, on the basis that the evidence of various items found in his possession connected him with the series of robberies.

[26] In relation to the charges against the appellant for illegal possession of firearm and illegal possession of ammunition on 21 October 2005, the judge said this[9]:

> "What about [the appellant], the constable who had this license [sic] firearm issued to him from South St. Catherine? The authorities say that, if [the appellant] allows, or permits a person to have his firearm unlawfully, then he is an aider and abettor to the illegal possession of firearm and as an aider and abettor, he is also, even though it is a licensed firearm, he is also guilty of illegal possession of firearm on the authority of Derrick Brown, a policemen who did that and was found guilty and appealed to the Court of Appeal and the Court of Appeal dismissed his appeal many years ago. So, that is in relationship to that firearm and in relationship to count 46 on the indictment."

The grounds of appeal and counsel's submissions

[27] With the leave of the court, the original grounds of appeal filed by the appellant were replaced by supplemental grounds filed on 12 July 2016, and finally by revised grounds filed on 25 July 2016. The revised grounds were as follows:

> "**Ground One**
>
> The learned trial judge erred in that having set up the legal and factual basis for his assessment of the evidence, that is, dock identification and recent possession in confluence, he failed to appreciate that in none of the counts assessed did the identification evidence reach the required threshold in law.
>
> **Ground Two**
>
> The learned trial judge erred in that having extensively directed himself in relation to several areas of the law he intended to apply to the facts of the case, he failed to direct

[9] At page 1807

himself on the law relating to recent possession despite the fact that he considered this areas [sic] of the law as critically important to his consideration of the evidence. The elements and nuances of this area was [sic] therefore not appropriately applied to the facts of the case.

Ground 3 – 8 [sic]

(**APPLIED IN REPITITION/SPECIFICALLY TO EACH OF THE CLUSTER OF COUNTS CONTAINED IN THE SUPPLEMENTARY GROUNDS … EXCEPT THE ILLEGAL POSSESSION OF FIREARM AND AMMUNITION**)

Despite the fact that the learned trial judge gave the standard direction on identification, it was perfunctory, as he failed to apply it to the facts which he used to ground the convictions on the counts proffered. In particular he failed to adequately treat with the patent weaknesses in the identification evidence, inter alia

1. The fact that in some instances the [appellant] was never identified in court
2. That in other instances the [appellant] was placed with the exhibits when the complainants were brought to the police stations to identify items
3. The difficult identification circumstances of the robbery
4. No identification parades and no compelling reason not to have held them
5. Dock id tainted by that outlined in 3 above
6. Less than satisfactory circumstances of the identification of the stolen items themselves in some cases.

Ground 9

The learned trial judge erred in not exercising his discretion to insist that the indictments were overloaded. Despite the fact that the amount of counts are allowed in circumstances like these the amount of accused and the amount of counts may have been responsible for critical oversights in this case."

[28] The revised grounds one to eight captured the essence of the argument put forward by Mr Robert Fletcher for the appellant. It was submitted that, having characterised the case as one of dock identification coupled with recent possession of stolen goods, the judge failed to address the issue of the quality of the identification evidence. As demonstrated by the number of witnesses who said that they were unable to identify any of the three robbers, and the fact that the appellant was not identified as one of them on any of the identification parades, the quality of that evidence was in fact poor. So, at the end of the day, all that was left was "bald recent possession" and the threshold for convictions based on visual identification was not met in the overwhelming majority of the counts on which the appellant was convicted.

[29] In support of these submissions, Mr Fletcher referred us to **R v Ashan Spencer**[10], in which this court pointed out that -

> "… even in a case in which reliance is placed on the doctrine of recent possession, the identification evidence must itself be of sufficient quality to enable the judge to leave the case to the jury."

[30] In a wholly admirable display of proper prosecutorial conduct, Mrs Seymour-Johnson agreed with these submissions. She accepted that in many instances the identification evidence had not crossed the standard threshold for such evidence. She pointed out that Mr AE's dock identification of the appellant as one of the robbers had

---

[10] (Unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 14/2007, judgment delivered 10 July 2009, para. 30

to be qualified by his admission that he had not told the police that he was able to identify any of the robbers. The absence of any proper identification of the appellant as one of the robbers therefore eroded the entire foundation of the case for the prosecution in relation to the counts for robbery with aggravation and most of the counts for illegal possession of firearm.

[31] However, Mrs Seymour-Johnson submitted that the counts in respect of illegal possession of firearm and illegal possession of ammunition on 21 October 2005 (counts 45 and 46), the day on which the police apprehended the appellant and his co-defendants on Lower South Camp Road, stood on a different footing. So too did the count of illegal possession of ammunition based on the subsequent finding of ammunition at the appellant's home (count 47). The judge's analysis of the legal position with regard to these counts could not be faulted and the convictions should therefore stand.

Discussion and conclusions

[32] Identification was a critical component of the case for the prosecution at trial. This was clearly demonstrated by the attempt to have the appellant identified at an identification parade and, when that failed, the various attempts during the trial to secure a dock identification. No complaint can be made about the judge's general directions on visual identification and dock identification, so far as they went. But it seemed to us that the judge omitted to apply those directions to the facts of the case and so to factor them into his consideration of whether the prosecution had proved its

case against the appellant in respect of the robberies and the offences associated with them beyond reasonable doubt.

[33] With regard to visual identification, the judge quite properly warned himself - at length - to examine closely the circumstances in which the identification of the appellant came to be made, and to consider the strengths and weaknesses in the identification evidence so as to satisfy himself that the witness or witnesses had a proper basis on which to make a reliable identification of him as one of the robbers. However, as appears from the transcript of his summation, he did not do so. Rather, he treated the case as one in which the other evidence of the appellant's possession of recently stolen goods, in effect, trumped the need to scrutinise the identification evidence with great care.

[34] It is true that, as this court observed in **Alcott Smith v R**[11], recent possession of stolen property may in a proper case constitute sufficient "other evidence", in the sense in which this phrase was used in **R v Turnbull and others**[12], to bolster an otherwise weak case of visual identification. However, in this case, it seemed to us that it remained necessary for the judge to demonstrate by his analysis of the evidence that he had given proper consideration to the essentially poor quality of the primary identification evidence, given the circumstances in which the robberies were committed; the difficult conditions in which the identifications were allegedly made; the fact that

---

[11] [2012] JMCA Crim 30, para. [32]
[12] See the highlighted passage from Lord Widgery CJ's judgment quoted at para. [23] above

most of the witnesses said that they were unable to identify the robbers; and the fact that no one pointed out the appellant at the identification parade which was conducted for the purpose.

[35] As regards dock identification, we think that it suffices to say that the judge's reliance on a dock identification made by a witness who had, at a time closer to the events in question, confessed his inability to identify any of the robbers, was as clear a demonstration as there ever could be of the vice of a dock identification. To this extent, therefore, the judge again failed to apply the perfectly accurate warnings which he gave himself – at even greater length - to the facts of the case before him.

[36] We accordingly concluded, in agreement with counsel on both sides, that the appellant's convictions for robbery with aggravation and the associated offences of illegal possession of firearm were unsafe and could not be allowed to stand.

[37] However, in relation to the counts relating to illegal possession of firearm and ammunition on 21 October 2005, and the count of illegal possession of ammunition on 22 October 2005, arising from the ammunition find during the search of the appellant's mother's house, we agreed with Mrs Seymour-Johnson that these called for a different consideration.

[38] In the passage from the summation which we have quoted at paragraph [26] above, the judge obviously had in mind the decision of this court in the case of **R v**

Derrick Brown[13]. The appellant in that case was a special constable and was in that capacity lawfully in possession of a firearm. On his own admission, he gave the firearm to a friend for safe-keeping during a bout of drinking. The friend used the firearm to shoot another police officer and the appellant was convicted at trial of the offences of illegal possession of firearm and wounding with intent.

[39] On appeal, it was contended on the appellant's behalf that, the firearm having been assigned to him in his capacity as a special constable, section 52(e) of the Firearms Act ('the Act') exempted him from liability for a firearm offence under the Act. The part of the Act relied on reads as follows:

> "52. This Act shall not apply:
>
> (e) to any … Special Constable … in respect of any firearm or ammunition in his possession in his capacity as … a Special Constable."

[40] The submission was rejected. This is how Downer JA explained the decision[14]:

> "It is true that he was assigned the firearm in his capacity as a special constable. The firearm was to enable him to carry out his lawful duties as a special constable. In such circumstances, the proviso to section 52(e) would apply. But the proviso does not cover instances where the special constable delivered up his firearm to his co-conspirator who then used the firearm to commit criminal acts. When the appellant was not acting as a constable, the Firearms Act applied to him and he was 'A person' subject to a charge of

---

[13] (Unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 68/1990, judgment delivered 23 June 1992

[14] At page 4

> illegal possession contrary to section 20 of the Firearms Act. This section comes into play because of section 2 of the Gun Court Act.
>
> …
>
> The appellant's possession of the firearm contrary to section 20 of the Firearms Act is to be considered when he delivered up the firearm to [his friend]. Then he was an aider and abettor to the illegal possession of the firearm and liable to be tried, indicted and punished as a principal offender: see section 41 of the Criminal Justice Administration Act."

[41] In this case, the appellant's co-accused was seen passing the 9mm Glock pistol to the appellant. The co-accused had no licence to be in possession of the firearm. His possession of it was therefore in breach of section 20(1)(b) of the Act[15]. In the circumstances described by the police evidence, the appellant, as the licenced holder of the firearm and the person who must have allowed the co-accused access to it, was clearly an aider and abettor to the offence of illegal possession of firearm committed by the co-accused. As such, by virtue of section 41 of the Criminal Justice (Administration) Act, he was "liable to be tried, indicted, and punished as a principal offender".

[42] (We have assumed for present purposes, as Downer JA obviously did in **R v Derrick Brown**, that the offence of illegal possession of firearm is to be treated as a misdemeanour, though the Firearms Act is silent on the point. As is well known, the distinction between felonies and misdemeanours was abolished in England and Wales

---

[15] "A person shall not … be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence."

by the Criminal Law Act 1967[16], and on all matters on which a distinction was previously made between felonies and misdemeanours, the law and practice in that jurisdiction is that formerly applicable to misdemeanours[17]. But nothing at all turns on the distinction in this case, as the application of section 34 of the Criminal Justice (Administration) Act, which deals with accessories before the fact to a felony, would produce the identical result.)

[43] It is on this basis that we considered that the appellant was properly convicted of the offences of illegal possession of firearm and illegal possession of ammunition on 21 October 2005 (counts 45 and 46). It is fair to point out that Mr Fletcher offered no contrary contention in this regard; nor did he suggest that there was anything wrong with the conviction of the appellant for illegal possession of the ammunition found during the search of his mother's home (count 47).

[44] There being no challenge to the sentences which the judge imposed on these three counts, we considered that the concurrent sentences of seven years' imprisonment for illegal possession of firearm and five years' imprisonment for illegal possession of ammunition should also stand. In keeping with the usual practice of the court, we ordered that these sentences should run from 31 December 2009, the date on which they were originally imposed.

---

[16] Criminal Law Act 1967, section 1(1)
[17] Criminal Law Act 1967, section 1(2)

[45] In light of this conclusion, we did not find it necessary to address the appellant's revised ground 9, in which complaint was made as to the multiplicity of counts on the indictment.

[46] These are the reasons for the decision of the court delivered on 25 July 2016.