[2025] JMCA Crim 20

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE D FRASER JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 65/2018

DWAYNE SHAKESPEARE v R

Anthony Williams for the appellant

Ms Kathy-Ann Pyke and Ms Ashley Innis for the Crown

21 and 25 July 2025

Criminal law – Sentencing – Spirit of section 42K of the Criminal Justice (Administration) Act may be applied to permit court to go below a mandatory minimum sentence even where no certificate issued, if clear on record learned judge had inclination to issue certificate.

As a rule, even where section 42K does not apply, defendant to receive full credit for time spent on pre-sentence remand even where subject to a mandatory minimum sentence

ORAL JUDGMENT

D FRASER JA

Introduction

[1] On 1 June 2018, the appellant, Dwayne Shakespeare, was convicted in the High Court Division of the Gun Court holden at King Street in the parish of Kingston, on an indictment for the following offences: illegal possession of firearm (count one), illegal possession of ammunition (count two), both contrary to section 20(1)(b) of the Firearms Act and wounding with intent, contrary to section 20 of the Offences Against the Person Act ('OAPA') (count three). On the same day he was sentenced to serve terms of

imprisonment at hard labour of seven years on both counts one and two and 15 years on count three. The sentences were ordered to run concurrently.

[2] A single judge of this court refused his application for leave to appeal his convictions but granted him leave to appeal sentence. The renewed application for leave to appeal conviction and the appeal against sentence came before the court for hearing on 21 July 2025.

Proceedings in the court below

The case for the prosecution

[3] On 19 November 2013, at about 11:00 am, the complainant, Mr Fabian McQueen, was seated by the roadside on Brown's Lane, Morant Bay in the parish of Saint Thomas. He was working on a bicycle about 10 feet away from his doorway. He felt the presence of someone; held up his head and saw the appellant who was 3 to 4 feet away from him. The appellant said, "Pussy, a yuh alone deh yah?" The appellant then squeezed the trigger of the gun he was armed with. The complainant heard explosions. Upon hearing the third explosion he realised he was shot in the left shoulder.

[4] The complainant flung a machete at the appellant who avoided it and turned back to where he was coming from, while continuing to squeeze the trigger. However, no explosions were heard at this time. After the appellant left, the complainant went down and then came back up the lane, got assistance and went to the Princess Margaret Hospital. A firearm with ammunition was recovered at the scene of the shooting.

The case for the defence

[5] The appellant denied being involved. He relied on an alibi, contending that he was not in the parish of St Thomas, but was in Kingston with his mother when the incident occurred. He also indicated that the complainant told a lie on him out of malice. He called a witness to testify to his good character.

Grounds of appeal

[6] The original grounds of appeal filed by the applicant complained of (i) "misidentity" by the witness, (ii) lack of evidence, (iii) unfair trial and (iv) miscarriage of justice. Mr Williams sought and received permission to abandon those original grounds and to argue the following supplemental grounds:

> "**Ground 1**
>
> The Learned Trial Judge erred in Law by failing to issue a certificate pursuant to the provisions of Section 42K of the Criminal Justice (Administration) Act (as Amended in 2015) [The CJAA] despite her inclination during sentencing that had she not been bound by the statutory minimum sentence, she would have credited him with the period she had calculated the Applicant would have spent on remand. This failure to issue the certificate would or has cause[d] an injustice to the Applicant in rendering the sentence for Wounding With Intent manifestly excessive
>
> **Ground 2**
>
> Further and / or in the alternative to Ground 1, The Learned Trial Judge erred in Law by failing to alert her mind to or to apply the provisions of Section 42K of the Criminal Justice (Administration) Act (as Amended in 2015) [The CJAA] despite her inclination during sentencing that had she not been bound by the statutory minimum sentence, she would have credited the Applicant with the period she had calculated the Applicant would have spent on remand. This failure to consider or to apply the said Section 42K of the CJAA to issue the certificate would or has cause[d] an injustice to the Applicant in rendering the sentence imposed for Wounding With Intent manifestly excessive."

Submissions

Mr Williams for the appellant

[7] Mr Williams, in his submissions, candidly stated that the learned trial judge had applied all the correct legal principles dealing with identification, alibi, evidence of good character and the other relevant areas that needed to be covered in the summation.

As he found the directions impeccable, counsel indicated that there was no basis on which to challenge the convictions.

[8] Regarding the sentences, Mr Williams reviewed the cases of **Daniel Roulston v R** [2018] JMCA Crim 20 and **Meisha Clement v R** [2016] JMCA Crim 26. He submitted that the learned trial judge applied the accepted legal principles to the sentencing exercise and that the sentences could not be said to be manifestly excessive, save and except the sentence for wounding with intent on count three. This especially as he highlighted the cases of **Lamoye Paul v R** [2017] JMCA Crim 41 and **Troy Rogers v R** [2018] JMCA Crim 20 in which this court indicated the starting point for illegal possession of firearm is 12 – 15 years, where there was not just possession simpliciter but also use of the firearm.

[9] The concern raised by Mr Williams about the sentence passed on count three is in these terms. The learned trial judge, having stated in her sentencing remarks that had she not been bound by the mandatory minimum sentence of 15 years for wounding with intent she would have credited the appellant with the time he spent on pre-sentence remand, failed to issue a certificate under section 42K of the Criminal Justice (Administration) Act ('CJAA'). This failure caused an injustice to the appellant as it caused his sentence to be manifestly excessive.

[10] Based on the intimation expressed by the learned trial judge, despite her failure to issue a certificate, Mr Williams submitted this court had the power to act within the spirit of section 42K and credit the appellant with the time spent on pre-sentence remand. He relied on the case of **Kerone Morris v R** [2021] JMCA Crim 10 which he distinguished from that of **Shaquille Powell & Kimani Walters v R** [2025] JMCA Crim 3.

Ms Pyke for the Crown

[11] In her submissions, Ms Pyke supported the position advanced by Mr Williams. She noted that the learned judge referred to the case of **Ewin Harriott v R** [2018]

JMCA Crim 22 as precluding the imposition of a sentence below the mandatory minimum in the absence of a section 42K certificate. In addition to the case of **Kerone Morris v R**, Ms Pyke also cited the case of **Lennox Golding v R** [2022] JMCA Crim 34, which followed the reasoning in **Kerone Morris v R**. She also distinguished **Shaquille Powell & Kimani Walters v R**. Additionally, Ms Pyke cited **Leopold Matthews v R** [2023] JMCA Crim 36 which examined the considerations this court should assess in determining whether a sentence should be reduced below the mandatory minimum, where a section 42K certificate has been issued, or based on statements made by the sentencing judge, in effect, deemed to have been issued.

[12] Ms Pyke also raised a separate basis on which the court could reduce the sentence of the appellant in the absence of a section 42K certificate. She cited the case of **Cecil Moore v R** (unreported), Jamaica, Court of Appeal, Supreme Court Criminal Appeal No 25/2016, judgment delivered 6 March 2025 (with reasons to follow), which she submitted has in effect overruled **Ewin Harriott v R**. Based on **Cecil Moore v R** she submitted that the appellant must be given credit for pre-sentence remand, even where the reduction would result in a sentence below the statutory minimum. Counsel also referred the court to the case of **Garfield Green v R** [2025] JMCA Crim 12 which followed the principle in **Cecil Moore v R**.

[13] Counsel, therefore, agreed that the appellant's sentence on count three should be reduced to take account of the time he spent in pre-sentence custody. In calculating this time counsel helpfully pointed to a passage on page 31 of the transcript which showed that the appellant was seen in custody on 28 December 2013, but there was no indication how long he had spent in custody up to then. She suggested that might have influenced the learned trial judge to round up the 11 months he was known to have spent in custody to one year.

Discussion and analysis

[14] The court agrees with counsel that the learned trial judge's summation was comprehensive and adequately dealt with all issues that arose for consideration. Great

care was taken in addressing the central issue of identification. The evidence was assessed in detail and the learned trial judge gave herself the requisite warning. All other relevant areas including alibi, evidence of good character and how to treat inconsistencies and discrepancies were adequately covered in a commendable summation. Accordingly, the convictions are safe and should not be disturbed.

[15] For the reasons stated by Mr Williams, we also agree that the sentences imposed on counts one and two are by no means manifestly excessive and should be affirmed. We specifically note that in her calculations the learned trial judge deducted one year from the sentences imposed on counts one and two to take account of the time the appellant spent in custody.

[16] The two supplemental grounds that deal with the sentence imposed on count three were conveniently argued together, as they essentially seek the same objective.

[17] These grounds were advanced based on sentencing remarks of the learned trial judge, recorded on pages 180 – 181 of the transcript. She stated as follows:

> "All right, I must take into consideration that you spent time in custody but you have heard your Attorney explain and I would have said it earlier, **that this particular offence attracts a mandatory minimum sentence, so even though I am, well, I am out to give a discount for all the mitigating factors that I have identified and I would have thought in the circumstances that three (3) years would be reasonable and in addition to that I would have deducted the eleven (11) months that you spent in custody, but for practical purposes it makes no difference and I think that would have been demonstrated in a previous case that came out of the Court of Appeal, it was a matter involving a sexual offence, I don't remember the name of the case, it was the decision, Harriot, I believe his name was … it very clearly demonstrates that the Judge's discretion is curtailed in so far as being able to take into consideration the fact that you spent time in custody where even if I would have ended up with a sentence below the mandatory minimum, I am not able to**

> **deduct the time spent in custody from the 15 years. So in all the circumstances, I still end up at, in relation to the offence of Wounding with Intent with a sentence of 15 years imprisonment**." (Emphasis added)

[18] The learned trial judge clearly disclosed her mind. Her inclination was to go below the mandatory minimum, but for the fact that she thought she was precluded from so doing.

[19] Section 20 of the OAPA, so far as relevant, reads as follows:

> "20. —(1) …
>
> (2) A person who is convicted before a Circuit Court of —
>
> (a) …
>
> (b) wounding with intent, with the use of a firearm,
>
> shall be liable to imprisonment for life, or such other term, not being less than fifteen years, as the Court considers appropriate.
>
> (3) In this section, 'firearm' has the meaning assigned to it by section 2 of the Firearms Act."

[20] By virtue of section 9(b) of the Gun Court Act, the learned trial judge sitting in the High Court Division of the Gun Court, "in relation to any offence" has "all the powers of a Judge and jury in a Circuit Court". Accordingly, the learned trial judge was required to give full effect to the provisions of section 20(2)(b) of the OAPA. The learned trial judge was, therefore, correct in noting that the offence of wounding with intent attracts a term of imprisonment for a mandatory minimum period of 15 years. She, however, failed to consider the power open to her under section 42K of the CJAA, which provides a mechanism for review by this court of sentences punishable by a prescribed minimum penalty.

[21] Section 42K is in these terms:

"42K. —(1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall—

(a) sentence the defendant to the prescribed minimum penalty; and

(b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.

(2) A certificate issued to a defendant under subsection (1) shall outline the following namely –

(a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;

(b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and

(c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may –

(a) impose on the defendant a sentence that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[22] The appellate process enabling review by this court is supported by section 13 subsections (1A) and (1B) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). They provide:

> "(1A) Notwithstanding subsection (1)(c), a person who is convicted on indictment in the Supreme Court may appeal under this Act to the Court with leave of the Court of Appeal against the sentence passed on his conviction where the sentence was fixed by law, in the event that the person has been sentenced to a prescribed minimum penalty in the circumstances provided in –
>
> (a) section 42K of the Criminal Justice (Administration) Act, and has, pursuant to that section, been issued with a certificate by the Supreme Court to seek leave to appeal to the Court of Appeal against his sentence; or
>
> (b) section 42L of the Criminal Justice [(]Administration[)] Act.
>
> (1B) For the purposes of subsection (1A), the reference to 'Supreme Court' shall include the High Court Division and the Circuit Court Division of the Gun Court established under the Gun Court Act."

[23] Thus, pursuant to section 13(1A) of the JAJA where a certificate has been issued under section 42K of the CJAA, this court may entertain an appeal against sentence. The court's powers on an appeal against sentence expressed in section 14(3) of the JAJA are well known, enabling the court to quash a sentence passed at trial and substitute another warranted in law.

[24] In **Kerone Morris v R**, the learned judge placed on record that due to Mr Morris' youth and good antecedents, apparent lack of intent to kill his victim (not treated as a major factor) and the time he spent on remand she would, if she could, have sentenced him to serve a period 18 months less than the mandatory minimum. (On appeal the time spent on remand was treated as 19 months as it was actually only eight days shy of that period). She, however, did not appreciate that she was required to issue a section 42K certificate. In those circumstances this court treated those statements as "certification", enabling the court to adjust the sentence in accordance with sections 13(1A) and 14(3) of JAJA.

[25] In **Lennox Golding v R**, the appellant was convicted of illegal possession of firearm and wounding with intent. The learned judge erroneously thought the mandatory minimum sentence applied to both counts and sentenced the appellant to 15 years imprisonment on each count. The record reflected that the learned judge indicated orally an intention to issue a certificate under the CJAA to allow Mr Golding to seek leave to appeal his sentences. However, no certificate was in fact issued. This court ultimately found that the sentences recommended by the learned judge were too low but made downward adjustments to both sentences. Following the decision in **Kerone Morris v R**, given the indications of the learned judge, to honour the spirit of the CJAA the court found it was empowered to go below the statutory minimum for wounding with intent, to credit the appellant with the time he spent on pre-sentence remand.

[26] The justification for utilising a section 42K certificate to go below the mandatory minimum was explained in **Paul Haughton v R** [2019] JMCA Crim 29 at para. [50] by Morrison P in this fashion:

> "…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**, 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."

[27] It is noted that neither counsel invited the court to go beyond crediting the time spent on remand. The court agrees with that stance. In **Leopold Matthews v R**, Brown JA emphasised that in assessing a section 42K referral, the circumstances of the case have to be assessed to determine whether the imposition of the prescribed minimum penalty is manifestly excessive and unjust. The facts of this case reveal a brazen daylight attack on the complainant causing injury to the complainant's shoulder, which at the time of the social enquiry report, years after, was still causing him discomfort. In those circumstances, subject to the right of the appellant to be credited for time spent on remand, it could not be credibly maintained that the mandatory minimum sentence of 15 years for the wounding of the complainant was manifestly excessive.

[28] There is, however, another basis, independent of the honouring of the spirit of section 42K of the CJAA, which entitles the appellant to be credited with the time spent on pre-sentence remand. In **Cecil Moore v R**, this court determined that, notwithstanding the existence of a mandatory minimum sentence, a defendant is entitled to be credited with all the time spent on pre-sentence remand, in recognition of his constitutional right to liberty. This principle was followed and applied in **Rory Edmond v R** [2025] JMCA Crim 15. See also **Garfield Green v R** where, following **Cecil Moore v R**, the court went below the mandatory minimum to provide constitutional redress for delay.

[29] Accordingly, on the basis of the principles established in **Kerone Morris v R** on the one hand, and in **Cecil Moore v R** on the other, the sentence of the appellant on count three, should be adjusted to credit him for the time he spent on pre-sentence remand.

[30] The court, therefore, makes the following order:

i) The application for leave to appeal convictions is refused.

ii) The sentence imposed of seven years' imprisonment for the offence of illegal possession of firearm is affirmed.

iii) The sentence imposed of seven years' imprisonment for illegal possession of ammunition is affirmed.

iv) The appeal against the sentence imposed for the offence of wounding with intent is allowed.

v) The sentence of 15 years' imprisonment imposed for the offence of wounding with intent is set aside, and substituted therefor is the following:

(1) 15 years' imprisonment for the offence of wounding with intent, less credit given of 12 months for time spent on pre-sentence remand.

(2) Having deducted the time spent on pre-sentence remand of 12 months the appellant is to serve 14 years' imprisonment.

vi) The sentences are to run concurrently and are reckoned as having commenced on 1 June 2018, the date on which the original sentences were imposed.