[2018] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 63/2015

BEFORE: **THE HON MR JUSTICE BROOKS JA**
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

STEPHEN SMITH v R

Mrs Valerie Neita-Robertson QC for the appellant

Jeremy Taylor and Miss Syleen O'Gilvie for the Crown

24, 25 September and 29 November 2018

F WILLIAMS JA

Background

[1] By this appeal, the appellant challenges his convictions and sentences for the offences of illegal possession of firearm, wounding with intent and robbery with aggravation. He was convicted on 29 July 2015 after a trial by a judge sitting alone in the High Court Division of the Gun Court for the parish of Clarendon. On 31 July 2015, he was sentenced to 10 years' imprisonment for the illegal possession of firearm offence; 20 years' imprisonment for the wounding with intent and 10 years' imprisonment for the robbery offence. The sentences were ordered to run concurrently.

[2] On 29 August 2017 he was granted leave to appeal his conviction and sentences by a single judge of this court.

Summary of the prosecution's case at trial

[3] A summary of the prosecution's case in the court below is that, on Sunday 28 September 2014, the appellant and another man, both armed with firearms, kicked off the back door to the virtual complainant's home, robbed him of his cellular telephone and, after having him tell them his name, shot him two times and left him for dead. The virtual complainant's evidence is that, after shooting him, one of the men in fact approached him and looked at him whilst poking him with a rifle, as if trying to ensure that he was in fact dead.

[4] The virtual complainant testified that he had known the appellant before the incident and would see him regularly at a shop operated by his (the appellant's) girlfriend, Nan, at the May Pen bus park in the said parish of Clarendon.

[5] The prosecution called four witnesses: (i) the virtual complainant; (ii) the police sergeant who conducted the identification parade; (iii) the medical doctor who attended to the virtual complainant on the night that he was shot; and (iv) the investigating officer. At the end of the prosecution's case, counsel for the defence unsuccessfully made a no-case submission. Thereafter, the appellant gave sworn testimony. In that testimony he denied any knowledge of or involvement in the incident. He admitted knowing the virtual complainant from the bus park where his (the appellant's) girlfriend Nan, is a vendor. He himself is a higgler.

The grounds of appeal

[6] When the matter came on for hearing on 24 September 2018, the appellant was granted leave to abandon his original grounds of appeal filed on 10 August 2015; and to argue the following supplementary grounds:

Ground 1

> "The learned trial judge erred in not accepting the no-case submission made on behalf of the accused at the trial."

Ground 2

> "The learned trial judge failed to adequately isolate and direct himself as judge of law and fact on the weaknesses in the prosecution case. In this respect his directions on identification were below the standard required in law."

Ground 3

> "The learned trial judge erred in treating with the several critical discrepancies in the evidence. This failure denied the appellant a fair and balanced consideration of his case."

Ground 4

> "The verdict is unsafe and unsatisfactory having regard to the evidence."

Ground 5

> "The sentence is manifestly excessive."

[7] We now proceed to a consideration of the various grounds of appeal.

Ground 1: the learned judge erred in not accepting the no-case submission.

Summary of submissions

For the appellant

[8] On behalf of the appellant, Mrs Neita-Robertson QC reminded the court of the test in **R v Galbraith** (1981) 73 Cr App R 124 and pointed out that the no-case submission was based on the second limb in that case. In other words, the no-case submission was meant to convince the learned trial judge to stop the case and not call on the appellant to answer, on the basis that the prosecution's evidence, taken at its highest, was such that a jury properly directed could not properly convict on it. She submitted that:

> (i) the quality of the identification evidence before the learned trial judge was poor. The identification was made with the aid of light that came from the complainant's cellular telephone. There was no other light to aid in the identification, which occurred in a dark room at 10:00 p.m. There were also no distinguishing features that the witness could identify in the person he said was the appellant, to make the quality of the identification evidence better. The time for observation as well did not exceed 10 seconds.
>
> (ii) the appellant's identification at the identification parade ought not to have been relied on. The main reason for

> this was a discrepancy that arose from the virtual complainant's testifying that he pointed out the suspect on the parade at position number nine; whereas the sergeant who conducted the identification parade testified that the suspect was standing under number eight. Another reason arose from the fact that the virtual complainant testified that he had gone to the parade to point out the man who had shot him; which conflicted with his evidence that it was the other man who had done the shooting.

[9] The combination of these factors, it was submitted, required the learned trial judge to have examined the identification issues with caution and from the position of a no-case submission, rather than to view it just as an issue of credibility, which he obviously did. The identification evidence, it was submitted, was weak and tenuous.

[10] A credibility issue also arose in relation to what the virtual complainant said about the telephone, it was submitted, in that, in his first statement to the police, he did not mention that the robbers had taken his telephone, nor did he mention the telephone at all. This was telling, as the telephone was important in relation to the issue of identification, which is the crux of the case.

For the Crown

[11] On behalf of the Crown, Mr Taylor asked the court to find that, at the end of the Crown's case, a *prima facie* case had been established, and so the learned trial judge was correct in rejecting the no-case submission. He acknowledged that, at the end of the Crown's case, a number of issues had arisen; but said that these were matters to have been resolved in the judge's jury mind, after the learned trial judge had appropriately directed himself. In other words, the issues turned on the question of credibility, which the authority of **R v Galbraith** indicates, allows a judge to have resolved by the tribunal of fact. He further submitted that this was not a borderline case of "picking out the plums and leaving the duff behind" (citing **R v Shippey** [1988] Crim LR 767); but added that, according to Lord Lane CJ in **R v Galbraith**, even borderline cases should be left to the discretion of the judge.

[12] It was further submitted that, on the submission of no case to answer, the criterion to be applied by a trial judge was whether the evidence was such that, without irrationality, a jury could be satisfied of guilt. If there was such evidence, the judge is required to allow the trial to proceed (citing **Taibo (Ellis) v R** (1996) 48 WIR 74).

[13] Mr Taylor also cited the case of **Herbert Brown and Mario McCallum v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered on 21 November 2008 and the case of **Daley v R** [1994] 1 AC 117, as to what ought to be the court's approach to the decision to stop or allow a case to proceed on the making of a no-case submission.

[14] In relation to the period of time of 10 seconds for which the virtual complainant said that he was able to see the appellant's face, Mr Taylor submitted that that was sufficient for a recognition, citing the case of **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 & 78/1995, judgment delivered on 26 February 1996, in support. In that case, a viewing of eight seconds was held to be sufficient for a recognition case. Mr Taylor also submitted that, apart from the period of time for recognition being sufficient, the distance at which the suspect was seen and the fact that nothing obstructed his view, made for a positive and reliable recognition.

[15] In relation to the discrepancies and inconsistencies, Mr Taylor submitted that they were not such as to cause or require the trial judge to have stopped the case at the stage of the no-case submission (citing dicta from **Steven Grant v R** [2010] JMCA Crim 77). The existence of inconsistencies and discrepancies does not mean that a *prima facie* case has not been made out, he submitted.

Discussion

The period for which the men's faces were seen

[16] At page 29 of the transcript, the complainant in examination-in-chief testified to seeing the face of the man he said was the appellant "for about five or six minutes" when the man held up his (the complainant's) cellular telephone to look at it and the screen lit up. In cross-examination, (at page 40 of the transcript) however, he was shown his statement to the police and accepted that he has stated in that statement that the phone had lit up for a total of about 10 seconds.

[17] At page 41 of the transcript, he was asked for an explanation for the inconsistency and gave one as follows:

> "Sir, I just got shot. I was bleeding, I was almost unconscious, sir."

[18] At pages 144-146, the learned trial judge dealt directly with the matter of this inconsistency. At page 144, he first gave himself the required warnings pursuant to **R v Turnbull** [1976] 3 All ER 549. Later, at page 145, lines 3-8 he stated:

> "So the question now becomes whether or not that ten-seconds opportunity at that distance, with that kind of light from the cell phone, whether or not that can be deemed to be qualitatively good to make out his assailant."

[19] On the same page at lines 18-25, he further stated:

> "When he was confronted with his statement, he agreed, yes, I gave that statement to the police and I agreed that I told the police that it was ten seconds. Here, the issue was the duration of time in which he was able to make out his assailant and he confirms that it was ten seconds."

[20] Having given direct consideration to this inconsistency, and after further analysis of the evidence, the learned trial judge at the end of the day found the virtual complainant to be a witness of truth.

[21] Before that, however, (and more importantly for this ground) at the stage of his consideration of the no-case submission, the learned trial judge clearly focussed on this inconsistency. In a ruling on a no-case submission unusually going into some detail, the learned trial judge, after reminding himself of the requirements laid down by Lord Lane CJ in **Galbraith v R**, is recorded as stating as follows (at page 112, lines 20-25):

> "So the question to my mind here is whether or not the Prosecution's evidence taken at its highest - taken at its highest here would mean that the complainant is saying that he was able to see the face of the accused through the aid of the light of a 'cellphone' for ten seconds. Although initially he had said five to six, when confronted with the statement which he gave to the police ten seconds and that is correct."

[22] The learned judge thereafter reminded himself of paragraph 2(b) of **Galbraith v R**, as follows:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or on other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the accused is guilty, then the judge should allow the matter to be tried by the jury..."

[23] The learned trial judge also reviewed the evidence relating to the other issues affecting identification in the case and the other issues raised in the course of the no-case submission. He considered as well the case of **Herbert Brown and Mario McCallum v R**, which was cited to him by the Crown in the course of the no-case submission.

[24] In the case of **Richard Anderson v R** [2012] JMCA Crim 7, light from a cellular phone was among the sources of light used by the complainant to observe the appellant's face. In that case this court dismissed the appeal against conviction in circumstances in which the learned trial judge had demonstrated an awareness of the special need for caution in cases of visual identification and had sufficiently considered the evidence relating to the circumstances of visual identification.

[25] Likewise, here it is patently clear that the learned trial judge gave specific and careful consideration to the quality of the lighting, that is, that it came solely from the illumination of the appellant's face by the light from the screen of a cellular phone and, in particular, considered whether it would have been sufficient to enable a positive recognition.

The identification parade

[26] At page 117 of the transcript, the learned judge also considered the matter of the discrepancy relating to the identification parade. In ruling on the no-case submission, he found that the important consideration on that matter was that the appellant was told at the end of the parade that he had been pointed out.

[27] In relation to the identification parade and the discrepancy surrounding it, there are two observations that will help to put the matter in its proper perspective. For one, the attorney-at-law who represented the appellant at his trial was the same one who had represented him at the identification parade. At no time from the holding of the identification parade, through the trial, up to the point of the hearing of this appeal has it been contended that the parade was conducted unfairly. The other observation is that, from all indications, the appellant was the suspect on the parade. The other men who stood in the line up were volunteers. The appellant was the one who was pointed out and he was so informed by the sergeant who conducted the parade. There is no contention otherwise. The learned trial judge therefore viewed the discrepancy as arising from faulty recollection on the part of the virtual complainant and (as it was open to him to do) preferred the evidence of the sergeant.

[28] Another issue was taken in relation to the identification parade - that is, that the virtual complainant, when asked the reason for his presence at the identification parade, stated that he was there to identify the man who had shot him. This, the submission ran, was in conflict with the virtual complainant's evidence. In that evidence the virtual complainant spoke to the appellant having been armed with an M-16 rifle, whereas the other man, who was armed with what appeared to be a 9mm pistol, was the one who shot him. This, it was submitted, was an indication of another weakness in the prosecution's case - particularly of the identification evidence. It was further submitted that the learned trial judge attempted to deal with the matter from the point of view of joint enterprise, a legal concept, and not one with which the witness would have been familiar.

[29] For the Crown, it was submitted that the virtual complainant's reference to the appellant as the man who shot him arose from the way in which he gave his evidence, at times grouping the men together.

Discussion

[30] The learned trial judge at page 147 of the transcript appears to have considered the matter of joint enterprise as the concept on which the Crown was relying; but considered as well that the matter had to be viewed against the background of the overall credibility of the virtual complainant: he would have had to be proven unreliable and untruthful for his evidence to be rejected. The learned trial judge's conclusion was that it could not be said that the virtual complainant's evidence could not be believed at all.

[31] A perusal of the transcript seems to support the Crown's contention. For example, in examination-in-chief, the virtual complainant is recorded at page 7, line 13 of the transcript as saying:

> "A. They was looking on the phone..." (Emphasis added)

[32] Similarly, at page 50, line 18, when asked about his cellular phone, the virtual complainant is recorded as saying:

> "A. They took it, sir." (Emphasis added)

[33] Another example of the giving of his evidence in this way may be seen at page 54, lines 7-9 of the transcript, with a similar grouping of the men first seen in a question asked by defence counsel in cross-examination as follows:

> "Q. Answer mi man, dem did shoot yuh yet?
> A. Dem just come in an tek weh mi phone, mi never get shot yet, sir." (Emphasis added)

[34] Against the background of this kind of evidence, we are of the view that no adverse inference should be drawn on this issue. The point has arisen, we would think, simply as a result of a simple man speaking somewhat loosely; and not as a result of prevarication.

[35] From the foregoing we find ourselves unable to agree with the submission that the learned trial judge erred in failing to uphold the no-case submission. In our view, he gave consideration to all the important factors at that stage of the case and correctly

concluded that there was a case for the appellant to answer. In our view, therefore, there is no merit in this ground of appeal.

Ground 2: the learned trial judge failed to adequately isolate and direct himself as judge of law and fact on the weaknesses in the prosecution case. In this respect his directions on identification were below the standard required in law.

Summary of submissions

For the appellant

[36] Mrs Neita-Robertson contended that, whilst not every detail of the analysis of a judge sitting alone needs to be set out in his summation, in the instant case it was important for the learned trial judge to have gone through the weaknesses in the identification evidence so as to examine and weigh for himself the quality of that evidence. That, she submitted, he failed to do.

For the Crown

[37] For his part, Mr Taylor submitted that the transcript discloses that the learned trial judge sufficiently addressed his mind to the issues in the case - especially the identification evidence - and showed how he arrived at his verdict.

[38] He cited the case of **R v Simpson; R v Powell** [1993] 3 LRC 631 in support of his submission that the learned trial judge satisfactorily discharged the duties required of a judge conducting a "bench trial". To similar effect, Mr Taylor submitted, is the case of **Andre Downer and Darren Thomas v R** [2018] JMCA Crim 28 - especially paragraphs [23] and [26].

Discussion

[39] At page 641 of the case of **R v Simpson; R v Powell**, this court (per Downer JA) succinctly outlined what is required of a judge sitting alone in giving a summation in a criminal trial. It is there stated that:

> "[T]he trial judge sitting without a jury must demonstrate in language that does not require to be construed that he has acted with the requisite caution in mind and that he has heeded his own warning. However, no particular form of words need be used. What is necessary [is] that the judge's mind upon the matter be clearly revealed."

[40] It is important to recall, in considering this appeal, that the central issue in the matter was that of identification by way of recognition.

[41] A perusal of the transcript, in particular pages 168 to 170, shows that the learned trial judge spent some time dealing with the issue of recognition against the background of the particular facts of this case. So, for example, he looked: (i) at the ten-second duration of the sighting; (ii) the fact that the identification was made by way of the light from the telephone screen, which was about a foot away from the face of the appellant; (iii) the fact that the virtual complainant knew the appellant before the incident and knew his name and that of his girlfriend; and other similar factors. The learned trial judge, throughout his summation, can clearly be seen specifically addressing the very matters that the defence sought to highlight as weaknesses in relation to the case of recognition. He also gave himself the warnings required by **Turnbull v R** – for example, at page 168, lines 16- 19, to page 169, lines 1-5, he said:

> "Now, I remind myself in relation to this case, identification evidence is one of the most notorious area[s] in the criminal law.
>
> For the sheer reason rather, it has been shown even honest witnesses can be mistaken. And that miscarriage of justice has taken place because of wrongful identification..."

[42] Additionally, at page 169, lines 19-23, he also stated:

> "It doesn't matter that this is a recognition case. People do make mistakes even in recognition cases, where somebody has known someone before, experience has shown that they too make mistakes..."

[43] At pages 142-143 and pages 151-152 of the transcript the learned trial judge also spent some time examining the evidence relating to the identification parade and concluded (in our view, correctly) at lines 22-24 of page 152 that:

> "[T]here can be no question that the person who was identified and put before the Court is Stephen Smith."

[44] Having regard to all these considerations, the appellant fails as well on this ground.

Ground 3: the learned trial judge erred in treating with the several critical discrepancies in the evidence. This failure denied the appellant a fair and balanced consideration of his case.

Summary of submissions

For the appellant

[45] The main submission made in respect of this ground on behalf of the appellant was that the learned trial judge erred in his treatment of the discrepancies that arose in the trial. These discrepancies, it will be recalled, concerned: (i) the discrepancy between the virtual complainant's evidence and that of the sergeant who conducted the

identification parade as to under which number the appellant was standing; (ii) what was said to be the inconsistency between the virtual complainant's testifying that he was shot by someone who was in the company of the appellant; and, at the identification parade on which the appellant was the suspect, stating that he was there to point out the man who had shot him. These apparent discrepancies were described by learned counsel for the appellant as "irreconcilable".

[46] Learned counsel for the Crown did not argue this ground; but relied on his written submissions. It was submitted that the learned trial judge correctly found that such discrepancies as there were, were not material and did not affect the virtual complainant's credibility. The Crown also pointed to sections of the transcript at which the learned trial judge gave himself the general warnings in relation to discrepancies and inconsistencies and how he was to treat with them.

Discussion

[47] It is correct, as the Crown asserts, that the learned trial judge demonstrated his awareness of the main considerations when dealing with discrepancies and inconsistencies in a case. We accept that one of these instances may be found at page 142, line 19 to page 143, line 1 as follows:

> "I must here pause and remind myself that in any case in which one tries there are bound to be inconsistencies or discrepancies or even contradictions. And the task of this court is to determine whether or not the inconsistency is slight or serious, material or immaterial or is so profound and inexplicable that this court cannot act on it at all."

[48] Additionally, at page 143, lines 16-21, as was pointed out, the learned trial judge is recorded in the transcript as having said:

> "I remind myself I am free to accept part of what a witness says and reject another ...part. If I feel the witness is either mistaken, [or] lying or I may accept the evidence of another witness on the point in reference to that evidence."

[49] The transcript further discloses that, apart from giving himself these general warnings, the learned trial judge also dealt with the specific discrepancies and inconsistencies that arose during the course of the trial. As we have dealt with these matters in the preceding paragraphs – in particular, under ground 1, no useful purpose would be served by going through them again. However, a consideration of the evidence on this ground, leads us to conclude that the appeal must fail on this ground.

Ground 4: the verdict is unsafe and unsatisfactory having regard to the evidence.

Summary of submissions

For the appellant

[50] The main submission proffered here on behalf of the appellant was that the identification evidence is such that it leaves a lurking doubt in one's mind as to whether the appellant was one of the men who entered the virtual complainant's room. This lurking doubt (the submission continued) should have been created in the mind of the learned trial judge by the combination of circumstances in relation to the identification evidence, such as: the poor quality of the identification evidence; the discrepancies in respect of the identification parade; the failure of the appellant to mention in his first statement that his telephone had been stolen, et cetera.

For the Crown

[51] On behalf of the Crown it was submitted that the appellant had failed to establish that the verdict was against the weight of the evidence as to be unreasonable and unsupportable. This court should be reluctant to interfere with the verdict, it was submitted, unless it was shown to be obviously or palpably wrong. The cases of **Alrick Williams v R** [2013] JMCA Crim 13; and **Wayne Samuels v R** [2013] JMCA Crim 10 were cited in support of these submissions.

Discussion

[52] Most of these submissions and issues have been discussed whilst discussing other grounds of appeal. The only one that has perhaps not been addressed directly is that relating to the absence from the virtual complainant's first statement of the robbery of his telephone.

[53] The learned trial judge had regard to the circumstances in which the first statement had come to be given – that is, within a few hours after the virtual complainant had been shot and while he was lying in a hospital bed. The learned trial judge is recorded as stating at page 148, lines 3-13:

> "Again, it doesn't seem to bear any insidious import because the witness did say, that he had just got shot and was bleeding and the police was questioning him. Am I to infer from that, that in one fell swoop, a witness is likely to recall every single detail of his experience to just be put on paper once and for all and that he would not remember anything else after that, to bring to the attention of the police to help them in their investigation?"

[54] At page 154, lines 4-7, he also stated:

> "Now this is on the very Sunday that the complainant was injured. When he was in the agony of distress on a hospital bed."

[55] There are two additional considerations that the learned trial judge brought to bear on this particular omission: (i) the importance of the *viva voce* evidence in all the circumstances; and (ii) the conduct of the investigations.

[56] In relation to the *viva voce* evidence, the learned trial judge stated at page 148, line 17 to page 149, line 15:

> "Those three statements also became the focus in relation to what he told the police about the cell phone being robbed from him. The inference is, why is such an important fact not mentioned in his first statement? Again, it is what is said from the witness box which is important. Anything he might have said or omitted to say on a previous occasion to the extent where it is inconsistent with something else, would be what matters in terms of his own credibility. I do not find that his failure to mention in the first statement, in any way, derogates from him what he said in the witness box that is getting the statement from him that is in relation to Count three because he did not give anybody permission to take it that's my understanding. He says he told the police that they took his cell phone. He said the officer read back his statement to him and when it was read back to him, he heard the officer read that the men take his cell phone. When confronted with it, he did not see anything in his statement to that effect."

[57] In relation to the conduct of the investigations, the learned trial judge several times commented adversely on the want of professionalism displayed by the investigating officer. For example, at page 153, lines 5-11, he raised the following question:

> "It might well be that this witness did not display the sort of professionalism which is required in the investigation of cases of this nature, but I ask myself the question: how can incompetence or rather an incompetent investigation be visited upon the complainant?"

[58] From the foregoing, it seems to us that the learned trial judge gave due consideration to the matter from a number of different perspectives and that his treatment of it was adequate. Looking at the matter against the background of all the evidence, it strikes us as an innocuous omission. We are unable to see what advantage the virtual complainant could have hoped to achieve either by intentionally not mentioning the robbery of the telephone or to have concocted a story some time after the incident of having been robbed of it. It may well be that the robbery of the telephone assumed less significance to the virtual complainant in the immediate aftermath of his receiving possibly life-threatening gunshot injuries. Or, it could just be that the offence of wounding with intent was the main focus of the investigating officer.

[59] We therefore find that this ground as well has no merit.

Ground 5: the sentence is manifestly excessive

Summary of submissions

[60] Neither party argued this ground. Learned Queen's Counsel for the appellant candidly conceded that, especially in the light of the appellant's previous conviction for conspiracy to murder, the sentences that were imposed fell within the normal range of sentences imposed for offences of this nature.

[61] In the light of this concession, the Crown did not argue the point. The Crown did, however, put before us for our consideration a number of cases setting out guidelines for dealing with crimes of causing grievous bodily harm and firearm offences. The main ones were: (i) **The Queen v Taueki** [2005] 3 NZLR 372 (a decision of the New Zealand Court of Appeal dealing with serious violent offending); (ii) **Tony Avis & Ors v R** [1998] 1 Cr App R 420 (a decision of the English Court of Appeal, providing sentencing guidelines for firearm offences); and (iii) **Jerome O'Neal Bovell v The Queen**, Criminal Appeal No 23 of 2000 (a decision of the Barbados Court of Appeal, agreeing with the recommendations made in **Tony Avis & Ors v R**).

[62] In **R v Taueki**, guidelines were given for trial courts engaged in the sentencing process as to what matters were to be regarded as aggravating factors. The relevant parts of the guidance given in that case are as follows:

> "[31] We now turn to the features of offending which will be seen to contribute to the seriousness of the conduct and criminality involved in a GBH [(grievous bodily harm)] offence. We reiterate that the sentencing Judge will need to consider the combination of factors applying in a particular case, when assessing the appropriate sentencing band and the starting point within that band. The factors which we highlight are:
>
> (a) *Extreme violence*: The extent of the violence involved in the offending will have an obvious impact on the level of criminality. Where any violent conduct is prolonged that will also be relevant, as will violence which is unprovoked or gratuitous...
>
> (b) *Premeditation*: The degree of pre-meditation and planning will also reflect

criminality. Serious violence which can properly be classified as impulsive or a reaction to an unexpected event will generally be seen as less culpable than premeditated violence...

(c) *Serious injury*: Where the injuries suffered by the victim or victims are very serious, a higher starting point than in cases of minor injury will be called for... This is particularly the case where the injuries are potentially fatal or are such as to cause long term or permanent disability impacting on the victim's quality of life... An offender who acts with intent to cause grievous bodily harm and does, in fact, cause such harm cannot escape responsibility for the consequences of his or her actions. However, care has to be taken not to double count the level of violence inflicted and the seriousness of the injuries which result from it.

(d) *Use of weapons*: The use of a lethal weapon such as a firearm or a knife will be a serious aggravating factor. In short, the more lethal the weapon that is used, the greater the aggravating factor will be. Where offenders use a broken bottle, the likelihood of very serious injury is high and this will also be a serious aggravating factor. Other examples are use of clubs, baseball bats and similar weapons which, particularly when aimed at the head, can cause significant and permanent injury. The use of a syringe with infected blood or an accelerant to set fire to the victim raise similar concerns to the use of a weapon. Where the use of a weapon is premeditated, the criminality will be worse. In particular, if the offender brings a weapon to the scene with the intent of its being used, that will be severely aggravating. Similar considerations arise if

the weapon is brought to the scene for use as intimidation, because it can be anticipated that a weapon brought to the scene in such circumstances will, in fact, be used by the offender. Another relevant factor will be the potential for danger to the public, where, for example, a firearm is fired indiscriminately in a public place.

(e) *Attacking the head*: Even where weapons are not used, attacks on the head of a victim can have particularly serious consequences. Thus, where a victim is subjected to a severe beating or kicking causing head injuries, the offender's conduct will be treated similarly to offending involving the use of a weapon.

(f) *Facilitation of crime*: Where a GBH offence involves the use of violence to facilitate the commission of another offence (for example rape) that will also be seen as an aggravating factor...

(g) *Perverting the course of justice*: Similarly, where violence is used in an attempt to pervert the course of justice (for example stopping a person from making a complaint or testifying, or punishing a person for doing so), that will be an aggravating factor.

(h) *Multiple attackers*: The greater the number of attackers and the greater the disparity between the number of the attacking group and the victim group, the greater the culpability will be.

(i) *Vulnerability of victim*: Where the victim is particularly vulnerable (for example a child or where there is a disparity in size or strength between the attacker and the victim), that will also be a significant factor in the assessment of culpability...

Similar considerations arise with victims who are disabled in some way or otherwise defenceless.

(j) *Home invasion*: Where the offending involves the invasion of the sanctity of the home, this will be a particularly important factor... [T]he Courts have repeatedly emphasised the importance of recognising the sanctity of the home and insisted that violence occurring in a person's house is to be treated as an aggravating factor calling for a higher sentence.

(k) *Gang warfare*: ... Where serious violence is perpetrated by members of a criminal gang or organised crime cartel, that would be a further aggravating feature.

(l) *Public official*: Where the victim is a law enforcement officer or other public official (such as an ambulance officer or fire fighter) carrying out his or her duties, that will be a serious additional aggravating factor.

(m) *Vigilante action*: Where the serious violence results from the actions of one or more persons taking the law into their own hands, acting out of revenge or using stand-over tactics for the enforcement of other obligations that will also be an aggravating feature.

(n) *Hate crime*: Where the attack is inspired by racism, homophobia or hostility to any other group, that may also constitute an additional aggravating factor. "

[63] That case also sets out recommended considerations in relation to mitigating factors. For example, at paragraph [32] it is stated that:

"[32] Matters which may be seen as leading to lower starting points are:

(a) *Provocation*: Where the offender has been provoked, that may justify a lower starting point. It is not enough simply to claim to have been incensed by the actions of the victim or another: rather, the sentencing Judge will need to be satisfied that there was serious provocation which was an operative cause of the violence inflicted by the offender, and which remained an operative cause throughout the commission of the offence.

(b) *Excessive self defence*: Similarly, where a party has acted out of self defence but has gone too far, the fact that the attack initially commenced as an effort to defend himself or herself (or another) may be seen as reducing the seriousness of the offending."

[64] Similarly, in the case of **Tony Avis & Ors v R**, the court (per Lord Bingham of Cornhill LCJ) set out certain questions that a sentencing court ought to ask itself when dealing with offences involving possession simpliciter or possession and use of firearms. The questions are set out in the head note to the judgment as follows:

"(1) What sort of weapon is involved? Genuine firearms are more dangerous than imitation firearms. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than firearms for which no ammunition is available. Possession of a firearm which has no lawful use (such as a sawn-off shotgun) will be viewed even more seriously than possession of a firearm which is capable of lawful use.

(2) What (if any) use has been made of the firearm? It is necessary for the court, as with any other offence, to take account of all circumstances surrounding any use made of the firearm: the more prolonged and premeditated and violent the use, the more serious the offence is likely to be.

(3) With what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious

> offences under the Act are those which require proof of a specific criminal intent (to endanger life, to cause fear of violence, to resist arrest, to commit an indictable offence). The more serious the act intended, the more serious the offence.
>
> (4) What is the defendant's record? The seriousness of any firearm offence is inevitably increased if the offender has an established record of committing firearms offences or crimes of violence."

[65] In **Jerome O'Neal Bovell v The Queen**, the court (per Simmons CJ) expressly agreed that sentencing judges should ask themselves those four questions set out in **Tony Avis & Ors v R**.

[66] In at least one of these cases just mentioned (**Jerome O'Neal Bovell v The Queen**), the court's primary purpose was to seek to set general tariffs for the guidance of trial judges. However, with Jamaica's Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and Parish Courts, December 2017 (the Guidelines) being officially launched as recently as January 2018, with recommended usual starting points and ranges of sentences, it will not be necessary for this court to do so. The Guidelines also set out what might be taken into consideration as aggravating factors (part 8) and mitigating matters (part 9) respectively. To the extent that the Guidelines might not reflect all of the considerations set out in the cases of **R v Taueki** and **Tony Avis & Ors v R**, however, we see these cases as providing useful general guidance on matters to be considered in the sentencing process and we commend the recommendations made in them for the consideration of sentencing judges in this jurisdiction.

The particular sentences in this case

[67] It seems to us that the concession of the appellant that the sentences fall within the normal range was a concession well made. Although the sentences were imposed some time before the introduction of the local guidelines, a comparison between (a) the sentences imposed and (b) the recommendations for each offence in the Guidelines may be instructive. In relation to the sentence of 10 years for illegal possession of firearm, the Guidelines speak to a normal range of between seven and 15 years, with a usual starting point of 10 years. In relation to the sentence of 20 years imposed for the offence of wounding with intent, the Guidelines speak to a normal range of between five and 20 years. It mentions a usual starting point of seven years, except when a statutory minimum applies. The statutory minimum in this case was 15 years. As regards the sentence of 10 years for robbery with aggravation, the Guidelines speak to a normal range of between 10 and 15 years, with a usual starting point of 12 years. When the sentences that were imposed in this case are looked at against the background of the Guidelines, the home invasion and also against the background of the appellant's previous conviction for conspiracy to murder, it is clear beyond peradventure that these sentences could not fairly be said to be manifestly excessive.

Conclusion

[68] The appellant in this case has failed to make good any of his grounds of appeal. In the result, the appeal against the appellant's convictions and sentences is dismissed.

The convictions and sentences are affirmed. The sentences are to be reckoned as having commenced on 31 July 2015.