[2023] JMCA Crim 14

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEAL NO 46/2013

ROCKEL WEST v R

Donald Gittens for the applicant

Mrs Christine Johnson Spence for the Crown

14, 15 December 2022 and 31 March 2023

FOSTER-PUSEY JA

[1] On 20 May 2013, Rockel West ('the applicant') was convicted of the offences of illegal possession of firearm (counts 1 and 2), illegal possession of ammunition (count 3) and shooting with intent (count 4) in the High Court Division of the Gun Court following a trial before D Fraser J (as he then was) ('the learned judge'). The learned judge, on 21 May 2013, sentenced the applicant to serve 12 years' imprisonment at hard labour for each count of illegal possession of firearm, eight years' imprisonment at hard labour for illegal possession of ammunition and 18 years' imprisonment at hard labour for shooting with intent. The sentences were to run concurrently.

[2] The applicant applied for leave to appeal his convictions and sentences ('the application') on 27 May 2013. Unfortunately, there was a significant delay before the

transcript of the proceedings was submitted and later re-submitted to this court. The transcript was first received in this court on 26 April 2022, nearly nine years after the application. On 3 May 2022, a single judge refused the application. The judge noted that the transcript was incomplete, as the evidence of three witnesses to which the learned judge referred in his summation was missing, and urged that efforts be made to obtain the missing testimony. The single judge opined, however, that in light of the time that had passed since the application was made, the "missing evidence" ought not to delay the matter being placed before the court for consideration.

[3] As is his right, the applicant renewed his application.

[4] The transcript was re-submitted to the court on 1 November 2022. The applicant's attorney-at-law complained that parts of the transcript were still missing and requested the notes of the learned judge. These draft notes were provided to counsel by email on 18 November 2022 and were later certified on 30 November 2022.

[5] The grounds of appeal are best considered against the backdrop of the facts and various developments in this matter.

The case for the prosecution

[6] In light of the focus of the grounds of appeal, a summary of the facts is sufficient.

[7] On 13 January 2010, Corporal Glenford Henry and Constable Jazmarie Mattis, while dressed in police uniform, were on mobile patrol duty in a marked police vehicle along the Stewartfield Main Road in the town of Seaforth in the parish of Saint Thomas. Upon reaching a place called "Gully", three men emerged from the left embankment to the road. The men looked in the direction of the police vehicle and hurried across the road towards a lane. As the men hurried towards the lane, the police officers noticed that one of the three men, the applicant, was carrying a khaki bag strapped from the left to the right side of his body. Corporal Henry instructed the men to stop moving, however, they ignored his instruction and ran into the lane. He gave chase. The applicant pulled a gun, pointed it in Corporal Henry's direction and fired several shots. Corporal Henry took cover

and returned fire in the direction of the applicant. He saw the applicant fall to the ground. The other two men ran away.

[8] Corporal Henry approached the applicant who lay on the ground gripping a pistol in his hand. He kicked the pistol away from the applicant's hand and noticed another pistol on the ground approximately 2 feet away from where the applicant lay. The khaki bag was still strapped across the applicant as he lay on the ground, bleeding from his left upper shoulder. When asked for his name, the applicant identified himself as Rockel West.

[9] A team of police officers, including Detective Constable Delano Martin, came on the scene. On his arrival, he saw the applicant lying on the ground with the khaki bag across his shoulder. He also saw two black 9-millimetre pistols beside the applicant-one close to his upper body and the other close to his feet. He picked up the firearms and removed the khaki bag from the applicant's shoulder. Upon searching the bag he saw one black glove, a black ski mask, a suit of army fatigue and a semi-automatic magazine with 9-millimetre cartridges inside. The applicant was taken to the hospital for treatment.

[10] Detective Sergeant Courtney Daley went to the scene and saw Constable Martin with two firearms in his hands and a khaki-coloured bag stained with blood. Constable Martin handed over the firearm to him along with the khaki bag and its contents. He noticed blood stains approximately four feet from a spent shell on the scene.

[11] Detective Corporal Omar Sutherland, a certified Forensic Crime Scene Investigator, processed the scene. He found two 9-millimetre spent casings as well as what appeared to be blood on the scene. He took photographs of the scene.

[12] Dr Judith Mowatt, Director of the Forensic Science Laboratory, conducted analysis on a beige patterned bag allegedly taken from the applicant. She detected human blood on various areas of the bag.

[13] The applicant gave an unsworn statement in which he stated that while he was walking through Berger Lane, which leads to Stewartfield main road, he passed two

young men. He heard shuffling and "a bunch of noise" behind him. Before he could turn around to see what was happening, the two men ran towards him, and one of them collided with him. He and the young man fell but the young man rose quickly and ran away. The applicant stated that when he arose from the ground he came face to face with a policeman pointing a handgun at him and asking him for the two young men. The policeman shot him twice. He played dead until he was taken to the hospital. He denied having a bag, or any weapons or pointing and shooting at the police.

[14] Dr Cecil Batchelor gave evidence for the applicant. He testified about the gunshot wounds that the applicant suffered to his chest, his left upper arm, and right forearm.

The grounds of appeal

[15] The original grounds of appeal on which the applicant relied were as follows:

> "(1) **Misidentify [sic] by the Witness**:- That the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.
>
> (2) **Lack of Evidence**:- That the prosecution failed to provide to the Court any piece of 'Concrete', Material, or Scientific Evidence to link me to the alleged crime.
>
> (3) **Unfair Trial: -** That the evidence and testimonies upon which the Learned Trial Judge relied on [sic] for the purpose to convict me lack facts and creditability[sic] thus rendering the verdict unsafe in the circumstances.
>
> (4) **Miscarriage of Justice:-** That the Learned Trial Judge failed to recognised [sic] the fact that I was shot and charged for a crime that I knew nothing about. I was just an innocent bystander on my private business." (Emphasis as in the original)

[16] At the hearing before us, the applicant sought permission to rely on the following additional proposed grounds of appeal:

> "(5) Unavailability of Transcript - Denial of Record

The unavailability of the transcript for approximately 8 years and 10 months, from 07 June 2013 when the Applicant filed Criminal Form B1 initiating his appeal, to 26 April 2022 when the learned registrar of the Court of Appeal received the transcript from the Supreme Court, constitutes a breach of the right of the Applicant to have a copy of the record of the proceedings made by or on behalf of the court, as guaranteed under the said section 16(7) of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica.

(6) Transcript Delay - Single Judge Consideration Delayed

The delay, between the filing of the Criminal Form B1 by the Applicant initiating his appeal on 07 June 2013, and the submission of the transcript of the trial of the Applicant to the Court of Appeal on 26 April 2022, resulted in a delay of approximately 8 years and 11 months for the consideration of his appeal or application by a single judge of the Court of Appeal, and this constitutes a breach of the rights of the Applicant to a fair hearing within a reasonable time under Section 16(1) of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica.

(7) Transcript Delay - Appeal Hearing Delay

The delay, between the filing of the Criminal Form B1 by the Applicant initiating his appeal on 07 June 2013 and the listing of his appeal for hearing on a date over 9 years and 5 months later on 28 November 2022, also caused by the delay in the submission of the said transcript, also constitutes a breach of the rights of the Applicant to a fair hearing within a reasonable time under the said section 16(1) of the said Charter enshrined in the said Constitution.

(8) Incompleteness of Transcript - Denial of Adequate facilities

The incompleteness of the transcript, in that the evidence of three witnesses is missing therefrom, constitutes a breach of the right of the Applicant to

have adequate time and facilities for the preparation of his defence as guaranteed under section 16(6)(b) of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica, and so too is the loss of transcript in that part of one question, all of two questions, and all of two answers from the cross-examination of Constable Mattis are missing from page 183 of the transcript.

(9) Incompleteness of Transcript - Denial of Record

The incompleteness of the transcript, in that the evidence of three witnesses is missing therefrom, further constitutes a breach of the right of the Applicant to have a copy of the record of the proceedings made by or on behalf of the court, as guaranteed under the said section 16(7) of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica, and so too is the obliteration or loss of transcript, in that, part of one question, all of two questions, and all of two answers from the cross-examination of Constable Mattis are missing from page 183 of the transcript.

(10) Draft Notes by Learned Trial Judge

The typewritten draft notes of evidence taken by the learned trial judge were provided to counsel for the Applicant on Friday 18 November 2022, which did not allow sufficient time for comparison thereof with the transcript of the trial, nor sufficient time for taking instructions thereon from the Applicant, and these insufficiencies are in breach of the aforesaid right of the Applicant to adequate facilities for the preparation of his defence, one such facility being the opportunity to test the evidence recounted in the summing up against the evidence actually given by the witnesses.

(11) Denial of Due Process

The cumulative effect of the several instances of denial of constitutional rights set out above is that the Applicant has been, is being and is likely to be denied due process contrary to section 13(1)(3)(r) of the

aforesaid Charter enshrined in the aforesaid Constitution.

(12) Missing Pages on Sentencing - Further Denial of Record

The incompleteness of the said transcript, in that it is missing pages 327 and 328 pertaining to the sentencing process, constitutes a further breach of the right of the Applicant to have a copy of the record of proceedings made by or on behalf of the court as guaranteed under the said section 16(7) of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica.

(13) Missing Pages on Sentencing - Further Denial of Facilities

The said incompleteness of the transcript, in the missing pages 327 and 328 pertaining to the sentencing process, impairs the ability of the Applicant to challenge the basis of the sentences passed against him, and therefore also constitutes a breach of his right to adequate facilities for the preparation of his defence, contrary to the said section 16(6)(b) of the said Charter enshrined in the said Constitution

(14) Determination of Sentences - Principles not Determined

The sentences imposed on the Applicant were, on the transcript as such was available, determined in a manner that did not sufficiently take into account common law principles reflecting the methodology by which they were determined, and as a consequence it was not demonstrated in the available transcript, nor in the draft notes of evidence, how the learned trial judge determined them." (Emphasis as in the original)

[17] The matter came before the court on 28 - 30 November 2022 and was adjourned to 14 December 2022 for hearing. By the time the matter came on for hearing before us on 14 and 15 December 2022, Mr Gittens, on the instructions of his client, abandoned any challenge to the applicant's convictions and sentences, insofar as the question of the correctness of the sentences imposed was concerned. He indicated, quite frankly, that

the sentences imposed on the applicant for the offences, including that for shooting with intent with which the applicant was most concerned, could "not reasonably be assailed as being manifestly excessive". Consequently, he did not pursue the original grounds one to four (challenging the applicant's conviction) and the proposed supplemental ground 14 (challenging the sentences imposed).

[18] In our view, the evidence on which the applicant was convicted of the offences was strong. The applicant's attorney-at-law, on the instruction of the applicant, was correct in the decision to abandon the challenge to the applicant's convictions for the offences.

[19] The focus of the remaining proposed grounds of appeal concerned the alleged incompleteness of the transcript of proceedings, the alleged inadequacy of the notes of the learned judge, and the obvious delay before both were provided to this court and the applicant. The court granted the applicant's attorney-at-law permission to argue those remaining grounds.

The applicant's affidavit filed on 9 December 2022

[20] The applicant's counsel asked the court to take the applicant's affidavit into account in considering the proposed grounds of appeal. The applicant deposed that he is currently held at the Tower Street Adult Correctional Centre, suffers from kidney disease and at times urinates blood. In addition, he has painful hemorrhoids and, although dates have been set for him to do corrective surgery, the operations have been cancelled for one reason or another. He stated that during his imprisonment, he has been held in the general population and not in any special section for prisoners on remand or on appeal. He deposed, further, that, although he has been constantly worried about his appeal and has been hoping for it to be heard, he did not know of any date for hearing until 28 November 2022, and he was never given a reason for the delay. It was only on 5 December 2022, that his attorney-at-law gave him a copy of the transcript and he noted that the transcript did not include the evidence of three of the witnesses at this trial. The applicant complained that the time between when his attorney-at-law gave him the

transcript and the next date set for the hearing of his application, was insufficient for him to go through the transcript and to meet with his attorney-at-law to discuss what he could recall of the evidence given by the three witnesses.

[21] Finally, the applicant stated that he was aware that convicted prisoners get the chance to be released after serving 2/3 of their sentence if they had a record of good behaviour in prison. He opined that his record had been good and he would qualify for such a release.

The issues arising for determination

[22] In spite of the numerous grounds outlined by the applicant's attorney-at-law, in our view two issues arise for determination:

i. Issue 1 - (Grounds 5, 8, 9, 10, 11, 12 and 13)

1(a) - Whether the applicant's right to adequate time and facilities (including the record of the proceedings of his trial) for the preparation of his defence/appeal has been breached; and

1(b) - If yes, what is the appropriate redress for the breach?

ii. Issue 2 - (Grounds 6, 7 and 11).

2(a) - Whether the applicant's right to a hearing within a reasonable time has been breached; and

2(b) - If yes, what is the appropriate redress for the breach?

We examine the issues below.

Issue 1 - (Grounds 5, 8, 9, 10, 11, 12 and 13)

1(a) - Whether the applicant's right to adequate time and facilities (including the record of the proceedings of his trial) for the preparation of his defence/appeal has been breached; and

1(b) - If yes, what is the appropriate redress for the breach?

Submissions

The applicant's submissions

[23] Mr Gittens submitted that the incompleteness of the transcript, in that the evidence of three witnesses was missing, constituted a breach of the applicant's right to have adequate time and facilities for the preparation of his defence as guaranteed by section 16(6)(b) and 16(7) of the Constitution of Jamaica ('the Constitution'). Mr Gittens highlighted the fact that a part of one question, all of two questions and all of two answers were missing from the cross-examination of Constable Mattis as reflected on page 183 of the transcript (this was reflected on page 184 of the judge's notes). Counsel reiterated that the transcript is an essential facility for the preparation of the defence, which includes the preparation of the application, and an incomplete transcript is inadequate.

[24] Counsel stated that, in light of the missing portions of the transcript, the applicant was unable to assess the summing up of the learned judge against the evidence recorded by the transcript, and this caused the applicant to suffer substantial prejudice in the presentation and preparation of his grounds of appeal and application to file additional grounds of appeal against his convictions.

[25] While acknowledging the eventual receipt of the notes prepared by the learned judge, Mr Gittens insisted that the notes did not address or remedy the "loss of the record" and therefore the breach of the applicant's right was continuing. Counsel submitted that the applicant is to receive redress for "past breaches, present breaches and future breaches". He relied on **Evon Jack v R** [2021] JMCA Crim 31 in support of his submissions on this issue.

The respondent's submissions

[26] Mrs Johnson Spence, on behalf of the Crown, submitted that the law provides for the use of the judge's notes where there is no transcript. She stated that although at one time the applicant's rights to the record were being breached, the breach of his rights in this regard had been remedied with the provision of the transcript and the judge's notes

to his counsel. She emphasized that it was incorrect for the applicant's attorney-at-law to claim that the applicant's rights were still being abridged.

[27] Counsel distinguished **Evon Jack v R** on which Mr Gittens relied, on the basis that in the case at bar, Mr Gittens was able to assess the various issues in the case with the material he received. Furthermore, the applicant was no longer contesting his conviction but was instead focused on challenging the sentence in light of the delay in the hearing of his appeal. Mrs Johnson Spence also submitted that the sections of the transcript that were missing from the transcript did not go to the gravamen of the case.

[28] In response to a query from the court, counsel also submitted that the applicant's affidavit did not bring any relevant issue before the court.

The applicable constitutional provisions

[29] Both issues in the case at bar hinge on the right to due process guaranteed by the Constitution. Every person charged with a criminal offence, or subject to the determination of his civil rights and obligations, is entitled to due process. Section 16 of the Constitution states in part:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> …
>
> (5) Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.
>
> (6) Every person charged with a criminal offence shall -
>
> (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged;

> (b) have adequate time and facilities for the preparation of his defence;
>
> …
>
> (7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

Discussion

[30] The applicant is entitled to have a court superior to the one in which he was tried, review his conviction and sentence. He is also entitled to adequate facilities to argue his application. These facilities include a record of the proceedings in which he was tried and convicted.

[31] It is indeed correct that the transcript provided by the court did not include the evidence of Detective Sergeant Daley, Detective Corporal Sutherland and Dr Judith Mowatt. However, the evidence of these three witnesses was included in the certified copy of the notes of trial made by the learned judge (see the judge's notes at pages 52 - 69 and 95 (the evidence of Detective Sergeant Daley), 76 - 88 (the evidence of Detective Corporal Sutherland) and 89 - 91 (the evidence of Dr Judith Mowatt)).

[32] Mr Gittens maintained that the applicant suffered disadvantage due to the missing lines in the transcript at the time Constable Mattis was being cross-examined. We examined the transcript and the judge's notes in light of this complaint.

[33] On pages 184 - 186 of the transcript, we noted the following exchange during defence counsel's cross-examination of Constable Mattis:

"Q: Yes, until you left?

A: About 15 minutes.

Q: You were on the scene for about 15 minutes?

HIS LORDSHIP: In total?

A: Fifteen minutes and then Mr. Daley arrived, we were there for some time after that and then we left.

Q: I said in all, for this 15 minutes plus how long, in all?

A: 20 minutes

Q: About 20 minutes. So for about 20 minutes sir, you were on this scene?

A: From my arrival to leaving.

Q: I follow and thank you for answering m … during those 20 minutes you did no … to look around the crime … where Corporal Henry … or not there w … millime …

A: …

Q: …

A: …

Q: Di …

A: No, I did not go with him.

Q: Did you transport him, did you help to lift him to take him out of the lane?

A: I did not lift him, I was securing the weapons along with the bag.

Q: You were securing the weapons?

A: Along with the bag.

Q: And you were asking him questions. Isn't that so?

A: When he was lying on the ground I asked him three questions.

Q: Yes, sir, I am just trying to follow this thing. You were securing the weapons and you were asking him questions?

A: Yes, sir.

Q: And you were not the one who lifted him and took him to the vehicle?

A: No, I was not the one who lifted him out.

Q: And you were there for at least 20 minutes, is that your evidence?

A: On the scene?

Q: Yes, is that your evidence?

A: From arrival at the scene…

Q: Yes, sir.

A: … about 20 minutes. The time the accused man is about three to four minutes.

Q: I understand you, sir. Did you ask anyone else to look to see whether spent shells were there?

A: No, sir.

Q: Whilst you were there did any Scene of Crime unit come to that location, did you see a Scene of Crime unit come? Again it's either you did or did not see one come.

A: Can't recall. "

(Suspension points represent missing points of the cross-examination)

[34] The learned judge's notes covered that aspect of the cross-examination in the following manner on pages 48 - 49:

" · I was on the scene in all about 20 mins

· I did not look for spent shells

· Re preserving life was to get him to the hospital

· I did nto [sic] lift him I was securing bag and the weapons

· The time with the accd [sic] man was about 3-4 mins

· I din't [sic] ask anyone else to look to see if spent shells were there

· Can't recall if a SOC unit came."

[35] We note that this aspect of the cross-examination related to a time when the shooting had already ceased, and so was not critical to a determination of the applicant's involvement in the shooting incident or, as counsel for the Crown put it, "did not go to the gravamen of the case". Upon a comparative review of the transcript and the judge's notes, it is our view that the latter document adequately captured the area of cross-examination and there is no basis for any argument that the applicant was prejudiced by having to rely on the judge's notes for that aspect of the cross-examination. It is the same position in respect of the judge's notes that recorded the evidence of Detective Sergeant Daley, Detective Corporal Sutherland and Dr Mowatt.

[36] The circumstances in the case at bar differ considerably from those in **Evon Jack v R**. In that case, although the court requested the judge's notes of evidence of the proceedings at trial, they were never produced and the transcript of the evidence was also not available. All the court had was a transcript of the summation. This court concluded that the issues in the case required sight of the transcript of the evidence, and the accuracy of the judge's summation on certain important parts of the evidence could not be tested in the absence of the transcript or the judge's notes of evidence. The court quashed Mr Jack's conviction as redress for the breach of his rights to a copy of the record of his trial, the six-year delay before the record of the summation was produced as well

as the approximately eight-year delay before his application for leave to appeal was heard.

[37] In the case at bar, the applicant has been provided with the transcript and the judge's notes of evidence, which together, provided his counsel with adequate facilities to assess his application for leave to appeal.

[38] It should be recalled that section 12(3A) of the Gun Court Act provides:

> "Save as otherwise provided by rules of court or regulations under this Act, a High Court Division of the Court shall observe as nearly as may be the like process, practice and procedure as a Circuit Court, so, however, that, unless otherwise provided as aforesaid-
>
> **(a) the Judge shall take notes of the evidence and other proceedings taken before that Division;**
>
> **(b) such notes shall be sufficient record for all purposes of the proceedings taken before that Division;**
>
> (c) **such notes or a copy thereof certified by the Clerk of the Court** as being a true copy, and the documents received in evidence before the Judge, or copies thereof certified by the Clerk of the Court as being true copies, **shall be read and received as the evidence in the case by the Court of Appeal**, which may, nevertheless, if it thinks fit in any case, require the production of the original documents, or any of them, or of the original notes of evidence." (Emphasis supplied)

[39] The judge's notes are sufficient by themselves for use by this court on an appeal from a proceeding, such as the case at bar from the High Court Division of the Gun Court. It follows that there can be no proper challenge raised when such notes are utilized if the transcript of evidence taken by a court reporter is incomplete. In all the circumstances, we concluded that the applicant's right to a copy of the record of proceedings was not breached.

[40] In addition, the period of time over which the applicant's attorney-at-law received the notes of the learned judge, afforded the applicant and his attorney-at-law sufficient time for their review, and comparison with both the transcript of the evidence and the summation.

[41] As indicated earlier in this judgment, at the commencement of the hearing of the renewed application, Mr Gittens informed the court that, after discussions with his client, he would no longer be challenging the applicant's convictions. It seems to us that having received the notes of the learned judge, counsel and the applicant were put in a position to fully assess the likely success of a challenge to the applicant's conviction. Counsel's insistence, after a decision that he would not be challenging the applicant's convictions, that his client was prejudiced due to the inadequacy of the transcript and the judge's notes, was difficult to follow. Nevertheless, out of an abundance of caution, we examined the complaint, and, having done so, have concluded that it has no merit.

[42] Counsel also complained that he was not able to see the learned judge's sentencing remarks on pages 327 and 328 of the transcript, as those pages were missing from his copy of the record. The records that the members of the court and the office of the Director of Public Prosecutions ('ODPP') had, included these pages. The ODPP had promised to provide counsel with a copy of the pages missing from counsel's record. Unfortunately, counsel stated that even at the time of the hearing of the application, he had not received the promised "missing" pages. Again, we did not understand the basis on which counsel was pursuing this issue, in light of his decision to abandon any challenge to the sentences that were imposed and particularly that imposed for shooting with intent, on the basis that the sentences could not be regarded as manifestly excessive. We examined the issue nevertheless, since counsel insisted on pursuing this line of argument.

[43] At pages 327 - 328 of the transcript, which are a part of the judge's sentencing remarks, the learned judge noted the ammunition found in the applicant's bag along with the ski mask and other paraphernalia that did not suggest innocent activity; the fact that he fired at the police; that firearms and firearm offences are very prevalent in our society;

and that legislation mandates a minimum sentence of 15 years. The learned judge indicated that he was not taking into account the applicant's prior conviction and deportation from the United States and so treated the applicant as having no previous conviction. The learned judge, however, took into account the fact that the applicant had two children residing in the United States, who relied on him for support, that the applicant was gainfully employed, suffered an injury in the incident, was still a young man and appeared open to rehabilitation. The learned judge also noted that the applicant was in custody for approximately one year and four months. It was after taking all these and other matters into account that the learned judge sentenced the applicant to 18 years for the offence of shooting with intent.

[44] In **Deryck Azan v R** [2020] JMCA Crim 27, at para. [43], the court considered that an appropriate sentence range for the offence of shooting with intent in circumstances where the statutory minimum is applicable, is 15 - 20 years' imprisonment at hard labour. The sentence imposed on the applicant was well within this range, bearing in mind that he fired shots at a uniformed police officer. Mr Gittens was, therefore, correct in his assessment that the sentence imposed was not manifestly excessive.

[45] In **Jerome Dixon v R** [2022] JMCA Crim 2, the court concluded that, although the applicant's right to the record of proceedings relevant to a hearing in chambers, was technically breached due to his failure to receive this portion of the record, this did not adversely affect the applicant in the conduct of his trial or in the conduct of his appeal.

[46] Similarly, in the case at bar, we did not see any basis on which to find that the applicant was prejudiced as a result of the missing pages in the sentencing remarks in counsel's record.

[47] In all the circumstances, we conclude that while the applicant did not receive the transcript and the notes of the learned judge in a timely manner, upon receipt of the documents, he was afforded adequate time and facilities for the preparation and conduct of his application. Grounds 5, 8, 9, 10, 12 and 13 therefore fail.

[48] This led to a consideration of the issue of delay.

Issue 2 - (Grounds 6, 7 and 11)

2(a) - Whether the applicant's right to a hearing within a reasonable time has been breached; and

2(b) - If yes, what is the appropriate redress for the breach?

Submissions

The applicant's submissions

[49] Mr Gittens submitted that the applicant's right to the hearing of the application for leave to appeal within a reasonable time was breached in light of the over eight years and 10 months that elapsed before the transcript was provided to this court and the applicant's counsel. He urged that because of the delay, the applicant was denied due process and should be granted redress for every stage at which the applicant's case was impacted by the delay, including the ruling of the single judge and, thereafter, the hearing of the renewal of the application for leave to appeal.

[50] Counsel submitted that the court should take into account the applicant's personal circumstances that were outlined in his affidavit. On the point as to the appropriate remedy for the breach of the applicant's rights, counsel stated that he fully appreciated the issues discussed in **Melanie Tapper v DPP** [2012] UKPC 26 and the parameters by which this court is constrained. In all the circumstances, he submitted that a reduction in the applicant's sentence would be the most appropriate remedy. Noting that the applicant has already served nine years of his sentence, counsel suggested that a reduction of the applicant's sentence by three years would be appropriate. If this were done, it would mean that the applicant would complete two-thirds of his sentence very soon and would be eligible for parole contingent on his good behaviour.

[51] Mr Gittens relied on a number of cases in support of his submissions including: **Jerome Dixon v R**, **Oraine Ellis v R** [2022] JMCA Crim 8, **Kemar Effs v R** [2022] JMCA Crim 9 and **Cornelius Robinson v R** [2022] JMCA Crim 16.

The respondent's submissions

[52] Counsel for the Crown conceded that due to the delay in the provision of the judge's notes and the transcript, the applicant's right to a hearing within a reasonable time had been breached and it was appropriate for the court to provide a remedy.

[53] Mrs Johnson Spence submitted that there was no purpose in separating the different periods of delay as counsel for the applicant did, because it was one continuous period of delay. Counsel relied on **Jahvid Absolam et al v R** [2022] JMCA Crim 50, **Techla Simpson v R** [2019] JMCA Crim 37, **Andra Grant v R** [2021] JMCA Crim 49, **Curtis Grey v R** [2019] JMCA Crim 6 and **Tussan Whyne v R** [2022] JMCA Crim 42 and submitted that a two-year reduction in the applicant's sentence would be an appropriate remedy for the breach of his right to a fair hearing within a reasonable time.

The applicant's response

[54] Mr Gittens, in response, submitted that **Absolam et al v R** can be distinguished on the basis that the breach of the applicant's rights in the case at bar is more egregious.

[55] He urged that, in the instant case, there is a multiplicity of constitutional breaches coupled with the incompleteness of the transcript. The latter issue, he submitted, did not arise in **Absolam et al v R**.

Discussion

[56] The applicant has a guaranteed constitutional right to have his application heard within a reasonable time (see section 16(1) of the Constitution).

[57] It is unfortunate that in recent times this court has had to examine and rule on a number of cases in which there has been significant delay in the provision of transcripts, which has, in turn, resulted in a delay in the hearing of a number of applications and appeals. Where the delay in the hearing of an appeal or application is caused by the late provision of the record or notes of proceedings, there is no question that this is no fault of the appellant or applicant.

[58] In **Allan Cole v R** [2010] JMCA Crim 67, Harrison JA stated that the reasonable time guarantee regarding appellate proceedings is to avoid a convicted person remaining too long in a state of uncertainty about his fate (see para. [73]). In the case at bar the applicant has, not surprisingly, deponed to his anxiety concerning the progress of his application.

[59] As this court reiterated in **Absolam et al v R** at para. [82]:

> "Section 16(1) of the Constitution … stipulates a right to a fair hearing within a reasonable time, by an independent and impartial court … [A] remedy should be given where the state must have caused an unreasonable delay. Where there is a breach of the right to a fair hearing within a reasonable time the court may grant a reduction in sentence as one of the remedies for the breach."

[60] In **Evon Jack v R**, Brooks P, after reviewing a number of authorities on the issue, including **Melanie Tapper v DPP** and **Attorney General's Reference No 2 of 2001** [2003] UKHL 68, indicated that redress for the breach of an applicant's right to the hearing of his appeal within a reasonable time may take a number of forms ranging from a public acknowledgment of the breach, reduction of sentence or a quashing of a conviction. However, the latter remedy would not be a normal remedy for a long, even extreme case of delay in hearing an appeal (see paras. [44] and [45]).

[61] **Absolam et al v R** on which the respondent relies, is very helpful (see paras. [81] – [84]). In that matter Brooks P noted that in **Techla Simpson v R** there was a delay of eight years before Mr Simpson's case went on for trial and he was granted a reduction of two years from his sentence for that breach of the constitutional right to a fair trial within a reasonable time.

[62] In **Absolam et al v R**, the applicants were each sentenced to serve 15 years' imprisonment for illegal possession of firearm, 20 years' imprisonment for robbery offences and five years' imprisonment for simple larceny. Brooks P noted that there was a seven-year delay before the transcript of the trial in that case was produced, and no

part of that delay could be attributed to the appellants. By the time that appeal came on for hearing, eight years had elapsed since the appeals were filed. The court determined that two years' reduction in the appellants' sentences was appropriate as constitutional redress for the breach of their rights to a hearing within a reasonable time.

[63] It is important to recognize that in each case, the court exercises a discretion in determining the appropriate redress in the particular circumstances. In **Anthony Russell v R** [2018] JMCA Crim 9, the applicant was convicted for murdering two persons and was sentenced to life imprisonment on each count, to serve 25 years before he was eligible for parole. At the hearing of his application for leave to appeal, counsel referred to the three years that the applicant spent in custody from the time of his arrest until trial and six years that passed between his conviction and the hearing of the application. The court stated that the applicant had every right to complain about the length of time that it took for his trial to be completed and for his appeal to be determined. The court acknowledged that a delay of four years awaiting the transcript of the trial was due to the fault of the State. The court, however, while giving the applicant credit for the time spent in custody pending his trial, declined to reduce the applicant's sentence as redress for the delay (see paras. [102], [105] - [111]).

[64] On the other hand, in **Andra Grant v R** the applicant was convicted and sentenced to serve 10 years' imprisonment at hard labour in 2017; and due to the delay in the acquisition of the transcript of his trial, his appeal came up for hearing four years later in 2021. The court granted a one-year reduction in the applicant's sentence (see paras. [72] - [73]).

[65] In **Jerome Dixon v R**, there was a 10-year delay between the applicant's conviction and the hearing of the appeal. The court noted that the period of delay was not attributable to the applicant in any respect. The court stated that in light of the egregious breach of the applicant's right to be heard within a reasonable time, an appropriate remedy was required. The applicant had been sentenced to 15 years' imprisonment at hard labour for wounding with intent and had spent 10 years imprisoned.

This was equivalent to his having reached his earliest available release date. The court decided that the full period that he served between his conviction and the disposition of the appeal should count towards his sentence and he should not be subjected to any further term of imprisonment (see paras. [254], [288] - [291]).

[66] In **Tussan Whyne v R**, the appellant was convicted of murder and sentenced to life imprisonment with a pre-parole eligibility period of 20 years. The applicant complained that the delay of eight years between when he was charged on 31 October 2007 and tried in July and September 2015 was a breach of his right to a trial within a reasonable time. The court examined the main causes of the delay, concluded that it was equally contributed to by both parties and determined that the appellant's right was breached to the extent of the State's culpability. The court found that the appropriate remedy for the breach of the appellant's right was a one-year reduction in the period that the appellant was to serve before he would be eligible for parole (see paras. [2], [86] and [91]).

[67] In **Curtis Grey v R**, the appellant was tried and convicted on seven counts for varying offences. However, the count for which the court was asked to concern itself in the appeal was robbery with aggravation for which the sentence imposed was 15 years' imprisonment. One of the grounds of appeal pursued concerned the four-year delay before the trial took place and six years that elapsed before the appeal was heard due to the unavailability of the transcript. The court reduced the appellant's sentence by one year as redress for the breach of the appellant's right to a trial within a reasonable time (see paras. [23] - [25]).

[68] Turning to the case at bar, we agree with the submissions made by counsel for the Crown, that the circumstances of the instant case require us to consider one continuous period of delay, and it is not necessary to separate the period of delay before the single judge made a ruling, from the period of delay before the renewal of the application before the court. The applicant applied for leave to appeal on 27 May 2013 and the transcript first came to the court on 26 April 2022. The transcript was incomplete, and the applicant received a draft and, later, a certified copy of the notes of the learned

judge on 18 and 30 November 2022 respectively. In all, the delay between the applicant's conviction and the provision of the complete record is a little over nine years, half of his 18-year sentence for shooting with intent. This is a clear breach of the applicant's right to a hearing within a reasonable time. Grounds 6, 7 and 11 therefore succeed.

[69] Before proceeding, a few comments on the applicant's affidavit are necessary. Apart from the applicant's concern about the progress (or lack thereof) of his application, the matters in his affidavit appear to have been included with a view to persuading this court to facilitate his departure from prison at the earliest possible time. They were not linked to any specific grounds of appeal.

[70] Having considered the circumstances in this case and the authorities on the issue of delay, we concluded that an appropriate redress for the breach of the applicant's right to a hearing within a reasonable time, is a reduction in the sentence imposed. We agree with the submission of counsel for the Crown that in the instant case, a reduction of two years in the applicant's sentence for shooting with intent is appropriate redress for the breach of his constitutional right to a fair hearing within a reasonable time.

[71] The orders of the court are therefore:

> (1) The application for leave to appeal against the convictions is dismissed.
>
> (2) The application for leave to appeal against the sentence of 18 years' imprisonment at hard labour imposed for the offence of shooting with intent is granted and the hearing of the application is treated as the hearing of the appeal.
>
> (3) The appeal against sentence is allowed.
>
> (4) As redress for the breach of the applicant's right to a hearing of his application for leave to appeal within a

reasonable time, the sentence of 18 years at hard labour is set aside, and substituted therefor is a sentence of 16 years' imprisonment at hard labour. The sentence is to be reckoned as having commenced on 21 May 2013, the date on which it was originally imposed.