[2021] JMCA Crim 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 102/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

RANDEANO ALLEN v R

Miss Audrey Clarke for the applicant

Joel Brown and Miss Devine White for the Crown

10, 12, 16, 26 October 2018 and 19 February 2021

F WILLIAMS JA

Introduction

[1] This applicant is renewing before us his application for leave to appeal against conviction for the offences of robbery with aggravation (two counts), shooting with intent, and illegal possession of firearm. He was convicted in the Gun Court for the parish of Saint Elizabeth, after a trial by a judge sitting alone between 29 August and 4 September 2012. On 12 December 2014, he was granted by a single judge of appeal, permission to appeal only his sentences, imposed on 25 September 2012, of 20 years' imprisonment imposed across the board for all the offences, the said sentences to run concurrently. Thus, he also comes before us as an appellant in relation to the sentences imposed.

Summary of the Crown's case at trial

[2] It was the Crown's case that on Thursday, 22 March 2012, around 9:00 pm, the appellant was among a group of men who, armed with guns, robbed a service station at Pedro Cross, in the parish of Saint Elizabeth. The two counts of robbery with aggravation arose from (i) the robbery from Mr Everton Bryan of the sum of $20,000.00; and (ii) the robbery of the sum of $105,000.00 from Ms Rena Powell, both employees of the service station. The count in respect of shooting with intent arose from the Crown's contention that the appellant opened gunfire at Mr Sylvester Thaxter, who worked at the service station as a security guard.

[3] Mr Thaxter gave evidence that he had known the appellant before and recognized him on the night in question. Mr Thaxter was the sole eyewitness at the trial and the only person who identified the appellant as one of the robbers that night. Evidence was also given by Deputy Superintendent of Police (DSP) Lanford Salmon, who testified to speaking on the telephone with the appellant, among other times, on 24 March 2012 concerning information as to his alleged involvement in the robbery; and that, despite several promises, the appellant failed to meet with him to discuss the matter and to show that he had not received a gunshot wound in the incident, contrary to information that had reached DSP Salmon. Additionally, DSP Salmon testified to having had a conversation with the appellant, during the course of which the appellant made what is tantamount to an admission to his involvement in the commission of the offences, saying, inter alia:

> "Big man ting, mi carry some youth on a work on Thursday night. It didn't gwaan good, so mi drive weh lef' dem."

[4] Evidence was also led as to contradictory explanations given by the appellant for the cause of an injury to his leg. Detective Corporal Garnett Smith testified that the appellant told him that he had been injured by a spear accidentally fired from a fish gun; whereas Detective Inspector Noel Laing testified that the appellant told him, as he was taking him into custody on 3 April 2012, that he had been shot by bad men in Saint Elizabeth.

Summary of the defence

[5] The appellant gave sworn testimony. His defence, in essence, was one of alibi. He contended that he was at home with his mother, daughter, his daughter's mother and his cousin at the time of the incident. His mother gave evidence as his alibi witness.

[6] In his evidence, apart from advancing the alibi, the appellant made other points, which may be summarized thus: (i) he was not involved in the (or any other) robbery; (ii) the scars on his left leg, near to his knee did not come about as a result of a healed gunshot wound; but had been caused by the spear of a fish gun, accidentally fired by his friend when they were journeying by boat to the Pedro Keys; (iii) he went to the Pedro Keys on 23 March 2012, around 3:00 am and returned on 30 March 2012, which is why he missed his court date on 26 March. (That was his first visit to those keys and he went there not knowing when the persons he went with were returning); (iv) he was not any of the persons seen on the video shown in court; (v) he did not know Mr Thaxter before the incident and never worked at the places at which Mr Thaxter said he had worked; (vi) he did not have the telephone conversations that DSP Salmon said that he had had

with him; (vii) he did not tell Det Inspector Laing that he had been shot by gunmen; and (viii) he did not say anything at all to Det Cpl Smith about the wound or scars to his leg.

Grounds of appeal

[7] The appellant, through his attorney-at-law, set out in his supplemental grounds of appeal, filed 3 October 2018, which he was given leave to argue, the following grounds of appeal:

> "(i) The Applicant complains that he did not benefit from a fair trial and further he perceives that the learned judge was preconceived about his guilt before the matter was tried by him.
>
> (ii) The Learned Judge, prior to the trial date had made certain unfavourable utterances about the Applicant at a time prior to the trial of the matter and at the hearing of an application for bail made on behalf of the Applicant by counsel.
>
> (iii) The evidence in respect of the visual identification of the Applicant was equivocal and tenuous neither did any of the purported images of the Applicant which were admitted into evidence from the video reel brought from the scene, positively show/identify the face of the Appellant. The quality of the evidence of identification of the Applicant was poor and the attendant dock identification in the circumstances further contributed to the weakness of the case.
>
> (iv) The Learned Judge erred in accepting as 'exceptionally good' the quality of identification as given in the evidence of the sole witness who claimed to have identified and known the Applicant, because the circumstances in which he indicated that he knew the Appellant were difficult, inconclusive/equivocal.
>
> (v) The perception by the Applicant was [sic] of unfairness in the trial by the Learned Judge was further compounded by his excessive intervention during the questioning of the Applicant and his witness particularly during cross-examination of each by the prosecution.

(vi) The degree to which the Learned Judge descended into the arena and involved himself in the case was too high in the circumstances.

(vii) In the absence of any clear image of the face of the Applicant on the tape presented in evidence, [the] learned judge erred in his treatment of the image of the bent 'bow leg' of the person seen on the tape.

(viii) The mention of the previous charge of murder against the Applicant contributed to his not benefitting from a fair trial.

(ix) The learned judge erred in accepting the evidence of the witness in respect of the Applicant having been seen with a gunshot injury (in the absence of any medical/expert evidence to this effect.

(x) The sentence imposed on the Applicant was manifestly excessive and reflected the preconceived position of the learned judge, in respect of the guilt and reputation/character of the Accused."

Issues

[8] From these various grounds of appeal, five core issues (encompassing the various overlapping grounds) arise. They are:

(i) Whether the appellant was denied a fair trial in being tried by a judge who had made unfavourable pre-trial comments, reflecting a preconception about the guilt of the appellant. (Grounds (i) and (ii))

(ii) Whether the identification evidence, including that provided by the video recording, which was one of the exhibits

in the case, was sufficient to ground a safe conviction. (Grounds (iii), (iv) and (vii))

(iii) Whether the learned judge "descended into the arena" and excessively intervened in the leading of evidence, resulting in an unfair trial. (Grounds (v) and (vi))

(iv) Whether the mention of a charge of murder during the trial or the accepting of the evidence of scars from an injury, without medical evidence, or any other factor operated to render the trial unfair. (Grounds (viii) and (ix))

(v) Whether the sentences imposed were manifestly excessive. (Ground (x))

Issue 1: pre-trial comments

Summary of submissions

For the appellant

[9] The complaint that was made here on behalf of the appellant is that, during the course of a bail application on 21 June 2012, the learned trial judge had expressed disbelief at the appellant's explanation for missing his court date on 26 March 2020, as being due to the fact that he had gone to the Pedro Keys.

[10] The following (recorded at page 1 of the appellant's skeleton arguments) is said to be the exchange that formed the basis of the complaint:

"His Lordship: Almost every other week I go to Pedro Cays, you never go to any Pedro Cays, that's a lie.
The Accused: I was at Pedro Cays
His Lordship: The first time I went there I had to get permission to enter…You are a liar."

[11] This led to the complaint being made that these remarks were indicative of bias, disqualifying the learned trial judge from presiding at the trial and making the trial unfair, he having presided over it. The trial took place between 29 August 2012 and 4 September 2012.

For the Crown

[12] The Crown relied on an affidavit of Sophia Thomas, deposing as an Assistant Director of Public Prosecutions in the Office of the Director of Public Prosecutions, sworn to and filed on 9 October 2018. In that affidavit, Ms Thomas spoke to, among other things, the outcome of a bail application which she said was made on 12 July 2012, which was that the appellant was granted bail.

[13] Against this background, the Crown took the position that there could have been no bias on the part of the learned trial judge, who ultimately made an order that was in favour of the appellant, before the trial began.

[14] The Crown further submitted that there was otherwise no basis on which the appellant's contention of unfair conduct on the part of the learned trial judge could fairly be made out.

Discussion

[15] It should be noted at the outset that Ms Thomas' assertion in her affidavit, that the appellant had been granted bail in the matter, has not been challenged. We, therefore, accept that result as true.

[16] What is of at least equal significance as well is the fact that, contrary to expressing a doubt about the appellant's assertion that he had travelled to the Pedro Keys, the learned trial judge, in the course of his summation, accepted that explanation. This can be seen in the following excerpt from the transcript, to be found at page 467, lines 9 to 21:

> "I find that he was hiding from the police and went to the Pedro Keys. I reject when he said he was shot by a speargun and was shot by Mr. Thaxter and it's not by coincidence that he went away the early morning of the 23rd of March, the incident having happened less than three hours ago or three to four hours ago and that the Parroty [sic] beach is within that vicinity there of Pedro Cross. I find that when he was on the Pedro Keys, the reason why he did not seek medical assistance was that he didn't want to go into the arms of the police." (Emphasis added)

[17] In our view, the Crown is correct in its submission that no evidence of bias has been presented. It cannot be reasonably contended that, in a bail application, as in a trial, a judge is not permitted to test contentions, explanations and arguments put forward by either the Crown or the defendant; and to express a view on any of these. It seems to us that that was all the learned trial judge can be seen to have done in this case, based on the material put before us. The transcript also shows that, even if the learned trial judge had entertained a doubt about the appellant's explanation at that

stage, that did not later on prevent him from giving to the appellant what he felt justice demanded - that is, the grant of bail. Further still, the trial judge accepted the explanation of the trip to the Pedro Keys, although rejecting the appellant's defence and accepting the Crown's case against him, resulting in a conviction. An additional consideration is that defence counsel who appeared at the hearing of the bail application where the words complained of were spoken, was the same one who conducted the trial and no application for recusal was made or objection taken to the learned trial judge's presiding over the trial.

[18] It is apparent from the foregoing that the appellant's appeal on this issue has not been made out.

Issue two: the identification evidence, including the video evidence

Summary of submissions

For the appellant

[19] The appellant's contention in respect of the identification evidence may be summarized as follows: (i) the purported recognition was made under difficult circumstances, with inadequate opportunity for a proper identification; (ii) evidence as to prior knowledge of the appellant by the sole purported eyewitness was expressly contradicted by the appellant, putting the Crown's evidence in this regard in doubt; (iii) the appellant is not identified in the video evidence presented; and (iv) the learned trial judge erred in using the video evidence as a basis for comparison with the appellant as he appeared in court, referring to what he said was the appellant's having obvious bow legs. In summary, the submission in respect of the video evidence is that, when the video

evidence "is juxtaposed against the totality of evidence of the identifying witness, it confirms the absence of cogency" (page 3 of the appellant's supplemental skeleton arguments).

For the Crown

[20] The Crown's contention in relation to the identification evidence, similarly summarized, is as follows: (i) during the course of the robbery, there was enough opportunity for the main witness, Mr Thaxter, to have recognized the appellant; (ii) the learned trial judge assessed and accepted the evidence of Mr Thaxter, whom he found to be a credible witness; and (iii) the learned trial judge's reference to bow legs was separate from and came after he had already made findings accepting Mr Thaxter's evidence.

Discussion

[21] There were three instances of purported identification as found by the learned trial judge: (i) the first, when the person Mr Thaxter said was the appellant entered the mini mart or store that formed a part of the service station and fired a shot; (ii) when Mr Thaxter was retreating down an aisle in the store; and (iii) when Mr Thaxter crouched by the door and fired at the men including the man he said was the appellant. The Crown quite frankly conceded that, when the video is viewed, there is no visual support for the second instance of purported identification. Having seen the video ourselves, we entertain no doubt that this concession was properly made.

[22] In relation to the first purported identification, however, a review of the video evidence makes it just as apparent that there was sufficient opportunity for Mr Thaxter to have recognized or otherwise identified the person he said was the appellant. There was a period of some two or so seconds for him to have done so, which, in our view, was sufficient. In coming to this conclusion, we have accepted dicta in cases cited by the Crown, such as **Separue Lee v R** [2014] JMCA Crim 12, in which this court upheld a conviction based solely on a recognition made in a viewing time of two seconds. The recognition was made by a child who was 13 years of age at the time of the incident and about a year older at the time of trial. It was made in respect of someone whom the witness had known for only some two and a half months before the incident, and in respect of whom there was no other evidence led as to prior knowledge. We have considered as well the dicta in **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered on 26 February 1996, to the effect that the time that is required for making a reliable recognition need not be as long as in a case in which an identification is being made of a defendant who was not previously known to the witness. We accept and rely as well on the dicta of this court in the case of **Raymond Hunter v R** [2011] JMCA Crim 20, in which Morrison JA (as he then was) at paragraph [30], observed that:

> "…police officers, who, though subject to the same rules as lay witnesses, were 'likely to have a greater appreciation of the importance of identification' (**R v Ramsden**, page 296)."

[23] The evidence brought out in the cross-examination of Det Cpl Smith (see page 180, line 10 to page 181, line 3 of the transcript) was that Mr Thaxter had been a member of the Jamaica Constabulary Force in the rank of Corporal at the time of the incident, though he was no longer serving when he gave evidence.

[24] With respect to the third purported sighting by Mr Thaxter, the video does not appear to specifically confirm or disprove his evidence of having had another opportunity of recognizing the person he said was the appellant. In those circumstances, at the trial, the learned trial judge was left with Mr Thaxter's *viva voce* evidence, which, having given himself the appropriate warnings, the learned trial judge was free to accept or reject. He chose to accept Mr Thaxter's evidence in this regard. In doing so, he cannot be faulted.

[25] In any event, even if there had been no other opportunity of viewing the person Mr Thaxter said was the appellant, the first sighting, by itself, based on our review of the video exhibit, would have been sufficient to ground the conviction. It seems to us as well that Mr Thaxter would have been better placed to have observed the person he testified was the appellant, than might be shown on the video footage, as the cameras appear to have been positioned above the height of the persons in the store, whilst Mr Thaxter would have been able to view the assailant at eye level.

[26] Some of the evidence in relation to the first sighting by Mr Thaxter is captured at page 223, lines 15 to 224, line 2 as follows, as the video recording was being viewed in court:

> "Q And this is where you told us, yesterday, that you saw the

accused?
A That's when I saw 'Deano'.
HIS LORDSHIP: And when you looked around, who you saw?
WITNESS: I saw 'Deano', sir.
Q And you said you can see his face?
A Yes, ma'am. I could see his face.
HIS LORDSHIP: How far were you from him at that time?
WITNESS: No more than probably two feet – three feet most, sir."

[27] Against this background, there was sufficient evidence of identification, considered in the light of the **Turnbull** warning which the learned trial judge gave himself (vide page 421, line 14 to page 423, line 9), to render unsustainable the complaint that the quality of the identification evidence was poor.

Evidence of prior knowledge

[28] Mr Thaxter, in his testimony at the trial, stated that, shortly after the incident, he had given the police the appellant's full name; not an alias or only one of his names. He also testified to prior knowledge of the appellant and as to places where he had seen the appellant before. All these were, not unnaturally, denied by the appellant. We say "not unnaturally" because, outside of a criminal matter spared a full-length trial by a plea of guilty, it is to be expected, whether a defendant is eventually found guilty or acquitted, that a defendant will join issue with every material particular in the prosecution's case. Where issue has been joined, it then falls for the tribunal of fact to sift through the competing contentions, assertions and denials, separate "grain" from "chaff" and find where, in its view, the truth really lies. In the instant case, the learned trial judge, being the trier of fact as well as of law (this having been a judge-alone trial) considered the competing accounts, rejected the appellant's evidence, found Mr Thaxter to be a witness

of truth, and, in those circumstances, the appellant's conviction on the various counts inevitably followed.

[29] Contrary to the assertions made on behalf of the appellant, we do not agree that the prosecution's case, by virtue of the several challenges by the appellant, lacked cogency. We are also unable to find any error on the part of the learned trial judge in respect of the handling of the identification evidence to warrant an overturning of the convictions.

[30] In the case of **Irvin Goldson and Devon McGlashan v The Queen (Jamaica)** [2000] UKPC 9, Lord Hoffman, delivering the Board's advice, made the following observation at paragraph 13 of the decision:

> "13. There is no dispute that if an identifying witness has not made a previous identification of the accused, a dock identification is unsatisfactory and ought not to be allowed. Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade. On the other hand, Mr. Thornton accepts that if the accused is well known to the witness, an identification parade is unnecessary and could, for the reasons already given, be positively misleading. In the present case, however, the question of whether the identification fell into the one class or the other was itself a question in dispute. Mr. Thornton says, rightly, that an identification parade would have helped to resolve this dispute. It does not however follow that the absence of a parade has resulted in a serious failure of justice so as to require the intervention of the Privy Council.
>
> 14. The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard

> against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of Claudette Bernard's assertion that she knew the accused. It is of course true that even if her evidence about knowing them had been truthful, she might still have been mistaken in identifying them as the gunmen. But, as Lord Devlin remarked in his *Report to the Secretary of State for the Home Department of the Departmental Committee on Evidence of Identification in Criminal Cases* (26th April 1976) (at page 99 para. 4.96), that is 'not a claim that could be tested by a parade'."(Emphasis added)

[31] Similar to the case of **Goldson and McGlashan v R**, in the instant case, it is difficult to see the purpose that an identification parade would have served. The main witness, Mr Thaxter, gave a statement indicating the full name of the appellant. He also testified about this, although there was a point in his cross-examination when he seemed to admit of the possibility that he had been reminded by someone of the appellant's last name. However, that was denied by Det Cpl Smith at pages 181 to 182 of the transcript. The appellant put forward an alibi and denied working at the places at which Mr Thaxter testified to having seen him. Against this background, the issue became one of credibility – a matter to be resolved by the tribunal of fact. Also, it is not without significance that Det Cpl Smith said that, based on the information received from Mr Thaxter, the police went to the appellant's home that very morning (23 March 2012) (see page 170, line 19 to page 171, line 2). In these circumstances, we fail to see how an identification parade would have served a useful purpose. In the case of **Mark France and Rupert Vassell v R** [2012] UKPC 28, Lord Kerr observed as follows at paragraph 28 of the judgment:

> "28. It is now well settled that an identification parade should be held where it would serve a useful purpose – **R v Popat**

> [1998] 2 Cr App R 208, per Hobhouse LJ at 215 and endorsed by Lord Hoffmann giving the judgment of the Board in **Goldson and McGlashan v The Queen** (2000) 56 WIR 444. In **John v State of Trinidad and Tobago** [2009] UKPC 12, 75 WIR 429 addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice – see Goldson at (2000) 56 WIR 444, 450."

[32] Lord Kerr also noted, at paragraph 34 of the judgment, the difference between a dock identification in the true sense and a pointing out of a defendant in the dock whom a witness has previously identified. He said:

> "…Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time, 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock'."

[33] It is our view that it has not been demonstrated by the appellant that, in the facts and circumstances of this case, an identification parade would have served a useful

purpose. It would only have been to test the assertion that Mr Thaxter knew the appellant. Neither is it the case that this was a dock identification in the true sense.

[34] The appellant, therefore, also fails on this issue.

Comparing the person in court with the person in the video

[35] In his summation, the learned trial judge made the following comment (to be found at page 466, line 22, to page 467, line 3 of the transcript:

> "As the trier of facts in this case, I've viewed the tape and find that the person in the tape armed with a gun – or discharging a gun, is this accused man before the court. I view him when he was walking into the box with a bent 'bow legs' and I'm satisfied that it is the one and the same person in the tape."

[36] The complaint here was that there was no basis for the comparison and that this act on the part of the learned trial judge was impermissible.

[37] On the other hand, the Crown argued that previous authorities established that a trial judge was entitled to do the very thing that the learned trial judge did in this case and so he did not err. The Crown relied on **Lynden Levy et al v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 152, 155, 156, 157 and 158/1999, judgment delivered 16 May 2002. It cited this case as a basis for submitting that a judge is permitted to refer to and rely on a recording that is in evidence. The learned trial was "within the bounds of the law", it was submitted, in comparing the way the accused man walked and appeared as seen in court, with what was seen in the video.

Discussion

[38] We find to be apposite in addressing this issue, the quotation relied on by this court in the **Lynden Levy v R** judgment, taken from the case of **R v Alexander Nikolovski** [1996] 3 SCR 1197 as follows:

> "28 Once it is established that a videotape has not been altered or changed, and that it depicts the scene of a crime, then it becomes admissible and relevant evidence. Not only is the tape (or photograph) real evidence in the sense that that term has been used in earlier cases, but it is to a certain extent, testimonial evidence as well. It can and should be used by a trier of fact in determining whether a crime has been committed and whether the accused before the court committed the crime. It may indeed be a silent, trustworthy, unemotional, unbiased and accurate witness who has complete and instant recall of events. It may provide such strong and convincing evidence that of itself it will demonstrate clearly either the innocence or guilt of the accused."

[39] The following other significant observations were made in the same case by Cory J, who delivered the judgment of the majority (paragraphs 20 to 23):

> "20 It cannot be forgotten that a robbery can be a terrifyingly traumatic event for the victim and witnesses. Not every witness can have the fictional James Bond's cool and unflinching ability to act and observe in the face of flying bullets and flashing knives. Even Bond might have difficulty accurately describing his would be assassin. He certainly might earnestly desire his attacker's conviction and be biased in that direction.
>
> 21 The video camera on the other hand is never subject to stress. Through tumultuous events it continues to record accurately and dispassionately all that comes before it. Although silent, it remains a constant, unbiased witness with instant and total recall of all that it observed. The trier of fact may review the evidence of this silent witness as often

as desired. The tape may be stopped and studied at a critical juncture.

22 So long as the videotape is of good quality and gives a clear picture of events and the perpetrator, it may provide the best evidence of the identity of the perpetrator. It is relevant and admissible evidence that can by itself be cogent and convincing evidence on the issue of identity. Indeed, it may be the only evidence available. For example, in the course of a robbery, every eyewitness may be killed yet the video camera will steadfastly continue to impassively record the robbery and the actions of the robbers. Should a trier of fact be denied the use of the videotape because there is no intermediary in the form of a human witness to make some identification of the accused? Such a conclusion would be contrary to common sense and a totally unacceptable result. It would deny the trier of fact the use of clear, accurate and convincing evidence readily available by modern technology. The powerful and probative record provided by the videotape should not be excluded when it can provide such valuable assistance in the search for truth. In the course of their deliberations, triers of fact will make their assessment of the weight that should be accorded the evidence of the videotape just as they assess the weight of the evidence given by *viva voce* testimony.

23 It is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime. It is clear that a trier of fact may, despite all the potential frailties, find an accused guilty beyond a reasonable doubt on the basis of the testimony of a single eyewitness. It follows that the same result may be reached with even greater certainty upon the basis of good quality video evidence. Surely, if a jury had only the videotape and the accused before them, they would be at liberty to find that the accused they see in the box was the person shown in the videotape at the scene of the crime committing the offence. If an appellate court, upon a review of the tape, is satisfied that it is of sufficient clarity and quality that it would be reasonable for the trier of fact to identify the accused as the person in the tape beyond any reasonable doubt then that decision should not be disturbed. Similarly, a judge sitting

> alone can identify the accused as the person depicted in the videotape."

[40] In our view, these paragraphs make unmistakably clear the fact that the learned trial judge was entirely within his right to have proceeded as he did – by comparing one of the persons seen in the video with the appellant who appeared before him. It is to be remembered as well that the video evidence did not stand alone; but was added to supplement the testimony of Mr Thaxter, which the learned trial judge accepted. The judgment of the Supreme Court of Canada in **R v Nikolovski**, with its review of the approach of other courts in other jurisdictions in dealing with this issue, demonstrates that Canada is not alone in its approach; but that the same approach is taken in the United States of America and the United Kingdom for which approach there is "strong support".

[41] A reading of the transcript suggests that the legal position was not lost on the learned trial judge, who, at page 424, line 11 to page 425, line 2 of the transcript addressed the legal position in relation to video evidence as follows:

> "Video recording is acceptable as evidence of identification once it's established or that the Court is satisfied that no alteration was made to the footage. And the expert testified that it was in good working condition. I must remind myself that video tapes could be used and have been used to establish innocence as also guilt, once it proves that the tape was not altered in any way or that the sole eye-witness testified to the accuracy of the events of the tape. A video camera records accurately all that it perceives and it is precisely because video tape evidence can present such clear and convincing evidence of identification that Trial Judges or triers of facts can use it as the sole basis for the identification of an accused before them, as the perpetrator of the crime."

[42] It is clear, therefore, that the appellant has also failed on this issue.

Issue three: whether the learned trial judge descended into the arena

Summary of submissions

For the appellant

[43] The substance of the appellant's complaint in respect of this issue may be seen in his written submissions filed 13 October 2018. In paragraph 2 of page 2 of the said submissions, it is said that:

> "During the actual trial of the matter, the Learned Judge asked an excessive amount of questions and often interjected when the case for the prosecution (particularly when the eye witness was being examined in chief) was proceeding, as well as during the testimony of the Appellant and the witness for the Appellant."

[44] It was contended that the learned trial judge's "participation is particularly excessive", and reference was made to several parts of the transcript in an effort to support the contention. One such excerpt may be found at pages 97 to 102 of the transcript. The interventions, it was submitted, "could be interpreted as interfering with the right of the Accused man to a fair trial".

For the Crown

[45] On the Crown's behalf, it was argued that, although at some points the learned trial judge's interruptions might be viewed as excessive, those interruptions did not hinder the presentation of the defence or prevent the appellant or his witness from telling the appellant's story in his own way. It was further submitted, *inter alia*, that the interruptions did not tip the scales of justice, reaching the point of descending into the arena; and

were done mainly in an effort for the judge to get an accurate note and to clear up obscure points. In support of its arguments and submissions, the Crown referred to the cases of: (i) **R v Haniff Miller** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 155/2002, judgment delivered 11 March 2005; (ii) **Carlton Baddal v R** [2011] JMCA Crim 6 at paragraphs [17] and [18]; and (iii) **R v Hulusi and Purvis** [1973] 58 Cr App Rep 378 (which referred to **R v Hamilton**, an unreported judgment of the English Court of Criminal Appeal, judgment delivered 9 June 1969) in which Lord Parker CJ is quoted as stating:

> "Of course it has been recognised always that it is wrong for a judge to descend into the arena and give the impression of acting as advocate….Whether his interventions in any case give ground for quashing a conviction is not only a matter of degree, but depends to what the interventions are directed and what their effect may be."

[46] The Crown also set out a summary of the principles established in **R v Hulusi and Purvis** as to circumstances in which a judge may overstep his bounds by his interventions doing the following (set out at paragraph 13 of the Crown's written submissions):

> "I. Invited the jury to disbelieve the evidence for the defence, which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury.
>
> II. Where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence
>
> III. Where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[47] The Crown also commended for the court's consideration what appears at page 97, lines 1 to 15 and page 98, lines 1 to 23 of the transcript (those portions of the transcript having been re-numbered as page 128, lines 1 to 24 and page 129, lines 16 to 23), as supporting its submissions. That section of the transcript records the following exchanges:

> " WITNESS: The inside of the minimart, there are several—what you call florescent lamps, the elongated ones, which are very bright, I would say. There are also lights on the piazza of the minimart, servicing the motor vehicle accessory area and the mini mart area, which are also very bright. So far, it does for the minimart.
>
> On the outside—that's the canopy where the pumps are—a number of very—there are about five or six very large lights under the canopy. They are very bright.
>
> Q Under the where?
>
> A The canopy.
>
> HIS LORDSHIP: This is the shed?
>
> WITNESS: That's the shed that houses the pumps.
>
> HIS LORDSHIP: You said six lights?
>
> WITNESS: Yes, about six.
>
> HIS LORDSHIP: Large…
>
> WITNESS: Large, very large.
>
> HIS LORDSHIP: …bulbs?
>
> WITNESS: Yes.
>
> HIS LORDSHIP: And very bright?
>
> ….
>
> HIS LORDSHIP: In the form of a floodlight, like?

WITNESS: Yes, sir, for want of a better word, sir.

HIS LORDSHIP: One place or many places?

WITNESS: One place, sir. That services that side of the premises.

HIS LORDSHIP: Which side?"

Discussion

[48] Apart from the excerpt from **R v Hamilton** quoted by the Crown, there is another part of the judgment at which Lord Parker CJ made the following additional observation:

> "Interventions to clear up ambiguities, interventions to enable the judge to make certain that he is making an accurate note, are of course perfectly justified. But the interventions which give rise to a quashing of a conviction are really three-fold; those which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury…The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[49] This appears to be the passage from which the principles stated in **R v Hulusi and Purvis** appear to have been distilled, the latter case having adopted the ruling in **R v Hamilton**.

[50] By way of contrast, we may briefly consider a case in which there was a finding that the nature and amount of the interventions by one performing a judicial role, reached the extent to render a hearing unfair. That case is **Peter Michel v The Queen** [2009]

UKPC 41, in which Lord Brown, writing on behalf of the Board, observed at paragraphs 12 and 13 as follows:

> "12. So much for the evidence. The Board turn at once to the central ground of appeal as to the fairness of the trial, focused as this is entirely on the Commissioner's conduct of the hearing: his continual interruptions of the evidence, of prosecution witnesses as well as the appellant himself, of evidence in chief as well as cross examination. During the Crown's case the Commissioner time and again asked questions damaging to the defence case which prosecuting counsel could never have asked—for example cross-examining the appellant's clients to suggest both that they had behaved criminally and that this must have been obvious. During the appellant's own evidence the Commissioner intervened with substantive questions on no fewer than 273 occasions, 138 of them during evidence in chief. Generally this was with a whole series of questions, taking up in all just over 18% of the appellant's eight and a half days in the witness box. So much for the bare statistics. Of altogether greater significance than the mere number and length of these interruptions was, however, their character. For the most part they amounted to cross-examination, generally hostile. By his questioning the Commissioner evinced not merely scepticism but sometimes downright incredulity as to the defence being advanced. Regrettably too, on occasion the questioning was variously sarcastic, mocking and patronising.
>
> 13. The Board will give but a single, brief illustration of this, taken from the transcript of the appellant's examination-in-chief. The appellant was being questioned about his knowledge of a particular client's transactions. The Commissioner intervened:
>
> > 'There is no question, is there, of his having snooked just a teeny-weeny bit of his money, £49,000, out without paying tax on it, or anything like that?'
> >
> > And a little later: 'We just want a picture of where, in his case, this minute quantity of cash went'."

[51] We are firmly of the view that the learned trial judge's interventions in this case did not go anywhere near to the level or nature of the interventions in the case of **Peter Michel v R**; and that, looked at objectively, whilst some unnecessary remarks were made, the conduct of the learned trial judge did not cross the threshold of rendering unfair the appellant's trial. The interventions were made, in the majority of instances, to clarify evidence and assist in the taking of a careful note.

[52] We therefore find the appellant's case on this issue to be without merit.

Issue four: whether any other factor (such as the mention of a charge of murder or the acceptance, without medical evidence, of the contention that the appellant had been shot) served to render the trial unfair

Summary of submissions

For the appellant

[53] For the appellant, the elements comprising this issue were subsumed under the general contention that the trial was unfair and a review of the notes do not disclose further submissions on this issue being advanced. No submissions have been recorded in relation to the mention of the murder charge.

For the Crown

[54] In its written submissions, the Crown sought to meet this point by arguing that the learned trial judge was entitled to draw inferences from facts adduced and accepted in Mr Thaxter's evidence. It was submitted that this court should be reluctant to interfere with a trial judge's findings of fact and should only do so when the judge can be shown

to be plainly wrong. In support of this submission the Crown cited **Everett Rodney v R** [2013] JMCA Crim 1.

Discussion

[55] In considering this issue, it is important to have regard to the totality of the evidence, which included the following facts: (i) Mr Thaxter fired at the person he said was the appellant; (ii) the police, on the evidence of DSP Salmon, received information that the appellant had been shot in the incident; (iii) On DSP Salmon's evidence, this was brought to the attention of the appellant, who denied it and promised to prove that it was not so by meeting with DSP Salmon and attending court; (iv) the appellant failed to do so; and (v) the appellant was later seen with circular wounds for which he sought no medical treatment and to explain the presence of which he gave conflicting accounts. The learned trial judge was entitled to, as he did, draw inferences from these primary facts. Additionally, a part of the appellant's defence at trial included the contention that he had been injured by a spear from a fish gun. The issue, therefore, was not so much whether he had been shot or injured at all; but by what means that injury came about. In any event, however, whether or not the appellant had been shot in the robbery was not a finding that was central to the court's ultimate finding and decision of his guilt. Central to the case was Mr Thaxter's testimony and its acceptance by the learned trial judge. In all these circumstances we find that this issue as well has no merit.

Issue five: sentence manifestly excessive

Summary of submissions

For the appellant

[56] On the appellant's behalf, Ms Clarke submitted that the sentences imposed were manifestly excessive, especially seeing that the applicant was 23 years of age at the time of the offence. Additionally, he had no previous convictions and, in keeping with the plea in mitigation, he could become a productive member of society. The sentences, it was submitted, deviated from those usually imposed for those types of offences; and a more appropriate range of sentences would be between 10 and 15 years. A good starting point would have been 12 years, it was submitted. Further, although the community report in the social enquiry report was negative, that should not be the deciding factor in imposing manifestly-excessive sentences. If the sentences imposed should be kept, that would mean that the appellant's entire youth would be taken from him, was another submission.

For the Crown

[57] For the Crown, Mr Brown conceded that the sentences of 20 years' imprisonment, in particular for the offence of illegal possession of firearm, could be considered as being out of range with several other cases. He referred, for example, to the cases of **Jermaine Barnes v R** [2015] JMCA Crim 3 and **Jerome Thompson v R** [2015] JMCA Crim 21. The case of **Jermaine Barnes v R**, he submitted, would support the contention that a sentence of 15 years' imprisonment for the offence of illegal possession of firearm would be more appropriate to the facts and circumstances of this case. Additionally, the case of **Jerome Thompson v R** supports the view that the usual sentence for robbery with

aggravation after a trial would be in the region of 12 years. With the more egregious circumstances in this case, it was submitted, a sentence of 15 years for the offence of robbery with aggravation would be appropriate. **Matthew Hull v R** [2013] JMCA Crim 21 supports a sentence of 20 years' imprisonment for shooting with intent, it was also submitted.

Discussion

[58] We share the view of both counsel that the sentences for the offences of illegal possession of firearm and robbery with aggravation do appear to be outside the range of sentences imposed for these offences in a range of cases.

[59] In relation to the offence of robbery with aggravation, and illegal possession of firearm, Brooks JA (as he then was) in **Ashadane Henry v R** [2020] JMCA Crim 30, made the following observations at paragraph [38] of the judgment:

> "[38] Learned counsel are correct that the sentence that the learned trial judge imposed for the offence of robbery with aggravation is consistent with the normal range of sentences imposed for that offence. In **Joel Deer v R**, Phillips JA conducted, at paragraph [12] of the judgment, an analysis of the sentences imposed in several cases involving robbery with aggravation and illegal possession of firearm. It can be gleaned from the cases, to which Phillips JA referred, that the normal sentence for illegal possession of firearm, in such cases, is 10 years, and the normal range of sentences for the offence of robbery with aggravation is 10 – 15 years."

[60] It appears to us that a sentence of 12 years' imprisonment at hard labour for the offence of illegal possession of firearm would not be unreasonable in the circumstances of this case.

[61] In relation to the offence of robbery with aggravation, we have reviewed the normal range of sentence and starting point set out in the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("the Sentencing Guidelines"), though not published at that time. For this offence, the normal range and starting point are 10-15 years and 12 years, respectively. Having regard to the particular facts and circumstances of this case and to the learned trial judge's finding that the appellant was the "commander in charge" (page 481, line 23 of the transcript) of the events that led to the charges and this appeal, it seems to us that a sentence of 15 years' imprisonment for the offence of robbery with aggravation would be fair and reasonable in the circumstances of this case. This sentence is reflective of all the mitigating and aggravating factors in this case, the latter consisting of the apparent planning of the offences with multiple participants, each seemingly with a particular role.

[62] In relation to the offence of shooting with intent, the Sentencing Guidelines indicate as the normal range a sentence of 7-15 years, with a starting point of 10 years' imprisonment. In the facts and circumstances of this case, a sentence of 15 years' imprisonment is appropriate.

[63] We were informed by both counsel that the appellant spent some four months in custody and that fact appears not to have been taken into account by the learned trial judge. In keeping with the current learning (see, for example, **Romeo Da Costa Hall v The Queen** [2011] CCJ 6), the appellant should have that period deducted from the sentences to be imposed.

[64] In the result, therefore, and with apologies for the delay in delivery, these are the orders of the court:

(i) The application for leave to appeal conviction is refused.

(ii) The convictions are affirmed.

(iii) The appeal against sentence is allowed.

(iv) The sentences are set aside and substituted therefor are the following:

(a) Illegal possession of firearm: 12 years' imprisonment at hard labour, less four months spent in custody;

(b) Robbery with aggravation: 15 years' imprisonment at hard labour, less four months spent in custody;

(c) Shooting with intent: 15 years' imprisonment at hard labour, less four months spent in custody.

(v) The sentences are to run concurrently and are to be deemed as having commenced on 25 September 2012.