**[2024] JMCA Crim 32**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MRS JUSTICE FOSTER-PUSEY JA**
**THE HON MRS JUSTICE DUNBAR-GREEN JA**

**SUPREME COURT CRIMINAL APPEAL NO 72/2014**

**CHRISTOPHER DUNKLEY v R**

**Patrick Peterkin for the applicant**

**Miss Ashtelle Steele and Marvin Richards for the respondent**

**6, 9 June 2023 and 4 October 2024**

**Criminal law - Application for permission to appeal - Challenge to adequacy of summation - Fairness and balance - Whether summation unfair, resulting in a miscarriage of justice - Whether reasons for decision insufficient - Whether mandatory minimum sentence for illegal possession of firearm indicated under section 20(1)(b) - Section 20(1)(b) of the Firearms Act in 2012 and 2014**

**F WILLIAMS JA**

## Introduction

[1] This is a renewed application for leave to appeal against conviction (and, before us, sentence) for the offences of illegal possession of firearm (count 1) and wounding with intent (count 2). The applicant was convicted on 27 May 2014, after a trial by a judge of the Supreme Court ('the learned judge'), sitting without a jury, in the High Court Division of the Gun Court for the parish of Clarendon. On 4 July 2014 he was sentenced to concurrent terms of 15 years' imprisonment at hard labour for the offences. His application was refused by a single judge of appeal on 31 July 2017.

[2] The applicant renewed his application before the court. Although there was no ground challenging sentence, the matter of sentence was also dealt with, as, on our

own motion, we requested the parties to address us on the sentence imposed, having regard to what we considered to be an error in that regard made in the court below.

[3] We heard the application on 6 June 2023, and, on 9 June 2023, we ordered as follows:

> (i) The application for permission to appeal against conviction is refused.
>
> (ii) The application for permission to appeal against the sentence for illegal possession of firearm is granted. The hearing of the application is treated as the hearing of the appeal and the appeal is allowed. The sentence of 15 years' imprisonment is set aside; and substituted therefor is a period of 10 years' imprisonment at hard labour.
>
> (iii) The sentences are to run concurrently and are to be reckoned as having commenced on the date on which they were imposed, that is 4 July 2014.

These are our reasons.

**Factual background**

[4] The facts as given in evidence and accepted by the learned judge were that, on 1 December 2012, the applicant shot the virtual complainant ('Mr Stewart') twice, as he walked towards his home in Frankfield, in the parish of Clarendon. The incident occurred around 10:00 pm. On Mr Stewart's evidence, there was a Jamaica Public Service streetlight near to where the incident occurred and in fact about 16 feet away from where the applicant stood as he fired at him. He identified the applicant at a distance of about 7 feet and observed his face and entire body for about 15 seconds. He had known the applicant for about 15 years. He had seen the applicant earlier that night at a plaza which was well lit. The applicant had on the same clothes when he shot him, as he had on when he saw him at the plaza. The only difference to his dress

was that he was wearing a black cap on the second occasion; but that did not prevent him from or hinder him in identifying the applicant as the person who shot him.

[5] Mr Stewart also gave evidence of knowing the applicant's brother, Troy, and his sister and mother; and testified that his (Mr Stewart's) girlfriend was once the applicant's girlfriend.

**Summary of the applicant's case at trial**

[6] In his defence, the applicant gave sworn testimony. He denied shooting Mr Stewart or being involved in the incident in any way. He testified that, although he was at the plaza earlier the night of the shooting, when he left the plaza, he went to his parents' house. He called two witnesses in support of his case: Mr Robert Anderson and Mr Nicardo Thomas. Mr Thomas testified that, sometime in February 2014, in the town of Christiana, Mr Stewart had pointed him (Mr Thomas) out to the police as the man who shot him on the night in question in 2012. For his part, Mr Anderson testified to being familiar with the area in which the shooting occurred and of knowing about the streetlight near to which the shooting was said to have taken place. He stated that that streetlight was not working at the time of the shooting and, in fact, was not restored to service until the middle of December, 2012.

[7] The applicant's testimony confirmed some of Mr Stewart's testimony such as the fact that his ex-girlfriend was then Mr Stewart's girlfriend and other evidence that Mr Stewart gave concerning the applicant's family.

**The learned judge's decision**

[8] In briefest summary, the learned judge accepted the testimony of Mr Stewart, rejected that of the applicant and his witnesses and found the applicant guilty of both counts on the indictment. She regarded the defence witness, Mr Anderson, as a witness of convenience and also rejected the testimony of Mr Thomas. She considered the main issues in the case to be identification by way of recognition and credibility, and addressed those, along with the issue of alibi, that being the defence advanced by the applicant.

## The appeal

[9] Being dissatisfied with the verdicts, the applicant sought permission to appeal by filing his application in a criminal form B1 dated 18 July 2014. When he appeared before us, Mr Peterkin, for the applicant, sought and was granted permission to abandon the original grounds of appeal contained in the form B1, and to argue the following supplemental ground:

> "(1) The learned trial judge treated with the case for the defence unfairly, resulting in a substantial miscarriage of justice. In support thereof:
>
> (A) The learned trial judge treated the witness for the defence unfairly during the summation, resulting in a substantial miscarriage of justice.
>
> (B) The learned trial judge failed to give any or any sufficient reasons as to why she rejected the Defendant's and his witness' evidence, which resulted in a denial of the Applicant's right to a fair trial, amounting to a substantial miscarriage of justice."

### Ground 1A: the learned trial judge treated the witness for the defence unfairly during the summation, resulting in a substantial miscarriage of justice

Summary of submissions

*For the applicant*

[10] In support of this ground, Mr Peterkin submitted that the learned judge failed to afford the applicant due process, and that this was evidenced by what he referred to as "her inequitable treatment of the case for the defence, as compared to her analysis of the prosecution's case". He further submitted that "the summation when read as a whole, deprived the appellant of his right at common law to a fair trial and his rights under the Charter of Fundamental Rights and Freedoms ('the Charter') to a fair trial by an impartial tribunal" (see para. 15 of his written submissions). In support of his submissions, counsel referred to the case of **Peter Michel v R** [2009] UKPC 41, quoting Lord Brown, whose reminders to judges included the admonition to "steer clear of advocacy", while at the same time "to assist the jury to arrive at the truth".

[11] Mr Peterkin also cited the case of **R v Nelson (Garfield Alexander)** [1997] Crim LR 234, in which Simon Brown LJ, on behalf of the Court of Appeal of England and Wales, opined, among other things, on the importance of a judge giving "full and fair weight to the evidence and arguments of each side".

*For the Crown*

[12] On behalf of the Crown, Miss Steele submitted that the applicant has failed to demonstrate to this court in what way the learned judge was unfair in her treatment of the applicant's case in her summation, resulting in a miscarriage of justice. She further submitted that the learned judge correctly identified the issues in the case, and was balanced in her assessment of the entire case, considering the comments by the prosecution and the issues highlighted by the defence.

[13] It was further submitted that the learned judge, in her summation, highlighted the need to assess the evidence presented by the applicant in the same manner as she assessed the evidence presented by the prosecution. The learned judge, it was argued, throughout her summation, also compared and contrasted aspects of the evidence with issues that arose in the course of the trial.

Discussion

[14] Immediately after considering whether the evidence established that she had jurisdiction to try the case, the learned judge stated the following at page 176, line 21 to page 178, line 19 of the transcript:

> "The major issue is the identification of the shooter. On – the Crown's evidence is dependent on the eye [sic] identification of this accused man by the complainant, Mr. Stewart. And although it is what one would call a recognition case, I still have to proceed with some caution when relying on the identification evidence because it is possible for an honest witness to make a mistake in identification, and an apparently convincing witness can make a mistake even when the person is known to them. So, I have to examine the evidence carefully and this is even more so because the accused man gave sworn evidence.

> He called two witnesses and I have to assess their evidence in the same fairness which I accord with [sic] the witnesses for the Prosecution, but in his evidence the accused man has put up a defence and an alibi. He is saying he was not at the scene of crime when it was committed. And I do bear in mind that it is the Prosecution to prove his guilt. So, I am sure of it that he doesn't have to prove that he was elsewhere.
>
> Because the Prosecution must disprove his alibi and if – even if I can prove that his alibi is false, that does not mean I can convict him. Even if I reject his alibi, the Prosecution must still make me feel sure of his guilt because an alibi sometimes is invented to bolster a [genuine] defence. So, even if I reject this man's alibi, I still have to go back and examine the Crown's case. So, as I say, the Prosecution is relying wholly on the identification evidence of Mr. Stewart.
>
> I also have to bear in mind that the credibility of Mr. Stewart is a major issue in this case. So, even if I conclude that Mr. Stewart is an honest, reliable witness and that he had sufficient opportunity to see the shooter that night, I still have to consider whether the issue of his credibility: Is he lying? Is he – even if I conclude that he is not, as I said, he had sufficient opportunity to view. Is he lying? Also, because that has been challenged, that issue, his credibility has been strongly challenged by the Defence but I first have to go and examine the identification evidence presented."

[15] By this thorough overview of the central issues in the trial and the manner in which she had to embark on the analysis of the evidence in the case, the learned judge set the tone at the outset for what, on our review of the evidence and the summation itself, was a fair and balanced discussion of all the matters that arose for consideration in the trial. On our reading of the transcript and on our assessment of the summation as a whole, the learned judge clearly had in mind and resolved all the issues in the case, after considering the positions advanced by the prosecution and the defence, thus giving full and fair weight to the arguments presented. In these circumstances, we were unable to accept the contention that there was any unfairness meted out to the applicant in the way the learned judge handled the case. We found, therefore, that the applicant had not made out his case on this ground.

**Ground 1B: the learned trial judge failed to give any or any sufficient reasons as to why she rejected the Defendant's and his witness' evidence, which resulted in a denial of the Applicant's right to a fair trial, amounting to a substantial miscarriage of justice.**

Summary of submissions

*For the applicant*

[16] The applicant's main contention under this ground was that the learned judge's treatment of the evidence of the defence witness, Mr Robert Anderson, did not show any analysis or reveal her reasons for rejecting his evidence and regarding him as "a witness of convenience". In support of this submission, Mr Peterkin relied on the cases of: (i) **Lowell Forbes v R** [2010] JMCA Crim 81; (ii) **Andrew Stewart v R** [2015] JMCA Crim 4; and (iii) **R v Locksley Carroll** (1990) 27 JLR 259. He submitted that, in this trial in which the presence of the lighting at the scene, to which Mr Stewart testified, was being directly challenged, it was important for the learned judge to have given reasons for her rejection of Mr Anderson's evidence.

[17] It was also argued that, in the circumstances in which the lighting at the scene was being challenged, "it would have been imperative on the prosecution to cite independent witnesses to deal with the issue of lighting…".

*For the Crown*

[18] Miss Steele, in arguing that the applicant, in submitting on this ground, was taking too narrow and restricted a view of the evidence in this case, asked the court to consider an extensive part of the transcript, to be found at page 185 (lines 7-25) to page 196 (lines 1-5). She submitted that the learned judge's finding that Mr Anderson was a witness of convenience was preceded by considerable discussion and review of the evidence, in which the learned judge highlighted the relevant aspects of Mr Anderson's evidence and noted that the matter was one of credibility to be resolved on the question of whose evidence she accepted in relation to the lighting – especially in light of the fact that there were no independent witnesses.

[19] Miss Steele relied on the case of **Dal Moulton v R** [2021] JMCA Crim 14 in support of her submission that the consequence of the learned judge's acceptance of

Mr Stewart's testimony in relation to the lighting was the rejection of the testimony of Mr Anderson, as it was not possible for her to have believed them both.

[20] Citing **R v Crawford** [2015] UKPC 44, she urged the court to accept the guidance in that case and be slow to seek to overturn a decision from a lower court that was based on findings of fact by a judge who had had the advantage of seeing and hearing witnesses, which advantage an appellate court normally does not enjoy. In relation to the cases cited by Mr Peterkin, Miss Steele argued that they all could be distinguished in the following ways:

> "(a) **Peter Michel v R** [2009] UKPC- The conviction was quashed because the judge descended into the arena and his interventions were found to be excessive and inappropriate. It was held that the trial judge acted as a second prosecutor.
>
> (b) **Andrew Stewart v R** [2015] JMCA Crim 4 - The conviction was quashed because the learned [trial] judge failed to demonstrate how core inconsistencies which went to motive were resolved in light of the lie told by the particular witness
>
> (c) **Locksley Carroll v R** (1990) 27 JLR 259- The conviction was quashed as the learned trial judge did not face or demonstrate that she faced the difficulties inherent in the two most critical pieces of evidence on identification."

**Discussion**

[21] In both the civil and criminal arenas, it has come to be generally accepted that judges should give reasons for their decisions. The extent of that duty, however, will vary from case to case, depending on the issue(s) to be resolved. In the civil case of **Flannery and another v Halifax Estate Agencies Limited (Trading as Colley's Professional Services)** [2000] 1 WLR 377, Henry LJ at page 382 made the following observation:

> "The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough

> for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other." (Emphasis added)

[22] On the criminal side, in the case of **R v R (D)** [1996] 2 SCR 291, Major J, writing on behalf of the majority in the Supreme Court of Canada, stated that:

> "Depending on the circumstances of a particular case, it may be desirable that trial judges explain their conclusions. Where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary, appellate courts will not interfere. Equally, in cases such as this, where there is confused and contradictory evidence, the trial judge should give reasons for his or her conclusions." (Emphasis added)

[23] To similar effect, in the case of **R v Burns** [1994] 1 SCR 656. McLachlin J, writing for the court in the Supreme Court of Canada, discussed the important guiding principles at page 664 thus:

> "Failure to indicate expressly that all relevant considerations have been taken into account in arriving at a verdict is not a basis for allowing an appeal under s. 686(1)(a). This accords with the general rule that a trial judge does not err merely because he or she does not give reasons for deciding one way or the other on problematic points: see *R. v. Smith*, [1990] 1 S.C.R. 991, affirming (1989), 95 A.R. 304, and *Macdonald v The Queen*, [1977] 2 S.C.R. 665. The judge is not required to demonstrate that he or she knows the law and has considered all aspects of the evidence. Nor is the judge required to explain why he or she does not entertain a reasonable doubt as to the accused's guilt. Failure to do any of these things does not, in itself, permit a court of appeal to set aside a verdict.
>
> This rule makes good sense. To require trial judges charged with heavy caseloads of criminal cases to deal in their reasons with every aspect of every case would slow

> the system of justice immeasurably. Trial judges are presumed to know the law with which they work day in and day out. If they state their conclusions in brief compass, and these conclusions are supported by the evidence, the verdict should not be overturned merely because they fail to discuss collateral aspects of the case."

[24] In **R v Burns**, the following were the reasons given (after a review of the evidence) by the trial judge in convicting Burns, which conviction was overturned by the court of appeal, but restored by the Supreme Court of Canada (page 660):

> "I had the opportunity to hear the evidence of [the complainant] and to observe her demeanour in the witness stand. Although she was not sure of the exact dates of the specific acts and was confused as to some of the continuing events, she did present her evidence in an honest and straightforward manner, without equivocation. She was in my opinion a credible and believable witness. I accept her evidence as to the alleged indecent assaults from 1980 to 1983, and I also accept her evidence as to the sexual assault that occurred in January of 1987.
>
> Based upon that evidence, I am satisfied beyond a reasonable doubt that the accused is guilty on both counts."

[25] It should be remembered that Mr Anderson's only purpose for being at the trial and to give evidence for the applicant, was to testify about the streetlight which Mr Stewart said aided him in the identification of the applicant. His evidence was that it was not working on the night on which Mr Stewart said that he was shot by the applicant. As the learned judge said in her summation, the matter fell to be decided as one of credibility. At several points in her summation, the learned judge remarked on how impressive a witness she found Mr Stewart to be. For example, at page 202, line 4 to page 203, line 5 of the transcript, she said the following:

> "So, what I have before me is a sole witness who is saying this man is the shooter and I do accept that the police officer is not here but as I said, Mr. Stewart was very impressive. I watched him, saw how he answered the questions put to him and he gave cogent and compelling evidence.
>
> I find him to be a reliable, honest, straightforward witness. And there is no evidence to support him. I do accept what he has

> told this Court and I find there was sufficient opportunity for him to view the shooter that night. I reject the alibi of Mr. Dunkley.
>
> I go back to Mr. Stewart and based on his evidence I feel sure as to the identification of this person."

[26] The foregoing is but a small part of the learned judge's consideration and discussion of the issues of lighting as it relates to identification and credibility that were among the central issues in the case. There was no confused or contradictory evidence in the trial below with respect to the streetlight. Each witness on the issue (the complainant and Mr Stewart) asserted and maintained a clear position that was contrary to the other. The learned judge was clearly very much alive to this; and, based on how these two witnesses gave their evidence, she rejected one and accepted the other. It is difficult to see what further explanation could reasonably have been expected or required. Further, the absence of a detailed explanation for the rejection of Mr Anderson's evidence, has, in our view, worked no injustice against the applicant. We cannot fairly say that more was required to have been said on the particular facts and in the circumstances of this case.

[27] Further, we agreed with the Crown's submission that, although it might have been desirable, there was no requirement for any other witness to have been called with respect to the lighting of the area. The learned judge took her case as it was presented to her and dealt with the evidence in a fair and balanced way. The applicant, therefore, also failed on this ground.

**The sentence**

[28] As previously indicated, although not included in the grounds of appeal, the matter of the sentence of 15 years' imprisonment imposed for count one on the indictment (illegal possession of firearm) concerned us sufficiently for us to seek submissions from both counsel in the matter and, in the interests of justice, to treat the matter of sentencing on count one as an application for permission to appeal against the sentence for illegal possession of firearm.

Summary of submissions

*For the applicant*

[29] On the applicant's behalf, Mr Peterkin submitted that the sentence appeared to be manifestly excessive and not in keeping with the sentences generally imposed for that offence in similar circumstances. He submitted that a more appropriate sentence would be between seven and 10 years' imprisonment.

*For the Crown*

[30] Miss Steele argued that, whilst the sentence fell within the range of sentences generally imposed for the offence, in these circumstances the 15 years imposed did seem excessive.

Discussion

[31] It appeared to us that, unfortunately, the learned judge was labouring under a misapprehension that, in respect of the offence of illegal possession of firearm, she was bound by a statutory minimum of 15 years. That that was so can be seen first at page 223, lines 14 to 18 of the transcript as follows:

> "By law, the offences you have committed attracts [sic] what is called a mandatory minimum sentence. In other words, by law, I cannot go below that." (Emphasis added)

[32] Similarly, at page 225, lines 8 to 16, the following was said:

> "We just take a firearm and we aim it and we shoot and that is what you are going to have to grapple with Mr. [sic] I see the minimum is fifteen years and that is what I am going to give you on both counts one for Illegal Possession of Firearm and Count two for Wounding with Intent." (Emphasis added)

[33] Whilst there is no doubt that a statutory minimum attached to the offence of wounding with intent, it is important to note that the applicant was indicted pursuant to section 20(1)(b) of the Firearms Act. In several cases, this court has reviewed the changes relating to mandatory minimum sentences that had been made to the Firearms Act as it then stood and noted that that particular section did not carry with

it a mandatory minimum. For example, in the case of **Leon Barrett v R** [2015] JMCA Crim 29, we made the following observations on section 20(1)(b) of the Firearms Act, at paras. [82] to [85] of the judgment:

> "[82] …. It has been generally felt that the amending Act effected a change to all sections of the Act dealing with firearm offences, making the minimum sentence in each case 15 years. On closer scrutiny of the Act, however, it appears that that is not so. It will be seen that the amending Act amended only the following sections of the then existing Act: section 4 (amended by section 2 of the amending Act); section 9 (amended by section 3 of the amending Act); section 10 (amended by section 4 of the amending Act); section 24 (amended by section 5 of the amending Act); and section 25 (amended by section 6 of the amending Act).
>
> [83] Those were the only amendments to the principal Act.
>
> [84] It is therefore apparent that section 20(1)(b), under which the applicant was charged, is to be read as it was before the amending Act took effect (and, in actuality, as it still now reads). Subsection (4) is that part of section 20 that imposes the penalty for breach of the section. It reads as follows:
>
> '(4) Every person who contravenes this section shall be guilty of an offence, and shall be liable-
>
> (a) if the offence relates to the possession of a prohibited weapon –
>
> (i) on summary conviction before a Resident Magistrate to imprisonment with or without hard labour for a term not exceeding five years;
>
> (ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour;'
>
> [85] It will be seen, therefore, that the maximum punishment for illegal possession of firearm, when charged under section 20(1)(b) is life imprisonment (it so remains under the amended Act); but that no statutory minimum sentence exists under this section."

[34] In the light of this, the learned judge erred in believing that she was bound by the relevant statute to impose what she thought to have been the mandatory

minimum sentence of 15 years, thus fettering her own discretion. That sentence, therefore, had to be set aside and replaced with an appropriate sentence, although, with the sentences running concurrently, it may not have any or much practical effect for the applicant.

[35] In **Ian Wright v R** [2011] JMCA Crim 11, Dukharan JA writing on behalf of the court, spoke, at para. [12], to the normal range of sentences for the offence of illegal possession of firearm as follows:

> "We are cognizant of the range which is between seven to ten years for similar offences when illegal firearms have been used to commit offences."

[36] For what it is worth, we will note that the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts ('the Sentencing Guidelines') state that the normal range for sentences for illegal possession of firearm is seven – 15 years and that the usual starting point is 10 years. We say "for what it is worth" because the trial and sentencing in this matter preceded the introduction of the Sentencing Guidelines in December 2017. In **Lamoye Paul v R** [2017] JMCA Crim 41, this court opined that a reasonable range from which to select a starting point in cases in which an illegal firearm was used to commit an offence was between 12 and 15 years.

[37] In all the circumstances we formed the view that a sentence of 10 years' imprisonment would be reasonable, using the range indicated in  and given the applicant's relatively-good antecedents. This was arrived at by using a starting point of 12 years and deducting two years on account of the applicant's previous unblemished record, there being no significant aggravating factors.

[38] It is for the foregoing reasons that the court made the order as indicated in para. [2] above.