

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE LAING JA (AG)**

SUPREME COURT CRIMINAL APPEAL NO 61/2013

ADOLPHUS KNIGHT v R

Gavin Stewart for the applicant

Miss Paula-Sue Ferguson and Miss Cygale Pennant for the Crown

12, 14 and 16 June 2023

Criminal Law-Illegal possession of firearm- Robbery with aggravation

Constitutional Law – Post-conviction delay - Whether delay amounted to a breach of the constitutional right to a fair hearing within a reasonable time – Redress for breach - Whether sentence should be reduced for the delay - The Charter of Fundamental Rights and Freedoms, sections 16(1), 16(7) and 16(8)

Criminal Procedure - Missing portions of the transcript of the trial - Whether missing portions of transcript affect the validity of the conviction

BROOKS P

[1] On 14 June 2023, having heard the application in this case, we made the following orders:

- “1. The application for leave to appeal against the convictions is refused.
2. The application for leave to appeal against the sentences is granted.
3. The hearing of the application in respect of the sentences is treated as the hearing of the appeal.

4. The appeal against the sentences is allowed, in part.
5. The sentences in respect of counts 1 and 3, of seven years' imprisonment at hard labour each, for illegal possession of a firearm, are affirmed.
6. By way of relief for the breach of the appellant's constitutional right to have his appeal heard within a reasonable time, the sentences in respect of counts 2, 4 and 5 are set aside, and the following sentences are substituted:
 - Count 2. Robbery with aggravation - 13 years' imprisonment at hard labour.
 - Count 4. Robbery with aggravation - 13 years' imprisonment at hard labour.
 - Count 5. Robbery with aggravation - 13 years' imprisonment at hard labour.
7. All sentences shall run concurrently and are to be reckoned as having commenced on 31 July 2013, which is the date that they were originally imposed."

We promised at that time that we would provide reasons in writing. We now fulfil that promise.

[2] On the evening of 1 November 2012, a man lurked in the bushes adjacent to a train line at Paisley Avenue near Junior Crescent in the parish of Clarendon. He was armed with a firearm; a silver and black handgun. His aim was to rob passers-by. His first victim was Mr Romaine Simpson, who was walking along the train line at about 8:20 pm. The man approached Mr Simpson, pointed the gun at him and told him not to move. He searched Mr Simpson and robbed him of his cellular telephone and told him to run. Mr Simpson walked away.

[3] At about 8:45 pm the robber struck again. His next victims were two schoolboys, who were walking together along the train line as Mr Simpson had been. The robber

came up behind them, told them to face him, and then instructed them, at gunpoint, to put their belongings on the ground. Having obeyed his instructions, he told them to run. After some hesitation, they obeyed him.

[4] The description given of the clothing worn by the robber in these two incidents is similar. The victims in each incident also knew the robber before. The victim in the first robbery, Mr Simpson, said that he did not know the robber by name but it was someone whom he would see every day for about two years at a shop near to the same train line.

[5] The victims in the second incident knew the robber by the name "Bups" or "Boops". They knew that he operated a shop along the train line at "the train gate", and they both went to that shop often. One of them would speak to "Bups" every time he went to the shop because "Bups" would serve him.

[6] All three victims ended up at "Bups" gate later the same evening of the robberies, where they accused him of being the perpetrator. He and they, along with others, were taken to the May Pen Police Station where they made their respective reports about the robberies.

[7] At the trial in the High Court Division of the Gun Court, held in Clarendon before a judge sitting without a jury, all the victims pointed out the applicant, Mr Adolphus Knight, as the person who robbed each of them that evening and whom they knew before.

[8] In his sworn testimony in his defence at the trial, Mr Knight denied being the robber or having anything to do with the robberies. He provided an alibi that he was at his friend's house at the time that those robberies occurred. Mr Knight also raised his good character as an issue.

[9] The learned trial judge, Gayle J, accepted that the victims had been robbed that evening and that they were not mistaken as to the identity of the robber. He found that Mr Knight was in the area at the time of the robberies and that he used a handgun to rob

the victims. He rejected Mr Knight's alibi and found him guilty of two counts of illegal possession of firearm, and three counts of robbery with aggravation.

[10] He sentenced Mr Knight to seven years' imprisonment for each of the counts of illegal possession of a firearm (counts one and three) and 15 years' imprisonment for each of the counts of robbery with aggravation (counts two, four and five).

[11] Mr Knight has applied for leave to appeal from these convictions. A single judge of this court considered the application but refused it.

[12] Although Mr Knight has renewed the application before the court, Mr Gavin Stewart, who appears for him in the application, has informed this court that he can find no basis to argue against the validity of these convictions. He has also informed Mr Knight of his stance in the matter. The representatives of the Crown, Miss Paula-Sue Ferguson and Miss Cygale Pennant, have informed the court that they too have found nothing in the transcript that could properly impugn the convictions.

[13] The court agrees with counsel in respect of their joint stance. The learned trial judge correctly identified the salient issues raised in the case. In his summation of the case, he correctly reminded himself of the issues relating to the jurisdiction of the court, identification, credibility, alibi and good character. He reminded himself about the effect of discrepancies on a case. His findings of fact are consistent with and supported by the evidence in the case. There is, therefore, no basis to disturb the convictions.

[14] The court was, however, concerned about two issues that arose after the conviction. The first is the length of time that it has taken for the transcript of the trial to be produced and the second is the fact that there were certain aspects of the trial that are missing from the transcript. Having considered those matters, however, we are satisfied that they do not affect the convictions. They may, however, affect the sentences.

[15] Mr Stewart was, therefore, given permission to apply for leave to appeal against the sentences imposed upon Mr Knight on the basis of the delay in the production of the transcript, which prevented the hearing of the appeal within a reasonable time.

[16] In this regard, the court noted, firstly, that it took seven years to produce the transcript. Such a delay, by itself, will not affect the conviction (see **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26). There have been cases, however, in which a delay of this length was found to warrant a reduction in the sentence imposed. In **Jahvid Absolam and others v R** [2022] JMCA Crim 50, this court, by way of Constitutional redress for a seven-year delay in producing a transcript, reduced, by two years, the sentences imposed at first instance. The court said in this regard:

“[83] In this case, the appeals were all filed in May 2014. The transcript of the trial was not produced until 15 June 2021. There is no part of that seven-year delay that can be attributed to any of the appellants. Similarly, the additional year since that time was due to the normal processes and schedule of this court. There has therefore been a delay of eight years for the appeal to have come on for hearing.

[84] These appellants are entitled to the benefit of similar constitutional redress for the breach. Two years’ reduction in their respective sentences would also be appropriate.”

[17] This case is materially indistinguishable on this aspect. As it was in **Absolam and others v R**, Mr Stewart argued that the delay in the present case is unreasonable and that Mr Knight’s sentence should be reduced as redress for the breach of his constitutional right to a fair hearing within a reasonable time.

[18] This court will take into account the breach of Mr Knight’s constitutional right to having his appeal heard within a reasonable time as guaranteed by sections 16(1) and 16(8) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica (‘the Charter’). The delay in awaiting the transcript is unreasonable. None of that delay can be laid at Mr Knight’s feet.

[19] Additionally, this court acknowledges that his appeal is being heard two years and nine months after the production of the transcript. A distinction must be drawn however, between the time spent awaiting the transcript and the time that elapsed in having the case brought to the hearing list. Given this court's schedule and workload, the time that elapsed in placing the case on the hearing list, although not desirable, is not entirely unreasonable. It is not every delay that amounts to a breach of the constitutional right (see para. [124] of **Germaine Smith and others v R** [2021] JMCA Crim 1).

[20] In the circumstances, a similar level of redress of two years' reduction in sentence as was given in **Absolam and others v R** should be given to Mr Knight. The redress, however, must be applied to the longer sentences in order for it to be effective. Accordingly, Mr Knight's sentences on counts two, four and five should be reduced by two years, in recognition of the breach.

[21] The second aspect, the portions missing from the transcript, have less of an impact. The missing portions were: the commencement of Mr Knight's evidence in chief, a portion of his cross-examination by the prosecutor, the plea in mitigation and the sentencing exercise. By virtue of section 16(7) of the Charter, an applicant or appellant is entitled to have a copy of the record of his or her proceedings within a reasonable time (see para. [20] **Evon Jack v R** [2021] JMCA Crim 31). In view of Mr Knight's stance in respect of his conviction, the missing portions of the transcript, other than the portion dealing with the sentencing, have no impact on the fairness of his appeal.

[22] As far as the sentencing is concerned, it is necessary to consider the ground of appeal placed before the court on Mr Knight's behalf.

[23] The absence of the transcript of the sentencing exercise requires this court to consider the sentences afresh, but the sentences that the learned judge imposed are within the range stipulated in the Sentencing Guidelines for the use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'). On page A-15, the range of sentences for illegal possession of a firearm is

set at seven - 15 years. The learned judge imposed the sentence at the lower end of the range. That should not be disturbed.

[24] On page A-12 of the Sentencing Guidelines, the range of sentences for robbery with aggravation is stipulated to be 10-15 years. Although the usual starting point is 12 years, the circumstances of Mr Knight being, what can only be described as, a predator along that train line on the evening of 1 November 2012, would justify the learned trial judge using the higher end of the scale of sentences for these offences. The sentences as imposed could, therefore, not be considered as excessive.

[25] In the circumstances, we are satisfied that the application for leave to appeal against the convictions should be refused but the sentences should be reduced in recognition of the breach of Mr Knight's constitutional right to a fair hearing of his appeal within a reasonable time.

[26] It was for these reasons that we made the orders outlined at para. [1] above.