JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00063

LEOPOLD MATTHEWS v R

Mr Leroy Equiano for the appellant

Miss Kathy-Ann Pyke for the Crown

16, 17 February and 31 July 2023

Criminal Law – Mens rea – Intention – Specific intent – Oblique intention – Recklessness – Illegal possession of firearm – Illegal possession of ammunition -Wounding with intent – Licensed firearm holder – Out of court statement by the accused – Inculpatory and exculpatory statements - Inconsistencies - Sentence – Mandatory minimum – Certificate issued pursuant to section 42K of the Criminal Justice Administration Act – Firearms Act Section 20(4)(a)(ii) – Offences Against the Person Act, Section 20(1) and section 20 (2)(b) of

BROWN JA

[1] Leopold Matthews ('the appellant') was tried and convicted, on 19 December 2019, on an indictment containing three counts for the offences of illegal possession of firearm, illegal possession of ammunition and wounding with intent, by Gayle J ('the learned judge'), in the High Court Division of the Gun Court, sitting in the parish of Saint Ann. On 9 November 2020, the learned judge sentenced the appellant to concurrent terms of seven years' imprisonment at hard labour for the offences of illegal possession of firearm and illegal possession of ammunition and 15 years' imprisonment for the offence of wounding with intent.

Background

Case for the prosecution

[2] The Crown relied on a number of witnesses as well as a statement given to the police by the appellant, in mounting its case at the trial. The prosecution's case was that on 23 June 2013 the complainant, Damion Edwards ('Mr Edwards'), a licensed firearm holder, was at a shooting range called Hodden Range in the parish of Saint Ann, where he was shot and injured by the appellant whilst he, Mr Edwards, was assisting with the replacement of targets.

[3] Mr Edwards gave evidence that the appellant was one of three operators of the range. He also told the court that there were two sections at the range. Section A was operated by the appellant and another man, while section B was operated by a Mr Rousseau, who was absent when Mr Edwards arrived that day. Upon arrival Mr Edwards registered, then handed over his firearm and the firearm registration booklet to the appellant. Mr Edwards then went to section B where he assisted some students, until Mr Rousseau arrived.

[4] Mr Edwards then went to section A. There the appellant asked him and a Mr Fakhourie to assist with the erecting of targets for a shotgun training exercise that the appellant was going to conduct. So, based on this request, Mr Edwards, Mr Fakourie and the appellant removed a number of plates (targets) from storage and installed them on the pedestals.

[5] Upon the completion of that task, Mr Edwards, along with Mr Fakhourie and a Mr Neil, stood behind a student who fired at and hit all five targets. After the student hit the targets, the appellant called "dead range". According to Mr Edwards, "dead range" meant that any loaded firearm should be unloaded and placed in a safe position or made safe.

[6] After giving this order the appellant told Mr Edwards to return the six-inch plates to their respective pedestals. Upon realising that the range was clear Mr Edwards began affixing the targets. He installed target one and whilst in the process of installing the

second target he heard a loud explosion. He turned around swiftly and saw the appellant "coming from a shooting position" with a shotgun in his hand. Using some expletives, Mr Edwards said to the appellant, "Don't play with my life with a gun". After he said that, the appellant told Mr Edwards he could proceed. No guns were pointing at Mr Edwards at this time. He continued to install the remainder of the metal plates on their pedestals. Upon installing the fifth and final target Mr Edwards heard another explosion. He turned around, looked up and saw the appellant with a black pistol in his left hand pointing at him. There was another explosion and Mr Edwards felt what he described as a hard hammering at his right elbow, resulting in him screaming that he had been shot. He was bleeding profusely and ran to the "firing line". There he was assisted by several persons, including the appellant, in stopping the bleeding by compressing the spot where the bullet had entered.

[7] Mr Edwards said that the appellant was the only person he saw with a firearm at the time he was shot. Mr Rousseau took Mr Edwards to the Saint Ann's Bay Hospital where he received treatment. Mr Edwards was informed that he had suffered a broken bone that required surgery. He eventually underwent surgery. This information was later confirmed by Dr Ingram, the second of two doctors called by the prosecution.

[8] The first of the two was Dr R Bennett who had prepared the medical certificate based on the hospital records. He outlined the injuries and the treatment administered, based on the notes made by the doctors who treated Mr Edwards. One of those doctors was Dr Htay, about whom more will be said later.

[9] It was Dr Ingram who more particularly described the injuries suffered by Mr Edwards and the treatment administered. He confirmed that Mr Edwards received a gunshot to the right humerus (upper arm bone), which resulted in a fracture. Dr Ingram also said the entrance wound was on the lateral aspect of the arm; the bone was re-aligned and plaster of Paris was applied.

[10] Dr Ingram told the court that based on the positions of the entry and exit wounds, the bullet travelled horizontally. Dr Ingram also said that the entrance wound, where the bone was broken, and the exit wound, were on the same level. He said that the wounds Mr Edwards had were side-to-side, not back-to-front, that is from the outer side to the inner side.

[11] Dr Ingram opined that the location of the entry wound could only have been the result of a ricochet, based on the scenario put to him by counsel for the defence (whether it was likely that the entry wound resulted from a situation where the actors were facing each other and one fired at the other). During re-examination, based on another scenario put to him by counsel for the prosecution, he stated that the injuries could also have been caused if the victim, or the victim's body, was in motion at the material time.

Case for the defence

[12] The appellant made an unsworn statement in which he outlined his version of the incident. He stated that he had known Mr Edwards for over a year prior to the incident and they had become good friends and training partners. He said Mr Edwards was assisting him in basic tactical training. He said tactical training provided him with the opportunity to assess how Mr Edwards would react to gunfire, and that he pointed his weapon at a 45-degree angle away from Mr Edwards. Based on the transcript, the appellant did not explicitly say that he fired his gun at this angle and saw the bullet hit the ground. However, it was clear that that is what he meant. He said after he fired he heard Mr Edwards say that he got shot.

[13] He went on to tell the court that the only way Mr Edwards could have got shot was from a ricochet that could have come from any area. He also told the court that he and Mr Edwards never had any disagreement. The appellant also said that he would have had to be a madman to shoot Mr Edwards with over 60 persons present on the range that day. He denied shooting Mr Edwards. He also said he did not intend to shoot or injure Mr Edwards. The appellant confirmed that he rendered first aid to Mr Edwards.

[14] The defence called Dr Kyam Myint to read the notes made by Dr Htay as to the diagnosis and treatment administered to Mr Edwards. The defence was particularly interested in what Dr Htay had recorded in relation to the "history of present illness". Dr Htay's note was that Mr Edwards had been "[a]ccidentally shot to elbow [sic] from right elbow, from the round-about sign, which is approximately 20 feet range at training ground, Moneague".

The trial judge's decision and the sentence imposed

[15] The learned judge found the appellant guilty and impose mandatory minimum sentence for the offence of wounding with intent. The learned judge imposed a sentence of seven years' imprisonment on each of the counts for illegal possession of firearm and illegal possession of ammunition, which he though was the mandatory minimum sentence. He then issued a certificate pursuant to section 42K of the Criminal Justice (Administration) Act and indicated that if the Firearms Act and the Offences Against the Persons Act ('the OAPA') had not prescribed mandatory minimum sentences, he would have imposed three years' imprisonment for the illegal possession of firearm, three years' imprisonment for the illegal possession of ammunition and four years' imprisonment for the wounding with intent.

The appeal

[16] The appellant filed an appeal challenging his conviction and sentence on the following grounds:

> "1. The verdict is unreasonable having regard to the evidence.
>
> 2. The Learned Trial Judge in his summation seem [sic] to base his finding of guilty [sic] on Recklessness but he failed to demonstrate the basic [sic] of his findings as per R v Lamb [1967] 2 QB 981 and R v Cunningham [1957] 2 QB 396. Thus depriving the Appellant of a fair trial.
>
> 3. In order for the Defendant to have been found guilty of Wound [sic] with Intent, the Learned Trial Judge would have

> to first find that the act of the Defendant was unlawful. The Learned Trial judge did not make any such finding and as such his verdicts cannot be accepted.
>
> 4. The Crown placed before the court two sceneries [sic] of the event, one as given by the witness Edwards and the supporting witness Carter and the contrasting evidence from the statement of the Defendant as admitted into evidence. Faced with these [sic] contrasting evidence the Learned Trial Judge failed to demonstrate with any clarity how he reconciled the variances in arriving at the verdict. Because of this indefinable [sic], the Appellant did not get a fair trial.
>
> 5. The sentence of the court is manifestly excessive as illustrated by the Learned Trial Judge."

Submissions

Appellant's submissions

Ground 1

[17] Learned counsel for the appellant argued that based on section 20(1) of the OAPA the Crown was required to prove, not only that the action of the appellant was unlawful and malicious, but also that he had the intent to maim, disfigure or disable Mr Edwards, or to do him some other grievous bodily harm.

[18] The appellant submitted that the Crown presented two scenarios before the court as to how Mr Edwards was injured. Firstly, that the Crown presented evidence to show that the act of the appellant was deliberate and intended to cause harm to Mr Edwards. The second scenario, based on the appellant's statement to the police ('police statement'), seemed to be that there was evidence from which the court could have inferred that the act of the appellant, if not deliberate, was negligent enough to infer criminal intent.

[19] The appellant contended that the expert medical evidence negated the plausibility of Mr Edwards' evidence supporting any unlawful or malicious intent to grievously harm

him, on the part of the appellant and gave credence to the defence of an accident. Also, that there was no evidence of malice or ill will by the appellant to Mr Edwards.

[20] In relation to the second scenario, it was argued that the Crown presented evidence to show that there was no ambiguity with the appellant's intention. Further, that the appellant perceived that there was no risk caused his action and that if there was a risk he acted sufficiently to negate it.

[21] Learned counsel argued that the judge's finding that the appellant was reckless runs contrary to the evidence. It was also urged that the learned judge on the one hand, was saying that the appellant was reckless in causing wounding Mr Edwards, while on the other hand, he found that the appellant fired at Mr Edwards. Furthermore, the learned judge did not define the reckless act.

[22] The appellant contended that if the learned judge had effectively analysed the evidence, weighed the variances, the explanation and applied the law he would more than likely not have convicted the defendant.

Ground 2

[23] It was submitted that the learned judge relied on the appellant's police statement in finding that he was reckless and that the shooting was not an accident. It was argued that the appellant's police statement as to what had occurred could not amount to an outrageous or reckless act but more a mistake in judgment or accident. Further, that in his police statement the appellant was saying that he did not think or know that his act created a risk to Mr Edwards as he did everything possible to eliminate the risk. This, it was argued, required an analysis of the evidence and the thought process of the appellant.

[24] The appellant contended that in **R v Cunningham** [1957] 2 QB 396 (Cunningham') it was stated that the test for recklessness is subjective and that the issue in considering recklessness is whether the appellant foresaw the harm that in fact

occurred or might have occurred from his action and continued regardless of the risk. The appellant also relied on **R v Lamb** [1967] 2 QB 981.

[25] It was submitted that there was uncertainty as to the learned judge's basis for finding that the appellant was reckless and that he did not demonstrate that he considered the appellant's state of mind. It was also submitted that the learned judge seemed to have applied an objective test rather than a subjective test.

[26] The state of mind of the appellant, it was argued, was to be found in his police statement and his unsworn statement. It was submitted that the judge ignored this evidence and relied solely on objectivity.

Ground 3

[27] It was submitted that Mr Edwards was shot in the target area of the range by the appellant, the firing of live rounds on the range was legal and the appellant was legally in possession of his firearm and ammunition.

[28] It was submitted that in order for the appellant to be guilty of illegal possession of firearm the prosecution must prove that the firearm was used for an illegal purpose. It was also argued that the pointing of a firearm in the direction of a person does not in itself constitute an unlawful act. It can only constitute an unlawful act if accompanied with a malicious intent.

[29] The appellant argued that the evidence adduced by the prosecution showed the mindset and intention of the appellant and this should not have been ignored by the learned judge. The appellant, it was argued, was conducting a training exercise and even if the action was considered reckless, it would only amount to a technical assault and an unlawful act and, in the circumstances, criminal negligence.

[30] The appellant submitted that the learned judge seemed to have concluded that the act of firing the firearm was reckless in and of itself and constituted an unlawful act. The appellant complained that the learned judge ignored the stated intention of the

appellant and with no contradicting evidence he applied the objective test instead of the subjective test.

Ground 4

[31] Mr Equiano argued that in drawing inferences from the evidence of Mr Edwards, in arriving at his decision, the learned judge completely ignored the state of mind of the appellant, as contained in the appellant's police statement. It was contended that the appellant's police statement gave an explanation that removed ill-will as a reason for the appellant firing his gun. Further, that the appellant's police statement was supported by the expert witness, Dr Graham, and the learned judge failed to demonstrate that he had taken all such evidence into consideration and reconciled the variances in arriving at the decision.

[32] It was Mr Equiano's further contention that the instant case required careful analysis of the facts and the law and the merger of the two in arriving at a decision. He charged that the learned judge merely recited the evidence and stated findings without any analysis and convergence of the law and the facts in the case. This approach, counsel concluded, deprived the appellant of a fair trial.

Ground 5

[33] It was submitted that the learned judge sentenced the appellant to the statutory minimum sentence for the offence of wounding with intent and seven years' imprisonment for illegal possession of firearm and illegal possession of ammunition.

[34] The appellant submitted that the learned judge saw it fit to issue a certificate pursuant to section 42K of the Criminal Justice (Administration) Act and to recommend that the sentence be reduced to four years for the wounding with intent and three years for the illegal possession of firearm and ammunition.

[35] The appellant pointed out that the offences of illegal possession of firearm and illegal possession of ammunition are not subject to statutory minimum sentences, and so the learned judge was not precluded from imposing the sentences he deemed appropriate. It was submitted that based on the circumstances of the case the sentences recommended by the learned judge were the most appropriate.

[36] The appellant submitted that the appeal should be allowed and the sentences set aside and a verdict of not guilty be entered. In the alternative, it was submitted that the appeal against sentence be allowed and the sentences imposed be set aside and the sentences recommended by the learned judge in the certificate be adopted by the court.

Crown's submissions

Ground 1

[37] The Crown outlined section 20(1) of the OAPA and argued that the *actus reus* that must be proved in respect of wounding with intent is an unlawful act causing a wound or grievous bodily harm to another person. Further, that the *mens rea* constitutes an intention to do some grievous or serious bodily harm. It was argued that the section specifically requires the proof of intention and that it is a crime of specific intent. Also that intention is a question of fact, determined subjectively, so the Crown must satisfy the court as to what was actually intended at the time of the commission of the offence.

[38] It was submitted that intention involves circumstances where the consequences which result are what the perpetrator intended to achieve, this is direct intention. The Crown submitted that intention also encompasses those circumstances where the consequence is indirect, or oblique, that is, it is not the exact desired consequence intended by the perpetrator, however, it could be appreciated that it was a virtually certain consequence of the act. And that the judge of fact is required to decide whether the perpetrator foresaw the harm suffered as a virtually certain consequence of his actions, though it was not his primary intention. In support of these submissions the Crown referred the court to Blackstone's Criminal Practice, 2017 Chapter A2, *Mens rea*,

para. A2.4 – 5; **R v Briston Scarlett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 153/1999, judgment delivered 6 April 2001; **R v Devon Collins** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 80/2006, delivered 30 July 2009 ('**Collins v R**'); **R v Loxley Griffiths** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 31/1980 delivered 26 October 1981; and **Cadogan (Tyrone DaCosta) v The Queen** (unreported), Court of Appeal, Barbados, Criminal Appeal No 16 of 2005, judgment delivered 31 May 2006 ('**Cadogan v The Queen'**). The Crown also referred to a number of paragraphs from the Supreme Court of Judicature of Jamaica Bench Book ('the Criminal Bench Book').

[39] The Crown outlined the findings that the learned judge made in relation to the commission of the offence and submitted that in view of the circumstances and the law, as far as intention is concerned, the learned judge was only required to consider whether, in light of what was said and done and all the circumstances, the appellant intended to cause serious bodily harm to Mr Edwards.

[40] The learned judge, it was argued, was correct in his findings that the appellant directly fired at Mr Edwards, in light of the evidence.

[41] In relation to the appellant's submission that the Crown had presented two scenarios, it was submitted that the appellant had misperceived the evidential nature and significance of the police statement and the purpose for which it was put into evidence. It was submitted that the effect of it was not to contradict and undermine the evidence from Mr Edwards, but rather, it was placed before the court in order to establish that the appellant admitted shooting at Mr Edwards and, any explanation the appellant gave in the statement, was to be viewed in the context of the differing evidence of Mr Edwards and Mr Shelton Carter, who testified for the prosecution. Also, that the Crown would have capitalised on any contradictions between the statement and the appellant's unsworn statement.

[42] It was submitted that the Crown was not accepting the appellant's police statement as true but presented it for the judge of fact to see the response of the appellant when first taxed. The police statement, it was argued, was a classic mixed statement which contained both inculpatory and exculpatory portions.

[43] The Crown argued that the legal status of the police statement enabled the Crown to present an out of court statement of the appellant containing material contradictory to its case, without it negating the evidence presented by the Crown in proof of the case. The court was expected to assess the police statement in the context of all the evidence, giving it full consideration and the appropriate weight. This autonomy accorded to judges of fact in respect of a mixed statement is well settled, it was further argued, and there is an abundance of case law on the point. Reliance was placed on this court's decision in **Wayne Hamil v R** [2021] JMCA Crim 12.

[44] The Crown submitted that the learned judge considered the police statement along with all the evidence in the case and he demonstrated that he had given full consideration to the police statement in coming to his findings. Further, that the police statement was potent material which provided a sound basis for the judge to accept that the appellant actually fired directly at Mr Edwards in the manner and circumstances outlined on the Crown's case.

[45] The Crown also submitted that the evidence of Mr Edwards and Mr Carter showed that the appellant acted deliberately with full knowledge that Mr Edwards was in the line of fire and that no guns should be fired pursuant to the orders the appellant had given. In addition, the appellant's police statement demonstrated that he acted deliberately and had commenced to put Mr Edwards through a tactical shooting exercise that he knew Mr Edwards was not prepared for or expecting, because there had been no prior agreement.

[46] The Crown submitted that the appellant's actions demonstrated that there was an obvious risk, and he did not demonstrate any attempt to negate the risk. Rather the risk was exacerbated by the impromptu and unilateral tactical shooting. And that there was

in fact a virtual certainty of a risk of injury and he was not in control of the situation, having regard to the nature of the weapon involved and what was taking place on the range before he decided to fire.

[47] In relation to Dr Ingram's evidence, the Crown argued that his evidence as to which wound was exit and entry and whether it was consistent with being inflicted when Mr Edwards was in motion, did not negate Mr Edwards account, as it stands on its own, given the dynamic circumstances and the theoretical basis of the question. Further, the appellant in his police statement supported Mr Edwards evidence that he was in motion (the process of turning around), having taken up the fifth and final target, when he was shot.

[48] The Crown contended that the learned judge had no obligation in law to accept the opinion of Dr Ingram, and as the judge of fact he was entitled to come to his own findings as to how the injuries were sustained and the position of Mr Edwards in relation to the muzzle of the gun when the shots were fired. The Crown relied on **R v Carletto Linton et al** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 & 5/2000, judgment delivered 20 December 2002.

[49] It was also submitted that, in light of the evidence of Mr Edwards and Mr Shelton Carter, there was no issue that Mr Edwards was shot whilst in the process of turning around and that based on the circumstances the learned judge was better placed to come to a finding as to whether these injuries were received directly from the gun or by ricochet from someone else's gun.

Ground 2

[50] The Crown argued that having regard to the meaning of intention as it relates to the offence of wounding with intent the appellant's suggestion that the learned judge ought to have relied on the cases of **R v Lamb** and **Cunningham** is incorrect and misconceived. It was also submitted that given the requirement of the intention to do an act to produce the result, the learned judge's resort to recklessness was misplaced.

[51] The Crown contended that recklessness has no place in relation to *mens rea* for the offence of wounding with intent, by virtue of the fact that wounding with intent requires specific intention to cause the harm that resulted. It was also argued that it is different from crimes of basic intent which only require proof of malice. Further, that in a case dealing with causing grievous bodily harm the offence is proven by evidence that unlawful force was used on the person and that the accused acted maliciously, that is, either he intended to cause some injury to the person or foresaw the injury as a virtually certain but took that risk and caused the person to suffer some wound or grievous bodily harm. And in those cases, the intention or recklessness need not relate to the particular kind of harm done, but any injury, however slight. The Crown relied on the Criminal Bench Book, section 8-3.

[52] The Crown submitted that the learned judge seemed to have married the two states of mind. In addition, it was argued that this is not fatal given the specific findings that he arrived at and the preceding thorough examination of the case presented by both sides in order to determine the state of mind. The learned judge, it was argued, made a finding of the appellant's intention based on particular circumstances, such as the direct aim of the firearm at Mr Edwards, rather than at the ground, when he fired. Further, that the Crown presented cogent and coherent evidence which supported the finding of guilt.

[53] The Crown submitted that if the court were to find that this is a material error this is an appropriate case for the proviso to be applied in light of the clear and convincing evidence which overwhelmingly supported the finding that the appellant fired directly at Mr Edwards, and not at an angle to the ground as he said.

[54] It was also argued that the lesser offence of unlawful wounding for which recklessness is a consideration in proving *mens rea* was also open to the learned judge given the facts of the case. Therefore, should the court find itself constrained to not apply the proviso, then the lesser charge is also available to be substituted in light of the powers of the Court of Appeal to correct defects as was pointed out in **R v Shirley Ruddock** [2017] JMCA Crim 6.

[55] The Crown contended that the learned judge demonstrated that he considered the case for the defence and obviously resolved whatever weaknesses in favour of the evidence presented by the prosecution, having recognised that the central issue was credibility and found Mr Edwards and the other witnesses for the prosecution convincing and was satisfied with the reliability of the prosecution's case.

Ground 3

[56] The Crown submitted that the learned judge stated unequivocally his finding that the appellant acted unlawfully when he used his firearm in an illegal way by intentionally shooting Mr Edwards in the circumstances outlined. Further, that the approach of the learned judge was very thorough and he considered the state of mind of the appellant pointedly, as well as the other evidence presented by the prosecution. It was also submitted that the learned judge's approach to the assessment of the evidence was objective.

[57] The Crown also argued that it is settled law that a licensed firearm holder who uses his gun to commit a crime is thereby guilty also of illegal possession of the gun.

Ground 4

[58] It was submitted that the learned judge correctly assessed the facts of the case presented, identified the main issue which was credibility and considered the defence put forward by the appellant. Further, that the learned judge demonstrated that all the salient features of the case and the statements of the appellant were considered and assessed and he was satisfied that the Crown had proven its case. The Crown also relied on the House of Lords decision in **R v G** [2003] UKHL 50.

[59] It was contended that in the light of the position stated in **Hamil** it is clear that it was for the learned judge to decide whether to accept or reject all or a part of the appellant's police statement. Furthermore, the learned judge was obligated to consider the police statement in light of the appellant's statement from the dock.

Ground 5

[60] The Crown acknowledged the strong mitigating factors in favour of the appellant, his good antecedent history and character and that the mitigating features overwhelm the aggravating factors and the fact that the appellant paid compensation in excess of $1,000,000.00 to Mr Edwards and has apologized.

[61] As a result, it was submitted that the Crown had no objection to the sentence proposed by the learned judge and would recommend an even lesser sentence based on the appellant's contribution to his community and his unlikelihood to reoffend.

Discussion

[62] The supplemental grounds of appeal raise the following issues for discussion. Firstly, did the learned judge misdirect himself on the mental element required to prove the offence of wounding with intent (ground two)? Secondly, was the learned judge required to make a predicate finding of unlawful conduct on the part of the appellant, before returning an adverse verdict on the count for wounding with intent (ground three)? Thirdly, did the admission into evidence of the appellant's police statement represent a contrasting version of the case for the prosecution, requiring resolution in advance of returning a guilty verdict (ground four)? Fourthly, are the verdicts sustainable, having regard to the evidence (ground one)? For convenience, the issues will be discussed sequentially, as set out above, and not in the order in which the grounds were argued.

<u>Issue #1: did the learned judge misdirect himself on the mental element required to prove the offence of wounding with intent?</u>

[63] The offence of wounding with intent is created under section 20(1) of the OAPA. Section 20(1), in so far as is relevant, is extracted below:

> "Subject to subsection (2), whosoever, shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, … **with intent in any of the cases aforesaid, to maim, disfigure or disable any person, or to do some other grievous bodily harm**

> **to any person**, … shall be guilty of a felony." (Emphasis added)

Wounding with intent, therefore, comprises both an act (unlawfully and maliciously wounding), and the mental element (the intent to do grievous bodily harm). We are not, at this juncture, concerned with the act, only the mental element.

[64] The mental element is accepted as one of specific intent; that is, to do grievous bodily harm. Grievous bodily harm, it is said, should be given its ordinary and natural meaning of "really serious bodily harm" (see Archbold 36th edition para. 2654). The crux of the matter is proving that the person on trial had the specific intent, coincident with the infliction of the wound. This takes us to the meaning of intention. The development of the law on intention followed the trajectory of appellate review of convictions for murder, another offence of specific intent, and, is consequently applicable to all offences requiring the proof of intention as the mental ingredient.

[65] The applicable principles have been distilled and summarised from the leading cases by the learned editors of Archbold 2022, at para. 17-33 ('Archbold's principles'):

> "The relevant principles are:
>
> a) When a judge is directing a jury upon the mental element necessary in a crime of specific intent [such as wounding with intent], he should avoid any elaboration or paraphrase of what is meant by intent, and leave it to the jury's good sense to decide whether the accused acted with the necessary intent.
>
> b) Foresight of the consequences which it must be proved that the accused intended (in murder, death or really serious bodily injury), is no more than evidence of the existence of the intent; it must be considered, and its weight assessed, together with all the evidence in the case. In other words, if the prosecution proves that the defendant, accused of murder, must have foreseen that his actions would cause at least really serious harm, that is evidence which the jury may use in order to decide whether

it was, in fact, his intention to do so. A direction on foresight will only be necessary when the judge considers that, in order to avoid misunderstanding, some further explanation is necessary due to the way in which the facts and/or arguments have been presented.

c) The probability of the result is an important matter for the jury to consider and can be critical in their determination whether the result was intended.

d) Where, exceptionally, it is insufficient to give the jury the simple direction that it is for them to decide whether the defendant intended to kill or do serious bodily harm, they should be told that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant must have appreciated that such was the case; they should always be told that the decision is theirs to be made on a consideration of the whole of the evidence.

[66] These principles are of some vintage and were accepted by this court in **Collins v R**. In that case, Smith JA cited with approval the judgment of Simmons CJ in **Cadogan v The Queen**. In **Cadogan v The Queen**, Simmons CJ culled five propositions ('the Simmons' propositions') from his review of the cases on the mental element for murder (intention). In the interest of brevity, those need not be regurgitated here. It suffices to say Simmons' propositions one and two are captured in Archbold's principle (a); Simmons' proposition three reflects the law as stated in Archbold's principles (b) and (c); while Simmons' propositions four and five mirror Archbold's principle (d).

[67] Before applying the above principles, it should be borne in mind that there is a correlation between a person's intention and the consequence(s) of his action. In the articulation of Blackstone's Criminal Practice 2020, at para. A2.4:

> "'Intention' is a word that is usually used in relation to consequences. A person clearly intends a consequence if it is

> his purpose that the consequence should follow from his action. This is so whether the consequence is very likely or very unlikely to result ..."

The question of intention turns on whether the defendant's purpose in perpetrating the act was to bring about a particular result. So that the defendant's intention in achieving a particular consequence is severable from the probability of its achievement. Therefore, the defendant who discharges a firearm in the direction of another, would still have the intention to do serious bodily harm, although the intended target, unknown to the defendant, was beyond the range of the particular firearm.

[68] In the above example, had the target been within range of the firearm and suffered injury, that would have been a direct attack. If that is correct, the case would fall under Archbold's principle (a). Therefore, the judge would not be required to "elaborate or paraphrase" what is meant by intent. The judge's simple task would be to leave it to the jury's good sense to decide whether the accused had the requisite intention.

[69] It would be quite another matter if the victim's injury arose as a secondary consequence from a primary act; meaning, a defendant may be held to have the requisite intention although he might not have wanted the particular consequence to follow, but which he knew to be virtually certain to ensue. The law is expressed in the following way in Blackstone's Criminal Practice 2022, at para. A2.4:

> "The meaning of 'intention' is not restricted to consequences which it is the accused's purpose to cause (sometimes referred to as 'direct' intent) but includes consequences which an accused might not want to follow but which he knows are virtually certain to do so (sometimes referred to as 'oblique' or 'indirect' intent) …"

[70] Therefore, the application of the principles mandates a predicate distinction between cases arising from a direct attack upon the victim and those where the victim sustains injury as a result of some other eminently dangerous act perpetrated by the defendant (see **Collins v R**, at para. 18). In cases stemming from a direct attack, Archbold principle (a) would apply. In cases where the injury or death occurs from the

inherently dangerous act, Archbold principles (b), (c) and (d) would be applicable. Although Archbold seems to limit telling the jury that intention should be founded upon a consideration of all the evidence, to cases where the injury or death was a virtual certainty, this direction is not so confined in **Cadogan v The Queen**. Simmons' proposition (v) reads:

> "In all cases the jury should be told that their decision on the issue of intent must be reached upon a consideration of all the evidence including what the defendant said and/or did."

This, however, is not a material distinction but a consequence of the categorization adopted by Archbold and Simmons. Therefore, it is accepted that in all cases the jury should be directed in the manner articulated by Simmons.

[71] Based on the above exposition of the law, the first question for the learned judge's resolution, in considering whether the prosecution had proven that the appellant had the specific intent, was, did Mr Edwards sustain his injury as a result of a direct attack upon him by the appellant or from an inherently dangerous act by the appellant, the consequence of which the appellant knew to be virtually certain? In order to determine the learned judge's approach, it is necessary to set out his relevant findings of fact (pages 432-434 of the transcript), in some detail:

> "[1] Also I find that the complainant, Mr. Damion Edwards, erected the targets and they were shot down and he was asked to re-erect them. He was six meters [sic] or six feet or something from the firing line.
>
> [2] Mr. Matthews, I find that Mr. Matthews said dead range. He said it in his cautioned statement, he said dead range, this meaning both by what he said and what the witness said, that all firing must stop, the situation must be safe for the complainant, Mr. Edwards to go and erect those targets again. So it must be safe.
>
> [3] I find that Mr. Edwards went to erect those targets after dead range was called and he was satisfied that it was safe to do so.

> [4] I find that he did erect them.
>
> [5] I find that when Mr. Matthews said dead range, that is [sic] clear indication that he recognized that there was a danger if the complainant would [sic] go out there to erect those targets at that time, so that's why he called dead range, so he recognized there is [sic] a danger.
>
> [6] I find that the complainant, having gone out there after it had been safe, that shots was [sic] fired from a shotgun by Mr. Matthews at him out there.
>
> [7] I find also that Mr. Matthews fired a shot from his pistol too which caught the complainant.
>
> [8] The court can infer from Mr. Matthews act of calling dead range, recognizing the situation and also fired the shotgun, and also find that, find and infer that the Crown has proven his intention in this offence.
>
> [9] I find that [Mr Edwards] did not consent or did not participate in any tactical training that day. The law is that the complainant cannot consent to serious injuries being done to him.
>
> [10] I find that action taken by Mr. Matthews was reckless because he was aware of the danger that existed and what could have happened.
>
> [11] I find that Mr Matthews fired at [Mr Edwards] and it was not an accident.
>
> [12] I find that Mr Matthews used his firearm in an unlawful way and as such make [sic?] it illegal.
>
> [13] I find there was no ricocheting."

It was on those findings of fact, and the rejection of the defence, that the learned judge returned a verdict of guilty on all the counts of the indictment.

[72] There is nothing in the learned judge's findings from which it may conclusively be said that he found the appellant launched a direct attack upon the complainant. There is, admittedly, a fine line between the learned judge's rejection of the appellant's claim of

ricochet and finding that he fired at the complainant (findings # 11 and # 13), on the one hand, and saying there was no direct attack, on the other hand. However, that apparent inconsistency disappears when the summation is read as a whole (we will return to this below). What is clear from the findings of fact, however, is an absence of appreciation for the intellectual differentiation between direct and oblique intention.

[73] In essence, the learned judge found that the appellant created the illusion of safety when he called dead range, a situation into which Mr Edwards was lulled/lured by the request to replace the targets, then the appellant transformed what was safe into a dangerous situation by firing at Mr Edwards. As we understand the learned judge, the appellant knew that Mr Edwards was within the range of the pistol (whether 6 feet or metres from the firing line, finding #1); yet, he fired at Mr Edwards (finding #11); in circumstances where the appellant had foresight of the consequences and the probability that Mr Edwards may sustain really serious injury (finding #10).

[74] This brings us to the thorny issue concerning the learned judge's use of the word reckless in finding 10. This provided fodder for Mr Equiano's submission that the learned judge departed from the specific intent, required for wounding with intent, and strayed into the mental element required for unlawful wounding under section 22 of the OAPA; that is **Cunningham** recklessness (see **Cunningham**).

[75] The leaned editors of Blackstone's Criminal Practice 2020, at para. A2.6 acknowledge that recklessness concerns, essentially, unjustified risk-taking, which is not susceptible to precise definition. The learned writers, in the same passage, provide a list, which they argue, elucidates, the "relationship between intention and recklessness (in relation to consequences)". The list is extracted below:

> "(a) Consequence aimed at (i.e. D acts in order to cause the consequence): intention.
>
> (b) Consequence foreseen as virtually certain: intention *may* be found.

> (c) Consequence foreseen as probable: typically (if risk unreasonable) recklessness (subjective).
>
> (d) Consequence foreseen as possible: typically (if unreasonable) recklessness (subjective).
>
> (e) Consequence not foreseen but ought to have been: negligence (objective recklessness).
>
> (f) Consequence not foreseen which even a reasonable person would not foresee: strict liability."

[76] Mr Equiano's complaint does not concern (e) and (f). So, we may safely disregard those for present purposes. Mr Equiano's submissions appear to encompass (c) and (d). In his written submissions, counsel advanced that the learned judge seemed to base his finding of guilt on recklessness but failed to demonstrate the basis of his findings in accordance with **R v Lamb** and **Cunningham**.

[77] In **R v Lamb** the defendant was convicted for manslaughter which arose from the following circumstances. The defendant possessed a five-chambered cylinder Smith & Wesson revolver. The revolver contained two bullets, none of which was opposite the barrel. The defendant, in jest, pointed the firearm at his friend who was also treating the matter as a joke. When the defendant pulled the trigger, the cylinder rotated and a bullet was discharged, resulting in the death of the friend. It was not disputed that the defendant did not intend to fire the bullet and was ignorant of the fact that pulling on the trigger would cause the cylinder to rotate to a chambered section of the barrel. Expert evidence confirmed that a novice to revolvers would be as ignorant of the mechanical workings of the firearm as the defendant. The defendant was convicted and appealed.

[78] The appeal turned on two points. The first point was the trial judge's erroneous view that for proof of manslaughter, proof of even, what was termed "a technical assault" was unnecessary. The second point concerned the omission of the judge to direct the jury on the defendant's state of mind that he could pull the trigger without firing a bullet, together with the experts' supporting view of the defendant's opinion. It was against the background of the second challenge to the conviction that Sachs LJ, at page 990, said:

> "… When the gravamen of a charge is criminal negligence – often referred to as recklessness – of an accused, the jury have to consider among other matters the state of his mind, and that includes the question of whether or not he thought that that which he was doing was safe. In the present case it would, of course, have been fully open to a jury, if properly directed, to find the defendant guilty because they considered his view as to there being no danger was formed in a criminally negligent way. But he was entitled to a direction that the jury should take into account the fact that he had undisputedly formed that view and that there was expert evidence as to this view being an understandable view".

[79] In Mr Equiano's criticism of the learned judge, in this case, there is an equivalence between the omission in **R v Lamb** and the present case. In his oral argument, Mr Equiano said the appellant maintained that he fired. Notwithstanding questions being put to the prosecution's witnesses concerning the possibility that the bullet may have come from another source, material before the court indicated that the appellant fired in the direction of Mr Edwards, with a particular intention and to achieve a certain objective. Therefore, the appellant was not ruling out that the bullet could have come from his gun. Against that backdrop, counsel submitted, there would be no intention to satisfy section 20 of the OAPA.

[80] In our view, **R v Lamb** does not assist the appellant. Firstly, unlike in **R v Lamb**, where both victim and perpetrator operated under a common misunderstanding that the latter was acting in jest, there was no meeting of the minds between Mr Edwards and the appellant in this case. The appellant alleged that he and Mr Edwards were engaged in tactical training. However, both had a different understanding of the phrase. Mr Edwards understood tactical training to mean, in brief, hiding behind objects, shooting at and running between targets. The appellant, on the other hand, said the "shooting in which I fired my pistol while Edwards was down range is a tactical shooting" (see page 216 lines 5-7 of the transcript). The appellant elaborated in his unsworn statement thus:

> "Tactical training was how he would react -- I point my weapon to an angle of 45 degree [sic] angle away from him

> which I saw hit the ground. And I heard he [sic] said he got shot ..."

So then, Mr Edwards' concept of tactical shooting did not involve placing himself in a location where live fire would be directed, contrary to the appellant's understanding. Quite apart from their polar opposite concepts of tactical training, Mr Edwards categorically denied that they were so engaged at the material time. The appellant in his police statement said he neither briefed nor discussed tactical shooting with Mr Edwards on the eventful day. It is small wonder that the learned judge rejected consensual participation in tactical training (finding #9).

[81] Secondly, having rejected consensual participation in tactical training, this case was clearly not one of criminal negligence. The learned judge did not treat it as such. This is evident from his finding that the appellant fired at Mr Edwards, a corollary to which was the rejection of the defence of accident (finding #11). The learned judge showed that he was aware of the mental element the prosecution needed to establish in order to discharge its burden of proof. After giving a working definition of a wound, the learned judge subdivided what the prosecution had to prove as follows: "(a)the accused caused a break in the skin; and also (b) that the accused intended to cause serious bodily harm when he did or if he did the act" (see page 399 lines 10-14 of the transcript).

[82] The learned judge did not stop there. On the same page, at lines 15-19, he elaborated, "the prosecution is saying the shooting of another person is intended to cause serious bodily harm and, in fact, caused grievous bodily harm. The prosecution must prove the intention of the accused". The learned judge then went on to answer his own question as to how the prosecution should go about proving intention; that is, by inviting the court to look at what was said or done in order to draw an inference. Following on that, the learned judge stated that "there is no positive proof of intention" (see page 399 lines 19-24 of the transcript). The learned judge returned to the ingredients of the offence, at page 430 lines 23-25 and page 431 lines 1-5. There he said:

> "… the Crown has a duty to prove all the ingredients in the case, more so in the case of Wounding with intent. The Crown must prove intent, the breaking of the skin, that burden is on the Crown, break in the skin and bleeding, that burden is on the Crown. The Crown must prove that it was not an accident …"

[83] When the learned judge's findings of fact are viewed from the perspective of his stress on intention and the prosecution's obligation to prove it, it can be appreciated that he was concerned with pulling together the evidence of what the appellant did in order to infer his intention. Viewed from this perspective, while the learned judge's description of the appellant's act of shooting in the circumstances of the case as "reckless", was unwise, in our opinion the learned judge was saying no more than that the appellant had foresight of the consequences of his act. Foresight of the consequences is evidence of the existence of intent (see Archbold's principle (b) at para. [66] above). To underline the point, proof that D knew there was a likelihood of result Z occurring from his act, is evidence from which the inference may be drawn that he intended result Z (see Phipson on Evidence 20th ed para. 16-10). In Lord Steyn's articulation, "a result foreseen as virtually certain is an intended result" (**R v Woollin** [1999] 1 AC 82, at page 94).

[84] Although the learned judge did not articulate his conclusion in the same semantic vein as the court in **R v Woollin,** we understand him to be saying, given the circumstances engineered by the appellant, causing serious bodily harm to Mr Edwards must have been a result foreseen by the appellant as virtually certain and, accordingly, was the intended result. Therefore, the learned judge was not required to direct himself along the lines of **R v Lamb**. That is, there was no legal requirement for the learned judge to embark upon an examination of the appellant's state of mind. To find his intention, the learned judge was required to do no more than draw conclusions from the appellant's conduct and what he said, before, at the time of or after the shooting. An obligation the learned judge recognized (see para. [83] above).

[85] Notwithstanding the appellant's vacillation between denial, injury from ricochet and accident, the essence of his answer to the charge was that he did not intend to shoot

or injure Mr Edwards. In short, he did not act to bring about the fracture to Mr Edwards arm, secondary to the gunshot wound. That being the appellant's stance, the learned judge could have benefitted from the guidance offered by the Criminal Bench Book, at chapter 8-1, para. 13:

> "… where D contends that he did not act to bring about the result contended by the prosecution, and/or acted to bring about a different result, it may be necessary to add a direction (sometimes referred to as a *Nedrick* or *Woollin* direction) that before the jury could find that D intended the result contended for by the prosecution, they would have to be sure that it was virtually certain that D's actions would have that result unless something unexpected happened, and that D himself realised that that was so. If the jury were sure of that, it would be open to them to find that D intended that result, if they thought it right to do so in light of the evidence ..."

This direction accurately reflects the law, alluded to earlier in Archbold (see para. [66] above); **Cadogan v The Queen** (see para. [67] above). Based on the learned judge's findings of fact, it was virtually certain that Mr Edwards would sustain serious bodily harm in the circumstances in which the appellant fired at him, barring a supervening event, which the appellant must have appreciated. Adherence to the guidance in the Criminal Bench Book would have obviated the need for the reference to reckless. In any event, as we said earlier, this was a loose reference to the appellant's foresight of the probable consequences and not a substitution of recklessness as the mental element for the offence of wounding with intent. Consequently, there is no merit in this ground of appeal.

Issue #2: was the learned judge required to make a predicate finding of unlawful conduct on the part of the appellant, before returning an adverse verdict on the count for wounding with intent (ground three)?

[86] Mr Equiano asserted that the learned judge did not make a finding that the act of the appellant was unlawful. The gravamen of his submissions was that the circumstances in which Mr Edwards was injured did not lend themselves to a finding of unlawful user; namely (a) both the appellant and Mr Edwards were participants at a shooting range

where live rounds could legally be discharged, (b) the pointing of the firearm, juxtaposed with the appellant's mindset and intention, negatived even a technical assault.

[87] Taking Mr Equiano's base premise first, it is factually incorrect to submit that the learned judge did not make a finding that the act of the appellant was unlawful. In the section of his summation in which the learned judge was reciting what may be described as standard directions, at page 405 lines 3-4, he said, "[a] legal firearm can become an illegal firearm if it is used unlawfully". The learned judge, an experienced jurist, therefore telegraphed that he had to make a prefatory finding of unlawful user since the appellant was a licensed firearm holder. The learned judge, in his penultimate findings of fact (finding #12, at para. [72] above) specifically found the appellant used his firearm in an unlawful way, thereby transforming his possession from legal to illegal.

[88] This finding of fact is amply supported by the evidence that was before the learned judge, both in terms of an assault and wounding with intent. We will consider the assault first. Hearing the explosion, which Mr Edwards found "shocking and frightening", he turned around and saw the appellant pointing the pistol at him (see page 32 lines 12-25 of the transcript; page 33 lines 1-16). Contrary to Mr Equiano's submission, pointing a loaded firearm at a person who is within the gun's range is an assault (see Archbold Pleading, Evidence & Practice 36th ed para. 2631). An assault is an intentional or reckless act by one person, which causes another to apprehend immediate and unlawful personal violence (Smith and Hogan Criminal Law 12th ed para. 17.1.1). Words, may, however, negate the action which would otherwise be an assault. In **Tuberville v Savage** (1669), 1 Mod Rep 3; 86 ER 684 D placed his hand on his sword and said, "[i]f it were not assize time I would not take such language". Since it was assize time, D clearly had no intention of visiting immediate and unlawful personal violence upon the would-be victim.

[89] Learned counsel for the appellant appeared to couch his submission in the vein of **Tuberville v Savage** by his reference to the appellant's "mind set and intention". However, the appellant made no utterance at the time of pointing and discharging the firearm. It was only after Mr Edwards said he had been shot that the appellant spoke.

And, when he did so, it was to deny that the injury was by his act of shooting. Respectfully, whatever the appellant said about his "mind set and intention" after the fact, cannot be used retrospectively to say he lacked the guilty mind when he pointed his firearm.

[90] Furthermore, the learned judge's finding of unlawful user is fortified by his earlier finding that the appellant fired at Mr Edwards and that the shooting was not accidental (see finding #12). In other words, in the view the learned judge took of the evidence, the appellant voluntarily and deliberately fired at Mr Edwards. When the appellant fired as the learned judge found, he had neither lawful justification nor excuse; he was not defending himself or using the range for the lawful purpose of target practice. The learned judge's finding of unlawful conduct is unimpeachable. Consequently, there is no merit in the issue raised in ground two.

Issue #3: Did the admission into evidence of the appellant's police statement represent a contrasting version of the case for the prosecution, requiring resolution in advance of returning a guilty verdict (ground four)?

[91] In order to address this issue, the appellant's police court statement must first be classified. Such a statement may be entirely inculpatory, completely exculpatory or a mixture of inculpatory and exculpatory ('mixed'). Phipson on Evidence 20th ed, at para. 36-33, defines a mixed statement "as one containing both exculpatory elements and an admission of fact which is significant to any issue in the case, that is capable of adding some degree of weight to the prosecution case on an issue which is relevant to guilt". A wholly inculpatory statement usually presents little, if any, difficulty. The same may be said for the completely exculpatory statement. It is the mixed statement that usually presents challenges. After what may be described as a comprehensive review of the authorities in **Wayne Hamil v R**, D Fraser JA (Ag), as he then was, declared that the whole of the mixed statement should be presented to the jury for its assessment and determination as to where the truth lies. At para. [42] D Fraser JA (Ag) said:

> "… The review of the law has clearly shown that where an out of court statement given by a defendant is wholly exculpatory,

> as in **R v Storey and Anwar** and **R v Barbery et al**, it is not receivable in evidence in proof of the truth of its contents. It is however 'evidence showing the reaction of the accused when first taxed with the incriminating facts … which forms part of the general picture to be considered by the jury at the trial'. Where however the statement is mixed as in **R v Donaldson et al, R v Duncan**, **R v Hamand**, **R v Sharp**, **Western v Director of Public Prosecutions** and **Alexander von Stark v The Queen**, 'the whole statement, both the incriminating parts and the excuses or explanations must be considered by [the jury] in deciding where the truth lies'."

[92] There was no dispute before us that the appellant's police statement falls to be classified as mixed. Therefore, the learned judge, sitting without a jury, was duty-bound to consider the whole statement to decide where the truth laid. Since that was the learned judge's obligation, we agree with learned counsel for the Crown that the appellant's counsel "misperceived the evidential nature and significance of the [police] statement". Mr Equiano's misperception is betrayed by his mischaracterization of the appellant's version as an alternate scenario of how the shooting took place, presented by the prosecution. The question becomes, did the learned judge discharge his duty in the present case?

[93] The learned judge's approach to the appellant's police statement is readily discernible from the transcript, at page 405. The learned judge made reference to the fact that the police statement had been admitted into evidence, and compared it to a cautioned statement. He then went on to say, at lines 14-19:

> "A cautioned statement must be made free and voluntary, court must look at the statement and see if what he said is true."

That pronouncement was followed by a comprehensive review of the police statement, as part of the general review of the evidence led for the prosecution (see page 421 line 18 through to page 424 line 9 of the transcript).

[94] The learned judge's treatment of the appellant's police statement showed that he considered the whole statement, both the inculpatory and exculpatory parts, according to the dictates of **Wayne Hamil v R**. In considering the whole statement, the learned judge was required to bear in mind that the incriminating parts were likely to be true, whereas the excuses did not bear the same weight: **R v Duncan** (1981) 73 Cr App R 359. It is apparent from the learned judge's findings of fact that he rejected, or accorded less weight to, the exculpatory parts of the appellant's police statement, while giving more weight to the parts which were capable of adding some degree of weight to the allegations of Mr Edwards and his witness. There is, therefore, no merit in the complaint raised by this ground.

Issue #4: Are the verdicts sustainable, having regard to the evidence (ground one)?

[95] This is an omnibus challenge to the conviction which largely covered territory traversed, in subsets, by the issues raised by the other grounds. Mr Equiano launched a two-pronged attack upon the conviction under this ground. Firstly, he charged that the Crown presented two scenarios of the incident: (a) through the composite version of Mr Edwards and his witness, the prosecution attempted to show that the appellant's act was deliberate and intended to cause harm; and (b) from the appellant's police statement, the prosecution asked the court to infer that the appellant's act, if not deliberate, was negligent enough to be criminal.

[96] Earlier in this judgment (see discussion under issue #3 between paras. [91] - [94]) we demonstrated that the proposition of a two-case scenario is misconceived. Notwithstanding, we wish to dispose of one significant matter raised by Mr Equiano under this head, concerning a discrepancy between the evidence of Mr Edwards and Dr Ephraim Ingram. In examination-in-chief Mr Edwards said he heard an explosion while installing the final target; felt a "hard hammering" at his right elbow which bled profusely; and turned around immediately after installing the target. In cross-examination, Mr Edwards said the entry wound was to the outer front of his arm, while the exit wound was to the

back of his right hand. The witness asserted that, to the best of his knowledge, it was to the front, when defence counsel suggested to him he was lying.

[97] Dr Ephraim Ingram confirmed the presence of two gunshot wounds on Mr Edwards' right arm; one to the outer/lateral aspect and the other to the medial aspect just above the elbow. The former wound was described as the entry wound, distinguished by its regular shape, searing (burning and charred) around the edges and inverted (depressed inwards) skin edges. Based on the respective positions of the entry and exit wounds and the bone having been broken at the same level, Dr Ingram opined that the bullet's trajectory was "roughly horizontal". It was also Dr Ingram's view that, if the protagonists were facing each other at the time of the shooting, only a ricochet could have caused the wound. The latter opinion was qualified under re-examination to say, the infliction of the wound was likewise consistent with the victim being in motion and turning towards the shooter.

[98] The important matter for our consideration is how the learned judge addressed this discrepancy. The learned judge gave himself standard directions on inconsistencies (see page 401 lines 8-25; page 402 lines 1-4 of the transcript). Subsequently, the learned judge highlighted the specific discrepancy (see page 411 lines 3-13 and 21-24 of the transcript). The learned judge then resolved the issue of the entry wound by deferring to the expert medical evidence. At page 414 lines 12-17 of the transcript, the learned judge assessed the aftermath of the shooting and then expressed himself as follows:

> "So he saw the accused point the gun at him and he knows who shot him. He could see Mr Matthews clearly, his face. He said Mr Matthews at one stage helped to stop the bleeding, then he said the bullet entered the front part of his hand but he showed it, as I said before, in circumstances where he saw the blood, he is not a medical [sic] trained person. He said the stitches to the front, he can't see the back ..."

[99] The learned judge did not go on to find that the resolution of this discrepancy destroyed the fabric of the prosecution's case. By these pronouncements, the learned judge appeared to have accepted that, as a layman, Mr Edwards was guided by the

presence of blood and his optical limitations (not being able to see back of the arm), in determining where the bullet entered. In other words, the learned judge accepted that Mr Edwards' untrained eyes would not have been alert to the presence and significance of the distinguishing features of an entry gunshot referred to above (see para. [98]). As an aside, strictly, this was not a fair question to pose to a lay witness.

[100] Returning to the discrepancy, the learned judge also had before him the appellant's own assertion that Mr Edwards was in motion at the time he was fired upon. At page 216 lines 2-4, the appellant said, in his police statement, "[a]t the time I fired the round Mr Edwards was in the motion of turning around to face me". This is inculpatory material which the learned judge was entitled to take into his consideration in rejecting the appellant's claim that Mr Edwards suffered his injury indirectly, that is, by way of ricochet; a position entirely consistent with the medical opinion, expressed under re-examination. Therefore, Mr Edwards' evidence concerning both the entry wound and his position, in relation to the appellant at the time, did not present an irreconcilable discrepancy on the case for the prosecution.

[101] We now turn our attention to the second prong of Mr Equiano's attack. Mr Equiano quoted findings #10 and #11 (see para. [71] above) and submitted that these findings run counter to the evidence. It was his further submission that these findings of fact are implicitly inconsistent and the so-called reckless act was left undefined. When the learned judge's impolitic use of the word "reckless" is understood in the manner articulated above (see discussion under issue #1 at paras. [63] – [85we]), the apparent inconsistency between these two findings of fact vanishes. More so, both findings #10 and #11 are amply supported by the evidence. For emphasis, we repeat, the medical evidence supported the finding that Mr Edwards was directly struck by the bullet from which it is a very short step to further find that the appellant fired directly at him. A finding that the appellant fired directly at Mr Edwards in circumstances where he appreciated it was virtually certain Mr Edwards would have sustained injury, is consistent with saying the shooting was no accident.

[102] It is convenient at this time to dispose of the complaint that the learned judge failed to define the reckless act. Concluding as we have, that the learned judge's use of the word 'reckless' was not in its classic or legal denotative sense, there was no need to attempt any such definition. On the contrary, the absence of any such definition, together with the learned judge's several references to intention, further undermines the contention that he misapprehended the requisite mental element for the offence of wounding with intent.

[103] The upshot of the foregoing discussion is that the contention that the verdict is unreasonable having regard to the evidence is without merit.

Sentence

[104] In the instant case, the learned judge issued a certificate pursuant to section 42K of the Criminal Justice (Administration) Act to allow the appellant to have this court review the mandatory minimum sentence imposed. As a prelude to issuing the section 42K certificate, the learned judge, at page 487 lines 23-25 to page 488 lines 1-10, said:

> "But based on the circumstances of the case, the makers of the law made provisions that the judge can issue a certificate, and when I look at the circumstances, the good character, no previous conviction, the age at which the offence was committed, outstanding member of the community, I have decided that I will issue a certificate, and I have read and re-read, and I have decided there is a range of five to seven or thereabout, for Wounding with Intent, five to ten, I think, and there is a range of - - but I am going outside of that.
>
> I have decided to issue a certificate, I think this is the most reasonable sentence in the circumstances, I don't know if the Court of Appeal will agree, but I have decided that for the Firearm you would serve three years, that's what I would have given and the ammunition, [three] years, and for the Wounding with Intent, I have decided that four years imprisonment, sentence to run concurrently, that's what I think, based on all the circumstances, I think that is what I would have imposed had I not followed the mandatory sentencing. I trust and issue a certificate to you."

Firstly, it is apparent that the learned judge based the issue of the section 42K certificate upon a comprehensive overview of the case namely, the circumstances in which the offences were committed and the appellant's profile. Secondly, it appears the learned judge treated all the offences as being subjects of a prescribed mandatory minimum sentence.

[105] The latter position was an unfortunate misunderstanding on the part of the learned judge, a seasoned judicial officer. The appellant was charged under section 20(1)(b) for the offences of illegal possession of firearm and ammunition under the Firearms Act. Whereas a maximum penalty of imprisonment for life is prescribed for both offences, there is no minimum term of imprisonment laid down in section 20(4)(a)(ii) of the Firearms Act, the penalty section. We quote section 20(4)(a)(ii):

> "(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) …
>
> (ii) on conviction before a Circuit Court to imprisonment for life with or without hard labour"

Therefore, in so far as these two offences are concerned, the learned judge had the discretion, fettered only by the principles of sentencing, the well-established case law methodology and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), to impose appropriate sentences upon the appellant. The issuance of a section 42K certificate was, therefore, not relevant to the offences of illegal possession of firearm and ammunition.

[106] The position is quite different, however, in respect of wounding with intent. The starting point is section 20 of the OAPA, which reads, so far as is relevant:

> "20. – (2) …

(2) A person who is convicted before a Circuit Court of –

(a) …

(b) wounding with intent, with the use of a firearm,

shall be liable to imprisonment for life, or such other term, not being less than fifteen years, as the Court considers appropriate".

Section 20(2)(b) of the OAPA makes it clear that, for the offence of wounding with intent, the learned judge's discretion to impose a term of imprisonment was circumscribed by the statutory minimum of 15 years.

[107] It is against the background of section 20(2)(b) of the OAPA, that we will now review the learned judge's decision to issue the section 42K certificate. Section 42K reads:

"42K. – (1) Where a defendant has been tried and convicted of an offence that is punishable by a prescribed minimum penalty and the court determines that, having regard to the circumstances of the particular case, it would be manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty for which the offence is punishable, the court shall –

(a) sentence the defendant to the prescribed minimum penalty; and

(b) issue to the defendant a certificate so as to allow the defendant to seek leave to appeal to a Judge of the Court of Appeal against his sentence.

(2) A certificate issued to a defendant under subsection (1) shall outline the following namely –

(a) that the defendant has been sentenced to the prescribed minimum penalty for the offence;

(b) that the court decides that, having regard to the circumstances of the particular case, it would be manifestly unjust for the defendant to be sentenced to the prescribed minimum penalty for which the offence is punishable and stating the reasons therefor; and

(c) the sentence that the court would have imposed on the defendant had there been no prescribed minimum penalty in relation to the offence.

(3) Where a certificate has been issued by the Court pursuant to subsection (2) and the Judge of the Court of Appeal agrees with the decision of the court and determines that there are compelling reasons that would render it manifestly excessive and unjust to sentence the defendant to the prescribed minimum penalty, the Judge of the Court of Appeal may –

(a) impose on the defendant a sentence that is below the prescribed minimum penalty; and

(b) notwithstanding the provisions of the *Parole Act*, specify the period, not being less than two-thirds of the sentence imposed by him, which the defendant shall serve before becoming eligible for parole."

[108] The first question for us is whether we agree with the learned judge that the imposition of the prescribed minimum penalty for wounding with intent is manifestly excessive and unjust, having regard to the circumstances of this case.

[109] In **Paul Haughton v R** [2019] JMCA Crim 29, a section 42K certificate referral, the approach was whether there was anything in the case which took it outside the sentencing range of 15-25 years for the offence of rape. After comparison with previously decided, this court found the sentence of 15 years "quite unexceptionable", and reduced it only to reflect time spent on remand.

[110] Similarly, in **Lennox Golding v R** [2022] JMCA Crim 34, this court disagreed with the sentencing judge that the minimum sentence for wounding with intent was manifestly excessive and unjust. In that case, the sentencing judge did not issue a section 42K certificate, although expressing that intention. The sentencing judge said were it not for the legislative constraint she would have imposed short terms of imprisonment which she would also suspend. Yet again, the sentence was reduced purely to give credit for time spent on remand. Likewise, in **Garfield Elliott v R** [2023] JMCA Crim 22 (considered under section 42K), this court rejected both the sentencing judge's assessment of the

minimum penalty and the recommended sentence, and adjusted the sentence only to account for time spent on remand before sentencing.

[111] One case in which the sentence imposed for wounding with intent was considered to be outside the normal range, was **Carey Scarlett v R** [2018] JMCA Crim 40. The appeal in that case did not reach the court by the route of a section 42K certificate. However, the challenge was that the sentence of 25 years' imprisonment was manifestly excessive. The complainant was shot during an attack while he was locking up his home and as he fled to escape his assailant. This court found that the sentence fell outside the normal range for this offence in which a firearm was used. It was also said that the injuries the complainant suffered were dissimilar to those sustained by victims in the precedents the court considered. Accordingly, the sentence of 25 years was reduced to 18 years' imprisonment.

[112] In **Carey Scarlett v R**, a short review of cases of wounding with intent, committed with a firearm, revealed a sentence range of between 15-17 years. Those were cases which antedated the publication of the Sentencing Guidelines in 2017. However, it was said that the range must be considered to be 15-20 years (see paras.33-36). The learned judge in the present case imposed the prescribed minimum penalty of 15 years, the lowest point of the range. There must, therefore, be something in the instant case which takes it out of the normal range (see **Paul Haughton v R**).

[113] The learned judge was not untouched by pathos which seemed to suffuse the peculiarities of this case. The unusual features of the case extended from the unlikely crime scene (a shooting range) to Mr Edwards (a participant), and the appellant (an instructor/operator of the range). When the learned judge directed his mind to ferreting out the aggravating factors, aside from the use of a firearm, he found none and was constrained to comment that he did not find it an egregious action (see page 486 lines 7-13 of the transcript). On the other hand, his consideration of the mitigating factors led him to conclude that they were overwhelming.

[114] Our perusal of the transcript constrains us to agree with the learned judge's assessment which led him to issue the section 42K certificate. The events giving rise to the charge cannot fairly be described as acts of wanton criminality for example, attacking the complainant at his home, as in **Carey Scarlett v R**; or premeditated, to be inferred from driving the shooter to and from the scene of the crime, as was done in **Lennox Golding v R**; or deploying gratuitous violence to commit the crime in **Paul Haughton v R**; or those of a sexual predator in **Garfield Scarlett v R**.

[115] The appellant was not only a first offender of considerable maturity (51 years of age at sentencing), but also a contributing member of society. The circumstances of the shooting do not give rise to an inference that it was premeditated. Additionally, the appellant was belatedly remorseful, evidenced by the offer of compensation to Mr Edwards and the tendering of an apology. On the other hand, the injury suffered by Mr Edwards was not the worst in cases of this kind, for example, in **Brian Shaw v R** [2010] JMCA Crim 34, the complainant was crippled as a result of the attack.

[116] That takes us to the appropriate sentences to be imposed. The learned judge recommended short periods of imprisonment for all the offences. Although his recommendation in respect of illegal possession of firearm and ammunition was made on a false premise, it appears to us those are the sentences he would have imposed, were it not for his error in thinking himself legislatively restrained. In all the circumstances, we are not minded to do differently. In that vein, we will also give effect to the recommended sentence for wounding with intent. These are matters to which we gave our gravest consideration, not wishing to appear to trivialize these serious offences. However, the circumstances of the case, with all its peculiarities, have led us to conclude that there are compelling reasons that would render it manifestly excessive and unjust to sentence the appellant to the mandatory minimum. It seems to us that the sentences that the learned judge indicated that he thought were appropriate meet the justice of the case.

[117] Before leaving this matter, we express our profound gratitude to learned counsel for the Crown for her industry in providing further submissions and authorities in relation

to this court's powers on a section 42K certificate recommendation, which greatly assisted in our deliberations. However, having regard to how we propose to dispose of the appeal, we do not think it fitting to pronounce on the further questions on which counsel were invited to make further submissions. The appellant's counsel simply responded that he had found no authorities and seized the opportunity to re-make some of his submissions regarding the conviction.

Conclusion

[118] The appellant shot at Mr Edwards in circumstances in which it was virtually certain that Mr Edwards would be injured. In those circumstances, it cannot be seriously argued that the appellant did not have the requisite intention, namely, to cause grievous bodily harm. Notwithstanding the learned judge's loose use of the word 'reckless', his several references to the prosecution's duty to prove the appellant's intention made it clear that he was not under any misapprehension of what the law required. Further, although the prosecution tendered the appellant's police statement, that was by no means a competing version of the events being advanced by the prosecution. The adverse verdict is demonstrative of the fact that the learned judge accepted Mr Edwards' account of the incident. There was sufficient evidence before the learned judge to support the verdicts. Accordingly, the challenge to the conviction must fail.

[119] On the question of sentence, we agree with the learned judge, and the Crown conceded, that the substantial mitigating factors provide a compelling reason to sentence the appellant below the prescribed minimum penalty for the offence of wounding with intent. In accepting the learned judge's recommendations, to lean on, and adapt, the view expressed by Hilbery J in **R v Ball** (1951) 35 Cr App R 164, 165 that the learned judge saw the appellant and heard his history and character witnesses, and was therefore best placed to recommend the appropriate sentences. It is convenient to note that the appellant has been on bail for the period between his conviction and the hearing and delivery of judgment of this appeal.

Order

[120] In light of the above, we make the following orders:

1. The appeal against conviction is dismissed.
2. The appeal against sentence is allowed. The sentences of seven years' imprisonment imposed for illegal possession of firearm and ammunition are set aside and substituted therefor is a sentence of three years' imprisonment at hard labour for each offence. The sentence of 15 years' imprisonment for wounding with intent is set aside and substituted therefor is a sentence of four years' imprisonment at hard labour.
3. The sentences are to run concurrently.
4. The sentences are to be reckoned as commencing on 31 July 2023, the date of this judgment.