**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE P WILLIAMS JA**
**THE HON MR JUSTICE BROWN JA**
**THE HON MRS JUSTICE G FRASER JA (AG)**

**SUPREME COURT CRIMINAL APPEAL NO 84/2016**

**JERMAINE MILFORD v R**

**Keith Bishop and Janoi Pinnock instructed by Bishop and Partners for the appellant**

**Miss Kathy-Ann Pyke and Miss Cindi-Kay Graham for the Crown**

**22, 26 January and 16 February 2024**

**Criminal Law – Appeal against sentence - Sentencing principles**

**Constitution Law - Right to fair trial within reasonable time - Post conviction delay - Whether delay amounted to a breach - Redress for breach - Whether sentences should be reduced for the delay - The Charter of Fundamental Rights and Freedoms, sections 16(1), 16(7) and 16(8)**

**G FRASER JA (AG)**

[1] On 26 January 2024, 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 appeal against the sentences is allowed, in part.
>
> 3. The sentences in respect of counts 1, and 3, of 15 years' imprisonment at hard labour each, for illegal possession of a firearm and robbery with aggravation, and 5 years imprisonment at hard labour for illegal possession of ammunition, are affirmed.

> 4. It is declared that the appellant's constitutional right under section 16(7) of the Constitution, to be given a copy of the record of proceedings within a reasonable time after judgment, has been breached; and
>
> 5. By way of redress for the breach of the appellant's constitutional right to have his appeal heard within a reasonable time, the sentences in respect of counts 1 and 3 are set aside, and the following sentences are substituted: Count 1. Illegal possession of firearm - 14 years' imprisonment at hard labour. Count 3. Robbery with aggravation - 14 years' imprisonment at hard labour.
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> 6. All sentences shall run concurrently and are to be reckoned as having commenced on 26 October 2016, 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.

## Introduction

[2] Jermaine Milford ('the appellant') on 1 September 2016 was convicted, after trial by a judge sitting without a jury (hereinafter referred to as 'the learned judge'), in the High Court Division of the Gun Court. The appellant was charged on an indictment for the offences of illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act (count one), illegal possession of ammunition contrary to section 20(1)(b) of the Firearms Act (count two), and robbery with aggravation contrary to section 37(1)(a) of the Larceny Act (count three). On 26 October 2016, the appellant was sentenced to 15 years at hard labour each on counts one and three, and five years at hard labour on count two. The sentences were ordered to run concurrently.

## Summary of the evidence

[3] The background, against which the appellant's conviction and sentencing arose is that, on 15 March 2013 in the parish of Saint Andrew, the complainant a businessman had gone to the First Caribbean Bank and conducted some business. Upon leaving the bank, he had a bag containing $650,000.00 along with some documents. While the

complainant was on his way to the car park he felt a pull on his bag, on turning around he was confronted by a man who pointed a gun at him. The gunman relieved the complainant of his bag and its contents. The gunman ran off, entering a motor vehicle of which Mr Milford the appellant was the driver. The motor vehicle was chased by police officers in a marked service vehicle and ultimately came to a stop. The appellant alighted therefrom and ran but was chased and apprehended by the police. Upon the subsequent search of the motor vehicle, the complainant's bag with the money and a firearm were recovered from the glove compartment.

[4] The Crown's case was premised on the allegation that the appellant was the getaway driver in a joint enterprise to execute a robbery with aggravation.

**The defence's case**

[5] In his unsworn statement, the appellant denied that he partook in the commission of the offences. Although indeed he was the getaway driver, he acted under duress. He further stated that, he was parked beside Nova Scotia Bank off Half-Way-Tree Road waiting for his girlfriend when the gunman entered his car. In fear for his life, he was made to drive away with the gunman. He said that when he was accosted by the police he was not running. There was no issue arising as to the fact of the robbery and the use of the firearm to commit same, nor the identity of the gunman who was apprehended as he exited the front passenger door of the motor vehicle. The gunman subsequently pleaded guilty to all the offences. The gunman was also a witness for the defence in support of the appellant's assertions that he acted under duress. The appellant's explanation found no favour with the learned judge, and he was subsequently convicted.

**The sequence of events post-conviction**

[6] After being sentenced on 26 October 2016, the appellant filed a Criminal Form B1 ('Form B1') dated 7 November 2016, giving notice of appeal. He, therefore, had filed his application within the 14 days specified by law. There, however, was a delay in the transcript of the trial being submitted to this court. The transcript is stamped dated,

acknowledging receipt at the Court of Appeal Registry on 19 March 2021, occasioning a delay period of four years and five months.

[7] The application for leave to appeal against convictions and sentences has been reviewed by a single judge of this court who opined that the learned judge had:

> "…adequately and properly directed herself on the law relating to duress. The sole issue before the Learned Trial Judge (LTJ) was the credibility of the witnesses. The LTJ identified and analyzed the omissions and discrepancies on the [C]rown's case. The LTJ did not find the discrepancies to be material as they concerned areas that were not in issue. The main omission regarded whether Mr. Milford had run upon alighting from the car. The LTJ properly identified this as a material omission. She came to the conclusion that the witnesses were truthful and the evidence reliable. This was a finding of fact supported by the evidence. The LTJ similarly analyzed the defence's case and came to the conclusion that Mr. Milford and his witness were not credible and rejected the statement from the dock and the evidence of his witness. There is therefore no reason to disturb the findings of the LTJ and conviction of Mr. Milford."

[8] Accordingly, on 5 May 2021, Mr Milford's application for leave to appeal his conviction was refused, but his application for leave to appeal his sentences was granted. We entirely agree with and adopt the very astute and succinct assessment of the single judge as it concerned the application regarding the convictions.

## Grounds of appeal

[9] Mr Keith Bishop ('Mr Bishop'), counsel on record for the appellant, accepted the ruling of the single judge, and by extension was taken to have accepted that the summation of the learned judge is unassailable. The appellant had, wisely, in our view, not sought to renew an application concerning the convictions. Counsel accordingly concentrated his efforts in respect of the appeal on sentences relative to the illegal possession of firearm and robbery with aggravation, no issue was taken in relation to the sentence of five years imposed for the illegal possession of ammunition.

[10] At the hearing of the appeal, the appellant sought leave of this court and was permitted to abandon the original grounds of appeal, and instead proceeded on the supplemental grounds of appeal included in the written submissions filed 17 January 2024. The supplemental grounds of appeal being relied on by the appellant were as follows:

> "a. Whether or not the Learned Sentencing Judge followed the well-established principles in sentencing an offender by making a determination of a starting point. Identify [sic] the aggravating and mitigating factors, determine the appropriate sentence and thereafter deduct from the sentence any time spent in pre-trial custody; and
>
> b. Whether or not a delay of seven [7] years from the date of sentence and eleven [11] years from the date of the offence is a breach of the appellant's constitutional right for a fair trial before an impartial tribunal within a reasonable time."

Counsel, for the appellant also formulated the supplemental grounds of appeal into issues, which are more or less the same as the grounds. The Crown in response, followed the pattern of the supplemental grounds of appeal and for the avoidance of confusion, we have done the same.

**Ground a. – Whether or not the Learned Sentencing Judge followed the well-established principles in sentencing an offender by making a determination of a starting point, identifying the aggravating and mitigating factors, determining the appropriate sentence and thereafter deducting from the sentence any time spent in pre-trial custody.**

Submissions for the appellant

[11] In his written submissions, Mr Bishop acknowledged that the learned judge had mentioned the "classical principles of sentencing" but argued that it was "unclear" how she arrived at a "starting of 20 years for the offence of illegal possession of firearm and a starting point of 15 years for the offence of robbery with aggravation". Counsel further submitted that, long before the promulgation of the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('Sentencing Guidelines'), there existed several authorities from which the learned judge

could have sought guidance in determining a starting point. In support of these submissions, counsel relied on the authorities of **R v Sergeant** (1975) 60 Cr App 74, 77 ('**R v Sergeant**') affirmed by Harrison JA in **R v Everald Dunkley** (unreported) Court of Appeal, Jamaica, Resident Magistrate Criminal Appeal No 55/2001, judgment delivered 5 July 2001 ('**R v Everald Dunkley**') and Rowe JA in **R v Sydney Beckford and David Lewis** (1980) 17 JLR 202 ('**R v Sydney Beckford and David Lewis**').

[12] In the written submissions, Mr Bishop also highlighted that the sentence was imposed in 2016, so that "further reading beyond the principles outlined in **R v Sergeant**, would have significantly assisted the sentencing of the appellant". In support of this submission counsel cited the authority of **Kurt Taylor v R** [2016] JMCA Crim 23. Counsel also highlighted that the Sentencing Guidelines indicate a usual starting point of 10 years for the offence of illegal possession of firearm, with a normal range of seven to 15 years and for the offence of robbery with aggravation, a usual starting point of 12 years is recommended with the normal range being 10 – 15 years. In furtherance of this point, counsel acknowledged that it was appropriate for a sentencing judge to take into consideration both aggravating and mitigating factors relative to the offence, and factors such as premeditation can, in fact, impact the starting point. Counsel maintained that "Notwithstanding that the sentencing judge taking into consideration aggravating and mitigating factors, based on what was taken into consideration by the sentencing judge and further mitigating factors within the Sentencing Guidelines, it can be said that the starting point for both offences is manifestly excessive". There was also no clarity he said, on how the learned judge arrived at a starting point of 20 years, as she failed to follow the methodology outlined in **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement v R**') and **Daniel Roulston v R** [2018] JMCA Crim 20 ('**Daniel Roulston v R**').

[13] In advancing this first ground of appeal counsel submitted that it was clear from these authorities that the learned judge "abandoned the well-known, tried, and proven methodology" to be used to arrive at a fair and just sentence. He contended that while

the starting point was within the discretion of the learned judge, the discretion was not to be arbitrarily exercised. Thus, he submitted that a starting point undergirded by reasons was the best methodology for arriving at a "fair and just sentence".

[14] In adopting the methodology recommended in the foregoing authorities, counsel for the appellant submitted that appropriate starting points, for the offences of illegal possession of firearm and robbery with aggravation, were 10 and 12 years respectively. In the written submissions, he had identified four aggravating factors and seven mitigating factors which would impact the starting point. Counsel had also indicated a period of two years and three months that the appellant had spent on pre-trial/sentence remand. In oral submissions, the calculations undertaken by (co-counsel appearing for the appellant), Mr Janoi Pinnock, ultimately resulted in a term of years of six years and three months for the offence of illegal possession of firearm and six years and nine months for the offence of robbery with aggravation. On enquiry by the court as to the reasonableness or otherwise of those calculations, Mr Bishop conceded that on a review by this court, 10 years in respect of each offence would be appropriate.

Submissions for the Crown

[15] Miss Kathy-Ann Pyke, on behalf of the Crown, in responding to this ground of appeal, conceded that the learned judge had erred in respect of the methodology utilized, but had given a reason for selecting a starting point of 20 years in respect of both offences.

[16] Counsel conceded that lower starting points were appropriate but, disagreed that a starting point of 10 years for the illegal possession of firearm was appropriate as submitted by counsel Mr Bishop. She highlighted that the appellant exercised his option and had gone through a full trial so he cannot be treated as someone who pleaded guilty. She suggested starting points of 15 years for the robbery with aggravation and 13 years for the illegal possession of firearm. Although she identified aggravating factors and mitigating factors beyond those identified by the learned judge and made mathematical calculations and adjustments to the sentence for robbery with aggravation, her outcome

was such that Miss Pyke submitted that the 15 years imprisonment imposed by the learned judge was not excessive and ought not to be disturbed by this court.

[17] In relation to the illegal possession of firearm, after arithmetically adjusting the starting point of 13 years by seven years and five years for aggravating and mitigating factors respectively, Counsel arrived at a provisional figure of 15 years, and after crediting the appellant with the pre-sentence period, she recommended as appropriate a sentence of 13 years and nine months. It is to be noted that at the start of her submissions Crown counsel indicated that the computation relative to the pre-sentence remand was erroneous.

Analysis

[18] Before this court, are two distinct issues that are potentially capable of affecting the applicant's sentences. These are, the matter of a challenge to the sentences of 15 years imprisonment that were imposed by the learned judge for the offences of illegal possession of firearm and robbery with aggravation, respectively , on the one hand, and the alleged "breaches of the Charter of Fundamental Rights and Freedoms, contained in the Constitution ('the Charter') on the other hand. The latter issue will be dealt with anon.

[19] We acknowledge that notwithstanding the fact that the learned judge did not have the benefit of the Sentencing Guidelines at the time when sentence was imposed on the appellant in October 2016, there was however in existence a plethora of cases providing guidance as to the proper methodology to be utilized by judges in the sentencing process. Contrary though, to what Mr Bishop submitted, **Daniel Roulston v R** was not one such authority as that appeal was decided by this court in 2018, some two years after the appellant was sentenced.

[20] Both counsel for the appellant and Crown submitted that the learned "sentencing judge" had indicated a starting point of 20 years, we discerned that, after itemizing some mitigating and aggravating factors the learned judge made the pronouncement thus, "For illegal possession of firearm, sir, and the robbery with aggravation, is 20 years". She

asserted she had considered the plea in mitigation, the antecedent report, and the social enquiry report. She then proceeded to repeat and list some mitigating factors and indicated she had given full credit for time spent in custody. She then pronounced the sentence of 15 years at hard labour for each of those two offences.

[21] Counsel for the appellant had complained that it was "unclear how the sentencing judge arrived at a starting point of 20 years…". Crown Counsel, on the other hand, posited that the narrative proceeding the indication of the 20 years was to be regarded as the reasons proffered by the learned judge for choosing 20 years as an appropriate starting point. These would have included factors such as the seriousness of the offences, the fact that it was a firearm-related matter, and the prevalence of such crimes in the society. Although the learned judge had not specifically indicated that the 20 years was the starting point chosen, counsel submitted that in all the circumstances it can be fairly inferred that the 20 years was indeed the starting point selected.

[22] We note, from our perusal of the transcript, that prior to indicating the 20 years the learned judge also made references to some mitigating factors relevant to the offender, such as the positive social enquiry report, previous good character, his age, and the fact that he was the father of two children. She also mentioned the plea in mitigation and the time spent on pre-trial remand and that based on his antecedents he was a suitable candidate for rehabilitation. We, therefore, agreed with counsel that it is unclear how the learned judge arrived at the 20 years and would add that if indeed the 20 years was supposed to represent her selected starting point this should have been clearly indicated as such. Furthermore, all the mitigating factors identified, prior to the pronouncement of the 20 years, would have been relative to the offender and not the offence and, therefore, ought not to have been utilized in determining the starting point (see **R v Tauer and others** [2005] NZLR 372).

[23] On our assessment, therefore, the learned judge had attempted to apply the generally accepted principles of sentencing but had fallen short. The learned judge had mentioned the "four classical principles" (**R v Everald Dunkley**) and declared she had

taken them into account and given them the weight she saw fit. She also demonstrated an awareness of proportionality and that the sentence must be one that fit the crime (**R v Sydney Beckford and David Lewis**). She had identified several aggravating and mitigating factors but had not indicated arithmetically how many years were added and subtracted from the chosen starting point in respect of these, and so arrived at an expressed provisional sentence. The learned judge had also acknowledged that the appellant had been on pre-trial remand for two years and three months, she indicated that full credit was given for this period, however, we are not able to measure if this is so as she had not stated a provisional sentence from which the credit was deducted. If we were to assume it was deducted from the so called starting point of 20 years then, the result would be 17 years and nine months, the difference between this figure and the final sentence of 15 years is two years and nine months. Are we to assume that balance is the result of the calculations of the aggravating and mitigating factors? We think not. Judges are urged to be objective, and transparent in conducting sentencing exercises. This must mean that a coherent methodology is utilized and articulated. In the circumstances of the deficiencies we have identified, and the concession of Crown Counsel that the learned judge's "methodology was overall incorrect", we believe the sentences required our intervention and review as to whether they were excessive according to the complaint of the appellant.

[24] In considering whether the sentences imposed by the learned judge, in this case, were manifestly excessive, as Mr Bishop contended, we were reminded of the general approach which this court usually adopts on appeals against sentence. In this regard counsel for the Crown in their written submissions referred us to the decision of **Meisha Clement v R**, in which this court had adopted the following statement of principle by Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164 at page 165:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only

> when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

[25] In undertaking the review of the sentences in the case at bar, we adhered to the guidance provided in **Meisha Clement v R**. At para. [41] of that decision, this court had adopted and adapted the Definitive Guidelines issued by the Sentencing Guidelines Council in England and Wales (see Andrew Ashworth, Sentencing and Criminal Justice, 5th edn, page 32) and enumerated the following sequence in the sentencing process:

> "(i) identify the appropriate starting point;
>
> (ii) consider any relevant aggravating features;
>
> (iii) consider any relevant mitigating features (including personal mitigation);
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> (iv) consider, where appropriate, any reduction for a guilty plea; and
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> (v) decide on the appropriate sentence (giving reasons)."

[26] Although the Sentencing Guidelines were not yet promulgated when the appellant was sentenced, they nonetheless reflect "experience gathered over time as well as previous sentencing decisions of the Court of Appeal" (see para. 7.5 of the Sentencing Guidelines) and the use of same is, therefore, appropriate in selecting a starting point and range of sentences.

[27] It is judicious at this point to determine what is meant by the "starting point". According to the Sentencing Guidelines, "the starting point is a notional point within the normal range, from which the sentence may be increased or decreased to allow for aggravating or mitigating features of the case" (see para. 7.1 of the Sentencing Guidelines). Appendix A of the Sentencing Guidelines indicates that the normal range of sentence for the offence of illegal possession of firearm is seven – 15 years, with the usual starting point being 10 years. While for the offence of robbery with aggravation,

the normal range is 10 – 15 years with the usual starting point being 12 years. In our recalculations, we considered in addition to the Sentencing Guidelines, authorities emanating from this court.

[28] As it relates to the offence of illegal possession of firearm and an appropriate starting point, the authority of **Paul Lamoye v R** [2017] JMCA Crim 41 is instructive. In that case the appellant had filed a single ground of appeal, complaining that the sentence of 15 years' imprisonment imposed upon him for illegal possession of firearm was "harsh and excessive". He had further complained that the sentencing judge had "failed in her consideration of an appropriate sentence to balance the mitigating factors against the aggravating factors…". McDonald-Bishop JA, in delivering the judgment of the court, at para. [18] opined that:

> "[18] In respect of illegal possession of firearm, … The learned judge was required to choose a starting point and a range for the offence, which she did not. Bearing in mind that this is not a case that involved the possession of a firearm simpliciter, but also the use of a firearm, a starting point, anywhere between 12 to 15 years, would be appropriate."

[29] Having regard to the guidance in the foregoing case, ultimately a starting point of 12 years was selected by this court upon reviewing the sentence for illegal possession of firearm. We were of the view the appellant's position was indistinguishable from that of Mr Paul as the firearm was used to commit a felony and was not possession simpliciter. We, however, maintained the starting point of 12 years for robbery with aggravation as indicated in appendix A of the Sentencing Guidelines.

[30] We took note of the aggravating features that the learned judge had identified such as the serious nature of the offence; the use of a weapon to facilitate the robbery; the prevalence of the offence in our society. We, in fact, identified other aggravating factors which the learned judge could have quite properly taken into consideration, including the following:

i. Use of violence - the firearm was used to assault the complainant, putting him in fear for his life;

ii. The offence was premeditated – we agree with the Crown's submission, that the joint venture was well organized with a get-away car at the ready and there was obvious observation of the target (complainant);

iii. The appellant was operating in a group (a dyad - the smallest social group in society comprising of two people also referred to as airs, couples, duos, etc.)

iv. Motivation of greed - based on the appellant's family background and upbringing and the information imparted by his mother, he was not a person in need, and had been "raised in a supportive and loving environment" he was gainfully employed and described as industrious.

v. Maturity of the appellant - he was 37 years old at the time of sentencing in 2016, so that in 2013, at the time of the offence he would have attained the age of 34 years. He was therefore not a callow youth, suffering from immaturity, and should have been able to make good lifestyle choices and not be susceptible to peer pressure.

[31] Owing to the significant number of aggravating factors identified in the factual circumstances of this case, we deemed it appropriate to move the calculations upwards by the addition of 10 years. This would result in new figures of 22 years in respect of both offences.

[32] However, the court must have regard to the mitigating factors as well, accordingly, we scrutinized the transcript to determine whether any mitigating circumstances existed.

We agreed with the learned judge that the appellants previous good character was to his "benefit" and that the positive social inquiry report and his capacity for reform were mitigating factors. Although the learned judge had considered the fact of the appellant's fatherhood as a mitigating factor, we did not identify any evidence or other information from the social inquiry report that he was contributing to his children's welfare and maintenance we, therefore, did not deem this to be a mitigating factor. We were satisfied that the learned judge had identified all the relevant mitigating factors and accordingly a downward movement of four years to the calculations, was made. This, therefore, reduced our evaluated sentences for both offences to 18 years.

[33] As these were convictions following a full trial, there was no scope for any discount for a guilty plea, so after affording the appellant the full credit of two years, four months and 14 days spent on pre-trial remand, the final figures on our calculation were, the sentence of 15 years, seven months, and 14 days at hard labour each for the offences of illegal possession of firearm and robbery with aggravation.

[34] On our evaluation of the sentences within the framework of the applicable principles of law, we found that the sentences of 15 years imprisonment for the offences of illegal possession of firearm and robbery with aggravation were within the normal range of sentence stated in the Sentencing Guidelines. Although both sentences are veering towards the upper limit of the range, they did not exceed it.

[35] We noted, however, that our evaluated sentences, exceeded that which was imposed on the appellant by the learned judge. Accordingly, in determining the proper approach in treating with the instant case, we were mindful of the edicts in the Privy Council decision of **Williams (Earl) v The State** [2005] UKPC 11, were at para. 10 their Lordships stated:

> "10. … an appellate court which has power to increase a sentence and is considering the exercise of that power should invariably give the applicant for leave to appeal against sentence or his counsel an indication to that effect and an opportunity to address the court on the increase or to ask for

> leave to withdraw the application. …The Board indicated the need to follow such a course in **Skeete v The State** [2003] UKPC 82 at paragraph 44 of their judgment and their Lordships now confirm that failure to do so would in their opinion be unfair and a breach of natural justice. The arguments to be presented against an increase in sentence may vary from those advanced in favour of a reduction and the applicant should have the opportunity to put them before the court."

[36] The above principle has been applied in our jurisdiction in the cases of **Linford McIntosh v R** [2015] JMCA Crim 26 and **Ian Wilson v R** [2021] JMCA Crim 29. In the circumstances, therefore, it would not have been just to increase the sentence for the offence of robbery with aggravation without having given a prior indication of this to the appellant or his counsel. As a result, we abstained from increasing those sentences.

[37] A review of other cases where appellants were convicted of similar charges of illegal possession of firearm and robbery with aggravation, revealed that similar sentences, as those imposed in the instant case, were not found by this court to be manifestly excessive. For example, in **Selvin Thorpe v R** [2011] JMCA Crim 34 and **Paul Kennedy v R** [2015] JMCA Crim 5 the average sentence approved on appeal was 15 years imprisonment at hard labour for illegal possession of firearm. In **Joel Deer v R** [2014] JMCA Crim 33; **Jermaine Cameron v R** [2013] JMCA Crim 60; **Kemar Palmer v R** [2013] JMCA Crim 29 and **Michael Evans v R** [2015] JMCA Crim 33, we observed that the approved sentence for the offence of robbery with aggravation was 15 or 16 years' imprisonment at hard labour.

[38] In **Shanor Bertram v R** [2019] JMCA Crim 9, the learned trial judge, in imposing sentence on the appellant, had failed to identify the sentence range and an appropriate starting point within the range. However, despite this failure, this court found that the sentences imposed were well within the usual range of sentences imposed for the offences charged and stated at para. [25] that "[n]otwithstanding the learned trial judge having failed to identify the sentence range or an appropriate starting point within the range, there can be no legitimate complaint in respect of the sentences which were

ultimately imposed". We conclude, therefore, that the learned judge made no error in principle that could be taken to be so fundamental as to undermine the reasonableness of the sentences, which are within the range of sentences for offences of this nature, taking into consideration the circumstances of this case.

**Issue b. Whether a delay of seven [7) years from the date of sentence and eleven [11] years from the date of the offence is a breach of the appellant's Constitutional right to a hearing of his application for leave to appeal within a reasonable time.**

Appellant's submissions

[39] In support of this ground, Mr Bishop submitted that the records show that the appellant was sentenced on 26 October 2016 and, thereafter, filed on 7 November 2016, a notice of appeal by way of Form B1. On counsel's calculations, there is a seven years and two months delay between the filing date of Form B1 and the hearing date 22 January 2024 of this appeal. Counsel's further submission was that section 16(1) of the Charter requires that whenever a person is charged with a criminal offence, they should be afforded a fair hearing within a reasonable time by an independent and impartial court.

[40] Counsel contended that by this section and given the above-mentioned sequence of events, the delay between the notice of application to appeal and the hearing of the appeal is a breach of the appellant's constitutional rights to a fair trial within a reasonable time. As such, the appellant would have been prejudiced being in "review custody" for more than seven years. In furtherance of his submission, Mr Bishop pointed out that there is no evidence before the court which indicated that this delay was triggered by the appellant.

[41] In conclusion, counsel for the appellant urged, that this court could consider the option of reducing the appellant's sentence by 18 months as redress for the breach of his constitutional rights.

Crown's submissions

[42] The Crown contended that the appellant's assertions that his constitutional rights had been breached, were lacking in merit and further the appellant had not furnished any evidence to substantiate his assertion. The Crown recited a compendium of the events since the prosecution of the appellant was initiated until the hearing of the appeal herein and posited that "there has not been an inordinate delay due to the actions of the [C]rown and its agents. The progress of the case at both stages has been plagued by issues that the Appellant has had with representation".

[43] In reliance on the authority **Adolphus Knight v R** [2023] JMCA Crim 26 ('**Adolphus Knight v R**') the Crown emphasized that it was not every delay that amounted to a breach of a constitutional guarantee. Crown Counsel submitted that there has been no breach of the appellant's rights and any delay in the process is to be attributed to the appellant. In response to a query from the bench, counsel conceded that the court may, among other things, as redress for breach of the appellant's constitutional rights, publicly acknowledge the breach or reduce the appellant's sentence. Further if the court was moved to agree with the appellant that his rights were infringed, counsel conceded that an acknowledgment of the delay by declaration was an appropriate redress, and if any adjustment was to be made to his sentences, then no more than one year's deduction should be accorded.

Analysis

[44] It was noted that the appellant had not been tardy in initiating the appeal process and the period of delay up until 19 March 2021, appeared to have been occasioned by the court reporting services, an agent of the state. In **Rockel West v R** [2023] JMCA 14 this court had at para. [57] of that judgment, observed that:

> "It is unfortunate that in recent times this court has had to examine and rule on a number of cases in which there has been significant delay in the provision of transcripts, which has, in turn resulted in a delay in the hearing of a number of applications and appeals. Where the delay in the hearing of

> an appeal or application is caused by the late provision of the record or notes of proceedings, there is no question that this is no fault of the appellant or applicant."

[45] It seemed to have eluded the attention of the Crown, that there had been a lapse of four years, four months, and 12 days between the filing of the application for leave to appeal and the furnishing of the transcript to this court. The Crown seemed not to have regarded this as a delay, although in their written submissions they had correctly captured the essence of the law relating to delay, and the dictum enunciated in **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72 at para. 24 as follows:

> "If through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may… be just and appropriate…"

[46] Notwithstanding the stance taken by the Crown, we were of the view that there had been a delay of four years, four months, and 12 days after the application for leave to appeal was made by the appellant. Consequently, we deemed this to be a breach of the appellant's rights to have his sentence reviewed by a superior court, as well as, to receive a record of the proceedings from the Supreme Court within a reasonable time.

[47] Section 16 of the Charter provides that any person who is charged with a criminal offence must be afforded a fair hearing within a reasonable time, the constitutional right to a fair trial within a reasonable time also applies to appellate proceedings (see **Evon Jack v R** [2021] JMCA Crim 31, para. [19] ('**Evon Jack v R**')). That same section of the Constitution provides that:

> "(7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.

> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

[48] Subsection (7) specifies that the timeline for receipt of "record of proceedings" (in this case the transcript of evidence) ought to be "within a reasonable time after judgment." There is no mention of a time frame in subsection (8). In the present case, the appellant was sentenced on 26 October 2016 and filed his application for leave to appeal on 7 November 2016. The necessary transcript of the proceedings at trial did not become available until 19 March 2021. On our calculation, this is a period of more than four years, and on any reasonable assessment amounts to a considerable delay. Although there is no time specified as to when an appeal must be heard by the superior court, in a fair and just society it must be inferred that a reasonable time frame is anticipated.

[49] Counsel, Mr Bishop, had framed his second ground of appeal and had complained that there had been a delay of seven years from the date of sentence and 11 years from the date of the offence. In response to a query from the court, counsel had indicated that his focus was the period from sentencing until the hearing of the appeal. This period includes the further time since the production of the transcript, until 22 January 2024, wherein the matter was set down for hearing in this court, this accounted for the seven years calculated by counsel.

[50] Counsel had further submitted that Mr Milford was in no way responsible for nor contributed to any of the delays over the seven years' period that he complained of. Crown Counsel on the other hand, pointed out, that the appellant has been unfortunate in not securing legal representation to advance the appeal on his behalf, and that was what had accounted for this second period of delay. According to the court's record, initially, the appellant was represented by counsel and had so stated on the Form B1, but counsel renounced his interest in June 2021. After the appellant was informed of this renunciation by the Registrar of this court, another counsel indicated his appearance and was in correspondence with the Registrar until August 2022, when he too indicated he

could no longer assist. In February 2022, legal aid assignment was made to a third attorney-at-law, but there is no indication why he did not follow through on the assignment and argue the appeal. Finally, on 24 May 2023, counsel Mr Bishop was assigned by the Legal Aid Council and a letter was issued by the Registrar, advising him of the legal aid assignment. The matter was again scheduled on the hearing list for week commencing 22 January 2024 and proceeded.

[51] Regardless as to who is at fault, we did not however agree with Mr Bishop that the latter period between 19 March 2021 and 22 January 2024 ought to be included in calculating the period of the delay. We were fortified in that view, based on earlier pronouncements by this court. In the case of **Adolphus Knight v R**, the applicant had complained that in addition to the seven years it had taken to supply the transcript, there was a further delay in scheduling the matter for hearing. Brooks P at para. [19] of the judgment opined that:

> "[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)."

[52] We had determined that there was in fact an unreasonable delay in the appeal process, we then considered what if any redress should be granted to the appellant. We recognized that the nature of any redress depended on the circumstances of each case and how shocking the extent of the breach was. In **Evon Jack v R**, Brooks P had further opined at para. [44] of the judgment that:

> "[44] Redress for breaches of constitutional rights may take a number of forms, ranging from a public acknowledgment of the breach to a quashing of the conviction. Public

> acknowledgment of the breach, reduction of the sentences and quashing of the convictions are remedies that this court can grant, in appropriate circumstances, without the appellants having to apply to the Supreme Court, pursuant to section 19 of the Constitution. This court has previously granted redress for delays in the hearing of appeals. It reduced the respective sentences in **Tapper v DPP**, in **Techla Simpson v R** [2019] JMCA Crim 37 and in **Alistair McDonald v R** [2020] JMCA Crim 38. In all those cases, however, it was possible to hear the respective appeals."

[53] In this case we were able to hear the appeal and were provided with a full transcript of the proceedings, although belatedly. We considered that the appellant is not at fault, nor had contributed to the delay up to the time when the transcript was produced. In addition, he instructed his attorney-at-law to abandon all the grounds of appeal that he the appellant had originally filed relative to his conviction and to pursue only the issue of certain sentences imposed by the learned judge, and which he criticized as being manifestly excessive. We considered also that the single judge of this court had granted the appellant's application for leave to appeal his sentences. In the circumstances, we were minded to grant some measure of redress for the constitutional breaches, being a reduction in sentence of 12 months on each of the two counts of illegal possession of firearm and robbery with aggravation, and additionally a declaration that the appellant's rights had been breached.

## Conclusion

[54] For the reasons we have sought to explain, there was no basis on which it could have been successfully argued that the sentences of 15 years' imprisonment for the offences of illegal possession of firearm, and robbery with aggravation, were manifestly excessive, or unreasonable.

[55] In the circumstances, we were 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 Milford's constitutional right to a fair hearing of his appeal within a reasonable time.

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