

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE BROOKS P  
THE HON MISS JUSTICE P WILLIAMS JA  
THE HON MRS JUSTICE DUNBAR-GREEN JA**

**SUPREME COURT CRIMINAL APPEAL NOS 63 & 64/2013**

**PHILLIP SIMPSON & DEVON SIMPSON v R**

**Mrs Melrose Reid for the applicants**

**Mrs Kimberley Dell-Williams, Mrs Christina Porter and Miss Kathrina Watson  
for the Crown**

**22 and 23 June 2023**

**Jurisdiction of the Gun Court for firearm-related offences – Whether a medical report is required to prove the existence of an injury – Whether the sentence imposed for illegal possession of firearm was manifestly excessive – Whether there was a breach of constitutional rights – The appropriate redress for those constitutional breaches –Sections 16(7) and 16(8) of the Constitution of Jamaica.**

**ORAL JUDGMENT**

**P WILLIAMS JA**

[1] On 5 January 2010, at approximately 9:40 am, two police officers, Constable Damanoy Thomas ('Cons Thomas') and Sergeant Lukel Jarrett ('Sgt Jarrett'), were on patrol along Terminal Road in the Old Harbour Bay area in the parish of Saint Catherine. They were dressed in uniform and travelling in a marked police vehicle. They saw three men standing along the roadway. Two of the three men were observed looking in the direction of the police vehicle, and then all three men ran off in the direction of Burkes Field away from the police vehicle. The driver of the unit, Cons Thomas, gave chase

driving the police vehicle into Burkes Field. The men were next seen standing at a barbed wire fence. All three men were armed with 9mm pistols in their hands, which they pointed in the direction of the police vehicle and started shooting. Given the position of the police officers in the vehicle, only Cons Thomas was able to return the fire. This exchange of gunfire lasted for about 15 seconds. When the shooting ended, the officers observed several bullet holes on the right door of the police vehicle, on the driver's side, where Cons Thomas would have been seated and on the top of the police vehicle. Cons Thomas felt a burning sensation in the region of his knee and saw that there was some blood in the area. He realised he had been shot. He sought and received treatment for the wound. The investigating officer, Detective Corporal Shermin Green ('Det Cpl Green'), later observed a white bandage on Cons Thomas' left knee and bullet holes to the right front door, steering wheel and roof of the police vehicle. She subsequently visited the scene where she saw spent shells on the ground in the middle of the road and by a barbed wire fence.

[2] Cons Thomas and Sgt Jarrett recognised the shooters as persons they had known before and, subsequently, Messrs Devon Simpson and Phillip Simpson ('the applicants') and a third man were arrested and charged for the offences of illegal possession of firearm, wounding with intent and shooting with intent (counts 1, 2 and 3 respectively). They were tried and convicted before Straw J (as she then was) ('the learned trial judge'), in the High Court Division of the Gun Court in the parish of Kingston, in a trial that lasted from 26 June 2013 until 4 July 2013. On 25 July 2013, Mr Phillip Simpson was sentenced to 15 years' imprisonment on all counts, and Mr Devon Simpson was sentenced to 16 years' imprisonment on all counts. The sentences for both applicants were set to run concurrently.

[3] In this appeal, the applicants challenge the learned trial judge's jurisdiction in hearing and determining the counts for wounding with intent and shooting with intent. (grounds 1 and 3). They also challenge the sufficiency of the evidence on which the learned trial judge found that the officer had received an injury during the incident (ground 2). Although not numbered as a ground, the applicants complained that the

sentences imposed on each of them for illegal possession of firearm is manifestly excessive.

### **Jurisdiction (grounds 1 and 3)**

[4] On the issue of the jurisdiction of the Gun Court, counsel for the applicants, Mrs Melrose Reid ('Mrs Reid'), valiantly tried to convince the court that its interpretation of the provisions of the Gun Court Act has been wrong over the years. She indicated that based on her interpretation of the Gun Court Act, the Gun Court, in this case, only had the jurisdiction to try the offence of illegal possession of firearm, simpliciter, pursuant to section 20 of the Firearms Act and for offences under that section. No adjunct offence could be joined. She indicated that the learned trial judge lacked jurisdiction to conduct a trial in the High Court Division of the Gun Court, for the offences of wounding with intent and shooting with intent, since those offences are indictable pursuant to section 25 of the Firearms Act, and do not fall within the schedule to that Act or the Gun Court Act. Counsel referred to **R v Anthony Clarke** (1978) 15 JLR 268; **Stevon Reece v R** [2014] JMCA Crim 56; and **R v Clinton Jarret and Others** (1975) 14 JLR 35 in support of these submissions.

[5] The Crown submitted that there was evidence that the firearms, as defined by section 2 of the Firearms Act, were used by both applicants, and so the jurisdiction of the Gun Court is well grounded. It was further contended that it is well recognised that the High Court Division of the Gun Court has jurisdiction to hear and determine offences which fall within the definition of "firearm offences" in section 2 of the Firearms Act (see **R v Conrad Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 30/1991, judgment delivered 23 March 1992, **Steven Bryan and Searchwell Smith v R** (unreported), Supreme Court Criminal Appeal Nos 187 & 188/2002, judgment delivered 20 December 2002, and **R v Derrick Brown** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 68/1990, judgment delivered 23 June 1992). Accordingly, the offences with which both applicants are charged fall squarely within the

jurisdiction of the Gun Court and can be adjudicated by the High Court Division of the Gun Court.

[6] An analysis of these grounds may properly start with an outline of section 2 of the Gun Court Act, which defines "firearm offence" as follows:

- "(a) any offence contrary to section 20 of the Firearms Act;
- (b) any other offence whatsoever involving a firearm **and** in which the offender's possession of the firearm is contrary to section 20 of the Firearms Act;" (Emphasis supplied)

[7] Section 5(2) of the said Act states that:

"A High Court Division of the Court shall have jurisdiction to hear and determine –

- (a) **any firearm offence**, other than murder and treason;
  - (b) any other offence specified in the Schedule,
- whether committed in Kingston or St Andrew or any other parish..." (Emphasis supplied)

[8] Section 20(5)(c) of the Firearms Act provides that:

"In any prosecution for any offence under this section-

...

- (c) any person who is proved to have used or attempted to use or have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section."

[9] Section 25 of the Firearms Act provides that:

"(1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to commit or to aid the commission of a felony or to resist or prevent the lawful

apprehension or detention of himself or some other person, shall be guilty of an offence against this sub-section.

(2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First schedule, has in his possession any firearm or imitation, firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this sub-section and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.

..."

[10] For the purposes of this matter, it is noted that section 20 of the Firearms Act deals with the possession of firearms and ammunition and specifies that a person shall not be in possession of a firearm or ammunition except under and in accordance with the terms and conditions of a firearm user's licence. The section lists the category of persons who are exempted from that prohibition and the circumstances of possession that would not attract the penalty provided for in section 20(4). No other offence is created under the section. A firearm offence, therefore, must be one in which a firearm is involved, and the possession of that firearm must be unlawful. Section 25 of the Act addresses circumstances where it can be established that the weapon that was used could have been an imitation firearm or where the person in possession of the firearm had a licence and would not be in illegal possession, per se. In those circumstances, if the firearm is used to commit certain offences, the possession is deemed illegal by virtue of section 20(5)(c) of the Act. This is the interpretation of the interplay between these sections, which this court has found to be correct and has followed for these several decades, and Mrs Reid failed to convince us that it is wrong. A careful reading of the authorities to which Mrs Reid referred supports our interpretation of the relevant provisions of the statute.

[11] The applicants were charged with being in illegal possession of a firearm contrary to 20(1)(b) of the Firearms Act. The offences of wounding with intent and shooting with intent involved the usage of a firearm, the possession of which was alleged to be unlawful contrary to section 20 of the Firearms Act. These were clearly firearm offences for which

the learned trial judge had jurisdiction sitting in the High Court Division of the Gun Court. The challenge to her jurisdiction is entirely without any merit. Grounds 1 and 3 accordingly fail.

### **Evidence of Injury (ground 3)**

[12] Mrs Reid contended that the learned trial judge made a “dangerous inference” when she convicted the applicants of the offence of wounding with intent, as there was no medical evidence that Cons Thomas suffered any injuries. She questioned why the investigating officer did not initially charge these applicants with wounding with intent, and no mention was made of Cons Thomas’ injury in the station diary. She urged the court to take note of the fact that a count charging the applicants for wounding with intent was laid long after those for the other charges. She said that the charge of wounding with intent is “a trumped-up charge that is vexatious and frivolous”, and the conviction for that charge ought to be set aside.

[13] The Crown contended that the wound need not be proven by a medical report, and, in any event, there was evidence and sufficient corroborative evidence to support the learned trial judge’s finding that Cons Thomas was injured by a firearm.

[14] Cons Thomas testified that after the shooting had ceased, he felt a burning to his foot in the vicinity of his knee and noticed that the area was bleeding. He was assisted to the doctor and was treated, the wound was cleaned up, dressed and a bandage placed on it. He said that the injury was as a result of the gunshots that were fired by all three men. Sgt Jarrett testified that after the shooters had left the scene, he saw a wound on Cons Thomas’ knee, and he saw blood coming from a section of the knee. Det Cpl Green, who later saw and received a report from Cons Thomas, observed the bandage on Cons Thomas’ knee.

[15] There was sufficient evidence, which, if the learned trial judge accepted it, raised the inference that Cons Thomas had indeed received a wound as a result of the shots that had been fired at him. He explained that he was leaning slightly to the left in the

police vehicle while returning fire through the window. It is noted that, in her submissions, Mrs Reid acknowledged that “the issue of a wound (without the medical certificate) rests on the credibility of the victim and any supporting witness”. There is no basis for any assertion that the credibility of the witness who suffered the injury, on this issue or at all, was such that the learned trial judge was plainly wrong in accepting that Cons Thomas had been shot at and wounded as a result. Therefore, ground 2 also fails.

## **Sentence**

[16] The applicants’ complaint about the sentence imposed relates to the sentence imposed on each applicant for illegal possession of firearm, which, it is submitted, is manifestly excessive. The learned trial judge is said to have gone beyond the normal range and starting point without stating the reason for such a variation.

[17] The learned trial judge noted the seriousness of the offences for which the men had been convicted, especially the fact that it was two police officers who had been shot at and one was wounded, albeit not seriously. She also noted the prevalence of gun-related offences. She took into consideration some of the classical principles of sentencing: deterrence, rehabilitation and punishment. She recognised that there was a statutory minimum of 15 years for shooting with intent and wounding with intent. She acknowledged that both applicants had been in custody for almost three years prior to trial and that Mr Devon Simpson had been convicted for illegal possession of a firearm in 2007.

[18] She then indicated that she would not go above the minimum for Mr Phillip Simpson and imposed the sentence of 15 years’ imprisonment for each count. From what she said prior to this comment, it was apparent that she was referring to the minimum sentence for wounding with intent and shooting with intent which he would have had to serve in any event. In relation to Mr Devon Simpson, the learned trial judge said that she would add one year because of his previous conviction and, thus, she added one year to the statutory minimum of 15 years and imposed 16 years on each count.

[19] It is noted that, at the time these sentences were imposed, the learned trial judge would not have benefited from **Meisha Clement v R** [2016] JMCA Crim 26, which is the first of several cases from this court which establishes a more mathematical approach in determining appropriate sentences, to ultimately ensure greater transparency and consistency in the process. However, there are earlier decisions which offered guidance requiring a sentencer to determine a sentence as a starting point and then consider any factors that would influence the length of the sentence (see **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002).

[20] This court is loath to interfere with a sentence imposed unless satisfied that it was manifestly excessive or inadequate in circumstances where there was a failure to apply the right principles (see **R v Kenneth John Ball** (1951) 35 Cr App Rep 164). The learned trial judge fell into error when she failed to identify a starting point for the sentence of illegal possession of firearm and, thereafter, considering and making adjustments for the aggravating and mitigating factors.

[21] The learned trial judge did not have the guidance of the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, which set out that the normal range for illegal possession of firearm as being seven-15 years and the starting point as 10 years. This, not being a case of possession simpliciter, but also the use of the firearm to attack police officers, intending to cause harm while evading detention, would justify a starting point between 12 to 15 years for each applicant. The aggravating features which would cause an upward adjustment to this starting point are those identified by the learned trial judge in addition to the fact that this was a brazen attack on police officers dressed in police uniform, driving in a police service vehicle, in broad daylight. The firearms used in this attack were never recovered. The fact that Mr Devon Simpson had a previous conviction for illegal possession of firearm would increase his sentence above that which would be given to Mr Phillip Simpson.



[22] The only mitigating feature outlined by the learned trial judge for Mr Phillip Simpson was that he had no previous convictions. There were no more mitigating features that we could discern for Mr Phillip Simpson and no significant mitigating features identifiable for Mr Devon Simpson. The aggravating features far outweigh the mitigating ones and would justify a sentence in the range of 18-20 years for both applicants.

[23] As the learned trial judge indicated, both applicants would have been in pre-trial custody for approximately three years. When that period is deducted, the sentence for both applicants falls within the range of 15-17 years' imprisonment. In those circumstances, we find that the sentences imposed on both applicants were not manifestly excessive.

[24] Responding to queries from the court, Mrs Reid also argued that the applicants' constitutional rights had been breached by the inordinate delay between the completion of their trial and the provision of the transcript. She urged the court to grant the appropriate remedy it deemed fit. The Crown correctly conceded that there was indeed such a breach of the applicants' constitutional rights on account of that delay. The applicants were sentenced on 25 July 2013. However, the transcript of proceedings were not received by this court until 4 November 2022 (a delay of nine years and approximately four months). We agree that the delay is indeed inordinate. We also agree that that delay breaches the applicants' constitutional right to be given a copy of the record of the proceedings made by or on behalf of the court (see section 16(7) of the Constitution of Jamaica ('the Constitution')) and their right to have their convictions and sentences reviewed by a superior court within a reasonable time (see section 16(8) of the Constitution).

[25] The redress for those constitutional breaches can be in the form of public acknowledgment, payment of compensation, reduction in the sentence or quashing the conviction (which is seen as an extreme step). The redress deemed most appropriate is made having regard to the nature of the breach, all the circumstances of the case and whether the hearing itself was unfair (see **Attorney General's Reference (No 2 of**

**2001)** [2004] 2 AC 72). Unlike the situation in **Evon Jack v R** [2021] JMCA Crim 31, the transcript of proceedings are available. The allegations are rather serious as they involve shooting at police officers and ultimately wounding one officer. In those circumstances, in our view, the most appropriate remedy for these breaches would be a reduction in sentence. In **Jahvid Absolam and Others v R** [2022] JMCA Crim 50, there was a two-year reduction in the respective sentences as a form of redress for a seven-year delay in delivering the transcript. Since the offences of shooting with intent and wounding with intent attract the mandatory minimum sentence of not less than 15 years' imprisonment; given Mr Devon Simpson's previous conviction; and given the very serious nature of the allegations in the instant case, we would reduce the sentence only in relation to the conviction for illegal possession of firearm, by two years.

[26] As a consequence, we make the following orders:

1. The applications for leave to appeal the convictions of both applicants are refused.
2. The applications for leave to appeal the sentences imposed on both applicants are granted.
3. The hearing of the applications for leave to appeal the sentences imposed on both applicants is treated as the hearing of the appeal.
4. The appeals against sentence are allowed, in part.
5. It is declared that the right of the applicants under section 16(7) of the Constitution of Jamaica, to be given a copy of the record of the proceedings made by or on behalf of the court, within a reasonable time after judgment, has been breached.
6. It is declared that the right of the applicants under section 16(8) of the Constitution of Jamaica, to have their convictions and sentences reviewed by a superior court, within a reasonable time, has been breached by the

excessive delay between their convictions and the hearing of their applications.

7. On counts 2 and 3, which charge both applicants with the offences of wounding with intent and shooting with intent, respectively, the sentences imposed of 15 years' imprisonment on those counts on Mr Phillip Simpson, and 16 years' imprisonment on those counts on Mr Devon Simpson, are affirmed.

8. As redress for those breaches of the applicants' constitutional rights, in these circumstances, the following sentences are imposed:

On count 1, which charges both applicants with illegal possession of firearm, the sentences imposed of 15 years' and 16 years' imprisonment on Mr Phillip Simpson and Mr Devon Simpson, respectively, are set aside. Substituted therefor is a sentence of 13 years' imprisonment on Mr Phillip Simpson and 14 years' imprisonment on Mr Devon Simpson – a reduction of two years having been granted for the breach of the applicants' constitutional rights.

9. The sentences are reckoned to have commenced on 25 July 2013, the day they were originally imposed.