JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00029

TEVINO STEWART v R

Cecil J Mitchell for the appellant

Ms Sophia Rowe and Kemar Setal for the respondent

18 July 2023 and 15 March 2024

Criminal Law – Sentence – Illegal possession of firearm – Wounding with intent – Mandatory minimum sentence – The jurisdiction to reduce sentence below the mandatory minimum sentence - Certificate issued pursuant to section 42K of the Criminal Justice Administration Act

BROWN JA

Introduction

[1] The appellant was tried and convicted in the High Court Division of the Gun Court, sitting at King Street, in the parish of Kingston, on 28 October 2019, on an indictment for the offences of illegal possession of firearm (count one) and wounding with intent (count two). On 7 February 2020, the learned judge sentenced him to five years' imprisonment on count one and 15 years' imprisonment on count two, to run concurrently. The latter sentence is the prescribed statutory minimum penalty. The learned judge was moved to issue the appellant a certificate under section 42K of the Criminal Justice (Administration) Act ('the section 42K certificate'), for this court to review his sentence on the basis that the imposition of the prescribed minimum sentence was manifestly excessive and unjust.

[2] A single judge of this court granted the appellant leave to appeal in accordance with the section 42K certificate for us to consider the sentence for wounding with intent. However, the single judge refused the applicant permission to appeal his convictions and the sentence for illegal possession of firearm (count one). The appellant was dissatisfied with the refusal of the single judge and, in exercise of his right, filed Criminal Form B6 for this court to consider and determine, afresh, in addition to the sentence for wounding with intent, his application for leave to appeal his convictions and his sentence for illegal possession of firearm.

[3] At the commencement of the hearing, learned counsel for the appellant, as telegraphed in his written submissions, informed the court that the applicant was no longer pursuing the renewal of his application for permission to appeal against his convictions and sentence for the offence of illegal possession of firearm (count one). This appeal is, therefore, concerned only with the sentence imposed for the offence on count two of the indictment, namely, wounding with intent.

Background

[4] The brief background facts giving rise to the conviction are as follows. On 14 August 2017, at about 6:50 am, the complainant, Errol Smith ('Mr Smith'), was walking home. Nearing his home, he heard the sound of a gun "selecting" behind him. Mr Smith turned around quickly and saw the appellant, whom he knew before as Andy, pointing a firearm at him. A distance of about 10 feet separated them. Mr Smith said to the appellant, "Andy, what yuh a do, Andy?" The appellant's response was to shoot at Mr Smith. That set Mr Smith to flight. The appellant discharged more shots at him (Mr Smith) as he fled. Mr Smith received one gunshot wound to his left upper thigh which exited in the region of his left buttock. He was taken to the Spanish Town Hospital. There, he was treated and released the same day.

[5] The appellant made an unsworn statement. He strenuously denied committing the offences, and spoke of the gruesome murder of his brother, which caused him to leave the community as he feared for his life. He was arrested when he went back to the

community to visit family. He also spoke of his good character and that he was an industrious citizen.

The sentencing hearing below

[6] An antecedent report was read into the record and a short form social enquiry report was made available to the court to facilitate the sentencing exercise. Both reports disclosed that the appellant was born on 15 March 1996, making him just shy of 24 years of age at the time of the hearing (and about 21 years when the offences were committed). When he was arrested he was employed as a mason, even though uncertified. He was single and had no children. The antecedent report revealed that he had no previous convictions.

[7] In addition to the matters covered by the antecedent and social enquiry reports, defence counsel appearing below asked the learned judge to consider the following factors. This offence was out of character and was triggered by the violent death of his brother. Contradicting the probation officer that the appellant was unremorseful, the learned judge was told that what exacerbated matters was that the appellant believed the death of his brother was not under investigation. It was the belief of his then counsel, that the appellant "was pushed by the system and coerced by individuals to … commit an act of reprisal".

[8] In sentencing the appellant, the learned judge remarked that the appellant had been convicted for serious offences involving the use of a firearm, which remained in the public space and that the court was put through the trouble of a trial (see page 144 of the transcript). Those matters he considered to be against the appellant but more than counterbalanced by factors in his favour, pointing to the matters adverted to in the reports, mentioned above. The learned judge also accepted the appellant's eleventh - hour expression of remorse, as conveyed through his counsel. At page 145 of the transcript, the learned judge said:

> "I believe initially there was a sense that there was a [lack] of remorse but I do believe counsel that you are remorseful now and the possibility of rehabilitation is a factor that I weigh heavily in your favor [sic] not [as] a mitigating factor but it is one of those [factors] that your counsel would want me [to consider] in line with the possibility of rehabilitation ..."

[9] The learned judge then addressed his mind to the apparent motive, reprisal, that led the appellant to commit the offences. The learned judge seemed wholly persuaded by what was urged upon him in the plea in mitigation of sentence, expressing himself as appears below (see pages 145-146 of the transcript):

> "And the provoking circumstances that caused him to commit this fact [sic] is a fact that I must say weighs heavily on this Court's mind. Despite your denials it is evident that you went on this vendetta because you believe [sic] for whatever reason know [sic] that this complainant was involved whether directly or indirectly with the death of your brother. Whether that is so or not I believe weighed heavily on your mind which is why I agree with counsel she didn't use that word that this incident is more or less an aberration, it is something that happened that is outside of the ordinary of your usual character and the entire community seems to view you in that way, that you are not normally somebody that is given to that, but you have allowed persons to influence you towards taking revenge in this case ..."

Following on that, the learned judge, mindful of the statutory minimum sentence of 15 years, went on to demonstrate how he arrived at seven years' imprisonment, which he would have imposed, had he not been constrained by the statute.

[10] The learned judge then referred to the qualified statutory escape mechanism from the mandatory minimum sentence; that is, the section 42K certificate. The learned judge further exposed his mind in his decision to issue the section 42K certificate to the appellant. The preponderant factors in his thinking were the appellant's youth and the manner of his brother's death. In the learned judge's articulation (captured at pages 147-148 of the transcript):

> "In relation to count 2 the sentence of this court is fifteen (15) years imprisonment in line with the statutory minimum. However, the provisions of the Criminal Justice Administration Act, the Amendment Act Section 42 (a) [sic] does allow the court where in the circumstances of the particular case had it not been for the statutory minimum I would have given you a lower sentence. I do believe imprisonment notwithstanding the fact that you felt that you were justified in taking out your own justice on the complainant, that a period of imprisonment especially the matter having gone to trial is necessary but I will look at the fact that you are a young man, I look at the fact that the death of your brother was done in a very gruesome way and I believe that it affected you in such a way that you felt you needed to seek justice for your brother and as such even though the sentence requires that I give you fifteen (15) years imprisonment, I believe based on what I reasoned and indicated to you that I will issue a certificate in accordance with Section 42 (a) [sic] which your attorney can then take to the Court of Appeal … to indicate what the lower sentence would be that I would give you had it not been for the statutory [sic] and as such in relation to count 2 a certificate is issued for a sentence of seven (7) years imprisonment."

The learned judge went on to itemize his reasons which grounded the issuance of the section 42K certificate. Those reasons were:

> "(a) No Previous Convictions
>
> (b) Youth – Rehabilitation
>
> (c) Very Good Character – Incident an aberration
>
> (d) Remorseful
>
> (e) Provocation – Belief that complainant was involved in his brother's death [and] how it affected him emotionally."

The appeal

[11] The appellant listed the following as his grounds of appeal:

> "a) That the mandatory minimum Sentence was manifestly excessive.

> b) That the Appellant appeals by way of a Certificate granted under S. 42 (a) of the Criminal Justice Administration (Amendment) Act."

Submissions on behalf of the appellant

[12] In essence, counsel for the appellant, in his skeleton submissions, recounted the statutory constraint on the learned judge and the sentence he was minded to impose but for that constraint and the issuance of the section 42K certificate. Counsel, therefore, "submitted and prayed" that this court would "adopt the reasoning" of the learned judge, and impose the sentence he contemplated.

Submissions on behalf of the Crown

[13] Learned counsel for the Crown expressed herself as being unable to depart from the reasoning of the learned judge. The Crown, therefore, joined heart and mind with the appellant in his prayer for the imposition of a sentence of seven years' imprisonment.

Discussion

[14] The offence of wounding with intent was created by section 20 of the Offences against the Person Act of 1864 ('OAPA'). Section 20 of the OAPA was amended by Act 18 of 2010, which inserted subsection (2). The relevant part of subsection (2) reads:

> "(2) A person who is convicted before a Circuit Court of-
>
> …
>
> 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".

Wounding with intent with the use of a firearm, as in this case, therefore, attracts a prescribed minimum penalty of 15 years' imprisonment.

[15] The clear legislative intent is that, without more, the minimum sentence to be imposed on all persons convicted of the offence of wounding with intent, committed with

the use of a firearm, should be 15 years. That is the appropriate sentence where the commission of the offence involved no gratuitous violence; that is, violence exceeding that which inheres the offence itself and the defendant was seized of good antecedents (see **Garfield Elliott v R** [2023] JMCA Crim 22; **Kimani McDermott v R** [2022] JMCA Crim 38). The appropriateness of the prescribed minimum penalty encompasses not only persons with good antecedents, who acted with proportionate violence, but also those falling below the adult demography category.

[16] Two examples are enough to make the point that youth does not displace the justice of imposing the prescribed minimum sentence. In **Tafari Morrison v R** [2020] JMCA Crim 34; [2023] UKPC 14 ('**Tafari Morrison**'), the appellant was 16 years of age when he committed the offences of illegal possession of firearm, robbery with aggravation and wounding with intent. He pleaded guilty after the commencement of his trial, and when he was sentenced, he was 17 years of age. He too was subject to a mandatory minimum penalty of 15 years for the offence of wounding with intent. In upholding his sentence, the court sought to individuate and assess his sentence along the lines of proportionality outside of the imposition of the statutory minimum. At the end of that exercise, which travelled the path dictated by **Meisha Clement v R** [2016] JMCA Crim 26 and **Daniel Roulston v R** [2018] JMCA Crim 20, Phillips JA concluded at para. 108:

> "In all the circumstances, and after consideration of all these factors, we could not therefore say, in any event, the mandatory minimum sentence of 15 years [sic] imprisonment … imposed for wounding with intent, using a firearm, was 'grossly' or 'wholly' disproportionate, nor was it manifestly burdensome or excessive."

[17] The decision in **Tafari Morrison**, portended the position of the court in **Kerone Morris v R** [2021] JMCA Crim 10, in which the former was cited. The applicant was under 18 years of age at the material time, as was the complainant. The applicant fired four shots at the complainant, injuring him in the left leg, while he rode his bicycle along the public thoroughfare, about one month after the two had been involved in a fight. The

applicant was sentenced to the minimum of 15 years' imprisonment for the offence of wounding with intent.

[18] The learned trial judge, in that case, did not issue a section 42K certificate. In debunking the submission that this court had the power to reduce the applicant's sentence below the mandatory minimum for time served on remand, in the absence of the section 42K certificate, Brooks P said, at para. [9]:

> "The fact that … Mr Morris spent 19 months on remand, does not allow, without a certificate, for a reduction of the statutory minimum. **There is also no room for the reduction of the statutory minimum sentence merely because Mr Morris was a minor at the time of the offence**. In addition, bearing in mind the premeditated and deliberate nature of the shooting, it cannot be said that the mandatory sentence was disproportionate to the offence (see **Tafari Morrison v R**)." (Emphasis added)

[19] In addition to the above, the minimum statutory penalty is within the range of sentences imposed for wounding with intent. Although the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines') state that the normal range of sentences for this offence is between five years and 20 years' imprisonment, this includes both firearm non-firearm offences. In **Carey Scarlett v R** [2018] JMCA Crim 40, Brooks JA (as he then was) deduced a range of 15-20 years for wounding with intent with the use of a firearm, from an analysis of a number of cases (see paras [27]-[36] of the judgment).

[20] Notwithstanding the clear legislative intent, expressed in section 20(2)(b) of the OAPA, the legislature recognised that there may be cases in which the imposition of the prescribed minimum penalty upon an individual offender may be manifestly excessive and unjust. Hence the passage of the Criminal Justice Administration (Amendment) Act 2015. The principal Act was amended by, among other things, inserting a new Part 1B, "Review of Sentences Punishable by Prescribed Minimum Penalty". Section 42K falls under Part 1B.

[21] Section 42K(1) provides what may be conveniently described as the initiation mechanism for review of the prescribed minimum penalty. That is, the sentencing judge must first come to the view that, upon a consideration of the peculiar circumstances of the case before him, it would be manifestly excessive and unjust to impose the minimum penalty stipulated by the legislature upon the defendant. The sentencing judge must then impose the prescribed penalty and issue a certificate (referred to above as the section 42K certificate) to the defendant to seek permission from a judge of the Court of Appeal, to appeal against the sentence. The section 42K certificate must outline: the fact of the imposition of the prescribed penalty; the decision of the sentencing judge that the peculiar circumstances of the case before him makes the prescribed penalty manifestly excessive and unjust, together with his reason(s); and the sentence that he would have imposed, but for the legislative constraint (see section 42K(2)).

[22] If the Court of Appeal concurs with the views of the sentencing judge and finds that there are compelling reasons justifying the appellation, "manifestly excessive and unjust", then the Court of Appeal may substitute a sentence which falls below the prescribed penalty and stipulate a parole ineligibility period of not less than two-thirds of the substituted sentence. That is the pith and substance of section 42K(3), which is set out below:

> "(3) Where a certificate has been issued by the Court pursuant to section 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."

[23] Therefore, for there to be the imposition of a sentence below the statutory minimum sentence, there must, be a convergence of this court's view with that of the learned judge that the minimum penalty imposed on the appellant was manifestly excessive and unjust. As was said in **Paul Haughton v R** [2019] JMCA Crim 29 (a section 42K certificate case), the first question is whether there is anything in the circumstances of this case to take it outside of the normal range of 15-20 years identified in **Carey Scarlett v R**. Accordingly, we must interrogate the learned judge's reasons for issuing the section 42K certificate against the backdrop of previously decided cases.

[24] In **Carey Scarlett v R**, the applicant attacked the complainant as he was locking up his house to leave home at about 9:30 pm. The complainant first received a gunshot wound to his hand when he attempted to knock the firearm out of the applicant's hand. The complaint then backed away from the applicant, ducked behind a vehicle parked near the house then ran off. As he ran, the applicant chased him and fired several shots at him. The complainant received two additional gunshot wounds to his side and buttock. The complainant was hospitalised for eight days as a result of those injuries.

[25] On those facts, this court substituted a sentence of 18 years' imprisonment for the 25 years, imposed by the trial judge. Brooks JA, at para. [37], opined that the sentence of 25 years fell outside the normal range, making it manifestly excessive and warranting a downward adjustment. Importantly, Brooks JA considered that although the complainant suffered serious injuries, comparatively, those injuries were no more so than some of the victims in the cases he reviewed. However, the nature of those injuries and the fact that the attack occurred at the complainant's home, trumped the applicant's previous good character. Hence, the imposition of a sentence slightly above the mandatory minimum.

[26] The circumstances of the commission of the offence in this case are not vastly dissimilar from those in **Carey Scarlett v R**. In the present case, Mr Smith's evidence was that he was "approaching, reaching my house" when he heard the noise behind him (see page four of the transcript). So that, it appears the incident took place in reasonable

proximity to Mr Smith's house, as in **Carey Scarlett v R**. Although the appellant does not appear to have chased Mr Smith, he, like the applicant in that case, discharged several rounds at Mr Smith. It seems fair to infer, therefore, that both intended more harm than was done. Mr Smith's opinion that "this man came to kill me this morning" is not farfetched (see page 11 of the transcript). Furthermore, there, as here, was an element of premeditation in the manner in which the offence was committed. The impression that both victims were waylaid is irresistible.

[27] Leaving aside the circumstances of the offence, both the applicant in that case and the instant, were persons without previous convictions. Whereas the social enquiry report revealed that the community had an unflattering view of the applicant in **Carey Scarlett v R**, a similar report in this case said the appellant was "not generally a wayward individual."

[28] The learned judge's reason (e) addressed the appellant's reason for committing the offence. Respectfully, reason (e) is as flawed as it is confused. In one breath, the learned judge classified the appellant's motivation as provocation and a vendetta (see para. [7] above). There was no evidence before the learned judge to raise provocation in the technical sense of the word, which only applies to the offence of murder. From the appellant's unsworn statement, he was not present when his brother was brutally and savagely attacked. So, he could not have been privy to anything done or said, which may have caused him to lose his self-control. Even had he been present, it is arguable that provocation, in law, would still not have availed him as the shooting of Mr Smith was so remote in time, that hiatus would be recognised as a sufficient "cooling-off period". Since the learned judge is taken to know the law, his less than forensic use of the phrase "provoking circumstances" ought perhaps to be understood in the layman's sense of the word, something done which excited a response.

[29] If that is what the learned judge meant, there is consonance with his opinion that the shooting of Mr Smith was the result of a "vendetta". That the shooting was done in furtherance of a vendetta cannot be countenanced as a judicious basis upon which to say

the penalty mandated by law is manifestly excessive and unjust. We would venture that, the court being the guardian of the public values of the society, it should set its face resolutely against even the appearance of giving succour to anyone who is so motivated to kill or wound.

[30] Leaving aside the learned judge's reason (e), his other reasons, (a) to (d), may be shortly disposed of. The personal mitigatory circumstances in this case are, in a word, unremarkable. Both reasons: (a) no previous convictions; and (c) a very good character and the commission of the offences being an aberration, may be condensed into previous good character. These features, whether individually or cumulatively, cannot be elevated to the level to warrant the characterisation of a sentence as manifestly excessive and unjust (see **Tafari Morrison** and **Kerone Morris v R**). The same may be said of reason (d), remorseful. In so far as a plea of guilty evidences remorse, it ought to be recalled that **Tafari Morrison** was sentenced after a plea of guilty, albeit entered after the commencement of the trial. It may, therefore, be said that the remorse demonstrated in **Tafari Morrison** did not operate to make the imposition of the mandatory minimum sentence "manifestly burdensome or excessive". So, remorse is demonstrably an insufficient reason for the learned judge to have issued the section 42K certificate in the circumstances of this case.

[31] **Paul Haughton v R** was a case in which this court disagreed with the trial judge's reasons for issuing a section 42K certificate. That case concerned a commercial sexual arrangement, between the appellant and a sex worker (so described by the trial judge), which went horribly wrong. They agreed a price, a down payment of one-fifth, the remainder to be paid once they were in a taxi. They were supposedly bound for the appellant's home, to consummate the bargain. Once inside the taxi, the sex worker made several unsuccessful requests for the balance.

[32] The taxi drove to a bushy, unlit area where they disembarked and the taxi sped off. The appellant led the sex worker up a knoll. There, he physically assaulted the sex worker with a stone; raped her, and ejaculated inside her against her wish. The physical

assault was supported by medical evidence. At the end of the assault, he ordered her to leave, without paying her the remaining four-fifths of the negotiated price. The appellant admitted the sexual intercourse, denied that it was without consent and asserted he used a condom. He also denied the physical assault. The commercial nature of their interaction was admitted, but he countered that the agreed price was $2,000.00, which he paid but refused her request for another $2,000.00.

[33] Against the backdrop of the jury's guilty verdict, the trial judge held a rather jaundiced view of the circumstances leading to the appellant's conviction. Accordingly, he took a benign view of the appellant and was moved to issue a section 42K certificate. Were it not for the statutory minimum of 15 years, he would have imposed seven years' imprisonment. In **Haughton v R**, Morrison P listed the reasons the trial judge gave in the certificate at para. 26 as:

> "(a) The offence occurred in circumstances where there was a willing transaction entered into by the complainant and the [appellant]. There was no force or violence at the time.
>
> (b) The [appellant] may have misjudged the actions of the complainant. He did not go to the place of offence with any weapons such as a knife or even an imitation firearm. It was a stone he used to [injure] the complainant.
>
> (c) The social enquiry report shows that the personal early life of [the appellant] may have limited his approach to conflict resolution and disagreement in interpersonal relationship. Also his mental reason [sic] may have been affected by consumption of alcohol."

[34] Although this court accepted that the appellant was unarmed at the time, the considered view was that the trial judge took into consideration matters that the jury, by their verdict, must have rejected (see para. [39] of the judgment). Emblematic of the judge's misplaced reliance on facts which found no favour with the jury was his "repeated reference to the possibility that the appellant, in his interaction with the complainant, might have 'misjudged the situation'" (see para. [40]). After a comparative analysis between **Paul Haughton v R** and **Oneil Murray v R** [2014] JMCA Crim 25, that was

considered analogically apt, the court concluded that no compelling reasons were evident in the circumstances to make the prescribed minimum sentence manifestly excessive and unjust (see para. [48] of the judgment). Accordingly, the sentence was only disturbed to allow credit for pre-trial incarceration.

[35] A similar conclusion (no compelling reasons to disturb the sentence) was arrived at in **Kimani McDermott v R**. In that case, this court found that the sentencing judge had failed to take into consideration critical aggravating factors while, at the same time, giving undue weight to some mitigating factors (see paras. [21] - [26] of the judgment). The errors which grounded the section 42K certificate in **Garfield Elliott v R** were dissimilar from those in **Kimani McDermott v R**. In **Garfield Elliott v R**, the appellant committed acts of grievous sexual assault and buggery, upon the child complainant. The learned judge in that case improperly sought to introduce categories into the former offence, expressing the view that the 15 years' minimum sentence was reserved for those assessed to be "extraordinarily serious" (see para. [15] of the judgment). The learned judge's attempt in that case to whittle down the seriousness of the grievous sexual assault also led him, erroneously, to the view that buggery was a more serious offence, to be gathered purely from the lesser maximum sentence of 10 years' imprisonment. The sentence was only disturbed to give credit for time spent on remand.

[36] The issues arising in this case and others, some to which we have already referred, raise the question of what should be the proper approach in issuing a section 42K certificate. We have distilled the following principles from our short review of the cases:

> 1. A section 42K certificate is only applicable in cases attracting a mandatory minimum sentence where the defendant was tried and convicted (see **Miguel Moss v R** [2022] JMCA Crim 10).

2. The sentencing judge is required to sign the document 'Judge's Certificate', setting out his reasons for its issuance (see **Miguel Moss v R**; **Kerone Morris v R**; section 42K (1) (b) and (2) of the CJAA).

3. Before deciding to issue a section 42K certificate, the sentencing judge should first identify the range of sentences for the offence attracting the prescribed minimum penalty. For example, the normal range for wounding with intent is 15-20 years' imprisonment (see **Carey Scarlett v R**).

4. Next, the notional sentence in the case before him should be determined, using the **Meisha Clement/Daniel Roulston** methodology.

5. The pivotal question that the judge should then pose to himself or herself is: is there anything in the circumstances of the case before me which takes it outside the normal range of sentence for the offence that would render the imposition of the prescribed minimum penalty manifestly excessive and unjust? (see **Paul Haughton v R**).

6. In seeking to answer that question, the sentencing judge must scrupulously consider only such facts as, on any fair view of the evidence, the tribunal of fact must have accepted in arriving at its verdict. Facts which the jury is taken to have rejected ought not to factor into the consideration of the circumstances (see **Paul Haughton v R**; Blackstone's Criminal Practice 2020 at para D20.42**)**.

7. All aggravating and mitigating factors must be identified and be accorded their proper weight (see **Kimani McDermott v R**).

8. The decision to issue a section 42K certificate must reflect the intention of the legislature; avoid making fanciful or otherwise improper comparisons with different pieces of legislation (see **Garfield Elliott v R**).

9. A section 42K certificate may be issued where the convicted person had spent time on remand which will result in him serving a sentence greater than the mandatory minimum, if it is determined that he should serve only the minimum period of imprisonment (see **Paul Haughton v R**; **Lennox Golding v R**; **Garfield Stewart v R**).

[37] It is only if the pivotal question (at item 5 above) is answered in the affirmative that the sentencing judge can properly issue a section 42K certificate. In other words, a section 42K certificate should not be issued because the sentencing judge: is moved by sympathy for the offender; disagrees with the jury's verdict; thinks the prescribed sentence is disproportionate to the maximum allowed for a kindred offence; or assumes the mandatory penalty is discordant with his appreciation of the seriousness of the offence. In short, the decision to issue a section 42K certificate must be judicious. Perhaps the best way to avoid the injudicious issuance of a section 42K certificate is for the sentencing judge to studiously follow the methodology laid down in **Meisha Clement v R**, together with its refinement in **Daniel Roulston v R** and the Sentencing Guidelines.

[38] In this case, the learned judge adopted an unorthodox and flawed methodology to arrive at a sentence below the mandatory minimum penalty. The learned judge articulated his approach while addressing the appellant, at pages 146-147 of the transcript. He said:

> "Had there not been a statutory minimum in relation to the wounding the usual range would be somewhere between 2 to 20 years but that is the usual starting point of seven years [sic] imprisonment. Now if there was no statutory minimum I believe in relation to the wounding an additional seven years to that starting point of seven years would be reasonable given the fact that this matter was able to proceed to a trial – well, that there was a contested trial and that the serious nature of these injuries are such we could have had a murder case on our hands and as such I believe that the starting point- well I added those aggravating features perilous to at least 14 years had their not been a statutory minimum. From that I would have taken the 1 year and 9 months to a total of 12 years and 3 months in relation to the maximum sentence and I will deduct a further 5 years for each of those elements that I mentioned that there is no previous convictions, your age, good character, remorsefulness and the provoking circumstances and that had there not been a statutory minimum sentence of 15 years imprisonment in this case my sentence on that count would have been seven (7) years imprisonment to you ..."

[39] The fundamental flaw in this approach is the misunderstanding that the requirement under section 42K(2)(c) of the CJAA to state in the certificate the sentence that would have been imposed, but for the prescribed minimum penalty, means the adoption of a fictional range and starting point below the mandatory minimum penalty. That misunderstanding beguiled the learned judge into identifying a range of 2 to 20 years' imprisonment. That was apparently an inaccurate representation of the range that appears in Appendix A of the Sentencing Guidelines; correctly expressed as "5-20 years". Brooks JA (as he then was), in **Carey Scarlett v R**, acknowledged the range stated in the Sentencing Guidelines but opined that it would include both firearm and non-firearm offences. He went to say, at para. [31]:

> "… The fact that there was a statutorily imposed minimum sentence necessarily means that, for wounding with intent, using a firearm, the low end would be 15 years. The high end of the normal range, would of course, be 20 years."

Carey Scarlett v R was decided on 2 November 2018, just over a year before the instant case (sentenced on 7 February 2020). Therefore, the learned judge ought to have been aware of the accepted range for wounding with intent with the use of a firearm and that, the range must take cognizance of the statutory minimum penalty.

[40] Likewise, cognizance of the statutory minimum enjoins a starting point that is at least coterminous with the minimum penalty. The learned judge chose a starting point of seven years. While it is true that the Sentencing Guidelines stipulate seven years as the usual starting point, the cautionary parenthesized words, "other than when [statutory minimum] applies", cannot be ignored. It is palpable that the architects of the Sentencing Guidelines were not advocating a starting point that would run afoul of the prescribed minimum penalty. On the contrary, the seven years starting point is specifically dis-applied where there is a statutory minimum penalty.

[41] So then, the statutory minimum penalty ought properly to have been the learned judge's lodestar in determining both the range and the starting point. Applying the principles adumbrated at para. [34] above, the learned judge should have chosen 15-20 years as the range. The starting point, or notional sentence, would therefore fall somewhere in the range. We will take 15 years as the starting point.

[42] From there, the pivotal question (item 5 at para. [34]) must be answered. The sentencing judge must bring to bear a full appreciation of the facts the jury must be taken to have found by their verdict. Being so seised, the sentencing judge will go on to consider the aggravating and mitigating factors. The learned judge in this case named two factors as aggravating, only one of which can be properly so characterized (the seriousness of the injuries, signifying greater harm was intended than resulted); the other factor, that the appellant was being sentenced at the end of a trial, cannot be properly so called. We understand the learned judge reference to the trial, to mean the appellant ought to be treated differently from person who pleaded guilty.

[43] In our view, the learned judge could have gone on to isolate the following additional aggravating factors: (a) an element of premeditation; and (b) the prevalence of firearm offences in the island. The learned judge assigned an additional seven years for the aggravating features, as he perceived them to be. We will not depart from his assessment. That raises the sentence from 15 to 22 years.

[44] Leaving aside the aggravating indicia, we move on to consider the mitigating factors. The learned judge purported to name five such features. We take issue with one of the five. That is, the improper elevation of what the learned judge called "provoking circumstances" to a mitigating circumstance (see discussion at paras. [26]-[27] above). That criticism aside, we would add to the mitigating side of the equation, the appellant's immaturity which is reflected in his susceptibility to the influence of others to commit the offences; his capacity for reform. Inexplicably, the learned judge acknowledged the appellant was not beyond recall and, although it "weigh[ed] heavily" in the appellant's "favour", he was disinclined to treat it as a mitigating factor (see page 145 of the transcript). Adopting the learned judge's weighting of five years for the mitigating factors, notwithstanding the missteps, that would take the sentence to 17 years.

[45] The sentence of 17 years' imprisonment, before the compulsory reduction for time spent on remand, falls squarely within the range of 15-20 years' imprisonment identified in **Carey Scarlett v R**. Applying the principle established in **Callachand and Another v The State** [2008] UKPC 49 that the appellant must be given full credit for any pre-sentence incarceration, the time the appellant would serve would be reduced by two years (see also **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ). The appellant was incarcerated for one year and nine months. However, the learned judge appears to have rounded that figure up to two years. We are not minded to dilute the learned judge's generosity. Therefore, the appellant would serve a period of 15 years' imprisonment.

Conclusion

[46] So then, whether it be 17 years or 15 years, after giving 100% credit for time spent on remand, when all the aggravating and mitigating factors are taken into

consideration, there is nothing in the circumstances of this case to take it outside the normal range of sentences imposed for this offence. The fact of his age would not so operate (**Tafari Morrison v R**; **Kerone Morris v R**). Equally, that the appellant was previously of good character would not make the prescribed minimum sentence manifestly excessive and unjust (**Kimani McDermott v R**). There is, therefore, no compelling reason to reduce the sentence imposed on the appellant below the prescribed mandatory minimum of 15 years' imprisonment. Accordingly, his appeal against the sentence imposed for wounding with intent should be dismissed.

Orders

[47] We, therefore, make the following orders:

1. The application for permission to appeal against the convictions for both offences and the sentence of five years' imprisonment, imposed for the offence of illegal possession of firearm (count one), is refused.

2. The appeal against the mandatory minimum sentence of 15 years' imprisonment imposed for the offence of wounding with intent (count two) is dismissed.

3. The sentence of 15 years' imprisonment imposed for the offence of wounding with intent is affirmed.

4. The sentences are to be reckoned as having commenced on 7 February 2020, the date they were imposed, and are to run concurrently as ordered by the learned judge.