[2023] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL NO 57/2018

CLAYTON WILLIAMS v R

Ms Tameka Menzie for the applicant

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

19, 23 June and 28 July 2023

Criminal law – illegal possession of firearm – robbery with aggravation- whether trial judge retains jurisdiction to consider count in indictment which the Crown concedes has not been made out by the evidence – whether jurisdictional and aggravating elements of robbery with aggravation made out- Sections 20 and 25 of Firearms Act, 1967 and section 37 (1)(a) of the Larceny Act, 1942 applied

Identification – suspect has unusual physical features – whether rule 552 of the Identification Parade Rules complied with

Pre-sentence remand – primary rule – whether sentencing judge has residual discretion not to apply the primary rule on good reasons being shown

DUNBAR GREEN JA

[1] On 13 December 2017, after a trial before Stamp J ('the learned trial judge'), in the High Court Division of the Gun Court, the applicant was convicted on an indictment for the offences of illegal possession of firearm (count one) and robbery with aggravation (counts two and three). On 7 June 2018, he was sentenced to 12 years' imprisonment at

hard labour for count one and 14 years' imprisonment at hard labour each for counts two and three. The sentences were ordered to run concurrently.

[2] The applicant's application for leave to appeal his convictions and sentences was refused by a single judge of this court.

[3] On 19 and 23 June 2023, we considered his renewed application, and made the following orders:

> "1) The application for leave to appeal convictions is refused.
>
> 2) The application to appeal sentences is allowed.
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> 3) The hearing of the application is treated as the hearing of the appeal.
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> 4) The appeal against the sentences is allowed, in part.
>
> 5) The sentences of 12 years' imprisonment at hard labour for illegal possession of a firearm and 14 years' imprisonment for robbery with aggravation (both counts) imposed by the learned trial judge are set aside, and substituted therefor are sentences of 11 years and 10 months' imprisonment at hard labour for illegal possession of firearm and 13 years and 10 months' imprisonment at hard labour for robbery with aggravation, the applicant having been credited with an additional two months for time spent in pre-sentence custody.
>
> 6) The sentences are reckoned as having commenced on 7 June 2018, the date on which they were imposed."

[4] This is the fulfilment of our promise made then to put our reasons in writing.

The evidence at trial

Crown's case

[5] The case for the Crown was that at about 6:40 pm, on 20 November 2014, the applicant, along with another man, being armed with a firearm, held up and robbed Ms Esther King, a guidance counsellor, and Mrs Odean Cole Phoenix, her friend ('the

complainants'). This took place at Ms King's home in Green Acres in the parish of Saint Catherine.

[6] The incident unfolded this way. Mrs Cole-Phoenix had gone to collect food items from Ms King, who walked her to the gate. While Mrs Cole-Phoenix was placing the food items inside her car, which was parked on the roadway outside at the gate, the perpetrators approached and enquired whose car it was. Ms King asked why, and the applicant told her that he wanted to borrow it because he had just killed some people and he and his companion needed to escape. The perpetrators and the complainants had further exchanges about the car, after which Mrs Cole-Phoenix was asked for the car key and she complied by handing it to the applicant's companion. The applicant then told the complainants to accompany him and his companion through the gate towards the house. Mrs King started to panic and begged him to take the car and leave. The applicant proceeded through the gate towards the house and told the complainants to follow. When they got to the veranda the applicant lifted his shirt, revealed a firearm in his waistband, and said, "You see this, you see this? We don't want to hurt you, we don't want to hurt you". The applicant took the complainants through various parts of the house, including Ms King's bedroom, where he robbed her of a cell phone, a house phone and cash in the amount of $1100.00 (the particulars of count two). He then cautioned the complainants against raising any alarm within an hour of their departure. The perpetrators then left in Mrs Cole-Phoenix's car, which contained her belongings, including a purse with personal documents, a cell phone and $500.00 in cash (the particulars of count three).

[7] The complainants reported the matter to the police. Subsequently, they separately pointed out the applicant on identification parades ('the parades').

The defence

[8] The defence's case was one of alibi. The applicant gave an unsworn statement from the dock. He stated that on the relevant date, he was at home in Water Mount District in the parish of Saint Catherine, working on a grille at his home. This project

lasted from 9:00 am to 5:00 pm, after which he took a bath in a nearby river and then assisted his child with homework. He denied committing the offences.

The appeal

[9] At the commencement of the hearing of this application, counsel for the applicant sought and obtained permission to abandon the original proposed grounds of appeal. Instead, she argued the following grounds contained in the skeleton submissions:

> "(1) The learned trial judge erred when he disallowed or ignored the concession of the Crown on Count three of the indictment, where a verdict of not guilty should have been returned, thus rendering the conviction unsafe;
>
> (2) The learned trial judge erred in principle in failing to give a mathematical account for time spent in pre-trial custody;
>
> (3) The evidence of the identification parades did not indicate that every precaution was taken to exclude any suspicion of unfairness being directed to the applicant based on physical deformity or disability; and
>
> (4) The sentences were manifestly excessive."

Ground 1

Submissions for the applicant

[10] Counsel appearing for the applicant, Ms Menzie, submitted that the prosecutor having conceded that count three of the indictment had not been made out, it was no longer a live issue for the consideration of the learned trial judge. Therefore, the applicant ought to have been acquitted of that charge.

Submissions for the Crown

[11] In response, Mrs Dell-Williams, appearing for the Crown, submitted that despite the prosecutor's concession, count three remained a live issue for the learned trial judge's consideration. Counsel made two main arguments in support of that position. Firstly, the

aggravating element of the offence (the use of the firearm) was satisfied in that the applicant was armed with a firearm or imitation firearm when he relieved both complainants of their belongings. Counsel pointed to Ms King's evidence that while they were on the veranda (having been instructed by the applicant to follow him into the house), the applicant moved away his shirt and said, "You see this, you see this? We don't want to hurt you, we don't want to hurt you", after which she observed the handle of a gun tucked in the applicant's waistband right above his navel, and upon being shown the gun she panicked and begged him not to go inside the house. Support was also sought from Mrs Cole-Phoenix's evidence that the applicant lifted his shirt and said, "look at this", but she looked away because she was traumatised at the thought of what she would be looking at. Counsel also pointed to the robbery of Mrs King's items occurring after they had all entered the house; and thereafter, the applicant and his companion drove away Mrs Cole-Phoenix's car with her other belongings.

[12] Counsel pointed to additional evidence from Ms King in which she described the gun and gave reasons for concluding that it was a gun, as sufficient evidence from which the learned trial judge could conclude that the applicant was armed with a firearm or imitation firearm. Counsel relied on section 25 of the Firearm's Act ('the Act') (then in existence) and **Stevon Reece v R** [2014] JMCA Crim 56, an authority from this court that deals with the interplay between sections 20 and 25 of the Act.

[13] Counsel also pointed to evidence from both complainants that they were put in fear (another element that is relevant to the charge of robbery with aggravation) and that their property was taken as a part of one transaction. She highlighted Ms King's evidence that having seen the gun she panicked and begged the applicant to leave, and Mrs Cole-Phoenix's fear of what she might have seen when the applicant said, "look at this", as good footing on which the learned trial judge convicted the applicant on count three.

[14] Secondly, counsel explained that the concession came as a direct response to a question, by the learned trial judge, during closing submissions, and there was no

indication that the prosecutor was offering no evidence or that the applicant was discharged by the learned trial judge. In the absence of the adoption of any such procedure, the learned trial judge could consider count three and make the findings that he did.

Discussion

[15] The thrust of Ms Menzie's submission was that the mere fact that the prosecutor conceded on count three in final addresses meant that the learned trial judge was deprived of the jurisdiction to consider it and enter a verdict of guilty.

[16] At page 125 of the transcript, the learned trial judge outlined the elements of the offence of robbery with aggravation, as follows:

> "… For robbery with aggravation to be established the prosecution must prove that the accused person while being armed with a firearm or imitation firearm stole from the person of another or from another or in the presence of another anything of value by means of putting that person in fear with the firearm. So the use of the firearm or imitation firearm in the course of the robbery must also be proved. This raises some issues in respect of Count Three, the robbery or the alleged robbery of Mrs Phoenix because Mrs Phoenix said she did not seen [sic] the firearm. I will refer to that later because crown counsel had conceded that that count was not made out."

[17] That statement by the learned trial judge is consistent with section 37(1)(a) of the Larceny Act, 1942, under which the applicant was charged for the offence comprised in counts two and three. That section provides, in part:

> "Every person who –
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> (b)...

> shall be guilty of felony, and on conviction thereof liable to imprisonment with hard labour for any term not exceeding twenty-one years."

[18] For proof of count three (similarly for count two), it had to be established that the applicant had a firearm and used it to commit the robbery. As no firearm was recovered there was no evidence to establish that the object that Ms King said she saw in the waist of the applicant was a firearm as defined in section 2(1) of the Act. Therefore, the prosecution had to prove that, at the very least, the object Ms King said she saw, and was ultimately used, had the appearance of a firearm. That was the basis on which section 25 of the Act was invoked by the learned trial judge.

[19] That section, as far as is relevant, provides:

> "25. – (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 subsection.
>
> (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 the subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.
>
> (3)...
>
> (4)...
>
> (5) In this section –
>
> 'firearm' means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes any prohibited weapon and any restricted weapon, whether such is a lethal weapon or not;

> 'imitation firearm' means anything which has the appearance of being a firearm within the meaning of this section whether it is capable of discharging any shot, bullet or missile or not."

[20] As was explained at para. [30] in **Stevon Reece v R**:

> "…The provisions of section 25 become relevant to a consideration of a charge under section 20(1)(b) by virtue of section 20(5)(c), which states:
>
> > '(c) any person who is proved to have used or attempted to use or to 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.'"

[21] At pages 158-159 of the transcript, the learned trial judge dealt with the issue of the concession, and the relevance of section 25 of the Act to count three, in this manner:

> "In response to a question from the court the Crown Counsel had expressed to me that because Mrs Cole Phoenix did not see the weapon Count three would not be made out. However, having considered the matter myself I bring in mind section 25 of the Firearm's Act, that a person is guilty of an offence, a felony if he uses in the course of that felony any firearm or imitation firearm, robbery with a felony robbery [sic] is also a scheduled offence under section 25 so under both - can I ask if anyone has the Firearm's Act? I find that he used the firearm or imitation firearm in furtherance of a robbery, which is a felony (A) and (B) it is also a stated offence and therefore pursuance [sic] to section 20 subsection [sic] (4) and (5) of the Firearm's Act these offences can be charged as firearm offences. In the circumstances I also find him guilty of Count Three."

[22] Having reviewed the transcript and the submissions of counsel, we are not of the view that the learned trial judge lacked the jurisdiction to consider count three. Firstly, there was no indication of any pronouncement by the prosecutor that it had offered no

evidence on count three. Having not been brought to finality by the Crown's concession, count three remained a live issue for consideration by the learned trial judge, who had a duty to consider the evidence and the law, and make findings as were appropriate. The court could not be constrained in doing justice because of a concession that was unfounded in law and fact.

[23] Secondly, the evidence was that to secure compliance with his demands, the applicant lifted his shirt and drew attention to the handle of an object which Ms King said she saw and knew to be a gun. It was, therefore, for the learned trial judge to say whether that evidence satisfied him that what Ms King saw was at the very least an imitation firearm that was used to commit the robberies, there being no dispute that robbery with aggravation is a felony (see section 25(1) of the Act).

[24] Having accepted that the applicant had a firearm or an imitation firearm, the learned trial judge was correct that he had jurisdiction to try the various counts in the indictment, including count three. It was then for him to say whether the other elements of robbery with aggravation (particularly as they pertained to count three) were made out in light of evidence from both complainants that they were put in fear by the gun being made visible to Ms King and Mrs-Cole Phoenix's perception of what was being shown when the applicant said, "look at this". Mrs Cole-Phoenix's decision not to look, out of fear for what she would see, did not negate the evidence that a firearm or imitation firearm was present, and it was that weapon which was ultimately used in committing both robberies.

[25] The evidence that the learned trial judge accepted was that, after the gun was shown, certain demands were made of the complainants and they were ultimately relieved of their individual possessions by the applicant. We believe that this was evidence on which the learned trial judge could make a finding that count three was made out. We accept the Crown's submission that the incident comprised one transaction, and that, whereas Ms King's evidence was capable of satisfying the jurisdictional and the aggravating elements of the offence charged in count three, the evidence of both

complainants that the applicant lifted his shirt and drew their attention to what was there, made them both fearful, which was a necessary element of the offence.

[26] For these reasons ground 1 fails.

Ground 3

[27] For convenience and a logical flow, ground 3 will be considered before ground 2.

Submissions for the applicant

[28] Counsel for the applicant hinged her submissions on the evidence that the applicant had a distinct physical characteristic. Ms King gave evidence that the applicant had "[an] irregular, smaller [right hand] and not like his other hand", and Mrs Cole-Phoenix described the applicant's right hand as being held close to him and "...it didn't look as though it was normal or working well as the left hand". The investigating officer also stated that he had conducted investigations into a case of robbery with aggravation against a "finned[sic] hand man".

[29] Counsel submitted that these were descriptions of an unusual physical feature and, therefore, the composition of the parades should have been of at least eight persons fitting the general appearance of the applicant. Otherwise, steps ought to have been taken by the police officers conducting the identification parades to conceal the unusual and distinct feature.

[30] She further contended that the learned trial judge should have also given his jury mind a clear and firm warning consistent with the principles in **Bernard v R** (1994) 45 WIR 296. We were referred to rule 552 of the Identification Parade Rules, 1939 ('the parade rules'), for the proposition that a failure to abide by those provisions would lead to a miscarriage of justice. Further support was sought from **R v Michael Cornwall and Francis Holloway** (1996) 54 WIR 333, a case relied on by the Crown in its written submissions.

Submissions for the Crown

[31] The Crown pointed out that the applicant and his attorney-at-law participated in choosing eight volunteers for each identification parade and there was no evidence of any objection having been taken, or any issue raised during or after the parades.

[32] It was indicated also that the statements by Sergeant Grant Taylor, the police officer who conducted the parades, the apprehending officer, and the investigating officer respectively, were agreed by the parties pursuant to section 31CA of the Evidence Act. Those statements were, therefore, admitted into evidence without the makers having been called to give evidence. Also, the form accompanying those documents was signed by the applicant, his attorney-at-law and counsel for the prosecution. This was proof that the conduct of the parades was not being challenged.

[33] Counsel submitted that there was no evidence to suggest that fairness at either parade was compromised or that the conduct of the parades was impugned. There was no such suggestion to either complainant and questions put to them in cross-examination, in the main, were about actions prior to the parades and not about any physical disability. There were no questions or suggestions that directed their attention to any physical deformity of the applicant. Ms King was only asked by defence counsel whether she was shown photographs or a driver's license of the accused before she went on the parade, and she answered in the negative. She was also questioned about her ability to identify the applicant, but this was in relation to the cap that she said he was wearing at the time of the robberies. Mrs Cole-Phoenix's evidence did not suggest that there was anything done to direct her attention to the suspected person at the parade, and nothing was suggested to her, at trial, to impugn the fairness of the parade. There was also no basis on which to conclude that the applicant's defective hand was definitive or factored at all in the identification of him. Further, neither the conduct of the parades nor any issue with the applicant's deformity was raised as a concern in the unsworn statement.

[34] We were referred to **R v Michael Cornwall and Francis Halloway** in which the court concluded that if a person (an observer at the identification parade or the suspect)

challenges the conduct of the parade for unfairness, the jury ought to be allowed to hear not only the nature of the allegations of unfairness but also the reason for such allegations.

[35] Counsel also cited **R v Bradley Graham and Randy Lewis** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 158 & 159/1981, judgment delivered 26 June 1986, particularly pages 27-29, where this court addressed the effect of a breach of the parade rules, and explained that, "...the Regulations are procedural only and any positive breach will have the effect of weakening the weight to be given to an identification made at such a parade".

[36] The applicant's resort to rule 552 of the parade rules was rebuffed, by Mrs Dell-Williams, as being a pre-supposition that the witnesses were unable to identify the applicant on a strict application of the **Turnbull** guidelines and, therefore, had to resort to using the applicant's deformity as an identifying feature. That was not the case, counsel argued, as throughout the narrative the complainants gave details of what transpired and their ability to see the applicant during the robberies. Their ability to identify him was not contingent on any deformity, and although the description of the applicant included his deformity the complainants identified him by his face. Counsel reiterated that there was no evidence that any undue attention was drawn to the applicant or his physical disability or that the applicant's deformity was used at all or as a determining factor at the parades.

Discussion

[37] Rule 552 of the parade rules states:

> "In arranging for personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the prisoners paraded, and (b) to make sure that the witnesses' ability to recognize the accused has been fairly and adequately tested."

[38] There is nothing in the statement by Sergeant Grant Taylor to indicate whether the applicant's deformity was visible while he was on the parades. Ms Menzie's contention that the parade officer did not take steps to prevent the applicant from being unfairly distinguished on the parades would have to be on the presumption that the police sergeant was aware of the deformity. As indicated earlier, there seemed to have been no evidence that this issue was raised by counsel or the applicant himself, or by the investigating officer, or that the deformity was seen by the officer.

[39] Clearly, if the parade officer had no knowledge of any distinguishing feature, there could not have been any obligation for her to take precautions to prevent the complainants' attention from being specifically drawn to the applicant as a suspect. The converse is also true. If she was aware that the suspect had such a remarkable or distinct physical feature, she would have been obliged to make a record of it, and ensure that the proper procedure was adopted.

[40] As we understand it, the disability had to do with the applicant's right hand being shorter than the left hand. It was also described as being held close to the applicant's body. This was while he was in the presence of the complainants and moving about during the robberies. However, it is not clear from the evidence whether these features were so remarkable that the police officers at the parade must be deemed to have noticed them or that they must have been determinative in the identification.

[41] In **R v Bradley Graham and Randy Lewis**, the men in the line-up were asked by one of the witnesses to raise their right hands and the witness pointed out the appellant after he saw a large scar at the back of his right hand. The witness said he had observed the scar when the perpetrator was pointing at him on the night of the murder. The witness did not tell the police about the scar and the appellant was the only person with one on the parade. In making a determination as to the effect of that evidence on the fairness of the parade, this court said at page 22 of the judgment:

> "We do not think that the failure of the police officer who conducted the identification parade for Graham to cause the

> defacing scar at the back of his right forearm to be overlaid with tape and to provide similar coverings for the others on the parade was an irregularity in the holding of the parade. The scar was in the nature of a secret mark, its location being its own adequate covering."

[42] In **R v Michael Cornwall and Francis Halloway**, the second appellant was not identified on the parade but was the subject of a dock identification. At the identification parade, the suspect was said to have had a deformity to one of his hands, so all the men in the line-up were asked to remove their hands from their pockets, which they did, but held them to their sides. At trial, when it was suggested to the witness that she did not point out the second appellant because she was not sure, she answered, "I did not point him out, because I did not see his hand. If I had seen his hand, I would say it was him, because I didn't know anybody else with a fin hand, or whatever you want to call it, deformed hand". As it turned out, the witness' view of the suspect's facial features on the night of the incident was limited by a handkerchief which was tied around his face.

[43] These cases can be distinguished on the facts. Whereas in those cases there was some relevant evidence for the consideration of the trial judge, in the instant case, there was no evidence that the applicant's deformity was visible while he stood in the line-up, or that he was the only person on the parade with a deformed hand, or that he was identified by his hand or his deformity. The evidence of Sergeant Grant Taylor was that Ms King took about 45 seconds to identify the applicant and Mrs Cole-Phoenix took 15 seconds. After the applicant was pointed out he was asked to step forward. It was also the case that no questions were asked of the witnesses to challenge the conduct of the parades and no suggestion was made to the complainants that they had identified the applicant by his deformed hand. Also, the applicant did not raise the issue. These considerations are pertinent to the allegation of unfairness.

[44] **Antony Bernard v The Queen** is also distinguishable. In that case, the Privy Council found that there were weakening factors in the prosecution's case that called for greater emphasis on the guidelines in **R v Turnbull and others** [1976] 3 All ER 549

('**Turnbull**'). That would not be a reasonable criticism of the learned trial judge's direction in the instant case.

[45] In our view, it is not enough for the applicant to assert that the procedure adopted for the parades was unfair based simply on what was not contained in the agreed statement of Sergeant Grant Taylor. The learned trial judge certainly should not speculate. He had no duty to go any further than to look at the evidence that was agreed and the *viva voce* evidence, and then make a determination as to whether the evidence disclosed any procedural unfairness.

[46] The evidence of the parades did not stand in isolation and the learned trial judge recognised that. He carried out a careful examination of the testimonies of the complainants and found the witnesses to be credible and their accounts reliable. He observed that the discrepancies that existed between them were insignificant and did not undermine the reliability of the identification of the applicant. He accepted the evidence of both complainants that they saw the applicant's face multiple times throughout their engagement with him: while at the gate where they were first engaged in a conversation aided by one or two street lights; on the veranda aided by light from the kitchen; while they were in the bedroom with the aid of light from the bathroom; and again on the veranda. These sightings were mostly within arm's length of the applicant and nothing obscured them from viewing his face. They were particularly taken by how well-groomed his face was.

[47] On pages 22-23 of the transcript, Ms King had the following exchange with Crown Counsel:

> "Crown counsel: Now while you were inside that room ma'am, what part of the man at the back were you able to see?
>
> Witness: All of him.
>
> Crown counsel: When you say all of him?

Witness: I could see his face and see him, I was seeing him and talking to him.

Crown counsel: And during this, while you were inside the room, ma'am, what distance would you say you were from the man at the back?

Witness: The furthest, the bedroom is not a really very big one, the furthest I was from him was maybe two arms [sic] length, not more than two arms [sic] length way, for most of the time he is within arms [sic] length.

Crown counsel: And madam, about how long would you say you were inside your bedroom with the man at the back?

Witness: It shouldn't be more than, maybe just a five over five minutes, shouldn't be more than five, six minutes.

...

Crown counsel: Did you make any observation of this man, madam?

Witness: Yes, he, at the time wasn't wearing his hair.

Crown counsel: He was?

Witness: He wasn't wearing the hair he is now, he was very well groomed, very well groomed, very defined, what you call this part right here, sideburns and moustache, very neat, very well groomed, he was looking very good.

Crown counsel: But apart from his pleasant appearance ma'am, what, if any, other observations did you make of his physical appearance?

Witness: His hand, his hand, I think it's this one.

Crown counsel: The one you are saying you think is, what hand do you call that ma'am?

Witness: The right hand, I am sorry, was irregular, in that it was not the same as the other, it was smaller..."

[48] The learned trial judge dealt with the identification evidence, starting at page 127 of the transcript, where he reiterated that this case turned on the correctness of the

identification of the applicant by the complainants. He gave himself the standard **Turnbull** warning and isolated the factors relevant to his assessment of the identification evidence. At page 132, in assessing the evidence of Ms King, he stated:

> "She observed that the accused man was very well groomed...she could see how neatly trimmed his beard and sideburns were and she said he had low cut hair and she also noticed his right arm was shorter and smaller than the other one, his left hand. I can observe now, on observation of the accused man that it is obvious that his right hand is shorter and smaller than his left hand. However, I should state that this is not the basis on which solely the Crown relies. It is on the identification of the accused' face."

[49] The learned trial judge did a thorough examination of the identification evidence again at page 151, noting the importance of reviewing the evidence of the complainants separately, and reminding himself that more than one witness can be mistaken in the identification which the defence says is wrong. He pointed out the weaknesses in the evidence and concluded at pages 155-156:

> "I observed both complainants, their demeanour carefully and I find them to be truthful witnesses. Indeed, counsel for the defence did not challenge their honesty and that I find irresponsible and a dishonourable way of conducting the defence. The defence was that they were mistaken. However, I find them not only truthful but also reliable. The discrepancies that exist [sic] between their evidence was not significant and did not undermine the credibility of the identification of the accused. I find the visual identification made by each witness separately was made after a long period of observation in sufficient lighting for them to make a correct identification. And I accept the evidence of the complainants that they were able to see the accused man's face, each one of them separately. I repeat they were able to see the accused man's face at the gate, at the veranda before they entered the house, inside the bedroom and again on the veranda, as he left the house and those areas were sufficiently lit for them to make an identification. I make those findings bearing in mind certain aspects of the prosecution case which may be described as weaknesses."

[50] Returning to the parades, the learned trial judge said, at page 158:

> "I find that the identification parade was fair and that it gave the witnesses an opportunity and when I say witness I mean each of them separately and independently without any assistance to identify the assailant. I rejection [sic] the suggestion that photographs were shown to these witnesses. In any case, there is no evidence of that and both of them denied it…"

[51] The learned trial judge observed that the complainants were credible witnesses who had multiple opportunities to view the face of the perpetrator in adequate lighting, over a sufficiently lengthy period. Although they both mentioned the irregularity of the applicant's right hand, they specifically spoke about identifying him by his face. In these circumstances, it could not be said that the learned trial judge failed to consider material evidence or considered evidence that was immaterial or that he was plainly wrong in accepting that the parades were fair and the identification evidence sufficiently reliable.

[52] It was contended that in accepting the evidence of what had taken place on the parades, the learned trial judge should have warned himself of the risk of undue prejudice to the applicant, and having not done so there was a miscarriage of justice. Ms Menzie provided no authoritative support for that statement. We see no duty for the learned trial judge to have warned himself against prejudice to the applicant, on account of the conduct of the parades. Even were such a warning warranted, its absence would have been mitigated by the overwhelming evidence of the complainants at trial, the comprehensive analysis of the evidence by the learned trial judge, and the full **Turnbull** warning, about the dangers of acting upon visual identification, that he gave himself in more than one instance.

[53] In our view, there was no miscarriage of justice, having regard to: (i) the applicant and his attorney having participated in the parades, raising no issue about it, or establishing that either of the complainants identified him solely based on his deformed hand; (ii) the credibility of the complainants, against the backdrop of there being no challenge to the conduct of the parades or the documentation, either at the parades or

at trial; and (iii) the cogent evidence which was comprehensively analysed by the learned trial judge and on which he concluded that the parades were conducted fairly.

[54] For these reasons, ground 3 fails.

Ground 4

[55] During oral argument, Ms Menzie correctly conceded that there was no merit in ground 4.

Ground 2

Submissions for the applicant

[56] In her written submissions, Ms Menzie took issue with the calculation of the applicant's sentences, on the basis that the learned trial judge failed to show, arithmetically, that he gave credit for the time spent on pre-sentence remand. Counsel relied on the principles outlined in **Meisha Clement v R** [2016] JMCA Crim 26 and **Callachand & Anor v The State of Mauritius** [2008] UKPC 49.

[57] By her calculation, the applicant should have received a credit of three years and 29 days. However, during oral arguments, not only did counsel acknowledge that the learned trial judge did give a credit of two years, but she also conceded that the learned trial judge had the discretion to deduct time during which the applicant had escaped custody, was remanded in custody in connection with that offence, and was serving a six-month sentence for that offence. The deduction would amount to 12 months.

Submissions for the Crown

[58] Citing the authorities of **Callachand & Anor v The State of Mauritius**, and **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ), Mrs Dell-Williams submitted that a sentencing judge has a residual discretion to not give full credit for time spent on remand, if there are good reasons to do so. On the basis of that principle, she indicated that the applicant was not entitled to credit for four months during which he was at large, having escaped custody; two months during which he was remanded for escaping

custody; and the six months during which he served a sentence for escaping custody (a total of 12 months).

[59] Counsel explained that the applicant was apprehended on 9 May 2015, escaped custody on 15 July 2015, was re-arrested on 22 October 2015, was convicted for the offence of escaping custody on 17 June 2015, was sentenced to six months in prison for escaping custody on 18 December 2015, and sentenced for the instant offences on 7 June 2018. The total credit was, therefore, three years and two months less 12 months, resulting in a credit of two years and two months.

[60] Counsel agreed that to credit the applicant with two years instead of two years and two months, without reasons, the learned trial judge would have erred, in principle.

Discussion

[61] As a general rule, an offender must be given full credit for time spent on pre-sentence remand and this should be expressed arithmetically (see para. [34] of **Meisha Clement v R**, and para. 9 of **Callachand & Anor v The State of Mauritius**).

[62] An exception to the general rule is found at para. 10 of **Callachand & Anor v The State of Mauritius**. There, the Board stated that, "... a defendant who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once". The exception was elaborated on by the Caribbean Court of Justice in **Romeo Da Costa Hall v The Queen**, para. [18], viz.:

> "We recognize a residual discretion in the sentencing judge not to apply the primary rule [of full credit], as for example: (1) where the defendant has deliberately contrived to enlarge the amount of time spent on remand, (2) where the defendant is or was on remand for some other offence unconnected with the one for which he is being sentenced, ...(4) where the defendant was serving a sentence of imprisonment during the whole or part of the period spent on remand and (5) generally where the same period of remand in custody would be credited to more than one offence."

[63] When an exceptional situation arises, the sentencing judge is required to give the reasons for deviating from the general or primary rule (see **Callachand & Anor v The State of Mauritius**, para. 26).

[64] Assisted by the background information provided by the Crown, we reviewed the calculation of the time credited by the learned trial judge and concluded that the applicant should have received a credit of two years and two months but had only received a credit of two years, without any explanation. This was a departure from the requirements outlined above and the error necessitated our intervention (see **R v Kenneth John Ball** (1951) 35 Cr App Rep 164).

[65] There were just about three years and two months between the time when the applicant was apprehended and when he was sentenced in this matter. We considered that 12 months were unconnected to the offences before the court. Not only did he escape custody for four months but there was an overlap of time spent on remand for the two sets of offences committed at different times, and he was also tried, convicted, and served a further six months for escaping custody.

[66] When the 12 months are subtracted from the total time spent in incarceration, the result is two years and two months. The applicant was, therefore, entitled to a credit of two years and two months. Since the learned trial judge gave him a credit of two years' credit, this court only gave him two additional months.

[67] It was for the foregoing reasons that we made the orders set out herein at para. [3].