**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**COURT OF APPEAL**

**Criminal Appeal No. 6 of 2017**

**BETWEEN:**

**ADRIAN MICHAEL BEST** **Appellant**

**AND**

**THE QUEEN** **Respondent**

**Before The Hon. Sir Marston C.D. Gibson KA, Chief Justice; The Hon. William J. Chandler and the Hon. Margaret A. Reifer, Justices of Appeal (Acting)**

**2019: March 19; April 30; May 28**

**Mr. Marlon Gordon for the Appellant**
**Ms. Olivia Davis for the Respondent**

**REASONS FOR DECISION**

**GIBSON CJ:**

**Introduction**

[1] This appeal raises the question of whether the appellant, Adrian Michael Best ("Mr. Best" or "the appellant"), was deprived of his constitutional right to legal representation contrary to **section 18 (2) (d)** of the **Constitution of Barbados** and, consequentially, to a fair trial. The appellant also challenges the sentences imposed as being excessive.

[2] We have determined that the appellant was not deprived of his right to legal representation, neither were the sentences excessive. In light of the fact that we had been informed that the appellant's sentences were due to expire on 9 May 2019, we delivered an oral decision on 30 April 2019 dismissing the appeal and affirming the sentences, with reasons to follow. These are the reasons.

**Factual and Procedural Background**

[3] On 26 January 2016 the appellant was arraigned in the High Court and pleaded guilty to the offences of unlawful possession of a firearm and ammunition. Prior to his arraignment, Mrs. Babb-Agard QC, Deputy Director of Public Prosecutions (DPP), (as she then was), enquired "from the accused if he is represented by an attorney-at-law" and the trial judge asked, "Are you represented by an attorney-at-law, Mr. Best?", to which the appellant replied, "No, ma'am." (Transcript, pp. 2-3).

[4] Mrs. Babb-Agard QC accepted the guilty pleas and proceeded to outline the facts surrounding the offences as follows: On 26 December 2013, the appellant, alias "Plucky", went to a party with his friend, Shamar Lewis, at the Reggae Lounge, St. Lawrence Gap, Christ Church. Mr. Lewis gave the police a statement that, during that night, he saw two boys hand something to the appellant and later saw the appellant push a firearm under the dashboard of the motor vehicle in which they were driving. Simultaneously,

a civilian witness made a report to the police who successfully tracked the motor vehicle to a gas station in Christ Church. The police officers conducted a search of the vehicle in the presence of the appellant and recovered the firearm, a .32 revolver, loaded with four rounds of ammunition. The appellant was admitted to prison on remand on 30 December 2013, charged with both offences.

[5] Mrs. Babb-Agard QC recounted oral statements made by the appellant during the investigation. After stating that "I can't put my friends in trouble, the gun is mine", and "I ain't want my friends in no trouble for my gun", he was reminded of his right to an attorney. He replied: "I good. I ain't want no lawyer. I want to get past this thing" (Transcript, p. 9-10, 13). He admitted that he got the gun for protection because of a dispute with two men over some "weed" after which, one of the men said of him "don't worry bout he. He live bout here and we can find he and kill he."

[6] On that same arraignment date, a police sergeant attached to the Criminal Records office gave evidence that the appellant had one previous conviction for stealing a number of items and a sum of money, all valued at $1,535.00 for which he was fined $750.00 to be paid in two months or nine months in prison. Thereafter, Mrs. Babb-Agard QC requested a pre-sentence report on Mr. Best's behalf, noting that he was unrepresented, and the trial judge stated: "Mr. Best, in the circumstances, the Court is going to order that a Pre-Sentence Report be prepared" and informed him that "at some

subsequent date you will have the opportunity to speak on your own behalf." (Transcript 15-16).

[7] On 22 March 2016, a probation officer gave evidence in respect of the pre-sentence report. Immediately before this evidence was given, the trial judge asked the appellant, "before we proceed though, Mr. Best, I just want to clarify, you are representing yourself?," to which the appellant replied "Yes. ma'am." The trial judge further enquired whether the appellant had received a copy of the pre-sentence report and he replied that he had. The probation officer then read the report into the record and the trial judge asked the appellant whether he had read the report and if there was anything in it to which he objected. He replied, "No, ma'am." A prison officer then gave evidence that, at that date, the appellant had spent 814 days on remand. Mrs. Babb-Agard QC was not present during this testimony and the matter was adjourned to give her an opportunity to question the probation officer.

[8] On 14 April 2016, Mrs. Babb-Agard QC cross-examined the probation officer regarding the officer's unavailing attempts to contact the appellant's mother. The appellant was asked whether he had any questions for the probation officer and he said no. However, when the trial judge enquired whether he "need[ed] some time to get his thoughts together about what [he] want[ed] to say on [his] own behalf", the appellant answered "Yes, ma'am." The trial judge then informed him that "on the next occasion. . .you will mitigate on your own behalf. . .Because you are self-represented you will

speak for yourself and explain your side of it." He responded "Yes, ma'am" (Transcript, p. 25).

[9] On 26 April 2016, the allocutus was put to the appellant, and he mitigated on his own behalf. He stated that he was begging the court for a chance so that he could go home and help his father who was "a real bad diabetic, ma'am, and he is not really able and I am his only son." He stated that his uncle, who used to take care of his father had passed away on 23 December 2014, and he recounted that his father had told him that his father went outside and the wind was so high that it blew the father down, and his eight year-old cousin had to help his father. He noted that he had two sisters who also helped his father but they were not his father's children and were not always available to help. Asked if he had anything further to say, he said no.

[10] Mrs. Babb-Agard QC then stated, "…as the accused man is unrepresented I wanted to have provided for the court the case of Elvis Alexander, in hard copy." She then made submissions on sentencing and concluded that an appropriate starting point of a sentence for the offence, based on this Court's prior decision in *Jerome Bovell v R*, was 9 years imprisonment. The judge then asked the appellant whether he had had a chance to look at the case handed to him by counsel, and he indicated that he had not. Noting that Mr. Best was unrepresented, the judge adjourned the matter to 11 May 2016 to allow him the opportunity to review the case and to add anything to his mitigation.

[11] On 11 May 2016, three weeks after mitigating for himself, the appellant stated to the Court that he did not understand the nine years that Mrs. Babb-Agard QC had mentioned and submitted that it was too high. He asked the court to have leniency on him, stated that it was his first time committing a firearm offence and apologised to the Court. The Court explained that the nine years was only the starting point, and asked Mr. Best whether he wished to add anything further and he declined. The Court adjourned the matter to 14 June 2016 for sentencing. On that date the matter was adjourned until 27 June 2016.

[12] Almost a year later, on 8 May 2017, Mr. Marlon Gordon, attorney-at-law, was retained by the appellant's family, and mentioned to the trial judge that the Adrian Best matter was outstanding. The judge indicated that she would be doing sentences the following month and Mr. Gordon requested a date to return. The Court enquired whether Mr. Gordon was going to be present on that occasion and the following exchange ensued at pp. 53-56 of the Transcript:

> "MR. GORDON: Yes I will be here for the sentencing, ma'am, I have to be because I am now in the matter *so I would definitely address you in terms of mitigation*. I am not sure if there was any pre-sentencing report, any social enquiry as it relates to the accused.
>
> THE COURT: You want to address in terms of mitigation you said?

MR. GORDON: Well, I understand it is awaiting sentence.

…

THE COURT: This is one that the sentencing is actually supposed to be done.

…

MR. GORDON: *And in spite of the fact that you have completed all the social enquiry and the remand time already*.

THE COURT: *Yes*.

MR. GORDON: Well, *he didn't have the benefit of counsel and I didn't want to raise it to delay the sentencing* but –

THE COURT: *But if you raise it now*, if you do that with all due respect, I can't tell you what to do, *it is going to delay the sentencing*.

MR. GORDON: No, no. What I am saying, ma'am, that is why I was suggesting having a mention date so that I could properly look at what has happened *and if there is anything that I need to say* because there is a thing as I said res ipsa loquitur. *If the thing speak for itself then there is no need for me to gild the lily. If it is a report that comes back to suggest that he is a person that the Court can and all circumstances balance justice with mercy, then there would be* –

THE COURT: I don't think, I can't speak, *I can't tell you what my sentence is.*

…

THE COURT: That's as far as I want to go, so that's why I said that the matter is to be set for sentencing.

MR. GORDON: Very well. All I will just remind, My Lady, that it has been a long time.

THE COURT: With all due respect, Mr. Gordon, that is why I said the matter is going to be set for sentencing."

(Emphasis added)

[13] The matter was adjourned to 6 June 2017. However, the appellant was not present at court as a result of some confusion with the prison authorities. The Court set another adjourned date of 8 June 2017. The exchange between the Court and counsel at pp. 58 to 59 of the Transcript was as follows:

"THE COURT: And just to be clear. This is for my sentencing.

MR. GORDON: Yes, My Lady.

THE COURT: Because you've come in at the end basically, Mr. Gordon. *Everything else has been done, it is just the sentencing that needs to be done.*

MRS. BABB-AGARD QC: Yes, ma'am, that is correct.

MR. GORDON: *Yes, ma'am, I am aware of that.* And we are hoping that it should have been over today, ma'am. He has been waiting on his family as well *but I await your decision, ma'am.*"

(Emphasis added)

[14] The parties returned to court on 8 June 2017. Mr. Gordon entered an appearance on behalf of Mr. Best and once again the Court sought clarification from Mr. Gordon as to his role in the proceedings, as is captured in the following extract of p. 61 of the Transcript:

> "THE COURT: And just for the record, you are here *to hear the sentence*?
>
> MR: GORDON: *The sentencing*."

[15] The trial judge then delivered her sentence as is recorded in pp. 61-69 of the Transcript. The judge accepted Mrs. Babb-Agard QC's starting point of nine years from which she deducted one-third or three years for the convicted man's early guilty pleas and co-operation with the investigating officers. After weighing the mitigating and aggravating factors, which included a prior conviction for theft and the fact that the probation report indicated that, given his failure to complete school or a joinery course which he had started and his association with men 'on the block', he presented "a medium to high risk of reoffending", the judge arrived at a notional sentence of six years imprisonment.

[16] The judge then deducted from the sentence a total of 1,257 days, or three years 161 days, for the time spent by the appellant on remand and imposed a sentence of two years, 204 days in respect of each count to run concurrently. The sentences were to run from the date of imposition (pg 69 lines 13-16)

[17] Mrs. Babb-Agard QC responded "As the Court so pleases." Mr. Gordon, however, was anything but satisfied, and the following exchange between the Court and him occurred:

> "MR: GORDON: Ma'am, it's not very usual that counsel coming in at the back of the matter, obviously the scenario and *I awaited the Court's own position before I spoke* because the invidious position that I find myself in is that the accused man was unrepresented and he had to deal with a very able prosecutor, who started out at the threshold of nine years. Now, *I cannot see that the Court is functus officio at this state* because as it is *we have arisen now to alert the court* –my main reason for doing it this was I did not want to lose the opportunity to have him brought up because obviously my –
>
> THE COURT: I am not clear on what – I am not clear on what is happening here.
>
> ...
>
> MR: GORDON: I am asking if you are functus and because that he was on --
>
> THE COURT: *But I am functus, I just sentenced the accused*.
>
> MR. GORDON: But ma'am, am I not be (*sic*) allowed to address you, in any event?
>
> …
>
> THE COURT: *Mr. Gordon, if you had concerns, the appropriate time for you to have raised your concern, if you*

*wished to make mitigation in respect of the now convicted man, it would have been to do that before I sentence –*

MR. GORDON: *But ma'am –*

THE COURT: -- *not to wait for me to sentence and then make the submissions.*

…

MR: GORDON: When I spoke to the Court concerning this matter, the Court's position was that if I address the Court on sentence it will only delay the matter. I say, ma,am, *I am blind to the matter, I don't have any notes, I don't have a probation report, I have nothing*. My aim was to get the gentleman before the court…The Crown ably represented by a Queen's Counsel…stand up in court against an unrepresented man and canvassed for nine years as a starting point…So that not having had the benefit of counsel would have impacted unfairly…*The Court never gave counsel any opportunity.* And, for the Court to tell me Mr. Gordon sit, have a seat. The Court is at the point of, I could only say, doing serious injustice. It is wrong."

(Emphasis added)

**The Appeal**

[18] On 20 June 2017, the appellant, on his own, filed a notice of appeal dated 17 June 2017. On 29 October 2018, over a year and four months after the appellant was sentenced on 8 June 2017, his attorney, Mr. Gordon, filed a "Notice of Application for Leave to Appeal Sentence" together with Grounds of Appeal and Skeleton arguments. On 8 November 2018, a case management conference was held at which it was agreed that Mr. Gordon would file and serve his skeleton arguments on or before 3 December 2018,

with the Crown to respond by 17 December 2018. The date of hearing was set for 16 January 2019 but it was adjourned to 14 March 2019 for reasons which will become apparent in the next paragraph.

[19] Mr. Gordon, on 14 March 2019, informed us that "on the last occasion when this matter should actually have been done", he had been experiencing some difficulties and "had some challenges with his files and office space." We had then set the date of 14 March 2019 because we were aware, notwithstanding counsel's challenges, that the appellant's sentence was due to expire on 9 May 2019.

**The Right to Legal Representation**

[20] In his skeleton arguments, Mr. Gordon extracted specific exchanges between the judge and himself to support his arguments that "the approach taken by the learned trial judge during the sentencing hearing as it relates to allowing legal counsel to address the court on behalf of the appellant can be described as indifferent to the right to have legal representation" and "The trial judge's right to control the proceedings in the court should not be one sided or be seen as one sided." Those portions are already set forth above between paras [13] and [15].

[21] In his oral arguments, Mr. Gordon submitted that he was prepared to address the court on behalf of the appellant but he was "deprived of giving the appellant any assistance." He argued that the appellant's right to legal

representation is a part of due process and "the secure protection of the law under section 18 of the Constitution of Barbados."

[22] Counsel also cited Archbold Criminal Pleadings, Evidence and Practice 2010 at Chapter 4-32 at page 378 to support his argument that "the test of whether the learned trial judge acted in a manner which can be said to be one-sided or showed some form of partiality and/or bias must be examined against the viewpoint of the fair-minded observer". He added that while "[t]he suggestion may be made that the unrepresented Appellant did a good enough job to mitigate on his own behalf regarding the aggravating and mitigating factors of the offence and the offender. . .the crux of the matter is whether the appellant was still entitled notwithstanding to have legal counsel assist him to assess, evaluate and analyze (*sic*) the relevant issues regarding aggravating and mitigating factors for the court to his benefit or advantage. The discretion of the court during the sentencing process was used in an arbitrary and oppressive manner."

[23] Moreover, Mr. Gordon contended that "[t]he Court was not functus officio when counsel for the Appellant informed the court that he was appearing and the previously unrepresented applicant was entitled to have legal counsel still address the Court on his behalf..*(sic)* in light of the fact that the court was put on notice that Counsel wished to addressed *(sic)* the court as it relates to the mitigation during the sentencing hearing."

[24] Ms. Olivia Davis, for the Crown, submitted that the trial judge did not deprive the appellant of his constitutional right to counsel. The trial judge did not prevent Mr. Gordon from making further submissions in the matter and that the appellant suffered no automatic disadvantage. She noted the appellant was asked whether he was represented by counsel and "[w]hen he indicated to the Court that he would be representing himself he was afforded adequate time to prepare his submissions and to read the cases referred to by the prosecution. Ms. Davis further argued that the right to counsel did not exist in a vacuum but was to be considered in the circumstances of the particular case. It could not be said, she noted, that this right was denied where the appellant only secured the services of an attorney-at-law after his allocutus and mitigation were concluded and after sentencing submissions were done by the prosecution.

[25] In addition to the appellant having adequate time to prepare his submissions, Ms. Davis contended that Mr. Gordon also had opportunity on 8 June 2017 *before* the sentence was delivered to object to the judge delivering the sentence without him mitigating on his client's behalf. But he never did. According to Ms. Davis, at the point when Mr. Gordon indicated that he wished to mitigate the court was *functus officio*. Counsel also denied that there was any indication that the trial judge was biased and that the appellant had been deprived of the right to have legal counsel.

**Discussion**

[26] Before discussing this ground of appeal further, it behoves this Court to make a few preliminary observations on the arguments of counsel arising from the facts as recorded in the transcript. First, Mr. Gordon was unable to point to anything within the transcript to support his allegation of bias or partiality on the part of the learned trial judge. We can see nothing in the facts which points to any partiality or bias on the part of the trial judge against Mr. Best or Mr. Gordon. Any allegation of bias or impartiality on the part of a judge must be considered against the fact that it is presumed in law that a judge will be impartial in the execution of his duties according to his judicial oath. In **Aaron Parris Construction Inc. and Timothy Edwards v Tristan Broomes Civil Appeal No. 12 of 2013** at **para [27]**, this court expounded the law in the following terms "the presumption of impartiality of judges...rests at the bedrock of the common law system of justice on which our system is based. This presumption is that, because of the professional background required for their appointment, as is the case in Barbados, pursuant to section 7 of Cap 117A, judges are to be assumed to be persons of 'conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances': per L'Heureux-Dubé and McLachlin JJ in R v S (RD*)* [1997] 3 SCR 484 (R v S (RD)) at [32]."

[27] Every presumption is capable of being rebutted. It is Mr. Gordon's duty, as counsel alleging bias or impartiality, to bring before us the evidence in support of his grounds of appeal so as to rebut the presumption and he has failed to do so. As such, we dismiss these submissions by Mr. Gordon as groundless in so far as he has failed to demonstrate to us anything that would displace the presumption of impartiality of the trial judge.

[28] The second issue is deeper, however and, like the first, we prefer to deal with it at this juncture rather than later in the judgment. It concerns whether the trial judge was *functus officio* at the time when Mr. Gordon sought to interpolate himself into the proceedings. Both the trial judge, at sentencing, and Ms. Davis before this Court took the position that the trial judge was *functus* after she had delivered the sentence.

[29] The 2018 **CCJ** decision of **R v Gilbert [2018] CCJ 21 (AJ)** (**Gilbert Henry**) provides guidance on this issue which arose in an intriguing way. The appellant was convicted in the Supreme Court of Belize in July 2012 and sentenced to five years imprisonment. His appeal was heard almost five years afterwards, on 14 March 2017. Eight days later, on 22 March, the Court of Appeal of Belize dismissed the appeal and affirmed both the conviction and sentence in an oral order, with reasons to follow. Three months later, the Court of Appeal, in a written judgment delivered on 16 June 2017, allowed the appeal and quashed the conviction for failure to conform to a section of the Belize Juries Act. The written judgment did

not mention or allude to the prior oral order. Significantly, in the period between the order and judgment, no steps were taken to formally draw up and record the oral order.

[30] The DPP of Belize sought special leave of the **CCJ** to appeal against the written judgment on the ground that, having delivered the oral decision, the court became *functus officio* and therefore had no jurisdiction to deliver the subsequent contrary written judgment. Delivering the judgment of the **CCJ**, **Anderson JCCJ** stated, after discussing relevant Commonwealth authorities:

> "[17] In analysing this issue, the Court begins from the widely accepted principle that there must be finality to litigation. Judicial decisions must confer certainty and stability. People who are affected need to know where they stand. They must be able to order their affairs in the sure knowledge that the word of the court is the final word on their legal rights and responsibilities. However, a second principle is equally uncontroversial. The principle of finality cannot be applied in an unyielding manner if that application results in injustice. This is particularly so in criminal proceedings where the liberty or even the life of an individual may be at stake. It is thus settled law that a court has an inherent power to even reopen a criminal appeal to ensure that justice is done. Thus, both principles are required to ensure public confidence in the administration of justice.
>
> . . .
>
> [23] These authorities suggest that the following principles are applicable:
>
> (a) An oral decision or order made by a judge is normally binding from the moment it is delivered. It has legal force and the parties are entitled to rely upon it. . .It therefore goes without saying that the judicial officer must be entirely certain before making the oral order. If there is any

uncertainty or doubt as to the decision, the judge should reserve judgment.

(b) The court retains a residual jurisdiction to vary its earlier decision until the order of the court is recorded or otherwise perfected. That jurisdiction is exercisable on narrowly defined principles. There must be exceptional circumstances warranting its exercise. A relevant factor in deciding whether the jurisdiction should be exercised is whether any party has acted upon it to his or her detriment, especially in a case where it is expected that he or she may do so before the order is formally drawn up. The court should normally invite submissions (which may be written submissions) from the parties affected by the earlier decision and should in its subsequent decision, refer to the earlier decision and explain its reasons for varying or overturning it; and

(c) The court is *functus officio* once the order has been recorded or otherwise perfected. Thereafter remedy for errors in the judicial process lies in the appellate process."

[31] Applied to the facts of this case, **Gilbert Henry** yields the conclusion that while the trial judge's sentence was final when delivered, she still retained a residual discretion to reopen the matter had Mr. Gordon demonstrated to her that an injustice had occurred. However, he clearly had not done so on this record.

**The denial of legal representation point**

[32] Mr. Gordon, contended before us, as he did less expansively before the trial judge, that he was "deprived of giving the appellant any assistance" and that the appellant's right to legal representation is a part of due process and "the secure protection of the law under section 18 of the Constitution of

Barbados." We do not agree that the appellant was deprived of legal representation.

**The Law**

[33] **Section 18(2)(d)** of the **Constitution** of Barbados provides that "Every person who is charged with a criminal offence - *shall be permitted to defend himself before the court in person* or *by a legal representative of his own choice.*"(Emphasis added.)

[34] Mr. Gordon, as recounted above, never came into the picture until May 2017, nearly a year after the appellant had received a copy of the pre-sentence report and had already done what was, in our view, a creditable job of mitigating for himself in the face of the indication in the presentence of his proclivity to and likelihood of reoffending. Moreover, and significantly, nowhere in the sentencing record before the judge pronounced sentence did Mr. Gordon ever ask to be heard in mitigation on the appellant's behalf.

[35] This brings into sharp focus the differing roles of the trial judge and defence counsel.

**The role of the trial judge**

[36] At this stage of the proceedings, the role of the trial judge was to sentence the convicted man according to law and in accordance with the provisions of the **Penal System Reform Act, Cap 139** of the **Laws of Barbados**. She had fulfilled her duty in putting the allocutus to the convicted man and

hearing his response thereto. She had afforded him his right to mitigate on his own behalf and to further mitigate. The learned trial judge adjourned the matter to afford him an opportunity to read for himself the case of ***Jerome Bovell***, where the sentencing guidelines are established, and to address her on it. During this time he was self-represented as was his right under **section 18 of the Constitution**.

**The role of counsel**

[37] It is the duty of counsel fearlessly and zealously to represent his client's interests in a criminal trial according to his instructions.

[38] It is not the duty of the court to tell counsel how that duty is to be executed. The court is entitled to assume that counsel has, and will faithfully execute, his client's instructions. Thus faced with the situation where counsel has on one occasion said he wants to mitigate and after months, counsel, indicates to the court that he was appearing to hear the sentence and expressing concerns about the delay in the sentencing, the judge was entitled reasonably to conclude that counsel no longer wished to mitigate. The absence of an express request to mitigate also fortifies the reasonableness of that conclusion.

[39] It is clear from the record of proceedings that Mr. Gordon was never denied the opportunity to appear on the appellant's behalf. His appearance was duly noted by the trial judge. His submissions suggest that he was not allowed to perform his role as counsel for the appellant. The parts of the

record set out in this decision clearly demonstrate that Mr. Gordon addressed the court on several occasions on the appellant's behalf. He cannot therefore, legitimately claim that he was denied his right of audience.

[40] Nowhere in the record of proceedings is it shown that Mr. Gordon told the court that he wanted to mitigate on the appellant's behalf except at page 53 lines 23 -24 of the record where it is recorded that Mr. Gordon's statement to the court is recorded:

> "MR. GORDON: Yes I will be here for the sentencing, ma'am, I have to be because I am now in the matter *so I would definitely address you in terms of mitigation*."

The statements which follow and which have been set out in this decision at page 55 lines 6-14 of the record are worth repeating here;

> "MR. GORDON: No, no. What I am saying, ma'am, that is why I was suggesting having a mention date so that I could properly look at what has happened *and if there is anything that I need to say* because there is a thing as I said res ipsa loquitur. *If the thing speak for itself then there is no need for me to the gild the lily. If it is a report that comes back to suggest that he is a person that the Court can and all circumstances balance justice with mercy, then there would be…"*

[41] It is a reasonable inference from Mr. Gordon's statement to the court and his other statements that Mr. Gordon no longer wanted to mitigate on behalf of the appellant but that he wanted to be present for the sentencing.

[42] In the circumstances, we find that the trial judge did not exclude or impede the appellant's right to legal representation. Accordingly, this ground of appeal is dismissed.

[43] We wish, however, to say a few words on this Court's jurisdiction to protect the constitutional right to legal representation since we have recently spoken on this issue. **Section 18 (2) (d)** of the **Constitution**, as noted above, mandates that "Every person who is charged with a criminal offence - shall be permitted *to defend himself* before the court *in person* or by a legal representative of his own choice." In our recent decision, **Pedro Deray Ellis aka Pedro Deroy Ellis v The Director of Public Prosecutions Civil Appeal No. 3 of 2017 (Pedro Ellis v DPP)**, **Burgess JA** opined that, "It is only where the High Court judge has made a decision on a violation of a constitutionally protected fundamental right under **section 24 (1)** of the **Constitution** that this Court can have appellate jurisdiction."

[44] **Section 24 (1)** of the Constitution provides:

> "Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23 has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a

> contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress."

[45] Moreover, as was stated in **Pedro Ellis v DPP**, "**section 87** of the **Constitution** vests jurisdiction in this Court to hear appeals from final decisions of the High Court made under **section 24** of the **Constitution**." We would add that **section 55** of **Cap. 117A** repeats **section 87** by providing as follows:

> "An appeal to the Court of Appeal lies as of right from any decision of the High Court that is given in exercise of the jurisdiction conferred on the High Court by section 24 of the Constitution."

[46] Mr. Gordon never applied to the High Court for constitutional redress which is the correct course which ought to have been taken in pursuit of his allegation that his client's **section 18 (2) (d)** right to legal representation had been contravened. Instead, he has come to this Court directly by way of appeal against sentence but alleging constitutional impropriety.

[47] In any event, we note that Mr. Best was permitted to defend himself before the court in accordance with **section 18(2)(d)** of **the Constitution**. The Privy Council in **Gianchand Jahree v The State [2005] UKPC 7** reviewed the law relating to this question and arrived at the following conclusion:

> "Their Lordships consider that the principles laid down in Mohammadally v The State and Gooranah v The Queen are correct and are consistent with those accepted by the Judicial Committee in Robinson v The Queen [1985] AC 956 and Dunkley v The Queen [1995] 1 AC 419."

[48] The Privy Council recounted the facts in *Robinson v The Queen* [1985] AC 956 as follows:

> "In Robinson v The Queen counsel had been engaged by the appellant but did not turn up in court because he had not been put in funds. The judge refused to hold up the trial, which commenced without counsel. On the following day junior counsel appeared and asked for permission for himself and his leader to withdraw from the case. The judge offered him a legal aid assignment, but counsel declined it. The judge then refused permission to withdraw and refused to adjourn the trial, whereupon counsel left the court and did not return. The Judicial Committee held that there had not been a breach of the relevant provisions of the Jamaican Constitution…Giving the judgment of the Board, Lord Roskill stated at pages 966-7:
>
> > "In their Lordships' view the important word used in section 20 (6)( c) is 'permitted'. He must not be prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection. He must be permitted to exercise those rights…
> >
> > In their Lordships' view the judge's exercise of his discretion, which the counsel for the appellant rightly conceded to exist, can only be faulted if the constitutional provisions make it necessary for the judge, whatever the circumstances, always to grant an adjournment so as to ensure that no one who wishes legal representation is without such representation. Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which if exercised to the full could all too easily lead to manipulation and abuse … If a defendant … does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot

> reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights."

[49] There is therefore no merit in any argument that the trial judge failed or refused to permit Mr. Best to defend himself in person as he was not "prevented by the state in any of its manifestations, whether judicial or executive, from exercising the right accorded by the subsection." This ground therefore fails.

**Excessive sentences**

[50] The prevalence of firearm offences over the recent years has resulted in the justifiable public fear and concern that people in possession of firearms will graduate from mere possession to violent use.

[51] In relation to the second ground of appeal, namely that the sentence imposed was excessive, Ms. Davis submitted that the starting point of nine years was not excessive. She cited the case of ***Jerome Bovell v The Queen*** **CA No. 23 of 2000**, the leading case providing guidelines for sentencing in firearm matters. In that case, this Court had stated that the starting point of sentences for the possession of a firearm should be within the range of 8 to 10 years, and Ms. Davis properly added that the appellant was not only charged with possession of a firearm, but also four rounds of ammunition with which the firearm was loaded, all without a valid licence.

[52] Mr. Gordon argued that, to the extent that the appellant was unable to have legal representation to address the court on his behalf during the sentencing

process, the sentence should be quashed and set aside and a different sentence imposed. In his written submissions, he argued that "[t]he suggestion may be made that the unrepresented Appellant did a good enough job to mitigate on his own behalf regarding the aggravating and mitigating factors of the offence and the offender. However the crux of the matter is whether the appellant was still entitled notwithstanding to have legal counsel assist him to assess, evaluate and analyze (*sic*) the relevant issues regarding aggravating and mitigating factors for the court to his benefit or advantage. The discretion of the court during the sentencing process was used in an arbitrary and oppressive manner." We do not agree.

[53] As Ms. Davis quite properly argued, the starting point for possession of a firearm was not excessive. Before us, Mr. Gordon found authority in **Elvis Alexander v R Criminal Appeal No. 14 of 2007** for the proposition that the proper starting point was seven years. That was an entire misunderstanding of that decision. In **Elvis Alexander**, this Court struck down as unconstitutional the mandatory minimum sentence of seven years for a first offence and 15 years for a second offence as contained in the **Firearms Amendment Act 2002**. In fact, this Court applied the guidelines laid out in its earlier decision of **Jerome Bovell v R Criminal Appeal No. 23 of 2000 (Bovell)** in respect of the range of sentence for offences involving possession of firearms. In **Bovell**, **Sir David Simmons CJ** stated that, the range of sentence for offences under **section 3** of the **Firearms Act**

should be between eight and 10 years. This Court went on to say that "In determining an appropriate sentence within the ranges mentioned, we agree that sentences should ask themselves the four questions recommended by Lord Bingham CJ in Tony Avis. These are:

(i) What sort of weapon was involved?

(ii) What use was made of the firearm?

(iii) With what intention did the defendant possess or use the firearm?

(iv) What was the defendant's record?

[54] In our view, not only was the starting point of 9 years imprisonment appropriate, but the judge took into account the four questions recommended by Lord Bingham in Tony Avis during her remarks on sentence. The trial judge remarked that Mr. Best was seen receiving a firearm, specifically a .32 long Llama revolver, from someone in a public domain, and then seen placing the firearm in the motor vehicle. That firearm was loaded with four rounds of ammunition.

[55] The appellant was never issued with a licence by the Commissioner of Police to have, use and carry a firearm or ammunition. The judge also noted that there was no evidence in relation to the second question, namely, "what use had been made of the firearm?" However, as to the intended use of the firearm, the judge recalled that in the appellant's oral statement to the police, he stated that he had the gun for protection. Although the judge

made no mention of it in her sentencing remarks, the appellant had, in fact, explained to the police that he had bought the gun for protection owing to a drug transaction which had resulted in threats to his life.

[56] As regards the final question, the judge noted that the record indicated that the appellant had one prior conviction of stealing a number of items and a sum of money in 2010 when he was 17 years old.

[57] The judge balanced the aggravating and mitigating factors relating to the relating to the offence and to the appellant as an offender, as required under **section 35(4)** of the **Penal System Reform Act Cap. 139.** The judge took into account his guilty plea at the earliest opportunity, instead of engaging the court's resources in a contested trial, and gave a one-third deduction on the length of his sentence, leaving a notional sentence of six years. The judge mentioned that the court might have taken into account, as a mitigating factor, his indication that his incarceration had caused acute hardship to his father, but she noted, however that he had not provided any evidence. Despite this, the judge took into account a number of other mitigating factors; that the appellant cooperated with the police from the outset, his plea in mitigation, his expression of remorse and his youth.

[58] The trial judge considered the seriousness of the offences committed by the appellant namely, as we stated previously, that he was in possession of a firearm in a public place. The judge similarly made note of the prevalence of offences relating to possession of firearms in Barbados.

[59] With respect to the offence of possession of ammunition, this is also an offence within section 3 of the Firearms Act. The circumstances of possession were the same as for possession of the firearm. Whilst the two offences are qualitatively different in terms of the object possessed, the grave societal concerns about firearm possession are no different with respect to ammunition. In this case it was not a case of possession of ammunition simpliciter, the ammunition was within the loaded gun. The trial judge took that into account, so that we can see no improper exercise of discretion in fixing the same starting point for both offences.

[60] In all the circumstances, we find no merit in Mr. Gordon's argument that the sentences imposed for the offences were excessive. Accordingly, we dismiss this ground of appeal as well.

**DISPOSAL**

[61] The appeal is dismissed and the sentences affirmed.

**Chief Justice**

**Justice of Appeal** **Justice of Appeal**