[2019] JMCA Crim 39

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 79/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

DUDLEY WILLIE v R

Ms Jacqueline Cummings instructed by Archer Cummings and Company for the appellant

Ms Maxine Jackson and Ms Natalie Malcolm for the Crown

18, 19 and 29 November 2019

BROOKS JA

[1] In the early hours of the morning of 9 March 2013, the virtual complainant was in her house, at Prospect District in the parish of Hanover, when she heard a noise. She went toward the front door to investigate the cause, and noticed, with the aid of an electric light that was on inside the house at the time, that some of the wooden louvre blades, for one of the front windows of the house, were missing. She looked through the space and saw a man standing outside. The man had a gun in his hand. He told her to come outside or he would shoot up the house. Her response was to withdraw from the window.

[2] The man eventually kicked open the front door, entered the house, grabbed her and took her outside at gunpoint. He began pulling her into bushes at the back of her house. She told him that if it was money that he wanted, there was money in her handbag. He said that she was an informer and that he was taking her to get his friends to kill her. Although she admitted to have been frightened by the man's actions, the complainant was brave in the face of danger. She wrestled with the man, took away the gun, and threw it into nearby bushes. After further wrestling, she pushed him into a gully and escaped. She ran to a neighbour's house, where she stayed for about an hour until the police arrived. She then returned to her house.

[3] She found that the premises had been ransacked and several items were missing. The police went with her to the area behind her house, where the man had earlier taken her. They, with her assistance, and in that general vicinity, but not necessarily at the same spot, found her cellular telephone, her handbag, the same pistol that the man had, and that she threw away, and a red handkerchief, which, the complainant said, the man was wearing at his neck at the time that he attacked her. The sum of $700.00 was missing from her handbag.

[4] The appellant, Mr Dudley Willie, was taken into custody later that morning. The complainant attended an identification parade on 15 March 2013 and pointed him out as the man who had entered her house and assaulted her.

[5] Mr Willie was tried in the Western Regional Gun Court, before a judge sitting without a jury. The trial commenced with an indictment containing two counts, namely,

the offences of illegal possession of firearm and robbery with aggravation of cash amounting to $4,300.00. During the course of the trial for those offences, the prosecution added a count of burglary to the indictment.

[6] Mr Willie denied all knowledge of the commission of the offences. He said that he was just leaving home on the morning of 9 March 2013 when the police took him into custody.

[7] On 23 August 2013, he was convicted of all three offences. He was, on 6 September 2013, sentenced to nine years' imprisonment for the offence of illegal possession of firearm and to 18 years' imprisonment for each of the other two offences. The sentences were ordered to run concurrently.

[8] He applied for leave to appeal from the convictions and sentences. A single judge of this court granted his application.

[9] Ms Cummings argued the three grounds of appeal that Mr Willie had filed in support of his application. They are:

> "(a) Unfair trial
>
> (b) Insufficient evidence to warrant a conviction
>
> (c) Sentence excessive"

[10] Learned counsel expanded somewhat on those grounds. The issues raised by her and otherwise during the course of submissions are:

(a) whether the offence of robbery with aggravation had been made by the prosecution;

(b) whether the offence of burglary had been made out by the prosecution;

(c) whether the learned trial judge's treatment of the issue of identification was deficient;

(d) whether there was excessive and unwarranted entry into the arena by the learned trial judge;

(e) whether the offence of illegal possession of firearm could stand on its own if the other two offences were not made out;

(f) whether the learned trial judge's treatment of the sentencing was deficient.

Issue (a) – The offence of robbery with aggravation

[11] Ms Cummings submitted that the prosecution did not lead any evidence concerning the taking of the money and therefore the charge of robbery had not been made out.

[12] Ms Jackson for the Crown agreed that although it was open to the learned trial judge to have inferred that the same person, who caused the complainant to flee, had re-entered the house and ransacked it, taking what he wished, it was not an inescapable inference that that was so.

[13] Another issue arising from that evidence, is whether the taking of the complainant's money ($700.00 and not $4,300.00) was within the jurisdiction of the High Court Division of the Gun Court. By the time that taking had occurred, the complainant had relieved the assailant of the firearm. It is clear from the evidence that he did not recover the weapon. It would not be true to say, therefore, that, "being armed with a firearm", he had robbed the complainant of money.

[14] It is unnecessary to dilate on any of these points as, based on the concession by the Crown, the conviction for the offence of robbery with aggravation must be quashed and the sentence in respect of it set aside.

Issue (b) – The offence of burglary

[15] Ms Cummings also submitted that nothing in the evidence about the dialogue between the complainant and the assailant suggested that the complainant's assailant had come to rob her. The evidence, learned counsel submitted, was that he intended to take her elsewhere. Although learned counsel made those submissions in the context of the absence of evidence to prove robbery with aggravation, they are also relevant to the issue of the requisite intent for the count of burglary. Interestingly, again in the context of addressing the issue of robbery with aggravation, Ms Jackson submitted that there was an "absence of circumstances demonstrating a clear intention to rob the complainant" (page 4 of her written submissions).

[16] In oral arguments, Ms Jackson submitted that, based on the dialogue between the complainant and the assailant, the assailant's intention at the time of entering must

have been to commit a felony, such as murder. Learned counsel accepted that the actions of the assailant, having entered, that is, pointing his firearm at the complainant and dragging her out of her house did not constitute a felony, but rather a misdemeanour.

[17] It must be noted that the count of burglary did not allege that Mr Willie entered the dwelling house with an intent to rob. The count, as it was read to him, stated that he was charged with burglary contrary to section 39(1) of the Larceny Act. The particulars, as read, were:

> "…that you Dudley Willie on the 9th of March in the night, did break and enter the dwelling house of [the complainant] with intent to commit a felony therein." (See page 94 of the transcript.)

[18] Two issues arise for analysis. The first is that it is usual to particularise in the indictment, the felony that the prosecution alleges was intended. The learned author of the 11th edition of Russell on Crime suggests that specifying the intended felony, is not just a practice, but is a requirement. He states, in part, at page 937:

> "The felony really intended must be laid in the indictment and proved as laid. Proof of intent to commit a felony will not support an indictment charging a felony actually committed. Thus, where upon an indictment for burglary and stealing goods, it appeared that there were no goods stolen, but that the burglary was with intent to steal, it was held that the indictment was not supported by the evidence. So, if it be alleged that the entry was with intent to commit one sort of felony and it appears by the evidence that it was with intent to commit another, it will not be sufficient."

We are grateful to Mesdames Jackson and Malcolm for having provided this authority to us. It is in the best traditions of the bar and consistent with their roles as officers of the

court. The learned authors of the 36th edition of Archbold, Pleading, Evidence and Practice in Criminal Cases, proffer a similar opinion. They state, in part, at paragraph 1819:

> "the intent laid in the indictment must be to commit some *felony* (a) in the dwelling- house, such as larceny, murder, rape etc: **and the intent must be proved as laid**…." (Emphasis supplied)

[19] The extracts demonstrate that the prosecution should not be at large in drafting the indictment, hoping for evidence that will support some felony, which it eventually proves had occurred on the premises. The finding is consistent with section 4(1) of the Indictments Act, which requires the indictment to contain "such particulars as may be necessary for giving reasonable information as to the nature of the charge". It was also held in **R v Thompson** (1781) 2 East PC 515, that where the intent is at all doubtful, it may be laid in different ways in different counts.

[20] In applying that learning to the present case, reference should first be made to section 39 of the Larceny Act. The relevant portion states:

> "Every person who in the night –
>
> (1) breaks and enters the dwelling-house of another with intent to commit any felony **therein**; or
>
> (2) breaks out of the dwelling house of another, having –
>
> (a) entered such dwelling house with intent to commit any felony **therein**; or
>
> (b) committed any felony **in such dwelling-house**,

> shall be guilty of felony called burglary, and on conviction thereof–
> …" (Emphasis supplied)

[21] The learning above suggests that the indictment in this case was defective insofar as it failed to particularise the intended felony. Based on the analysis that will immediately follow, it is not necessary to make a definitive statement in that regard.

[22] The second issue that arises for analysis is whether the prosecution led any evidence that proved the intruder's intention to commit a felony at the time of breaking and entering the complainant's home. The most usual way of proving such intent is by proving the acts of the intruder, once he has gained access to the dwelling house. It must be remembered that section 39(1) of the Larceny Act speaks to an intent to commit a felony inside the dwelling house, which has been broken into.

[23] In this case, the acts done upon entry to the dwelling were to assault the complainant, threaten to kill her and then take her away from the dwelling. After leaving the dwelling, the assailant stated an intention to take the complainant to his friends so that they could kill her. None of those actions would constitute a felony. An assault at common law has long been determined to be a misdemeanour, as is false imprisonment. There is also no evidence of any sexual interference or comment so there would be no forcible abduction in breach of section 17 of the Sexual Offences Act.

[24] Ms Jackson submitted that the evidence supported an intention to commit murder. Learned counsel argued that even if the murder were not to have been

committed inside the house, a taking away for that purpose would be sufficient to satisfy the requirement of section 39(1) of the Larceny Act.

[25] The evidence does not support Ms Jackson's submissions. The section does not allow an interpretation to include an intention to commit a felony elsewhere. In addition, the evidence does not support an inescapable inference of that intention by the intruder at the time of entry.

[26] The relevant statement by the assailant was set in the context (described on page 12 of the transcript) of her calling for help while she was still in the house. She had called out after he demanded that she come out of the house or he would shoot it up. A neighbour answered and the complainant explained that "a gunman come een pan mi". The assailant then "kick the door an it fly open…[t]hen him come inside and him grab mi" and took her outside. Having taken her outside, she volunteered that money was in her bag, but the man did not respond; he continued taking her toward the bushes behind her house. She asked to be allowed to put on her slippers. It was then that the man spoke about killing. Her evidence in this regard is recorded at page 14 of the transcript. She said:

> "Him se, wha kind a slippers you a talk 'bout. Mi [meaning the complainant] a informa because as gunman come fi mi, mi a call dung crowd and him a guh carry mi an mek him friend dem kill mi."

The assailant's statement is sufficiently equivocal to prevent it being said that the prosecution had proved, beyond reasonable doubt, that his intention, at the time of breaking and entry, was to commit murder.

[27] There is, therefore, no proof of an intent to commit a felony at the time of the breaking and entry. This offence would also fall away.

Issue (c) – The treatment of the issues related to visual identification

[28] Ms Cummings' complaint about the learned trial judge's treatment of the issue of identification centred on the manner in which Mr Willie came to the attention of the police. Learned counsel submitted that the learned judge:

a. failed to deal with a discrepancy between the complainant and another witness concerning a discussion in which that witness ventured an opinion that the assailant must be someone named Eskimo; and

b. failed to consider that the rendering of that opinion caused the complainant to point out Mr Willie, who is also known as Eskimo, on the identification parade.

According to learned counsel, the fairness of the identification parade was compromised because the complainant had, quite likely, gone to the parade with a view to pointing out Eskimo as her assailant.

[29] The other witness involved is the person who shared the house with the complainant at the time. He was not at home at the time of the incident, but when the complainant described her assailant to him, as having a "funny eye", he was of the opinion that it was someone whom he knew before as "Eskimo". The witness testified

that he stated his opinion in the presence of the complainant and the police. Later that morning, the witness went in search of Eskimo and when he had found him, he called the police, who took Mr Willie, who admits to being called "Eskimo", into custody.

[30] The discrepancy that Ms Cummings identified was that the complainant denied that the witness had suggested a name for the assailant. That was a clear discrepancy on the prosecution's case. The learned judge did not specifically identify the discrepancy. He should have. The omission is, however, not a fatal error.

[31] The reason that the error is not fatal also involves Ms Cummings' second complaint. There is no evidence that suggests that the provision of the name, "Eskimo", assisted the complainant in any way at the identification parade. The complainant did not go with the witness in search of Eskimo and there is no evidence that Mr Willie was exposed to the complainant at any time after he was taken into custody.

[32] What is important in this context is the complainant's evidence that she had seen her attacker before. In fact, she had seen him twice in the week preceding the invasion of her home. She had seen him at her place of work, a bar, where she is a bartender. On the first occasion, she saw him for about an hour and observed his face for all of that time. The next occasion, she saw his face for only a minute, but she observed that he had a conversation with her boss.

[33] There is therefore, no evidence that there was any unfairness in the identification of Mr Willie as the assailant. It did not appear on the evidence that the

provision of the name, Eskimo, assisted the complainant in pointing out Mr Willie. For that reason, this case is distinguishable on its facts from **Courtney Lawes v R** [2011] JMCA Crim 55. In that case, the person pointed out on the identification parade had been previously exposed to the identifying witness. This court overturned the conviction in **Courtney Lawes v R** because the previous exposure "severely tainted the identification of [Mr Lawes]" (see paragraph [46]).

[34] It must also be recalled that Mr Willie had a distinguishing characteristic. It may or may not have assisted the complainant at the identification parade. There is no evidence either way in that regard. There is also no other complaint about the conduct of the identification parade.

[35] There is no merit to the complaint about the treatment of the identification evidence.

Issue (d) – The interventions by the learned trial judge

[36] The traditional outline of the duty of a trial judge to act fairly, is taken from the judgment of Lord Denning MR in **Jones v National Coal Board** [1957] 2 QB 55, where he said at page 64:

> "A judge's part . . . is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate;

> and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: 'Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal.'"

The Privy Council in **Peter Michel v The Queen** [2009] UKPC 41 explained that that duty is even more important in a case where someone is on trial for a criminal offence. Their Lordships said at paragraph 32:

> "The need for the judge to steer clear of advocacy is more acute still in criminal cases. It is imperative that a party to litigation, above all a convicted defendant, will leave court feeling that he has had a fair trial, or at least that a reasonable observer having attended the proceedings would so regard it."

[37] Their Lordships gave further guidance as to the role of a trial judge in a criminal case. They said, in part, at paragraph 34 of their judgment:

> "…Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced."

[38] Ms Cummings submitted that the learned trial judge, to use the analogy of Lord Denning, dropped the mantle of judge and assumed the role of a prosecutor. Learned counsel submitted that the learned trial judge did so by assisting the prosecutor with her examination-in-chief, interfering with defence counsel's cross-examination and making the case for an amendment of the indictment to add the count of burglary.

[39] Learned counsel pointed to areas of the transcript where the learned trial judge asked several questions of the complainant. Although, at some places, the learned judge did ask several questions of the complainant, which could and would have been properly asked by the prosecutor, it cannot be said that he had gone beyond clarifying the witness' evidence in any critical area. He did seem to take over the examination in chief in seeking to get an understanding of the layout of the complainant's house (see pages 5-6 of the transcript). That, however, is not an area that would have been unfairly prejudicial to Mr Willie, whose defence, it must be borne in mind, was that he was not the person at the complainant's home at the time of the incident.

[40] He asked other questions in relation to the location of the complainant's bag, the condition of her window when she went to bed, and other matters identified by Ms Cummings, but none of them was in respect of ground not previously covered in evidence by the witness.

[41] Similarly, the learned trial judge asked several questions of the police sergeant who conducted the identification parade. None of the matters questioned about were new. They had been previously covered by the prosecutor. The learned judge's questions went into greater detail. They did not amount to unfairness to Mr Willie.

[42] It is also incorrect to say that the learned trial judge treated the defence counsel with any hostility or aggression. There was no judicial action that could be said to have prevented or hindered the defence counsel in putting forward Mr Willie's case.

[43] The issue of the addition of the third count is an issue of law. The prosecutor explained her reason for asking to add burglary as a third count to the indictment. The learned trial judge then asked learned defence counsel if he objected to the addition. Upon learning that there was an objection, the learned trial judge debated the issue of law with learned defence counsel. The exchange was not one that was aggressive. The difference between learned defence counsel and the learned trial judge seemed to be whether there was evidence to support a count for burglary, which involved a theft. The learned judge was of the view that sufficient evidence had been led to justify the addition of the third count. It cannot be said that in seeking to point out that evidence to learned defence counsel meant that the learned judge had adopted the mantle of the prosecutor.

[44] None of the submissions in respect of this issue can succeed.

Issue (e) - The firearm offence, in the absence of the other offences

[45] If, as reasoned above, both the offences of robbery with aggravation and burglary should fall away, the remaining count on the indictment would be that of illegal possession of firearm. It is necessary to decide whether it can stand on its own. The learned trial judge found that the 9mm pistol, recovered from the scene by the police, was that which the assailant had when he entered the complainant's house.

[46] Both the 9mm pistol and a ballistics expert's certificate, in respect of it, were admitted into evidence. Curiously, as it first appeared, the learned trial judge did not refer to the certificate as supporting the prosecution's case that the item was a firearm

and that the court, therefore, had jurisdiction to try the case. Instead, the learned trial judge referred, for that purpose, to the complainant's previous familiarity with guns. A mere description by the complainant, however, would not have been sufficient to allow for the count of illegal possession of firearm to stand on its own. Such a count could only be free-standing if there was expert evidence that the item in question was a firearm within the definition of the Firearms Act (see **R v Vincent Pryce** (1967) 10 JLR 196).

[47] The commendable industry of counsel for the Crown, Ms Jackson and Ms Malcolm, secured, for this court, a copy of the ballistics expert's certificate, which had been omitted from the transcript. The ballistics expert's certificate somewhat explains the learned trial judge's reliance on the complainant's evidence with regard to the presence of a firearm. The pistol was defective and not capable in that condition of discharging deadly missiles. The relevant part of the report states:

> "[The item tested] was a 9mm luger 'Stallard Arms' autoloading pistol that was unable to discharge deadly bullets from the barrel due to…missing parts. **However, if these parts are replaced, it would be capable of discharging deadly bullets from the barrel**." (Emphasis supplied)

[48] Ms Jackson, in addressing this evidence, submitted that the ballistics expert's opinion would, nonetheless, have supported a count on the indictment for illegal possession of firearm. Learned counsel submitted that the definition of a firearm, as set out in the Firearms Act, included a component part of a firearm. She argued that the ballistics expert's opinion allowed for the item, which was tendered into evidence, to be

found to be a component part of a firearm, and that this court should so find. Learned counsel cited in support of her submissions **Regina v Elliston Watson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 129/77, judgment delivered 14 May 1979.

[49] Ms Cummings argued that **Regina v Elliston Watson** was distinguishable on its facts as the weapon in that case, though missing a part, was actually test-fired by the ballistics expert. That, learned counsel submitted, is not the situation in this case.

[50] Section 2 of the Firearms Act defines a firearm, for those purposes. The definition includes a component part. It states:

> "'firearm' means any lethal barrelled weapon from which any shot, bullet or other missile can be discharged, or any restricted weapon or, unless the context otherwise requires, any prohibited weapon, **and includes any component part of any such weapon** and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, but does not include any air rifle, air gun, or air pistol of a type prescribed by the Minister and of a calibre so prescribed;" (Emphasis supplied)

[51] The evidence, in this case, does allow the exhibit to be found to be a component part of a firearm, and therefore a firearm within the definition of the Firearms Act. The ballistics expert's opinion that replacement of the missing parts would enable the exhibit to discharge deadly missiles, is consistent with a ballistics expert's report in **Regina v Elliston Watson** as well as in **R v Errol Hewitt** (1971) 12 JLR 614. In the latter case, a firing pin was missing from the exhibit, which was a starting pistol. Smith JA, as he then was, after assessing other decisions based on other legislation that is similar to the

Firearms Act, concluded that the starting pistol was a firearm for the purposes of the Firearms Act. In delivering the judgment of this court said at page 616G:

> "The subject-matter of the charge against [Mr Hewitt] consisted of everything else, except a firing pin, which was necessary to make it a lethal barrelled weapon from which a bullet can be discharged. It was, therefore, a component part of such a weapon within the definition."

[52] Based on that analysis, the offence of illegal possession of a firearm is capable of standing on its own, as a separate charge. The prosecution having proved, by inescapable inference, that the assailant was in possession of the exhibit, it was open to the learned trial judge, having accepted that evidence, to have properly convicted for the offence of illegal possession of a firearm.

Sentence

[53] Based on the above analysis it would be unnecessary to consider the submissions in respect of the learned trial judge's approach to sentencing in relation to the convictions for robbery with aggravation and burglary.

[54] Ms Cummings did not complain about the sentence imposed for the offence of illegal possession of firearm. The sentence was imposed before the publication of the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts (the Sentencing Guidelines). The Sentencing Guidelines may nonetheless be used to test the appropriateness of the sentence in this case. The Sentencing Guidelines stipulate that the normal range of sentences for the offence of illegal possession of firearm is seven to 15 years with the usual starting point being 10 years.

[55] In considering sentence, the learned judge considered the circumstances of the case being a home invasion. That cannot be ignored in this context. He also considered that Mr Willie:

a. had threatened to kill the complainant; and

b. was already the subject of a suspended sentence for unlawful wounding.

There had also been a threat to "shoot up" the complainant's house. Despite the inability of the exhibit to have allowed him to carry out that threat, it must have been frightening to the complainant, as she would not have known of that incapacity. There were therefore aggravating factors, which could have increased the sentence above the usual starting point.

[56] The learned judge should have taken into account the fact that Mr Willie had spent six months in custody awaiting trial. He did not. The omission was an error. Mr Willie is entitled to be credited with that time (see **Meisha Clement v R** [2016] JMCA Crim 26).

[57] Based on that analysis the sentence of nine years cannot be considered manifestly excessive. Mr Willie should, however, have the sentence adjusted to account for his pre-trial custody.

Section 24(2) of the Judicature (Appellate Jurisdiction) Act

[58] Ms Jackson invited this court to consider substituting, for the offence of burglary, the offence of assault contrary to common law. Learned counsel submitted that the

offence was evident from the pointing of the firearm at the complainant. The substitution, learned counsel submitted, is permitted by section 24(2) of the Judicature (Appellate Jurisdiction) Act.

[59] Section 24(2) of the Judicature (Appellate Jurisdiction) Act allows this court, where it is satisfied that a conviction for a particular offence is wrong in law or on the facts, to substitute a verdict of guilty for another offence. The important part of the subsection for these purposes is that this court may only do such a substitution if the jury or court below could have convicted the appellant on charges in the indictment that was before it (see **Marc Wilson v R** [2014] JMCA Crim 41 and **Shirley Ruddock v R** [2017] JMCA Crim 6). The subsection states:

> "Where an appellant has been convicted of an offence **and the Resident Magistrate or jury could on the indictment have found him guilty of some other offence**, and on the finding of the Resident Magistrate or jury it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity." (Emphasis supplied)

[60] Common assault, however, is not an offence for which the learned judge could have convicted Mr Willie, as an alternate offence, for on any of the counts of the indictment as laid or as amended. A conviction for common assault may be substituted, as a lesser offence, for charges such as unlawful wounding and assault occasioning

actual bodily harm (see **R v Oliver** (1870) LR 1 CCR 241; (1860) 24 JP 742). It may not, however, be substituted for offences of wounding with intent or causing grievous bodily harm with intent (see **Regina v McCready; Regina v Hurd** [1978] 1 WLR 1376). It would not be permissible to substitute it for burglary.

[61] Based on those principles, this court cannot accede to Ms Jackson's invitation.

Conclusion

[62] The prosecution failed to produce evidence to support the elements of the counts of robbery with aggravation and burglary. As a result, the convictions in respect of those offences must be quashed and the respective sentences set aside.

[63] The prosecution did, however, prove the offence of illegal possession of a firearm, despite the fact that the exhibit was not capable of firing deadly missiles at the time Mr Willie used it to menace the complainant. The conviction in respect of that offence should stand.

[64] The sentence of nine years, imposed by the learned trial judge for the latter offence, cannot be said to be manifestly excessive. It should, however, be adjusted to account for the period that Mr Willie spent in custody awaiting trial. For this reason, that sentence should be set aside, and a sentence of eight years and six months substituted therefor.

Order

[65] The order of the court is, therefore, as follows:

1. The appeal is allowed in part.
2. The convictions for the offences of robbery with aggravation and burglary are quashed, the respective sentences set aside and judgments and verdicts of acquittal substituted in respect of both.
3. The conviction for illegal possession of firearm is affirmed.
4. The sentence of nine years imposed for the offence of illegal possession of firearm is set aside and a sentence of eight years and six months is substituted therefor. The sentence is to be reckoned as having commenced on 6 September 2013.