[2020] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 22, 27, 30 & 32/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA

KEVIN REID
KEVIN BROWN
SANDUS SIMPSON
ANDREW ROBINSON v R

Keith Bishop and Andrew Graham for Kevin Reid

Linton Gordon and Obiko Gordon for Kevin Brown

Nancy Anderson for Sandus Simpson

Garth Taylor for Andrew Robinson

Adley Duncan and Steve Walters for the Crown

4, 5, 17 December 2018 and 31 July 2020

F WILLIAMS JA

Introduction

[1] In these consolidated applications, the applicants seek this court's permission to appeal against their convictions in the Home Circuit Court on 12 March 2013 for the offence of murder, after trial by a judge and jury. They also seek the court's permission

to appeal against their sentences of life imprisonment with the stipulation that each of them serve 35 years' imprisonment at hard labour before becoming eligible for parole. Those sentences were imposed on 22 March 2013.

Brief background

[2] The charge and conviction arose from the killing of one Veronica Blake as she lay in bed around 11:00 pm on Tuesday 11 July 2006 in Succaba Pen, Old Harbour in the parish of Saint Catherine. She was sleeping with her grandson, Clifford, on one of two beds in a room of a board house. Her daughter, NP, the Crown's only witness to the killing, slept on another bed with her (NP's) son. NP's evidence is that she was awakened by the sound of gunshots. She then saw the entrance door to the room kicked open. Her boyfriend and his friend rushed in and the door was kicked back shut. NP said that she noticed her mother bleeding from a wound in the region of her neck. She stood on her mother's bed, looked through a space about 1½ centimetres long in one of the board walls of the house and saw five men, all armed with guns, standing abreast and facing the board house. They were standing in front of an unfinished concrete building being constructed in front of the board house. On seeing the men, all of whom she recognized, she fled into another bedroom behind the front one and sought refuge under the bed with her son and nephew. Thereafter ensued a barrage of gunshots, during the course of which both youngsters sustained bullet wounds. After unsuccessfully trying to call the police herself, whilst still under the bed, she telephoned her cousin, who arrived some time after with the police. At that point, she felt safe enough to emerge from her hiding place under the bed. She later gave a statement to the police. In that statement she

identified the men she saw as: "Gavin" (later identified to be Sandus Simpson); "Bait Up", "Terror" or "Big Man" (later identified as Marvin Bonner, her cousin, who was not tried with these four applicants); "Tigga" or "Bush Tiger" (later identified to be Kevin Brown); "Fourie" (later identified to be Andrew Robinson) and "Bullet Head" (later identified to be Kevin Reid). In her statement and at the trial, NP gave descriptions and background information of the persons whom she identified – such as where they lived, their associates and family members, that they were friends of her brothers and, in some cases, the schools she said they attended. The applicants gave unsworn statements. The applicant Simpson said that he was not at the scene of the shooting. The others advanced alibis (in the true sense) indicating the places where they said they were at the material time.

[3] With specific reference to the applicant Robinson, NP testified to having attended the Old Harbour High School with him. Her further testimony was that she was ahead of him in school. (See page 44 of the transcript and following pages.)

[4] At the hearing of these applications we permitted the adducing of fresh evidence on behalf of Andrew Robinson. This came in the form of evidence from Mr Lynton Weir, Principal of the Old Harbour High School and Mrs Shernet Anika Chambers-Bedward, Acting Principal of the Spring Gardens All Age School. Mr Weir's evidence was to the effect that the applicant Robinson never attended Old Harbour High School. The evidence of Mrs Chambers-Bedward was to the effect that Robinson attended the Spring Gardens All Age School between the period January to July 2001 and left in grade 8. Mr Weir's evidence was led in an effort to counter NP's evidence that she and the applicant

Robinson had attended the Old Harbour High School. That contrary contention had been suggested to her at the trial; but no evidence had been called to support the suggestion. This evidence was used as a challenge to NP's credibility. The evidence in relation to the Spring Gardens All Age School was intended to support the applicant Robinson's contention that he attended that All Age school.

[5] We should point out as well that these applications are in fact a renewal of the applicants' application for permission to appeal, their applications having, on 25 January 2016, been refused by the single judge of appeal (who first considered them). The main bases of that refusal were that the learned trial judge dealt with the main issues adequately and that the sentences fell within the permissible range of sentences for the offence of murder and were appropriate.

[6] By agreement among counsel for the applicants, there was a departure in the presentation of submissions from the usual chronological order of the listing or filing of the appeals. Instead, this was the order in which the submissions were presented: (i) Kevin Brown; (ii) Sandus Simpson; (iii) Kevin Reid; and (iv) Andrew Robinson. We propose to address the submissions in the same order.

Kevin Brown

Grounds of appeal

[7] On behalf of the applicant Kevin Brown, Mr Linton Gordon sought and was granted leave to argue six new supplemental grounds of appeal and to abandon those originally

filed. Three supplemental grounds were contained in the applicant's "Supplemental Notice of Appeal and Grounds of Appeal" dated 27 January 2017. They are as indicated below:

> "1. The verdict arrived at in this case was unreasonable having regard to the evidence before the Court.
>
> 2. The Learned Trial judge failed to adequately guide and instruct the Jury on the danger of relying on identification evidence given the circumstances under which the eyewitness for the Crown alleged that she was able to identify the accused.
>
> 3. Having regard to the age of the accused, his unblemished record and the fact that the accused was not convicted of Capital Murder the Sentence was excessive and unreasonable."

[8] However, six supplemental grounds were actually argued. They were those contained in the applicant Brown's skeleton arguments dated 27 January 2017 and were as follows:

> "**GROUND 1**
>
> The Learned Trial Judge in his summation to the jury failed to properly and adequately highlight and explain the importance of the brief view the witness Miss Pryce had of the accused and the difficult circumstances under which she was viewing them through a 1½ cm opening. The Learned Trial Judge further failed to highlight the possibility of the eye witness making an error given the fact that she had just been awoken [sic] by explosions and was peeping through a small opening during a period in which she must have been excited and frightened.
>
> **GROUND 2**
>
> The Learned trial judge failed to properly explain to the jury and guide them as to the significance and importance of discrepancies and inconsistencies on the Crown's case.

GROUND 3

The Learned Trial Judge substituted his personal experience and the experience of viewing persons in an open Courtroom in a way that strengthened the reliability of the identification witness and this was unfair to the accused and must have unduly influenced the jurors in their reliance on the identification. Furthermore by offering an explanation for the conduct of the witness, one that was not offered by the witness herself nor the Prosecution, the Learned Trial Judge in effect adduced evidence on behalf of the identification witness, which would have had the effect of strengthening her testimony on a whole in the eyes of the tribunal of fact (pages 653-654).

GROUND 4:

In directing the jurors that the sole eyewitness said she was looking at the faces of the accused men for thirty seconds, the judge misinterpreted the evidence as this was not what the witness said. This misinterpretation of the evidence was unfair to the accused men as it strengthened the identification evidence rather than highlighting the possible weakness and potential danger of relying on the identification witness (page 740 para 3).

GROUND 5:

The Learned Judge ridiculed and cast a negative view on the defence of the accused man Brown when in his summation to the jury [he] questioned why someone would call the accused and tell him of the death of Sonia. The Learned Trial Judge went on to question why persons were calling to report the death. That this had the effect of creating a negative view of the Defence of the Appellant and the casting of aspersions as to whether or not him receiving a call somehow showed a nexus between himself and the incident.

GROUND 6:

That the sentence of Life Imprisonment, and not being eligible for parole before the age of Thirty Five (35)years is excessive having regard to the unblemished record of the accused and the fact that the conviction was a non-capital conviction."

[9] In discussing the several grounds of appeal, it is convenient to treat with grounds 1, 3 and 4 together, as they concern the identification evidence and the learned judge's treatment of it in his summation. Some time will be spent discussing this issue of identification by way of recognition of this applicant and the issue generally, as the issue of identification is a basis of challenge by each of the other applicants to the conviction.

Grounds 1, 3 and 4

Summary of submissions

[10] In respect of ground 1, Mr Gordon submitted that the learned judge failed to adequately guide the jury as to the measurement of 1½ centimetres. The learned judge, he further submitted, also ought to have highlighted the difficulties surrounding the identification – both the physical challenges and that the witness had spoken to being frightened. The totality of the circumstances would have created challenges, he submitted, and this should have been brought to the attention of the jury. In support of this contention, he made particular reference to pages 740-741 of the transcript. The reference to these sections will be considered in due course.

[11] With respect to ground 3, Mr Gordon, referring to pages 653-654, and 659, line 12, submitted that the learned judge, in using his personal experience to indicate an ability to see five persons at the same time, brought enormous strength to the witness' identification evidence. That inappropriately and unfairly bolstered the credibility of the witness, he argued.

[12] In relation to ground 4, Mr Gordon submitted (referring to page 740 of the transcript) that the learned judge's comments in relation to the telephone call strengthened the quality of the identification evidence.

[13] On behalf of the Crown, Mr Duncan submitted that the circumstances in which the identification was made in this case, even if acknowledged to be attended with difficulty, did not prevent the making of a reliable identification, as several previously-decided cases illustrate. He referred, in support of this submission, to, for example, the case of **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered 26 February 1996, in which, he said, an identification by way of recognition made in three to four seconds was upheld on appeal. Similarly, he submitted, in the case of **Separue Lee v R** [2014] JMCA Crim 12, a viewing time of two seconds by a child was held to be sufficient evidence to have supported a conviction and the appeal was dismissed. Mr Duncan further submitted that it could reasonably be inferred that NP knew that, by going to look through the space in the wall, rather than the window that was nearby, she would have been able to see. The evidence does not go so far as to enable this court to say that it was improbable that NP could have been able to recognize the men she said were the applicants, he submitted.

[14] Mr Duncan further submitted, in relation to ground 3, that the learned judge was entitled to make comments on the evidence and that, at page 590, the learned judge gave the jury directions on how to treat with his comments and how, generally, they should approach the consideration of the evidence. The learned judge did not go beyond the bounds of what was appropriate in making his comments, he submitted.

[15] In relation to ground 4, Mr Duncan submitted (referring to page 47 of the transcript) that the clear and unequivocal evidence is that the witness viewed the men in a period of 30 seconds. He submitted that the learned judge's review of the identification evidence, coupled with the directions and the Turnbull guidelines were adequate, accurate and fair.

Discussion

[16] In giving her testimony, NP spoke to viewing the men she said were the applicants for a period of some 30 seconds. The relevant part of her evidence in this regard reads as follows (page 47, line 18 to page 48, line 2):

> "Q. You mentioned that they were nine feet away from you?
>
> A. Yes, ma'am.
>
> Q. Well, what you pointed out, we estimated to be nine feet. About how long, did you see their faces for that night?
>
> A. Thirty seconds.
>
> Q. Was anything blocking or obstructing your view from seeing their faces clearly?
>
> No, ma'am."

[17] This reference to viewing the men for 30 seconds is repeated several times in the course of cross-examination. For example, in the course of cross-examination by Mr Bishop on behalf of the applicant Kevin Reid, NP said (page 118, lines 14 to 22):

> "A. Yes, I ask can answer. The seconds that I speak about, when I look I saw the five men, because in the thirty-seconds I saw the five men standing in the one unfinished building and the other two outside, but as I say I wasn't talking about the

other two, because I couldn't see who they were. I was paying attention to who I am seeing in front of me."

[18] What may be of even greater significance for the purpose of this discussion is NP's answer to another of Mr Bishop's questions in cross-examination, recorded at page 128, line 24 to page 129, line 1, as follows:

> "Q. So could it have been what you call thirty seconds might have been twenty or fifteen?
>
> Sir, it was not less, it might be more." (Emphasis added)

[19] Another attempt was made by Mr Armstrong in cross-examination to have NP state how long she had had each of the men she said were the applicants under observation. This might be seen at page 98, lines 9-20 of the transcript as follows:

> "Q. How much of that thirty-second period would you say that you saw Mr. Robinson, Andrew Robinson, how much of that third-second [sic] period of seeing each and their guns, how much of that time period would you say that you saw the face of Mr. Robinson?
>
> A. Sir, I wouldn't be able to estimate the time I saw each, I was looking at all of them, all at the same time.
>
> Q. You were looking at each at the same time?
>
> A. Yes, sir."

[20] So that the witness NP would have viewed the five men, whom she testified to knowing before, for at least 30 seconds. Evidence as to the lighting of the area in which the men stood came from NP; and also the investigating officer, Detective Sergeant Michael Simpson. Both witnesses spoke to two light sources that are relevant to identification by way of recognition: (i) one some 15 feet from the men on the house of NP's aunt, located in the same yard; and, more significantly, (ii) another on the outside

of the board house to the front was also about 15 feet away from the men (see page 49, line 24 to page 50, line 20). The men were about nine feet away from the witness NP (see, for example, page 21, lines 6-21).

[21] In relation to ground 1, Mr Gordon pinned his submission to that part of the learned judge's summation recorded at pages 740-741 of the transcript. It reads as follows:

> "Remember I told you to look for the circumstances. She said she had known all of these persons before. I think two, for three years, one for five years and one for six to twelve months and these are persons she was accustomed to see regularly. This is one of the circumstances you have to look at. Were these persons she saw regularly? She says yes. Was there lighting, she said yes there was a hundred watt bulb in the area that they were. What was the distance that separated them? Was it too far for her to be able to recognise them? She said no it was about from the witness box to where the computer was which was estimated to be about nine feet. How long she said at least thirty seconds and she was looking at their faces for thirty seconds. You have to look at all these. First of all, do you believe that she can climb upon this bed and look through this space? If you believe that she did it, could she have seen these persons out there? If you accept that there was a light and this was the distance that separated them, was she able to recognise these persons who she said she knew for how many months or years? So that is how you look at it, Mr Foreman and members of the jury, do you believe that she is truthful? Do you believe that she is a credible witness? Do you believe she is a reliable witness? Because that is where the case have [sic] to be determined in relation to these persons or their involvement in this."

[22] It will be recalled that Mr Gordon also referred to pages 653, line 19 to page 654, line 10 and 659, in his submissions. This is the relevant portion:

> "But what she is saying, what is correct is that she looked through the space after these persons came in.

> And you remember counsel for the defendants in their addresses to you said that can you believe that? Well, it is a matter for you. You will have to look at it. Different people live in different places and they are accustomed to different circumstances.
>
> Remember where she said that she lived and how she describes it as ghetto. And you might have experienced it, Mr. Foreman and members of the jury. Sometimes quite peculiar things happen in Jamaica, you have gunshots being fired and persons instead of running away run towards it where it is happening."

And page 659, lines 8 to 25:

> "Remember, she said they were in a line and one was nearest to her, so she was looking down the line.
>
> You can use your experience, <u>you can even try a demonstrate</u> [sic] <u>to see if that can happen</u>. Additionally, whether or not someone could look through a space and see if they can see 5 persons at the same time. You can have an opportunity to see whether or not that can happen, you can try to see a situation in anything to see if whether or not that is possible. So this is what she said happened, and what she said she saw. She was only able to look at all five of them at the same time. Well, you must realize whether or not that can happen, do you think that I am looking at all of you at the same time? Do you think that I am looking at all counsel at the same time? These are matters for you."
>
> (Emphasis added)

[23] The underlined portion of the foregoing passage is that complained of. But it was necessary to quote the remainder of those portions of the summation to give a more comprehensive picture of the matters that were brought to the jury's attention and of the context in which the underlined portions of the quotation were said.

[24] It is necessary too in this discussion to consider those portions of the summation that were brought to our attention by Mr Duncan on behalf of the Crown; and other portions of the evidence that, to us, are relevant to the consideration of these issues. One matter that Mr Duncan referred to, for example, was what appears at page 47 of the transcript, in the examination-in-chief of NP, relating to the time period of 30 seconds. That part (along with page 47, line 18 to page 48, line 2) reads as follows:

> "Q. You mentioned that they were nine feet away from you?
>
> A. Yes, ma'am.
>
> Q. Well, what you pointed out we estimated to be nine feet.
>
> About how long, did you see their faces for that night?
>
> A. Thirty seconds.
>
> Q. Was anything blocking or obstructing your view from seeing their faces clearly?
>
> A. No, ma'am."

[25] In relation to the time of 30 seconds and its full significance to the question of identification, and the adequacy of the learned judge's warning and directions to the jury, we refer to a portion of the summation that, in our view, could have left no doubt in the jury's mind of the need to scrutinize closely the time for viewing. This is at pages 658, line 21 to 659, line 10. Here the learned judge directs the jury's attention specifically to the nature of the defence's challenge to the identification, using the approach of one of the lawyers in cross-examination to do so. The relevant portion of the summation reads as follows:

> "So, you have to look at it to see whether or not you find her credible and when she had the opportunity to recognize persons outside, if she saw anyone outside, and she said she was looking at all the men at the same time.
>
> Now this is an important aspect of the case, because you remember when Mr. Bishop was addressing you, he said since it was five of them, you had to look at them individually and remember, he did some calculations for them and he said that it was 6 seconds for the gun, so you would have to look at that, can you look at 5 persons at the same time?"

[26] With those references, it seems clear to us that it has been demonstrated that there is no merit to the applicant's complaint with respect to the learned judge's reference to the viewing time of 30 seconds.

[27] We think, too, that there is also no merit in the complaint that the frightening circumstances in which NP made the identification by way of recognition of the men, including the person she said was the applicant, was not sufficiently conveyed to the jury. In illustration of this, we note, for example, page 657, lines 9-18:

> "She said she was frightened when she saw Matthew and Ryan coming, but at the time there were no gunshot.
>
> Remember, she said the gunshot awakened her. So up to the time when they came in and when she went on the bed to look in, there were no gunshots firing. So, you have to look at that, because counsel is saying, would someone really go on the bed to look out the window. So you have to say what you make of it." (Emphasis added)

[28] Similarly, at pages 674, line 18 to 675, line 7, the learned judge directed the jury as follows:

> "She said after she left the house that night she never went back, she did not know whether or not changes were made

> after she left. She said as soon as the police came, she left for the hospital. She said although she was frightened, and I think at one stage she said she was terrified, she said that she was not making a mistake and she could even say that Kevin Reid was in the middle of the five persons. So, again, if you can see from the extend [sic] that she could say from what position he was in, could she see him? Could she see outside? And if she was anybody, could she have had the time, the light, the opportunity, to recognize the persons she said that she saw?" (Emphasis added)

[29] Also of significance here is page 678, lines 7-9:

> "She said her mother was dying and she was frightened and afraid and nervous."

[30] Apart from these passages, it seems clear to us that, the very nature of the narrative (reflected, for example, at page 670, line 19 to page 671, line 1) would have clearly conveyed to the jury, what her emotional state at the time of the identification must have been. This is what was recorded:

> "Said she grabbed her nephew and son and ran and left her mother because her mother was already dying. What she is saying she couldn't be of any assistance to her mother, but she could assist her son and her nephew, that is why she grabbed those two. You will have to say whether or not you believe her whether or not she saw what she said she saw."

[31] There can be no denying that a judge, in the course of a summation, is entitled to make comments on the evidence. He will not have fallen into error so long as he makes it clear that it is the members of the jury who are supreme in respect of facts, whereas he or she is supreme on questions of law and that they are free to disregard a judge's comments if they do not agree with them. At page 589, line 21, to 590, line 22, this is what the learned judge said to the jury in respect of comments:

> "Now, as I indicated, Mr. Foreman and members of the jury, the facts or the finding of facts is your responsibility, and yours alone. But no doubt you listened carefully to all the attorneys who addressed you, because they made reference to the facts.
>
> They asked you to view the facts in a particular way. Now, they are merely expressing their views of the evidence. If you accept any view which is put forward by any of the attorneys, by all means you can adopt them and use them as your own. If, however, you disagree with any views put forward, then your duty as the judges of the facts would be to cast those views aside and substitute your own, because it is your views of the evidence which is important. And it is from your views of the evidence that your true verdict must come.
>
> Additionally, when I review the evidence I might also express views as to how you should look at the evidence. In the same way that you deal with the views of counsel, either for the Prosecution or the Defence, you treat my views similarly. It you agree with anything that I might express, you can always adopt them and use them as your own. If you disagree, you discard them and substitute your own."

[32] It seems to us that any invitation by the learned judge to the jury to approach the assessment of the evidence in a particular way (as for example, by seeing whether it was possible to view persons through a narrow space) or to consider the significance of a particular feature of the evidence or an unsworn statement (such as the reason for a defendant being telephoned and informed of the death of someone) must be viewed against the background of his umbrella warning to them. Further, in addition to the umbrella warning, there was at least one instance in which, during the course of the summation, the learned judge made a comment and specifically reminded the jury that it was a comment and how they were to deal with it. This is to be found at page 640, lines 15 to 23, as follows:

> "If you are accustomed to seeing somebody in the day, would you be able to recognize him at night? These are matters for you, one may think, but it is a comment I make. What would be important it is not whether or not night or day, but sufficient lighting for you to see. That is a comment I make. If you agree with it you can accept it; if you disagree you can discard it."

[33] We cannot see where the learned judge could fairly be said to have overstepped his bounds in the matters complained of: he was, in our view, only seeking to assist the jury in their role as the supreme finders of fact. There is, therefore, no merit in grounds 1, 3 and 4.

[34] We may now, therefore, move to a consideration of ground 2.

Ground 2

Summary of submissions

[35] On behalf of the applicant Brown, the essence of the challenge was that the learned judge failed to properly explain to and guide the jury as to the importance of discrepancies and inconsistencies on the Crown's case.

[36] In response, the Crown's submission was that the learned judge gave complete, proper and useful directions in relation to inconsistencies and discrepancies; and that in so doing, he met the standard that was required of him.

Discussion

[37] At pages 594 to 598 the learned judge gave what might be regarded as the standard directions on inconsistencies and discrepancies – explaining the difference between them and directing the jury on how to treat with them, should they arise on the

evidence. Apart from the standard directions, at times during his summation, the learned judge also pointed to specific areas of the evidence on which an issue arose and put it pointedly before them for their consideration as a possible inconsistency. One such instance arose as to exactly where on Ms Blake's body Detective Sergeant Simpson observed what, in his view, was a gunshot wound. That reference is to be found at page 708, line 15 to page 709, line 1 as follows:

> "But, again, remember I told you how you treat the evidence given at the preliminary examination, you can't substitute that for the evidence that is given in court. It is merely put forward to see whether or not you can accept this witness as a truthful and reliable person. What they are saying, you have to look whether or not there is an inconsistency here, what do you make of it, serious or slight, does it take away the credibility of this witness? These are matters for you, Mr Foreman and members of the jury."

[38] It will be apparent, therefore, that this ground, too, is devoid of merit.

Ground 5

Summary of submissions

[39] In a nutshell, the challenge by the applicant Brown was to the effect that the learned judge's comments on the applicant's receiving a telephone call concerning the death of Veronica Blake amounted to ridiculing and casting a negative view on his defence.

[40] On the other hand, the Crown submitted that in making the comments that he did in relation to the telephone call, "…the learned judge remained within the walls of permissibility…". (See paragraph 12_of the Crown's written submissions).

Discussion

[41] What the learned judge said is to be found at page 734, lines 7 to 16 of the transcript and reads as follows:

> "He said he got a call that Sonia died and you remember during cross-examination we had heard that Miss Victoria Blake was also called Sonia. He obviously would have known her to hear that Sonia died and for somebody to call him to tell him. Why would somebody call him. Why are these persons saying when this person died somebody called him.There are two persons who say that, you have to look at it to see what you believe."

[42] In discussing this area, we are aware of dicta in several cases outlining the boundaries within which a judge is permitted to make comments on evidence during the course of a trial. One such case from the jurisdiction of the United States of America is that of **People v Santana** (2000) 80 Cal App Ath 1194, 1206-1207, in which the court made the following observation:

> "A court may control the mode of questioning of a witness and comment on the evidence and credibility of witnesses as necessary for the proper determination of the case. Within reasonable limits, the court has a duty to see that justice is done and to bring out facts relevant to the jury's determination. A court commits misconduct if it persistently makes …remarks so as to discredit the defense or create the impression it is allying itself with the prosecution." (P. 1206-1207.)

[43] The first observation that we must make is that we can find nothing in the words used in the summation or in the approach to the review of the unsworn statement of any of the applicants that could fairly be described as ridicule or amounting to portraying the defence in a negative light. We note as well that the comments made by the learned

judge could not reasonably be construed as the learned judge's allying himself with the prosecution or of being lacking in judicial objectivity. His comments (as we see them) were meant to make the jurors give consideration to the applicant Brown's unsworn statement and to assess it from a practical standpoint. To our view, therefore, this ground was also without merit.

Ground 6: sentence manifestly excessive

[44] This ground was not pursued by the applicant Brown. As it stands among the grounds for the other applicants, it will be considered along with the sentences in respect of all the applicants, after all the other grounds have been considered.

Sandus Simpson

Grounds of appeal

[45] On behalf of the applicant Sandus Simpson, Ms Anderson at first sought only to challenge the sentence imposed on him. She later, however, adopted the submissions in respect of identification that were made in relation to Kevin Brown by Mr Gordon and later Kevin Reid by Mr Bishop. That is his ground 4. We have already dealt with the issue of identification.

[46] He also challenges in grounds 1 and 3 the sentence imposed on him as being manifestly excessive. Those challenges apart, his main complaint is with the delay in the matter: that between the date of the incident and the date of his trial; as well as the delay between his conviction and the hearing of his application for leave to appeal. That complaint forms ground 2 of his "Second Supplemental Grounds of Appeal…" filed 14

December 2018. The prayer which the applicant Simpson makes in respect of this ground is that the period to be served before he becomes eligible for parole should be reduced. However, as previously indicated, we propose to deal with the issue of sentencing for all the applicants, later in this judgment.

Kevin Reid

Grounds of appeal

[47] On behalf of the applicant Kevin Reid, Mr Bishop argued the grounds of appeal that were originally filed and did not file or seek to argue any supplemental grounds. These were the grounds:

> "a. That the learned Judge erred in law when he did not uphold the no-case submission on behalf of the Appellant;
>
> b. The learned Judge erred in law when he permitted prejudicial information regarding previous charges to be admitted for the prosecution in rebuttal although the cases were dismissed or withdrawn and the convictions spent and of no legal effect pursuant to the Rehabilitation of Offenders Act;
>
> c. The learned Judge erred in law in allowing and permitting prejudicial information to be presented at trial by the prosecution following the unlawful taking of the Appellant's fingerprint by the police during the trial without an order of the Judge and the unlawful taking of information for the antecedent report by the police during the trial before conviction and thereafter before the completion of the trial the police provided the prosecution with information obtained from the interview with the Appellant for the antecedent report and the said information was used by prosecution against the Appellant at his trial;
>
> d. The learned Judge erred in law in revoking the bail of the Appellant at the commencement at his trial in breach of the

provisions of the Bail Act although the Appellant had previously complied with all conditions of his bail;

e. That the learned Judge misdirected the jury with respect to the issue of identification;

f. That the case of the Appellant was not properly summarized by the Judge and placed before the jury;

g. That given all the circumstances, the Appellant did not receive a fair trial, which is in breach of the Constitution of Jamaica; and

h. The sentence was unreasonable and excessive."

[48] The applicant Reid, in his said written submissions, also set out what he considered to be the issues in the case, which closely follow the grounds. Those issues are:

"a. Whether or not the learned Judge should have acceded to the submission of no case made on behalf of Kevin Reid in light of the evidence touching and concerning identification.

b. Whether or not the learned Judge should have permitted witnesses called by the prosecution to give evidence in rebuttal;

c. Whether or not the learned Judge erred in law in allowing prejudicial information with respect to a criminal charge and convictions to be received in evidence;

d. Whether or not the learned Judge properly exercised his discretion to revoke the bail of Kevin Reid when he attended for trial;

e. Whether or not the learned Judge misdirected the jury on the issue of identification;

f. Whether or not the learned Judge fairly summarized the case of the Appellant, Kevin Reid;

g. Whether or not the Appellant, Kevin Reid, received a fair trial; and

> h. Whether or not the sentence imposed by the learned Judge was excessive and well outside the bounds of the Sentencing Guidelines."

Issue a: no case submission and identification evidence

Summary of submissions

[49] In respect of this ground, Mr Bishop adopted the submissions in respect of identification made by Mr Gordon, and submitted that, in light of what he considered to be the tenuous and manifestly unreliable nature of the identification evidence in respect of the applicant Reid, the learned judge erred in ruling that there was a case to answer.

Discussion

[50] The submissions of no case to answer that were made on behalf of the applicants were based on the case of **R v Galbraith** [1981] WLR 1039. Of relevance is the dictum of Lord Lane CJ in **Galbraith** at page 1042 as follows:

> "Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[51] Of relevance too is the dictum of Lord Carswell in the case of **Director of Public Prosecutions v Varlack (British Virgin Islands)** [2008] UKPC 56 (1 December 2008). In that case at paragraphs 21 and 22 of the Board's advice, Lord Carswell opined as follows:

"[21] The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in *R v Galbraith* [1981] 2 All ER 1060, 144 jp 406, 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences.

[22] The principle was summarised in such a case in the judgment of King CJ in the Supreme Court of South Australia in *Questions* of Law Reserved on Acquittal (No 2 of 993) (1993) 61 SASR 1, 5 in a passage which their Lordships regard as an accurate statement of the law:

> 'It follows from the principles as formulated in *Bilick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence … He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence…
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends

> upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.'

A similar statement appears in a recent judgment of the English Court of Appeal, Criminal Division in *R v Jabber* [2006] EWCA Crim 2694, where Moses LJ said at para 21:

> 'The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude.'

Cf *R v Van Bokkum* (unreported) 7 March 2000 (EWCA Crim, 199900333/Z3), para 32; *R v Edwards* [2004] EWCA Crim 2102, paras 83-5; Blackstone's *Criminal Practice,* 2008 ed, para D15.62."

(Emphasis added)

[52] From the review of the identification evidence that was done earlier in this judgment, it could not be concluded that that evidence in the court below was weak, tenuous or unreliable. On the contrary, although the circumstances in which the

identification was made were not ideal, there was before the court, direct evidence on which a reasonable jury properly directed could find the charge in question proved beyond reasonable doubt. There is therefore no merit in the applicant Reid's contention on this issue.

[53] The applicant argued issues b and c together.

Issue b: rebuttal evidence; and

Issue c: admission of prejudicial information

[54] The background to the two grounds, which these issues encompass, is that, during the course of his lengthy unsworn statement (it covers some 23 pages, running from pages 434 to 456 of the transcript), the applicant Reid said the following:

> "All now mi can understand di bottom of dis how mi get involve of dis. From di day mi born mi neva charge much less tink about…" (page 446, lines 7 to 10)

[55] At page 451, lines 14 to 15 he is also recorded as saying:

> "Ah neva mix up wid any wrongs or any wrong doings, sir, in no form, sir."

[56] In seeking to rebut this assertion of never having been charged or mixed up in wrongdoing, the Crown applied for and was granted permission to lead evidence from two witnesses. The first witness, Detective Constable Pavaul Alexis Brown, testified that, on 13 March 2006 he had accosted the applicant Reid in the Succaba Pen area and arrested and charged the applicant with the offence of illegal possession of ammunition. In cross-examination, he stated that that charge was eventually dismissed by the court. The second witness, Detective Sergeant Llewellyn Madden, testified to having arrested

and charged the applicant Reid on the said 13 March 2006 with the offences of possession of ganja; dealing in ganja and possession of a chillum pipe. The applicant was tried for these offences, found guilty and was fined for all of them. It appears that the Crown became aware of these charges through the police by way of the police obtaining information from the applicant during the trial for the purposes of putting together an antecedent report in the event that he was convicted for the murder.

Summary of submissions

[57] The applicant's complaint in respect of these issues are that: (i) no evidence in rebuttal should have been permitted; and (ii) the evidence obtained from him when his antecedents were being taken, should not have been allowed to be used.

[58] Mr Bishop, on behalf of the applicant Reid, argued that the ganja convictions were spent and that no reference was to have been made to them as such reference is proscribed by the Criminal Records (Rehabilitation of Offenders) Act, in particular section 11(1)(c). He further submitted that the evidence led in rebuttal was highly prejudicial and that leading such prejudicial evidence is fatal to the conviction.

[59] This is how section 11 of the Criminal Records (Rehabilitation of Offenders) Act reads:

> "11.--(1) Subject to sections 13 and 14, and notwithstanding the provisions of any other enactment or the operation of any rule of law to the contrary, in any proceedings before a judicial authority exercising jurisdiction or functions in Jamaica-
>
> (a) no evidence shall be admissible to prove that a person has been charged with, or prosecuted for, or

convicted of or sentenced for, any offence which was the subject of a spent conviction;

(b) a person shall not in any such proceedings, be asked and, if asked shall not be required to answer, any questions relating to his past which cannot be answered without acknowledging or referring to a spent conviction or any circumstances ancillary thereto: and

(c) where a person has been asked in any proceedings a question relating to his past and he inadvertently discloses a spent conviction or any circumstances ancillary thereto such disclosure shall be disregarded by the judicial authority.

(2) For the purposes of this section and section 13, any of the following are circumstances ancillary to a conviction, that is to say-

(a) the offence or offences which were the subject of that conviction;

(b) the conduct constituting that offence or those offences; and

(c) any process or proceedings preliminary to that conviction, any sentence imposed in respect of that conviction any proceeding (whether by way of appeal or otherwise) for reviewing that conviction or any such sentence and anything done in pursuance of or undergone in compliance with any such sentence."

[60] On the other hand, Mr Duncan submitted that what was done was permitted by the provisions of section 13 of the same Act.

[61] These are the provisions of section 13:

"13. Nothing in section 11 shall affect the determination of any issue or prevent the admission or requirement of any evidence, relating to a person's previous convictions or to circumstances ancillary thereto-

> (a) in any criminal proceedings before a court (including any appeal or reference in a criminal matter);
>
> (b) in any service disciplinary proceedings or in any proceeding on appeal from any service disciplinary proceedings;
>
> (c) in any proceedings or enquiries relating to adoption or to the guardianship, wardship, marriage, custody care and control of access to, any minor, or to the provision by any person of accommodation, care or schooling for minors;
>
> (d) in any proceedings in which he is a party or witness if, on the occasion when the issue or the admission or requirement of the evidence falls to be determined, he consents to the determination of the issue or, as the case may be, the admission or requirement of the evidence notwithstanding the provisions of section 11."

[62] The first point to note when one considers the two sections (11 and 13) together, is that section 11 is "subject to" section 13. This means that, if there is any conflict or doubt as regards the application of the two provisions, it is section 13 that would be preeminent. Another point of observation is that section 11 refers to proceedings before "a judicial authority exercising jurisdiction or functions in Jamaica"; whereas section 13 deals with "criminal proceedings before a court". In fact, the marginal notes to each section seem to be consistent with the draftsman being desirous of marking some distinction between the two sections. For example, the marginal note to section 11 reads: "Inadmissibility in proceedings of evidence relating to spent conviction". On the other hand, the marginal note to section 13 reads thus: "Admissibility in criminal and other proceedings of evidence relating to spent convictions". So that while both sections treat with "proceedings", it is clear that section 13, by dealing specifically with "criminal and other proceedings", is the section that more directly addresses the matters with which

we are concerned – to wit, a criminal appeal and the criminal trial from which it arises. When this approach is taken, it lends support to Mr Duncan's submission on the applicability of section 13. We agree with the submission and find that the leading of the evidence was not in breach of the Act.

[63] Apart from our interpretation of the Act, based on the words contained in it, however, it seems that, considered from a practical standpoint, the approach contended for by Mr Bishop could not be tenable. It is important to note that, in this case, the fact of the applicant Reid having been charged in relation to the ammunition and convicted in relation to the ganja offences, is not being challenged by him. In fact, when asked whether he admitted the convictions, he said "yes" (see page 765, lines 1 to 5). If the learned judge had been persuaded, with the reference to section 11 of the Act, to have excluded the evidence, the position would have been that the applicant Reid would have been allowed to leave the jury with an incorrect impression: that he had never been charged, when he had in fact been charged, and in relation to several offences. The jury would have retired to consider the applicant Reid's fate based on this incorrect impression that he, himself, conveyed to them. If this was permissible, without the Crown being able to lead evidence in rebuttal correcting that incorrect impression, would that not be an open invitation to persons on trial and making unsworn statements, to say anything (whether intentionally or inadvertently) that might benefit their case, with the Crown being left with no recourse and juries retiring without a true picture of all the facts? As we see it, that is exactly the kind of situation that the right to call evidence in rebuttal was developed to counter.

[64] Guidance as to the circumstances in which it is permissible to give evidence in rebuttal has been given in a number of cases. Among them is the Canadian Supreme Court decision of **R v G (SG)**, [1997] 2 SCR 716. At paragraph 39 of the decision, Cory J, on behalf of the majority, opined as follows:

> "39. …the Crown should not be permitted to gain the unfair advantage which will inevitably arise from 'splitting its case'. The rule against 'splitting the case' developed primarily in the context of applications to adduce rebuttal evidence by the Crown. Applications to adduce rebuttal evidence and to reopen the case are 'close cousins', but not 'identical twins': *R. v. F.S.M.* (1996), 93 O.A.C. 201, at p. 208. Rebuttal evidence is properly admissible where the matter addressed arises out of the defence's case, where it is not collateral, and generally, where the Crown could not have foreseen its development: *R. v. Krause*, [1986] 2 S.C.R. 466, at p. 474; *R. v. Aalders*, [1993] 2 S.C.R. 482, at pp. 497-98. With rebuttal evidence, it is the rules of the adversarial process that justify the admission of the reply evidence…"
>
> (Emphasis added)

[65] The applicant Reid, therefore, also fails on this issue.

Issue d: discretion to revoke bail

Summary of submissions

[66] The submissions in respect of this issue were based on the contention that the applicant Reid had been on bail for several years before the start of his trial and had been complying with his conditions of bail. In those circumstances, it was submitted, his bail should not have been revoked at the start of the trial and, in fact, should not be revoked unless he had been in breach of section 16 of the Bail Act. Being brought to court in handcuffs and guarded in court, would likely have conveyed the view to the jury that he

was a dangerous man, who must be removed from society. The revocation of his bail, therefore, amounted to a breach of the Bail Act and of the Charter of Fundamental Rights and Freedoms (according to the submission).

Discussion

[67] Section 16 of the Bail Act deals with instances in which persons on bail fail to surrender to custody or absent themselves from court. In those instances, a warrant may be issued for their arrest. That does not appear to have been the case with the applicant Reid. Nothing appears on the record indicating the learned judge's reason for revoking his bail. However, it was revoked once the trial started.

[68] We do not believe that a person's bail should be arbitrarily revoked. It seems to us that the grant or revocation of a person's bail should be informed by the provisions of the Bail Act, which was enacted for that purpose, and the consideration that is central to that is ensuring that the defendant will surrender to custody.

[69] That having been said, we are reluctant to say anything more on the matter for two reasons. First, the issue relating to the revocation of the applicant Reid's bail was not a matter on which submissions were made and a decision given that would properly constitute a substantive ground of appeal. The issues on this appeal in relation to this applicant are identification, credibility and the plausibility or otherwise of his alibi. Second, in our view, it is, at best, speculative to say the jury likely viewed him in a negative light because he was in custody. In our experience persons in custody are sometimes acquitted and sometimes convicted. The same applies to persons on bail. Accepting this point would

mean an opening of the door to all persons convicted whilst remanded in custody, to challenge their convictions on the basis of their being tried whilst in custody or not having been permitted bail during the course of their trials. Even when viewed from the perspective of what might have been an arbitrary revocation of bail, we fail to see how that could fairly be seen as a constitutional breach that would avail the applicant of a sustainable ground of appeal in the circumstances of these applications.

[70] A similar argument was raised before this court and later before the Judicial Committee of the Privy Council in the case of **Donald Phipps v The Director of Public Prosecutions and the Attorney General of Jamaica** [2012] UKPC 24. There, the challenge was contained in the following supplemental ground of appeal, set out at paragraph 11 of the decision:

> "i) The appellant did not receive a fair trial because of the overwhelming prejudice to his case arising from procedural irregularities in the course of the trial namely:
>
> a) the jury was made aware that the appellant was remanded in custody and the co-accused was on bail…"

[71] At paragraph 14 of the Board's advice, this is what Lord Carnwath opined:

> "14. As to the first, the Board agrees with the Court of Appeal that no material prejudice arose from the mere fact that the appellant may have been seen to be in custody, while his co-accused was on bail. The judge had properly reminded the jury of their duty to arrive at their decision according to the evidence, uninfluenced by any prejudice against the appellant or bias in his favour. Morrison JA said:
>
> 'In our view, in all the circumstances of this case, these remarks by the judge would have sufficed to focus the minds of the jury, as persons of ordinary

> courage and firmness, on the business at hand, that is, to consider the evidence carefully and to render a true verdict according to law. While it would obviously have been best if the remand status of the applicant had been dealt with as a matter of routine after the jury had withdrawn, we do not think that to the extent that there may have been occasional departures from this ideal during the course of the long trial, any prejudice to the applicant has been demonstrated to have resulted from any such lapse.' (para 128)" (Emphasis added)

[72] In light of these considerations, and the learned judge's directions at pages 585 to 587 of the transcript as to matters such as sympathy and prejudice, the applicant Reid also fails on this issue.

[73] We may next deal with issue e.

Issue e: misdirection on the issue of identification

Summary of submissions

[74] The essence of the applicant's submission here is that the learned judge's directions on identification fell woefully short of what was required in this area of the law. This area has already largely been dealt with in relation to the applicant Brown and has been found lacking in substance. The additional submission appears to be (in paragraph 42 of the submissions for the applicant Reid) that the learned judge failed to warn the jury that mistakes can be made in cases of recognition. It is there stated that the learned judge:

> "did not tell the jury that: **'a witness who is able to recognize the defendant, even when the witness knows the defendant well, maybe wrong.' [See**

Judge's comments at Page V.2, page 619, lines 3-11]"
(Emphasis as in original)

[75] This submission might be regarded as being correct only to a very limited extent – that is, that the learned judge did not give the recognition warning at that particular point in his summation. However, this is what the learned judge said further in his summation, specifically at page 739, line 24 to page 740, line 6:

> "Remember I told you you might well think, that it is more likely that you would be able to identify somebody who you knew before than somebody you are seeing for the first time. However, even if you knew the person before mistakes can still be made. So you will have to bear that in mind, Mr. Foreman and members of the jury." (Emphasis added)

[76] The underlined words clearly satisfy the Turnbull requirement. The applicant Reid, therefore, also fails on this issue.

[77] It is convenient to consider issues f and g together.

Issue f: summary of the case; and

Issue g: fair trial

[78] The nub of the submissions here is to the effect that the learned judge failed to present the applicant Reid's defence in a fair and balanced way. It was submitted that "half of the comments made by the Judge was about what other witnesses told the court about Kevin Reid". Reference was made to volume 2, pages 725-730 of the transcript.

Discussion

[79] The learned judge's review of the applicant Reid's unsworn statement begins at page 725, line 1. In that review, the learned judge, in our view, accurately summarized

the main points of the applicant Reid's defence which included: (i) a denial of his involvement in the murder; (ii) that he lives in Portland and only visits Old Harbour occasionally and does not stay there for long; (iii) his connection to Marvin Bonner (through his mother, who has a "baby father" in Old Harbour); (iv) his alibi – that he was babysitting his son in Portland in the company of a young lady (and this was given with the warning that it was not for him to prove the alibi); (iv) that he did not know the persons with whom he was on trial; (v) that he got a phone call about the murder from Marvin Bonner's mother; and (vi) that he had never been charged for any offence. While conducting that review, the learned judge did mention the evidence of NP with a view to raising with the jury the appearance that, in some respects, NP, in her evidence about her familiarity with the applicant Reid, indicated his connection with Marvin Bonner and Old Harbour. The learned judge queried whether in these and other respects, NP and this applicant were not actually saying the same thing. On mentioning the applicant Reid's speaking of receiving the telephone call about the murder, the learned judge also mentioned the following:

> "He said when that thing happened, the phone call come from Marvin Bonner's mother. Remember Crown Counsel says why would anybody make a phone call if he is not connected and he does not know these people."

[80] In other words, the learned judge summarized Crown counsel's comment on the unsworn statement. Similarly, when reviewing this applicant's statement that he had never been charged, the learned judge referenced the evidence of the police witnesses who testified to having charged him in 2006.

[81] It seems to us that, in reviewing the applicant Reid's statement in this way, and, while doing so, mentioning related evidence in the case, all the learned judge was doing was giving proper context to the unsworn statement and to illustrate to the jury the importance of considering the statement, not in a vacuum, but against the background of all the evidence in the case. It being their duty, as jurors, to consider all the evidence in the case, it must be clear that this issue also has not been made out by the applicant Reid.

[82] Ground h deals with the contention that the sentence is unreasonable and excessive. We will consider that along with the similar contentions of the other applicants nearer to the end of the judgment.

Andrew Robinson

Grounds of appeal

[83] We may therefore at this juncture proceed to consider the submissions made in respect of the applicant Andrew Robinson. The following were his supplemental grounds for which he sought and was granted permission to argue, as well as to abandon those originally filed:

> "Ground one:
>
> The Learned Trial Judge summed up in such a way as to give the jury the impression that the only possible inference that could be drawn was that the presence of men with guns in the unfinished concrete structure of the premises combined with the presence of spent shells found there could only mean that shots were fired by those men from that concrete structure towards the board structure.

In doing so, the learned trial judge's summation fell short of the standard required to allow the jury to properly assess the evidence before them in arriving at a guilty verdict. Alternatively, there has been a miscarriage of justice in that the Jury should have drawn other inferences with respect to causation contrary to the crown's case since there was more than enough evidence for them to do so.

Ground two:

The Learned Trial Judge failed to direct the Jury properly on certain aspects of the law on identification, dock identification and identification parades and in so doing denied the Applicant a fair trial.

Ground three:

The Learned Trial Judge ought not to have called upon the Applicant to answer the charges against him being that the identification evidence against him was was [sic] not of good quality and a mere fleeting glance under difficult circumstances with no identification parade held and with the witness giving a description of the Applicant to the police that was inconsistent with how the applicant really looks. Alternatively, the conviction ought not to stand as the Jury erred in convicting the Applicant on the weak identification evidence presented in the case.

Ground four:

The Learned Trial Judge in his summation in referring to certain aspects of the evidence and the case did so in an unbalanced manner and in such a way as to mislead the jury and to result in an unfair trial in the following circumstances:

1. The Learned Trial Judge erred in his summing-up when he referred to the witness [NP] giving the alias Bait-up to the police (at page 664 of his summation) who she said is her cousin. The Judge failed to make it clear to the jury that they must determine as a question of fact whether Bait-up is really her cousin. Instead the Learned Judge used giving the name of Bait-up to the police as a gauge to test whether or not she really did know the real names of the other accused men.

2. The Learned Trial Judge erred in telling the jury that the Applicant does not deny knowing the witness. The Learned Trial Judge should have told them to determine as a question of fact if he is denying knowing her in light of his statement from the dock.

3. The Learned Trial judge erred in telling the jury (at page 618 of his summation) that the witness gave names to the police shortly after the incident. This suggests that she really knew them. The Learned Trial Judge should have told the jury that whether or not she gave their names to the police is a question of fact to be determined by them. It is also incorrect to say that she gave their names to the police. It was aliases that she gave to the police.

4. In giving directions on previous inconsistency (at page 650 of his summation) the Learned Trial Judge failed to explain to the Jury that the witness can change what is in their Statement at a police station or at a preliminary enquiry if they disagree with the evidence recorded before they proceed to sign it as being true and correct.

5. In reminding the Jury of [NP] evidence that she has described the Applicant in her Police Statement as being 5' 6" tall (at page 662 of his summation) the Learned Judge reminded the Jury that she had given an explanation that it was the police who estimated the height but the learned judge failed to remind the jury that she had signed the same police statement as being true and correct and also failed to remind them that her evidence is that it was read over to her and she had an opportunity to make changes if desired.

6. The Learned Trial Judge gave the jury his directions on identification evidence at page 620 of his summation and in doing so failed to warn the jury that even in recognition cases mistakes are made with respect to identification and that is also a reason to approach the identification evidence against the Applicant with caution and care. It is not until page 70 of his summation that the Learned Trial Judge says ‘even if you knew the person from before mistakes can still be made’ and in only saying this to the jury so long after discussing the topic would reduce the importance of the possibility of such mistakes in the minds of the jury and thereby disabling them from putting the statement in its proper context.

Ground five

The sentence is manifestly excessive."

Ground one: inferences

Summary of submissions

[84] In respect of this ground, Mr Taylor, on behalf of the applicant Robinson, submitted as follows (in summary):

> There is evidence in the case from which other possible reasonable inferences inconsistent with the Crown's case and guilt of the applicant could be drawn. This is said to be based on these facts:
>
> (a) spent shells were found elsewhere in the yard (other than in front of the house); (b) two other men were seen standing near the witness' house; (c) the witness said that the explosions sounded like they were coming from all over.
>
> On the basis of this it was submitted (page 7 of the submissions) that:
>
> > "…the possible inferences which could be drawn from these bits of evidence is [sic] that the shots were fired from elsewhere other than from the concrete structure and by persons other than those in the concrete structure".

[85] There was also a complaint in relation to a direction given by the learned judge at page 613, lines 19 to 22 of the transcript that:

> > "Again, in considering circumstantial evidence, you should be careful to distinguish between arriving from [sic] conclusions based on reliable circumstantial evidence and mere speculation."

[86] The submission in relation to that direction was that: "…the juxtaposition of the foregoing quote from the learned Judge at that particular juncture without any clarification could only serve to cause the jury to believe that to entertain the thought of other possible inferences based on the gunshot holes in the concrete structure and spent shells in the yard etc. [w]ould be speculating as the judge had warned".

[87] It was also submitted that the learned trial judge should have pointed out "…all possible reasonable inferences to the jury and to point out the evidential basis on which such other possibilities arise. It is submitted that the jury should be allowed to voluntarily reject those other possibilities but they must be told what they are" (Page 9 of the written submissions).

[88] On behalf of the Crown, Mr Duncan submitted that the appropriate directions were given and that (citing the case of **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26) no special directions were required concerning the availability of alternative inferences inconsistent with guilt. Citing the same authority, he further submitted that a conviction based on circumstantial evidence is safe, once founded on a hypothesis consistent with guilt beyond reasonable doubt that is legitimately available on the evidence.

Discussion

[89] The question of the directions to be given to a jury in a case of circumstantial evidence has been discussed in a number of cases, among them the case of **Melody Baugh-Pellinen v R**, cited by Mr Duncan. In that case, Morrison JA (as he then was) made the following observations at paragraphs [39] to [40] of the judgment:

"[39] As regards the proper directions to a jury on the subject of circumstantial evidence, **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 resolved the question whether any special directions were necessary in such cases by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. Delivering the leading judgment of a unanimous House of Lords, Lord Morris of Borth-Y-Gest said this (at page 510):

> 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or maybe so they could not say that they were satisfied of guilt beyond all reasonable doubt.'

[40] There is therefore no rule requiring a special direction in cases in which the prosecution places reliance either wholly or in part on circumstantial evidence. This was confirmed by this court in ***Loretta Brissett v R (SCCA No. 69/2002***, judgment delivered 20 December 2004) and ***Wayne Ricketts v R*** *(SCCA No. 61/2006*, judgment delivered 3 October 2008), in both of which **McGreevy** was cited with approval."

[90] A perusal of the transcript shows that the learned judge scrupulously gave the jury all the directions on circumstantial evidence that were required. For example, at pages 587, line 11 to 588, line 20, he began by giving the standard directions on inferences. Then, at pages 610, line 11 to 614, line 13 he gave the jury the required directions on circumstantial evidence. Of particular importance in this regard are the following directions that the learned judge gave at page 613, lines 2 to 17:

> "Now, circumstantial evidence can be powerful evidence but it is important Mr. Foreman and members of the jury, that you examine it with care and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are or maybe of sufficient reliability and strength to weaken or destroy the prosecution's case. So you look at the evidence to see whether or not there are any other conclusions that you can draw, any other conclusions which would weaken or destroy the prosecution's case."

[91] To our mind, these directions would have clearly made the jury aware of the need to examine other hypotheses, if any, that might have emerged from the evidence – even hypotheses and conclusions that went against the Crown's case.

[92] But there is another matter that, based on the evidence presented, gives rise to the following question: was there any or any sufficient evidence to support the other hypothesis for which counsel for the applicant Robinson contends? In other words, was there sufficient evidence to lead to a reasonable and rational inference that the fatal shot or shots could have been fired by others present at the scene at the material time? We entertain considerable doubt that there was. The Crown's case, it should be remembered,

was composed of various strands, including this evidence: (i) where the men NP says were the applicants were positioned; (ii) that they were all armed with guns; (iii) where the deceased was in the room in relation to the men; (iv) that spent shells were recovered in the area in which the armed men were seen, and so on. On the other hand, in respect of the other possible inference being contended for on behalf of this applicant, its three elements are that: (i) two other men were seen nearby; (ii) spent shells were seen at other parts of the premises; and (iii) the witness NP said it sounded like shots were coming from "all over". However, the main weakness with this hypothesis is that there is no evidence whatsoever of anyone, other than the men NP says were the applicants, being armed that night. So that, yes, two other men were seen; but there is no evidence that they were armed or that they were shooting. And there is no evidence of there having been anything akin to a shootout at the premises at the material time. So by what process of reasoning can one conclude that unarmed men standing around in the presence of armed men would have been there other than as participants in the common design? It seems to us that it would require a significant leap to arrive at the conclusion or find sufficient evidence to support the inference for which the applicant Robinson contends. This ground, for these several reasons, is therefore without merit.

Ground two: identification parade and dock identification

Summary of submissions

[93] It was the submission of Mr Taylor, on behalf of the applicant Robinson, *inter alia*, that the learned judge should have directed the jury that this was a case in which an

identification parade was desirable in light of the fact that the witness NP only gave the applicant's alias to the police and in light of the applicant's height that she gave as 5' 4".

[94] He further submitted that the learned judge ought to have warned the jury of the dangers of not having a parade when one ought to have been held and how to approach the issue of identification when a parade is desirable but not held. He also submitted that the learned judge ought to have given the appropriate warning on dock identification to the jury and further warned them to look at the identification evidence in respect of the applicant Robinson with caution, in light of the absence of an identification parade.

[95] On behalf of the Crown, Mr Duncan submitted that the standard directions necessary in cases in which there was no identification parade and where there was said to be a "dock identification" were articulated by the Privy Council in **Mark France and Rupert Vassell v The Queen** [2012] UKPC 28, and that those directions were applied by the learned judge. All directions that were necessary were given, he submitted.

Discussion

[96] The law in respect of identification parades and as to the circumstances in which they ought to be held, might be considered to be now well settled. In the case of **Mark France and Rupert Vassell v The Queen**, Lord Kerr, writing of behalf of the Board, stated the law on the matter at paragraph 28 of the Board's advice as follows:

> "28. It is now well settled that an identification parade should be held where it would serve a useful purpose – ***R v Popat*** *[1998] 2 Cr App R 208, per Hobhouse LJ at 215* and endorsed by Lord Hoffmann giving the judgment of the Board in ***Goldson and McGlashan v The Queen*** *(2000) 56 WIR 444.*

> *In* ***John v State of Trinidad and Tobago*** *[2009] UKPC 12, 75 WIR 429* addressing the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown considered three possible situations: the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances, an identification parade will obviously serve a useful purpose. In the second it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice – see ***Goldson*** at (2000) 56 WIR 444, 450."

[97] The witness NP's testimony of what she said was her knowledge of the applicant Robinson begins at page 44, line 5 of the transcript and runs to page 46, line 21 in respect of her examination-in-chief. In her said testimony she speaks to having attended Old Harbour High School with him, she being ahead of him in school. She testified as well that he lived in her scheme and that his house was about a four-minute walk away from hers. She also gave evidence of knowing his parents and that the last time that she saw him was about two weeks before the incident. At trial she gave his correct name and also gave his alias as "Fourie". Her testimony continued that the applicant and her brothers were friends, would play football together and that he would sometimes accompany her and her brothers on trips to the country.

[98] In her cross-examination, which begins at page 61, line 7 of the transcript, she was tested in relation to her evidence as to identification generally. She was also asked questions about her purported knowledge of the applicant Robinson from page 101, line 7 of the transcript, to page 109, line 16. It was put to her that: (i) this applicant did not live where she said he lived; but at least 25 minutes' walk away; (ii) that he never attended the Old Harbour High School; (iii) never visited her house; (iv) never went on excursions with them and was someone that she saw "very irregularly" (see page 104, lines 6 to 14. She was also challenged in relation to the height she gave in her statement in which she purported to describe the applicant Robinson as being 5' 4" tall.

[99] In cross-examination, she said that she was about 6' 2" but agreed that this applicant was taller than she. She agreed that she had identified him in her statement only by the name "Fourie"; but explained that by saying that, even though she knew his correct name at the time of giving her statement, she had not been asked by the police to give the full names of the men. She also stated that she had shown the police an indication of the height of this applicant and that it was the police who had assigned numbers to what she had shown them and had written the height of 5' 4" seen in her statement.

[100] In re-examination, she again stated that she had just shown the police what she thought to be the height of the applicant Robinson and it was he (the policeman) who had put figures to it.

[101] Of interest as well is the evidence of Detective Sergeant Michael Simpson who testified that, on first speaking with this applicant on a ward of the May Pen Hospital on 21 July 2007, this applicant acknowledged being known by the name "Fourie" (which was the name or alias given by the witness NP) (see pages 292 to 293 of the transcript). He also formally charged this applicant on that date. No identification parade was held for this applicant. The reason for this that he gave is to be found at page 373, lines 20 to 23 of the transcript in cross-examination by Mr Ernest Davis as follows:

> "Q. And what about the other two? Why didn't you give the other two an opportunity?
>
> A. Because they were taken into custody shortly after the crime was committed, sir."

[102] The "other two" refers to the applicants Robinson and Reid.

[103] In his unsworn statement to be found at pages 430-434 of the transcript, the applicant said that the witness, NP, is someone he had seen before, though she is not his friend and they do not speak. He is no friend of her brothers and has never been to the country with them. She is mistaking him for someone else, he said. His mother does not live in Old Harbour: she moved to the United States some 20 years ago. He denied attending Old Harbour High School and said he attended Spring Garden All-Age School. He was in Old Harbour Glades and not in Marley Acres the night of the incident. He did not go to the witness, NP's home that night. He is not a gunman, he said, and had nothing to do with the murder, and, in fact, does not know his co-accused.

[104] In his summation, the learned judge prefaced his directions on identification with the following words, recorded at pages 615, lines 11 to 15 of the transcript:

> "The defendant, each defendant, is saying that it was not me. You must be making a mistake about the identity of the person you saw, if she saw anybody out there at all."

[105] Of importance, as well, is what the learned judge said in respect of identification parades. This runs from page 619, line 17 to page 620, line 22, as follows:

> "Now in this case, Mr. Foreman and members of the jury, you heard that out of the four persons, two were placed on identification parades and two were not. Now Sergeant Simpson gave a reason for this. His is saying that it is not because he thought that Miss Pryce did not know the persons who she said she saw but because two were placed on parades were held sometime later but the two who were held shortly after he did not think it was necessary to hold an identification parade and you remember he was cross-examined about when is an identification parade needed. Now, an identification parade, Mr. Foreman and members of the jury, is a means by which you test whether or not a witness can identify a particular person. And this is most often used and should always be used when the person who is said to have committed the offence is not known to the person who saw him. Now in this case, Miss Pryce said she saw these persons and she gave their names to the police. Now an identification parade is also important and should be held where, although the witness said she knew the persons before this is being denied by the persons who are being identified. So you would have to look at this particular case, Mr. Foreman and members of the jury, what is been [sic] said are these persons denying that Miss Pryce knew them?"

[106] The aspect of the summation dealing with the applicant Robinson's unsworn statement is to be found at page 661, line 8 to page 663, line 25. That part of the summation contains directions from the learned judge that: it was being challenged that he had attended Old Harbour High School and that the defence was highlighting her

description of this applicant as being 5' 6" tall. Important as well was pages 662, line 22 to 663, line 1, which read as follows:

> "…[So] you have to look at that again, Mr. Foreman and members of the jury to see whether or not she was describing somebody who was different from the accused man Robinson.

Discussion

[107] The best place to begin this discussion is with a consideration of the three categories mentioned by Lord Brown in **John v State of Trinidad and Tobago** (2009) 75 WIR 429, in considering whether an identification parade would serve a useful purpose. The first ("where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime") is obviously inapplicable in this case. Here, although the suspect was taken into custody shortly after the commission of the crime, the witness claims to have had previous knowledge of the suspect. The witness claims detailed and close knowledge; whereas the applicant, even though he denies the extent of that knowledge, admits (from the thrust of the cross-examination at page 104, lines 5 to 13) sightings of himself by the witness, although "very irregularly".

[108] In relation to the other two categories, they are: "the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this…". In the circumstances of this case, the second category is not relevant, given this applicant's denial of several of the aspects of his life about which the witness NP testified to have known. It appears that it is the third category into which this applicant's case falls. It is

not a perfect fit, given his acknowledgment that the witness NP would have seen him before and given his acceptance to Detective Sergeant Simpson that he is known by the alias "Fourie". In relation to the third category, Lord Brown indicated that there are one or two further considerations: (i) "whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade". (ii)"If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice".

[109] In respect of this applicant, two positions were put before the jury for them to decide which, if any, to accept and which to reject: (i) the witness NP's contention that she knew him and her reasons for saying so; and (ii) the applicant Robinson's contention that she is only someone he had seen before, and only very irregularly. Although the jury did not have the benefit of the evidence as to his schooling that was put before us in the fresh evidence application, the fact that he was challenging the contention that he had attended Old Harbour High School was clearly and directly put to the jury for their consideration. They obviously rejected the applicant's contention in that regard. But, even if they had accepted that the applicant did not attend Old Harbour High School, that, along with the challenged evidence as to his height, was only a part of the witness NP's evidence as to her knowledge of and familiarity with him. The jury also had, for example, her evidence as to his close association with her brothers and his acceptance of the alias "Fourie". Against this background, it cannot be concluded retrospectively that the holding of an identification parade in relation to this applicant would have contributed to testing

his purported recognition by the witness NP. However, even if we are in error in coming to that view, we are of the view that no miscarriage of justice was occasioned thereby. It should be remembered in this regard that the witness gave this applicant's correct name in evidence and also testified to having known his correct name and those of the other men at the time of the incident; but did not give it before the trial as she was not asked to do so. That would have been an additional identifying factor.

The fresh evidence

[110] In addition to the matters observed in the immediately-preceding paragraph, there are a few other observations that might be made in respect of the fresh evidence that was led in this case.

[111] In the case of **Ladd v Marshall** [1954] EWCA Civ 1, Lord Denning gave guidance on the criteria for adducing fresh evidence as follows:

> "In order to justify the reception of fresh evidence or a new trial, three conditions mast be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

[112] In **Palmer v The Queen** [1980] 1 SCR 759, Laskin CJ in the Supreme Court of Canada, gave the approach taken in that jurisdiction (based on s 110(1)(d) of their Criminal Code) as follows:

> "(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen.*
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

[113] In **Benedetto v R** [2003] UKPC (7 April 2003), the Board (per Lord Carswell) after reviewing the West Indies Associated States Supreme Court (Virgin Islands) Ordinance (Cap 80) which governs fresh evidence applications in the British Virgin Islands from which that appeal arose, observed at paragraph 63:

> "Thus, under these provisions, the court has a discretionary power to receive fresh evidence, to be exercised when the court thinks it necessary or expedient to do so in the interest of justice."

[114] We are, of course, also familiar with section 28 of the Judicature (Appellate Jurisdiction) Act, the material parts of which read as follows:

> "28. For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) …
>
> (b) if they think fit, order any witnesses who would have been ompellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial…."

[115] We bore all these considerations in mind when we allowed the applicant Robinson to adduce evidence from his two witnesses as to his schooling. We did so with a view to having all relevant evidence before us. In doing so, however, we were and remain concerned that absolutely no explanation whatsoever has been given for the fact that that evidence, although from all indications available, was not given at the trial. This is clearly manifested in the fact that his counsel directly suggested to the witness NP that that applicant did not attend the Old Harbour High School.

[116] Putting that aside, however, and taking the evidence for what it was worth, we would again point to the totality of evidence adduced in respect of the identification of the applicant Robinson. These have been set out in paragraph [109] above. Suffice it to say that the school that the applicant attended was but one of the several matters referred to by the witness NP in giving evidence as to her knowledge of and familiarity with this applicant. The applicant Robinson's contention that he never attended Old Harbour High School; but that he attended the Spring Gardens All Age School was pointed out to the jury by the learned judge in his summation where at page 720, lines 10 to 12, he said:

> "Said he never attended Old Harbour High School, he went to Spring Garden All Age School."

[117] In the light of these circumstances, we fail to see how the fresh evidence could fairly be viewed as rendering the conviction unsafe; or that, if given at the trial, it is likely to have resulted in a different verdict.

[118] The fresh evidence that was led therefore does not take the matter any further.

The contention as to a dock identification

[119] It is very useful, when considering this issue, to bear in mind the discussion of what constitutes a dock identification by Lord Kerr in **Mark France and Rupert Vassell v R** at paragraphs 33 to 36. It reads as follows:

> "33. The argument that the trial judge should not have permitted a dock identification of the appellants and that he failed to deal adequately with the dangers of such an identification can be taken together and dealt with briefly. A dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified. The dangers inherent in such an identification are clear and have been the occasion of repeated judicial warnings – see, for instance, *Pop* (Aurelio) *v The Queen* [2003] UKPC 40; 147 SJLB 692, *Pipersburgh v The Queen* [2008] UKPC 11, 72 WIR 108; *Edwards v The Queen* UKPC 23, 69 WIR 360 and *Tido v The Queen* [2012] UKPC 16, [2012] 1 WLR 115. The inclination to assume that the accused in the dock is the person who committed the crime is obvious.
>
> 34. There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in both instances. Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time, 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock.'
>
> 35. In *Stewart v The Queen* [2011] UKPC 11, 79 WIR 409 the identifying witness, Ms Minnott, claimed to have known the appellant and his family for a long time. Although the defence attacked Ms Minnott's evidence on this, the Board held that

there was no real challenge to her in fact knowing the appellant and his family in the way she described and accordingly being in a position to have recognised them on the day of the killing as she said she did. At para 10, Lord Brown, delivering the judgment of the Board said:

> 'It is the Board's clear view that this cannot properly be regarded as a dock identification case at all. As already indicated, Ms Minnott knew not only the appellant but also his mother and his brother as well and it can hardly be thought that she was mistaken in her recognition of all three of them as having been present on the day in question. By the time she came to point out the appellant in the dock at trial (the 'dock identification' as Mr Aspinall seeks to characterise it) she had already told the police precisely who he was … It was in answer to the question 'and you see Peter Stewart here today?' that she pointed to the appellant in the dock. It was a pure formality.'

36.The same considerations apply here. This was not in any real sense a dock identification. It was, as Lord Brown said in *Stewart*, a pure formality. The warning in the present case needed to be directed, therefore, not to the danger of the witness assuming that the persons in the dock, simply because of their presence there, committed the crime but to the need for careful scrutiny of the circumstances in which the purported recognition of the appellants was made…"

[120] In the instant case, the applicant Robinson was not, at his trial, being identified in the dock for the first time. He had, for example, been previously identified at the preliminary examination. Additionally, at the trial, he had been identified by his correct name, with an explanation that the jury considered after a direct warning on the issue, as to why his correct name had not previously been given. He had also been identified by the giving of other details, which he denied. Those disputed facts were put to the jury and they clearly chose the witness, NP's account, in a context in which he admitted that the witness would have seen him before. In those circumstances, it seems to us that the

pointing out of this applicant at an identification parade would have been a mere formality. The focus of the learned judge's directions was on the correctness or otherwise of the identification of the men, given the circumstances surrounding the identification or recognition. In our view, that focus was the correct one.

[121] An important addendum to this that, in our view, weakens the dock identification argument is that the witness NP was required to correctly identify (and did correctly identify) the applicant Robinson, not sitting alone in the dock, but from among a group of four men, one of whom (Reid) had also not been previously pointed out at an identification parade.

[122] It is apparent, therefore, that the applicant Robinson has not made out any of his grounds of appeal challenging his conviction.

Sentencing

[123] All the applicants have challenged the sentences that were imposed on them as being manifestly excessive.

[124] Before the hearing of these applications, the court had obtained copies of psychiatric and social enquiry reports to assist it in conducting an informed review of the sentences, if it became necessary.

[125] We may now consider the contentions of each applicant.

Kevin Reid

[126] On behalf of the applicant Reid it was contended that: "This sentence of 35 years is way above the normal number of years or the normal range [NR] as outlined in the Sentencing Guidelines" (see paragraph 49 of the written submissions, dealing with issue 8 on behalf of this applicant). It was also submitted (at paragraph 51) that: "the period before parole should be 15 years".

Kevin Brown

[127] Mr Gordon submitted on behalf of the applicant Brown, by way of ground 6, that the period of 35 years to be served before parole was excessive, having regard to the unblemished record of the applicant and the fact that the conviction was a non-capital conviction. It was submitted that no account appears to have been taken of the six years that the applicant Brown had spent in custody. Also challenged was the apparent starting point of the learned judge. It was submitted that, calculating backwards from the pre-parole period finally imposed, it would appear that the starting point that the learned judge had in mind was 45 years, which would be way out of step with sentences imposed for similar offences. We were asked to have a special regard to the positive comments made about this applicant in the social enquiry report.

Sandus Simpson

[128] This applicant's challenge to the sentencing came in his ground 2. His and the applicant Robinson's challenge to sentencing were similar. The challenge was framed somewhat differently from those of the other two applicants - Reid and Brown. This is how ground 2 for the applicant Simpson reads:

> "Ground 2: The delay in the hearing of the trial and this appeal are breaches of the applicant's Constitutional right to a fair trial within a reasonable time- section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution."

Summary of submissions

[129] On behalf of the applicant Simpson, Miss Anderson submitted, as outlined in ground 2 of his grounds of appeal, that it was the duty of the state to bring the applicants to trial within a reasonable time. She further submitted that, because of what she termed the "extraordinary delay" in performing its duty, the state has made the applicant Simpson suffer. In support of this submission she cited the authority of **McCordie Morrison v The Chairman of the Parole Board and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 24/2003, judgment delivered on 2 March 2004.

[130] Miss Anderson also cited the case of **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, in which there was a three-year delay in total up to the completition of the trial and a four-year delay before the hearing of the appeal. In particular, Miss Anderson relied on the dictum of Smith JA to the effect that such delay as existed in that case amounted to a breach of that appellant's constitutional right to a fair hearing within a reasonable time as required by what is now section 16(1) of the Charter.

[131] In relation to the remedy for such a breach, Miss Anderson referred to the Board's decision in the case of **Tapper v Director of Public Prosecutions**, in which, at

paragraph 26, the case of **Attorney General's Reference** [2004] 2 AC 72, was discussed and the following stated:

> "…if the breach of the reasonable time requirement is established retrospectively after there has been a hearing, the appropriate remedy may be a public acknowledgment of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant…"

[132] In **Tapper v Director of Public Prosecutions**, as well, reference was made to **Boolell v The State** [2006] UKPC 46, in which the principles stated in the **Attorney General's Reference** were summarized. The Board held that the law as stated in **Attorney General's Reference** and **Boolell v The State** is applicable to Jamaica, she submitted. Finally, in terms of what the appropriate remedy would be in this case, she submitted that it would be a reduction in the number of years stipulated for him to serve before becoming eligible for parole.

Andrew Robinson

Summary of submissions

[133] Mr Taylor, in his written submissions, cited the same main cases as Miss Anderson and used the same line of argument in his attempt to persuade the court to reduce his client's pre-parole period. At paragraph 12 of his written submissions, Mr Taylor submitted that:

> "…the remedy for the breach of Mr. Robinson's right to a fair trial and a hearing of his appeal within reasonable times is a reduction of the sentence determined against him as it concerns the years before he is eligible for parole. It is

> submitted that a pre-parole period of 25 years is more appropriate in the circumstances."

[134] On behalf of the Crown, Mr Duncan submitted that the sentence of imprisonment that was imposed on each applicant was within the range of sentences normally given upon convictions for murder. Further, it was submitted, the sentencing remarks made by the learned judge reflected the fact that he had paid due attention to all the salient considerations with respect to sentencing and so the sentences ought not to be disturbed.

[135] In relation to the submissions concerning delay made on behalf of the applicants Simpson and Robinson and the cases cited therein, Mr Duncan reminded the court that a reduction in a sentence was not the only remedy available when delay occasioning a constitutional breach had been established. Another remedy available, he said, was a public acknowledgment of the breach.

[136] Mr Duncan further submitted that in **Lincoln Hall v R** [2018] JMCA Crim 17, this court declined to follow **Tapper v Director of Public Prosecutions** , on the basis that the reason for the pre-trial delay in **Lincoln Hall v R** was not known. Similarly, with this case, he submitted, no information has been provided to the court concerning the cause of the delay.

Discussion

[137] In respect of these applications, the murder was committed on 11 July 2006 and the sentences were imposed on 22 March 2013, the trial having begun on 5 March 2013. This represents a gap of some seven years between when the offence was commited and when the applicants were sentenced. The applicants' notices of appeal or applications for

permission to appeal were filed between 2 and 4 April 2013, with decisions coming from the single judge on 25 January 2016. The renewed applications for permission to appeal were heard in December of 2018. This represents a further interval of some five or so years. Without a doubt, we are concerned about these periods of what could be construed as delay. However, as Mr Duncan submitted, we have no information as to the causes or contributing factors to these periods of "delay". Delay in the hearing of an appeal or the commencement of a trial can be due to any number of factors – such as, for example, backlog in the court system; delay in defendants securing legal representation; unavailability of counsel on mention and trial dates occasioning adjournments; delay in the completion of files by the police and so on. In respect of some of these factors, blame would have to be laid at the feet of the state. However, in respect of others, say difficulty in retaining counsel or counsel's being absent on trial dates, it would be unfair to attach blame to the state for those. In these circumstances, our concern notwithstanding, we find ourselves unable to confidently declare that there has been a breach of the constitutional rights of these applicants by reason of delay. We simply do not have enough information to be in a position to do so.

[138] In relation to the applicants' contention that the duration of the pre-parole period that was specified is excessive, counsel sought to rely on a number of cases. However, it is important to observe that no two cases are exactly alike. Accordingly, the cases that a court is asked to consider can only be used as general guides. So that, while there are cases that seem to support the contention that a pre-parole period of 30 years might be more in keeping with the sentences generally imposed for the offence of murder, there

are others with higher sentences. One such case is that of **Anneth Livingston, Ramon Drysdale and Ashley Ricketts v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77, 81 & 93/2003, judgment delivered on the 31 July 2006. In that case, the appellants had been convicted for the offence of murder carried out by a common design that ended with the cutting of the throat of the deceased. The trial judge had sentenced them to life imprisonment with the stipulation that they serve 60 years each before becoming eligible for parole. On appeal to this court, their pre-parole period was reduced to 35 years. On further appeal to the Judicial Committee of the Privy Council, Livingston's appeal against conviction was allowed; but Drysdale's application for special leave to appeal to Her Majesty in Council was refused, effectively confirming as appropriate his pre-parole period of 35 years.

[139] It is, we think, important in this discussion to remember the facts and circumstances of this case. Those facts involve a gang of men, all armed with guns, launching a gun attack directed at a board house occupied by several persons, firing several salvos in the process. The result was that one person died and two children were injured (though the injuries and any charges that might have arisen therefrom do not form a part of this case). Against this background, we cannot say that the pre-parole period imposed of 35 years, looked at by itself, was manifestly excessive. There is, however, another issue that will shortly be addressed.

[140] A concern arose about the fact that the pre-parole period was applied "across the board" to all of the applicants, without any differentiation. However, an important factor for consideration is that, from the evidence, none of the applicants played a role that was

greater or less than the others – they all opened gunfire at the house together. Another factor is that, although some of them (viz., Reid and Brown) had convictions, because the nature of the convictions was different from the offence of murder for which these applicants were convicted, the previous convictions were not taken into account by the learned judge in passing sentence (see the learned judge's comments in this regard at page 780, lines 3 to 8 of the transcript).

[141] We can also see the taking into account by the learned judge of the time the applicants spent in custody before sentencing. There are several authorities indicating that this is now the settled position (see, for example, **Romeo DaCosta Hall v The Queen** [2011] CCJ 6; and **Meisha Clement v R** [2016] JMCA Crim 26).

[142] At this juncture, it is useful to set out the learned judge's final sentencing remarks to be found at page 782, line 17 to page 783, line 22. That part of the transcript reads as follows:

> "In my view, in light of all the circumstances of this case, an appropriate sentence, first, that each of you be imprisoned, kept at hard labour for life. The law requires that is what I do. So I stipulate a period which must be served before you are eligible for parole. When I look at the circumstances of this case, two rooms in a board house and shots being fired indiscriminately, in that one of the first figure that came to my mind was forty-five years, and I say that because none of you seemed to have cared whether or not the whole household was wiped out, shots being fired into a board house where these persons were, including two children, a baby and a six-year-old. That was the first thing that came to my mind.
>
> I was asked to consider the period that you have served before you were granted bail. It would seem that the figure of six years would be more or less what most of you would

> have served before you were granted bail. I'll make that deduction as counsel has asked me to do. But I'll make a further reduction in the sentence, and you can consider yourselves all lucky that each of you be imprisoned and put at hard labour for life, not to be eligible for parole until you have each served thirty-five years. So that is the sentence which I pass in relation to this matter."

[143] This excerpt from the transcript discloses that the learned judge deducted from the pre-parole period that he initially had in mind, six years for each applicant. He also indicated that he was deducting a further (unspecified) period. Since the pre-parole period ultimately imposed was 35 years, this gives weight to Mr Gordon's contention that the learned judge's starting point might have been around 45 years or thereabouts. There would have been no justification for this, given the previous sentences that we have considered.

[144] It seems to us, from a review of sentences imposed in fairly-similar circumstances, that, when all the factors are considered, the pre-parole period for the applicant Simpson should be 35 years and that it is from that figure that his time spent in custody should be deducted. We note, in arriving at this figure of 35 years, that the applicant Simpson has been diagnosed by the consultant forensic psychiatrist, Dr Clayton Sewell, in his report of 3 March 2017 as meeting the criteria of having an antisocial personality disorder. This condition, Dr Sewell states at page 3 of his report, is:

> "…associated with a relatively lower likelihood of the success of psychotherapeutic interventions aimed at rehabilitation. There is also a higher risk of repetitive antisocial behavior in Mr Simpson's case."

[145] His period in pre-trial custody is stated by his counsel at page 774, lines 9 to 11, as six years and six months. There was no challenge to this. He should be credited with this period and it should be deducted from the 35 years.

[146] None of the other applicants was diagnosed with an antisocial personality disorder and the consequential treatment challenges. It seems to us that a pre-parole period of 33 years would be appropriate in each of their cases. Each applicant is also to be given credit for six years spent in custody.

[147] In the result, the orders are as follows:

> (i) The applications for permission to appeal against conviction are all refused.
>
> (ii) The applications for permission to appeal against sentence are granted in respect of all applicants.
>
> (iii) The hearing of the applications for permission to appeal against sentence is treated as the hearing of the appeals.
>
> (iv) The sentence of life imprisonment at hard labour for each applicant is affirmed.
>
> (v) The stipulation that the applicant Sandos Simpson serve a period of 35 years is affirmed; but he is to be credited with the period of six years and six months that he spent in pre-

sentence custody, thus making his pre-parole period 28 years and six months.

(vi) The pre-parole period of 35 years stipulated for each of the applicants Reid, Brown and Robinson is set aside. Substituted therefor in respect of each applicant is a period of 33 years. From that figure, each of the applicants Reid, Brown and Robinson is to be credited with the six years that each spent in pre-sentence custody, thus making the pre-parole period for each, 27 years.

(vii) The sentences are to be reckoned as having commenced on the date on which they were imposed, viz, 22 March 2013.