[2021] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MR JUSTICE FRASER JA

SUPREME COURT CRIMINAL APPEAL NOS 28, 29, 37 & 38/2011

SYLVAN GREEN
ALROY SHAW
RICARDO TAYLOR
RICK THORPE v R

Linton Gordon and Obika Gordon for the applicant Sylvan Green

Oswest Senior-Smith for the applicant Alroy Shaw

Anthony Williams for the applicant Ricardo Taylor

Ravil Golding for the applicant Rick Thorpe

Mrs Taneshia Evans Bibbons for the Crown

23, 24 November, 18 December 2020 and 25 June 2021

MCDONALD-BISHOP JA

[1] The circumstances of the commission of the offence of murder, in this case, were, indeed, tantamount to "domestic terrorism" as one counsel so aptly described it. It was a deadly attack perpetrated during a night-time invasion of a dwelling house in Retirement District, Granville, in the parish of Saint James on 18 November 2006. At least four men, some dressed in police vests, and armed with firearms, invaded the home of a family of nine persons, including a toddler. At the end of the attack, the gunmen left in their wake four dead bodies, and of the five occupants who remained alive, three were suffering from gunshot wounds.

[2] Upon the completion of police investigations, Messrs Sylvan Green, Alroy Shaw, Ricardo Taylor, and Rick Thorpe ('the applicants') were arrested and charged. Between 10 January and 8 April 2011, they were tried and convicted on an indictment containing four counts before Sykes J (as he then was) ('the trial judge') sitting with a jury in the Circuit Court Division of the Gun Court held in Saint James.

[3] In the particulars of offence of the indictment on which the applicants were charged, it was alleged that they murdered Lyris Ellis-Johnson (count one), Dalton Johnson (Jnr) (count two), Kirth Wilson (count three) and Kaya Wilson (count four). Lyris Ellis-Johnson was the mother of the other three victims named in the indictment.

[4] At the conclusion of the trial, which ended with 11 jurors, as one juror was discharged, the jury returned a majority verdict (10/1) of guilty on each count of the indictment against all four applicants. However, the trial judge accepted the verdict only on count one concerning the murder of Mrs Lyris Ellis-Johnson and ordered a retrial on the remaining counts. He did so on the basis that, on a proper construction of section 44(1)(a) of the Jury Act, he could not properly take a majority verdict on the remaining counts of the indictment.

[5] On 8 April 2011, the applicants were sentenced on count one, which charged them with the murder of Mrs Lyris Ellis-Johnson. Sylvan Green and Alroy Shaw were both sentenced to 35 years' imprisonment at hard labour with a stipulation that they both serve a minimum period of 20 years' imprisonment before their eligibility for parole. Ricardo Taylor was sentenced to 25 years' imprisonment at hard labour, with the stipulation that he serves a minimum of 15 years' imprisonment before his eligibility for parole. Rick Thorpe was sentenced to 30 years' imprisonment at hard labour with the stipulation that he should serve a minimum of 19 years' imprisonment before his eligibility for parole.

[6] Aggrieved by the outcome of the trial, the applicants each filed an application in this court for leave to appeal his conviction and sentence. A single judge of the court

considered the applications and refused leave to appeal. The applicants have renewed their applications before the court, as is their right to do.

[7] On 18 December 2020, the court, having heard and considered the submissions of counsel on the renewed applications, within the framework of the evidence advanced at trial and the applicable law, made the orders delineated below:

> "1. The applications of all four applicants for leave to appeal against conviction are refused.
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> 2. The applications of all four applicants for leave to appeal sentence are granted and the hearing of the applications for leave to appeal sentence is treated as the hearing of the appeal against sentence.
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> 3. The appeal against sentence is allowed, in part, in respect of all four applicants and the following orders are made to allow credit for four years spent in pre-sentence custody:
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> (i) **Alroy Shaw** - the sentence of 35 years' imprisonment at hard labour is set aside and substituted therefor is a sentence of 31 years' imprisonment at hard labour. The stipulation that a minimum period of 20 years' imprisonment is served before eligibility for parole is affirmed.
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> (ii) **Ricardo Taylor** - the sentence of 25 years' imprisonment at hard labour is set aside and substituted therefor is a sentence of 21 years' imprisonment at hard labour. The stipulation that a minimum period of 15 years' imprisonment is served before eligibility for parole is affirmed.
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> (iii) **Rick Thorpe** - The sentence of 30 years' imprisonment at hard labour is set aside and substituted therefor is a sentence of 26 years' imprisonment at hard labour. The stipulation that a minimum period of 19 years' imprisonment is served before eligibility for parole is affirmed.
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> (iv) **Sylvan Green** – the sentence of 35 years' imprisonment at hard labour is set aside and substituted therefor is a sentence of 31 years' imprisonment. The stipulation that

a minimum period of 20 years' imprisonment is served before eligibility for parole is affirmed.

4. Each sentence is to be reckoned as having commenced on 8 April 2011, the date it was imposed."

[8] We promised then to reduce our reasons for the decision to writing. This is in fulfilment of that promise.

[9] Before embarking on the consideration of the applications, it is considered useful to offer a brief insight into the salient facts, which provided the relevant context for the review of the central issues raised for the court's consideration.

The case at trial

(a) The prosecution's case

[10] The case against all four men rested primarily on the eyewitness accounts of three occupants of the house that was invaded, Miss Kim Wilson, Mr Dalton Johnson (Snr) and "J" (a minor). The witnesses collectively testified that they were at their home with the four deceased family members when men armed with firearms entered their home and fired shots at the occupants. Seven occupants of the house were shot - four fatally. They all died on the spot. Miss Kim Wilson and the toddler were the only occupants of the house who escaped being shot. The witnesses all placed the applicants on the crime scene, being armed with firearms, and actively participating in the invasion.

[11] Miss Kim Wilson was the main witness for the prosecution, and her evidence was particularly critical to the application for leave to appeal of the applicant, Alroy Shaw. The material aspects of her evidence may be outlined as follows: she is the daughter of the deceased, Mrs Lyris Ellis-Johnson, and the other victims' sister. She was watching television with her two deceased brothers, Kirth Wilson and Dalton Johnson (Jnr) when she heard dogs barking in an "unusual manner". As a result, she looked through the

louvre windows in her living room, which doubled as her bedroom. She saw a group of men entering her yard, all brandishing handguns. With the assistance of streetlight and light on the veranda, she identified the four applicants among the group of men. She knew them all before, by their names and aliases for varying periods, each spanning at least a decade.

[12] Upon seeing the men, she spoke to her brother, Kirth Wilson, and then ran and stooped behind the door, which led to her mother's bedroom. This room abutted a book press. She looked through the space between the door and the book press to see the front door. She then heard banging on the door with shouts of "Police! Open!". The door was then kicked open, and Kirth Wilson kicked it back. One of the men asked him, "[w]eh di gal Kim deh?". The man then pointed a gun at Kirth Wilson and said, "informa fi dead!". She observed that her brother was shot and injured. She first testified that the man who spoke and fired at her brother was Alroy Shaw, but later, upon being cross-examined, she changed her testimony to say that it was, in fact, Ricardo Taylor.

[13] Miss Wilson also testified that during the shooting of her brother, Kirth Wilson, she saw Sylvan Green enter the room with a handgun in his hand. Her two-year-old son began to cry, and her mother, Mrs Lyris Ellis-Johnson, ran inside the room and picked him up. Sylvan Green was still inside the room at that time. She then saw Ricardo Taylor point a gun in the direction of her mother, and she heard loud explosions. She was able to see with the aid of light from an electric bulb in the living room.

[14] The second eyewitness, Mr Dalton Johnson (Snr), who was the husband of Mrs Lyris Ellis-Johnson, stated that he was in his bedroom with his wife, and "J", when he heard banging on the living room door and shouts of "Police!" He hid under his bed, and he heard a banging sound from the door leading to his bedroom from the veranda. The door eventually broke, and persons entered the room. Someone lifted the bed, and he saw "about three individuals in the room". One of them, he identified as Sylvan Green o/c Ping Wing, and the other as Ricky Thorpe o/c Tappa Rat. He was able to see

the men from their heads to their feet because there was light in the room from a fluorescent bulb, the television and computer screens. He knew both men for about four to five years before the incident and would see them regularly. He had last seen them passing his gate on the day before the incident.

[15] The third eyewitness, "J", stated that he was playing video games in his parents' bedroom when he heard a loud bang on the front door. He then heard when the door was opened, and loud explosions followed. Upon hearing the explosions, he went underneath the bed and joined his father. He then heard the room door kicked open, and he moved up to the head of the bed to see who it was. He was able to see inside the room from the light on the veranda and in the bedroom from the television and computer monitors. At the time, he only knew Sylvan Green by his alias 'Ping Wing', and he had a frontal view of his face and entire body. He knew Sylvan Green for about four years in the community and had last seen him the day before the incident at a welding shop.

[16] "J" attended an identification parade on 5 December 2006, where he positively identified Sylvan Green as one of the men who was present inside his home on the night of the incident. No other identification parade was held in respect of Sylvan Green or the other applicants.

[17] The case against Rick Thorpe was further buttressed by the discovery of a DVD player, which was found at premises that he allegedly occupied. Miss Kim Wilson identified the DVD player as her property, which was at her house on the night of the incident but was missing when she returned on 19 November 2006.

[18] Ricardo Taylor was further implicated in the murder by damning admissions he made orally and in written cautioned statements to the police.

(b) <u>The applicants' case</u>

[19] At the trial, all the applicants gave unsworn statements from the dock, in which they denied involvement in the incident. Sylvan Green raised a defence of alibi, whilst

the other applicants simply denied knowledge of and participation in the incident. They only explained that on the night they were apprehended by the police and informed of the allegations of their involvement in the commission of the offence, they were travelling in a motor vehicle on their way to Saint James from a political party conference in Kingston.

[20] In his effort to account for the admissions he allegedly made to the police, Ricardo Taylor stated that the police forced him to say things that he knew nothing about. According to him, he was "beaten" and "stressed out and frustrated", and he "just made up something and told [the police]". He said the police then asked him to sign a piece of paper, which he signed as "R. Taylor" (pages 1110 to 1112 of the transcript).

[21] In relation to the discovery of the DVD player, Rick Thorpe denied that the police had found anything at his home and stated that the first time he saw the DVD player was in court.

Applications for leave to appeal conviction

(a) Sylvan Green, Ricardo Taylor and Rick Thorpe

[22] At the hearing of the applications, three of the applicants, Sylvan Green, Ricardo Taylor, and Rick Thorpe sought leave to pursue their applications for leave to appeal against their sentences only. They rightly accepted, through their counsel, that they faced an insurmountable challenge to pursue an appeal against conviction. They, therefore, did not advance any argument in support of the application for leave to appeal their convictions.

[23] The court accepted the position taken by these three applicants as a proper one because they had no prospect of succeeding on appeal in their arguments that their convictions were unsafe. There was more than enough evidence against each of them to satisfy the jury to the requisite standard, upon proper directions in law from the trial judge, that they were each guilty of the murder for which they were charged on count

one of the indictment. The trial judge's directions to the jury were comprehensive, accurate, balanced and, therefore, above reproach.

[24] Therefore, it was inevitable that the applications of these three applicants for leave to appeal their convictions should be refused.

(b) Alroy Shaw

[25] The only applicant to persist in his challenge against his conviction was Alroy Shaw. He sought and obtained leave to abandon his original grounds of appeal and to argue the solitary supplementary ground that the trial judge erred when he left the case against him for the jury's consideration. Although Mr Shaw's application was for leave to appeal both conviction and sentence, no ground was advanced concerning sentence, either in the B1 form or in the supplementary ground of appeal. It would appear that Mr Shaw was confident his leave to appeal his conviction was meritorious and would have succeeded. The court, however, was not persuaded to share that view for reasons, which will now be detailed.

[26] The ground of appeal advanced by Alroy Shaw against his conviction was framed in these terms:

> "The Learned Trial Judge Erred When He Left The Case Mounted Against The Applicant For The Jury's Consideration."

[27] In advancing the arguments in support of this ground, Mr Senior-Smith advised the court that he would not contend that the trial judge should have upheld the no-case submission. He argued that the trial judge should not have left the case for the jury's consideration during the summing up. It is considered prudent to rehearse the written submissions of counsel in his words, for fear of doing violence to his formulation and meaning:

> "The extracts of inconsistencies parsed by the Learned Trial Judge in the summation monumentally adversely affected and undermined the Prosecution's case.

> These reversals in the testimony of the sole eyewitness against the Applicant were significant in eroding the reliability of the Prosecution's assertions.
>
> Cumulatively, and severally, the infirmities in the unbuttressed identification evidence damaged the root of the plinth that supported the case that was marshalled in reference to the Applicant.
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> The Learned Trial Judge, as a result, respectfully, ought properly to have withdrawn the case from the jury, when, particularly during the summation he outlined a course demonstrating how fundamentally, Miss Kim Wilson had been impugned during cross-examination.
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> It is submitted that given the number and the nature of the variances in Miss Wilson's evidence, and the tenor of the apparent incredulity excited from the Bench, the jury was incapable of reconciling the inherent conflicts to render a just verdict.
>
> Indeed, the apt analysis undertaken by the Learned Trial Judge in relation to Miss Kim Wilson showed a textbook and classic example of a 'manifestly discredited' witness, and revealed at best a 'borderline' case against the Applicant. The Applicant lost the protection of the law, and thereby was exposed to conviction, as the assessment showed Miss Kim Wilson's evidence to provide only a slender base, unreliable and insufficient to found a conviction."

[28] In reinforcing his arguments that the case against Alroy Shaw ought not to have been left to the jury during the trial judge's summation, counsel pointed to, and relied on, 40 or so extracts from the summation regarding Miss Kim Wilson's purported identification of Mr Shaw. Counsel argued that after Mr Shaw's case was closed, the evidence against him was so poor that it was incumbent on the trial judge to withdraw the case from the jury. He argued that the central flaw was the inconsistencies in the evidence of Miss Wilson, the only witness who, purportedly, identified Mr Shaw.

[29] Counsel relied on the well-known case of **Wilbert Daley v The Queen** (1993) 30 JLR 429, and a case from this court, **Prince Emanuel Dell v R** [2012] JMCA Crim

27, to forcefully make the point that the trial judge was duty-bound to withdraw the case from the jury during his summation in the light of the inconsistencies in Miss Wilson's evidence that related to the identification of Mr Shaw. Although Mr Senior-Smith pointed to various aspects of Miss Wilson's testimony as requiring close scrutiny by the court, it can safely be said that the kernel of Mr Shaw's complaint largely emanated from the inconsistency in the evidence of Miss Kim Wilson as to who she saw fire at her brother upon entering inside the house and uttered the words "informa fi dead". In her evidence-in-chief, Miss Wilson stated that Mr Shaw was the man who did so; however, during cross-examination, when challenged on the accuracy of that bit of evidence, she accepted that in her statement to the police, she had identified that man to be Ricardo Taylor. In re-examination, she explained that she had made a mistake in naming Mr Shaw in court as the man who spoke to, and fired at, her brother because of the lapse of time since the incident, which was approximately five years.

[30] Miss Wilson had given detailed evidence of the circumstances in which she identified Mr Shaw on the night in question and her prior knowledge of him, which the trial judge pointed out to the jury in treating with the inconsistencies in her testimony. Some salient aspects of the evidence going to the identification of Mr Shaw by Miss Wilson, which the trial judge focused on in his directions to the jury, were the following (page 1223 line 10 to page 1224 line 13 of the transcript):

(a) she knew Mr Shaw for over 10 years;

(b) she knew him in her community and from their attendance together at the Granville All-Age School. They were schoolmates, but he was in a grade above her;

(c) she would see him in and around the community and in a specific place called Nampriel;

(d) she would see him almost every day - roughly three days per week - and in the daytime;

(e) the last time she saw him was a day before the incident.

[31] The trial judge, having reiterated those aspects of the evidence to the jury, then directed them, in part (page 1224 line 13 to page 1227 line 25 of the transcript):

> "So what she is setting out here, is that on the face of it, you would say she has extensive knowledge of Mr. Shaw. And from the Prosecution's standpoint, they are saying to you, boy, she know[sic] this man for over ten years, she sees him, roughly, sometimes three days for the week, sometimes on a regular basis, she says. So you would want to think, remember she was twenty-four when the incident occurred, right, which means that it is about ten years, she knew him from he was around thirteen, fourteen years old. And they were growing up, according to her, as young people in the community.
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> So you want to say to yourself, well, boy, she really know this man. But remember now, the same Mr. Shaw that she says she knew for this decade she said she made a mistake when she said it was Mr. Shaw she saw shooting her mother [sic]. What was the mistake? When it was pointed out to her that on previous occasion she said, Taylor, she said, well, if I mek a mistake and seh, Shaw, well, it is really a mistake, it is really, Taylor.
>
> So here it is that you have the witness saying I have made a serious error in respect of someone that she says she knew for at least a decade. And it is not like you see the man when you are fourteen, and the next time you see him is when you are twenty, and next time you see him is when you are twenty-three. What she is saying is she saw him virtually continuously over this decade, three days a week. He is out and about in the community.
>
> She was saying there was light inside the room, inside the living room, TV light, bulb light. So you will have to say, based upon that now, is she truthful? If you say she is truthful; is she reliable? Remember that she is the only witness that has identified Mr. Shaw, so remember now, you have to look at the evidence separately against each defendant.

> She says further, that on the night in question she first saw Mr. Shaw, at her gate. I saw his face, saw him for about forty-five minutes. Now she was asked to point out the distance, and the distance that she pointed out, she said Shaw was from where I was standing, out to the lady, and she was pointing at one of the shorthand writers, and it was estimated at about seven to eleven feet. Guess what now? We know that the distance to the house, to the gate is more than eight feet, because she was saying that the light is by the gate. The streetlight which used to light up the yard and so on. And the distance she pointed out was from the witness box to the door. Now, by any measure, even if you have a bad ruler, the distance from the witness box to the door of the courtroom is really several times eight feet. So, what do you make of that? Is she reliable? From her to the witness box, from the witness box to the entrance to the court, and then now, that is the distance that is supposed to be from the light or from the gate to the house, but yet she is saying the distance I saw Mr. Shaw is from the witness box to where the Court reporter is.
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> So, what she is really saying? Is that in one breath she is saying I first saw him at the gate, but when she points out the distance the man is virtually on the veranda, because remember she told us the width of the veranda when you step up off the landing and step on the veranda. And you are going from veranda to door to go to living room, she estimated - - not estimated - - she said it was about five feet eight, but having regard to clear difficulty with measurements, you have to begin to wonder, is it five feet eight or more than that, or even less than that. So, all of these things now go to the question of reliability and honesty. And she is saying now, that the light on the veranda was on, the light on the street was on and working. She says, as well, that nothing blocked her view of Shaw on the night of the incident."

[32] Mr Senior-Smith also pointed to other pages of the transcript at which the trial judge dealt with other matters in the testimony of Miss Wilson relating to, among other things, for how long, at what distance, and the points in the incident she, purportedly, identified Mr Shaw (pages 1228 to 1240 of the transcript). The trial judge also directed the jury's attention to the inconsistencies in Miss Wilson's evidence concerning the voice

identification of Mr Shaw, the number of men that she saw entering the yard and the shooting of her brother, Kirth Wilson, after the men entered the house (page 1246 line 1 to page 1254 line 6 of the transcript).

[33] On its examination of the entire transcript, the court observed that the trial judge exhaustively pointed out to the jury, in much detail, the inconsistencies in Miss Wilson's evidence. Those inconsistencies related to matters that could have affected her credibility and reliability regarding her identification of Mr Shaw. Mr Senior-Smith's complaint, however, was that the trial judge did not go far enough. Counsel maintained, in his oral submissions, that "based on the defects underscored by the trial judge as he pulled [the inconsistencies] together, it was palpable that the 'reversal inconsistencies' were fundamental and went to the root of the prosecution's case against Mr Shaw". He contended further that Mr Shaw "lost the protection of the law and was irretrievably exposed to conviction, having regard to the slender base of the evidence, which was unreliable and insufficient to found a conviction". Counsel persisted in his contention that the trial judge should have withdrawn the case from the jury, having recognised in the preparation of his summation that there were problems with Miss Wilson's testimony that would have rendered her identification evidence unreliable.

[34] Mrs Evans Bibbons drew support from the long-settled principles regarding a no-case submission in responding for the Crown. In this regard, she pointed to the oft-cited statements of law of Lord Lane CJ in **R v Galbraith** [1981] 1 WLR 1039, at page 1042, as to the approach the court should take on a no-case submission. She submitted that based on, what we commonly call, 'the second limb' of **Galbraith**, the trial judge was correct to have left the case for the jury's deliberation and that he "quite thoroughly" dealt with the issues of inconsistencies and discrepancies and warned the jury about them. She argued that even if there was "incredulity excited from the Bench", as Mr Senior-Smith opined, and the trial judge was of the view that the evidence could not be relied upon because of "the taint of inconsistencies", the case should, nevertheless, have been left to the jury as credibility was within their sole

purview. In support of this argument, counsel also relied on the judgment of H Harris JA in **Steven Grant v R** [2010] JMCA Crim 77 which, at paras. [68] to 70], treats with the proper approach of a trial judge, in dealing with inconsistencies and discrepancies in the testimony of witnesses, in his or her directions to the jury.

[35] We, unreservedly, accepted the submissions of Mrs Evans Bibbons and the authorities on which she relied on this issue. We concluded that there was no merit in the contention of Mr Shaw that the trial judge erred by failing to withdraw the case from the jury during his summation or at any other time. The matters highlighted by Mr Senior-Smith in the evidence of Miss Wilson did not touch the quality and reliability of her purported identification of Mr Shaw that would bring the case within the **Wilbert Daley** directives for the withdrawal of the case from the jury. Neither did they fall within the prescriptions of **Galbraith** for the withdrawal of the case from the jury, albeit that Mr Senior-Smith did not ground his arguments on the failure of the trial judge to uphold a no-case submission.

[36] In **Wilbert Daley**, the editor's note at page 430 of the report accurately indicated that their Lordships in the Privy Council delivered an account of the history of this branch of the criminal law and explained how the principles of **R v Turnbull** [1977] QB 224 and **Galbraith** are able to live together. The Privy Council's discourse on the inter-relationship between the two authorities, in which it found no conflict, is set out at pages 435 and 436 of the report. For present purposes, however, it is sufficient to state the principle captured in the headnote, which accurately reflects the board's reasoning, in part. It reads:

> "Where the prosecution relies on identification evidence, the quality of which is poor, the trial judge should withdraw the case from the jury, not because the court believes a witness is lying but because the evidence if taken to be honest has a base which is so slender that it is unreliable and therefore insufficient to found a conviction; and the fact that an honest witness may be mistaken on identification is a particular source of risk."

[37] Their Lordships went on to make the related point, at page 436, that:

> "When assessing the 'quality' of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

[38] After having regard to the principles enunciated in **Wilbert Daley**, this court in Prince Emanuel Dell concluded that the trial judge, in that case, erred in not withdrawing the case from the jury. After an assessment of the evidence of visual identification, the court found that the cumulative effect of the sightings of the appellant by the sole identifying witness, a policeman, made the case one of a fleeting glance. Accordingly, the court opined that a no-case submission should have been upheld, and as a result, the verdict was unreasonable. It quashed the conviction, set aside the sentence, and entered an acquittal.

[39] However, the circumstances of the identification in the instant case are highly distinguishable from that which obtained in **Prince Emanuel Dell**. Simply put, the purported identification of Mr Shaw was not based on a fleeting glance, nor was it one of a longer observation made under challenging circumstances that would have warranted the withdrawal of the case from the jury in accordance with the guidance from **R v Turnbull** ('the Turnbull guidelines') and **Wilbert Daley**. Miss Wilson gave evidence regarding all the circumstances in which the purported identification of Mr Shaw was made. She knew him sufficiently well and was able to identify him in the house in relatively good conditions, within close proximity and for a sufficient time. All those were matters for the jury's contemplation and assessment in accordance with the Turnbull guidelines, on which the trial judge correctly directed them.

[40] Miss Wilson also explained to the jury the reason for the inconsistencies in her evidence as to which of the men had spoken to her brother and shot him; that explanation was that she made a mistake because she did not remember. The explanation was before the jury for them to say whether they found it satisfactory, and that was a matter entirely for them. If the trial judge had stopped the case based on his

view of the witness's credibility and reliability in the light of the inconsistencies in her evidence, that would have amounted to a usurpation of the jury's function.

[41] In this regard, we adopted and applied to our deliberations the authoritative pronouncements of H Harris JA in **Steven Grant v R**, relied on by counsel for the Crown, that:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited...
>
> [69] It must always be borne in mind that discrepancies and inconsistencies in a witness' testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness' testimony.
>
> [70] Even in circumstances where a judge is of the view that, by reason of discrepancies and inconsistencies, a conviction could not be supported by the evidence, it is not the judge's duty to stop the case and this is so, even if he believes the witness to be lying. In **Kissooa and Singh v The State** (1994) 50 WIR 266 Kennard JA at page 289, said:
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> > 'Even if the judge has taken the view that the evidence could not support a conviction because of inconsistencies, he should nevertheless have left the case to the jury. It cannot be too clearly stated that the judge's

> obligation to stop a case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury.'"

[42] In our view, the evidence against Mr Shaw had passed the threshold necessary for a safe conviction, despite the inconsistencies complained of in Miss Wilson's evidence. Mr Shaw's culpability for the death of Mrs Ellis-Johnson was based on joint enterprise or common design. Therefore, the critical question was not whether he was the triggerman in respect of the shooting, which caused Mrs Ellis-Johnson's death but, at minimum, whether he was part of an unlawful joint enterprise to kill or cause really serious bodily harm, which resulted in her death. Once the answer to that was in the affirmative, which it most certainly would have been, then the question of whether he was the shooter of Kirth Wilson, and had uttered the words initially attributed to him by Miss Wilson, was not crucial. The inconsistency complained of would not have affected the safety of the conviction.

[43] In the end, the trial judge gave adequate and accurate directions in law on joint enterprise/common design and identification, which were the significant issues arising on the case against Mr Shaw. The jury was also comprehensively and accurately directed on how to treat inconsistencies and discrepancies, which went to the twin questions of the identifying witness's credibility and reliability. Furthermore, the jury was more than amply and ably assisted by the trial judge with identifying the material inconsistencies in the evidence of Miss Wilson, which could have affected her purported identification of Mr Shaw. It was exclusively for the jury to determine what effect those inconsistencies had on her credibility and reliability and, overall, on the case brought by the prosecution against Mr Shaw, having regard to the explanation she gave for the inconsistencies. Regardless of any contrary views, the trial judge may have formed as

to the credibility of Miss Wilson, he had to leave all those matters for the consideration of the jury, which he appropriately did.

[44] The complaint of Mr Shaw concerning the trial judge's approach in leaving the case for the jury's consideration is, therefore, unfounded.

[45] With there being no criticisms levelled at the trial judge's directions to the jury on the issue of the identification of Mr Shaw and how to treat with the conflicts in the evidence of Miss Wilson, there is no basis upon which this court could have justifiably accepted that the case ought to have been withdrawn from the jury at the point of the trial judge's summation, or at any other point.

[46] For the foregoing reasons, we found no merit in the supplementary ground of appeal, and so, Mr Shaw's application for leave to appeal against conviction was refused.

Applications for leave to appeal sentence

(a) Sylvan Green, Ricardo Taylor and Rick Thorpe

[47] The applicants, Sylvan Green, Ricardo Taylor, and Rick Thorpe, presented identical cases concerning sentence. They complained that "there [was] no clear and unambiguous ruling" by the trial judge that he considered the four years that they were in custody before sentence. Counsel for the three applicants pointed to the reasoning of the trial judge at page 1547 of the transcript where, in dealing with the sentencing of Mr Shaw, he acknowledged that all the applicants had been in custody for more than four years and that it had to be taken into account "especially if the Court [was] going to impose a finite term of imprisonment". Counsel pointed out that there is no indication in the trial judge's sentencing remarks that he had taken the time spent on pre-sentence remand into consideration because he failed to indicate the reduction in the sentence that he would have made on that basis.

[48] Referencing such authorities as **Meisha Clement v R** [2016] JMCA Crim 26, **Paul Brown v R** [2019] JMCA Crim 3, and **Kevin Reid and others v R** [2020] JMCA Crim 35, counsel submitted that, in keeping with the guidance afforded by those authorities, the three applicants should be credited the four years that they spent in pre-sentence custody. They also submitted that the credit should be applied to the pre-parole terms of imprisonment.

[49] The submission by Mrs Evans Bibbons in response, on behalf of the Crown, was that having regard to the case of **Paul Brown** and the table of cases enumerated by the court in that case, the sentences imposed by the trial judge "fell well within the usual range" for these types of cases. Mrs Evans Bibbons argued that the sentences in the instant case could be said to be "decidedly lower" than those enunciated in **Paul Brown**. It is arguable, she said, that any further reduction "would not be within the principles of sentencing and would essentially make the sentence appear ludicrous compared to like offences without there being any discernible reason as to why this sentence is lower than others of a similar ilk". It, therefore, meant, she said, "that one has to temper whatever 'scientific' calculation with common sense".

[50] Mrs Evans Bibbons maintained that the submissions of counsel for the three applicants that the trial judge did not account for the four years pre-sentence remand were without merit. She highlighted several portions of the transcript in support of this argument. She noted, in particular, that the trial judge was "quite unequivocal" that the pre-trial remand must be taken into account, as he had indicated at page 1547 of the transcript and the totality of his sentencing remarks. She also submitted that a reduction of the sentences would go against the spirit of the sentencing guidelines, which included considering the nature of the offence and all the aggravating and mitigating factors in each applicant's case.

[51] Counsel was also of the view that no reduction in the sentences should be made on the minimum period stipulated for parole. She noted that in the case of Mr Taylor, who had received the "most benevolent" of all the sentences imposed on the

applicants, a reduction in the sentence would be "preposterous" if the court were to follow his counsel's submission to its logical conclusion by reducing the pre-parole sentence to 11 years' imprisonment.

[52] As can be gleaned from the arguments of counsel on both sides, the issues to be decided by this court on the matter of sentence were within very narrow confines, which were:

(i) whether the trial judge failed to give credit for time spent by the applicants on remand before their sentencing; and, if so;

(ii) whether this court should apply the credit to the pre-parole period of imprisonment or the fixed term of imprisonment.

(i) Whether the trial judge failed to give credit for time spent by the applicants on remand prior to their sentencing

[53] It was recognised that this case was before the guidance given on this question in **Meisha Clement**, which, seemingly, introduced within our jurisdiction for the first time, the rule of law established by the Privy Council in **Mohamed Iqbal Callachand & Anor v The State** [2008] UKPC 49 **('Callachand'),** and followed by the Caribbean Court of Justice ('CCJ') in **Romeo Da Costa Hall v The Queen** [2011] CCJ 6. According to these highly persuasive authorities, the court must take fully into account time spent in custody before sentencing.

[54] The Privy Council in **Callachand** had further instructed that taking the time spent in custody into account should not simply be by means of a form of words but by an arithmetical deduction when assessing the length of the sentence to be served from the date of sentencing. It is now settled beyond question, on the strong authority of **Meisha Clement,** that the principles regarding the treatment of pre-trial/pre-sentence

remand in the sentencing process, laid down by the Privy Council in **Callachand**, should apply in this jurisdiction to courts at all levels.

[55] In keeping with the state of the law and practice as it was before **Meisha Clement**, the trial judge stated that he had taken into account the fact that the applicants were in custody before sentencing but did not indicate or demonstrate, by any arithmetical formula, the deduction he had made for time spent in pre-sentence remand. Therefore, this court was unable to definitively say whether he had applied any arithmetical formula and, if so, what was the extent of the deduction he made. As a result, it was not established to the court's satisfaction that the applicants were fully credited for the time spent on pre-sentence remand. We considered that, in keeping with the current law and practice in this court, and more so, in the interests of justice, allowance should be made for the full time spent in custody awaiting trial and sentencing in this case.

[56] Therefore, in all the circumstances, the court could not safely accept the submissions of Mrs Evans Bibbons that the four years should not be deducted. We were, indeed, mindful that there was a risk of double-deduction. However, because there was nothing to indicate the arithmetical deduction made by the trial judge from the sentences imposed, as required by the authorities, we formed the view, after much deliberation, that we should make allowance for full credit. We also considered that the time to be deducted is not designed in law to reduce the sentence that the trial judge had imposed. Instead, it must be viewed from the perspective of their Lordships in **Callachand** that the rule of giving full credit for time spent on pre-trial remand arose from concern for the basic right to liberty (para 9]. Similarly, as Wit JCCJ attractively puts it in **Romeo Da Costa Hall**:

> "[40] It would appear then that the legal basis for giving full credit is basic fairness, the avoidance of injustice or, formulated more positively, the interest of justice. Liberty is clearly highly valued by the Constitution. Liberty should therefore be the golden rule and detention, however it is called and for whichever reason it is imposed, must remain

> the exception to that rule. In an 'ideal' world the presumption of innocence would require the courts not to incarcerate a person until he or she has been found guilty. But in the real world that is simply not possible. There are, perhaps unfortunately, many situations which make it necessary to detain some people before they are tried. This is especially unfortunate if that person is eventually found to be innocent. But even in the case of a conviction it would be unfair to the prisoner not to acknowledge, in a very real and effective manner, that he has, albeit with hindsight, *de facto* been serving his sentence from the day he was detained..."

[57] In the light of the views expressed in the preceding dicta regarding the concern for the right to liberty, the interference by this court with the sentences imposed by the trial judge was warranted and justified. Therefore, it was considered fitting to grant permission for leave to appeal sentence to these applicants for the necessary deduction to be made in the sentences imposed on them, to make allowance for the deprivation of their liberty through time served on pre-sentence remand.

[58] With that having been established, the ultimate question for the court's determination was whether the deduction for time served should have been made from the pre-parole term of imprisonment or the fixed-term (finite) sentence.

(ii) Whether the four years spent in pre-sentence custody should be applied to the pre-parole period or the fixed term of imprisonment

[59] Mr Linton Gordon, in making his submissions on behalf of Sylvan Green, made the point that if the court were to discount the fixed term and not the pre-parole term of imprisonment, the applicants would have been placed in a worse position than an accused who was sentenced to life imprisonment. We did not agree, however, with those submissions in light of the circumstances of this case. When one examines the trial judge's reasoning, it is clear that his acknowledgement of the need to allow time for pre-sentencing remand assumed importance in the context of a finite term of imprisonment, as he expressly stated (page 1547, lines 18 to 23 of the of transcript). It means that in his consideration, the credit would relate to the term that he was going

to impose as the finite sentence and not on the stipulated pre-parole sentence. It was seen from a review of the sentencing reasoning of the trial judge that it was after that sentence had been arrived at that he then indicated the minimum pre-parole term of imprisonment.

[60] At page 1550, line 12 to page 1551, line 3 of the transcript, the trial judge indicated his approach to sentencing in this way:

> "...so that is how I intend to approach the matter of sentencing. That is where in respect of each defendant not more than two bases that opinion in which the jury might have returned an adverse verdict and sentence on the basis that is more favourable to the defendant in the circumstances and then that now is going to **reflect itself in the term of imprisonment that is imposed on each defendant and then, that term of imprisonment is also influenced by the additional circumstances in relation to each defendant**, like age, at the time of the offence and the role played by them, their antecedents and **other relevant considerations. So that is how I propose to deal with the matter**." (Emphasis added)

[61] Therefore, the trial judge indicated that he would have taken into account all the relevant considerations to arrive at the appropriate finite term of imprisonment. Thus, in sentencing Ricardo Taylor, he stated, in part, at page 1557, lines 3 to 14:

> "So in respect of Mr. Taylor all things taken into account, **including the time that he has spent in custody,** the absence of previous convictions ...The sentence of the court is a finite term of imprisonment in respect of Mr. Taylor is 25 years and the minimum period that he should serve before becoming eligible for parole is 15 years..." (Emphasis added)

[62] It is accepted that the trial judge had said that he would have taken into account the time spent on pre-sentence remand. However, apart from expressly indicating that he had done so for Mr Taylor, he did not demonstrate that he had done so for any other applicant. Nevertheless, it was clear to us that the trial judge intended to arrive at the fixed term of imprisonment after considering all relevant circumstances, which

would have included time spent in custody, based on his reasoning concerning Mr Taylor.

[63] In any event, we formed the view that the minimum periods stipulated for parole were already outside the lower end of the range for a murder committed with firearms during a home invasion at night by multiple perpetrators. The interests of justice would not be served by an application of the credit on the recommended period for eligibility for parole in the circumstances of the case. Furthermore, in making allowance for full credit to be applied to the sentences, this court would have been giving the applicants the benefit of the trial judge's omission to indicate the extent of the credit he gave. The punishment must fit the crime, and so any deduction in the periods stipulated for eligibility for parole would not reflect, as it should, the egregious nature of the crime.

[64] Accordingly, four years was deducted from the fixed terms of imprisonment for the applicants, Sylvan Green, Rick Thorpe, and Ricardo Taylor, to make allowance for time served while awaiting trial and sentencing. The period stipulated for parole remained unchanged.

(b) Alroy Shaw

[65] In so far as this applicant is concerned, Mr Senior-Smith was permitted by the court to make submissions on the issue of credit for time served in custody, albeit that he had only considered it necessary to argue the single ground regarding the conviction. Counsel submitted that in the event the court refused leave to appeal the conviction, he would ask that Mr Shaw also receive credit for time spent in pre-sentence custody.

[66] The court saw no basis to treat Mr Shaw differently from the other applicants on this ground as their personal circumstances were identical in this regard, and he had applied for leave to appeal sentence. Consequently, he was considered entitled to be credited with four years deducted from the fixed term of imprisonment imposed on him, with the stipulated period for eligibility for parole also remaining unchanged.

[67] Leave to appeal sentence was, therefore, granted to Mr Shaw solely for this purpose.

Conclusion

[68] The court concluded that each applicant's application for leave to appeal conviction must be refused and that the application of each for leave to appeal sentence be granted to allow the necessary deductions to be made for pre-sentence remand. Consequently, we made the orders detailed at para. [7].