JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 89/2013

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

LESCENE EDWARDS v R

Patrick Atkinson QC, Mrs Valerie Neita-Robertson and Miss Deborah Martin for the appellant

Mrs Lisa Palmer-Hamilton, Mrs Karen Seymour-Johnson, Ms Michelle Salmon and Mrs Lenstr Lewis-Meade for the Crown

18, 19, 20, 21, 22, 25, 26 April 2016 and 19 January 2018

BROOKS JA

[1] The main question for the jury in the trial of Mr Lescene Edwards was whether he had fatally shot Mrs Aldonna Harris-Vasquez in the bathroom of her home on 5 September 2003, or whether she had used his police service pistol to commit suicide. A significant element of the prosecution's case was expert evidence that Mr Edwards was the author of a note, allegedly written by Mrs Harris-Vasquez, which suggested that her death was by suicide.

[2] The majority of the jury accepted the prosecution's case that it was a case of murder, and, on 31 October 2013, convicted Mr Edwards for that offence. On 5 November 2013, he was sentenced to life imprisonment and ordered to serve 35 years imprisonment before being eligible for parole. A single judge of this court granted Mr Edwards' application for leave to appeal from his conviction and sentence.

The prosecution's case

[3] The prosecution's case was that on 5 September 2003, Mr Edwards, then a constable of police, was visiting Mrs Harris-Vasquez at her home at 5 Pinnacle Close in the parish of Saint Andrew. He is the father of her twin-children, who were born before her marriage to a man who is not a Jamaican, and who lived outside of Jamaica. Despite her marriage, Mr Edwards and Mrs Harris-Vasquez, who was called "Patricia" at home, continued to have an intimate relationship.

[4] That day, Mr Edwards went to visit Mrs Harris-Vasquez at about 11:00 am. While they were alone together in Mrs Harris-Vasquez' bedroom, Mrs Maud Harris, who is Mrs Harris-Vasquez' mother, and with whom Mrs Harris-Vasquez shared the premises, dozed in the living-room of the house. Mrs Harris was awoken by a loud noise. Mr Edwards then came to her asking where Patricia was. She answered saying that he was the one who was with Patricia. After this answer he went back into the bedroom and returned to her. He was crying. She then followed Mr Edwards to the bathroom door, which was closed. He opened the door, which opened outward into a passage, and she saw Mrs Harris-Vasquez' body on the bathroom floor. Mrs Harris heard Mr Edwards say that "the girl" had used his gun to kill herself. Mrs Harris then fainted.

[5] Mr Edwards called the police and a police team came to the premises. The police investigators processed the scene and examined Mrs Harris-Vasquez' body. It appeared that death was caused from a single gunshot, which went through her head, from the right to the left side. While the police team was processing the scene, a notebook was found on Mrs Harris-Vasquez' dresser, in her bedroom. The notebook was open to a page, on which was written, what seemed to be, a suicide note. The police took custody of that notebook, two other notebooks and a University of Technology form, firearm and several other items. They also took photographs of the scene. Swabs were taken of Mr Edwards' hands, as well as Mrs Harris-Vasquez'. His clothing was also taken for examination. Mrs Harris-Vasquez' body was taken to the morgue. The police, thereafter, ordered the scene to be cleaned.

[6] On 11 September 2003, Mrs Harris-Vasquez' clothing was taken for examination. During the course of the investigation, Mr Edwards gave, at the request of the police, samples of his handwriting.

[7] The notebooks, firearm, samples of Mr Edwards' handwriting, swabs, clothing and other material were sent to the relevant respective forensic experts. Testing of the clothing of both Mrs Harris-Vasquez and Mr Edwards, and of the swabs taken of their respective hands, did not reveal the presence of any gunshot residue (GSR). The prosecution's handwriting expert, retired Senior Superintendent of Police Mr Carl Major, who examined the note, handwriting in the notebooks and on the University of Technology form as well as the sample handwriting of Mr Edwards, opined, however,

that the "suicide note", otherwise referred to herein as "the questioned document", had been written by Mr Edwards.

[8] Mrs Harris-Vasquez' mood, in the period before her death, was also the subject of evidence placed before the jury. Various relatives spoke, with varying opinions, to her mood on her wedding day and in the week prior to her death. Mrs Harris testified, however, that earlier in the morning of the day of her death, Mrs Harris-Vasquez had a conversation with Mrs Harris, in which Mrs Harris spoke of having had a dream that she would lose one of her children. Mrs Harris testified that during that conversation Mrs Harris-Vasquez appeared to be crying.

[9] Mrs Harris also said that her daughter and Mr Edwards did not have any quarrels or difficulties. Mrs Harris said that she also had a good relationship with him.

The case for the defence

[10] Mr Edwards gave sworn testimony in his defence. His case was that when he went to the house, Mrs Harris-Vasquez and he were talking about their respective future plans. She was to be going away to join her husband and Mr Edwards was also planning to go abroad. Mrs Harris-Vasquez, he said, expressed great sadness that they would be separating. They had sexual intercourse and while they were there in bed, she received a telephone call. She embarked on a telephone conversation with the caller. Mr Edwards formed the view that it was her husband, who had called her. Mr Edwards said that while she was having the telephone conversation he fell asleep.

[11] He said that he was awakened by a loud explosion. Mrs Harris-Vasquez was not in the room and he noticed that his firearm was missing from the place on the dresser where he had put it, prior to him and Mrs Harris-Vasquez engaging in sexual intercourse. He ran to the living-room and asked Mrs Harris for Mrs Harris-Vasquez. Her answer not proving informative, he went back toward the bedroom area and noticed that the bathroom door was closed. He opened the door and the torso of Mrs Harris-Vasquez' body, which, he said, appeared to have been in a sitting position, slumped out onto the floor of the passage. He saw his firearm in her right hand in her lap. He took it up out of fright, holding it only with his right thumb and middle finger, but, immediately realising that he should not have picked it up, dropped it back into her lap. He called the police, put on his pants and shoes (he was then dressed only in underpants and undershirt), and waited in the living room for the police to arrive. Mrs Harris, he said, was present and conscious from the time that he spoke to her until the police arrived, at which time she fainted.

[12] Mr Edwards said that although the police took his underpants from him at the scene, no exhibits were sealed in his presence and no note or notebook was shown to him or pointed out by him. He did hear mention of a note while at the house, but didn't see the "suicide note" until the following day. This was at the Duhaney Park Police Station, under which jurisdiction the premises fell. He denied having had anything to do with Mrs Harris-Vasquez' death and denied having written the "suicide note".

[13] Among the witnesses called to support his case was a handwriting expert, Mr Charles Haywood, who said that it was inconclusive as to whether Mr Edwards had written the "suicide note". Mr Haywood said that, on his examination of the relevant material, which were photocopies of the original, "Mr Edwards or the writer of the specimen writing could not be eliminated, he could be identified, but he couldn't be eliminated either" (page 1186 of the transcript) as the author of the "suicide note". He also opined that the author of the content of 12 sheets photocopied from one of the notebooks found in Mrs Harris-Vasquez' room, which was said to be her notebook, could not be excluded as the author of the "suicide note". It could be gleaned from Mr Haywood's evidence that the method of collecting the sample handwriting from Mr Edwards was not in accordance with what Mr Haywood described as, "best practice".

The issues placed before the jury

[14] Apart from the testimony of the various witnesses from each side, the jury visited the house where the incident took place. They were able to see the layout for themselves. There had only been a slight change in the layout between the time of the incident and the visit by the jury.

[15] During the summation, the learned trial judge told the jury, several times, what the respective cases of the prosecution and defence were. She told them that they were the judges of the facts and that they had to decide whether the prosecution had provided evidence to make them feel sure that its case was the one they should believe.

The appeal

[16] Mr Edwards initially filed four grounds of appeal. They are:

> "(1) That the verdict was unreasonable having regards [sic] to the evidence
>
> (2) That the Trial Judge erred in not upholding the 'no case submission'
>
> (3) That the Trial was unfair in that there was extra ordinary [sic] delay in bringing the matter to Trial leading to the loss of memory, exhibits and witnesses and furthermore the prosecutor invited the jury to speculate inappropriately on the matters not in evidence or capable of being ascertained because of said losses, on account of delay
>
> (4) That the case was tried and put to the Jury by the Trial Judge on speculative platform [sic], which is steeply based on media and public bias"

In addition to those grounds, eight detailed supplemental grounds were filed by counsel on his behalf. Some of those grounds covered areas which are covered by the original grounds. The supplemental grounds are:

> "**GROUND 1**
>
> That the Learned Trial Judge (LTJ) failed to assess and/or to assist the Jury in determining what weight or effect, if any to attach to the failure to obtain and/or produce evidence of the following:-
>
> 1. The exhibits which were destroyed in 2009 and which, by their absence curtailed the ability of Counsel to fully cross-examine the witnesses Marsha Dunbar and Sharon Brydson when they came to give evidence at trial on matters which were critical to the Defence;
>
> 2. Any analysis of the bathroom's surfaces for gunpowder where this could have assisted in determining the circumstances surrounding

where the Deceased was at the time of her shooting;

3. Any analysis of the clothes of the Deceased or the Appellant for gunpowder testing to asses if either or both were within range when the gun was fired; and

4. The testing of the firearm or the holster found in the bathroom for fingerprints to see whether the Deceased was precluded or included amongst the recent handlers.

That this non-direction, in circumstances where suicide was raised on the Crown's case from as early as the viewing by the Police of the 'suicide note' at the locus in quo and during the giving of answers during Q&A statement of the Accused, denied the Jury of the assistance they would have required in assessing the Crown's Case having regard to the burden of proof as well as the Appellant's case in response.

Ground 2

That the LTJ, in reviewing the evidence of the Q&A failed to:-

1. Direct the Jury that the exculpatory aspect was evidence to be adopted and relied on once accepted by the Appellant whilst giving his evidence and that it was a question of what weight they should attach to it when assessing the case for the Defence; and

2. Failed to caution the Jury that the issues raised as to motive in the questions asked by Retired ACP Gauze and which were not subsequently supported by any evidence were not to be relied on, were only prejudicial and of no probative value and that they should disregard them and any innuendo that may arise therefrom.

Furthermore, that the LTJ erred in leaving to the jury:

1. "The theory" raised by the Crown that the Appellant relied on his knowledge and understanding as a 'scenes of Crime' man to interfere with the scene; and

2. The theory of negligence in the handling of his gun thus enabling the Deceased to have access,

as this invited the Jurors into the realm of speculation on matters prejudicial to the Appellant and which were not relevant and/or supported by the evidence.

Ground 3

That the LTJ erred in not upholding the No Case Submission at the Close of the Crown's case as:-

1. Though accepted that it was the Appellant's firearm which caused the injury resulting in the death of Aldonna Harris Vazquez, the Crown's Case did not establish that the Appellant had the actus reus and/or mens rea to commit the offence;

2. That the Crown had failed to establish a prima facie case based on circumstantial evidence pointing in one direction and one direction only; and

3. The Witness Mr. Carl Major's processes were so discredited that it was unsafe to leave his evidence to a jury.

Ground 4

The LTJ erred in leaving the evidence of Mr. Carl Major to the Jury as he had merely made, what was effectively, a pronouncement of his findings without demonstrating how he came by his findings; that at best he demonstrated his methodology but not his actual analysis and thus the Jury were denied the ability to assess the material whilst relying

on the stated methodology to see whether or not they were able to accept the opinion of the Expert.

Alternatively, that Mr. Major's own evidence as to the process by which handwriting specimens ought to have been collected, i.e., by way of dictation when compared to the evidence as to how they were collected by the investigating officer via a supervised and directed process of copying, rendered the foundation on which the opinion was based so fundamentally flawed that anything flowing from it became of questionable or no value, was unsafe and ought not to have been left to the Jurors for their consideration.

Ground 5

That the LTJ failed to assist the Jury in their understanding as to how to assess the evidence of the expert witness for the Defence as to what use they could have been made of him in guiding their assessment of the Crown's expert to see whether they could accept Mr. Major's opinion to support their making a decision of Guilty beyond a reasonable doubt.

Ground 6

That the delay of ten (10) years before the commencement of the trial resulted in the loss and/or damage of material essential to the Defence and denied the Appellant material that would have assisted his case.

Included are:-

1. The presence of the Pathologist who had migrated: This denied the Appellant of the benefit of his expert opinions as raised and/or reflected in drawings he had made at the time of the post mortem;

2. The Opinion of the Pathologist as to whether the death of the deceased was suicide or murder could not be explored and/or received;

3. There were jottings and notes in the Documents in the custody of witness who spoke to Pathologist's documents which could

not be explored as the Court limited itself only to what was in the disclosed 'report';

4. The exhibits were destroyed thus denying Marcia Dunbar and Sharon Brydson of material on which they could have rendered opinions which were vital to the defence; and

5. The loss of Woman Sgt. Hyacinth Brown, the first responder who had since migrated and whose statement was inconsistent with that of SSP Phipps' viva voce evidence as well and [sic] his evidence at the Preliminary Enquiry as to the circumstances in which the book with the suicide note was discovered.

The cumulative effect was to deny the Appellant his constitutional right to a fair trial.

GROUND 7

That the Learned Trial Judge's directions to the Jury were weighted in favour of the Prosecution and consequently the LTJ failed to outline the Appellant's case with equal emphasis and failed to put to the Jury for their consideration essential elements of the Appellant's case resulting in his not receiving a fair trial.

GROUND 8

That the sentence of thirty-five (35) years was manifestly excessive in the circumstances."

Original ground 1 - the issue of whether the verdict was unreasonable

[17] Mr Atkinson QC, who presented the arguments in respect of this issue, stressed that the killing could not have occurred the way the prosecution had theorised. Learned Queen's Counsel pointed out that the physical evidence dictated that Mr Edwards could not have been involved in Mrs Harris-Vasquez' death.

[18] Mr Atkinson submitted that the presence of a bullet hole and a bullet, in the bathroom door, were critical bits of evidence. The hole was 2 feet 8 inches from the floor and the bullet was found inside the bathroom door. Learned Queen's Counsel pointed out that the trajectory of the path of the bullet which went through Mrs Harris-Vasquez' head was upward. Mrs Harris-Vasquez was 5 feet 11 inches tall. These physical factors meant, he submitted, that her head was at that low level, and she was probably seated, when she received her injury. In addition to that, learned Queen's Counsel submitted, the following factors contradicted the prosecution's case:

1. Mrs Harris-Vasquez' body slumped from a seated position into the passage when the bathroom door was opened outward. A smear on the bathroom door supported the oral evidence that that movement had taken place.
2. Her position from a photograph of the scene suggested that she had been seated, leaning against the door. The location of the bullet hole indicated the door must have been closed at the time of the shooting. In those circumstances, the door could not have been opened and reclosed after she had been shot.
3. The bathroom was very small and the space between the bathroom basin and the door was insufficient to allow for any other person to have been present in the bathroom

so as to shoot Mrs Harris-Vasquez, while she was so positioned.

4. There was no sign of any scuffle, trauma or other indication that Mrs Harris-Vasquez had been subdued in order to be in that position.
5. The characteristics of the entry wound suggested that the muzzle of the firearm was against Mrs Harris-Vasquez' head at the time that it was fired. This suggested that the majority of the GSR went into her head and explained the lack of GSR on her hand.
6. There was blood on the back of Mrs Harris-Vasquez' right hand and blood on fingernail clippings taken from that hand.
7. There was no blood on Mr Edwards' hand or otherwise on his person or clothing.
8. There was no time for Mr Edwards to have staged that situation. The timeline suggested that immediately after Mrs Harris heard the explosion, Mr Edwards came to her to enquire about Mrs Harris-Vasquez' whereabouts.

All those circumstances, Mr Atkinson submitted, were not catalogued by the learned trial judge in her summation to the jury. The result, he argued, was that the summation was, therefore, unfair to Mr Edwards.

[19] Mr Atkinson submitted that without the evidence of the handwriting expert, Mr Major, there would have been insufficient evidence on which Mr Edwards could have been convicted. Learned Queen's Counsel submitted that further arguments would demonstrate that the expert evidence in respect of the handwriting was also flawed. The totality of these matters, he submitted, required that the conviction should be quashed and the sentence set aside.

[20] In response to those submissions, Ms Salmon for the Crown submitted that this court was not charged with assessing issues of fact. That duty, she said, was the province of the jury. Learned counsel argued that the authorities established that the jury's verdict should not be disturbed unless it was shown to have been palpably wrong. On the contrary, learned counsel submitted, the evidence placed before the jury was overwhelming in justifying a conviction. The verdict was therefore not unreasonable and should not be set aside.

[21] Ms Salmon submitted that Mr Atkinson's approach, in his submissions, amounted to an attempt to re-try the case before this court. She argued that that was not the proper approach in this court. Learned counsel relied on **R v Joseph Lao** (1973) 12 JLR 1238 in support of her submissions.

[22] The arguments on either side did cause some pause. Ms Salmon's outline of the role of this court is, however, the route by which this court should approach the resolution of the issues raised by Mr Atkinson. The general principle in respect of

questions of fact is that this court will only interfere with the verdict of the jury if the verdict is shown to be "obviously and palpably wrong".

[23] The principle was carefully considered by this court in **R v Joseph Lao**. It is that case which is most often cited in this court when the issue of the reasonableness of the verdict is considered. Henriques P, in delivering the judgment of the court in **R v Joseph Lao**, approved the opinion of the learned editors of Archbold - Pleading, Evidence and Practice in Criminal Cases. It is apparently from paragraph 934 of the 36th edition of that work that Henriques P quoted. The paragraph states, in part:

> "In order to succeed an appellant must show, in the words of the statute [the equivalent of section 14(1) of the Judicature (Appellate Jurisdiction) Act], that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence....Nor is it sufficient merely to show that the case against the appellant was a very weak one...nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict...nor that the judge of the court of trial has given a certificate on that ground...**The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong**...." (Emphasis supplied)

The relevant provision of the English statute was, at the time, in almost identical terms as section 14(1) of the Judicature (Appellate Jurisdiction) Act. That country's statute has since had its wording and standard, in this regard, changed. Jamaica's has remained unchanged.

[24] The standard approved in **R v Joseph Lao** has been supported in several judgments of this court (see, for example, **R v William March and others**

(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 87, 155, 156, and 157/1976, judgment delivered 13 May 1977, **Charles Salesman v R** [2010] JMCA Crim 31 and **Everett Rodney v R** [2013] JMCA Crim 1). In the last mentioned case, the court cited another extract, upon which Henriques P had relied in **R v Joseph Lao**. It is an extract from Ross on the Court of Criminal Appeal (1st edition) at page 88. The learned author is quoted by Henriques P, at page 1240, as saying, in part:

> "...The verdict must be so against the weight of evidence as to be unreasonable or insupportable....The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, **nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before the court**. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury." (Emphasis supplied)

[25] The question to be addressed, hereafter, is whether the issues of fact were properly placed before the jury. Learned counsel have differed in their submissions in this regard.

[26] A trial judge, in summarising to the jury, the evidence adduced during a case, is not required to do a minute examination of the evidence to explain the case of either the prosecution or the defence. The level of detail required will vary from case to case, but it will generally be sufficient for the summation to give a fair and balanced outline of each of the respective cases and to point out major discrepancies where they occur. A direction as to the method of dealing with discrepancies and inconsistencies, where they occur, is also required.

[27] The learned trial judge adhered to the required standard. On several occasions during her summation she outlined the competing cases for the jury. For example, at page 1486 of the transcript, in reminding the jury of what constituted the offence of murder, the learned trial judge is recorded as saying:

> "...In this case the Prosecution is saying that this accused, Mr. Lescene Edwards, killed the deceased, Aldonna Harris-Vasquez, by a deliberate act; that is, by shooting her and then staging the scene to give the appearance that the deceased committed suicide.
>
> The Defence on the other hand is saying that Aldonna Harris-Vasquez committed suicide, and the defendant knows nothing about her death. In other words, she was the author of her own demise."

Similar statements are recorded in other contexts at pages 1458, 1519-1520, 1540-1541, 1701-1702 and 1772 of the transcript.

[28] In the context of outlining the application of the standard of proof in the area of circumstantial evidence, the learned trial judge is recorded at pages 1540-1541 as saying, in part:

> "If you are left in a state of reasonable doubt having examined all the evidence, then the law says you would have to resolve that doubt in his favour, and if you believe him when he says that he had nothing to do with it, and that Mrs. Vasquez had taken his gun and shot herself, then you will have to resolve in favour of him. It is only if you are satisfied to the extent that you feel sure that on the evidence that has been presented, then and only then would you be able to return a verdict which is adverse to him."

[29] Further, in setting out the circumstantial evidence on which the prosecution was asking the jury to accept the guilt of Mr Edwards, the learned trial judge cautioned them, at page 1673, thus:

> "...I must warn you that you have to examine the evidence very carefully. You must remember that if, on the totality of the evidence, it is consistent with innocence as well as it is with guilt; or if, on the totality of the evidence it amounts to a mere suspicion, then the Prosecution would not have proven their case. It is only if it points to one conclusion and one conclusion only, the guilt of the accused, that you can accept that circumstantial evidence is suffice. If it leaves you in a state of reasonable doubt, then that doubt must be resolved in favour of the accused, and if you do not believe it on the totality of the evidence, then he must be acquitted...."

[30] There is also no doubt that the jury would have heard from counsel for the prosecution and the defence what their respective stances were in respect of the case. Indeed, Mrs Neita-Robertson, who was lead counsel for Mr Edwards at the trial, in suggesting an additional direction for the learned trial judge to give to the jury, had her view of the evidence recorded in the transcript. This is done at pages 1767-1768:

> "...And the direction that the jury must consider whether murder is possible, having regard to the one injury, the unchallenged evidence of the locus.
>
> ...
>
> ...Whether murder is possible, having regard that there being only one injury to the body. The condition and all, the evidence relating to the bathroom, the bullet hole in the door, the trajectory of the bullet, no gunpowder deposit on Mr. Edwards, or blood, and no evidence to contradict all of that. If in those circumstances murder is possible, and if

> they are in doubt whether in those circumstances murder is possible, then they must acquit."

[31] The learned trial judge, after hearing Mrs Neita-Robertson and lead counsel for the prosecution, Mrs Palmer-Hamilton, then said to the jury:

> "You have heard the concerns raised by the attorneys on behalf of their respective cases...." (See page 1768 of the transcript.)

[32] She then went on to address the various points raised by counsel. In respect of the injury to Mrs Harris-Vasquez, the learned trial judge said to the jury:

> "...it is a matter for you to determine whether you believe that the injury, the one injury that you saw there, would have caused her death, and caused it in the way that the Crown is saying that she met her end." (See pages 1770-1771 of the transcript.)

[33] Based on those directions, the jury would have been in no doubt as to the task that they had been asked to perform and the issues of fact that they were required to consider, in deciding who had fired the shot that killed Mrs Harris-Vasquez. They decided, on those facts, that it was Mr Edwards who had done so. This court, on the basis of the written evidence alone, cannot say that they were "obviously and palpably wrong".

[34] There are other issues to be considered and therefore, although ground one, on its own, should not succeed, this view is not determinative of the appeal.

Original Ground 3 and Supplemental grounds 1 and 6 – the effect of the delay in bringing the case to trial and the summation in respect of that effect

[35] The original ground 3 complains that the delay in bringing the case to trial worked an unfair prejudice to Mr Edwards and was a breach of his constitutional right to a fair trial in a reasonable time. The issue of delay is one of the bases on which the learned single judge of this court granted leave to appeal. Mr Atkinson submitted that the 10 year delay could, in no way, have been attributed to Mr Edwards.

[36] In respect of supplemental ground 6, Mr Atkinson submitted that the defence was unfairly hampered at the trial by the absence of critical evidence. That absence was due, he argued, to the prosecution's delay in bringing the case to trial. At the time of the trial, Mr Atkinson submitted, important bits of evidence, such as clothing and other exhibits, had been destroyed or had gone missing. Mr Atkinson submitted that their absence hampered the defence in its testing of the prosecution's expert witnesses.

[37] During the delay, Mr Atkinson submitted, important witnesses had also left the island and had become unavailable. One of the first police officers to attend the scene, Sergeant Hyacinth Brown, had migrated. Her absence was important, Mr Atkinson submitted, because her statement contradicted, or at least did not support, the testimony of one of the investigators, Senior Superintendent Phipps (SSP Phipps), as to whether Mr Edwards had said anything at the scene about the notebook or the note. The absence of an explanation for the difference worked to Mr Edwards' disadvantage, according to Mr Atkinson.

[38] Similarly, learned Queen's Counsel submitted, the failure of the prosecution to finance the return to the island of Dr Ere Sheshiah, the pathologist who had performed the post-mortem examination, but had since emigrated, hampered the defence. Defence counsel were prevented, Mr Atkinson argued, from getting the doctor's explanation for the physical evidence to be gleaned from the condition of Mrs Harris-Vasquez' body, and also the meaning of some notes that were in the doctor's handwriting, which were not re-produced in the typed version of the post-mortem report.

[39] Mrs Neita-Robertson supplemented those arguments by Mr Atkinson. She submitted, in support of supplemental ground 1, that in addition to the evidence that was lost by the delay, the prosecution's failure to initially garner what could have been relevant evidence from the scene, also worked to Mr Edwards' disadvantage. Learned counsel pointed to the failure by the police to:

a. take swabs from the tiles on the bathroom wall in the vicinity of the body so as to determine if GSR was present there and thus assist in ascertaining the position of Mrs Harris-Vasquez' body at the time of the shooting;

b. properly swab Mrs Harris-Vasquez' hands, especially her right hand, so as to secure such GSR as was

present, despite the presence of blood on her right hand;

c. submit the firearm, as well as the firearm holster that was found in the bathroom, to the forensic scientists to investigate for fingerprints and other relevant information;

d. promptly produce Mrs Harris-Vasquez' clothing to the forensic analysts so that it could produce optimal results for tests for GSR;

and said that these failures hampered the defence. Learned counsel also argued that the learned trial judge erred in failing to highlight those defects to the jury so as to demonstrate how the absence of the evidence negatively affected the prosecution's case.

[40] All those factors, learned counsel for Mr Edwards submitted, combined to deprive him of a fair trial, to which he was constitutionally entitled.

[41] Mrs Palmer-Hamilton responded for the Crown in respect of the grounds concerning the delayed trial. Learned counsel accepted that the delay of 10 years for the trial was inordinate. She submitted, however, that that was not a basis for setting aside a conviction. The record of the reasons for the delay, Mrs Palmer-Hamilton submitted, could not support a setting aside of Mr Edwards' conviction. She argued that there was no deliberate delay on the part of the prosecution. Learned counsel

submitted that the test was whether the trial was fair and balanced. She argued that Mr Edwards' trial was fair and the learned trial judge's approach was balanced.

[42] Any delay in the trial, Mrs Palmer-Hamilton submitted, should be accounted for in the sentence that was imposed. Learned counsel relied on **R v Dalton Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 41/1997, judgment delivered 25 January 2007, in support of her submissions on this ground.

[43] Ms Salmon responded for the Crown on the issues of the absent witnesses and the directions given by the learned trial judge on these matters. She submitted that it was unfair for Mr Edwards to complain in this court about the absence of Dr Sheshiah, as there was no complaint in the court below about that absence. Learned counsel accepted that the learned trial judge did not direct the jury on the possible impact of the absence of witnesses and material on the totality of the evidence. She submitted, however, that the learned trial judge did direct the jury that there were deficiencies in the collection of forensic evidence and that the missing evidence and witnesses could possibly have assisted the court and jury. Ms Salmon argued that the learned trial judge was not required to go beyond that outline and give a commentary on the consequence of the absences, as that would have resulted in delving into speculation. Learned counsel submitted that there was no misdirection and no prejudice to Mr Edwards in this area of the summation.

[44] Counsel for the Crown, in their respective submissions, sought support in the guidance given in various cases, including that in the judgment in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503.

A Delay in the commencement of the trial

[45] The complaints arising from the delay in bringing the case to trial are not new. Defence counsel raised them at the trial during a no-case submission at the end of the prosecution's case. Miss Martin, in advancing the no-case submission on behalf of Mr Edwards (at pages 1015-1016 of the transcript), argued that the delay, the missing exhibits and the absent witnesses resulted in a situation which was inconsistent with the right to a fair trial and that these factors should be considered as supporting an order that there was no case for Mr Edwards to answer.

[46] In assessing the contending positions before this court, it is noted that the issue of delay in bringing cases to trial is usually considered at first instance in the context of applications to stay proceedings because of unreasonable delay resulting in an abuse of the process of the court. Once the trial has taken place, however, the approach on appeal, in this regard, should be that the conviction should be quashed "on the grounds that the original trial was unfair and the unfairness was of such a nature that it [could not] now be remedied on appeal" (see **R (on the application of Ebrahim) v Feltham Magistrates' Court and another; Mouat v Director of Public Prosecutions** [2001] 1 All ER 831, at paragraph [75]).

[47] An example of such applications is **Bell v Director of Public Prosecutions and Another** (1985) 32 WIR 317; [1985] AC 937. In that case, their Lordships in the Privy Council accepted, at page 324f, that the "longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial". They did not, however, seek to set any time limit as to when delay could be "too long". Their Lordships stated that a balance was to be drawn between the principle of prejudice to the accused and the principle that it is in the public interest that the guilty should be punished. In addressing that balance, they stated a number of factors that should be considered in deciding whether a delay constituted an abuse of process and the denial of the accused's right to a fair trial within a reasonable time.

[48] Their Lordships held that "[i]n determining whether delay in bringing an accused to trial constituted a breach of his right to a fair trial within a reasonable time under section 20(1) of the Constitution a court should have regard to the length of the delay, the reasons alleged to justify it, the responsibility of the accused for asserting his rights, and any prejudice to the accused" (page 318d). This approach was adopted in **R v Dalton Reynolds**, cited by Mrs Palmer-Hamilton. In **R v Dalton Reynolds**, this court also specifically considered the strength of the prosecution's case. These factors will be considered below in the context of this case.

(i) <u>the length of the delay</u>

[49] It cannot be denied that the 10 years that it took for this case to come on for trial was unacceptable. Their Lordships looked askance, in **Charles (Curtis), Carter**

(Steve) and Carter (Leroy) v The State (of Trinidad and Tobago) (1999) 54 WIR 455, at a situation where the accused were put on trial for a third time after nine years had elapsed since the incident for which they were charged. Admittedly, their Lordships were similarly alarmed that the State sought to try the accused again after two previous trials. The length of the delay, is, however, only one of the factors to be considered in deciding this issue.

(ii) the reasons advanced to explain the delay

[50] The second factor to be considered is the reason for the delay in bringing the matter to trial. Counsel for the Crown very helpfully compiled a list of the various dates on which the case came before the court below. By that compilation, the case came on for trial some 21 times before the trial actually started. Although the case was adjourned for varying reasons, none could be ascribed to wilful delay or a lack of diligence by the prosecution. The adjournments mostly centred on the absence of witnesses (both for the prosecution as well as for the defence) as a result of illness or their being away from the island. This is not a strike against the prosecution.

(iii) the responsibility of the accused for asserting his rights

[51] It does not appear that the issue of the delay was raised as a complaint prior to the making of the submission that Mr Edwards had no case to answer. As mentioned above, it was coupled with the complaint about the absence of exhibits and witnesses that resulted from the delay. The fact that a few of the adjournments, prior to the trial being started, were made on the application of counsel for Mr Edwards is perhaps the

basis that the complaint as to delay was not made sooner. This is also not a strike against the prosecution.

(iv) any prejudice to the accused

[52] The absence of two witnesses, namely the pathologist, Dr Seshiah, and the police officer, Sergeant Brown, and the loss of certain bits of physical evidence are the main factors said to be the manifestation of prejudice to Mr Edwards. This factor is to be considered separately as part of these consolidated grounds and therefore will not be considered in this context as being either for or against the prosecution.

(v) the strength of the prosecution's case

[53] Bearing in mind the issues drawn between the parties at the trial, it cannot be said that the prosecution's case was such that a conviction was inevitable.

B The absence of the witnesses and physical evidence

[54] There were, as learned counsel for Mr Edwards have pointed out, several instances of failure in the investigation and prosecution of the case. There was failure to collect samples from the surfaces in the bathroom and to promptly send Mrs Harris-Vasquez' clothing to the forensic analysts. There was also the destruction of the material that was collected, albeit after the material had been analysed by the forensic analysts. There was also the emigration of both Dr Seshiah and Sergeant Brown.

[55] In **Ebrahim**, mentioned above, the court was dealing with the failure to collect, or the destruction of, videotape evidence. Nonetheless, the judgment is helpful in terms of the general guidance it affords in cases where there has been a failure to collect

evidence or where evidence, though collected, has been lost or destroyed. Brooke LJ, in delivering the judgment of the court, summarised that guidance at paragraph [74] of the judgment. He said:

> "We would suggest that in similar cases in future, a court should structure its inquiries in the following way. (1) In the circumstances of the particular case, what was the nature and extent of the investigating authorities' and the prosecutors' duty, if any, to obtain and/or retain the ...evidence in question?...(2) If in all the circumstances there was no duty to obtain and/or retain that...evidence before the defence first sought its retention, then there can be no question of the subsequent trial being unfair on this ground. (3) If such evidence is not obtained and/or retained in breach of the obligations [placed on the prosecution], then the principles set out in paras 25 and 28 of this judgment should generally be applied. (4) If the behaviour of the prosecution has been so very bad that it is not fair that the defendant should be tried, then the proceedings should be stayed on that ground. The test in para 23 of this judgment is a useful one."

[56] In adapting that guidance to the present case, it may be said that the factors that courts should consider are:

1. whether the investigating authorities were under any obligation to collect the evidence;

2. if there were no such duty, whether any request was made by the defence for the material, before it became unavailable;

3. if there was a breach of duty in the collection or preservation of evidence, the court should consider whether there could have been a fair trial, bearing in mind that the trial process does compensate for many of such defects in providing evidence; and

4. whether the conduct of the prosecution was so egregious that it should not have been allowed to prosecute the accused and a quashing of the conviction is the only appropriate remedy.

The factors are considered below:

(i) <u>whether there was an obligation to collect the evidence</u>

[57] It would be fair to say that the investigators were obliged to collect such evidence as they could from the scene. Some level of reasonableness should, however, be applied. It would be unreasonable to say that the investigators were in breach of their duty merely because of a slip to collect some bit of evidence, which in hindsight, could be thought material. In the light of the fact that it is purely speculative as to whether gunshot residue was on the wall of the bathroom or fingerprints on the firearm or holster, it cannot be said that the investigators were obliged to conduct the forensic procedures that were required to collect that evidence. There was no breach of duty in that regard.

(ii) requests, if any, for material before it became unavailable

[58] The circumstances of this case was that the scene of the incident was cleaned up long before there was any likelihood of a request by the defence for any material.

(iii) whether there was a breach of duty by the prosecution in the preservation of the material

[59] Whereas it has been said above that there was no breach of duty in the collection of the material, it must be said that there was a breach of duty in the preservation of the material that had been collected. Mrs Harris-Vasquez' clothing should have been preserved for the trial, likewise Mr Edwards' firearm. They were not. The investigating officer SSP Phipps testified (pages 494 and 576 of the transcript) that those items along with the firearm, spent bullet casing and the damaged bullet were deposited with the exhibit storekeeper at the Half Way Tree Police Station. He said that when he went to retrieve them he discovered that they had been destroyed in 2009 (pages 495 and 577 of the transcript).

[60] The destruction was apparently a deliberate action. SSP Phipps testified that there was a formal record of the destruction. It was apparently done without reference to anyone connected to the investigation. It does not appear, however, that it was done out of malicious intent to suppress evidence or other unworthy motive.

[61] The absence of the material did affect the trial. The examination of one witness, as to the chain of custody of some of the material collected during the investigation, had to be prematurely halted. The government forensic analysts, who tested the relevant material, testified to the disadvantage caused by the absence.

[62] One of the analysts, Ms Sheron Brydson, testified that she received clothing said to have been worn by Mrs Harris-Vasquez and Mr Edwards, respectively. She also received bedding, a condom, condom wrapper, two vaginal swabs and fingernail clippings. She tested all these items for the presence of blood and semen. She found no blood on Mr Edwards' clothing or the bedding, but found blood on Mrs Harris-Vasquez' clothing and fingernails as well as on the vaginal swabs taken from her.

[63] Ms Brydson was asked about the distribution of blood on Mrs Harris-Vasquez' clothing. Although she could give a general description of the distribution she stated that it would be better to have had the garments in order to explain the placement of the blood. In fact, she said it would have been better to have the garment in order for her to say, in court, whether the wearer was sitting or lying at the time of the depositing of the blood.

[64] The other forensic analyst who testified, Mrs Marcia Dunbar, said that she tested, for the presence of GSR, the swabs taken of the hands of both Mrs Harris-Vasquez and Mr Edwards. She found no GSR on any of these swabs. She also tested for the presence of GSR, with similarly negative results, on the clothing taken from Mrs Harris-Vasquez and Mr Edwards. It does not appear that the absence of the clothing affected Mrs Dunbar's testimony. She was asked about the night-dress, said to have been worn by Mrs Harris-Vasquez and she stated that she had tested the entire garment for the presence of GSR. She did say that the delay in recovering the night-dress from Mrs

Harris-Vasquez' body and sending it to the forensic analyst could have negatively affected the detection of GSR from the garment.

[65] Mrs Dunbar was asked about the presence of GSR on surrounding surfaces, such as the wall and floor of the bathroom. She was also cross-examined, with a view to discrediting the method used to collect samples from Mrs Harris-Vasquez' hands, about the method of collecting samples from a hand which had blood on it.

[66] The learned trial judge reminded the jury of what the respective analysts had said. She pointed out that Ms Brydson had said that it would have been better if the night-dress were present in order to say whether the wearer was lying or sitting at the time. The learned trial judge also said that Mrs Dunbar had said that if the garment were present she could show the areas of it that she tested.

[67] It does not appear that there was any appreciable disadvantage to the trial caused by the absence of the material. The main item that would have been relevant would have been Mrs Harris-Vasquez' night-dress, but that garment would have been relevant to help demonstrate to the jury whether Mrs Harris-Vasquez was lying or sitting at the relevant time. That issue was answered by the photographs taken of her body, while it was still clad in that garment. The photographs were in evidence for the jury to examine and it would, therefore, not have lost anything from the absence of the item.

[68] The delayed collection of the night-dress from Mrs Harris-Vasquez' body, which was being stored in the morgue, could have affected the detection of GSR on the

garment. It is, however, unlikely that the presence of the substance on the garment would have been helpful in determining whether or not the injury was self-inflicted. The distance between the entry wound and the garment, as long as Mrs Harris-Vasquez was wearing it at the time, would have been a constant in either scenario.

[69] The learned trial judge also directed the jury in respect of the absence of both Dr Seshiah and Sergeant Brown. In respect of the former, although this approach was criticised by counsel for Mr Edwards, the learned trial judge gave the appropriate and standard direction concerning a witness, who by reason of absence, had to have his evidence produced to the court by someone else. The learned trial judge reminded the jury that, not having seen Dr Seshiah, they did not have an opportunity to assess his demeanour. She said at pages 1588-1589 of the transcript:

> "...I must tell you that the post mortem report as evidenced would not carry the same weight as the evidence which has been tested by cross-examination, you must, therefore take this into consideration when you are evaluating the evidence of Doctor Seshaih [sic] as it relates to credibility and reliability. [H]e was not here for you to see him for you to assess him however, as I said his post mortem report as well as the two drawings with his notices are available to you and you will have to treat his evidence in that way bearing in mind that you did not get an opportunity to see him and to assess him in the same way as you would have assessed the other witnesses."

She is also recorded as having made similar statements at pages 1763 and 1770-1771 of the transcript.

[70] There was no need for any such warning in respect of Sergeant Brown as her statement was not put into evidence, though it was shown to SSP Phipps in order to

have him read it. He admitted that there was no mention in the statement that Mr Edwards had shown the book to Sergeant Brown. The learned trial judge reminded the jury of the issue, at page 1625 of the transcript, and pointed it out as being one for its analysis. The absence of Sergeant Brown was no more detrimental than the absence of any other witness in a trial.

(iv) the general assessment of the conduct of the prosecution

[71] In **Ebrahim**, Brooke LJ spoke of a category of cases in which "it would be unfair for the defendant to be tried" (paragraph [18]). He explained that these were cases "in which a court is not prepared to allow a prosecution to proceed because it is not being pursued in good faith, or because the prosecutors [including the investigative arm] have been guilty of such serious misbehaviour that they should not be allowed to benefit from it to the defendant's detriment" (paragraph [19]).

[72] In this case the prosecution cannot be said to have acted in a fashion which would justify preventing it from having Mr Edwards tried. Indeed there has been no such complaint by counsel for Mr Edwards, although, in her no-case submission, Miss Martin castigated the prosecution for refusing to spend the money required to have Dr Seshiah return to the island to give testimony of his findings on his post-mortem examination of Mrs Harris-Vasquez' body.

C Directions by the learned trial judge on the absence of witnesses and exhibits

[73] Lord Morris of Borth-Y-Gest explained in **McGreevy v Director of Public Prosecutions**, at page 507, the basic contents of a summation. He said at page 507:

> "The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful…."

[74] Carey JA, in delivering the judgment of this court in **Sophia Spencer v R** (1985) 22 JLR 238, at page 244, also gave guidance as to the purpose of a summation. He said:

> "A summing up, if it is to fulfill its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
>
> If it is so couched in language neither patronizing nor technical, then it cannot fail but be helpful to a jury of reasonable mean and women in this country."

[75] It has been pointed out above that the learned trial judge did remind the jury of the evidence concerning both the aspects of the missing material and the absent witnesses. She also brought to their attention (recorded at pages 1546-1549 of the transcript) Mrs Dunbar's evidence concerning the proper method of collecting samples of GSR from a bloodied hand and the effect that storage of a body in a morgue could have had on the presence of GSR. The learned trial judge reminded the jury of defence counsel's understanding of the effect of that evidence. She was not required to use any particular approach in doing so. It is for the jury to have made what it would, of the effect of those absences.

D Conclusion on these grounds

[76] Based on the above analysis it cannot be said that the delay in commencing the trial or the absence of witnesses or material resulted in a situation where it was unfair to subject Mr Edwards to a trial, or resulted in a trial that was unfair to Mr Edwards. Nor can it be said that the directions of the learned trial judge on these issues were so inadequate as to amount to misdirection. These grounds fail.

Supplemental ground 2 - the learned trial judge's directions in respect of the Q and A, the branch of the police force that Mr Edwards worked in and the negligent placing of the firearm

[77] During their investigation of Mrs Harris-Vasquez' death, the police conducted a question and answer session with Mr Edwards in the presence of his attorney-at-law. The officer in charge of the interview was Senior Superintendent Granville Gause. He administered the usual caution to Mr Edwards and the questions and answers were recorded in writing. There was no complaint at the time, about the process used.

[78] The document in which the questions and answers were recorded was tendered and received into evidence, without any objection by the defence. The document was read to the court by Mr Gause, who had, by the time of the trial, retired from the police force. That evidence is recorded at pages 366-385 of the transcript. Included among the questions posed to Mr Edwards were some concerning his feelings about Mrs Harris-Vasquez' marriage to another man, as well as Mr Edwards' manner of securing of his firearm whenever he visited her, both generally and specifically on the day of her death. Mr Edwards, in his answers to these questions, denied any discomfort or

unhappiness with the marriage and stated that it was his custom when visiting that house to place his firearm on either the dresser or the ironing board.

[79] Mrs Neita-Robertson argued that the learned trial judge failed to direct the jury that the questions asked of Mr Edwards did not constitute evidence. Learned counsel also submitted that the learned trial judge was wrong to have, in her summation, specifically referred to a number of questions that had been posed to Mr Edwards during the interview. She submitted that the learned trial judge also erred in not giving specific directions on the exculpatory nature of some of the answers given during the interview.

[80] Learned counsel said that some of the questions consisted of "theories" being posited by the police, that the killing was motivated by jealousy. It was wrong and prejudicial to Mr Edwards, she submitted, for the learned trial judge to have repeated those questions to the jury.

[81] Learned counsel further submitted that the learned trial judge also erred in leaving to the jury, according to Mrs Neita-Robertson, the "theory", not supported by any evidence, that Mr Edwards used his special training as a Scenes of Crime investigator, to conceal the fact that he had killed Mrs Harris-Vasquez. Learned counsel also criticized the evidence, and the learned trial judge's reference to it in the summation, which suggested that Mr Edwards had been negligent in leaving the firearm on the dresser in Mrs Harris-Vasquez' room, while he was there with her. The substance

of Mrs Neita-Robertson's complaint is that the evidence and this aspect of the summation were unwarranted and entirely prejudicial.

[82] Ms Salmon responded for the Crown in respect of this ground. She pointed out that there was no objection raised at the trial to the admission into evidence of the question and answer document. Learned counsel submitted that the learned trial judge was not required to do more than she did in this regard, namely, to review the evidence given by Mr Gause in respect of the question and answer session. There was no requirement, Ms Salmon submitted, for the learned trial judge to have given any directions on exculpatory statements made during the question and answer session.

[83] There is no decided case or other authority, which has been brought to the court's attention in any of the submissions, that supports the position that the document in which the interview is recorded, may not be read back to the jury during the summation. Nor has it been said that only the answers should be brought to the jury's attention. The fact is that the questions, in most cases, provide the context for the answers.

[84] Where, in the record of the interview, there appear answers that are exculpatory, the trial judge should bring those answers to the specific attention of the jury. If however, the import of the exculpatory statements is repeated during the case for the defence at the trial, it may be said that there is no miscarriage of justice if the trial judge does not give a separate direction in respect of the exculpatory statements

made during the interview. That was the finding in **Edward Bitter v R** [2016] JMCA Crim 10. In that case, F Williams JA (Ag), as he then was, stated:

> "[63] Additionally, when one peruses the contents of the Q & A [in] the transcript, it becomes clear that those contents amounted to a foreshadowing of the unsworn statement. The effect of the Q & A was to deny the allegations that made up the Crown's case and to put forward an alibi. The unsworn statement was to the same effect.
>
> [64] In light of this, we shared the Crown's view that there was no injustice occasioned to the applicant, as the main points of the unsworn statement were dealt with adequately by the learned trial judge [in the summation]. This was how the substance of his defence was put to the jury by the learned trial judge...:
>
> > 'He said he never had a gun and he never shoot [sic] anyone and he was never in any car, in particular the car that he said he saw parked outside the gate with the lights flashing. He said he just walked. He had just come off the bus and walked in front of it. He said he wasn't in any gang war to shoot anyone and that he is innocent of this [sic] charges.
> >
> > As I said he gave you an unsworn statement, you have to attach what weight you think fit, if what he has given you in his explanation is acceptable to you and you feel that he is speaking the truth, then you would act upon it and you would acquit him. In essence, his defence is one of an alibi.'
>
> [65] His defence of alibi and the required alibi warning were dealt with by the learned trial judge specifically [in the summation]."

[85] In the present case, a similar situation applied. In his defence, Mr Edwards, during his sworn testimony, maintained his stance as expressed in his answers given during the interview. There was a question which he refused to answer during the

interview. He testified at the trial that his refusal was based on legal advice that he had received (see page 1108 of the transcript). The learned trial judge correctly directed the jury that Mr Edwards was entitled to refuse to answer the question. What she said is recorded at pages 1562-1563 and 1714 of the transcript. At pages 1562-1563, having concluded the summing-up of the evidence of Mr Gause, she directed the jury thus:

> "Now, let me say to you at this point that it is [Mr Edwards'] right, and if you remember the terms of the caution [administered to him at the start of the interview], he was not obliged to answer any question. He has a right not to answer, if he did not answer, it is not to be taken against him as such because it is a right which is conferred on him and [Mr Gause] had said it was his right that he could refuse to answer any question that was told to him at the very outset."

At page 1714 of the transcript, while recounting the evidence of Mr Edwards for the jury, she was recorded as saying:

> "...Now, let me remind you, he has a right not to answer any questions put to him and that was told to him in the caution and his lawyer was there and advised him not to answer, so the fact that he don't [sic] answer is not something that should be taken [sic] against him...."

[86] It is true that the learned trial judge did not direct the jury as to the approach it should take concerning the questions that were asked during the interview which suggested acrimony resulting from Mrs Harris-Vasquez' marriage. It would have been correct to say that the questions did not constitute evidence and it would have been better if the learned trial judge had given that direction. She did, however, remind the jury of Mrs Harris' evidence as to the good relations that Mr Edwards and Mrs Harris-Vasquez enjoyed. The learned trial judge also recounted, for the jury, Mr Edwards'

evidence as to the continued good relations that he and Mrs Harris-Vasquez maintained despite her marriage to someone else. The learned trial judge is recorded as addressing that evidence at pages 1701-1702 of the transcript:

> "...He also stated that after he became aware that she was going to get married to this gentleman, they nevertheless continued an intimate relationship. Now, Mr. Foreman and members of the jury, their morals are not on trial, so do not be sidetracked by whatever your views maybe [sic] in relation to that and I say this because the issues that are to be determined are not really morals issues but the fact as to who it was who killed Aldonna because the Crown is saying that it was Mr. Edwards who killed Aldonna while the defense is saying, I had nothing to do with her death, she was the person who took her own life...."

[87] There was no miscarriage of justice as a result of the learned trial judge's failure in that regard.

[88] As counsel for Mr Edwards also correctly pointed out, the learned trial judge merely recounted the evidence concerning the standard for caring for a firearm (page 1616-1618 of the transcript), what Mr Edwards said was his custom concerning the firearm when visiting Mrs Harris-Vasquez (page 1722) and what he did with it on the day of the incident (pages 1700-1701). The learned trial judge did not comment one way or the other on this evidence, although she properly should have directed the jury that the case was not about negligence in handling a firearm. The learned trial judge, did, however, on several occasions, remind the jury of the main issue that it was asked to decide, was who killed Mrs Harris-Vasquez. The learned trial judge put the case for the defence, that this was a case of suicide, to the jury on a number of occasions. The

jury would not have been misled concerning the issue of the care of the firearm. There was no miscarriage of justice in respect of this issue.

[89] This ground fails.

Original ground 2 and supplemental grounds 3 and 4 - the rejection of the No Case Submission

[90] Miss Martin, on behalf of Mr Edwards, argued that the respective cases of the prosecution and defence were so close in content that the only real difference between them, apart from Mr Edwards' denial, was Mr Major's opinion that Mr Edwards was the author of the questioned "suicide note". Learned counsel submitted that there was nothing in the prosecution's case, apart from that opinion, that suggested that Mr Edwards had anything to do with Mrs Harris-Vasquez' death.

[91] Mr Major's evidence, learned counsel submitted, was not only insufficient to contradict the physical evidence observed at the scene, or the depiction of the photographs taken by the investigators, but was fatally flawed, because Mr Major did not demonstrate the features of the respective samples of handwriting that he relied upon to come to his opinion. His opinion was, therefore, she submitted, a mere assertion. Learned counsel cited the cases of **R v Fitzroy Fisher** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 2/2000, judgment delivered 20 July 2000 and **R v Harden** [1962] 1 All ER 286 to support her criticisms of Mr Major's testimony. In **R v Fitzroy Fisher**, this court stated, at page 11, that "[i]t would seem imperative that a handwriting expert must demonstrate visually how, based on the scientific criteria he used, why a particular conclusion was reached".

[92] Learned counsel also criticized Mr Major's approach in that he failed to analyse any other handwriting in the notebooks in order to determine what was confirmed as Mrs Harris-Vasquez' handwriting so as to compare it to that in the questioned document. According to Miss Martin, there was no evidence that Mrs Harris-Vasquez could not have written the questioned document.

[93] Miss Martin further argued, in effect, that the method of collecting the specimen handwriting from Mr Edwards was so flawed that Mr Major's entire process of comparison of the specimen handwriting to the questioned handwriting was based on a false premise, namely, that the specimen handwriting was a true representation of Mr Edwards' handwriting. Learned counsel demonstrated her submission by pointing to the evidence of SSP Phipps in which he stated that Mr Edwards was told, in giving the specimen handwriting, to write the words contained in the questioned document "line by line in-keeping with" the way the that the questioned document was written (page 643 of the transcript). She contrasted that evidence with that of Mr Major, who said that in collecting the sample, the proper procedure was for the content of the questioned document to be read to the person giving the sample handwriting "and allow them to write in their natural hand" (page 925 of the transcript).

[94] All these factors, Miss Martin submitted, demonstrated that the learned trial judge was in error in ruling that there was a case for Mr Edwards to answer. Miss Martin relied on a number of cases in support of her submissions. These included **R v Galbraith** [1981] 1 WLR 1039, **R v Rowan Fraser and Aileen Fraser** (unreported),

Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 39 and 40/1992, judgment delivered 29 July 1994 and **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26.

[95] Mrs Palmer-Hamilton and Mrs Lewis-Mead responded on behalf of the Crown in respect of these grounds. According to learned counsel, the prosecution, in the court below, relied on circumstantial evidence. Mrs Palmer-Hamilton argued that circumstantial evidence is to be considered as a whole and it was for the jury to have assessed the circumstances and to have drawn the inferences that it deemed appropriate. Inferences, Mrs Palmer-Hamilton stressed, were matters for the consideration of the jury, not for the trial judge.

[96] Learned counsel submitted that the learned trial judge had applied the correct test in deciding whether the case should have been left for the consideration of the jury. Mrs Palmer-Hamilton submitted that it should be the inferences that are most favourable to the prosecution that a trial judge should consider when deciding if there was sufficient evidence to be left for the jury's consideration. The trial judge, learned counsel submitted, should consider this in the context of the burden and standard of proof and this, Mrs Palmer-Hamilton submitted, the learned trial judge in this case, did.

[97] Mrs Palmer-Hamilton relied, for these points, on several cases, including **Director of Public Prosecutions v Varlack** [2008] UKPC 56; [2009] 4 LRC 392, **McGreevy v Director of Public Prosecutions**, **R v Anthony Rose** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/1997, judgment

delivered 31 July 1998, **Loretta Brissett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004, **Rv Herman Dunkley** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 195/1987, judgment delivered 23 January 1989 and **Lloyd R v Barrett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 151/1982, judgment delivered 4 November 1988.

[98] Mrs Lewis-Mead submitted that Mr Major explained for the jury the theoretical basis for examining handwriting, and demonstrated to them how he analysed and compared the questioned and specimen handwritings. Learned counsel submitted that this case was different from **R v Fitzroy Fisher** because Mr Major carried out the demonstration, which this court, in **R v Fitzroy Fisher**, found, was lacking.

[99] In assessing these grounds it is best to start with acknowledging the well-established test, concerning ruling on no case submissions, as set out in **Galbraith**, at page 1042 of the report:

> "...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...."

[100] The test in **Galbraith** was considered by this court in **R v Rowan Fraser and Aileen Fraser**. Rattray P confirmed the application of the test by the courts in Jamaica.

He spoke for the majority of the panel in finding that the prosecution in that case had failed to produce either direct or circumstantial evidence against the defendants. It is not surprising, therefore, that in the brief analysis, conducted, at pages 36 to 37 of the judgment of the majority, of the issue of whether there was a case for the defendants to have answered, that the majority merely stated the principle taken from **Galbraith**, and went on to tersely find that there was no such case. The case, on this point, turns on its own facts.

[101] **Galbraith** was also acknowledged, with approval, by their Lordships in **Varlack**. Their Lordships then placed that test in the context of a case which involved circumstantial evidence. They approved the principle that if circumstantial evidence could lead a reasonable jury to convict an accused despite the fact that another reasonable conclusion of innocence could be drawn on that evidence, the matter should be left to the jury's determination. They said at paragraphs [21] and [22] of their judgment:

> "[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, [1981] 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 1993)* (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* [**R v Bilick** (1984) 36 SASR 321] 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 supplied)

[102] These principles and authorities were specifically considered by this court in **Melody Baugh-Pellinen v R**. In that case, Morrison JA (as he then was), in delivering the judgment of the court, confirmed that in cases where the prosecution was relying

on circumstantial evidence, the jury was required to decide the case, not on whether individual items of evidence had been proved beyond reasonable doubt, but whether the inference of guilt had been proved beyond reasonable doubt (see paragraph [31]). Morrison JA went on to conclude, at paragraph [34] of the judgment that:

> "In the light of these authorities, it therefore seems to us that the correct approach to the question of whether the learned trial judge ought to have upheld the no case submission in the instant case is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt."

Having made that statement, Morrison JA, went on to set out, what, he said, were the "various items of circumstantial evidence upon which the prosecution relied" in that case.

[103] In at least three of the cases cited above, where the circumstantial evidence was analysed on appeal, in order to determine if there was a case, which the appellant should have been called upon to answer, the various aspects of the circumstantial evidence was set out. Morrison JA, did so in **Melody Baugh-Pellinen v R**, Carey JA did so in **R v Lloyd Barrett**, and Gordon JA, who dissented in **R v Rowan and Aileen Fraser**, also did so.

[104] In the present case, the evidence that the prosecution relied on included the following points:

1. Mr Edwards and Mrs Harris-Vasquez shared a relationship that had produced two children;

2. having been recently married, she was looking forward to joining her husband overseas;

3. Mr Edwards and Mrs Harris-Vasquez were alone in her bedroom, while Mrs Harris dozed out in the living room;

4. he came to Mrs Harris to ask where Mrs Harris-Vasquez was;

5. he went to the bathroom door and opened it revealing Mrs Harris-Vasquez' body;

6. he picked up the firearm in a peculiar way;

7. as a scenes of crime officer, he has special training in treating with crime scenes and how material is collected therefrom;

8. the swabbing of Mrs Harris-Vasquez' hands was properly done;

9. the test of the swabs revealed no GSR on Mrs Harris-Vasquez' hands;

10. the type of firearm involved, a revolver, would have emitted a higher concentration of GSR on the hand than a pistol would;

11. the feigned crying by Mr Edwards when the police arrived at the house;

12. the location and position of the questioned document;

13. Mr Edwards' statement to the police during the Q and A interview, that the first time that he saw the "suicide note" was at the police station, the day after the incident;

14. Mr Major's testimony that Mr Edwards had written that note;

15. Mr Edwards' denial that he had written the document.

[105] It may well be said, as Miss Martin stressed, that other than for the opinion by Mr Major, there was very little difference between the respective cases of the prosecution and the defence. The question is whether taken at its highest, the prosecution's case could be said to have advanced a case that a reasonable jury, properly directed, would have been entitled to draw the inference, beyond a reasonable

doubt, that Mrs Harris-Vasquez had been killed by a hand other than her own, and that that other hand belonged to Mr Edwards.

[106] As far as the reliability of the sample handwriting and the validity of Mr Major's analysis is concerned, it is to be noted that Mr Major described at least some parts of the sample handwriting that had been given by Mr Edwards as "free and flowing, boldly written handwriting" (page 927 of the transcript), "free and flowing cursive handwriting" (page 928) and a mixture of writing styles (page 931). The evidence that the handwriting is free and flowing in parts and a mixture overall, which could be attributable to natural variation, is material that should properly be considered by the jury in determining whether the sample that Mr Major analysed was a true representation of Mr Edwards' handwriting.

[107] Unlike the situation in **Fitzroy Fisher v R**, Mr Major did demonstrate for the jury how he arrived at his conclusion in the case. He utilised enlargements of the various aspects of the writings, which he said assisted him. It was for the jury to decide whether he was convincing or not.

[108] It must be found that Mr Major's evidence and Mr Edwards' denial that he wrote the questioned document led to more than just suspicion. It would be open to a reasonable jury inferring that the reason that the note was written by Mr Edwards was to attempt to conceal the fact that it was he who had fired the fatal shot.

[109] Unlike the ruling of this court in the older case of **R v Lloyd Barrett**, Morrison JA expressly approved the stance taken in **McGreevy v Director of Public**

Prosecutions concerning the directions that a trial judge should give to a jury in respect of considering circumstantial evidence. Those directions are, however, not relevant to these grounds of appeal, as they do not concern the directions given by the learned trial judge in her summation to the jury.

[110] On this reasoning these grounds fail.

Supplemental ground 5- the consideration of the Mr Haywood's testimony

[111] Miss Martin submitted that the learned trial judge failed to explain to the jury the import of the testimony of Mr Haywood, the handwriting expert that was called by the defence. Learned counsel argued that the learned trial judge merely recounted Mr Haywood's evidence but did not show how it could affect either Mr Major's testimony or assist the jury in making their own findings of fact on the important decision of the authorship of the questioned document. She submitted that the non-direction amounted to a misdirection of the jury and, being the critical aspect of the prosecution's case that Mr Major's opinion was, that the misdirection was fatal to the conviction.

[112] Mrs Lewis-Mead countered those submissions by arguing that the learned trial judge did direct the jury in the way they should treat with Mr Major's evidence. She submitted that the direction was appropriate to the circumstances of the case. Learned counsel also pointed out that the learned trial judge gave the jury an appropriate direction on how to treat with the testimony of an expert witness.

[113] Miss Martin is not on a firm footing in respect of this ground. The learned trial judge not only gave an appropriate direction to the jury as to how to treat with the

testimony of expert witnesses generally, but she reminded them (at pages 1649, 1662, 1743 and 1769-1770 of the transcript) of that direction in respect of the handwriting experts. She also set out what it is that each had said. In Mr Major's case she pointed out at page 1657 that he had opined:

> a. that the questioned document and the specimen handwriting (given by Mr Edwards) were written by the same person, and
>
> b. that although only one person authored the name written on two of the notebooks (bearing the names Aldonna Harris and Aldonna Vasquez, respectively), and certain other handwriting in the third of those notebooks, those writings were made by a different person from the author of the questioned document and the specimen handwriting.

[114] In Mr Haywood's case, the learned trial judge, reminded them that he is an expert witness and set out in detail for them the contents of his testimony. She set out for the jury, Mr Haywood's opinion that Mr Edwards was not confirmed as the author of the questioned document.

[115] It is to be noted that the learned trial judge reminded the jury more than once that they were entitled to reject the testimony of either or both of these expert

witnesses. After comparing a particular aspect of their respective testimonies, she said at page 1743 of the transcript:

> "...And you have to look at those two gentlemen who were treated as experts and determine if you accept any of them or if you accept one against the other. Because, as I said to you, in dealing with expert witnesses they are to be treated like any other witness in the case, and you have to assess their evidence and decide if you are going to accept or you are going to reject them, or you are going to accept a part of what that [sic] say and reject another part. It is for you to make that determination."

[116] The learned trial judge after being prompted by defence counsel, gave a further direction specifically stating that Mr Haywood had also testified that the writer of the contents of the John Dickinson and Mead notebooks, bearing the names mentioned above, could not be excluded as the writer of the questioned document. Importantly, the learned trial judge directed the jury on the defence's position based on Mr Haywood's testimony. She said at pages 1769-1770 of the transcript:

> "Now, it is also being posited that the absence of any proof that the John Dickenson, the writing in the John Dickenson notebook and Mead notebooks [sic] were the handwriting of Aldonna Vasquez, that Mr Major cannot preclude Mrs. Vasquez. That is a matter that you will have to decide, because [Mr Major] has given his opinion and in his evidence that he found that the writer of the questioned document was the person who had given the sample, meaning Mr. Edwards. But you have heard all the evidence and you must, based on that evidence, see whether you accept or reject Mr. Major's evidence. He has given his opinion, you are free to either accept his opinion or to reject him....
>
> Mr. Haywood has given his opinion and he has said that in his opinion Mr. Edwards was not confirmed as the writer of the questioned document. He said, he, again, is an expert, you may treat his evidence the same way. You may accept

> one expert as opposed to another and you may reject both of them, depending on what you believe. It is for you to determine what evidence you accept and what evidence you reject."

[117] The learned trial judge fulfilled her duty in respect of this aspect of the case. She carefully placed before the jury the issue in dispute between the prosecution and the defence. It was for the jury to decide which, if any, of the expert opinions they would accept.

[118] This ground fails.

Supplemental ground 7 - the balance in the summation

[119] Mrs Neita-Robertson submitted that whereas the learned trial judge set out for the jury all the various elements that the prosecution was relying on in its presentation of a case based on circumstantial evidence, the learned trial judge did not similarly point out the weaknesses in the prosecution's case that the defence relied on. Those weaknesses, learned counsel submitted, failed to bring home to the jury the thrust of the defence. Learned counsel also argued that the learned trial judge merely recited the evidence of the various witnesses to the jury and failed to analyse the import of that evidence. The combined effect of these flaws in the summation, Mrs Neita-Robertson submitted, resulted in Mr Edwards being deprived of a fair trial.

[120] Miss Salmon, for the Crown, submitted that there was no particular form that a summation should take. She contended that the learned trial judge did what was required of her in directing the jury on the relevant law, reminding them of the

evidence and placing before them the issues in contention between the prosecution and the defence. The summation, Miss Salmon argued, cannot be faulted.

[121] Miss Salmon is correct in respect of these submissions. Reliance is again placed on the duty placed on a trial judge conducting a summation, as set out in the extract, cited above, from the judgment of Carey JA in **Sophia Spencer v R**. The learned trial judge was true to her duty in this aspect of the case. She:

a. properly directed the jury several times as to the burden and standard of proof; that it was the prosecution which was required to prove Mr Edwards' guilt (e.g. see pages 1450-1451, 1460, 1540, 1673, 1695 and 1772-1773 of the transcript);

b. faithfully recounted the evidence adduced by both the prosecution and the defence;

c. several times, stated the kernel of the defence's case (e.g. see pages 1458, 1486, 1520, 1540, 1702-1703 and 1772); that Mr Edwards knew nothing about the shooting and that Mrs Harris-Vasquez was the author of her own demise;

d. gave several examples of discrepancies in the prosecution's case, including that concerning the

absence from SSP Phipps' statement of any indication that Sergeant Brown had said that it was Mr Edwards who had brought the "suicide note" to her notice (at page 1625); and

e. explained to the jury, as she went along, the complaints that the defence made in respect of various aspects of the prosecution's case, including the delay in the trial and the absence of Dr Seshiah and the articles of clothing taken from Mrs Harris-Vasquez' body.

[122] This ground also fails.

Supplemental ground 8 - the sentence imposed

[123] The length of the sentence was the second of the two bases on which the learned single judge of this court granted leave to appeal. In their written submissions on this ground, learned counsel for Mr Edwards, argued that the sentence that Mr Edwards should serve 35 years before being eligible for parole was manifestly excessive. The bases on which this submission was made were:

a. the evidence of Mr Edwards' previously good character;

b. the absence of any indication that the killing was premeditated;

c. the delay of 10 years prior to the start of the trial; and

d. the fact that Mr Edwards was the sole supporter for his twin children, who had lived with him since Mrs Harris-Vasquez' death.

[124] In passing sentence, the learned trial judge stated that she considered Mr Edwards' previous good character and reputation and his service to the country in various capacities. She said that she took into account all that had been advanced on his behalf by defence counsel, which included the reference to Mr Edwards' children.

[125] The learned trial judge acknowledged that she was somewhat restricted by the provisions of the Offences of the Person Act, in that she was obliged to impose a custodial sentence. The relevant provisions of that Act would be sections 2(2) and 3(1)(b). The circumstances of Mrs Harris-Vasquez' killing would fall within the provisions of section 2(2) of the Offences Against the Person Act. It is unnecessary to set out its terms but Mr Edwards would, by its provisions, be liable to be sentenced in accordance with section 3(1)(b) of that Act. Section 3(1)(b) states:

> "3.—(1) Every person who is convicted of murder falling within—
>
> …

(b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

In addition to considering the provisions of that section, the learned trial judge explained, in passing sentence, that she took into account the "principles of sentencing: deterrence, prevention and rehabilitation", and fairness to the community, the family of the deceased and Mr Edwards.

[126] What the learned trial judge did not do, however, is to, firstly, state what range of sentences she was using as a guide and how she arrived at the period of 35 years, and, secondly, state that she considered the length of the pre-trial delay.

[127] In recent times this court has suggested to sentencing judges that they should, in passing sentence, reveal the process by which they have arrived at the sentence imposed. In doing so, sentencing judges would be assisted by using the usual range of sentences that is imposed for the particular offence. Thereafter, the sentencing judge should choose a starting point, according to the circumstances of the commission of the offence, whether a point higher or lower on the range is appropriate. Thereafter, the circumstances of the particular offender would determine whether to increase or lower the severity of the penalty. Examples of the circumstances of the individual offender would be whether there was a guilty plea, whether he had a previous conviction for a similar offence, whether he was previously of good character and the like.

[128] Of the range of cases in which sentences for the offence of murder were considered, that of **Omar Reid v R** [2011] JMCA Crim 62 stands out. Mr Reid and Ms

Barbara Scott had an intimate relationship. One day they had a dispute over money. He said that he hit her and she fell and hit her head and died. He put her body in a pit to conceal it. An autopsy showed that she died as a result of "great blunt force trauma to the right side of the head resulting in a fracture to the skull and inter-cranial bleeding". He was convicted of murder and sentenced to imprisonment for life and ordered to serve 25 years before becoming eligible for parole.

[129] The pre-trial delay is also a factor that this court is entitled to take into account.

[130] In **Dalton Reynolds v R**, cited by Mrs Palmer-Hamilton, this court explained that such delays may be taken into account in the sentence that is imposed. Although that case involved delay in the hearing of the appeal, the principle is applicable here. Harrison P, at page 7 of the judgment, said that delays which were lengthy and inordinate did not "automatically attract a quashing of [the] conviction, but may be taken into account, in considering any alteration of the sentence imposed".

[131] When considering pre-trial delay, the issues of whether the accused was on bail or in custody is relevant. Also relevant is the effect on the accused of having a serious charge hanging over his head. In **Beres Douglas v R** [2015] JMCA Crim 20, this court considered the time between the commission of the offence and the time when a new trial would have commenced. Phillips JA pointed out the factors which should be considered in deciding whether a new trial should have been ordered. The learned judge of appeal said, at paragraph [64] of the judgment:

> "The Privy Council in **Charles and Others v State of Trinidad and Tobago; Carter (Steve) v Same; Carter**

> **(Leroy) v Same** (1999) Times, 27 May and this court in **Pauline Gail v R** have considered the delay between the commission of the offence and the new trial and the ordeal suffered by the appellant, in considering whether or not to grant a new trial. In the instant case, there has been some delay since it has been approximately seven years since the commission of the offence and four years since the trial and subsequent conviction. **However, the appellant had been on bail during the trial and remained on bail during the hearing of this appeal, although one must still consider that the matter has remained outstanding, hanging over his head, and would continue to do so until finally determined**." (Emphasis supplied)

[132] Another point to be considered is that this court has stated that an offender should receive, in mitigation of his sentence, a recognition of the time spent on remand pending trial. In **Meisha Clement v R** [2016] JMCA Crim 26, at paragraph [34], Morrison P said:

> "...However, in relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial...."

[133] In this case, in applying the principles mentioned above, it should be noted that the period usually ordered to be served prior to eligibility for parole, for the offence of murder, ranges from 15–45 years. The circumstances of this particular killing, though planned and calculatedly, if not cunningly, executed, were not gruesome. It has left two young children without their mother and caused loss to a family of a daughter and aunt. It was committed in the victim's home, where she would, and should, have felt safe, and was committed by a person whom she trusted. Taking all those factors, some

of which were indeed mentioned by the learned trial judge, into account, and considering the sentence used in **Omar Reid v R**, a period of 25 years would be an appropriate point at which to start to examine Mr Edwards' individual circumstances.

[134] The delay in bringing this case to trial was unquestionably long. However, Mr Edwards was on bail for much of that period, although he did spend some two years in custody before being granted bail. Nonetheless, the mere fact of having such a charge pending would have undoubtedly had an effect on him. The learned trial judge should have specifically taken the delay and the pre-trial custody into account. Mr Edwards should have been given some "credit" in his sentence for those factors.

[135] He was also previously of good character and had no previous convictions. He had, as the learned trial judge pointed out, served in the correctional services, the special constabulary and the constabulary forces. He had good character references from his colleagues in the police force as well as in business. His honesty and integrity were extolled. Those factors count in his favour. His insistence on his innocence, despite the majority verdict of the jury, does not, but there should be no increase, in the circumstances of this case, for that factor.

[136] In the circumstances, the period imposed before Mr Edwards may be eligible for parole, can be said to be manifestly excessive. It should be set aside and a period of 20 years, before being eligible for parole, imposed in its stead.

Conclusion

[137] Learned counsel for Mr Edwards, each in their own sectors of the submissions, advanced the factors of:

a. pre-trial delay affecting the fairness of the trial and compromising Mr Edwards' constitutional right to a fair trial in a reasonable time;

b. deficiency in the evidence presented by the prosecution, particularly that of the handwriting expert Mr Carl Major;

c. the adequacy or fairness of the learned trial judge's summation; and

d. the sentence imposed.

[138] Having considered all of these factors individually, and unavoidably, at some great length, it has been determined that the delay and missing evidence did not prejudice the trial of the case, and there was sufficient evidence presented by the prosecution, on which a jury, properly directed, could have convicted. This is so, despite the fact that a reasonable mind may have had a contrary view. In the circumstances, the learned trial judge was correct in calling on Mr Edwards to answer the prosecution's case.

[139] The learned trial judge, in a long case, did an excellent job in identifying the legal issues for the jury and reminding them of the evidence that was adduced before them. The various complaints about deficiencies in her summation are unfounded. The majority of the jury having come to the conclusion that it was Mr Edwards' hand that caused Mrs Harris-Vasquez' death, the conviction should, therefore, stand.

[140] The learned trial judge, although she did set out a number of factors that she took into account in passing sentence on Mr Edwards, did not explain how she arrived at the period of 35 years imprisonment before he became eligible for parole. Her approach has left this court to consider that aspect of the case afresh. After considering the usual range of sentence that is passed for this offence, the particular nature of this killing and Mr Edwards' particular circumstances, it has been decided that the period of 35 years should be set aside and a period of 20 years should be served before Mr Edwards should be eligible for parole.

[141] The delay in delivering the judgment is sincerely regretted.

Order

a. The appeal against conviction is dismissed, and the conviction is affirmed.

b. The appeal against sentence is allowed, and the sentence is set aside.

c. The sentence imposed, in its stead, is imprisonment for life. The appellant is to serve 20 years before he becomes eligible for parole. The sentence is to be deemed as having commenced on 5 November 2013.