[2019] JMCA Crim 7

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 34/2012

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

CARL PINNOCK v R

Robert Fletcher and Miss Deneve Barnett for the applicant

Miss Patrice Hickson for the Crown

5 February and 8 March 2019

STRAW JA

[1] The applicant, Mr Carl Pinnock, was convicted on 30 January 2012 of the offence of murder, in the Home Circuit Court, after a trial before Daye J and a jury. Subsequently, he was sentenced to life imprisonment on 28 March 2012, with the stipulation that he should serve 18 years before becoming eligible for parole. The applicant applied for leave to appeal against his conviction and sentence. That application was refused by a single judge of this court.

[2] Consequently, the applicant has renewed his application for leave to appeal against conviction only.

Factual background

[3] The applicant, who was known by the alias "Brown Boy", was charged with the murder of Cornelius Green, otherwise called "Carney", on 29 January 2009 at Mitchell Crescent, Edgewater in the parish of Saint Catherine. Mr Green died as a result of a single gunshot wound to the body.

[4] At the trial, the Crown called two eyewitnesses, Miss Nikeisha Porter and Mr Nathan Cameron who spoke of a dispute between the deceased, one "Tall man" and the applicant. Both Crown witnesses gave evidence that the applicant pulled a gun during this dispute and shot the deceased. The applicant gave an unsworn statement, in essence, denying that he pulled any firearm and shot the deceased. He alleged that it was one "Kirlew", a friend of the deceased, who fired the shot that hit the deceased.

[5] The defence called four eyewitnesses, Messrs Nico Darby, Ryan Young and Morris Richards and Ms Tameka Brown, who said that it was not the applicant who fired the shot but a tall, Indian man who made his way up towards the crowd during the dispute and fired the shot. This person was known to one of the four witnesses as "Kirlew".

The application for leave to adduce fresh evidence

[6] At the commencement of the hearing, counsel for the applicant, Miss Deneve Barnett, made an application for leave to adduce fresh evidence from one Mr Wayne Lamey. The application was made pursuant to section 28(a) of the Judicature

(Appellate Jurisdiction) Act. The application was supported by an affidavit of Mr Lamey and contained similar evidence to that given by the four defence witnesses at the trial.

[7] This was to the effect that the affiant, a taxi driver, had dropped off a passenger a little past the location of the incident (Mitchell Crescent) on 29 January 2009. As he was passing Mitchell Crescent, he observed a "tall Indian youth", who he stated "take out a gun and started to squeeze it". He then asserted he heard "shots". He stated that he drove away and circled back several minutes later and saw one person on the ground who was being taken up and put into a vehicle. He knew none of the people. He learnt that a "short dark youth" was held for the killing. In April, he made efforts to attend both the Bridgeport police station and what he described as the "Hundred Man" police station to give a report as to the description of the person he saw firing the weapon. On the third occasion, he actually spoke to the investigating officer and gave him that information. He was told to return the following week for a statement to be taken. However, on his subsequent return, the investigating officer told him that he could take no more statements in relation to the matter.

[8] Having heard the submissions made by both parties, this court refused the application to allow the fresh evidence as it did not satisfy all the factors that should be established in order for such evidence to be adduced. These factors were recently set out by this court in **Seian Forbes and Tamoy Meggie v R**[1]. Brooks JA, who delivered the judgment of the court, considered the authority of the court to admit fresh evidence

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[1] [2014] JMCA App 12

and the manner in which the authority is to be exercised at paragraphs [25] to [27]. At paragraph [26], the learned judge of appeal quoted, with approval, the four criteria to be satisfied for the admission of fresh evidence as set out by Lord Parker CJ in **R v Parks**[2]. He said thus:

> "There has been ample guidance from the decided cases as to the way in which this authority is to be exercised. The most often-cited authority in respect of this guidance is that contained in the judgment of Lord Parker CJ in **R v Parks**. In construing the authority given to the court by legislation, similar in terms to section 28, Lord Parker stated:
>
> > 'As the court understands it, the power under s 9 of the Criminal Appeal Act, 1907, is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way: **First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.' (Emphasis supplied)
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> It was pointed out by Harrison JA in this court, in **Mario McCallum v R** [(unreported), Court of Appeal, Jamaica,

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[2] [1961] 3 All ER 633

> Supreme Court Criminal Appeal No 93/2006, judgment delivered 18 June 2008] that the requirements identified in the above extract 'are cumulative hence the applicant must satisfy each one' (page 3)."

[9] In applying these criteria, this court came to the conclusion that the statement contained in the affidavit of Mr Lamey did satisfy the first three factors: (i) it was not available at the trial, (ii) it was relevant to the issues and (iii) it was evidence capable of belief. However, it fell woefully short of the fourth criterion necessary for a successful application. This is whether the evidence might have raised a reasonable doubt in the minds of the jury as to the guilt of the applicant.

[10] Miss Barnett argued valiantly that Mr Lamey's evidence would provide the only account to be given by someone who is not connected to the community and the individuals involved in the dispute and of whom it could be said there was no apparent interest to serve. However, we found that this point was unmeritorious. Two of the four defence witnesses, Messrs Ryan Young and Morris Richards, did not know anyone involved in the dispute and did not belong to the community. Mr Young had gone to visit a woman in the community and Mr Richards, to visit a friend. Also, Miss Tameka Brown, another of the defence witnesses, had recently moved into the area one month previously and her only knowledge of the parties was limited to seeing the accused in passing. Bearing in mind the similarity of Mr Lamey's evidence in relation to "a tall Indian" shooter and bearing in mind that the jury had obviously rejected that version of events, this court was of the view that the nature of the evidence would not have raised

a reasonable doubt in the minds of the jury as to the guilt of the applicant if his evidence had been taken.

The grounds of appeal

[11] At the conclusion of the hearing in relation to the application for leave to adduce fresh evidence, Mr Robert Fletcher, counsel for the applicant, was granted permission to argue supplementary grounds of appeal (in substitution for the grounds originally filed by the applicant). Those grounds are as follows:

> **"GROUND 1**
>
> **The absence of evidence of Wayne Lamey (the fresh evidence affiant) from the trial, denied the Applicant of the type and nature of evidence which, as it was independent, could have significantly increased his chance of acquittal. This absence denied him a fair trial."**
>
> **"GROUND TWO**
>
> **The refusal/failure of the Police/Prosecutor to take statements from potential witnesses who submitted themselves to the jurisdiction of the process of justice denied the Applicant a fair trial and did not inure to the best interest of justice**."
>
> **"GROUND 3**
>
> **The learned trial judge erred in failing to give the necessarily careful direction about evidence that other witnesses had come forward to give statements but on the instructions of the Clerk of the Court their statements were not taken. The admission of that fact on the case required a direction about the limited value, if any, such fact had. Without it the accused would reasonably be said to be prejudiced by the potentially adverse inference**

that could flow from fact that that evidence was given."

"GROUND 4

The Learned Trial Judge erred in his summation, failing to deal with two starkly prejudicial non-probative statements adverse to the Applicant. That failure denied the applicant a fair and balanced consideration of his case."

"GROUND 5

The learned trial Judge failed to adequately deal with stark discrepancies and contradictions in the evidence and in so doing, did not provide the jury with a sufficiently clear picture of the weaknesses in the evidence. This denied the Applicant a fair and balanced consideration of his case."

"GROUND 6

The Learned Trial Judge erred in not availing himself of an Ensor hearing at the conclusion of the evidence which would assist him as to some of the more nuanced but extremely critical issues that needed to be dealt with in the summation."

"GROUND 7

The verdict is unreasonable having regard to the evidence."

Ground 1

The absence of evidence of Wayne Lamey (the fresh evidence affiant) from the trial, denied the applicant of the type and nature of evidence which, as it was independent, could have significantly increased his chance of acquittal. This absence denied him a fair trial.

[12] In the light of the fact that ground one was dependent on a successful application for the fresh evidence to be received, Mr Fletcher properly abandoned the ground.

[13] Accordingly, this ground is no longer relevant to the determination of this appeal.

Ground 2

The refusal/failure of the police/prosecutor to take statements from potential witnesses who submitted themselves to the jurisdiction of the process of justice denied the applicant a fair trial and did not inure to the best interest of justice.

The relevant evidence

[14] The investigator, Detective Sergeant Karl Morrison, obtained two eyewitness statements from Miss Nikeisha Porter and Mr Nathan Cameron. Detective Sergeant Morrison stated that based on his investigations, he discerned that there would have been other witnesses. The applicant did indeed call four eyewitnesses to the incident. These four witnesses all supported the applicant that he did not shoot the deceased but it was a tall man of Indian extract. One of the four defence witnesses, Mr Nico Darby, as well as the applicant identified this man to be "Kirlew".

[15] Detective Sergeant Morrison also stated that he received information that other witnesses attended the police station in order to give statements to him. He said he spoke to the clerk of the court at Half Way Tree Parish Court about the matter and was told that it would not be appropriate for him to record those statements. He never spoke to these persons.

Submissions on behalf of the applicant

[16] Mr Fletcher has submitted that this ground straddles several areas including prosecutorial misconduct and abuse of process. He states that it is a deliberate "shutting of the eye" of the integrated prosecution team to potential evidence. The

court was referred to the manual for prosecutors entitled "The Decision to Prosecute: A Jamaican Protocol", where it states (at page 12):

> "...Every case that Prosecutors receive from investigators is reviewed. Prosecutors must ensure that they have as much information as they need to make an informed decision about how best to deal with the case. This will often involve Prosecutors providing guidance and advice to the police and other investigators about lines of enquiry, evidential requirements, and assistance in any pre-proceedings procedures throughout the investigative process by providing a ruling on the case"

[17] In written submissions, it was argued that the prosecutor erred in his advice to the investigating officer, that this was a breach of the prosecutor's duty to guide and advise the police and caused the investigation to be truncated and incomplete by excluding potential evidence. It was further submitted that the defence was robbed of potential disclosure of statements that may have assisted them in a decision as to whether to call other witnesses.

[18] Learned counsel asked that the court consider the question: "What is the prosecutor's duty?" He submitted that if there is no duty to obtain or retain evidence, then no issue would arise as to whether a subsequent trial would be unfair and somewhat prejudicial to a defendant. By failing to take the statement of witnesses who made enquiries, the prosecution suppressed evidence and violated the principle of due process. At the least, counsel submitted that such a decision as was taken is irregular and not in the interests of justice. Mr Fletcher relied on several authorities including **R v**

Brooks[3], **Edwards v R**[4], **R v Malcolm Charles Dobson**[5], **R (on the application of Ebrahim) v Feltham Magistrates' Court and another; Mouat v Director of Public Prosecutions**.[6]

[19] These cases, he submitted, are basically concerned with absent evidence, whether the fact of such absence could cause a trial to be unfair or whether there ought to have been a stay of execution. Counsel admitted that these cases are somewhat distinguishable from the case at bar. He also admitted that the issue of abuse of process is not one for this court, however, the question that must be answered is: In what way would the applicant have been prejudiced? Counsel admitted that it was difficult to say what specific prejudice the applicant might have suffered. However, he stated that the issue be considered within the context that the giving of a statement connotes a badge of sincerity and the defence witnesses were asked if they had given statements to the police and they all indicated that they had not. It is his view that the defence could have been significantly impaired in the eyes of the jury. The issue remains unresolved as to what might have been in those statements and prejudice against the applicant ought to be presumed.

Submissions of the Crown

[20] Miss Patrice Hickson, counsel for the Crown, submitted that there was no prejudice to the applicant by the failure of the police to take statements from potential

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[3] [2004] EWCA Crim 3537
[4] [2018] JMCA Crim 4
[5] [2001] EWCA Crim 1606
[6] [2001] EWHC Admin 130; [2001] 2 Cr App R 427

witnesses. She stated that there is no fault to be attached to the actions of the police officer as he sought the guidance of the clerk of the court. Counsel submitted also that there was no evidence of *mala fides* or any question of dishonesty on the part of the police officer as referred to in **R v Brooks**. The issue complained of is speculative in nature; the question of law concerning abuse of process is the province of the trial judge, not the jury. She further stated that the circumstances complained of were addressed by the learned trial judge at page 354 of the transcript (lines 11-18):

> "And I pause to say also that as jurors you should not speculate. If no evidence was called or no witness was called, it is not your function to surmise what the person would have said, how it went, or anything like that. It is not your function to speculate. Your function is to decide the case on the evidence which was presented before you in Court."

[21] Counsel also submitted that there was no basis to establish unfairness as to how the trial proceeded. It was her submission that the jury heard the reason given by the police officer for the failure to interview and collect these statements. This would have been in their remit for consideration on the totality of the evidence.

Analysis and discussion

[22] The authorities relied on by Mr Fletcher involve essentially issues surrounding lost or destroyed video tape evidence. The courts had to consider whether there ought to have been a stay of proceedings as a result of abuse of process. In **R v Brooks**, a decision from the Court of Appeal of England and Wales, there was an eight minute gap in a compilation of video footage. At paragraph [12] of that judgment, Sir Edwin Jowitt,

who gave the judgment, stated that the stay of a trial for abuse of process is an exceptional course. He expressed his reasoning as follows:

> "…**This is because the trial process can itself in most cases be adequately fit to deal with the matters complained of and ensure the fairness of the trial.** If the court is satisfied that the prosecution has deliberately resorted to dishonest or unfair and manipulative practices to frustrate the Defendant's opportunity of receiving a fair trial, the court has the power to stay a prosecution even though these efforts have not been successful. If the court is not so satisfied - and the burden of proof on the balance of probabilities rests on the Defendant who seeks a stay - the court will be concerned to consider whether, despite all that has gone wrong, a fair trial can be had. If a Defendant satisfies the court that he cannot have a fair trial, then the court's discretion will be exercised in favour of granting a stay, but that is a rare case because of the checks and balances which exist during the trial process itself…" (Emphasis supplied)

[23] Mr Fletcher has not argued that a stay of proceedings ought to have been granted in the court below (indeed no such application had been made during the trial). He however seeks to impress upon this court that a miscarriage of justice has occurred as a result of the prosecution's failure. However, as expressed in **R v Brooks,** any situation of unfairness complained of is to be weighed and considered within the context of the trial process and the evidence that evolved.

[24] In **R (on the application of Ebrahim)**, a decision from the High Court of England and Wales[7], the court gave guidance where applications are made in the Magistrates' Court to stay proceedings for abuse of process on the basis of destruction

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[7] The Queen's Bench Division

of video tape evidence. The case concerned two separate matters: an application for judicial review and an appeal. In relation to Mr Mouat, he had appealed from his conviction by the Crown Court which had refused to stay proceedings for abuse of process on the grounds that the police officers in the case had destroyed a video recording of the relevant incident soon after it took place. In the relevant jurisdiction, there is an established Code of Practice and Attorney General Guidelines to guide the police. Paragraph 2.1 of the Code of Practice published pursuant to sections 23 and 25 of the Criminal Procedure and Investigations Act 1996, provides as follows:

> "material may be relevant to the investigation if it appears to an investigator, or to the officer in charge of an investigation, or to the disclosure officer, that it has some bearing on any offence under investigation…unless it is incapable of having any impact on the case."

[25] Brooke LJ, in delivering the judgment, made it clear that the provisions of the Code merely preserved and amplified common law rules which were prescribed by the judges before the Code came into force on 1 April 1997. He stated at paragraph 12, pages 431 to 432 of the report:

> "…In one of them, *Reid* March 10, 1997 (unreported), Owen J. said, in effect, that
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> (i) There is a clear duty to preserve material which may be relevant;
>
> (ii) There must be a judgment of some kind by the investigating officer, who must decide whether material may be relevant;
>
> (iii) If he does not preserve material which may be relevant, he may in future be required to justify his decision;

> (iv) If his breach of duty is sufficiently serious, then it may be held to be unfair to continue with the proceedings."

[26] Although the circumstances of this case are sufficiently distinct with the issues involving lost or destroyed evidence, the guidelines reflect common law rules and are helpful to this court in considering the complaint of the applicant. In this case, there was no interviewing of the potential witnesses to determine whether the material was relevant or not. However, there is also no evidence that there was a deliberate intent by the police officer/prosecution to obfuscate the investigation and to use manipulative and dishonest tactics so to do. The issue is whether this failure to interview possible potential witnesses has led to such a prejudicial state of affairs that it would have been impossible for the applicant to obtain a fair trial.

[27] In relation to this issue, it cannot be said that there was any real prejudice that could militate against a fair trial. The case for the defence was fully advanced. There were two opposing set of facts put before the jury for their consideration. There was sufficient material for the jury to come to the conclusion it did. The prosecution witnesses have maintained that the applicant was the one who shot and killed the deceased. The defence witnesses spoke to a tall man of Indian extract as the shooter.

[28] Additionally, the jury had evidence before them that the investigator had been trying to locate "Kirlew" but was unable to do so. There was cross-examination of all these witnesses and a summation that dealt with the relevant issues. None of the defence witnesses had given evidence that they had attempted to give a statement to the police. The trial judge had properly directed the jury on the burden and standard of

proof, and had recounted the evidence adduced by both parties. He directed the jury extensively on the need to be satisfied that the Crown witnesses were credible and that they had to be satisfied that the identification evidence was cogent.

[29] At the end of the day, it is clear they rejected the version put forward by the defence and accepted the evidence of the prosecution witnesses. There could be no speculation as to what other potential witnesses may have said and it was the trial judge's duty to give that warning, which he did. It cannot therefore be maintained that the failure of the police officer/prosecution to collect statements as described resulted in egregious prejudice so as to warrant a decision that there was a miscarriage of justice.

[30] This ground of appeal must fail.

Ground 3

The learned trial judge erred in failing to give the necessarily careful direction about evidence that other witnesses had come forward to give statements but on the instructions of the clerk of the court their statements were not taken. The admission of that fact on the case required a direction about the limited value, if any, such fact had. Without it the accused would reasonably be said to be prejudiced by the potentially adverse inference that could flow from fact that that evidence was given.

Submissions on behalf of the applicant

[31] Mr Fletcher submitted that the trial judge ought to have given careful directions about the limited value of this evidence in order to ensure that the jury did not make findings based on unreasonable inferences as to why such a decision was made. He stated also that the trial judge ought to have reminded the jury of that aspect of the

evidence and directed them as to "what their minds should not be adverted to". He submitted that even though the evidence was brought out by defence counsel, it is evidence that is capable of creating a range of inferences. The first inference is that there is a body of potential statements from witnesses which could reinforce the prosecution's case. The second is that there is enough evidence and no more is required. Those inferences are prejudicial and therefore required careful direction by the trial judge. He submitted also that a standard direction in relation to speculation did not cover the specific issues raised in the case.

[32] Counsel relied on the cases of **White (Kory) v R**[8] and **Delroy Hopson v The Queen**[9].

Submissions of Crown

[33] Miss Hickson submitted that the directions of the learned trial judge were sufficient and that any further directions would have the result of the jurors speculating as to what the witnesses would have said. She referred to the trial judge's summation at page 445 of the transcript (lines 13-25):

> "The officer said he did get a description about a person name 'Curl Lue' and he was told that he was somebody of an Indian extract and was very tall and he did go in search of one 'Curl Lue', but he never found him, and to date, he has not found him. And as I said to you, you can't speculate anything about –

[8] (1997) 53 WIR 293
[9] [1994] UKPC 20; (1994) 45 WIR 307

> further, what you have to concentrate on is the evidence that you have heard by the eyewitnesses who say they were eyewitness [sic] and whether you believe them, and believe that they were not mistaken. That is the evidence that the Prosecution has presented to you."

[34] Miss Hickson stated that the jury would have been well aware that the officer did attempt to locate this person, Kirlew, that the applicant and defence witnesses spoke about and of their duty not to speculate but to decide whether they believed the eyewitnesses and whether they were mistaken.

Analysis and discussion

[35] In **Delroy Hopson,** an appeal from this court to the Privy Council, the investigating officer had given evidence that he attended the hospital and spoke to the victim. He said he was told something after which he made a decision to look for a particular person as part of his investigation. The victim subsequently died and there was no suggestion when the evidence was elicited from the officer that the victim's statement was treated as a dying declaration. The officer went on to say that after leaving the hospital he spoke to two witnesses and the following morning he obtained a warrant for the arrest of the appellant. The Privy Council held that the evidence was hearsay, highly prejudicial and wholly inadmissible; that the jury could only have understood the officer's evidence that he was looking for someone in particular as implying that the victim had named the appellant as his attacker. This is wholly distinguishable from the case at bar as there is nothing in the evidence from which one could imply what the potential witnesses would or could have said.

[36] In **White (Kory) v R**, a decision from this court, the complainant in a case of a sexual offence gave evidence that she reported the incident of the sexual assault to other people. None of those persons were called to give evidence so there was no evidence of recent complaint. The trial judge rightly directed the jury that the evidence as to the reports did not constitute corroboration. This court stated that the evidence of her reports was not in itself inadmissible in the course of a fair and coherent account of her behaviour after the incident. However, the appeal was allowed as this court held that it was incumbent on the trial judge to give the jury a careful direction about the limited value which could be attached to the complainant's evidence as regards the reports.

[37] Again, the circumstances are distinguishable. It could be inferred from the evidence of the complainant in **White (Kory) v R** that she made reports to persons concerning the sexual assault, although there was no such evidence before the court which could be treated as recent complaint. In the case under consideration, no such inference could be drawn as to what these witnesses might have said. The jury were cautioned not to speculate. This direction was given at different sections of the summation (see pages 354 and 445 of the transcript as quoted respectively at paragraphs [20] and [33] herein). The jury were also directed in relation to the issue of reasonable inferences at pages 359 to 360 of the transcript:

> "Apart from the facts proving a case, you are entitled to draw reasonable inference from such facts as you find proved in order to assist you to come to your decision. And that

> is different, Mr. Foreman and members of the jury, from speculating. When you draw a reasonable inference, there must be facts proved and then you can draw an inference from it. Speculation means there is no facts proved or evidence. You just have to surmise, not on any evidence at all…"

[38] The prosecution and defence had two contrasting versions as to what took place. The jury had to decide whether the prosecution had satisfied them on the evidence beyond a reasonable doubt. The learned trial judge reminded the jury of the burden and standard of proof in adequate and sufficient terms. This is observed in several sections of the transcript including pages 363 to 365. In particular, at pages 364, to 365, he directed them in the following terms concerning the case put forward by the applicant:

> "As I said before, there is no duty on the accused to prove his innocence or to call any witness or to say anything, but in his attempt to do so and in this case he did, if he attempts and succeeds, then he is not guilty, because what he said and the witnesses he called, you are satisfied, then he is not guilty of the offence charged. But if he attempts to prove his innocence by giving a statement and calling witnesses and he failed, that is, you don't believe or accept what he said, or his witnesses, then you don't simply find him guilty on that, guilty on those grounds alone. What you have to do is to consider all the evidence that is presented by the Prosecution, including what the accused has said and when you look at everything, you decide whether you are satisfied, so that you feel sure that the Prosecution has proven this charge of murder against the accused."

[39] This ground is therefore without merit.

Ground 4

The learned trial judge erred in his summation, failing to deal with two starkly prejudicial non-probative statements adverse to the applicant. That failure denied the applicant a fair and balanced consideration of his case.

Submissions on behalf of the applicant

[40] The written submissions of counsel referred to two prejudicial statements that occurred during the trial. However, in oral submissions to this court, Mr Fletcher pointed to a third such statement.

[41] These statements are set out in the order that the evidence was given and are highlighted in bold. The first such statement was made by the witness, Miss Nikeisha Porter, speaking to words used by the mother of the applicant. She said in the discourse recorded at pages 31 to 33 of the transcript:

> "A. She said to 'Cutter', anything, she said anything, she seh no…
>
> Q. Take your time.
>
> HIS LORDSHIP: All right, go ahead.
>
> THE WITNESS: **She said, mi have a woman weh back me, because her money tall up, and anything… (inaudible.)**
>
> HIS LORDSHIP: You have to go over that, just take your time.
>
> A. Can I have some water, please?
>
> HIS LORDSHIP: You want to sit?
>
> THE WITNESS: Yes
>
> HIS LORDSHIP: Have a seat. When you are ready, tell us.

THE WITNESS: Yes, sir.

HIS LORDSHIP: The only thing that I have gotten, I don't know if the Writer, the only word I have gotten is anything, so you need to repeat it.

THE WITNESS: Yes, sir.

...

HIS LORDSHIP: That's the only. You have to say it all over again.

…

A. She said mi woman wi back mi because har money tall up soh and anything mi pickney dem do, dem have fi get weh."

[42] The second statement was also made by the witness Miss Nikeisha Porter as to words used by the deceased in the presence of the applicant just before the applicant pulled a firearm and shot at the deceased. This aspect of the evidence is found on pages 36 and 37 of the transcript:

"A. I hear 'Tall Man' seh, 'bad man Carney.'

Q. Yes?

A. She, 'bad man Carney,' and Carney seh, 'yes, a datz why dem run you out a foreign because you a wear tight pants like you a batty man.'

HIS LORDSHIP: Yes.

Q. And after he said that, well, who was Carney talking to at that time?

A. He was talking to 'Tall Man.'

Q. To 'Tall man.' After he said, because you a wear tight pants like you a batty man, what happened next?

A. Then I hear 'Brown Boy' seh, 'you see how you a call mi friend batty man, you see how you a call mi friend batty man.'

Q. Yes?

HIS LORDSHIP: Yes.

Q. Yes.

A. **You see how you a call mi friend batty man, and then him seh, 'come off a mi road,' and then Cornelius said, he was referring to 'Tall Man' and myself, 'you think mi nuh know seh a oonuh kill the two man dem round deh soh.'**

HIS LORDSHIP: Cornelius said what, said certain things.

THE WITNESS: He said something to 'Tall Man.'

HIS LORDSHIP: Yes, stop there."

[43] The third statement was made by the witness Mr Nathan Cameron and relates to a statement made by the applicant immediately after the deceased was shot. At page 126 of the transcript, he stated thus in response to Crown Counsel's questions:

"A. When I see 'Corney' drop, I get over him and hold him.

Q. What you said, sir, sorry?

A. I get over 'Corney' when I see him drop on the ground, and kinda hold him; just hold him a little.

Q. Where was 'Brown Boy', at this time?

A. At that time me on the ground with 'Corney', back, back, back, and running going up the road, with the gun in a him hand.

(Witness demonstrates)

Q. What happened next?

A. **He said him seh long time he is killing people.**"
(Emphasis added)

[44] Counsel complained that the trial judge failed to give directions to the jury, at all, as to how to deal with any of these statements. He submitted that all these statements were not probative of any fact in issue and were highly prejudicial. The first statement, relating to words uttered by the mother of the applicant, commenced with a statement of impunity and could have had an effect on how the applicant was seen by the jury. In particular, the second such statement, Mr Fletcher argued, would have established (in the mind of the jury) the culture of the applicant as a murderer. It would have prejudiced the applicant beyond recovery. The third statement, he submitted, would have produced a cumulative effect that would have been devastating to the applicant.

Submissions of the Crown

[45] Miss Hickson submitted that the trial judge committed no such errors as opined by counsel for the applicant because of a failure to give any directions in relation to the said statements. She submitted that all three statements are to be seen as forming part of the *res gestae*. In relation to the statement concerning the words uttered by the mother of the applicant, counsel submitted that this evidence was part of the full picture of what took place on the scene, in particular before the shooting took place. In relation to the second statement, she stated that the trial judge's summation was meticulous and he could not be faulted for the use of his discretion in deciding how the matter should be dealt with. She stated that the same submissions would apply in relation to the third statement.

Analysis and discussion

[46] In **Dwight Gayle v R**[10], a judgment of this court, Brooks JA, at paragraph [107], summarized the applicable principles to be considered when a potentially prejudicial statement is improperly made:

> "In **Machel Gouldbourne v R** [2010] JMCA Crim 42, this court outlined the applicable principles where a potentially prejudicial statement is improperly made. The principles may be identified at paragraphs [21] and [22] of that judgment:
>
> a. Each case will depend on its own facts.
>
> b. In circumstances where potentially prejudicial statements are improperly made the trial judge has a wide discretion.
>
> c. There are a number of choices that are open to a trial judge in exercising that discretion. These include, taking no action and making no mention of the matter, discharging the jury, immediately directing the jury appropriately, waiting until the summation to direct the jury on the matter, or combining both of the last two choices.
>
> d. An appellate court will be loath to interfere with an exercise of that discretion. It will only do so in the most extreme cases. 'As Sachs LJ put it in the well known case of ***R v Weaver*** [1967] 1 All ER 277, 280 ...the correct course 'depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted…' (see also Archbold, Criminal Pleading, Evidence and Practice 1992, para. 8-194, and the decision of this court in **McClymouth v R** (1995) 51 WIR 178).'"

[10] [2018] JMCA Crim 34

[47] In relation to the first statement, the utterances of the mother of the applicant, the trial judge made a brief reference to that evidence in his direction to the jury at page 430 of the transcript:

> "There is a slight difference in the sequence that Nathan Cameron used because Nikeisha Porter suggests that the mother was acting in a – beat her chest and used certain sort of defiant language. Whereas Nathan 'Cutta' is saying the mother was telling – waving and telling 'Brown Man' to go back and he did actually walk back up. It's when the words were used, Nathan is saying he came back down and pulled this gun. So, there is a slight difference. You must decide whether that is slight, serious or immaterial or if it affects the credibility of any of the witnesses."

[48] The trial judge did not repeat the words used but characterized them in a manner that would reduce any potential for prejudice in the eyes of the jury. What is even more potent is that he made it clear that what Miss Nikeisha Porter indicated that the mother said was an area of discrepancy between the two Crown witnesses. He reminded them that Mr Nathan Cameron did not report that the mother used such words but was telling the applicant to go back up the road. In the transcript of the evidence found at page 117, Mr Cameron stated, in a discourse with Crown Counsel, as follows:

> "A. His mother shield him off with him [sic] hand.
>
> (witness indicates)
>
> Q. What happened next, sir?
>
> A. Say, go back up the road, a talk, me, a 'Cutter', deh here talking, call me 'Cutter'.
>
> Q. Why they call you 'Cutter'. Why they call you 'Cutter'?

A. A just in the area, the names, is a woman thing, cut everything.

Q. Yes, sir, after she said those words to him, what, if anything happened next?

A. Not at the same time, he turn back.

Q. He who?

A. 'Brown Boy' turn back."

[49] The jury would have had to weigh this discrepancy in order to determine if there was credible evidence that the words were used. In any event, any effect which those words might have had, could be said to have been diluted by the treatment of the trial judge and the subsequent evidence of the mother's behaviour by Mr Cameron. Finally, this court would have to agree with the submission of counsel for the Crown that the words were part of the *res gestae* - the narrative of events taking place. It cannot be said to have been improperly admitted. Certainly they were not words attributable to the applicant. This court is of the view that the trial judge properly exercised his discretion in his manner of dealing with this statement.

[50] In relation to the second statement, the words used by the deceased to Tall Man and the applicant, the inference is that Tall Man and the applicant had previously killed two men. The transcript itself does not make it abundantly clear who the word "oonuh" referred to. The witness, Miss Nikeisha Porter is recorded, at page 37 of the transcript, as saying:

> "…and then Cornelius said, he was referring to 'Tall Man' and myself [sic], 'you think mi nuh know seh a oonuh kill the two man dem round deh soh.'"

[51] It is apparent however that the words used were accepted as referring to both Tall Man and the applicant and not Tall Man and the witness. These words would therefore have been patently prejudicial in nature even though they could be said to form part of the narrative of events. The applicant was on trial for murder and the words clearly suggested that he and another man had committed two murders previously. The words themselves had no probative value as to any issue to be proved by the Crown. It is clear that the trial judge made every effort, after the words were spoken, to ensure they were not repeated by the witness. However, he did not instruct the jury at that time, nor during the summation, how to treat with those words which were choices open to him. The issue is therefore whether he wrongly exercised his discretion in this regard.

[52] In **McClymouth (Peter) v R**[11], the sole eyewitness to a murder blurted out during the course of her evidence that Mr McClymouth was a repeat murderer and also cast aspersions on the character of his counsel. This court allowed the appeal for the reasons stated in the headnote as follows:

> …that the whole case had depended on the evidence and credit of the eye-witness; it was expecting too much of the jurors that they should divorce from their minds that a credible witness had said that the appellant was a repeat murderer and had commented adversely on the character of his counsel."

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[11] (1995) 51 WIR 178

[53] The distinction in this present case lies in the fact that this was not an extraneous statement made by the witness, Miss Nikeisha Porter. She is saying these words were among other words used by the deceased before he was shot. Carey JA, who delivered the judgment in **McClymouth**, opined, at page 185 of the report, that the court will be slow to interfere unless it feels the applicant would be justified in saying that what occurred was devastating. He stated also that the court must have regard to what was divulged, whether accidentally or deliberately, to appreciate whether it was perhaps a casual remark, as the court found in **R v Martin Coughlan and Gerard Peter Young**[12], or whether it was so prejudicial it cannot be cured. In **McClymouth**, this court was of the view that no words of caution by the trial judge could cure the trial process.

[54] In **R v Coughlan**, a defendant during cross-examination by the Crown referred to the fact that a co-defendant had a previous conviction of some gravity. Lord Justice Lawton, in delivering the judgment, summarized what took place during the trial: he noted, at page 38 of the report, that the prosecuting counsel sensibly went on with his cross-examination as if nothing untoward had happened; defending counsel just as sensibly did not intervene at once; he waited until the defendant had completed his evidence, then asked the judge to allow the jury to retire; thereafter, and in the jury's absence, defending counsel asked that they be discharged so far as Mr Coughlan was concerned; the judge refused so to do.

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[12](1976) 63 Cr App R 33

[55] The judge's refusal to terminate the trial and order a fresh trial was upheld. Lord Justice Lawton observed at page 38 of the report:

> "...The judge made his own assessment of the impact which [the] outburst may have made on the jury. It is our experience that if this kind of casual remark is made and no notice taken of it at the time, it tends to be forgotten particularly when the trial is a long one and there are a number of defendants. The judge was in a far better position to assess the likelihood of prejudice to Coughlan than this Court is..."

[56] In terms of length, the trial of the applicant in the present case took place between 17 to 30 January 2012. It was not a trial of relatively long duration. The impugned statement was made by the Crown witness who gave evidence on 19 January 2012. The applicant was the sole defendant. However, the words were never repeated by the trial judge or apparently by either prosecuting or defence counsel. The trial judge did have the discretion to take no action and make no mention of the matter depending on his assessment of the likelihood of prejudice.

[57] In deciding whether this was a proper exercise of his discretion, this court is therefore to pay careful attention to the circumstances under which the words were admitted as well as the nature of the words (see **McClymouth** and **Machel Gouldbourne**). This court is also under a duty to examine the case in its entirety and to satisfy itself that, at trial, no miscarriage of justice had occurred. If the court is so satisfied a conviction will not be disturbed (per Harris JA in **David Russell v R**[13] at

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[13][2013] JMCA Crim 42

paragraph [32]). Harris JA stated in **David Russell**, at paragraph [33], that this court will only interfere in circumstances where an accused would be justified in asserting that what had transpired at the trial was "severely overwhelming, incurably wrong and unfair to him or her".

[58] In **Calvin Powell and Lennox Swaby v R**[14], a prejudicial remark was made by the witness who attended the police station to identify articles stolen from the house of both deceased. Both accused were present. The relevant transcript of the evidence including the prejudicial statement is set out at paragraph [90] of the judgment:

> "The statement was made during examination in chief, in the following context:
>
> 'Q. You told us on one of the occasion [sic] Grey Beard and one of the detective [sic] was there. The second time who was there?
>
> A. The second time I went the two young men that commit the crime they were there. I don't really know them. It is the first I am seeing them so…
>
> Q. You said you did not know them before that day?
>
> A. No, I didn't.
>
> Q. Did you [ever] see either of them before that day?
>
> A. No, only one of them I identify and one time I see the one that kill his baby mother. I saw…
>
> Q. Okay.
>
> HER LADYSHIP: No, wait' (pages 1358-1359 of the transcript)"

[14] [2013] JMCA Crim 28

[59] In that case, this court concluded that the situation required a decision by the trial judge, either to terminate the trial and order a new trial or to give a warning directly to the jury. The trial judge chose the latter course. Brooks JA, who delivered the judgment of this court, stated, at paragraph [91] that the question for decision is "whether any direction could have cured the effect of the statement, and if so, when ought it to have been given and in what terms".

[60] At paragraphs [92] and [93] of the judgment, Brooks JA set out the course directed by the trial judge:

> "[92] …She decided to give the direction to the jury very shortly after the statement was made and before the examination in chief was completed. After describing the witness as 'talkative' and recounting the evidence set out above, the learned trial judge said in part, at (pages [sic] 1370 of the transcript):
>
> > 'Mr Foreman and members of the jury, I would like to point out to you that **she has not identified anybody here as being that person.** That it forms no part of this case and I would ask you to disregard it entirely, wipe it out of your minds. It has nothing to do with this case and it should not be considered by you at any time. It is a remark. It was not explored. We don't know exactly what is what.'
>
> [93] The learned trial judge repeated the admonition to the jury several times during that direction…She concluded the direction with the following statement:
>
> > 'I am sure the jurors will take the good advice I have given them and consider the very substantial amount of evidence that there is otherwise in this case and not dwell upon [the improper statement]. (page 1371 of the transcript)'" (Emphasis supplied)

[61] The court concluded that what had occurred was not devastating. The reasons for this decision, as set out by Brooks JA at paragraphs [98] to [100] of the judgment, included the fact that the witness was not an eyewitness to the murders, she did not identify the persons who were present when she identified goods to the police, nor did she ascribe the improper statement to any of the appellants.

[62] As stated previously, this court is of the view that the evidence of the words uttered by the deceased suggesting that the applicant had been involved in two homicides previously were prejudicial. It spoke directly to him as one of two persons who was responsible for the death of two individuals. The trial judge cannot be faulted for not making any immediate reference to the jury concerning the statement as it was part and parcel of the narrative being given by the witness. It was not an extraneous remark as in **McClymouth** as well as **Powell and Swaby**. However, some warning ought to have been given during the summation to the jury that such a statement ought to be totally disregarded by them in determining the guilt of the accused. The issue that remains is whether what had occurred was so devastating that it could be concluded that there was a miscarriage of justice.

[63] In relation to the third statement which came out on the evidence of Mr Nathan Cameron, there is absolutely no merit in the complaint that the words were prejudicial without any probative value. Again, they were part of the narrative and said to be made by the applicant as he moved away from the scene after shooting the deceased. The main issue for the jury to decide is whether the applicant had fired the shot. The

witness gave evidence that he did so and immediately afterwards used those words. Certainly the jury would have had to decide whether this was credible bearing in mind the defence mounted. The other Crown witness did not support this aspect of the evidence and it was also challenged by the defence to the extent that it was suggested that the applicant never used those words. There is therefore no reason to impugn the trial judge's application of his discretion in this regard.

Ground 5

The learned trial judge failed to adequately deal with stark discrepancies and contradictions in the evidence and in so doing, did not provide the jury with a sufficiently clear picture of the weaknesses in the evidence. This denied the applicant a fair and balanced consideration of his case.

[64] Counsel Mr Fletcher submitted that there was nothing in relation to this ground that he could bring to our attention for an assessment as to whether there was a failure on the part of the trial judge. This court agrees entirely with his stance. The trial judge dealt extensively with inconsistencies and discrepancies that arose in the evidence and properly directed the jury how to deal with them.

[65] There is no merit in this ground of appeal.

Ground 6

The learned trial judge erred in not availing himself of an Ensor hearing at the conclusion of the evidence which would assist him as to some of the more nuanced but extremely critical issues that needed to be dealt with in the summation.

[66] Counsel's written submission on this point was merely to state that the details of the killing were by no means straightforward and required assistance from counsel at

the conclusion of the evidence. The court was referred to the case of **R v Ensor**.[15] However, during oral submissions, Mr Fletcher admitted that he could not identify any issues that as counsel, he could have alerted the court to consider in his remarks to the jury.

[67] In **R v Ensor**, the accused was charged with two counts of rape. One of the grounds of appeal was that the trial judge should have directed the jury in regard to the second count on the need for corroboration of both the act of intercourse and lack of consent. Lord Lane CJ in his judgment remarked, at page 593 e-f of the report, that Crown Counsel had indicated that as far as he could recall, the judge did not invite, nor did counsel volunteer, any submissions in connection with corroboration. Lord Lane went on to observe that the case was by no means straightforward in that respect and the court felt that the judge would have been assisted by submissions from counsel in relation to the issue of corroboration relevant to each count.

[68] No such issue arises in this case, as all the important directions that were necessary for the jury to properly consider the charge were given by the trial judge. This ground of appeal also fails.

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[15] [1989] 2 All ER 586

Ground 7

The verdict is unreasonable having regard to the evidence.

[69] Counsel, Mr Fletcher indicated that he was not pursuing this ground as the evidence must overwhelmingly point away from guilt.

[70] The court also agrees that this ground has no merit as there was sufficient evidence before the jury to have reached the verdict that they did. This ground of appeal therefore fails.

Summary and conclusion

[71] This court is of the view that the learned trial judge erred when he failed to give some direction by way of caution to the jury in relation to the words attributed to the deceased by Miss Nikeisha Porter. These words were to the effect that the applicant and one Tallman had killed two men on an occasion prior to the relevant incident. However, while we consider that this is an irregularity, it is not sufficiently serious to prevent this court from applying the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act:

> "14. (1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:
>
> Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal

> might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[72] The test to be applied in relation to the proviso is whether a jury, properly directed, would inevitably have come to the same conclusion (see **Rupert Anderson v The Queen**[16], per Lord Guest at page 5; **Giselle Stafford and Dave Carter v The State**[17], per Lord Hope of Craighead at paragraphs 9 and 10).

[73] We are of the view that the jury in this present case would have inevitably come to the same conclusion of guilt. This opinion is based on the totality of all the evidence that was adduced at the trial and the effect of the totality of the summation of the trial judge (as already referred to in paragraphs [27] and [38] of this judgment). In the final analysis, there has been no substantial miscarriage of justice.

Disposition

[74] The orders therefore are as follows:

1) The application for leave to appeal is allowed.

2) The hearing of the application is treated as the hearing of the appeal.

3) The appeal is dismissed.

4) The conviction and sentence are affirmed.

5) The sentence is to be reckoned as having commenced on 28 March 2012.

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[16] [1971] UKPC 25
[17] [1998] UKPC 35