[2026] JMCA Crim 5

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MR JUSTICE LAING JA
THE HON MRS JUSTICE TIE POWELL JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 27 & 28/2018

LENNOX ALVARANGA
FRANCIS DAVIS **v R**

John Clarke for Lennox Alvaranga

Terrence Williams KC and Miss Celine Deidrick for Francis Davis

Jeremy Taylor KC and Rasheed Lee for the Crown

14, 15, 16 January and 27 March 2026

Criminal law – Summation – Jury directions – Challenge to adequacy of judge's directions on inconsistencies and discrepancies – Whether jury was properly directed that the evidence of a witness could be rejected in its entirety

Bad character evidence – Interest to serve – Whether trial judge failed to give adequate cautionary direction – Impact on fairness of trial

Jury management – Juror-fear complaint – Inquiry conducted in absence of accused – Collective jury inquiry versus individual juror inquiry – Adequacy of investigation – Application for discharge of jury – Correct legal test for apparent bias – Impact on fairness of trial

Right to fair hearing – Independent and impartial tribunal – juror-fear complaint – Whether treatment of issue breached constitutional guarantees – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, section 16

TIE POWELL JA (AG)

Introduction

[1] On 3 November 2017, the applicants, Messrs Lennox Alvaranga (also referred to as 'Gaza') and Francis Davis (also referred to as 'Tall man'), were convicted, following a trial by jury, of the murder of Wendell Williamson ('the deceased') and of the wounding with intent of Mr Paul Jones (also referred to as 'Sir P'). They were subsequently sentenced on 6 April 2018. These proceedings constituted a retrial, both applicants having previously been tried in January 2016 for the offence of murder arising out of the same incident.

[2] For the offence of murder, the learned trial judge sentenced each applicant to 19 years' imprisonment at hard labour, with eligibility for parole after serving 15 years. In relation to the offence of wounding with intent, Mr Alvaranga was sentenced to 10 years' imprisonment at hard labour, and Mr Davis to nine years' imprisonment at hard labour.

[3] On 19 April 2018, the applicants sought leave to appeal their convictions and sentences. (The date recorded on Mr Alvaranga's Criminal Form B1 is 19 April 2017, which, in light of the date of the trial, we treat as an obvious clerical error.) On 12 July 2021, a single judge refused the applications. Pursuant to rule 3.11(2) of the Court of Appeal Rules, the applicants exercised their right to renew the applications before this court. The renewed applications were heard on 14, 15 and 16 January 2026. At the conclusion of the hearing, given the nature of the case and the issues raised, we reserved our decision to allow for careful and deliberate consideration of the submissions advanced. We now deliver our decision.

Background

<u>The case for the prosecution</u>

[4] The prosecution's case was that on 12 July 2012, in the parish of Westmoreland, the applicants shot and killed the deceased and wounded Mr Jones with intent to cause him grievous bodily harm.

[5] The prosecution's case rested primarily on the evidence of the virtual complainant, Mr Jones. He testified that the applicants and another person had engaged him to arrange their illegal travel by boat to the United States of America ('the USA'). Sums of money were paid to him, which he handed over to a man known as 'Jimmy' or 'Rasta', the captain of the vessel.

[6] On the expected date of travel, they met in Sheffield, Westmoreland, but the trip was aborted due to adverse weather conditions. The intended travellers remained in the area for more than three months, moving between various locations while awaiting suitable conditions to embark on the journey. During this period, Mr Alvaranga became increasingly dissatisfied with the delay, demanded the return of the money paid, and issued threats to Mr Jones, who was then out of the parish, by telephone. As a result, Mr Jones stopped answering his calls, although he continued to maintain contact with Mr Davis.

[7] On the date in question, Mr Jones arranged for a man known as "Smithy" ('Mr Evan Smith' also called 'Lobster Man') to rent a motor car and transport him and his brother-in-law, the deceased, to Sheffield District to recover the money previously paid to Jimmy. Mr Davis provided directions to his location by telephone. Upon their arrival, Mr Davis guided them to the place where Jimmy was supposed to be, but Jimmy was not present. They left Mr Davis but returned shortly after when Mr Davis telephoned to inform them that Jimmy had arrived.

[8] On their return to Mr Davis, a vehicle driven by Mr Alvaranga pulled up but then sped off. Mr Smith drove to Jimmy's location, and on arrival, everyone except Mr Smith got out of the vehicle, and Mr Davis led them toward the rear of the house.

[9] There, Mr Jones saw Mr Alvaranga with a firearm in his hand. Mr Jones tried to run but was shot, fell face down, and pretended to be dead. He then heard Mr Davis say, "[d]on't let his brother-in-law get away".

[10] Mr Davis came over to him and emptied his pockets; Mr Alvaranga turned him over and removed his belt; then they left.

[11] The body of the deceased was later discovered on a section of the property by the police.

The case for the defence

[12] In their defence, both applicants gave unsworn statements from the dock.

[13] Mr Alvaranga stated that he was not present at the scene. He said that, at the material time, he was in Windsor Heights, Spanish Town, in the parish of Saint Catherine. He asserted that Mr Jones had taken him to Westmoreland and abandoned him there, and that he had not seen him since. He stated that he attempted to contact Mr Jones on two occasions but was unable to reach him, and he did not see him again until the trial. He further denied any knowledge of "their business what they are doing".

[14] Mr Davis stated that he had never been charged with any offence before and denied involvement in a plan to murder the deceased or to shoot Mr Jones. He claimed to have enjoyed a good relationship with both Mr Jones and the deceased and denied possessing any weapon.

[15] Mr Davis relied on the evidence of Mr Smith, whose statement dated 13 July 2012 was read into evidence. Therein, Mr Smith stated that he was a businessman involved in the export of processed lobster. He sought to expand his business, and a friend introduced him to a man referred to as "Sir P" (Mr Jones), who promised to invest in his lobster business. On 11 July 2012, Mr Jones told him that he expected to collect something in Negril and wanted to rent a motor car. Mr Smith said that Mr Jones was always telling him that he was supposed to collect £40,000.00 in Negril and would invest JA$3,000,000.00 in his business. He therefore had no problem getting the car for him to go to Negril.

[16] The following day, Mr Smith rented a vehicle and, at Mr Jones' request, agreed to drive Mr Jones and the deceased to Sheffield, Westmoreland. On arrival at around 9:30 pm, they went to a bar where they were joined by a tall, slim man (Mr Davis). They later left the bar, with this man giving directions, and when they arrived at the premises, they alighted from the vehicle, leaving him, Mr Smith, in the car.

[17] Whilst there, he heard loud explosions that sounded like gunshots and, fearing for his life, he ran across the road and hid. After the shooting ceased, he saw neither Mr Jones, the tall man (Mr Davis), nor the deceased.

Juror concerns and the learned trial judge's inquiry

[18] During the trial, an unusual event occurred that affected the jurors. A report was made to the learned trial judge before the day's proceedings began. In response, the judge ordered the courtroom door to be closed and directed that the applicants not be brought into court at that stage. She then summoned the foreman and jurors 2, 3, and 4 for preliminary inquiries. Counsel for the defence was present.

[19] Upon inquiring of juror number 4, and learning that his concern had been shared with the other members of the panel, the learned trial judge summoned the remaining jurors. The inquiry revealed concerns expressed by three jurors, the full details of which are set out later in this judgment. In summary, jurors 4, 5, and 6 reported observing conduct by certain men that they associated with one of the applicants, which made them fearful.

[20] Having questioned the jurors, the learned trial judge determined that the trial should continue, despite defence counsel's concerns and a request for a retrial.

The renewed applications for leave to appeal

[21] The applicants renewed their applications for leave to appeal and filed notices and grounds of appeal, and thereafter supplemental and amended supplemental grounds of appeal, challenging both conviction and sentence.

[22] At the hearing of the application, Mr Terrence Williams KC, appearing on behalf of Mr Davis, sought and obtained leave to abandon the original grounds 1, 2, 3(a), 3(b) and 4 contained in Criminal Form B1. He indicated that he would instead rely on amended supplemental grounds 1, 3 and 4, filed on 17 April 2024, and on amended supplemental ground 5, filed on 8 January 2026. Original ground 3(c) was maintained and renumbered as ground 2.

[23] Mr John Clarke, appearing on behalf of Mr Alvaranga, similarly sought and obtained leave to abandon the original grounds of appeal filed in Criminal Form B1, indicating his intention to adopt the amended supplemental grounds advanced by Mr Williams KC. It was further indicated that Mr Williams KC would present submissions on grounds 1, 2 and 3, while Mr Clarke and Miss Celine Deidrick would address grounds 4 and 5, respectively. Accordingly, the grounds of appeal are now framed as follows:

> "1. The proceedings, at trial, were unfair and a substantial miscarriage of justice given that the Defence Counsel was not furnished with the transcript of the first trial on these charges.
>
> 2. The learned trial judge failed to give adequate directions to the jury regarding the inconsistent and contradictory testimonies as presented by the prosecution witness.
>
> 3. The learned trial judge failed to adequately direct the jury on the prosecution's chief witness being of bad character and having had an interest to serve.
>
> 4. The learned trial judge conducted an unfair and inadequate inquiry into jurors' disclosure that they were fearful of the Applicant and, as a result, failed to make an informed exercise of her discretion and made a fundamentally flawed decision to continue the trial.
>
> 5. The applicant is entitled to a reduction of sentence for constitutional breaches, including breach of guarantee for a fair trial in a reasonable time."

Ground 1: "The proceedings, at trial, were unfair and a substantial miscarriage of justice given that the Defence Counsel was not furnished with the transcript of the first trial on these charges."

[24] During the hearing of the applications, the applicants withdrew this ground of appeal because it became apparent that the basis of the complaint was misconceived.

[25] The applicants had asserted, both in their written submissions and in oral argument, that defence counsel at the retrial had not been furnished with the transcript of the original trial proceedings. Surprisingly, the prosecution conceded this point in its written submissions. However, during the hearing of the appeal, the court identified explicit references in the retrial transcript indicating that both defence counsel had been furnished with the transcript of the initial trial and had, in fact, utilised it during the cross-examination of the main prosecution witness. It was, therefore, evident that the premise of this ground was plainly erroneous. Accordingly, and properly so, the ground of appeal was withdrawn.

[26] The remaining grounds will, therefore, now be examined.

Ground 2: "The learned trial judge failed to give adequate directions to the jury regarding the inconsistent and contradictory testimonies as presented by the prosecution witness."

Submissions on behalf of the applicants

[27] Mr Williams KC submitted that the learned trial judge failed to give adequate and balanced directions regarding the numerous inconsistencies in Mr Jones' evidence, which he repeatedly altered without a satisfactory explanation for the differences.

[28] The applicants identified areas of conflict in the evidence on the first and second transcripts that they said were not addressed due to the absence of the first transcript. In addition, the applicants pointed to seven instances in which they contend that the learned trial judge failed to give adequate directions on discrepancies and inconsistencies in Mr Jones' evidence. These matters concerned:

"(1) Did Jones approach Rasta for himself to be on board the boat?

(2) Did Jones meet with Rasta before meeting the appellants?

(3) Did Jones make prior arrangements for other parties to be smuggled?

(4) How long a sighting of [Mr Alvaranga] before the shooting?

(5) Did [Mr Alvaranga's] car lead or follow?

(6) Was there a passenger in [Mr Alvaranga's] car?

(7) Was [Mr Alvaranga] with [Mr Davis] prior to everyone going down to the house?"

[29] King's Counsel argued that although the learned trial judge gave general directions on inconsistencies, the circumstances required specific guidance addressing the particular conflicts in Mr Jones's evidence and how these might affect his credibility. The jury, counsel submitted, should have been expressly told that if they found material inconsistencies that remained unresolved, they were entitled to reject his evidence entirely. Instead, the learned trial judge simply told the jury to consider whether they accepted or rejected parts of his evidence, without adding the words "or at all" to signal that they could reject it entirely, while also cautioning them that a witness who lied about some matters was not necessarily unreliable overall.

[30] Mr Williams KC, relying on **Vernaldo Graham v R** [2017] JMCA Crim 30 and **Omar Blake and others v R** [2024] JMCA Crim 28 ('**Omar Blake**'), also argued that the learned trial judge should have directed the jury that material inconsistencies affecting a witness's credibility must be satisfactorily explained before the evidence can be relied on.

[31] Consequently, King's Counsel submitted that because of the learned trial judge's failings, the summation fell below the required standard and deprived the applicants of a fair consideration of their defence, rendering the convictions unsafe.

Submissions on behalf of the Crown

[32] For the Crown, Mr Taylor KC argued that the learned trial judge gave adequate general directions on assessing discrepancies and inconsistencies. He noted that the jury was told to determine Mr Jones' truthfulness by considering all the evidence, including discrepancies, and that they could reject unreliable portions while accepting the rest if "worthy of acceptance". These words, he argued, effectively conveyed that they could accept or reject the evidence in whole or in part. He added that the learned trial judge properly reminded them that rejecting one aspect of the evidence did not require discarding the remainder.

[33] Mr Taylor KC relied on **James Field v The State** [2023] CCJ 13 (AJ) BB, which he said reflects the directions given by the learned trial judge and suggested that, given the absence of specific specimen directions in Jamaica in this regard, future guidance should adopt the approach therein. Although the often-used phrase "or at all" was absent from the directions, he maintained that the summation, taken as a whole, made clear that the jury could accept or reject Mr Jones' evidence as they saw fit, and that no prejudice resulted.

Analysis

[34] It must first be observed that the complaint regarding the alleged discrepancies between the transcripts of the two trials is premised on the initial contention that the first transcript had not been made available to defence counsel during the second trial. As previously indicated, this was not so. Rather, the record reveals that defence counsel elected to engage only sparingly with the contents of the transcript when cross-examining Mr Jones. This aspect of the complaint is, therefore, without merit.

[35] Before turning to the summation and addressing the remaining complaint, it is helpful to outline the guiding principles governing how a trial judge ought to assist the jury when conflicts arise in the evidence. As the authorities establish, a trial judge must:

(i) Ensure that deficiencies in the prosecution's case, including inconsistencies and discrepancies, are identified and adequately placed before the jury. Whilst there is no requirement to identify all disparities arising from the evidence, those that may be considered especially damaging to the prosecution's case should be highlighted;

(ii) Direct the jury that it is their duty to:

a. assess the logical implications of the conflicts that arise from the evidence;

b. consider any explanations offered for those conflicts;

c. understand that material conflicts require an explanation before such evidence can be accepted or relied on, and that these explanations must be grounded in the evidence itself and not based on speculation or conjecture; and

d. evaluate the materiality of the conflicts on the evidence and determine the effect that it has on the credibility of a witness.

[36] These principles were affirmed in **Omar Blake**, where Dunbar-Green JA adopted and endorsed the observations of V Harris JA in **Michael Lorne v R** [2022] JMCA Crim 45 at para. [46], while also drawing on the earlier guidance provided by Edwards JA in **Adrian Forrester v R** [2020] JMCA Crim 39 at para. [121].

[37] Whilst there may be no existing specimen direction on inconsistencies or discrepancies, as submitted by the Crown, this, in our view, is of no consequence. The jurisprudence within this jurisdiction is rich with guidance. What is required is not the recitation of any particular formula, but rather, the directions must adequately convey the relevant principles.

[38] A review of the learned trial judge's summation reveals that she provided comprehensive general directions on how the jury should treat inconsistencies and discrepancies, and on the possible impact of such matters on a witness' credibility, to include rejecting the evidence of a witness in its entirety. She instructed the jurors that they were responsible for weighing the evidence and determining which aspects they considered reliable.

[39] In directing the jury on their assessment of the evidence, the learned trial judge stated that:

> "… in dealing with the evidence of a particular witness, you may accept all that the witness told you **or you may reject all that the witness told you** or you may accept a part of what the witness told you and reject the rest." (see page 455 lines 3 – 8 of the transcript) (Emphasis supplied)

[40] The learned trial judge also reinforced this direction when addressing the jurors regarding the treatment of agreed statements read into evidence. She explained that:

> "… like evidence of witnesses who came and testified here…You can accept everything they told you in the statements **or you can reject everything.** Or you can accept some of it and reject some of it." (see page 463 lines 6-12 of the transcript) (Emphasis supplied)

[41] The learned trial judge explained to the jury the concept of inconsistencies and discrepancies and how such inconsistencies and discrepancies can arise. She directed that they needed to identify the various inconsistencies and discrepancies, evaluate them, distinguish between minor and major conflicts, and determine whether such matters went to the core of the case. They were advised to assess their impact on both the reliability of the evidence and the credibility of the person giving the evidence.

[42] She explained that the presence of inconsistencies or discrepancies does not necessarily mean a witness' evidence is untrue. She also advised the jurors that when evaluating evidence from witnesses with conflicting accounts, they were entitled to accept one witness' testimony over another on any particular point.

[43] The learned trial judge also instructed the jury on how to treat with explanations for inconsistencies and discrepancies. They were advised that if, after considering the inconsistencies and discrepancies and any explanations that may have been provided, they still had concerns about the reliability of one or more aspects of the evidence, then they could reject that evidence and rely on other aspects they found reliable.

[44] She further explained that even if the jury accepted that a witness might have lied about something, it does not necessarily mean that the witness' evidence in its entirety should be rejected. She emphasised that it depends on their assessment of the evidence and the impression they formed of the witness, reminding them to focus on the central issues of the case. She explained that if they found a witness unreliable on a particular point and rejected that part, they did not have to reject all of the evidence. She concluded by saying, "It's really a matter for you" (see page 577 lines 2-3 of the transcript).

[45] It is our view that these final words clearly reinforced the learned trial judge's earlier directions and made plain to the jury that, having assessed a witness' credibility, they possessed complete autonomy to decide whether to accept all, some, or none of that witness' evidence.

[46] In relation to Mr Jones' evidence, the learned trial judge told the jurors that: "It is for you to decide whether Mr Paul Jones is a truthful witness or, for that matter, all witnesses in this case" (see page 561 lines 4-6). She further directed them that they:

> "… must look at all of the evidence to include any discrepancies, or inconsistencies you find to exist, and find what effect it has on a witness' truthfulness and reliability or accuracy of the evidence. If you are sure that a particular witness' account is true, then you are entitled to rely on it, regardless of the inconsistencies. If you consider that any part of a witness's evidence is unreliable, because of a material inconsistency with other statements or evidence, you may reject that part that you find unreliable, but you go on to accept the rest of the evidence, **if you think it is worthy of acceptance**." (see page 561 lines 7-21) (Emphasis supplied)

In our view, the phrase, "if you think it is worthy of acceptance", echoes her earlier general guidance that "you may reject all that the witness told you".

[47] The learned trial judge also addressed the situation in which a witness had made previous statements that differed from the evidence given at trial. She explained that such discrepancies were matters for the jurors to consider when deciding whether a witness, including Mr Jones, was believable.

[48] The learned trial judge then proceeded to dissect various aspects of Mr Jones' testimony and invited the jurors to consider whether they accepted his evidence. She reminded the jurors that Mr Jones had been challenged in relation to previous statements allegedly made by him. She noted that in some instances he admitted having made the prior statements; in others, he stated he could not recall; and in others, he denied having made them. The learned trial judge explained that,

> "…the fact that he might have said something different about a particular point previously from what he told you about the same point in his evidence, is something you may take into account and you may take that into account when you come to assess his credibility, that means whether he is a truthful witness and whether he is to be believed." (see page 567 lines 16-23 of the transcript)

She continued:

> "[b]ut I have also told you that when you are assessing it, you have to look to see whether you might find one piece of the evidence unreliable, in which case you reject it, but if you find the rest of the evidence is reliable, you can rely on it." (see page 567 lines 23, page 568 lines 1-3 of the transcript)

[49] The learned trial judge reminded the jury of the evidential conflicts. She highlighted that in his statement to the police, Mr Jones said that he went to meet Rasta or Jimmy, and he told him he wanted to leave the island; yet he later denied making that statement. She also reminded the jury that under cross-examination, he admitted that he told the police that it would be too risky for him to travel with drugs on the boat; but, later in cross-examination, he said "he didn't really remember saying that he wanted to

leave the island" (see page 568 lines 14-16 of the transcript). The learned trial judge commented that "he said a lot of things" and continued:

> "[s]o, that is something you need to look at when you come to assess his credibility, and you look at it also to see whether it is relevant to the case." (see page 568 lines 16-19)

[50] The learned trial judge also reminded the jury that Mr Jones had previously denied to a judge that he had regularly assisted other persons by boat, but now said he had only made such arrangements twice.

[51] She further reminded them that Mr Jones testified in court that he could not remember seeing any other person in the car with Mr Alvaranga when Mr Alvaranga pulled up beside him. She pointed out that Mr Jones was challenged about whether he had previously said in his statement to the police that there was a passenger in the car, which he could not recall. She then told the jury, "[a]ll the evidence that you might find, that goes to inconsistencies and/or discrepancies will go naturally to the credibility of the witness" (see page 570 lines 6-9 of the transcript).

[52] The learned judge directed the jurors about the explanations given for conflicts in the evidence. She advised them that they:

> "…might consider whether it is reasonable for there to be variability in the recall of normal or unusual experiences; in other words, is it expected that there will not be perfectly consistent recollection of those experiences that are traumatic or emotionally charged, it is a matter for you." (see page 570 lines 19-25 of the transcript).

[53] It is apparent that this relates to the responses given by Mr Jones under cross-examination, regarding the statement that he gave to the police the day after the incident. Under cross-examination, when challenged, he stated "...everything was in my mind, but at the same time, the mind was not stable one hundred per cent" (see page 142, line 24 of the transcript). At another point, he stated: "This statement was tek less than 12 hours after my brother-in-law died and I get shot in the head" (see page 153 line

9-12). The learned judge was clearly inviting the jury to take Mr Jones's explanation into their consideration.

[54] The learned trial judge also instructed them that:

> "[i]n assessing Mr Jones' credibility you may take into account the degrees of error based on time which had elapsed, he would have pointed you to that as a possible explanation. In particular, in relation to whether there is a passenger in the car that Mr Alvaranga was allegedly seen driving that night, you might want to say whether that detail is relevant to what the central issues are and whether also it would have been relevant to the witness, Mr Jones, in his recall of the incident." (see page 571 lines 3-14 of the transcript)

[55] The learned trial judge also reminded the jurors of the inconsistencies in Mr Jones' testimony regarding the length of time he observed Mr Alvaranga before the shooting. He initially stated he saw Mr Alvaranga's face for one minute, but under cross-examination said it was five seconds. She also pointed out his explanation that he had time to reflect and that the incident had occurred five years earlier. She told the jury,

> "[y]ou will have to consider whether this is a reasonable explanation for saying one minute on one occasion and saying 5 seconds on another occasion." (see page 532 lines 12-16 of the transcript)

[56] We are of the view that the learned trial judge reviewed the evidence of Mr Jones in a way that highlighted the flaws in his evidence. Indeed, the major conflicts were spotlighted, and it was made clear to the jury that they were to consider the impact on his credibility and reliability. She further explained that, where there was conflicting evidence between witnesses, the jury was required to assess each witness' reliability, honesty, and accuracy in resolving those conflicts.

[57] The learned trial judge reminded the jurors of Mr Smith's evidence, as contained in his statement, which differed in some respects from Mr Jones' account, particularly regarding his reason for going to Sheffield. She pointed out that:

> "…when you come to review the evidence of both men, it will be for you to say what the differences are, if anything, and the relevance

> of those pieces of evidence that you have to decide in the case." (See page 520 lines 19-23)

[58] She further reminded the jurors that the defence's position was that Mr Jones could not be believed and directed them that this issue was one for their judgment.

[59] Having reviewed the entirety of the summation, we are satisfied that the learned trial judge properly instructed the jury on how to deal with the inconsistencies and discrepancies arising in Mr Jones' evidence and in the evidence generally. She identified and addressed the material conflicts that arose on Mr Jones' evidence and in the evidence in general and appropriately guided the jurors as to the proper treatment of same, in a balanced manner. She properly directed their minds to the implications of these conflicts on their assessment of Mr Jones' evidence, having reminded them of explanations proferred.

[60] Whilst the summation did not address every conflict highlighted by the applicants in their complaint, in our view, those not expressly dealt with by the learned trial judge were not material and, therefore, did not cause any prejudice to the applicants. Indeed, a trial judge is not required to identify every inconsistency or discrepancy in the evidence; rather, the judge must direct the jury's attention to the major and material conflicts. In our assessment, the learned trial judge satisfied that obligation.

[61] Whilst a specific direction explicitly informing the jury that they were entitled to reject Mr Jones' evidence, delivered at the point when the learned trial judge was traversing his testimony, would have been ideal, we are satisfied that, taken as a whole, the summation made it sufficiently clear that the jury was free to wholly reject Mr Jones's evidence if, having considered the inconsistencies and evaluated his overall credibility, they found his testimony unreliable, or not 'worthy of acceptance'.

[62] We find that the learned trial judge's directions were consistent with the principles established in the authorities relied on by the applicants, and otherwise.

[63] We, therefore, find no merit in the applicants' complaints on this ground.

Ground 3: "The learned trial judge failed to adequately direct the jury on the prosecution's chief witness being of bad character and having had an interest to serve."

Submissions on behalf of the applicants

[64] Mr Williams KC contended that Mr Jones, a deported drug-trafficking offender, who was now involved in criminal activity related to the offences in issue, was a witness of bad-character with an interest to serve, whose evidence required a direction of caution. He argued that the judge wrongly conflated the applicants' alleged bad character with that of Mr Jones' on the basis that they were all involved in some way in the illegal trip, and then told the jury to disregard Mr Jones' bad character entirely.

[65] King's Counsel argued that the indicators of such an interest to serve were evident from the transcript and did not require defence counsel to explicitly put to Mr Jones that he was fabricating evidence, especially since the Crown itself accepted that he was involved in illegal activity. He argued that Mr Jones had an interest to serve, as he may have sought to conceal or minimise his own criminal involvement or curry favour with the authorities.

[66] King's Counsel argued, relying on **R v Beck** [1982] 1 All ER 807 ('**Beck**') and **Tillet v R** [1999] UKPC 27 ('**Tillet**'), that witnesses associated with criminal activity may have their own motives, thereby giving them an interest to serve. Citing **Spencer v R; Smails v R** [1987] AC 128, he contended that Mr Jones' bad character, without more, required a jury warning, and referred to **Pringle v R** ('**Pringle**') to emphasise that the threshold for such a warning is not 'exacting'.

Submissions on behalf of the Crown

[67] Mr Taylor KC, referring to **Pringle**, argued that there was no evidential basis for claiming that Mr Jones was a bad character witness with an interest to serve. He submitted that the authorities cited by the applicants — **Pringle**, **Beck**, and **Tillet** — were concerned with witnesses with clear motives or accomplice status. This, he contended, was not the case with Mr Jones, who had been candid about his past and his

joint plans with the applicants. Further, both applicants acknowledged their own involvement with Mr Jones, with Mr Davis indicating in a question and answer session that both he and Mr Jones had been attacked on the night in question, thus undermining any suggestion of blame-shifting.

[68] Kings Counsel argued that Mr Jones' prior narcotics convictions bore no similarity to, and therefore had no probative value in relation to, the offences charged, an important consideration under the English Criminal Justice Act regarding the treatment of a witness's bad character. He commended this Act to the court in preference to the Jamaican Criminal Bench Book, which he contended offers little guidance. He submitted that the trial judge had properly sanitised the evidence to prevent unfair prejudice to the applicants, and that her conclusion that no caution was required lay squarely within her discretion, which was not subject to appeal.

Analysis

[69] Mr Jones was the prosecution's principal witness in relation to the murder count on the indictment on which the applicants were tried, and the virtual complainant in the wounding with intent count. His criminal history was not in dispute, he having admitted to an eight-year sentence for a cocaine-related conspiracy offence and to having been deported from the USA in 2011 for immigration breaches.

[70] Given his own testimony about his past misconduct, there was no real controversy that he could properly be regarded as a person of bad character for the purposes of assessing credibility.

Interest to serve

[71] That being the case, the issue is whether, on the evidence adduced, Mr Jones can properly be regarded as having an interest to serve. A careful and comprehensive examination of the record is, therefore, necessary to ascertain whether there exists a sufficient evidential foundation, from which it may be reasonably inferred that he had a

motive to give false testimony, whether to shield himself from potential consequences or to secure some personal advantage.

[72] The essence of the prosecution's case, as derived from the testimony of Mr Jones, was that the applicants had paid him to arrange an illegal boat journey to the USA with the assistance of an individual known as Jimmy. The trip never materialised, and the alleged payment was not returned. The prosecution further contended that when Mr Jones and the deceased travelled to Westmoreland in an attempt to recover the money, Mr Jones was shot and injured, and the deceased was fatally shot.

[73] The applicants relied heavily on Mr Jones' admitted involvement in arranging the illegal trip to argue that he was engaged in criminal activity proximate to the offences in the indictment. The applicants submitted that, because the murder allegedly arose out of this illicit arrangement, this alone established that Mr Jones had an interest to serve.

[74] We are unable to accept this proposition. The mere fact that Mr Jones was involved in an illegal activity with the applicants does not, without more, provide a sufficient evidentiary basis to conclude that he had a motive to fabricate or distort his account to protect himself or deflect scrutiny. Whilst engagement in criminal activity may, depending on the circumstances, raise questions of credibility, it does not automatically give rise to an interest to serve. The question is whether the evidence discloses a logical and realistic motive for Mr Jones to tailor his account in a manner favourable to himself.

[75] Having carefully scrutinised the evidence, we do not accept the submission advanced that the evidence indicates that Mr Jones had an interest to serve. Further, there was no explicit challenge in the cross-examination of Mr Jones, suggesting that he was acting out of any ulterior motive in giving evidence against the applicants. Notably, in their unsworn statements, neither applicant alleged that Mr Jones was motivated by ill intent, nor did they seek to implicate him in the events giving rise to the counts in the indictment.

[76] We are unable to discern how Mr Jones' evidence concerning the murder of the deceased and his own injury could have advanced his interests in relation to any prior arrangement to transport the applicants illegally, a trip that never materialised.

[77] We also considered the several suggestions made to Mr Jones in an effort to undermine his credibility. On behalf of Mr Alvaranga, it was suggested that he had told Smithy he was going to Westmoreland to collect £40,000.00 and that he intended to give him JA$3,000,000.00 to invest in his lobster business. He denied this proposition. As part of the case advanced on behalf of Mr Davis, Mr Smith's statement was read into evidence, wherein he recounted discussions with someone he referred to as 'Sir P,' (who on the case was accepted to be Mr Jones) and who promised to invest in his lobster business, and told him on 11 July 2012 that he was going to Negril to collect something.

[78] Taking this material at its highest, we are unable to perceive any basis upon which it could properly be concluded that Mr Jones had an interest to serve in relation to this aspect of the evidence. Even if Mr Smith's version were to be accepted, nothing arises on this from which it could reasonably be inferred that Mr Jones' evidence was influenced by an improper motive or was otherwise tainted by any untoward consideration.

[79] It was also suggested to Mr Jones, on behalf of Mr Davis, that his purpose in going to Negril was to rob Jimmy's ganja, an assertion he denied. He further denied involvement in trafficking ganja. These suggestions were unsupported by any other evidence and therefore attract no evidential weight. In any event, when examined, it is unclear how any of these propositions could give rise to a potential detriment that Mr Jones' testimony, as to the murder of the deceased or his own wounding, could have mitigated against. We are unable to discern any rational basis on which he might have been seeking to protect himself, or how his testimony could have furthered such a purpose.

[80] In our assessment, the authorities cited by the applicants are materially distinguishable on their facts. In **Pringle**, the prosecution relied on the evidence of a witness who was the appellant's cellmate, who claimed that the appellant had confessed

to the murder. It was in that factual setting that their Lordships discussed the concept of an 'interest to serve'. **Tillet** concerned a shop robbery which culminated in the fatal shooting of the shopkeeper. The case rested largely on the evidence of a witness who admitted to being present but denied knowledge of a gun. It was determined that this witness had a strong interest in testifying to exculpate himself and that the failure to give caution as regards his evidence rendered the trial unfair. In **Beck**, the accused was convicted of conspiracy to defraud. The prosecution's case relied heavily on the evidence of witnesses who were associated with the fraudulent scheme but were not directly involved in the conspiracy charged. The court held that while a strict accomplice warning was not necessary, a warning was desirable where a prosecution witness has an "interest to serve" or a "motive for falsehood".

[81] We are of the view that the factual circumstances of those cases are manifestly distinguishable from the evidence in the instant case and therefore offer no material support for the contention that Mr Jones had an interest to serve. In our view, there is nothing in the evidence capable of supporting an inference that Mr Jones' testimony was motivated by an improper purpose. There was no evidential foundation on which the learned trial judge could properly have directed the jury that Mr Jones had an interest to serve.

Bad character

[82] Whilst we accept, as the Crown has submitted, that there is no similarity between Mr Jones' past convictions and the offences on the indictment, we do not agree with their position as regards the learned trial judge's treatment of his character. We are of the view that his character was relevant to the assessment of his credibility.

[83] We, therefore, see merit in the argument presented on behalf of the applicants that the learned trial judge did not adequately explain the implications of Mr Jones' character. His chequered past was a prominent part of the case. He volunteered this information and was extensively cross-examined on it. Additionally, the learned trial judge identified credibility as a central issue for the jury. Because a witness' character relates

to credibility, the potential impact of Mr Jones' criminal history on the reliability of his evidence should have been clearly addressed.

[84] In referring to his status as an ex-convict, the learned trial judge directed the jury that "… you can't let the fact that he might have been convicted for a crime influence your decisions in relation to him or the case" (see page 451 of transcript). We fear that this formulation may have led the jury to conclude that his criminal record was irrelevant to their assessment of his credibility.

[85] In line with the concerns raised by the Crown regarding the provisions in the Jamaican Bench Book, under the section 'Non-Defendant's Bad Character', we note that it does not include an example of directions suitable for the current case. We believe that a direction should have been given to clearly inform the jury that Mr Jones' character, influenced both by his criminal history and his admitted involvement in organising an illegal trip, was a relevant factor in assessing his credibility. The jury should have been instructed that they could consider whether, and to what extent, these aspects of his character impact their evaluation of his credibility and honesty. Additionally, the jury should have been instructed that, given this information, his evidence should be approached with caution. It was for them, having observed him in the witness box and having scrutinised his testimony with the requisite care, to determine whether they were convinced that he was telling the truth.

[86] A direction to the jury concerning the implications of Mr Jones' character on their assessment of his evidence would inevitably involve reference to his participation in the illegal trip. That, in turn, would require an accompanying instruction that the applicants' involvement in that illegal trip was irrelevant to the question of whether the prosecution had proved the offences charged on the indictment. Such a direction would be necessary to guard against any risk of prejudice to the applicants.

[87] There is, therefore, some merit in this ground of appeal which cannot be ignored in examining the safety of the conviction.

Ground 4: "The learned trial judge conducted an unfair and inadequate inquiry into jurors' disclosure that they were fearful of the applicant and, as a result, failed to make an informed exercise of her discretion and made a fundamentally flawed decision to continue the trial."

[88] Mr Clarke, on behalf of the applicants, raised five central criticisms of the juror inquiry conducted by the learned trial judge:

(1) that the inquiry was conducted in the absence of the applicants, thereby infringing their constitutional right to be present at every stage of their trial;

(2) that the learned trial judge questioned the jurors collectively, rather than individually, thereby creating a real risk of contamination of the panel and undermining the integrity of the inquiry;

(3) that the scope and substance of the inquiry were inadequate, in that the learned trial judge failed to properly investigate and evaluate the reports made by the jurors;

(4) that the learned trial judge applied an incorrect test in determining whether the jurors were able to remain impartial by focusing solely on their subjective assessment, without regard for an objective consideration; and

(5) that the jury inquiry impinged on the applicants' constitutional right to a fair hearing before an independent and impartial tribunal.

[89] These five challenges will be examined in turn.

<u>The conduct of the jury inquiry in the absence of the applicants</u>

Submissions on behalf of the applicants

[90] Mr Clarke submitted that the learned trial judge, while sitting in court, conducted an inquiry of the jurors in the absence of the applicants, having directed that the doors

to the courtroom be closed and that they not be brought. This, he argued, directly engaged their constitutional right to be present at their trial under sections 16(3) and 16(6)(g) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter').

[91] He submitted that what transpired was distinguishable from the position in **Shawn Campbell, Adidja Palmer, Kahira Jones and Andre St John v R (No. 2)** [2024] UKPC 6 ('**Shawn Campbell PC**'), where the trial judge conducted inquiries in chambers without the accused, but with counsel and a court reporter present, an approach that the Privy Council did not criticise.

[92] Counsel also relied on **Nash Lawson v R** [2012] JMCA Crim 29 to argue that exclusion of the accused from a jury-related inquiry constituted an irregularity.

Submissions on behalf of the Crown

[93] Mr Taylor KC argued that the exclusion of the applicants during the juror inquiries did not render the trial unfair. He submitted that although there was no record of what the trial judge expected the jurors to say, it could reasonably be inferred that the judge was aware of the general nature of the issue, which explained the applicants' exclusion. He further contended that, consistent with **Shawn Campbell PC**, their absence caused no unfairness, particularly since they were continuously represented by counsel.

Analysis

[94] The applicants argue that their constitutional rights under sections 16(3) and 16(6)(g) of the Charter, to be present at their trial, were violated. Firstly, as it relates to closing the doors to the courtroom, they rely on section 16(3), which states:

> "16. - (3) All proceedings of every court and proceedings relating to the determination of the existence or the extent of a person's civil rights or obligations before any court or other authority, including the announcement of the decision of the court or authority, shall be held in public."

[95] It is clear that section 16(3) enshrines the long-standing common law principle of open justice, that all proceedings of every court should be held in public. This general rule, however, is expressly qualified by section 16(4), which permits a judge hearing the proceedings to exclude members of the public in certain circumstances. Particularly relevant is subsection (4)(c)(i), which states:

> "16. - (4) Nothing in subsection (3) shall prevent any court or any authority such as is mentioned in that subsection from excluding from the proceedings, persons other than the parties thereto and their legal representatives-
>
> (a) ….
>
> (b) ….
>
> (c) **to such extent as –**
>
> **(i) the court or other authority may consider necessary or expedient, in circumstances where publicity would prejudice the interests of justice**." (Emphasis added)

[96] It was acknowledged in **Norton Wordworth Hinds et al v The Director of Public Prosecutions** [2017] JMCA Civ 17, by Morrison P, at para. [67], that:

> "…both at common law and under section 16(4) of the Constitution, the court has a limited discretion to exclude members of the public from its hearings as an exception to the general rule."

[97] It was further observed that:

> "…while section 16(4) of the Constitution sets out a set of circumstances in which the court may exclude members of the public, the court's discretion is wider than this and, in a proper case, it may be exercised taking into account matters relating to the nature of the proceedings and the type of function conferred upon the court in the particular proceedings."

[98] While there is no indication on the record that the courtroom had been cleared, it is reasonable to infer that ordering that the doors be closed was to exclude the public. Although the learned trial judge did not state on the record her reasons for so ordering,

the concerns that later emerged, namely, the apparent questionable interaction between one applicant and other men, which had evidently been brought to her attention beforehand, provide a clear and rational basis for her approach. In these circumstances, a strict application of the principle of open justice might have frustrated, or rendered impracticable, the proper administration of justice. Importantly, the court reporter was present, and therefore, if needed, the record of what transpired could be made available.

[99] As it relates to the exclusion of the applicants from their trial, the applicants rely on section 16(6)(g) of the Charter, which states:

> "16. - (6) Every person charged with a criminal offence shall-
>
> > (g) except with his own consent, not to be tried in his absence unless –
> >
> > > (i) he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to continue in his absence; or
> >
> > (ii) he absconds during the trial."

[100] With respect to the exclusion of the applicants, the learned trial judge also placed no reasons on the record. While we recognise the considerable pressure that issues of this kind can place on a trial judge during proceedings, it remains crucial that the rationale for all such decisions be fully stated on the record. Nevertheless, from the circumstances ultimately disclosed on the record, namely, that the jurors had expressed fear arising from an interaction involving one applicant and other individuals, the rationale for the learned trial judge's course is clearly discernible and understandable.

[101] In considering this complaint, we observe that neither the prosecution nor the defence raised any objection to the procedure adopted at that time. We also observe that the very authority relied upon by the applicants of **Nash Lawson v R**, recognises that there are occasions when an accused may properly be absent from an aspect of the proceedings, provided that a court reporter is present to document what transpires. The

court in **Nash Lawson v R** referred to **R v Lee Kun** [1916] 11 Cr App R 293, and made the following observation:

> "R v Lee Kun may be described as an exceptional case [it dealt with an accused who did not understand English, which was the language in which the trial was being conducted]; however, the principle holds true in all instances, that an accused is not to be excluded from any portion of his trial unless there are very good reasons. There may be circumstances during a trial when a judge and counsel for the defence and the prosecution need to confer in chambers in the absence of the accused. On such occasions, it is important that a court reporter be present to record what transpires."

[102] The applicants have relied on the Privy Council's decision in **Shawn Campbell PC** to support their argument that the learned trial judge's decision to exclude the applicants from the courtroom was wrong. In that case, the trial judge conducted inquiries in his chambers and in the absence of the accused. A juror had expressed concern arising from her son's detention in the same correctional facility as one of the accused. The defendant had allegedly approached the juror's son and made a remark concerning his co-defendant having seen his mother. In approving the trial judge's handling of the matter, Lord Lloyd-Jones, in delivering the opinion of their Lordships' Board, held at para. [24] of the judgment that:

> "…the judge was correct to deal with the matter in chambers in the presence of counsel but in the absence of the defendant. Two defendants were implicated in what was said to have occurred."

He further noted that: "The defendants were represented by their counsel who were able to make submissions to the judge".

[103] Mr Clarke seeks to distinguish the approach adopted in **Shawn Campbell PC** from that in the present case, on the basis that the inquiry was conducted 'in the courtroom'. We cannot agree with such an argument. Although physically in the courtroom, the learned trial judge expressly directed that the courtroom be closed, effectively transforming the setting into the environment of chambers. The proceedings

were therefore not, in substance, 'open court' proceedings and were comparable to the approach endorsed in **Shawn Campbell PC**.

[104] In light of the circumstances that clearly operated on the mind of the learned trial judge, most notably, that the jurors' expressed fear arising from an interaction involving one of the applicants, we are satisfied that her decision to close the doors to the courtroom and to exclude the applicants from the inquiry cannot be faulted. The applicants' rights were protected by the presence of defence counsel and the court reporter. This aspect of the ground of appeal has no merit.

Presence of the entire jury

Submissions on behalf of the applicant

[105] Mr Clarke submitted that the learned trial judge erred in conducting the inquiry in the presence of the entire jury, rather than isolating and questioning jurors individually. In support, he relied on **Bonnett Taylor v R** [2013] 1 WLR 1144; **R v Brown** [2001] EWCA Crim 2828; the Supreme Court of Judicature of Jamaica Criminal Bench Book ('Criminal Bench Book'); and the 2012 Crown Court Practice Direction on Jury Irregularities, all of which emphasise the desirability of isolating jurors and conducting inquiries individually to avoid contamination of the panel. He argued that the learned trial judge's approach undermined the applicants' right to a fair hearing by an independent and impartial tribunal under section 16(1) of the Charter.

[106] Counsel highlighted that initially, four members of the panel were summoned by the learned trial judge. Whilst the transcript does not reveal what was first brought to the learned trial judge's attention, it presumably involved these jurors. Having made inquiries of one of the jurors and appreciating that his concerns had been communicated to the remaining jurors, the learned trial judge then called the entire panel and engaged them as a group. Three jurors then shared their observations relating to one applicant, which made them feel fearful.

Submissions on behalf of the Crown

[107] Regarding the applicants' complaint that the jurors were questioned collectively rather than individually, Mr Taylor KC argued that there was no evidence of contagion or cross-contamination among the jurors. He relied on the presumption that jurors are persons of integrity and common sense, who are expected to adhere to the learned trial judge's instructions and to apply them responsibly. In the circumstances, he argued that the approach taken by the learned trial judge was within her proper discretion in managing the inquiry.

Analysis

[108] Given the nature of this criticism, and indeed the remaining criticisms under this ground of appeal, it is important to set out the relevant portions of the proceedings in detail, particularly the exchanges that unfolded during the inquiry. Having summoned the foreman along with jurors 2, 3 and 4, the following exchange took place (see pages 247-249 of the transcript):

To juror number 4, the learned trial judge asked:

> "Her Ladyship: It has come to my attention that you might have experienced something yesterday afternoon, which was really unfortunate, and you would have brought it to the attention of your other fellow jurors here. Did you bring it to the attention of the others?
>
> Juror No. 4: Yes, your honour."

At this point, the other jurors were sent for, and the learned judge continued her queries.

> "Her Ladyship: I am going to ask you, firstly to relate to us and to relate to us what your experience was…
>
> Juror No 4: Yesterday when the court was going on, yesterday when the case was going on, I observed…

Her Ladyship: Was that in the morning part or the afternoon part? It was in the afternoon?

Juror No 4: Yes. I observed one of the gentlemen that is sitting into the box, the tall one ….

Her Ladyship: Yes

Juror No 4: He was speaking to somebody on the outside. The person came on the veranda and saying something to him and he was nodding his head.

Her Ladyship: Just a minute. Yes nodding his head.

Juror No 4: I don't say I heard what they were saying, but there was a conversation between the two of them.

Her Ladyship: That was what happened?

Juror No 4: Yes and after he leave there is another come and doing the same thing.

Her Ladyship: That's it?"

[109] The transcript then ascribes the following words to someone described as a "witness," although it is evident from the context that the speaker was in fact a juror:

"Witness: That makes all of us very uncomfortable."

[110] The interaction continues:

"Juror No 4: That make all of us very uncomfortable.

Her Ladyship: I will ask them. But, please, why did that make you uncomfortable that they were speaking?

Juror No 4: Mek I feel we are up here and we not comfortable seeing persons coming there and looking up on us."

[111] After further discussion, the learned trial judge questioned juror number 4 as follows:

"Her Ladyship: Based on what you said might have happened, are you of the view that you would not be able to give a fair verdict on this case?

Juror No 4: No, your Honour.

Her Ladyship: It doesn't affect you in that way?

Juror No 4: No

Her Ladyship: So you would not have been intimidated then, is just that you did not like what you saw?

Juror No 4: Yes, your Honour.

Her Ladyship: So you would still be able to, independent of that, to give a fair verdict?

Juror No 4: Yes, your honour.

Her Ladyship: And you are sure about that?

Juror No 4: Yes your honor."

[112] Established practice recognises that when issues arise that may affect impartiality, a trial judge should, wherever practicable, question jurors individually rather than collectively. This allows the court to determine the exact extent of each juror's knowledge of the matter and to evaluate the potential impact on that juror's ability to remain impartial, thereby preventing the entire panel from being influenced by one juror's fears or subjective impressions. This approach also helps determine whether any alleged misconduct was genuinely improper or simply a misunderstanding.

[113] Collective questioning, by contrast, risks contaminating individual jurors' views and may unintentionally pressure them to conform to others' views or suppress their own personal views. The undesirability of questioning jurors en bloc was highlighted in **R v Brown**, where collective questioning was found to be an imperfect method for identifying and isolating the issue of jury bias. In that case, the trial judge conducted an inquiry into alleged improper conduct by members of the defendant's family. On appeal, Mance LJ observed, at para. 24, that:

> "questions to a jury en bloc in open court, and without the opportunity to consider or respond to them individually and privately, may not have been the best way of dealing with the problem."

[114] In the present case, juror number 4 informed the learned trial judge that his experience had been shared with the entire panel, which may have prompted the learned trial judge to assemble all the jurors. Nonetheless, it remained necessary, even in those circumstances, to conduct a separate inquiry of each juror. Only by doing so could the learned trial judge determine precisely what information each juror possessed and evaluate the effect, if any, on that juror's ability to remain impartial. The remark by juror 4 that the events made 'all of us very uncomfortable ´may have influenced the perceptions of other jurors, thereby exacerbating the risk of compromised impartial deliberations.

[115] During the collective inquiry, jurors 5 and 6 raised additional concerns. There is nothing on the record to suggest that these issues had been previously communicated to the rest of the panel. The relevant part of the exchange with juror number 6 is as follows (see pages 250-253 of the transcript):

> "Juror No 6: Yesterday, I was sitting here and here someone asked for one of the accused men in the box and somebody…
>
> Her Ladyship: I am not hearing you that clearly. You were sitting there while we having the matter?
>
> Juror No 6: Somebody come around the back and asks for one of the accused man.
>
> Her Ladyship: Asked for one of the accused men?
>
> Juror No 6: Yes, like the court is going on and the person seh to him seh, ' I don't really know,' and then afterwards the person go away.
>
> Her Ladyship: Oh, so he just asked for one of the accused men?
>
> Juror No 6: Yes

Her Ladyship: So did that affect you in anyway?

Juror No 6: Yes

Her Ladyship: Tell me how it affected you?

Juror No 6: Cause I don't know if they come to do anything.

Her Ladyship: You don't know if they came to do anything?

Juror No 6: Yes, that is why, the reason why they asked about the person.

Her Ladyship: How did that make you feel otherwise?

Juror No 6: Fearful

Her Ladyship: Fearful. Fearful to the point where you wouldn't be able to give a fair verdict or an independent verdict in this case?

Juror No 6: No, your honor, but like we are going on the street, we are going home, we don't know what can happen to us."

[116] There followed a short discussion about what might alleviate juror number 6's concerns, after which the learned trial judge inquired:

"Her Ladyship: But you would be able to give an independent and fair judgment, nevertheless, in this case, verdict in this case, yes?

Juror No 6: Yes your honor.

Her Ladyship: That is one of the reasons I called you to be sure of that and I am sure of that?

Juror No 6: Yes, your Honour."

[117] The collective format of the inquiry allowed juror number 6 to disclose information in the presence of all jurors, information they may not previously have known. His expression of fear, particularly his statement that he did not know whether the men had "come to do anything," had the potential to introduce new concerns into the minds of

other jurors that might not otherwise have arisen. This created a real risk that the remaining jurors' views could have been influenced or coloured by juror number 6's apprehensions.

[118] This risk underscores the fundamental problem with conducting the inquiry en bloc rather than individually: the process may inadvertently circulate unverified information and subjective impressions among the panel, thereby undermining the objective of isolating and evaluating each juror's independent knowledge and state of mind.

[119] Juror number 5 also contributed to the discussion, further demonstrating that the collective approach facilitated new disclosures that had not previously been investigated and the impact on each juror was not separately explored. Juror number 5 stated (see pages 253-255 of the transcript):

> "Juror No 5: I would also share how I felt when I saw the man yesterday, it was 4 of them.
>
> Her Ladyship: Oh, you had seen them as well?
>
> Juror No 5: Yes all of us saw them when they were standing outside, the way they were looking at us.
>
> Her Ladyship: I am not able to see from here, you see, so had I seen them I would have probably said something, but I can't see directly across.
>
> Juror No 5: I believe that an officer asked them to leave.
>
> Her Ladyship: The officer did speak to them?
>
> Juror No 5: Yes, but they came back.
>
> Her Ladyship: Okay
>
> Juror No 5: But the way they were looking at us and I remember when I went out to collect my lunch, I ordered lunch and the deliver guy came and when I went downstairs there were on the other side of the road and

looking at me. So I just glanced and turned around and hurriedly came back up here and, of course, it is an intimidating experience when you are in this position. It will not affect my decision, but….

Her Ladyship: But you would like for more to be done you are saying, to insulate you?

Juror No 5: And then in my head I am just wondering why they were looking at us the way they did.

Her Ladyship : All right, I will ask the officer, time to come, whether he would have noticed anything, because there is an officer at the door, I will see how that goes on. That wont necessarily—I just want to know how you feel and I will take steps to secure. I just want to know if any of you is so affected by what would have happened or what you perceived to have happened, such that you would not be able to make an independent and fair judgement in the case. So all you think that you could regardless of what might have happened? I haven't heard from juror number 7.

Juror No. 7: I am fine.

Her Ladyship: You are agreeing that you would be able to make an independent assessment of the case and give a fair and true verdict?

Juror No. 7: yes, your honour."

[120] There is no indication that, prior to this stage of the proceedings, the other jurors were aware of the experience recounted by juror number 5. It is readily apparent that the expression of his concerns could have influenced the remaining jurors' perceptions, altering views that may previously have been neutral and potentially fostering a negative impression of the applicants that had not existed before.

[121] It is, therefore, clear to this court that the risk of contamination within the jury was a real and present one. In the circumstances, this court cannot accept the Crown's submission that there was no evidence of contamination. The nature and structure of the inquiry conducted made such contamination not only possible but likely. The inquiry was therefore flawed in this respect.

[122] The implications of this conclusion will become apparent later in this judgment as we address the remaining three criticisms advanced by the applicants' counsel. These are, namely:

(i) the substance of the inquiry undertaken by the learned trial judge;

(ii) the test applied in determining whether bias existed; and

(iii) the impact on the applicants' constitutional right to a fair trial.

As these issues are closely interrelated, they will be addressed together following a summary of the respective submissions.

Submissions on behalf of the applicants

[123] Mr Clarke submitted that the inquiry into the jurors' fears was fundamentally inadequate and prevented a proper exercise of the judge's discretion under the Jury Act. He complains that not all jurors were questioned, and that the questions asked were not sufficiently probing to determine whether apprehensive jurors could remain impartial or whether a fair trial remained possible. Relying on **R v Brown**, he argued that the learned trial judge failed to explore the critical issues, asked the wrong questions, allowed no time for reflection, and conducted no structured evaluation before deciding to continue the trial. He further contended, citing **R v Sawyer** (1980) 71 Cr App R 283 and **R v Spencer** [1987] AC 128, that the learned trial judge made no effort to determine whether any juror had become consciously or unconsciously prejudiced.

[124] He complained that the inquiry relied solely on the jurors' accounts, as the applicants were never asked for their version of events. Therefore, no proper fact-finding exercise was conducted to determine the applicants' role, if any, contrary to the guidance in **Bonnett Taylor v R**.

[125] He argued that, unlike in **Shawn Campbell PC**, defence counsel were not given an opportunity to consult with their clients, as no adjournment was granted before the decision to continue the trial. Further counsel's views on whether the trial should continue were never sought. While one defence counsel volunteered a desire for his client to face a new trial, this obviously occurred without consultation.

[126] Mr Clarke further noted that the learned trial judge's summation had no specific direction capable of mitigating the risk of potential jury bias arising from the concerns expressed by jurors 4, 5 and 6.

[127] The applicants next challenged the test applied by the learned trial judge. Mr Clarke argued that the judge placed undue reliance on the interviewed jurors' assurances that the incidents would not influence their deliberations, thereby only applying a subjective approach. He argued that an objective assessment was necessary to determine whether bias existed on the part of the jurors. He argued that the law as it relates to bias has undergone changes as a result of the Strasbourg Court jurisprudence, as reflected in the authorities of **In re Medicaments and Related Classes of Goods (No 2)** [2001] 1 WLR 700 ('**re Medicaments**'), **Porter v Magill** [2002] 2 AC 357, **R v Brown**, and **Carrol Ann Lawrence-Austin v The Director of Public Prosecutions** [2020] JMCA Civ 47 ('**Lawrence-Austin v DPP**'), all of which confirm that the proper approach is an objective test, and not soley a subjective one.

[128] Counsel argued that the learned trial judge did not adopt the proper dual-test approach, which requires the judge to first consider whether there is evidence of actual bias and then to make an objective assessment of the issue of impartiality, as applied in

Lawrence-Austin v DPP. Consequently, he further suggested that **Delroy Laing v R** [2016] JMCA Crim 11 may need to be revisited.

[129] He also cited **R v Bow Street Metropolitan Stipendiary Magistrate ex parte Pinochet Ugarte (No 2)** [2001] 1 AC 119 ('**Pinochet**') and **R v Sussex Justices** [1924] 1KB 256 in support of the proposition that justice must not only be done but must be seen to be done. On this basis, he argued that the applicants' rights under section 16(1) of the Charter were breached.

[130] In closing, Mr Clarke turned to his final area of criticism, that the applicants' constitutional right to a fair hearing before an independent and impartial tribunal, guaranteed by section 16(1) of the Charter, was breached. He submitted that the jurors' expressed fears, the inadequacies of the inquiry, and the learned trial judge's application of the wrong test left the court without the necessary factual foundation to determine reliably whether the trial could fairly continue, rendering the convictions unsafe.

[131] He submitted that, although **Delroy Laing v R** and **Lawrence-Austin v DPP** do not ground the analysis in constitutional principles, **Shawn Campbell PC** affirms that questions of juror impartiality must align with the Constitution. He argued that the convictions were therefore unsafe and should be quashed, with verdicts of acquittal entered under section 14(2) of the Judicature (Appellate Jurisdiction) Act, since a retrial would be neither appropriate nor just in all of the circumstances.

Submissions on behalf of the Crown

[132] On behalf of the Crown, Mr Taylor KC submitted that the learned trial judge handled the jurors' concern appropriately and that there was no evidence of bias or contagion. While he opined that a caution in the summation to the jury regarding the issue that had arisen would have been preferable, its absence did not render the summation inadequate.

[133] While acknowledging that some jurors were not questioned, Mr Taylor KC maintained that the trial judge nonetheless had the opportunity to observe the entire

panel. Given her expressed intention to hear from all jurors, he argued that their demeanour must have provided non-verbal cues as to their views. He opined that the judge therefore had a sufficient evidential basis to determine what had occurred, to conclude that the incident did not implicate the applicants, and to decide that discharging the jury was unnecessary. He submitted that the methodology adopted by the learned trial judge was broadly consistent with the approach contemplated in the Practice Direction (Crown Court: Jury Irregularities) [2013] 1 WLR 486.

[134] Mr Taylor KC candidly conceded that the correct legal test was not employed, but maintained that the decision not to discharge the jury was nonetheless proper. Relying on section 45(2) of the Jury Act, he submitted that although the statute does not define "necessity," it must be understood as importing a high threshold, which is within the judge's assessment, and should not attract appellate intervention.

[135] To support his submissions regarding judicial discretion, the high threshold of 'necessity', and the application of the fair-minded observer test, he relied on **R v Olassio Bailey** (1981) 18 JLR 23, **Webb and Hay v R** (1994) 122 ALR 41, and **R v Porter and Williams** (1965) 9 WIR 1 ('**Porter and Williams**') He contended that jurors must be presumed to possess ordinary courage, even where they express fear or discomfort.

[136] His final submission was that, although the learned trial judge did not invite defence counsel's input, counsel for Mr Alvaranga could have made submissions independently, as counsel for Mr Davis had done. In the circumstances, he argued that no prejudice arose and that the high threshold of necessity for discharging the jury was not met.

Analysis

[137] It is essential that any matter capable of affecting, or appearing to affect, the jury's independence or impartiality be approached with utmost care. Even minor irregularities, real or perceived, can erode public confidence in the fairness of the proceedings. Accordingly, when jury concerns arise, the court must act with meticulous care to identify,

evaluate, and address any circumstance that could cast doubt on the integrity of the jury's deliberative process. Impartiality requires that decisions be made fairly and without bias, based solely on the evidence properly before the tribunal, and free from extraneous or improper influences.

[138] The fundamental importance of impartial adjudication was underscored by Lord Hope of Craighead in **Pinochet** at page 288, where he observed that:

> "One of the cornerstones of our legal system is the impartiality of the tribunals by which justice is administered."

[139] Because an impartial tribunal of fact is fundamental, any question concerning the discharge of a juror, or the entire panel, must be considered whenever circumstances arise that may compromise their impartiality. As noted in **Delroy Laing v R,** the court bears a duty to consider whether discharge is appropriate even in the absence of an application from counsel.

[140] The cumulative guidance emerging from the authorities makes it clear that, once a legitimate concern is raised about a potential compromise to the jury's impartiality, the trial judge must undertake a structured, four-stage analysis, as follows:

1. Investigate the matter to ascertain the nature and extent of the alleged irregularity.

2. Evaluate all information and make factual findings as to what transpired.

3. Determine subjectively whether each juror possesses the requisite impartiality.

4. Conduct an objective assessment of the jury's impartiality.

Ultimately, the judge's concern must be to ensure that there is no real danger that the position of the defendant might be prejudiced.

[141] As it relates to the first step, the trial judge must undertake a careful and thorough fact-finding exercise to ascertain precisely what transpired. This foundational inquiry is essential to enable an informed and principled decision. Input from both Crown and defence counsel regarding the proposed course is always beneficial. The probe must extend to all individuals who may have knowledge of the incident, and defence counsel must be afforded an opportunity to question those individuals involved, and thereafter to make submissions on behalf of the applicants. The overarching objective is to obtain the most comprehensive and accurate account possible.

[142] The learned trial judge in the present case did not conduct the inquiry required. The investigation ought to have encompassed not just the jurors but also the police officer whom juror 5 indicated had instructed the men to leave, as well as, if possible, the men allegedly involved and the applicants themselves. Anyone capable of shedding light on what had transpired should have been questioned.

[143] It is evident that the learned trial judge, whilst indicating an intention to do so, made no inquiries of the police officer mentioned by juror 5. There is also nothing on the record to indicate that any effort was made to identify or to possibly locate the men who were observed speaking to one of the applicants.

[144] Furthermore, the applicants were not afforded an opportunity to be heard, an omission that may have deprived the court of information capable of clarifying the incident and possibly demonstrating that the alleged conduct was innocuous. This is particularly significant given the court detective's speculation that the men might have been individuals for whom bench warrants had been issued, a possibility that may have legitimately accounted for their presence. In this regard, it must be recognised that where an inquiry reveals that a juror has misunderstood an event and the defendant is not at fault, such a misunderstanding may itself suggest that the juror has adopted a biased or unbalanced view of the defendant.

[145] Defence counsel should have been permitted to consult with their clients and, if they considered it necessary, to put questions to the jurors. They ought also to have been invited to make submissions on the matter.

[146] We are constrained to conclude, in all the circumstances, that the inquiry was flawed. The inquiry conducted by the learned trial judge did not avail her of all the information that may have been available and, as a result, she was not properly placed to determine what had happened and the precise involvement, if any, of the applicant implicated in the jurors' reports.

[147] We, therefore, cannot accept the Crown's submission that the methodology employed by the learned trial judge was appropriate or consistent with established practice in the English Crown Court. Our review of that jurisprudence indicates, for example, that the usual practice is for the judge to consult with counsel, invite submissions, and question jurors individually.

[148] It is only after a comprehensive investigation has been completed and the relevant information gathered that the judge is properly positioned to proceed to the second step: assessing the evidence and determining, on a balance of probabilities, what in fact transpired. (see Lord Clarke in **Attorney General of the Cayman Islands v Tibbetts** [2010] UKPC 8). The learned trial judge, while indicating that the jurors were not casting aspersions on the applicants, made no findings of fact as to what had transpired. Such findings were necessary to form a proper basis for determining how the matter should proceed.

[149] The third and fourth steps require, first, determining whether each juror believes he can remain impartial, and second, the judge's own independent and objective assessment of that issue. Needless to say, where jurors indicate an inability to remain true to their oath of impartiality, that is where there is actual bias, there is no need to proceed to the objective limb of the test.

[150] It is evident that the inquiry conducted did not extend to each juror. The transcript reflects exchanges only with jurors 4, 5, 6 and 7, as well as with the foreman. Each juror ought to have been questioned individually and afforded time for reflection on their ability to uphold the jurors' oath, namely, to return a true verdict in accordance with the evidence. The jurors should also have been questioned about the basis for their assertion that they could return a fair verdict, given their expressions of fear. This would have assisted in evaluating the soundness of that conviction.

[151] Although the learned trial judge indicated that she wished to determine whether any juror had been so affected by the events that they could no longer return an impartial verdict, the record contains no response from jurors 2 and 3. Even if some non-verbal indication was given, as the Crown suggests may be implied from the judge's remark about not having heard from juror number 7, it was essential for any such indication to be expressly recorded. It, however, seems hardly the case that a non-verbal indication could satisfy the demands of the situation.

[152] It is also clear that the test employed by the learned trial judge in considering whether bias existed was solely subjective. This is evident from the questions asked of the jurors during the inquiry. Juror number 4 was asked whether he could return a "fair verdict", to which he responded affirmatively. Jurors numbered 6 and 7 were each asked whether they could make "an independent and fair judgment", and both confirmed that they could. Juror number 5, while describing the incident and the unease it caused him, stated that "it will not affect my decision". The foreman who was initially questioned was not asked his position.

[153] The subsequent discourse between the learned trial judge and defence counsel for one applicant is also indicative of this. Part of that exchange was as follows (see page 258 of the transcript):

> "Her Ladyship: Counsel, let me tell you something, the important thing is to make sure that they can give an independent verdict, that is the test.

Mr D Morgan: M'Lady, m'Lady…

Her Ladyship: Yes

Mr D Morgan: … saying they can, leave me in great fear and apprehension.

Her Ladyship: No, I can't go beyond that, because they said that they would be able to give an independent verdict, they are not casting any aspersions.

Mr D Morgan: If they are afraid…

Her Ladyship: But counsel, most jurors who come here I would imagine that they are afraid, enuh.

Mr D Morgan: No, Judge, no, Judge, that is not the experience here.

Her Ladyship: I cannot do anything about it, they say that they will be to give an independent verdict and that is where ends. They say they will be, I can't - - and to be honest, I don't believe that it was a case where anybody was pointed out. When I heard the story first, it appeared to me as though they were looking at them, but that was not so, based on what I have been told.

Mr D Morgan: Now, I am fearful for my client, honestly, very fearful, in fact, if I could get a retrial, I would say take the additional months in custody and agree for a new trial.

Her Ladyship: No, they have already said that they believe that it would not affect their ability and people can be independent regardless. People can be independent regardless and they have already said that in court. Okay, so let's proceed. Thank you."

[154] This dialogue illustrates plainly that the learned trial judge regarded the jurors' own assertions of impartiality as determinative. No objective assessment of perceived bias or possibility of bias was undertaken.

[155] Authorities within this jurisdiction are sparse on the question of the correct test to be employed in assessing concerns of apparent jury bias. Although **Lawrence Austin v DPP** addresses the principles of apparent bias, it did not arise in the context of a jury and therefore offers limited comparative value for the issues at hand. The factual matrix in **Delroy Laing v R** involved allegations of potential juror misconduct and is therefore distinguishable from the instant case. Though distinguishable, we will return to this authority in short order.

[156] The jurisprudence governing the test for apparent juror bias has evolved over time. For years, the governing standard was the "real risk of bias affecting the mind or minds of the relevant juror" (**R v Gough** [1993] AC 646). However, developments in European jurisprudence necessitated refinement of that test, introducing a stronger objective element.

[157] Lord Hope of Craighead in **Porter v Magill** recognised and accepted the refinement introduced by the Court of Appeal, in **In re Medicaments**, where it was observed that (at para. 102):

> "When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in **R v Gough** is called for…. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased."

[158] Lord Hope of Craighead, however, removed what he regarded as the unnecessary reference to "real danger". He stated that the question to be asked is (para. 103):

> "…whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

[159] The characteristics of the "fair-minded and informed observer" were elaborately articulated by Lord Hope in **Helow v Secretary of State for the Home Department**

[2009] 2 All ER 1031. Put shortly, this observer is gender-neutral, reasonable, neither unduly sensitive nor suspicious. This individual considers all relevant information from a detached and balanced perspective before reaching a conclusion, appreciating that fairness requires not only actual impartiality but also the appearance of impartiality. The observer also seeks to ascertain all pertinent facts and evaluate them fairly within their proper context.

[160] It was observed in **Lawrence-Austin v DPP** at para. 38 that the objective test, "…is the 'court's view of the public's view, not the court's own view, which is determinative' (see **Webb v The Queen**)".

[161] The discussion on this matter does not end with the introduction of an objective assessment. The Privy Council in **Shawn Campbell PC**, in addressing how a judge should exercise his discretion in the face of allegations of jury misconduct, harkened back to the 'real danger' consideration, stating that "the judge's concern should have been to ensure that there was no real danger that the position of any defendant might be prejudiced (**R v Sawyer** (1980) 71 Cr App R 283; 285; **R v Spencer** [1987] AC128.)". The Board indicated that a trial judge must therefore assess whether the alleged incident could have influenced the jurors, whether consciously or unconsciously, against the defendants.

[162] It is clear that prejudice to a defendant, in the context of jury bias, may stem from either actual or perceived bias. A defendant is entitled to a tribunal that is, and is seen to be, neutral and impartial. Surely, a biased juror cannot be trusted to assess the evidence objectively. Likewise, the appearance of bias is sufficient to undermine the fairness of the trial, since justice requires not merely actual impartiality but the clear appearance of it.

[163] Although the authorities employ both the terms "real possibility" and "real danger" in discussing the test for impartiality, the substantive principle is materially the same. When an issue arises concerning the impartiality of a juror, the trial judge must undertake both a subjective and an objective assessment, with the overarching objective of ensuring

that there is no real danger that the defendant's position has been prejudiced by any partiality, whether actual or perceived, on the part of the jury.

[164] The Court of Appeal in **Delroy Laing v R** recognised the "Sawyer's danger test" and also referenced a passage from Archbold 2013 at para. 4-312, which further referenced the dictum of the English Court of Appeal in **R v Mears and Mears** [2011] 10 Archbold Review 3, CA, which incorporated the issue of the objective test with the real danger test:

> "...the question a court should ask itself being whether or not there was a real danger or risk of bias or unfairness should be suitably adapted to one in which the court should ask itself whether a fair-minded and informed observer would conclude that there was a real possibility, or real danger, the two being the same, that the jury were or would be biased. The independent observer must reach his conclusion on the basis of all the raw material; it is not open to the judge to find facts and then to attribute knowledge of such facts to the observer."

[165] The learned trial judge in the case at hand, having been satisfied of the juror's views, did not proceed to consider the matter objectively. She was guided solely by the jurors' impression of their ability to be fair and independent. It is not apparent on the record what, if anything, served to dissipate those fears, nor upon what basis the jurors asserted those fears would not impair their ability to remain fair.

[166] As the Crown conceded, the learned trial judge applied the incorrect test. We are, however, unable to accept their further submission that no circumstance of necessity arose warranting the discharge of the jury.

[167] In our view, a jury composed of individuals who have openly expressed fear arising from acts associated with an accused raises serious concerns about their impartiality, even where the jurors have not attributed responsibility for those acts to the accused himself.

[168] We find that there was a real danger or possibility that the jurors who themselves expressed fear, and those who became aware that their fellow jurors were in fear, and the reason for this, may have been consciously or unconsciously affected by this, and as a consequence, the position of the applicants might have been prejudiced. Such a situation, *prima facie*, presents a compelling case for the discharge of the jury.

[169] We cannot agree with the Crown's position that the judge's discretion regarding the discharge of jurors is not open to review in these circumstances. The respondent relies on a statement in the Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book') under the heading "Discharging the entire jury", which states: "It is for the judge alone to decide if a necessity exists for discharging the jury and his decision is not subject to appeal".

[170] While the statement in the Bench Book is acknowledged, it cannot be correct that a judge's failure to discharge a jury in circumstances that plainly warrant such a course is protected from appellate review. Adopting that position would compromise the integrity of the trial process, as a refusal to discharge a biased or conflicted jury could impact the fairness, and consequently the validity, of the entire proceeding.

[171] Indeed, one of the authorities upon which the Crown relies is contrary to this stated position. In **R v Olassio Bailey** (1981) 18 JLR 23, it was noted by Rowe, JA that:

> "Where the trial judge exercises his discretion not to discharge the jury and a conviction follows, the Court of Appeal has jurisdiction to review the circumstances under which that discretion was exercised."

[172] Apart from this, we do not find the authorities relied on by the Crown to be of assistance to its position. The facts in **R v Olassio Bailey** were such that the conduct complained of on the part of the juror was insufficient to support any inference of improper behaviour. Similarly, **Porter and Williams** concerned a high-profile criminal trial that attracted considerable public attention and large crowds at the courthouse. The concern raised was that the jurors might have been intimidated or otherwise influenced

in their deliberations. On appeal, however, it was concluded that there was no basis for such a finding, as no juror had made any complaint to the trial judge when he enquired into the matter. In **Webb and Hay v R**, the issue was whether the trial judge's warning to a juror regarding his questionable actions was sufficient to dispel any concern of bias. In the present case, by contrast, the learned trial judge issued no warning or direction during her summation. These authorities are therefore plainly distinguishable from the circumstances before us and provide no assistance in resolving the issue at hand.

[173] We note that no direction was given to the jury in the learned trial judge's summation regarding the incidents in question. The Crown submitted that this would have been useful but emphasised that its absence was not fatal. We cannot agree. In this case, the test the learned trial judge applied in deciding not to discharge the jury was wrong, and this error would have been exacerbated by the absence of directions to the jury regarding the treatment of the reported fear of those questioned. In any event, while there are instances in which an appropriate direction may serve to dispel concerns of impartiality, given the issues raised in this case, it is our view that it is unlikely that a direction to the jury could have sufficed to cure the deficiencies and errors in the learned trial judge's treatment of the matter.

[174] As we see it, the learned trial judge, having erred both in the conduct of the jury inquiry and in the deployment of the legal test applicable to apparent bias, was not properly equipped to determine whether the trial ought to have continued. It follows that we cannot regard the refusal of defence counsel's application for discharge of the jury and a retrial as a proper exercise of discretion.

[175] Given the fear expressed by some jurors, it is understandable that the applicants would have a legitimate concern as to whether the tribunal of fact remained impartial. It is from this that the applicants contend that their entitlement to a fair hearing before an independent and impartial tribunal under section 16(1) of the Charter has been breached. This section states:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[176] There is a notable paucity of authorities within this jurisdiction that directly address this issue. The constitutional dimensions of the issue of juror impartiality were not raised in **Delroy Laing v R**, nor in **Lawrence-Austin v DPP**. However, the Privy Council in **Shawn Campbell PC** held that continuing a criminal trial with an allegedly corrupt juror infringed the defendants' fundamental right to a fair hearing by an independent and impartial court, in accordance with section 16 of the Constitution.

[177] We recognise that it is a fundamental right of an accused person to be tried by an independent and impartial tribunal. This right must be cherished and rigorously protected. The principles of independence and impartiality are closely intertwined and are indispensable to the proper functioning of our justice system. Tribunals are expected to deliberate without fear or favour, affection or ill will, and must therefore remain entirely free from any form of partiality or prejudice. Jurors must not only be subjectively free of personal bias, but must also appear to be so, in order to dispel any perception or legitimate doubt as to their impartiality. A jury that is partial, or even one that appears to be partial, strikes at the heart of the accused's fundamental right to a trial before an independent and impartial tribunal.

[178] Given the fear expressed by jurors, which was based on acts connected to one of the applicants, together with the errors in the conduct of the jury inquiry and the application of an incorrect legal test, we accept the submission made on behalf of the applicants that there existed a legitimate basis for concern regarding the infringement of their constitutional rights to a fair hearing.

[179] Accordingly, in relation to the criticisms advanced under ground 4 of the appeal, we conclude as follows:

(i) the learned trial judge did not err in deciding to close the doors to the courtroom and to conduct the jury inquiry in the absence of the applicants;

(ii) the learned trial judge fell into error in undertaking the inquiry with the entire jury panel present;

(iii) the manner in which the inquiry was conducted was unsatisfactory;

(iv) the learned trial judge erred by applying solely a subjective test, without incorporating the requisite objective analysis based on the correct test, and failing to direct the jury regarding how they were to treat the events that arose during the course of the trial and their reported fear in determining their verdict; and

(v) the applicants' constitutional right to a fair hearing has been breached by the refusal to discharge the jury.

[180] Taken cumulatively, we are of the view that the course followed by the learned trial judge in dealing with the jurors' complaints of fear was a material irregularity in the course of the trial which infringed the applicant's constitutional right to a fair hearing by an independent and impartial tribunal established by law. This failure on the part of the learned trial judge is compounded by her failure to give directions to the jury on the prosecution's main witness' bad character as a material consideration in assessing his credibility. These errors have given rise to a miscarriage of justice within the meaning of section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). Accordingly, the convictions are rendered unsafe and liable to be quashed.

[181] This ground of appeal, therefore, succeeds and is determinative of the applications for leave to appeal.

Ground 5: The applicants are entitled to a reduction of sentence for constitutional breaches, including breach of guarantee for a fair trial in a reasonable time

[182] Given our conclusion that the applicants succeed on ground 4, which is determinative of the applications for leave to appeal, ground 5 is accordingly rendered otiose.

[183] There remains, however, the question whether, pursuant to section 14(2) of the JAJA, it would be in the interests of justice to order a retrial, or whether judgments and verdicts of acquittal should instead be entered. We, therefore, turn to that question.

Retrial

Submissions on behalf of the applicants

[184] It was submitted that, given the lapse of approximately 14 years since the alleged offences, the question of a new trial ought not now to be entertained. Reliance was placed on **Mark Russell v R** [2021] JMCA Crim 34, to argue that, considering the breaches of the applicants' constitutional rights, no retrial should be ordered. Counsel also placed reliance on **Shawn Campbell, Adidja Palmer, Kahira Jones and Andre St John v R** [2024] JMCA Crim 30 ('**Shawn Campbell CA**'), a decision of the Court of Appeal, on remission by the Privy Council. He argued that, having regard to the relevant factors, including the substantial delay, the prejudice suffered by the applicants over the past 14 years, and the fact that two previous trials have already been conducted in this matter, it would not be in the interests of justice to order and embark on a third trial.

Submissions on behalf of the Crown

Regarding the issue of delay, it was argued that the applicants were not entirely without fault and that some of the delay occurred after the conviction. The Crown, however, quite frankly indicated that it was unclear whether the sole prosecution eyewitness would be available.

Analysis

[185] The court's power to order a retrial after quashing a conviction arises under section 14(2) of the JAJA. It states:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

A new trial can only be ordered, therefore, if "the interests of justice so require". Otherwise, the court must direct that a judgment and verdict of acquittal be entered. Determining whether a retrial is appropriate involves an evaluative balancing exercise in which the court weighs the factors for and against a new trial. These factors are not closed, and the relative weight to be accorded is dependent on the circumstances of the particular case.

[186] In the 2024 Court of Appeal decision of **Shawn Campbell CA**, this court reaffirmed a number of relevant considerations, including: the seriousness and prevalence of the offence; the effect of a new trial on the accused; the time that has elapsed since the alleged offence and the likely timing of a retrial; the evidence likely to be available at a new trial; the strength of the prosecution's case at the previous trial; the expense and duration of a new trial; and whether a retrial would be oppressive or unjust. The constitutional implications of these factors are also significant considerations.

[187] Applying these principles, there is no gainsaying that the offences for which the applicants were charged are undoubtedly serious, and the public interest in prosecuting such crimes is significant. However, the approximately 14-year period since the alleged commission of the crimes is substantial and inevitably affects the fairness and practicality of any retrial. It significantly increases the likelihood that critical witnesses may be unavailable or unable to provide reliable testimony, as memories fade and recollections become less reliable over time. We have noted that the delay cannot properly be attributed to the applicants in any significant way.

[188] Another relevant consideration is the time that the applicants have already spent in custody. The applicants were in custody at the commencement of the second trial in October 2017 and have been in custody since. The transcript of the previous trial, which commenced in January 2016, indicates that the applicants were in custody at that time. There is nothing from the Crown to indicate they were not in custody prior to the first trial. Therefore, although the precise period of incarceration is unclear, it seems likely that they have been in custody prior to 2016 and could have been since their apprehension. It is, therefore, beyond dispute that the applicants have spent a considerable amount of time in custody, between 10 and 14 years. The inherent physical and mental toll of such imprisonment cannot be ignored.

[189] The uncertainty surrounding the availability of Mr Jones, the sole eyewitness, for the prosecution, is another highly relevant and crucial factor against a retrial. The Crown's case depended almost entirely on his evidence, with credibility being squarely in issue. This, therefore, may not be a case where the Crown could fairly conduct a "paper retrial," particularly given the inconsistencies in Mr Jones's evidence.

[190] The effect of a retrial on the applicants must also be considered. As **Shawn Campbell CA** recognises, the "effect of a new trial on the accused" and the "ordeal" inherent in a fresh hearing are legitimate factors in the balancing exercise. Whilst counsel for the applicants did not delve into the personal impact that a retrial would have on each applicant, the prejudice is manifest. We recognise that the applicants have already borne the burden of two previous trials, in addition to appellate proceedings. Given the significant case backlog at the Supreme Court, securing an early trial date is highly improbable. In any event, we are of the settled view that a third trial, after approximately 15 years after the commission of the offence, due to no fault of the applicants, would be onerous.

[191] The prolonged delay in reaching a final determination in this matter also raises serious constitutional concerns. Having considered the various relevant factors as delineated above, the court is satisfied that the interests of justice are best served by

declining to order a retrial. Given that the convictions have been quashed, and a retrial is not required in the interests of justice, this court is obliged to order that judgments and verdicts of acquittal be entered.

Conclusion

[192] For the reasons set out above, the applicants' applications for leave to appeal are granted, the hearing of the applications is treated as the hearing of the appeals, and the appeals are allowed.

Orders

[193] The orders of the court are as follows:

1. The applications for leave to appeal are granted.

2. The hearing of the applications is treated as the hearing of the appeals.

3. The appeals are allowed.

4. The convictions of each applicant are quashed, sentences set aside and judgments and verdicts of acquittal entered in respect of each.