[2024] JMCA Crim 28

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 30, 31 & 33/2011

OMAR BLAKE
OMAR DUNKLEY
JASON COLEY v R

Mrs Valerie Neita-Robertson KC for the 1st applicant Omar Blake

Robert Fletcher for the 2nd applicant Omar Dunkley

Anthony Williams for the 3rd applicant Jason Coley

Ms Donnette Henriques for the Crown

15, 16, 17, 18 November 2021 and 8 July 2024

Criminal Law - Whether no-case submissions should have been upheld

Criminal law - Challenge to adequacy of judge's directions on issues of conflicts in the evidence and common design

Criminal law - Summing up – Whether misdirection on previous inconsistent statements – Effect - Whether judge failed to identify specific weaknesses in the identification evidence – Impact on safety of the convictions

Criminal law - Sentencing – Whether sentence manifestly excessive – Sentencing judge not considering starting point, aggravating and mitigating factors or pre-sentence remand – approach of appellate court

DUNBAR GREEN JA

Introduction

[1] On 11 April 2011, the applicants, Messrs Omar Blake ('Blood'), Omar Dunkley ('Cootie Pang'/ 'Cooty Pang'/ 'Andre Palmer') and Jason Coley ('Tick Tack'/ 'Tick Tock'/ 'Rasta J') were convicted by a jury, and sentenced, on 15 April 2011, for the murder of Michael Curtis ('Java'/'the deceased') on 20 July 2004, in the parish of Saint Andrew. The learned trial judge sentenced each applicant to 25 years' imprisonment at hard labour.

[2] A single judge of this court refused leave to appeal conviction and sentence. However, the applicants renewed their applications before us.

The prosecution's case

[3] The prosecution's case was that the deceased was shot and killed by the applicants at the home of the deceased's girlfriend, Pam, in the Reserve Road/August Town Road area of Saint Andrew, pursuant to a joint enterprise.

<u>The main witnesses for the prosecution</u>

[4] The prosecution's principal witness, Mr Richard Simpson, claimed to have been an eyewitness to events, leading up to and subsequent to the killing, which implicated the applicants in the killing. There was no direct evidence of the killing.

[5] In summary, Mr Simpson gave evidence that, sometime in the evening of 20 July 2004, the applicants were among a group of men, numbering between five and eight, sitting on the "banking"/ "banking side" in the community. The "banking" was described as a concrete structure in the open lot, close to where the deceased resided with his mother, Ms Audrey Williams ('Ms Williams'), and the neighbouring houses of Pam and Mr Simpson.

[6] Sometime in the afternoon, the applicant, Omar Blake, left the group and went to Ms Williams' yard, and in the presence of Ms Williams and others, declared, "A long time him nuh mek a Duppy. A long time we nuh moan". After that declaration, he re-joined

the group of men on the "banking" and, in a loud voice, said, "A long time him want kill a boy and run way". The men, including Mr Blake, then started to whisper among themselves.

[7] Shortly after, the deceased arrived home. He went across the lane to Pam's gate, and Mr Simpson heard Mr Blake questioning him as follows: "Hey Bwoy, how you a look pon mi so?" The deceased replied, "Who a look pan you? You see, who a look pon you, you see me a look pon you, man?" Mr Blake questioned further, "Hey Bwoy, a who you a chat to?" The deceased did not answer and made his way into Pam's yard.

[8] Mr Blake re-focused his attention on the group of men, and said, "Come on, get up...Come, let's go, we ready". The three applicants then "move[d] fast" into Pam's yard. Three others, 'Papa', 'Demar', and Carey Dennis, also jumped the fence into Pam's yard.

[9] Mr Simpson then heard gunshots coming from the yard, and, soon after, saw Messrs Blake, Dunkley, and three other men running from Pam's yard. Both applicants had guns in their hands. Whilst they were running away, Mr Blake was heard asking the other men in the group, "Weh you kill the brown youth fah?"

[10] There was further evidence from Mr Simpson that he had encountered some members of the group of men earlier in the day, at which time Mr Blake told him to get off the road because he did not want to kill him.

[11] Ms Williams corroborated the evidence of Mr Simpson that Mr Blake had made a declaration of violent intent, in her presence, shortly before the killing. She, however, recalled a different context and slightly different words being used.

Challenge to the prosecution's case

[12] Mr Simpson was cross-examined about several material omissions from his first witness statement to the police, on the basis of previous inconsistent statements in his deposition, taken at the preliminary enquiry, and about other inconsistencies and discrepancies in relation to his evidence. Other witnesses, including Ms Williams, were

also cross-examined about previous inconsistent statements and discrepancies. These aspects of the evidence will be referred to as the context necessitates.

The defence

[13] In their defence, the applicants made unsworn statements in which they unequivocally denied being present at the scene of the killing, and having any involvement in the killing. Mr Coley stated that he was vending at the University of the West Indies and had only heard of the incident on the 7:00 o'clock news.

[14] The applicants contended that Mr Simpson was lying or had been mistaken as to the identity of the persons he saw entering and leaving Pam's yard. They did not dispute being previously known to Mr Simpson.

The verdict and sentence

[15] After the summation, the jury retired for two hours and 40 minutes, and returned a unanimous verdict against Messrs Blake and Dunkley and a divided verdict of 11 to one, against Mr Coley.

The appeal

[16] At the hearing of the application for leave to appeal, on 15 November 2021, counsel for the applicants were permitted to abandon the original grounds of appeal, and argue, instead, the supplemental grounds set out below. They were also granted an extension of time within which to file skeleton arguments.

Omar Blake

[17] The supplemental grounds of appeal for Mr Blake were:

> "**Ground 1**
>
> The Learned Trial Judge failed to assist the jury to analyse the effects of the contradictions/discrepancies, inconsistencies and previous inconsistent statements of the Applicant/Appellant [sic] and failed to leave for the jury in a

clear and adequate way all the possible interpretations for their consideration. In the circumstances, Omar Blake was denied an adequate consideration of his case and was thereby deprived of a fair trial.

Ground 2

The Learned Trial Judge failed to deal with the issue of Common Design adequately or fairly in relation to the purported statement of the Applicant/Appellant. That the matter was left to the jury as an afterthought and consequently would not have impressed the jury as a matter of any moment.

Ground 3

That the Learned Trial Judge misdirected the jury in respect of the unsworn statement of the Applicant/Appellant when she said that it was not evidence. That this misdirection deprived the Applicant/Appellant of a fair consideration of his defence.

Ground 4

The Learned Trial Judge erred in her directions and/or comments to the jury in regard to prejudicial evidence against the accused men. The comments and the possible interpretations she left to the jury denied the accused of a fair trial, individually and collectively.

Ground 5

That the sentence is manifestly excessive."

Omar Dunkley

[18] The supplemental grounds advanced on behalf of Mr Dunkley were:

"**GROUND ONE**

The learned trial judge erred in not accepting the no-case submission made on behalf of the applicant Dunkley.

GROUND TWO

The learned trial judge's treatment of the inconsistencies/ contradictions in the case against Omar Dunkley in particular was wholly inadequate. The inadequate treatment denied him a fair trial and a real chance of acquittal.

GROUND THREE

The learned judge failed to deal adequately with the unique issue of the weakness in the identification evidence against the applicant. This failure denied him a fair consideration of his case and a real chance of acquittal.

GROUND FOUR

The fundamental principle that a trial judge ought to direct a summation so that the jury is able to consider the case against each separately was not sufficiently or rigorously applied. The failure denied the applicant a fair consideration of his case and a real chance of acquittal.

GROUND FIVE

The learned Trial judge misquoted evidence in a way which prejudiced the applicant by making it appear that he was part of alleged words showing violent intent ascribed to one of the other applicants.

GROUND SIX

The sentence is manifestly excessive."

Jason Coley

[19] The supplemental grounds advanced on behalf of Mr Coley were:

"GROUND 1

The Learned Trial Judge erred in Law by rejecting the no-case submission made for and on behalf of the applicant. This resulted in a miscarriage of Justice by denying the applicant a chance of acquittal and deprived him of a fair trial.

GROUND TWO

The learned judge failed to assist the jury to analyse the effects of the contradictions/discrepancies, inconsistencies and previous inconsistent statements of the applicant and failed to leave for the jury in a clear and adequate way all the possible interpretations for their consideration. In the circumstances, Jason Coley was denied an adequate consideration of his case and was thereby deprived of a fair trial.

GROUND THREE

The Learned Trial Judge misdirected the jury as to the legal effect of an unsworn statement and the way it should be treated in law when she said it was not evidence. The misdirection deprived the applicant of a fair consideration of his defence.

GROUND FOUR

The verdict is unreasonable and cannot be supported having regard to the weight of the evidence. By that miscarriage of justice, the convictions ought to be quashed and the sentence set aside."

[20] Due to significant overlap in the grounds of appeal, we decided to group and consider them under the following issues:

(i) whether the learned trial judge erred in rejecting the no-case submission, and if so, did the error result in a miscarriage of justice? (ground one- Omar Dunkley; ground one – Jason Coley);

(ii) whether the learned trial judge failed to adequately direct the jury on the effect of conflicts in the evidence (including omissions from Mr Simpson's first witness statement, previous inconsistent statements, and internal inconsistencies in the evidence); and, if so, what was the effect on the fairness of the trial? (ground 1- Omar Blake; ground Two - Omar Dunkley; and ground Two -Jason Coley);

(iii) whether the learned trial judge failed to deal adequately with weaknesses in the identification evidence, and if so, what effect did it have on the applicant's case? (ground three- Omar Dunkley);

(iv) whether the learned trial judge failed to deal adequately or fairly with the issue of common design in relation to the purported statement of the applicant – "A weh you kill the brown youth for?" (ground two- Omar Blake);

(v) whether the fundamental principle that a trial judge ought to direct a summation so that the jury is able to consider the case for each applicant was sufficiently or rigorously applied, and, if not, did it result in unfairness and deny the applicant a real chance of acquittal? (ground four - Omar Dunkley);

(vi) whether the learned trial judge misquoted the evidence to the jury and, if so, did it cause prejudice to the applicant? (ground five - Omar Dunkley);

(vii) whether the learned trial judge erred in her directions and/or comments to the jury as regards prejudicial evidence and thereby deprived the applicant of a fair trial (ground four - Omar Blake);

(viii) whether the learned trial judge misdirected the jury as to the legal effect of the unsworn statement and whether any such misdirection deprived the applicants of a fair consideration of their defence (ground three -Jason Coley; and ground three - Omar Blake);

(ix) whether the verdict was unreasonable and cannot be supported by the evidence (ground four - Jason Coley); and

(x) whether the sentence was manifestly excessive (ground five- Omar Blake; and ground six- Omar Dunkley).

Issue (i): whether the learned trial judge erred in rejecting the no-case submission, and if so, did the error result in a miscarriage of justice? (ground one – Omar Dunkley; ground one - Jason Coley)

Summary of submissions

For Omar Dunkley

[21] Mr Fletcher, appearing on behalf of Mr Dunkley, submitted that the no-case submission should have been upheld based on the raft of unexplained and material inconsistencies in the evidence against Mr Dunkley. The evidence, counsel argued, fell short of the standard of proof, as the main witness for the prosecution, Mr Simpson, was totally discredited. By any standard, even in cases of circumstantial evidence, if the evidence falls short of the standard of proof because the witness is discredited, a no-case submission ought to succeed, counsel argued. He relied on **R v Curtis Irving** (1975) 13 JLR 139, and **R v Clarice Elliot** (1952) 6 JLR 173.

For Jason Coley

[22] Mr Williams, appearing on behalf of Mr Coley, gave four main reasons why the learned trial judge should have upheld the no-case submission in relation to Mr Coley. Firstly, Mr Simpson was completely discredited by the raft of unexplained material contradictions in the evidence, and his responses to questions put to him, in cross-examination, about previous inconsistent statements. Secondly, Mr Simpson's evidence, taken at its highest, was tenuous, unreliable and incredible because of the plethora of untruths and unexplained contradictions. Thirdly, the numerous untruths, discrepancies and inconsistencies were weaknesses in the prosecution's case that went to the root of the visual identification, and were of such significance that the case ought not to have

been left to the jury. Fourthly, the instant case is distinguishable from **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56 in which the inconsistencies did not undermine the prosecution's case. **R v Galbraith** [1981] 1 WLR 1039 and **R v Curtis Irving** were also relied on.

For the Crown

[23] Ms Henriques, appearing for the Crown, acknowledged that several conflicts emerged during the cross-examination of Mr Simpson, but submitted that they went directly to his credibility, and were not so overwhelming and inexplicable that a jury, properly directed, could not arrive at a just decision on the evidence. She submitted that **R v Curtis Irving** did not apply because, unlike the instant case, the sole eyewitness was a self-confessed liar who admitted to lying at the preliminary enquiry. In the instant case, she argued, the sole eyewitness was not lying but had linguistic challenges, and this was recognised when he gave the first witness statement, at the preliminary enquiry, and at the trial. Counsel referred us to relevant principles in **R v Galbraith**, **Director of Public Prosecutions v Selena Varlack**, **Steven Grant v R** [2010] JMCA Crim 77, and **Ramie Miller v R** [2020] JMCA Crim 12.

Discussion

[24] The substance of counsel's complaint bearing on this issue is that there was insufficient cogent and reliable evidence to link the applicants to the offence.

[25] As a general rule, it is the duty of the jury to determine the strength of the evidence, not the trial judge (see, for example, **Director of Public Prosecutions v Selena Varlack**, para. [21]; **R v Galbraith**, at page 1042, per Lord Lane CJ; **R v Steven Grant**, paras. [68] - [70], and **Mills v Gomes** (1963) 6 WIR 18). This includes the existence of discrepancies, inconsistencies and even straight-out lies in a witness' testimony. It is only where the trial judge examines the evidence and feels certain that it is wholly unreliable and the witness is totally discredited, that the case should be withdrawn from the jury, the rationale being that "taken at its highest, a jury properly

directed could not properly convict upon it" (**R v Galbraith)**. See also **Adrian Forrester v R** [2020] JMCA Crim 39, para. [121].

[26] The primacy of this principle and prerogative of the jury to adjudicate on the evidence were reinforced by Morrison JA (as he then was) who, in reference to **R v Galbraith**, made the observation in **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/06, judgment delivered 21 November 2008, at para. 26, that the judge's discretion was a narrow one and cases should not be withdrawn from the jury because it was thought the witness was lying.

[27] The learned trial judge, therefore, could not simply "discard" Mr Simpson's evidence because of contradictions or even a determination that he was lying. In a case such as this, which is also concerned with visual identification, as a first step, the trial judge must "assess the cumulative effect of weaknesses in the evidence" (see **R v Vincent Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 187/2004, judgment delivered 7 April 2006, page 7, applying **R v Ivan Fergus** [1993] 98 Cr App R 313; **Dwayne Knight v R** [2017] JMCA Crim 3, at para. [30]; and **R v Turnbull** [1977] 1 QB 224). At the end of that examination, the trial judge must ask herself whether she is satisfied that the evidence is "…sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in **R v Oakwell** [1978] 1 WLR 32, 36-37) of mistaken identification" (**Herbert Brown and Mario McCallum**, per Morrison JA at para. [35]).

[28] Looked at through a similar prism, if the trial judge concludes that there are admitted untruths coupled with "blatant and unexplained contradictions and inconsistencies" which completely discredit the witness, it would be fair to withdraw the case from the jury on the basis that they could not reasonably convict on the evidence (see the headnote in **R v Curtis Irving**).

[29] The no-case submission, on Mr Dunkley's behalf, which is recorded at pages 1080-1088 of the transcript, focused the learned trial judge's attention on the purported absence of evidence from the prosecution to establish a nexus between the copper-jacketed bullet taken from the body of the deceased and the weapons Mr Simpson claimed to have seen two of the applicants (Messrs Dunkley and Blake) carrying after the shooting. It was also contended that the evidence of Mr Simpson was weak and tenuous because the prosecution failed to provide any evidence that the applicants were ever seen entering Pam's yard with any weapons, or how they came by the weapons while they were in the yard. Further, it was argued, there was no direct evidence linking the applicants to the crime, and the prosecution's case was made manifestly weaker by the glaring absence of credibility on the part of Mr Simpson whose evidence was replete with unexplained material inconsistencies. A similar submission is recorded at pages 1088-1109 of the transcript, with respect to Mr Coley.

[30] Our examination of the evidence reveals material conflicts in Mr Simpson's evidence, among which were omissions in his first witness statement to the police, as they pertained to Mr Coley's alleged presence and involvement in the killing. For instance, there was evidence about Mr Coley having been seen by Mr Simpson on the road before the shooting, seen going inside Pam's yard and seen leaving Pam's yard after the shooting. Yet, there was no mention of Mr Coley in Mr Simpson's first witness statement to the police, whether by name, description, or otherwise.

[31] There were also significant differences in the evidence, at trial, and with Mr Simpson's deposition, at the preliminary enquiry, as to Mr Dunkley's presence and alleged involvement in the killing. In the main, the differences pertained to whether Mr Dunkley was seen on the road before, at the time of, or after the shooting; Mr Simpson only heard Mr Dunkley as opposed to seeing him; and Mr Dunkley emerged from Pam's yard, after the shooting, with a gun in hand.

[32] There were also differences in Mr Simpson's evidence, on various other matters, including his location when he purportedly made his observations, whether there was a

fight between Mr Blake and the deceased before the shooting, and the proximate time of the shooting.

[33] These issues, which will be examined in greater detail later in this judgment, had the potential to discredit Mr Simpson on the critical questions of identification and joint enterprise, especially if unexplained. According to Mr Simpson, the omissions were not his fault as, generally, he had provided the information to the police. He further explained that the police officer who took his first statement had difficulty understanding him because of his speech impediment, and requested that he repeat aspects of his statement. In cross-examination, he said the police read over the statement to him, but he did not take notice of what he (the police) was saying.

[34] We have noted Mr Simpson's further evidence that he, in fact, gave at least four witness statements to the police in this case.

[35] As regards the previous inconsistent statements, Mr Simpson mostly denied making them or said he could not remember making them. In some instances, he equivocated.

[36] We have seen evidence that, at the preliminary enquiry, Mr Simpson was assisted (appropriately or otherwise) by a police officer when his deposition was being taken, and the transcript reveals that, at the trial, he had difficulty speaking clearly. When asked by the prosecutor if anybody was there to assist him, during the taking of the statement, he answered, "No. It was like di police was barely understanding mi, him neva understand, him keep a say I must repeat again…. When di police neva understand him ask mi to repeat and then him understand…That day I know me and him a talk, him say fi repeat one a di time mi get ignorant, him say him know mi ignorant but…" (pages 548-549 of the transcript). Additionally, Mr Simpson explained, at page 562, that, at the preliminary enquiry, "the police …did deh beside mi and a explain back and the judge start write it dung".

[37] The learned trial judge had to decide whether these matters fell below the threshold for the jury's consideration. She rejected the no-case submissions and ruled that each applicant had a case to answer.

[38] It is apparent that there were several matters for a jury to consider, not least of which were the possible inferences open to be drawn on the evidence that could be accepted as proved. We do not believe that the evidence, albeit largely circumstantial, was so tenuous, nor was Mr Simpson so discredited that the case had to be withdrawn from the jury. This is certainly not a case "where the necessary minimum evidence to establish the facts of the crime [had] not been called" (see **R v Barker** (1975) 65 Cr App Rep 287, page 289, cited with approval in **Anand Mohan Kissoon and Rohan Singh v The State** (1994) 50 WIR 266 at page 275). Much depended on the correctness and adequacy of the learned trial judge's directions, and how the jury would ultimately come to view the explanations given by Mr Simpson for the contradictory evidence. As arbiters of the facts, the jury were well-placed to assess the materiality of the contradictions and the explanations for them (or lack thereof), determine whether in spite of them they could accept Mr Simpson's evidence or any part thereof, and what inferences, if any, could be drawn from any fact that had been proved to their satisfaction.

[39] For these reasons, the grounds bearing on this issue fail.

Issue (ii): whether the learned trial judge failed to adequately direct the jury on the effect of conflicts in the evidence (including omissions from the first witness statement, previous inconsistent statements, and internal inconsistencies in the evidence); and, if so, the effect on the fairness of the trial (ground one - Omar Blake; ground two – Omar Dunkley; and ground two- Jason Coley)

Summary of submissions

For Omar Blake

[40] King's Counsel, Mrs Neita-Robertson, appearing for Mr Blake, submitted that the contradictions in the evidence of Mr Simpson were overwhelming, profound, and went to the root of the issues of identification and the creditworthiness of the sole eyewitness;

and the learned trial judge failed to guide the jury on how they should critically assess them. The learned trial judge also failed to leave all possible interpretations of the evidence for the jury's consideration clearly and adequately. King's Counsel emphasised that the trial was long, tedious and difficult to follow, mainly because of the slow pace at which the evidence from Mr Simpson was elicited (due partly to his disability and, in some instances, resistance to cross-examination) and, therefore, greater care was required from the learned trial judge in demonstrating to the jury the effect of the contradictions in an organized, effective and adequate way.

[41] Chief among King's Counsel's complaints were that the learned trial judge inadequately directed the jury on the treatment of:

> (a) the inconsistencies and discrepancies as to the time of the killing and their effect on the correctness of the visual identification of the assailant or assailants;
>
> (b) the omission of one or more of the alleged utterances, by Mr Blake, from Mr Simpson's first witness statement, and Ms Williams' first three witness statements and deposition;
>
> (c) the inconsistencies in Mr Simpson's evidence as to who ran out of the yard, how many of the alleged perpetrators had guns and the types of guns they had;
>
> (d) Mr Simpson's admission that he had lied about seeing a 'drape up/fight' between Mr Blake and the deceased while they were in Pam's yard, which had the effect of making Mr Blake out as the aggressor; and
>
> (e) the conflicts in Mr Simpson's evidence concerning his alleged observations and vantage points during the events leading up to the killing and immediately after, which arguably, had a bearing on the

identification of the assailants, and whether they would have acted jointly as alleged.

[42] As regards the latter, King's Counsel argued that the learned trial judge inappropriately sought to explain the contradictions under the rubric of "moving at different points", thereby failing to leave to the jury a possible alternative interpretation of the evidence that was material to whether Mr Simpson was in any position to make the observations he allegedly made. King's Counsel further submitted that the learned trial judge misdirected the jury and, thereby undermined the effect of the contradictions, at page 1261, lines 17-23 of the transcript.

[43] We were referred to several cases including **R v Carletto Linton and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 & 5/2000, judgment delivered 20 December 2022; **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987; and **Dwayne Douglas v R** [2010] JMCA Crim 66.

For Omar Dunkley

[44] Mr Fletcher submitted that the contradictions in the case against Mr Dunkley were stark, critical and central to the issue of identification, yet the learned trial judge's treatment of them was wholly inadequate. Counsel submitted that there were no explanations or successful attempts to reconcile these contradictions, by Mr Simpson, and in light of their materiality and significance, the learned trial judge's mere rehearsal of the fact that they were present was insufficient. He added that the learned trial judge erred in not sufficiently highlighting those inconsistencies to which the jury needed to apply particular care. Counsel pointed to the conflict between:

(a) Mr Simpson's evidence, at trial, that Mr Dunkley was present, before, during and after the killing, and his signed deposition at the preliminary

enquiry, that "Cooty Pang [Mr Dunkley] never deh deh wid dem pon di road";

(b) Mr Simpson's evidence that Mr Dunkley emerged from Pam's yard with others after the killing with a gun, and his statement previously that, "What I am saying is that I see them go into the yard but after the shooting I only see Blood, Tick Tack, Blake, Nemar and Papa come out the yard and run down the road. I never see Cooty Pang if him come out of the road or what";

(c) Mr Simpson's evidence, at trial, which placed Mr Dunkley among the men sitting on the "banking", conversing throughout the daytime, and later entering Pam's yard, and Mr Simpson's deposition, at the preliminary enquiry, that he never saw Mr Dunkley on the road before the shooting;

(d) Mr Simpson's evidence that after the shooting, he saw Mr Dunkley with a "Magnum" (type of gun) in his hand as he returned to the roadway, and his deposition of never having told the police that he had a Magnum; and

(e) Mr Simpson's evidence that he saw Mr Dunkley before and after the shooting, but gave further evidence that he had only heard him.

[45] Counsel further submitted that, at pages 1260-1261, the learned trial judge misdirected the jury on the relevance and effect of previous inconsistent statements. Consequently, Mr Dunkley was denied a fair trial and a real chance of acquittal. Counsel relied on **Dwayne Brown v R** [2020] Crim 31, and **Jason Brown and Ricardo Lawrence v R** [2017] JMCA Crim 20.

For Jason Coley

[46] Mr Williams submitted that the learned trial judge failed to assist the jury in analysing the effects of the contradictions in the case against Mr Coley; failed to adequately and/or properly highlight the evidence and analyse the significance of

weaknesses where necessary; and essentially, regurgitated the evidence that was manifestly contradictory, whilst failing to leave to the jury all possible interpretations and effects of those interpretations on Mr Coley's case. Consequently, Mr Coley was denied a fair trial.

[47] Counsel drew the court's attention to contradictions in the evidence, which he contended were glaring, and serious, and went to the root of the critical issues of identification and the credibility of Mr Simpson. These included the omission of any reference to Mr Coley as being in the company of any of the men sitting on the corner or "banking" or "banking side", or going into Pam's yard. In order to fairly put Mr Coley's case to the jury, it was necessary for those aspects of the evidence to be emphasised, counsel submitted, relying on **R v Carletto Linton** and **Barrington Taylor v R** [2013] JMCA Crim 35, **R v Lenford Clarke** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 74/2004, judgment delivered on 29 July 2005, and **Vernaldo Graham v R** [2017] JMCA Crim 30.

For the Crown

[48] Counsel for the Crown accepted that there were contradictions in aspects of Mr Simpson's evidence, but submitted that they were highlighted during cross-examination and formed a part of the exhibits in the case. Further, the learned trial judge had referenced the conflicts extensively and, at pages 1168, lines 19-25 and 1169, lines 4-21 of the transcript, gave the jury a "textbook warning" as recommended in **R v Carletto Linton**. Further, at pages 1221-1226, she addressed the conflicts, and at pages 1163-1164, 1261-1262, and 1331-1332, explained how the jury ought to treat with them, indicating that the purpose of this type of analysis was to assist in determining the creditworthiness of the witness and reliability of his evidence. The learned trial judge had also put each applicant's case to the jury, and continually reminded the jury of the standard and burden of proof. This detailed approach in identifying the contradictions, explanations and the salient issue of credibility, belied the assertion that she failed to

demonstrate the impact of the contradictions in an organised and effective way, counsel submitted.

[49] We were referred to **Demone Austin and Others v R** [2017] JMCA Crim 32 where this court concluded, "while…[the] directions may not have conformed in every respect with the letter of the formula proposed in **R v Linton et al**, they certainly made it plain to the jury that the potential impact of the complainant's omissions was that, if they were unable to accept his explanation for them, they went to his credibility".

Discussion

[50] As we have distilled them, the principal complaints in these grounds pertain to the quality of the learned trial judge's guidance to the jury on how they were to critically analyse the effects of the proven contradictions, and the explanations (or the lack thereof) by the witnesses, specifically Mr Simpson; and the claims that she incorrectly infused her own opinion into the direction about aspects of the evidence, and amplified the directions on previous inconsistent statements.

Duty of the trial judge

[51] The guiding principles on how a trial judge ought to assist the jury, as regards conflicts in the evidence of witnesses, were helpfully summarised by V Harris JA in **Michael Lorne v R** [2022] JMCA 45, at para. [46]:

> "(1) Deficiencies (including inconsistencies and discrepancies) in the Crown's case are to be adequately placed before the jury by the trial judge (per Brooks JA (as he then was) at para. [17] in **Negarth Williams** applying **Mills and Gomes v R** (1963) 6 WIR 418, **Ibrahim and another v The State** (1999) 58 WIR 258 and **Eiley and others v The Queen** [2009] UKPC 40).
>
> (2) A trial judge is expected to give directions on discrepancies and conflicts which arise in the case being tried before him or her, but there is no requirement to identify all the disparities that have occurred during the trial. However, the trial judge should mention the inconsistencies and discrepancies that

'may be considered especially damaging to the prosecution's case' (**R v Fray Diedrick, Morris Cargill v R**).

(3) Unless any admitted or proved inconsistencies are immaterial, explanations should be provided for them before the evidence in court can be accepted and relied on concerning the particular point. However, it is not for the trial judge to explain. Explanations should come from the witness (or the evidence as a whole). (**R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 & 52/1986, judgment delivered 3 June 1987, **Vernaldo Graham v R**).

(4) Where the prosecution relies on the evidence of a sole witness whose credit-worthiness has been completely eroded because of admitted untruths, blatant and unexplained contradictions, as well as inconsistencies that render his or her evidence so manifestly unreliable that no reasonable tribunal could safely act on it, it is justifiable for the trial judge not to leave the case to the jury (**R v Curtis Irving** (1975) 13 JLR 139 which was cited with approval in **Negarth Williams** at para. [20])."

[52] Further clarity was added by Edwards JA in **Adrian Forrester v R**, at para. [121]:

> "It is the duty of a trial judge to indicate conflicts in the evidence, where they appear, **and the possible logical consequences of such conflicts**. It is the function of the jury to assess the credibility or otherwise of a witness' testimony and to give it whatever weight they see fit. It is also the function of the jury to determine if discrepancies or inconsistencies exist, whether they are material or immaterial, **and what if any weakening effect the existence of such discrepancies or inconsistencies might have on the credibility of a witness** …." (Emphasis added)

Adequacy of the directions to the jury

[53] The learned trial judge's summation, which commenced on page 1158 of the transcript, included general standard directions on the jury's duty to consider all the evidence, weigh it, and accept or reject parts, or all of it, depending on whether they were of the view that a particular witness spoke the truth or was mistaken, and to draw reasonable and inescapable inferences from proved facts, as were appropriate. She also

gave the usual directions on the presumption of innocence, and the burden and standard of proof.

[54] The jury were told about the nature of the evidence and that it was both direct and circumstantial, illustrated by parts of the narrative given by Mr Simpson. The learned trial judge directed the jury on circumstantial evidence in keeping with the direction in **McGreevy v Director of Public Prosecution** [1973] 1 WLR 276; and indicated that where the evidence was capable of two interpretations, her duty was to point out those possible interpretations leaving it for them to decide which interpretation they would accept having regard to the rest of the evidence in the case.

[55] At page 1168, line 18, to page 1172, line 23, she went on to give this direction about the treatment of conflicts in the evidence of witnesses:

> "…Now, in most trials... it is always possible to find what are known as inconsistencies, discrepancies or contradictions in the evidence, especially when the facts about which they speak are not of recent occurrence, and this case is alleged to have taken place in 2004, that's some seven years ago...memories fail... Now, what you must, however, examine is, if there are these inconsistencies, you must examine if they are slight or if they are serious; are they material or immaterial to the issue to be determined. Now, if they are slight, you, the jury, will probably think that they really do not affect the credit of the witness or witnesses concerned. **On the other hand, if you find that these inconsistencies or discrepancies are serious then you may say that because of them it would not be safe to believe the witness or witnesses on that point or at all.** And in this case…the question of credibility is indeed a question—it is a matter for you … to say in examining the evidence whether or not there are any such inconsistencies, discrepancies, or contradictions; and if you find that there are you must go on to examine whether they are slight or they are serious, whether they are material or immaterial and by so doing will determine how they affect the credibility of each of the witnesses concerned. Now…you must take your witnesses as you find them. You must take into account the witnesses' level of intelligence, their ability to put into words what evidence

> they have come here to give, their powers of observations…Some persons are more articulate than others and will be able to verbalize in a way that is very clear for you to understand. Others might not be as articulate…you will have to look at each witness, consider what they have said and like with everything else in our normal everyday lives we have to assess and weigh and try to determine who is speaking the truth, if they are speaking the truth; and by doing so try to arrive at the true facts in the case. Now, in most cases difference in the evidence of witnesses is to be expected. The occurrence of disparity in testimony recognises that in observation, recollection and expression the abilities of individuals will vary. Indeed, when the testimony of two or more witnesses coincide exactly, as judges of the facts, you will be entitled to become suspicious of their vivacity [sic], their truthfulness…On the other hand, disagreement between witnesses on the facts are also a warning that a falsehood or error might occur, because if two persons seeing the said same thing, although they may express themselves differently, you would expect there would be a certain consistency in what they are saying..." (Emphasis added)

[56] The jury were also directed on the purpose of cross-examination, that is, to ferret out conflicts in the evidence and provide material for the suggestion that the truth has not been told. They were told at page 1172, lines 16-24 of the transcript: "You have seen and heard all the witnesses in this case and it is for you to say whether or not there have been contradictions…and you will have to say, are they profound and inescapable, **or if reasons have been given for them are these reasons satisfactory**..." (emphasis added).

[57] The learned trial judge told the jury that Mr Simpson was the main witness on which the prosecution was relying, and reminded them that there were difficulties in deciphering some of the things he was saying. She mentioned the evidence that Mr Blake came up to the deceased's house and said certain things, the conflict about the fighting, the opportunities and distances for identification throughout the day, the differences regarding Mr Simpson's location, and what Mr Simpson said about the contradictions (pointing out Mr Simpson's denials in some instances and inability to recall in others).

[58] The jury were told that they should take account of Mr Simpson's demeanour and speech impediment, but cautioned that his impediment should not be allowed to "colour their decision as to whether he spoke the truth". They were told that "credibility is a big issue" in the case, as the defence viewed Mr Simpson as someone who was not a truthful witness, but rather motivated to fabricate a story because of the conflicts between the communities, and a desire to be paid money not to attend court, which was not forthcoming. The jury were told to look at the evidence against that background.

[59] Beginning on page 1218, the learned judge went through the cross-examination, indicating aspects of Mr Simpson's evidence that were challenged. She, again, pointed out that Mr Simpson's evidence had inconsistencies and that they, the jury, were required to decide how those affected his credibility. She mentioned the delay of Mr Simpson's first witness statement, by approximately eight months, then went on to remind the jury about the omissions from Mr Simpson's first witness statement concerning Mr Blake's alleged utterances to the deceased, how many persons he had seen, and about Mr Blake having a gun. She also reminded the jury of other conflicts including where Mr Blake was when he allegedly made the utterances, where Mr Simpson said he was when he saw different aspects of the events, the time of the shooting, the layout of the surroundings and who carried what make gun. The jury were reminded of the evidence that, on all occasions, Mr Simpson saw the applicants' faces. She also mentioned the purported distances from which he allegedly saw them, and recapped the evidence about previous knowledge.

Specific direction about the alleged fight

[60] At page 1231, lines 3-9, the jury were specifically reminded of Mr Simpson's testimony, at trial, that after the men went into Pam's yard, he heard fighting and thumping going on in the yard between Mr Blake and the deceased, but did not see any fight. This is how the learned judge put it: "There was fighting and thumping going on from what he was hearing and he described it about the movements. He said he told the

police about that and then his statement was read over to him and he said he didn't see it in the statement".

[61] That direction, in our view, was patently inadequate. Information about the fight, was reportedly in Mr Simpson's deposition which was taken at the preliminary enquiry, but Mr Simpson retracted it at trial, indicating, at first, that he had 'seen' no such thing, then later, saying, "I don't remember mi did tell har that, yuh nuh" (page 563 lines 1-25). He explained, at trial, that he had only heard movements and wrestling taking place in the yard: "Weh part me de, me know that fighting was gwan in there…Yes. Which part me did de stand up, me see like movement, them a fight in there, man…like tumbling and wrassling" (pages 48 lines 18 – 25, page 54, line 20); but this evidence was in contrast to Mr Simpson's evidence, at page 50 lines 20-25 to page 51 lines 1-2, that, "Java go in and Him 'drape' him up…Omar Blake 'drape' him up and fighting did a go on inna di yard". We note also that, at page 462, lines 4-14 of the transcript, he specifically admitted that he remembered telling the judge "in Halfway Tree" that he saw Mr Blake and the Java "drape up".

[62] This issue was revisited in re-examination, at page 563 lines 1-19, where Mr Simpson testified that he did not see any "drape up" in the yard, or that Mr Blake and the deceased had "draped up each other", and that he did not remember telling that to the judge at the preliminary enquiry.

[63] Mr Simpson gave no explanation for the variation in the accounts about seeing a fight between Mr Blake and the deceased.

[64] The learned trial judge was, therefore, incorrect to have treated the conflict solely as an omission. She also failed to specifically alert the jury to the possible effect of this unexplained conflict on Mr Simpson's credibility. The jury should have been specifically instructed to consider whether he was being truthful about what he said he saw and heard, and/or honest in his recollection of what transpired at the preliminary inquiry. In other words, did he contrive a story about a fight that he did not see, and embellish it

with graphic details, in circumstances where he also testified that he could not see what was going on in Pam's yard, or as was it that he had only seen movements and heard sounds which he interpreted as a fight? These were relevant questions for the jury to be directed to consider, given Mr Simpson's equivocation on the matter and the absence of any explanation for the apparent conflict in his evidence and with his deposition.

[65] Having considered King Counsel's submission that Mr Simpson had lied about seeing a fight between the deceased and Mr Blake, and that the lie had the effect of making out Mr Blake to the jury to be the aggressor, without proper directions from the learned trial judge, resulting in unfairness to Mr Blake, we make the following observations. Firstly, although the learned trial judge did not specifically deal with the conflict in the evidence and with the deposition, she did, however, indicate to the jury that conflicts in Mr Simpson's evidence went to Mr Simpson's credibility, and that they, the jury, were entitled to reject parts or all of his evidence if they did not believe he was truthful on any particular point. Secondly, Mr Simpson said, in evidence, that the statement about seeing a fight was untrue, which admission, in our view, should have shifted the jury's attention away from Mr Blake and to Mr Simpson's credibility. Thirdly, Mr Blake had been made out as the aggressor in other evidence which was compelling, for example, in Mr Simpson's evidence about Mr Blake's advice that he should leave the road because he did not want to kill him, in Mr Simpson's evidence about Mr Blake's less than pleasant conversation with the deceased just prior to the shooting death, and also Mr Simpson's and Ms Williams' evidence about Mr Blake's expression of violent intent towards the community. For these reasons, we are not of the view, that the deficit in the directions, on this point, caused any undue prejudice to Mr Blake.

[66] We now consider the learned trial judge's directions in light of counsel's complaint that the learned judge did not sufficiently assist the jury.

[67] As regards Mr Blake, there was significant evidence implicating him in the killing, that had been placed before the jury, which was not proved to be inconsistent or wholly inconsistent, and on which the learned trial judge's directions were adequate. Those

aspects of the evidence placed Mr Blake in Pam's yard at the time of the shooting, and had him emerging from her yard after the shooting and running away. There was also evidence of his conduct proximate to the shooting. Specifically, Mr Simpson made consistent assertions in his evidence, at trial, that Mr Blake, whom he knew before, was present on the roadway throughout the day of the shooting and had engaged him in dialogue early in the day when he was told to leave the road, as he (Mr Blake) did not want to kill him. Later that day, Mr Blake was also said to have made a threatening utterance in the presence of Mr Simpson's mother and Ms Williams, to the effect that a long time "him nuh mek nuh Duppy" and "a long time we nuh moan". Mr Simpson had also given evidence that he observed Mr Blake and the deceased having a conversation in which things were said separate and apart from that which was omitted from his first witness statement. It was after this alleged encounter that Mr Blake and others purportedly entered Pam's yard.

[68] Ms Williams supported Mr Simpson's evidence, about the latter utterance, in material respects. We, however, take note that she did not tell the police about seeing Mr Blake or the threatening words in her first three witness statements or the deposition, at the preliminary enquiry, and did so only on 29 March 2011, during the trial, after Mr Simpson had testified. She explained that that was the first time she had been asked about what Mr Blake had said.

Specific direction about the alleged declaration of violence by Mr Blake in Ms Williams' presence

[69] The learned trial judge recounted the evidence of Ms Williams that before her son came home, she had been talking with Mr Simpson's mother and Mr Blake had an argument with a lady and said, "a long time unnu nuh mourn, mi a go mek unnuh mourn dis evening". The fact that Ms Williams' testimony and explanation came only at trial was pointed out to the jury, by the learned trial judge, at page 1329, lines 1-25, along with the inconsistencies in Mr Simpson's account. The learned trial judge also said, at page 1324, lines 10-18:

> "...so you know it is against that background that you would have to examine her evidence and to see whether you find that she is a credible witness because there is some complaint now, because it is she is saying for the first time that Mr Blake had used these words to her, how come after seven years this is the first time she is saying that."

[70] At page 1327 – 1328 the learned trial judge continued:

> "She said …. after her son was shot that those words came back to haunt her…. She said she can't recall the first time she told those words to the police. And then you recall that her various statements it were shown to her[sic]; one of the 30th July, 2024, and it was read to her. She said she didn't see any mention of those words in that statement. Her statement on the 4th of August, in that statement there is nothing in which she mentioned those words….She said, "I do not recall telling the judge at Half Way Tree about those words that Mr Blake used because I was not asked."

[71] The learned trial judge repeated the evidence, highlighted the explanations for the delay, and left it to the jury to resolve as a credibility issue. This was a discrepancy to which the jury was to apply particular care, and the learned trial judge did instruct them accordingly.

Specific direction about the alleged time of the shooting

[72] It was also argued that the significance of the contradictions in the evidence about the proximate time of the shooting was not adequately pointed out to the jury, but we disagree. At trial, Mr Simpson said when the deceased came home from work, it was "a little before 5:00 pm". He also said that when the deceased and Mr Blake were talking it was "bright, bright, how yah so bright, bright. It never dark up yet". He denied that he told the police, in his first witness statement, that the events happened at 6:45 pm. He said he told him 5:00 pm and it was the police who made the mistake. He also denied that, at the preliminary enquiry, he told the judge that the incident happened "a little before 5:00 going on to 6:00 pm". At page 200, line 2, Mr Simpson said Mr Blake ran out of Pam's yard at 5:00 pm, but "it never dark". Contrast this with Ms Williams' evidence

that, the incident occurred sometime going up to 7:00 pm, and that she could not remember telling the police, in her statement, of 31 July 2004, that the deceased left her house minutes to 7:00 pm. She also said when the police arrived, it was after 7:00 pm, but not dark. The first investigating officer, Detective Sergeant Vecas Blake, gave evidence that he heard the radio transmission of the shooting at 7:00 pm and proceeded to the scene of the killing.

[73] Throughout her summation, the learned trial judge reminded the jury of the conflict in the evidence about the time when the events were said to have unfolded, and indicated that the differences about the time of the shooting were relevant to the issue of identification and emphasised that it was for the jury to ultimately say whether they believed Mr Simpson and Ms Williams that, up to the time of shooting, it was not yet dark. The jury were reminded that the applicants were persons known to Mr Simpson prior to the incident and that he would see them "morning, noon and night". This familiarity was not in issue. Although she did not advert to whether there was sufficient lighting to enable a correct identification of the perpetrator or perpetrators, in her directions about factors to consider under the **Turnbull** guidelines, she did mention the lighting.

[74] It is against that background that the learned trial judge gave a modified **Turnbull** warning followed by further directions on circumstantial evidence, commencing at pages 1179 line 7 through to page 1181 line 8, and those about common design. Specifically, the learned trial judge reminded the jury of the evidence of identification in relation to Mr Blake (on pages 1201-1202; 1204-1206; and 1208). There was evidence from Mr Simpson that he had seen Mr Blake's face and body when he was having the conversation in the presence of Ms Williams, when he was going into Pam's yard, and when he was running away. These sightings were allegedly at distances between 18-35 feet. She also told them to consider the distances from which the observations were made, the lighting, and whether there was any obstruction interfering with the identification.

[75] The jury were alerted to the defence's position, including that Mr Simpson's testimony was contrived:

> "Now, part of the defence in this case is that these persons were not there and that either Mr Simpson is making up these, ahm, this story, either because of this ongoing feud between 'Vietnam' and 'Jungle Twelve' or that at the time when the incident took place he was mistaken about the identification of the persons that he saw entering Pam's yard and leaving Pam's yard that evening." (page 1249 lines 20 to 1250 line 4)

[76] The jury were, therefore, entitled to consider the evidence which was not inconsistent or wholly inconsistent, further to any other evidence they found to have been satisfactorily proved, in making a determination of whether Mr Blake was guilty.

[77] On the basis of that evidence, coupled with the learned trial judge's directions to the jury, including that they were entitled to say what evidence they believed or disbelieved, and it was open to them to accept a part or all, or reject any part, or all, we believe there is no merit in counsel's complaint about insufficiency of directions about the time of the shooting and its effect on the visual identification of the assailants.

Directions on the omissions in Mr Simpson's first witness statement

[78] As regards Mr Blake, the omissions concerned mainly three alleged utterances of intended violence, immediately preceding the shooting (including intent to kill and run away, and a direction to the men to go into Pam's yard) and that he emerged from Pam's yard with a gun after the shooting. These, in our view, were mainly credibility issues. Whilst the jury were reminded about this evidence and that Mr Simpson's explanation was that he had told the police about these things, the learned judge did not specifically assist the jury in analysing the possible effect of them on Mr Simpson's credibility. She did, however, sufficiently make it plain to the jury, throughout the summation, that the presence of conflicts in Mr Simpson's evidence raised issues about his credibility, and directed them that if they were unable to accept his explanation they went to his

credibility. Therefore, we do not believe that there was any prejudice caused to Mr Blake by the learned judge not making those directions specific to those omissions.

[79] Nevertheless, in circumstances where the omissions were significant and had the effect of weakening the prosecution's case, particularly the identification evidence, they needed to have been brought forcefully to the minds of the jury, and adequate assistance given in resolving them. This was the case, we believe, with the omissions pertaining to Mr Coley. Those omissions went to the root of his identification and the issue of a joint enterprise. Mr Simpson's first statement to the police was devoid of any information that Mr Coley was present on the road or that he had been seen entering Pam's yard, although he said Mr Coley was known to him as 'Rasta J' for over 20 years. Mr Simpson gave multiple explanations including these "Yes. I tell the police…I tell the police everything about 'Tick Tack'. I never know him right name... I never know his right name, a 'Tick Tack' me know him as dem time there… I don't remember everything but I report it…". Mr Simpson also said that he told the police the names of all the men whom he saw and he thought the police wrote them but he never did.

[80] It was also put to Mr Simpson that it was not in his first statement that Mr Coley ran out of Pam's yard. Mr Simpson's answer was that he had told that to the police. He acknowledged there was nothing in his first statement about seeing Mr Coley earlier in the day of the killing either, but insisted Mr Coley was there.

[81] At trial, Mr Coley was not initially identified, by name, as one of the men who ran from Pam's yard after the shooting, as can be seen, at page 55 of the transcript, where Mr Simpson testified, "… when me look, me see them run down the road. And when me look me see Blood, Cootie Pang, Demar, Papa and Carey". The latter bit of evidence was confirmed by the learned trial judge's reference at page 427 of the transcript. However, later in his evidence, Mr Simpson insisted that Mr Coley emerged from Pam's yard after the shooting.

[82] Commencing at page 1240, the learned trial judge recapped the cross-examination on behalf of Mr Coley and Mr Simpson's explanations for the omissions in his evidence; and reminded the jury of the several questions put to Mr Simpson about those issues. She also reminded the jury that Mr Simpson had agreed that he made no reference to Mr Coley in his first witness statement, whether by name, alias, description, or where he lived. They were reminded as well of Mr Simpson's evidence that he did not know Mr Coley's "right" (formal) name and had told the police about "Tick Tack". The learned trial judge correctly directed the jury to consider the omissions and say whether the explanations were satisfactory. However, she did not specifically direct them to consider in what way, if any, the omissions could have impacted the case against or for Mr Coley.

[83] The nature, magnitude and significance of those omissions called for cogent directions, including how the jury should critically analyse Mr Simpson's evidence in light of them. The jury needed to be specifically alerted to consider the significant evidence that five other men, implicated by Mr Simpson, were mentioned by name/alias, description, other attributes, or address and material information provided about them, yet Mr Coley, who had been known to Mr Simpson for 20 years and was said, at trial, to have been equally culpable, was not mentioned at all. The jury should have also been instructed to consider whether that evidence could have undermined Mr Simpson's evidence, at trial, as regards Mr Coley presence and participation in the killing. Mr Coley's alibi defence needed also to be specifically highlighted in this context.

[84] Ultimately, the jury needed to be guided on the question of whether, in all the circumstances, they could accept Mr Simpson's evidence on those points, or at all. This involved them being offered possible interpretations including the possibility of contrived evidence in this specific circumstance; and specifically told to consider whether the contradictory evidence could have impacted the issues of identification and joint enterprise/common design, both of which were critical issues in this case. The contradictory aspects of Mr Simpson's evidence called for greater emphasis and specific

instructions for them to consider whether the contradictions could undermine the body of circumstantial evidence relied on by the prosecution to prove Mr Coley's guilt.

[85] We believe such failure to adequately discharge her duty caused substantial prejudice to Mr Coley.

Directions specific to other conflicts in the evidence of Mr Simpson

[86] As regards Mr Dunkley, the main complaint was that the jury received no guidance from the learned trial judge on previous inconsistent statements, by Mr Simpson, pertinent to Mr Dunkley. Throughout his evidence at trial, Mr Simpson maintained that Mr Dunkley was among the group of men who, from "morning till evening", were sitting on the "banking", conversing and sweeping the street. However, when it was suggested to Mr Simpson that, at the preliminary enquiry, he had stated that he did not see Omar Dunkley on the road amongst the men, he said, "I don't remember, don't tell you that I don't remember". He also said, on being shown his deposition, that he did not remember saying previously, "Cootie Pang [Mr Dunkley] never deh deh wid dem pon di road".

[87] Mr Simpson also said that he did not remember saying at the preliminary enquiry, "I hear him", when it was suggested that he did not see Mr Dunkley enter Pam's yard. He was reminded that, at the preliminary enquiry, he reportedly said, "I had said that I hear 'Cootie Pang', I am saying today that I saw 'Cootie Pang' and the other men going into the yard", and his response was, "Yea, dem inna di yard". It was then suggested he could not see the men entering the yard from where he was standing, to which he replied, "yeah". However, in re-examination, he denied saying that Mr Dunkley was not with the men on the road, and insisted he was there, during the day, sitting on the bench.

[88] It was also suggested to Mr Simpson that, at the preliminary enquiry, he said, "What I am saying is that I see them go into the yard but after the shooting I only see Blood, Tick Tack [Mr Coley], Blake, Nemar and Papa come out the yard and run down the road. I never see Cootie Pang [Mr Dunkley] if him come out the road or what". Mr Simpson responded that he did not remember saying that at the preliminary enquiry. He

said, instead, "but him did in a di yard". He also responded, "Him come out" to counsel's suggestion that he had not seen Mr Dunkley coming out of the yard.

[89] In re-examination, he was asked to explain the inconsistencies, and he denied telling the judge, at the preliminary enquiry, that he never saw Mr Dunkley coming out of Pam's yard.

[90] Mr Simpson also held seemingly inconsistent positions as to whether Messrs Dunkley and Coley were seated among the men on the bench early in the day of the shooting. Mr Simpson gave evidence, at trial, that earlier in the day, he was walking from Welco Factory when Mr Blake told him to come off the road as he did not want to kill him, and on that occasion, Messrs Dunkley and Coley were there along with Demar and Papa. By contrast, Mr Simpson's first statement to the police had him saying: "…I was walking on the road, I saw Blood [Mr Blake] and Papa, two bad man. Blood said come off the road because I don't want to kill you … Blood and Papa then went and sat on a long bench in front of the shop near to where my yard was". Mr Simpson denied telling the police that. However, he agreed that he had said elsewhere, "Blake and Papa then went and sat on a long bench in front of the shop near my yard. Omar Blake then walked up to my yard and said to my mother, "Long time mi nuh mek nuh duppy … Omar Blake then left and came back to Vietnam, this time he was with Papa as I mentioned before and other men from Jungle 12, whom I know as Carey, Cooty Pang and Demar". He also said, in evidence, that when Mr Blake spoke to his mother, all five men were there.

[91] Clearly, the previous inconsistent statements went to the core of the case against Mr Dunkley, and materially conflicted with the core evidence against him, at trial. It will be recalled that the learned trial judge correctly brought to the jury's attention that Mr Simpson did not admit those statements and told them repeatedly that they should consider them in deciding whether Mr Simpson was a credible witness. Nevertheless, she failed to give any guidance or assistance in relation to the weakness that they posed to the prosecution's case against Mr Dunkley. She was required to assist the jury with directions to critically analyse the evidence that, at one point Mr Dunkley was said to be

on the road and entered Pam's yard, then said to be not there. At another point he was only heard, not seen. Yet, at another point, he was said to have emerged, along with others, armed with a gun. The learned trial judge's duty, involved directing the jury to consider in what way, if any, the previous inconsistent statements (which were exhibited) could have impacted the central issues of identification and joint enterprise, as regards Mr Dunkley. Her directions, for the most part, fell short of what was required for a full direction as to, in what way Mr Simpson's testimony at the trial, which was in conflict with the deposition, could constitute the undermining of the evidence which he gave at trial, particularly if they found that the inconsistency was material (see R v **Hugh Allen and Danny Palmer** (1988) 25 JLR 32, page 35; and **R v Whylie** (1977) 15 JLR 163, 166).

[92] Although the learned trial judge adequately highlighted the omissions, other conflicts (including those having to do with previous inconsistent statements), and explanations (where given), the learned trial judge's directions fell short on specificity, and guidance to the jury on how they should treat contradictions where the explanations were non-existent. The guidance from this court in **R v Carletto Linton** is that the trial judge should point out the major contradictions and instruct the jury to consider whether there was an explanation or satisfactory one for each of them. The jury is to be told that, in the absence of any or a satisfactory explanation, they must go on to consider whether the evidence of the witness can be accepted on the point or at all.

[93] It was not good enough for the learned trial judge to faithfully narrate the evidence and treat the contradictions, pertinent to Messrs Coley and Dunkley, as matters of credibility, for the jury to decide. Much also depended on pulling together the different strands of evidence for the jury, which were largely circumstantial and replete with material contradictions which went to identification. In this context, the jury should also have been directed to consider the gravity of the contradictions, and in light of those contradictions, whether they were satisfied that the circumstances were consistent with

Messrs Coley and Dunkley having committed the crime (see **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26).

[94] In **R v Carletto Linton**, where the alleged eyewitness gave conflicting evidence on a material aspect of the evidence, Harrison JA stated the following, at page 24:

> "Being a major discrepancy on the issue of the weakness of the identification of the appellant…the learned trial judge…inadequately assisted the jury by failing to direct them to consider 'whether they could believe the witness on that point or at all'. This failure of the learned trial judge in respect of the said inconsistency deprived the appellant…. of his chance of an acquittal".

[95] Similar to what transpired in **R v Carletto Linton**, the directions in the instant case were not sufficiently tailored to the circumstances of the case for Messrs Coley and Dunkley. The directions needed to be "custom built" to make the jury understand their task in relation to each applicant's particular case (see **R v Stephen Lawrence** [1982] AC 510, 519). More so, as the contradictory evidence, as it pertains to Messrs Coley and Dunkley, went to the root of the issues of visual identification and joint enterprise, the jury needed to be directed to consider whether it irreparably damaged the credibility of Mr Simpson. As was observed by counsel, if Mr Dunkley was not on the road, he could not have gone inside with the other men, or participated in any joint enterprise with them to kill the deceased; and if he had not been among the men who came from the yard, there would have had to be some other explanation for him being seen on the road after the shooting, with a gun fitting either of the descriptions given by Mr Simpson. These matters, therefore, called for specific, clear and proper directions.

[96] In both Mr Coley's and Mr Dunkley's cases, we are left with the view that the applicants "did not have the benefit of having the deficiencies of the Crown's case adequately placed before the jury" (see **Negarth Williams v R** [2012] JMCA Crim 22 at para. [17]. They were entitled to a fair and adequate consideration, by the jury, of the implications of the contradictory evidence and the explanations given by Mr Simpson.

[97] In **Anthony Bernard v the Queen** (1994) 31 JLR 149, where it was considered that the trial judge failed to adequately assist the jury, the Privy Council said at page 155, "…**because of the presence of so many weakening elements the prosecution case called for greater emphasis**. **This direction was therefore inadequate although in a strong unflawed prosecution case it would no doubt have been accepted as adequate**" (emphasis added). In **Michael Rose v The Queen** (1994) 31 JLR 462, at page 465, it was also stated by the Privy Council, that the "**[t]he essential requirement is that all the weaknesses should be properly drawn to the attention of the jury, and critically analysed where this is appropriate**" (emphasis added). Those observations, in our view, equally apply to the circumstances of Messrs Coley and Dunkley.

[98] For these reasons, we are of the view that there was a substantial miscarriage of justice as regards Messrs Coley and Dunkley.

Appropriateness of the learned trial judge's comment about Mr Simpson's purported movements

[99] On behalf of Mr Blake, King's Counsel also complained that the learned trial judge gave her own explanation of the conflicts as regards Mr Simpson's vantage points, and failed to leave to the jury the material as evidence rather than her opinion when she gave the following direction, at page 1199, lines 1-20 of the transcript:

> "He said he was looking at them talking and he not only know his face, but he knows his voice. He said after the talking between 'Java' and Mr Blake, he said when they walked up, he came back and was on the banking side and was standing there and you will recall that there was some talk about where he said he was, **but if you listen carefully, he tells us that he is moving at different points**. He is at 'Java's' mother's house at one point, then he is at his yard fence, and then he is on the banking so it shows that things are happening…**if you accept what he said, and this thing is not a static event… he is moving from one point to the next based on what he tells us, and it is for you to determine whether he is speaking the truth**…" (Emphasis added)

[100] There is no gainsaying that a trial judge is entitled to "give reasonable expression to [her] own views, so long as [she] makes it clear…that decisions on matters of fact are for the jury alone and does not direct them as effectively to take the decision out of their hands" (see **Uriah Brown v The Queen** [2005] UKPC 18, para. 33). The editors of Blackstone's Criminal Practice 2007 ('Blackstone') expressed the view, with which we concur, at page 1686, para. D16.20, that, provided "[the trial judge] emphasises that the jury are entitled to ignore his opinions, the judge may comment on the evidence in a way which indicates his own views…However, the judge must not be so critical as to effectively withdraw the issue of guilt or innocence from the jury". We also make the point that although there is no duty on a trial judge to point out all conflicts in the evidence to the jury, she is required to state matters clearly, impartially and logically (see **Berrada** (1989 91 Cr App R 131 cited at page 1689 of Blackstone).

[101] To illustrate, we cannot avoid referring to aspects of the evidence about how Mr Simpson was supposedly moving about. At page 41, lines 7-10, Mr Simpson said that when Mr Blake engaged the deceased in a conversation at Pam's gate, Mr Simpson was on the open land, but at page 66, lines 3-12, he said, "Me----de---alright, me left [Ms Williams] yard, me, you know…and me de out a my front yard, but, them never see me, but me looking at them a talk and, me know him voice and me know him…right at me front gate". Then, at page 67, when the prosecution questioned whether he was at the gate when Mr Blake asked the deceased why he was looking at him, Mr Simpson answered, "No, …me de pon the banking side out there so, and me de pon the open lot…". He went on to explain, at page 80, that the open lot and his gate were beside each other.

[102] At page 33, lines 4 and 8-15, when Mr Simpson said that Mr Blake came to his [Simpson's] mother's yard and Ms Williams' house, he located himself "over his yard". At page 105, lines 1-4, when asked by the prosecutor: "Where were you when you were looking over the yard hearing Blake talking to [Miss Williams] and your mother?" he

answered, "Me did over [Ms Williams'] house, mi did over de at the time". The prosecutor repeated the question and he said then that he was over his yard, on his veranda.

[103] At page 89, lines 15-19, Mr Simpson said that when he left Ms Williams' yard, the men were on the "banking side" and he went to his gate. He was asked if he could see the men, and answered, "Dem did inna the yard [Pam's yard]". At page 90 line 16, the prosecutor then said, "What I need to find out when you leaving from Java's mother's [Ms Williams'] yard to your yard, where are the men?" He answered, "Dem leave off a de banking side already".

[104] At page 196, lines 12-14, Mr Simpson said he did not move from his location when Mr Blake moved into Pam's yard. At page 311, he was observing the men as they entered Pam's yard from the "banking side", and he was at the same spot, on the "banking side" when he saw them run out of Pam's yard. At pages 322 – 324, he explained that he was standing on the other side of Pam's yard, across the road; and at page 417, lines 7-25, he said he was at Ms Williams' yard, then he left for his own yard gate, then moved off to the "banking side".

[105] During cross-examination, when asked about his location when the men headed to Pam's yard, he answered, "I'm at my gate standing up". When challenged as to whether he was at Java's mother's ['Ms Williams'] yard at the time, he answered, "Me at Java's mother's house first and then me left and go to my yard, standing up at my gate and then move off". He was then confronted with his deposition wherein he had reportedly said: "When I first saw the men I was standing in Java's [Ms Williams'] yard …From there I saw the men go in Pamela's yard and after I saw the men go into the yard I did not move…I stand up same way", to which his response was that he did not remember saying that. Also, at pages 554-555, on being re-examined, Mr Simpson said that he came out of his yard when he saw the men going up to Pam's yard.

[106] Having examined those aspects of Mr Simpson's evidence, there is no doubt in our minds that the manner in which the learned trial judge dealt with this aspect of the

evidence was deficient. The impugned direction was given against the background that Mr Simpson had purportedly said in his deposition that he never moved from Ms Williams' yard throughout the course of his observations; but when challenged at trial, he said he did not remember saying that. The direction was also given in the context of evidence, at trial, which could potentially be viewed as internally inconsistent. In those circumstances, the learned trial judge needed to have pulled the statement and the evidence together for the jury, and then to have given proper directions that took account of the inconsistencies and any explanation from Mr Simpson for those inconsistencies.

[107] That said, to our minds, the learned trial judge's failure was, not fatal to the convictions as she left the choice to accept or reject those parts of the evidence (or, her conclusion about them) with the jury; and had earlier told them that they were not bound by her comments or views (pages 1161, 1162, and 1167 of the transcript). By those directions, the jury should have been aware that they were entitled to their own interpretation of the evidence. They were also entitled, as instructed, to ignore the learned trial judge's apparent views or comments on the evidence except in so far as they thought them helpful. Furthermore, the learned trial judge did point out to the jury, earlier, that Mr Simpson had made a statement at the preliminary enquiry which was inconsistent with his present testimony, that he did not move, his response when challenged that he did not remember saying so, that these matters went to Mr Simpson's credibility, and they should consider whether to accept his evidence

[108] In the circumstances, there was no unfairness to Mr Blake or the other applicants that would result in a miscarriage of justice.

Whether the specific direction on previous inconsistent statements threatened the safety of the convictions

[109] Counsel have argued that the following portion of the learned trial judge's direction on previous inconsistent statements was an incorrect extension/amplification of the guidance in the cases:

"You cannot however reject the evidence at trial and act instead on the evidence at the preliminary enquiry as in this case unless the witness admits that conflicting evidence at the preliminary enquiry or what is contained in the statement was truthful."

[110] They submitted that in assessing the witness' credibility, the jury can believe and act on the evidence from the preliminary enquiry whether the witness "admits that he said that or not or whether the witness agrees that what was said there was true or not." This, they submitted, might be as a result of other evidence from the same witness, other witnesses, or other evidence in the case.

[111] Counsel contended that the learned trial judge's failure to give a correct direction on previous inconsistent statements caused prejudice to Messrs Blake and Dunkley, in that, the jury, in assessing the witness' credibility, could believe and act on the evidence from the preliminary enquiry whether the witness admitted that he gave the statement, and it was true.

[112] At pages 1261-1263 of the transcript, the learned trial judge gave this direction on previous inconsistent statements, inclusive of the words being challenged:

"Mr Simpson's evidence that you will have an opportunity to examine and look at closely. What I will tell you about is inconsistency statement [sic] and it is that evidence given by a witness at a preliminary examination or in a previous statement is not relevant to the trial except insofar as such evidence conflicts with his evidence before this court. If there is a conflict you the jury having due regard to any explanation offered by the witness are entitled to take that conflict into account for the purpose of deciding whether the evidence of the witness ought to be rejected unreliable generally [sic] or in so far as it conflicts with its earlier evidence. You cannot however reject the evidence at trial and act instead on the evidence at the preliminary enquiry as in this case unless the witness admits that conflicting evidence at the preliminary enquiry or what is contained in the statement was truthful. What it does Mr Foreman and members of the jury, it is to assist you to determine his creditworthiness. Is he a credible

> witness? Is he a witness who can be relied on? Is he a witness that you ought to believe? And so, you will have to look at it in that light to see whether or not, whether you in assessing his evidence if he is in fact, a credible witness because the adage is "he who asserts must prove" …But whether out of malice or because of gain, if you find that he is concocting the story and he is not a witness of truth, then you will have to reject him.... But what I will say to you, you have to examine what he has told you how to deal with previous inconsistency [sic]? statement, how to deal with things like the identification issue and all the other things and you have to use your wisdom, your common sense and your knowledge of Jamaican life to assist you in so assessing his evidence." (Emphasis added)

[113] It is well established that where a witness admits the truth of a previous inconsistent statement, under cross-examination, it becomes evidence in the case. The Supreme Court of Judicature of Jamaica Criminal Bench Book 2017 ('the Bench Book'), drawing from the dictum of White JA in **R v Garth Henriques & Owen Carr** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 97 & 98/1986, judgment delivered 25 March 1988, provides useful guidance on this issue. The following direction, at page 187, is to be adapted as the context necessitates: "…**You may take into account the fact that he [the witness] made such a statement when you consider whether he is believable as a witness. However, the statement itself is not evidence of the truth of its contents, except for those parts of it which he has told you are true**" (emphasis added).

[114] Had the highlighted aspects been all the learned trial judge said in her direction on previous inconsistent statements, the jury could have been left with the impression that even if they came to the view that Mr Simpson was lying in his previous statements, they could not consider it in their assessment, unless the witness had said that he was being truthful when he made it. However, the learned trial judge sought to explain herself by what she said following the impugned words (in addition to what she said immediately prior). She said, "What it does Mr Foreman and members of the jury, it is to assist you to determine his creditworthiness. Is he a credible witness? Is he a witness who can be

relied on? Is he a witness that you ought to believe?..." That was to say to the jury that the previous inconsistent statements went to the witness' credibility.

[115] The extracted direction, as a whole, could be faulted for inelegance, but, in our view, substantively comported with the guidelines; and coupled with other correctly stated directions, would have sufficiently explained to the jury that the previous inconsistent statements were to be assessed to determine the witness' credibility. Further to that, the learned trial judge called the jury's attention to portions of the challenged evidence which were exhibited before them.

[116] Even had we found that there was a misdirection it would not have amounted to a miscarriage of justice applying the threshold test established in **Woolmington v Director of Public Prosecutions** [1935] AC 462 at page 482, and affirmed by the Privy Council in **Stafford and Carter v State** (1998) 53 WIR pages 422 to 423, which is whether the jury, properly directed, would inevitably have come to the same conclusion upon a review of all the evidence.

[117] In the circumstances there was no threat to the safety of the convictions.

Was there was substantial miscarriage of justice as a result of the errors in the learned trial judge's directions?

[118] The options open to this court on the hearing of appeals, though well known, bears repeating. Section 14(1) of the Judicature (Appellate Jurisdiction) Act provides that:

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

> consider that no substantial miscarriage of justice has actually occurred."

[119] It has already been established that the learned trial judge erred in not giving sufficient guidance to the jury in how to critically assess the evidence, and in some instances gave less than adequate directions. However, those errors were not fatal to the conviction of Mr Blake as they caused no actual miscarriage of justice. Consequently, his appeal cannot be allowed on his ground of appeal bearing on this issue.

[120] By contrast, as earlier indicated, we believe that some of those errors resulted in a substantial miscarriage of justice as regards the convictions of Messrs Coley and Dunkley. Therefore, their grounds of appeal, considered under this issue, succeed.

Issue (iii): Whether the learned trial judge failed to deal adequately with weaknesses in the identification evidence, and if so, what effect did it have on the applicant's case? (ground three – Omar Dunkley).

Summary of submissions

For Omar Dunkley

[121] Mr Fletcher submitted that the contradictions were, at the very least, stark weaknesses in the prosecution's case, yet nowhere in the directions on identification, at pages 1250-1255 of the transcript, did the learned trial judge highlight them as actual or potential weaknesses. Consequently, the applicant was denied a fair consideration of his case and a real chance of acquittal. Counsel further submitted that although the applicant and Mr Simpson were previously known to each other, given the weaknesses in the identification evidence, a complete **Turnbull** direction was required. Counsel cited **R v Ivan Fergus** in support of his submissions.

For the Crown

[122] Relying on **R v Turnbull**, at pages 228-229, and **R v Raymond Hunter** [2011] JMCA Crim 20 para. [29], Ms Henriques submitted that the issue of identification in this case was more pointedly a case of recognition. Counsel argued that the learned trial judge gave extensive directions, and highlighted the only aspects of the identification

evidence that could be considered weaknesses. Those were the issues related to the time the incident occurred, and the length of time Mr Simpson said he had Mr Dunkley under observation after the shots were fired. The learned trial judge capped off her directions with the warning as set out in **Turnbull**. Counsel also relied on her written submissions regarding inconsistencies and discrepancies.

Discussion

[123] We are in no doubt that the learned trial judge was mindful that the issue of identification was joined at the trial. Hence, at pages 1205, 1252, and 1331-1332, she highlighted evidence specific to identification, and the **Turnbull** guidelines (as to time, distances, and sightings) and gave a modified **Turnbull** direction in which she warned the jury of the special need for caution in approaching the evidence of identification, recalling for them the reason for the warning, and pointing out the possibility that even honest witnesses can make mistakes in identification/recognition cases. Then, at page 1359, she said this in relation to Mr Dunkley:

> "Likewise, you will have to look at what Mr Omar Dunkley otherwise Mr Andre Palmer, has told you. I will just repeat it and you will have to apply the same consideration as it relates to what he has told you, because again, it is the prosecution who has brought him here and it is the prosecution who must satisfy you to the extent that you feel sure of his guilt. He is saying, I was not there, I know nothing about it. And you will also have to look at the evidence against..."

[124] However, as indicated earlier, the learned trial judge approached the issue of identification too narrowly. Mr Dunkley's defence was that he was not present during the killing and had not participated in it, and that Mr Simpson was either lying or had been mistaken about his presence at the scene. There was no issue that Mr Dunkley was previously known to Mr Simpson. There was also no evidence linking Mr Dunkley to the murder, apart from the circumstantial evidence of Mr Simpson which was materially inconsistent with Mr Simpson's previous statements and went to the core of whether he was present at the scene of the killing and participated. Yet, at no time did the learned

trial judge tell the jury that the presence of the contradictions potentially weakened the visual identification evidence against Mr Dunkley.

[125] There can be no question, in our view, that the contradictions had the effect of weakening the identification evidence and, ultimately, the prosecution's case. The instant case, therefore, does not fall within any of the exceptions pointed to by Morrison JA (as he then was) at para. [29] in **Raymond Hunter**:

> "However, in his well known work, The Modern Law of Evidence (6th edn, page 252), Professor Adrian Keane makes the point that '…**R v Turnbull** is not a statute and does not require an incantation of a formula or set words: provided that the judge complies with the sense and spirit of the guidance given, he has a broad discretion to express himself in his own way' (for an example of a case on appeal from this court which was held by the Privy Council to fall within this category, see **Rose v R** (1994) 46 WIR 213). Further, it is also clear that, in 'exceptional circumstances', a conviction following on from a failure by the trial judge to give the **Turnbull** directions altogether may nevertheless be upheld on appeal (see **Scott v R** [1989] 2 All ER 305, 314 – 15). A good example is provided by **Freemantle v R** [1994] 3 All ER 225, in which the Board held (in a judgment delivered by the late Sir Vincent Floissac CJ) that 'exceptional circumstances' might include the fact that the evidence of identification was of exceptionally good quality and, accordingly, applied the proviso in a case in which the failure of the trial judge to give the requisite warning was conceded by the Crown to have been a non-direction amounting to a misdirection."

[126] We, therefore, accept Mr Fletcher's submission that, given the weaknesses associated with the visual identification of Mr Dunkley, the learned trial judge needed to have given a complete **Turnbull** direction which, among other things, requires that a trial judge remind the jury of any specific weaknesses in the identification (see Lord Widgery CJ at page 228 in **Turnbull**). This error deprived Mr Dunkley of a real chance of an acquittal. For these reasons, this ground succeeds.

Issue (iv): whether the learned trial judge misquoted the evidence to the jury and, if so, did it cause prejudice to the applicant? (ground five- Omar Dunkley)

Summary of submissions

For Mr Dunkley

[127] It is not necessary to rehearse Mr Fletcher's submissions because the Crown conceded that the learned trial judge misquoted the evidence, and we concur.

For the Crown

[128] Ms Henriques submitted, however, that the misstatement (to be outlined below) did not rise to the level of "miscarriage of justice" as contemplated in section 14 of the Judicature (Appellate Jurisdiction) Act and so, the threshold question of whether the judge's error improperly prejudiced Mr Dunkley's case, could not be answered in his favour. This was because the judge had made it clear to the jury that there was other relevant evidence on the issue of common design. Such other evidence, counsel argued, was sufficiently compelling to offset any perceived miscarriage of justice (see **Rupert Anderson v The Queen** [1971] 3 WLR 718). Counsel submitted further, relying on **Ryan Palmer and Ricardo Dewar v R** [2014] JMCA Crim 27, para. [60], that had the jury been properly directed they would inevitably have come to the same conclusion. Accordingly, counsel argued, there was no miscarriage of justice.

Discussion

[129] In recounting the evidence that was applicable to the issues of common design and circumstantial evidence, the learned trial judge, at page 1362 line 25 to page 1363 lines 1-8 of the transcript, inaccurately substituted the singular pronouns with the plural forms of the words highlighted below:

> "Remember he [Mr Simpson] said he was told to come off the road, because **wi nuh want kill oonu and that he was going on like them want people to fraid a dem.** There was also evidence that you were asked to look at '**A long time we want kill a boy and run weh**', and when he said that Mr. Blake was alleged to have been talking in a loud voice

> and the other men were seen talking and whispering together." (Emphasis added)

[130] We note also that earlier in the summation, at page 1362 lines 5-24, she misstated the evidence of Ms Williams, in a similar way, when she said:

> "…[B]ecause the Crown is basing their case on the fact that these persons were acting together; and they are asking you to look at the conduct of these men while over on the banking side, Mr. Blake, Mr. Dunkley, otherwise called Mr. Palmer, and Mr. Coley. And you know the fact that they are always on the corner, they are always there together, talking together, 'sparing', using the Jamaican vernacular, 'sparing' together. Then you have the words that were used, 'A long time oonu nuh mourn', according to Mr. Simpson, the words use, 'A long time oonu nuh mourn – a long time oonu nuh mek nuh duppy', and you have Miss Williams, '**A long time oonu nuh mourn, wi a mek oonu mourn this evening**.' According to Mr. Simpson the words were used before Java came from work and Miss Williams said after he came from work; were these words used and were they used by Mr. Blake as he said?" (Emphasis added)

[131] Mr Fletcher was, therefore, correct that the misstatement of the evidence was an amplification of the case for joint enterprise, and was an error on the learned trial judge's part.

[132] The question for this court, though, is whether the effect was an actual miscarriage of justice, given that the misstatement had the effect of associating him with the words allegedly uttered by Mr Blake before the group of men went into Pam's yard.

[133] We have examined the learned trial judge's entire directions on joint enterprise and circumstantial evidence. Those include directions to the jury that: (a) this was a case based partially on circumstantial evidence which included alleged declarations made by Mr Blake to commit a violent act; (b) one of the issues was joint enterprise; (c) a large part of the evidence going to the issue of joint enterprise had to do with evidence that the men (including Mr Dunkley) were on the road together throughout the day; (d) certain words were uttered to Cootie Pang, "Come me ready"; (e) the men (including Mr Dunkley)

went into Pam's yard together; and (f) certain of them (including Mr Dunkley) came from pam's yard together, after the shooting with guns.

[134] We note that, at pages 1225-1226, she also stated correctly what Mr Simpson said in evidence on the point.

[135] When the misstatement is examined, therefore, in the context of all the evidence, the instances where the learned trial judge correctly stated the evidence, and the learned trial judge's directions on common design, we are of the view that, "if the jury had been properly directed they would have inevitably come to the same conclusion" (per Lord Sankey in **DPP v Woolmington**). Accordingly, the misstatement, though prejudicial, did not result in a substantial miscarriage of justice. Mr Dunkley's appeal, therefore, cannot be allowed on this ground.

Issue (v): whether the fundamental principle that a trial judge ought to direct a summation so that the jury is able to consider the case against each applicant was sufficiently or rigorously applied, and if not, did it result in unfairness and denied the applicant a real chance of acquittal? (ground four – Omar Dunkley).

Summary of Submissions

For Omar Dunkley

[136] Both this and the previous ground have to do with related questions and were argued together. Mr Fletcher submitted that although the learned trial judge reminded the jury of the evidence, and told them to consider the case against each accused separately, she failed to disaggregate the evidence in the case against, and for Mr Dunkley sufficiently, and consider the evidence against Mr Dunkley separately. It was argued that she, unmistakably, treated Mr Dunkley as being part of a group at very critical points, including instances where she misstated the evidence (as referenced above). This failure, counsel argued, denied the applicant of a fair consideration of his case and a real chance of acquittal.

For the Crown

[137] Ms Henriques also referenced aspects of the summation, at page 1173, where the learned trial judge directed the jury to consider the case for each accused separately and then determine his guilt or innocence. Counsel further submitted that the learned trial judge had also reminded the jury of the burden and standard of proof at several stages throughout the summation. Further, after reviewing the evidence, she went through Mr Dunkley's unsworn statement and directed the jury to give it the weight they thought it deserved. Counsel added that the circumstances substantially involved the principle of common design, so the directions regarding each applicant could not be separated other than how the learned trial judge had done it.

Discussion

[138] We have carefully considered the summing up, and having regard to all that the learned trial judge said on this point, there is no substance in the complaint. Although she misquoted the evidence and thereby amplified the case for joint enterprise, at pages 1362, lines 5-24, 1363, lines 1-8, and 1369 there was adequate separation of the case for each applicant. Very early in the summation, she called the jury's attention to the need to consider the case against each applicant separately, and accurately summarised the relevant aspects of the evidence against each applicant. She also gave directions that should have made it clear to the jury what evidence specifically concerned each applicant, and that it was the prosecution that had the burden to prove their guilt and disprove their alibi.

[139] If evidence of how the jury responded to the directions is needed, it is worth noting that while the verdict in relation to Messrs Blake and Dunkley was unanimous, that was not so for Mr Coley.

[140] For these reasons, this ground fails.

Issue (vi): whether the learned trial judge failed to deal adequately or fairly with the issue of common design in relation to the purported statement of

the applicant – "A weh you kill the brown youth for?" (ground Two - Omar Blake).

Summary of submissions

For Omar Blake

[141] Mrs Neita Robertson complained that the learned trial judge did not adequately address the issue of common design during her summation, and erred specifically when she told the jury that the prosecution had viewed an alleged statement by Mr Blake, "A weh yuh kill the brown youth fah", as a "sham".

[142] The specifics of the complaint were that there was no evidential basis for Mr Simpson's opinion, and the learned trial judge's direction in relation to the alleged statement, coming so long after her directions on common design, diminished the effect of her earlier direction. King's Counsel also argued that by directing the jury to advert to whether the alleged statement was a sham, the learned trial judge inadvertently weakened the effect of Mr Blake's defence that he was not a part of any common design. This treatment, King's Counsel argued, deprived Mr Blake of a fair consideration of the effect of the statement on the issue of whether he jointly participated in the killing.

For the Crown

[143] Ms Henriques submitted that the learned trial judge adequately and fairly addressed the jury on the words allegedly said by Mr Blake. She had invited them to examine what was said and left two possible interpretations for them to consider. Further, counsel submitted, the issue of common design was adequately addressed throughout the learned trial judge's summation. In support of those submissions, she referred to **Troy Smith and others v R** [2021] JMCA Crim 9, and **R v Jogee; Ruddock v The Queen** [2016] UKPC 7.

Discussion

[144] At pages 56-57 of the transcript, the following exchange occurred between counsel for the prosecution and Mr Simpson:

> "Mr Simpson: When them a run down the road Omar Blake say, 'Weh you kill the brown youth for?...'Weh, a weh them kill the brown youth for' like is a …
>
> Counsel: 'A weh dem kill the brown youth for' and, like is a what?
>
> Mr Simpson: A sham him a use.
>
> Counsel: Like is a sham? Why you say is a sham?
>
> Mr Simpson: A Omar Blake did say him must kill one a we, a Omar Blake a say him must kill one a we.
>
> Counsel:… [after an objection by defence counsel] Yes. Just want to make sure we have that…
>
> Mr Simpson: Yes and the whole of them agree to kill the youth."

[145] At pages 1195-1196 of the transcript, the learned trial judge reminded the jury of that aspect of Mr Simpson's evidence, as follows:

> "…Now, while they were running down the road he said he heard Omar Blake say, 'Weh dem kill di brown youth fah?'…. and then you will recall him saying like is a sham him a use and when he was asked what he meant by that he said I say it is a sham because Omar Blake them say, had said something before. He said he saw Omar Blake with the gun while he was running. He had the gun in his hand."

[146] Towards the end of the learned trial judge's summation, she was reminded by the prosecutor of the alleged question by Mr Blake, in the context of whether a specific direction on common design was necessary, and at pages 1372-1373, the learned trial judge addressed the jury as follows:

> "You will recall, Mr Foreman and members of the jury, that there was a bit of evidence that Mr Omar Blake, when he was seen running from the yard with the gun in his hand what he was supposed to have said, 'A whey dem kill di brown youth fah'. Now, what is the significance of the words and what do they mean in light of those words?

> The defence case is that it means he was not a party to a common design because what they are saying is that, especially as it relates to Mr Blake, 'A weh dem kill di brown youth fah', it would suggest maybe that there were other persons there and he was asking the question why they kill the brown youth. And, you remember Mr Curtis was described as being a brown man.
>
> The prosecution's case is that it was a sham or a trick based on what he had said earlier about 'A long time oonu nuh mourn, wi a go mek oonu mourn this evening', so those are two of the interpretations, or maybe you can think of others as to the significance of those words. So, you will have to examine them, the meaning, and try to determine based on all the evidence, what was the meaning of those words, signifying that other persons were there or is it that it was done as a sham to cover up what had been done. You may accept one or the other or you may accept none at all because as the judges of the facts it is for you to determine based on all the evidence in the case what meaning, if any, and what significance if any, you are going to give to those words."

[147] We make the observation that the alleged statement, when first testified about, by Mr Simpson, was actually, "Weh **you** kill the brown youth for?" (emphasis added) (see page 56, line 8 to 9 of the transcript). Upon repeating himself, Mr Simpson replaced "you" with "dem". In either case, it was important for it to be pointed out to the jury that, if they believed that these were words were said, by Mr Blake, on either interpretation, he was purportedly distancing himself from the actual killing of the deceased, while implicating one or more of the other men, or some other persons. However, the question posed by him would not absolve him, if they were sure, on the evidence, that he evinced an intention, by words and or conduct, to participate and did participate in committing the offence, even if he did not pull the trigger. Put another way, the learned trial judge needed to point out to the jury that, if they believed that Mr Blake was seen leaving the scene of the killing when he said those words, that would not necessarily be the end of the matter, as he could still be found culpable if they believed he was present, had a shared intention to kill the deceased, and lent support by his words and/or conduct.

[148] A direction in such terms would accord with the law, expressed in **Troy Smith v R**, as follows:

> "[36] …mere presence on the scene by itself is insufficient proof of 'assistance or encouragement', but may very well be evidence relevant to such a finding (**Jogee and Ruddock**, paragraph 11). The law is also clear that a person present on a crime scene does not only participate in the commission of the crime by assisting with physical acts, but may also participate by encouraging it, by way of words and other deeds. This participation is evidence upon which a jury could infer that there was a joint agreement between the parties to commit the crime."

[149] The learned trial judge did not express the direction in that way, but she did say to the jury that the words could mean that Mr Blake was saying "he was not a party to the common design". She had earlier explained the concept of "common design", and gave examples of instances in the evidence from which the inference of common design could be drawn (page 1333, lines 8-25, page 1334, lines 1-2).

[150] The learned trial judge also directed the jury to examine the words, determine their meaning, based on the evidence, and come up with other interpretations as appropriate in light of all the evidence. Other than that, although she could have pulled together the illustrated evidence on common design better, given the protracted trial, we find no reason to interfere with her treatment of that aspect of the matter.

[151] We agree that Mr Simpson's conclusion about the words allegedly used by Mr Blake was speculative and, therefore, prejudicial. This was not lost on the learned trial judge as she had cautioned Mr Simpson to confine his answers to what he saw and heard. An appropriate direction should have been given to the jury to disregard his opinion and draw their own conclusions based on facts proved to their satisfaction. This was not done, albeit at different points in the summation the learned trial judge directed the jury that it was their duty to draw appropriate inferences from the evidence.

[152] In our view, when the evidence against Mr Blake is considered as a whole, including one or more declarations of violent intent just prior to the shooting, the argument with the deceased just prior to the shooting, and evidence of Mr Blake and others going into Pam's yard, after which gunshots were heard, and then they were seen running away, along with the general directions on common design and how the jury should treat with the evidence as a whole, including that they were entitled to reject it, there was nothing as a consequence of the deficiencies in this direction, that would amount to a substantial miscarriage of justice.

[153] For these reasons, this ground fails.

Issue (vii): whether the learned trial judge misdirected the jury as to the legal effect of the unsworn statement and whether any such misdirection deprived the applicants of a fair consideration of their defence (ground three - Omar Blake and Jason Coley).

Summary of submissions

For Omar Blake

[154] King's Counsel submitted that the learned trial judge misled the jury when she directed them, at page 1365, that the unsworn statement was not evidence. This direction, she contended, had the effect of inviting the jury to disregard what the applicant had said in his defence, erased any credibility that his statement could have had with the jury, and rendered the trial unfair. The predominant view, counsel submitted, is that juries should not be given such a directive, relying on **Vince Edwards v R** [2017] JMCA Crim 24, the relevant authoritative principles set out in **Alvin Dennison v R** [2014] JMCA Crim 7, and **Delroy Laing v R** [2016] JMCA Crim 11.

[155] King's Counsel further complained that the learned trial judge's directions on the unsworn statement, taken as a whole and in the context of the evidence, had the effect of withdrawing from the jury a full and fair consideration of the issues raised by Mr Blake's defence. Furthermore, the learned trial judge failed to make it pellucid to the jury that Mr Blake's statement, though unsworn, was nevertheless evidence.

For Jason Coley

[156] Mr Williams' submissions mirrored that of King's Counsel. He contended that the directions, at page 1365, served to confuse the jury as they were led to believe that the unsworn statement had no evidential value and could not prove facts otherwise proven by evidence. Counsel further submitted that the directions were misleading and had the effect of inviting the jury to disregard what Mr Coley had said in his defence. He relied on **Director of Public Prosecutions v Leary Walker** [1974] 1 WLR 1090. Counsel cited **R v Hart** [1978] 16 JLR 165, **Alvin Dennison**, **Vince Edwards**, and **Delroy Laing**, to support his contention that the learned trial judge ought to have followed the guideline on the objective evidential value of an unsworn statement as authoritatively stated.

For the Crown

[157] Counsel for the Crown submitted that the relevant test is whether the directions were so egregious as to undermine the jury's assessment of the unsworn statement. She pointed to instances where the jury were told that the prosecution bore the burden of proof; informed of the standard of proof; and directed to consider each applicant's unsworn statement and give it the weight that they thought it deserved. Counsel argued that to equate the unsworn statement with evidence, as the applicants suggest, would confuse the jury and be tantamount to an 'Animal Farm' scenario of some evidence being more equal than others. **Alvin Dennison** was distinguished because, it was submitted, the real issue there was that the judge's summation had the effect of substituting her own opinion of the weight to be attached to Dennison's unsworn statement for that of the jury's. Counsel further submitted that even were we to find the summation deficient, no harm was done to the applicants' defences as the learned trial judge had properly put their cases to the jury, and at all times combined her review with the overriding duty of the prosecution to satisfy the burden of proof.

Discussion

[158] An appropriate starting point is section 9 (h) of the Evidence Act which expressly recognises the right of a person charged with an offence "to make a statement without being sworn". In **Alvin Dennison**, at paras. [49]-[51] reproduced below, Morrison JA (as he then was) gave a thorough review of the law as it relates to how an unsworn statement should be treated. It is worth reproducing below:

> "[49] In a variety of circumstances, over a span of many years, the guidance provided by the Board in **DPP v Walker**, which also reflected, as **R v Frost & Hale** confirms, the English position up to the time of the abolition of the unsworn statement, has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. **It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence**. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a well settled area of the law.
>
> [50] The latitude afforded by **DPP v Walker** to trial judges 'to explain the inferior quality of an unsworn statement in explicit terms', as Lord Steyn put it in **Mills and Others v R**, must, in our view, be circumscribed by the considerations generally of the kind referred to in the Board's guidance. Thus, as Lord Salmon explained in **DPP v Walker**, the judge

> could quite properly go on to say to the jury that they may perhaps be wondering (in keeping with what Carey JA described as 'the natural curiosity an intelligent juror would have') whether there was anything behind the defendant's election to make an unsworn statement, such as a reluctance to put his evidence to the test of cross-examination. But at the end of the day, as this court has repeatedly emphasised, the jury must be told unequivocally that the weight to be attached to the unsworn statement is a matter entirely for their assessment. Given that the defendant's defence is more often than not stated in the unsworn statement, a failure to give directions along these lines may effectively deprive the defendant of a fair consideration by the jury of his stated defence. This is therefore essentially a fair trial issue.
>
> [51] Carey JA's characteristically trenchant description of the right to make an unsworn statement as a 'vestigial tail' of the law of evidence may well reflect a view shared by many, though certainly by no means at all, persons involved in the system of criminal justice in this jurisdiction. But, in our view, for so long as it remains a right available to defendants, it is incumbent on trial judges to direct juries as to its effect fully in accordance with the authorities. This view of the matter remains unaffected, it seems to us, by Lord Clyde's dismissal of the unsworn statement in **Alexander von Starck v R**, echoing Lord Steyn in **Mills and Others v R**, as 'significantly inferior' to oral evidence. As has been seen (at para. [47] above), Lord Griffiths expressed a similar view, perhaps less definitively, in **Solomon Beckford v R**, in his observation that the unsworn statement 'is acknowledged not to carry the weight of sworn or affirmed testimony'. Whether this is so or not from an objective standpoint, the fact remains that (a) as Gordon JA put it in **R v Michael Salmon** (at page 3), '[i]n our law an accused has a right to make an unsworn statement in his defence'; and (b) the value of an unsworn statement in a particular case is still purely a jury matter." (Emphasis added)

[159] The Privy Council gave further guidance, on this point, in its ruling in **Leslie McLeod v R** [2017] UKPC 1. In that case, the defence raised was an alibi, and the accused gave an unsworn statement. The issue before their Lordships for determination was whether the case for the defence would have been any stronger had the accused

given sworn testimony. The Board, in commenting on the judge's direction on the unsworn statement, said at para. 16 of their opinion:

> "...But as against this disputed evidence of [the sole prosecution eye-witness] Reid, the jury had only an unsworn statement. The judge gave the conventional direction. She made it clear that the conflict had to be resolved, and that the burden lay on the Crown, so that if what the appellant had said in court put the jury in doubt, acquittal must follow. That was correctly to state the test, and to give some value to the unsworn statement for assessment against the evidence of Reid. She correctly directed the jury to take good character into account in the appellant's favour in resolving the conflict. **But she also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been.** She said this: 'Now, Mr Foreman and members of the jury, the prosecution closed its case and at the close of its case the defendant, accused man … had three choices. He could stay there and say nothing at all, he could say, well, the prosecution has brought me here, let them prove me guilty; or, he could go up in the witness box and give evidence on oath and be cross-examined like any other witness or he could stay where he is and give a statement from the dock which is what he did. That is his right in law. So, he gave you a statement from the dock. But you remember you are going to give it what weight you see fit. **It is not evidence that has been tested under cross-examination**. So, you can't weigh it in the same scale as the evidence of the witnesses for the prosecution because they all gave evidence on oath.'
>
> Unless one is to assume that the jury would disregard this (accurate) judicial direction that the unsworn statement was of less value than a sworn one would have been, it is simply not possible to conclude that the absence of sworn evidence must inevitably have made no difference. It is no more than speculation, and moreover speculation which ignores the direction." (Emphasis added)

[160] What we distil from the authorities, cited to us, is that the jury can be told that an unsworn statement has less weight than sworn testimony in the sense that it has not

been tested under cross-examination. In **McLeod v R**, the Privy Council also did not say that the judge was incorrect in directing that the unsworn statement is not evidence.

[161] At page 1365, the learned trial judge directed the jury thus:

> "…Mr. Coley…gave you an unsworn statement from the **dock, which was not tested by cross-examination, and so as I said, an unsworn statement is not evidence because it has not been tested by cross-examination,** but you must consider it and if you are satisfied that what he has said is in fact so, then you may give it the weight that you think it deserves." (Emphasis added)

[162] A similar approach was taken in relation to Mr Blake, that is, the recognition of the right to give unsworn statements on which they could not be cross-examined.

[163] The learned trial judge also directed, among other things, that they were not obliged to prove their innocence, and it was the prosecution that had to prove their guilt. She indicated further that although the jury were deprived of the opportunity of hearing their stories tested in cross-examination, "the one thing [they] must not do is to assume that they are guilty because they have not gone into the witness box to give sworn evidence". She directed further that the jury must consider the contents of the unsworn statements in relation to the whole of the evidence, and that it was exclusively for them to make up their minds whether they had any value and, if so, what weight should be attached to them. She also brought to their attention the applicants' respective defences, and reiterated that the jury must consider the case against each accused separately and that their verdicts need not be the same.

[164] In our view, when the directions are considered as a whole, the learned trial judge's treatment of the unsworn statement did not "withdraw from the jury a full and fair consideration of the issues raised in the applicants' defences" (Brooks JA at para. [27] in **Vince Edward**, citing Kerr JA in **Hart v R**, at page 169 H).

[165] Accordingly, there was no misdirection, and the grounds which formed the basis of this issue, have no merit. The respective grounds, therefore, fail.

Issue (viii): whether the learned trial judge erred in her direction and/or comments to the jury as regards prejudicial evidence and thereby deprived the applicant of a fair trial (ground four-Omar Blake)

Summary of submissions

For Omar Blake

[166] King's Counsel argued that, at pages 1360-1361 of the summation, the learned trial judge directed the jury on several pieces of prejudicial evidence and told them to expunge them from their minds, and in doing so excluded areas of Mr Blake's defence, thereby further prejudicing his case.

For the Crown

[167] Ms Henriques submitted that it was correct for the learned trial judge to explain to the jury why there needed to be a removal of Mr Blake's alias, which, from the outset of the identification evidence, she was at pains to remove. This, counsel argued, was to the benefit of Mr Blake and ensured a fair and balanced summation. Counsel submitted further that, in speaking about the conflict between Jungle 12 and Vietnam, the learned trial judge highlighted a key aspect of Mr Blake's defence. This was, at pages 1361 – 1362, where she specifically left the issue of whether the purported gang/community conflict had motivated Mr Simpson to falsely accuse the applicants of murder.

Discussion

[168] One of the early references to "Jungle 12" is at page 296 of the transcript, where, during the cross-examination of Mr Simpson, defence counsel read an excerpt from his first witness statement in which he made reference to "Blood and Papa, two of Jungle 12, bad man …". The learned trial judge cautioned counsel about eliciting prejudicial evidence. Subsequently, it was suggested to Mr Simpson that he was concocting a story because of the feud between the communities of Jungle 12 and Vietnam. In his vehement denial, Mr Simpson made potentially prejudicial statements, implicating Messrs Blake and Dunkley as being members of a gang.

[169] It would have been difficult for the learned trial judge to decide on how best to mitigate the prejudicial effects of that evidence because the issue also went to aspects of the defence - that Mr Simpson was motivated to make up the story because of gang conflict between communities.

[170] The learned trial judge dealt with the matter in this way. On page 1360, she dealt with the prejudicial evidence about Mr Blake's alias "Blood", reference to gangs, and places with which the applicants were associated. The jury were told to expunge those bits of evidence from their minds. Then, at pages 1361-1362, she asked the jury to consider whether Mr Simpson was a witness of truth or was concocting a story because his cousin had been killed and he wanted to get even; or whether the feud between the communities had motivated him to tell lies on the applicants.

[171] At page 1360, this is what she said:

> "Now, I told you how you were to deal with some prejudicial evidence which had come out in the case and some of this relates to the alias by which Mr Blake is known. I told you to expunge it from your minds. There were other bits and pieces that had come out…and again I ask you to expunge that from your minds. And of course, there was the suggestion that persons ---[suspension points] one of the things that motivated Mr Simpson to come here and tell lies on them, because they are saying these are lies, which are being told by them, was the fact that Vietnam where Mr Simpson is alleged to have resided is always in conflict with Jungle 12, and it is said that those men had connection with Jungle 12, so these are some of the things."

[172] And at page 1361, she continued:

> "...[Y]ou saw Mr Simpson…he gave evidence before this Court it's for you to determine if he is a witness of truth or you believe that he has fabricated and concocted this story because his cousin had died and he is angry about it. That was what was put to him, because he wants to get even with these people, he is from Vietnam, they are from Jungle 12 and there is always conflict between them, is that what

> motivate him to come here and tell us this story. It's a matter for you…"

[173] King's Counsel's concern was that the first part of those directions effectively withdrew from the jury Mr Blake's defence that it was the conflict between the communities which motivated Mr Simpson to tell lies on him.

[174] In our view, without further explanation, the jury could have been put in a state of confusion because they would be left with a direction that was potentially contradictory. That is where the content of the defence and remaining elements of the learned trial judge's directions about Mr Blake's defence came into play. As Morrison JA said in **Machel Goulbourne v R** [2010] JMCA Crim 42, para. [22], albeit in circumstances that are different from those before us, when a trial judge exercises discretion in relation to prejudicial evidence which is elicited, we will not lightly interfere in how she does so "in the face of what is usually a completely unexpected and (hopefully) purely gratuitous eruption from a witness…". I would add that the appellate court will interfere only if the judge's action had such an impact as to render the verdict unsafe.

[175] We place some store on the fact that it had been brought to the jury's attention, more than once, that one aspect of Mr Blake's defence was that Mr Simpson was telling lies on him and as, we said before, they were adequately directed on the value of his unsworn statement.

[176] In the circumstances, we find that there could have been better clarity in the guidance to the jury, on aspects of the prejudicial evidence, but the directions as a whole adequately focused the jury on the defence of alibi and that Mr Simpson had concocted the evidence against Mr Blake. The withdrawal of the purported motive for the lie should not have diverted the jury's focus from the substance of this defence or deprive Mr Blake of a fair consideration of it. We, therefore, do not agree with the submission that a substantial miscarriage of justice occurred as a result of any deficit or error in the learned trial judge's directions. Mr Blake's appeal, therefore, cannot be allowed on this ground.

Issue (ix): whether the verdict was unreasonable and cannot be supported by the evidence (ground four – Jason Coley)

Summary of submissions

For Jason Coley

[177] In oral submissions, Mr Williams submitted that the verdict against Mr Coley was unreasonable and could not be supported by the weight of the evidence. He relied on the test as stated in **Alrick Williams v R** [2013] JMCA Crim 13 and **R v Joseph Lao** [1973] 12 JLR 1238.

For the Crown

[178] Ms Henriques submitted that the case was fairly put to the jury, and that the learned trial judge had continuously reminded them of the standard and burden of proof while dealing with the conflicts in the evidence. The jury had also viewed the witnesses and were entitled to assess their demeanour. In all the circumstances, there was no issue with the case that rose to the mark of being "obviously and palpably wrong". Counsel referenced **Lescene Edwards v R** [2018] JMCA Crim 4, where this court stated that the salient question to be addressed is whether the issues of fact were properly placed before the jury.

Discussion

[179] In **Joseph Lao**, Henriques, P approved the opinion of the learned authors of Archbold, and stated at page 1241 that:

> "The court will set aside a verdict on this ground, where a question of fact alone is involved, only where the verdict was obviously and palpably wrong."

[180] **Alrick Williams** reiterated the test in **Joseph Lao**, at para. [18], as follows:

> "Admittedly there were contradictions and inconsistencies in the evidence of [the prosecution's sole eye-witness] but this Court will only interfere with the verdict of the jury, where

> questions of facts are involved, if the verdict is shown to be obviously and palpably wrong."

[181] In **Lescene Edwards v The Queen** [2022] UKPC 11 (not cited to us), the Privy Council made the following observation at paragraph 53:

> "If the sole ground of appeal in this case had been that the verdict of the jury was unreasonable, and if the fresh evidence had not been forthcoming, the Board would have agreed with the Court of Appeal that the conviction should be upheld. On the evidence presented at the trial the result, though surprising, could not be said to be obviously and palpably wrong. **But authorities such as Lao do not assist in fresh evidence cases, nor where it is alleged that there was a misdirection by the judge or a material irregularity in the course of the trial."** (Emphasis added)

[182] We have already indicated that the sole eyewitness for the prosecution gave conflicting evidence on critical aspects of the case against Mr Coley, and those contradictions necessitated proper directions from the learned trial judge. We have also determined that the learned trial judge erred in failing to adequately guide and assist the jury in critically analysing that evidence, the result of which was a failure to properly place before the jury issues of fact, which were particularly relevant to Mr Coley. Given these material omissions, the verdict against Mr Coley was unsafe and could not stand.

Disposition of grounds dealing with conviction

[183] For all the reasons stated above, Mr Blake is refused leave to appeal his conviction. However, leave to appeal conviction is granted to Messrs Dunkley and Coley.

Issue (x): Whether the sentence was manifestly excessive (ground five –Omar Blake; ground six-Omar Dunkley; Ground five – Jason Coley)

[184] Based on determinations we have made about Messrs. Dunkley and Coley this ground will be considered only in regard to Mr Blake.

Summary of submissions

Mr Blake

[185] In challenging the reasonableness of the sentence, King's Counsel submitted that the learned trial judge fell into error when she failed to order a social enquiry report, set a starting point, consider the mitigating and aggravating factors, take into account the period spent in pre-sentence custody, apply one or any combination of the classical principles of sentencing, and stipulate a period of parole ineligibility, in accordance with section 3(1C)(b)(ii) of the Offences Against the Person Act.

[186] King's Counsel submitted that taking 25 years as the starting point, then considering the aggravating and mitigating factors, and applying a credit of one and a half years for time spent in pre-sentence custody, a minimum pre-parole period of 10 years would be appropriate.

For the Crown

[187] Ms Henriques submitted that although the learned trial judge did not enunciate and elaborate on the sentencing principles that she adopted, her sentencing remarks indicated an appreciation of the relevant sentencing principles. Furthermore, the sentence falls within the range of sentences that the court is empowered to give for the particular offence.

Discussion

[188] The authorities have made it plain that this court ought not to disturb a sentence imposed by a sentencing judge unless she erred in principle (see **R v Ball** [1951] 35 Cr App R 164 and **R v Alpha Green** (1969) 11 JLR 283). It is, therefore, to be determined whether the learned trial judge erred in one or more of the established sentencing principles, and if any such failure resulted in a sentence that was manifestly excessive.

[189] Although this case pre-dates the promulgation of the Sentencing Guidelines for use by Judges of the Supreme Court and Parish Courts, December 2017 ('the Sentencing Guidelines'), and **Meisha Clement v R** [2016] JMCA Crim 26, which give authoritative guidance for sentencing judges, the learned trial judge was not bereft of ample guidance from earlier cases that would have enabled her to apply the same or consonant principles of sentencing. For example, in **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, which was cited with approval in **Meisha Clement**, Harrison JA (as he then was) made the following observations at page 4:

> "If…. the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise…"

[190] In her sentencing remarks, the learned trial judge indicated that she would take into account counsel's plea in mitigation, Mr Blake's employment record, his nine children, and prospects for rehabilitation. She gave no weight to his two previous convictions because of a lapse of 10 years between the second and most recent convictions. She remarked further that those factors had to be balanced against the seriousness of the offence and the high incidence of murders in the country.

[191] We accept the submissions of King's Counsel that the learned trial judge failed to follow the structured approach outlined in **Everald Dunkley**. She did not demonstrate how the sentence was arrived at, or whether full credit was given for time spent in pre-sentence custody (see **Callachand & Anor v The State** [2008] UKPC 49 on the offender's entitlement to full credit save in exceptional circumstances).

[192] The learned trial judge also omitted to set a parole ineligibility period as mandated by law. Although she acknowledged the provisions of section 3(1)(b) of the Offences Against the Person Act ('the Act'), which stipulate a maximum sentence of life

imprisonment or a determinate sentence of not less than 15 years, for this category of murder, she failed to consider section 3(1C)(b)(1) of the Act which requires the sentencing judge to specify a period of parole ineligibility, being not less than 10 years, in circumstances where a determinate sentence is imposed (as in the instant case).

[193] Having failed to follow the standard approach to sentencing, and the relevant provisions of the Act, the learned trial judge erred in principle. This required us to re-visit the sentence imposed.

[194] In this category of murder, the range of sentences is between 15 years' imprisonment and life imprisonment. The starting point, therefore, has to be set in relation to the intrinsic seriousness of the offence and the circumstances of the particular case, including factors of aggravation and mitigation relevant to those circumstances, for example, the manner in which the deceased was killed. We believe that the use of a firearm or firearms, the level of pre-meditation and multiple perpetrators are compelling reasons to adopt a starting point of 25 years. This is in keeping with decisions of this court, including **Paul Brown v R** [2019] JMCA Crim 3).

[195] The figure of 25 years is then increased by five years to reflect the aggravating factors (excluding those used in computing the starting point), such as the youth of the deceased and the high incidence of murders in society as reflected in the reasons of the learned trial judge. That increase takes the figure to 30 years, which is then adjusted downwards by three years and six months to reflect the mitigating factors such as the fact that Mr Blake was gainfully employed, and the number of his dependents as identified by the learned trial judge. The result is a sentence of 26 years and six months' imprisonment.

[196] The remaining considerations are in respect of time spent in pre-sentence custody, and the parole ineligibility period. There being no exceptional circumstances disclosed, we apply a credit of one year and six months, for pre-sentence custody, as indicated by King's Counsel. The sentence arrived at is 25 years' imprisonment.

[197] As regards the learned trial judge's failure to specify a parole ineligibility period, we have considered **Paul Brown**, in which F Williams JA outlined several cases showing a range of sentences between 45 years and 25 years' imprisonment before eligibility for parole, with the higher figures stipulated in cases with multiple counts. In **Jason Palmer v R** [2018] JMCA Crim6, the applicant was convicted of one count of murder. His sentence of life imprisonment was affirmed on appeal, but 30 years before eligibility for parole was reduced to 25 years. We have noted that these are cases in which the sentence was life imprisonment and not a determinate sentence, as in the instant case. Nevertheless, guidance is offered in terms of proportionality. We also considered the following authorities.

[198] In **Kelvin Downer v R** [2022] JMCA Crim 3, a determinate sentence of 25 years' imprisonment was upheld on appeal, for one count of murder (multiple stab wounds), and a pre-parole period of 15 years was reduced to 10 years to take account of time spent on pre-sentence remand. In **Omar Brown v R** [2016] JMCA Crim 18, the deceased was shot to death, and the applicant was sentenced to life imprisonment and ordered to serve 28 years in prison before becoming eligible for parole. On appeal, this court found that a minimum period of 28 years could not be said to be manifestly excessive. In **Jermaine McIntosh v R** [2020] JMCA Crim 28, the applicant was convicted of murder, and sentenced to life imprisonment at hard labour, with a stipulation that he should serve a minimum of 30 years before becoming eligible for parole. His sentence was upheld on appeal.

[199] We note that learned King's Counsel did not suggest that we disturb the determinate sentence of 25 years' imprisonment. Her primary submission was that we specify a parole ineligibility period of 10 years. However, having considered the egregious circumstances of this case, including the use of at least one firearm, and the decided cases adverted to above, we cannot agree with a parole ineligibility period of 10 years. We are of the view that a parole ineligibility period of 16 years is more appropriate as it falls well within the range of minimum pre-parole periods given in similar circumstances.

Disposal of the appeal

Omar Blake

[200] Having given due consideration to the grounds of appeal advanced on behalf of Mr Blake, and learned King's Counsel's detailed and well-articulated submissions, we were unable to find any basis upon which leave to appeal conviction could have been granted. Accordingly, the application for leave to appeal conviction is refused.

[201] However, there was merit in the ground dealing with his sentence. Therefore, the application for leave to appeal sentence is granted, and the hearing of the application is treated as the hearing of the appeal against sentence. For reasons stated above, the appeal against sentence is allowed, in part; the sentence of 25 years' imprisonment is affirmed; and Mr Blake is to serve a period of 16 years' imprisonment before being eligible for parole.

Omar Dunkley and Jason Coley

[202] For reasons set out above, we are of the view that the applications of Messrs Dunkley and Coley for leave to appeal conviction ought to be granted, the hearing of the applications treated as the hearing of the appeals, and the appeals against conviction allowed.

[203] While the seriousness and prevalence of this type of offence cannot be overstated, we have found no reason that would justify a re-trial of the case against either of these applicants, having considered the compendium of possible reasons at para. [31] in **Brenton Tulloch v R** [2019] JMCA Crim 45, per Phillips JA (citing Brooks JA (as he then was) in **Nerece Samuels v R** [2017] JMCA Crim 17). Messrs Dunkley and Coley would be severely prejudiced by a new trial, as approximately 20 years would have passed since the crime was committed; they would have served about 13 years of their sentence to date; and the possibility of a re-trial date, in the near future, is hardly likely. Furthermore, the trial was long and tedious caused in no small measure by the fact that the principal witness had a serious speech impediment. Therefore, the resources likely to be incurred

for a new trial would be enormous. In all these circumstances, the interests of justice would be better served if no re-trial was ordered.

[204] Accordingly, the court makes the following orders:

Omar Blake

(i) The application for leave to appeal conviction is refused.

(ii) The application for leave to appeal sentence is granted and the hearing of the application is treated as the hearing of the appeal against sentence.

(iii) The appeal against sentence is allowed, in part. The sentence of 25 years' imprisonment is affirmed. It is stipulated that Mr Blake is to serve a period of 16 years' imprisonment before being eligible for parole.

(iv) The sentence is reckoned as having commenced on 15 April 2011, the date on which it was imposed.

Omar Dunkley & Jason Coley

(i) The applications for leave to appeal conviction are granted.

(ii) The hearing of the applications is treated as the hearing of the appeals.

(iii) The appeals against conviction are allowed.

(iv) The conviction of each applicant is quashed, and judgments and verdicts of acquittal entered.