[2020] JMCA App 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 29-32/2014

MOTION NOS COA2020MT00006-9

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA

SHAWN CAMPBELL
ADIDJA PALMER
KAHIRA JONES v R
ANDRE ST JOHN

Bert Samuels, Miss Bianca Samuels and Isat Buchanan instructed by Knight Junor Samuels for the applicant Shawn Campbell

Isat Buchanan and Ms Alessandra LaBeach for the applicant Adidja Palmer

John Clarke for the applicants Kahira Jones and Andre St John

Jeremy Taylor QC, Orrett Brown and Miss Syleen O'Gilvie for the Crown

29, 30 June, 1, 2 July and 25 September 2020

BROOKS JA

[1] The applicants, Messrs Shawn Campbell, Adidja Palmer, Kahira Jones and Andre St John, on 13 March 2014, were convicted for the murder of Mr Clive Williams. They were each sentenced to imprisonment for life, with various periods to be served before being entitled to be considered for parole. They were sentenced on 3 April 2014.

[2] In April 2020, their respective appeals to this court from those convictions were dismissed, but the sentences were each reduced to account for time spent on pre-sentence remand. All four have filed motions applying for this court's leave to appeal to Her Majesty in Council (the Privy Council or the Board or their Lordships). A prominent theme in questions, which the applicants wish to have posed to the Privy Council, is the issue of whether they had a fair trial. The Crown has opposed the applications. It contends that only one of the issues raised by the applicants meets the requirements of the Constitution and the relevant legislation, regarding the grant of leave to appeal to the Privy Council in criminal cases.

[3] The applications have been made pursuant to section 110 of the Constitution. They will be considered in the context of the relevant portions of that section. Hereafter, all references to sections, unless otherwise stated, will be to sections in the Constitution.

The questions posed by the applicants

[4] The number of questions filed by the applicants is unusually large when the relevant principles governing such applications are considered. The questions contained in the respective applications have been set out in full in the appendix to this judgment.

[5] It is apparent from their formulation of the majority of the numerous questions, that the applicants have not taken account of the requirements of section 110(1)(c). As a result, only the issues which satisfy section 110(1)(c) will be discussed in the next section of this judgment. The applicants have helpfully identified the issues which they wish referred pursuant to section 110(2)(b) and its expansion by section 35 of the

Judicature (Appellate Jurisdiction) Act (JAJA). Those will be discussed after the consideration of the section 110(1)(c) issues.

[6] Learned counsel who advanced arguments before the court, on behalf of the applicants, all adopted each other's submissions. Accordingly, the oral submissions of Miss Samuels, Mr Buchanan and Mr Clarke will not be individually identified, but will be addressed collectively. They have identified that the questions broadly raise the following issues:

a. jury management;

b. prosecutorial misconduct;

c. admissibility of evidence;

d. publicity affecting the case;

e. the judge's directions to the jury;

f. the sentencing procedure; and

g. the delay in the delivery of this court's judgment.

Mr Taylor QC, addressed the court on behalf of the Crown. The court is grateful to all counsel for their assistance.

The principles governing an application for leave to appeal to the Privy Council in criminal cases pursuant to section 110(1)(c) of the Constitution

[7] Leave to appeal to the Privy Council, as of right, is governed by section 110(1). The relevant section for this case is section 110(1)(c). Section 110(1) states, in part:

> "(1) An appeal shall lie from decision of the Court of Appeal to Her Majesty in Council as of right in the following cases-
>
> ...

(c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution;

..."

[8] The requirements of paragraph (c), for these purposes, are that the decision from which appeal is sought must be:

a. a final decision of this court;

b. in respect of a criminal case; and

c. on a question as to the interpretation of the Constitution.

All three requirements must be satisfied.

[9] It has been established that even for cases where the appeal is as of right under section 110(1), it is for this court to ensure that the appropriate conditions have been met. This principle was confirmed in **Alleyne-Forte (Learie) v Attorney-General of Trinidad and Tobago and Another** [1997] UKPC 49; (1997) 52 WIR 480, where their Lordships said in their concluding paragraph:

> "An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required, but this is required, is that the proposed appeal raises a genuinely disputable issue in the prescribed category of case…"

[10] Their Lordships of the Privy Council have asked that appellate courts, such as this, be vigilant in protecting the process of appeals to the Board from being debased by frivolous applications for leave to appeal. They did so in **Eric Frater v R** [1981] UKPC

35; (1981) 18 JLR 381, which arose from a decision of this court. After stressing that the question before this court, in that case, was not about an interpretation of the Constitution, their Lordships, concluded the point by saying:

> "In *Harrikissoon v. Attorney-General of Trinidad and Tobago* [1980] A.C. 265 this Board had occasion to point out the danger of allowing the value of the right to apply to the High Court for redress for contravention of his fundamental rights and freedoms which is conferred upon the individual by…the Constitution…to become debased by lack of vigilance on the part of the courts to dispose summarily of applications that are plainly frivolous or vexatious or are otherwise an abuse of process of the court. In their Lordships' view similar vigilance should be observed to see that claims made by appellants to be entitled to appeal as of right under section 110(1)(c) are not granted unless they do involve a genuinely disputable question of *interpretation* of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right."

That guidance was reinforced by their Lordships in **Joseph v The State of Dominica** [1988] UKPC 20; (1988) 36 WIR 216 and **Meyer v Baynes** [2019] UKPC 3.

[11] The Caribbean Court of Justice (CCJ) has also accepted, as being applicable to appeals to its jurisdiction, their Lordships' stance on the assessment of cases for referral to the final court. The CCJ did so in the context of considering the assessment, for referral, of cases in which the issue of the constitutional right to a fair trial has been raised. That court considers appeals from jurisdictions, which have similar constitutional provisions to section 110, and therefore its judgments are of persuasive value.

[12] In **R v Mitchell Lewis** [2007] CCJ 3 (AJ); (2007) 70 WIR 75, all the judges in the seven-member panel of the CCJ concurred on the decision of whether the issue of a fair trial, had been properly raised for its consideration. de la Bastide PCCJ delivered a

judgment, with which five other judges agreed. In considering legislation with similar import to section 110(1)(c), de la Bastide PCCJ said, in part, at paragraph [42] of his judgment (all extracts are taken from the judgment as published on the CCJ's website):

> "We would respectfully adopt the remarks of Lord Diplock [in **Eric Frater v R**] and Lord Keith [in **Joseph v The State of Dominica** [1988] UKPC 20; (1988) 36 W.I.R. 216] with regard to the need for vigilance by the Court of Appeal when dealing with claims to appeal as of right on the ground that the case involves a question of interpretation of the Constitution."

[13] Pollard JCCJ said that he utilised a different route from the other six judges, in arriving at the same result. It is necessary to point out, however, that both de la Bastide PCCJ and Pollard JCCJ disagreed, somewhat, with an element of the Privy Council's decision in **Joseph v The State of Dominica**, which was delivered by Lord Keith. de la Bastide PCCJ, departing from a broader restriction that the Privy Council had promulgated, held that there were some instances when the issue of whether an accused had had a fair trial, could involve an interpretation of the Constitution. An example of those instances, de la Bastide PCCJ said, would be when some novel element or feature arose. The deciding criterion, de la Bastide PCCJ determined, is when the complaint is whether the appellate court misinterpreted, rather than misapplied, a constitutional provision. The learned President said, in part, at paragraph [43] of his judgment:

> "We do not, however, accept what appears to have been the view of Lord Keith that the question whether a case has received 'a fair hearing' within the meaning of the relevant constitutional provision, can never be a question of interpretation of that provision. **More often than not what**

> **will be involved in the answering of this question, is the application of some well established rule as to what does or does not constitute a fair hearing, to the facts of the particular case**. In the instant case, that rule was that the hearing must be before an unbiased jury. **There may be cases, however, in which the fairness of the hearing is challenged by the inclusion of some novel element or feature in the concept of what constitutes a fair hearing**….It is a truism that a court of appeal must first of all understand what a fair hearing connotes before it can apply that concept to what transpired before the trial court. For the purpose of applying a provision like [the equivalent of section 110(1)(c)], however, it is crucial to consider whether the party seeking to appeal to the final court is complaining that the Court of Appeal either (i) applied a rule or standard not necessary for a fair hearing or conversely failed to apply a rule or standard that is necessary for a fair hearing, or (ii) simply misapplied an accepted rule or standard to the facts of the case. **It is quite clear that in the instant case the Crown's complaint was in essence of a misapplication, and not of a misinterpretation, of the constitutional provision**." (Emphasis supplied)

[14] In his judgment, Pollard JCCJ opined that the question of whether a party had had a fair hearing, "unavoidably engages an interpretation of the Constitution" (paragraph [89]). Those words, taken literally, would undoubtedly mean that every aggrieved party who alleges that he did not have a fair trial, would be entitled, as of right, to appeal to the final court. Pollard JCCJ, however, blanched such an understanding by stating that it is for the court to determine whether there has already been a judicial interpretation of the issue before that court. He said at paragraph [89]:

> "In my opinion, a judicial determination whether, on the basis of the facts established in any given case, the constitutional right of an accused to a fair trial guaranteed by Section 18(1) has been breached, unavoidably engages an interpretation of the Constitution. Nevertheless, in any particular case it is for

> the courts to determine if, on the facts found, a judicial interpretation of a fair trial in accordance with the Constitution has already been made by a court of competent jurisdiction and all that remains to be done is to apply the relevant principles to the instant case."

[15] The relevant principles, for these purposes, that may be extracted from the judgments in **R v Mitchell Lewis** are:

a. the Constitution guarantees a fair hearing to all;

b. an assertion that there has been a departure from the standard of a fair hearing, requires an understanding of the concept of a fair hearing; and

c. an understanding of the concept inherently involves an interpretation of the term "fair hearing", as used in the Constitution; but

d. the concept of a fair hearing is comprised of a number of established principles, which have been the subject of numerous judicial decisions; and, therefore,

e. in the majority of cases where the fairness of a trial is challenged, the exercise for the court is more of an application of the established principles, rather than an interpretation of the term 'fair hearing'.

[16] The learned judges of the CCJ accepted, however, that the Constitution is designed to be broadly interpreted so that it can adapt to changing times. Accordingly, they conceived that there will be occasions that the consideration of a challenge to the

fairness of a hearing will require a fresh look at interpreting the constitutional provision, which stipulates a "fair hearing", rather than the usual approach of an application of the established principles.

[17] If that understanding is correct, then no violence has been done to the view of the Privy Council in **Joseph v The State of Dominica**. From the CCJ's decision, it may be held that, in cases where there is an assertion that the constitutional right to a fair hearing has been infringed, it is for the court to decide on the facts of each case, the approach that is to be adopted. A case of genuine interpretation will give rise to an appeal as of right, whilst a case of application of the established principles, will not.

[18] Although the learned judges of the CCJ did not give any examples of the well-established principles that would coalesce to constitute a "fair hearing", it may be said, without any hint of being exhaustive, that they would include the requirement to:

a. manage a trial so as to exclude from evidence, material that is more prejudicial than probative;

b. inform the jury in criminal cases of the general rule that the prosecution bears the burden of proof and that the standard of proof is beyond a reasonable doubt;

c. give fair and clear guidance to the jury as to the assessment of evidence;

d. warn the jury of the caution to be exercised in particular instances, such as visual identification and for the desirability of corroboration in others;

e. properly guide the jury on the relevant law in the case;

f. allow the accused's defence to be fairly presented and to place the defence fully and fairly before the jury;

g. properly direct the jury on the implications of good character evidence;

h. remind the jury that it should decide the case based on the evidence, and to ignore all extraneous matter; and

i. sentence the convicted offender as an individual.

Some of these principles will be mentioned below in the consideration of the questions that the applicants have asserted that they are entitled as of right, or should be allowed, to ask the Privy Council to consider.

Do any of the issues qualify for referral under section 110(1)(c) ?

[19] The questions, which an applicant may propose for referral to the Privy Council, pursuant to section 110(1)(c), must be "on a question as to the interpretation of the Constitution". These applicants have sought to have numerous issues referred to the Privy Council by including, in the majority of their proposed questions, a reference to the constitutional right to a fair trial. These issues, include:

a. the prosecutorial misconduct issue;

b. the publicity issue;

c. the privacy of communication issue;

d. the delay issue;

e. sentencing and other issues.

The applicants included jury management issues as part of their submissions in connection with the right to a fair trial. The notice of motion, however, did not include it. These issues will be dealt with under the section dealing with section 110(2)(b) matters.

[20] The applicants have sought to justify their approach by relying on the extracts, cited above from the judgments of de la Bastide PCCJ and Pollard JCCJ in **R v Mitchell Lewis**. What the applicants have not done, however, is to show that in considering the issue of a fair hearing or trial, this court, in its judgment, considered elements that are so unique or novel that they are not well-established principles that help to comprise a fair hearing. Indeed, it is noted that, despite their comments, on which the applicants rely, the judges of the CCJ found that Mr Lewis' appeal did not satisfy the requirement in the legislation that is the equivalent of section 110(1)(c). To be plain, therefore, the inclusion of the term "fair hearing" in a proposed question does not automatically qualify it for referral to their Lordships' Board.

[21] That is not to say that this court, in its judgment, did not specifically consider the constitutional requirement of a fair trial. It did. The judgment specifically considered that concept in two contexts, namely:

a. the conduct of the Director of Public Prosecutions during a consultation by the learned trial judge with counsel; and

b. the extensive publicity surrounding the trial.

a. The prosecutorial misconduct issue

[22] The judgment dealt with the issue of prosecutorial misconduct as a discrete issue (see paragraphs [242] – [267]). The alleged misconduct, the applicants assert, is the Director of Public Prosecutions' (the Director) failure, in the face of allegations of attempted jury tampering, to halt the trial and, more egregiously, to encourage the learned trial judge to continue the trial with only a warning to the jurors to be true to their oaths.

[23] The court, at paragraph [242] outlined the ground of appeal that raised the issue. The ground stated:

> "The assistance sought from and rendered by the Learned Director of Public Prosecutions to the LTJ [learned trial judge], which was ultimately adopted by him, amounted to prosecutorial misconduct and led the Court into error, in that it was so gross and prejudicial a departure from good practice, as to render the trial unfair."

[24] At paragraph [244], the judgment provided the context for the ground of appeal. The paragraph stated:

> "As would have been seen from the ground itself, the challenge to the conviction under this ground relates to the DPP's contribution to a discussion in chambers when the judge consulted with counsel on both sides. The DPP herself

> was not one of the two attorneys-at-law conducting the trial on behalf of the Crown, but attended the discussion in chambers along with counsel. The DPP's contribution to the deliberations was to urge the judge to continue the trial, but to remind the jury members of the oath that they had each taken."

[25] This court, in its judgment, considered submissions that included arguments based on section 16(1) dealing with the right to a fair trial. The section states:

> "16-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded **a fair hearing within a reasonable time by an independent and impartial court** established by law." (Emphasis supplied)

[26] The applicants complain about the conduct of the learned Director. The judgment also considered it as an issue. It was, therefore, the application of the established principles surrounding prosecutorial misconduct, with which the court was concerned; not an interpretation of the constitutional provision. The court decided the issue based on whether there had been prosecutorial misconduct. It said at paragraphs [261] – [262] of its judgment:

> "[261] Again, whether the advice was right or wrong, the giving of the advice, it is important to note, was not an action the consequence of which was final. The advice given was considered by the judge (who had requested it in the first place) who was not bound by it and under no compulsion to accept it. The judge sought the assistance of counsel on both sides, received contrasting submissions, and made his independent decision at the end.
>
> [262] We are unable to conclude (as counsel for the appellants submitted) that the suggestion made by the DPP resulted in an abridging of the appellants' constitutional rights and/or that it occasioned a breach of any of the cannons of

> the legal profession. We also find that the conduct of the DPP in, at the judge's invitation, making a suggestion as to a valid course to be adopted in the circumstances, cannot possibly approach being an instance of misfeasance in a public office, as outlined in the **Three Rivers** case [**Three Rivers District Council and others v Bank of England** [2000] 3 All ER 1]. Any attempt to get guidance from this case would be stymied by the lack of any evidence of the third limb of the tort, as outlined by Lord Steyn as follows:
>
> > '(3) **The third requirement concerns the state of mind of the defendant**
> >
> > The case law reveals two different forms of liability for misfeasance in public office. First there is the case of targeted malice by a public officer i.e. conduct specifically intended to injure a person or persons. This type of case involves bad faith in the sense of the exercise of public power for an improper or ulterior motive. The second form is where a public officer acts knowing that he has no power to do the act complained of and that the act will probably injure the plaintiff. It involves bad faith inasmuch as the public officer does not have an honest belief that his act is lawful.'" (Emphasis as in original)

[27] Based on that analysis, the court's discussion of the complaint concerning prosecutorial misconduct does not satisfy the requirement of section 110(1)(c). The applicants, however, contended that this issue also falls under the purview of the provisions dealing with public importance. It will be again considered in that context.

b. The publicity issue

[28] The applicants' complaint in respect of the issue of publicity also fails to demonstrate that there was an interpretation, as opposed to an application, of the constitutional provision requiring a fair trial. Again, however, the applicants contend that

this issue may also be placed before their Lordships as one, which satisfies the requirements of section 110(2)(b), as expanded by section 35 of the JAJA. The essence of the complaint at the core of this issue is that given:

a. the significant public (local and international) profile of the applicants, Messrs Campbell and Palmer;

b. the publicity given to the case prior to the trial;

c. the publicity given to the case during the trial, including prejudicial social media postings by the police communications arm; and

d. the publicity given to the case since the trial,

the applicants did not receive a fair trial and cannot receive a fair trial in Jamaica.

[29] This court, in its judgment, outlined the principles involved in this issue. It considered the relevant authorities against the backdrop of section 16(1) (see paragraph [462] of the judgment). It then summarised its understanding of the principles, as distilled from the decided cases. It said, at paragraph [484] of the judgment:

> "In any event, as the authorities make clear, courts are generally loath to prevent trials from continuing on the ground of adverse publicity, preferring instead, as Lord Phillips CJ put it in **R v Hamza** [[2006] EWCA Crim 2918], the view that 'directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity...'"

[30] Thereafter the court applied those principles to the complaints concerning the publicity surrounding the case, as well as certain occurrences during the trial. It

assessed the manner in which the occurrences were brought to the attention of the learned trial judge and how he dealt with them, both in the absence of the jury and in his directions to them during his summation. Its concluding paragraph on the issue, is manifestly an application of the principles concerning the issue of publicity and the trial process, rather than an interpretation of meaning of the term "fair hearing", as used in section 16(1). The court said, at paragraph [499]:

> "In these circumstances, the actual language and format chosen by the judge to deal with the problem posed by the adverse publicity in this case were matters entirely for him. Rather than overloading the summing-up with references to the very material which he wished the jury to ignore, the judge chose to be as pointed and direct as he possibly could in telling the jury to have regard solely to the evidence given at the trial and not to anything reported in the press; nor to any product of speculation or conjecture; nor to any notion of morality or concern for the state of crime in the country. In our view, the judge's directions on the matter of adverse publicity were entirely appropriate in the circumstances and would have adequately conveyed to the jury that they were to decide the case purely on the basis of the evidence."

[31] The complaints by the applicants as to the court's approach, and their disagreement with the court's analysis of the learned trial judge's treatment of the issue of publicity, do not raise the issue of an interpretation of section 16(1), so as to warrant a referral to their Lordships as of right.

The privacy of communication issue

[32] The judgment of this court also considered another constitutional issue, namely, the constitutional right to privacy of communication (section 13(3)(j)(iii)), which forms

part of the 2011 Charter of Fundamental Rights and Freedoms (the Charter). The relevant portion of section 13 states:

> "(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society–
>
> (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and
>
> (b) **Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights**.
>
> (3) The rights and freedoms referred to in subsection (2) are as follows–
>
> …
>
> (*j*) the right of everyone to-
>
> …
>
> (iii) **protection of privacy of other property and of communication**.
>
> …" (Emphasis supplied)

(None of the provisions mentioned in subsection (2) affect this issue, and so they need not be quoted.)

[33] The court considered section 13(3)(j)(iii), while dealing with the admissibility into evidence of a compact disk (CD), dubbed "JS2". The admission was made pursuant to common law principles, where the acquisition of the CD contravened the right to privacy, and had not been done in conformity with the provisions of the Interception of Communications Act (ICA).

[34] The court considered the issue in the context of a ground of appeal, and said, in part, at paragraph [136]:

> "The appellants' complaints in respect of exhibit JS2 are twofold. The first complaint, without any admission of the authorship of the communication, is that the data provided by Digicel, which are on JS2, were obtained in breach of the ICA and of the constitutional right to privacy. The second issue is that there were doubts about the provenance of JS2 and that it ought not to have been admitted into evidence."

[35] In its consideration, the court dealt with the basis for statutory derogation from the constitutional right to privacy as well as a trial court's authority to admit evidence in breach of that constitutional right. This court not only compared section 13(3)(j)(iii) with the previous section 22, which formed part of the repealed Chapter III of the Constitution, but it also compared section 13(3)(j)(iii) with the relevant provisions of the Constitutions of both Canada and the United States of America.

[36] In that analysis, the court said at paragraphs [142] and [143]:

> "[142] The provisions of the Charter, in this context, are similar to the aim expressed in the repealed section 22. Section 13(3)(j)(iii) addresses the issue of the privacy of communication. It guarantees to all persons in Jamaica, the right to 'protection of privacy of other property and of communication'.
>
> [143] There is no gainsaying the importance of the right to privacy. It is said to be 'a basic prerequisite to the flourishing of a free and healthy democracy' (paragraph [38] of the judgment of Côté J in **R v Jones** 2017 SCC 60, [2017] 2 SCR 696). The right is, however, not absolute. It is guaranteed by the Charter, only to the extent that it does 'not prejudice the rights and freedoms of others' (section 13(1) of the Charter). The right may also be curtailed 'only as may be demonstrably

> justified in a free and democratic society' (section 13(2)). **Two observations may be made about the relevant provisions of the Charter:**
>
> **a. there seems to be a reversal of the onus of proof as regards constitutionality, in that the Charter places the onus on the party seeking to assert justification of the curtailment; and**
>
> **b. there is no provision which exempts previously existing law from the entitlement to the right to privacy**." (Emphasis supplied)

[37] The applicants contend that, those analyses inherently involve an interpretation of section 13(3)(j)(iii), and therefore this issue falls within the ambit of section 110(1)(c). They rely, in part, on the reasoning in **Mitchell Lewis v R**, which has been cited above, as support for that assertion.

[38] Although the court did consider the importance of the right to privacy it cannot properly be said that there was any attempt at interpreting section 13(3)(j)(iii). The court's statement at paragraph [143] of its judgment was not an interpretation of the meaning of that section of the Charter as a distinct issue arising in the appeal. It was, rather, an emphasising of the importance of the right to privacy and an examination of its application in a free and democratic society.

[39] In the circumstances, no questions connected to the privacy of communication issue may properly be referred pursuant to section 110(1)(c). That is not, however, the

end of the discussion of this issue as the applicants have asserted that it may also be referred pursuant to section 110(2)(b). That aspect will be analysed below.

Sentencing and other issues

[40] The applicants raised the issues of sentencing and delay among the many matters that they wished to refer to the Privy Council pursuant to section 110(1)(c), but these, like so many of the others, did not satisfy the requirements of the subsection. There is no aspect of the decision of the court that involves a genuine dispute regarding the interpretation of any provisions of the Constitution in respect of those several issues. The issues of sentencing and delay will be addressed in considering the aspect of the application that concerns section 110(2)(b). No further consideration will be made of any of the other matters.

Conclusion on the section 110(1)(c) points

[41] Based on the reasoning above, it is concluded that there has been, in this case, no interpretation by this court of any provision of the Constitution that warrants a referral, as of right, to the Privy Council.

The principles governing an application for leave to appeal to the Privy Council in criminal cases pursuant to section 110(2)(b)

[42] Section 110(2) deals with applications, not as of right, as in subsection (1), but with the permission of this court. Paragraph (a) of subsection (2) gives greater latitude to this court, in civil cases, to grant leave to appeal to Her Majesty in Council. The provision allows the court to exercise a discretion to grant leave, when it is of the view that the issue in those civil cases involves a matter of "great general or public

importance or otherwise". Paragraph (a) of the subsection does not apply to criminal cases (see **R v George Green** (1969) 11 JLR 305). Paragraph (b) confers on Parliament the authority to specify other categories of cases, in which appeals to Her Majesty in Council may be allowed. Subsection (2) states, in part, as follows:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) **such other cases as may be prescribed by Parliament**.
>
> …" (Emphasis supplied)

[43] Parliament, by section 35 of the JAJA, has prescribed, pursuant to section 110(2)(b), the types of criminal cases that may be sent on appeal to the Privy Council. Section 35 mirrors, in some ways, the standard prescribed, in respect of civil cases, by section 110(2)(a). Section 35 provides:

> "The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V or VI, **where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought**." (Emphasis supplied)

[44] The civil standard, it will be noticed, is "great general or public importance or otherwise", while the criminal standard is "exceptional public importance" and the public's interest that there be a further appeal. The difference in terminology suggests a higher standard in criminal cases. That difference may stem from the traditional attitude of the Privy Council that it is only in exceptional cases that it grants leave to appeal in criminal cases. In **Edith May Hallowell Carew v The Queen** [1897] UKPC 32, the Board, at page 2, stated the principle as follows:

> "…it is only necessary to say that, **save in very exceptional cases**, **leave to appeal in respect of criminal investigation is not granted by this Board**. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of argument, *re Abraham Mallory Dillett* ((1887) 12 App. Ca. 459): 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice has been done'." (Emphasis supplied) (Italics as in original)

[45] Another case from the Privy Council is **Nirmal son of Chandar Bali v The Queen** [1971] UKPC 39. In that case, the Privy Council dealt with the standard for allowing appeals in criminal cases. It quoted with approval from Lord Sumner's judgment in **Ibrahim v R** [1914] AC 599. The Board said, in part at pages 5-6:

> "…In *Ibrahim v. R*. Lord Sumner said at pp. 614 615 '…Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Reid v Reg.* (1885) 10 App. Cas 675; nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': *Dillet's case*. It is true that these are cases of applications for special leave to appeal, but the Board has

> repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being on the same footing: *Reil's case. Ex parte Deeming* [1892] A.C. 422. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself: and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* [1893] A.C. 346. **There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future**: *Reg v. Bertrand.*'" (Emphasis supplied) (Italics as in original)

[46] Although that guidance assists greatly, the reference to section 110(2)(a) is also pertinent because this court has previously provided careful guidance as to the approach to considering the issue of public importance. That guidance is also of significant help in determining the approach to considering the cases that meet the standard set by section 35 of the JAJA. In the civil case of **The General Legal Council v Janice Causewell** [2017] JMCA App 16, McDonald-Bishop JA, with whom the rest of the panel agreed, considered several previously decided cases on this court's approach to applications under section 110(2)(a). The learned judge of appeal, at paragraph [27] of her judgment, set out a clear synopsis of the relevant principles:

> "The principles distilled from the relevant authorities may be summarised thus:
>
> i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not [to] be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

ix. ..."

[47] Two more principles should be added to those eight. The first of which, was recognised by the Court of Appeal of the Commonwealth of the Bahamas in **Nyahuma Bastian v The Government of the USA and others** (unreported), Court of Appeal,

Bahamas, SCCrApp & CAIS No 199 of 2017, judgment delivered 23 January 2020 (see paragraph 20). It is that the court should not refer a question to the Privy Council if the Board has previously given its opinion on that question. This principle expands on principle iii. above, for if the issue has been previously decided by the Board, in respect of materially similar circumstances, then it cannot be regarded as being open to serious debate. This is similar to the point made by Pollard J at paragraph [89] of **Mitchell Lewis v R**, cited above.

[48] The second additional principle is one pointed out by Mr Taylor. That principle was stressed by their Lordships in **Michael Gayle v The Queen** [1996] UKPC 18; (1996) 48 WIR 287. Lord Griffiths, in delivering the judgment of the Board, said, in part, at page 289 of the report of the case:

> "Furthermore, it is not the function of the Judicial Committee to act as a second Court of Criminal Appeal."

That case was, however, an appeal by way of special leave from their Lordships. It is debatable if the principle is relevant to applications made pursuant to section 110 of the Constitution or section 35 of the JAJA. Both provisions use the term "appeal" in reference to the referral of cases to the Privy Council. Section 110 states that "[a]n appeal shall lie from decisions of [this court]". Section 35 states that the parties, there listed, "may…appeal" to Her Majesty in Council". That terminology suggests a different connotation than that indicated by Lord Griffiths and advocated for by Mr Taylor.

[49] Having identified the relevant principles, the questions proposed by the applicants may now be considered.

Do any of the issues qualify for referral under section 35 of the JAJA?

[50] Section 110(2)(b) allows for the consideration of issues in the context of section 35 of the JAJA. There is no dispute about the need to satisfy the basic requirements of section 35, namely that the issues in this case arise from a final decision in a criminal case on appeal from the Supreme Court. The dispute between the applicants and the Crown is whether the issue "involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought".

[51] The applicants, in their written submissions, have argued that there are four issues which meet the requirements of section 35, namely:

a. jury management;

b. prosecutorial misconduct;

c. the admissibility of the technology evidence; and

d. the publicity surrounding the case.

[52] In their joint speaking notes, they sought to add additional matters, including:

a. this court's delay in the delivery of its judgment;

b. the failure to leave the alternative verdict of manslaughter;

c. the treatment of the applicants' respective unsworn statements;

d. general matters including the learned trial judge's general directions to the jury; and

e. the treatment of the sentencing.

a. Jury management

[53] This issue mainly arose from two incidents, involving the jury, during the trial. Both were investigated by the learned judge in his chambers with counsel on both sides present. The investigation was recorded by the court reporters. The applicants and the jury, as a body, were, however, absent. The learned trial judge's treatment of those issues and his reaction to them are the matters raised by the applicants.

[54] In the first investigation, one of the jurors told the learned trial judge that she had gone to see her son at a correctional institution and discovered that at least one of the applicants was being remanded at that institution, on the same block as her son. She expressed fear for her son's safety in the circumstances. The learned judge, after discussing the matter with counsel, discharged the juror.

[55] In the second investigation, the foreman of the jury informed the learned judge, in the latter stages of his summation, that one of the jurors had offered bribes to other members of the jury, with a view to affecting the outcome of the case. The learned judge, after hearing the foreman and consultation with counsel, decided not to discharge the jury, but to complete his summation that afternoon and leave the case to the jury for the deliberation of its verdict.

[56] This court, prior to hearing the appeal, allowed fresh evidence to be adduced concerning the second investigation. The relevant fresh evidence adduced before this court concerned the accounts of two of the jurors as to the events leading to the second

investigation. Despite mentioning that the evidence had been adduced, the court failed to assess the issues raised by the evidence.

[57] The applicants assert that at least four issues are raised in this context:

a. the learned judge's failure to allow questioning in court of the relevant persons involved in each incident;

b. the exclusion of the applicants from the investigations;

c. this court's failure to treat with the fresh evidence from the jurors; and

d. the time at which the jury was sent to commence its deliberation.

They contend that these issues are matters of great importance, which not only affect them but also affect the conduct of trials in the future. In addition, the applicants assert, the manner in which this court resolved these issues in its judgment differed from the guidance that it has given in other decisions, which it has previously made.

[58] They point to the fact that this court has, not only in its judgment in this appeal, but in other cases such as **Delroy Laing v R** [2016] JMCA Crim 11, pointed out that there is no established procedure, statutory provision, rule of court or practice direction in respect of handling issues such as these. Learned counsel for the applicants also contended that the court's judgment in this case conflicted with the guidance that it gave in **Delroy Laing v R**. Learned counsel for the applicants submitted that the appropriate procedure, as recommended in **Delroy Laing v R**, was to have questioned, on oath, in open court, the various persons involved in each incident. In the

circumstances, the applicants assert, it is necessary to obtain guidance from the Privy Council on these issues.

[59] Counsel for the Crown contended that there is no basis for referring this issue to the Privy Council. Firstly, learned counsel stated, there is no conflict between the decision in the appeal in this case and that in **Delroy Laing v R**. Learned counsel also asserted that the Privy Council has already given guidance on this issue and that to again refer this issue to their Lordships is contrary to the guiding principles concerning referring matters to the Board. Learned counsel relied on **Bonnett Taylor v The Queen** [2013] UKPC 8 in support of the latter submission.

[60] The two previously decided cases, which have been cited in the submissions, require some analysis. Firstly, in its judgment in this case, the court examined **Delroy Laing v R** and accepted a principle, stated therein, as to the authority to be left to a trial judge in dealing with jury-management issues that arise during a trial. The court, in its judgment in this case, said at paragraph [228]:

> "The best starting point in the discussion of these issues is to recognise, as this court stated in **Delroy Laing v R**, that there is, in Jamaica, no set procedure, statutory provision, rule of court or practice direction governing how an enquiry as to jury misconduct or alleged tampering is to be conducted. The only guideline that can be definitively stated is that the judge must conduct a proper investigation into the matter. The realization or acceptance that, in this jurisdiction, there is no set format or procedure for such an enquiry, immediately undermines the way in which ground 8(a) for the appellant, Campbell, is framed, as contending that the judge failed: '…to invoke the proper procedure…', as there is no set procedure. It further undermines, in our view, every positive assertion made in challenge to the manner in which the enquiries were conducted, such as, for example, the

> contention that: (i) the hearings should have been conducted on oath; (ii) each juror should have been questioned on the second occasion and (iii) the judge ought to have made enquiries of juror number 11 herself, as to whether she has discussed the matter with any other juror (and ought not to have relied only on the word of the registrar). " (Underlining as in original)

[61] Both the judgment in this case and that in **Delroy Laing v R** considered a number of authorities concerning the correct course that should have been adopted at the respective trials. In **Delroy Laing v R**, more stress was placed on a thorough enquiry, including circumstances in which it may be desirable for making enquiries on oath. In the end, the court found that the trial judge in that case failed to do enough to ensure that justice was seen to be done. The court said, at paragraph [98]:

> "We believed that in failing to conduct a more thorough investigation into the circumstances of this case, the learned trial judge may have failed to take into account all relevant considerations before coming to his findings that the appellant was not prejudiced or that there was no danger of him being prejudiced or the trial undermined. We have recognised that each case will turn on its own peculiar facts but the ultimate goal must always be the attainment of justice. As is often said, 'justice should not only be done, but should manifestly and undoubtedly be seen to be done'. In the circumstances as obtained in this case, we found ourselves unable to say that no injustice was caused simply because the investigation carried out by the learned trial judge was not sufficiently thorough."

In the present case, the court found that the learned judge had conducted a sufficient enquiry to see that justice was done. It said, at paragraph [238]:

> "It seems to us that the judge had before him enough information on which to base his discretion to continue with the trial with warnings or directions to the jury, which he ultimately did. There was nothing that could have been gained (at best a denial by the accused juror), and a great

> deal that would have been lost (the possibility of having to discharge the jury), by questioning the accused juror. We can see no basis to interfere with the exercise of that discretion. It should also be observed in relation to this enquiry as well that what transpired in chambers was also recorded by a court reporter, again in keeping with the guidance in **Nash Lawson v R** [[2014] JMCA Crim 29]."

It must be said, however, that the facts involved in this case are unique in terms of jury management. Among the unique aspects is the fact that the last jury misconduct issue came during the latter part of the summation of what is perhaps the longest criminal trial that has ever been conducted in this jurisdiction.

[62] Secondly, it is to be noted that the Privy Council has previously given guidance on the issue of managing jury impropriety. **Bonnett Taylor v The Queen** is a decision of the Privy Council on an appeal from this jurisdiction. It is therefore binding on this court. In that case, it was brought to the trial judge's attention, in the presence of the entire jury, that one of the jurors had indicated a, more than passing, prior acquaintance with the accused. The judge had no prior notice of the issue and dealt with it, immediately, by making enquiries of the juror, in the presence of the other jurors. Upon hearing her enquiries, the judge discharged the juror. In addressing the jury on the issue, the judge warned the remaining jurors to decide the case on the evidence and to disregard anything extraneous that may have been communicated to them by any of their members, then, or previously sitting among them.

[63] The Board, albeit by a majority, decided that the judge had done sufficient to avoid a miscarriage of justice. Their Lordships referred to a number of authorities on the point and provided guidance, which they intended for the courts in this jurisdiction.

[64] Their Lordships, in the majority, gave close guidance on the point at paragraphs 22-28 of their judgment. It is unnecessary for these purposes to repeat them here. It will be sufficient to observe that the guidance exists. Importantly, however, their Lordships concluded their discussion on the issue with the view that it is for the judiciary of this country to decide, for itself, the matters of practice, involved in this issue. They said at paragraph 29:

> "These are matters of practice that are, of course, best left to the judiciary in Jamaica to decide upon for themselves. But it is possible that, if those steps [set out in their Lordships' guidance] had been taken in this case, the juror would have made her position known at the outset and that, if this had been done, there would have been time for another juror to be selected to take her place."

[65] Although, in addition to their Lordships' guidance, there now exists the guidance in in this area in the Supreme Court of Judicature of Jamaica Criminal Bench Book (the Criminal Bench Book), the latter was not available at the time of this trial. Their Lordships were also not unanimous in their decision in **Bonnett Taylor v The Queen**. It will be of assistance to have their further consideration of the issue and to determine whether the learned trial judge had done sufficient to avoid a miscarriage of justice.

[66] Neither **Bonnett Taylor v The Queen** nor the Criminal Bench Book deal with the aspect of the presence of the accused for enquiries into jury-management issues. There is, however, a general requirement, at pages 25-28, of the Criminal Bench Book for the accused to be present at his trial. That issue of an accused's right to be present at every stage of a trial, was dealt with in the judgment in this case with a reference to

Nash Lawson v R [2014] JMCA Crim 29, in which it was said that there are occasions which justify the absence of that accused from an aspect of the proceedings.

[67] **Nash Lawson v R** was a judge-alone trial and therefore it is not on all fours with this case. In its judgment in that case, the court, at paragraph [17], referred to the guidance in **R v Lee Kun** [1914-15] All ER Rep 603; [1916] 11 Cr App R 293:

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

In **R v Lee Kun**, Lord Reading CJ said, in part, at page 604 of the former report:

> "No trial for felony can [be] had except in the presence of the accused, unless [he] creates a disturbance preventing a continuance of the trial: *R v Berry* [*(1897)* 104 LT Jo 110; 14 Digest (Repl) 293, 2710] per WILLS, J. Even in a charge of misdemeanour there must be very exceptional circumstances to justify proceeding with the trial in the absence of the accused. The reason why the accused should be present at the trial is that he may bear the case made against him and have the opportunity of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. The prisoner may be unable, through insanity or deafness or dumbness, or the combination of both conditions, to understand the proceedings or to hear them, either directly or by reading a record of them, or to answer them either by speech or writing." (Italics as in original)

[68] There are other instances which justify the exclusion of an accused, such as disruptive behaviour (as mentioned by Lord Reading CJ), but, again, that is not the situation in this case. It will, therefore, be of assistance to obtain their Lordships' guidance on the principles governing the absence of accused persons during the course of jury-management enquiries.

[69] The final aspect of the issue of jury-management, is that concerning the time at which the jury in this case were sent to deliberate.

[70] The applicants assert that it was unreasonable, given the length and complexity of the case, for the learned judge to have sent the jury, after 3:00 pm, to deliberate on its decision, with the end of the court day being 4:00 pm. The Crown contends that, given the unusual situation with the allegations as to jury-tampering that had been brought to the learned judge's attention that afternoon, it was not unreasonable for him to have sent the jury to deliberate at that time.

[71] In its judgment, this court referred to the decisions of the Board in **Shoukatallie v R** (1961) 4 WIR 111 and **Holder v The State** (1996) 49 WIR 450, as well as to the Criminal Bench Book. It took the view that there was no definitive time beyond which it was unreasonable for the jury to be asked to retire to deliberate on its verdict. It held that, in the circumstances, it was not unreasonable for the learned trial judge to have asked the jury to retire at the time that he did.

[72] Guidance is given at page 346 of the Criminal Bench Book:

> "The jury should not be placed under any pressure to arrive at a verdict. It is for that reason that the summation should not be concluded close to the end of the court day; the jurors should not have any anxiety, for example, about getting home etc, affecting their deliberations. For that reason a 3:00 p.m. benchmark has been adopted. Only in the simplest of cases would it be not unreasonable to send the jury to deliberate after that time. But the time is not an inflexible one. In more complex cases, it may well be unreasonable to conclude the summation during the afternoon session. In such cases, it is best to delay concluding the summation until early the following day in order to give the jury adequate time to consider all the issues before it."

[73] It is to be noted that the jury is not permitted to separate once it has been asked to deliberate on its verdict. Undoubtedly, the Criminal Bench Book will be sufficient in all but the rarest of cases. For the less usual cases, such as this, it will be of assistance to secure their Lordships' guidance as to this aspect of jury management. Undoubtedly, there will be no two cases that are exactly alike but their Lordships may be asked to state the principles, which govern the time at which a jury may be asked to retire to consider its verdict.

b. Prosecutorial misconduct

There is absolutely no merit in the issue as advanced by the applicants. The learned Director gave her opinion to the learned judge, as did defence counsel. As the court held in its judgment, it was for the learned judge to make a decision and he did so. The constitutional aspect of the issue has already been discussed above. The fact that she was not the prosecutor in charge of the case, the prosecutor was, nonetheless, her representative. Her input cannot be said to be improper.

c. The admissibility of the technology evidence

[74] The technology evidence has two main aspects to it. The first is an offshoot of the analysis of the effect of the admission of the CD, JS2, on the right to privacy. The second is the admissibility of a cellular telephone that is said to have been taken from Mr Palmer during the course of the investigation of Mr Williams' death.

[75] On the issue of the admissibility of JS2, although the analysis conducted above has concluded that the issue does not qualify for reference under section 110(1)(c), it does appear that it gave the court some concern, given the departure by the police, for at least a second time, from the provisions of the ICA. The court also considered the importance of the application of the constitutional right to privacy. Accordingly, it does seem that the issue warrants referral to their Lordships by virtue of section 35 of the JAJA. Mr Taylor conceded that this was an area of exceptional public importance.

[76] The applicants formulated the proposed questions in different ways. Mr Campbell formulated them thus:

> "v. What is the correct test to be applied to the admissibility of evidence which is obtained in breach of section 13 (3) j (iii) of the Charter of Fundamental Rights and Freedoms?
>
> vi Whether the Court, being an organ of the state pursuant to s.13(2)(b) of the Charter of Fundamental Rights and Freedoms, has a duty to exclude material obtained in breach [of] an Appellant's Constitutional rights, in light of the new landscape of the Charter of Fundamental Rights and Freedoms, 2011."

Messrs Palmer, Jones and St John used a common formulation:

> "7) Whether Jamaican trial court judges:

a. Have a constitutional duty (pursuant to section 13 (2) (b) of the Jamaican Constitution) or a common law duty or some other duty to exclude evidence which was obtained in a manner that infringes or denies rights or freedoms guaranteed by the Jamaican Constitution on the basis that the admission of it in the proceedings would bring the administration of justice into disrepute?

b. Alternatively, have to apply a restricted discretion to exclude evidence which was obtained in a manner that infringes or denies rights or freedoms guaranteed by the Jamaican Constitution that takes account of matters such as the importan[ce] of upholding that constitution?

c. Alternatively, have to [sic] an unrestricted discretion to exclude evidence which was obtained in a manner that infringes or denies rights or freedoms guaranteed by the Jamaican Constitution that takes account of matters such as the importan[ce] of upholding that constitution?"

[77] In light of Mr Taylor's concession on the point, he was invited to submit, in writing, a suggested wording of an appropriate question. He formulated his questions thus:

"[1] Whether or not in the absence of an express provision in the Charter of Fundamental Rights and Freedoms 2011 that a court shall exclude evidence that was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, Jamaican trial courts are entitled to exercise its discretion as to whether or not to admit into evidence material that may have been obtained in breach of a Charter Right?

[1.a] Did the fact that the information which was provided by the communication's provider DIGICEL to the police about the use of exhibit 14C (a BLACKBERRY cellular telephone) on the communications provider's network in circumstances where there was not strict compliance with the procedure laid down provisions of the **Interception of Communications Act** give rise to a breach of the **Charter of Fundamental Rights and Freedoms 2011**?

[1.b] And if the answer to [1.a] is yes what is the effect of that breach on the admissibility of the evidence?

[2] Whether the Learned Trial Judge erred in admitting exhibit 14C into evidence and accordingly this meant a failure to discharge his duty to ensure the overall fairness of the proceedings in accordance with section 13(2) (b) of the Charter of Fundamental Rights and Freedoms 2011 owing to the issues surrounding the chain of custody of exhibit 14C from the time it was taken from Mr Palmer by the police such as:-

[2.a] its integrity because of the unexplained use of exhibit 14C while it was in the custody of the police;

[2.b] the discrepancies in the evidence concerning the presence of an SD card in the exhibit 14c at the time that it was handed over to the police, where it was examined;

[2.c] the admissibility and integrity of a video clip said to have been found on the internal memory of exhibit[.]"

[78] Each formulation has its merits, but none fully reflects this court's consideration in its judgment, of the issue, or the juridical basis for the referral. Accordingly, the

following are the questions on this issue, that are certified for consideration by their Lordships:

a. Does the Charter of Fundamental Rights and Freedoms (the Charter) affect the court's authority to admit into evidence material acquired, secured or collated in breach of the rights and freedoms that the Charter guarantees, and if so, in what way?

b. How does the answer to that question affect the admission into evidence of JS2, which was acquired in breach of the right to privacy of communication and the Interception of Communications Act?

[79] On the issue of the admissibility of the cellular telephone, which is a crucial part of the prosecution's case, the applicants assert that the use and handling of the instrument is plagued with uncertainties that should have prevented its admission into evidence. According to the applicants, the uncertainties surrounding the instrument and its contents are such that, not only was the learned judge wrong to have admitted it into evidence, but this court erred in principle in holding that the mere possibility of tampering is insufficient to prevent admission into evidence. The applicants argue that this court's approach reduces the standard of proof that the prosecution bears. The applicants extend that reasoning to the admission of JS2, which also suffered from the uncertainty that it may be different from the master, or control copy of the CD, JS1, which had gone missing.

[80] Although Mr Taylor submitted questions in respect of exhibit 14C, the applicants are not on good ground in this regard. The handling of the chain of custody, and the question of fact which it entails, are matters, which have been well traversed. The fact that the principles had to be applied to the, previously unchartered, area of telecommunication does not require adjustment of the principles. This court, in its judgment in the appeal, reasoned that the issues of fact were properly placed before the jury for its consideration. It is not an issue that is of exceptional public importance and desirable in the public interest that a further appeal should be brought.

d. The publicity surrounding the case

[81] The applicants contend that, apart from the issue of their constitutional right to a fair trial, there is need for guidance to trial judges for handling situations where incidents occur during the trial which may prejudice the trial process. They contend that this court, in its judgment in this case, failed to give that guidance. They argue that it is necessary for the matter to be referred to their Lordships for their guidance.

[82] Learned counsel for the Crown opposed this aspect of the application on the basis that it had already had the attention of this court in **R v Porter and Williams** (1965) 9 WIR 1, and their Lordships' Board, in **Desmond Grant and Others v The Director of Public Prosecutions and Another** [1981] UKPC 20; [1982] AC 190.

[83] The publicity issue has already been considered in this judgment in the context of being a constitutional issue. This court also considered it in **R v Porter and Williams**, when the assertions on appeal were that occurrences during the trial would have

affected the jury and prejudiced the appellants' case. The court also considered steps taken by the learned trial judge to prevent a recurrence of the unfortunate events and his directions to the jury concerning the matter. It dealt with the issue by saying, in part, at page 9 of the report:

> "What this court has to determine is whether it can draw the inference that the jury must have concentrated upon the disorderly behaviour of the crowd and its evident hostility to the applicants rather than upon the evidence in the case, or that they probably were intimidated by such behaviour and thus biased against the applicants for the purpose of the trial. Having carefully considered the evidence and the relevant portions of the transcript we find ourselves quite unable to draw either of these inferences."

[84] In similar manner, this court in its judgment in this case, considered the previously decided cases and the actions of the learned judge and held that no prejudice had been shown. The court's assessment, at paragraph [484] of its judgment, has already been quoted above.

[85] **Desmond Grant v DPP** was concerned more with pre-trial publicity and is therefore not on all fours with the present case. Nevertheless, Counsel for the Crown is correct in the submission that this is not a matter to be referred to their Lordships.

[86] The issues as, as outlined in the joint speaking notes will now be discussed.

a. *The delay issue*

[87] Apart from the constitutional issues that arose in the judgment, the applicants have complained that the delay in having a decision on their respective appeals

constituted a breach of their right to a fair hearing in a reasonable time, as set out in section 16(1) of the Constitution. The applicants point, in particular, to this court's delay in delivering its judgment. They assert that the delay also manifested itself, to their prejudice, when this court failed to consider some statements that it had admitted, at their request, as fresh evidence. The statements, the applicants contend, concern the issue of a trial by an impartial tribunal, as guaranteed by section 16(1). They also contend that this is an issue that satisfies section 35 of the JAJA.

[88] The complaints concern the facts that:

a. the appeal was heard in July 2018 and the judgment was handed down in April 2020; and

b. although the court, at paragraph [44] of the judgment, recorded the fact that it had admitted the relevant statements into evidence, it did not consider them any further in the written judgment.

[89] The applicants rely on the fact that this court has, fairly recently, recognised that the issue of delay is worthy of the consideration of the Privy Council. It did so, they contend, when it referred the issue to the Privy Council, in the case of **Lescene Edwards v R** [2018] JMCA App 48.

[90] There are two basic flaws with this aspect of the applications. The first, is that the issue raised by the applicants does not involve an interpretation of section 16(1). In **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the Privy

Council held that the question of delay was more an issue of the application rather than the interpretation of section 20(1). Section 20(1) has, since that judgment, been replaced by section 16(1), but they are in identical terms.

[91] Their Lordships said, at paragraph 9 of their judgment:

> "Leave was granted under section 110(1)(c) of the Constitution, which gives a right of appeal in respect of final decisions 'on questions as to the interpretation of this Constitution'. Although no point was taken by the Crown, the Board doubts respectfully whether either point justified leave to appeal under that sub-section. The first issue did not arise, since the Court of Appeal accepted, and there is no dispute, that section 20 extends to post-conviction delay. On the second issue, it is not now contended that, in the event of a breach arising from such delay, section 20 'requires' a conviction to be quashed. **The submission is that the Court erred in the exercise of its discretion. On this basis, the issue seems properly characterised as one of *application* of the constitutional provision, rather than interpretation**." (Emphasis supplied) (Italics as in original)

[92] The second flaw in the applicants' position on this point is that their Lordships have previously pronounced on the issue of delay. They have determined that it is for this court to determine, by virtue of its knowledge of local conditions, whether or not the delay has been so inordinate as to amount to a breach of the right guaranteed by section 16(1). Their Lordships said, at paragraph 19 of **Melanie Tapper v DPP**:

> "…On their exercise of discretion it would require something exceptional to justify the Board substituting its opinion for that of the domestic court. In particular, the domestic court is much better placed to judge the significance of delay having regard to local conditions and pressures on the courts (see *Bell v Director of Public Prosecutions* [1985] AC 937, 953E-G). In the circumstances, the Board finds no grounds to

> question either their decision to reduce the sentence, rather than to adopt some other remedy, or the amount of the reduction." (Italics as in original)

[93] It is recognised that the issue of delay, by itself, is different from the issue of any prejudice that that delay may cause. In this case, it cannot be said that the delay in delivering the judgment caused any prejudice to the applicants. Their Lordships in **Melanie Tapper v DPP** said, in part, at paragraph 28 of their judgment:

> "…even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time."

Although there was fresh evidence adduced in the instant case, this court did not seem to consider it important to the outcome of the appeal. It cannot be said, as the applicants contend, that the delay caused the court to forget about the submissions concerning the fresh evidence, because it did mention the fact that it was adduced.

[94] It must also be stated that **Lescene Edwards v R** does not assist the applicants. The complaint in that case involved a 10-year delay before Mr Edwards' trial commenced. He asserted that his defence was prejudiced as a result. That is a very different set of circumstances from the applicants' case. In addition, at paragraph [16] of the judgment in **Lescene Edwards v R**, this court recognised the fact that Mr Edwards' case was, despite those factors, a borderline one:

> "As a consequence, it appears to us, that the circumstances of this case may fall for consideration under section 110(1)(c) and (2) of the Constitution. In whichever case (for it may be

> that with regard to section 110(1)(c), this matter is a borderline one, it not being a specific interpretation of the Constitutional provision), such delay in the conduct of the matter, during which period several other events have taken place, may have been to the detriment of the applicant in the conduct of his case."

[95] For those reasons, there is no basis to refer this issue for the consideration of their Lordships, either as an issue falling under the purview of section 110(1)(c) or under section 35 of the JAJA.

b. The failure to leave the alternative verdict of manslaughter

[96] The applicants criticised this court's handling of the ground of appeal dealing with the learned trial judge's failure to leave the alternative offence of manslaughter for the jury's consideration.

[97] The court identified the issue at paragraphs [412]-[413] of its judgment:

> "[412] And, on ground 16, with specific reference to Messrs St John and Jones, Mr Senior-Smith submitted that the judge ought to have directed the jury that the limited involvement which [the eyewitness] Mr Chow attributed to them was an insufficient basis upon which to find them guilty of murder.
>
> [413] Mr Senior-Smith relied heavily on the already very well-known joint decision of the United Kingdom Supreme Court and the Privy Council in **R v Jogee** and **Ruddock v The Queen** ('**Jogee & Ruddock'**) [2016] UKSC 8, [2016] UKPC 7, which we will consider in a moment."

[98] It resolved the issue partly by stating that the applicants had not provided any basis for the learned judge to have left the alternative offence to the jury. The court said at paragraph [421]:

> "...As Mr Taylor [for the Crown] pointed out, the appellants were indicted jointly for murder. The case for the prosecution was that they acted together and in concert in murdering the deceased. Their defences were a denial that they committed the offence. **There was therefore nothing in the evidence to ground a suggestion that any of them may have had an intention other than the intention to kill or to cause grievous bodily harm**. In these circumstances, in our view, the question of manslaughter did not arise and the judge was entirely correct to remove it from the jury's consideration." (Emphasis supplied)

[99] It must be said that the applicants are not on good ground on this issue. The case of **Jogee** and **Ruddock** has already explained their Lordships' stance in respect of the issue of "parasitic accessory liability". There is therefore no extraordinary public importance, in the sense that the issue needs clarification, or in the sense that there has been "a disregard of the forms of legal process, or by some violation of the principles of natural justice, or otherwise, substantial and grave injustice" (**Abraham Mallory Dillett v R**). There is no basis for referring the issue to their Lordships under the purview of section 35 of the JAJA.

c. The treatment of the applicants' respective unsworn statements

[100] There is a plethora of cases dealing with the treatment of unsworn statements by accused persons. Nothing new arises in this case in respect of that issue. It does not qualify under section 35 of the JAJA.

d. General matters including the learned trial judge's general directions to the jury

[101] The applicants have complained about a number of other issues. These are set out in their questions in the appendix. Included in these issues are matters such as:

a. the treatment of the evidence of the sole eyewitness, Mr Lamar Chow;

b. the treatment of evidence of efforts to identify the whereabouts of an alleged deceased person; and

c. the treatment of the good character evidence adduced on behalf of the applicants.

[102] The issues raised in these complaints do not give rise to questions of exceptional importance. An extract from **Michael Gayle v The Queen** is relevant to this point. Lord Griffiths, said, in part, at pages 289-290 of the report of the case:

> "Matters such as the weight properly to be given to evidence, and inferences that may or may not legitimately be drawn from evidence and whether a presumptive or final burden of proof has been discharged, are to be determined by the Court of Appeal in the local jurisdiction, and save in exceptional circumstances the Judicial Committee will not enter upon a rehearing of such issues (see *Muhammad Nawaz v King-Emperor* (1941) LR 68 Ind App 126, *Badry v Director of Public Prosecutions* [1983] 2 AC 297 at pages 302, 303, and *Sattar Buxoo v R* [1988] 1 WLR 820 at page 822)." (Italics as in original)

[103] Similarly, the treatment of good character evidence has already been the subject of several definitive decisions from their Lordships' Board, including **Teeluck (Mark) and John (Jason) v The State** [2005] UKPC 14; (2005) 66 WIR 319, **France and Vassell v The Queen** [2012] UKPC 28 and **Lawrence v The Queen** [2014] UKPC 2.

e. The sentencing issue

[104] The applicants accept that this court only disturbs a sentence where it is found to be manifestly excessive or out of the usual range of sentencing. They submit, however, that that approach is too limited, as the court is empowered, by section 14(3) of JAJA to review a sentence, even if it is not manifestly excessive as the sentence could be wrong procedurally or based on an incorrect principle of law. Section 14(3) of the JAJA states:

> "On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal."

[105] The applicants also contend that the court should have obtained a social enquiry report to determine a fair sentence. They further argue that some of the cases on sentencing, to which the Crown referred in the appeal, included cases that involved social enquiry reports. Accordingly, the use of those cases is unfair.

[106] Additionally, it was argued that Messrs Jones and St John were young at the time of the incident, yet the youngest applicant received the second highest sentence.

[107] The applicants are not on good ground with these submissions. The ground of appeal complained that the sentence was manifestly excessive. This court will disturb a trial judge's sentencing if it is founded upon a wrong principle of law. In **Matthew Hull v R** [2013] JMCA Crim 21, this court set out the guiding principle at paragraph [9]:

> "[9] An appellate court does not alter a sentence merely because the members of the court might have passed a different sentence. A sentence is only altered when there…appears to have been an error in principle. If a sentence is manifestly excessive, that is an indication of a failure to apply the right principles - see **R v Ball** 35 Cr App Rep 164."

[108] In the present case, the court considered the authorities and found that the sentences were not manifestly excessive, and that the learned judge had not erred in principle, save that he did not consider the time the applicants had spent on remand.

[109] The court relied on **Sylburn Lewis v R** [2016] JMCA Crim 30, and held that a social enquiry report is not mandatory (see paragraph [527] of the judgment). The court also relied on **Michael Evans v R** [2015] JMCA Crim 33 for the point that it would need to consider whether the social enquiry report would benefit the applicants.

[110] In relation to Messrs St John and Jones, the court acknowledged that the learned judge, in his sentencing remarks, considered each applicant separately. Section 35 of the JAJA has not been satisfied.

Conclusion

[111] Although the applicants proposed almost 40 questions for referral to the Privy Council, the vast majority do not fall for consideration under either section 110(1)(c) or section 110(2)(b) (as extended by section 35 of the JAJA). There are, however, three issues which fall for consideration by their Lordships, pursuant to section 110(2)(b), as being of exceptional importance and desirable in the public interest that a further appeal

should be brought, not only for the result of this case, but also for the guidance of the judiciary for future cases.

[112] The issues concern:

a. the admissibility of evidence which has been acquired in breach of a constitutional right guaranteed by the Charter of Fundamental Rights and Freedoms;

b. the handling of issues involving an enquiry as to jury misconduct or impropriety; and

c. the time at which it may be inappropriate to have a jury retire to deliberate on its verdict.

[113] As a consequence, the following orders are made:

1. The applicants are granted conditional leave to appeal to Her Majesty in Council, the decision of the Court of Appeal delivered on 3 and 17 April 2020, pursuant to section 110(2)(b) of the Jamaican Constitution for consideration of the questions set out below:

   a. Does the Charter of Fundamental Rights and Freedoms affect the court's authority to admit into evidence material acquired, secured or collated in breach of the rights and freedoms that the Charter guarantees, and if so, in what way?

   b. How, if at all, does the answer to that question affect the admission into evidence of JS2, which was

acquired in breach of the right to privacy of communication and the Interception of Communications Act?

c. How are enquiries involving jury impropriety or misconduct to be handled when they arise?

d. Whether the convictions of the applicants for murder are rendered unsafe by:

(i) the trial judge's management of the issue of jury impropriety that occurred during the course of the trial, in particular, the procedure that was adopted and the extent of the enquiry that was conducted;

(ii) the trial judge's refusal to discharge the jury (or any juror) following his enquiry into the issue of jury impropriety;

(iii) any inadequacy in the trial judge's directions to the jury following the enquiry into the issue of jury impropriety; and

(iv) the failure of the Court of Appeal to expressly demonstrate its findings and conclusions in respect of the fresh evidence that was adduced

concerning the issue of jury impropriety at the trial.

e. What principles govern the latest time at which a jury may be asked to retire to consider its verdict?

f. How, if at all, does the answer to question e. affect the convictions of these applicants?

2. The conditions on which leave is granted are:

(a) that the applicants shall each pay the sum of $1,000.00 within 30 days of the date hereof for the due prosecution of the appeal; and

(b) that within 90 days of the date hereof the applicants should take the necessary steps for the purposes of procuring the preparation of the record and its dispatch thereof to England.

3. The costs of and incidental to this application shall be costs in the appeal to Her Majesty in Council.

APPENDIX

THE APPLICANTS' QUESTIONS

[1] Mr Campbell's questions are as follows:

> "i. Whether the learned trial judge's failure to:
>
> a. Give an express warning to the jury to be cautious before accepting the evidence of Mr. Chow, as there was evidence to support a finding that he was a witness who may have been serving his own interest in giving evidence;
>
> b. Direct the jury's attention to the said evidence on which that issue arose; and
>
> c. Explain the significance of said evidence,
>
> breached the Applicant's Constitutional right to a fair trial pursuant to section 16 of the Constitution, resulting in a substantial miscarriage of justice.
>
> **In the alternative**, whether testimony from a witness, whose evidence does not rise to the level of being evidence of a confession but is nonetheless tainted by an improper motive, triggers the need for a direction from the judge to be cautious before accepting and acting upon that evidence.
>
> ii. Whether the right to a fair trial is compatible with the view that in all trials relating to murder, in which a body has not been found, evidence purportedly demonstrating 'the extent of the efforts made to exclude any possibility that the person allegedly murdered was still alive', regardless of its prejudicial effect, will always be admissible.
>
> iii. Whether the Learned Trial Judge's directions on evidence, having regard to the unique circumstances of this case, were sufficient to ensure a fair trial pursuant to the Applicant's right to a fair hearing.
>
> **In the alternative,** whether in all cases in which clear directions on the standard of proof have been given to a jury, it will be unnecessary for the judge to further direct the jury that they must rule out all inferences consistent with

innocence before they can find that an inference of guilt had been established, in light of the decision of **Ian McKay v R** [2014] JMCA Crim 30.

iv. Whether the manner in which the Learned Trial Judge presented the Applicant's defence, in his summation, deprived him of an accurate, fair and balanced consideration of his defence, resulting in a departure from his entitlement to a fair trial pursuant to section 16(1) of the Constitution of Jamaica, in particular, the Learned Trial Judge's failure to:

a. adequately alert the jury to the significance of the prosecution's evidence of the cell-cite positioning of the Applicant, to his defence that he did not participate whatsoever in what has been alleged to have happened at Swallowfield on 16 August 2011; and

b. give directions as to the relevance of Shawn Campbell's good character as it affects the issue of his propensity to commit the offence of murder.

In the alternative, whether, in a joint trial, good character directions can be fairly given without tailoring said directions in respect of each accused person separately.

v. What is the correct test to be applied to the admissibility of evidence which is obtained in breach of section 13 (3) j (iii) of the Charter of Fundamental Rights and Freedoms?

vi. Whether the Court, being an organ of the state pursuant to s.13(2)(b) of the Charter of Fundamental Rights and Freedoms, has a duty to exclude material obtained in breach [of] an Appellant's Constitutional rights, in light of the new landscape of the Charter of Fundamental Rights and Freedoms, 2011.

vii. Whether, the Court of Appeal's treatment of the statement of Mr. Chow dated 24 August 2011, adduced as fresh evidence, breached the Applicant's right to a fair trial pursuant to section 16 of the Constitution.

viii. Was the Court of Appeal's conclusion that a direction on the verdict of manslaughter was not appropriate in this case in

keeping with the Applicant's right to a fair hearing pursuant to section 16(1) of the Constitution?

ix. Given the nature, extent and volume of the publicity in the instant case, did the trial judge's actions, rulings and directions to the jury breach the Applicant's Constitutional right to a fair trial pursuant to section 16(1) of the Constitution?

x. Whether, in light of the Applicant's right to a fair hearing pursuant to section 16(1) of the Constitution, the Court of Appeal was wrong to find that the appellant's sentence was proper despite the errors of the trial judge in relation to the sentencing exercise at the trial?

In the alternative, whether in a difficult case with multiple Appellants, a Court of Appeal's reliance on antecedent reports in the absence of social enquiry reports is sufficient in determining whether the sentences imposed are appropriate, even if the Court is satisfied that the sentences are within range.

xi. Whether the delay between the hearing of the Appeal and delivery of judgment violated the Applicant's right to a fair trial under section 16(1) of the Constitution of Jamaica and impacted the Honourable Court of Appeal's recall of submissions presented, having regard to the unusually voluminous nature of the record of appeal herein, within the context of the Jamaican criminal practice.

xii. What is the procedure that ought to be followed by a trial judge in this jurisdiction, where allegations of jury misconduct and/or impropriety arise during a jury trial[?]

In the alternative, whether the procedure adopted by the Learned Trial Judge in relation to the allegations of jury misconduct and/or impropriety was sufficient to ensure the Applicant's right to a fair hearing pursuant to section 16 of the Constitution.

xiii. Whether trial judges have a Constitutional duty to investigate matters that give rise to a real possibility that a jury is neither independent nor impartial?

xiv. Did the Court of Appeal err in concluding that the Appellant's right to a fair trial pursuant to section 16 of the Constitution was not breached, despite their absence when matters were determined in the learned trial judge's chambers[?]

xv. Whether the Court of Appeal's failure to consider and/or its treatment of the fresh evidence, in the form of the affidavit of Miss Kymberli Whittaker and witness statements of Claudine Bullens and Charmaine Page, breached the Applicant's right to a fair trial pursuant to section 16 of the Constitution.

xvi. Whether the Learned Trial Judge's treatment of the technological evidence, that is, exhibit 14C and JS2, in particular, their admission into evidence and directions given in relation thereto is compatible with section 16(1) of the Constitution of Jamaica.

xvii. Whether the conduct of the Director of Public Prosecutions during the trial breached the Applicant's right to a fair trial pursuant to section 16 of the Constitution.

xviii. Whether, in light of section 13(2)(b) of the Constitution, the powers under section 94(c) ought to be invoked by a Director of Public Prosecutions where it comes to her attention that the right of an accused to a fair hearing by an *independent and impartial jury*, pursuant to section 16 of the Constitution, is or has been abrogated.

xix. Whether the Learned Trial Judge's management of the jury between (and including) the conclusion of the summation and the rendering of the final verdicts, was in breach of the Appellant's right to a fair hearing, in particular, his right to a fairly considered verdict." (Underlining removed, bold type and italics as in original)

[2] The questions which Mr Campbell wishes to pose to the Privy Council are also raised by some of the questions which the other applicants wish to pose.

[3] Mr Palmer's questions are as follows:

> "1) Did the conduct of the trial breach the Applicant's constitutional or common law rights (including the Applicant's right to a fair trial)?
>
> 2) Did the trial judge erred [sic] by failing to ensure that the jury was sufficiently independent and impartial?
>
> 3) Without prejudice to the generality of the second question, should the trial judge have taken further action when faced with allegations of matters that raised questions about the independence and impartiality of the jury?
>
> 4) Without prejudice to the generality of the second and third question[s], was the trial judge subject to a constitutional duty to investigate matters that might suggest a juror/the jury lacked independence and impartiality?
>
> 5) Did the trial judge's actions during the trial and his directions to the jury ensure a fair trial for the Appellant given the widespread nature and sources of adverse publicity in this case?
>
> 6) Did the Court of Appeal err by concluding that the Applicant enjoyed a fair trial despite their absence when matters were determined in chambers?
>
> 7) Whether Jamaican trial court judges:
>
> a. Have a constitutional duty (pursuant to section 13 (2) (b) of the Jamaican Constitution) or a common law duty or some other duty to exclude evidence which was obtained in a manner that infringes or denies rights or freedoms guaranteed by the Jamaican Constitution on the basis that the admission of it in the proceedings would bring the administration of justice into disrepute?
>
> b. Alternatively, have to apply a restricted discretion to exclude evidence which was

obtained in a manner that infringes or denies rights or freedoms guaranteed by the Jamaican Constitution that takes account of matters such as the importan[ce] of upholding that constitution?

c. Alternatively, have to [sic] an unrestricted discretion to exclude evidence which was obtained in a manner that infringes or denies rights or freedoms guaranteed by the Jamaican Constitution that takes account of matters such as the importan[ce] of upholding that constitution?

8) Whether it was correct to allow exhibit 14c and its contents (JS2) into evidence in light of the inability of the technological experts to vouch for the integrity of the material?

9) Is the conviction of the Applicant safe in light of the trial judge's failure to give a warning to the jury that Mr. Chow had an interest to serve?

10) Was the Court of Appeal correct to find that a direction on the verdict of manslaughter was not appropriate on the facts of this case given that the Learned Trial Judge erred in not directing the Jury on the availability of an alternative verdict of manslaughter in respect to Adidja Palmer :

a. that an alternative verdict of manslaughter was available on evidence adduced at trial;

b. that such a direction ought to have been given irrespective of the wishes of the Prosecution or Defence Counsel;

c. that such a direction ought to have been given not withstanding [sic] it was inconsistent with either how the Prosecution put their case against AP; that such a direction ought to have been given not withstanding it was inconsistent with either how the Defence put their case for [Mr Palmer];

11) Were the trial judge's directions on the law, evidence and the defence's cases sufficiently complete, balanced and fair to ensure the Applicant's constitutional and common law rights?

12) Is the conviction of the Applicant safe in light of the fresh evidence that was admitted in the Court of Appeal which was not assessed in the decision of the court?

13) Whether the Court of Appeal was wrong to apply the general guidelines to refuse to further examine the appellant's sentence despite finding that the trial judge could have been assisted by social enquiry reports?

14) Whether the Court of Appeal's approach to the sentencing exercise was consistent with fair trial rights of the Applicant who may be now subjected to a lengthier sentence than is just because the Court declined to get social enquiry reports or to follow now established sentencing guidelines which are steeps in common law practices of fair hearing sentencing considerations and procedure to assist judges in arriving at the appropriate sentences for the Applicant based on the peculiar circumstances of his and the relevant sentencing objective?

15) Whether the delay between the hearing of the Appeal and delivery of judgment violated the Applicant's right to a fair trial under section 16(1) of the Constitution of Jamaica and impacted the Honourable Court of Appeal's recall of submissions presented, in particular the submissions concerning Exhibit 14c as well as the unchallenged narrative of events in relation to what the Jurors had knowledge of resulting in complete contamination of the panel before rendering its verdict.

16) Whether the conduct of the Director of Public Prosecutions during the trial breached the Applicant's right to a fair trial pursuant to section 16 of the Constitution.

17) Whether, in light of section 13(2)(b) of the Constitution, the powers under section 94(c) ought to be invoked by a Director of Public Prosecutions where it comes to her attention that the right of an accused to a fair hearing by an independent and impartial jury, pursuant to section 16 of the Constitution, is or has been abrogated." (Underlining removed)

[4] Questions 1–9 and 11-13 of the respective list of questions proposed by Messrs Jones and St John are identical to each other and to their equivalent numbers in the questions proposed by Mr Palmer. Questions 1-13 and 15, by Messrs Jones and St John are identical. Those questions will not be repeated here. Question 10 is one of those common to both Messrs Jones and St John:

"10) Was the Court of Appeal correct to find that a direction on the verdict of manslaughter was not appropriate on the facts of this case?"

[5] Question 14, for both Messrs Jones and St John, is of the same effect, although there is a slight variation between them. Question 15 is identically worded, but follows from question 14. Mr Jones' questions 14 and 15 are:

"14) Whether the applicant (who was 22 years at time of incident received a fair sentencing hearing, pursuant to section 16 of the Constitution, in light of the Court of Appeal's finding that the trial judge did not get a desirable social enquiry report which would have assisted the court to determine whether the sentences imposed were appropriate for the applicant?

15) If the answer to the above question is no, can a mere reference to the sentencing guideline range be sufficient to fulfill [sic] a fair sentencing hearing when the possibility exists that an individualized social enquiry report could result in the appellant receiving a shorter period to be eligible to apply for probation (of

up to 5/10 years) in light of his own factual circumstances and the relevant sentencing objectives?"

Mr St John's question 14 is:

14) Whether the Appellant's [sic] received a fair sentencing hearing, pursuant to section 16 of the Constitution, in light of the Court of Appeal's finding that the trial judge did not get a desirable social enquiry report which would have assisted the court in determining whether the sentences imposed were appropriate for the particular applicant?