[2020] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 29, 30, 31 & 32/2014

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA

SHAWN CAMPBELL
ADIDJA PALMER
KAHIRA JONES v R
ANDRE ST JOHN

Bert Samuels, Miss Bianca Samuels, Miss Dania Allen and Isat Buchanan for the appellant Shawn Campbell

Mrs Valerie Neita-Robertson QC and Tom Tavares-Finson QC for the appellant Adidja Palmer

Robert Fletcher and Donahue Martin for the appellant Kahira Jones

Oswest Senior-Smith for the appellant Andre St John

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

9, 16-20, 23, 24 July 2018 and 3 April 2020

MORRISON P, BROOKS AND F WILLIAMS JJA

Layout of the judgment:

Introduction

[1] This is the judgment of the court, to which each member has contributed a substantial part.

[2] The appellants are Messrs Shawn Campbell (also known as 'Shawn Storm'), Adidja Palmer (also known as 'Vybz Kartel'), Kahira Jones, and Andre St John (also known as 'Mad Suss'). For the purposes of this judgment, save where it is necessary to refer to the appellants individually by name, we will refer to them collectively as 'the appellants'.

[3] The appellants were charged with the murder of Mr Clive "Lizard" Williams ('the deceased'). The case for the prosecution was that the deceased was murdered on 16 August 2011, but the case was unusual in that the deceased's body was never found.

[4] Mr Calvin Haye and Mr Shane Williams were charged along with the appellants with the murder of the deceased. However, the prosecution did not proceed to trial against Mr Haye, while Mr Williams was ultimately acquitted by the jury.

[5] On 13 March 2014, after a trial lasting 64 days before Campbell J ('the judge') and a jury in the Home Circuit Court, the appellants were convicted of the murder of the deceased. And, on 3 April 2014, the judge sentenced all four appellants to imprisonment for life at hard labour. He ordered that Messrs Campbell and Jones should each serve a minimum of 25 years in prison before becoming eligible for parole, while Messrs Palmer and St John should serve a minimum of 35 years and 30 years respectively.

[6] Pursuant to leave to appeal granted by a single judge of this court on 13 March 2017, the appellants now appeal against their convictions and sentences. They have filed numerous grounds of appeal, canvassing a range of issues. In broad outline, these may be summarised as concerning (i) the admissibility of evidence derived from cellular telephone analysis and video recordings; (ii) the credibility of the prosecution's sole eye-witness; (iii) the judge's management of various issues concerning the jury (including whether they were subjected to undue pressure as a result of the hour at which they were invited to retire); (iv) the judge's directions to the jury; (v) the admissibility of

evidence adduced from Deputy Superintendent Vernal Thompson; (vi) the impact of publicity on the fairness of the trial; and (vii) whether the sentences which the judge imposed were manifestly excessive.

The facts in summary

[7] In order to make the issues which arise on this appeal intelligible, we must first summarise the facts of the case, albeit in some detail.

[8] The case against the appellants was based on a combination of direct evidence and circumstantial evidence. The principal item of direct evidence came from Mr Lamar Chow (otherwise known as 'Wee'), the prosecution's sole eyewitness.

[9] The case for the prosecution was to the following effect. The deceased and Mr Chow were given two unlicensed firearms, which were said to belong to Mr Palmer, for safekeeping. Despite a deadline of 8:00 pm on 14 August 2011 having been set by Mr Palmer for the return of the firearms, the deceased and Mr Chow were unable to account for the firearms at that time. They were therefore summoned to Mr Palmer's house at 7 Swallowfield Avenue, Havendale, to meet with him.

[10] In this judgment, we will refer to 7 Swallowfield Avenue interchangeably as 'the house' or 'the premises'.

[11] On 16 August 2011, urged and accompanied by Mr Campbell, Mr Chow and a reluctant, fearful, deceased, travelled by taxi to the house. When they arrived, Mr Palmer, Mr Jones and Mr St John were all present. Mr Palmer then proceeded to question the

deceased and Mr Chow as to the whereabouts of the firearms and what plans they had to replace them. The deceased's response was that he would buy replacements. Immediately after that, Mr Jones held the deceased from behind, whereupon Mr Chow ran into a room at the rear of the house and tried unsuccessfully to lock himself inside of it. Messrs Palmer and Campbell opened the door to the room, and Mr Palmer held Mr Chow around the neck and brought him back to the hall-way of the living room. There, Mr Chow saw the deceased lying motionless on his back on the ground. The deceased appeared to be trying unsuccessfully to speak, while Mr Jones stood bending over him. Mr St John, with a building block in his hands, also stood over the deceased.

[12] Fearing for his own safety, Mr Chow fled from the house, climbed over the gate and ran up the road. He was chased by Mr Palmer, who sought to have him return to the house, assuring him that he had nothing to worry about. Mr Chow did not go back to the house. Instead, he went with Mr Palmer to a hospital where Mr Palmer was treated for a dog-bite that he had apparently received during the chase. On the following day, Mr Palmer invited Mr Chow to accompany him, Mr Campbell and others to Guyana. The purpose of the trip was to avoid questioning by the police. However, Mr Chow declined to go and made his own arrangements to leave the community in which he lived.

[13] Nothing was seen or heard of the deceased after 16 August 2011. His girlfriend, Ms Oneika Jackson, who last saw him on the morning of that day, had communicated with him by way of text messages throughout the day, including during the trip to the house, right up to around 7:26 pm that evening. However, after that, her calls to the deceased's

cellular telephone went unanswered. In addition, the deceased's sister, Mrs Stephanie Brakenridge (who was also called Nadine), made several futile attempts to contact him by telephone in the afternoon of 16 August 2011, after having spoken to him that morning. She had last seen him two days before, on 14 August 2011, when he and Mr Chow came to her house in Waterford. On that occasion, they both appeared to be frightened and were constantly on their cellular telephones.

[14] On 22 August 2011, a team of police officers went to the house. They were investigating an "alleged" case of homicide. The house appeared to be unoccupied at that time. An inspection of the house revealed disorderly and ransacked rooms, with items of clothing all over the floor in one of them. The police officers also observed that the house smelled like disinfectant ("Fabuloso").

[15] On 24 August 2011, Mr Chow gave a statement to the police. Based on the information received, a police team accompanied him to Havendale, where he pointed out the house to them.

[16] On 25 August 2011, having ordered a forensic examination of the premises, the police placed yellow tape around the perimeter wall, treating the premises as a crime scene. When the police returned there on 27 August 2011, it was discovered that the entire interior of the house had been destroyed by a fire, of which the police had had no report.

[17] The police forensics team conducted their investigations on 29 August 2011, at which time it was reported that a foul odour had by now started to emanate from the

living room of the house. Upon completion of the forensic examinations, caution tape was again placed along the perimeter wall of the premises. But, on a subsequent visit to the premises on 30 September 2011, it was discovered that the rear of the house had been demolished. A search for the body of the deceased by digging up the rear of the premises proved fruitless.

[18] The police took the appellants into custody on 30 September 2011. Among the items of property taken from Mr Palmer were four cellular telephones, including two Blackberry smart-phones. Two cellular telephones belonging to Messrs St John and Williams were also retrieved and a total of 10 cellular telephones were seized during the operations. These telephones were handed over to the Communications Forensics and Cybercrimes Unit ('CFCU') of the Jamaica Constabulary Force ('JCF').

[19] As might have been expected, Mr Chow's credibility was severely impugned at the trial. Among the matters relied on for this purpose were: (i) the alleged internal inconsistencies and discrepancies in his evidence; (ii) the technical evidence, which we will mention below, relating to the timing and place of origin of telephone calls to and from his cellular telephone on 16 August 2011; and (iii) the production of a letter dated 13 November 2013 purportedly written by him to the Public Defender. In the letter, Mr Chow stated that he had in fact seen the deceased alive after 16 August 2011, and that he, Mr Chow, had been pressured by the police to give the statement which he gave on 24 August 2011.

[20] In addition to Mr Chow's testimony, the prosecution relied heavily on evidence derived from the cellular telephones. This evidence included numerous text messages, Blackberry messages, voice notes and a video, all of which were said to have been extracted from a Blackberry Torch cellular telephone, a digital data storage card (SD card) and a subscriber identity module card (SIM card). Both cards were found in that cellular telephone. That instrument was allegedly taken from Mr Palmer. As the context allows, we will refer to that instrument and its cards as exhibit 14C.

[21] Some of the text messages were from Ms Jackson's cellular phone. The text messages suggested that, when they were written, the deceased was, against his better judgment, in a car with Mr Campbell and Mr Chow, on the way to a meeting with Mr Palmer. In his text exchanges with Ms Jackson, the deceased expressed palpable fear for his life and begged her to have his sister call the police to rescue him.

[22] According to the prosecution, those bits of correspondence and communication media, taken as a whole, suggested the fact of the killing, the reason for the killing, the method of disposal of the deceased's body and the identity of at least one of the killers, namely, Mr Palmer.

[23] In order to ground this evidence, the prosecution adduced evidence from representatives of Digicel (Jamaica) Limited ('Digicel'). Their evidence described in considerable detail the nature of cellular telephone technology, the architecture of the cellular telephone network in Jamaica and the methodology of cellular telephone analysis.

[24] Detailed evidence of the cellular telephone analysis was provided by Corporal Shawn Brown, who was a communications analyst and certified cellular site surveyor assigned to the CFCU. Pursuant to notices issued to Digicel, purportedly under the provisions of section 16(2) of the Interception of Communications Act ('the ICA'), Corporal Brown obtained communication data (call data records, text message and subscriber information) relating to various cellular telephone numbers, including those attributed to the deceased and Mr Palmer. With the aid of a computer, Corporal Brown was able to confirm that, during the course of 16 August 2011, there was constant communication between Mr Campbell, the deceased and Mr Chow, for the most part; and also, to a lesser extent, between Mr Campbell and Mr Palmer.

[25] Further evidence was adduced through Detective Sergeant Linton of the CFCU of his analysis of voice notes, Blackberry and text messages from exhibit 14C. Among the telling pieces of evidence relied on by the prosecution were Blackberry messages sent on 19 August 2011, attributed to Mr Palmer, stating that they had chopped up the deceased, "fine fine", like "mincemeat", and "dash him weh".

[26] Not surprisingly, all of this evidence was strongly challenged by counsel for the defence. In cross-examination, the analytical methodology used by both Constable Brown and Sergeant Linton in relation to the cellular telephones and the Blackberry messages was attacked; questions were raised in relation to the chain of custody, the general integrity of the exhibits and the potential for corruption of the data. Sergeant Linton's integrity and impartiality were also impugned.

[27] In their defence, all of the appellants gave unsworn statements from the dock. They maintained their innocence and denied any participation in the murder of the deceased.

[28] Mr Palmer denied ever seeing the deceased at the house. The only time he recalled encountering the deceased, he said, was at stage shows when the deceased accompanied Mr Campbell to them. Mr Palmer recounted the events leading to his arrest and eventual charge for the murder of the deceased and the multiple allegations by the police against him that turned out to be false. He also referred to the fact that the then Minister of National Security had publicly ascribed blame to him as one of the factors "mashing up Jamaica". He contended that this was prejudicial to his defence.

[29] Mr Palmer's sister gave favourable evidence as to his character, his family history and his educational qualifications.

[30] Mr Campbell said that on 16 August 2011 the deceased and Mr Chow had freely followed him in a vehicle to Havendale. He said that the deceased exited the vehicle at a nearby guest house and Mr Chow exited at 7 Swallowfield Avenue. He said that he left Mr Chow there and, later that same night, Mr Chow came to his house and told him that Mr Palmer had received a dog-bite and had to be taken to the hospital. At that time, Mr Chow made no mention of any other incident.

[31] Mr Jones stated that he had never killed anyone, he was not a murderer, and Mr Chow and the police had conspired to send him and the other appellants to prison by telling lies on them.

[32] Mr St John stated that he was a professional barber and that he was accused of murder because of his association with Mr Palmer. He was unaware of where the deceased lived. However, on 16 August 2011, when Mr Chow entered the premises at 7 Swallowfield Avenue, he was on his way out, heading to his barber shop. Mr Chow, he said, was unaware that the dog was loose and Mr Palmer, in an effort to protect Mr Chow, got bitten. Mr St John said that he took the dog and tied it to the back of the house, and on his return, Mr Palmer and others were not in the yard. He also maintained that the police and Mr Chow were conspiring against him.

[33] Apart from its length, the appellants' trial was also unusual in other respects. First, on 7 January 2014, while the trial was in progress, a report was made to the judge of an encounter between a member of the jury and one of the counsel appearing for the defence. As a result, the judge made various enquiries of all concerned in chambers and decided, with the apparent agreement of all counsel present, to continue with the trial.

[34] The judge then informed the jury of the report which he had received and told them that he had conducted an enquiry into the circumstances. The judge explained that, having spoken to the juror, the counsel involved and all the attorneys present, "we are firmly of the view that what transpired was an innocent interaction, it came out of inadvertence … and it is unlikely to affect us adversely, or in any way". The usual warning was then issued to the jurors before they were discharged for the day (Vol IV, pages 2061-2062 of the transcript).

[35] Then, on 6 February 2014, after the matter had already been on foot for close to eight weeks, there was a dramatic turn of events. As a result of a report made to the Registrar by a member of the jury ('juror number 11'), the judge invited all counsel in the case to see him in chambers. Although the meeting was placed on the record of the court, none of the appellants was invited to attend. Juror number 11, who was present at the meeting, told the judge that her son had been in custody at the Horizon Adult Correctional Centre ('Horizon') since August 2011. After the appellants' trial had begun, on a Friday when there was no sitting of the court, she went to Horizon to visit her son. As she awaited his arrival in the lobby, Mr St John came into the area. He appeared to be surprised to see her. When she spoke to her son on a subsequent occasion, he told her that Mr Palmer mentioned to him that Mr St John had told him that he had seen his mother, but that he (Mr Palmer) had not told the other appellants about it. On hearing this, juror number 11 became concerned for her son's safety. She gave as the basis for her fear the fact that the appellants now knew that her son was at Horizon, and that he and Mr St John were housed on the same block.

[36] After some discussion, the judge indicated, with the apparent agreement of all counsel present in his chambers, that he would release juror number 11 from further service on the jury. While still in chambers, the judge then made further enquiries of the forewoman, to whom juror number 11 had also spoken, as to whether the other members of the jury were aware of what she had said. The forewoman stated that they were not. She assured the judge that she felt able to continue with her duties as a juror, although she intended to say something to the other jurors, "to soothe everybody's mind" (Vol VII,

page 4063 of the transcript). This elicited a suggestion from the judge that, insofar as juror number 11 was concerned, the forewoman might want to tell the other jurors something along the lines that, "[t]he Court feels that her personal situation will not allow her to continue and you don't know what was said to us". On the resumption of the trial in open court, the judge excused juror 11, explaining that she had a "personal difficulty which will cause her not to be able to serve on the panel further" (Vol VII, page 4065 of the transcript).

[37] And finally, on 13 March 2014, which, as it turned out, was the last day of his summation, the judge was again obliged to convene a hearing in his chambers. Counsel for the appellants and for the prosecution, including Miss Paula Llewellyn QC, the Director of Public Prosecutions, were in attendance. The appellants were again absent. The judge told counsel that it had been brought to his attention that a member of the jury had attempted to "persuade another member of the jury by offering a [sic] $500,000 to do a particular thing … to go which way … I don't know what it is, but whatever way" (Supplemental Record of Appeal, Vol X, page 1). It appears that the juror had made an offer to more than one of the others. The juror who made these offers was said to be the same juror who had had the encounter with defence counsel at an earlier stage of the trial.

[38] The forewoman was again invited into the judge's chambers. There, she was questioned at length by the judge as to the circumstances in which the offers were allegedly made. It appeared that the forewoman had recorded the exchange between herself and the juror who made the offers. After the forewoman was excused from

chambers, the judge asked, perhaps rhetorically, "Can we possibly continue or we have to bring it to an end? That is the decision I have to make" (Supplemental Record, Vol X, page 10).

[39] After a 10-minute break, during which the prosecution and defence teams conferred separately, Miss Llewellyn indicated that the prosecution was prepared to proceed, but suggested that the judge should, "[j]ust warn [the jury] again about their oath". However, both members of the defence team who spoke, Mr Tavares-Finson and Mr Rogers, expressed serious reservations about proceeding under the circumstances. After hearing counsel on both sides, the judge indicated that he would "be proceeding to finality" that afternoon (Supplemental Record, Vol X, page 12).

[40] As he said he would, the judge concluded his summation shortly after 3:30 pm that afternoon and the jury were invited to retire at 3:42 pm. At 5:35 pm they returned with a verdict which was not unanimous. So, after advising them that the time at which the law permitted a majority verdict to be taken had not yet arrived, the judge sent them out again at 5:46 pm. Just over 20 minutes later, at 6:08 pm, the jury returned to court with a verdict (by a majority) of guilty of murder against the appellants.

The issues on appeal

[41] At the start of this appeal, counsel for the appellants all sought and were granted permission to abandon the original grounds of appeal filed on behalf of their respective clients and to argue the supplemental grounds filed in their stead. As might have been expected, the appellants filed a great many supplemental grounds of appeal between

them. However, there was also considerable overlap between the grounds and we hope that we do them no disservice by categorising the issues which arise for our consideration in this appeal as follows:

A) The admissibility of the cellular phone and video evidence (exhibit 14C) (including the judge's directions to the jury on these matters)

(i) whether the technology evidence admitted at the trial (including exhibit 14C) was in breach of statute and common law and, if so, the effect of the breach on the appellants' trial (ground 10/Shawn Campbell (SC), grounds 1 and 3/Adidja Palmer (AP), Kahira Jones (KJ), Andre St John (AStJ));

(ii) whether the directions of the judge on how to approach this evidence were adequate in all the circumstances (grounds 2 and 4/AP, KJ, AStJ).

B) The judge's handling of the jury management issues which arose during the trial

(i) whether the appellants should have been present during the conduct by the judge of hearings in chambers with respect to the matters relating to the jury (ground 5/SC and ground 11/AP, KJ and AStJ);

(ii) whether the judge should have conducted an enquiry or discharged the jury when he was apprised of issues relating to the offer of a bribe to the foreman/jury (ground 8(a) and ground 8(b)/SC) ;

(iii) whether the late retirement of the jury resulted in undue pressure on them to arrive at a verdict (ground 7/SC and ground 8/AP, KJ and AStJ);

(iv) whether the conduct of the learned Director of Public Prosecutions amounted to prosecutorial misconduct (ground 6/SC).

C) The judge's directions to the jury (other than in relation to the admissibility of the cellular telephone and video evidence)

(i) whether the judge's directions to the jury in relation to the letter purportedly written by Mr Chow were inappropriate, inaccurate and/or prejudicial to the appellants, thus denying them the substance of a fair trial (ground 5/AP, KJ, AStJ);

(ii) whether the judge's directions in respect of the treatment of inferences were adequate (ground 6/AP, KJ, AStJ);

(iii) whether the judge's directions in respect of the law of circumstantial evidence were adequate (ground 7/AP, KJ, AStJ);

(iv) whether the judge's directions on the proper approach to the unsworn statements made by the appellants were adequate and/or appropriate (ground 9/AP, KJ, AStJ);

(v) whether the judge made unjustified, unreasonable, improper, palpably biased and/or prejudicial comments with respect to different aspects of the evidence (ground 10/AP, KJ, AStJ);

(vi) whether the judge dealt with the respective defences of the appellants adequately or fairly (grounds 9/SC and 14/KJ, AStJ);

(vii) whether, on the evidence adduced at the trial, the judge erred in not leaving it open to the jury to return verdicts of manslaughter, or at any rate in relation to the appellants Jones and St John (grounds 15 and 16/AP, KJ, AStJ).

D) The admissibility of Deputy Superintendent Thompson's evidence

E) The impact of publicity

Whether, given the nature, extent and volume of the publicity regarding the trial (pre-trial, during trial, post-trial) the appellants can receive a fair trial in Jamaica (ground 13/AP, SC and AStJ).

F) Sentencing

Whether the sentences imposed by the judge were manifestly excessive in all the circumstances of the case (grounds 11/SC and 12/AP, KJ, AStJ).

Two preliminary applications

[42] On 9 July 2018, at the outset of the hearing of the appeal, we heard applications by the appellants for leave to adduce fresh evidence and for the appeal to be considered on paper.

[43] In the first application, Messrs Palmer, Jones and St John sought leave to admit the affidavit of Miss Kymberli Whittaker, who is an attorney-at-law, and copies of the witness statements of two jurors who were involved in the appellants' trial. For his part, Mr Campbell sought leave to adduce fresh evidence in the form of affidavits sworn to by him and by Miss Kimberley Cranston on 27 April 2018 and 25 April 2018 respectively; and the hand-written statement of Mr Lamar Chow dated 24 August 2011.

[44] After hearing the submissions of counsel on both sides, the court granted leave to the appellants Messrs Palmer, Jones and St John to adduce as fresh evidence the affidavit of Miss Kymberli Whittaker and the copies of the witness statements of the two jurors. In relation to Mr Campbell's application, leave was granted to adduce his affidavit, sworn to on 27 April 2018, and the handwritten statement of Mr Lamar Chow dated 24 August 2011. The court refused the application for leave to adduce the affidavit of Miss Kimberley Cranston sworn to on 25 April 2018.

[45] The application for the appeal to be considered on paper was also refused and the hearing of the appeal, which was originally set for three weeks, proceeded in accordance with a somewhat abridged timetable.

Issue A - The admissibility of the cellular phone and video evidence (exhibit 14C) (including the judge's directions to the jury on these matters)

[46] We have already stated in broad outline the evidence upon which the prosecution relied in this matter. As we have indicated, apart from Mr Chow's testimony, the prosecution relied heavily on various items of evidence which may collectively be referred to as the "technology evidence". In this appeal, as at the trial, counsel for the appellants spent considerable time and effort in attempting to demonstrate that, in addition to the fact that Mr Chow's testimony ought not to have been relied upon, exhibit 14C ought not to have been allowed into evidence.

The technology issues

[47] The grounds of appeal that are relevant to the technology issues are ground 10 of Mr Campbell's grounds of appeal and grounds 1, 2, 3, and 4 of the joint grounds of appeal of the other appellants. These grounds complain about the integrity of the technology evidence that was adduced by the prosecution and the judge's handling of that evidence, both in respect of its admission as well as his directions to the jury.

[48] Ground 10, for Mr Campbell, states:

> "The [learned judge] erred when he left exhibit 14C, one of the cellphones [sic] relied on by the prosecution, for consideration by the jury, in circumstances where there was

direct evidence that the integrity of the said cell phone had been significantly compromised."

[49] The relevant grounds for the other appellants state:

Ground 1

"The Learned Trial Judge erred in admitting evidence of the cell phones and the data therefrom which comprised one of the fundamental strands of the case for the prosecution. The evidence had demonstrated that these had been compromised and contaminated to such an extent that there was more than a reasonable doubt about their integrity as evidence."

Ground 2

"The Learned Trial Judge failed in his summation to adequately deal with the issue of compromise of the cell phones and the relating [sic] data which were admitted as exhibits. His failure to do so was a misdirection which denied the Appellants a fair and balanced consideration of the case against them."

Ground 3

"The Learned Trial Judge erred in admitting video graphic [sic] evidence which was highly prejudicial and of little, if any, probative value. By so doing, he invited the jury to speculate about the contents of the video and any possible linkages to the appellants thereby compounding the prejudice and denying them a fair trial."

Ground 4

"The Learned Trial Judge failed to treat adequately with the videographic evidence that he had admitted and in so failing denied the appellants a fair and balanced consideration of their case by the jury."

[50] Three specific areas arise for analysis from these complaints:

a. the admissibility of exhibit 14C, given:

i. the breaks in the chain of its custody from the time that exhibit 14C was taken from Mr Palmer to the time that it was examined by the Detective Sergeant Patrick Linton, the Police Computer Forensic Examiner;

ii. its admitted, unexplained use, while it was in the custody of the police, and before it was examined by Sergeant Linton;

iii. the discrepancies in the evidence concerning the presence of an SD card in the instrument at the time that it was handed over to the CFCU, where it was examined; and

iv. the admissibility and integrity of a video clip said to have been found on the internal memory of exhibit 14C.

b. the admissibility of a computer compact disc (CD) (referred to hereafter as JS2) that had been prepared and supplied to the police by the telecommunications provider, Digicel, in respect of the use of exhibit 14C on Digicel's network for a period which included 16 August 2011, given:

i. the questions relating to JS2's identity and integrity; and

ii. the admission that the data on JS2 was not provided in compliance with the provisions of the ICA; and

c. the judge's treatment of the technology evidence, in his address to the jury.

[51] The general issue of the admission of material into evidence will be first addressed before specifically considering the relation of that law to the admission of exhibit 14C, the data (including the video clip) thereon, and exhibit JS2.

[52] The judge's treatment of that evidence in his summation to the jury will then be considered.

(a) The decision to admit material into evidence

[53] The judge was sailing in relatively uncharted waters in his quest to determine the admissibility of exhibit 14C and its contents. There is very little in the way of learning, in this jurisdiction, on the relevant issues. For this reason, a reference to some first principles may prove helpful.

[54] "The cardinal rule of the law of evidence is that, subject to the exclusionary rules, all evidence which is sufficiently relevant to the facts in issue is admissible, and all evidence which is irrelevant or insufficiently relevant to the facts in issue should be excluded" (see Blackstone's Criminal Practice 2019 paragraph F1.11). The admission of evidence, the shorthand term for the admission of material into evidence, is a question of law to be determined by a trial judge. It is a part of every trial judge's wider duty of ensuring that

the accused has a fair trial. Authority for the latter principles may be found in **Ajodha v The State** [1982] AC 204; [1981] 2 All ER 193 and **Sang v R** [1980] AC 402.

[55] The general tests for the admission of material into evidence are:

a. the relevance of the material; and,

b. whether its probative value surpasses its prejudicial effect.

Noor Mohamed v The King [1949] AC 182, is authority for those principles.

[56] Evidence is relevant if it is logically probative or disprobative of some matter which requires proof. In **DPP v Kilbourne** [1973] AC 729; (1972) 57 Cr App Rep 381, Lord Simon of Glaisdale explained the principle in finer detail. He said, in part, at page 756 of the former report:

> "Evidence is relevant if it is logically probative or disprobative of some matter which requires proof…. It is sufficient to say, even at the risk of etymological tautology, that relevant (i.e., logically probative or disprobative) evidence is evidence which makes the matter which requires proof more or less probable. To link logical probativeness with relevance rather than admissibility (as was done in **Sims** [[1946] KB 531; (1946) 31 Cr App Rep 158]) not only is, I hope, more appropriate conceptually, but also accords better with the explanation of **Sims** given in **Harris v. Director of Public Prosecutions** [1952] A.C. 694, 710. Evidence is admissible if it may be lawfully adduced at a trial."

[57] **Noor Mohamed** also explains that although material may be admissible into evidence as being relevant, the judge, nonetheless, has a discretion to exclude it if its

prejudicial effect exceeds its probative value (see page 192). **R v Flemming** (1987) 86 Cr App Rep 32, [1987] Crim LR 690 is also authority for that principle.

[58] When a trial judge makes a decision to admit into evidence, or exclude from evidence, some legally admissible material, that decision constitutes an exercise of a discretion given to the judge. Generally, an appellate court will not lightly set aside a decision made as a result of the exercise of discretion by a judge.

[59] Once the trial judge admits material into evidence, it is for the tribunal of fact, which is normally a jury, to assess the weight or credibility of that evidence, if the case is left to that tribunal. **Ajodha v The State** is also authority for that principle.

[60] The admissibility of an item such as exhibit 14C into evidence requires evidence that its integrity has not been compromised. Proof of the chain of custody goes toward demonstrating that that integrity has been preserved. There is, however, no strict requirement to prove every link in that chain. The applicable principles were explained in **Damian Hodge v R** (unreported), Court of Appeal, British Virgin Islands, HCRAP 2009/001, judgment delivered 10 November 2010. Baptiste JA dealt with them at paragraph [12] of the judgment:

> "The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. **Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's**

> **case unless they raise a reasonable doubt about the exhibit's integrity** [see **R v Larsen** 2001 BCSC 597 per Romily J]. **There is no specific requirement, neither is it necessary, that every person who may have possession during the chain of transfer be called to give evidence of the handling of the sample while it was in their possession. It is a question of fact for the jury whether or not there is reason to doubt the accuracy of DNA results because of the possibility that security or continuity of samples was not maintained**. See **R v Stafford** [2009] QCA 407] at paragraph 116, where the case of **R v Butler** [2009] QCA 111 is cited for that proposition." (Emphasis supplied)

[61] The judgment of Romily J in **R v Larsen** 2001 BCSC 597 is also authority for the principle that, even if there is a gap in the continuity of custody of an item, it may still be admitted into evidence. Those principles have been accepted in this court in **Chris Brooks v R** [2012] JMCA Crim 5 and **Garland Marriott v R** [2012] JMCA Crim 9.

[62] It is against those basic principles that the admission of the individual items, being the subject of the relevant grounds of this appeal, will be analysed.

(b) Exhibit 14C

[63] As has been explained above, exhibit 14C is said to have been taken from Mr Palmer. Sergeant Linton extracted from the exhibit 14C instrument, and the cards in it, a number of the items forming part of the technology evidence, on the prosecution's case.

[64] Those items, however are, individually, the subject of separate aspects raised by the grounds of appeal. For that reason, they will be considered individually. The first outline of physical custody, however, considers exhibit 14C as a composite.

The chain of custody of exhibit 14C

[65] The judge admitted exhibit 14C, and the other telecommunication material, into evidence after an extensive *voir dire*, or trial within a trial. The *voir dire* was conducted in the absence of the jury. Its purpose was to determine the admissibility of material into evidence for the jury's consideration. The judge made his decision after hearing testimony about how the material was identified, collected, collated and handled by the police.

[66] As has been mentioned above, there was an admission by the prosecution that there was unexplained use of exhibit 14C while it was in the custody of the police. In analysing the judge's decision to admit it into evidence, it is necessary to identify the chain of its custody, as adduced by the prosecution during the *voir dire*. The evidence of the chain of its custody was given by the following witnesses:

a. **Senior Superintendent Cornwall Ford** (SSP Ford) – (Vol 1, pages 227-281 of the transcript) – on 30 September 2011, took exhibit 14C from Mr Palmer and later handed it to Corporal Abebe Pitt;

b. **Corporal Abebe Pitt** – (Vol 1, pages 375-386 of the transcript) – on 3 October 2011, received exhibit 14C from SSP Ford and later handed it to Corporal Shawn Howard at the CFCU;

c. **Corporal Shawn Howard** – (Vol II, pages 815-840 of the transcript) – on 3 October 2011, received exhibit

14C from Corporal Abebe Pitt and gave it to Detective Sergeant Patrick Linton who was also present at the time that Corporal Howard received exhibit 14C from Corporal Pitt;

d. **Detective Sergeant Patrick Linton** – (Vol II, pages 850-996, Vol III, pages 1035- 1304, 1356-1403 of the transcript) - on 3 October 2011, received exhibit 14C from Corporal Howard, examined it using a forensic kit and extracted data from it and from an SD card inside it, analysed the data extracted, which data included text and video, prepared a CD with the material and gave the CD to Constable Kemar Wilks;

e. **Constable Kemar Wilks** – (Vol III, pages 1404-1551, 1542-1551 of the transcript) – on 24 November 2011, received the CD with data from Sergeant Linton; created a text document of everything decipherable from the video and audio files on the CD.

[67] The defects in the chain of custody of exhibit 14C were:

a. it was used, on 1 October 2011, to send a text message, that is, during the time it was supposed to have been in SSP Ford's custody; and

b. it was used, on 9 October 2011, to make three telephone calls, that is, during the time it was supposed to have been in Sergeant Linton's custody.

[68] That use of exhibit 14C was not explained by any of the prosecution witnesses. SSP Ford was not asked any questions about it. Sergeant Linton testified that he did not use the phone, nor did he authorise anyone to use it. He testified that he had locked it away in a storage locker in the CFCU office, but had left the key for the locker on top of the locker.

The data on the SD card in the instrument

[69] The SD card in the exhibit 14C instrument is important to the prosecution's case as it contained a number of voice notes on which the prosecution relied. The voice notes were initially played as evidence in the *voir dire*. On the prosecution's case, they are recordings of voice messages sent by Mr Palmer. His voice in each of those voice notes was identified by Mr Chow, both in the *voir dire* (see Vol IV pages 1707-1722 of the transcript), and later, in testimony before the jury (see Vol VII pages 4000-4014 of the transcript).

[70] On the prosecution's case, some of those voice notes were created between 14 August 2011 at 2:37 pm and 16 August 2011 at 2:38 pm. The voice notes were played to the court during the *voir dire* (see Vol III, pages 1086-1104 of the transcript). Their contents were not fully recorded in the transcript of the *voir dire*, but were so recorded

when they were later recited in the presence of the jury. Essentially, the voice notes for the period describe the following scenario:

a. Mr Palmer gave two guns, which, in the voice notes, he calls "shoes", to Mr Williams and Mr Chow (the custodians) for safekeeping, which custody, he describes as "locking" (Vol VI, page 3324 of the transcript);

b. he received a report that the custodians could not find the weapons (Vol VI, page 3324 of the transcript);

c. he later received information as to who had taken the guns and how that person had gained the confidence of, and deceived, the custodians, in order to get the weapons (Vol VI, pages 3326 and 3329 of the transcript);

d. he gave a deadline to the custodians for the delivery of the weapons to him (Vol VI, page 3324 of the transcript);

e. he stipulated that if they failed to deliver the weapons by eight o'clock (apparently of the evening of 14 August 2011) somebody would be killed (Vol VI, pages 3327, 3330 and 3346 of the transcript);

f. he also stated that in the unlikely event that the custodians absconded, Shawn Campbell would have to pay for the guns (Vol VI. pages 3347 and 3348 of the transcript).

[71] The incident, on the prosecution's case, in which Mr Williams was killed, occurred after 7:00 pm on 16 August 2011. The prosecution also relied on voice notes created between 17 August at 9:57 am and 18 August 2011 at 12:13 pm. In some of those voice notes, Mr Palmer is heard asking his correspondent about the origin of some information that the latter had received. More particularly the voice notes for that period speak to Mr Palmer:

a. having a tattoo put on; and

b. enquiring of his correspondent, about something that that person has heard, and from whom; and

c. specifically wanting to know "A who him say dash dem weh" (see Vol VI, pages 3350-3352 and Vol VII, page 4013 of the transcript).

[72] Sergeant Linton extracted other items from the SD card. These included three specific Blackberry text message conversations (BB messages). BB messages are unique to the Blackberry communication system. It will be recalled that the exhibit 14C instrument is a Blackberry phone. Sergeant Linton testified that, for the purposes of the BB messages, each Blackberry phone possesses a unique Personal Identification Number (PIN). The PIN

for the exhibit 14C instrument is 234BAE6D (see Vol III, page 1065 of the transcript). Only the messages sent by that instrument were admitted into evidence. Those were identified during the *voir dire* at Vol III, pages 1127 and 1145-1154. The judge did not admit the replies to that instrument into evidence, because there was no evidence as to the identity of the sender of those replies.

[73] The BB messages that were admitted into evidence were later read to the jury. The first BB message adduced into evidence by the prosecution is one sent from the exhibit 14C instrument to a Blackberry phone with PIN 22C4DB97. The message was sent on 19 August 2011. It says:

> "'tween me and you a chop we chop up di boy 'Lizard' fine, fine and dash him weh enuh. As Long as yuh live dem can neva find him." (See Vol III, pages 1127 and Vol VI, pages 3402-3403 of the transcript.)

[74] The second BB message, also sent on 19 August 2011, is one sent to the same Blackberry phone with PIN 22C4DB97. It says:

> "Well, mi tell Shawn seh H-I-E haffi buy dem back. I waan tell yuh seh mi still gi him a new 45 wha mi just get fi gwaan watch him head, and tell him seh any man missin' dis, same treatment." (See Vol III, page 1146 and Vol VI, page 3405 of the transcript.)

[75] Another BB message, sent on 19 August 2011, to the same Blackberry phone with PIN 22C4DB97, is along the same lines as that last message. It says:

> "Right yah now, any man have a shoes betta take care a it like a baby weh just born." (See Vol III, page 1148 of the transcript.)

It does not appear that this message was read to the jury.

[76] The next set of BB messages, which were admitted into evidence, were sent to Blackberry phone with PIN 25E00FF7. The first was sent on 14 August 2011. In it, the sender tells the receiver to instruct that the sender wants his guns by 8:00 o'clock (there was no specification as to morning or evening). The message states:

> "Yow, call them, [expletive] deh and tell dem seh mi want mi shoes by 8 o'clock eenuh, ban (B-A-M-M-A-N). Cause mad dawg haffi deal with dem wicked eenuh 5710021" (see Vol III, page 1150 and Vol VI, page 3407 of the transcript).

By way of reference, it should be noted that Mr Clive Williams' sister testified that his telephone number was 571-0021 (Vol I, page 100 of the transcript).

[77] The prosecution then relied on a number of messages sent after 16 August 2011 from the exhibit 14C instrument to Blackberry phone with PIN 25E00FF7. The first is sent on 18 August 2011. It speaks to the relevance of Mr Chow and Mr Campbell to the sender's thinking. It states:

> "Memba se a mi name (W-O-R-L-B-O-S-S), Worl' boss, so a mi dem a go send fa, but only W-E-E, Wee or S-H-A-W-N, can sink we. So we haffi watch if police go fi dem" (see Vol III page 1150 and Vol VII page 3408 of the transcript).

[78] The other BB messages sent from exhibit 14C to Blackberry phone with PIN 25E00FF7 are sent on 23 August 2011. In these messages, the sender:

a. expresses surprise that the forensic investigators are acting so quickly in going to Havendale;

b. warns the receiver not to talk on the phone;

c. states an intention to leave the island by boat or some other conveyance; and

d. expresses an alternative desire to have the receiver and other people around him. (See Vol III, pages 1152-1154 and Vol VI, pages 3409-3410 of the transcript)

[79] The third conversation using BB messages was between the exhibit 14C instrument and a Blackberry phone with PIN 22E62CE2. This conversation took place on 23 August 2011. In these messages, outlined between pages 1164 and 1195 (during the *voir dire*) and 3411 and 3424 (before the jury) of the transcript, the sender:

a. expresses the need to leave the island fast, and asks if the receiver can assist or has any contacts that can assist;

b. wants to know if a boat to the Bahamas is a possibility;

c. wants to know the kind of boat that is being considered for the exercise;

d. instructs the receiver not to mention his name in the transaction because he is too well known and it will be hard to keep the matter confidential;

e. wonders if it is possible to fly from Jamaica "while it kinda cool" (see Vol VI, page 3417 of the transcript);

f. wonders if he would be able to properly enter the Bahamas, because he was supposed to have done a show there some time before, but didn't turn up for it;

g. considers the possibility of getting in contact with a "Ras [in the Bahamas] weh keep nuff show with dancehall artist" (see Vol VI, page 3419 of the transcript);

h. considers the alternatives of Cuba and Miami;

i. considers the use of a ruse that entry to Cuba is needed to make a music video;

j. seems to settle on using a boat and plans to leave the following morning (see Vol VI, page 3422 of the transcript); and

k. considers whether he should go alone or take some people with him.

[80] The defence counsel at the trial strenuously objected to the admission of that material into evidence. One of the major planks of their objection was the provenance of the SD card. There were discrepancies in the evidence in respect of the presence of the SD card in the exhibit 14C instrument. Corporal Pitt, who delivered exhibit 14C, among other cell phones, to Corporal Howard at CFCU, did not testify concerning the presence of SD cards? in any of the phones, and he was not asked any questions about such cards. He did, however, testify that he saw SIM cards in some of the instruments.

[81] Corporal Howard, having received the instruments from Corporal Pitt, had the responsibility of recording in a log, that which he had received. He recorded that he received SIM cards along with some of the instruments. Those SIM cards were inside their respective instruments. At first, he testified that he had logged "the total amount of items" that he had received, including the SIM cards (see Vol II, page 827 of the transcript). When questioned about the absence of any record by him of the receipt of SD cards, he testified that it was not his "responsibility to remove or check for any" such cards (see Vol II, page 833 of the transcript). That, he said, was the responsibility of the person doing the forensic examination.

[82] The first bit of evidence of the presence of an SD card in the exhibit 14C instrument was given by Sergeant Linton. He conducted the forensic examination. He said that he saw the SD card in the instrument at the time of his examination. Sergeant Linton testified that he was present and saw when Corporal Pitt handed over the instruments to Corporal Howard. He received those items from Corporal Howard. He, however, in the statement that he gave to the investigator, made no reference to seeing such a card at that time. It is only in cross-examination that he first mentioned that he saw an SD card in the exhibit 14C instrument at the time of the handover from Corporal Pitt to Corporal Howard.

The video file on exhibit 14C

[83] Sergeant Linton testified that in his forensic examination of the exhibit 14C instrument he found a file containing a video clip. The file was stored in the internal memory of the instrument. He said, during the *voir dire*, that according to the metadata

(data about the data) for this file, the video was recorded on 16 August 2011 at 10:34:02 pm (Vol II, page 988 of the transcript). He said that it was recorded continuously, that is, without stopping or restarting, for two minutes and 17 seconds (Vol II, page 956 and Vol VII, page 3392 of the transcript).

[84] His description of the contents of the video is given at Vol II, page 957-960 and 978-981 of the transcript. That video was played during the *voir dire*. It was later replayed for the jury. The video depicts a total of six males at a location. The camera taking the video is directed mainly to avoid the faces of the individuals present. Their conversation is, however, recorded. Mr Chow identified Mr Palmer's voice as one of the voices recorded in the video (Vol VII, pages 4022-4024 of the transcript). The video also prominently depicts a pick-axe, which is said, during the course of the video, to have been swung.

[85] The conversation, as described by Sergeant Linton at Vol II, pages 979-981 of the transcript, and outlined for the jury at Vol VI, pages 3396-3398, speaks to:

a. whether a pick axe stick could be used to kill a man;

b. holding down someone and cutting his throat;

c. whether anyone in the group had a gun;

d. a desire that Mr Chow should have been present to see what was happening; and,

e. an instruction for Mr Campbell and Needfa Speed (the taxi driver who transported Messrs Campbell, Chow and Williams to Mr Palmer's house), to leave.

[86] Sergeant Linton testified that he took a total of 68 photographs of the frames in the video. He first spoke to them during the *voir dire* (see Vol II, pages 983-995 of the transcript). They were later shown to the jury during his testimony before them (Vol VI, pages 3240-3241 of the transcript).

[87] The defence counsel objected to the admission of the video into evidence. Apart from the issue of its inseparable connection with the exhibit 14C instrument, learned defence counsel at the *voir dire*, objected on other grounds. They contended that the prosecution had not shown the video to be relevant as it:

a. did not purport to identify anyone; and

b. did not show any crime being committed.

A further objection to the admission was that there was no proof of who had recorded the video.

The other evidence on the instrument's internal memory

[88] Sergeant Linton testified that his forensic examination of exhibit 14C revealed photographic images in the phone's internal memory. Of those photographs, three bore the same date-stamp information as was on the video recording described above, that is, 16 August 2011. Two of the three photographs, he said, were taken at 11:33 am (Vol II, page 986 of the transcript). Before the jury, he testified that they had been taken at Russell Heights, Saint Andrew (Vol VI, page 3266 of the transcript). The third photograph, he said, was taken at 3:49 pm in the Havendale area (Vol II, page 989 of the transcript). The three photographs "showed a male wearing a shirt that closely resembles that of [sic]

the shirt worn in the video" (Vol II, page 962 of the transcript). The shirt in the photographs showed the entire word "TRIUMPH" written to the top front of the shirt, whereas, in the video, only the letters "PH" are visible at the top front of a similar shirt, seemingly at the end of a word (Vol II, page 960 of the transcript).

[89] Mr Chow identified the man in all three photographs to be Mr Palmer (see Vol VII, pages 3991-3992 of the transcript).

[90] Among the photographic images that Sergeant Linton extracted from the instrument's internal memory is a photograph of five males. One of them is displaying a tattoo of the word "BOSS" on his left arm. That man is seen wearing a pair of black slippers with three white stripes. The photograph, from the metadata, was taken on 24 September 2011, and is said to be relevant because of a connection, on the prosecution's case, with the video mentioned above. One of the males in the video has a similar "BOSS" tattoo on his left arm (Vol II, page 990 of the transcript), and is wearing a pair of black slippers with three white stripes, in a similar design to that in the photograph (see Vol II, page 995 of the transcript).

[91] Mr Chow identified the person in the photograph with the "BOSS" tattoo as Mr St John (Vol VII, page 3999 of the transcript).

The judge's ruling on the voir dire

[92] The judge made a detailed ruling in respect of the admission of the various items of technology material (Vol IV, pages 2216-2259 of the transcript).

[93] In analysing the question of admission of the exhibit 14C instrument, the judge identified:

a. that the instrument was important to the prosecution because of the data that was said to be on it;
b. its origin as having been taken from Mr Palmer;
c. the complaints about the gaps in the custody of the instrument due to its unexplained use;
d. the complaints about that unexplained use; and
e. that chain of custody is not a legal requirement.

Those observations are recorded at Vol IV, pages 2228 to 2232 of the transcript in the judge's ruling on the *voir dire*.

[94] He ruled that the exhibit 14C instrument was admissible despite the complaints about the gaps in the evidence concerning the custody of the phone. He did so on the basis that proof of the chain of custody is not a legal requirement. He drew a distinction between the instrument and the data. On his analysis, the defence had not shown that there had been any tampering with the data on the instrument. Such interference with the instrument, he found, was shown to be after the events that are relevant to the case.

[95] The judge having seen the video, the still photographs that had been made of the frames in the video, and the other photographs taken of Mr Palmer and of Mr Palmer's house, found that there was sufficient evidence to indicate that the video had been

recorded at Mr Palmer's house. He is recorded at Vol IV, page 2264 of the transcript as stating some of his reasons for admitting it into evidence:

> "The video, as I have indicated, the Prosecution, I understand, is stating a particular place … and at a particular time, against a background where the allegations and certainly the indictment speaks to a particular date, and the thrust of the Prosecution has been to a particular time period. The main event would have occurred in that respect, the video. I see the video as a composite which includes both the audio and the visual, that were done within that framework and it is being admitted based on those facts."

[96] The judge, in wrestling with these issues, found that there was no evidence of any tampering with any of the voice notes, text messages or the video, which formed part of exhibit 14C. The judge recognised the fact that the instrument was used, while it was in the custody of the police. He noted, however, that the metadata showed that that use was after the events on which the prosecution was relying for its case against the appellants. The voice notes, text messages and video were relevant, the judge found, as:

a. Mr Chow identified Mr Palmer's voice on the voice notes and in the video;

b. the video showed items, which were relevant to the case; and

c. the text messages after 16 August 2011 suggested a guilty mind.

[97] The judge found the various items of data on exhibit 14C, to be relevant and capable of assisting the jury in considering its decision. For those reasons, he ruled exhibit 14C admissible, with the exception of some of the voice notes thereon.

[98] In respect of the text messages between Mr Williams and his girlfriend, Ms Jackson, the judge found that they were admissible as a relevant part of the events of 16 August 2011, as they unfolded.

[99] The judge did rule certain items of text messages and voice notes to be inadmissible. He did so on the basis that the source of each was unknown (Vol IV, page 2247 of the transcript).

Submissions

[100] The submissions on behalf of the appellants in respect of these matters are dealt with as a composite. This is partly for convenience and partly because counsel for each appellant adopted the submissions, made by their colleagues for the other appellants.

[101] Learned counsel for the appellants addressed all the technology related aspects of the prosecution's case. The admission into evidence of the technology items, learned counsel submitted, depended on the proof of their integrity. The integrity of those items, they submitted, must be shown, beyond reasonable doubt, to be intact. The issue of integrity of potential evidence, they argued, is one for the decision of the judge and not for the tribunal of fact.

[102] They submitted that the integrity of these items is demonstrably flawed. The unexplained usage of the exhibit 14C instrument, they submitted, necessarily means that the integrity of exhibit 14C, as a composite, is compromised. Learned counsel argued, in respect of the exhibit 14C instrument, and the data extracted from it, that none was the

same as was allegedly taken from Mr Palmer (page 95, paragraph 17, of counsel's skeleton arguments).

[103] Allied to that submission, learned counsel stressed that the evidence concerning the SD card was crucial to demonstrating the unreliability of the exhibit 14C instrument. Learned counsel pointed out the absence, prior to Sergeant Linton's testimony in court, of any mention of the presence of an SD card. This, it was submitted, was despite evidence by persons who would have had an opportunity to see the SD card, prior to examination by Sergeant Linton, and to record its presence. There was evidence by:

a. Corporal Pitt, who testified that he had to open the back of the phone, where the SD card would have been located, in order to record the instrument's International Mobile Equipment Identifier number (IMEI) and the presence of a SIM card;

b. Corporal Howard, who received the phone from Corporal Pitt, and was obliged to log all that he had received; and

c. Sergeant Linton, himself, who is said to have had at least three occasions in his written statements, prior to the start of the case, to have recorded the presence of the SD card.

[104] As a result of the defects in the integrity of these items, learned counsel submitted, they should not have been admitted into evidence. The questionable integrity of the data, learned counsel submitted, was amplified by the fact that Sergeant Linton testified that it was possible to manipulate the contents of the data on the phone and on the SD card.

[105] Learned counsel submitted that the cases that speak to the chain of custody, not being a requirement in law, but instead an issue of fact, did not apply to exhibit 14C. Cases such as **Damian Hodge v R**, **Chris Brooks v R** and **Garland Marriott v R**, learned counsel argued, only contemplated a break in the chain of custody, and no more. The difference with this case, learned counsel submitted, is that it has been demonstrated that the integrity of the exhibit has been compromised. That factor, on their submissions, went beyond the scope of the decision in **Damian Hodge v R**, **Chris Brooks v R** and similar cases. This case, learned counsel argued, is similar in this respect to **Heron Plunkett v R** [2015] JMCA Crim 32.

[106] The approach of learned counsel was that the data on exhibit 14C, by virtue of its association with the phone, ought not to have been seen by the jury. The argument was not, however, entirely consistent. Firstly, learned counsel for Mr Campbell very candidly made the observation that "exhibit 14C is bifurcate, simply by reason of being a cell-phone" (page 95, paragraph 16, of counsel's skeleton arguments on behalf of Mr Campbell). Counsel's point was understood to be that the exhibit 14C instrument had a separate identity from the data said to be in its internal storage and on the SIM and SD cards in the phone.

[107] Despite that observation, however, learned counsel stressed the point that from the mere fact that there was an admission that the instrument "was used to make telephone calls and send a text message, while in the custody of the police, it follows that data had been added to the device, and was thereby '*altered*', after collection and prior to production in court" (page 95, paragraph 16, of counsel's skeleton arguments on behalf of Mr Campbell). By tampering with the data on the phone, learned counsel submitted, the phone became "something new". By that argument, the instrument and the data thereon constituted a single unit.

[108] Learned counsel contended that the disclosure of the improper interference with exhibit 14C raised the "lurking doubt, which has now poisoned the verdict of the jury, [as to] what else was done to the phone between the collection of the exhibit and its analysis, while in the custody of the police" (paragraph 17 on page 96 of the submissions on behalf of Mr Campbell).

[109] Additional submissions were made in respect of the admissibility of the items of data, which were said to have been found in the internal storage of, and the SD card found in, the exhibit 14C instrument. The submissions expanded on the objections, which were made at the *voir dire*, to the admission of the video file on exhibit 14C. They also advanced other bases for opposing the admission of the video file.

[110] Mr Fletcher, appearing for Mr Jones, submitted that the images on the video were so indistinct that the probative value of the video was outweighed by the prejudicial effect.

[111] In addition to the arguments about the content of the video, learned counsel contended that the metadata in respect of the video showed that, when it was created on 16 August 2011, at 10:34:02 pm, Mr Palmer was, on the prosecution's case, by other evidence, elsewhere.

[112] The integrity of the data, on the submissions on behalf of the appellants, had thereby been compromised and rendered both the instrument and the data thereon inadmissible as neither the instrument nor the data were the same as they were when they were taken from Mr Palmer (page 95, paragraph 17, of Mr Campbell's counsel's skeleton arguments). Additionally, learned counsel submitted that the exhibit 14C "cannot be analysed in isolation of the context within which it was relied on by the prosecution" (page 103, paragraph 28, of counsel's skeleton arguments).

[113] Messrs Taylor and Brown, for the Crown, addressed these issues in response. They argued that exhibit 14C was properly admitted into evidence. They stressed that proof of continuity is not a legal requirement and that the issue of the authenticity of exhibit 14C, as with the other exhibits, was a question of fact for the determination of the jury. Learned counsel contended that there was no basis to treat the exhibit 14C instrument, the SIM and SD cards, and the data on each, as exceptions to the principle set out in **Damian Hodge v R**.

[114] Learned counsel accepted that in order for any exhibit such as 14C to be considered by the jury, there was a minimum standard that the prosecution had to satisfy as to its integrity. They argued that the prosecution, in this case, had satisfied that

standard. Learned counsel argued that a number of factors supported the judge's decision to admit the items into evidence. Some of those are:

a. the accounting for the custody of the exhibit 14C instrument from the time it was taken from Mr Palmer to the time that it was examined by Detective Sergeant Linton;

b. the unique IMEI number of the exhibit 14C instrument which confirmed that the instrument examined by Sergeant Linton is the same instrument that was taken from Mr Palmer;

c. Detective Sergeant Linton's evidence that he saw the SD card inside the instrument when he first saw it on 3 October 2011;

d. the fact that the BB messages relied upon by the prosecution:

   i. are unique to the exhibit 14C instrument as shown by its individual BB PIN; and

   ii. were created before the dates of the unauthorised use of the phone;

e. the voice notes and the video, relied upon by the prosecution, are all date and time stamped and all of

those dates preceded 3 October 2011, which is the date of the unauthorised use of the instrument;

f. the local communications provider did not have access to the BB messages contained on the instrument; and

g. there is no evidence of any alteration or manipulation of the date and time stamps or the contents of the voice notes, video or BB messages.

[115] Learned counsel submitted that the evidence that it was possible for the date and time stamps and other data to be manipulated by a skilled person, did not prevent exhibit 14C being admitted into evidence. Whether such manipulation did in fact take place, he submitted, was an issue for the consideration of the jury. It is not sufficient, learned counsel submitted, for the appellants to raise possibilities on appeal, they must go further. Learned counsel relied on **R v Lao** (1973) 12 JLR 1238 and **Miller v Minister of Pensions** [1947] 2 All ER 372 in support of that submission.

[116] The absence of any mention of the SD card in Sergeant Linton's first written statement, learned counsel submitted, was an issue of fact for the jury and it was open to the jury "to infer that the SD card was inside the Exhibit [14C] when it was transferred to [CFCU]" (page 3, paragraph 7c, of counsel's skeleton arguments filed on 12 July 2018).

[117] Similarly, learned counsel argued, the use of exhibit 14C to send a text message and to make three telephone calls, while it was in the possession of the police, was not

fatal to the integrity of exhibit 14C, but raised "questions of reliability for the consideration of the [j]ury" (page 3, paragraph 8, of counsel's skeleton arguments filed on 12 July 2018).

Analysis

[118] The law in respect of the chain of custody of an item sought to be admitted into evidence has been outlined above. There have also been judgments of this court that go beyond that general outline. Phillips JA did so in the judgment in **Heron Plunkett v R**. The essence of the learning distilled in that case is that:

a. the issue of chain of custody of an exhibit is a question of fact for the jury, as explained in **Damian Hodge v R**;
b. the prosecution must, however, prove the integrity of the item before it can be admitted into evidence; and
c. where there is a break in the chain of custody, combined with a doubt as to the integrity of the potential exhibit, the item ought not to be admitted into evidence.

[119] As a part of her analysis of the relevant law, Phillips JA cited, with approval, the judgment of Lai Kew Chai J in delivering the judgment of the Singapore Court of Appeal in **Nguyen Tuong Van v Public Prosecutor** [2005] 1 SLR 103; [2005] 5 LRC 140. Lai Kew Chai J said at paragraph [36]:

> "The principles relating to the chain of custody of exhibits in evidence are settled. The Prosecution bears the burden of proving beyond reasonable doubt that the drug exhibits analysed by Dr Lee Tong Kooi of the HSA were the same as those seized from the appellant's back and haversack. **Where there is a break in the chain of custody and a**

> **reasonable doubt arises as to the identity of the drug exhibits, then the prosecution has not discharged its burden, and has failed to make out a prima facie case against the accused**…" (Emphasis supplied.)

[120] In applying that learning to this case, it must be noted that the judge seems to have adopted the approach that the items of communication data could be considered individually, as also the video. In this regard, although he recognised that the exhibit 14C instrument had been used while it was in the custody of the police, that use, he found, was capable of being identified and isolated.

[121] That approach, it seems, addresses the essence of the distinction between the positions of the appellants and of the Crown in this aspect of the appeal. Whereas the appellants stress the combination of:

a. breaks in the chain of custody;

b. unauthorised use of the instrument, evidencing those breaks; and

c. the evidence that it is possible for the data to have been manipulated during the course of such use,

and treat exhibit 14C as a composite, the Crown contends, firstly, that the instrument and the data relied upon by the prosecution, cannot be considered as a whole, but should be looked at individually, and secondly, that the data do not show any evidence of manipulation.

[122] That is also the essence of the difference in the results of the previously decided cases, cited above, dealing with breaks in the chain of custody. Whereas in **Chris Brooks v R** and **Garland Marriott v R**, there was no evidence of any tampering with the relevant samples, the situation was different in **Heron Plunkett v R**, where there was obvious interference with the sample, in that case, parcels of vegetable matter, between the time it was taken from the accused and the time that it that was taken to the forensic laboratory for testing.

[123] The question at this juncture is whether a distinction may properly be drawn between the material in this case and that in **Heron Plunkett v R**. The answer to that question is, as identified by the judge, in the affirmative. The basis for the distinction is that each item that the prosecution sought to rely upon, namely, the video, the voice notes and the BB messages, had a unique identifier, that is, a date and a time stamp. It is possible therefore to examine each of these items to determine its admissibility and relevance to the case. Consequently, a distinction may properly be drawn between those items and the items which were created by the use of the exhibit 14C instrument after it fell into the custody of the police. Importantly, as the judge found, there is no evidence of tampering with either the date or time stamps of the items relied upon by the prosecution. A mere possibility that there could have been a manipulation of those items is not sufficient to disqualify those items from the consideration of the jury.

[124] The submissions of counsel for the appellants, with respect to the exclusion of exhibit 14C, as a composite, cannot be accepted. The fact that the exhibit 14C instrument

was improperly used while in the custody of the police is too slender a basis to exclude the rest of the evidence comprised in the composite. If, as can be credibly contended, the exhibit 14C instrument may be considered separately from the data thereon, then it necessarily follows that each aspect of the data should be considered on its own merit. That which is caught by the improper use must be discarded, but unless there is evidence suggesting tampering with or adjustment of other data, they should be available for the consideration of the jury.

[125] It must be noted that there is evidence that one of the BB message files was modified after the exhibit 14C instrument was taken by the police. Sergeant Linton testified that the file containing the communication between that instrument, and the phone bearing the unique PIN 22C4DB97, was modified on 30 September 2011 at 8:54 am; some three hours after it had, on the prosecution's case, been taken from Mr Palmer. Sergeant Linton testified that the modification consisted of the last entry on the file (Vol VII, page 3794 of the transcript). That entry was an incoming message from the Blackberry bearing PIN 22C4DB97.

[126] Despite that modification, the Sergeant's testimony is that the file containing the exchange of messages between those instruments was created on 6 July 2011 and that the messages in that file, upon which the prosecution relied, were sent on 19 August 2011. That evidence allows for the messages in that file to be individually considered, so that the insertion of the last entry must be determined to constitute a discrete event,

which does not eliminate the rest of the messages in that file from being considered for admission into evidence.

[127] There is sufficient basis, therefore, for the judge to have arrived at his decision in respect of each of these issues. The judge's decision is bolstered by Mr Chow's identification of Mr Palmer's voice, not only in the voice notes but in the video.

[128] The appeal in respect of the admission of exhibit 14C, as a composite, should fail.

(c) Exhibit JS2

[129] The evidence concerning the creation of exhibit JS2 commenced with a request made by the police to Digicel. Corporal Shawn Brown, testified that he made the request of Digicel for communication data. He did so after having received a briefing from the investigators in this case, and having read a statement by Mr Chow. That statement included references to various persons and their respective telephone numbers. The data that Corporal Brown requested was in reference to the calls made to and from various telephone numbers deemed relevant to the case.

[130] Mr Joseph Simmonds is the group business risk director at Digicel. Acting in pursuance of Corporal Brown's request, Mr Simmonds extracted the relevant data from Digicel's computers and downloaded them onto two CDs. He marked one of the CDs "JS1" and the other "JS2". JS1 was intended to be the master, or control copy, and JS2, the working copy. He said the CDs were made almost simultaneously and their contents were identical.

[131] Mr Simmonds delivered both disks to Corporal Brown, but only JS2 was available at the trial. Corporal Brown said that he delivered JS1 to one of the prosecutors in charge of the case. Sadly, that person died before the case was tried and so was unable to give any information as to the whereabouts of JS1.

[132] Corporal Brown used the data from JS2 to create a spread sheet attributing names and aliases to the various persons sending and receiving communication. The communication involved, the prosecution asserted, is relevant to Mr Williams' death.

[133] The issue of the breach of the ICA arose from the fact that the request to Digicel and the provision of the data requested were not done in accordance with the ICA. Corporal Brown was not authorised, under the ICA, to either request or receive the data. Additionally, the notice requesting the data, that is required to have been issued by the police to Digicel, was not issued. The provisions of the ICA could not, therefore, have been prayed in aid to have data, which were obtained from Digicel, admitted into evidence.

[134] Defence counsel complained, at the trial, that the data on JS2 were inadmissible as having been acquired in breach of the fundamental right to the protection of privacy of communication guaranteed in the Charter of Fundamental Rights and Freedoms ('the Charter') contained in the Jamaican Constitution. It bears repetition that there is no admission by any of the appellants of the relevance to them of any of the material referred to in JS2.

[135] The judge ruled, in respect of the data secured from Digicel in breach of the provisions of the ICA, that the common law allowed the admission of JS2. This is so, even in the face of a breach of the Charter. He found the material to be relevant and ruled it admissible.

[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.

[137] It is regrettable that the prosecution, in this case, should have found itself in the same position in which it was, in **Donald Phipps v R** [2010] JMCA Crim 48, where a flawed approach, similar to Corporal Brown's, was assessed by this court. In both cases, the Crown's representative was obliged to concede to this court that the procedure used was flawed. The situation prompted the judge to appropriately observe that, "[c]learly, the authorities are not learning anything from this" (Vol IV, page 1942 of the transcript).

[138] In **Donald Phipps v R**, Morrison JA, as he then was, in writing for the court, made a number of important points, two of which are relevant to this case. Firstly, he cited **Attorney General and Another v Antigua Times Ltd** (1975) 21 WIR 560, 573-4, for the principle that it should be presumed, until the contrary appears or is shown, that all Acts passed by the Parliament are reasonably required. As a corollary to that principle, the learned judge of appeal also cited with approval, **Dwight and Keva Major**

v Superintendent of Her Majesty's Prisons and the Government of the USA, (unreported) Court of Appeal, The Commonwealth of the Bahamas, Appeal No 15/2005, judgment delivered 8 March 2007. In **Major v Superintendent of Her Majesty's Prisons**, Ganpatsingh JA characterised interception of communications as "an indispensable means used by law enforcement and intelligence agencies to combat serious crime".

[139] It is in that context that Morrison JA found that Mr Phipps had not rebutted the presumption that the ICA was within the ambit of this country's Constitution, as being reasonably required for our society. He said in part, at paragraph [112] of **Donald Phipps v R**:

> "We entirely agree and we therefore conclude on this point that the burden on the applicant [Mr Phipps] to rebut the presumption that the ICA is a measure reasonably justifiable in our democratic society has not been discharged."

[140] The second important point made by Morrison JA, for these purposes, is that where the requirements of the ICA had not been followed, material which had been secured by virtue of the flawed procedure, although not allowable under the provisions of the ICA, could nonetheless still be admissible. The learned judge of appeal found that reliance, for admission, had to be made on a "wider principle" (paragraph [118] of his judgment). In circumstances where the complaint about the admissibility of evidence was materially identical to those in this case, Morrison JA assessed a number of previously decided cases and concluded, at paragraph [121], that the common law principles of admissibility of evidence, based on relevance, applied. He said, in, part:

> "In the light of this unbroken chain of authority, it appears to us that in the instant case the question of the admissibility of the communications data obtained by the [designated person under the ICA] from [the telecommunications provider] falls to be dealt with entirely on the basis of its relevance, irrespective of the admitted imperfections in the way in which the evidence was obtained….We therefore hold that the evidence was properly admitted by [the judge at first instance], as was [the] evidence, which was primarily based on the data thus provided by [the telecommunications provider]."

[141] It cannot be ignored, however, that **Donald Phipps v R** was decided before the promulgation of the Charter. Despite that difference, the reasoning by Morrison JA in considering the aspect of the freedom of expression enshrined in the then, section 22(1) of the Constitution, is applicable, in the context of the environment governed by the Charter. Section 22, since repealed, dealt, in part, with the freedom from interference with a person's means of communication. It also provided for derogations from that freedom in certain conditions, including public safety. The section stated:

> "22. - (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes the freedom to hold opinions and to receive and impart ideas and information without interference, **and freedom from interference with his correspondence and other means of communication**.
>
> (2) **Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—**
>
> **(a) which is reasonably required—**

(i) in the interests of defence, public safety, public order, public morality or public health; or

(ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, **maintaining the authority and independence of the courts**, or regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication, public exhibitions or public entertainments; or

(b) which imposes restrictions upon public officers, police officers or upon members of a defence force." (Emphasis supplied)

[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.

[144] The term, "only as may be demonstrably justified in a free and democratic society", was carefully considered by Edwards JA (Ag, as she then was) in **Al-Tec Inc Ltd v James Hogan and others** [2019] JMCA Civ 9. The learned judge of appeal, albeit in a different context, identified the bases on which legislation should be tested to determine if it had satisfied that criterion. She said at paragraph [164] of her judgment:

> "The right to be heard not being an absolute right, a rule limiting the right may not be unconstitutional, if it is demonstrably justifiable in a free and democratic society. How is it determined whether a restriction is demonstrably justifiable? There are essentially five central criteria which must be met. See **R v Oakes** [1986] 1 SCR 103; **Defreitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing** [1998] 3 WLR 675; **Huang v Secretary of State for the Home Department** [2007] 2 AC 167; **R v Secretary of State for the Home Department** [2014] UKSC 60. These criteria in summary are that:
>
> (1) there must be a sufficiently important objective in making the restriction;

(2) the measures used must be carefully designed to achieve that objective and must be rationally connected to that objective;

(3) the means used should be the least drastic so that it impairs as little as possible, the protected rights or freedoms;

(4) the effect should not be disproportionate; and

(5) the interests of society must be balanced against those of individuals and groups."

[145] It is unnecessary, for these purposes, to decide if the provisions of the ICA satisfy the five criteria that Edwards JA identified. That is because the provisions of the ICA were not followed in the instant case. The observations made by Morrison JA in **Donald Phipps v R**, in finding that the ICA had not been proved to be unconstitutional, may, however, fairly be said to be applicable despite the introduction of the Charter. The cases that he cited support a finding of justification.

[146] It is also unnecessary to use the five criteria, which Edwards JA identified, to analyse the common law principle of admissibility of evidence, based on relevance. The criteria do not necessarily apply to the sphere of the court's discretion concerning the admission of material into evidence.

[147] In this context, the observations of the Privy Council in **Herman King v The Queen** (1968) 10 JLR 438, upon which Morrison JA relied, in part, in **Donald Phipps v R**, are relevant. Their Lordships held that, in the absence of a constitutional provision to the contrary, the court is entitled to exercise its discretion to admit into evidence, material

obtained in breach of a Constitutional right. The headnote to the report is reflective of the Privy Council's decision. It states in part:

> "…although there was no legal justification for the search, this was not a case in which the evidence had been obtained by conduct of which the Crown ought not to take advantage. **The court had a discretion whether or not to admit the evidence and this discretion was not taken away by the protection against search of persons or property without consent enshrined in the Jamaican Constitution.** In the circumstances there was no ground for interfering with the way in which the discretion had been exercised. **Kuruma Son of Kaniu v R** [[1955] AC 197] applied." (Emphasis supplied)

[148] Their Lordships' comment was made in the context of the common law approach to the admission of material into evidence. It would also, no doubt, be extended to regular legislative provisions. In this regard, it should be noted that a telecommunications provider in this country is permitted to disclose details of the private communication of its subscribers in certain circumstances. These include an obedience to a request made "for the purpose of the investigation or prosecution of a criminal offence" (section 47(2)(b)(i) of the Telecommunications Act). That provision would assist a court in deciding whether to exercise its discretion to allow telecommunication information (such as that in issue in this case) into evidence.

[149] It is also important to note that there is an important difference between the relevant juridical approach in this country, as opposed to Canada and the United States of America, to failures to observe constitutional rights. In the United States of America, there exists the exclusionary rule and its offspring, preventing the admission into evidence

of "the fruit of the poisonous tree". Those rules are rigidly applied (**Nardone v United States**, 308 U.S. 338, 60 S. Ct. 266, 84 L. Ed. 307 (1939) and **Wong Sun v United States**, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963)). In Canada, a similar approach is taken to restricting the admission into evidence of items obtained in breach of constitutional rights (**R v Jones** 2017 SCC 60, [2017] 2 SCR 696 and **R v Marakah** 2017 SCC 59, [2017] 2 SCR 608). The Canadian Constitution does, however, allow the courts of that country to exercise a discretion, in certain circumstances, to admit into evidence material that has been secured in breach of a right (section 24(2) of the Canadian Charter of Rights and Freedoms).

[150] The Constitution of this country, subsequent to the advent of the Charter, does not contain a provision similar to section 24(2) of the Canadian Charter of Rights and Freedoms. Section 24(2) specifically allows a court of that country the discretion to exclude material, which is obtained in breach of a Charter right, if admission of that material would bring the administration of justice into disrepute. Section 24 states:

> "24.(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, **the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute**." (Emphasis supplied)

In the absence of such a constitutional or legislative stipulation, the courts of this country are entitled to exercise the discretion referred to by their Lordships in **Herman King v The Queen**.

[151] Based on the above analysis, the constitutional point, raised by the appellants in respect of JS2, fails.

[152] The remaining issue in respect of JS2 is the complaint that JS2 ought not to have been admitted into evidence because its integrity was questionable. The complaint, both at the trial and in this appeal, is that in the absence of JS1, the integrity of JS2 cannot be verified. JS1 was intended to be a standard by which the integrity of JS2 could be tested.

[153] Mr Simmonds' evidence at the *voir dire*, was that JS1 was intended to be the "control copy" CD, which was designed for the use of the court. JS2 was intended to be a "working copy" CD, that the police would be able to use in their work. He said that he marked the case into which he placed JS2, but did not mark the CD itself. He was unable, just by looking at the physical CD, to distinguish JS2 from any other CD. He agreed with a suggestion in cross-examination that JS2, by itself, was a "document" that cannot be substantiated. He did, however, look at the contents of JS2 and recognised the files that he had placed on the CD, which he had prepared and handed over to the police. He did so by reference to a serial number that he had ascribed to those files.

[154] In the presence of the jury, Mr Simmonds stated that it was possible for an unscrupulous person to "recast" the data from the original CD that he created, put the

data on a new CD and present that CD to the court, passing it off as his work. He nonetheless identified information on the CD that he had prepared.

[155] The importance of JS2, as mentioned above, is that Corporal Brown used it to:

a. analyse the call data record;

b. identify and merge the incoming and outgoing calls;

c. sort the calls by date and numbers of interest;

d. create a spread sheet which he used, based on the content of the communication and the cross-referencing of the calls, to attribute names and aliases to the various persons sending and receiving communication; and

e. prepare both a soft copy (on CD) and hard copies of the spread sheet.

Importantly, Corporal Brown testified that, in creating the spread sheet, he did not alter JS2 or the data received.

[156] This aspect of the admissibility issue, however, raises a question of fact. It was a matter for the discretion of the judge whether Corporal Brown's evidence was such that it was capable of being believed by the jury. Guidance for this point may be found in the decision of **Galbraith v R** [1981] 1 WLR 1039. Although that case dealt with the decision of whether there was a case for the defence to answer, the principle of assessing whether evidence is sufficient for the jury to consider it, is common to both. The relevant principle

in that decision is that, barring unfairness, if the acceptance of the prosecution's case depends on the reliability of the evidence produced, the issue is one for the jury to resolve.

[157] In this case it cannot be said that the admission of the evidence concerning JS2 was unfair or such that a jury could not properly rely upon it. The judge, having admitted JS2 gave the jury extensive directions in respect of this aspect of the evidence. Those directions will be addressed below.

[158] The complaint about the admission of JS2 must also fail.

The judge's directions to the jury on the technology issues

[159] Learned counsel for the appellants complained that the judge's treatment of exhibit 14C in his summation to the jury was inaccurate and grossly inadequate.

[160] They specifically condemned a direction, which in their submission, is "completely antithetical to the very principles governing the integrity of the exhibits as laid down in **Damian Hodge v R**, and to the 'golden thread' which has always run through the common law", that is, the burden and standard of proof that is applicable in criminal cases. The submission is hinged upon the appellants' thesis that exhibit 14C could only be considered as a composite and that it is improper, given the interference with the exhibit 14C instrument, to consider the individual items of data on it. That issue has already been decided above.

[161] Nonetheless, learned counsel for the appellants also stated that the judge did not inform the jury of the importance and consequences of the discrepancies in Sergeant

Linton's evidence when examined in the light of his evidence that the data on exhibit 14C, including the date-stamping, could have been manipulated by someone who has those skills.

[162] Allied to that complaint, is the submission by learned counsel that the judge, in his summation to the jury, failed to remind them of an important inconsistency in the evidence of Sergeant Linton. The inconsistency concerned the date that Sergeant Linton started his forensic examination of the exhibit 14C instrument. Learned counsel submitted that the inconsistency raised a strong inference of improper interference with the data on exhibit 14C and that the judge failed to communicate that inference to the jury.

[163] In his various written statements prior to the start of the trial, and even in his examination in chief, Sergeant Linton asserted that he started his examination of exhibit 14C on 22 October 2011. In cross-examination, he was, however, obliged to accept that the relevant video file was accessed on 14 October 2011. He then testified that he started his forensic examination on 14 October 2011, and that his previous assertions, concerning starting on 22 October 2011, were mistaken.

[164] Learned counsel for Mr Palmer further submitted that the judge failed to inform the jury of the danger in acting upon evidence which had been shown to have been compromised. The voice notes were especially targeted in this submission. Instead of identifying the danger of manipulation of the data, learned counsel submitted, the judge "repeatedly reminded the jury that the voice [in the voice notes] was still the voice of Mr Palmer, [thereby] suggesting that nothing short of the appearance of a different voice

could make the impeached exhibits unworthy of their consideration" (page 10 of the Supplementary Grounds and Skeleton Arguments- Core Bundle 2A – Tab I and page 52 of the written submissions on behalf of Mr Palmer and Mr St John).

[165] Learned counsel argued that the judge failed to make it clear to the jury that the data evidence was in fact compromised and that the jury ought, at the least, to be very wary of acting on that evidence.

[166] The message containing the graphic description of what had become of Mr Clive Williams, and how his body had been disposed of, was the topic of a number of submissions. That message, it will be recalled, was a BB message on the SD card in the exhibit 14C instrument. It will be referred to below as "the chop up message". It is, for convenience only, repeated below:

> "'tween me and you a chop we chop up di boy 'Lizard' fine, fine and dash him weh enuh. As Long as yuh live dem can neva find him." (Vol VI, pages 3402-3403 of the transcript).

[167] Firstly, learned counsel highlighted a discrepancy in respect of the date that the chop up message was sent. Sergeant Linton testified that it was sent on 19 August 2011. Learned counsel submitted that much uncertainty surrounds the creation of the chop up message and whether it had been modified.

[168] In the written submissions on behalf of Mr Campbell, it was submitted that Sergeant Williams had, in cross-examination, changed his testimony to say that the chop up message had been created on 6 July 2011; 42 days before Mr Williams' disappearance

(paragraph 74 of the written submissions). Learned counsel submitted that the judge should have directed the jury to disregard the chop up message as being totally irrelevant to the case.

[169] Mr Buchanan, on behalf of Mr Campbell, also argued that there was evidence that the chop up message could have been created on 30 September 2011 at 12:54 (paragraph 14 of his speaking notes).

[170] These uncertainties as to the date the chop up message was created, it was submitted, were not brought to the attention of the jury. Learned counsel submitted that the omission is unfair to the appellants.

[171] Learned counsel for Mr Campbell also submitted that the judge confused the evidence about the chop up message with evidence about a discrepancy concerning another message. The confusion, learned counsel submitted, gave the "chop up" message a legitimacy that it did not deserve.

[172] Learned counsel for the Crown submitted that the judge did bring all the relevant issues to the attention of the jury. Mr Brown argued that the judge accurately gave the jury instructions on:

a. the burden of proof;

b. the breaks in the chain of custody and their consequences;

c. the respective integrity of exhibit 14C and JS2;

d. inconsistencies and discrepancies in the evidence and their consequences;

e. the credibility of Sergeant Linton as an expert witness; and

f. expert evidence generally.

[173] Mr Brown submitted that there was no discrepancy in respect of the chop up message. Learned counsel argued that a distinction must be drawn between the date of the creation of the file containing the message, the date on which the message was sent and the date that the file was accessed. He argued that it is important to distinguish between the file and the message. The relevant dates he said were:

a. 6 July 2011 – date of the creation of the file (Vol VII, page 3789 of the transcript);

b. 19 August 2011 – date that the chop up message was sent (Vol VI, page 3402 of the transcript);

c. 18 October 2011 – date that the file was accessed (Vol VII, page 3792 of the transcript).

[174] Learned counsel submitted that there was no evidence that the date and time stamp for the chop up message was changed. The reliability of the evidence, he submitted, was a matter for the consideration of the jury.

[175] In analysing these contending submissions, it must be noted that the judge, as is usual in most summations, accurately gave the jury general directions in respect of:

a. the credibility of the witnesses (Vol IX, page 4720 of the transcript);
b. the burden and standard of proof (Vol IX, pages 4728-9, 4909 and 5139 of the transcript);
c. inferences (Vol IX, pages 4725 and 4731 of the transcript);
d. inconsistencies and discrepancies (Vol IX, page 4729 of the transcript);
e. expert witnesses (Vol IX, page 4923 of the transcript); and
f. the significance of proof of the chain of custody of the exhibits (Vol IX, pages 4942 and 4944 of the transcript).

He again mentioned some of these general directions in the context of specific directions. It cannot, therefore, be ignored that the general directions were given and the jury is expected, indeed is presumed, to continuously bear them in mind.

[176] The judge did direct the jury on the defence's robust challenge to Sergeant Linton's credibility. The judge reminded the jury that the defence contended that Sergeant Linton was a charlatan; a trickster who had corruptly manipulated the text messages and the video, which he said that he found on the exhibit 14C instrument (Vol IX, pages 5001 and 5034 of the transcript). In doing so, the judge raised with the jury the issue of whether

Sergeant Linton, whose evidence was critical to the technology evidence, could be relied upon. He is recorded at page 5001 as saying, in part:

> "…but the messages, you bear in mind, were these concoctions or were they extracted from the device as stated by Sergeant Linton?"

[177] As part of Sergeant Linton's credibility concern, the judge brought to the jury's attention the discrepancy in Sergeant Linton's testimony as to when he commenced his forensic examination of exhibit 14C. Not only did the judge remind the jury of the differences in Sergeant Linton's evidence in that regard, he also reminded them of the accusation that Sergeant Linton was lying in order to cover up an improper interference with the exhibit 14C instrument while it was in police custody (Vol IX, page 5022 of the transcript). Learned counsel's complaint, in this regard, about the summation, is unfounded.

[178] Learned counsel's complaint about the issue of the time-stamps is also unfounded. The judge is recorded, at Vol IX, pages 5022-5023 of the transcript, as addressing that issue. He reminded the jury of Sergeant Linton's testimony that the time-stamps are capable of being altered. The judge put that testimony in the context of the challenge by the defence. He reminded them of the cross-examination of Sergeant Linton and that the issue of the validity of the data was highlighted. The judge quoted the cross-examination, in part, at page 5023:

> "The question again, you remember I had asked you at the very beginning of my cross-examination about you saying that if the phone was left up to unauthorised persons the data taken from it would have been virtually worthless?"

[179] The judge specifically addressed the most critical parts of the data evidence as produced by the prosecution. In respect of the chop up message, the judge told the jury, at Vol IX page 4999 of the transcript, that the defence challenged that message as being a fabrication and that the time-stamp suggested that it was not made at any time that was relevant to this case.

[180] The evidence concerning the chop up message demonstrates that it was part of an exchange of messages between the exhibit 14C instrument and another Blackberry phone. The exchanges were contained in a file on the exhibit 14C instrument (Vol VI, pages 3282-3285 of the transcript). Each message carried meta-data as to the date and time that it was sent and which was the sending and which the receiving phone. The evidence also demonstrates that there are four distinct dates, which should be considered in this context. They are:

a. 6 July 2011, which is the date of the creation of the file containing the conversation between the two BB phones (Vol VII, page 3789 of the transcript);

b. 19 August 2011, which is the date that the chop up message was sent from the exhibit 14C instrument to the other BB phone (Vol VI, page 3402 of the transcript);

c. 30 September 2011, which is the date that the last message in that conversation was sent (Vol VII, page 3794 of the transcript); and

d. 18 October 2011, which is the date that the file was accessed (Vol VII, page 3790 of the transcript).

There was detailed cross-examination as to the time at which the message of 30 September 2011 was sent (Vol VII, pages 3794-3798). This was to determine whether it had been sent during the time the exhibit 14C instrument was in the custody of the police. Its contents were not revealed in the transcript, but an examination of the file shows that the last entry in that exchange was a message sent from the other Blackberry phone to the exhibit 14C instrument.

[181] The judge reminded the jury of the contents of the chop up message, and of the fact that it had been challenged as being a fabrication, as not having been done at a time that would make it relevant (Vol IX, page 4999 of the transcript). Despite the submissions of Mr Buchanan in respect of the chop up message, it cannot be said that there was truly a discrepancy as to when the message was sent. The cross-examination sought to introduce the other dates as being important but Sergeant Linton did not resile from his evidence as to the date that the chop up message was sent.

[182] The judge reminded the jury of the evidence about the Epoch time of the message. Sergeant Linton testified that the Epoch time is a record of every second since 1 January 1970. That time, he said, was also used to identify the time, down to milliseconds, that

messages are sent (Vol VI, pages 3284-3285 of the transcript). He said that the conversation, which included the chop up message, also had the Epoch time to identify when it took place (Vol VI, page 3401 of the transcript). The judge's directions on this point are recorded at Vol IX, pages 5001-5003 of the transcript.

[183] In respect of the video file and the BB messages, the judge reminded the jury that they were required to decide on the authenticity of that material, bearing in mind that:

a. there had been a break in the chain of custody;

b. it was possible to alter that material; and

c. Sergeant Linton was accused of manipulating the material.

(Vol IX, pages 5033-5035 of the transcript)

[184] The judge directed the jury on the evidence concerning JS2 and the significance of the absence of JS1 (Vol IX pages 4955-4958 of the transcript). He made it clear that JS2, by itself, had to be closely examined for reliability. He also directed them on the significance of the photographs that were made from the frames from the video (Vol IX pages 5037-5039 of the transcript).

[185] There was a mass of evidence adduced during this long trial and the judge carried out a comprehensive review of the major items. There were items which received more, or less, emphasis than the appellants' counsel would have liked, but it cannot be said that the summation was unfair.

[186] Based on that analysis the complaints concerning the judge's summation, in respect of the technology evidence, cannot succeed.

Conclusion on the technology issues

[187] The grounds containing the complaints about the technology evidence and the judge's directions in respect of it, therefore fail.

Issue B - The judge's handling of the jury management issues which arose during the trial

[188] There are several grounds of appeal that give rise to what might conveniently be referred to collectively as the "jury-management issues". One of these grounds, for each appellant, seeks to establish that the fact that the jury was sent out to deliberate, relatively late in the day, resulted in undue pressure being placed on its members, rendering the verdict unsafe. That ground is ground number 7 in the appeal brought by the appellant Shawn Campbell; and ground number 8 in the appeals of the other appellants.

[189] Grounds 5, 8a and 8b (for the appellant, Shawn Campbell) and 11 (for the other appellants) challenge the conviction by seeking to establish that the appellants' constitutional rights were infringed and that they were denied due process at common law by the manner in which the trial judge on two occasions, namely, on 6 February 2014 and on 13 March 2014, conducted separate enquiries into issues concerning the jury. They were:

a. a report of severe anxiety by juror number 11, when she realised that her son was being detained at the

same remand centre as at least one of the appellants, whom she saw at the time of visiting her son; and,

b. allegations of attempts at jury tampering by one member of the jury. (It was alleged that one member of the jury attempted to bribe the others to dispose of the case in a certain way).

[190] Specifically, the appellants contend that the correct procedure was not followed and that the enquiries ought not to have been conducted in their absence. The challenge also relates to the circumstances surrounding the discharge of juror number 11 after the enquiry on 6 February 2014.

[191] Another complaint, which may also conveniently be addressed under this heading, is that represented by ground 6 for the appellant Campbell, and adopted by the other appellants at the hearing of the appeal. It seeks to demonstrate that there was prosecutorial misconduct in relation to the guidance given to the court below by the Director of Public Prosecutions ('the DPP') as to how the said "jury management issues" were to have been resolved. The contention was that that advice was such as to render the trial unfair.

[192] We now proceed to a discussion of these grounds.

The time at which the jury was sent to deliberate

[193] This is how the grounds asserting that undue pressure was placed on the jury, were stated:

> Ground 8 (Messrs Palmer, Jones & St John):
>
> > "The Learned Trial Judge, after months of trial, retired the jury at a time so late in the day, as to bring undue pressure on them to arrive at a rushed verdict."
>
> Ground 7 (Mr Campbell):
>
> > "The learned trial judge's (LTJ's) decision to have the jury retire on Thursday, March 13, 2014 at 3:42 pm (v9- p5142, L.11), after seventeen (17) weeks of trial, in all the circumstances, amounted to the imposition of undue pressure on the jury to return a verdict."

Submissions

[194] On behalf of the appellants, their counsel drew the court's attention to chapter 25-2, section 5 of the Supreme Court of Judicature of Jamaica Criminal Bench Book, ('the Bench Book'), where the following is stated:

> "5. 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."

[195] Counsel for the appellants used this as a launching pad to argue that undue pressure was likely brought to bear on the jury by the very fact that they were made to retire so late in the day. It was pointed out that: (i) the jury was made to retire at 3:42 pm; (ii) they returned at 5:35 pm with a verdict that was not unanimous; (iii) after the prosecutor pointed out that the prescribed time for the taking of a majority verdict had not expired, the judge sent them out again at 5:46 pm; and (iv) roughly 20 minutes thereafter, the jury returned with their verdict.

[196] It was emphasised, especially on behalf of the appellant Campbell, that the jury was made to retire just 18 minutes before the normal end-of-day adjournment of 4:00 pm. There were also, it was submitted, several factors that compounded the problem created by the late retirement of the jury, namely: (i) this was not a trial of a single defendant; but of five defendants, each of whose cases had to be considered independently of the others; (ii) the length of the trial (17 weeks); (iii) more often than not during the course of the trial, court adjourned before 4:00 pm each day; (iv) 24 witnesses testified for the Crown and six for the defence; (v) five unsworn statements were given; (vi) 25 exhibits were tendered into evidence; and (vii) the trial involved issues of some complexity. It was submitted, *inter alia*, that in all those circumstances, it was the judge's duty to have informed the jury that they could have continued their deliberations the following morning, if the circumstances so warranted.

[197] It was further submitted that the entire manner in which the jury was made to retire offended: "… a cardinal principle … that in considering their verdict, concerning, as

it does, the liberty of the subject, a jury shall deliberate in complete freedom …" (**R v McKenna; R v McKenna; R v Busby** [1960] 1 All ER 326, 329G), thus rendering the verdict unsafe.

[198] Submissions were also made to the effect that the judge, in sending the jury to deliberate for a second time, used words that might have conveyed to them that they were to return merely to "carry out a perfunctory exercise of simply waiting for the remaining seven minutes (before the expiry of the two-hour statutory minimum requirement for the acceptance of a majority verdict) to pass and then return". The jury would also have been led to believe, it was submitted, that they had no more than the two hours to deliberate.

[199] A complaint was also made that the enquiry made by the registrar of the forewoman, was made only in respect of the appellant, Palmer, and there was no enquiry as to the verdicts for the other appellants. The enquiry as to how the jury were divided at that point was also impermissible at the stage at which it was made, it was argued. This is the record of what transpired (Vol IX, pages 5143-5144 of the transcript):

> "REGISTRAR: …. Madam Foreman and members of the jury, in respect of the accused man, Adidja Palmer, have you arrived at a verdict?
>
> MADAM FOREMAN: Yes, we have.
>
> REGISTRAR: Madam Foreman and members of the jury, is your verdict unanimous? That is, are you all agreed?
>
> MADAM FOREMAN: No sir.

> REGISTRAR: Madam Foreman and members of the jury, how are you divided?
>
> MADAM FOREMAN: 10 to one.
>
> MR. J. TAYLOR: M'Lord, the two hours, according to statute has not yet past [sic].
>
> HIS LORDSHIP: Madam Foreman and your members, the time that you can take a majority verdict has not been arrived at. I ask you once more to retire to continue your deliberation. I am not able to take the verdict at this time. So you will have to retire once more in order for me to do so…"

[200] The case of **Holder (Peter) v The State** (1996) 49 WIR 450 was cited, specifically highlighting the Board's advice that "a late retirement of the jury in a capital case is undesirable". Otherwise, it was submitted, **Holder v The State** could not be interpreted in any other way as to sanction the late retiring of the jury.

[201] On behalf of the Crown, Mr Taylor argued that, although the advice is given in the Bench Book as to the desirability of adhering to a 3:00 pm bench mark, no authoritative foundation is given for that advice. Additionally, no such authoritative foundation existed at the time the appellants were tried. He submitted that it was, therefore, a matter of judicial discretion as to what time the jury was to have been sent out. It does not necessarily follow, he further submitted, that because a jury was sent out after 3:00 pm, they were subjected to undue pressure.

[202] In support of his submissions, he placed reliance on **Holder v The State**, in which a jury had retired at 6:40 pm and yet the conviction that ensued was upheld by the Privy Council. The Crown also referred to several other cases (such as, **R v Tommy Walker** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/2000,

judgment delivered 20 December 2001; and **R v Clive Barrett, Ivan Reid and Linton Barrett** (1994) 31 JLR 221) which were put forward as examples of circumstances in which judges' interaction with juries were held to have "crossed the line". It was submitted that none of the features in those cases were present in the instant appeal.

Analysis

[203] Whilst acknowledging that the Board in **Holder v The State** commented on the undesirability of a jury being made to retire late, especially in a murder case; and whilst the correctness of that position is accepted, it should be noted that that remark was made in a wider context, which. That context might be seen by setting out in full the paragraph in which that comment was made, appearing at pages 453-454 of the Board's advice, delivered by Lord Steyn. It reads as follows:

> "Finally, counsel for the appellant submitted that the judge erred in directing the jury to retire and deliberate at 6.40 p.m. **That the jury did not feel under undue pressure is demonstrated by the fact that they retired for more than an hour before bringing in their verdict. That is a substantial retirement in local conditions.** Their Lordships agree with the Court of Appeal that no prejudice to the appellant was caused by the late retirement. Nevertheless, in agreement with the Court of Appeal, their Lordships must record that such a late retirement of the jury in a capital case is undesirable." (Emphasis added)

[204] In **Holder v The State**, the jury was made to retire some two-and-a-half hours after the usual time of 4:00 pm, when the court proceedings would normally have ended. Additionally, the jury retired for more than an hour before returning their verdict. That period of retirement, which, in the circumstances, the Board found to be substantial, was

regarded as an indication that the jury did not feel any undue pressure to return its verdict. Accordingly, the Board was unable to say that the appellant suffered any real prejudice by virtue of the late retirement.

[205] In the instant appeal, the jury was sent out some 18 minutes before 4:00 pm and took in excess of two hours to return the verdict (one hour and 53 minutes in the first instance of deliberation and 20 minutes upon the second retirement). In our view, a similar approach to that taken in **Holder v The State** ought to be taken in these appeals, resulting in a similar finding: that is, that the appellants suffered no prejudice. This is so because, in this case, the jury retired at an earlier time than in **Holder v The State**, and also took a longer time to arrive at the verdicts (thus indicating that it was under no undue pressure).

[206] The issue of pressure on a jury arising from the time at which it is sent to deliberate was discussed in the case of **Shoukatallie v R** (1961) 4 WIR 111. In that case, the summation ran from 10:14 am to 4:50 pm, with the lunch break from 11:20 am to 12:30 pm. The jury was asked to retire at 4:50 pm (later than the jury in the instant case), which they did. At 8:40 pm, they returned into court, returned to the jury room at 8:49 pm and went back into court at 10:00 pm for further directions, retiring again at 10:15 pm. The verdict was delivered at 1:35 am the following day. The conviction was challenged, mainly on the basis of the contention that the jury had been coerced by the trial judge, whose words to them had included the following (reported at page 114 B-C):

> "Now, you must return to that jury-room and consider the matter again and then make up your minds one way or the other. If you feel one way and another member of the jury thinks another way, then you must examine the arguments of each other and accept reason. You must not be pig-headed. Not because you may feel one way or the other does it mean that you must never give way, even though sound commonsense [sic] and good reason are placed before you.
>
> The community is looking to you to return a verdict in accordance with the evidence and in accordance with your own conscience. If you fail to do that you will not only be bringing disgrace upon the community but you will be bringing disgrace upon yourselves, which is perhaps even worse.
>
> Gentlemen of the jury, I am now going to order you to return to that jury-room and consider the matter calmly and dispassionately, and give you an opportunity of arriving at an honest verdict in this case. Please see that you do not besmirch the fair name of your country. Please return to the jury-room."

[207] The appeal was dismissed. In doing so, the Board observed, among other things, the following (at page 116, B-C):

> "The question in this case is whether the judge went beyond exhortation which is permissible, and exerted some measure of coercion which is not ... It was perhaps, as the Federal Supreme Court said, too strongly worded and might have been differently put. But the Federal Supreme Court did not see in it such a measure of coercion as to invalidate the verdict. Nor do their Lordships. The more especially as the conduct of the jury shows that they were not in the least coerced by it. They deliberated for more than an hour and then came back with a request for further directions on a pertinent point …"

[208] It is acknowledged that, in **Shoukatallie v R**, the focus of the appeal appears to have been more on the alleged coercion of the jury than on the time at which the jury

was asked to retire. That notwithstanding, in that case the jury was asked to retire at 4:50 pm – that is, an hour and eight minutes later than the jury in the instant case was asked to retire – and even that, coupled with the strong words used by the judge in **Shoukatallie v R**, was not enough to win the appeal for the appellant, Shoukatallie. In our view, the time of retirement in these appeals is earlier; the entire time span of deliberation, far shorter than in **Shoukatallie v R**, and the language used nowhere as exhortative or directory as in **Shoukatallie v R**. Nor are the times and utterances in the instant case otherwise objectionable so as to render the verdict unsafe.

[209] In this regard, the Bench Book is not inflexible but must be considered guidance as to the best practice. Where, however, the circumstances require a departure from the usual time, then that departure cannot be fatal to the conviction. This was certainly a set of circumstances, bearing in mind the situation with the allegation against the juror, which required the earliest deliberation by the jury. Departure from the usual time was justified.

[210] In relation to the registrar's failure to enquire about the verdicts in respect of the other defendants, whilst it is an irregularity, we do not see it as rising to the level of causing any injustice to the appellant Campbell; or to any of the other appellants. The trial, after all, was a joint trial in which the Crown's case was advanced on the basis of, *inter alia*, a joint enterprise. It is entirely speculative to contend that the other appellants about whom no enquiry was made could have been deprived of a verdict of acquittal. If the jury had in fact arrived at verdicts in respect of the appellants other than the appellant Palmer, those verdicts could also equally have been for conviction.

[211] Having reviewed all these matters, we are firmly of the view that these grounds of appeal cannot succeed.

The enquiries into jury issues

[212] Ground 11 (Palmer, Jones & St John) states that:

> "The Learned Trial Judge erred when he had hearings into a critical aspect of the trial and the jury in the absence of the accused. He further erred in failing to conduct the appropriately transparent enquiry and to resolve the issue correctly. These errors are constitutional breaches as well as abrogation of established principles designed to protect the rights of citizens on trial."

[213] For the appellant, Shawn Campbell, the challenge in this area is to be found in grounds 5, 8a and 8b, which read as follows:

> Ground 5
>
> "The Learned Trial Judge (LTJ) infringed upon the Appellant's right to due process at Common Law and as enshrined in the Charter of Rights, when he conducted jury investigations in Chambers on February 6, 2014 and March 13, 2014, in the absence of the Appellant, resulting in a substantial miscarriage of justice."
>
> Ground 8a
>
> "The LTJ erred in law by failing to invoke the proper procedure and/or apply the proper test in respect of the complaint of alleged jury tampering made by the forewoman, resulting in a substantial miscarriage of justice."
>
> Ground 8b
>
> "The LTJ failed to embark upon a fulsome investigation of the effect of juror no. 11's personal difficulty on the other members of the jury, with the result that there was a real risk that the verdict may [not] have been rendered by an impartial jury, contrary to the Constitution."

Submissions

[214] The submissions made here on behalf of the appellant Campbell were also adopted by the other appellants. On behalf of the appellant, Campbell, it was emphasised that a challenge was being mounted to the conduct of the proceedings in chambers in the absence of the appellant on two dates: (i) 6 February 2014 – when juror number 11 was discharged; and (ii) 13 March 2014 – when the forewoman was heard in relation to possible attempts at jury tampering.

[215] The substance of the submissions made on behalf of the appellant Campbell in relation to his ground 5, might be seen in paragraphs 40 and 41 (pages 16 and 17) of his skeleton submissions contained in Core Bundle 2A filed on 2 July 2018. They read as follows:

> "40. It is submitted that the presence of an accused at hearings involving investigations into jury tampering, are required by the rules of natural justice, the Common Law and the Constitution and also finds support in statute (the Jury Act, s. 33(1)); the requirement is therefore absolute.
>
> 41. The exclusion of the Appellant from the two (2) in chambers proceedings (volumes 7 and 10), during which the two (2) jury matters were decided on, deprived the Appellant of a fair trial by an impartial jury, as the allegations and decisions made in chambers on both occasions, fundamentally concerned the composition of the judges of fact, which ultimately rendered a verdict against him."

[216] The submissions were anchored primarily on section 16(1), (3) and (4)(c)(i) and (6)(g) of the Charter, in relation to what was put forward as the appellants' constitutional

right to have been present during those proceedings. In relation to what was put forward as the appellants' common law right to have been present, reference was made to several cases, including **Neville Lewis and Others v Attorney General of Jamaica and Another** (2000) 57 WIR 275 and **Annamunthodo v Oilfields Workers' Trade Union** (1961) 4 WIR 117.

[217] In relation to ground 8(a) (concerning the procedure adopted in respect of the complaint of jury tampering), the substance of the submissions might be seen in paragraph 37 (page 59) of the appellant Campbell's skeleton submissions, also contained in Core Bundle 2A. This is how the submission reads:

> "37. It is submitted that the LTJ's failure to conduct a more detailed investigation by inviting all the jurors to be questioned under oath, he failed to take into account all relevant considerations before coming to his decision to proceed with the trial despite the allegations made by the forewoman. The result of this approach of the LTJ was to potentially deny the Appellant his right to be tried by an impartial and independent jury, resulting in a substantial miscarriage of justice."

[218] In the skeleton arguments, it was sought to emphasise the circumstances leading up to the hearing as well as the fact that "[n]o other jurors, including the alleged briber, were called by the learned trial judge to be questioned" (paragraph 2 d of page 45).

[219] One possibility in dealing with the matter, it was submitted, was to have discharged the individual juror against whom allegations were being made. The effect of that discharge would have been to cause the entire panel to be discharged for falling below the minimum number. Heavy reliance was placed on the case of **R v Blackwell**

and others [1995] 2 Cr App Rep 625, 633-4, as outlining (in the submission) the approach that ought to have been taken. It was also submitted that the learned trial judge considered irrelevant matters (namely the possibility of aborting a trial that had gone on for some 17 weeks) in making the decision to continue the case. Reliance was additionally placed on the case of **R v Putnam and others** (1991) 93 Crim App Rep 281, as also being similar to the facts of this appeal. There was a complaint that a recording, said to have been made by the forewoman of the alleged attempt at jury tampering, was also not listened to by the learned trial judge. The decision of this court in the case of **Delroy Laing v R** [2016] JMCA Crim 11 was also referred to in relation to the submission as to the need to conduct a proper investigation. It was desirable for sworn testimony to have been taken, it was submitted.

[220] In relation to ground 8(b), concerning the discharging of juror number 11 on 6 February 2014, the substance of the complaint can be seen in paragraph 25 (page 67) of the appellant Campbell's skeleton submissions (contained in Core Bundle 2A). This is how that paragraph reads:

> "25. The LTJ's treatment of, and the circumstances surrounding the discharge of juror no. 11 makes it clear, it is submitted, that not only had the forewoman become demonstrably impartial, [sic] but the pivotal question as to whether the other jurors had become so persuaded, was left unanswered. Such circumstances, it is submitted, was [sic] unsatisfactory and carried with it the real risk of a verdict rendered by a jury which was, contrary to the Appellants fundamental rights, '*partial*'. This state of affairs viewed at the end of a trial, amounted to a substantial miscarriage of justice,

> rendering the verdict so unsafe that the proviso is inapplicable."

[221] It was also submitted that the judge ought to have made enquiries of juror number 11 herself as to whether she had discussed the matter with any other juror. (The judge had only interviewed the forewoman on the issue.) It was submitted as well that the judge's sole question to the forewoman (which was: "Do you think you are in a position to continue to listen to the matter objectively?") was inadequate. The judge also wrongly relied on the registrar's word that he was informed that only the forewoman had been told about the matter. He ought to have explored further the possibility of contamination of the other jurors. The response of the forewoman (she said: "…I just want to ensure that she is safe, that's my only concern…"), it was submitted, revealed that she was infected: she must have believed that the accused men were capable of jeopardizing the safety of juror number 11.

[222] On behalf of the Crown, it was submitted that: (i) while it is accepted that, as a general rule, no part of a trial should be conducted in the involuntary absence of the defendant, that rule is not inflexible. In support of this submission, counsel cited the case of **Nash Lawson v R** [2014] JMCA Crim 29 in which Panton P observed at paragraph [17] as follows:

> "…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."

[223] It was pointed out that the learned judge's approach and the decision taken in respect of the first matter (the discharge of juror number 11) were not opposed by any of the counsel who were there representing all the defendants. Neither, it was submitted, was there a dissenting voice from counsel when the judge indicated that he would have been announcing, in dismissing her, that she had a personal difficulty. The juror, it was also pointed out, was discharged in open court in the presence of all the defendants. The judge, in discharging the juror, exercised an option that he had pursuant to section 31(3) of the Jury Act, specifically, to discharge a juror for "sufficient cause".

[224] In continuing the submissions, it was stressed that there are no statutory provisions, rules of court or practice directions in Jamaica laying down the specific procedure to be adopted in conducting an enquiry into suspected jury impropriety. The cases of **Delroy Laing v R** and **R v Taylor** (2013) 83 WIR 442 were cited. Reference was also made to the Bench Book, which, it was pointed out, does not state that such enquiries must be done in the presence of defendants. Additionally, reference was made to the **Practice Direction (Crown Court: Jury Irregularities)** [2013] 1 WLR 486. In essence, that practice direction advises that jury enquiries should be conducted in open court in the presence of defendants, unless there is good reason not to do so.

[225] In relation to the enquiries made by the learned trial judge on 6 February 2014, it was also pointed out that the learned trial judge gave the jury a direction tailored to the circumstances, although it was not in the form recommended in the practice direction.

[226] It was submitted that, in all the circumstances, no miscarriage of justice was caused to any of the defendants.

Analysis

[227] These grounds of appeal embrace three inter-connected issues, namely: (i) whether the judge erred by failing to conduct the enquiry correctly; (ii) whether the judge erred in conducting hearings in the absence of the accused; and (iii) whether the judge should have discharged the jury.

[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).

[229] The fact that we are without specific guidance in this jurisdiction as to how such enquiries are to be conducted also robs of their force submissions made on the basis of cases from other jurisdictions according to their rules, which are not in force in this jurisdiction. Such cases include: **R v Blackwell and others** and **R v Putnam and others**, on which the appellants placed heavy reliance.

[230] The case of **Sangit Chaitlal v The State** (1985) 39 WIR 295, is helpful in providing some guidance as to the judge's paramount duty where jury impropriety is alleged. In that case, the judge conducted an enquiry in his chambers, with counsel for both sides present, on being informed that a juror had been seen speaking with a witness during a break. No evidence was taken on oath. Both the witness and the juror denied the occurrence of the incident. The murder trial was allowed to continue with the juror on the panel. A verdict of "guilty" was returned. On appeal, the question arose as to whether failing to have evidence on oath taken at the enquiry vitiated the verdict. This is what was held (as recorded in the head note):

> "Held, dismissing the appeal … once a complaint regarding such a matter had been raised, **the paramount duty of the trial judge was to determine whether there was a possibility of a miscarriage of justice**; whether or not evidence on such an inquiry should be on oath was a matter entirely within the discretion of the trial judge, as was the question whether any or all the jurors should be discharged." (Emphasis added)

A similar stance was taken by this court in **R v Oliver Whylie**, (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 143/1978, judgment delivered 17 December 1980. The court did consider whether the issue could have been dealt with by a *voir dire* (see page 6 of the judgment). It was satisfied that as long as the *audi alteram partem* rule had been followed there was no basis for interfering with the exercise of the trial judge's discretion. (It should be noted that this court's decision in that case was overturned on appeal to the Board in the case of **Reid, Roy Dennis and Oliver Whylie v. The Queen and Errol Reece, Robert Taylor and Delroy Quelch v. The Queen (Jamaica)** [1989] UKPC 1 (27th July, 1989). The appeal was allowed (as, for example, paragraph 46 of the Board's advice shows) on the basis of challenges in relation to the identification evidence and the directions given on that issue.)

[231] This seems to us to give a trial judge dealing with such an enquiry a very wide discretion in how the enquiry is to be handled, the paramount consideration being to avoid a miscarriage of justice. So that, unlike other cases in other jurisdictions that might have rules or established procedures for dealing with such enquiries, in this jurisdiction, apart from the parameters of justice and the avoidance of a miscarriage of it, a trial judge is given significant leeway. Our focus therefore has to be to discern whether the course adopted by the judge in respect of each of the issues caused any miscarriage of justice to any of the appellants.

[232] In examining the issues, it is also important to recognise and accept as correct guidance, the dictum from this court at paragraph [17] of the case of **Nash Lawson v R**

cited by the Crown, that circumstances may arise during a trial where the judge may need to confer with counsel for both sides in the absence of the accused. This leads us to a consideration of the circumstances of the hearings on both dates.

[233] In the first instance (involving juror number 11), it is important, in our view, to note that, although the defendants were absent from the hearing in chambers, they were all represented by counsel. In the course of the enquiry (and, in fact, even just before he adjourned to deal with the issue) the judge indicated that he was seeking the input of counsel on both sides, in trying to find the best way of dealing with an unexpected development. The record shows that he received this input. There was no demur in chambers to the course proposed; and, similarly there was no demur even when the course proposed in chambers was acted on in open court. As time passed between when the enquiry was disposed of in chambers and when the matter resumed in open court, that would have allowed counsel to have dialogue with the appellants, to apprise them of what had taken place in chambers and, if necessary, to take instructions as to any particular course of action. It is also important to note that, on this occasion, in keeping with the guidance in **Nash Lawson v R**, what transpired in chambers was recorded by a court reporter.

[234] The procedure adopted and the circumstances were quite similar in relation to the second instance of an enquiry being conducted in chambers: counsel representing the appellants were present and the judge consulted with them before coming to a decision. No objection was taken to the procedure adopted. In one instance, a concern was

expressed (that is, that the jurors, being aware of the attempt at bribery, might have overcompensated against that threat, by ensuring that a guilty verdict was returned, regardless of the evidence). However, the judge, in his discretion, came to a decision on what he clearly thought was the best way to deal with the situation that confronted him.

[235] The decision whether or not to discharge the jury, in response to the second jury situation, was also one that fell within the judge's discretion. At Vol X, page 10, lines 5-7 of the Supplemental Record of Appeal, it is clear that he considered, then ultimately rejected, the option of discharging the jury and stopping the trial. The following is recorded:

> "HIS LORDSHIP: Can we possibly continue or we have to bring it to an end? That is the decision I have to make."

Based on our reading of the transcript and our consideration of the submissions, we can see nothing manifesting an improper exercise of that discretion. The question of the amount of time spent in the trial of the case was not, contrary to the submissions for the appellants, an irrelevant matter. The proper administration of justice does require the consideration of such issues as well as the issue of prejudice to the persons accused.

[236] In relation to the complaint that the learned trial judge ought to have listened to the recording of the alleged attempt at bribery, it should be noted from the outset that doubt was cast on the quality and extent of the recording in the first place. For example, when asked whether she had a recording of the conversation between herself and the allegedly erring juror, the forewoman replied: "Somewhat" (Vol X page 5, line 3 of the transcript). She also said: "The recording is low, I don't know if you can hear it" (Vol X

page 6, lines 14-15 of the transcript). Line 16 of page 6 shows that an attempt was in fact made to play the recording and that the judge asked whether there was some way of amplifying the recording: he was told that "the cyber people" could do so. He indicated an intention to listen to it, then proceeded to hear from the forewoman. So, it is not clear that the recording was audible at all or enough for the judge to have listened to it. If it was not, was the hearing of the recording absolutely necessary for the judge's decision, that he should have deferred his decision pending the amplification of the recording (however long that might have taken)? We think not. Any recording could be used in further criminal proceedings against the juror in question.

[237] During the course of that enquiry, the judge also had the forewoman's assurance that none of the jurors was being influenced by the juror in question and that she was reminding the other jurors to be guided by the evidence.

[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**.

[239] It is important to note as well that, in relation to section 16(3) of the Charter, it is difficult to see how the fact that the defendants were not present when the jury management issues were being dealt with could be fatal to the convictions. At every turn, they were all represented by counsel, who would have apprised them (or have had the opportunity of apprising them) of all the details of what had occurred in chambers, taking their instructions and proceeding as those instructions required. At all material times the defendants' rights and interests were protected by their legal representatives. The same instructions which the defendants could have given to their counsel if they had been present at the enquiries are the same instructions that they could have given to their counsel after being informed of what had transpired in chambers.

[240] There was the submission that the judge did not use or apply the correct test in dealing with the jury management issues, in particular the second situation. That test is enunciated in cases such as **Magill v Porter; Magill v Weeks** [2001] UKHL 67. At paragraph [103], Lord Hope of Craighead said as follows:

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

There is, however, nothing compelling that we can discern from our review of the matter that shows the existence of any possibility, risk or danger that a fair-minded and informed observer could or would have come to such a conclusion. This submission must therefore be rejected.

[241] We find that the following words used by the Privy Council in **R v Taylor** at paragraphs [22] and [23] to describe the situation with which the judge in that trial was confronted, and his approach in dealing with it, might be applied to the circumstances which faced the judge in this case:

> "[22] …The question how then to deal with the situation was at the judge's discretion. It was for him to take the course which he regarded as best suited to the circumstances: **R v Orgles** [1993] 4 All ER 533 at 538, [1994] 1 WLR 108 at 112 per Holland J. In **R v Thorpe** (9 October 2000, unreported) (Court of Appeal, Criminal Division), para [12], Kay LJ said of a recorder, faced with unusual circumstances which had come upon him with little warning, that it was not surprising that he took a course which he no doubt believed at the time was a fair course and would properly deal with the circumstances in which he found himself....
>
> [23] …The general rule is not in doubt. It is the duty of the trial judge to inquire into and deal with the situation so as to ensure that there is a fair trial: **R v Orgles** [1993] 4 All ER 533 at 538, [1994] 1 WLR 108 at 112. Here again, however, much has to be left to the discretion of the trial judge."

The sum total of this is that the appellants have failed in respect of these grounds relating to the jury management issues.

Complaint of prosecutorial misconduct

Ground 6

[242] Ground 6 is concerned solely with the hearing in chambers on 13 March 2014. It reads as follows:

> "The assistance sought from and rendered by the Learned Director of Public Prosecutions to the LTJ, 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."

[243] The complaint made under this ground came in several documents: (i) the "Additional Grounds of Appeal and Skeleton Arguments on behalf of Shawn Campbell" ('the first document'); (ii) a document entitled: "Supplemental Skeleton Arguments in Support of Ground 6" ('the second document'); and (iii) a document headed: "Is the test for Misfeasance in a Public Office a relevant consideration for Prosecutorial Misconduct?" ('the third document').

[244] 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.

Submissions

[245] The most salient features of the challenge contained in the 43 paragraphs of the first document, may be identified as being reflected in paragraphs 16, 30 and 43, which are reproduced as follows:

> "16. It is submitted that the learned DPP's decision not to discontinue at that stage of the trial, amounted to a failure to perform her functions, both as a minister of

justice and pursuant to her powers given under s.94 of the Constitution, in accordance with the Appellant's Constitutional right to a fair hearing (s.16(1)) and her obligation at Common Law to ensure that best practices are maintained throughout in a criminal trial (see **R v Randall** [2002] UKPC 19).

….

30. It is submitted that the advice given by the learned DPP to the LTJ, to continue with the case in the face of contamination, though given in the confines of the judge's chambers and thus, outside of the hearing of the jury, it having been acted upon by the LTJ, ultimately contributed directly to the breaches of the Appellant's Constitutional right to, inter alia, due process, involving his entitlement to trial by an impartial tribunal and thus to the substantial miscarriage of justice meted out to the Appellant. Therein lies a clear case of prosecutorial misconduct.

….

43. The aforementioned assistance rendered by the DPP was so gross a departure from good practice, as to amount to prosecutorial misconduct. Said advice having been sought and adopted by the LTJ, it undoubtedly had the effect of undermining the integrity of the trial in a material respect, in that it directly affected the question of the ability of the tribunal of fact to render an impartial verdict in accordance with the Constitution."

[246] In the second document, the appellants made reference to the Legal Profession Act; The Legal Profession (Canons of Professional Ethics) Rules ('the canons'), canons III(f) and (h); and section 16(1) of the Charter. The appellants contended that the DPP, by encouraging the judge to retain the juror against whom allegations of tampering were being made, knowingly and deliberately acted contrary to the laws of the land and encouraged the learned trial judge to do the same. The relevant provisions are as follows:

Canon III(f):

> "An Attorney shall not act contrary to the laws of the land, or aid, counsel or assist any man to break those laws."

Canon III(h):

> "An Attorney engaged in conducting the prosecution of an accused person has a primary duty to see that justice is done…"

Section 16(1) of the Charter:

> "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."

[247] The gravity of the breach of the canons by the DPP, it was submitted, lends itself to the irresistible conclusion that the integrity of the trial was undermined, rendering it unfair and resulting in a breach of the appellants' constitutional right to due process.

[248] In the third document, the appellants argue that the principles enunciated in the tort of "misfeasance in a public office" can be of assistance in determining whether there has been prosecutorial misconduct. In this regard, counsel referred to the cases of **Ashby v White** (1703) 2 Ld Raym 938 (which, it was submitted, gave rise to the tort) and **Three Rivers District Council and others v Bank of England** [2000] 3 All ER 1 ('**Three Rivers**'), as a basis for contending that the DPP, a public officer, contrary to the principle outlined in the **Three Rivers** case, used her power for improper purposes. Her actions, it was further contended, were in breach of the common law and she "aided and abetted in the offence of attempting to pervert the course of justice". It was further submitted that, in addition to being in breach of section 16(1) of the Charter, the actions of the DPP also

amounted to a breach of section 13(2)(b) of the Charter in that the action had the effect of abrogating, abridging and infringing on the fundamental rights of the appellants.

[249] On behalf of the Crown, it was submitted as a starting point that guidance as to the role and duties of a prosecutor could be found in the case of **Berger v United States** (1935) 295 US 78 at page 88, per Sutherland J, who said:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

[250] It was submitted that prosecutorial misconduct has to be made of more offensive and abrasive conduct than rendering advice of the type given by the DPP in this case, at the request of the judge. All that the DPP did, it was contended, was to give her invited view on what she thought was best to preserve the interests of justice.

[251] The Crown also submitted that the **Three Rivers** case has three ingredients, which must be proven before the offence of misfeasance in a public office could be established: viz, (i) that the defendant is a public officer; (ii) that that person must exercise a public power; and (iii) that the public officer must have demonstrated a particular state of mind, to wit: either conduct specifically intended to injure others; or acting, knowing

that there is no power to do so and that the act will probably cause injury. Neither of the factors in (iii) applies in this appeal, it was argued. It was submitted that, in the circumstances of this case, the arguments and submissions in respect of this ground are unsubstantiated, unmeritorious and unfortunate.

Analysis

[252] It is important to briefly revisit the circumstances of what transpired in chambers in relation to this ground and of some of the dialogue between the judge, on the one hand, and counsel for the prosecution and for the defence, on the other. For one, it bears repeating that it was the judge who initiated the discussion in chambers as indicated in Vol IX of the transcript at pages 5129, lines 17-21, as follows:

> "HIS LORDSHIP: Yes, I have arrived at the point where I will need the assistance of both sides before I can further continue my summation. I am going to ask both sides to meet me in my Chambers very shortly."

Thereafter, in chambers, followed dialogue between the judge and counsel, with the following extracts, at Vol X, pages 10 to 11, being the focus of the complaint:

> "MISS PAULA LLEWELLYN D.P.P.: Can we speak?
>
> HIS LORDSHIP: Could you answer?
>
> MISS PAULA LLEWELLYN D.P.P.: Just warn them again about their oath. Just their oath.
>
> HIS LORDSHIP: Because this is how I reason it. If it were not so, a person could always taint the trial.
>
> MISS PAULA LLEWELLYN D.P.P.: As far as the Prosecution is concerned, we are prepared for the matter to proceed, just

> that your Lordship remind them of their oath and their charge, all of them.
>
> HIS LORDSHIP: Mr. Finson?
>
> MR. T. FINSON: We are of the view – we don't see how you could proceed under these circumstances where you have a person who is making an allegation that someone is going around offer [sic] the jurors money, and she obviously have some tapings. Her role is very serious. I don't see in those circumstances …
>
> MISS PAULA LLEWELLYN D.P.P.: Remember she has not really told us – she said that the charge that she has – she has remember [sic] what the judge is saying. So in otherwords [sic] is 'You must be true to your oath and it is only the evidence you must be guided by.' In other words out of the both of us it is the Prosecution who is most at a disadvantage."

[253] The focus of the complaint is in respect of the advice given by the DPP to proceed with the trial, with a warning to the jurors to bear in mind the oath that they took as jurors.

[254] It is useful, as the discussion begins, to bear in mind the general background against which criminal trials such as the one giving rise to this appeal are conducted. That can be seen in paragraph 9 of the case of **Randall v R** (Cayman Islands) [2002] UKPC 19:

> "[9] A contested criminal trial on indictment is adversarial in character. The prosecution seeks to satisfy the jury of the guilt of the accused beyond reasonable doubt. The defence seeks to resist and rebut such proof. The objects of the parties are fundamentally opposed. There may well be disputes concerning the relevance and admissibility of evidence. There will almost always be a conflict of evidence. Some witnesses may be impugned as unreliable, others perhaps as dishonest.

> Witnesses on both sides may be accused of exaggerating or even fabricating their evidence. Defendants may choose to act in an obstructive and evasive manner. Opposing counsel may find each other easy to work with or they may not. It is not unusual for tempers to become frayed and relations strained. In a fraud trial the pressure on all involved may be even more acute than in other trials. Fraud trials tend to involve a great deal of documentation, which is particularly cumbersome to handle in a jury trial. They tend to involve much unfamiliar detail, often of a technical nature, which it is difficult for many people to understand, assimilate, retain and recall. And fraud trials tend to be very long, which in itself tends to increase the strain on all involved, whether the defendant, witnesses, jurors, counsel or the judge. The appellant's trial was said to be the longest criminal trial ever held in the Cayman Islands."

[255] The trial from which these appeals arise was, it should be remembered, a trial for the offence of murder with five defendants. It lasted for some 17 weeks. The trial in **Randall v R** lasted some 41 days. The pressure on all participants (including the judge) must have been the more intense in this trial, given the more serious charge and the longer duration of the trial. Against that general consideration, we think it is also important to set out briefly the nature of the contentions as to prosecutorial misconduct against the relevant persons in the two main cases cited in this area: **Randall v R** and **Berger v United States**.

[256] In **Randall v R**, the main complaint made was that that the trial was conducted in a manner which was grossly and fundamentally unfair, due to the conduct of prosecuting counsel. At paragraph [12] of the judgment, the main complaints against counsel in that case are set out as follows:

> "[12] The appellant makes a number of complaints of unfairness. These complaints fall under several different heads. First it is complained that prosecuting counsel repeatedly interpolated prejudicial comments while examining prosecution witnesses, repeatedly interrupted the cross-examination of prosecution witnesses, often with prejudicial comment, repeatedly interrupted the examination in chief and re-examination of the appellant, interpolated prejudicial comment in the course of his cross-examination of the defendant and interrupted the judge in the course of his summing up..."

[257] At the end of the day, the Board found that some of these complaints were made out and that, by virtue of them, there was so gross a departure from good practice that the appellant was denied a fair trial.

[258] In **Berger v United States**, the allegations and findings against the appellant were summarized at page 84 of the judgment as follows:

> "2. That the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense is clearly shown by the record. He was guilty of misstating the facts in his cross-examination of witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and in general, of conducting himself in a thoroughly indecorous and improper manner."

[259] In our view, compared to the complaints in **Berger v United States** and **Randall v R**, and even looked at on their own, the facts about which complaint has been made in these appeals cannot be regarded as a departure from good practice. Further, they could never be said to have come near to that point described in paragraph [28] of **Randall v R** as follows:

> "… There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty."

[260] It appears from this dictum that the conduct complained of in any given case would have to be "gross"; "persistent"; "prejudicial" or "irremediable" in nature in order for an allegation of prosecutorial misconduct fairly to be made. For our part, the DPP's offering of advice when requested by the judge, although the appellants disagree with it, cannot fairly be characterised as prosecutorial misconduct. Whether the advice given by the DPP was right or wrong, we can discern no intention to mislead or deceive the court into making an error so that a conviction might have been won. Contrary to the appellants' submission, there is nothing in the DPP's suggestion that comes close to being fairly regarded as aiding and abetting an attempt to pervert the course of justice.

[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. 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."

[263] At paragraph 18 of the appellants' first document relating to the ground alleging prosecutorial misconduct, we were invited to assume jurisdiction to allow the appellant to challenge the DPP's decision not to invoke her powers to terminate the case against the

appellants after the incident on 13 March 2014. Whilst asking us to do so, an important concession was made, that is, that:

> "… ordinarily, the exercise of the DPP's discretion to halt a case falls in the realm of public law by way of judicial review …"

[264] One basis on which we were asked to assume jurisdiction was that the decision not to discontinue the case was not known to the appellants at the time. It seems to us, however, that this could be a basis for an application to extend the time to challenge the decision by way of judicial review. (It will be recalled that rule 56.6 (1) of the Civil Procedure Rules, 2006, requires that applications for judicial review be filed promptly, and, in any event, within three months from the time the right to make the application first arose. Rule 56.6(2), however, permits an extension of time if "good reason" for doing so is shown.)

[265] Another basis put forward was that the DPP's decision not to discontinue the case:

> "… was made despite the acceptance by the DPP that the tribunal of fact had become impartial …"

Suffice it to say that we can discern no such acceptance by the DPP from our reading of the transcript. What was accepted was that a member of the jury appeared to have been attempting to influence the others not to give a true verdict according to the evidence.

[266] In the circumstances, it would be injudicious for us to assume the jurisdiction the appellants would wish us to assume. This would properly be a matter for judicial review if

the "decision" complained of can be properly identified. Such a hearing would necessitate the filing of affidavit evidence. All that we now have are submissions, which are insufficient for us to properly consider what are serious allegations.

[267] In the result, therefore, we find this somewhat amorphous and wide-ranging ground to be without merit.

Issue C - The judge's directions to the jury (other than in relation to the admissibility of the cellular telephone and video evidence)

(i) The judge's treatment of the letter allegedly written by Mr Chow to the Public Defender (ground 5/AP, KJ, AStJ)

[268] As we have indicated, Mr Chow was the sole eye-witness upon whose evidence the prosecution relied. Much therefore turned on his credibility. Accordingly, as was to be expected, the defence made significant efforts – including extensive and searching cross-examination by all counsel on that side - to discredit him.

[269] Not least among these efforts was the suggestion that, less than a week before the trial was to commence, Mr Chow wrote and delivered a letter dated 13 November 2013 to the then Public Defender, Mr W Earl Witter QC, in which he sought to distance himself from his previous statements to the police implicating the appellants in the murder of the deceased.

[270] Mr Chow denied this suggestion on the several occasions it was put to him in cross-examination by counsel (see, in particular, the cross-examination by Mr Finson QC, counsel for Mr Palmer - Vol VII, pages 4028-4040 of the transcript). In addition, in answer to Mr Rogers, counsel for Mr Jones, Mr Chow stated that, on 13 November 2013, he was

in "[police] protection" and was therefore not free to "move about" (Vol II, page 749 of the transcript).

[271] So, as part of the defence case, Mr Witter was called to produce a handwritten letter dated 13 November 2013. The letter was purportedly written by one "L Chow" and was addressed to "the Public Defender Mr. Earl Witter". The evidence was that it was received at the office of the Public Defender on 18 November 2013. Mr Witter testified that the letter was brought to his attention in office by a member of his staff on 20 November 2013. Having read the letter, he dispatched a copy to the Director of Public Prosecutions under cover of a letter dated 20 November 2013. In due course, the letter was disclosed to the defence by the Director.

[272] The letter read as follows:

> "Good day, I'm Lamar Chow Im [sic] the witness in the Vydz [sic] Kartel cause the purpose of this letter is to inform you that that statement taken by the police by me wasn't willing Because I didn't go freely to the police station they came for me in brute force because of this I apprehend fear and I legitimise their theory of what happen on the 16 of August 2010 I didn't intend to be involved in their cause the reason why I don't want to come to court is because I see Clive after that."

[273] Counsel for Mr Palmer also called as a witness Mr Karl Major, a retired Senior Superintendent of Police. At the time of his retirement in 1997, Mr Major was the Chief Handwriting Expert attached to the Jamaica Constabulary Force; and, even after his retirement, he had continued to give evidence in criminal matters on behalf of the Crown, the last occasion having been as recently as September 2013. Despite the fact that Mr

Major was extensively cross-examined by counsel for the prosecution as to the methodology adopted by him in his examination of the challenged document in this case, his qualification as an expert appears to have been accepted.

[274] Mr Major's evidence was that, having examined a total of 32 specimens of signatures made by Mr Chow, and compared them with the handwriting and signature on the 13 November 2013 letter, he had formed the opinion that they were made by the same person.

[275] In his summing-up, after reading the letter to the jury, the judge told them this (Vol IX, pages 5123-5128 of the transcript):

> "That is the – well, Mr Chow has denied that he wrote this letter. What Mr. Chow has said, the evidence before the court is at the time when this letter was written, he was in the protective custody of the police. He defined 'productive custody' to mean he could move around freely but he couldn't go a road. He couldn't go a road. That was how he described his state. And that condition, that 'protective custody', according to his testimony, was going on up until when he was giving evidence.
>
> The 13th of November would have been a matter of, perhaps two weeks or so, a matter of days before he gave evidence before you for the first time. What the letter is saying, 'I didn't intend to be involved in their cause, the reason why I don't want to come to court is because I see Clive after that.'
>
> Now, the date that he mentions is, 'I legitimize their theory of what happened on the 16th of August, 2010,' and the date he refers to, 'I don't want to come to court is because I see Clive after that.' Is that the date he is referring? The 16th of August, 2010? You have seen the witness, Mr Chow. You heard, in fact, when he started to give his testimony, the lawyer was asking, under cross-examination, if he had refreshed himself, he said he hadn't. He was, to my mind – a comment I make – very clear in respect of what he was saying.

HIS LORDSHIP: It is a matter for you, whether in writing about the incident, in writing this letter, if he would have put the date, the 16th of August, 2010. And because you would probably think a date, the 16th of August, would be, and the year it happened, would be of some significance to him. Is this something that he would have forgotten? It is a matter for you, Madam Foreman and your members.

You may well ask yourselves, who was it who took this letter to the Public Defender? How did it reach there? What the Crown has said, that the word 'cause' how used here, 'the Vibes [sic] Kartel cause'. Now, I don't know how many – a comment I make – persons know that you can describe a case in court by calling it a cause. That is a way lawyers describe a case. You have a cause before the Court. But, Madam Foreman and your members, this tattoo artist that you saw, he described, he called it the Vibes [sic] Kartel cause. It is a matter for you. It is a matter for you.

The Prosecution has also drawn to your attention to [sic] the fact that he uses the language 'legitimize their theory'. You have heard him. Is that something you expect Lamar Chow would have said, 'legitimize their theory'?

When the Court asked Mr. Chow if he knew who the public defender was, he said no. This is addressed to the Public Defender, Mr. Earl Whitter, he knew the Public Defender's name. It is a matter for you. And how, if it is, this letter is written on the 13th and he told you, that the 13th, it is undisputed before this court that he was in protective custody then. He says he was. You haven't heard anything that he wasn't. You may very well ask your yourselves [sic], how could he, him seh him cyaah goh a road, and police is there – well, he is in protective custody, he is protected, how did this letter get to wherever it got to? It is a matter for you.

This is the letter you will be allowed to take into the room with you. Importantly, too, you have heard evidence of where Mr. Chow had been for a period of time since the incident; because he told you the incident he left one place, police came for him there etc. and what happened after that, you heard the parishes. And you heard how the lawyers went on before the place was even called, because one of the attorneys kept mentioning public interest and whatever, and what was the background against where this man was being held.

Now, the address he gives was his, rather, and you will see it, 3545 some Way or the other, you can look at it, Waterford. Would that have been his address when this letter was written? He says he was in

> police custody, protective custody. But then it is a matter for you, because the handwriting expert has said, a man on whom the Prosecution relied earlier, has said, having examined this letter, along with signatures of his Lamar Chow that is given to him, he formed the view that it was written by one and the same person, you bear that in mind. You bear also in mind when you think of this letter, that even if – and this is a comment I make, and you have heard from me and you have heard what you can do with comments that you don't like, from whatever source they come.
>
> What is the significance of this, what does it say? It is saying, on a literal interpretation, that he has seen Chow [sic] since the 16th of August, 2010. But then, that is not the problem. What the Prosecution is saying he has not been seen a year later. Is one year after that, the Prosecution is saying, nobody has seen him. Of course, everybody used to see him everyday before and when this man was saying he saw him, that wasn't a problem, everybody used to see him who wanted to see him. The thing this Prosecution is saying, the 16th of August, 2011, when, according to Lamar Chow, Lizard, taken by Needfa, went to 7 Swallowfield Avenue, the home of Adijah Palmer; he has not been seen since. And that is what is before the Court, not 2010, but that is a matter for you, Madam Foreman and your members."

[276] In ground 5, the appellants complain that the judge's comments about the 13 November 2013 letter "were unreasonable and, at its lowest, capable of suggesting manipulation by Counsel acting on behalf of the appellants". Further, that the judge's comments "prejudiced the appellants and denied them a fair trial".

[277] The appellants highlight two aspects of the directions in particular. First, the judge's remark that "I don't know how many … persons know that you can describe a case in court by calling it a cause ... [t]hat is the way lawyers describe a case … [b]ut … this tattoo artist that you saw [Mr Chow], he described, he called it the [Vybes] Kartel cause" (Vol IX, page 5125 of the transcript). And second, the judge's reminder that "[t]he prosecution has also drawn to your attention to the fact that he uses the language

'legitimize their theory'", followed by his comment that "You have heard him ... [i]s that something you expect Lamar Chow would have said, 'legitimize their theory'?" (Vol IX, page 5126 of the transcript.)

[278] Mrs Neita-Robertson QC, whose submissions on this ground were adopted by counsel for all of the other appellants, submitted that the judge's comments on the use of (i) the word "cause", and (ii) the phrase "legitimize their theory", in the 13 November 2013 letter were inappropriate and improper, in that they implied complicity by counsel in the writing of the letter. Therefore, the clear inference from the judge's remarks was that the letter was manufactured by the appellants with the assistance of a lawyer.

[279] In response, Mr Taylor submitted that the judge's comments were reasonable and were merely directed at inviting the jury to think about the evidence critically. In any event, the judge made it clear to the jury that, his comments notwithstanding, it was ultimately a matter for them to decide.

[280] We agree with Mr Taylor. It seems to us that the use of the word "cause" and the phrase "legitimize their theory" (to which we might also add the phrase, "I apprehend fear"), in the context of the otherwise simple writing style evinced in the 13 November 2013 letter as a whole, was sufficiently unusual as to warrant the judge's comments. In this regard, it is relevant to keep in mind that, as the judge reminded the jury, these were points which counsel for the prosecution had already made in addressing them.

[281] Further, in his comments, the judge expressly invited the jury to consider the points in the light of the way in which they had already heard Mr Chow give his evidence. There was therefore no question of them being invited to speculate about the limits of Mr Chow's vocabulary.

[282] The judge also balanced his comments in the appellants' favour by reminding the jury that "the handwriting expert [Mr Major] … a man on whom the Prosecution relied earlier, has said, having examined this letter, along with signatures of this Lamar Chow that [were] given to him, he formed the view that it was written by one and the same person".

[283] And finally, and in any event, the judge expressly reminded the jury that it was entirely a matter for them to decide what weight to attach to the 13 November 2013 letter. This was in fact a repetition of his expansive general direction on the point at an early stage of the summing-up (Vol IX, pages 4719-4720 of the transcript):

> "During the course of my summation to you, Madam Foreman and your members, I may make a comment on aspects of the evidence. I want you to understand in the same way I have described myself as being supreme in relation to the law, you are supreme in relation to the facts. If I make any comment or, in fact, counsel – and you heard the various and several comments that were made in how you are to view and apply the evidence – comments came fast and furious and from every direction. If those comments don't accord with your view … you can toss it [sic] aside. You don't have to accept it because you are supreme in relation to the facts of this case.
>
> Again, if I make any comment or counsel, for that matter, make any comment with which you disagree, do not hesitate to discard them and to substitute your own views of the facts for any comment which I or counsel might make. The same principle applies to all counsel for the Crown or for the Defence."

[284] Ground 5 therefore fails.

(ii) The directions on the treatment of inferences (ground 6/AP,KJ,AStJ)
(iii) The directions on circumstantial evidence (ground 7/AP,KJ,AStJ)

[285] It is convenient to take these two issues together. The appellants complain in ground 6 that the judge "gave inadequate directions in respect to the law of inferences or to apply the law relating to it, thereby denying the jury appropriate tools to enable a fair and balanced assessment of the case". And the complaint in ground 7 is that the judge gave "inadequate directions in respect to the law of circumstantial evidence" and that, given the nature of the case, "this] was a critical misdirection".

[286] The judge gave general directions on inferences in two parts. First, he told the jury that (Vol IX, page 4725 of the transcript):

> "Madam Foreman and your members, another part of your function is to draw reasonable inferences from proven facts. Where direct testimony is not available, when you draw inferences from proven facts, you must be quite sure that it is the only inference that can reasonably be drawn in the circumstances. Where the evidence is capable of two interpretations my duty … is to point out those possible interpretations leaving you, the jury, to select one, having heard the rest of the evidence in the case. I cannot direct you to which facts you are to find and what other inferences you draw are tantamount to the finding of facts. When I leave both interpretations to you, you look over the whole picture and see which one you are going to take. In considering the evidence given from the witnesses called in the case, you are entitled … to take into account what is referred to as the demeanour of the witnesses and this is very important in this case."

[287] And then, after telling the jury that not everything can be proved by direct evidence and that "[s]ome things have to be proved inferentially", the judge added this (Vol IX, page 4731 of the transcript):

> "Inferences can only be drawn from facts which you find proved. The law permits you to draw inferences, but the law says you must not draw an inference from a set of proven facts unless that inference is reasonable and inescapable. And you may draw an inference either to establish guilt on the one hand or innocence on the other hand. But bearing in mind, again, I remind you, an inference can only be drawn if it is reasonable and inescapable."

[288] Counsel for the appellants submitted that, notwithstanding the judge's comments to the jury about drawing reasonable inferences from proven facts, he did not indicate to the jury that, in drawing inferences, they must rule out all inferences consistent with innocence before they could find that an inference of guilt had been established.

[289] For the Crown, it was submitted that the judge's directions on inferences were adequate and that he was not required to give any specific directions on inferences in the circumstances of the case.

[290] The Crown relied on the oft-cited statement by Lord Morris of Borth-Y-Gest in **McGreevy v Director of Public Prosecutions** ('**McGreevy**') [1973] 1 All ER 503, 510:

> "In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond all reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence

> they could not say that they were satisfied of guilt beyond all reasonable doubt."

[291] In our view, in an area of the law which is now completely uncontroversial, this authoritative statement of the position provides a complete answer to the appellant's complaint in ground 6.

[292] Close to the beginning of the summing-up (Vol IX, page 4729 of the transcript), the judge told the jury that they should –

> "… consider all the evidence in the case, including what the accused man has said and see whether you are satisfied, so that you feel sure, that the prosecution has proven its case because it is only when you are so satisfied so that you feel sure, that you can say that the accused is guilty."

[293] Then, virtually at the end (Vol IX, page 5139 of the transcript), he reiterated that point:

> "As I told you … you must be satisfied to the extent that you feel sure of the guilt of the accused before you can find them guilty."

[294] In these circumstances, it seems to us that, when taken in the context of these clear directions on the standard of proof, the jury would have had no difficulty in appreciating that, where there were competing inferences pointing to guilt, on the one hand, or innocence, on the other, they could not be satisfied of guilt beyond a reasonable doubt unless they wholly rejected and excluded the latter. In our view, therefore, it was not necessary for the judge to go on to tell the jury specifically that they must rule out all

inferences consistent with innocence before they could find that an inference of guilt had been established.

[295] Ground 6 therefore fails.

[296] The power of circumstantial evidence derives, of course, from inference. Much of what we have already said in the foregoing paragraphs is therefore equally applicable to the appellants' concerns about the judge's directions on circumstantial evidence.

[297] But the judge also dealt specifically with the issue of circumstantial evidence at a number of points in the summing-up. Firstly, in the context of proof of death, after reminding the jury that there was no direct evidence that Mr Clive Williams was dead, the judge explained that (Vol IX, pages 4714-4715):

> "The fact of death can be proven like all other facts in a case, by what is called circumstantial evidence. That is to say … evidence of facts that lead to one conclusion, and one conclusion only. And you must be aware … that before you can draw an inference that Clive Williams is dead, and that it is the accused who killed him, all the circumstances on which the Prosecution rely, must point in one direction, and one direction only.
>
> You must be sure that the circumstances point to his death. Circumstantial evidence … is regarded as being reliable because it usually consists of a number of items pointing to the same conclusion. In the absence of a body or any trace of a body ever being found, death is provable by circumstantial evidence. Before the defendants can be convicted, the fact of death should be proved by such circumstances as rendered the commission of the crime certain...
>
> The circumstantial evidence should be so cogent and compelling as to convince you and your members that [on] no rational hypothesis other than murder can the facts be accounted for, so that's the first issue for the prosecution. You have to find and determine whether Clive 'Lizard' Williams is dead."

[298] Secondly, the judge undertook a detailed review, of which the appellants make no complaint, of the items of circumstantial evidence upon which the prosecution relied to prove the death of the deceased. Despite its length, we will reproduce it in full below in order to show the basis on which the judge left the prosecution's case of circumstantial evidence to the jury (Vol IX, pages 4733-4744):

> "So what are the ingredients which the Prosecution must prove to your satisfaction before you can say that the offence of murder has been established? The first thing, Madam Foreman and your members, the Prosecution must prove, is the death of Clive Williams. That's the first thing the Prosecution must prove. And in this case the Prosecution sets out about doing that by identifying certain circumstances. They are relying on circumstantial evidence to establish, to prove the death of Clive Williams. The first of those circumstances is that there was a common design to kill the men responsible for the loss of the guns and for failure to return them before 8 o'clock on the 14th of August 2011.
>
> Let me say that, again, the first thing the Prosecution is saying, because what I am telling you in relation to the charge of Murder, there are certain ingredients that have to be proven. We are now dealing with the first ingredient that the Prosecution has to prove, which is the death the [sic] Clive 'Lizard' Williams. Remember I told you already, this is not a case where they can bring a [sic] 'I see' witness. I have already indicated to you that the law allows death in these circumstances where there is no 'I see' witness, to be proven by circumstantial evidence, and I explained to you what circumstantial evidence is.
>
> The circumstantial evidence that the Prosecution is relying on at this point, to establish that Clive 'Lizard' Williams is dead, is, firstly, that there was a common design, a common plan to kill the men responsible for the loss of Adijah Palmer's new shoes, him [sic] new gun. If those guns were not returned before 8 o'clock on the 14th of August, then sanctions would apply. And in due course those, the Prosecution is saying, if you listen to the voice notes that you heard, voice note 1, 4, 6 and 7, where – and I think in 7 Mr. Palmer is saying that well, if the guns are not returned, him and him mumma a goh dead. It is indicating what the common plan was. In addition, Shawn

Campbell as a part of that common design, his text of the 16th of August was indicating that he knew of Kartel's plan. He was texting that a serious thing, cause people a goh dead. Those texts were being sent between 11 minutes after 1:00 and 11:45 on the 16th. So, what the Prosecution is saying, when you put the voice notes messages of Adijah Palmer and what Shawn Williams [sic] was texting, you see that there was a plan.

The second thing the Prosecution is relying on to establish the death of Clive 'Lizard' Williams is that the men responsible for the loss of the guns were identified. Men were given, they knew who they gave the guns to, and these were the men who were supposed to return the guns. Wee and Lizard as the defaulters. So, firstly, you have this plan to kill the men who default, and then they were identified who were going to be killed.

And we are going to look in due course at the text messages between Onieka Jackson, you remember her? Onieka Jackson, and Clive 'Lizard' Williams, the deceased, which started from 6:53 p.m. to 7:37 p.m., telling the men that Kartel wanted to see them. So there are those text messages between 'Lizard' Williams and his girlfriend saying they have been summoned, 'Teacha waa si mi' and the statement of Shawn Campbell telling the men that Kartel wanted to see them. When you go to the testimony of Mr. Lamar Chow, you will see where he said that was said by him. The third thing that the prosecution is relying on that 'Wee' and 'Lizard' were summoned to account to Kartel. The fourth thing is that when they arrived at the premises, Kartel was in the yard at 7 Swallowfield Avenue. Also present in the yard was 'Mad Suss', that is the reference to Mr. St. John, Andre St. John, there was also a young lady.

The evidence of Mr. Lamar Chow describes a girl who was always following Kartel. Well, I suppose Mr. Palmer, being a celebrity of sort [sic], people will follow him. And what the prosecution is relying on in this chain of circumstances is that when they arrived at 7 Swallowfield Avenue, these persons were there, that Kartel asked the men to enter the house and asked them to account, that Lamar Chow started to explain, started to account. In fact, Lamar Chow started to say he had bills to pay, him light bill to pay and he had to take a little work at Facey and whilst that was going on 'Lizard' was attacked and 'Wee' Lamar Chow fled.

The next point that the prosecution is relying on that Chow was brought back by Palmer and Shawn Campbell into the area where they had been before and there they saw 'Lizard' was seen lying motionless

on the ground with Andre St. John and Kahira Jones and another man over him. Imagine that. He had walked into that building on his own steam, if you accept what Mr. Chow had said, we are going to look very closely on the evidence. He had walked into that room, the witness who came, his girlfriend, I don't recall whether it was his girlfriend at this time or his sister, described that he was not sick, he was a healthy young man. You remember his sister saying his dancing ability was what caused him to be called 'Lizard', because of how he moved. 'Lizard' was lying on his back when the men brought back Chow into that room. He went in on his own steam and was lying there on his back, if you accept what Chow said.

The next thing the prosecution – and you bear in mind, you bear in mind because you saw photographs of it, what 7 Swallowfield Avenue looked like. You could not see into that place from the street, that is the evidence that is not challenged before you, very high walls from the gate, the high metal gate did not afford anybody looking in and seeing anything that was going on there. You have to wonder why, even in those circumstances, if you accept what Chow says, the men were invited by Adidja Palmer into the darkened house because they could not – anybody passing on that road, could not have been able to know what is happening in that yard and as the evidence will point out, since we are at this point, there were no cars there, nobody has said any cars were there but there was this large group of men in there, so anybody passing could see nothing. So the high walls surrounding the tall gate, the condition that 'Lizard' was in, motionless on the floor, he could not, said the prosecution, along with the pit bull outside, he would not have been able to make it out of that place, if you accept what Chow said.

The next item the prosecution is relying on is the video of the room which Superintendent Thompson and Chow identified and the audio that was heard speaking of killing a man at a time that was consistent with Mr. Palmer's return to Havendale.

The next point that the prosecution is relying on is Shawn Campbell's 'schooling', telling Lamar Chow to say, if asked, he was to say that 'Lizard' never came in the car. The next point, the clear words of Mr. Palmer that they can never find 'Lizard'. You may – the prosecution also relies on the change in the whole tone of Mr. Palmer's messages and just prior to the 16th there was this urgency, 'If I doan get mi gun him and him mumma a guh dead.' After that, after the 16th, no mention of that urgency, that is another thing the prosecution is relying on.

The next thing the prosecution is relying on [sic] that subsequent to the 16th, the extension of the first invitation for 'Wee' to travel with Palmer because what 'Wee' had said is that he had never, although he had been overseas, he had never travelled on one of these concerts or wherever overseas with Palmer. The day following the 16th, he is invited to travel with Palmer and he was offered, on his evidence, Chow's evidence, by Campbell, to buy him a suitcase for the reason that Palmer did not want the police to question him, Chow.

The next thing that the prosecution is relying on is the extensive search that was done from hospital, through morgue, through burial sites where bodies are found. Those extensive searches and the fact that although you have heard from his girlfriend, that is the girlfriend of 'Lizard' Williams, that they had a stable relationship, they lived together, that they were texting each other almost the entire day of the 16th, she has never heard from him again.

HIS LORDSHIP: Is he alive or is he dead? His sister has never heard from him. His girlfriend has never heard from him. And these are people with whom he has no quarrel. It is a matter for you, but those are the areas the Prosecution is relying on to say, when you put those circumstances together, it leads to one direction, that Clive 'Lizard' Williams is dead. That is what the Prosecution is saying …

… Madam Foreman and your members, we will continue looking at the circumstances which the Prosecution has placed before the Court, to establish the death of Clive 'Lizard' Williams.

The next one, this cleaning of the house. You recall Police Officer Thompson indicating there was a smell of Fabuloso and the odor of death, the burning down of the house. This house had only been acquired some eighteen months prior to this fire. You will recall that the analyst, the forensic experts who visited the scene of the fire was [sic] of the opinion that the fire had been deliberately set. The police officer, Superintendent Thompson was of the view – well, it was his evidence that it was the first time he was experiencing a situation where someone had a home which appeared, on the face of it, to be an expensive house, it had been damaged seriously, totally by fire which had been set deliberately, and no report had been made about it.

The next thing on which the Prosecution rely in this chain of circumstances – and before I leave the point of the burning of this house - - the fact is the house was burnt prior to an examination, a visit by the experts who were supposed to come and examine the

> house to see if there were any clues, anything they could use to detect what had happened there. This fire was prior to that visit. And you may think that it is important because of what the Defence lawyer had said in respect of the police operation in this case, because they have said that the police have concocted the evidence, that they are corrupt and the whole thing, the entire prosecution's case is a conspiracy against the accused men. In those circumstances you will want to examine, is this the action of the police in destroying, in setting fire to the house before? How did it come about? It is a matter for you.
>
> The final area of the circumstances that the Prosecution has tendered before you, is the demolition of sections of the house which also had not been reported. Now, that is the Prosecution's evidence that they have put before you in order to establish the death of Clive 'Lizard' Williams."

[299] And thirdly, in a passage which the appellants have heavily criticised, the judge said this (Vol IX, page 4747 of the transcript):

> "Circumstantial evidence must always be narrowly examined if only because evidence of this kind may be fabricated to cast suspicion on another. It is also necessary, before drawing the inference of the accused [sic] guilt from circumstantial evidence to be sure that there are no other coexisting circumstances which could weaken or destroy [the] inference. **On the other hand, it is often said that circumstantial evidence is very often the best evidence. It is the evidence of surrounding circumstances which by, or designed coincidence, is capable of proving the proposition with the accuracy of mathematics**." (Emphasis supplied)

[300] The appellants submitted that this last statement was a material misdirection because, even if the judge's comment about "the accuracy of mathematics" was allowable, he should have subjected the items of circumstantial evidence upon which the prosecution relied to this mathematical test for the benefit of the jury. Or he would have needed, at least, to point the jury to those items of evidence which may have fallen short of that standard. The judge gave no help in this regard, therefore leaving the jury with the

impression that the circumstantial evidence in this case had reached the level of mathematical accuracy.

[301] Referring again to **McGreevy**, the Crown submitted that no special direction was required of the judge in relation to the circumstantial evidence and that it sufficed for the judge to make it clear to the jury that they must not convict unless satisfied beyond reasonable doubt of the guilt of the accused.

[302] As Lord Morris of Borth-Y-Gest indicated in **McGreevy** (at pages 510-511), "it would be undesirable to lay it down as a rule which would bind judges that a direction to a jury in cases where circumstantial evidence is the basis of the **prosecution** case must be given in some special form provided always that in suitable terms it is made plain to a jury that they must not convict unless they are satisfied of guilt beyond all reasonable doubt" (emphasis as in the original). In this case, as we have already indicated, the judge told the jury more than once in ample terms of the need for them to be sure of the guilt of the appellants before they could return a verdict of guilty. In our view, therefore, the requirements of the law in relation to circumstantial evidence were fully met.

[303] Finally, on this point, as regards the judge's remark that circumstantial evidence was capable of "proving the proposition with the accuracy of mathematics", this was, as it seems to us, no more than a comment. It is clear from the context in which it appears that the judge was not intending to suggest a test to be applied in cases of circumstantial evidence. Rather, he was merely indicating, as he had already said in so many words, the potential of circumstantial evidence to be "the best evidence". Nowhere in the summing-

up did he suggest to the jury that the evidence in this case was required to reach the standard of mathematical accuracy and there was therefore no need, as the appellants contended, "to subject the items of circumstantial evidence to this mathematical test for the benefit of the jury".

[304] Ground 7 therefore fails.

(iv) The directions on how to approach the appellants' unsworn statements (ground 9/AP, KJ, AStJ)

[305] As we have noted, each of the appellants made an unsworn statement from the dock. At the end of his review of the evidence relied on by the prosecution, the judge began his review of the appellants' cases by indicating to the jury that, at the close of the prosecution's case, each of them had a choice of whether to say nothing at all in defence, to make an unsworn statement from the dock, or to give evidence on oath. He also explained that, in each of the first two instances, the appellants could not be asked any questions, but that, had they opted to give evidence, they would have been open to cross-examination and questions from the judge, like any other witness. The judge then went on to say this (Vol IX, pages 5101-5103 of the transcript):

> "In any event, they gave unsworn statements. And I am to tell you that one of the things you cannot do is, because they did not give sworn statements, you cannot say on that, that they are guilty, that would be wrong. You can't do that. Because as I indicated, that is a right provided by law.
>
> If they – as I indicated to you, Madam Foreman and your members – if they had gone in the witness box they could have been cross-examined. You and your members may, perhaps, be wondering why the accused had elected to make an unsworn statement. That, it could not be because he had any conscientious objection to taking the

> oath since if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the Court.
>
> Madam Foreman and your members, it is exclusively for you to make up your minds whether the unsworn statement has any value and, if so, what weight should be attached to it. That is for you, the jury, to decide whether the evidence for the prosecution has satisfied you of the accused guilt beyond reasonable doubt and that, in considering your verdict, you should give the accused unsworn statement only such weight as you may think it deserves."

[306] The appellants take no issue with these directions, so far as they go. But, in ground 9, they complain that the judge erred by failing "to inform the jury of the possible effects of the statements on their consideration of the appellants' case". This failure, the appellants contend, deprived them "of a full and adequate consideration of their case".

[307] In support of this ground, the appellants made a number of points. By telling the jury that he was going to "…look at the case as put up by the accused", the judge, the appellants say, failed "to individualize and thereby particularise the respective defences to emerge from the unsworn statements". Accordingly, the directions were general in character and not tailored to each of the appellants. As such, they were not in keeping with the law as laid down in the decisions of the Privy Council in **Director of Public Prosecutions v Leary Walker** ('**Walker**') (1974) 12 JLR 1369, and of this court in **Delroy Laing v R** [2016] JMCA Crim 11, **R v Michael Salmon** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 45/1991, judgment delivered 24 February 1992 and **Alvin Dennison v R** [2014] JMCA Crim 7. In particular, learned counsel submitted, the judge failed to tell the jury that each unsworn statement could

have had the effect of (a) convincing them of the innocence of the accused, or (b) causing them to doubt, in which case, the accused would be entitled to an acquittal, or (c) strengthening the case for the prosecution. This non-direction, counsel for the appellants contended, amounted to a mis-direction in law, with the result that the appellants' defences were not fairly left to the jury for their consideration and the appellants were therefore denied a fair chance of acquittal.

[308] For the Crown, it was submitted that the judge's treatment of the appellants' unsworn statements was adequate and entirely in keeping with the guideline directions laid down by the Privy Council in the leading case of **Walker**.

[309] In **Walker**, in response to a specific request from this court for guidance on the objective evidential value of an unsworn statement, the Board stated the following (at page 1373):

> "Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are, however, cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only if such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant

> to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict, they should give the accused's unsworn statement only such weight as they may think it deserves."

[310] These guidelines have been consistently followed and applied by trial judges in this jurisdiction. Indeed, as Gordon JA observed in **R v Michael Salmon** (at page 3), **"**when they are applied no challenge to a summing-up can be successful".

[311] In the most recent review of the position in **Alvin Dennison v R**, this court summarised the effect of the authorities in this way (at paragraph [49]):

> "In a variety of circumstances, over a span of many years, the guidance provided by the Board in **DPP v Walker**, which also reflected, as **R v Frost & Hale** confirms, the English position up to the time of the abolition of the unsworn statement, has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves."

[312] In our view, there can be no doubt from the language used in the extract from the summing-up set out at paragraph [305] above that the judge had the **Walker** prescription firmly in mind. Thus, he told the jury that it was exclusively for them to decide whether the unsworn statements had any value and, if so, what weight should be attached to them. This direction clearly distinguishes the case from a case like **Delroy Laing v R**, in which the judge, wrongly as this court held, went on to tell the jury what value the unsworn statement may have had, thus usurping the jury's function.

[313] However, basing themselves on a passage from the judgment of Gordon JA in **R v Michael Salmon**, the appellants complain that the judge ought also to have told the jury that the unsworn statement of each appellant might "(a) convince them of the innocence of the accused, or (b) cause them to doubt, in which case the [appellant] is entitled to an acquittal, or (c) it may and sometimes does strengthen the case for the prosecution".

[314] We accept that this might have been a useful addition, by way of overall summary of the position, to the judge's directions on the weight to be attached to the unsworn statement. But we would also observe that neither **Walker** nor any of the subsequent authorities on the point, including **R v Michael Salmon** itself, lists this as an essential ingredient of the standard direction on the value to be placed on the unsworn statement.

[315] In this case, the judge told the jury plainly that it was for them "to decide whether the evidence for the prosecution has satisfied you of the accused [sic] guilt beyond reasonable doubt and that, in considering your verdict, you should give the accused [sic]

unsworn statement only such weight as you may think it deserves". In our view, this restatement of the direction which the judge had previously given on the standard of proof, in the context of his directions on the value of the unsworn statement, would have made it clear to the jury that, if they accepted the truth of what was said in a particular defendant's unsworn statement, or if it left them in doubt, the prosecution would have failed to prove the case against that defendant beyond a reasonable doubt.

[316] Finally, on this point, as regards the complaint that the judge's directions on the unsworn statement "were general in character and not tailored to each of the appellants", it suffices to point out, we think, that having given his general directions on how to approach the unsworn statements, the judge undertook a detailed review of the unsworn statement given by, and the evidence given in support of the case of, each of the appellants (Vol IX, pages 5103-5139 of the transcript).

[317] Ground 9 therefore fails.

(v) Whether the judge made unjustified, unreasonable, improper, palpably biased and/or prejudicial comments with respect to different aspects of the evidence (ground 10/AP, KJ, AStJ)

[318] Ground 10 reads as follows:

> "The Learned Trial Judge erred at many points in his summation where he made unjustified, unreasonable, improper and prejudicial comments and omissions pertaining to different aspects of the evidence. In addition, at different points he misquoted the evidence and made palpably biased comments, all of which were fatal to any possibility of a fair trial."

[319] On this ground, the appellants submitted that there were "many deficiencies" in the summing-up. Mrs Neita-Robertson specifically referred to the following matters:

(a) The judge's summation was "… replete with comparisons between what the defence was asserting and the question whether the defence was saying that the police force and prosecutors are concocting a story". Further, that "[t]his juxtaposition was designed to contrast the appellant's credibility with that of the forces of the state and must have had the effect of ridiculing the appellants and their cases". Learned counsel, by way of example, referred to an extract of the summation at Vol IX, page 4783 of the transcript:

> "For you to understand, you have to see the entire context. Remember I gave you an order in which the Prosecution is saying these circumstances took place, starting with the plan, starting with what Mr. Palmer had said would happen, if you find that was said because remember, what the defence is saying, is that it's all manipulated; it's spliced; it's put together; it is a fabrication; the police force in this matter has conspired against all five of them. So you have to bear that in mind. This is a conspiracy. I don't know if it said that it extends as far as the Honourable Minister, but he was certainly mentioned as being somebody who was trying to prejudice the fair trial of Mr. Palmer."

(b) The summing-up "also included amplified imaginative storytelling". In this regard, the appellants referred in particular to two extracts from the summing-up, both of which formed part of the judge's summary of the items of circumstantial evidence relied on by the prosecution (Vol IX, pages 4737-4739 of the transcript):

> "The next point that the prosecution is relying on [sic] that Chow was brought back by Palmer and Shawn Campbell into the area where they had been before and there they saw 'Lizard' was seen [sic] lying motionless on the ground with Andre St. John

> and Kahira Jones and another man over him. **Imagine that**. He had walked into that building on his own steam…" (Page 4737) (Emphasis supplied)
>
> "The next thing the prosecution - and you bear in mind, you bear in mind because you saw photographs of it, what 7 Swallowfield Avenue looked like. You could not see into that place from the street, that is the evidence that is not challenged before you, very high walls from the gate, the high metal gate did not afford anybody looking in and seeing anything that was going on there. You have to wonder why, even in those circumstances, if you accept what Chow says, the men were invited by Adidjah Palmer into the darkened house because they could not - anybody passing on the road, could not have been able to know what is happening in that yard and as the evidence will point out, since we are at this point, there were no cars there, nobody has said any cars were there but there was this large group of men in there, so anybody passing could see nothing. So the high walls surrounding the tall gate, the condition that 'Lizard' was in, motionless on the floor, he could not, said the prosecution, along with the pit bull outside, he would not have been able to make it out of that place, if you accept what Chow said." (Pages 4738-4739)

(c) The judge attempted to convey to the jury a sense of how dangerous the appellants were by indicating that Mr Chow and the deceased, who were not "very soft guys", were really scared on the night of 16 August 2011 (Vol IX, page 4844-4845 of the transcript):

> "Again, now, Madam Foreman and your members, those are not two very soft guys, these are men who lock guns, these are men who lock guns. In fact, on the very night of the incident, on the 16th, the evidence is that a gun was brought to Chow to lock. So these are men you would think wouldn't scare easily, their knees wouldn't buckle readily, they wouldn't get frighten just so. But they were telling you here, 'We were scared, knowing the situation we were into'."

(d) The judge wrongly recounted the content of various text messages to the jury as though they were evidence of their contents without the maker having been called

to speak to their contents. There was thus a free for all in directing the jury on material which ought not to have been left to them (Vol IX, page 4770 of the transcript).

(e) The judge wrongly recounted to the jury the evidence of the police in relation to a report about one 'Gaza Slim', when that evidence ought not to have been allowed in, much less repeated, as it had no relevance whatsoever and was highly prejudicial with no probative value (Vol IX, page 4761 of the transcript):

> "[Mr Williams' girlfriend, Oneika Jackson,] mentioned a person by the name of 'Gaza Slim'. Now, that name, 'Gaza Slim', you will recall the evidence of Superintendent Thompson, which was to the effect that one of the things, one of the reports that he received on the 29th of October [sic], 2011, he received certain reports in respect of an alleged case of robbery against a person called Vanessa Sadler, otherwise called 'Gaza Slim'. And the alleged report named a suspect, Clive Williams. So, this person who she has identified as a part of the --what she calls the Gaza Family, had made a report, shortly after--if not shortly, on the date the 29th of October [sic], he having gone missing on the 16th of October, [sic] that Clive 'Lizard' Williams had held her up with a firearm. The important point in that--is that the officer said that he gave instructions on the report for investigations to be conducted on Gaza Slim's report, and specifically, to record statements from the relative of Williams, now being called a suspected robber."

(f) In leaving to the jury the condition of the house at Havendale (supposedly where the deceased was killed) and emphasising that the house appeared to have been cleaned and later burnt, the judge deliberately implied that this was an attempt to conceal evidence (Vol IX, pages 4743-4744 of the transcript):

> "The next one, this cleaning of the house. You recall Police Officer Thompson indicating there was a smell of Fabuloso and the odor of death, the burning down of the house. This house had only been acquired some eighteen months prior to this fire.

> You will recall that the analyst, the forensic experts who visited the scene of the fire was of the opinion that the fire had been deliberately set. The Police Officer, Superintendent Thompson was of the view--well, it was his evidence that it was the first time he was experiencing a situation where someone had a home which appeared, on the face of it, to be an expensive house, it had been damaged seriously, totally by fire which had been set deliberately, and no report had been made about it."

(g) Although the house was at the time of the examination a crime scene under the control of the police, the judge couched his comments in terms designed to make it appear ridiculous that the police may have had anything to do with the compromise of the crime scene (Vol IX, pages 4743-4744 of the transcript):

> "The next thing on which the Prosecution rely in this chain of circumstances--and before I leave the point of the burning of this house--the fact is the house was burnt prior to an examination, a visit by the experts who were supposed to come and examine the house to see if there were any clues, anything they could use to detect what had happened there. This fire was prior to the visit. And you may think that it is important because of what the Defence lawyer had said in respect of the police operation in this case, because they have said that the police have concocted the evidence, that they are corrupt and the whole thing, the entire prosecution's case is a conspiracy against the accused men. In those circumstances you will want to examine, is this, the action of the police in destroying, in setting fire to the house before? How did it come about? It is a matter for you."

(h) The judge, having placed the wrong appellant standing over the motionless body with a block, drew an intervention from counsel, but failed to correct the error (Vol IX, pages 4892-4893 of the transcript):

> "MS. T. HARRIS: M'Lord, I would also seek your special assistance, my recollection of the evidence does not speak to my client standing over somebody with a block; it speaks to him with a block, but my evidence is he was not standing over the

motionless body with a block. That is my recollection of the evidence. Perhaps I could get assistance in relation to the transcript.

HIS LORDSHIP: Okay."

(i) The judge speculated and made biased comments about a girl allegedly seen at the premises in Havendale (Vol IX, pages 4851-4852 and 4868 of the transcript):

> "It was also not denied that there was a girl--I think the witness Chow referred to her as Candice--there. The question we ask, if this girl Candice was, in fact, there would she have seen what happened upon Chow's entry to the yard? And why is it she didn't accompany Cartel [sic] to the hospital because remember, the evidence is, by Chow, she came later."
>
> "Remember now, Madam Foreman and your members, what Wee, Lamar Chow said when he got there, who he saw in the yard? He said he saw Kartel, he saw a girl who always a follow Kartel, and he saw Mad Sus [sic]. Question, if it is, Madam Foreman and your Members that Wee went in, the dog came at him, Kartel tried to protect him and got bitten, would the girl have seen what happened? Would Mad Sus [sic] have seen what happened? Why is it only Lamar Chow who went to Andrews Hospital? The girl went after, which suggests that I am willing to come. Why didn't she go with him? She would have seen what happened in the yard. Why didn't she go? She went to Andrews that is the evidence before this Court. It is a matter for you Madam Foreman and your Members."

(j) The judge demonstrated palpable bias when he improperly commented as follows (Vol IX, page 5025 of the transcript):

> "And this is why **we** are saying the person who did this, the person who did this, one has to look at the text and what it is saying in order to assist you, to assist yourself, as finders of fact in this case, to say how you must treat with this text. Because one construction I would say, as a matter of fact, that could be placed on it, is that it is final, it speaks to, to speaks to a disposal

> of 'Lizard' and that the author of this must have known he is totally unlikely to surface any time after this text was done. A comment I make, and you can deal with the comment in any way you wish, that it would be a most uncouth police officer to have gone ahead and produced a text like this, unless he knows as a fact that Lizard is dead." (Emphasis supplied)

(k) The judge recounted a text message speaking to a gun transaction which had nothing at all to do with the case and was therefore entirely prejudicial and without any probative value (Vol IX, page 5000 of the transcript):

> "Now, this particular message is on the 19th of August, and it refers to, 'Well, mi tell Shawn she him have fi buy dem back, a waan tell yu seh mi still gi him a new 45 weh mi jus get fi gwaan watch him head, and tell him seh, any man miss it di same treatment'."

(l) The judge referred to "the case startler", when posing the question whether the police were manufacturing evidence in a simple area of the evidence, thus ridiculing the defence contention on the point (Vol IX, page 5081 of the transcript):

> "So the case startler is that the police has manufactured the evidence here and their conduct must be closely scrutinize [sic] because the Crown must satisfy you to the extent that you feel sure that the evidence was not fabricated, concocted, or altered to the detriment of these accused men because that is what they claimed."

(m) The judge attempted to minimise the significance of the fact that the CD which was referred to as 'JS1' was missing by suggesting that it was of no great moment, given the evidence that Mr Joseph Simmonds, the person who prepared the disc, would also summarise the information which it contained in his witness statement (Vol IX, pages 4949-4952 of the transcript).

(n) The judge offered the analogy of the baton change in a relay in an attempt to explain the gap in the integrity of the exhibits, thus giving the jury an option to sanitise the evidence that the content of exhibit 14C might have been tampered with. The analogy was very weak and deceptive because it failed to address the fact that it was established that the "evidence/baton" was compromised (Vol IX, pages 5011-5012 of the transcript):

> "It will be for you to say, Madam Foreman and your members, whether, in fact, the content of the phone had been tampered with. Because, it is clear from the evidence that somebody, in fact interfered, whichever word you want to use, tamper, tampered with, or did something to the phone on days whilst it was in the custody of the police. Remember the directions I gave you in respect of a break in the continuity, a chain of custody, a gap in that chain, which is like a relay when you think of it. The baton, in order to get to where you want it to go, it has to be passed from one hand to the other. The difference with that analogy, if the baton falls you can pick it up and run, if you manage to get there you get there. However, with this chain of custody, the Court has to be ensured that the baton, when it is retrieved, it is the same condition as when it fell, it was picked up and moved in the same condition. And I told you, you assess how you make the assessment to determine whether this, despite the fact that the baton fell, or put it the other way, there is a gap in the custody, whether, in fact, you maintain a reasonable doubt as to the integrity of the material, the contents of the phone."

(o) The judge referred to Mr St John as "Mad Suss", which was his stage name and in the context in which it was used was purely prejudicial.

[320] In support of these submissions, Mrs Neita-Robertson referred to and relied on the caution given by Lord Lane in the decision of the Privy Council in **Byfield Mears v The**

Queen [1993] UKPC 13, [1993] 1 WLR 818, 822, against a "fundamentally unbalanced" summing-up:

> "The Court of Appeal took the view that the trial judge was not putting forward an unfair or unbalanced picture of the facts as he saw them. In rejecting the defendant's submission that the comments of the judge were unfairly weighted against him, the court asked themselves whether the comments amounted to a usurpation of the jury's function. In the view of their Lordships it is difficult to see how a judge can usurp the jury's function short of withdrawing in terms an issue from the jury's consideration. In other words this was to use a test which by present day standards is too favourable to the prosecution. Comments which fall short of such a usurpation may nevertheless be so weighted against the defendant at trial as to leave the jury little real choice other than to comply with what are obviously the judge's views or wishes. As Lloyd L.J. observed in **Reg v. Gilbey** (unreported), 26 January 1990:
>
> > 'A judge … is not entitled to comment in such a way as to make the summing up as a whole unbalanced … It cannot be said too often or too strongly that a summing up which is fundamentally unbalanced is not saved by the continued repetition of the phrase that it is a matter for the jury.'"

[321] Lord Lane went on to accept that, as the Crown had submitted in that case, it was necessary to take the summing up as a whole. He therefore considered that the court should ask itself whether there was, in the words of Lord Sumner in **Ibrahim v The King** [1914] AC 599, 615 -

> "… something which … deprives the accused of the substance of a 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 future."

[322] On this basis, Mrs Neita-Robertson submitted that the judge's summing-up in this case was fundamentally unbalanced, thus depriving the appellants of the substance of a fair trial.

[323] In response to these complaints, the Crown was content to submit that the judge gave a fair and balanced summation; he looked at the evidence from both sides and gave guidance to the jury on how to critically examine that evidence, while consistently reminding them where necessary that it was a matter for them; and the various comments identified by the appellants were not sufficiently prejudicial as to be fatal or make the trial unfair.

[324] We accept the Crown's submission. By any measure, this was, as we have already observed, a long trial. Perhaps of necessity, the summing-up, which covered 437 pages of the printed transcript, was also a long one. In it, following on from 64 days of trial, the judge sought to give to jury an accurate synopsis of the case that had been presented through the mouths of 24 witnesses for the prosecution, six for the defence, five unsworn statements from the dock and 25 exhibits.

[325] As might perhaps inevitably be expected in any such exercise, there were a few errors in detail, such as when the judge placed the wrong appellant as one of the persons who stood over the motionless body of 'Lizard' in the house at 7 Swallowfield Avenue. It is also true that, had he had it to say again, the judge would probably have avoided the use of the possessive pronoun "we" in explaining the inference which the prosecution was asking them to draw from a certain piece of evidence ("this is why **we** are saying"); or

characterising the defence contention that the police may have been involved in fabricating evidence as "the case startler".

[326] But, in our view, these were no more than missteps in the course of what was a thorough and well-balanced summing-up. Apart from the obviously inadvertent use of the word "we", the appellants were completely unable to point to anything to suggest that the judge was affected by either actual or apparent bias. The reference to the defence suggestion that the police may have fabricated evidence of a cover-up of the murder of the deceased as "the case startler" was no more than a comment – and a slightly ambiguous one as well – on the evidence which the jury had to consider. In referring to Mr St John as "Mad Suss", the judge was doing no more than repeating the name by which he was described by Mr Chow – more than once - in his evidence. The judge's comments of which complaint is made were all, as it seems to us, perfectly justified by the evidence in the case. In addition, the judge was in any event careful to emphasise to the jury at each point, as he had done at the outset of the summing-up, that the ultimate decision on whether the appellants were guilty or innocent was solely theirs to make and that they should feel free to disregard any comments which he might make on the facts and to substitute their own views therefor (see paragraph [283] above). Further, that they were "the supreme judges of the facts", and that they were accordingly "not bound by comments which either the judge or counsel make, unless those comments accord with the views that you hold on the facts" (Vol IX, page 4720 of the transcript).

[327] In our view, taken as a whole, therefore, the aspects of the summing-up highlighted by Mrs Neita-Robertson cannot be said to have been of such a nature as to deprive the appellants of the substance of a fair trial and the protection of the law.

[328] Ground 10 therefore fails.

(vi) Whether the judge dealt with the defence of Mr Shawn Campbell properly (ground 9/SC)

[329] Mr Campbell, who filed a separate ground of appeal under this head, complained as follows:

> "The [judge] failed to fully instruct the jury, or instruct them at all, in relation to Shawn Campbell's defence, including his statement from the dock, depriving him of a fair and balanced consideration of his case, resulting in a substantial miscarriage of justice."

[330] In support of this ground, Mr Bert Samuels made extensive written and oral submissions on Mr Campbell's behalf. At the heart of these submissions was the contention that the judge failed to analyse and treat Mr Campbell's unsworn statement with the same detail and attention which he gave to the allegations against him; and that he failed to leave to the jury all possible favourable inferences that could be drawn from the statement. By so doing, it was submitted, the judge deprived Mr Campbell of the possibility of a verdict of acquittal and thereby denied him a fair trial.

[331] Mr Samuels submitted further that the judge's directions to the jury on what Mr Campbell had said in his unsworn statement (i) misrepresented Mr Campbell's statement that the deceased and Mr Chow "freely followed" him to Havendale on the evening of 16

August 2011; (ii) failed to mention that Mr Campbell said that he did not take the deceased to 7 Swallowfield Avenue, but dropped him off at the guest house some 10 minutes' drive away; and (iii) failed to tell the jury that Mr Campbell's statement that he had voluntarily reported three times to the police station, before he was charged, was consistent with his innocence.

[332] To give these points graphic force, Mr Samuels produced a table of the differences of which he complained between Mr Campbell's unsworn statement and the judge's account of it in the summing-up (emphasis as in the original):

	STATEMENT FROM THE DOCK	**Volume 8 - Page Numbers**	**SUMMATION**	**Volume 9 - Page Numbers**
1.	"Upon going there **I reported**, I was held for three days…About a week after my mother called me and say she got a message from the Constant Spring police station **that I must report again, being a law abiding citizen, I did so**. This time they take me for twelve days and then release me again…**Four days after that I was summoned by the police** to the Constant Spring Police Station again, this	Page 4366, (lines 10-25) Page 4367 (lines 1-3)	"He heard of a report for questioning **and going there**, he was held for three days…He said that he was called there again, and he is a law abiding citizen. **He was kept for twelve days; released. He was asked to do a question and answer**, and based on that he was charged for murder"	Pages 5131 (lines24-25), Page 5132 (lines 1-10)

	time as a person of interest. **When I went there**…"			
2.	"I am not a murderer or have I ever taken part in **any alleged offence pertaining to an alleged deceased** Clive Williams."	Page 4367 (lines 7-10)	"I am not a murderer, nor have I ever," neither has he ever taken part in any alleged **plan** in respect of Clive Williams"	Page 5132 (lines 11-13)
3.	"On August 16, 2011, Lamar Chow and Clive Williams **freely followed** me to Havendale"	Page 4367 (lines 13-18)	"What Mr. Shawn Campbell had said is that **he took** Lamar Chow to, and Mr. Williams, Clive Williams to Havendale." "Lamar Chow and Clive Williams **followed me** to Havendale"	Page 5133 (lines 20-21) 5133 (lines 19-21)
4.	"…at no time did he told me about he seeing **any body** on the ground or anything like that"	Page 4368 (lines 2-4)	"No time did he tell me about **anything** on the ground or anything like that" on the ground"	5132 (line 25)-5133 (line 1)

[333] On the basis of this table, Mr Samuels submitted that a comparison between what Mr Campbell said in his unsworn statement and how it was transmitted to the jury by the judge demonstrated the omissions and misquotations in the summing-up, resulting in an unfair presentation of the appellant's defence to the jury.

[334] Mr Samuels submitted further that the judge did not point out to the jury that Mr Chow's letter dated 13 November 2013 to the Public Defender also supported Mr Campbell's statement that he left Clive Williams at the guest house. This piece of evidence, if believed, lent support to Mr Campbell's defence that he did not participate in the common design as he had taken Clive Williams, not to Swallowfield Avenue, but to the guest house and nowhere else. The judge's failure to draw it to the jury's attention as an item of evidence which was corroborative of the defence of Mr Campbell, severely damaged the strength of his defence.

[335] Mr Samuels submitted that Mr Chow's credibility was further impaired by the contents of his further statement dated 24 August 2011, which this court admitted as fresh evidence at the commencement of the hearing of the appeal. In this statement, Mr Chow told the police that he, Mr Campbell and the deceased arrived at Havendale at about 8:00 pm on the evening of 16 August 2011. This contradicted his evidence at the trial, in which he placed the time of arrival at Havendale at 5-5:30 pm, and other answers given by him in cross-examination, in which he indicated that he had in fact departed from Portmore at about 5-5:30 pm that same day.

[336] Mr Samuels submitted that this was further compounded by the evidence of the cell-site positioning of Mr Campbell, which, as the judge correctly told the jury (Vol IX, page 4712 of the transcript), placed him "well away from the vicinity of 7 Swallowfield Avenue at the time the prosecution alleges that the video was shot". Despite acknowledging the defence's contention that the positioning of Mr Palmer and Mr Campbell was "very materially discrepant", the judge failed to alert the jury to the significance of this evidence to Mr Campbell's defence that he did not have anything to do with whatever may have happened at Swallowfield on 16 August 2011, or at all.

[337] For all these reasons, as well as a number of others referred to in the printed skeleton arguments, Mr Samuels submitted that the judge's failure to present Mr Campbell's defence in a fair and balanced manner amounted to a departure from his entitlement to a fair trial by depriving him of a fair and balanced consideration of his defence.

[338] For the Crown, it was submitted that the judge dealt with the case for Mr Campbell in a fair and balanced manner and that there was accordingly no miscarriage of justice.

[339] In order to assess Mr Campbell's complaints on this ground, we will first compare the actual text of his unsworn statement with the terms in which it was left to the jury by the judge.

[340] Having stated his name and address, Mr Campbell said the following in his unsworn statement (Vol VIII, pages 4365-4368 of the transcript):

"… I am 34 years old. I attended Jose Marti Technical High School where I graduated with four subjects. I then attended Jamaica German Automotive School. I studied there for three years as a Mechanical Engineer. I graduated with a certificate.

… I then worked at JUTC for six years. I started as an apprentice then extended to Grade 1 Mechanic …

However, in October 13, I was at home and I hear on the news that I am supposed to report to the Constant Spring Police Station for questioning. Upon going there I reported, I was held for three days. Then after my lawyer, then Mr. Michael Deans filed for a habeas corpus. I was released by the police at Constant Spring Police Station. They asked me to leave my number, my mother's number and land line for my home.

Upon doing that the police say if they need me for anymore questioning they would call me. Bout a week after my mother call me and say she get a message from the Constant Spring Police Station that I must report again, being a law-abiding citizen I did so. This time they take me for 12 days and then release me again and say if they need me they going to call me again. Four days after that, I was summoned by the police to the Constant Spring Police Station again, this time as a person of interest. When I went there, [with] my then lawyer Mr. Michael Deans, I was asked to do a Q and A. Based on that I was charged for Murder. M'Lord, I would like to make this clear I am not a murderer or have I ever taken part in any alleged offence pertaining to an alleged deceased Clive Williams. I, Shawn Campbell, am no murderer.

On 16 August, 2011, Lamar Chow and Clive Williams freely followed me to Havendale. Upon reaching at Havendale, Clive Williams came out of the vehicle at the guest house, m'Lord. And then Lamar Chow came out of the vehicle at Swallowfield …

Then Lamar Chow came out at the Swallowfield address, then I leave. That same night Lamar Chow came to me at my house and told me that dog bite 'Kartel' and mi carry him guh hospital …

A dog bite 'Kartel' and mi carry him guh hospital. At no time did he tell me about seeing any body on the ground or anything like that.

> M'Lord, Madam Foreman and members of the jury, I would like to say that I am innocent man of this charge, and all that I am asking for, Madam Foreman and members of the jury, to consider – what I would also ask for is to get back my life to continue taking care of my sick mother and my daughter and further my career as an Artist and a certified mechanical engineer …"

[341] In leaving Mr Campbell's defence to the jury (Vol IX, pages 5131-5133 of the transcript), the judge summarised his unsworn statement by, first, reminding the jury of what he had said about his schooling, qualifications and work history. The judge then continued in this way:

> "However, in October 30, he heard of a report for questioning [sic] and going there, he was held for three days, and his lawyer applied for *habeas corpus*. He was released by the police, and they took his baby mother and himself, took their numbers. He said they would call him if they needed him for any further questions. He said that that he was called there again, and he is a law-abiding citizen. He was kept for twelve days; released. He was asked to do a question and answer, and based on that he was charged for murder.
>
> He said 'I am not a murderer, nor have I ever', neither has he ever taken part in any alleged plan in respect of Clive Williams.
>
> He says, 'I, Shawn Campbell, am no murderer, and on August 16, 2011, Lamar Chow and Clive Williams followed me to Havendale, and on reaching at Havendale, Clive Williams came out at the guest-house.' **It's important to remember that, that's what he has maintained.** 'Lamar Chow came out of the vehicle at Swallowfield, then I leave, then I leave. That same night, Lamar Chow came to me at my house, and told me that dog bite Kartel and him, meaning him, Lamar Chow, carry Kartel goh to hospital. No time did he tell me about anything on the ground or anything like that. Some of the things he did, he did not mention anything like that on August the 16th, when he came to my house. I am an innocent man of this charge. All I am asking is for that to be considered,' and to get back to his life to take care of his sick mother and daughter and to further his career as an artist, and certified mechanical engineer." (Emphasis supplied)

[342] In our view, a comparison of what Mr Campbell said in his unsworn statement with what the judge told the jury in leaving it to them plainly reveals that Mr Samuels' principal complaints about the latter are unfounded. In stating this conclusion, we have not lost sight of the table which we have reproduced above. But such differences as emerge from the comparison which it invites are, in our view, differences in choice of language only, revealing no significant divergences in meaning.

[343] For instance, it is true that the judge did not use Mr Campbell's exact words as regards Mr Chow and the deceased having travelled with him to Havendale on 16 August 2011, which were that "Lamar Chow and Clive Williams **freely followed** me to Havendale" (emphasis supplied). However, it seems to us that the way in which the judge put it ("Lamar Chow and Clive Williams **followed** me to Havendale") (emphasis supplied) was nonetheless perfectly apt to convey the meaning for which Mr Samuels contends: that is, neither man was coerced by Mr Campbell to travel with him to Havendale on 16 August 2011.

[344] In fact, the judge told the jury more than once that what Mr Campbell was saying was that although Mr Chow and the deceased had followed him to Havendale, the latter came out of the vehicle at the guest house (see, for instance, Vol IX, page 4751 of the transcript).

[345] The same point appears even more clearly from the judge's reminder to the jury (which Mr Samuels may have overlooked) that Mr Campbell stated that, "on reaching at Havendale, Clive Williams came out at the guest-house" (Vol IX, page 5132 of the

transcript). In other words, he did so voluntarily. It is also equally clear from the sentence which we have highlighted in the quotation from the summing-up set out in paragraph [341] above ("It's important to remember that, that's what he has maintained") that the judge fully appreciated and took steps to convey to the jury the importance to Mr Campbell's case of demonstrating (i) the voluntary nature of the deceased's presence on the journey to Havendale, and (ii) that the deceased had not gone all the way to the house at 7 Swallowfield Avenue, but had disembarked at the guest house.

[346] Not content to leave it there, the judge then went on to remind the jury again of the very point, in the context of the case as a whole, when he explained to them how the cases for the prosecution and for the defence stood in opposition to each other (Vol IX, page 5733 of the transcript):

> "What Mr. Shawn Campbell had said is that he took Lamar Chow … and Mr Clive Williams to Havendale. In his version Clive Williams came off at the guest-house; the Prosecution is saying, in fact, both men exited the car at Havendale. And in doing that, Mr. Shawn Campbell accomplished all that he was to do in the common design."

[347] As regards the judge's failure to tell the jury specifically that Mr Campbell's statement that he had voluntarily reported three times to the police station, before he was charged, was consistent with his innocence, Mr Samuels developed the point more fully in his written submissions in this way:

> "It is submitted that this conduct which [Mr Campbell] said was driven by his good character as a 'law abiding citizen' was also consistent with innocence and ought to have been brought to the jury's attention for consideration where the person putting it forward was charged for

> the crime of murder. In other words whereas evidence of evading the police is capable of an adverse inference, it is submitted that volunteering to go to the police on three (3) separate occasions, even where you are kept for 3 or 12 days in custody previously inures to your benefit in assessing your conduct whether its [sic] consistent with innocence or guilt. At no time did the [judge] make this favourable point to the jury concerning the Appellant, Shawn Campbell."

[348] Along similar lines, Mr Samuels also directed attention to the fact that, in his unsworn statement, Mr Campbell had on three occasions made the point that he was "no murderer"; and that he had never taken part in any "alleged offence pertaining to an alleged deceased Clive Williams".

[349] By this submission, it was plainly being contended that Mr Campbell was a person of good character. In these circumstances, having made an unsworn statement from the dock, he was at the very least entitled, as is now well-established in the jurisprudence of this court, to the benefit of a direction as to the relevance of his good character as it affects the issue of propensity to commit the offence of murder (see, for instance, **Horace Kirby v R** [2012] JMCA Crim 10, per Brooks JA at para. [11]). But, it appears that, initially at any rate, the judge did not read Mr Campbell's defence in this way. For, despite having given Mr Palmer the benefit of a standard good character direction in the main body of the summing-up, he did not do so in relation to Mr Campbell.

[350] In his earlier directions in relation to Mr Palmer, the judge had said this (Vol IX, pages 5108-5109 of the transcript):

> "You have heard, Madam Foreman and your members, that the defendant is a young man of good character … Of course, good

> character cannot, by itself, provide a defence to a criminal charge, but … it is evidence which you can take in account, in his favour. As I have said, the fact that he is of good character may mean that he is less likely than otherwise might be the case, to commit the crime with which he is charged.
>
> I have said that these are matters to which you should have regard in the defendant's favour. It is for you to decide what weight you should give to them in this case. In doing this, you are entitled to take into account everything you have heard about the defendant in relation to his character here in court, including his age, the fact of his kindness to his parents, his upbringing, and that he has no previous run ins with the law. Having regard to what you know about this defendant, you may think … that he is entitled to ask you to give favourable weight to his good character when deciding whether the Prosecution has satisfied you of his guilt."

[351] So, when the judge asked counsel at the end of the summing-up if there was anything that he had omitted to tell the jury, counsel for the prosecution, Mr Taylor, enquired whether the judge might not want to give good character directions in relation to Messrs Campbell and Jones. Agreeing immediately, the judge then added this (Vol IX, pages 5141-5142 of the transcript):

> "This morning, in fact, Madam Foreman and your members, you recall I did, in fact, give a good character direction in respect of Mr Palmer. You would recall that I said that the defendant is to be regarded as a man of good character. And if you so regarded, that would support his credibility. This means that it is a factor which you should take into consideration when deciding whether you believe his evidence or not, and that is a direction that would equally apply to the accused, Jones and Campbell, and Williams. In the first place, despite the fact that they did not give evidence, you bear that in mind.
>
> In the second place, the fact that he is of good character may mean that he is less likely than otherwise might be the case to commit this crime. That is as far as I would go in that particular area. You bearing [sic] the fact of his good character, and the fact that being a man of good character, you put that in the scale when you look at the

> evidence, and you may very well find that that good character will cause you to say he is less likely than otherwise might be the case to commit the crime with which he is charged."

[352] No doubt not finding it possible to do so in the light of these directions, Mr Samuels made no complaint of a failure by the judge to give any good character directions at all in respect of Mr Campbell. But he did complain that the judge failed to tailor the good character directions to each accused, and in particular Mr Campbell, and so denied him of a fair treatment of his defence and, ultimately, a verdict favourable to him.

[353] We agree with Mr Samuels in one respect: it seems to us that more careful consideration of the good character issue at the planning stage of the summing-up may well have led the judge to deal with the matter in a more structured way in relation to each of the defendants in respect of which it arose, particularly Mr Campbell.

[354] That having been said, however, it seems to us that the directions which the judge gave were more than adequate to convey to the jury the potential impact in law of Mr Campbell's assertion that he was, as Mr Samuels put it, a law-abiding citizen who willingly cooperated with the police when called upon to do so. It was clearly a matter for the jury to decide, having been properly directed on the matter, what weight they should give to Mr Campbell's unsworn statement, taking into account all the circumstances of the case. Having given the jury ample directions on the standard of proof more than once during the course of the summing-up, the judge had in fact reiterated that point to them immediately before Mr Taylor's intervention, telling them that (Vol IX, pages 5139-5140 of the transcript):

> "As I told you … you must be satisfied to the extent that you feel sure of the guilt of the accused before you can find them guilty … If you have any doubt, if you maintain any reasonable doubt in respect of the accused, you must acquit."

[355] Taking all the judge's directions together, therefore, it seems to us that there could have been no question of any imperfection in them as regards the effect of Mr Campbell's good character, if such there was, jeopardising the fair treatment of his defence by the jury.

[356] As we have noted, Mr Samuels also made further general complaints about the judge's failure to put Mr Campbell's case to the jury fairly (the principal ones having to do with the effect of Mr Chow's 13 November 2013 letter to the Public Defender; and the evidence of the cell-site positioning of Mr Campbell). In this regard, we think that it suffices to note that, after summarising the case for the prosecution at a relatively early stage of the summing-up, the judge went on to give the jury this general summary of the case for the defence (Vol IX, pages 4711-4712 of the transcript):

> "The Defence, on the other hand, deny that they were involved in the death of Clive Williams, if, in fact, he is dead. They don't know. That the main witness for the Prosecution, Lamar Chow, in a letter dated the 13th of November 2013, addressed to the Public Defender, advised that he had seen Clive 'Lizard' Williams after the 16th of August 2010 [sic]. That Clive Williams never came to 7 Swallowfield Avenue on the 16th of August, 2011. That he had exited the taxi at the guest house in the same community of Havendale, that there were inconsistencies between items of evidence produced by the Prosecution that passed great doubts on their reliability that Chow's testimony of the arrival time at 7 Swallowfield Avenue, and the cell site positioning of Palmer and Campbell are very materially discrepant. That the cell site positioning places Shawn Campbell well away from the vicinity of 7

> Swallowfield Avenue at the time the Prosecution alleges that the video was shot.
>
> The defendants further allege that the evidence produced by the Prosecution was manipulated by the police as part of a conspiracy to convict the five accused. Adijah Palmer complains that his fair trial has been prejudiced by the Minister of National Security who blamed him for being responsible for crime in Jamaica.
>
> The expert Linton, Mr. Patrick Linton on whom the Prosecution relied was charged as being unprofessional and that he bore malice against Mr. Palmer. And that the witness, Chow's statement was a concoction made up by the police with Chow's cooperation. That's the two sides."

[357] In our view, this perfectly accurate statement of the defence case adequately conveyed to the jury those elements of Mr Campbell's defence which Mr Samuels complains were not dealt with properly, or at all. The question of whether the matters referred to by the judge in the above passage provided corroboration of Mr Campbell's defence was entirely a matter for the jury to decide, having considered the evidence of which the judge reminded them.

[358] Finally, on this ground, we will mention Mr Samuels' yet further complaint that, as regards the time at which he, Mr Campbell and the deceased arrived at the house in Havendale on 16 August 2011, Mr Chow's credibility was further impaired by the contents of his further statement dated 24 August 2011 (see paragraph [335] above). As will be recalled, the court admitted this statement as fresh evidence at the outset of the hearing.

[359] The first point to be noted is, of course, the obvious one that the jury did not have the benefit of this statement at the trial. So, the question for this court must be to assess the value of Mr Chow's further statement in the context of the evidence given at the trial

as a whole. As the Privy Council put it in **Dial & Dottin v State of Trinidad & Tobago** [2005] UKPC 4, at paragraph 31, "[i]f the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal". (See also **Kevon Williams v R** [2016] JMCA Crim 2, where this court applied this principle at paragraphs [40]-[41].)

[360] It is clear from the judge's summary of the defence set out at paragraph [356] above that the question of inconsistencies in the evidence as to the time of arrival at 7 Swallowfield Avenue of Mr Chow, Mr Campbell and the deceased had already loomed large at the trial. By their verdict, the jury resolved this question in favour of the prosecution.

[361] In the 24 August 2011 statement, Mr Chow told the police that he, Mr Campbell and the deceased arrived at Havendale at about 8:00 pm on the evening of 16 August 2011, thus contradicting (i) his evidence at the trial, in which he placed the time of arrival at Havendale at 5-5:30 pm; and (ii) other answers given by him in cross-examination, which suggested that he had in fact departed from Portmore at about 5—5:30 pm that same day. To this extent, therefore, the 24 August 2011 statement added another layer of inconsistency to Mr Chow's evidence. The statement also omitted any reference to the car in which Mr Chow travelled to Havendale making a stop at the guest house that evening before arriving at the house.

[362] Despite these differences, however, Mr Chow's account as to what took place once the three men arrived at the house on the evening of 16 August 2011, including his own attempt to flee the premises after seeing the deceased lying unmoving on the floor in the

house, remained unimpaired by anything contained in the 24 August 2011 statement. In these circumstances, therefore, we are clearly of the view that Mr Chow's further statement dated 24 August 2011 raises no reasonable doubt as to the guilt of Mr Campbell or as to the correctness of the jury's verdict in the matter.

[363] Mr Campbell's ground 9 therefore fails.

(vii) Whether the judge dealt with the respective defences of the other appellants adequately or fairly (Ground 14/AP,KJ,AStJ)

[364] In ground 14, the appellants (other than Mr Campbell) complained that the judge "failed to deal with the respective defences of the appellants adequately or fairly". Mr Senior-Smith argued this ground principally in relation to Messrs St John, Jones and Palmer. He submitted that, instead of leaving the various defences to the jury completely and clearly, the judge's summing-up was replete with deficiencies in the presentation of each of their cases, with the result that each appellant accordingly lost the protection of law.

[365] In support of this complaint, Mr Senior-Smith identified a number of specific matters. First, it was said that the appellants lost the protection of the law when their defences were treated by the judge as one composite whole. With specific regard to Messrs Jones and St John, he contended that, by lumping all the defences together, the judge failed to assist the jury to appreciate that there were real differences between the cases against and the defences of each of the defendants. In this regard, he submitted, there ought to have been "some element of deconstruction" in the judge's summation of

the evidence. The main focus of the complaint on this score was that part of the summing-up in which the judge set out to "just put in a nutshell – a rather large nutshell in this case – what the two sides, what the two versions in this case are …" (Vol IX, page 4708 of the transcript). It was submitted that the vice of the judge's approach was that, by treating the defences together, the judge "unwittingly" prejudiced the position of certain of the appellants, Messrs Jones and St John in particular, against whom there was no evidence of any overt acts in support of the common design postulated by the prosecution.

[366] For its part, the Crown submitted that all that the judge was attempting to do was to provide the jury with an overview of the respective cases for the prosecution and the defence and that he had done so adequately. In particular, Mr Taylor referred us to a number of passages from the summing-up in which, it was submitted, the judge cautioned the jury against merging the defences of the appellants and directed them to consider the cases against and for each of them separately.

[367] Mr Senior-Smith referred us to a number of authorities to support his points in relation to a trial judge's duty in summing-up to the jury in a criminal case.

[368] In **EL-Jalkh v R** [2009] NSWCCA 139, a decision of the New South Wales Court of Criminal Appeal, the court considered it (at paragraph [82]) to be "… essential, if a summing up is to be fair and balanced, that the defence case be put to the jury". The court also referred (at paragraph [83]) to **Regina v Schmidt** [1965] VR 745, 748, in which Winneke CJ observed that "…[f]ailure to put the defence is, of course, a well-recognized ground of appeal"; **Regina v Tomazos** (NSWCCA 6 August 1971), in which

Issacs J added that "… [a] trial according to law includes as an essential prerequisite that the trial judge has put fairly, cogently and with clarity to the jury the accused's defence"; and **R v Malone** (NSWCCA 20 April 1994), in which Blanch J stated that "[i]f a jury is not given the opportunity fairly to consider the defence case, then there has been a miscarriage of justice".

[369] On this basis, the court in **EL-Jalkh v R** concluded (at paragraph [148]) that:

> "… it is the essential function of a trial judge in summing-up to a jury that the trial judge, having identified the issue or issues in the trial, put the defence case on this issue or those issues and that the trial judge make such reference to the evidence as may be required to enable the jury properly to understand the defence case and that it is not sufficient for the trial judge to say to the jury that they should give consideration to the arguments which have been put by counsel."

[370] Mr Senior-Smith next referred us to **Mencarious v R** [2008] NSWCCA 237, another decision of the New South Wales Court of Criminal Appeal, in which the court considered that, depending on the circumstances of the particular case, the issues which arise, the length of the trial and the complexity of the facts relevant to the particular issue, the trial judge in summing-up "may need to provide a resume of the evidence so that the jury understands how the relevant law may be applied to it" (per McClellan CJ at CL, at paragraph 55).

[371] Lastly on this point, Mr Senior-Smith referred us to **R v Amado-Taylor** [2000] EWCA Crim 25, a decision of the Court of Appeal of England and Wales, particularly for the following points which emerge from the judgment of Henry LJ in that case: (i) the

longer a trial lasts, the greater will be the jury's need for assistance from the trial judge relating to the evidence (paragraph 9); (ii) putting the defence fairly and adequately to the jury cannot be done without referring to the evidence when the defence has sought to exploit inconsistencies in the prosecution witnesses' account (paragraph 11); and (iii) it is only in a short and simple case, which this was not, that no review of the facts by the trial judge might be required (paragraph 12).

[372] For the Crown, Mr Taylor did not dissent from anything said in any of the authorities referred to above. Nor do we. Indeed, a trial judge's duty in summing up to the jury as described by the Australian authorities to which Mr Senior-Smith so helpfully referred us, is entirely in keeping with the established jurisprudence of this court. In **R v Boucher** (1991) 28 JLR 35, 39, for example, Gordon JA (Ag) (as he then was), described it as the duty of the trial judge "to lay before the jury all the evidence that supports or tends to support a defence raised in language which they easily appreciate and assist them to understand it in its proper context".

[373] We therefore approach the appellants' complaints under this head on the basis that the judge was under a duty to put the cases for each of the appellants clearly and fairly to the jury; and that this duty involved not only identifying the issues which arose in each case, but also, this having been a long trial, providing the jury with an adequate summary of the evidence in the case, sufficient to enable them to appreciate the complaints by the defence as to the alleged inconsistencies in the evidence. A failure to do so may in a proper case amount to a miscarriage of justice.

[374] We have already set out (at paragraph [356] above) that portion of the summing-up in which, after summarising the case for the prosecution, the judge undertook the same exercise in relation to the cases of all the defendants. Having done so, the judge went on to identify in some detail what he described as the main issues for the jury's determination. We therefore consider that, in summarising the case for the defence in one broad compass, "in a nutshell", as the judge put it, he was doing no more than establishing for the jury the overall context within which to consider the detailed directions which were to follow.

[375] At several subsequent points in the summing-up, the judge made it plain to the jury that their obligation was to consider the case and the evidence in respect of each defendant separately.

[376] First, in directing the jury on the burden of proof, the judge emphasised the obligation on the prosecution to prove the guilt of each defendant to the jury's satisfaction (Vol IX, page 4728 of the transcript):

> "In every single criminal case which comes before these courts, every single accused person is always presumed to be innocent until you, Madam Foremen and your members, by your verdict say he is guilty. There is absolutely no burden on any accused person to prove his innocence. The burden of proof rests on the prosecution throughout the case and never shifts. Before you can convict the accused men, the prosecution must satisfy you, by the evidence, so that you feel sure of each accused man's guilt."

[377] Second, after reminding the jury of the evidence upon which the prosecution relied to establish that the defendants killed the deceased and acted together in doing so (Vol IX, pages 4747-4751 of the transcript), the judge again summarised the defence of each of the defendants (Vol IX, pages 4751-4753 of the transcript):

> "Now, what is the response of the defendants? They claim that they were not present at Swallowfield Avenue at the material time, neither were they involved in the death of Williams. Mr. St. John says he was on his way out of the premises. Mr. Palmer says he never encountered Clive Williams at 7 Swallowfield Avenue, he has never sent anyone to kill Clive Williams nor did he do it himself. Mr. Campbell stated that Chow and Clive Williams followed him to Havendale and Williams came out of the vehicle at the guesthouse and Chow came out of the vehicle at Swallowfield Avenue then he, Campbell, left. That's what Kahira Jones says and I'm going to tell you that each case in respect of the accused men are [sic] to be dealt with separately. I will give you more directions in respect of what Kahira Jones said [sic] is that Chow and the police dem plan up to tell lie 'pon him. 'Dem say dem a guh send mi guh a prison.' And Mr. Williams, Shane Williams says he is not in any murder or know of any murder. He doesn't know Mr. Chow. He denied that his name was Terrence or that his voice appeared on the video.
>
> … And what Mr. St. John says, I am only here because I am associated with Mr Palmer. He doesn't know where Clive Williams is. He did not see him on the 16th of August. He doesn't know of any plot or any plan about this alleged murder, whatsoever."

[378] Third, before turning to a detailed review of the evidence, the judge told the jury how they should approach the case (Vol XII, page 4756 of the transcript):

> "Your approach to the case … should therefore be as follows: If looking at the case of any of the five accused, you are sure of the intention to commit the offence, [sic] took part in committing it, however great or small, is guilty. I must tell you that mere presence at scene of the crime is not enough to prove guilt, but if you find that that particular accused was on the scene and intended and did, by his

> presence alone, encourage the others in committing the offence, he is guilty."

[379] And finally, close to the end of the summing-up, having reviewed for the benefit of the jury the unsworn statement given by each of the defendants, the judge reminded them yet again of the need to keep the cases against each defendant separate (Vol IX, page 5139 of the transcript):

> "As I told you, each case in respect of each accused is separate. The evidence against each is separate and you are to try the case that way. A verdict against one doesn't necessarily mean you have to find the same verdict against each one of them. The evidence is separate against each. The verdicts that are open to you on this indictment, is [sic] guilty or not guilty of the charge of murder."

[380] In our view, in each of the instances quoted in the foregoing paragraphs, the judge was careful to exhort the jury to treat the cases both against and for the appellants separately. Taken together, we are satisfied that the jury must have appreciated that this was the correct approach to the case.

[381] Mr Senior-Smith then directed our attention specifically to Mr Jones's defence. His first complaint was that having told the jury that he would give them "more directions in respect of what Kahira Jones said" (see paragraph [377] above), the judge then proceeded to devote "only six and a half lines" of the transcript to Mr Jones' defence.

[382] This is what the judge told the jury (Vol IX, page 5137 of the transcript):

> "In respect of Mr. Kahira Jones, 27 years of age, he is a disc jockey, live [sic] at 3745 Waterford, St. Catherine. Knows didja [sic] Palmer

> for years. Never killed anyone. Never. Not a murderer. Lamar Chow and the police them plan up to tell lie pan dem sey dem a send all of us to prison. Thank you. That is what he said."

[383] And this is what Mr Jones actually said in his unsworn statement (Volume VIII, page 4370):

> "Good afternoon Madam, Foreman, m'Lord, and members of the jury, good afternoon. M'Lord, good afternoon, Madam, Foreman and members, my name is Kahira Jones. I am 27 years of age. I am a Disk Jockey. I live at 3745 Chantilly Road, Waterford, St. Catherine. I know Mr. Adijah Palmer for years. Him help grow mi, he was my next door neighbor. I never killed anyone at all never. I am not a murderer. Mr. Lamar Chow and the police dem plan up fi tell lie pon mi. Dem seh dem a send all of us a prison. Thank you, m'Lord, Madam Foreman."

[384] It seems to us that a comparison of the judge's summary with Mr Jones' unsworn statement reveals that, in all material respects, the former was in fact a virtually complete reflection of the latter. So there is nothing, in our view, in Mr Senior-Smith's complaint about the brevity of the judge's summary.

[385] But Mr Senior-Smith next went on to submit that there was material which emerged during the trial from which Messrs St John and Jones' defence might have benefitted. In this regard, he referred in particular to the circumstances of Mr Chow's identification of Mr Jones as one of the persons to whom he and the deceased had spoken over the telephone on 14 August 2011, and Messrs St John and Jones as being among the persons who were present at the house at 7 Swallowfield Avenue on the evening of 16 August 2011.

[386] For the Crown, Mr Taylor submitted that, given the limited role which the issue of identification played in the case on the evidence, the judge's extensive directions on the issue cannot be said to have been deficient in any way at all.

[387] Mr Chow identified Mr Jones as someone whom he knew from Waterford, through the deceased, for about three years (Vol II, pages 397-399 of the transcript). However, he did not know what kind of work Mr Jones did. Mr Chow had known the deceased for six years and he also knew his mother, sister, brother and most of his family members (Volume II, page 403). In particular, he knew the deceased's sister, whose name was Nadine, and had been to her home a few times.

[388] Mr Chow testified that on 14 August 2011 he accompanied the deceased to Nadine's house at about 5 o'clock in the afternoon. At that time, he said, the deceased was behaving "shaky, scared" (Vol II, page 413 of the transcript). He, Mr Chow, was also feeling shaky and scared. While at Nadine's home, the deceased placed a call to someone, using the speaker function on his cell phone. Mr Chow recognised the voice of Mr Jones, with whom he had spoken over the telephone several times before and whose voice he knew. He heard Mr Jones tell the deceased "everything good you don't have to worry yourself". The deceased responded by telling Mr Jones to "beg" Mr Palmer for him, whereupon Mr Jones told the deceased "nuh worry yourself, him a deal wid him fi him, deal wid him fi wi" (Vol II, pages 417-419 of the transcript). Mr Chow also testified that he too had received a few calls from Mr Jones, in which Mr Jones "seh nuh worry yuhself, him a deal with it fi mi, him a talk to di boss fi mi and dem ting de" (Vol II, page 467 of

the transcript). Mr Chow understood Mr Jones's use of the words "di boss" to be a reference to Mr Palmer (Vol II, page 469 of the transcript). And the statement that he was not to worry to be in reference to "[t]he threat whe we was [sic] getting" (Vol II, page 469 of the transcript).

[389] As has already been noted, Mr Chow's evidence was that two days later, on the evening of 16 August 2011, he went to 7 Swallowfield Avenue in the company of Mr Campbell and the deceased. He identified Messrs Palmer, Jones, St John and Campbell as being among the persons whom he saw in the house. He was able to see Mr Palmer from the light of his cell phone, which "was on the right beside of him shining bright up, the phone like a flashlight on the phone a torch phone like". From that light, he saw Mr Palmer's "whole face and body", a distance of an arm's length away (Vol II, page 494 of the transcript). As regards Mr St John, he observed his face from about four to five feet away. At one point Mr St John in fact came close to him, "about arm's length" and he was also able to see him from the Blackberry Torch cell phone that was nearby "shining light" (Vol II, pages 499-500 of the transcript). In relation to Mr Jones, he knew that it was him because he saw his face; indeed, he said, "[a]ll of them face I know. I know them that well". He was able to see Mr Jones' face because "[t]he phone light was shining" (Vol II, pages 500-501 of the transcript). He had been to the house about twice before and seen Mr Jones and Mr St John, each of whom had his own room and appeared to live there (Vol II, pages 502-503 of the transcript). And, as regards Mr Campbell, Mr Chow said that he knew him "pretty well", and that he was able to see "everything, his whole body, his

whole face" from about an arm's length away, with "the phone light shining constantly" (Vol II, pages 501-502 of the transcript).

[390] According to Mr Chow, Mr St John was the person who opened the gate for them when he arrived at the house in the company of the deceased and Mr Campbell on the evening of 16 August 2011 (Vol II, page 559 of the transcript); while Mr Jones was the person who held the deceased "backway", immediately after Mr Palmer asked him (Mr Chow) and the deceased to state their plans with regard to the missing firearms (Vol II, page 446 of the transcript). Mr Chow testified that, later, having been brought back into the hall-way by Mr Palmer and Mr Campbell after his unsuccessful attempt to escape, he saw the deceased lying on the ground, not moving, with Mr Jones "standing, bend over him", and Mr St John "over him with like a block … [w]eh you use to build up house" (Vol II, pages 453-454 of the transcript).

[391] Neither Mr Palmer, nor Mr Campbell, nor Mr St John denied that Mr Chow had been in their presence at some point on 16 August 2011. As has been seen, Mr Palmer categorically denied knowing anything at all about the murder of the deceased; and when Mr Chow was cross-examined by Mr Tavares-Finson, it was put to him that the only contact which he had with Mr Palmer that day was that he had placed him in a taxi-cab and accompanied him to the Andrew's Memorial Hospital after he had been bitten by the dog at his house (Vol II, page 604 of the transcript). For his part, Mr Campbell's case was that, on the day in question, while he and Mr Chow had travelled together to 7 Swallowfield Avenue, they had let off the deceased at the guest house (Vol VIII, page 4367 of the

transcript). And, in the case of Mr St John, he was on his way out from 7 Swallowfield Avenue, when Mr Chow entered the yard and was attacked by the dog. According to Mr St John, it was in the attempt to protect Mr Chow from the dog that Mr Palmer was bitten by it (Vol VIII, page 4373 of the transcript).

[392] But, under searching cross-examination by Mr Pierre Rogers, who appeared for Mr Jones at the trial, it was several times suggested to Mr Chow that he was lying about Mr Jones' involvement in the matter (Vol II, pages 669-755 of the transcript). However, Mr Chow maintained, firstly, that it was Mr Jones's voice which he had heard over the telephone on 14 August 2011 when he and the deceased visited Nadine's home that evening ("Sir, I know his voice pretty well" – Vol II, page 751 of the transcript); and, secondly, that it was Mr Jones whom he had seen hold on to the deceased from behind at the house on 16 August 2011, and later standing over the deceased's motionless body on the ground.

[393] And, in relation to Mr St John, Miss Tamika Harris, who appeared for him at the trial, suggested to Mr Chow in cross-examination that he did not see Mr St John "with any block"; nor did he live at 7 Swallowfield Avenue or have a bedroom there (Vol II, pages 775-776 of the transcript). Mr Chow denied both suggestions.

[394] There was also a significant dispute as regards the identification of the voices of Mr Palmer and Mr Campbell in the video recording upon which the prosecution placed much reliance.

[395] No doubt in the light of these factors, the judge chose to deal with the question of identification at some length, telling the jury that "identification is a problem that comes before the court with great frequency" (Vol IX, page 4875 of the transcript). The judge then went on to say this (Vol IX, pages 4875-4878 of the transcript):

> "The witness, Lemar Chow, has given evidence of a visual identification of the participation of four of the accused persons; that is, Palmer, Shawn Campbell, Kahira Jones and Andrew [sic]? St. John who, the Crown is saying, was [sic] acting together and in an assault of 'Lizard' and the witness, Lamar Chow.
>
> There is [sic] also claims of identification of the voice of Palmer and Shawn Williams in a video. That video scene has been identified as being in Mr Palmer's house at 7 Swallowfield Avenue. The time stamp of the video confirms the time as being relevant; that is, it was recorded on the 16th of August, 2011. The audio message on the video are of voices which appear to be seeking a means to kill a man. A tattoo on one of the men in the video has been identified as being similar to a tattoo on a man identified in a photograph as being Andrew [sic] St. John.
>
> In considering the whole question of identification, Madam Foreman and your members, you should consider whether the Prosecution witness, Mr. Lamar Chow, is a witness of truth and to disregard the evidence, unless you so find.
>
> In this case, the defence has been that the case against the accused is a concoction and fabrication of evidence against the accused men by Mr. Chow and the police. If you and your members are so satisfied as to the witness truthfulness, then you can go on to consider the reliability of his evidence as it deals with the question of identification because the case against the accused men depends, to a large extent, on the correctness of the identification of the accused of which the defence claims is fabricated and incorrect.
>
> I must therefore warn you of the special need for caution before convicting any of the accused in reliance on identification. That is because it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past as a result of such mistakes. Madam Foreman and your members, an

> apparently convincing witness can be mistaken as can a number of apparently convincing witnesses. Although it's only one witness we have in this case who has done any identification you, Madam Foreman and your members, should therefore examine carefully the circumstances of the identification by Mr. Chow; the circumstances under which that identification took place; how long did Chow had [sic] the person he says was the accused under observation; at what distance; in what light; did anything interfered [sic] with his observation; did he know the persons he was identifying before. If so, how long had he known the person; how familiar is he with the person; how often he used to see them. If it is only the occasion when he used to see that person, had he any special reason for remembering the person.
>
> You look at all those factors to determine whether there was a sufficiency of opportunity to afford Chow to say definitely. Until you are sure that this is the person that he saw, you look at the light, you look at the distance, you look at the time that they were together. If he had known the men before and from that you say whether you can rely, if you find he is a witness of truth, that you can rely on him."

[396] The judge then dealt with the issue of voice identification (Vol IX, pages 4878-4880 of the transcript):

> "The Prosecution, Madam Foreman and your members, also relies on voice identification to identify the accused and like I told you, like with visual identification you must be aware that voice identification poses the same type of danger because, as you know, it may very well have happened to you where you think you see somebody and you go up and you start talking and it turns out you are wrong; the person turns around and said, 'I don't know you from adam [sic],' and you mutter some words and move on.
>
> So you have to be careful. Did Chow know these persons before? Was the lighting there good? It's a matter for you.
>
> And I will tell you now that with the voice identification, there is the same type of danger because to put it in our vernacular, 'people sound like people'. The danger is more acute as those well recognized in visual identification and it has some additional dangers. You must examine the duration of the speech to determine whether there is a

> sufficiency of words to allow for identification; the level of familiarity with the voice of the person doing the identification. In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent, there must be evidence of the degree of familiarity the witness has had with the accused and his voice, including any prior opportunity the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between the knowledge of the accused [sic] voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused, the fewer the words needed for the recognition. The less familiar the witness is with the voice, the greater necessity there is for more spoken words to render recognition possible and therefore safe on which to act.
>
> So you bear that in mind, Madam Foreman and your members."

[397] The judge then invited the jury to consider the circumstances of the identification of each of the defendants by Mr Chow. In relation to Mr Jones and Mr St John (observing that "the witness refers to him as Mad Suss"), the judge reminded the jury, at Vol IX, pages 4883-4885 of the transcript, that –

> "[Mr Chow] said he had known [Mr St John] for three years. Said he was able to see Mad Suss, his face. He was about four to five feet away from him. He was within arm's length.
>
> He said that Kahira Jones was also in that room. He saw all of their faces. Kahira was between himself and [the deceased], and the phone light was shining. And as I told you, he said he had seen Mad Suss at the house on previous occasions.
>
> In the room he had seen him standing over [the deceased] with a building block. It was generally argued that the room, the lighting was not sufficient. The light, it was not a flashlight, but a flashing light; that no distance had been given in respect of some of the men. There was no time given as to how long this event had taken place, how long were they there for, so that you could properly assess how much time they had to spend looking at each person's face.

> It was also urged that the person who is claiming to do the identification was doing it under trying circumstances. He would have been apprehensive about his safety, and that could have affected his ability to discern or to properly discern all that is taking place around him.
>
> So, those are some of the things you bear in mind. You look at the -- although no period was given, but you were told that an account was given, that one of the men started to relate, when he was questioned as to what happened, started to relate a story. Would that have taken some time? Would that time, based on what you heard of what was being related, would that have afforded the witness sufficient opportunity, and bearing in mind these are men he says he knows. The situation is, according to him, he entered that room with Palmer, Shawn Campbell, and [the deceased]. He had seen Mad Suss outside. So you bear all those things in mind when you look at the circumstances of the identification."

[398] In giving these directions, the judge plainly had in mind the benchmark for identification cases set by **R v Turnbull** [1977] QB 224, and the numerous decisions of the Privy Council and this court in which it has been applied. For present purposes, it is sufficient to quote the following oft-quoted passage from the judgment of Lord Widgery CJ in **Turnbull** (at page 228-229):

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.
>
> Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.
>
> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but the poorer the quality, the greater the danger.
>
> In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution."

[399] Mr Senior-Smith's submission was that, in all the circumstances of this case, in which Mr Chow was the sole eyewitness upon whom the prosecution relied, the judge was also required to deal with the weaknesses in the identification evidence and the possible

effect of these weaknesses on Mr Chow's credibility. For this submission, Mr Senior-Smith relied on the following statement of the position by Edwards JA (Ag) (as she then was) in **Vernaldo Graham v R** [2017] JMCA 30, at paragraph [38]:

> "In a case in which the identification of the assailant depended solely on the evidence of a single eyewitness, whose evidence was flawed in several material respects, the trial judge is required not only to draw the jury's attention to the weaknesses in the evidence, the possible effect on the credibility of the witness, any material discrepancy and inconsistency that may exist affecting the overall quality of the identification evidence, but must also analyse the significance of such weaknesses, where necessary."

[400] While the judge did not, in formulaic compliance with the **Turnbull** guidelines, specifically characterise them as "weaknesses" in the identification evidence, it seems to us that he clearly had the issue in mind in the course of the directions set out at paragraph [397] above. Thus, the judge invited the jury's attention to the lighting, which the defence contended to be inadequate to allow for a proper identification; the fact that there was no evidence as to the distance from which Mr Chow was able to view some of the defendants or the length of time for which he had them under observation; the fact that Mr Chow's purported identification of the defendants would have been made "under trying circumstances", thereby potentially affecting his ability to make a proper identification; and the possibility that Mr Chow might "have been apprehensive about his safety, and that could have affected his ability to discern or to properly discern all that is taking place around him".

[401] In **Dwayne Knight v R** [2017] JMCA Crim 3 (at paragraph [64]), to which Mr Senior-Smith also referred us, McDonald-Bishop JA (Ag) (as she then was) referred to the earlier decision of this court in **R v Leroy Lovell** (1987) 24 JLR 18. In that case, it was held that "where the issue of identification arises in a criminal trial, two questions call for careful direction from the trial judge, (a) whether or not the witness was mistaken, and (b) whether the witness is credible". In our view, the judge's directions in this case, taken overall, were more than adequate to enable the jury to determine whether they could rely on Mr Chow's identification of Messrs St John and Jones as persons who were present at Mr Palmer's house on the evening of 16 August 2011, and participated in the events in the manner described by him.

[402] As regards voice identification, we note that Mr Senior-Smith made no specific complaint as to the judge's directions on this score. However, for completeness, we will add that the judge's directions (see paragraph [396] above) were entirely in keeping with the directions sanctioned by this court in **Donald Phipps v R** [2010] JMCA Crim 48, paragraphs [131]-[144]; and subsequently approved by the Privy Council in **Donald Phipps v The Director of Public Prosecutions & the Attorney General of Jamaica** [2012] UKPC 24, paragraphs 21-27.

[403] Mr Senior-Smith's final complaint related to what he described as the judge's perfunctory treatment of Mr Palmer's defence. He submitted that the material placed before the court by Mr Palmer was not adequately or fairly evaluated, particularly in relation to the evidence adduced on his behalf. Mr Palmer's categorical denial of having

had anything to do with the death of the deceased was not given appropriate weight by the judge in all the circumstances.

[404] We have already set out the two passages from the summing-up in which the judge summarised the cases of each of the appellants, including Mr Palmer (see paragraphs [356] and [377] above). As we have noted, the judge went on at a later stage of the summing-up to deal in greater detail with the defence of each defendant individually. With regard to Mr Palmer, the judge began with his unsworn statement (Vol IX, pages 5103-5105 of the transcript):

> "We now look at the unsworn statement of Mr. Adidja Palmer. He says, he gives his name and he says, 'Thirty-eight years old, I am innocent of all these charges. I have never been to 7 Swallowfield Avenue and seen 'Lizard' there. In fact, the only time I have ever encountered Clive Williams is when he travelled with Shawn at a stage show, never encountered him at Swallowfield Avenue.
>
> M'Lord, the incident that occurred on the 30th of September, 2011, I was at a hotel in New Kingston. Police entered, put me and a female companion on the ground, handcuffed us, took us downstairs in the lobby where I was greeted by other police officers and members of the media who was already there.
>
> I was taken to Central Kingston Police Station. After that, the police escorted me to my house in St. Andrew, where as a matter of fact, one being the home in Swallowfield Avenue. I was taken to Portmore where the house was searched. I was removed to Spanish Town MIT Headquarters. A few days later after doing a question and answer with Mr. Thompson, I was charged for murder of Clive Williams.
>
> After being at Gun Court, it came over the news that decomposed body [sic] was found at my residence, at my Swallowfield residence, which turned out to be a lie. Nothing of the sort was there. My Lord, in an effort to have my bail denied, not only did the police say that there was a decomposing body, on a

> subsequent bail hearing, the police said the blood of 'Lizard' Williams was found at Swallowfield Avenue which also turned out to be not true. On more than one occasion my bail was denied because of allegations that always turn out not to be true.' He said in a bid to prevent the denial [sic] of bail, that four cellular phones had been found in his cell. He contacted INDECOM to investigate the matter and like all other allegations against him it wasn't true. He said, further, that during the case, the course of the trial, he was of the view that someone or a group of persons are conspiring against himself and his friends.
>
> He said recently the Minister of National Security, Peter Bunting, took his music and image to the States claiming that Vybz Kartel lyrics is glorifying scamming, all this whilst he was in custody awaiting trial. Even in Jamaica, at one point, the Honourable Minister said that he was one of four essential factors 'mashing up' Jamaica. He was one of them, one of the factors that was 'mashing up' Jamaica and he considers that if that is not prejudicial he doesn't know what is.
>
> And he says he bleached his skin and he is heavily tattooed but that is merely superficial, that is about the persona of Vybz Kartel not Adidja Palmer and that he move to say that even you may sometimes judge in a wrong way by the way people look. He says he is not an alien from space that landed, he is a normal man like anybody else, that he even has a family and he mentioned that his grandmother and cousin and mother-in-law are here.
>
> He says, 'My hands are clean of Clive Williams' blood if, indeed, Clive Williams is dead, is deceased.' He says, 'I have never sent anyone to kill Clive Williams nor did I do it myself. I, an [sic] innocent man, that is all I have to say.' That's what he said."

[405] This was in fact a virtually verbatim reproduction of what Mr Palmer himself had said in his unsworn statement. There is, therefore, as it seems to us, no basis for Mr Senior-Smith's contention that the judge had, by his directions, significantly diluted the strength of the unsworn statement. This was in fact the third time that the jury was being reminded by the judge that Mr Palmer's defence was that, in essence, the case against

him was a concoction and that, if indeed Mr Williams was dead, he had had nothing to do with it.

[406] Mr Senior-Smith complained further that, after summarising Mr Palmer's unsworn statement, the judge's concluding statement, ("That's what he said") was deficient in that it contained no analysis at all. But we are unable to see what more the judge should have told the jury, given the view which we have already expressed that the judge's directions on the approach to the unsworn statement, that is, that they should give it such weight as they thought it deserved, were unexceptionable (see paragraphs [315]-[316] above).

[407] Following on from his summary of the unsworn statement, the judge then invited the jury's attention to the evidence of the witnesses who were called on Mr Palmer's behalf. His sister, Ms Moreen Nelson, spoke to his kindness, leading the judge, as has already been seen, to give him the benefit of a standard good character direction, in terms of which no complaint has been made. Retired Senior Superintendent Major, as has already been seen, gave evidence as to the authenticity of the 13 November 2013 letter allegedly written by Mr Chow. And the Public Defender and the two other members of his staff gave evidence as to the provenance of the 13 November 2013 letter. We have already expressed the view that such comments as the judge allowed himself in respect of the language of that letter were fully justified in the circumstances and, in all other respects, in our view, the judge's summing-up was perfectly fair to Mr Palmer.

[408] Ground 14 therefore fails.

(vii) whether, on the evidence adduced at the trial, the judge erred in not leaving it open to the jury to return verdicts of manslaughter, or at any rate in relation to the appellants Jones and St John (Grounds 15 and 16/AP, KJ, AStJ)

[409] The judge twice told the jury that, on the evidence which they had heard, there were only two verdicts open to them, guilty or not guilty of the charge of murder (Vol IX, pages 4732 and 5139 of the transcript).

[410] In ground 15, the appellants complain that the judge "erred in directing the Jury only in relation to binary verdicts whereas the material evidence in the trial left open the possibility of verdicts of Manslaughter". And, in ground 16, which relates specifically to Messrs Jones and St John, the complaint is that the judge failed to direct the jury that, on the evidence, they "may have been found to be bereft of the necessary intention to kill or cause grievous bodily harm, as there was no evidence of a plan, conspiracy or common design with anyone else as regards the deceased prior to or on the [16th] August, 2011".

[411] Mr Senior-Smith submitted that the judge failed to distinguish sufficiently between the evidence against each of the appellants and thereby failed to assist the jury in relation to the additional verdicts that were open to them on the evidence. The judge's error, he further submitted, was that he approached the case against each of the appellants as if he was a principal in the first degree, whereas there were shortcomings in the prosecution's case which, even assuming the death of the deceased, left several questions unanswered. These included, when did the deceased die, where was he killed, how did he die, who actually committed the physical act of the killing him, and what was the degree, type and/or nature of the involvement of each of the defendants? All of these

questions, it was submitted, warranted "a more discriminating set of instructions from the [judge]" (Appellants' Joint Written Submissions, page 137). Instead, it was submitted, the general pith of the directions was to – unfairly - treat each of the defendants as a principal in the first degree, without making any distinction between the principal actors and those who, on the evidence, may have played a secondary role and not shared the same intention as the principal actors.

[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 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.

[414] In response to these submissions, Mr Taylor pointed out that this was a case in which the appellants were all indicted as principals. What the prosecution set out to prove to the jury's satisfaction, therefore, was that they acted together and shared a common intention to murder the deceased. In these circumstances, it was submitted, there was no duty on either the prosecution to prove or the judge to direct the jury to consider who was a principal in the first degree and who was a principal in the second degree. The effect of section 81 of the Offences Against the Person Act ('OAPA') is that principals in

the second degree would still be liable to the same punishment as principals in the first degree. In this case, there was no indication from any of the defendants at the trial or in the evidence of any lesser intention at any point in time. In the light of this, Mr Taylor submitted that the particular problem of "parasitic accessorial liability" considered in **Jogee & Ruddock**, that is, where the scope of the common design has been exceeded by one party and it is sought to make a secondary party liable for the unintended consequences, simply did not arise in this case. There was therefore no basis upon which the judge could have left a manslaughter verdict to the jury.

[415] Section 81 of the OAPA provides as follows:

> "In the case of every felony punishable under this Act every principal in the secondary degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this Act punishable; and every accessory after the fact to any felony punishable under this Act (except murder) shall be liable to be imprisoned for a term not exceeding two years, with or without hard labour; and every accessory after the fact to murder shall be liable to be imprisoned for life, with or without hard labour; …"

[416] Section 81 therefore makes good Mr Taylor's first point, which was that, on the facts alleged by the prosecution, and naturally subject to proof, it was open, as a matter of law, to the jury to find the appellants guilty of murdering the deceased, whether the evidence showed them to be principals in the first or second degree. The governing principles applicable to such cases were restated by the court in **Jogee & Ruddock** in this way (UKPC 7, paragraph 1):

> "In the language of the criminal law a person who assists or encourages another to commit a crime is known as an accessory or secondary party. The actual perpetrator is known as a principal, even if his role may be subordinate to that of others. It is a fundamental principle of the criminal law that the accessory is guilty of the same offence as the principal. The reason is not difficult to see. He shares the physical act because even if it was not his hand which struck the blow, ransacked the house, smuggled the drugs or forged the cheque, he has encouraged or assisted those physical acts. Similarly he shares the culpability precisely because he encouraged or assisted the offence. No one doubts that if the principal and the accessory are together engaged on, for example, an armed robbery of a bank, the accessory who keeps guard outside is as guilty of the robbery as the principal who enters with a shotgun and extracts the money from the staff by threat of violence. Nor does anyone doubt that the same principle can apply where, as sometimes happens, the accessory is nowhere near the scene of the crime. The accessory who funded the bank robbery or provided the gun for the purpose is as guilty as those who are at the scene. Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other. These basic principles are long established and uncontroversial."

[417] But **Jogee & Ruddock** was concerned with a different problem, arising from a distinct set of facts. With slight modifications to the illustration used in that case by Lords Hughes and Toulson, the issue in that case may be stated in this way: where two persons (D1 and D2) set out to commit the offence of, say, robbery (crime A), and, in the course of that joint enterprise, D1 commits the offence of, say, murder (crime B), does D2 fall to be treated as an accessory to the offence of murder (and therefore equally guilty of murder), irrespective of whether or not he himself intended to kill or cause grievous bodily harm to the victim?

[418] In **Chan Wing-Siu v The Queen** ('**Chan Wing-Siu**') [1985] AC 168, it was held that, in such circumstances, D2 would be guilty of murder if he foresaw the possibility that D1 might act as he did. As Lords Hughes and Toulson explained in their joint judgment in **Jogee & Ruddock** (at paragraph 2), the upshot of **Chan Wing-Siu** was that -

> "D2's foresight of that possibility plus his continuation in the enterprise to commit crime A were held sufficient in law to bring crime B within the scope of the conduct for which he is criminally liable, whether or not he intended it."

[419] In **Jogee & Ruddock**, for reasons which it is not now necessary to explore, it was held that **Chan Wing-Siu** represented a misstep in the development of the criminal law and that it, and the later cases which followed it, should be overruled. Among other things, the court considered (at paragraph 84) that "… the rule brings the striking anomaly of requiring a lower mental threshold for guilt in the case of the accessory than in the case of the principal". It was therefore held that, on the facts of the illustration given above, in order for D2 to be guilty of murder, there would have to be evidence from which the jury could find that he also intended to kill or cause grievous bodily harm to the victim. But, on the other hand, "[i]f a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter" (per Lords Hughes and Toulson at paragraph 96). (And see generally paragraphs 88-99 of the judgment, where the applicable principles are restated.)

[420] In order to make good his second point, which was that the facts of this case were wholly different from the kind of case which gave rise to the decision in **Jogee &**

Ruddock, Mr Taylor referred us to the subsequent decision of this court in **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25. That case also involved a challenge on appeal to the appellants' convictions for murder, arising out of an alleged joint enterprise to kill, on the ground that the trial judge erred in not leaving manslaughter to the jury. In distinguishing **Jogee & Ruddock**, McDonald-Bishop JA said this (at paragraph [102]):

> "In sum, this was not a case which, on the evidence, involved a plan to carry out one crime (crime A) and during the course of carrying out crime A, to which the appellant was a voluntary participant, murder, which was another crime (crime B), was committed by someone else. In short, the circumstances of this case do not warrant the application of the principles emanating from **R v Jogee; Ruddock v The Queen** treating with parasitic accessory liability."

[421] In our view, this conclusion is equally applicable to this case. As Mr Taylor 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.

[422] The question of whether, if believed, the actions which Mr Chow attributed to Messrs St John and Jones were sufficient to show that they were part of a common design to kill the deceased was a matter entirely for the jury. The judge explained this carefully

and correctly to the jury in the following passage of the summing-up (Vol IX, pages 4716-4718 of the transcript):

> "The prosecution's case is that the five accused committed this offence together and I tell you, Madam Foreman and your members, where a criminal offence is committed by two or more persons, each of them may play a different part but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. Where persons together engage themselves upon pursuing a common design or purpose, then anything done in pursuit of that common design, each person who participated in the execution of that common design or purpose becomes liable for the act of each other.
>
> When you talk about a common design or a plan, those words don't mean that there has to be any formality about it. A plan that we are talking about of this nature to commit an offence may arise on the spur of the moment, nothing needs to be said at all. Such a plan may be made with a nod or wink or a knowing look. Such a plan may be inferred from the behaviour of the party. We don't need no formality fi wi guh siddung and draw up an agreement 'this is what wi go do', a nod or a wink, a knowing look, that can constitute the plan. Madam Foreman and your members, the essence of the common design for a criminal defence is that each defendant share [sic] the intention to commit the offence and took some part in it however great or small, so as to achieve that aim. Your approach to this case should, therefore, be as follows: If, looking at the case of any of the accused, you are sure that the intention that I have mentioned, he took some part in committing it with others, he is guilty."

[423] Grounds 15 and 16 therefore fail.

Issue D – The admissibility of Deputy Superintendent Thompson's evidence – Ground 12 (SC)

[424] In an additional ground of appeal filed on 16 May 2018, Mr Campbell contends as follows:

> "The Learned trial judge allowed inadmissible hearsay evidence from the investigating officer, Deputy

> Superintendent Vernal Thompson, which was wholly prejudicial and recounted that evidence to the jury in a manner which negatively implicated the accused men, including Shawn Campbell, resulting in a substantial miscarriage of justice."

[425] The background to this issue is as follows. It will be recalled that Miss Oneika Jackson was the girlfriend of the deceased, Mr Clive Williams. During her examination-in-chief, Miss Jackson was asked to identify some of the deceased's friends and associates. In the former category, she named Mr Campbell, and in the latter category she named a group of disc jockeys called "the Portmore empire", otherwise known as "the Gaza family" (Vol I, page 68 of the transcript). She described them as a group who "will go to stage show [sic] and perform". Among others, she named Mr Palmer ("Vybz Kartel") and Mr Campbell ("Shawn Storm") as members of the Gaza family. She added that the Gaza family had female associates as well, among them "Gaza hindu" and "Gaza Kim" (Vol I, page 69 of the transcript).

[426] Deputy Superintendent Thompson ('DSP Thompson'), then an Inspector, was the investigating officer in the matter. As was to be expected, he gave detailed evidence as to the circumstances of his first involvement in the case and the various steps which he took during the investigations. These included his first visit to 7 Swallowfield Avenue on 22 August 2011, when he discerned a strong fragrance similar to that of "Fabuloso" in the living room and an adjoining cubicle; a second on 25 August 2011; a third on 27 August 2011, when he observed that the entire interior of the house had been burnt out by fire; a fourth on 29 August 2011, accompanied by a team from the forensic laboratory, when

he discerned a foul odour coming from the living room; and a fifth on 30 September 2011, when he observed that the "entire rear of the dwelling house was demolished, crushed into one heap" (Vol VII, page 3851 of the transcript).

[427] Further investigations revealed that a missing person report had been made to the police in respect of "Clive Williams, otherwise called 'Lizard'", by Mr Williams' sister, Mrs Stephanie Brakenridge.

[428] DSP Thompson conducted a question and answer session with Mr Palmer on 24 October 2011. He testified that, at the end of this session, he told Mr Palmer words to the effect that, "me a goh charge you for the murder of Clive Lloyd Williams otherwise called Lizard … even though his body has not been found" (Vol VII, page 3859 of the transcript).

[429] DSP Thompson then told the court that, on 29 October 2011, he received "certain information in respect to an alleged case of robbery against one Vanessa Sadler … otherwise called 'Gaza Slim'" (Vol VII, page 3860 of the transcript). This evidence led to an intervention from Mr Lorne, who then appeared for Mr Campbell. Explaining his concern, Mr Lorne said this:

> "I am just wondering about the names of persons who are not before the court and I do not think that it is relevant to the offence [sic] that is taking place here, so I ask my friend to be cautious lest it become prejudicial."

[430] Mr Taylor responded to Mr Lorne's concern with the comment that the evidence "touches and concerns the alleged death of the deceased". DSP Thompson then went on

to say, without objection or further comment, that "[t]his alleged report named a suspect as Clive Lloyd Williams otherwise called Lizard who was armed with a firearm". Further, based on this report, he gave instructions for investigations "to be conducted into Gaza Slim's report … specifically to record further statements from the relatives and friends of the suspected deceased, Clive Lloyd Williams, now being treated as a suspected robber" (Vol VII, page 3861 of the transcript).

[431] Lastly on this point, DSP Thompson testified that, having reviewed these statements, he continued to direct the efforts to find the body of Mr Williams.

[432] In the course of reviewing Miss Jackson's evidence for the benefit of the jury, the judge said the following (Vol IX, pages 4760-4763 of the transcript):

> "And then she went on to tell us that she knows – she is familiar with members of the Portmore Empire and she describes it as a group of disc jockeys otherwise known as the Gaza Family. They go to stage shows, and they perform and in reciting the members that she was aware of, of that family, she talks about 'Vybz Kartel', 'Shawn Storm, 'Black Rhyno, 'Javinci', and they were some female associates. She mentioned a person by the name of 'Gaza Slim'. Now, that name, 'Gaza Slim', you will recall the evidence of Superintendent Thompson, which was to the effect that one of the things, one of the reports that he received on the 29th of October, 2011, he received certain reports in respect of an alleged case of robbery against a person called Vanessa Sadler, otherwise called 'Gaza Slim'. And the alleged report named a suspect, Clive Williams. So, this person who she has identified as a part of the – what she calls the Gaza Family, had made a report, shortly after -- if not shortly, on the date the 29th of October, he having gone missing on the 16th of October [sic], that Clive 'Lizard' Williams had held her up with a firearm. The important point in that – is that the officer said that he gave instructions on the report for investigations to be conducted on Gaza Slim's report, and specifically, to record

> statements from the relative of Williams, now being called a suspected robber. The statements were recorded and he having received the report about it, he continued, his evidence says, to look for the body. He then continued to look for the body of 'Lizard', Clive 'Lizard' Williams.
>
> Well, you didn't hear anything further at this trial of this person, a member of the 'Gaza Family', as it is described, about any robbery that Lizard Williams would have been involved in subsequent to the 16th of August."

[433] As foreshadowed by ground of appeal 12, Mr Samuels made two complaints arising out of the history we have described in the foregoing paragraphs. First, that the judge erred in allowing DSP Thompson to give inadmissible and prejudicial evidence about the alleged report that the deceased had been involved in a robbery. Mr Samuels developed the submission more fully in his written submissions, with the observation that –

> "The clear inference to be drawn from the evidence concerning Gaza Slim … is that the accused men were involved in soliciting help from Gaza Slim one of the members of the 'Gaza family', to take advantage of the missing body, by bringing Clive Williams to life, with an invented story that [he] had been involved in robbing her, at gun point, some two (2) months after the 16th of August 2011."

[434] Second, that the judge's directions to the jury in relation to DSP Thompson's evidence were unfair and only served to heighten its prejudicial effect.

[435] For his part, Mr Taylor submitted that "the evidence led by DSP Vernal Thompson was not prejudicial and recounted evidence that was admissible, relevant and probative to the issues at trial" (Skeleton Submissions filed on 25 June 2018).

[436] We would first observe that DSP Thompson's evidence was received without objection from counsel for any of the appellants. Mr Lorne's very mild enquiry was made, as he himself put it, with a view to urging Mr Taylor "to be cautious lest it become prejudicial". No ruling was sought from the judge, nor was any ruling made as to the admissibility of the evidence regarding the Gaza Slim robbery report.

[437] But it seems to us that, in any event, evidence of the report of an alleged robbery in which Mr Williams was said to have been involved, some two and a half months after the date on which he was allegedly murdered by Mr Palmer, was plainly relevant to the viability of the charge against Mr Palmer for his murder. So, in our view, DSP Thompson's evidence was admissible to demonstrate the extent of the efforts he made to exclude any possibility that Mr Williams was still alive in October 2011.

[438] Any question of hearsay could only have arisen if DSP Thompson's evidence of the Gaza Slim robbery report were being relied on "testimonially", that is, to prove that such a robbery did in fact take place, a matter which was not an issue in the case at all. As Lord Wilberforce explained in his well-known judgment in **Ratten v The Queen** [1971] 3 WLR 930, 930-934:

> "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', i.e., as establishing some fact narrated by the words."

(See also **Subramaniam v Public Prosecutor** [1956] 1 WLR 965, 970)

[439] As far as the judge's summing-up is concerned, it seems to us that, save in one respect, it was a perfectly accurate summary of the evidence given by both Miss Jackson and DSP Thompson. Our single reservation has to do with the fact that the transcript of Miss Jackson's evidence records her as having described one of the female associates of the Gaza family as "Gaza Kim", and not, as the judge put it, "Gaza Slim".

[440] It could of course be that Miss Jackson's evidence was inaccurately recorded. This view may in fact derive some support from Mr Samuels' written submission (see paragraph [433] above), which appears to proceed on the basis that Miss Jackson's evidence was the source of the description of "Gaza Slim" as "one of the members of the 'Gaza family'". The fact that the way the judge put it failed to attract correction from anyone at the trial, or protest from Mr Samuels on appeal, may also support this view.

[441] But, even if the name given by Miss Jackson was in fact "Gaza Kim", it would not detract from what the judge described as "the important point" of DSP Thompson's evidence: that is, that having received and investigated a report of Mr Williams' participation in a robbery in late October 2011, he continued to look for Mr Williams' body.

[442] In our view, the judge's juxtaposition of Miss Jackson's evidence with DSP Thompson's evidence in the passage complained of, as indeed we have done for the purposes of this part of the judgment, was a helpful means of enabling the jury to, so to speak, connect the dots in evidence spread over an extended period of trial. Any inference

to be drawn from that evidence was entirely a matter for the jury and we can see nothing in what the judge said that might have inclined them one way or another.

[443] In our view, Mr Campbell's ground 12 must therefore fail.

Issue E – The impact of publicity

[444] In ground 13, the appellants complain that:

> "Given the nature, extent and volume of the publicity regarding this trial (pre-trial, during trial, post-trial) the Appellants cannot receive a fair trial in JAMAICA."

[445] Mrs Neita-Robertson submitted that the case against the appellants was saturated with media publicity prior to the start of the trial, during the trial and up to the current date; that the material in the public domain was littered with grossly prejudicial information, often inaccurate and misleading; and that this prevented them from having a fair trial at every stage of the proceedings.

[446] In support of this submission, the appellants directed the court to a non-exhaustive list of 24 instances of media reports released to the public, electronically or otherwise, before, during and after the trial. Some of them consisted of articles ostensibly reporting on what had taken place at the trial on a particular day, while a smaller number of them consisted of public comment on aspects of the trial.

[447] Among those in the first category were, for instance, (i) an article published in the Daily Gleaner newspaper ('a Gleaner article') dated 7 January 2014, entitled 'Shawn Storm's text Were about Daughter, Not Lizard - Lawyer"; (ii) a Gleaner article dated 15 January 2014, entitled "Kartel, Shawn Storm Called Lizard Day Before Murder"; (iii) an

article published in the Daily Observer newspaper ('an Observer article') dated 10 February 2014, entitled "Head of police information unit, Steve Brown Summoned in Kartel"; (iv) an Observer article dated 11 February 2014, entitled "Kartel attorney takes issue with another police press release"; (v) an Observer article dated 16 February 2014, entitled "Laughter as prosecutor, witness square off at Kartel trial"; and (vi) an Observer article dated 7 March 2014, entitled "Jurors urged to ground judgment on evidence in [V]ybz Kartel Trial".

[448] Among those in the latter category, were, for instance, (i) a Gleaner article dated 24 February 2014, entitled "Pastor Rips Kartel's Music to shreds – describes Artiste's lyrics as 'Disruptive and violent'" (together with the various comments made on the article by readers); and (ii) a Gleaner article dated 27 March 2014, entitled "Lessons from the trial of Di Teacha Kartel".

[449] The appellants also complained of items of adverse publicity released by the police themselves, about which Mr Tavares-Finson had been obliged to protest during the trial. The first matter had to do with a JCF Constabulary Communications Network ('CCN') release dated 10 January 2014, the same day on which the Group Risk Director of Digicel, Mr Joseph Simmonds, was called to give evidence for the prosecution. As read into the record by Mr Tavares-Finson on 14 January 2014, the release stated that the police "have launched an investigation into reports into a series of activities which have been linked to a particular case that is currently before the court" (Vol V, page 2604 of the transcript). Included among these activities, was the malicious destruction of "a number of the fiber

optic cables of one of the cell sites of a telecommunication company" (Vol V, page 2605 of the transcript). The release went on to state that "preliminary investigations indicate that the acts appear to have been deliberately orchestrated by associates of suspects in custody, criminals who seek to intimidate witnesses and pervert the course of justice" (Vol V, page 2606 of the transcript).

[450] In response to Mr Tavares-Finson's submission that the release was part of an effort to interfere with the proceedings, the judge asked him to state what remedy he proposed. Mr Tavares-Finson replied as follows:

> "… I would like to see the person who takes responsibility for the Constabulary Communication Network broadcast asked to attend court, and he or she be warned that before material like this goes out that it is dealt with and analyzed with a view to recognising or determining whether or not it would interfere with the course of the case. And this is not in days gone by where jurors don't read – we assume that they listen to television, that they are reading the newspaper, because they are not sequestered in anyway – and the Constabulary Communication Network should be warned." (Vol V, pages 2607-2608 of the transcript)

[451] Mr Tavares-Finson went on to make a further complaint about remarks attributed to the Commissioner of Police as to the quality of the news reporting of the trial by the Press, ending on the note that "your Lordship may very well look at it within the context and say this is clear contempt of court, or you may view that a simple warning might be sufficient, but something has to be done" (Vol V, page 2609 of the transcript).

[452] Expressing his concern that the matter not be "treated in such a way that it, in fact, affects the trial", the judge asked that the ranking police officer present be called

into court. In the absence of the Commandant, Inspector Meikle answered the judge's call and the following exchange ensued (Vol V, pages 2614-2615 of the transcript):

> "HIS LORDSHIP: Inspector Meikle, I understand your Commandant is off the building.
>
> INSPECTOR MEIKLE: He was just called to an emergency meeting at headquarters.
>
> HIS LORDSHIP: I have before me a statement, I don't know if it is - -
>
> Mr. T. TAVARES-FINSON: News release.
>
> HIS LORDSHIP: By the Jamaica Constabulary Force Communication Network. It is dated the first -- the 10th of January this year, and the attorneys in the matter in which I am presiding, which is presently before the Court, have expressed some concern about the release. The purpose why I have brought you here is to ask you - - in fact what the lawyers had asked in this matter is that somebody be summoned from this Organization so that the Court could express its concerns directly to them. I don't think we need go so far. I think there are persons here who will be capable to really communicate with the Agency the concerns of learned counsel for the Defence. I myself, on an examination of the Release, see where it could be construed in that way by some persons in the society and, perhaps, greater care ought to be taken, because the Court itself is very jealous of its authority and it is jealous to see that justice prevails here, and that the rights of everybody is [sic] preserved and not prejudiced. So with that in mind, Inspector Meikle, I am going to ask you to communicate with this organization and communicate with them the concerns that the Court has expressed, and we hope that their Releases would be such as not to lend itself to the construction that has caused concern by counsel.
>
> INSPECTOR MEIKLE: Justice, could I get a copy of the document? And I definitely will have dialogue with Mr. Steve Brown."

[453] But, despite Inspector Meikle's assurance, the issue arose again on 10 February 2014, while the trial was still in progress. On that morning, a Monday, Mr Tavares-Finson

(again, in the absence of the jury) drew the court's attention to two newspaper publications over the weekend, in the first of which reference was made to an article issued by the Corporate Communications Unit ('CCU') in the JCF on the "'attempted' fire-bombing of a policeman's house". This article went on to describe the person involved as "a witness in a high profile case now before the courts" (Vol VII, page 4084 of the transcript). The second article spoke to the police having implemented a new protocol for the use of telephones in police custody, requiring the presence of specially trained personnel at each police station to prevent their use by unauthorised persons.

[454] As a result of all of this, Deputy Superintendent Steve Brown, the head of the CCU, was called into court later that same morning, shortly after the close of the prosecution's case. When questioned by the judge, Deputy Superintendent Brown confirmed that the information about the attempted fire-bombing of the house of a witness in a high-profile case was in fact sent out by the CCU, prompting the judge to say this:

> "… the complaint that is raised, as I understand it, is that it is likely to cause prejudice in respect of the trial of the persons before this court. Reason being, this is the second time the description that you've used in this publication, in fact, has been used by your Unit, in that, it was a high profile case here presently before the court. It doesn't take a lot of detective work to find out that the focus is on this particular case, as you are no doubt aware …" (Volume VII, page 4124-4125)

[455] The judge then went on to urge Deputy Superintendent Brown, in terms of which no complaint is made, to –

> "… maintain the line that there must be no prejudice. Nobody who is reading your article must come away with the view that persons

> before this court are involved in any untoward situation." (Vol VII, page 4128 of the transcript)

[456] In their written submissions, the appellants referred us to a number of other examples of what they described as prejudicial and or inaccurate reporting – in the print and electronic media – on various aspects of the case. In her submissions before us, Mrs Neita-Robertson specifically reminded us of Mr Palmer's complaint in his unsworn statement about statements attributed to the then Minister of National Security, Mr Peter Bunting.

[457] One of Mr Palmer's complaints related to an Observer article dated 13 January 2013, at a time when Mr Palmer was in custody awaiting trial, in which the Minister was reported as having specifically instanced a dance hall song by him "as evidence of the social dysfunctionality behind criminality in Jamaica". In the same article, the Minister was also quoted as having described the song as "an amazing piece of propaganda for [lottery] scammers".

[458] In his unsworn statement, Mr Palmer also referred to a further statement attributed to the Minister, to the effect that he (Mr Palmer) was one of four essential factors "mashing up" Jamaica. Mr Palmer's comment on this, it will be recalled, was "if that is not prejudicial against my case, my Lord, I don't know what is …" (Vol VIII, page 4327 of the transcript).

[459] As his exchanges with Inspector Meikle and Deputy Superintendent Brown demonstrate, the judge was alive to the potential for prejudice inherent in the level of

publicity which attended the trial. Indeed, in his exhortation to Deputy Superintendent Brown, although acknowledging the importance of freedom of expression, the judge went so far as to declare that "the rights of the persons sitting in court is [sic] going to trump – you understand my use of the expression, 'trump' the right of the press" (Vol VII, page 4126 of the transcript). These remarks were, of course, made in the absence of the jury. We will therefore have to return to what the judge actually told the jury in his summing-up in due course.

[460] Mrs Neita-Robertson's first submission on this issue was that, with regard to the "firebombing" report originating from the CCN, the judge ought to have given due consideration to discharging the jury at that point by reason of the adverse publicity which came at a crucial stage of the trial (that is, shortly after the completion of the cross-examination of Mr Chow). She submitted that in these circumstances, having regard to the type and source of the information, the jury must inevitably have been influenced by it, irrespective of any subsequent direction from the judge to disregard it.

[461] In response to this submission, Mr Taylor referred us, firstly, to section 16(3) of the Constitution, which provides that "[a]ll proceedings of every court … shall be held in public". He submitted that this was therefore an open trial, in which the defendants' right to a fair trial had to be balanced against the public's right to know, bearing in mind that two of the defendants were well-known entertainment personalities. The defendants did not, as they might have done (i) apply to the court for an order excluding the media from the trial (under section 16(4)(c)(i) of the Constitution); (ii) apply to the judge to stop the

trial and discharge the jury; or (iii) ask the DPP to institute proceedings for contempt of court against any offending persons.

[462] The appellants cited a number of authorities and we intend no disrespect by mentioning a few only of them. But, before doing so, we fully accept that, as the appellants submitted, the governing principle is the fair trial guarantee enshrined in section 16(1) of the Constitution:

> "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."

[463] In the context of a jury trial, the principle in action may clearly be seen in, for instance, **Rex v Fisher & Others** (1811) 2 Camp 563, 570. In that case, on the trial of the printer, publisher, and editor of a newspaper for publication of a libel, Lord Ellenborough stated that "[i]f anything is more important than another in the administration of justice, it is that jurymen should come to the trial of those persons on whose guilt or innocence they are to decide, with minds pure and unprejudiced".

[464] In **Desmond Grant and Others v Director of Public Prosecutions and Another** [1982] AC 190 (a decision of the Privy Council on appeal from this court to which Mr Taylor referred us), the question arose in the context of widespread pre-trial publicity, involving unveiled suggestions in newspapers with island-wide circulation that the applicants were guilty of murder and needed to be brought to justice. The applicants applied under the then equivalent of section 16(1) of the Constitution (section 20(1)) for

a permanent stay of the trial of the charges against them on the ground that, because of the massive prejudicial publicity, they would be deprived of their constitutional rights if the trial were allowed to proceed. The application failed in the Full Court of the Supreme Court and in this court on the basis that, despite the prejudicial pre-trial publicity that had taken place, it had not been shown that it would be impossible to empanel an impartial jury. In dismissing the appeal from the decision of this court, the Privy Council endorsed the following statement in the judgment of Carberry JA (quoted at page 199 of the judgment of the Board):

> "For the purpose of these proceedings a remedy under the Constitution is only available if the applicants can establish that there is likely to be a contravention of section 20 (1) of the Constitution. This they can only do by showing that there is likely to be a failure to afford them a fair hearing by an independent and impartial tribunal. It is not sufficient for them to establish - as they have done - that there has been adverse publicity which is likely to have a prejudicial effect on the minds of potential jurors. They must go further and establish that the prejudice is so widespread and so indelibly impressed on the minds of potential jurors that it is unlikely that a jury unaffected by it can be obtained. We are not satisfied that they have established this, having regard to the common law remedial measures which we indicated are available to a trial court."

[465] As the Board explained, the common law remedial measures to which Carberry JA referred were a change of venue (which had already been sought and granted in that case), postponement of the trial to allow the adverse publicity to fade in potential jurors' minds; and the exercise by the judge of his discretion to allow each juror before entering the jury box to be challenged for cause under section 33(4) of the Jury Act.

[466] Although not mentioned by name, the principle of **Rex v Fisher & Others** was obviously in play in the unusual case of **R v McCann and others** (1991) 92 Cr App R 239. We take the facts from the judgment of Beldam LJ, who delivered the judgment of the Court of Appeal.

[467] The appellants were apprehended in the vicinity of the home of the Secretary of State for Northern Ireland (Mr Tom King). They were arrested under the provisions of the Prevention of Terrorism (Temporary Provisions) Act 1984 and charged with two counts of conspiracy to murder Mr King and conspiracy to murder persons unknown respectively. However, they were subsequently committed to stand trial on the first count only. The case attracted a great deal of publicity. So much so that, on the day after the prosecution opening, following what Beldam LJ described (at page 244) as "some rather flamboyant reporting", an application was made to discharge the jury. The application was refused and the trial proceeded.

[468] After the close of the case for the prosecution, counsel for the appellants' made an unsuccessful no case submission, whereupon each of them elected not to give evidence. Counsel for the Crown made his closing speech to the jury on the following day, to be followed the day after by counsel for the appellants. While counsel for one of the appellants was in the process of addressing the jury, the Home Secretary announced in the House of Commons the government's intention to change the law on the right to silence. This controversial statement attracted great interest in the media, was widely reported and dominated that evening's television news broadcasts. In the course of those

broadcasts, Mr King made a number of observations which, it was submitted, tended to suggest that those who stood on the right to silence, particularly terrorists, did so to conceal their guilt. Upon being interviewed, the venerable Lord Denning, the former Master of the Rolls, made similar observations. In the light of these developments, counsel for the appellants made a further application to the trial judge to discharge the jury. The trial judge again refused the application, but warned the jury to disregard anything they may have heard on television in relation to the right to silence and undertook to warn them again in the summing-up. And, in due course, he did so in unexceptionable terms. The appellants were convicted after a total of 15 hours of deliberation by the jury.

[469] On appeal, it was submitted on the appellants' behalf that the intervention of the radio and television broadcasts and press comments at a critical stage of the trial made it impossible to say that they had not been influenced by what they must have seen or heard. Accordingly, the appellants contended, the trial judge fell into error in not discharging the jury and ordering a new trial.

[470] The Court of Appeal explicitly approached the matter bearing in mind that (i) "… as Lord Atkin once said, 'the path of justice is a public way'" (page 250); and (ii) the court was being asked to interfere with the trial judge's exercise of his undoubted discretion whether or not to discharge the jury in the circumstances which had arisen.

[471] But, these constraints notwithstanding, the court ultimately agreed with the appellants. Beldam LJ explained the court's decision in this way (at page 253):

> "In the final analysis we are left with the definite impression that the impact which the statements in the television interviews may well have had on the fairness of the trial could not be overcome by any direction to the jury, and that the only way in which justice could be done and be obviously seen to be done was by discharging the jury and ordering a retrial. In our judgment, that is what the learned judge should have done."

[472] In **R v Michelle Taylor and Lisa Taylor** (1994) 98 Cr App R 361, the appellant sisters were convicted of murder. The prosecution case was that they had stabbed the victim to death because of jealousy arising from a sexual relationship between one of them and the victim's husband. On appeal, it was contended that the convictions were unsafe because, firstly, there had been a failure to disclose a previous inconsistent statement by an important witness for the prosecution; and, secondly, the nature and extent of the press coverage of the trial were such as to make it impossible to say that, despite the several warnings which the trial judge gave the jury, they were not influenced in their decision by what they had read.

[473] The appeal succeeded on both grounds. In relation to the second, the court considered the press coverage of the case to have been so unremitting, extensive, sensational, inaccurate and misleading, as to create a real risk of prejudice against the defendants, thus rendering the convictions unsafe and unsatisfactory. In coming to this decision, the court placed express reliance on **R v McCann and others**.

[474] Two further points about **R v Taylor and Taylor** are worth noting. The first has to do with what McGowan LJ described (at page 368) as a "notable characteristic" of the media coverage in that case (368-369):

> "A video had been made of [the victim's husband's] wedding to the deceased. It had no relevance to the trial and was not played at it. Somehow or other a copy fell into the hands of the media, and we are told that it was shown on television. Among other things, it showed Michelle [Taylor] coming along the receiving line and kissing first the bride, and then the bridegroom. Her kiss of the latter was described to us as a 'peck on the cheek', such as any friend might give in those circumstances. What certain elements of the press did, however, was to show in their newspaper stills taken from the video, but in addition they froze a frame so that the peck on the cheek was made to appear a mouth-to-mouth kiss. This was accompanied in one newspaper by the headline, 'Cheats Kiss', and another by the headline 'Judas Kiss', and in another by the headline, 'Tender Embrace – the Lovers share a kiss just a few feet from [the victim].'
>
> Nothing like any of that, of course, had been said in Court. Indeed, the newspaper concerned did not limit themselves in any way to reporting what had been said in Court. These are some of the headlines we have seen: 'Till Death Us Do Part', 'Butchered Bride,' and 'Love Crazy Mistress Butchered Rival Wife Court Told.' The Court had been told no such thing."

[475] The second point arises from McGowan LJ's comment (at page 369) on the court's initial concern at the fact that defence counsel made no application to the trial judge to discharge the jury on account of the press coverage. Despite this, however, the court was persuaded by the consideration that asking for a retrial may well have placed defence counsel on the horns of a dilemma, given that their clients had already spent a considerable time in custody, with the prospect of yet a further longer period of delay to come.

[476] In **R v Hamza** [2006] EWCA Crim 2918, the appellant contended that the trial of the case against him should be stayed by reason of, among other things, the adverse publicity to which he had been subjected. In the course of his judgment in that case, Lord

Phillips CJ described the circumstances of **R v McCann** (at paragraph [88]) as "quite extraordinary", a view which he obviously took of **R v Taylor and Taylor** as well. Speaking more generally, however, Lord Phillips CJ went on to state the following (at paragraph [89]):

> "[89] In general, however, the courts have not been prepared to accede to submissions that publicity before a trial has made a fair trial impossible. Rather they have held that directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity. The position was summarised by Lord Taylor CJ in **R v West** [1996] 2 Cr App R 374 at pp 385-6 as follows:-
>
> > 'But, however lurid the reporting, there can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts. The question raised on behalf of the defence is whether a fair trial could be held after such intensive publicity adverse to the accused. In our view, it could. To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd. Moreover, providing the judge effectively warns the jury to act only on the evidence given in court, there is no reason to suppose that they would do otherwise. In **Kray** (1969) 53 Cr App R 412 at pp. 414, 415, Lawton J said:
> >
> > 'The drama … of a trial almost always has the effect of excluding from recollection that which went before.'
> > That was reiterated in **Young and Coughlan** (1976) 63 Cr App R 33 at p. 37. In **ex p. The Telegraph Plc** (1994) 98 Cr App R 91, 98 [1993] 1 WLR 980, 987, I said:
> >
> > 'a court should credit the jury with the will and ability to abide by a judge's direction to decide the case only on the evidence before them. The court should also bear in mind that the staying power and detail of publicity, even in cases of notoriety, are limited and the nature of a trial

> is to focus the jury's minds on the evidence put before them rather than on matters outside the courtroom.'"

[477] Lord Phillips CJ then went on to refer to – and to endorse - the following statement by the President of the Queen's Bench Division (Sir Igor Judge) in **In the matter of B** [2006] EWCA Crim 2962, paragraph 32:

> "32. There is a feature of our trial system which is sometimes overlooked or taken for granted. The collective experience of this constitution as well as the previous constitution of the court, both when we were in practice at the Bar and judicially, has demonstrated to us time and time again, that juries up and down the country have a passionate and profound belief in, and a commitment to, the right of a Defendant to be given a fair trial. They know that it is integral to their responsibility. It is, when all is said and done, their birthright; it is shared by each one of them with the Defendant. They guard it faithfully. The integrity of the jury is an essential feature of our trial process. Juries follow the directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court. No doubt in this case Butterfield J will give appropriate directions, tailor-made to the individual facts in the light of any trial post the sentencing hearing, after hearing submissions from counsel for the Defendants. We cannot too strongly emphasise that the jury will follow them, not only because they will loyally abide by the directions of law which they will be given by the judge, but also because the directions themselves will appeal directly to their own instinctive and fundamental belief in the need for the trial process to be fair."

[478] It may also be worth noting that, earlier in that same judgment, the court recognised the need to strike a balance between the right to a fair trial (the "birthright") and the freedom of the press:

> "[19] An equally precious principle, hallowed by custom and the tradition of the common law, is the freedom of the media to act as the eyes and ears of the public at large and, among their other responsibilities, to observe and contemporaneously to report the

> criminal proceedings involving the same Defendant whose birthright to a fair trial must be protected. The administration of criminal justice must be open and transparent. The freedom of the press to report the proceedings provides one of the essential safeguards against closed justice."

[479] In **R v Hamza**, Lord Phillips CJ stated the court's conclusion on the adverse publicity point as follows (at paragraph [92]):

> "… The risk that members of a jury may be affected by prejudice is one that cannot wholly be eliminated. Any member may bring personal prejudices to the jury room and equally there will be a risk that a jury may disregard the directions of the judge when they consider that they are contrary to what justice requires. Our legal principles are designed to reduce such risks to the minimum, but they cannot obviate them altogether if those reasonably suspected of criminal conduct are to be brought to trial. The requirement that a viable alternative verdict be left to the jury is beneficial in reducing the risk that the jury may not decide the case in accordance with the directions of the judge. Prejudicial publicity renders more difficult the task of the court, that is of the judge and jury together, in trying the case fairly. Our laws of contempt of court are designed to prevent the media from interfering with the due process of justice by making it more difficult to conduct a fair trial. The fact, however, that adverse publicity may have risked prejudicing a fair trial is no reason for not proceeding with the trial if the judge concludes that, with his assistance, it will be possible to have a fair trial. In considering this question it is right for the judge to have regard to his own experience and that of his fellow judges as to the manner in which juries normally perform their duties."

[480] Lastly, we must refer to **R v Gough** [1993] 97 Cr App R 188, on which the appellants rely heavily for the well-known observation by Lord Goff of Chieveley (at page 191) that "bias is such an insidious thing that, even though a person may in good faith believe that he was acting impartially, his mind may unconsciously be affected by bias".

[481] Against the backdrop of section 16(1) of the Constitution, these authorities therefore make it clear that, although the business of the court is generally conducted in public ("the path of justice is a public way"), preservation of a defendant's right to a fair trial is the paramount consideration for a trial judge. The fact that adverse publicity may have risked prejudicing a fair trial does not necessarily mean that the trial should not take place at all (in a case of adverse pre-trial publicity), or be proceeded with (in a case in which complaint is made of adverse publicity arising during the course of the trial itself). Where the trial commences, it will be for the trial judge to determine whether, with his assistance, it will be possible for the defendant's right to a fair trial to be adequately protected. The decision whether or not to discharge the jury on the ground of unduly prejudicial publicity in a particular case is a matter for the trial judge acting in his discretion. Where, as in **R v McCann** and **R v Taylor and Taylor**, the trial judge is satisfied that the impact of any prejudicial material cannot be overcome by directions to the jury, it may well be that the only way of preserving the defendant's right to a fair trial is to discharge the jury and, where appropriate, order a new trial. Where the trial judge decides that the trial should proceed, his or her function will be to seek to concentrate the jury's mind on the imperative of affording the defendant a fair trial, by way of directions carefully crafted to meet the circumstances of the particular case. In this regard, courts may generally credit the jury with the will and ability to abide by the judge's directions and to decide cases only on the basis of evidence before the court. In keeping with the general principle which governs appeals from the exercise of a judicial discretion, this court will generally defer to the decision of the trial judge, unless it is clearly satisfied

that the decision was plainly wrong, on the law or on the facts, or that it may have resulted in injustice to the defendant. And finally, while the question of whether an application to discharge the jury was made by counsel for the defendant at trial will always be a relevant factor to consider upon review by this court, it will not necessarily be determinative and it will always be a matter for this court to decide what the requirements of fairness dictate in all the circumstances of the case.

[482] Mrs Neita-Robertson's submission was, it will be recalled, that the judge ought to have given due consideration to discharging the jury immediately after the complaint about the report of the firebombing of the house of a witness for the prosecution in a "high profile case" was made. However, it will also be recalled that when the judge invited Mr Tavares-Finson, who had brought the matter to the court's attention, to indicate what remedy he proposed, his response was that the person responsible for the CCN broadcast should be asked to attend court and warned about the danger of interfering with the course of the case. It was in response to this suggestion, that Inspector Meikle was called into court (in the absence of the Commandant) and given a stern warning by the judge (see paragraph [452] above). And, upon Mr Tavares-Finson's further complaint about the report of an alleged investigation into a series of activities "which have been linked to a particular case that is now before the court", Deputy Superintendent Brown was summoned and given an even more pointed warning by the judge (see paragraphs [454]-[455] above).

[483] In his exchanges with the court about the CCN publications about which he complained, Mr Tavares-Finson, in clear recognition of the fact that whatever was to be done about them was a matter for the judge's discretion, told the judge that "your Lordship may very well look at it within the context and say this is clear contempt of court, or you may view that a simple warning might be sufficient, but something has to be done" (paragraph [451] above). As it turned out, the judge chose the very option suggested by counsel, which was to call in the responsible police officers and give them a warning. There is no evidence of any further infraction after Deputy Superintendent Brown was spoken to, therefore suggesting that the judge's exhortations had the desired effect. In these circumstances (including the absence of any application at the trial to discharge the jury), we find it impossible to say that the manner in which the judge exercised his discretion was aberrant in any way and that he ought instead to have considered discharging the jury.

[484] 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**, the view that "directions from the judge coupled with the effect of the trial process itself will result in the jury disregarding such publicity" (see paragraph [476] above).

[485] As examples of cases falling on the other side of the line, so to speak, the appellants naturally rely heavily on **R v McCann** and **R v Taylor and Taylor**, in both of which it was held on appeal that the respective trial judges should have discharged the

jury on the ground of adverse publicity. But these were both, in our view, highly exceptional cases. In **R v McCann**, the prejudicial material consisted of a combination of (i) a statement in Parliament of the government's intention to change the law on the right to silence, while counsel representing accused persons who had already elected to remain silent in the exercise of that right, were actually in the process of addressing the jury; (ii) accompanying commentary by the virtual complainant, who was himself a member of the cabinet, tending to suggest that persons who stood on the right to silence did so to conceal their guilt; and (iii) the supportive commentary of a widely revered twentieth century judicial legend to much the same effect. It seems to us hardly surprising that the Court of Appeal would have regarded this toxic combination as an insuperable obstacle to the fairness of the trial: it would have required an uncommonly focussed and single-minded jury indeed to put those matters out of their heads completely, no matter how strongly the trial judge might have directed them to do so. It is no doubt with all of this in mind that Lord Philips CJ described the circumstances in **R v McCann** as "quite extraordinary".

[486] It seems to us that the matters complained of in **R v Taylor and Taylor**, while perhaps different in kind, were equally egregious, given the extent of the prejudice that the kind of downright fabrication set out at paragraph [474] above (described by McGowan LJ as a "notable characteristic" of the media coverage) would inevitably have generated.

[487] So, in our view, those two cases stand in a category of their own. To some extent (though not on its facts), **R v Hamza** may bear closer analogy to this case. The appellant in that case was the imam of a London Mosque. On 7 February 2006, he was convicted on several counts of soliciting to murder, using threatening, abusive or insulting words or behaviour with intent to stir up racial hatred, possessing threatening, abusive or insulting recordings of sound with intent to stir up racial hatred and possessing a document or record containing information of a kind likely to be useful to a person committing or preparing an act of terrorism. In the main, the offences involved were allegedly committed between 1997 and 1999, but there was also one which was said to have been committed in 2004. One of the appellant's grounds of appeal was that, as a result of the adverse publicity to which he was subjected during the period of delay in bringing the case to trial, he could not receive a fair trial, or there had been a real risk that he would not receive a fair trial.

[488] To support this ground, the appellant relied on, among other things, over 600 pages of newspaper reports, articles and comments spanning the period from the beginning of 2003 to March 2005. As Lord Phillips CJ described it (at paragraph [96]), this material was -

> "… almost entirely hostile to [the appellant] and some of it couched in particularly crude terms. There was indeed a prolonged barrage of adverse publicity, some of which treated the Appellant as an ogre. The judge remarked at p 46 of his first ruling that he had no doubt that the publicity would have created a risk that the fairness of the Defendant's trial might be adversely affected."

[489] The trial judge refused three separate applications for a stay of the proceedings on the ground of abuse of process (which was said to include both the period of delay and the extent of the adverse publicity). In his view, it was possible to avoid the risk by way of a proper direction to the jury, thus enabling them to "bring impartial judgment to the case" (per Lord Phillips CJ, at paragraph [99]). The Court of Appeal declined to disturb the trial judge's conclusion on this point and Lord Phillips CJ explained the basis of the decision in this way (at paragraph [103]):

> "The judge was correct to conclude that the adverse media publicity attendant upon the events that had occurred between 2000 and the bringing of charges against the Appellant in October 2004 had put at risk the fairness of his trial. The challenge posed to the judge of taking appropriate steps to neutralise the effect of these matters by appropriate directions and guidance in the course of his summing up was considerable. The task was an exacting one. The judge was confident that he would be able to discharge it. We have concluded that his assessment of the position was correct. The circumstances did not require the judge to stay the prosecution on the ground that there could not be a fair trial."

[490] In the result, having considered the trial judge's summing-up, the court found no fault with it.

[491] In our view, the decision in **R v Hamza**, in not dissimilar circumstances, clearly supports the conclusion that it was entirely appropriate for the judge in this case to seek to mitigate the effects of such adverse publicity against the appellants as there may have been by way of suitable directions to the jury. This conclusion derives additional support, it seems to us, from the fact that, unlike in **R v Hamza**, the appellants made no

application to the judge to discharge the jury on the ground that the adverse publicity had put their right to a fair trial in jeopardy.

[492] This therefore brings us to the judge's summing-up and Mrs Neita-Robertson's second submission, which was that, in any event, the judge's directions on how to deal with the adverse publicity issue were wholly inadequate, given the extent of that publicity. She submitted that, in fact, the directions did not even come close to curing the mischief created by the direct involvement of the police in propagating such publicity against the appellants, Mr Palmer in particular. Indeed, in these circumstances, given the widespread nature of the adverse publicity and the police involvement, no warning that the judge might have been able to give could have sufficed to ensure a fair trial for the appellants.

[493] Mr Taylor responded by submitting that the judge's directions to the jury demonstrated that he was fully alive to the danger of prejudice and the need to safeguard the defendants' right to a fair trial. The directions were therefore wholly appropriate and adequate in all the circumstances.

[494] In summing-up to the jury, the judge tackled the issue almost at the very outset. He told them that the implication of the oath or affirmation which each of them had taken was that, in deciding the case, they should have regard to the evidence which they had heard only, and not to any extraneous considerations:

> "Madam Foreman and your members, you will recall when we started this case, each of you took an oath or an affirmation. You will recall that. That is of great significance and I want you to hold that. The oath, the affirmation you took is of great significance. That exercise

is not to be treated lightly. It has important implications. The essence of what you swore to do or affirmed, is that you would decide the case, Madam Foreman and your members, based on the evidence. Based on the evidence.

It follows, therefore, members of the jury, that when you come to consider the case, your deliberation must not be conditioned by any extraneous sentiment or consideration. You must not take into your deliberations matters which you may have heard outside of this court. You will, no doubt, recall that at each adjournment that was taken, I endeavoured to remind you not to discuss the case with anyone outside of your numbers. Perhaps Madam Foreman and your members, I did that to the extent that you were bored and a bit turned off by it. You probably wondered if the judge thought we didn't have any sense, why does he keep repeating it like that. I tell you again, because it was of tremendous importance and it remains that way.

Nonetheless, despite what I have been telling you, the case was widely reported by the media, both electronic and print. I quite understand it was generally topical. I can't presume, Madam Foreman and your members, that you have been insulated, kept apart from all the reporting on this case. I, therefore, implore you and I implore you because of the oath you took, because of the oath you took. I implore you and remind you that in this serious and responsible function that you have, you cannot bring external matters into the consideration. The great Roman jurist Justinian in defining what justice is says, '*Justice is a set and constant purpose which gives to every man his due*.' Madam Foreman and your members, I implore you, in keeping with your solemn oath and affirmation which each and every one of you took, prior to be empanelled in this case, that must be your resolve to do justice according to law, nothing else." (Volume IX, pages 4705-4707) (Emphasis supplied)

[495] Not too much further into the exercise, and still as part of his general directions, the judge returned to the question by way of a caution to the jury on the limits of their supremacy on the facts of the case:

> "Your supremacy in terms of the facts will not entitle you to some theory that is not grounded in the facts. And I need for you to remember that, Madam Foreman and your members. **You are bound by the evidence alone. You must not allow yourselves to be taken off into a path of speculation. Look at the evidence, look to the evidence, and that is what, Madam Foreman and your members, you are to look to, the evidence alone, not some speculation and conjecture. Do not be distracted into making conjectures.** The evidence must be your yardstick by which you judge this case, and the evidence comes from the witnesses. And when I say witnesses, I include the persons called on behalf of the Defence, as well as the witnesses for the Prosecution. (Vol IX, page 4721 of the transcript) (Emphasis supplied)

[496] And again, in the course of his general directions to the jury that they should not allow their minds to be prejudiced by anything they had heard or any view they had formed as to the nature of the activities in which the appellants were involved, the judge added this specific caution in relation to the case against Mr Palmer:

> "**Neither are you to say that the accused Palmer is responsible for promoting crime in Jamaica through the lyrical contents of his music. That cannot be the basis upon which you are to conclude that the count on this indictment which charges the accused men for Murder has been proved. As I said, people's morals are not on trial; so have no prejudice for [sic] the accused if you find that it is a 'gun locking' that had gone sour or that his lyrics are less than you would have them to be. Have no prejudice against them on that basis.** You have to look at the totality of the evidence because, bear in mind, the indictment charges for the offence of Murder." (Vol IX, page 4724 of the transcript) (Emphasis supplied)

[497] This last passage was plainly a reference to Mr Palmer's complaint about what Mr Bunting was reported to have said about the relationship between dance hall music and the dysfunctionality in Jamaican society. At several other points during the summing-up, the judge reminded the jury that "you must keep before you the oath or the affirmation

that you took that you are going to hear the case, try the case, based on the evidence that you hear within this Court" (Vol IX, page 5131 of the transcript); and that "you have … taken an oath and affirmed, to listen to the evidence in this case and to return a true verdict based on the evidence. Based on the evidence" (Vol IX, page 5137 of the transcript).

[498] As we have more than once observed, this was an unusually long trial. In the light of this, in deciding what to tell the jury about the impact of adverse publicity, the judge was, as it seems to us, placed in something of a dilemma. It would clearly have been unhelpful and counter-productive for him to have rehearsed for the jury specific items of adverse publicity, some of them harking back to a time long past during the trial, with a view to telling the jury to put them out of their contemplation altogether. But, on the other hand, it was obviously of critical importance that the jury be disabused in unequivocal terms of the notion that anything stated in the media had any bearing on the appellants' guilt or innocence of the offence for which they were charged.

[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.

[500] Ground 13 therefore fails.

Issue F – Sentencing

[501] As we have noted, the judge sentenced the appellants to imprisonment for life at hard labour. He ordered that Messrs Campbell and Jones should each serve a minimum of 25 years in prison before becoming eligible for parole, while Messrs Palmer and St John should serve a minimum of 35 years and 30 years respectively. All four appellants now complain that these sentences were manifestly excessive in all the circumstances of the case (grounds 11/SC and 12/AC, KJ, AStJ).

[502] The jury's verdict was taken on 13 March 2014. At the suggestion of Mr Tavares-Finson, and with the concurrence of all concerned, sentencing was set for 27 March 2014. On that date, the appellants' antecedents were read out in court and Mr Tavares-Finson made a plea in mitigation on behalf of Mr Palmer.

[503] The judge then raised the question of what assistance counsel might be able to give the court in relation to the principles of sentencing generally, for instance, with regard to any special aggravating or mitigating factors in the case; the appropriate ranges to be considered in fixing the respective periods to be served before becoming eligible for parole; whether the sentences should reflect differentials in the levels of involvement of each defendant in the commission of the offence; whether it was open to the court to

make any recommendation as to the disposition of the proceeds of any artistic endeavour conducted by any of the defendants while on remand pending trial; and whether it was appropriate to hear from the deceased's relatives on matters affecting sentence.

[504] On that note, the sentencing hearing was adjourned to 3 April 2014. It appears from the transcript of the proceedings that, by that date, the prosecution had provided the judge with a document setting out the aggravating factors and a schedule of previous cases (Vol IX, page 5174 of the transcript). However, it does not appear that anything similar was submitted on behalf of the defendants. The judge enquired of Mr Christian Tavares-Finson, who appeared for Mr Palmer on that date, whether he wished to make further submissions, but the invitation was declined and reliance was placed on the plea in mitigation which Mr Tom Tavares-Finson had made on the previous date. Pleas in mitigation were then made by Mr Rogers on behalf of Messrs Jones and St John, and Mr Michael Lorne on behalf of Mr Campbell.

[505] These were immediately followed by the judge's brief sentencing remarks (Vol IX, pages 5206-5208 of the transcript):

> "Thank you, Counsel. This has never been an easy part of the trial for me; and among my brethren, I think it is fair to say, also, that quite a few judges experience a great deal of difficulty at this stage in the criminal trial. The accused are before the Court for the offence of Murder. The court, naturally, at this time notes the seriousness of the matter, of the offence. There are certain factors that the Court looked at in respect of this matter. I think it has been called the aggravating factors, that there was a great deal of planning, and premeditation. That, in fact, that the deceased had been subjected to an elevated amount of mental stress and threats. That he was subjected to as, I have said, threats, and there was the concealment of the body of the

> deceased which is [sic] still not been found. And that attempts were made to destroy the evidence in relation to the matter.
>
> What counsel Rogers has said on behalf of his client [Mr Jones] and Mr. Andre St. John is that certain of these factors would not attach to those offenders. In relation to the premeditation for example, he says there is no evidence, in fact, that there was any such factor. The Court recognizes that among the offenders before the Court, that there were differing roles, and, as such, it is fitting and proper to deal with them individually and have distinctive sentencing in respect of each.
>
> In respect of the accused - - please stand, all of you.
>
> In respect of the accused,
>
> Mr. Adijah Palmer, the sentence of this court is that he be imprisoned at hard labour for life, and will not be eligible for parole until a period of thirty-five years have passed.
>
> In respect of the accused, Mr. Campbell, the sentence of the court is that he be imprisoned for life and not be eligible for parole until a period of twenty-five years have passed.
>
> In respect of Mr. Kahira Jones, to be imprisoned for life, he will be eligible for parole after a period of twenty-five years have passed.
>
> In respect of Mr. Andre St. John, to be imprisoned for life and to be eligible for parole after a period of thirty years have passed."

[506] It is not in dispute that, given the provisions of the OAPA relating to sentencing for the offence of murder, the leeway allowed the judge in passing sentence in a case such as this case was relatively narrow. As the appellants accept, this was a murder covered by section 3(1)(b) of the OAPA. A person convicted of murder falling under this section is liable to be sentenced "to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years". Section 3(1C)(b) goes on to provide that where, pursuant to section 3(1)(b), the court imposes "(i) a sentence of

imprisonment for life, the court shall specify a period, being not less than fifteen years; or (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should serve before becoming eligible for parole".

[507] In this case, there is no challenge to the judge's decision that the appellants should be sentenced to imprisonment for life. The judge was therefore limited to fixing a minimum period before parole of no less than 15 years. But the appellants submit, through Mr Robert Fletcher who carried this aspect of the argument, that in fixing the minimum period to be served by each of them, the judge erred in a number of respects. Thus, it was submitted that the judge failed (i) to apply the accepted principles of sentencing; (ii) to order and so avail himself of the benefit of a social enquiry report on each of the appellants; (iii) to give any or any sufficient weight to the various mitigating factors in respect of each of the appellants; (iv) to give them the benefit of the time spent by them in custody awaiting trial; and (v) to have any or any proper regard to the antecedents of the appellants and the pleas in mitigation made by their counsel on their behalf.

[508] For all of these reasons, Mr Fletcher submitted that even if the sentences actually imposed by the judge may have fallen within the appropriate sentencing range, the judge's failure to apply the relevant principles rendered them liable to review.

[509] In making these submissions, the appellants rely on a number of authorities, many of them decisions of this court. Intending no disrespect, we will refer to a few only of them, given the fact that they all traverse well-covered ground in the modern sentencing jurisprudence of the court.

[510] Thus, as regards the accepted principles of sentencing, the objectives of retribution, deterrence, prevention and rehabilitation have long underpinned sentencing practice in this jurisdiction and elsewhere (see, for example, **R v Sergeant** (1975) 60 Cr App R 74, 77, in which Lawton LJ characterised them as the four "classical principles of sentencing"; **Regina v Sydney Beckford and David Lewis** (1980) 17 JLR 202, per Rowe JA, as he then was, at pages 203-204; and **Veen v R (No 2)** (1988) 164 CLR 465, 476, in which Mason CJ, Brennan, Dawson and Toohey JJ identified "protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform" as the purposes of criminal punishment, while at the same time acknowledging that "[t]he purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case".

[511] It is by this means that the court seeks to "impose a sentence to fit the offender and at the same time to fit the crime" (**Regina v Sydney Beckford and David Lewis**, per Rowe JA at page 203).

[512] In relation to social enquiry reports, this court has expressly recognised, as McDonald-Bishop JA put it in **Michael Evans v R** [2015] JMCA Crim 33, at paragraph [9], "the utility of social enquiry reports in sentencing". The learned judge of appeal went on to point out that "obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice".

[513] However, it should be noted that in that case, in which the sentencing judge did not have the benefit of a social enquiry report, the court nevertheless dismissed the appeal against sentence, on the ground that, on the facts of the case, no prejudice to the defendant was caused thereby. Given the defendant's antecedents, the court considered it to be "virtually unlikely that a social enquiry report could have been of any real benefit to him in all the circumstances of the case", (per McDonald-Bishop JA at paragraph [11]).

[514] In relation to aggravating and mitigating factors, in **Meisha Clement v R** [2016] JMCA 26, this court explicitly included, in addition to the identification of an appropriate starting point and other factors, the consideration of any relevant aggravating and mitigating features in the sequence of important decisions required to be taken by a sentencing judge in each case (see per Morrison P at paragraph [41]; see also **Daniel Roulston v R** [2018] JMCA Crim 20, per McDonald-Bishop JA at paragraph [26]).

[515] As regards giving credit for time spent in custody awaiting trial, sentencing courts in this jurisdiction are now fully committed to the principle that full credit should generally be given to a defendant for time spent in custody pending trial (**Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ); **Meisha Clement v R**, at paragraphs [34]-[35]).

[516] And finally, as regards this court's power to review a sentence imposed at trial, in **Kurt Taylor v R** [2016] JMCA Crim 23, paragraph [23], F Williams JA referred to the well-known case of **R v Ball** (1951) 35 Cr App R 164, 165, in which Hilbery J explained the appellate court's traditional policy of showing deference to the sentencing judge, save where he or she is shown to have erred in principle:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The Learned Trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene."

(See also **Alpha Green v R** (1969) 11 JLR 283 and **Meisha Clement v R**, at paragraph [42]).

[517] Against this background, the appellants' first complaint is that, by not ordering a social enquiry report, the judge deprived himself of all the relevant information needed to inform an appropriate sentencing decision. They also complain that, in any event, the judge failed to have regard to their favourable antecedent reports, the pleas in mitigation made on their behalf and, in the case of Messrs Campbell and Palmer, the good character evidence given on their behalf during the trial. And finally, they contend that the judge ought to have given them credit for the time spent by them on remand pending trial.

[518] Mr Taylor accepted that, in his brief sentencing remarks, the judge did not identify a sentencing range, nor did he fix an appropriate point within the range in respect of each of the appellants. However, he submitted that the advances in sentencing jurisprudence, which cases like **Meisha Clement v R** and **Daniel Roulston v R** reflect, were not available to the judge at the time of sentencing in 2014. Accordingly, acting in accordance with then settled sentencing practice, the judge considered various aggravating factors, such as the planning and premeditation of the murder, the elevated amounts of mental

stress and the threats suffered and received by the deceased before he died, the fact that the body of the deceased was never found and the evidence of attempts to destroy the evidence in the period immediately following 16 August 2011.

[519] Turning to the absence of social enquiry reports, Mr Taylor referred us to **Sylburn Lewis v R** [2016] JMCA Crim 30, another decision of this court in which the value of such reports was stressed. However, having ordered that a social enquiry report should be obtained for the purposes of the appeal against sentence, the court was careful to point out that the question whether to order such a report is generally a matter falling within the discretion of the trial judge.

[520] But, although conceding that the judge's sentencing reasons in this case could have been more comprehensive, Mr Taylor submitted that the sentences which were imposed were well within the range of sentences previously sanctioned by the courts for like offences committed in similar circumstances. We will mention a few of them.

[521] In **Wayne Ricketts v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 61/2006, judgment delivered 3 October 2008, a case of murder in which the body of the deceased was recovered, this court upheld a sentence of imprisonment for life, with a minimum period before eligibility for parole of 25 years.

[522] In **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, a case of murder in which the deceased's body was also recovered, this court upheld the conviction, which was largely based on circumstantial evidence. There was no challenge on appeal to the trial

judge's sentence of imprisonment for life, with a minimum period before eligibility for parole of 21 years.

[523] In **Calvin Powell & Lennox Swaby v R** [2013] JMCA Crim 28, a double murder in which the bodies of the deceased husband and wife were recovered, this court quashed the sentence of death imposed by the trial judge and substituted in its place a sentence of imprisonment for life, with a minimum period before eligibility for parole of 35 years.

[524] In **Loretta Brissett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004, another circumstantial evidence case in which the deceased's body was never found, this court upheld a sentence of imprisonment for life with a minimum period before eligibility for parole of 25 years.

[525] And finally, in **R v Rushon Hamilton** (Supreme Court Criminal Appeal No 21/2013), another circumstantial evidence case in which the body of the deceased (a 15-year-old schoolgirl) was never recovered, the trial judge sentenced the defendant (a police constable) to imprisonment for life with a minimum period before eligibility for parole of 35 years. The evidence led by the prosecution in this case was that the deceased was abducted from her gate in Harbour View, Saint Andrew, taken out to sea on a boat, shot and dumped at sea. The prosecution's case was that the deceased was killed because she was a witness in a pending criminal case. (We should note that an appeal in this case is yet to be heard.)

[526] As Mr Taylor quite properly concedes, the sentencing exercise in this case left much to be desired. For instance, despite the fact that the appellants did not request the judge to order social enquiry reports, we consider that a case of this magnitude involving multiple defendants was clearly one in which the judge might have done so of his own motion, given their now well-established value.

[527] But, that having been said, as this court pointed out in **Sylburn Lewis v R** (at paragraph [15]), there is no mandatory requirement in the law for the ordering of a social enquiry report in every case. Accordingly, the question whether or not to order a social enquiry report in a particular case is "very much a matter for the discretion of the sentencing judge". The court went on to observe that, "[g]iven the fact that, usually, the sentencing judge would have heard the evidence and be fully seised of all the facts of a particular case, this is not a matter upon which we would wish to be too prescriptive". And, in any event, as was pointed out in **Michael Evans v R**, the court would also need to consider whether a social enquiry report could have been of any real benefit to the appellants in all the circumstances of the case.

[528] It is also clear that the judge's sentencing remarks fell short of the now accepted standards in other respects. Most notably, there is no indication on the record that he adopted the method of choosing an appropriate starting point and applying thereto the aggravating factors and the mitigating factors, with a view to arriving at a suitable sentence for each of the appellants in all the circumstances of the case (as to which see, among other cases, **Everald Dunkley v R** (unreported), Court of Appeal, Jamaica,

Resident Magistrate Criminal Appeal No 55/2001, judgment delivered 5 July 2002). Perhaps most egregiously, as Mr Fletcher submitted strongly, was the fact that, on the face of them anyway, the judge's sentencing remarks made no mention of any of the mitigating factors upon which the appellants were entitled to rely.

[529] In order to consider the weight that might have been given to these factors, we will summarise briefly the salient points which emerged from the antecedent reports of each of the appellants in turn.

[530] Mr Campbell was born on 17 November 1978. He was therefore 35 years of age as at the date of sentencing. He attended high school for five years and obtained four subjects in his Caribbean Examinations Council examinations. He had been gainfully employed for most of his adult life, most recently as an entertainer known as Shawn Storm. He was single with one dependant and had no previous convictions.

[531] Mr Jones was born on 13 January 1987. He was therefore 27 years of age as at the date of sentencing. He attended high school and is literate. After leaving school, he worked as a disc jockey and was so engaged up to the time of his arrest. He was single with no dependents and had no previous convictions.

[532] Mr St John was born on 7 April 1989. He was therefore 26 years of age as at the date of sentencing. He attended high school for a total of six years and is literate. He was engaged as a barber at the time of his arrest and was single, with two dependents. One

of them was a six-year-old girl in respect of whom he was a single parent. He had two previous convictions, the nature of which does not appear from the record.

[533] Mr Palmer was born on 7 January 1976. He was therefore 37 years of age as at the date of sentencing. He attended high school for a total of six years and is literate. After leaving school he started to write lyrics for other entertainers and was now himself an artiste with his own record label. He was in a common law relationship, and had seven dependents aged between three and seven. He had two previous convictions, both ganja related.

[534] On the basis of all these considerations, the appellants contend that the sentences imposed by the judge were manifestly excessive and should be reduced.

[535] We accept that it does not appear from the judge's sentencing remarks that he considered specifically the mitigating factors which emerged from the antecedent reports. Nothing at all was said about the fact that Messrs Campbell and Jones had no previous convictions; or that, although both Messrs Palmer and St John had previous convictions, they appeared to have been for relatively minor offences. Nor was anything said about their relative youth, their exposure to secondary education and their potential for rehabilitation. Nor, in the case of Mr Campbell, was anything said about the kindness shown by him to the deceased in the past. Nor, in the case of Mr Palmer, was anything said about the uncontroverted evidence of his good character given on his behalf during the trial.

[536] So, the question for this court is whether, in the light of the accepted shortcomings in the sentencing exercise which the judge conducted, we should reduce the sentences which he imposed, as the appellants ask us to do. In this regard, it is relevant to keep in mind, we think, that the ground of appeal is that the sentences were "manifestly excessive". Although, in accordance with established sentencing doctrine, it is open to this court to interfere with sentences imposed by a trial judge if it can be demonstrated that he or she erred in principle in arriving at them, the ultimate issue for this court's determination is whether, taking all factors into account, the sentences were unduly harsh, given the gravity of the crime and all other relevant factors.

[537] As the sentencing cases cited by Mr Taylor demonstrate (see paragraphs [521]-[5245] above), the minimum periods of imprisonment before eligibility for parole in cases of murder falling within section 3(1)(b) of the OAPA, all but one of them approved by this court, have ranged between 21 and 35 years. In both of the cases at the top of this range, there appear to have been special factors distinguishing them from the norm. **Calvin Powell & Lennox Swaby v R** was a case of a double murder, in which this court considered that "the heinous nature of the killings" justified the stipulation of a period of 35 years' imprisonment before becoming eligible for parole; and **R v Rushon Hamilton** was a case in which the very experienced trial judge (Hibbert J) considered that the motive behind the killing justified condign punishment.

[538] In **Christopher Thomas v R** [2018] JMCA Crim 31, paragraph [93], after reviewing a limited sample of sentences imposed after trial for murder, this court

concluded that the authorities suggested "a usual range of 20 to 40 years' imprisonment, or life imprisonment with a minimum period to be served before becoming eligible for parole within a similar range". At the very top of this range was **David Russell v R** [2013] JMCA Crim 42, in which the appellant was convicted for the murder of two men who had been shot and killed as a result of what the prosecution characterised as "a drug deal gone sour". The bodies of the two men were subsequently found bound and gagged in the back of a car in a cane field. The trial judge sentenced the appellant to 30 years' imprisonment on count one; and life imprisonment, with the stipulation that he should serve 40 years before becoming eligible for parole, on count two. His appeal against conviction was dismissed, and the court affirmed the sentences imposed by the trial judge.

[539] Having considered these authorities, as well as the arguments put forward on behalf of the appellants, our conclusion is that, save in one respect, the sentences imposed by the judge in this case cannot be said to have been excessive to such an extent as to call for this court's intervention. It is true that the judge did not, as he ought to have done, demonstrate in his sentencing remarks that he took all relevant matters into account. But we are quite satisfied that, on the facts found by the jury to have been proven in this case, the sentences fell comfortably within the range of sentences for murder established by the previous cases. In our view, the aggravating factors identified by the judge in his sentencing remarks – the planning, the premeditation, the elevated amount of mental stress caused and threats made to the deceased, the concealment of the body and the attempts to destroy the evidence - far outweigh the mitigating factors upon which the appellants rely.

[540] In relation to Messrs St John and Jones, it was submitted that the judge erred in not taking into account the limited role attributed to them on the evidence in the killing of the deceased. In our view, this criticism is quite unjustified. The judge not only mentioned the point specifically in his sentencing remarks (see paragraph [505] above), but it seems clear from the sentences which he did impose that he intended to distinguish between the appellants and their differing levels of involvement in the events of 16 August 2011.

[541] But it appears to us that the judge may have erred in not giving any consideration to the question of any time spent by the appellants in custody pending trial. It is quite likely that this situation arose because of the failure of defence counsel at trial to bring this aspect of the matter to the judge's attention. Having reviewed what we were told on this issue during the hearing of the appeals, it now seems to us that the best course to take at this stage is to (i) defer our decision on the appeals against sentence; (ii) request a brief note from counsel for the appellants as to the precise period of time spent in custody by each of them pending trial; and (iii) render our decision on sentencing in writing within 14 days of receipt of that note.

Disposition of the appeals

[542] This appeal has covered a wide range of issues, some of which are unusual, even novel, to this court. Others involve well-traversed paths. In arriving at the decision that the appeals against both the convictions and the sentences must be dismissed, this court has decided that:

a. the technology exhibits, in particular:

i. the cellular telephone taken from Mr Palmer, containing the various text messages, BB messages, photographs and the video;

ii. the CD prepared by Digicel showing the telephone contact between the various relevant persons; and

iii. the analysis of the technology experts in respect of the contents of the available data,

were properly admitted into evidence for the consideration of the jury;

b. the judge properly handled the challenging issues involving the jury;

c. the judge's directions to the jury in respect of all matters, although containing some minor missteps, were fair and in accordance with the guidance of the previously decided authorities;

d. the publicity, which was associated with the case, mainly because of the prominence of some of the appellants, did not prevent them from having a fair trial, as the judge properly and adequately reminded the jury of its duty to make its decision solely on the evidence before it; and

e. despite the failure of the judge to follow the now well established procedure involving sentencing, the sentences that he imposed are consistent with sentences handed down in previous cases, but the appellants are each entitled to the benefit of a deduction of the time that they spent in custody prior to sentencing.

[543] Despite the absence of a body, the prosecution's case, consisting of Mr Chow's testimony and the technology evidence, revealed an orchestrated plan to take Mr Williams to the place where he met his demise. The jury considered the evidence that was placed before it and, with the appropriate directions by the judge, found the appellants guilty of murder.

[544] This court appreciates the sacrifice that the judge, jury, counsel and court staff of the Supreme Court made in taking what was clearly a difficult trial to completion. We are grateful to counsel who appeared in this court for their assistance in marshalling the mass of material that the trial generated. We apologise for the length of time it has taken to produce this judgment, and also for its unavoidable length.

[545] The result of the appeal therefore is:

a. The appeals of Messrs Campbell, Palmer, Jones and St John against their respective convictions are all dismissed and the convictions are affirmed.

b. The decision in respect of sentence is further reserved pending the receipt from counsel, within seven days of the date hereof, of a brief note concerning the time spent on remand, by each of the appellants, prior to being sentenced. The court will render its decision on sentencing in writing within 14 days of receipt of that note.