[2025] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 83/2010

KARIM JOHNSON v R

Leroy Equiano for the applicant

Ms Kathy-Ann Pyke and Mrs Kristen Anderson Palarche for the respondent

18, 22 November 2024 and 18 July 2025

Criminal Law – Whether trial was unfair – Inadequate directions on provocation – Incompetence of counsel – Whether lack of directions on good character resulted in an unfair trial – Conviction for murder set aside – Verdict of manslaughter substituted – Offences Against the Person Act, s 6 – Judicature (Appellate Jurisdiction) Act, s 24(2)

Criminal law – Sentencing – Sentence for manslaughter – Credit for time spent on pre-trial remand – The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017

Constitutional Law – Delay in the hearing of the appeal – Production of transcript 12 years' post-conviction – Whether there was a breach of the applicant's right to a fair hearing within a reasonable time – Appropriate remedy for breach of the right to a fair hearing within a reasonable time – Constitution of Jamaica, s 16(1)

STRAW JA

[1] On 8 July 2010, following a trial before Martin Gayle J ('the learned judge') and a jury, the applicant was convicted in the Saint Mary Circuit Court on an indictment containing one count for the offence of murder, in relation to the death of Miss Sharon Hibbert ('the deceased'). He was sentenced by the learned judge, on 9 July 2010, to life

imprisonment, with the stipulation that he not be eligible for parole until he had served 15 years.

[2] The applicant sought leave to appeal his conviction and sentence, which was considered and refused by a single judge of this court on 7 July 2022. The applicant renewed his application before the court.

[3] On 18 and 22 November 2024, we heard and considered the application for leave which we treated as the hearing of the appeal, and made the following orders:

> "1. The application for leave to appeal against conviction and sentence is granted and the hearing of the application is treated as the hearing of the appeal.
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> 2. The appeals against conviction and sentence are allowed.
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> 3. The conviction for murder on the sole count of the indictment is quashed, judgment and verdict of acquittal are entered, and a verdict of guilty of manslaughter is substituted.
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> 4. The sentence of life imprisonment at hard labour with the stipulation that the appellant serve 15 years for the offence of murder before becoming eligible for parole is set aside, and a sentence of 14 years and two months is imposed for the offence of manslaughter, the time spent in pre-sentence custody of 22 months having been deducted.
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> 5. The sentence is to run as of 9 July 2010, the date on which the original sentence was imposed.
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> 6. The appellant having served 14 years and four months in custody, should be immediately released.
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> 7. It is hereby declared that the right of the appellant under section 16(1) of the Constitution to be afforded a fair hearing within a reasonable time, has been breached by the excessive delay between conviction and the hearing of the appeal."

[4] We promised to provide the reasons for our decision and this is a fulfilment of that promise.

Case for the prosecution

[5] The applicant was employed as a watchman at a construction site adjacent to an unfinished residence occupied by the deceased. It is not in dispute that some time in May 2008, he received permission from the deceased to charge his cellular phone on the verandah of her premises.

[6] Subsequently, hostility developed between the applicant and the deceased. According to the applicant, on an occasion that he left his cellular phone charging at the deceased's premises, when he returned to retrieve it, he saw her taking it up, along with the charger and going back inside her house. He called out to her, but she did not answer. Despite his many requests, she denied having it. The applicant made numerous attempts to retrieve the phone, reported the matter to a police officer and sought assistance from a friend to speak to the deceased about returning the phone, to no avail. The exact dates for these confrontations were not ascertained during the trial. Subsequently, the deceased's body was discovered at the back of her premises on 4 July 2008.

[7] The prosecution called several witnesses, including friends of the applicant, Mr Delroy Page (a co-worker) and Mr Carl Rose (described as the applicant's church brother). They spoke to the dispute and the applicant's efforts to get back his cellular phone. Mr Page gave evidence that the applicant told him (on a date he could not recall) that he had killed "the lady", and he (Mr Page) went and looked over the deceased's premises and saw her body on the ground. Mr Rose's evidence was that the applicant had called him from the number associated with the missing phone in early July 2008 and told him "somebody lick down the lady".

[8] Subsequently, on 9 September 2008, the applicant gave a caution statement and, on 10 September 2008, underwent a question-and-answer interview with Deputy Superintendent of Police ('DSP') Gladstone Ellis, in the presence of his attorney and Detective Sergeant Spencer Robinson. In his caution statement, the applicant stated that after he asked the deceased for his phone, she showed him the middle finger and said "go suck your mother". After further disputes over the phone, he went to her house, she

pushed him to the ground, then he used a piece of iron pipe to hit her on her head. In the question-and-answer document, he admitted that he was angry with the lady as she refused to return his phone.

[9] Dr David Crawford, who performed the post-mortem examination, gave evidence describing the injuries to the deceased's head and opined that, as a result of the injuries he observed, she died of brain damage and haemorrhage due to blunt force trauma.

Defence case

[10] At the trial, the applicant gave sworn evidence and denied committing the murder. He stated that he was coerced into giving the caution statement and that he was beaten and threatened by the police. He explained that when he refused to agree to a written statement shown to him, wherein he admitted to committing the murder, DSP Ellis threatened him and shortly after, another officer hit him on his head with a book and punched him in his face. As a result, he received a cut to his face, fell to the ground and the officer kicked him. DSP Ellis then told him that if he did not do as they said, they would push him out of the moving vehicle, shoot him and say that he tried to escape. He said that when he looked at DSP Ellis' face, he realised that he was serious.

[11] At that point, he asked for some time to get a lawyer, and he was told that he "shouldn't worry they already have a lawyer". He told the court that the lawyer came a short while later, and he spoke to the officers and then went inside the room where he was and spoke to him. He stated that when the lawyer asked him what went on before he came, he figured that he also had something to do with what was going on based on what DSP Ellis had said. He stated that the lawyer also asked him if he understood what he had to do and he told him yes.

[12] The lawyer, he said, then called in the police and he repeated the statement that the police had coached him to say. He gave the answers that he and DSP Ellis had gone over. He told the court that the caution statement did not contain the truth and that he gave that statement because he was fearful for his life.

The appeal

[13] At the hearing, Mr Equiano, on behalf of the applicant, sought and was granted leave to abandon the original grounds filed and to argue the following three supplementary grounds:

> "1. Inadequate directions given by the Learned Trial Judge to the jury: - Although the Learned Trial Judge gave direction [sic] on manslaughter and provocation, he failed to inform the Jury that the taking of the phone and failure to return it after several request, [sic] could be considered as forming part of the provocation. By not doing so, the Applicant was deprived of an opportunity to be found guilty of the lesser charge of Manslaughter.
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> 2. The Applicant did not receive a fair trial: - The Applicant's Attorney-at-Law failed [sic] elicit evidence of the Applicant's good character and failed to call witnesses that were available to give such evidence. As such the Applicant was deprived of a good character direction from the trial judge in circumstances where the Applicant's good character was essential to his defence.
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> 3. Breach of the Applicant's constitutional rights for a trial within a reasonable time: The Applicant filed [sic] Notice of Appeal on July 16, 2010 and the appeal is delayed by more than twelve years through no fault of the Applicant."

Ground 1 - Inadequate directions given by the learned trial judge to the jury

Submissions

[14] Mr Equiano submitted that the learned judge, in his summation of the prosecution's case, gave the jury directions on provocation and its effect. However, these directions were very restricted, and were confined to the contents of the caution statement, that is, that the deceased pushed the applicant to the ground prior to him hitting her in the head.

[15] Counsel argued that the main cause of the dispute between the applicant and the deceased was that the deceased had the applicant's cellular phone and refused to return

it, despite his many requests and requests made on his behalf. It was argued that this is what led to the final confrontation that resulted in the applicant's action. It was, therefore, important that the jury be asked to examine the entire sequence of events, to determine not just whether it was the immediate acts at the time of the final confrontation, but also, whether the "accumulative action" would have been so provocative as to cause the applicant to lose his self-control.

[16] Counsel relied on **Confessor Franco v R** [2001] UKPC 38 in submitting that it was particularly important for the learned judge to assist the jury in identifying the evidence they should assess when considering provocation. It was argued that the learned judge's failure to direct the jury to examine the entire scenario in the determination of whether there was provocation, deprived the applicant of the chance of the jury returning the alternate verdict of guilty of manslaughter.

[17] Ms Pyke, for the Crown, conceded that the directions on provocation were flawed. The learned judge, it was asserted, was correct to have left the issue of provocation to the jury, but failed to outline to the jury the circumstances, based on the evidence, to be considered in determining whether there was provoking conduct that caused the applicant to lose his self-control. As such, based on the evidence, the legal principles applicable to provocation supported the position of the applicant.

[18] Counsel highlighted section 6 of the Offences Against the Persons Act which outlines the requirements to be satisfied in order to establish this partial defence. She also referred to two decisions from this court, *viz*, **Raymond Bailey v R** [2021] JMCA Crim 34 and **Wayne Martin v R** [2024] JMCA Crim 21.

<u>Analysis</u>

[19] There was no complaint concerning the learned judge's direction to the jury on the law relating to provocation. We did not think it necessary, therefore, to review the law. This has been adequately expressed in numerous judgments of this court including

Raymond Bailey v R and **Bernard Ballentyne v R** [2017] JMCA Crim 23 (see also section 6 of the Offences Against the Person Act).

[20] In his review of the circumstances in his summation, the learned judge expressed to the jury that they were to consider whether the deceased's actions or conduct may have provoked the applicant. He reminded them of the portion of the applicant's caution statement at page 441, lines two to eight of the transcript, as follows:

> "She came up infront [sic] of me and said I must leave her place. I told her that I need my phone, after I said that to her, she push [sic] me to the ground and I saw her going into her handbag [sic] me never know wey she a guh fa, that's when I took up the iron an lick har wid it in her head and she fell to the ground."

[21] Further, at pages 444, lines 15 to 25 and 445, lines one to three of the transcript, the learned judge stated:

> "There are two questions here which you will have to consider before you are entitled to conclude that he was [sic] may have been provoked on this occasion, that's the occasion here. The deceased, Sharon Hibbert's action or conduct, the things it is alleged that the deceased have said or done or both of them, have provoked, that has caused the defendant Karim Johnson to suddenly and temporarily lose his self-control because he said, and [sic] she grab him and push him down. Madam foreman and your members, is that an instant reaction? That is suddenly because of what was said and done to him, he lose [sic] his self-control."

[22] Based on this portion of his summation, the learned judge limited the provocative conduct of the deceased to the fact that the applicant said the deceased grabbed him and pushed him down. He failed to present the entire evidence to the jury that was relevant to their consideration of the issue of provocation.

[23] This consideration should have included the evidence of the prosecution witnesses Mr Page and Mr Rose, who supported aspects of the confrontations between the deceased and the applicant that were set out in his caution statement. The learned judge did not

summarise these aspects of the evidence when addressing the jury on provocation. These aspects included:

> (1) Mr Page's evidence that the applicant told him that "him kill di lady" and that he hated "the lady" because "the lady tek away him phone" (see page nine, lines one to 19 of the transcript);
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> (2) Mr Rose's evidence that when he visited the site where the applicant lived on one occasion, they both went up to the fence of the deceased's house to see if the phone could be recovered. He called out and the deceased came outside and he asked her for the applicant's phone. However, the deceased denied having it and started to use indecent language. Also, he stated that the applicant kept talking to him about the phone and that he paid a lot of money for it (see pages 60 to 62 of the transcript); and
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> (3) Detective Sergeant Robinson's testimony that on a date prior to 4 July 2008, about three weeks prior, he had visited Lot 5 Spring Valley, the residence of the deceased. He had gone there based on a report by the applicant. While he stood with the applicant at the fence of those premises, he called out to the persons in the premises and the deceased came to the window. He told her that he was a police officer and that the applicant had reported to him that she had taken his cellular phone. She denied having the phone and said "him tek up him phone lang time" (see pages 194 to 195 of the transcript). He then told the applicant to attend the police station the next morning to give a statement.

[24] There was cogent evidence that the applicant had been responsible for the act leading to the death of the deceased, but, based on his admissions and the evidence of the prosecution witnesses, a verdict of manslaughter may have been available on the

basis of provocation. There were no specific dates set out in the evidence as to when the problems emerged between the deceased and the applicant, but Detective Sergeant Robinson stated that he visited the deceased's premises along with the applicant about three weeks prior to 7 July 2008. It could be inferred, therefore, that the incidents occurred over two to four weeks prior to 4 July 2008. The potential provocative actions would have therefore occurred within that timeline.

[25] In **Wayne Martin v R**, this court held that the judge's directions on provocation were inadequate as there was a failure to identify for the jury's consideration crucial aspects of the evidence that showed the potentially provoking conduct of the deceased prior to the altercation between herself and the appellant. At para. [12] of the judgment, V Harris JA stated:

> "It is settled law that once there is evidence of provocation, whether by words and/or conduct, the question of whether the provocation was sufficient to cause a reasonable person to suddenly and temporarily lose his self-control and do as he did should be left to be determined by the jury (see **R v Duffy** [1949] 1 All ER 932 and section 6 of the Offences Against the Person Act). Having determined that there was a live issue of provocation, the learned trial judge had a duty to direct the jury to the evidence that could be considered provocation. The learned trial judge failed to highlight aspects of the evidence that were crucial for the jury's determination of that question. We cannot say with certainty that the jury would have inevitably found that Mr Martin was guilty of manslaughter instead of murder had the learned trial judge pointed out all the evidence of provocation. However, the effect of her non-direction is that Mr Martin was deprived of a fair trial. Accordingly, this ground must succeed. As a result, we will invoke section 24(2) of the Judicature (Appellate Jurisdiction) Act that gives this court the authority to substitute a verdict of guilty for another offence for which the jury could have convicted an appellant; and set aside Mr Martin's conviction for murder and substitute therefor a verdict of manslaughter."

[26] Similarly, we could not say whether the jury would have returned a verdict of guilty of manslaughter instead of murder, if the learned judge had rehearsed all the salient facts and had asked them to consider the potential effect of the cumulative actions of the deceased upon the mind of the applicant at the time she pushed him down. However, it could not be said that a jury properly directed on the issue of provocation would, inevitably have returned the same verdict of guilty of murder. Ms Pyke's concession was, therefore, well-founded (see **Bayne Simms v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 109/2006, judgment delivered 24 April 2009).

[27] In the result, there was, a material non-direction which amounted to a misdirection that rendered the verdict of guilty for murder unsafe. This ground of appeal succeeded.

[28] Section 24(2) of the Judicature (Appellate Jurisdiction) Act ('JAJA') authorises this court to substitute a verdict of guilty for another offence for which the jury could have convicted an appellant. However, the remaining ground relevant to conviction had to be considered before any decision was made to substitute such a verdict.

Ground 2 - The applicant did not receive a fair trial

<u>Submissions</u>

[29] Mr Equiano submitted that as the applicant gave sworn evidence contrary to the prosecution's case, his credibility was at the heart of his defence. A good character direction from the learned judge would have given credence to his credibility. Further, the applicant would have depended on his counsel at the trial, to present his case in a professional manner. There was an obligation on counsel at the trial to adduce evidence of good character. The applicant pointed to three witnesses, including Mr Rose who testified for the prosecution, who could have spoken to his good character. Despite this, counsel at the trial failed to elicit such evidence. The failure of counsel to raise evidence of the applicant's good character deprived the applicant of a fair trial. The result was that

the learned judge merely gave a half-hearted direction on propensity. In making these submissions, reliance was placed on the cases of **The State v Muirhead** (2008) 74 WIR 394 ('**Muirhead**'); **R v Vye; R v Wise; R v Stephenson** [1993] 3 All ER 241 and **Teeluck (Mark) and John (Jason) v The State** (2005) 66 WIR 319.

[30] Ms Pyke argued, on the other hand, that there was no evidence to support the applicant's claim that the defence attorney had been informed of specific witnesses but failed to call them. She likewise noted that there was no meaningful response from defence counsel to either rebut or contextualise the assertions of the applicant. She, therefore, commended the case of **Mark Wilson v R** [2022] JMCA Crim 30 in submitting that the court could rely on the transcript to assess the fairness of the proceedings and the effectiveness of counsel's representation.

[31] While conceding that the complaint about defence counsel favoured the applicant, Ms Pyke, nevertheless contended that the absence of affidavits from the purported witnesses, undermined the credibility of the applicant's claim. This omission, she asserted, was a significant factor in assessing the merits of the applicant's case.

[32] Counsel went on to submit that even if the court were to find that the defence counsel's failure to introduce evidence of the applicant's good character amounted to incompetence, this omission did not impact the fairness of the trial. This was because, a properly directed jury would still have inevitably arrived at a verdict of guilty due to the strength of the prosecution's case. Counsel submitted that the proviso should be applied as there was no substantial miscarriage of justice.

<u>Analysis</u>

[33] Incompetence of counsel is now a well-traversed ground of appeal. Concerning this complaint, we considered the affidavit filed by the applicant on 16 November 2022. At paras. 7 and 8, he stated that he had told his attorney to call the witnesses David Lewis and Pastor Edwin Coleman to give evidence as to whether he made any confession to them. He also stated (at paras. 10 and 11) that he had indicated to his attorney that

Pastor Coleman, David Lewis and Mr Rose were available to give character evidence on his behalf. Further (at para. 12), he told his attorney that there were other persons from the home where he grew up who were also available to speak to his good character. Those witnesses were never called and Mr Rose, who testified for the Crown, was not cross-examined as to his knowledge of the applicant's character.

[34] Counsel who appeared for the applicant below, filed an affidavit in relation to this complaint of incompetence. However, it was of no assistance to this court as he indicated that the files relevant to the case were unavailable to him at this time. He explained that senior counsel in the firm had died in 2020 and the offices closed thereafter.

[35] The failure of defence counsel "to discharge his duty of ensuring that the defendant receives the benefit of a good character direction may in some cases, which are to be regarded as exceptional, make a conviction unsafe. …. Where the outcome of the trial would not have been affected by the lack of a good character direction, then that lack will not make a conviction unsafe …" (see **Muirhead** at para. [35]). The authorities have established that the absence of good character directions may or may not be fatal to a conviction. The principles guiding the court were set out by D Fraser JA in **Marlon Campbell v R** [2023] JMCA Crim 9. At para. [18](ix) and (x), he summarised the principles as follows:

> "ix) Where a good character direction has been erroneously omitted, the cases 'where plainly the outcome of the trial would not have been affected by a good character direction may not…be so 'rare'': Lord Brown of Eaton-under-Heywood in **Vijai Bhola v The State** (2006) 68 WIR 449 at para. 17, qualifying *dicta* in **Teeluck and John v The State of Trinidad and Tobago** at para 33. See also **Balson v The State**; **Brown v R** [2005] UKPC 18 and **Jagdeo Singh v The State**.
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> x) The test to determine the effect of the omission or inadequacy of the good character directions on the soundness of the conviction, is whether having regard to the nature of and the issues in the case and taking into account the other available evidence, a reasonable jury, properly directed,

> would inevitably (or undoubtedly) have arrived at a verdict of guilty: **Chris Brooks v R**; **Sealey and Headley v The State**; **Whilby v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/1999, judgment delivered 20 December 2000, per Cooke JA at page 12; **Jagdeo Singh v The State** per Lord Bingham at pages 435 – 436; and **Michael Reid v R** per Morrison JA (as he then was) at pages 27 – 28."

[36] In determining whether the incompetence of counsel resulted in a miscarriage of justice, the court is to consider whether this deficiency actually caused prejudice to the case for the applicant (see **Mark Wilson v R** and **Leslie Mcleod v R** [2012] JMCA Crim 59). One has to look at the evidence as a whole to see what difference the giving of a direction could have made to the verdict (see **Muirhead** at para. [35]).

[37] We started from the position that counsel failed in this regard, since there was nothing in the transcript that could have assisted us in our assessment. We were, therefore, left to conclude that the applicant was deprived of the benefit of a detailed good character direction albeit the learned judge did direct the jury in the following manner:

> "He told you he was a watchman, he is a church man, he said his brother is called Carl Rose, he said he call [sic] him brother because they are church brothers. He went on to tell us that he can't leave the watchman job because he is the one to give account for what take [sic] place.
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> He told you that he plays football in the community. He spoke about his phone, he has spoken about all those positive qualities about himself. What he is doing is asking you to take that into consideration, his good character and he is asking you to say that because of his good character it is less likely for him to commit this offence." (see page 481, lines four to 17 of the transcript)

[38] We considered the totality of the evidence against the applicant, including the evidence of his confession to his co-worker Mr Page, the caution statement given to the police, as well as the question-and-answer document made in the presence of an attorney

to whom he made no complaint. As stated earlier (see para. [24]), there was cogent and compelling evidence that the applicant was responsible for the death of the deceased. In that regard, we formed the view that the jury would inevitably have arrived at a verdict of guilty on either the offence of murder or manslaughter, even if the good character directions had been fully given (see **Simmons (Ronald) and Greene (Robert) v R** (2006) 68 WIR 37). We did not find that there was any merit in this complaint. This ground of appeal, therefore, failed.

[39] However, based on our determination concerning ground one, pursuant to section 24(2) of the JAJA, we determined that the applicant's conviction for murder should be set aside and a verdict of manslaughter substituted. It was, therefore, necessary for the court to consider the appropriate sentence to be imposed for the offence of manslaughter. However, as ground three concerned the alleged breach of the applicant's constitutional rights, we considered it necessary to first determine ground three, as it had the potential to impact the ultimate sentence imposed.

Ground 3 - Breach of the applicant's constitutional rights for a trial within a reasonable time

<u>Submissions</u>

[40] Mr Equiano submitted that section 16(1) of the Constitution of Jamaica gives the citizen a right to a fair hearing within a reasonable time by an independent and impartial tribunal. He cited Brooks P in **Evon Jack v R** [2021] JMCA Crim 31, where he applied the Privy Council's decision in **Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26 ('**Tapper v DPP**') in explaining that "hearing" included post-conviction proceedings.

[41] It was submitted that the applicant was convicted on 8 July 2010 and was sentenced on 9 July 2010. He then filed an appeal on 16 July 2010, which was not scheduled for hearing until more than 12 years after his conviction and the filing of the notice of appeal.

[42] Noting that "reasonable" is not defined in the Constitution, counsel relied on several cases, including **Tapper v DPP** where a five-year delay between sentence and the hearing of the appeal was deemed excessive and in breach of the constitutional right. He cited two decisions of this court: **Techla Simpson v R** [2019] JMCA Crim 37 and **Tussan Whyne v R** [2022] JMCA Crim 42 where eight-year periods of delay were deemed to be in breach of the constitutional right.

[43] Counsel contended that the applicant's constitutional rights were breached and, if this court determined that a conviction for manslaughter should be substituted, a determinate sentence should be imposed and the applicant released immediately from the correctional facility.

[44] Ms Pyke agreed that there was delay in determining the appeal and acknowledged the applicant's rights under section 16(1) of the Constitution. She asserted that an appropriate remedy should be provided but noted that the conviction ought not to be quashed based on the circumstances. She submitted that the court would be best able to determine the appropriate remedy in this case.

<u>Analysis</u>

[45] There had been an inordinate delay in the hearing of the appeal. The court's records revealed that the transcript of the trial was only filed on 17 June 2022, a period of 12 years after the trial was completed and almost 12 years after the notice of appeal was filed. The applicant could not be blamed for this delay. We found, therefore, that there was a breach of the applicant's right to a fair hearing within a reasonable time under section 16(1) of the Charter. As such, an appropriate remedy had to be granted (see **Techla Simpson v R** and **Evon Jack v R**), and this was addressed after the resentencing process.

Sentencing

<u>Submissions</u>

[1] Mr Equiano made no submissions, as such, on the issue of an appropriate sentence for the offence of manslaughter.

[46] Ms Pyke, in the light of the court's invitation, filed written submissions concerning the appropriate sentence for the conviction of manslaughter. It was submitted that this court in **Wayne Martin v R** [2024] JMCA Crim 21 and **Shirley Ruddock v R** [2017] JMCA Crim 6 accepted that the sentencing range for the offence of manslaughter is seven to 21 years.

[47] The respondent listed the senseless nature of the offence, the nature of the injuries, and the fact that the applicant did not realise that the victim had died or was reckless or indifferent to whether she died, as aggravating factors relevant to the determination of the starting point. She suggested a starting point of 14 years.

[48] The mitigating factors highlighted ranged from the victim's conduct, that is, the stealing of the phone and her retention of it, her conduct at the time of the incident (based on the applicant's account), and the applicant's failure to appreciate the severity of the injury he had inflicted.

[49] She submitted that nine years should be added to the starting point based on the aggravating factors and also nine years deducted for the mitigating factors. This resulted in no change to the starting point of 14 years.

[50] Counsel submitted that the one year and 10 months spent in pre-trial custody should be deducted. As a result, it was submitted that a sentence of 12 years and two months would not be unjust, and it would be consistent with other sentences imposed in recent cases of a similar nature.

Analysis

[51] The statutory maximum for the offence of manslaughter is life imprisonment, but the maximum sentence should be reserved for the "worst examples of the offence" (see **Wayne Martin v R** at para. [15] quoting Morrison P in **Meisha Clement v R** [2016] JMCA Crim 26).

[52] In undertaking this sentencing process, we had regard to the relevant sentencing principles and methodology as set out in numerous cases including **Daniel Roulston v R** [2018] JMCA Crim 20 and the Sentencing Guidelines for use by Judges of the Supreme Court and the Parish Court, December 2017 ('the Sentencing Guidelines').

[53] As per the Sentencing Guidelines, manslaughter attracts a normal range of three to 15 years with a starting point of seven years. However, guidance is also taken from the authority of **Shirley Ruddock v R**. In that case, Brooks P, having done a review of several authorities relevant to the offence of manslaughter based on provocation, set out a normal range of seven to 21 years. The actual starting point will depend on the circumstances of the offence and should reflect the intrinsic seriousness of the offence (per Morrison P in **Meisha Clement v R**).

[54] It was our view that an appropriate starting point should be 17 years, as the pathologist's evidence stated that the deceased had a compound depressed fracture of the right temporal area and closed depressed fractures of the maxilla area and the occipital skull bone. Further, that the deceased suffered massive brain damage and haemorrhage. He stated that the cause of death was due to the brain damage and haemorrhage as a result of multiple skull fractures caused by blunt trauma. He expressed the opinion that the force used was excessive. In the pathologist's opinion, the injuries could have been caused by more than one blow to the head.

[55] We identified the aggravating features as follows:

(a) There was an element of premeditation. The applicant told Mr Rose, prior to the actual killing, that he wanted to harm the deceased. Mr Rose advised him against it.

(b) The applicant made an initial report to the police concerning the cellular phone and was subsequently advised to make a formal report so action could be taken. He did not pursue that route.

(c) The applicant's continued confrontation of the deceased, despite the growing hostility between them.

(d) Having hit the deceased on the head with a piece of iron, the applicant left her on the ground unattended.

(e) The adverse effects on the family of the deceased.

These increased the starting point to 21 years.

[56] We identified the following as mitigating factors:

(a) The applicant was only 22 years old at the time of the offence.

(b) The previous good character of the applicant, including an excellent social enquiry report.

(c) The applicant, at a crucial stage of his development (14 years old), was taken to a place of safety, as his father had been arrested and no family members were willing to accept responsibility for him.

(d) The applicant was gainfully employed up to the time of his arrest.

(e) The pressures under which the offence was committed.

[57] On account of the mitigating factors, the starting point was adjusted downward to 16 years. The applicant was also given the full credit of 22 months for the time spent in

pre-trial custody. The sentence was, therefore, reduced to 14 years and two months. The applicant would have been entitled to a reduction in his sentence for the breach of his Charter rights to a fair trial within a reasonable time. However, he had effectively served the full sentence already. We, therefore, concluded that the appropriate remedy should be a declaration that his constitutional rights were breached.

[58] It was for these reasons that we made the orders set out at para. [3] above.