

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00006

TESHA MILLER v R

John Clarke and Isat Buchanan for the applicant

Ms Paula Llewellyn KC and Ms Loriann Tugwell for the Crown

29, 30, 31 March, 9, 12 – 16 June 2023 and 27 March 2026

Criminal Law – Application for leave to appeal conviction and sentence – Application to adduce fresh evidence in the interests of justice – Jury empanelling – Peremptory challenge – Number of peremptory challenges allowed for the offences of accessory before and after the fact to murder – Whether trial judge erred in the number of peremptory challenges given to the defence – Interpretation of section 33(2A) of the Jury Act – Use of the Hansard in statutory interpretation – Interpretation of sections 34 and 35 of the Criminal Justice (Administration) Act – Accessory liability – Challenge to the polls for cause – Pre-trial publicity – Pre-trial questioning of jurors – Jury Act, sections 33(2), 33(2A) and 33(4) – Criminal Justice (Administration) Act, sections 34, 35, and 37 – Offences Against the Person Act, sections 3(1)(b) and 81

Criminal Law – New trial – Interests of justice – 18 years between offence and a possible new trial – Applicant arrested 10 years after offences committed – Delay – Right to a fair hearing within a reasonable time – Whether new trial should be ordered or verdict and judgment of acquittal entered – Constitution of Jamaica, section 16(1) – Judicature (Appellate Jurisdiction) Act, section 14(2)

STRAW, FOSTER-PUSEY AND D FRASER JJA

Introduction

[1] On 3 December 2019, the applicant was convicted for the offences of accessory before the fact and accessory after the fact to murder, following a trial conducted in the Home Circuit Court in the parish of Kingston, on various dates between 13 November and 3 December 2019 before G Fraser J (as she then was) ('the learned judge') sitting with a jury. On 9 January 2020, he was sentenced to 38 years and nine months' imprisonment at hard labour for the offence of accessory before the fact to murder and 18 months' imprisonment at hard labour for the offence of accessory after the fact to murder. The sentences were ordered to run concurrently.

[2] The applicant applied for leave to appeal his convictions and sentences, and on 13 December 2021, a single judge of appeal refused that application. The application was subsequently renewed.

[3] In support of the renewed application, the applicant sought leave to adduce fresh evidence on appeal. This latter application was heard by this court between 29 and 31 March 2023. On 9 June 2023, the ruling of the court was handed down, in which several orders were made (which are set out at para. [29] below). The reasons for that decision were promised to be put in writing. As such, this judgment deals both with the promised reasons on the application to adduce fresh evidence as well as the renewed application for leave to appeal conviction and sentence.

Background

Proceedings in the court below

Case for the prosecution

[4] The indictment concerning the applicant stated:

"STATEMENT OF OFFENCE - Count 1

Accessory before the fact to murder

PARTICULARS OF OFFENCE

TESHA MILLER on a day unknown between January 1, 2008 and the 27th day of June, 2008 in the parish of Saint Catherine, did counsel and procure the murder of Douglas Chambers by Andre Bryan and others and on the 27th day of June, 2008 in the parish of Saint Catherine Douglas Chambers was murdered.

STATEMENT OF OFFENCE - Count 2

Accessory after the fact to murder

PARTICULARS OF OFFENCE

TESHA MILLER well knowing that Andre Bryan and others, on the 27th day of June, 2008 in the parish of Saint Catherine, murdered Douglas Chambers, did on the 27th day of June, 2008 in the parish of Saint Catherine, and on other days thereafter, assist Andre Bryan." (Emphasis as in the original)

[5] The applicant pleaded not guilty to both counts and was tried before the learned judge and a jury of seven persons. A number of agreed facts were adduced in evidence as follows: 1) Mrs Charmaine Chambers, wife of Douglas Chambers ('the deceased') identified his body at Spanish Town Funeral Home in Saint Catherine on 3 July 2008; 2) the post-mortem was conducted by Dr SN Prasad Kadiyala; 3) the deceased had 14 gunshot injuries to the body; and 4) the cause of death was multiple gunshot wounds.

[6] Among the evidence offered by the Crown were: 1) the statement of Detective Inspector Clifton Green dated 6 November 2018, which, by agreement of both sides, was read out in court without the witness being present (the statement was uncontradicted by the defence and outlined the officer's role in the matter as that of conducting a question and answer interview with the applicant, following which he charged the applicant for the offences); 2) the statement of Detective Inspector Marcel Bedward, the arresting officer who gave evidence in court that he took the applicant into custody on 29 October 2018 in connection with the killing; and 3) the evidence of SR ('the Crown witness of fact'), on whose credibility the case for the prosecution rested.

[7] The Crown witness of fact had been convicted for the offences of murder and arson in an unrelated matter, having pleaded guilty to those offences in 2018. He was sentenced to life imprisonment with eligibility for parole after serving 16 years. On 12 November 2019, he entered into a plea agreement with the Director of Public Prosecutions to give evidence in the trial of the matter against the applicant, in exchange for a lesser sentence, pursuant to the Plea Negotiations and Agreement Act. The learned judge who tried the applicant was the same judge who reduced the sentence of the Crown witness of fact.

[8] At the trial, the Crown witness of fact testified that he had known the applicant for over 10 years, had been a member of the Clansman gang and was also an accomplice in the murder of the deceased.

[9] His testimony gave details as to the killing of the deceased. He testified that sometime on the evening of 27 June 2008, he was in the vicinity of the JUTC Depot ('the depot') in Spanish Town, Saint Catherine. He was sent there by the applicant as part of a diversion group to distract the crowd, as the applicant was "going to send Blackman to kill the JUTC Operator". "Blackman's" correct name was Andre Bryan, and the "JUTC Operator" was the deceased. The instructions to go to the depot had been given by the applicant at Studio Lane in Spanish Town in a face-to-face meeting with the Crown witness of fact, before the incident. Also, in accordance with the instructions from the applicant, the Crown witness of fact said he went to New Nursery in Spanish Town and handed over two guns to Blackman in the presence of another man called "Brucky".

[10] He stated that at the time of the incident, while he and others were forming the diversion group across from the depot, the deceased came outside at the gate of the depot and stood smoking a cigarette. It was then that, according to the Crown witness of fact, Blackman, who was wearing a black pullover over his head, stepped out of a vehicle and shot the deceased, who fell to the ground. The other man, Brucky, also shot the deceased while he was on the ground, and they (Blackman and Brucky) escaped in the vehicle while the diversion group fired shots in the air to scare the people and to

prevent them from coming out, so as to facilitate Blackman's and Brucky's escape. The Crown witness of fact testified that the applicant told him at a meeting subsequent to the incident, in answer to his question: "How he was not seeing Blackman", that he, the applicant, had sent Blackman on a boat to the Cayman Islands because the police were looking for him.

[11] Under cross-examination, the Crown witness of fact indicated being aware that Blackman was acquitted in a previous trial, for the murder of the deceased.

[12] There was no independent evidence to support the testimony of the Crown witness of fact.

The defence case

[13] The applicant gave an unsworn statement from the dock. He denied the allegations. He said he did not know the Crown witness of fact before he gave evidence. It was submitted on his behalf by defence counsel that it was as a result of benefits received, that the Crown witness of fact gave evidence against the applicant.

The application for fresh evidence

[14] By further amended notice of application for court orders, filed 6 March 2023, the applicant sought leave to adduce fresh evidence on appeal. Specifically, he sought leave to adduce the following:

- "a. Affidavit of Tesha Miller (19 December 2022)
- b. Affidavit of Isat Buchanan (15 November 2022)
- c. Supplemental Affidavit of Isat Buchanan
- d. Affidavit of Valerie Neita Robertson KC (19 Jan 2023)
- e. Affidavit of Bert Samuels (13 Jan 2022)
- f. Affidavit of Bert Samuels (19 Jan 2022)
- g. Affidavit of Bert Samuels (6 March 2022)
- h. Any affidavit filed for or on behalf of the Applicant."

[15] The grounds on which the applicant sought the orders were:

i. Pursuant to sections, 16(1) and 16(8) of the Constitution [sic]

ii. Pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act.

iii. Pursuant to rule 1.7 (c) of the Court of Appeal Rules [sic]

iv. Pursuant to rules 3.2, 3.8, 3.9 of the Court of Appeal Rules [sic]

v. The interest of justice would be best served by the court exercising its discretion to waive such non-compliance since it is just to do so.

vi. Pursuant to section 28(a) of the Judicature (Appellate Jurisdiction) act [sic] this court may order the production of any document or exhibit connected with the appeal herein.

vii. It is necessary and expedient in the interest of justice to allow the Appellant/Applicant to adduce the information contained in the Affidavits.

viii. The affidavits are relevant to the issues to be determined in the appeal and are such that if this application is granted, they would have an important influence on the outcome of the appeal.

ix. If received, the reports, notes, affidavits and statements would form the basis of grounds filed and to be filed in the event this application is granted.

x. The Appellant will be significantly prejudiced if this Honourable Court does not grant the orders sought herein.

xi. The affidavits are relevant to the issues to be determined in the appeal [sic]

xii. The interest of justice and the due administration of the court would be enhanced by granting the orders sought."

[16] The second supplemental grounds of appeal filed 20 March 2023, being the grounds in support of which the application for fresh evidence was made, are set out at para. [31] below.

[17] An affidavit of Claudette Thompson, sworn 22 March 2023, and two affidavits of Michael Anderson, both sworn on 21 March 2023, were placed in a bundle of submissions and authorities filed on behalf of the Crown on 23 March 2023, in response to the application for fresh evidence. Affidavits in response to those affidavits were filed by and on behalf of the applicant.

The submissions

[18] Mr Clarke, for the applicant, submitted that the granting of the orders sought, would have enhanced the fair hearing and determination of the application for leave to appeal. The bases of the application were that the material sought to be adduced was relevant to the issues to be determined in the application for leave to appeal; would form the basis of the grounds filed; and would have an important influence on the outcome of the application for leave to appeal. He relied on the cases of **Bryan Smythe v R** [2018] JMCA App 3, **Benedetto v R; Labrador v R** [2003] UKPC 27 (**Benedetto**), and **Maharaj and others v the State (Trinidad and Tobago)** [2021] UKPC 27, and pointed out that the test was whether the evidence was necessary or expedient in the interests of justice.

[19] Ms Llewellyn KC, the learned Director of Public Prosecutions, on behalf of the Crown, relied on section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA') and the cases of **R v Parks** [1961] 3 All ER 633, **Shaw and others v R** [2002] UKPC 53, **R v Pendleton** [2002] 1 All ER 524, and **Stirland v DPP** [1944] 2 All ER 13. She submitted that the application did not fall within the parameters of fresh evidence. However, it was conceded that, in the interests of justice, some material should be admitted to assist the applicant to argue particular grounds. She reminded the court of the latitude outlined in that regard, in the case of **Bernal (Brian) and Moore (Christopher) v R** (1997) 51 WIR 241.

[20] King's Counsel noted that the material the Crown became aware of post-trial (based on defence requests), which were then disclosed, plus particular paragraphs of the affidavits of Tesha Miller and Bert Samuels in support of certain grounds, should be admitted in the interests of justice, should the court so determine. King's Counsel further asserted that it was not necessary for the other material in the application to be received, as the transcript was sufficient.

Discussion

Summary of the applicable legal principles

[21] Section 28(a) of the JAJA states:

"28. ... the Court may, if they think it necessary or expedient in the interest of justice—

(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; ..."

[22] Therefore, under section 28(a) of the JAJA, this court may admit evidence, connected with the proceedings, and which is necessary and expedient in the interests of justice, for the determination of the case. This includes fresh evidence. This was confirmed in the case of **Rayon Williams v R** [2022] JMCA Crim 41, where, at para. [88], the case of **Benedetto**, was cited, in which the Privy Council:

"explained that the discretionary powers of the court to receive fresh evidence, 'represents a potentially very significant safeguard against the possibility of injustice' and 'while it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice to receive it and take account of such evidence' (see also **Lundy v The Queen** [2013] UKPC 28, para.120 and the recently decided case of **Lescene Edwards v The Queen** [2022] UKPC 11). In the latter case, the Privy Council affirmed 'the interest of justice' as the overriding test."

[23] Material received in the interests of justice may either be fresh evidence or evidence that does not satisfy the test of being fresh (see **Benedetto**, and **Lundy v The Queen** [2013] UKPC 28). If the material is in the realm of fresh evidence, four criteria must be satisfied (see **R v Parks**).

[24] This application did not fall within the category of fresh evidence as stated in **R v Parks**, so it was unnecessary to discuss and evaluate the criteria stipulated in that case for consideration of whether to admit fresh evidence. Further, in keeping with the ordinary review function of this court, in all appeals, material disclosed on the transcript may be relied on by the applicant to inform his grounds of appeal and advance his application for leave to appeal. In such a circumstance, there is no need for fresh evidence to be prayed in aid, unless it is necessary for the explanation of what is recorded in the transcript or to support contentions advanced in the grounds of appeal, that would otherwise have no evidential foundation (see **R v Naz** [2018] 4 WLR 28 at para. 45 (adverse comment on absence of support for assertion in written grounds that judge's remarks/criticism of defendant had prejudiced the defendant); **R v Clifton Shaw & Others** (2002) 61 WIR 368 at para. 24 (no rebuttal of Ms Llewellyn's statement in her affidavit that disclosure of statement of witness was made during trial; this witness later gave affidavit containing information not in his statement, which cast doubt on the identification evidence); **Sankar v The State** (1994) 46 WIR 452 at 457 – 460 (evidence obtained from the appellant and counsel as to what occurred which resulted in the appellant not giving evidence)).

[25] Where there is a complaint that the defence did not receive adequate disclosure (as in this case), the material to be considered in assessing such a ground is not required to satisfy the criterion of being fresh evidence. The court will have to examine all relevant material to determine whether the ground has merit (see **R v Taylor** [2013] UKPC 8). The affidavits of Ms Claudette Thompson and Mr Michael Anderson, along with the affidavits of Tesha Miller, Bert Samuels and Bianca Samuels, would also have to be assessed to determine whether there exists any merit in that ground.

[26] The fundamental issue, therefore, in this case, was whether the material sought to be adduced should have been received in the interests of justice, as stated in **Benedetto**.

Whether it was necessary or expedient to admit the evidence in the interests of justice

[27] In this case, the applicant tasked the court to receive his evidence, along with the evidence of several others, and the transcript concerning the resentencing of the Crown witness of fact, as being necessary in the interests of justice. The applicant's evidence would show, among other things, his perception of the learned judge's conduct of the matter, his instructions to his attorney to object to jurors, the impact of alleged unfairness to him, allegations of non-disclosure of statements, and the impact of this on him. The evidence of Bert Samuels (the applicant's counsel at trial) would have disclosed among other things, that the learned judge who presided over the applicant's trial, also presided over the trial, sentencing and sentence reduction of the Crown witness of fact; the learned judge's conduct during cross-examination by defence counsel; the learned judge's conduct, demeanour and tone at various points of the trial; the alleged non-disclosure of statements and the impact of this on preparation of the defence case; fairness of the trial and safety of the conviction. The affidavit of Bianca Samuels addressed the issue of disclosure by the Crown, among other things.

[28] Upon a review of these affidavits and the transcript of the resentencing hearing, we concluded that they contained information relevant to the issues to be determined in the application for leave to appeal, which was capable of belief, and which may have impacted the safety of the conviction. The applicant may, therefore, have been significantly prejudiced if the court had not allowed the information, either partially or in its entirety, into evidence. As such, it was our view that it was necessary and expedient in the interests of justice to allow all or specific portions of the evidence to be adduced.

[29] On this basis, the following orders were made by the court, relevant to the grounds of appeal as indicated:

1. (Ground 1) Paragraphs 1 – 3 and the first 3 sentences of paragraph 4 of the affidavit of Tesha Miller filed 19 Dec 2022 are received in evidence, in the interest of justice.
2. (Ground 3) The transcript of the resentencing of [the Crown witness of fact] on 13 November 2019 is received in evidence in the interest of justice. The transcript of the sentencing of [the Crown witness of fact] on 24 January 2018 is excluded, as, it is not necessary or expedient for it to be received in the interest of justice.
3. (Ground 5) Paragraph 16 of the affidavit of Tesha Miller filed 19 December 2022 and paragraphs 1, 2 and 26 of the Affidavit of Bert Samuels filed 19 January 2023, are received in evidence in the interest of justice. All other affidavit evidence related to trial conduct is excluded.
4. (Grounds 8, 9 and 11)
 - (a) Paragraph 47 of the affidavit of Tesha Miller dated 19 December 2022 is received in evidence, in the interest of justice.
 - (b) Paragraphs 1, 2, 13 and 14 of the Further Supplemental Affidavit of Bert Samuels filed 20 March 2023, are received in evidence in the interest of justice.
 - (c) Exhibits BS-3 and BS-4 to the Further Supplemental Affidavit of Bert Samuels filed 20 March 2023 are however excluded as constituting hearsay.
5. (Ground 12) All material advanced in support of the complaint of material non-disclosure under ground 12 will be considered in the substantive appeal, subject to
 - i) any material disallowed as unnecessary or irrelevant and
 - ii) the determination that disclosure did not occur.In particular, the following documents may be relied on:
 - (a) The Supplemental Affidavit of Tesha Miller (including exhibits) filed 6 March 2023.

- (b) Paragraphs 1-6; 9-11; and 17-18 of the Further Supplemental Affidavit of Tesha Miller filed 23 March 2023, together with the exhibits attached to the affidavit.
 - (c) The Supplemental Affidavit of Bert Samuels filed 8 March 2023 save for paragraph 8.
 - (d) The Affidavit of Michael Anderson sworn to on 21 March 2023 with exhibited report of Dr Oo.
 - (e) Paragraphs 1-5; 6 (save for the deletion of the words, 'and paragraph 8 of the supplemental affidavit of Counsel, Mr. Bert Samuels'); 7-12; and 14-16 of the Affidavit of Claudette Thompson sworn to on 22 March 2023.
 - (f) Paragraphs 1-22 and 30-34 of the Affidavit of Bert Samuels in response to the Affidavits of Claudette Thompson and Michael Anderson together with exhibits attached, filed 28 March 2023.
 - (g) Paragraphs 1-5 of the Affidavit of Bianca Safiya Samuels in response to the Affidavit of Claudette Thompson, together with exhibit attached, filed 28 March 2023.
 - (h) Paragraphs 1-4; 10-15 (except the last sentence in paragraph 15); and 17, 18 and 19 of the Further Affidavit of Tesha Miller in response to the Affidavits of Claudette Thompson and Michael Anderson filed 29 March 2023.
6. The relevance of the statement of [the Crown witness of fact] dated 7/12/2015 has not been demonstrated.
 7. (Grounds 14-15) The Supplemental Affidavit of Tesha Miller filed 6 March 2023 may be relied on, in the interest of justice.
 8. (Ground 16) In so far as any evidence admitted or considered on other grounds may be relevant to ground 16, such evidence may be relied on, in the interest of justice.

9. No fresh or other evidence is required or allowed in support of grounds, 4, 6, 7, 10 and 13 as, where relevant, the transcript is sufficient.
10. In particular, the following are not admitted (either because the material is not allowed, has been adequately traversed by another affiant, or withdrawn):
 - (a) the Affidavit of Bert Samuels filed 13 January 2022;
 - (b) the Affidavit of Isat Buchanan filed 15 November 2022;
 - (c) the Supplemental Affidavit of Isat Buchanan filed 19 January 2023;
 - (d) the Affidavit of Valerie Neita Robertson KC filed 19 January 2023; and
 - (e) All paragraphs of affidavits and exhibits appended to affidavits that have not been specifically received in evidence."

[30] As seen from the orders, some affidavits or portions thereof were excluded, and the reason for their exclusion was stated in the order.

The application for leave to appeal

Grounds of appeal

[31] At the hearing of the renewed application for leave, the applicant sought and was granted permission to abandon the original grounds of appeal that were filed on 16 January 2020 and to rely on the second supplemental grounds of appeal, which were filed on 20 March 2023, outlined as follows:

- "1. The applicant's conviction should be set aside since he was wrongly refused his statutory right in relation to jury challenges in the following circumstances:-
 - 1) The Learned Trial Judge erroneously refused a peremptory challenge (p.71), so a juror who should have been removed served on the jury.

2) The applicant has been deprived of two (2) peremptory challenges in this matter (see affidavits of Bert Samuels and Tesha Miller).

2. The applicant's conviction should be set aside based on how the jury polling process was conducted by the judge. The errors in law were made in the following circumstances:-

- 1) The Learned Trial Judge allowed the section 33 (4) Jury Act process to be conducted in the presence of all potential jurors.
- 2) The Learned Trial Judge unduly reduced the proposed jury polling questions, in the process disallowing fair polling questions (pp.16 to 22, 30, T). The limited nature of the polling questions deprived the applicant, and the trial process, of the full benefit of the polling exercise, ensuring that the trial was unfair.
- 3) The Learned Trial Judge erred in refusing to ask the jurors whether they knew the deceased man (pp. 82 & 89, T) or any of the three questions (p.89T) she identified that she would normally ask jurors.

3. The applicant's conviction should be quashed based on the judge's decisions during the recusal application for the following reasons:-

- 1) The Learned Trial judge failed to give the application for her recusal due and just consideration.
- 2) The Learned trial judge rendered her decision on the recusal issue immediately after the applicant's application, thereby failing to show that she had given proper consideration of the recusal submission.
- 3) The Learned Trial judge erred in failing to appreciate that a fair-minded observer could have the impression and belief that she would not be fair and unbiased in her hearing of the

matter based on the role she played as a post-sentence Plea Judge (**section 21 of the Plea Negotiations and Agreements Act**), in reducing the sole eyewitness [sic] sentence from life to ten years in light of the 'extent and nature of the assistance given or offered' by [the Crown witness of fact] and the live possibility that she could be called upon to exercise a future discretion to reimpose the life sentence on [the Crown witness of fact] if he 'failed to assist' (**section 22 (5) of the Plea Negotiations and Agreement Act**) the crown.

- 4) The learned trial judge failed to consider that role [sic] in the post-sentence reduction of the sole material witness was uncharted waters in our jurisdiction and that her actions to conduct such an exercise whilst excluding the accused's lawyers from the process would give a fair-minded observer/ the accused the impression that the learned judge was not 'impartial'. It leads to real concern that her role as plea judge could unduly affect her ability to act as an umpire of fairness and to maintain the balance between the parties fairly, make fair rulings on points of law and give a balanced and fair summation in relation to this matter which has life-changing consequences for the accused.
 - 5) The learned trial judge utilised the wrong legal standard, 'actual bias', in dismissing the recusal application.
4. The applicant's conviction should be set aside on the grounds of the inclusion/introduction of prejudicial materials whose prejudicial effect has no probative value on the applicant's trial. The conviction should be set aside since:
- 1) The crown was permitted to lead evidence on prejudicial evidence [sic], which was not strictly relevant or necessary to resolve the issues on the indictment.

- 2) The crown's witness was permitted, without rebuke or (sufficient) adverse comments, to give evidence on prejudicial material which was neither strictly relevant nor necessary to resolve the issues on the indictment.
 - 3) The jury heard prejudicial evidence and material.
 - 4) The learned judge erred in failing to discharge the jury in this matter.
5. The applicant's conviction should be set aside on the ground that there was a substantial miscarriage of justice concerning the learned trial judge's conduct of the trial of this matter in the following ways:-
- a. She unduly limited the cross-examination by the Applicant's counsel of the sole material crown counsel [sic].
 - b. She failed to properly instruct the sole eyewitness to answer material questions posed by the applicant's counsel.
 - c. She excessively interfered in the cross-examination by the applicant's counsel of the sole material crown witness.
 - d. She undermined the defence counsel's duty, role, respect and function.
 - e. She had numerous clashes with the lead defence counsel and scolded junior counsel twice in the strongest terms in front of the jury. The learned trial judge deprived the applicant of a fair trial, including a fair presentation of his case, a fair consideration of his defence, and a fair and impartial tribunal presiding over the proceedings for which he was ultimately convicted.
6. The applicant's conviction should be set aside on the ground that there was a substantial miscarriage of justice in relation to the judge's summation since: -

- a. The learned judge erred in failing to take adequate steps to mitigate the unfairness and prejudicial evidence elicited in this matter to ensure the fair trial of the accused and that the juror did not rely on prejudicial evidence which was introduced by the accused [sic] on the record about the applicant and even concerning lawyers employed by the 'system'.
 - b. The learned trial judge failed to give the jury the appropriate directions as regards the prejudicial evidence reference [sic] in the preceding ground.
 - c. The Learned Trial Judge imported into her assessment of the evidence, queries and opinions for which there was no evidential basis. This treatment distorted the evidence in ways prejudicial to the applicant and, in [sic] doing, denied him a fair trial and a fair chance of acquittal.
 - d. The Learned Trial Judge failed to deal adequately with the applicant's defence adequately or fairly.
 - e. That the Learned Trial Judge's directions to the Jury were weighted in favour of the Prosecution and consequently, the LTJ failed to outline the Appellant's case with equal emphasis and was unable to put to the Jury for their consideration essential elements of the Appellant's claim resulting in his not receiving a fair trial.
7. The learned trial judge erred in law in failing to uphold the submission of no case to answer on the twin basis that (a) the applicant could not be guilty of being an accessory before the fact for a murder committed by Andre Bryan because a jury of competent jurisdiction had adjudged Mr Bryan to be not guilty of murder and (b) the witness was manifestly unreliable and that a trial solely on the strength of this evidence was unfair since there was no other evidence with which the judges of facts could weigh/contrast his possibly

tainted evidence to return a verdict on the appropriate standard of proof.

8. The address to the jury by the prosecutor gave rise to a miscarriage of justice.
9. There were no directions from the judge to the jury, which sought to cure the unfairness of the prosecutor's comment, and the learned trial judge should have discharged the jury.
10. The absence of the record of proceedings concerning the closing addresses of the defence and prosecutor abrogates, abridges, and infringes sections 16 (1) and 16 (8) of the **Constitution**. The actual effects of these breaches are a miscarriage of justice and the inability of this superior court of review to, on the facts of this case, genuinely certify the safeness of the impugned conviction.
11. The learned trial judge failed to give appropriate and sufficient directions to the jury to cure the inappropriate and unfair comments by the prosecutor in her address to the jury.
12. The state infringed the Applicant's constitutional rights to a fair trial in a reasonable time (**section 16 (1)** and **section 16 (6) (b)** of the Constitution [sic] and to have adequate time and facilities for the preparation of his defence. These breaches significantly disadvantaged the Applicant's preparation for his trial.
13. The state infringed the Applicant's constitutional rights to a fair review of his conviction by virtue of an absence of the oral address of the prosecutor (**sections 16 (1) and 16 (8) of the Constitution** [sic]. These breaches significantly disadvantaged the Applicant's fair hearing of his appeal.
14. The learned judge erred by failing to give the applicant a reduction in sentence for the breaches of his constitutional right concerning the reasonable time standard for the trial of this matter.

15. The sentence passed by the learned trial judge was not appropriate in all the circumstances of the case. The sentence passed warrants the court exercising its statutory power under **section 13 (3) of the Judicature (Appellate Jurisdiction) Act** to pass an appropriate sentence in light of the breaches of the applicant's constitutional rights at both the trial and appellate stages.
16. The cumulative effects of the foregoing grounds are to result in a miscarriage of justice in relation to making [sic] the conviction of the appellant. It is not in the interests of justice nor fairness to order a retrial more than 14 years after the material incident, based on the full circumstances of the impugned trial and the injustices meted out to the applicant." (Emphasis as in the original)

Ground 1 - The number of peremptory challenges to which the applicant was entitled

Submissions on behalf of the applicant

[32] It was argued by Mr Clarke that the applicant was entitled to four peremptory challenges and that the learned judge erred in limiting the number of peremptory challenges to two. These submissions were made on two bases. First, as the applicant was charged as an accessory before the fact to murder, which attracts a minimum sentence of 15 years' imprisonment (relying on section 34 of the Criminal Justice (Administration) Act ('CJAA') and section 3(1)(b) of the Offences Against the Person Act ('OAPA')), he was entitled to four challenges in keeping with section 33(2)(a) of the Jury Act. The Jury Act provides for four challenges in respect of offences that carry a possible minimum penalty of 15 years' imprisonment. Second, as the applicant was being tried for two different offences in the same trial, section 33(2A) of the Jury Act entitled him to four challenges.

[33] Counsel contended that as a result of this error, jurors served on the panel who should not have served, at least one of whom was expressly objected to. The applicant was, therefore, deprived of his right to a properly constituted jury, making the trial unfair,

such that the conviction should be overturned. Reference was made to several authorities including William Blackstone's Commentaries on the Laws of England, Book IV: Of Public Wrongs, page 228; Bennion, Bailey and Norbury on Statutory Interpretation 8th edition; and the cases of **The State v Baichandeen** (1979) 26 WIR 213, **People v Edwards** (1894) 101 Cal 543, **People v Diaz** (1951) 105 Cal App 2d 690 and **Pointer v United States** (1894) 151 US 396.

Submissions on behalf of the Crown

[34] Learned King's Counsel submitted that the issue of whether the learned judge erred in ruling that the applicant was entitled to no more than two peremptory challenges is a matter of interpretation of section 33(2) of the Jury Act and sections 34 and 35 of the CJAA. It was argued that sections 34 and 35 of the CJAA propose different forms of punishment depending on whether the accused is indicted for a substantive felony or as an accessory. That is, where the accused is indicted as the principal, then he must bear the same sentence as the principal, whereas, if indicted as an accessory before the fact then he is to be sentenced as an accessory and not a principal. As the applicant herein was indicted as an accessory before the fact, and not as the principal, section 34 of the CJAA was inapplicable, and section 35 was the applicable section. The result of this, according to learned King's Counsel, was that the applicant was not liable to be sentenced to the mandatory minimum sentence of 15 years' imprisonment for murder.

[35] In responding to the second premise argued by counsel for the applicant, King's Counsel submitted that the 2015 amendment to section 33 of the Jury Act did not provide for the joint trial of offences which arose from the same set of facts, but where, based on the differing sentencing regimes to which the offences were subject, there would be four peremptory challenges in respect of one offence and two peremptory challenges in respect of the other offence. King's Counsel argued that, in 2016, to correct this oversight in the two-tiered system under section 33(2) of the Jury Act, and help prevent cases going into backlog, Parliament introduced section 33(2A) to ensure that such offences could be tried together, with the accused having four

peremptory challenges in total. The *ejusdem generis* rule was relied on in support of this interpretation. Learned King's Counsel maintained that the case against the applicant fell under section 33(2)(b) of the Jury Act, as neither of the offences for which the applicant was charged attracted a mandatory minimum sentence of 15 years. Thus, he was only entitled to two peremptory challenges. Section 33(2A) of the Jury Act was not engaged and could not assist the applicant's position.

[36] King's Counsel sought to rely on the record of Hansard to assist in clarifying the ambiguity in the effect of section 33(2A). That is, to determine whether it means that (i) once offences are tried jointly the number of peremptory challenges is four regardless of the number of peremptory challenges an accused would be entitled to if the offences were tried separately, or (ii) its purpose was to allow for the joinder of offences for which there were two different entitlements to peremptory challenges, in which event the entitlement would be to four peremptory challenges. King's Counsel argued that the requirements of **Pepper (Inspector of Taxes) v Hart and related appeals** [1993] 1 All ER 42 ('**Pepper v Hart**') were met, permitting such reliance on the Hansard.

Applicant's submissions in reply

[37] The distinction sought to be drawn by the Crown regarding whether an accused is indicted as a principal or an accessory was refuted by the applicant's counsel on the bases that, (1) such an interpretation would put an accused's right to peremptory challenges within the hands of the Director of Public Prosecutions, who could choose whether to indict under section 34 or section 35 of the CJAA; and (2) the authorities indicate that regardless of which section a person is indicted under (whether section 34 or 35), he or she is liable to be punished in all respects as the principal.

[38] The applicant's attorneys noted the attempted reliance by the Crown on the record of Hansard, but contended that the words of the Jury Act should be given their ordinary meaning, as they are not ambiguous, obscure or absurd. Further, the preconditions for reliance on the Hansard as set out in **Pepper v Hart**, and **Regina v A (No 2)** [2002] 1 AC 45, were not met. The applicant took specific issue with the manner in which the

Hansard was presented to this court by the Crown, in that, it was not affixed to an affidavit and merely attached to submissions (**The Police Federation and others v The Commissioner of INDECOM and another** [2018] JMCA Civ 10 cited). The applicant put forward the following further submissions regarding why it was improper for the court to consult the Hansard:

- a) The Bill promoter did not consider the issue of the proper interpretation of sections 33(2) and (2A) of the Jury Act in relation to the issues between the parties;
- b) The words attributed to the Minister of Justice cannot correctly be attributed to "parliament" or as reflecting the "intention of parliament";
- c) The Crown's submission ignored the text directives in relation to the proper construction of section 33(2) of the Jury Act; and
- d) The Crown failed to consider the high constitutional principles such as the separation of powers doctrine and critiques of the wide application of **Pepper v Hart** without referencing the estoppel principle.

[39] Counsel argued that any comments in the Hansard on section 33(2) of the Jury Act could not be relied on, as the material speakers were not the promoters of the section 33(2) amendments and, in any event, misconstrued the clear language of section 33, which, in his submission, allows three levels of peremptory challenge.

[40] By the affidavit of Mr Ronaldo Everett, legal clerk, filed and sworn on 31 July 2023, the applicant placed before the court certified copies of the relevant extracts of the Jamaica Hansard from the House of Parliament Library, concerning both Jury (Amendment) Bills for 2015 and 2016. These extracts were certified by the Clerk to the Houses, Valrie Curtis. Both Ms Curtis' certificate and the relevant extracts were exhibited to Mr Everett's affidavit. Counsel for the applicant submitted, in the alternative, that this

affidavit may be received into evidence and relied upon, should the court wish to rely on the Hansard.

Discussion

The provisions of the Jury Act concerning peremptory challenges

[41] The appropriate starting point in arriving at a determination on this ground is an examination of the relevant provisions of the Jury Act concerning peremptory challenges. The chief provision brought into focus is section 33 of the Jury Act, which deals with peremptory challenges, and which has been subject to two fairly recent amendments; the Jury (Amendment) Act, 2015, which made a substitution to section 33(2) of the original Act, and, the Jury (Amendment) Act, 2016 which made an amendment to section 33(2) and inserted subsection 33(2A). With these amendments, which applied to the trial of the applicant's case, sections 33(1), (2), (2A), and (3) of the Jury Act stipulate as follows:

"33-(1) Every person arraigned for an offence referred to in section 31(1) shall be allowed to challenge seven and no more of the jurors by way of peremptory challenge and without being subject to assign any cause therefor.

(2) Subject to subsection (2A), every person **arraigned** before the Circuit Court for an offence, other than an offence referred to in section 31(1), shall be allowed to challenge-

- (a) **four** and no more of the jurors, where the **arraignment is for the offence of murder** (other than murder referred to in section 31(1) (b)) or **for any other offence that attracts a minimum penalty of a term of imprisonment of not less than fifteen years;** and
- (b) **two** and no more of the jurors, where the **arraignment** is for any other offence,

by way of peremptory challenge and without being subject to assign any cause therefor.

(2A) In respect of offences tried jointly, the peremptory challenges allowed for the purposes of subsection (2) shall be four.

(3) The Crown shall not be permitted to require any juror to stand by, but instead thereof the Director of Public Prosecutions or any Counsel appearing for the Crown shall be allowed to challenge, in respect of every person arraigned, seven and no more in the case of an offence referred to in section 31(1), or four and no more in the case of an offence referred to in subsection (2)(a), or two and no more in any other case, of the jurors by way of peremptory challenge and without being subject to assign any cause therefor.”
(Emphasis supplied)

[42] A review of these provisions demonstrates that a tiered approach has been adopted by the legislature concerning the number of peremptory challenges. Where a person is arraigned for more serious offences (namely treason, or murder committed under certain circumstances, generally considered to be “capital murder”, for which a sentence of death may be imposed – see section 31 of the Jury Act), the number of peremptory challenges afforded is seven. In cases of “non-capital murder” or other offences that attract a minimum term of imprisonment of 15 years, the number of peremptory challenges is four. For other, less serious offences, attracting lower penalties, only two challenges are afforded. Subsection (2A) provides a further stipulation where offences are tried jointly. That subsection will also be discussed in some detail below.

[43] It is the applicant’s contention in the first place that he was entitled to four challenges, as the offence of accessory before the fact to murder, for which he was charged, attracted a minimum penalty of 15 years’ imprisonment. This was also the view of defence counsel at trial, as can be seen on pages 71 to 74 of the transcript, where defence counsel sought to make a third peremptory challenge during the empanelling of the jury. He was prevented, however, by the learned judge who pointed to the amendment to the Jury Act by which the number of challenges had been reduced, thereby limiting defence counsel to two.

The penalty for the offence of accessory before the fact to murder

[44] This necessitates, therefore, an examination of the law regarding the penalty for the particular offence, accessory before the fact to murder. Counsel on both sides pointed the court to sections 34 and 35 of the CJAA, with counsel for the applicant saying that section 34 was applicable and counsel for the Crown disputing this on the basis that only section 35 was applicable. Sections 34 and 35 of the CJAA state:

"34. Whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law, or by virtue of any statute or law passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon.

35. Whosoever shall counsel, procure, or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any Statute passed or to be passed, shall be guilty of felony, and may be indicted and convicted either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as any accessory before the fact to the same felony, if convicted, as an accessory, may be punished." (Emphasis supplied)

[45] Section 34 of the CJAA indicates that an accessory before the fact "may" be indicted, tried, convicted and punished as if he were a principal felon. Section 35 of the CJAA seems to provide, among other things, a definition for an accessory before the fact (see **Wallace and others v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 42, 33 and 40/2003, judgment delivered 20 December 2004, at para. 11) and by this section, a person may be indicted and convicted either as an accessory before the fact to the principal felony, or of the substantive felony. In either scenario, the accessory before the fact may be punished in the same manner as an accessory before the fact to that felony, may be punished.

[46] We do not agree with either counsel that sections 34 or 35 of the CJAA are the only relevant provisions in this case. This is because section 81 of the OAPA makes specific provision for the punishment of accessories before and after the fact, where the felony is one punishable under that act. The felony in this case was murder, which is punishable under the OAPA.

[47] Section 81 of the OAPA provides:

“In the case of every felony punishable under this Act every principal in the second 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; ...”
(Emphasis supplied)

[48] Section 81 of the OAPA seems, through the use of the word “shall”, to mandate that an accessory before the fact to any felony punishable under the Act, be liable to the same punishment as the principal offender. In this case, the applicant being indicted as an accessory before the fact to murder, section 81 of the OAPA would be the applicable provision to his case. In this regard, the well-known maxim of statutory interpretation *generalia specialibus non derogant* applies. By that maxim, general words ought not to be used to govern a situation which is addressed by specific words (see **Donald Ho v Asset Recovery Agency** [2023] JMCA App 37 at para. [16]). Therefore, sections 34 and 35 of the CJAA, being general provisions, would not apply to the penalty for the offence of accessory before the fact to murder.

[49] It is essential, therefore, to examine the relevant provisions of the OAPA concerning punishment for the offence of murder, in order to determine whether it carried, at the material time, a minimum punishment of 15 years’ imprisonment.

[50] These provisions are found at section 3 of the OAPA, and in particular, so far as relevant to this case, section 3(1). It provides:

“3.-(1) Every person who is convicted of murder falling within

—

(a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;

(b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years.”

[51] Section 2(1)(a) to (f) concerns murders committed in the course of or ancillary to other offences (burglary, housebreaking, arson, robbery, or a sexual offence), murder of a certain category of persons (members of the security forces, or correctional officers acting in the course of duties, witnesses in court proceedings, jurors, Justices of the Peace, among others), murders committed pursuant to an arrangement and murders involving such violence as are calculated to create fear in the public. Section 3(1A) concerns a person who was previously convicted of murder in Jamaica, and was thereafter convicted of another murder. Section 2(2) relates to all other murders, save for those committed in circumstances specified in section 2(1)(a) to (f) or where section 3(1A) is applicable.

[52] Section 2(2) of the OAPA is the relevant section for consideration in this case. Based on these provisions, the minimum penalty for the offence of murder at the time of the applicant’s trial (prior to more recent amendments to the OAPA; see the Offences Against the Person (Amendment) Act, 2025) was life imprisonment or a fixed term of imprisonment of not less than 15 years. As an accessory before the fact to murder, murder being the felony, as per the requirements of section 81 of the OAPA, the applicant was subjected to the same minimum term of imprisonment of 15 years. As such, section 33(2)(a) of the Jury Act would have been applicable, and the applicant was entitled to four peremptory challenges for that offence and not two. The fact that section 33(2)(a) of the Jury Act does not use the term “mandatory minimum” penalty of not less than 15 years is of no consequence in this regard.

[53] In these circumstances, the learned judge erred in limiting the applicant’s peremptory challenges to two. The effect of this error will be considered below.

[54] This ground of appeal, therefore, succeeds.

The interpretation of section 33(2A) of the Jury Act

[55] Although our conclusion that the applicant was entitled to four peremptory challenges in keeping with section 33(2)(a) of the Jury Act is sufficient to dispose of this ground of appeal, we will nevertheless address the second premise on which the applicant argued that he was entitled to four peremptory challenges, in order to provide clarity for future proceedings.

[56] Based on section 33(2A) of the Jury Act (concerning the number of challenges to be allotted where offences are tried jointly), the applicant asserted that, as he was tried jointly for two offences, he was entitled to four peremptory challenges, regardless of whether any of the offences attracted a minimum penalty of 15 years' imprisonment. The Crown disputed this position and contended that the fact of two offences being tried jointly does not necessarily give rise to an entitlement to four peremptory challenges. Rather, it was Parliament's intention, by introducing subsection (2A) to allow for offences under section 33(2)(a) of the Jury Act (which have four challenges) to be tried jointly with offences under section 33(2)(b) of the Jury Act (which have only two challenges). Joinder in this manner results in each party (the Crown and defence) being entitled to four peremptory challenges, thereby solving a trial backlog problem whereby offences arising out of the same facts, but attracting different peremptory challenge entitlements, could now, by this amendment, be tried together. The further argument of the Crown was that, as the applicant was being tried for two offences that fell under section 33(2)(b) of the Jury Act, he was only entitled to two challenges, despite the two offences being joined on the same indictment.

[57] We have already found that the offence of accessory before the fact to murder falls within section 33(2)(a) of the Jury Act, as attracting a minimum penalty of 15 years' imprisonment. With respect to the offence of accessory after the fact to murder, it is our finding that this falls under section 33(2)(b) of the Jury Act based on section 81 of the OAPA, the latter part of which states concerning that offence:

“... 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;**” (Emphasis supplied)

[58] As such, section 81 of the OAPA prescribes the penalty for an accessory after the fact to murder as life imprisonment. This would be a maximum penalty, in keeping with section 44 of the Interpretation Act, which provides:

“Where any fine or penalty is imposed by or under the authority of any Act it shall be implied that the amount of such fine or penalty is the maximum amount; **and where by any Act any person may be sentenced to any term of imprisonment it shall be implied that such term of imprisonment is the maximum term**” (Emphasis supplied)

As section 81 does not prescribe a minimum penalty, section 33(2)(a) of the Jury Act would not be applicable to the offence of accessory after the fact.

[59] We note also the provisions of section 37 of the CJAA, which states:

“Every accessory after the fact to any felony **(except where it is otherwise specially enacted)**, whether the same be a felony at common law, or by virtue of any Statute passed or to be passed, shall be liable, at the discretion of the Court, to be imprisoned for a term not exceeding two years, with or without hard labour;” (Emphasis supplied)

[60] As specific provision is made in the OAPA for accessory after the fact to murder, section 37 of the CJAA would not be applicable in determining the punishment for that offence.

[61] Using the Crown’s interpretation of section 33(2A) of the Jury Act, the applicant would still have been entitled to four challenges, as there was a joinder of a section 33(2)(a) offence (accessory before the fact to murder), with a section 33(2)(b) offence

(accessory after the fact to murder). Based on this, the applicant would also succeed on this premise, in any event.

[62] It is necessary, however, for this court to determine the proper interpretation to be applied to section 33(2A) of the Jury Act, that is, whether it should be interpreted to mean the joinder of any two or more offences (as put forward by the applicant), or only the joinder of offences with different number of challenges (as put forward by the Crown).

[63] In arriving at this determination, this court will first have regard to the relevant principles of statutory interpretation. The House of Lords case of **Regina (Quintavalle) v Secretary of State for Health** [2003] 2 AC 687 provides useful guidance. Lord Bingham of Cornhill, at para. 8 of that decision, made the following statement:

“The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. **Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.**” (Emphasis supplied)

[64] Lord Steyn, who also agreed with Lord Bingham, stated further at para. 21:

"... In *Cabell v Markham* (1945) 148 F 2d 737, 739 Learned Hand J explained the merits of purposive interpretation:

'Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it a statute, a contract, or anything else. **But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.'**

The pendulum has swung towards purposive methods of construction. ..." (Emphasis supplied)

[65] In the more recent case of **Regina (O) v Secretary of State for the Home Department; Regina (Project for the Registration of Children as British Citizens) v Secretary of State for the Home Department** [2023] AC 255, from the UK Supreme Court, Lord Hodge DPSC reiterated the fundamental principles of statutory interpretation and stated:

"29 ... Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in *Spath Holme*, p 397: 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

30 ...

31 Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. Lord Nicholls, again in *Spath Holme* [2001] 2 AC 349, 396, in an important passage stated:

'The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the 'intention of Parliament' is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House ... Thus, when courts say that such-and-such a meaning 'cannot be what Parliament intended', they are saying only that the words under consideration cannot reasonably be taken as used by Parliament with that meaning.'

[66] In the present case, we accept, as the overarching principle, that this court's responsibility is to construe section 33(2A) of the Jury Act, so as to ascertain the meaning intended by Parliament, taking account of the words of the section, together with the Jury Act as a whole, and the historical context behind the enactment. We are indeed aware that the duty of the court is to interpret and not legislate, as stated by Lord Hope in **Regina v A (No 2)** (see para. 108).

[67] In so doing, we note that section 33(2A) was inserted into the Jury Act by way of an amendment. This fact is critical to understanding the section and determining the object that Parliament sought to accomplish with this amendment. As stated in Halsbury's Laws of England (Volume 96 (2024)) at para. 741:

"There is some presumption that an Act passed to amend the law is directed against defects which came into notice about the time when the Act was passed."

[68] The 2016 amendment came after more extensive amendments that were made to the Jury Act in 2015. Significant among the 2015 amendments were the reductions in the number of jurors required to try offences other than capital murder and treason from 12 to seven and a reduction in the number of peremptory challenges for those latter offences. A review of the Jury Act, both prior and subsequent to the amendments, demonstrates that the legislature consistently applies a tiered approach in assigning the number of jurors to form the array and the number of peremptory challenges allowed. That is to say, the number of jurors in each situation is determined by the class in which an offence falls, and the class of offences is based on the gravity of the offence and the sentencing regime attached. Prior to the 2015 amendment, the Jury Act demarcated two classes of offences. The first class consisted of murder and treason, which entitled an accused to an array of 12 jurors and seven peremptory challenges. The second class was simply every other offence, in respect of which, an accused was entitled to be tried by seven jurors and could make five peremptory challenges. By the 2015 amendment, the classes of offences were slightly modified. Concerning the number of jurors that formed the array, there remains two classes of offences. The first class consists of capital murder and treason, which still requires 12 jurors to form the array. The second class is now every other offence, including non-capital murder, for which seven jurors form the array. Where peremptory challenges are concerned, the offences are demarcated into three classes, namely, (1) capital murder (for which seven challenges are allowed); (2) non-capital murder and other offences which attract a minimum penalty of 15 years' imprisonment (for which four challenges are allowed); and (3) any other offence (for which two challenges are allowed).

[69] By the 2016 amendment, section 33(2) was amended to insert the words "[s]ubject to subsection (2A), every" as the beginning of the section, which previously commenced with "Every". Also, section 33(2A) was added. Both amendments concerned peremptory challenges. These amendments, together with an amendment to section 44(1A) concerning majority verdicts, were the only changes made to the Jury Act by the 2016 amendments. It is reasonable to conclude, in all these circumstances, that there

was an issue that Parliament desired to address regarding peremptory challenges through the inclusion of section 33(2A).

[70] Within this overall context, it is necessary to determine the mischief that section 33(2A) sought to resolve. On a textual review of the section, the mischief is not readily apparent. However, the Crown contends that the mischief is disclosed by the record of the Hansard surrounding the discussions on the Jury (Amendment) Bill, 2016.

[71] By order of this court, made on 17 July 2023, permission was granted for reliance on the Hansard by the Crown. The court made the order on the Crown's application that the material from the Hansard be filed and served on counsel for the applicant. This was done by way of documents affixed to submissions from the Crown.

[72] We are grateful to counsel for the applicant for producing certified copies of the relevant records and affixing the same by way of an affidavit (the affidavit of Ronaldo Everett), in keeping with correct procedure. The court had regard to this affidavit.

[73] That said, the question is whether there is sufficient legal basis to permit this court to use these records to assist in determining what Parliament meant by the words of section 33(2A). The requirements for consideration of the Hansard were laid down in **Pepper v Hart** as follows (see headnote at page 43d and e):

"Having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to parliamentary material as an aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (b) the material relied on consisted of statements by a minister or other promoter of the Bill which led to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effect, and (c) the statements relied on were clear."

[74] These are cumulative requirements, in that each must be satisfied (see page 52f of **Pepper v Hart**). We, therefore, consider each in turn.

[75] On a plain reading of the words of section 33(2A) of the Jury Act, we are of the view that although it could appear to convey the meaning asserted by the applicant, the meaning contended by the Crown may also reasonably be conveyed. This is because of the use of the phrase, "for the purposes of subsection (2)". There is no apparent reason for the inclusion of the phrase, if it were Parliament's intention that all offences tried jointly, regardless of their seriousness, should entitle an accused to four challenges. Such an intention would have been accomplished without the use of that phrase. We consider the use of this phrase to be somewhat ambiguous.

[76] We are also of the view that the meaning contended for by the applicant may produce two absurd results. Counsel for the applicant very helpfully cited the text Bennion, Bailey and Norbury on Statutory Interpretation, 8th edition, with specific reference to section 13.1 (at page 500), which provides:

"Presumption that 'absurd' result not intended

(1) The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature. Here, the courts give a very wide meaning to the concept of 'absurdity', using it to include virtually any result which is impossible, unworkable or impracticable, inconvenient, **anomalous or illogical**, futile or pointless, artificial, or productive of a **disproportionate counter-mischief**.

(2) The strength of the presumption against absurdity depends on the degree to which a particular construction produces an unreasonable result.

(3) The presumption may of course be displaced, as the ultimate objective is to ascertain the legislative intention."
(Emphasis supplied)

[77] On this basis, we find that two anomalies may result from the applicant's interpretation. The first being that, applying such an interpretation, in the event of a

joinder of offences falling under section 33(2)(b) **only**, the accused would be allowed four challenges, whereas the Crown would still be limited to two challenges by virtue of section 33(3) (cited at para. [41] above), there being no similar provision to section 33(2A) applicable to the Crown. This would represent a deviation from what obtained both prior and subsequent to the 2015 amendment, as, in both instances, it was typical for the Crown and defence to have the same number of challenges.

[78] The second absurd result is that there would be a deviation from the approach taken by the Jury Act to demarcate challenges by the class of offences. Specifically, it is suggested that even if the offences joined fall within the third class of offences (any other offence), an accused should be afforded the number of challenges allowable for the second and more serious class of offences. This would be contrary to the obvious legislative intent to reduce the number of peremptory challenges available, generally, and for lesser class offences. The overall scheme of the amendments demonstrates that Parliament did not intend to increase the number of peremptory challenges available.

[79] In these circumstances, we find the first condition of **Pepper v Hart** to be satisfied. Consideration of the second and third conditions requires a review of the Hansard itself. The records of particular relevance to this case are found in the Jamaica Hansard, Parliamentary Proceedings of the Honourable House of Representatives, Session 2016 – 2017 Vol 42 No 1, April 14, 2016 – July 26, 2016 ('the first record') and the Jamaica Hansard, Parliamentary Proceedings of the Honourable Senate, Session 2016 – 2017 Vol 42, Part 1 of 11, January 08, 2016 – July 22, 2016 ('the second record'). At pages 62 and 63 of the first record, the Minister of Justice, Mr Delroy Chuck is recorded as making the following statements:

"... I'm very pleased, Mr. Speaker, to present to the House, the Jury Amendment Bill 2016. This Bill is aimed at rectifying provisions and omissions made in the amendment of the Jury Act, by the Jury Amendment Act 2015, which came into force on February the 1st 2016. ...

Additionally, Mr. Speaker, the Jury Amendment Act 2015, created a two tiered system of peremptory challenges. Under the first tier, offences such as noncapital murder and other offences, which carry a mandatory minimum sentence of 15 years are allowed for [sic] peremptory challenges. Under the second tier, persons arraigned for trial for offences which do not carry a mandatory minimum sentence are allowed two peremptory challenges. **The differences in peremptory challenges, Mr. Speaker, for these offences has resulted in the unintended consequence that offences which could be joined on the same indictment for trial are no longer capable of being tried together.**

...

Mr. Speaker, I will now proceed to explain the Bill clause by clause.

...

Clause 2 inserts a new subsection 2(a) [sic] which permits for offences that are being tried jointly, which arise out of the same facts with different sentencing regimes, the preemptory [sic] challenges allowed will be four. This amendment now removes the disparity which existed with the differences in peremptory challenges, which prevented such matters from being tried together.” (Emphasis supplied)

[80] Subsequently, there was discussion on the Bill, which was given full support by the members of the opposition and other members of Parliament. The Bill was thereafter read a second time and passed through the committee stage without any amendment.

[81] At page 314 of the second record, Senator Kamina Johnson-Smith is noted as saying the following with reference to the same Bill:

“Mr. President, I will now explain the Bill clause by clause.

Clause 1 states the short title of the Bill as the Jury (Amendment) Act, 2016.

Clause 2 inserts a new subsection (2A) which permits for offences that are being tried jointly which arise out

of the same facts with different sentencing regimes to allow for four peremptory challenges. This amendment now removes the disparity which existed with the difference in peremptory challenges which prevented such matters from being joined.” (Emphasis supplied)

[82] Thereafter, debate followed on the Bill, which was widely supported. In the same session, it went through the committee stage where it was passed without amendment.

[83] As such, in both the House of Representatives and the Senate, the same explanation was given for the insertion of subsection (2A), which was to remove the disparity which existed with respect to the joinder of offences with different entitlements to peremptory challenges arising from different sentencing regimes. In our view, these statements were clear and very clearly stated the reason for the insertion of subsection (2A), which further demonstrates the effect that subsection (2A) was intended to have. The relevant statements were made by the promoter of the Bill and the relevant Ministers, and represented the collective intention of Parliament regarding the amendment. In these circumstances, we find that the second and third requirements adumbrated by **Pepper v Hart** are also satisfied, thereby allowing this court to have regard to these statements in the interpretation of subsection (2A).

[84] Similarly, we find on the basis of **Pepper v Hart** that the Memorandum of Objects and Reasons to the Bill, which is publicly available and was annexed to the Bill, may also properly be considered by the court in arriving at its determination. The applicant also relied on the Memorandum of Objects and Reasons in his written submissions filed on 20 March 2023. It stated:

“A decision has been taken to amend the Jury Act. The Jury (Amendment) Act, 2015, which came into effect on February 1, 2016, made several changes to the jury system including, *inter alia*, changes to address the problem of inadequacy of jurors to serve in the Circuit Courts, reducing the number of jurors required in criminal trials and reducing the number of peremptory challenges.

It has become necessary to further amend the Jury Act to provide for –

- (c) A verdict of not less than five jurors for non-capital murder, thereby correcting the anomaly that only unanimous verdicts would be acceptable in trials for non-capital murder; and
- (d) **That where offences are being joined which arise out of the same facts but which are subject to differing sentencing regimes, the peremptory challenges allowed shall be four.**

This Bill seeks to give effect to that decision.

DELROY CHUCK
Minister of Justice.”

(Emphasis supplied)

[85] Having regard to these external sources, Parliament’s intention for including subsection (2A) clearly accords with the position stated by the Crown, and was geared toward allowing for joinder of offences with different sentencing regimes, where the offences arise out of the same facts. There is no basis for concluding that this was not the intention of Parliament. To find otherwise would be to ascribe a meaning to the section that Parliament did not intend. Also critical to this point, is that a construction of section 33(2A) in this manner does not result in any detriment to the citizen. As such, we find that the interpretation put forward by the Crown is the correct interpretation to be applied, such that joinder of two or more offences that each fall under section 33(2)(b) of the Jury Act, would not entitle an accused person to four peremptory challenges under section 33(2A). Rather, the peremptory challenges in such a case would be limited to two. Whereas an accused person would be entitled to four challenges where two or more offences with different sentencing regimes are joined, that is, an offence falling under section 33(2)(a) being joined with an offence falling under section 33(2)(b).

The consequences of the denial of the applicant’s peremptory challenges

[86] The applicant has successfully demonstrated that he was entitled to four peremptory challenges and that he was expressly denied the right to exercise two of those challenges. We note the guidance offered in Halsbury's Laws of England (Volume 61A (2023)) at para. 233 as to the effect of such a situation, as follows:

“The improper disallowance of a jury challenge renders the subsequent proceedings before the jury **absolutely void, and is ground for a new trial being ordered on appeal, by a writ of venire de novo in the case of criminal proceedings.** Therefore, it is not within the province of the appellate court to consider whether the person complaining has been prejudiced and to exercise a discretion as to granting a new trial.” (Emphasis supplied)

[87] The effect, therefore, of such an irregularity is that the trial is voided and there is ground for a new trial to be ordered. In essence, it is treated as though there was no trial at all. This principle was applied in the case of **R v Page** [1965] Crim LR 444 and expressed in others (see **R v Edmonds** [1814-23] All ER Rep 241; and **R v Williams** (1925) 19 Cr App Rep 67). In **R v Page**, the appellant, who was convicted of robbery with violence, appealed on the ground that he was denied his full number of peremptory challenges. The complaint was found to be true, resulting in the trial being declared a nullity and a *venire de novo* being ordered.

[88] In declaring the proceedings a nullity, the court need not contemplate whether there was evidence of prejudice caused by the denial of the correct number of peremptory challenges. In the case of **Raymond Cloutier v The Queen** [1979] 2 RCS 709 from the Supreme Court of Canada, Pratte J stated at page 724:

“The accused, who is erroneously denied a peremptory challenge, is entitled to ask that the trial and the guilty verdict returned by an irregularly empanelled jury be annulled; **it is not necessary for him to prove a prejudice**; there is a ‘prejudice de droit’; as to this no doubt exists

In *King v Edmonds* ... Abbott C.J. said:

'It must further be observed that **the disallowing of a challenge is not a ground for a new trial, but for what is strictly and technically a venire de novo. The party complaining thereof applies to the Court, not for the exercise of the sound and legal discretion of the judges, but for the benefit of an imperative rule of law, and the improper granting, or the improper refusing of a challenge, is alike the foundation of a writ of error.'** " (Emphasis supplied)

[89] The basis for this approach may be gleaned from the rationale behind peremptory challenges, which demonstrates their importance. Pratt J explained at pages 720 to 721 as follows:

"According to Blackstone (*Commentaries on the Laws of England*, Lewis ed., vol. 4, No. 353, at p. 1738), there were two reasons which justified the existence of the right to peremptory challenges:

'353. Challenges upon any of the foregoing accounts are styled challenges *for cause*, which may be without stint in both criminal and civil trials. But in criminal cases, or at least in capital ones, there is, *in favorem vitae*, allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a *peremptory* challenge; a provision full of that tenderness and humanity to prisoners for which our English laws are justly famous. **This is grounded on two reasons. 1. As every one must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is**

still at liberty, if he pleases, peremptorily to set him aside.'

The very basis of the right to peremptory challenges, therefore, is not objective but purely subjective. The existence of the right does not rest on facts that have to be proven, but rather on the mere belief by a party in the existence of a certain state of mind in the juror. The fact that a juror is objectively impartial does not mean that he is believed to be impartial by the accused or the prosecution; **Parliament, when allowing each party a number of peremptory challenges, clearly intended that each party have the right to remove from the jury a number of individuals whom he does not believe to be impartial, though he could not provide evidence in support of such belief.**" (Emphasis supplied)

[90] Similarly, this court in the case of **Shawn Campbell and others v R** [2024] JMCA Crim 30 (**'Shawn Campbell (CA, 2024)'**) pointed out the important safeguards to the fairness of the jury system. This includes peremptory challenges. There, the court said:

"[168] ... The safeguards of fairness in our jury system do not reside in larger numbers of jurors forming the array in individual cases. Rather, they are found in the age-old common law and statutory mechanisms, which have proven to effectively reduce the risk of bias on the part of jurors and yield fair verdicts. Mechanisms such as polling of jurors, peremptory challenges, and challenges for cause, remain available even with the reduction in the number of jurors. The efficacy of these mechanisms is not undermined by the reduction in the number of jurors occasioned by the amendment. Fairness is also maintained by the quality of the legal directions given to the jurors and the character and conduct of the jurors."

[91] The denial of a peremptory challenge may properly be seen as resulting in a miscarriage of justice and indeed a breach of the right to a fair trial as provided for in section 16(1) of the Constitution of Jamaica ('the Constitution').

[92] There is, however, an important point of distinction between a denial of a peremptory challenge and a failure to exercise the right. This was demonstrated in **R v**

Berkeley [1969] 2 QB 446, in which case, the defendant was not advised by the court of his right to challenge and did not exercise the right. Notwithstanding this, his appeal was dismissed. It was held that:

“the defendant not having been denied his right to challenge, there had been merely a failure to follow a practice of informing him of the existence of the right, that, in the circumstances, it would be wrong to speculate whether he would have acted differently if he had been given notice of the existence of the right and wrong to say that he had been prejudiced or that any miscarriage of justice had occurred ...”

[93] It is apparent, therefore, that each case must be examined on its own unique facts when dealing with such errors. The applicant in this case was aware of his right to four challenges and sought to exercise it. He was incorrectly refused. The trial became a nullity from the moment the empanelling of the jury was completed without the applicant being allowed to enforce his right to the full number of peremptory challenges.

[94] It is necessary, therefore, to consider the question of whether a new trial should be ordered (which issue is raised under ground 16).

[95] Arising from our conclusion on this ground, we do not think it necessary to embark upon a determination of all the other grounds of appeal, save and except for ground two (dealing with the issue of challenge to the polls for cause), and an aspect of ground seven (dealing with whether the applicant was incorrectly indicted).

Ground 2 - Challenge to the polls for cause

[96] The applicant also challenged the correctness of the process by which the challenge to the polls (jurors) for cause was conducted. While this will not alter or affect the outcome of the appeal, we wish to offer some guidance for trial judges when dealing with such challenges.

[97] Though counsel for the applicant referred to the pre-trial questioning of jurors in this case as “polling”, our research has revealed that the term “polling” usually refers to

the process whereby each juror is asked to confirm their verdict at the end of the trial process. Therefore, “polling” is not the correct term to be used in this instance and hereafter, we will refer to the process as “questioning”, as opposed to “polling”.

Submissions on behalf of the applicant

[98] Counsel submitted that section 33(4) of the Jury Act, regarding challenge to the polls for cause, had been engaged based on the facts of the case, specifically, that there was pre-trial publicity. He referred the court to page 15, lines five to 17 of the transcript, and pointed out that an application was made under that section by defence counsel and that the application was granted.

[99] Counsel contended that the questioning process was not conducted using the correct procedure as required under section 33(4) of the Jury Act. He submitted that the learned judge wrongly curtailed the proposed questions prepared by the defence “without having a lawful basis for curtailing the accused’s right to cross-examination of prospective jurors under section 33(4)”. He added that the learned judge and the prosecutor had no right to vet or object to the questions before their submission to the individual juror. The cases of **Director of Public Prosecutions v Williams and another** (2016) 87 WIR 403 (**DPP v Williams**) and **R v Andrews** [1998] All ER (D) 454 (**Andrews**) were referred to.

[100] It was also submitted that section 33(4) provided that the questioning of jurors be done via a *voir dire* (which was not done). Further, that the jurors should have been examined on oath, that is, the learned judge should have ensured the jurors were sworn before answering the questions. Counsel asserted that the trial process was rendered unfair, the applicant was deprived of the full effect of the application for challenge for cause, and the conviction was unsafe.

[101] Further complaints by counsel were that:

- 1) the learned judge failed to recognise that she had a residual discretion to discharge a juror who ought not to be serving on the jury. In this regard, the case of **Regina v Ford (Royston)** [1989] 3 WLR 762 was relied upon.
- 2) the applicant was making a challenge to the array, and there was no need for a further application for challenge to the polls for cause pursuant to section 33(4) of the Jury Act, since an application was already granted under that section.
- 3) the learned judge should have formally ruled with respect to her finding according to section 33(4) of the Jury Act. The Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book') at pages 6 to 8 was cited.

Submissions on behalf of the Crown

[102] King's Counsel for the Crown denied that the section 33(4) (Jury Act) process was engaged, and argued that, in any event, the process was not conducted in the presence of all potential jurors. Reference was made to the transcript in stating that the learned judge had devised a system that allowed the process to be conducted outside of the hearing of prospective jurors. Reliance was placed on **DPP v Williams**. Learned King's Counsel also argued that the learned judge exercised due care in selecting the questions to be posed to the potential jurors and that, nine of the 16 questions proposed by the applicant's attorney were allowed by the learned judge. Referring to **Andrews**, it was submitted that the questions refused were jury vetting and repetitious.

Discussion

[103] Under section 16(1) of the Constitution, the right to due process includes the right to a trial by an independent and impartial court:

"16.-(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded

a fair hearing within a reasonable time by an independent and impartial court established by law.”

[104] Defence counsel had made an application for there to be the questioning of the jury based on the issue of pre-trial publicity (see page four, lines 11 to page five, line eight of the transcript). That application was supported by an affidavit of the applicant setting out the complaints regarding pre-trial publicity in the media as well as a reference by the Minister of National Security in Parliament, on 30 October 2019, to gang-related cases, including the trial of the applicant. There was no objection by the prosecution to this application. At page 15 of the transcript, the application was granted by the learned judge in these terms:

“The application of the defendant which was filed in the court on the 6th of November 2019, in the matter of section 16 and 19 of the Constitution of Jamaica in the matter of section 34 -- 33(4) of the Jury Act and in the matter of section 19 of the Constitution, is granted pursuant to paragraph 1; that is to say, the jury is to determine -- sorry. The jury that is to determine the trial of the applicant be polled. I have not heard any evidence to suggest that there is any other declaration in respect of this being exceptional.”

[105] The applicant argued that there were three main failings of the learned judge, in that she:

- 1) allowed the questioning process under section 33(4) of the Jury Act to be conducted in the presence of all potential jurors;
- 2) unduly reduced the questions to be put to the jurors (from 16 to four);
and
- 3) refused to ask the jurors whether they knew the deceased man or other questions that she would normally ask jurors.

[106] Determination of these issues requires an examination of section 33(4) of the Jury Act. The section reads:

“(4) Nothing in this section shall affect any right of challenge to the polls for cause, either on the part of the prosecution or of the defence, and every such challenge for cause, if objected to by the opposite party, shall be tried and determined by the Court without a jury, and the person challenged shall be examined on oath, and shall be required to answer on oath all lawful questions relating to the trial of the challenge.”
(Emphasis supplied)

[107] On the plain reading of the section, it is referring to the procedure for treating with objections to challenges for cause. It cautions that its provisions will not affect the right of the prosecution or defence to make such challenges to the polls for cause. However, it does not explain what a challenge for cause is or the categories of such a challenge. Further, the actual process for challenge to the polls for cause is not outlined. The relevant common law principles, would, therefore, have to be considered in that regard.

[108] Section 33(4), therefore, is engaged where there are: (1) challenges for cause (to the extent that it mentions that there is a right to them); or (2) where the opposite party objects to the challenge for cause. Where there is such objection, potential jurors are examined on oath and made to answer “all lawful questions relating to the trial of the challenge”. Since a trial is thereby engaged, this would require a determination by the trial judge without a jury.

Categories of challenge

[109] There are two categories of challenge provided for in section 33 of the Jury Act. Ground one addressed the first category, namely, peremptory challenge. This ground now addresses the second category, that is, challenge for cause. In the text Commonwealth Caribbean Criminal Practice and Procedure 5th ed., the authors state at page 275:

“Challenges

Both the prosecutor and the defence have the right to challenge prospective jurors called, before a jury is finally

selected. **This right to challenge, from very early times, was dictated by the common law and later by statute in England. In Commonwealth Caribbean jurisdictions the right is stipulated in the provisions in legislation on juries.** There are two types of challenge: peremptory challenge and challenge for cause.” (Emphasis supplied)

[110] Section 33(4) of the Jury Act is only concerned with such challenge for cause. At page 278 of the same text, the authors indicate:

“Challenge for cause

In selecting a jury, both the prosecution and the defence have the right to unlimited challenges of jurors (the polls) once they show cause. The party, be it prosecution or the defence, who seeks to exercise this type of challenge must first lay a foundation of fact in support of the ground of his challenge.”

[111] There must, therefore, be a reason or cause for the juror to be challenged. Such a cause has a foundation of fact that is required to be laid. Challenges for cause may be to the array (the entire panel of jurors) or to the polls (individual jurors) (see Archbold Criminal Pleading, Evidence and Practice (2000) para 4-239).

[112] Counsel for the applicant’s argument that there was a challenge to the array must be put to rest. Such a challenge is indeed a challenge for cause, but it only arises where there is a concern that those responsible for setting up the jury pool acted improperly. The writers of Halsbury's Laws of England indicate:

“(ii) Challenge to the Array

226. Challenge to the array.

Challenge to the array is the taking of exception to the whole panel of jurors; it is a right of challenge on the ground that the person responsible for summoning the panel of jurors in question is biased or has acted improperly. It is commonly divided into the following two classes:

(1) principal challenge, where the summoning officer is in a position inconsistent with impartiality, as by being party to the

claim, related to one of the parties, having empaneled certain persons at the request of one of the parties or having a claim pending against them by either party; and

(2) challenge for favour, where the position of the summoning officer is not necessarily inconsistent with impartiality, but may be suspected.”

(see Volume 61A (2023) at para. 226)

There have been no such allegations in this case.

[113] In Archbold, Criminal Pleading, Evidence and Practice in Criminal Cases, 36th edition (paras. 510 to 520), the usual procedure for challenges to the array and for cause are set out. The only scenarios set out in relation to the challenge to the poll for cause are where an objection is taken separately to each juror as he is about to be sworn.

“The challenge must be made when the juror comes to the book to be sworn and before the officer begins to administer the oath.” (para. 515)

[114] The procedure for the individual challenge to a particular juror is outlined in the Bench Book, which states at pages 7 to 8:

“Procedure on Challenge to the Polls for Cause

1. Challenges are made when the jurors are called to the box but before the challenged juror is sworn.
2. The accused should be informed by the clerk of his right of challenge.
3. On a challenge being indicated, the juror should be asked to leave the jury box whilst the remainder of the selected jurors are sworn.
4. Subsequent challenges should be dealt with in the same way.
5. If counsel can state the grounds of challenge without prejudicing his client in the eyes of the jury, or embarrassing the juror concerned, the judge may be

able to deal with the matter in open court briefly and informally (e.g. in a case where the ground is that a juror is related to a potential witness).

6. Where it is not possible to deal with the matter informally, the judge should ask the sworn jurors to retire to their room in the charge of the jury police officer and the remainder of the panel should be asked to leave the court for the time being.
7. The challenged juror should be kept outside the court in the care of an usher but close by in case it is necessary to question him.
8. The judge must next decide whether to hear the challenge in open court or to exclude the public and the press.
9. If the grounds of challenge, make it desirable in the interests of justice and of the challenged juror to close the court the judge should announce that the court will sit 'as in chambers' and the public and the press should be asked to leave the court.
10. Challenges should not be heard in the judge's chambers.
11. If the ground of challenge appears prima facie valid and the facts are contested the Judge must decide the facts.
12. The burden of proof is on the party challenging and is the civil burden, that is, on a balance of probabilities.
13. The judge can hear evidence (which should be given on the voir dire oath) and himself question the juror and may permit counsel to ask questions directed to the particular ground of challenge alleged; speculative questions seeking to establish the basis for a challenge on different grounds are not permitted.
14. After hearing the evidence and any submissions, the judge should announce his findings, which should be recorded on the court record.

15. If the challenge is allowed, the juror should be discharged and a fresh juror called to take his place when the remainder of the jury have returned.
16. If the challenge is disallowed, the judge should caution the juror not to disclose to other jurors any of the matters that have been considered in the hearing of the challenge and also not to allow the fact that he has been challenged to influence him in any way."

[115] There is common law authority, however, that speaks to a challenge to the polls for cause as was requested by defence counsel, that is, where there is pre-trial publicity. This will be discussed below.

How then is this process to be conducted where there is pre-trial publicity?

[116] In section 33(4) of the Jury Act, the provision for jurors to be lawfully questioned is at a *voir dire* to determine the challenges for cause where there has been an objection by the opposing party. In that regard, they are required to be sworn. In the case at bar, there was no such objection to any challenge for cause. According to the transcript, however, questions were asked of the jurors which would have been outside of that provision for trials under section 33(4).

[117] At page 279 –of the text, Commonwealth Caribbean Criminal Practice and Procedure, 5th edition, the authors state:

"In wholly exceptional cases, the trial judge may permit challenge for cause of prospective jurors **without laying a foundation of fact individually against each juror. This may occur where there has been widespread and prejudicial pre-trial publicity sufficient to establish the probability of prejudice on the part of anyone who had read that kind of information:** R v Kray (1969) 53 Cr App R 412." (Emphasis supplied)

[118] In Archbold, Criminal Pleading, Evidence and Practice (2000) at para. 4-246, it is stated "[a]s to adverse publicity as the basis for a challenge for cause, see *R v Kray and others* 53 Cr. App R. 412 CCC".

[119] In **R v Kray** (1969) 53 Cr App Rep 412 (**Kray**), the issue of adverse publicity was discussed, and it was stated by the Central Criminal Court that:

“The mere fact that a previous trial ending in a verdict adverse to the defendant has been reported at length in the Press including fair comments on the evidence, should not ordinarily provide a case of probable bias or prejudice in jurors on a later trial of the defendant. Where, however, newspapers, it being known that there was to be a later trial, had dug up from the past of the defendant after conviction in the first trial, discreditable allegations which might be either fact or fiction and which had been publicised over a wide area,

Held: That those facts led to a prima facie presumption that anyone who had read that kind of information might find it difficult to reach a verdict in the second trial in a fair-minded way, **that a prima facie case of probability of prejudice had been established, and that defending counsel was entitled further to apply to be allowed to examine the jurors as they came into the box to be sworn. The procedure adopted in this case of giving a ruling of this kind before any juror came into court should be regarded as having been adopted because of the wholly exceptional nature of the case.** The procedure normally to be adopted is correctly set out in Archbold’s Criminal Pleading and Practice, 36th ed. 516 to 520.” (Emphasis supplied)

[120] In the Archbold, mentioned in **Kray**, the procedure set out at paragraph 520 (under the heading of ‘Trial of Challenges for cause’), indicates that:

“When the challenge has been made, the trial proceeds by witnesses called to support or defeat the challenge; the juror objected to may also be examined on the voir dire...”

This process speaks to the challenge to the single juror.

[121] In **Kray**, the process referred to in Archbold, by which jurors were examined as they came into the box, was adopted and adapted, for a challenge for cause in the circumstances of pretrial publicity. This was followed in the case of **Desmond Grant and others v The Director of Public Prosecutions** (unreported), Court of Appeal,

Jamaica, Supreme Court Civil Appeal No 27/1979, judgment delivered 18 April 1990, a decision of this court. The case involved pre-trial publicity concerning the applicants, which was said to be widespread in Jamaica. At pages 22 and 23, this court reviewed the procedures available to a trial judge dealing with extensive pre-trial publicity. Carberry JA, on behalf of the court, stated these to include:

“(i) The warning traditionally delivered by the trial judge to the jury to decide the case solely on the evidence presented before them at the trial and disregard any other material in arriving at their ‘true verdict’...

(ii) [C]hange of venue for cause shown.

(iii) [P]ostponement [of the trial], a remedy that may on occasion allow for passion to cool...

(iv) [T]he sanctity of the oath taken by the jurors;

(v) [T]he use of ‘challenge to the jurors’ peremptory or for cause shown. In the United States this aspect of the criminal trial seems to have been extensively developed, and extensive questioning of members of the panel as they come up to be sworn seems to be allowed, with a view to seeing whether they may be challenged for cause or not.

This has not been the practice in the United Kingdom nor in Jamaica. However Lawton J. took the unusual course of allowing defence counsel to examine individual jurors as they came to be sworn in *R. v Kray et al* (1969) 53 Cr. A.R. 412 (See also *R. v Kray et al* (No. 2) (1969) 53 Cr. A.R. 569 (C.A.).”

[122] This court then went on to endorse the process adopted by Lawton J in **Kray**:

“We have already referred to the extended right of challenge to the panel of jurors that may be available if the trial judge adopts the course followed by Lawton J in *R v Kray* (supra). We recommend that he does so. We are of the view that the attempt to find an ‘independent and impartial’ jury must be made.” (see page 42)

[123] This view was endorsed by the Privy Council on appeal in **Desmond Grant and others v DPP** [1982] AC 190 (**Grant v DPP**). The Privy Council there affirmed the

position of this court in treating with the case when it was before it. The Board noted the judgment of Carberry JA, who, as we have seen above, referred to common law remedial measures available to a trial court in that regard. In the judgment, their Lordships stated (at page 199B – D):

“The Court of Appeal's reasoning is summarised in the following passage from the judgment of Carberry J.A.:

‘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.’

The common law remedial measures there referred to were: change of venue to a parish distant from the area in which the deceased lived and had their friends; 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 and **examined upon oath** as to his freedom from any bias consequent upon the pre-trial publicity – a course which the Court of Appeal recommended should be followed in the exceptional circumstances of this case.” (Emphasis supplied)

[124] The Privy Council, therefore, provided insight as to the procedure to be followed when treating with exceptional circumstances. The Board confirmed that an examination could be done.

[125] We note also that in **DPP v Williams**, the Court of Appeal of Guyana made the point that such examination was allowable in exceptional cases of pre-trial publicity (although it was not carried out in that case). There, it was held that:

“Whilst in a wholly exceptional case, the trial judge might exercise his discretion to allow jurors to be cross-examined where it was not founded on challenge for cause, the instant case had not been wholly exceptional.” (see headnote at page 404f)

[126] In **The Attorney General of Jamaica v Clarke and anor** [2018] JMCA App 17, Phillips JA referred to the endorsement of the Privy Council in **Grant v DPP** and stated:

“[88] The Privy Council accepted the decision of this court. Their Lordships noted the existence of the common law remedial measures identified by this court that would provide adequate safeguards against prejudice due to pre-trial publicity. These measures include change of venue to a parish distant from the area in which the deceased and their friends lived, as well as a postponement of the trial to allow the adverse publicity to fade in potential jurors’ minds. Reference was also made to the right of an accused to challenge for cause.”

[127] The trial judge is the one who exercises the discretion as to the common law remedial measures to be applied (see **Andrews** at page 10). It is undisputed, however, that in exceptional circumstances of pretrial publicity, the trial judge could entertain an application for challenge to the polls for cause. In that circumstance, even if section 33(4) of the Jury Act is not engaged to the extent that there was no objection by a party to a challenge for cause, the Privy Council in **Grant v DPP** has now set in place the process that would include each prospective juror being examined on oath as to “his freedom from any bias consequent upon pretrial publicity”.

[128] As far as the other complaints of counsel for the applicant are concerned, we note that once the list of questions was settled by the learned judge, it was defence counsel

that requested that the learned judge should ask the questions. He was never engaged or sought to engage in questioning the jurors.

[129] Further, the transcript does not reveal that there was any objection to any individual juror after the questioning was complete. The learned judge would only be required to make a ruling in relation to each juror depending on the answers given to the questions that were asked. The learned judge has no right to release a juror in those circumstances, apart from certain situations such as set out in Halsbury's Laws of England:

"It may be appropriate for a judge to excuse a juror from a particular case if they are personally concerned in the facts of the particular case, or closely connected with a prospective witness, or has personal knowledge of the defendant. An unqualified juror, although they are not challenged by either party, may object to serve and, if the court finds that they are not qualified, they will be ordered to stand down. The court has power to refuse to allow to be sworn any juror who from physical or mental infirmity, temporary or permanent, is incapable of duly attending to the evidence." (see Volume 61A (2023) at para. 224)

[130] Once the learned judge determined that there was exceptional pre-trial publicity, the examination of the jury panel was allowable. However, based on the authorities considered above, counsel for the applicant is correct that the jurors should have been sworn. In this extraordinary situation, they are examined on oath as they come to the box before they are sworn in as jurors. There is, indeed, a requirement to be sworn before the questions are administered.

[131] We note that in **Andrews** and the **Attorney General of the Cayman Islands v Tibbetts** (2010) 76 WIR 220, the use of questionnaires is an alternative process that can be employed in order to avoid the real danger that jurors might be biased in particular cases. Although there is no precedent for such an approach at this time in this jurisdiction, it is one that could be adopted in the future by our trial courts, where appropriate, as part of best practices in the administration of the criminal justice system.

The learned judge allowed the process under section 33(4) of the Jury Act to be conducted in the presence of all potential jurors.

[132] The transcript reveals that when each potential juror had answered the agreed questions, and were otherwise not excused, he or she went to sit with the others in the jury box who had already gone through the process. The defence had raised the issue as to whether the potential jurors should have been allowed to hear the questions as others were being examined.

[133] The transcript reveals that the learned judge devised a remedy to deal with this issue. According to the transcript, at page 36, lines four to 14, the learned judge stated:

“... I am going to ask that when the seven persons are called and we are sending out the six persons, so we can ask questions of the individual, those six will go inside the jury room. Persons who are waiting for theirs [sic] names to be called could occupy the benches close by so that when the police goes and makes the call they will hear. That is the best, I think, we can do in the circumstances. So with that in mind, have them brought in and I will proceed from there.”

[134] As the jurors were about to be questioned, the transcript records at page 39, line 21 to page 40, line 6, that the learned judge said:

“Jurors, before you are sworn, there are a number of questions that we need to ask you and we will be doing so individually. So the Registrar will conduct Mr. Parsard, Miss Foster, Mr. Orridge, Miss McKenzie, Miss Wilkie and Mr. Porter to the jury room, and I will be sending for each of you individually thereafter. Understood? So you remain Miss Brown and the other six persons will be conducted to the jury room by the Registrar. Go with this gentleman, please.”

[135] The jurors were not questioned in the presence of others who had not yet been examined. Counsel for the applicant has submitted, however, that, in keeping with the principle in **Crosdale (Rupert) v R** (1995) 46 WIR 278 (**‘Crosdale’**), the learned judge should have dealt with matters of law in the absence of the jury. The sworn jurors (who were already seated in the jury box), should not have been in court during the

questioning of other prospective jurors. It is not clear that the principle in **Crosdale**, which applies where there are sitting jurors, can be transposed to this situation dealing with the questioning of prospective jurors. In any event, the fact is, the jurors were not questioned in the presence of others who had not yet been examined. The fact that the jurors remained in court after they were examined and sworn, could not be said to have any impact on the questioning of the other jurors or prejudiced the hearing of the matter. This is so because there was a previously agreed specific set of questions to be asked of each prospective juror, in order to determine what they knew about the matter and whether they could be impartial and have regard to the evidence in court only. The applicant's complaint in this regard is without merit.

The learned judge unduly reduced the jury questions from 16 to four.

[136] The defence formulated 16 questions. The Crown took issue with 14 of them and agreed with questions two and four only. The learned judge stated that she had reviewed them and "would not allow them, certainly not in the format that they [were] in and some of them, [she] believe[d] [were] irrelevant and vague" (page 15, line 23 to page 16, line one).

[137] The learned judge granted the application for the jury to be questioned. There was some discussion by the learned judge with the attorneys for both sides about the questions. On page 29, line 25 to page 30, line 4, the transcript records as follows:

"HER LADYSHIP: Very well. Okay. So let me just for clarity indicate again the questions that are allowed. Question number 2, 3, 6 is [sic] allowed. 15 and 16 as amended. And question number [sic] 4, 9, 10 and 13."

[138] We now observe the questions and the comments of the learned judge in relation to each:

- 1) Question 1 - "What is your honest view of Tesha Miller at this time?" This question was rejected by the learned judge as being vague. We find that this decision was not unreasonable.

- 2) Question 2 - "Have you heard any news report in which Mr Miller was referred to as the leader of a gang in Jamaica?" That question was allowed. Later it was amended: "Have you ever heard any news reports or any word on the street in which Mr Miller was referred to as the leader of a gang in Jamaica?"
- 3) Question 3 – "Have you heard any comments of any Member of Parliament about Tesha Miller published in the media?" This question was revised to read: "Have you heard the comments of any Member of Parliament about Tesha Miller published in the media?" This revised question was allowed.
- 4) Question 4 - "Do you believe you can with a fair conscience listen to evidence and the evidence only in this matter and give a true verdict?" That question was allowed.
- 5) Question 5 - "Are you aware of the fact that Tesha Miller has filed a claim for defamation against TVJ in relation to its wrongful classification of him as the leader of a gang?" That question was deemed irrelevant and not allowed. We did not find this decision to be unreasonable.
- 6) Question 6 - "Based on all you have heard about Tesha Miller, have you formed a view of—about his guilt or innocence concerning the accusation that he is involved in the death of Douglas Chambers, Manager of the JUTC?" In relation to this question, the learned judge raised the concern that the question presupposed that persons had in fact heard about the applicant and indicated that it needed to be rephrased (see page 17, lines 13 to 20 of the transcript). The question was revised to read "Have you heard any newscast that Tesha Miller has been charged for the murder of Douglas Chambers, Manager of JUTC and if yes, have you formed any view about his guilt or innocence?" We find that the learned judge was reasonable in her decision regarding the question.
- 7) Question 7 - "Can you disregard all you have heard about Mr Miller, including all the media reports concerning him and listen to the evidence and render a

true and honest verdict at his trial?" The learned judge regarded the question as repeating elements of question 4 and also it presupposed that the persons had already heard of the applicant. She said it would have to be rephrased or it would be disallowed. It was not rephrased and was disallowed. This decision was reasonable.

- 8) Question 8 - "Notwithstanding all you have heard about Mr Miller, are you nonetheless willing to render a verdict of not guilty where the evidence leaves you in doubt or does not make you feel sure that Tesha Miller is guilty?" It was not allowed. The learned judge was correct that this was a repeat of question 4.
- 9) Question 9 - "Have you ever gone on social media and come upon any information about Tesha Miller? If yes, are you prepared to sit on this trial and render a true verdict?" The learned judge, though finding it a bit repetitious, allowed this question.
- 10) Question 10 - "Are you prepared not to go on social media or any other media source during this trial, but instead listen and rely only on the evidence in Mr Miller's matter?" That question was allowed.
- 11) Question 11 - "Can you disregard everything that you have heard on the streets from any person concerning Mr Miller and nonetheless give a true verdict according to the evidence?" The learned judge remarked that the question presupposed that they have heard things on the street and was a repetition of question 4. It was not allowed, but question 2 was amended (as set out above). That was not unreasonable.
- 12) Question 12 - "Do you feel that your verdict in this matter can be given without any influence from the things you have heard or read in the past?" The learned judge took the view that this question presupposed that they had heard

things and also incorporated number 4. The question was not allowed. Again, that was not an unreasonable stance.

- 13) Question 13 - "Are you having any feelings of bias against the accused, Tesha Miller, as a result of what you have heard or read?" The question was allowed by the learned judge.
- 14) Question 14 - "When all the evidence is heard by you, are you in a position to disregard what you have previously heard about Tesha Miller and solely rely on the evidence given in this trial and nothing else, in arriving at your true verdict on oath or affirmation?" The question was not allowed as it repeated question 4. This was a correct position taken by the learned judge.
- 15) Question 15 - "Do you have any family members or friends who have been murdered?" That question was reasonably allowed as this was a murder case, but only after being amended to add: "If yes, can you participate in this trial nonetheless and render a fair and unbiased verdict?"
- 16) Question 16: "Do you have any family members and/or friends who have been victims of gang activity?" That question was allowed but also amended to add "If yes, can you participate in this trial nonetheless and render a fair and unbiased verdict?"

[139] This court has not found that the exclusion of questions indicated would have given rise to the applicant's trial being unfair. The questions that were allowed covered the concerns mentioned by the defence regarding a jury hearing the matter. We find the applicant's complaint regarding the learned judge's treatment of the proposed questions unfounded.

The learned judge refused to ask the jurors whether they knew the deceased man or other questions that she would normally ask jurors.

[140] We note that the learned judge did not ask the jurors if they were familiar with the lawyers, accused or witnesses. Neither did she ask them whether they knew the deceased. While those questions were relevant, it was a matter for the learned judge whether she would have asked them specifically. She indicated that those questions would have been subsumed in the questions put to the jurors. It was clearly a matter of her style and for her discretion. In any event, during the questioning exercise, one of the jurors indicated knowing the deceased and was excused by the learned judge (see pages 77 to 78 of the transcript). She also excused two other jurors based on their answers to the questions (see pages 75 to 76 where the juror had heard the negative newscast, and pages 76 and 77, where the juror was not sure if they had heard the newscast and wished not to listen to the evidence and give a true verdict). Apart from that, she would have had no further basis to discharge any other juror.

[141] In the view of this court, the questions asked of the jurors covered all the concerns of the defence. As we have seen above, there was the removal of prospective jurors deemed unsuitable for the trial. Certainly, the transcript does not reveal that defence counsel requested that any of the jurors be removed.

[142] In **R v South Powys Coroners Court Ex parte Jones, Smith & Deputy Coroner of South Powys** [1990] Lexis Citation 2139, Farquharson LJ said:

“[I]t was complained that Brecon being a small town the coroner took no steps to enquire whether any of the eleven jurors knew the deceased or his family. One says straight away, as the coroner points out in his affidavit, it is not the coroner's task, unless in his discretion he thinks it is right in the interests of justice, to make these enquiries on his own initiative. Sometimes it may be that persons represented at the inquest may ask that an enquiry should be made of the jury as to whether they are known to or know any of the parties concerned, but whether such an enquiry is made is a matter for the coroner's discretion.”

[143] The learned judge exercised her discretion not to make such enquiries, and in light of the other enquiries made, it cannot be deemed an unreasonable decision.

[144] The complaints listed in this ground, therefore, are essentially of no merit, except to the extent that we determined that the jurors should have been sworn before any questioning. This issue, however, would have had no impact on the fairness of the trial in any event, as defence counsel had forfeited his right to question the jurors (as seen at page 40 of the transcript), when he indicated that he wished the learned judge to administer the questions. In the round, the circumstances raised under this ground would not have led to a miscarriage of justice in the particular circumstances of this case.

Ground 7(a) - Whether the applicant could have been found guilty of being an accessory before the fact for a murder committed by Andre Bryan where Andre Bryan was adjudged not to be guilty of murder

[145] This ground was argued on the basis that a no case submission ought to have been upheld by the learned judge. It was never raised before her. However, we thought it expedient to consider the legal issues, as they could impact the course of future trials.

Submissions on behalf of the applicant

[146] Mr Buchanan, for the applicant, argued that the plain reading of sections 34 and 35 of the CJAA led to the interpretation that the common law position that the acquittal of a principal is a bar to a conviction of an accessory to the principal, was not overridden by positive law. As such, the acquittal of the named principal in this case (Andre Bryan), meant that the applicant could not be found guilty as an accessory. Reliance was placed on several authorities in support of this position, namely **Regina v Quick; Regina v Paddison** [1973] QB 910, **R v Loukes** [1996] 1 Cr App Rep 444, **Morris v Tolman** [1923] 1 KB 166, **Thornton v Mitchell** [1940] 1 All ER 339, **The Minister of Food v O'Rourke** [1951] NI 97 and **State v Ludwick** 61 NC 400 (NC 1868).

[147] In oral submissions, Mr Buchanan stated further that on a reading of section 35 of the CJAA, the Crown can only bring a case against an accessory in two circumstances:

(1) after the conviction of the principal; or (2) where there is a joint trial with the principal. In this case, the principal having been acquitted and there being no joint trial, the only other option available to the Crown was to indict the applicant for the substantive offence of murder, based on section 35 of the CJAA.

Submissions on behalf of the Crown

[148] In disputing these submissions, Ms Tugwell for the Crown submitted that it is necessary to examine the purpose for which section 35 of the CJAA was enacted. Particularly, it was to ensure that accessories were brought to justice, irrespective of whether the issue of the liability of the principal had been adjudicated upon. Reliance was placed on 11 & 12 Vict Cap 46, **Regina v Anthony** [1965] 2 QB 189, and **R v Hughes** (1860) 169 ER 1245. It was submitted that section 35 of the CJAA provided the prosecution with a discretion as to the manner of indicting an accessory and that the offence of being an accessory was a substantive offence which stood on its own. Further, that the critical question was whether there was any prejudice to the accused in being charged for the lesser offence.

Discussion

[149] By way of written submissions and the oral submissions made by Mr Buchanan, the applicant did not contend that the indictment was a nullity arising from the fact that he was indicted as an accessory instead of for the felony of murder. In fact, Mr Buchanan asserted that it was open to the prosecution to apply to amend the indictment during the course of the trial. However, by way of written submissions in reply to the Crown, filed 23 June 2023, the applicant contended that the indictment should not have gone to trial. It is this aspect that we consider necessary to address.

[150] In our view, this latter submission by the applicant would not be correct, as there was no technical defect or fundamental flaw in the indictment, such as the offence not being one known to law or one over which the court had no jurisdiction.

[151] In the case of **R v Hughes**, the offence of an accessory before the fact is described as a “substantive offence” (as per Hill J) and a “substantive felony” (as per Erle CJ). In so stating, the learned Justices merely indicate that the offence of being an accessory before the fact is a standalone offence, not dependent on the principal offender being brought to justice, as was previously required. This is seen from the headnote to the judgment (at pages 1245 and 1246), which explained:

“The first two counts of an indictment charged A. and B. jointly with stealing, and the third charged B. alone with receiving the stolen goods. A. was acquitted, no evidence having been offered against him, in order that he might be a witness against the other prisoner. Upon his and other evidence, which proved that B. was an accessory before the fact to the stealing and afterwards received the stolen goods, the jury found a general verdict of guilty against B., which verdict was entered upon all the counts. **Held, that B. was not entitled to an acquittal upon the first two counts by reason of the principal, A., having been acquitted, because 11 & 12 Vict. c. 46, s. 1, has made the being an accessory before the fact a substantive felony, and the conviction of the principal is not now a condition precedent to the conviction of an accessory.** Held also, that there was no inconsistency in the general verdict as an accessory before the fact may also be a receiver.” (Emphasis supplied)

[152] Hill J stated at page 1248:

“The preamble of 11 & 12 Vict. c. 46 recites that it is ‘expedient that any accessory before the fact to felony should be liable to be indicted, tried, convicted and punished in all respects like the principal, as is now the case in treason and in all misdemeanors.’ The statute by the first section enacts, that ‘If any person shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted and punished in all respects as if he were a principal felon.’ **That enactment makes an accessory a principal felon.**” (Emphasis supplied)

[153] And further, also, at page 1248, Erle C J said:

“We are of opinion that this conviction is right, notwithstanding both the points relied upon. **With regard to the first point, we think that 11 & 12 Vict. c. 46, s. 1, has made the crime of being an accessory a substantive felony, and that the old law which made the conviction of the principal felon a condition precedent to the conviction of the accessory, is done away with by that enactment.** Suppose the accessory is captured before the principal, he may, under the statute, at once be tried and convicted. If the principal is afterwards taken, tried and acquitted, has the accessory a right to be discharged? We are of opinion that he has no such right. Whether he is tried before or at the same time as the principal, he may be found guilty as an accessory, although the principal be acquitted.” (Emphasis supplied)

[154] The statute relied on by the court in **R v Hughes** (11 & 12 Vict. c. 46) is worded in very similar terms to section 34 of the CJAA. However, there is no similar provision in that statute to section 35 of the CJAA. Notwithstanding this, it is proper to accept that the offence of accessory before the fact to a felony is a standalone offence, or a “substantive offence”. In those circumstances, the applicant's position that the indictment should not have gone to trial would not be meritorious as indicting the applicant for the offence of accessory before the fact did not amount to any technical defect in the indictment. In any event, the indictment conformed to the requirements of section 4 of the Indictments Act, in that, it contained a statement of the specific offences with which the applicant was charged together with particulars giving “reasonable information as to the nature of the charge”.

[155] Further, in the event that the learned judge had accepted the applicant's position that he could only have been indicted for the felony of murder (in light of the acquittal of the principal), he would not have been prejudiced if the indictment were amended during the trial, to one of murder. Such an amendment would not have changed the substance of the case that he was required to meet.

[156] As a separate, but important point, we do not agree with counsel for the applicant that there exists a general principle of law that the acquittal of the principal also leads to an acquittal of the accessory. The cases relied upon do not propound such a general principle. A more accurate statement of the law is as taken from Halsbury's Laws of England (Volume 25 (2025)) at para. 82 as follows:

“So that a defendant may know whether they are alleged to have been a principal or a secondary party, the particulars of the offence in the indictment should make it clear whether it is alleged that they were a principal or secondary party. However, if the prosecution is advanced on the basis that the defendant was either the principal or secondary party this does not prevent the prosecution from alleging this in a single count alleging the different ways of participation; it is not necessary to have separate counts.

A secondary party may be tried and convicted whether or not the principal has been tried: indeed, the fact that the alleged principal has been acquitted, whether on a procedural point or on the merits, is no bar to the conviction of a secondary party; there may be cases where the conviction of a secondary party must be quashed as inconsistent or unsafe where the principal is acquitted; but, where the offence can be proved against the secondary party, they are not entitled to be acquitted because the crime is not proved against the alleged principal.

A secondary party cannot be convicted unless the crime to which they are alleged to have been a party is proved to have been committed. However, if the actus reus of a crime requiring its perpetrator to be of a particular description, for example a person with a penis in rape or a married person in bigamy, is committed by a person of that description who lacks the necessary mens rea or who has a defence, a person not of that description who has aided, abetted, counselled or procured them to commit that crime can be convicted of it as a secondary party.

Where crimes share a common actus reus, being distinguished by different requirements as to mens rea, it seems that a secondary party may be convicted of a crime of

a more serious degree than that for which the principal has been convicted.” (Emphasis supplied)

[157] The authorities cited on behalf of the applicant demonstrate that each case must be decided on its own facts to determine whether the acquittal of the alleged principal would render the accessory's conviction inconsistent. This is not the issue in the present case, as the applicant has not contended that there was an inconsistency.

[158] In the circumstances, even if the trial was not a nullity, and the point was raised before the learned judge, ground of appeal 7(a) would not have been meritorious.

The outcome of the application for leave to appeal

[159] Based on our conclusion on ground one that the denial of the applicant's preemptory challenges rendered the trial a nullity and resulted in a miscarriage of justice, we find that the application for leave to appeal should be granted and the hearing of the application for leave treated as the hearing of the appeal. The appeal against convictions is allowed and both convictions are quashed. The sentences imposed on 9 January 2020, are set aside. The next issue to be determined is whether judgments and verdicts of acquittal should be entered or a new trial ordered.

Should a verdict and judgment of acquittal be entered or a new trial ordered?

[160] With respect to ground of appeal 16, the applicant contended that a retrial should not be ordered based on the length of time that has elapsed since the incident, and the possibility that the applicant could not get a fair trial due to the publicity. It was also submitted that a retrial would be oppressive and not in the interests of justice. The cases of **Lescene Edwards v R** [2022] UKPC 11, **Cumberbatch v R** (2004) 67 WIR 48, and **Adams and Lawrence v R** [2002] UKPC 14, were cited.

[161] The Crown did not directly address the question of whether a new trial could be ordered in the interests of justice, but submitted that the evidence for the prosecution was compelling.

[162] The applicant's position that a retrial should not be ordered was supported by evidence in a supplemental affidavit sworn and filed on 6 March 2023. By this affidavit, the applicant deposed to the effect of delay on the conduct of his defence and the prejudice arising therefrom. He stated specifically that delay prejudiced his ability to defend himself, noting that the material incident on which the indictment was based, allegedly occurred on or around 27 June 2008, which was 10 years before he was taken into custody. In 2008, and specifically when this incident occurred, he did not make any notes of his whereabouts. Therefore, when arrested in 2018, it was difficult to seek to reconstruct his whereabouts in 2008 in order to provide a proper defence. Further, as his phone was seized by the State upon his arrest, he was unable to have a forensic analysis done, with a view to obtaining information to prove his alibi.

[163] He also gave evidence regarding his position as an inmate. He stated that as an "appellant", he has not started serving his sentence despite the length of time for which he has been incarcerated. Further, as a result, he receives worse treatment than non-appellant inmates. He stated that he worked during his time in prison but was not paid, because he was an appellant. Additionally, he was advised by his attorney that as an appellant, he was entitled to certain rights, such as being able to provide food for himself, wear his own clothing, and use his own bedding, but he was not afforded those rights.

[164] He asserted that:

"40. After more than fifteen (15) years after the material incident, I cannot remember key details as it relates to where I was at the material date. I recall that at some point around the incident date I was with my mother.

41. My mother has since died and is no longer available as an alibi witness for a trial. She was not used on the last occasion since the trial process was unfair and adverse remarks were already made about her by jurors.

42. I would not be able to defend myself properly, after more than fifteen years since I am unable to get the phone records

to prove my location history and I also recall [sic] events from the year 2008.

43. There are no contemporaneous notes or statements made by me or the defence to refresh my memory of my case in relation to an incident which took place fifteen (15) years ago.

44. I would be at a distinct disadvantage since the crown has notes and statements from 2008 and 2018, and I am relying essentially on my memory. There was no written statement or instructions on my behalf in relation to this matter.

45. ...

46. I am financially embarrassed and unable to pay for another trial. I have exhausted my last financial resources. I don't trust the legal aid system to present my case fairly due to its resource constraint and flat fee for lawyers which cannot properly present my defence.

47. The delay in trying my matter and hearing this appeal has deprived me of my constitutional right to a fair hearing within a reasonable time. No delays can be attributed to me.

48. I firmly believe that a retrial would be oppressive to me in light of the full facts of my case."

[165] This court's power to order a new trial is governed by sections 14(1) and (2) of the JAJA, which provide:

"14.-(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, **or that on any ground there was a miscarriage of justice**, and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider

that no substantial miscarriage of justice has actually occurred.

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

[166] Since the proceedings were a nullity, it is treated as if a trial had never taken place. The *venire de novo* is a new trial, as distinct from a retrial. This was explained in the case of **Director of Public Prosecutions v Donald White** (1977) 26 WIR 482, where the Privy Council acknowledged that the term "new trial" in section 14(2) of the JAJA also extended to cover a *venire de novo* (see page 485a and b). Further, on an interpretation of sections 14(1) and (2) of the JAJA, it was held (see headnote):

"(i) that every ground of appeal on which the Court of Appeal shall allow an appeal against a conviction in the Supreme Court must fall within the categories defined in s 14(1) of the Judicature (Appellant Jurisdiction) Act;

(ii) that where an appeal is allowed on the ground of a wrong decision in law or a miscarriage of justice the Court of Appeal is by s 14(2) limited in its judgment either to:

(a) quashing the conviction and entering a verdict of acquittal; or

(b) quashing the conviction and if the interests of justice so require, ordering a new trial;

(iii) that on the grounds on which the appeal was allowed the Court of Appeal could not decline either to enter a verdict of acquittal or to order a new trial;

(iv) that the absence of an order for a new trial after an appeal is allowed and the conviction quashed would presuppose that the Court of Appeal had ordered a verdict of acquittal to be entered. The accused could in such circumstances plead *autrefois acquit* in bar if re-arraigned on the same indictment (or a new one charging the same offences)."

[167] The court, therefore, on allowing an appeal and quashing a conviction, may either (a) direct a judgment and verdict of acquittal, or (b) if the interests of justice so require, order a new trial. It is imperative, therefore, that notwithstanding the suggestion from the authorities that the ordering of a *venire de novo* may be automatic, this court must still be satisfied that an order for a new trial is required in the interests of justice.

[168] This approach was adopted in the cases of **R v Gash** [1967] 1 WLR 454 and **R v Gee; R v Bibby; R v Dunscombe** [1936] 2 KB 442. In **R v Gash**, there were grave irregularities in the empanelling of the jury, and the defendant's right to challenge for cause was denied. The appeal was allowed, and Lord Parker CJ stated at page 456G:

“This is a case where it might well be possible for the court to make an order for a *venire de novo*, but Mr. Simpson, for the prosecution, very properly has not called upon us to make such an order, **bearing in mind that this man has in effect almost served his sentence.** Accordingly, in the result the court will merely quash the conviction.” (Emphasis supplied)

[169] In **Shawn Campbell (CA, 2024)**, this court examined the applicable legal principles governing whether a new trial should be ordered, and in particular, the question of the interests of justice (see paras. [32] to [40]). It has been the consistent approach of this court to balance various factors, weighing either for or against the ordering of a new trial. Reference was made to the seminal case of **Reid v R** (1978) 27 WIR 254, which was summarised as follows (see para. [35] of **Shawn Campbell (CA, 2024)**):

- “(1) Whether the interests of justice require a new trial in a particular case may call for a balancing of a variety of factors, some of which will weigh in favour of a new trial and some against. The weight to be given to the various factors is a matter for judicial determination and may differ from case to case, although there are cases in which one factor might be decisive of the question.
- (2) The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica

that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some 'technical blunder' by the judge in the conduct of the trial or his summing up to the jury.

- (3) Some of the other factors deserving of consideration include, but are not limited to:
 - (a) the seriousness or otherwise of the offence;
 - (b) the prevalence of the offence;
 - (c) where the previous trial was prolonged and complex, the expense and length of time for which the court and jury would be involved in a fresh hearing;
 - (d) the effect of a new trial on the accused;
 - (e) the length of time between the alleged date of the commission of the offence and the new trial if, one is ordered;
 - (f) the evidence that would be available at the new trial; and
 - (g) the strength of the prosecution's case presented at the previous trial."

[170] The court also noted other factors that were gleaned from the case law, including the possibility of breach of a defendant's right to a fair trial within a reasonable time, and other factors as follows (see para. [40] of **Shawn Campbell (CA, 2024)**):

- "(1) whether there was some error, fault or misconduct on the part of the prosecution (see **R v Maxwell** [2010] UKSC 48);
- (2) whether the appellant has served a significant portion or all of the sentence imposed at the first trial (see **R v Thomas Clive Berry** [1996] 2 Cr App R 226 and **Mikal Tomlinson v R** [2020] JMCA Crim 54);

- (3) the likely penalty the appellant would face on a new trial (see **Mikal Tomlinson v R**);
- (4) the impact of any prejudicial publicity on the prospects of a fair trial if a new trial is ordered (see **R v Stone** [2001] EWCA Crim 297);
- (5) whether a change in the law applicable to the elements of the offence charged and/or the trial process would unfairly prejudice the appellants (see **The People v JC** [2015] IESC 50); and
- (6) whether a new trial would be oppressive or unjust (see **Mikal Tomlinson v R and Bowe v The Queen** [2001] UKPC 19)."

[171] Assessing the relevant factors, the court notes that the offences for which the applicant was convicted are serious and linked to the offence of murder, which is very prevalent in our society. The circumstances of the murder were disturbing. The interest of the public in Jamaica that such a heinous crime be determined by a trial is, therefore, a weighty point for our consideration.

[172] The miscarriage of justice is due to a procedural irregularity and through no fault or misconduct on the part of the prosecution. The case against the applicant was dependent on the view taken by the jury of the reliability and credibility of the Crown witness of fact. We are aware that at the time of the trial, the Crown witness of fact was serving a 10-year term of imprisonment beginning on 13 November 2019. Given his current incarceration, there is nothing to indicate that he will not be available to appear as a witness if a new trial is ordered.

[173] The trial of the offences took place over 11 days, which could be classified as moderately but not unduly lengthy. Neither is there any indication that the case was complex. However, a trial of such a length would likely have occasioned significant expense to the applicant, and any new trial would no doubt do so again. The court has to weigh all these competing factors.

[174] The applicant called no witnesses during the trial. Therefore, there is no witness that was available to give evidence on his behalf at the trial who would no longer be available if a new trial is ordered. In relation to the Crown witnesses, a document of agreed facts contained evidence of Mrs Charmaine Chambers (who identified the body of the deceased) and Dr Prasad (who conducted the post-mortem examination). The statement of Detective Inspector Clifton Green, the investigating officer, was agreed and read into evidence. The only witnesses that gave oral evidence were Detective Inspector Marcel Bedward and the Crown witness of fact. The position regarding witness availability has distinguished the case from that of **Shawn Campbell (CA, 2024)**.

[175] Of great concern is the delay that has occurred between the date of the incident and the trial. The applicant has expressed how he would be affected by this (as set out in his affidavit).

[176] The offences themselves occurred almost 18 years ago. In the case of **Shawn Campbell (CA, 2024)**, this court discussed at length the issue of delay and whether a new trial can be facilitated within a reasonable time. In relation to the length of the delay, it is useful to set out that discourse here:

“[182] Based on the submissions of counsel on both sides, the question with which we are immediately concerned is whether the delay of almost 13 years since the commission of the offence militates against subjecting the appellants to a new trial. The related question of whether the appellants’ constitutional guarantee to a trial within a reasonable time has been breached, will necessarily also be considered.

[183] We note that lengthy periods of delay in the completion of criminal proceedings have been treated as a powerful and sometimes decisive factor against ordering a new trial. The primary impact of delay is to undermine an appellant’s constitutional right to a trial within a reasonable time. Importantly, however, delay can also have a deleterious effect on the fairness of the trial. **It has long been recognised that the longer the delay in the completion of criminal proceedings, the more likely it is that the defendant will be prejudiced (see Tan Soon Gin v Cameron**

[1992] 2 AC 205). Such prejudice may take the form of lapses in memory among the defendants and their witnesses, excessive pretrial incarceration, and the death or disappearance of witnesses.

[184] In cases of very long delay, prejudice may be presumed to be visited upon the defendant, and the delay will be decisive of the question of whether a new trial should be ordered. Thus, in **Bell v DPP**, at page 9 of the judgment, the Privy Council outlined that a delay of seven years between the alleged date of the offence and the eventual date of a new trial led to 'inevitable' prejudice, the particulars of which the defendant did not need to prove. In **Charles (Curtis) Carter (Steve) and Carter (Leroy) v The State** (1999) 54 WIR 455, the Privy Council, when faced with a delay of 12 years between the incident and the proceedings before the Board, recognised that there may come a time when the delay is so great that, regardless of the public interest in convicting the guilty, it becomes 'an abuse of process and unacceptable for a prosecution to continue'.

[185] We have examined a number of cases decided by the Privy Council, this court, and other courts in the region, which serve to illustrate that delay is a weighty factor against ordering a new trial, where there has been a lapse of time of eight years or more between the commission of the offence and the appellate proceedings. These cases involve murders (including the murder of a child), rape, robbery, kidnapping and illegal possession of a firearm. The cases and the respective periods of delay in each of them are:

- (1) **Ajodha and others v The State** [1981] 2 All ER 193 (delay eight years);
- (2) **Winston Fuller v The State** (1995) 52 WIR 424 (delay of 10 ½ years);
- (3) **Adams and Lawrence v R** [2002] UKPC 14 (delay of 12 years);
- (4) **Shivnarine and another v The State** (2012) 80 WIR 357 (delay of 12 years);
- (5) **Simeon Bain v R** (delay of 13 years);

(6) **Mark Russell v R** [2021] JMCA Crim 34 (delay of 10 years); and

(7) **Lescene Edwards v R** [2022] UKPC 11 (delay of 18 years).

[186] Conversely, there may be situations in which long periods of delay are not necessarily decisive of the question of whether a new trial should be ordered. For example, in **Radcliffe Levy v R** [2019] JMCA Crim 46, the court ordered a new trial notwithstanding that 12 years had passed between the date of the offence and the hearing of the appeal. The appellant was convicted of killing his child's mother, and the evidence against him appeared to the court as strong. The appellant was on bail up to the date of trial but was in custody for approximately three years and nine months after conviction. In ordering a new trial, the court relied on several factors, including that prejudice to the appellant had been reduced by him having been on bail, as he had not spent excessive time in custody. There are other cases that this court has remitted for retrial despite a significant passage of time. However, each case must be examined within the framework of its own unique circumstances."

[177] Ultimately, in **Shawn Campbell (CA, 2024)**, the court determined that a period of almost 13 years since the commission of the offence was a powerful factor against ordering a new trial.

[178] In the instant case, there is a crucial distinction to be considered as it relates to the issue of delay. Although the offences were committed in June 2008, the applicant was not taken into custody until 29 October 2018 and arrested on 1 November 2018, as there was no evidence on which he could have been arrested prior to the Crown witness of fact's statement to the police, which was completed in March 2018. This passage of time by itself, therefore, would not weigh against the ordering of a new trial.

[179] We acknowledge the applicant's evidence that he had a difficulty in defending himself arising from this period of delay and that his difficulty would now be worsened by the further lapse of time. In that regard, specific directions can be given to the jury

relevant to the impact of delay on the case for the applicant (see pages 131 to 132 and 134 to 136 of the Bench Book). It is stated on page 132 para. 5 of the Bench Book that:

“Where there has been a significant delay, juries need to be directed on the relevance of that delay including the impact on the preparation and conduct of the defence and the relationship with the burden of proof.”

Whether there has been a breach of the appellant’s right to a fair hearing within a reasonable time

[180] The applicant has asserted that his constitutional right to a fair hearing within a reasonable time has been breached both in respect of the trial of his case and the hearing of his appeal. Section 16(1) of the Constitution states:

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

[181] This court has accepted, as having been long established, that the right to a fair hearing within a reasonable time includes hearings at the appellate level. In the case of **Evon Jack v R** [2021] JMCA Crim 31, Brook P stated at para. [19]:

“The term ‘hearing’ has been accepted as incorporating, not only trials, but also post-conviction proceedings. That interpretation was established even before the promulgation of the Charter. The Privy Council, in **Tapper v Director of Public Prosecutions of Jamaica** ... endorsed that position, saying at paragraph 9 of its judgment:

‘...the Court of Appeal [of Jamaica] accepted, and there is no dispute, that [the right to a fair hearing within a reasonable time by an independent and impartial court established by law] extends to post-conviction delay.’

[182] Similarly, in the case of **Romaine Nembhard v R** [2023] JMCA Crim 41, F Williams JA, also relying on **Tapper v DPP**, stated:

“[28] It has been accepted that the right to a fair hearing within a reasonable time (as per section 16 of the Constitution) includes the hearing of an appeal. In the case of **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the issue of what amounts to unreasonable delay was considered. At the time of the hearing of that appeal, what is now section 16(1) was then section 20(1) of the Constitution. The Privy Council was of the view at para. 28, that:

‘The Board would affirm that the law as stated in the *Attorney General’s Reference* case, [2004] 2 AC 72 and as summarised in *Boolell*, represents also the law of Jamaica. Although those judgments were not directed specifically at the effect of delay pending appeal, the same approach applies.’”

[183] The trial against the applicant proceeded in November and December 2019. He was sentenced in January 2020. In those circumstances, it can readily be seen that there was no delay in the trial of the matter, with the result that the applicant’s right under section 16(1) of the Constitution was not engaged on this account.

[184] Concerning the appeal, permission to appeal was sought in January 2020 and in the same month, this court requested the record of proceedings. The application for permission to appeal was considered by a single judge and a decision given on 13 December 2021 refusing leave to appeal conviction. This decision was given using the summation of the learned judge, being the only record of proceedings that was provided to the court up to that time. Subsequently, in August 2022, this court was provided with the notes of evidence. Thereafter, on 15 November 2022, the applicant filed a notice of application for court orders seeking production of certain documents, an extension of time to file skeleton arguments and chronology, and permission to adduce fresh evidence. This application was amended on 22 December 2022, and supplemental grounds of appeal and chronology were filed on 18 January 2023. The application was heard and determined on 24 February 2023. The hearing of the appeal commenced on 29 March 2023 and was adjourned on 31 March 2023 for consideration of the applicant’s application

to adduce fresh evidence. The decision on the application for fresh evidence was given on 9 June 2023. The substantive appeal was heard on 12 to 16 June 2023 and judgment reserved. In the circumstances, it cannot be said that there was any delay between the filing of the application for permission to appeal and the hearing of the appeal itself. However, there has been a delay between the conclusion of the hearing of the appeal and the delivery of judgment, which has been reserved for almost three years. In effect, this would be a delay of 18 years between the commission of the offences, and the judgment of this court, albeit only eight years between his arrest and the determination of the appeal.

[185] Several authorities have emanated from this court in which consideration has been given to the possibility of breach of the right guaranteed by section 16(1) and the factors to be used in making a determination. In **Techla Simpson v R** [2019] JMCA Crim 37, Brooks JA (as he then was), relying on the Privy Council decision of **Flowers v The Queen** outlined the relevant considerations:

“[37] **Flowers v The Queen** is also a decision of the Privy Council on an appeal from this jurisdiction. In that case, their Lordships examined the factors they considered to be relevant when addressing a complaint that there has been a breach of constitutional rights. They are:

- a. the length of delay;
- b. the reason for the delay;
- c. the defendant’s assertion of his right; and
- d. the prejudice to the defendant.

[38] The factor of prejudice has three further considerations, namely, the need to:

- d1. prevent oppressive pre-trial incarceration;
- d2. minimise anxiety and concern of the accused; and most importantly

d3. limit the possibility that the defence will be impaired.

Their Lordships emphasised that the fairness of the entire system will be skewed if a defendant is unable to adequately prepare his case.”

[186] Without engaging further in an individual consideration of these factors, this court accepts that the delay in the delivery of the judgment is unfortunate and could be considered a factor against the ordering of a new trial.

Whether the appellant has served a significant portion of his sentence

[187] The applicant, having served just over six years of the sentence imposed on him for the offence of accessory before the fact to murder, cannot be said to have served a significant portion of that sentence. Further, although if convicted on a new trial, he would be subject to the same mandatory minimum sentence mandated by section 3(1)(b) of the OAPA, he would be able to benefit from the approach adopted in the case of **Cecil Moore v R** Supreme Court Criminal Appeal No 25/2016, judgment delivered 6 March 2025 (with reasons to follow). In that case, this court (with a panel of nine judges) determined that upon a retrial, time spent in pre-sentence custody, including the period of incarceration spent before the second trial, should be deducted from any mandatory minimum sentence period imposed by the sentencing judge. As such, this factor does not weigh against the ordering of a new trial in respect of that offence.

[188] Concerning the offence of accessory after the fact to murder, the applicant has already served the sentence of 18 months’ imprisonment. This weighs very heavily against the ordering of a new trial for that offence.

[189] The other concerns raised by the applicant relevant to whether he has commenced the period of incarceration and the conditions of incarceration have been dealt with by this court as well as the Privy Council. These circumstances, by themselves, would not provide any basis for finding prejudice against the applicant or for not ordering a new trial (see **Shawn Campbell (CA, 2024)**).

Determination

[190] In all the circumstances, in relation to the offence of accessory after the fact to murder, the applicant having effectively served the period of imprisonment to which he was sentenced, it would not be in the interests of justice to order a new trial for that offence. However, in relation to the offence of accessory before the fact to murder, notwithstanding the factors that weigh against the ordering of a new trial, we believe that the seriousness of the offence, the prevalence of murder, together with the strength of the prosecution's case and the likely availability of the Crown witness of fact, are of greater weight. Crucially, too, is the distinction as it relates to the length of time between the offence and the trial as well as the determination of the appeal. Furthermore, we believe that there are adequate measures in place that may mitigate against the possible prejudice that may be experienced by the applicant on the ordering of a new trial. We are of the view that the matter should be sent back for a new trial of the offence of accessory before the fact to murder. However, in the interests of justice, orders will be made as to time constraints for any such trial.

Conclusion

[191] The court finds that the applicant has demonstrated merit in ground of appeal one, concerning the number of peremptory challenges to which he was entitled for the offence of accessory before the fact to murder. Based on the penalty imposed by law for that offence, as per section 81 of the OAPA, the applicant was entitled to four peremptory challenges and not two. Further, as the applicant sought to exercise his right to four peremptory challenges but was prevented from doing so by the learned judge, the trial was rendered a nullity. Consideration was also given to grounds of appeal 2 (regarding challenge to the polls for cause) and 7(a) (regarding the validity of the indictment), and it was found that there was no merit in those grounds. The court determined that, based on its conclusion in relation to ground one, it was not necessary to consider the other grounds of appeal, save for those already mentioned.

[192] The court acknowledges the delay between the completion of the hearing of the application for leave to appeal and the delivery of the judgment, for which the court sincerely apologises.

[193] Arising from the determination on ground one, the court would allow the appeal, quash the convictions and set aside the sentences.

[194] The court considered whether judgments and verdicts of acquittal should be entered or a new trial should be ordered. After considering and weighing the relevant factors for the determination of that issue, the court concluded that the interests of justice require that a new trial be ordered for the offence of accessory before the fact to murder only, set to commence within a stipulated time period. The court takes judicial notice that the applicant is currently engaged in a complex trial in the Supreme Court, which is likely to impact the scheduling of a new trial of this matter. This has to be taken into account in stipulating a time frame.

[195] We, therefore, make the following orders:

1. The application for leave to appeal convictions is granted, and the hearing of the application is treated as the hearing of the appeal.
2. The appeal against convictions is allowed.
3. The trial of the applicant conducted in the Home Circuit Court, from 13 November 2019 to 9 January 2020, is declared a nullity.
4. The convictions are quashed, and the sentences imposed on 9 January 2020, are set aside.
5. A judgment and verdict of acquittal is entered for the offence of accessory after the fact to murder.

6. A new trial of the offence of accessory before the fact to murder is ordered, in the interests of justice, to commence within six months of the conclusion of the trial proceedings in which the applicant is currently engaged. In the event that the prosecution fails to commence a new trial against the applicant within the specified period, the trial of the charge shall be stayed, unless the delay is due to the fault of the defence.