[2021] JMCA Crim 46

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 40/2016

RUSSELL SAMMS v R

Ms Jacqueline Cummings for the appellant

Mrs Lenster Lewis-Meade for the Crown

25, 26, 27 May and 26 November 2021

BROWN BECKFORD JA (AG)

Introduction

[1] Ricardo Dove, a 12-year-old child, was killed as he lay in his bed sleeping. On 19 February 2016, the appellant, Russell Samms, was convicted for his murder after a trial by a judge sitting with a jury in the Westmoreland Circuit Court. He was sentenced on 16 April 2016 to life imprisonment with the stipulation that he serves 25 years before being eligible for parole. He applied for leave to appeal his conviction and sentence on the grounds of "misidentity" by the witness, unfair trial, lack of evidence and miscarriage of justice. His application was considered by a single judge of this court who granted leave to appeal his conviction and sentence.

[2] At the commencement of the hearing before us, leave was granted to the appellant to abandon the original grounds of appeal dated 20 April 2016 and to argue eight supplemental grounds of appeal as follows:

"Supplemental Grounds of Appeal

a) The discrepancies and inconsistencies in the prosecution case were so numerous and such [sic] serious in nature that the jury ought not to have convicted the Appellant for this offence.

b) The sole eyewitness in giving evidence uttered words prejudicial to the Appellant and the Trial Judge failed to take steps to advise the jury to disregard those comments.

c) The Learned Trial Judge in her summation to the jury misquoted some of the evidence and unnecessarily advised the jury to speculate on the evidence.

d) The Learned Trial Judge erred when she explained the discrepancies between the eye-witness's evidence and the police were not serious enough to affect the credibility of the prosecution's case.

e) The trial of the Appellant was seriously prejudiced by the missing scenes of crime compac[t] disc taken by the police forensic expert on the night of the incident that could have assisted the Appellant in the defence of this matter and the negligence in(sic) the police and prosecution in the handling of it and failure to produce it at the trial.

f) The Appellant's attorney representation was insufficient as he did not conduct the trial with the skill [and] competence required and he failed to use certain evidence disclosed to him to assist the Appellant in his defence. He also failed to call evidence to support the Appellant's good character.

g) The Trial Judge erred when she suggested to the jury that the absence of evidence of a flashlight or floodlight or means of light as it invited the jury to speculate and come to wrong conclusion."

Appeal against sentence

[3] Although no supplemental ground of appeal in relation to sentence was identified, it was placed in the written submissions and counsel requested and was granted permission to argue as supplemental ground that the sentence is harsh and excessive having regard to all the circumstances of the case.

The prosecution's case

[4] The Crown's case is that Mr Robert Dove, who was the main witness for the prosecution, lived in a two-bedroom house made of plywood with board around the windows. He resided with his baby-mother and three sons, including Ricardo Dove (also called "Mention"). Ricardo was 12 years old. On 7 May 2012, they all retired to bed. Robert's wife, his youngest son and himself were in one room and the other two children in another room.

[5] He was awakened by an explosion which sounded as if it was coming from inside the house. He got up and headed towards the room where Ricardo and his other son were sleeping. On his way he heard another explosion. He called out for Mention. He heard him give a "flowy sound" as if in a deep sleep. When he got to the room, Mention was still on the bed lying on his stomach. He shook him but got no response. He turned him over onto his back and observed blood in his eye, and coming from his nose and teeth. He removed his other son from the room and went back to his room.

[6] In his room, he looked out of the glass window. He heard three shots, then another two which broke the glass in the window and tore the curtain. He looked through the part of the curtain that was torn and saw a man stepping backwards out of his yard with a black gun in his hand. He was able to see, as outside was lit by a 100-watt electric bulb attached to the outside of the house as well as by moonshine.

[7] He recognised the man to be the appellant whom he knew as 'Zazza' and whom he had known for over 25 years. Zazza had previously lived in the same community and he had seen him earlier that day at about 3:30 in the afternoon, dressed then in the same clothes as he was in his yard.

Defence case

[8] The defence made a submission at the close of the Crown's case that the appellant not be called upon to answer, as the evidence of identification was unreliable being no more than a fleeting glance made in difficult circumstances. The submission was not

upheld and the appellant was called upon to answer. The appellant gave an unsworn statement from the dock. His defence was one of alibi. He stated that at approximately 4:30 pm, he walked to his girlfriend's house where he spent a couple of hours with her and in the company of her cousins and some friends. He left there and headed home. She kept him company on the phone until he arrived home at about 8:00 in the night. He was able to stay that long on the phone as his phone plan allowed for unlimited talk and text. He did not leave his house that night. He denied killing anyone and stated that he did not own a gun.

Appeal against conviction

[9] We mean no disrespect to the erudition of counsel when we summarise the appellant's supplemental grounds of appeal into five heads which will be dealt with in the order stated.

1. Conflicts in the evidence
2. Incompetence of counsel
3. Missing evidence
4. Prejudicial evidence
5. Errors in summation
6. Sentence

(1) Conflicts in the evidence

Appellant's submissions

[10] It was submitted that the case was riddled with discrepancies and inconsistencies which undermined the reliability of the identification evidence and, as such, the matter should have been removed from the jury's consideration under the 'guard rail' principle. Ms Cummings, on behalf of the appellant, relied on the well-known authority of **R v Galbraith** [1981] 1 WLR 1039. She identified the following discrepancies and inconsistencies:

i. The lack of forensic evidence and the evidence that blood was seen in the yard on the scene;

ii. The difference between what the witness said about the lighting and the ability to see that night and what the police said;

iii. The issue of how the witness was able to see the assailant and the circumstances of the viewing of the assailant;

iv. The lack of lighting on the scene and in the circumstances that would have made identification of anyone difficult;

v. When the witness gave his statement to the police and if he read it, or was it read over to him and that it was dated with two different dates;

vi. The witness said he observed the assailant for five to six minutes and then later said it was for 20 seconds; and

vii. There were blood stains outside of the house. If the deceased was killed in his bed and the police arrived on the scene and the deceased was seen still lying on his bed how did blood stains happen to be on the outside of the house.

[11] It was also submitted that the learned trial judge erred when she explained that the discrepancies between the eyewitnesses' evidence and the police were not serious enough to affect the credibility of the prosecution's case.

The Crown's submissions

[12] Mrs Lewis-Meade, for the Crown, submitted that the case was properly left for the jury's consideration having regard to the fulsome guidance given by the learned trial judge on how to identify and treat with inconsistencies and discrepancies. The learned trial judge also directed the jury on how to treat with the issues of identification and

credibility, which were the main issues arising on the evidence. Moreover, the learned trial judge identified specific conflicts in the witnesses' evidence and how to treat with them in light of the criticism made by defence counsel which they were entitled to accept.

[13] In respect of the blood stains, counsel submitted that this was not an issue which was raised at trial as the investigating officer was not challenged in cross examination on this issue. The main issues at the trial were credibility and identification and not the absence of forensic evidence. On the issue of the varying dates on the statement, it was submitted that the jury was again properly directed on how to treat with this conflict and as the tribunal of fact would have to assess the evidence in light of the directions given by the learned trial judge.

[14] Counsel for the Crown submitted finally that the learned trial judge gave thorough directions on identification, over several pages of the transcript. She dealt with reliability and weaknesses in the identification evidence and the credibility and reliability of the eyewitness. She also gave proper directions in keeping with **R v Turnbull** [1977] QB 224 ('the Turnbull Guidelines').

Discussion

[15] The law is clear that it is "the jury's role to decide whether the presence of inconsistencies discredits the witness and whether reliance ought to be placed on his evidence. A judge may, however, withdraw a case from a jury if the evidence is so manifestly unreliable that a jury properly directed is incapable of rendering a verdict of guilt without irrationality" (see para [10] of **Andrew Stewart v R** [2015] JMCA Crim 4).

[16] In deciding on whether the case should be withdrawn from the jury, **Galbraith** has been the seminal authority. This well-known passage by Lord Lane CJ is accepted as the correct judicial approach.

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises

> where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury….' There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[17]

[18] As regards the conflicts in the evidence relating to identification, Ms Cummings highlighted: (1) the differing evidence of the witnesses concerning whether there was electric light on the house; (2) the time the eyewitness had the appellant under observation; (3) that the appellant's name was not given to the police the same night; (4) the inconsistencies in the eyewitness testimony with respect to the colour of the clothing the appellant was wearing; (5) the eyewitness' knowledge of the appellant and (6) that there was no indication of the distance of the appellant from the eyewitness at the time of observation.

[19] The intersection and interplay between **Galbraith** and the principles regarding identification evidence given in the Turnbull Guidelines was thoroughly analysed by Morrison JA (as he then was) in **Brown (Herbert) and McCallum (Mario) v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008, when considering the issue of whether the learned trial judge in that case erred in dismissing a no case submission made on the basis that the evidence was unreliable due to inconsistencies and discrepancies. He concluded at para 35 as follows:

> "35. So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstances the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in ***R v Oakwell*** [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury in keeping with ***Galbraith***, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered and the like."

[20] The issue was also recently traversed by this court in **Rohan Reid and Damion Walker v R** [2021] JMCA Crim 25. F Williams JA, writing for the court, opined that reading the principles of **Galbraith** and **Turnbull** together ensured a balanced approach. He said at para [23]:

> "[23] Thus, as demonstrated by the dicta quoted above, the principles enounced in **R v Galbraith** and **R v Turnbull**, when read together, ensure a balanced approach. The jury ought not to be given a case, based on evidence, which, even if given by an apparently honest witness, provides an insufficient basis to ground a conviction. On the other hand, and equally importantly, a jury is allowed to deliberate on cases in which the resolution of issues of credibility will determine the view to be taken of the strength and/or weakness of the evidence."

[21] Following the approach of F Williams JA, an analysis of the evidence of the eyewitness in this case set against the Turnbull Guidelines, shows as follows:

a) Time – he said in examination-in-chief 20 seconds and in cross-examination five to six minutes. He confirmed the time was 20 seconds and said when he gave the time of five to six minutes (at the preliminary

examination) he did so as he was invited by the judge to just give a time but that he did not check it.

As this was a recognition case, the guidance in **Brown and McCallum** para. 39, that the length of time for observation need not be as long as where the assailant is unknown, is apropos.

b) Distance – the distance from the window to the light on the wall - 4 feet. Appellant was under the light.

c) Lighting – 100-watt electric bulb on the house side, a little above the head of the appellant, and moonshine. His statement previously given to the police that there was no light on his house was admitted into evidence.

d) Whether any impediment - appellant viewed through a hole on the curtain.

e) How long known - about 25 years. Appellant moved from community about aged 10 but visited regularly. Saw him about once per week.

f) When last seen - that day about 3.30 pm.

g) Time between observation and report – information not given to police first on the scene (he said because the appellant's cousin was in close proximity). Gave statement the following morning and named the appellant.

h) Weaknesses – the learned trial judge identified as weaknesses, that the appellant left the area and grew up in another community, that his features may have changed as he grew older, that the observation was made under tragic/traumatic circumstances after the witness found his son shot dead and the inconsistencies and discrepancies as to lighting and time for observation.

[22] It is clear that the evidence of identification did not hang on so slender a thread that it should have been withdrawn from the jury. What was very clearly in issue was the view to be taken of the eyewitness' credibility and reliability. That was a matter squarely within the province of the jury and the learned trial judge properly so, left the issue.

[23] The Crown is correct that the learned trial judge gave proper and fulsome directions to the jury on how to deal with inconsistencies and discrepancies over eight pages in the transcript. The learned judge also highlighted possible conflicts in the evidence in her review of the evidence for the jury. An analysis of the summation does not suggest that the learned trial judge told the jury that the discrepancies were not serious enough to affect the credibility of the prosecution's case. Far from not treating the conflicts in the evidence as serious, the learned trial judge did impress on the jury the effect such conflicts in the evidence could have on the credibility and reliability of the witnesses. The learned trial judge pointed out the discrepancies between the testimony of the eyewitness and police witnesses in relation to an electric light and specifically indicated to the jury that it was for them to find whether there was electric light (see page 203 lines 2 to 13 of the transcript).

[24] The appellant fails on this ground.

(2) Incompetence of counsel

Appellant's submissions

[25] It was submitted that defence counsel, although thoroughly instructed, did not properly present the appellant's case before the jury. The appellant complains that defence counsel at trial was apprised of the fact that the eyewitness was charged with shooting at the appellant and thus had a motive to lie. He, however, failed to cross-examine the witness with this information. He also complained that counsel failed to put forward to the jury the defence of alibi knowing that the appellant alleged that at the time of the incident, he was at home with his mother who would have been able to speak to this fact. Again counsel took no steps to have his mother present such evidence at

trial. Moreover, it was submitted that defence counsel failed to call available witnesses of his good character on his behalf.

Crown's submissions

[26] The Crown received a response to these allegations in an affidavit of defence counsel at trial, Mr Dalton Reid, filed on 26 May 2021. This affidavit is however incomplete as it does not provide the date that it was sworn to before the Justice of the Peace. Nonetheless, the court considered the response provided by Mr Reid.

[27] Mr Reid outlines that he only became aware that a dispute existed between the appellant and the eyewitness when he received the Social Enquiry Report. He had specifically inquired of the appellant whether there was any dispute between him and the witness and received a negative response. As the motive of the eyewitness remained a concern for him, he probed the issue in cross-examination which yielded a response in the negative. The information in the Social Enquiry Report was, therefore, a surprise to him. He was dismayed and disappointed to learn that the appellant had lied to him.

[28] With respect to character witnesses for the appellant, he made inquiries of the appellant, but no witnesses were ever presented to him. He was not aware the appellant harboured doubts about the quality of his representation as the appellant contacted him from prison on two occasions, requesting him to prosecute his appeal.

Discussion

[29] A useful starting point is the observations of Lord Hughes in **McLeod v The Queen** [2017] UKPC 1 that:

> "13. Allegations against advocates are easy to make and all too common. Frequently the question which they raise will be whether there is any more than a complaint about a finely balanced decision upon trial tactics, very often one which had to be made without any opportunity for reflection. In such circumstances, as the English Court of Appeal observed in *R v Clinton* [1993] 1 WLR 1181, 1187, it will no doubt be 'wholly exceptional' for it to follow, even if with the benefit of

> hindsight the decision turns out to have been wrong, that there has been any miscarriage of justice."

[30] This issue was recently traversed by this court in **Andrew McKie v R** [2021] JMCA Crim 17 ('**Andrew McKie'**). Writing for the court, Phillips JA reminded that these allegations should not be made spuriously. Counsel conducting the appeal must be meticulous when considering this ground. The threshold test of reasonable competence of counsel in the conduct of the trial in all the circumstances of the particular case was endorsed at para [59]. She stated:

> "[59] In [**Tyrone Da Costa Cadogan v The Queen** [2006] CCJ 4 (AJ)], the justices of the Caribbean Court of Justice reiterated the circumstances in which it is appropriate to raise the issue of the incompetence of counsel. They wrote:
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> > 'Mr Shepherd further alleges that the incompetence of the Applicant's former counsel raises a realistic possibility of a miscarriage of justice if special leave is not granted. However, as stated by Sir David Simmons CJ in Weekes v The Queen [Criminal Appeal No 4 of 2000 (unreported)]
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> > > 'All attorneys-at-law will do well to take to heart the advice of Judge LJ in Doherty and Mc Gregor [[1997] 2 Cr App R 218, [1997] EWCA Crim 556]: **'Unless in the particular circumstances it can be demonstrated that, in the light of information available to him at the time, no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal [based on criticisms of former counsel**] should not be advanced.' There are difficulties which face counsel under the immediate pressure of the trial process and those difficulties should be carefully analysed. **At all times newly instructed counsel should approach the matter with a reasonable degree of objectivity**.'" (Emphasis supplied)

[31] Reviewing her own judgment which she wrote on behalf of the court in **Kenyatha Brown v R** [2018] JMCA Crim 24, where she had conducted an extensive review of the

cases treating with this issue, at para [61] of **Andrew McKie**, dealing with the principles to be considered, she wrote:

> "[61] …Phillips JA outlined the principles to be taken into account when the court examines the issue of incompetence of counsel and wrote at paragraph [25] that:
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> 'In **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) from the Caribbean Court of Justice, Nelson, Saunders and Hayton JJA (Wit and Anderson JJA dissenting), commented on the issue of the incompetence of counsel. The court said that in resolving this issue, the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather the court was guided by the principles of fairness and due process. There was no need, the court said, for any sliding scale of pejoratives to describe counsel's errors. The court made these comments at paragraphs [11], [12] and [13] of the judgment of the majority:
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> '[11] … **This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial**. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court may yet consider, in the words of de la Bastide CJ in *Bethel* that the ineptitude or misconduct may have become so extreme as to result in a denial of due process. As this Court said in *Cadogan v The Queen* [[2006] CCJ 4 (AJ) at [14]] **the Court will evaluate counsel's management of the case 'with a reasonable degree of objectivity.' If counsel's management of the case results in a denial of due process, the conviction will be quashed regardless of the guilt or innocence of the accused**. See also Teeluck and John v The State [[2005] 4 LRC 259, 273-4; (2005) 66 WIR 319 at [39]].

> [12] An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such as strategy, which issue he or she would contest, the evidence to be called, and the questions to be put in chief or in cross-examination subject to the rules of evidence. The judge is an umpire, who takes no part in that forensic contest. Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness-box and to rely on their unsworn evidence.
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> [13] **A conviction can only be set aside on appeal if in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial**: see *Boodram v The State* [2002] 1 Cr. App. R 12, 19].'" (Italicized as in original and emphasis supplied)

[32] This court's concern then is firstly to assess the worthiness of the appellant's allegations against counsel and if necessary, the effect on the fairness of the trial process. In the first place, this ground of appeal is based on verbal instructions given to Ms Cummings by the appellant. There is no affidavit from the appellant and so no evidence was presented to this court by the appellant. Counsel conceded that it was "untidy" to make these assertions without there being specific allegations to which defence counsel may be asked to respond and took responsibility for the absence of such, blaming in part the strictures of the COVID -19 pandemic. Given this absence, counsel asks us to say the neglect by trial counsel is apparent on the record. Ms Cummings further submitted that the previous incident between the witness and the appellant was raised for the first time by defence counsel at the sentencing stage in his plea in mitigation on behalf of the appellant, causing the learned trial judge to comment that it was not raised in the course of the trial.

[33] This means there is no evidence contradicting that of Mr Reid in his affidavit. This court must accordingly assess the conflicting accounts to determine the credibility of the allegations by the appellant.

[34] A comparable issue arose in **Leslie McLeod v R** [2017] JMCA Crim 35. In that case, the appellant had previously sought leave to appeal, which was denied. A ground of appeal was that he was unable to speak with his attorney to advise him that he wished to give sworn testimony at the trial. His attempts to contact counsel were futile (he was then on bail) and he had no opportunity to do so after the trial commenced and he was remanded in custody. This was in fact a retrial and Mr McLeod had made an unsworn statement at the first trial. He asserted that he had formed the view that the jury's verdict was based on the fact that he had not given sworn testimony.

[35] Counsel, Mr Palmer, (who had appeared for the appellant at his trial) refuted these allegations. He asserted that he had in fact held discussions with Mr McLeod after he received the transcript of the first trial. His options were discussed with him and he elected to make an unsworn statement.

[36] The court determined that it was unable to treat with this ground given the factual disputes raised by the appellant and defence counsel in their affidavits, which it could not resolve in the absence of cross-examination, and the opportunity to observe them giving their evidence in person. Mr McLeod appealed to the Privy Council.

[37] Before the Board, this was the sole ground argued. The Board found that if Mr McLeod's allegations were true, then there would have been a total failure by counsel to advise him, resulting in the denial of his right to give sworn testimony. The matter was remitted to this court to resolve the factual dispute as to appellant's complaint of the incompetence of counsel at his trial.

[38] On rehearing the appeal, the court invited the appellant to give evidence, which he refused to do, and sought only to rely on his affidavit. In the circumstances, this court did not call upon defence counsel to be cross-examined. P Williams JA, writing for this

court, noted that the appellant bore the burden of proving the allegation and that the same standard of proof would apply to both the appellant and defence counsel. She also went on to review the court's prior consideration of the issue noting that:

> "[25] The position of this court in approaching assertions of this type made by appellants against their counsel was noted in two of its recent decisions. In **Michael Reid v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered on 3 April 2009, Morrison JA (as he then was) writing on behalf of the court stated the following inter alia at paragraph 44 of the judgment:
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> > '44. In our view, the following principles may be deduced from the authorities to which we have been referred:
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> > > (iv) On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be relevance and will ordinarily, in the absence of other factors, be accepted by the court (**Bethel v The State**, page 398; **Muirhead v R** paragraphs 30 and 37).'
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> [26] In **Michael Lawrence v R** [2015] JMCA Crim 24, F Williams JA (Ag) (as he then was) had this to say at paragraph [15]:
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> > 'While we recognise that it is open to us to decide which account (or, indeed which part of the two accounts), to accept or reject, we approach the matter bearing in mind the words in paragraph [44] (iv) of the summary of the principles set out by Morrison JA in the case of Michael Reid. It will be remembered that the general admonition to be gleaned from those words is that the assertions of an appellant should be approached with some amount of caution, as they could very well be self-serving. A fortiori, we might observe that where (as here) there exists the likelihood of an appellant spending an

> extended period (here 20 years) confined in less-than-ideal conditions, that would provide an added or stronger incentive to make every effort to have the appeal succeed.'"

[39] In the case at bar, what is alleged is a failure to properly manage the appellant's case. Defence counsel raising in the plea in mitigation a possible motive of the eyewitness to lie and being told by the learned trial judge that it was not raised during the trial, cannot lead to the inevitable conclusion that he "failed" to raise the issue at trial. Mr Reid specifically denies being given such instructions despite making enquiries of the appellant.

[40] It is noted that the Social Enquiry Report records that the information about the incidents involving the appellant and the witness came from family members and not the appellant himself. It is therefore not inconceivable that the appellant failed to give this information to his counsel.

[41] With respect to character witnesses, there is no evidence that there was anyone willing and available to give such testimony on the appellant's behalf. The appellant was on bail and was therefore in a position to present these witnesses to his counsel. Nonetheless, he received the benefit of both the credibility and propensity limbs of a good character direction, despite having made an unsworn statement.

[42] There is nothing on the record which gives credence to these allegations of the appellant. Defence counsel's sworn affidavit, in the absence of any material contradicting his assertions, is to be accorded greater weight than the appellant's verbal instructions to his appellate counsel. As said in **McLeod**, "It is not the law that merely by making a complaint an appellant can require counsel to be cross examined, but this may in a particular case be the correct course for the court to take". This is not such a case.

[43] These allegations do not meet the threshold test. There is no indication that the actions of defence counsel in the management and conduct of the appellant's defence fell below that of reasonably competent counsel. This ground of appeal fails.

[44] Before leaving this ground it is noted that no reference is made in the affidavit of counsel Mr Reid, that he had taken written instructions from the appellant. We wish to remind trial counsel to take written instructions not only for the record, but for their own protection against allegations of this nature.

(3) Missing Evidence

Appellant's submissions

[45] On the night of the incident, the Scenes of Crime personnel took pictures of the scene of the crime and transferred those images unto a CD. However, at trial the CD could not be located. Counsel for the appellant submitted that the Scenes of Crime CD would contain information which could be used to impeach the credit of the eyewitness and that its presence at the trial would have caused the jury to come to a different conclusion. Counsel further submitted that, in particular, it deprived the appellant of conclusive evidence of whether a 100-watt light bulb was outside of the house assisting the eyewitness to identify him. In the absence of this CD to speak to the state of the crime scene, the appellant was prejudiced by the prosecution relying on tenuous identification evidence and the credibility of the sole eyewitness. It was submitted that the CD was crucial to the appellant enjoying a fair trial as it was the sole independent, scientific evidence which would corroborate or disqualify the evidence of the sole eyewitness and that its absence breached the appellant's right to a fair trial. As the identification evidence was tenuous, the jury would have come to a different conclusion had they had the benefit of the CD or better directions from the judge.

Crown's submissions

[46] Mrs Lewis-Meade submitted that there was no bad faith on the part of the Crown in not disclosing the Scene of Crime CD, as the evidence of the investigating officer was that it had not been submitted to the court since he had never received it, despite his efforts. In the circumstances, the Crown did not attempt to deprive the appellant of a fair trial. Further, at the trial, the appellant called as a witness Detective Corporal Senior, who processed the scene on the night of the incident. Corporal Senior spoke to the lighting

conditions at the scene and the surrounding area and his ability to process and take photographs of the scene. As such, the appellant was not denied a fair trial, as he had the benefit of the evidence of the person who took the photographs, and had full opportunity to make his case. Counsel for the Crown relied on **R (on the application of Ebrahim) v Feltham Magistrates' Court and another; Mouat v Director of Public Prosecutions** [2001] EWHC Admin 130; [2001] 2 Cr App 427 ('**Ebrahim**') which dealt with an application for a stay of proceedings based on abuse of process where the police had obliterated video evidence. The issue for determination was whether, for some reason connected to the prosecutor's conduct, it would be unfair to the appellant if the court were to permit the prosecution to proceed at all. There was no issue with the prosecutors' conduct in the case at bar.

[47] It was submitted further that the learned trial judge addressed the issue of the missing CD by reminding the jury not to speculate and to treat the evidence of Detective Corporal Senior in the same fair way as the prosecution's witnesses. For these reasons it was argued this ground should fail.

Discussion

[48] Mr Dove's evidence was that he was able to view the appellant through a tear in the curtain, assisted by the bright moonshine outside and the light outside of the house being one 100-watt light bulb on the house right above a window. This light, he said, was in front of the appellant. He saw the appellant stepping out of the yard with his back turned to the road. He maintained in cross-examination that he did mention this electric bulb in his statement to the police, later agreeing, however, that it was not in his statement. The relevant portion of his statement was admitted into evidence.

[49] The investigating officer, Detective Sergeant Haldane gave evidence that he was able to see at the scene as it was moonshine and the moon was bright. He did not recall seeing any outside light on the house but would have recorded this in his statement if he had made such an observation. His further evidence was that photographs were taken of the scene that night by Scenes of Crime personnel who he took inside and outside the

house. As the investigating officer, he would normally receive the Scenes of Crime CD which would contain photographs of the scene. In this case he did not. Despite his enquiries, he never received it. To the best of his knowledge, the CD with the photographs could not be located.

[50] There was also, for the defence, the evidence of Detective Corporal Wilford Senior who processed the scene. His evidence was that when he arrived at the scene, it was shortly after midnight. At that time the sky was clear and the moon was out and that there was a lot of foliage and trees around the house. The moon was out so he could see where he was going. He further said that the area was dark. Asked, he categorically replied there was no outside light on the house.

[51] It is common ground that the Scenes of Crime CD was not available for the trial. The main issue was identification made in the night. The question of lighting and the witness's ability to see and identify the perpetrator was critical.

[52] The learned trial judge addressed this issue in detail in her summing up. She pointed out that on the one hand, Mr Dove was adamant that there was electric light on the outside of his house but that the police witnesses, both for the prosecution and defence, could not recall or saw no electric light. They all testified that they made no record of any light on the house and that the lighting would have been important information occasioning some record of such an observation. They, the jury, would therefore have to make a decision on whether there was in fact electric light on the outside of the house. The learned judge went on to invite the jury to consider whether, if there was no electric light, there was sufficient moonlight for Mr Dove to make a correct identification of the appellant. This was set against the backdrop of the conflicts in Mr Dove's testimony about the time he had the person under observation and other weaknesses in the identification evidence. The learned trial judge also instructed the jury that it was open to them to accept a part of a witness's evidence and reject a part, if they disbelieved the witness on a particular issue.

[53] The effect of missing evidence in a trial was considered in **Lescene Edwards v R** [2018] JMCA Crim 4 (‘**Lescene Edwards’**). In that appeal, the appellant was convicted of the murder of a woman with whom he had children and with whom he continued to have an intimate relationship after she married another man. She died from a single gunshot which went through her head. The main question for the jury was whether the deceased had been fatally shot by Mr Edwards as was the prosecution’s case, or had committed suicide as was the defence case. One ground of appeal was that the defence was unfairly hampered at the trial by the absence of critical evidence. That absence was said to be caused by the prosecution’s delay in bringing the case to trial. At the time of the trial, important evidence, such as clothing and other exhibits had been destroyed or had gone missing. This, it was submitted, hampered the defence in its testing of the prosecution’s expert witnesses. The prosecution’s position was that the learned trial judge did direct the jury that there were deficiencies in the collection of forensic evidence and that the missing evidence and witnesses could possibly have assisted the court and jury. Further, that this direction was sufficient in curing any unfairness in the trial.

[54] The court reviewed **Ebrahim** and adopted the guidance given by Brooke LJ. Brooks JA (as he then was) gave the following summary of the factors to be considered when evidence that had been collected was lost or destroyed.

> “[56] In adapting that guidance to the present case, it may be said that the factors that courts should consider are:
>
> 1. whether the investigating authorities were under any obligation to collect the evidence;
>
> 2. if there were no such duty, whether any request was made by the defence for the material, before it became unavailable;
>
> 3. if there was a breach of duty in the collection or preservation of evidence, the court should consider whether there could have been a fair trial, bearing in mind that the trial process does compensate for many of such defects in providing evidence; and

> 4. whether the conduct of the prosecution was so egregious that it should not have been allowed to prosecute the accused and a quashing of the conviction is the only appropriate remedy."

[55] Of the above, only number 3 will detain our consideration, as it was not denied that the police were under a duty to collect and preserve the Scenes of Crime CD nor was there any assertion that the conduct of the prosecution was egregious.

[56] In **Lescene Edwards**, the court had to determine the weight of the missing evidence on appeal. The deceased's clothing and the accused's firearm should have been preserved for the trial. They were not. The investigating officer testified that those items along with the spent bullet casing and the damaged bullet were deposited with the exhibit storekeeper at the Half Way Tree Police Station. He said that when he went to retrieve them, he discovered that they had been destroyed in 2009. This destruction was apparently a deliberate action but was not found to have been done out of a malicious intent to suppress evidence or other unworthy motive.

[57] The court found that the absence of the material was disadvantageous to the appellant and had an impact on the trial. Despite the absence of this material, however, the court found that the learned trial judge did remind the jury of the evidence concerning both the aspects of the missing material and the absent witnesses. It was for the jury to have made what it would of the effect of the missing evidence.

[58] In the case at bar, the jury was clearly told that, even if they found the witness to be untruthful in respect of the electric light at trial, if they found that there was sufficient moonlight for Mr Dove to correctly identify the appellant, then they could convict. Though Mr Dove's credibility was central to the issue of identification, he was supported by at least, one other witness as to there being bright moonshine that night. It is clear that even if the Scenes of Crime CD had confirmed there was no light on the outside of the building, it was still open to the jury to accept the rest of Mr Dove's evidence. The learned trial judge did give the jury proper and adequate directions on omissions, discrepancies and inconsistencies in the evidence and on deciding what evidence to accept or reject.

She pointed out to the jury the discrepancy between the eyewitness and other witnesses in relation to the electric light and that conflicts in the evidence could affect the credibility of a particular witness.

[59] Essentially the question whether the missing evidence would have so affected the credibility of Mr Dove was squarely before the jury for their consideration. In the circumstances, the learned trial judge gave the jury proper and adequate directions on how to deal with the missing evidence and its absence did not, in all the circumstances render the trial of the appellant unfair. This ground of appeal fails.

(4) Prejudicial evidence

Appellant's submissions

[60] The sole eyewitness in giving his evidence at trial stated

> "It is true. I am not going to stay here and look on that man and tell any lie on him. It is true I am telling. The straight truth. And if it was not the truth I wouldn't get this shot. His same one come and shot me right here."

It was submitted that this statement was prejudicial to the appellant as there was no evidence that he was injured on the night of the incident nor was there any evidence of anyone seen firing at the witness. Counsel submitted further that the evidence was unconnected to the trial, was not part of the narrative of the case and could not be said to be part of the res gestae (relevant evidence surrounding the incident). Counsel also submitted that the learned trial judge ignored this statement and failed to direct the jury of the prejudicial nature of the statement and therefore denied the appellant of a fair trial.

Crown's submissions

[61] It was submitted by the Crown that the statement would need to be assessed within the context in which it was made. Mrs Lewis-Meade submitted further that the statement does not suggest that the injury was physical as the witness did not indicate

that he was shot on any part of his body. Additionally, the statement does not reveal the location of the incident. His response was therefore suggestive of a location in his yard and was so understood by those who heard and saw him. In light of this context, it was submitted that the learned trial judge would have been under no obligation to give any direction or guidance to the jury on how to treat with the statement, which was in no way prejudicial to the appellant.

Discussion

[62] The Crown's interpretation of this statement does not bear scrutiny. The witness was not shot in the incident. The words very clearly connoted that he was shot at some other time by the appellant when he said

> "…I wouldn't get **this** shot. Him same one come and **shot me right here.**" (Emphasis supplied)

He could not therefore be referring to the location of the incident. He was clearly referring to a location on his body. It is not in issue that the words did not form part of the res gestae nor were they probative of the issues joined in the trial. How then should the learned trial judge have treated them? In **Carl Pinnock v R** [2019] JMCA Crim 7 ('**Pinnock**') relied on by the appellant, Straw JA reiterated the judgment of Brooks JA (as he then was) in **Dwight Gayle v R** [2018] JMCA Crim 34 setting out the applicable principles to be considered when potentially prejudicial evidence is introduced in a trial. He said this at para [107]:

> "[107] In **Machel Gouldbourne v R** [2010] JMCA Crim 42, this court outlined the applicable principles where a potentially prejudicial statement is improperly made. The principles may be identified at paragraphs [21] and [22] of that judgment:
>
> a. Each case will depend on its own facts.
>
> b. In circumstances where potentially prejudicial statements are improperly made the trial judge has a wide discretion.

> c. There are a number of choices that are open to a trial judge in exercising that discretion. These include, taking no action and making no mention of the matter, discharging the jury, immediately directing the jury appropriately, waiting until the summation to direct the jury on the matter, or combining both of the last two choices.
>
> d. An appellate court will be loath to interfere with an exercise of that discretion. It will only do so in the most extreme cases. 'As Sachs LJ put it in the well known case of ***R v Weaver*** [1967] 1 All ER 277, 280 ...the correct course 'depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted…' (see also Archbold, Criminal Pleading, Evidence and Practice 1992, para. 8-194, and the decision of this court in **McClymouth v R** (1995) 51 WIR 178)."

[63] In the case at bar, the learned trial judge did nothing in respect of the impugned statement. At paragraph [57] of **Pinnock**, Straw JA delineated the role of this court in reviewing the learned trial judge's exercise of discretion in such circumstances. She said:

> "[57] In deciding whether this was a proper exercise of his discretion, this court is therefore to pay careful attention to the circumstances under which the words were admitted as well as the nature of the words (see **McClymouth** and **Machel Gouldbourne**). This court is also under a duty to examine the case in its entirety and to satisfy itself that, at trial, no miscarriage of justice had occurred. If the court is so satisfied a conviction will not be disturbed (per Harris JA in **David Russell v R**[1] at paragraph [32]). Harris JA stated in **David Russell**, at paragraph [33], that this court will only interfere in circumstances where an accused would be justified in asserting that what had transpired at the trial was 'severely overwhelming, incurably wrong and unfair to him or her'."

[1] [2013] JMCA Crim 42.

[64] The facts of **McClymouth (Peter) v R** (1995) 51 WIR 178 bear being outlined in this instance. In that case the appellant was charged with murder and had put up a defence of alibi. At the trial the eyewitness for the prosecution commented that the accused was a repeat murderer and cast aspersions on his counsel. In the judge's summation, the jury was directed to disregard the comment regarding the appellant's character but not concerning his counsel. On appeal, it was submitted that the appellant was denied a fair trial as the jury should have been discharged after having heard those comments. Carey JA, speaking for the court, considered that, as the case depended solely on the credibility of the eyewitness, the comment was devastating to the appellant. He said it would have called for "a remarkable mental ability on the part of any juror to divorce from his mind … that this credible witness had not said that the appellant was a repeat murderer".

[65] This case depended mainly on the evidence and credibility of the eyewitness. The deceased died from gunshot wounds. The statement described the appellant as someone who had access to an illegal gun and used it. It went squarely to his character. Any suggestion that the appellant shot the witness after the incident would in the words of Carey JA in **McClymouth** "[introduce] a degree of prejudice" from which the jury would be unlikely to divorce their mind without at least some word of caution from the learned trial judge. It may very well be that the learned trial judge could have asked the jury to disregard the statement either at the time it was made or during her summing up, based on her assessment of the effect of the statement. Though trial judges have wide discretion in such instances, including to take no action or to make no comment at all, this case called for some action. It cannot be said that this evidence, germane to the issues joined in the trial, must have had no effect on the jury when the case is examined in its entirety. The learned trial judge therefore ought to have given some warning to the jury. Her failure to do so was devastating to the appellant and rendered the trial unfair. (see also **R v Earl Pratt & Ivan Morgan** (1984) 21 JLR 334.

[66] The appellant succeeds on this ground which is sufficient to have his conviction quashed.

(5) Errors in summing up

Appellant's submissions

[67] It was submitted that the learned judge, in summing up the evidence for the jury, incorrectly rehearsed the evidence as set out below:

i. "I remind you that he was seen directly firing a gun, shooting up the house and thereby causing Ricardo's death". However, there was no evidence that on the night of the incident any person was seen directly firing any shots at the house.

ii. "He was nonetheless adamant that although the accused left the area, he was still visiting the area and he would see him particularly, he said, on weekends". It was submitted that the witness did not give this evidence.

iii. "He said he was about the length of the short side of a piece of ply. Now I am not a carpenter but I tell you that I love to use a hammer and nail and I know that a piece of ply is a [sic] eight by four. So the short side would be four feet". It was submitted that the judge erroneously gave evidence here instead of asking the witness to show a distance of four feet.

iv. "Mr Senior has not said anything about bringing to the scene any flashlight, any floodlight or any other means of light and he told you he processed inside and outside and took photographs". It was submitted that this statement was unfair given the fact that the witness was never asked if he had taken any lighting with him to the scene.

[68] It was submitted that these errors misdirected the jury on the evidence and had they been properly directed they would have come to a different conclusion as to the guilt of the appellant.

Crown's submissions

[69] It was submitted that when looked at as a whole the learned judge did not misquote any evidence given by the witnesses. Rather the learned judge paraphrased the evidence which is permissible. She also made comments which she told the jury to disregard if they did not agree with them.

[70] In dealing with the impugned portions of the summation the counsel for the Crown submitted that as the evidence of the witness was that he would see the appellant "like sometimes on weekends", the learned judge paraphrasing to say "particularly on weekends" does not change the meaning of the evidence given by the witness. In respect of the learned judge's comment on the length of the ply board it was submitted that this was appropriate in the circumstances and did not amount to misquoting the evidence. It was submitted further that the learned judge's comment on Mr Senior's failure to mention being aided by other sources of lighting was also appropriate, given his evidence that the yard was dark. This comment would not have lead the jury to speculate, as they had been properly warned against so doing.

[71] Reliance was placed on the decision of **Adrian Forrester v R** [2020] JMCA Crim 39 where at para [47] the court noted that:

> "[47] In addition to reminding the jury of the salient facts in the case, the trial judge is entitled to comment on those facts. In summing up a case to the jury, the trial judge is also entitled to, along with defining the issues, express his opinion, and in a proper case may do so strongly, so long as the jury are informed that they are entitled to ignore them, and the issues are left to the jury for their final determination."

Discussion

[72] The Crown's submissions that the learned trial judge did not misquote but paraphrased the evidence are well founded and we find them to be meritorious. Although this, by itself, is not definitive, it is important to note that neither counsel for the Crown nor defence counsel made any indication that the learned trial judge had misquoted any of the evidence when she invited them, at the end of her summation, to indicate if she had left anything out. The learned trial judge is not required to repeat the evidence verbatim to a jury who just heard it for themselves. In relation to comments she may have made, the learned trial judge made it clear that the jurors did not have to agree with her comments. She reminded them several times that they were the sole judges of the facts. This ground of appeal also fails.

Appeal against sentence

[73] It was submitted that the sentence is harsh and excessive having regard to the circumstances of the case and the principles of sentencing which ought to have been applied. Additionally, the time the appellant spent in custody awaiting trial was not credited back to him. However, having regard to the determination made below, it is unnecessary to consider these complaints.

Disposition

[74] Section 14 (1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') provides that the court shall allow the appeal if they think there has been a miscarriage of justice, provided that where no substantial miscarriage of justice has actually occurred the court may dismiss the appeal.

[75] The prejudicial statement goes to the view the jury may take of the case and so it cannot be said that the jury properly directed would have inevitably convicted, were the prejudicial material not introduced. This court has repeatedly approved and applied the inevitability of conviction as the test by which to determine whether or not to apply the proviso (see **Vince Edwards v R** [2017] JMCA Crim 24 where the authorities were

reviewed by Brooks JA (as he then was)). This case therefore is not a proper case for the application of the proviso.

[76] The question becomes whether a judgment and verdict of acquittal should be entered or a retrial should be ordered in the interests of justice, as per section 14(2) of JAJA, which provides as follows

> "14.-(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."

[77] In **Vince Edwards** Brooks JA, following the guidance of the Privy Council in **Dennis Reid v R** (1978) 16 JLR 246, identified a non-exhaustive list of considerations to be taken into account when deciding whether there should be a retrial which is reproduced below:

a. The strength of the prosecution's case;
b. The seriousness or otherwise of the offence;
c. The time and expense that a new trial would demand;
d. The effect of a new trial on the accused;
e. The length of time that would have elapsed between the event leading to the charges, and the new trial;
f. The evidence that would be available at the new trial;
g. The public impact that the case could have.

[78] The decision in each case must turn on the particular facts. Counsel for the appellant and the Crown were invited to make submissions on whether a retrial should be ordered. Written submissions on behalf of the appellant were submitted and considered. (The respondent also provided submissions, which, due to an unfortunate administrative error, were not considered; but which, at the end of the day, did not work to its disadvantage/prejudice.)

[79] Counsel for the appellant argued that there should not be a retrial as:

a) Too much time has elapsed since the happening of the events since 7 May 2012, to date;
b) the tenuous nature of the prosecution's case being reliant on a sole eyewitness in difficult circumstances and poor lighting conditions;
c) the unknown likelihood of witnesses not being available for both the crown and the appellant;
d) the still missing crucial evidence of the Scene of Crime CD;
e) the ongoing pandemic that may lengthen the time;
f) the appellant's right to a fair trial within a reasonable time will be undermined.

[80] There is no doubt that murder is a serious offence and that this country is in a state where it seems to continue unabated. The society demands that the perpetrators of these crimes be brought to justice. Nine years have elapsed since the incident and it cannot be gainsaid that such a delay would be prejudicial to the appellant. However, delay may not be a bar in all circumstances. This court countenanced a retrial in **Radcliffe Levy v R** [2019] JMCA Crim 46, where almost 12 years had elapsed from the commission of the offence to the hearing of the appeal. In that case, the appellant, who was alleged to have killed his child's mother, had been on bail and was only taken into custody on conviction. He had by then, served three years and nine months of his sentence. In those circumstances, the prejudice to him was said to be "somewhat reduced", and that it was within the remit of the prosecution to expedite the listing of the retrial. The appellant was arrested in May 2012. He was on bail from 26 June 2012 until the start of the trial on 15 February 2016.

[81] The issue of delay was also considered in **Vince Edwards**. In that case the nature of the matter, being a killing of a civilian by a police officer, carried greater weight than the delay of eight years from the commission of the offence to the hearing of the appeal.

[82] In the instant case, the life of an innocent child, deserving of protection, was snuffed out. The prosecution's case on the face of it is strong. The appellant is able to receive a fair trial notwithstanding the absent scenes of crime CD. The trial was completed over six days and so it was not of very long duration. There is a sole eyewitness. The delay is mitigated by the fact that the appellant was on bail until the trial commenced. We consider also that the appeal is being allowed on the basis of a technical blunder on the part of the learned trial judge. The concern of the appellant to mount his defence in full, if he is unable to produce his witness at trial, is not likely to cause the prejudice contemplated given the provisions of the Evidence Act and where the evidence given by the witness was not contested by the Crown. The court has also considered the delays that may be occasioned by the COVID-19 pandemic. We are of the view that these delays ought only to be a bar to a retrial where the delay has already been inordinately long. In the circumstances of this case, it is just that a retrial be ordered.

Conclusion

[83] The learned trial judge made a fatal error in admitting evidence that was highly prejudicial to the appellant without any comment or directions to the jury. This requires that the conviction be quashed and the sentence set aside. The interests of justice require that a retrial be ordered. In the event, the court orders that:

1. The appeal is allowed.
2. The conviction is quashed and the sentence set aside.
3. In the interests of justice, the case is remitted to the Circuit Court for the parish of Westmoreland for a retrial at the earliest possible time.