[2025] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P
THE HON MR JUSTICE BROWN JA
THE HON MRS JUSTICE SHELLY–WILLIAMS JA (AG)

CRIMINAL APPEAL NO COA2019CR00095

DWAYNE SMITH v R

John Clarke for the applicant

Miss Channa Ormsby and Miss Ofryea Cox for the Crown

6, 7 October and 19 December 2025

Criminal law – Murder – Admissibility of hearsay evidence – Prosecution witnesses could not be found after all reasonable steps taken to find them Visual identification evidence – Whether judge erred in not upholding the no case submission – Adequacy and accuracy of directions to the jury – Whether trial unfair due to non-attendance of the prosecution witnesses – Evidence Act, sections 31D(d) and 31L

Criminal Law – Sentencing – Breach of constitutional right to a fair hearing within reasonable time – Whether sentence manifestly excessive or inappropriate – Whether sentence to be reduced as a remedy for breach of the reasonable standards guarantee – Appropriate remedy for constitutional breach – The Constitution of Jamaica, sections 16(1) and 16(8)

SHELLY–WILLIAMS JA (AG)

[1] At the outset, this court wishes to mention that an application for fresh evidence was before us. That application was struck out as the respondent had not been served.

Background

[2] This is an application to appeal conviction and sentence after a trial before Gayle J and a jury in the Home Circuit Court. The trial commenced on 26 February

2019 and, on 17 March 2019, the jury unanimously found the applicant guilty of murder (*in absentia* – he absconded bail). On 28 June 2019, he was sentenced to life imprisonment with eligibility for parole after serving a minimum of 20 years.

The lower court's proceedings

[3] The case, in summary was that, on 13 August 2011, the applicant (also known by the alias of "Chad" by the eyewitnesses) murdered Clive Palmer ('Mr Palmer'). The evidence elicited by the prosecution was that the applicant, along with another man, went to a house at McCooks Pen in the parish of Saint Catherine, where Mr Palmer lived. There were a group of four men, including the deceased Mr Palmer, sitting under an apple tree in the yard at the house. Mr Palmer was subsequently shot and killed by the applicant. The two main witnesses as to the commission of the crime and the identity of the perpetrator were Mr Nigel Brown ('Mr Brown') and Mr Damion Wellington ('Mr Wellington'). The prosecution also presented medical evidence and evidence from police officers.

[4] At the trial, , Mr Brown's deposition, which was given at the preliminary enquiry at the Resident Magistrate's Court (now Parish Court), was admitted into evidence. Mr Brown was one of four men sitting under the apple tree. It is important to note that he was cross-examined at the preliminary enquiry, and the responses he gave were also noted and formed part of his evidence in the trial of the matter. Mr Brown gave evidence that when the applicant came upon them under the apple tree, the applicant spoke to him by saying, "Cuz… don't move" and pointed a gun in his direction. Mr Brown responded to the applicant, calling him by his alias "Chad". At that instance, Mr Brown heard gunshots at the back of the yard, and he ran.

[5] Mr Brown's evidence was that he ran in the direction from which the applicant was coming, running past another man who was not previously known to him. He was eventually shot and fell. He heard further explosions at the apple tree. He ran towards a gully and later met upon some police officers who took him to the hospital. But before going to the hospital, the police officers took him to the crime scene where he saw the deceased lying on the ground, appearing dead. At the hospital, he saw

another man, who was in the back of the yard where he had heard the initial explosion, nursing several gunshot injuries.

[6] Mr Brown's evidence was that he recognised the applicant and that:

a) the applicant was previously known to him two to three years prior to the incident;

b) there was a streetlight t eight feet away from the apple tree, and moonlight was present, which provided the right environment for him to properly identify the applicant;

c) he saw the applicant's entire face for 15 seconds;

d) he saw the applicant a month before the incident; and

e) he identified the applicant at an identification parade after the incident on 1 September 2011.

His evidence was that he did not see the applicant firing the gun.

[7] Mr Wellington's deposition was also admitted into evidence in the same manner as that of Mr Brown's. He was one of the four men present at the time of the incident. Mr Wellington's evidence before the Parish Court, was that:

a. the applicant was approximately 3 feet away from him when he came upon the men under the apple tree.

b. there was a streetlight that provided adequate light to see the applicant's face. It was approximately 10 feet away from where he was;

c. there were four working streetlights at the crime scene where he saw the applicant shooting at the deceased;

d. the duration of his observation of the applicant was three minutes from the applicant was approaching the tree, to him being observed shooting the deceased;

e. he observed the applicant's face for approximately 30 seconds;

f. he knew the applicant for approximately 15 years at the time of the incident;

g. he usually sees the applicant approximately three to four times per month, and they always speak;

h. he saw the applicant approximately a week before the incident when there was an argument between the applicant's friend and another individual;

i. neither he nor any of the men under the tree was involved;

j. he knows the applicant's mother, who has the same last name as him; he also knows the applicant's uncle; and

k. he knew that the applicant was not alone based on the first gunshot he heard, but he failed to see the other person's face.

[8] Additionally, Mr Wellington's evidence also revealed that the applicant instructed the men not to move and that at that juncture, he called the applicant by his alias "Chad", to which the applicant's response was to query who was under the tree. Mr Wellington's response was to advise that the deceased (using the alias of "Froggy") was present. Mr Wellington gave further evidence that the applicant was "firing shots" as he observed him when he was running down the deceased. The deceased fell to the ground as a result. Further, that he, Mr Wellington, also attended an identification parade on 1 September 2011, where he identified the applicant as the person who shot the deceased. He also divulged that the deceased is his cousin-in-law and that he had seen guns before in police officers' possession.

Before this court

[9] The applicant's initial application for leave to appeal came before a single judge and same was refused. As he is so entitled to do, pursuant to rule 3.11(2) of the Court of Appeal Rules, (2002), the applicant, has renewed the said application for this court's consideration.

[10] The applicant was allowed, with the permission of the court, to withdraw his original grounds of appeal and to argue the supplemental grounds filed on 20 December 2022. The supplemental grounds filed were:

> "1. The applicant's conviction should be quashed as the Applicant was deprived of a fair trial by the admission of the statements of the sole eyewitnesses at his trial without the defence being given the opportunity to cross-examine him.
>
> The fairness of the trial was affected because: -
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> a. There was no good reason for the absence of the witnesses.
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> b. The absent witnesses' evidence was sole and decisive.
>
> c. There was no counterbalancing factor (or in the alternative sufficient counterbalancing factors) to compensate for the difficulties caused to the defence by the admission of the statement.
>
> d. There were no measures that permitted a fair and proper assessment of the reliability of the absent witnesses' evidence.
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> 2. The Learned Trial Judge erred in law in admitting the statement of Damion Wellington in the context of the material case (pp. 103, 109, 114-5, 117, 129, 134) as: -
>
> a. There were no reasonable steps taken to find him.
>
> b. There was evidence that he was evading the system. The crown witness was voluntarily

absenting himself from the trial, his statement inadmissible on this ground.

c. The evidence that he was evading the system made it improper and impermissible to admit his [statement] under section 31D (d) of the Evidence Act.

d. The failure to properly particularize the evasions of the system brings into doubt whether the witness was 'lost' or whether reasonable steps were taken to find him in light of his (and his family's) evasions.

3. The Learned Trial Judge erred in law in admitting the statement of Nigel Brown in the context of the material case (pp. 103, 109, 114-115, 118, 134, 136) as: -

a. There were no reasonable steps taken to find him.

b. There was evidence that he was evading the system.

c. The evidence that he was evading the system made it improper and impermissible to admit his [statement] under section 31D (d) of the Evidence Act.

d. The failure to properly particularize the evasions of the system brings into doubt whether the witness was 'lost' or whether reasonable steps were taken to find him in light of his (and family's) evasions.

4. The Learned Trial Judge failed to give appropriate and sufficient directions to the jury to cure the unfairness which was occasioned by the admission of the sole material eyewitness statements – in scenarios where they were evading the system – with no proper measure to permit a fair and proper assessment of the reliability of their evidence.

5. The Learned trial judge erred by failing to give the applicant a reduction in the sentence for the breaches

of his constitutional right concerning the breach of the reasonable time standard for the trial of this matter.

6. 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."

[11] Those grounds of appeal can be summarised as follows:

a) The learned trial judge erred in admitting hearsay evidence, which was not subjected to cross examination, therefore, leading to an unfair trial.

b) The learned trial judge erred in not withdrawing the case from the jury in the light of the weaknesses which existed in the visual identification evidence.

c) The learned trial judge in his summation failed to identify the specific weaknesses in the case for the jury's attention.

d) The learned trial judge failed to grant the applicant a remedy by way of reduction of sentence for breach of his constitutional right to a fair hearing within a reasonable time.

e) The learned trial judge failed to adhere to the sentencing guidelines in arriving at an appropriate sentence for the applicant.

The applicant's submissions

[12] Mr John Clarke, on behalf of the applicant, argued grounds 1 to 3 together under the heading admissibility of deposition. In summary, the grouse is that the learned trial judge erred in admitting into evidence the depositions of Messrs Brown and Wellington.

[13] Counsel in his written submissions, made on behalf of the applicant, submitted that the prosecution failed to satisfy section 31(D)(d) of the Evidence Act because all reasonable steps were not shown to have been taken to find the witnesses. Counsel submitted that there was evidence of the witnesses' voluntary evasion of the court system and thus the admission of the depositions was not appropriate. Mention was made of Detective Sergeant Jackson's evidence during the *voir dire*, regarding the witnesses' ability to see him before he could see them and his belief that they were intentionally evading him.

[14] Counsel argued that the learned trial judge erred in admitting the depositions, and this was buttressed by the fact that these absent witnesses were the "sole and decisive witnesses" to the incident.

[15] Relying on cases such as **R v Davis** [2008] 1 AC 1128, [2004] EWCA Crim 2521; **R v Michael Barrett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 76/1997, judgment delivered on 31 July 1998; **Henriques and Carr v R** (1991) 39 WIR 253 (258c-e); **Al-Khawaja and Tahery v United Kingdom** (2009) 49 EHRR 1; **R v Khelawon** [2006] 2 SCR 787; **R v Adidjah Palmer, Lenburgh McDonald and Nigel Thompson** [2013] JMGCCD 1; **R v Horncastle and Another** [2010] 2 WLR 47; **Steven Grant v R** [2006] UKPC 2; and the Supreme Court of Judicature of Jamaica Criminal Bench Book (pages 178-179), counsel for the applicant argued that section 31D is an exception to section 16 of the Charter of Fundamental Rights and Freedom, as well as the recognised common law rule that a man ought not to be deprived of the ability to face his accuser and examine said accuser publicly. Additionally, fairness is the ultimate determination as to whether a statement ought to be admitted into evidence in a witness's absence from the trial, notwithstanding the statutory exception. Mr Clarke further proffered that this is determined by weighing all the relevant factors, determining whether the prejudicial effect outweighs the probative value and that the burden of proof is beyond a reasonable doubt.

[16] Ground 4 was argued by counsel for the applicant under the heading of identification evidence. It was submitted that there was a plethora of weaknesses in the identification evidence given by the eyewitnesses, and the case ought to have been withdrawn from the jury. The alleged deficiencies of the identification evidence included:

a. the lack of objective evidence regarding the lighting at the crime scene;

b. the possible view blockage by foliage;

c. the delay in identifying the approaching gunmen;

d. the possible chance that the attacker was not able to properly view the men under the tree;

e. the short time span within which the incident occurred; and

f. the discrepancy regarding Mr Wellington's specific location in the yard at the time of the incident based on his and Mr Brown's evidence.

Counsel contended that based on these deficiencies, coupled with the inability to cross examine the witnesses, the learned trial judge should have withdrawn the case from the jury.

[17] In further submissions with regards to ground 4, Mr Clarke argued that the learned trial judge's summation was deficient. Reliance was placed on the cases of **R v Turnbull and Others** [1976] 3 ALL ER and **Ivan Fergus v R** (1993) 98 Cr App R 313, for the position that the learned trial judge failed in his duty to highlight specific weaknesses to the jury. Mr Clarke argued that this pointed to the failure of the learned trial judge to "fairly and properly summarise" to the jury. Mr Clarke relied on pages 435- 439 of the transcript in support of his position.

[18] Ground 5 raised the issue of the applicant's right to a trial within a reasonable time. The submission of the applicant was that his section 16 constitutional right to a trial within a reasonable time had been breached. This breach, it was argued, should have resulted in the applicant receiving a reduction in his sentence. Reliance was placed on the case of **Evon Jack** [2021] JMCA Crim 31 for the view that, this court has the authority to consider constitutional breaches on a criminal appeal.

[19] Ground 6 dealt with the issue of whether the sentence passed by the learned trial judge was appropriate in all the circumstances of the case. The argument advanced under this head is that the sentence passed by the learned trial judge was not appropriate in all the circumstances of the case because the learned trial judge did not adhere to the applicable sentencing principles in arriving at it. Furthermore, the sentence should be reduced due to the "inexplicable delay of eight years caused in the appeal process". The cases of **Meisha Clement v R** [2016] JMCA Crim 26; **Edwards v R** (2018) 92 WIR 477; **Allan Cole v R** [2010] JMCA Crim 67; **Techla Simpson v R** [2019] JMCA Crim 37; **Tussan Whyne v R** [2022] JMCA Crim 42; **Jahvid Absolam and Anor v R** [2022] JMCA Crim 50 (at paras. [81- [84]); **Ray Morgan v The King** [2023] UKPC 25 (70-73); **Curtis Grey v R** [2019] JMCA Crim 6; and **Evon Jack v R**, were relied on for the position that the learned trial judge did not demonstrate an adherence to the applicable sentencing principles and methodology and that the applicant ought to receive a remedy for the delay. It was submitted that, based on the authorities cited on the issue of delay, the appropriate remedy would be a sentence reduction, a 'time-served order', or immediate release.

The Crown's submissions

[20] In relation to the fairness of the admission of deposition evidence (grounds 1-3), the Crown argued that the legal safeguards found in section 31L of the Evidence Act protected the applicant's right to a fair trial. Relying on the case of **Barnes, Desquottes and Johnson v R, Scott and Walters v R** (1989) 37 WIR 330, the Crown opined that the court may exclude evidence where the prejudicial effect outweighs the probative value.

[21] The case of **R v Adidjah Palmer, Lenburgh McDonald and Nigel Thompson** was referenced by the Crown, and it was submitted that the 1995 amendment to the Evidence Act created a statutory exception to the common law rule that an accused must be able to face his accuser.

[22] The Crown argued that section 31D of the Evidence Act broadened the powers which existed in section 34 of the Justices of the Peace Jurisdiction Act ('JP Act"), that is, it increased the persons whose statements could be admitted into evidence in their absence from a trial. The amendment to the Evidence Act also added the provision which excluded the admission of said statements where it was found to be unfair to do so.,.

[23] Counsel argued that the learned trial judge had demonstrated he had addressed his mind to the issue of fairness based on his ruling at pages 200-201 of the transcript, where he stated that, "[I] don't think there was any risk of unfair dealings toward [sic] the accused". This, it was argued, showed that the learned trial judge exercised his discretion under section 31L of the Evidence Act.

[24] Relying on the case of **R v Dragic** [1996] 2 Cr App Rep 232, the Crown proffered that where the sole evidence in a trial was in written form, this would not, in and of itself, render the trial unfair. Further, that the learned trial judge considered the evidence of the investigating officer, Sergeant Jackson, regarding the efforts he made to locate the witnesses. The investigating officer's evidence was that he was able to locate and take the witnesses to court to give the deposition evidence in the preliminary enquiry and to attend court on the first trial date in June 2019, however, he was unable to locate the witnesses to transport them to court after that date. The officer's evidence was that he consulted the spouses and parents and visited home addresses as well as places frequented by the witnesses. Ms Ormsby's position was that this evidence showed that the prosecution had met the requirements under the Evidence Act for the admission of the depositions. Counsel submitted that, having considered this evidence, the learned trial judge then adopted the principles in the case of **Brian Rankin and Carl McHargh v R**, (unreported), Court of Appeal,

Jamaica, Supreme Court Criminal Appeal Nos 72 and 73/2004, judgment delivered 28 July 2006 at para. 18.

[25] Regarding ground 4, as to whether sufficient directions were given to the jury as to how they were to treat with the depositions in their deliberations, the Crown argued that the learned trial judge gave the relevant warnings regarding the jury's inability to observe the witnesses and have their evidence tested on cross-examination. The guidance provided in the case of **Henriques and Carr v R**, at page 258, was referenced to buttress this argument. Counsel pointed to the judge's direction to the jury, at pages 435-494 of the transcript, in support of this position. Therefore, the Crown argued that the good quality of the identification evidence, in conjunction with the learned trial judge's directions to the jury, made the trial fair.

[26] In relation to ground 5, concerning the issue of the reasonable time standards , the Crown submitted that, based on the history of the case, the delays were not solely at the instance of the State. The applicant's change of counsel on four occasions contributed to the delay; albeit his right to counsel of his choice is recognised. Further, for every adjournment, the prosecution was again tasked with making enquiries to find the eyewitnesses, and the relevant communications had to be sent to the relevant personnel to take the necessary action.

[27] The Crown conceded that there was a breach of the applicant's right to a trial within a reasonable time and that this was not raised at the trial. The Crown's position was that other appropriate remedies for the breach, other than a reduction in sentence, were available. The Crown submitted that the appropriate remedy is a public acknowledgement of the delay. The cases relied on for these submissions were **Julian Brown v R** [2020] JMCA Crim 42 paras. 85 and 89 and **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26 at para. 25.

[28] Regarding ground 6, the Crown's response was that the learned trial judge did not err in sentencing, having regard to sections 2(2) and 3(1) of the Offences Against

the Person Act and the Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017.

Discussions

[29] This court has narrowed down the proposed grounds of appeal under four broad headings:

a. The admission of the deposition evidence (grounds 1(a), (b), (c), 2 and 3).
b. Absence of independent evidence and the failure to uphold the no case submission (ground 1(d)).
c. The adequacy of the learned trial judge's directions to the jury (ground 4).
d. The appropriateness of the sentence (grounds 5 and 6).

The admission of the deposition evidence

[30] The history of the admission of written documents into evidence in the maker's absence was initially contained in the JP Act. Then came the amendment to the Evidence Act in 1995, which permitted not only the admission of depositions, but also other forms of written hearsay evidence.

[31] Essentially, what is admissible into evidence are hearsay statements contained in documents, as the maker of those documents would not be appearing at the trial for cross-examination. Section 34 of the JP Act and section 31 of the Evidence Act have been challenged on several occasions before this court and the Privy Council. The cases of **Michael Barrett**; **R v O'Neil Smith** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2003, judgment delivered 20 December 2004; **Steven Grant v R**; **Brian Rankin and Carl McHargh v R**; **R v Davis** [2008] 1 AC; and **Tate v R** [2013] JMCA Crim 16 explored the constitutionality of the relevant statutory provisions and the issue of fairness as well as the standard of proof in the admittance of hearsay evidence.

[32] This case was, for the most part, a paper trial and centred on the two eyewitness depositions, those of Messrs Wellington and Brown. These witnesses gave evidence at a committal proceeding and attended the Home Circuit court on the first trial date in June 2013, but could not be contacted to attend court thereafter. The judge conducted a *voir dire* to decide whether the depositions of these witnesses were to be admitted into evidence. There are two elements which must be satisfied when conducting a *voir dire* prior to the admission of hearsay evidence, which are:

> (a) the prosecution has satisfied the requirements under Section 31D; and
>
> (b) the judge is satisfied that, in admitting the hearsay evidence, it would be more probative than prejudicial, that is, it is fair to admit the evidence (fairness).

[33] The prosecution, in this case, applied to have the depositions admitted by virtue of section 31D(d) of the Evidence Act, which states that: -

> "A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person-
> …
>
> (d) cannot be found after all reasonable steps have been taken to find him;"

[34] The Evidence Act has embedded safeguards with regard to section 31D. Section 31J and 31L should be considered when seeking to admit documents under Section 31D. Section 31J states that: -

> "(1) Where in any proceedings a statement made by a person who is not called as a witness in those proceedings is given in evidence pursuant to section 31D, 31E, 31F or 31G-
>
> (a) any evidence which, if that person had been so called would have been admissible as relevant to his credibility as a

> witness, shall be admissible in the proceedings for that purpose;
>
> (b) evidence may, with the leave of the court, be given of any matter which, if that person had been called as a witness, could have been put to him in cross-examination as relevant to his credibility as a witness but of which evidence could not have been adduced by the party cross-examining him;
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> (c) evidence tending to prove that, whether before or after he made the statement, that person made (whether orally or in a document or otherwise) another statement inconsistent therewith, shall be admissible for the purpose of showing that the person has contradicted himself.
>
> (2) References in subsection (1) to a person who made the statement and to his making the statement shall be construed respectively as including references to the person who supplied the information from which the document containing the statement was derived and to his supplying that information."

[35] Section 31L of the Evidence Act gives the court a residual power whereby, although a judge is satisfied that the prosecution has fulfilled all the pre-requisites under section 31D, it may still rule not to admit the statement into evidence. This confers on the court the right to delve into the circumstances surrounding the hearsay evidence and to decide whether it should be admitted into evidence. In the case of **Steven Grant v R,** Lord Bingham, in delivering the decision of the Board, analysed section 31L of the Evidence Act and gave guidance as to how the discretion conferred by the section should be exercised. He stated, at page 368, that: -

> "Section 31L acknowledges the discretion of the court to exclude evidence if it judges that the prejudicial effect of the evidence outweighs its probative value. In *R v Sang* [1980] AC 402, some members of the House of Lords (notably Lord Diplock at pp 434 to 437 and Viscount Dilhorne (pp 441 and 442) interpreted this discretion narrowly, and in *Scott and Walters v R* (1989) 37 WIR 330 at 338, the Board appears to have accepted that reading. It is not, however, clear that the majority in *R v Sang* favoured a similarly narrow interpretation (see Lord Salmon at pp 444 and 445, Lord Fraser of Tullybelton at p 449 and Lord Scarman at pp 453, 454 and 457). In any event, it is,

> in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. Such a discretion has been recognised by the Court of Appeal in *R v White* (1975) 24 WIR 305 at 309, and *R v Barrett*. It has been recognised by the Board in *Scott and Walters v R* at p 340 and *Henriques and Carr v R* (1991) 39 WIR 253 at 258; both these appeals concerned the admission of depositions, but the need for a judicial discretion to exclude is even greater when the evidence in question has never been given on oath at all. In England and Wales, the discretion has been given statutory force; see s 25(1) of the Criminal Justice Act 1988, *R v Lockley* [1995] 2 Cr App Rep 554 at 559 and 560, *R v Gokal* [1997] 2 *e* Cr App Rep 266 at 273, and *R v Arnold* (unreported) [2004] EWCA Crim 1293 at para [30]. Conscientiously exercised, this discretion affords the defendant an important safeguard." Italics as in the original.

[36] There have been several cases in which the court has declined to admit hearsay evidence, based on fairness. There is the first instance decision of **R v Adidjah Palmer, Lenburgh McDonald and Nigel Thompson,** where Sykes CJ declined to admit a statement pursuant to a *voir dire* as he was not satisfied that the Crown had taken all reasonable steps to locate the witness.

[37] Similarly, the Caribbean Court of Justice ('CCJ'), in the case of **Japhet Bennett v R** [2018] CCJ 29 (AJ), addressed the issue of fairness at para. [12] of the judgment. Witt, JCCJ, in delivering the majority decision, stated:

> "Nevertheless, the power of the judge not to admit admissible evidence was correctly recognized by the Court of Appeal in *Tillett v R*, a case which dealt with a hearsay statement admissible under section 73A, where the court stated, referring to its earlier decision in *Micka Lee Williams*, that
>
> > 'the admissibility of such a statement will nevertheless remain subject to the rule of the common law that a judge in a criminal trial has an overriding discretion to exclude it if its prejudicial effect outweighs its probative

> value, or if it is considered by the judge to be unfair to the defendant in the sense of putting him at an unfair disadvantage of depriving him unfairly of the ability to defend himself'." (Italics as in the original)

[38] In the instant case, the two eyewitnesses to the murder had given statements to the police and later attended a preliminary enquiry where they gave evidence-in-chief and were cross-examined. The case was transferred to the Circuit Court, and the two witnesses, who had previously given evidence at the preliminary enquiry, attended court on the first trial date. The trial did not proceed on that date, and it was adjourned to a later date. Prior to June 2013, the investigating officer, Sergeant Lans Jackson, would routinely contact the eyewitnesses the day before they were to attend court, and then would transport them to court from McCooks Pen. After June 2013, the investigating officer was unable to locate the witnesses to attend court.

[39] The prosecution led both documentary and oral evidence, highlighting the exhaustive search conducted to locate the two eyewitnesses. The evidence led by the prosecution on the *voir dire* was mainly from the investigating officer, Sergeant Lans Jackson. He gave evidence of his attempts to locate the witnesses over a period of six years, that is, from 2013 to 2019. He gave evidence of serving notices on various entities, including hospitals, funeral homes, the Passport, Immigration and Citizenship Agency, the correctional department and print media. Evidence was led by the prosecution that there were no responses that indicated the location of these witnesses.

[40] The evidence from the investigating officer was that he had spoken to Mr Brown's parents, persons with whom each man was living at the material time, as well as community members. He was advised that they no longer resided at those addresses and that no one was aware of their whereabouts. He did not receive any information that could assist him from these persons. He attended football matches in the community of McCooks Pen and neighbouring communities in an attempt to locate Mr Wellington. He did so because Mr Wellington had indicated that he played football.

[41] There were two occasions, in 2017, when the investigating officer indicated that he saw Mr Wellington. On the initial occasion, he spoke to Mr Wellington and asked him where he lived, but Mr Wellington refused to provide the investigating officer with an address. On the second occasion, on the approach of the investigating officer, Mr Wellington ran. The investigating officer visited various security companies in search of Mr Wellington, as he had indicated that he was a security officer. The investigating officer received a cellular number for Mr Wellington, called it and spoke to Mr Wellington on one occasion.

[42] In relation to Mr Brown, the investigating officer had been unable to locate him since the last time he had transported him to court in 2013.

[43] During oral submissions before this court, Mr Clarke conceded that the prosecution would have satisfied section 31D(d) of the Evidence Act based on the evidence elicited during the *voir dire*. He contended, however, that the learned trial judge had failed to address his mind to the issue of fairness in admitting the hearsay evidence.

[44] The prosecution, as well as counsel for the applicant at the trial, made extensive submissions to the learned trial judge not only on whether the prosecution had satisfied the court that all reasonable steps had been taken to have the witnesses attend the trial, but also whether the depositions should be admitted as a matter of fairness. The learned trial judge, having considered all the submissions, found that the prosecution had satisfied him in relation to section 31D(d) of the Evidence Act. He went on to find, at page 201, lines 8-9 of the transcript, that, "I don't think there was any risk [of] unfair dealings towards the accused".

[45] We find that the learned trial judge properly assessed the evidence given on the *voir dire* relating to the adequacy of the prosecution's evidence regarding section 31D(d). He considered the relevant law relating to the admission of the depositions as well as the safeguards afforded to the applicant in the Evidence Act and under the

common law. The trial judge then properly exercised his discretion to admit the hearsay evidence. We find no merit in these grounds.

Absence of independent evidence and failure to uphold the no case submission

[46] Counsel for the applicant submitted that the court should not have admitted the hearsay evidence in the absence of independent evidence to support it. Mr Clarke acknowledged that there were photographs taken of the scene which could be viewed as independent evidence. However, he contended that the scene of crime officer failed to take pictures of parts of the scene, namely the area under the apple tree. Mr Clarke argued that the lighting under the apple tree was important as Mr Wellington had given evidence at the preliminary enquiry, which pointed to the fact that there was an issue with visibility in this area of the yard. Mr Clarke highlighted the evidence of Mr Wellington, where he indicated that the applicant had enquired as to who was under the apple tree. This, counsel argued, showed that there was an issue with lighting in this area and thus created a lacuna in the prosecution's case. Not taking pictures of this area of the yard, counsel submitted, resulted in the applicant receiving an unfair trial.

[47] There are two questions that arise from this ground of appeal and the submissions made in support of same, namely:

a. at what stage should a judge, as the tribunal of law, consider the weight to be attached to hearsay evidence?

b. in paper trials, is there a requirement for independent evidence to be elicited to support the hearsay evidence?

[48] In criminal trials involving the admission of hearsay evidence, the trial judge is tasked with assessing the evidence at two stages. These are: -

a. the assessment of the evidence at the *voir dire* when the judge would have to decide whether the hearsay evidence is to be admitted; and

b. the assessment at the close of the prosecution's case.

[49] At the close of the prosecution's case, the court is compelled to consider, as established by the well-known case of **R v Galbraith** [1981] 1 WLR 1039, whether the evidence led by the prosecution is of such a quality that it can be left to the consideration of the jury. This position is supported by the case of **Japhet Bennet v R**, where the Witt, JCCJ opined at paras. [27] and [28] that:

> "[27] During a trial, particularly a jury trial, the judge in Belize has basically two opportunities to evaluate and assess the necessity and reliability of the hearsay evidence, and to decide whether it should be left to the jury. The first occasion occurs when the hearsay evidence is introduced, and the judge must decide whether, at that stage, to admit it. The evidence having been admitted, the second occasion occurs when at the close of the prosecution case a no case submission is made, and the judge must decide whether to uphold that submission. If, on the first occasion, the judge, exceptionally, is clear in his mind that the hearsay evidence cannot in reason safely ever be held to be reliable, the judge must exclude it and, where the prosecution's case, like here, wholly or substantially rests on that evidence, the judge should stop the trial and direct the jury to acquit the accused. If, however, there is a reasonable possibility that eventually, depending on how the trial unfolds, sufficient evidential material will emerge given which the hearsay evidence could in the end safely be held to be reliable, the judge should in principle admit the evidence. This is the more so, of course, if at that stage it is already clear that this test is or will be met.
>
> [28] Where at the close of the prosecution case a no case submission is made, which, one can assume, will be standard in cases like these, the final test is whether the evidence thus far produced could safely be held to be reliable 'as it is for the jury to decide whether in fact the evidence is reliable or not.' This is what in the Canadian terminology could be called the 'threshold reliability" (although it is there applied to the admissibility issue). If that test is met, the judge will leave the evidence for the jury, after having given them the necessary directions, to consider its 'ultimate

> reliability.' If it is not met, the judge should conclude that the evidence is inherently so weak that the jury, even if properly directed, could not properly or reasonably convict upon it, in which case the judge will uphold the submission and direct the jury to acquit the accused."

The review as to whether there was independent evidence and whether the prosecution had presented a case that should be left to the consideration of the jury is to be conducted at the stage of the no case submission.

[50] This leads to the second question as to whether there is a requirement for hearsay evidence to be supported by independent evidence. The simple answer to this question is that there is no requirement in law that a case that consists only of uncorroborated hearsay evidence cannot be left for consideration by a jury. In **R v Riat and Others** [2013] 1 WLR, Hughes LJ at page 2598 of the report stated that:

> "The written arguments in several of the cases now before us suggest that this language may be being understood to mean that hearsay evidence must be demonstrated to be reliable (i e accurate) before it can be admitted. That is plainly not what these passages from *R v Horncastle* say. The issue in both this court and the Supreme Court in *R v Horncastle* was whether English law knew an overarching general rule that hearsay which could be described as the sole or decisive evidence was not to be admitted, or would inevitably result in an unfair trial if it were. In answering 'no', this court pointed out repeatedly that any such inflexible rule would exclude hearsay which was perfectly fair because *either* it did not suffer from the dangers of unreliability which often may attend such evidence, *or* (if it did) there were sufficient tools safely to assess its reliability. This court was far from laying down any general rule that hearsay evidence has to be shown (or 'demonstrated') to be reliable before it can be admitted, or before it can be left to the jury. That is to take only half of the paired expressions as if it represented a separate and universal rule. If that had been the rule adopted, the appeals under consideration in *R v Horncastle* would probably not have been dismissed. Nor can that be the rule, for it would mean that hearsay

> evidence has to be independently verified before it can be admitted or left to the jury. That would be to reintroduce the abolished rules for corroboration, which the Law Commission expressly, and Parliament implicitly, rejected; indeed in some cases it would render the evidence admissible only when it was unnecessary."

[51] Where the case against the defendant is based on identification, at the no case submission stage, the evidence elicited by the prosecution should be carefully evaluated, taking into consideration the warning and dangers as highlighted in **R v Turnbull**. At the no case submission stage in this case, what was required to be assessed is whether the prosecution had established a *prima facie* case, that would allow the judge to leave the case to the jury.

[52] The evidence of the eyewitnesses was that they were able to see the applicant that night. Evidence was led as to the distance the applicant was from the eyewitnesses, the ability of the witnesses to see the face of the applicant, the time his face was observed for, and the fact that the applicant was known by both witnesses prior to the incident. The scene of crime officer gave evidence as to the photographs taken, his ability to see where the body was outside the premises at McCooks Pen, as well as the lighting inside the premises, where both eyewitnesses indicated that they were present.

[53] We note that both eyewitnesses in this case gave evidence at the preliminary enquiry that they were the ones sitting under the apple tree and were able to identify the applicant. The photographs taken by the scene of crime officer assisted in capturing the details of the scene, except for the area under the apple tree. The fact that there were no pictures of the area under the apple tree would have been an issue to be considered by the jury. We find that the learned trial judge fully appreciated the legal principles as laid down by **Galbraith** and **Turnbull** and properly applied them. We also do not find any merit in ground 1(d).

The adequacy and accuracy of the learned trial judge's directions to the jury (ground 4)

[54] The learned trial judge gave a comprehensive summation on all the issues which arose in the trial, including those that concerned any unfairness that could have been occasioned by the admission into evidence of the eyewitnesses' statements. The learned trial judge repeatedly warned the jury of the crucial fact that the witnesses had not been present during the trial and, as such, they were unable to assess the witnesses' credibility by reference to their demeanour and their responses to cross-examination. Additionally, the learned trial judge gave the **Turnbull** warning and highlighted the identification evidence presented by the prosecution. The learned trial judge highlighted specific weaknesses in the case for the jury's consideration, such as the fact that no pictures had been taken of the area under the apple tree. The learned trial judge gave directions with regard to agreed facts and documents, expert evidence, joint enterprise and credibility. The learned trial judge warned the jury as to the approach to be taken in the light of the fact that the applicant had absconded during the trial. Under cross-examination of the investigating officer, the issue of alibi was raised, and the learned trial judge gave the appropriate warning on this issue. The learned trial judge also gave directions as to the good character of the applicant. In sum, the learned trial judge gave adequate and correct directions on all pertinent issues for the jury's consideration, including the specific weaknesses which arose in the case. Ground 4, therefore, fails.

[55] We conclude that there is no legal basis upon which the verdict of the jury can be disturbed, and so the conviction is safe. Leave to appeal conviction must, therefore, be refused.

Sentencing -Appropriateness of the sentence (Grounds 5 and 6)

[56] In sentencing the applicant, the learned trial judge commenced by noting the principles of sentencing to be rehabilitation, deterrence, and protection of the public. He did not include retribution. The learned trial judge also mentioned the seven-year pre-sentence detention period, during which the applicant was in custody prior to

being granted bail, and the insufficient information for the purposes of the antecedent and social enquiry reports.

[57] The learned trial judge then stated that, having considered the foregoing, he would sentence the applicant to life imprisonment with eligibility for parole after serving 20 years. The thought process/reasoning that has been revealed for this sentence is that the initial view was to sentence the applicant to a minimum term, before eligibility for parole, of 30 years' imprisonment but subtractions were made, including the seven years the applicant had already spent in custody. This served to reduce the stipulated pre-parole period to 20 years.

[58] The oft-cited case of **Meisha Clement v R** provides adequate guidance on how a judge should proceed when sentencing a convicted individual. Morrison P (as he then was) explained, in that case, that the four principles of retribution, deterrence, prevention and rehabilitation ought to be considered. Morrison P further laid down the methodology in relation to sentencing, including the selection of an appropriate starting point, aggravating and mitigating factors as well as credit for time served in pre-sentence incarceration. Morrison P also noted that this court ought not to intervene merely because it would have given a different sentence. In the case at bar, the period of delay that is in issue is six years from the date of conviction to the current application for leave to appeal. Counsel for the applicant also indicated that the applicant had been in custody for seven years before he was granted bail. The question is whether the minimum term of 20 years before eligibility for parole is manifestly excessive or inappropriate.

[59] It is a fact that the learned trial judge failed to indicate the methodology by which he arrived at a minimum term of 20 years before parole eligibility. The circumstances of this murder case were that it was committed in the presence of several people, during the night, at the dwelling house of the deceased and with the use of a firearm, which was not recovered. This was a home invasion. There is also the fact that this type of crime is prevalent in society.

[60] The point of departure in deciding the years before parole in murder cases in which life imprisonment is being imposed is set out in section 3 of the Offences Against the Persons Act, which states that: -

> "In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted 6(1) to (4) of the Parole Act-
>
> > (a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or
> >
> > (b) where, pursuant to subsection (1)(b), a court imposes –
> >
> > > (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
> > > (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years
> >
> > which that person should serve before becoming eligible for parole."

[61] In the case of **Paul Brown v R** [2019] JMCA Crim, 3, at paras. 7 and 8, counsel for the applicant provided a series of cases from which F Williams JA extrapolated the minimum terms before eligibility for parole is imposed in murder cases. F Williams JA concluded that, based on those cases, the range was between 25 to 45 years with the higher figures being imposed in instances of multiple murders. F Williams JA, at para. 26, ultimately determined that 29 years' imprisonment before eligibility for parole was suitable for the case before him (but made deductions for pre-trial detention to reduce the figure to 23 ½ years) based on the specific circumstances of that case. That is, the appellant, having an unblemished record, being 43 and capable of rehabilitation, required a one-year reduction in sentence to 29 years from the initial 30 years. This

30-year minimum term sentence was determined as appropriate for that case based on the deceased person being unarmed, pursued by the appellant and shot to death (see para. 24 of the written judgment). This was after F Williams JA utilised the case of **Kevin Young v R** [2015] JMCA Crim 12 as a general guide, being mindful that, in the case before him, there was no confession as was the instance in **Kevin Young v R**. In **Kevin Young v R**, a late confession of murder, where the applicant murdered the deceased at 3 pm by standing over him and discharging multiple gunshots on his body, thereafter, resulted in a 20 year pre-parole period or minimum term which was reduced from a starting point of 30 years.

[62] In the case of **Jason Palmer v R** [2018] JMCA Crim 6, a sentence of life imprisonment with the stipulation that the defendant should serve 30 years before becoming eligible for parole was imposed. The sentence was reduced by this court to life imprisonment with the stipulation that the defendant serve 25 years before being eligible for parole, as the trial judge had failed to consider the pre-sentence period of incarceration.

[63] In the light of the foregoing authorities, it is apparent that the learned trial judge, in the instant case, would have been within the range of sentences to be imposed when he indicated that he was considering a sentence of 30 years before parole.

[64] At the sentencing hearing, there was an antecedent report presented to the court, but it did not reflect whether the applicant had any previous convictions. No social enquiry report was presented to the court in relation to the applicant. The learned trial judge indicated that he would reduce the applicant's sentence of 30 years by the seven years he had been incarcerated prior to sentencing. Despite the lack of information that could have been gleaned from a social enquiry report and the police record from the antecedent report, the learned trial judge further reduced the sentence of the applicant by another three years. It must be taken that he saw it fit to mitigate the sentence he had in mind, which would have been to the benefit of the applicant.

[65] Having considered the range of sentences for murder of this nature and the learned trial judge's indication that he was minded to sentence the applicant to a minimum term of 30 years before eligibility for parole, but instead sentenced him to a 20-year minimum term before eligibility for parole, it cannot be said that the sentence was manifestly excessive. Even though the learned trial judge did not demonstrably adhere to the established sentencing methodology, there is no rational basis for this court to conclude that the learned trial judge had imposed a sentence that was not appropriate in this case of a murder committed by the use of a firearm.

[66] Regarding the applicant's complaint that he is entitled to a reduction in sentence for breach of the reasonable time guarantee in the trial and appellate process, we find no merit in these grounds of appeal.

[67] It is observed that at no time during the trial did the applicant assert that his right to a trial within a reasonable time had been breached. Therefore, the learned trial judge did not consider any constitutional breach in sentencing the applicant. However, this omission does not render the sentence impeachable, as the applicant has not presented any positive case to show that any delay at trial was entirely or predominantly the fault of the State. Therefore, ground 5 regarding the reduction of sentence for pre-trial delay must fail.

[68] It is in the appellate process that the issue regarding breach of the reasonable time guarantee due to delay in disposition of the appeal arises for more serious consideration. The applicant was convicted in June 2019. He filed his application for leave to appeal in November 2019, and it was considered by a single judge of appeal in 2022, following the receipt of the transcript in September 2022, three years later. The application was finally heard in 2025. The case spent six years in the appellate process. The Crown has conceded that there is a breach of the reasonable time standard in the appellate process. The question is whether this breach justifies a reduction in the sentence.

[69] In **Evon Jack v R**, on which the applicant relies, this court declared that Mr Jack's right to obtain a record of appeal was breached along with his right to have his matter reviewed by a superior court without delay or within a reasonable time. The remedy granted for same was the quashing of Mr Jack's conviction and the setting aside of his sentence, and thus an acquittal. The facts upon which these declarations were made were that, after being convicted of sexual offences against a child in May of 2013, Mr Jack was only provided with the judge's summation over eight years after his conviction. Even so, the summation was deficient in that it contained a mixture of the court reporter's notes and notes from the trial judge's notebook, as the court reporter had left prior to producing the transcript. It was, therefore, not possible for the transcript to be made available for the appellant's appeal.

[70] In the instant case, the six-year period between the conviction and the disposal of the application before this court is unacceptable and is accepted to be in breach of the reasonable time guarantee. The applicant has, however, clearly benefited from the generosity of the learned trial judge when imposing sentence by an overall credit of seven years for time spent on pre-trial remand plus a further reduction of three years. Of those additional three years discounted by the learned trial judge, half of the period (being one year and six months) would be sufficient as a remedy for the delay in the disposition of his case before this court. This is so because any reduction to which he would be entitled, if he were to be granted a reduction, would not have exceeded one year and six month in keeping with the relevant authorities from this court that generally a delay of four years would justify a reduction of one year (see **Curtis Grey v R** [2019] JMCA Crim 6).

[71] Therefore, this court will grant no further reduction in his sentence but will instead publicly acknowledge the breach of the reasonable time standard due to delay in the appellate process and tender an apology for the breach. Ground 6 also fails to the extent that it posits that the sentence imposed by the learned trial judge is inappropriate because there should be a reduction in the sentence due to delay. Accordingly, there is no legal basis to disturb the sentence imposed by the learned trial judge, and so the application for leave to appeal sentence must also be refused.

Conclusion

[72] This court, therefore, concludes that the learned trial judge had considered the evidence elicited by the prosecution and found that section 31D(d) had been satisfied. We also find that the learned trial judge considered whether the hearsay evidence was more probative than prejudicial, whether it was unfair to admit it, and properly exercised his discretion to admit the evidence. The learned trial judge, at the close of the prosecution's case had assessed the evidence presented by the prosecution and correctly found that there was a case for the applicant to answer. He gave adequate and accurate directions in law to the jury on all material issues, especially as it relates to the fairness of the trial, being one without the appearance before them of the eyewitnesses and the applicant. The conviction cannot be disturbed.

[73] Regarding sentence, this was a gun-related murder, committed at night, at the home of the deceased during an invasion of his premises, and where the firearm was not recovered. The sentence of life imprisonment, and for the applicant to serve 20 years before becoming eligible for parole, cannot be considered manifestly excessive in all the circumstances, even though the learned trial judge failed to adhere to the prescribed sentencing methodology and all relevant principles. The sentence was not rendered inappropriate on account of this error.

[74] The court acknowledges a breach of the applicant's constitutional right to have his appeal considered within a reasonable time pursuant to sections 16(1) and 16(8) of the Constitution and apologises for the breach. There is no entitlement to a reduction in sentence or an immediate release. In the premises, leave to appeal cannot be granted. Therefore, the application for leave to appeal to be treated as the hearing of the appeal is now otiose.

Order

[75] Consequently, the court makes the following order:

a. The application for leave to appeal conviction and sentence is refused.

b. The sentence is to be reckoned as having commenced on 28 June 2019, the date it was imposed in the Home Circuit Court.

c. The court acknowledges that the applicant's constitutional rights to have his appeal considered by this court within a reasonable time, pursuant to sections 16(1) and 16(8) of the Constitution, have been breached and sincerely apologises for the breach.