[2021] JMCA Crim 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 32, 35, 36, 38/2012

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA

GERMAINE SMITH
DANIEL EDWARDS
ANDREW THOMAS v R
JIMMY ELLIS

Dwight Reece for the applicant Germaine Smith

Gladstone Wilson for the applicant Daniel Edwards

Miss Nancy Anderson for the applicant Andrew Thomas

Robert Fletcher for the applicant Jimmy Ellis

Mrs Kameisha Johnson O'Connor for the Crown

Ms Althea Jarrett, the Director of State Proceedings, for the Attorney General (at the invitation of the court)

18, 19, 20 May 2020 and 15 January 2021

BROOKS JA

[1] Mrs Pauline Brown-Anderson and her family lived at Buzz Rock, Effortville, in the parish of Clarendon. Theirs was a humble home, with walls constructed of wood and cardboard. Both the internal and external walls had a number of holes. On 23 May

2008, at about 11:20 pm, gunmen invaded their home, entering by a door to a room occupied by Mrs Brown-Anderson's five children. One of the men murdered her 14-year-old son, Ishmael Wellington, while he slept in his bed. Mrs Brown-Anderson and one of Ishmael's sisters witnessed the slaying. The sister was in the same room with Ishmael, but his mother watched from an adjoining room. She had looked through a hole in the cardboard partition wall.

[2] On 18 January 2012, a jury convicted the applicants, Messrs Germaine Smith, Daniel Edwards, Andrew Thomas and Jimmy Ellis, for that crime. On 16 March 2012, P Williams J (the learned judge), as she then was, sentenced each of the applicants to life imprisonment. She ordered each of them to serve a period of imprisonment before becoming eligible for parole.

[3] A single judge of this court refused the applicants' respective applications for leave to appeal from those convictions and sentences. All four have renewed their applications before the court. The proposed grounds of appeal have raised a variety of issues, but prominent among them are the issues of:

a. the learned judge's refusal of the no-case submissions made on behalf of the applicants;

b. the learned judge's directions to the jury on:

    i. visual identification, generally;

    ii. dock identification;

    iii. joint enterprise; and

    iv. unsworn statements;

c. conflict of interest of defence counsel;

d. the length of the sentences;

e. Mr Thomas' age; and

f. his constitutional right to a trial within a reasonable time.

The prosecution's case

[4] On the night of the shooting, Mrs Brown-Anderson, was awakened by people outside, banging on her door and shouting. She looked through the hole in the wall into her children's room. She saw two men enter that room. She knew the men before by the names, "Heavy Man" and "Mad Dem". At the trial, she identified the applicant, Mr Smith, as "Heavy Man", and the applicant, Mr Edwards, as "Mad Dem".

[5] She saw Mr Edwards shoot Ishmael, while Mr Smith went to her daughters' bed and fired shots. The men then went outside. Mrs Brown-Anderson looked outside through another hole. There she saw three more men, all armed with guns, standing by a water tank. They were pointing the guns at her house. They were "Lasha", "Rocky" and "Shawa". She identified Mr Ellis as 'Rocky' and Mr Thomas as "Shawa". She knew all five men before, by seeing them in her community, and particularly, she saw some of them as they played football at a "common" that is opposite her house. She knew them by their respective nicknames.

[6] Her ordeal was not over. Mr Smith and Mr Edwards came to a door to her room that led outside. They broke the door and Mr Edwards entered the room. He beat her about the head with his weapon and then left. She saw all the men run off.

[7] Mrs Brown-Anderson then found that Ishmael was dead and both her daughters, wounded. The police visited the scene and took four of the family members to the hospital to be treated for gunshot wounds. Ishmael's body was later taken to the hospital and he was pronounced dead.

[8] Mrs Brown-Anderson, at different times in November and December 2008, identified Messrs Smith, Ellis and Thomas at identification parades. She only identified Mr Edwards while he was in the prisoner's dock in court. He had not been placed on an identification parade. There was no explanation for that failure.

[9] Her daughter, who will be referred to herein, as W2, also testified. W2 said she heard the shouting and the banging. She looked through a hole in the wall next to her bed, and saw men outside. She saw a man enter her room. She heard gunshots and closed her eyes. After a short while, she went to her mother's room. There, she heard banging on her mother's door that led outside. She looked outside through a hole in the wall, and saw Mr Ellis at the water tank. She recognised him as someone whom she knew before as 'Rocky'.

[10] While her mother braced that door, W2 went under her mother's bed. There she saw her stepfather. A man came into the room and started beating her mother. The person was dressed in the same clothes as the person who had come into her room.

W2's mother fell to the floor and the man fired a shot. After the man left, her mother got up. It was then that W2 noticed that she herself had been shot. Her sister had also been injured, but Ishmael lay motionless in his bed.

The case for the defence

[11] Each of the applicants made an unsworn statement from the dock. They all denied being involved in the killing. Each said that he was at home at that time. Messrs Edwards and Smith denied ever having seen either Mrs Brown-Anderson or W2 before, while Mr Thomas denied knowing anywhere at Buzz Rock.

The grounds of appeal

[12] The applicants had some grounds of appeal in common. Those common grounds, whether by all or some of the applicants, will be dealt with below as the issues that have been outlined above. The unique grounds will be dealt with thereafter.

The learned judge's rejection of the no-case submission

[13] Messrs Smith and Ellis filed grounds that complained that the learned judge erred in rejecting the no-case submission. They asserted that the identification evidence was so tenuous and inconsistent that she was wrong to have left it for the jury's consideration. In addition, counsel who represented Mr Ellis at the trial, argued in his no-case submission that the evidence against Mr Ellis, that he was outside the house, with no word or action attributed to him, was such that it amounted to mere presence. It therefore could not properly support a conviction.

[14] Mr Reece, appearing for Mr Smith, and Mr Fletcher, appearing for Mr Ellis, both stressed, what they submitted, were weaknesses in the identification evidence, inconsistencies in respect of the opportunities for observing the perpetrators and contradictions between the evidence of the two eyewitnesses. Learned counsel argued that those matters should have led the learned judge to withdraw the case from the jury. Learned counsel, as part of their respective submissions, relied on the second limb of the guidance in **R v Galbraith** [1981] 1 WLR 1039, which stipulates that the case should be withdrawn from the consideration of the jury when the evidence is so unreliable that no reasonable jury, properly directed, could convict on it.

[15] In **Director of Public Prosecutions v Varlack** [2008] UKPC 56 their Lordships, sitting in the Privy Council, at paragraph [22], approved, as an accurate statement of law, the statement that, a trial judge, when considering a submission of no case to answer:

> "is concerned only with whether a reasonable mind could reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence".

[16] That learning is consistent with the guidance provided in **R v Galbraith**, where, it was said, at page 1042 of the report:

> "...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...."

[17] Learned counsel are not on good ground in respect of their submissions. There was sufficient evidence before the jury as to the opportunities for observing the perpetrators who entered the house and who were outside.

[18] Mrs Brown-Anderson testified that she saw Mr Smith's face for a minute when he was in her children's room. He was then three to four feet away from her. That room was illuminated by light from a 100-watt electric bulb that was burning outside, and by light from an electric bulb that was burning in her room. She saw his face again, when he came to the door of her room. She said that she last saw him the morning of that day when he walked past her house.

[19] Her evidence in respect of Mr Ellis is that he was about seven feet away when she looked through the hole and saw him with the other two men outside by the tank. She saw the faces of all three for about a minute. The outside lights illuminated their whole bodies. The nearest light was about 11 feet from where the men were. She said that she knew Mr Ellis for about 10 years before that day; that is, from he was a child. She would see him about three times per week, usually in the town of May Pen, at a place where bleach is sold. She, however, had never spoken to him.

[20] The negatives associated with the testimony in respect of these applicants are:

a. an inconsistency between her testimony and her statement to the police about the electric light in her room being on at the time of the intrusion;

b. the small holes through which Mrs Brown-Anderson was able to view the perpetrators;

c. the fright associated with the experience;

d. the fact that she took 15 minutes on the identification parade to point out Mr Smith;

e. the fact that she gave no names or alias names to the police in her first statement; and

f. the contradiction provided by W2's testimony that:

i. she only saw one man enter her room; and

ii. her mother's room light only came on when the man entered her mother's room.

[21] These were not matters, which so undermined the prosecution's case, that no jury, properly directed, could have convicted on the evidence. It was for the jury to decide what they believed in the circumstances. A similar principle applies to the evidence that Mr Ellis was seen pointing a firearm at Mrs Brown-Anderson's house at the time of the invasion.

[22] This ground fails.

The learned judge's directions on visual identification

[23] Learned counsel for each of the applicants argued that the learned judge failed to satisfy an essential element of the guidance in **R v Turnbull and Another** [1977] QB 224; [1976] 3 WLR 445. Learned counsel argued that during her general directions

on the issue of identification, the learned judge informed the jury that they should be alert to weaknesses in the evidence regarding identification. She promised the jury to return to that issue, but, according to learned counsel, she did not fulfil that promise. The failure, learned counsel submitted, in the context of the many factors inimical to positive identification, including:

a. the terrifying circumstances of the event;

b. the small holes used and the limited times for observation;

c. The inconsistency in the evidence of Mrs Brown-Anderson and W2 in relation to the number of assailants outside;

d. the claimed knowledge only by alias names;

e. the absence of descriptions being given to the police; and

f. the length of time elapsing before statements were given to the police, namely:

    i. seven weeks in Mrs Brown-Anderson's case; and

    ii. seven months in W2's case;

resulted in a miscarriage of justice.

[24] Mrs Johnson-O'Connor, on behalf of the Crown, took the court through a careful review of the learned judge's summation in respect of the evidence on visual

identification. She contended that although the learned judge did not use the term "weakness" in referring to all the various negative aspects of the identification evidence, she was not obliged so to do. Learned counsel submitted that the authorities made it clear that trial judges are not obliged to use any particular form of words in guiding the jury on the issue of visual identification. She argued that the directions on the effect of those negative aspects would not have been lost on the jury.

[25] Learned counsel for the applicants urged this court to reject the Crown's response to these submissions. It is not sufficient, learned counsel argued, for a trial judge merely to recite the evidence concerning the circumstances of visual identification, without explaining the deleterious impact that the negative factors would have had on the reliability of the identification.

[26] The guidelines of the Court of Appeal of England and Wales, in **Turnbull**, are well known. It is also well known that the impact of the summation on the jury in respect of the issue of visual identification depends on the context of the delivery. Mrs Johnson O'Connor is correct in saying that, in giving the **Turnbull** directions, no set formula of words is required. Nonetheless, a trial judge must clearly communicate the spirit of the guidance to the jury. That guidance includes the need for caution and the requirement to examine the circumstances of the claimed observation of the perpetrator.

[27] The **Turnbull** guidelines also require a trial judge to remind the jury as to weaknesses in the identification evidence. Lord Widgery CJ, at page 228 of the former report, stated, in this context:

> "…Finally, [the trial judge] should remind the jury of any specific weaknesses which had appeared in the identification evidence.
> Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[28] In this case, the learned judge gave the jury correct general directions in respect of assessing visual identification. She did so at pages 409-413 of the transcript. She:

a. reminded the jury that the evidence in respect of each man should be considered separately;

b. informed them of the defence that the witnesses were either mistaken or deliberately lying;

c. impressed on them the need for caution in cases of visual identification;

d. instructed them on the various aspects of visual identification that they would have to consider;

e. told them that even in claimed cases of recognition people still made mistakes; and

f. directed them that they had to be satisfied that they felt sure of the identification evidence.

[29] In directing the jury generally as to the aspect of weaknesses in identification evidence, the learned judge said, in part, at page 410:

> "...Were they able to see the assailant? You consider in what lighting. You consider...did anything interfere with their observation of all their assailants?..."

[30] The learned judge went further to say, at page 412:

> "In all the circumstances are you satisfied that the witness at the time had proper or sufficient lighting so they could make out and see who their assailants were? As I said you have to examine carefully, you have to decide whether you are satisfied so that you feel sure. **You have to consider any weaknesses which may exist in the identification evidence, and as I review it with you, I will point out any weaknesses that there are that I find, but as I said, if you, in considering the evidence see anything that I may not mention, you are duty bound to consider it**." (Emphasis supplied)

[31] After having given those general directions, the learned judge, in reviewing the evidence concerning the hole in the cardboard partition, reminded them that they had the assistance of photographs of the scene. She also reminded the jury about the evidence as to lighting, distances, time for observation and the fact that Mrs Brown-Anderson and W2 had testified that they knew the men before. In dealing with the visual identification evidence, she first said at pages 418-419:

> "…you have to take the witness as you found her and decide whether you believe her when she said this is what I did. What did she do? She described how she looked through the hole in the cardboard. As I said, you have the pictures, you have heard the arguments on both sides whether or not you have seen the pictures and Mrs. Anderson [sic] was called back to show you what she said it was the hole she looked through. Could she have looked through that hole?

> What did she see? What could she have seen when she looked through the hole?..."

[32] It is true that the learned judge does not use the term "weakness" in that extract, but there is no mistaking the exhortation to the jury to be careful about assessing the witness' evidence. The learned judge also made reference, on pages 419-420, to a discrepancy between the evidence of Mrs Brown-Anderson and W2 as to the number of men who entered the children's room, and asked the jury "what do you make of it?".

[33] At page 424, the learned judge dealt with the issue of whether or not a light was on in Mrs Brown-Anderson's room at the time of the invasion. She reviewed that evidence, pointed out the discrepancy in that regard, and informed the jury that they should consider that discrepancy in assessing Mrs Brown-Anderson's credibility.

[34] In respect of Mrs Brown-Anderson's evidence concerning Mr Smith entering the house, the learned judge asked questions in the context of there being a possible weakness in that aspect of the evidence. She said, in part, at pages 428-429:

> "Now, Mr Foreman and your members, as I said to you yesterday, we have to consider the possible weaknesses in the identification evidence. Is it that she focussed on his face for one minute, she focussed on the other man's face for one minute, or is it in the space of one minute she was able to focus on the two faces….So against that background, was that sufficient time for her to have seen and recognized persons she did not have a relationship with, persons she used to see at the common near to her house playing football?..."

[35] The learned judge, at pages 429-430, also asked the jury to consider the effect of Mrs Brown-Anderson's claimed view of the men who were outside her house. She did not use the term "weakness", but the context of the direction was more than just a reminder of the evidence. She said, in part:

> "…So given the size of the hole she showed us, given the position of the hole that she described it [sic], given how she looked through the hole as she described it, could she have seen three men standing side by side some eight feet away from her? That is what you have to ask yourselves. Given the lighting that existed, could she have seen the faces of these persons; she said she did…."

[36] A similar comment is applicable to the learned judge's direction in respect of the frightening experience in a short space of time. She asked the jury to consider how these factors could have affected the reliability of the identification evidence. She said, in part, at page 433:

> "…She estimated it to be about eight minutes. So, that is a factor you have to consider, things happened quickly that night, that's a comment I will make. Sometimes when you watch some of these shows on TV you see on the important times things slow down and it goes to slow motion so you can see what happened, but unfortunately, this is not like that, everything happens quickly and no one can deny it must have been a frightening experience. You have to consider things happens [sic] quickly under these frightening circumstances. Could she have seen, recognized the men who did those things in those circumstances?"

[37] The learned judge again addressed the subject of fright at pages 437-438. After reminding the jury that Mrs Brown-Anderson admitted being frightened, she also told them of the witness's claimed resolve, despite her fear, to make a proper observation. She asked the jury to consider the effect of that evidence. She said:

> "…She was also tested on whether or not she would be too frightened to have been able to be relied upon to give an accurate account of what had happened. She admitted that she was frightened but said that she was not trembling, and she said that such was her fear that she wet up herself. She said, in any event, she tried not to have fear because she thought to herself, 'I must see who was inside there.' Those were her words to you; you saw her. What did you make of it? Do you believe her that in this matter; was she able to properly see the men in the room?...Carefully consider this bit of evidence. What do you make of it?..."

She made similar comments at page 440 in the context of Mrs Brown-Anderson having been aroused from her sleep by the banging and shouting.

[38] Another negative aspect of the opportunity to identify the perpetrators of that crime is the factor of shadows casted by trees in the family's yard. The learned judge, at page 439, asked the jury to consider the effect of the presence of the trees: "Could those trees have cast a shadow to the extent where it would have affected her ability to see who was outside in the yard that night".

[39] The learned judge also addressed identification of the applicants in the context of the discrepancy between the evidence of Mrs Brown-Anderson being able to see outside and of W2 only being able to identify one person outside. The learned judge juxtaposed the evidence of both witnesses, at pages 444-445 of the transcript:

> "[W2] too claims she saw one man outside when she looked out because the other men she saw while she was lying on her bed, she said she just saw them running, but in the dark and she didn't see how many, she can't remember how many there were, because they were heading to the back, but she doesn't assist us as to how many men were outside. She speaks of seeing only one and she speaks of seeing this one she described for you....

> [Mrs Brown-Anderson] said she saw the men out there with guns, but when [W2] was asked specifically, did you see anything, the man that you saw, did you see anything in the man's hand? She said she doesn't remember what he was doing with his left hand, but the right hand was holding up the chin. What do you make of that difference? [Mrs Brown-Anderson] speaks of gun, [W2] does not, she explains she doesn't remember. [Mrs Brown-Anderson] said they were pointing it at the house when she, [Mrs Brown-Anderson] looked through the hole. The evidence, as the Prosecutor points out, there is no evidence they were looking at the same time..."

[40] In these circumstances, it cannot be said that there is a discrepancy in the evidence of Mrs Brown-Anderson and W2 as it is not clear that they looked outside at the same time, or through the same hole, to have seen the same thing. It is also to be noted that despite the fact that W2 said outside was dark, she also gave evidence of the 100-watt bulb burning outside the house (see page 143 of the transcript).

[41] The learned judge again specifically mentioned the term "weakness" in the context of guiding the jury on the issue of identification. She did so in dealing with the fact that Mrs Brown-Anderson did not give any description of the men and claimed to know them only by alias names. The learned judge said, in part, at pages 452-453:

> "…It is of course true that even if the evidence about knowing them had been truthful, she might have been mistaken in identifying them as the gunmen. Aliases were used; we don't know what description was given of these men, we have not heard of that – that's another possible area of weakness in this case, but she gave the aliases…."

[42] The learned judge again mentioned the term "weakness" at page 455. The reference was to the dock identification of Mr Edwards. She said:

> "…In relation to the accused man, Daniel Edwards, no identification parade was held; that is an immediate weakness in the case. If she had not known him before and came to court and pointed him out here for the first time, we could not have relied on that evidence at all; it would be unsafe to do so…"

[43] She culminated the summation in respect of the identification evidence of Mr Edwards, at page 456, again cautioning the jury about a possible pitfall. She said, in part:

> "…[Mrs Brown-Anderson] is saying she is accustomed to seeing the men together on the football field playing football, or at least some of them. So, you also have to consider if she has come to associate them as to always being together so that when she sees any of them she would associate the others with them. These are other factors you have to consider that I am obliged to bring to your attention because, as I said, identification evidence has to be carefully, cautiously approached and considered."

[44] Although not consistently using the term "weakness", it cannot properly be said that the learned judge failed to fulfil her promise to bring to the jury's attention the weaknesses that affected the identification evidence.

[45] In addition to counsel's contention that the learned judge did not address the weaknesses in identification evidence, Messrs Wilson and Fletcher raised other issues relating to the learned judge's directions, which they assert adversely impacted the identification of the applicants.

[46] Mr Wilson challenged the direction given by the learned judge, at page 453 of the transcript, that the applicants did not challenge that they were known by their respective aliases. He advanced that Mr Edwards did not admit to the alias.

[47] Mr Wilson's submission cannot succeed. While it is true that, as learned counsel advanced, Mr Edwards did not admit to the alias, the learned judge was also correct in saying that the applicants did not challenge their aliases. Additionally, the investigating officer testified that when he applied for the identification parade for Mr Edwards, he obtained his alias from police records (see pages 336-337 of the transcript). The evidence may be said to be prejudicial but cannot be fatal to the conviction as the jury would bear in mind the learned judge's general directions on the burden and standard of proof and the need to avoid prejudice.

[48] Mr Fletcher also argued that the learned judge misquoted the evidence, which, he submitted, unfairly bolstered the identification evidence relating to Mr Ellis. He contended that the learned judge, in her summation, amplified the evidence when she told the jury that there were floodlights outside the house (see page 423 of the transcript), when Mrs Brown-Anderson testified that there were 100-watt bulbs.

[49] Mr Fletcher added that the learned trial judge also misquoted the evidence as to recognition, when, during her summation, she placed Rocky on the common (see page 426 of the transcript), but there was no evidence that Mr Ellis was on the common. He also contended that the judge directed the jury that Mrs Brown-Anderson said she saw

Mr Ellis selling bleach (see page 436 of the transcript), however the evidence was that she saw him at the place where they sell bleach (see page 64 of the transcript).

[50] These complaints raised by Mr Fletcher about the misquoting of the evidence by the learned judge could not have affected the outcome of the case. Mrs Brown-Anderson testified of knowing Mr Ellis for several years and identified him at the ID parade. The misquoting by the learned judge, in these circumstances, is not fatal.

[51] As a result, the complaints about this aspect of the summation cannot succeed.

The learned judge's directions on dock identification

[52] Mr Wilson, on behalf of Mr Edwards, criticised the learned judge's summation in respect of the dock identification of Mr Edwards. Learned counsel submitted that she failed to tell the jury that the dock identification deprived Mr Edwards of the advantage that an identification parade provides. Mr Wilson relied on a number of cases in support of his submissions in this regard. These included **Nicholas Power v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal No 147/2006, judgment delivered 24 April 2008, **Dwayne Douglas v R** [2010] JMCA Crim 66, **Maxo Tido v The Queen** [2011] UKPC 16; [2012] 1 WLR 115 and **Jason Lawrence v The Queen** [2014] UKPC 2.

[53] Mrs Johnson O'Connor submitted that the learned judge properly exercised her discretion to admit the dock identification into evidence. Learned counsel also submitted that the learned judge properly brought to the attention of the jury, the dangers inherent in dock identification. She contended that Mr Edwards did not suffer any

injustice as a result of the exercise of discretion or the learned judge's directions. She also relied, in part on **Lawrence v The Queen** and **Tido v The Queen**.

[54] **Lawrence v The Queen** is a decision of the Privy Council in an appeal from this court. Lord Hodge, who delivered the decision of the Board, accepted that a dock identification may sometimes be allowed, but he emphasised:

a. the general undesirability of dock identification; and

b. the need for careful directions to the jury, when a dock identification is allowed.

He set out those principles at paragraph 9 of his judgment:

> "In several cases this Board has held that judges should warn the jury of the undesirability in principle and dangers of a dock identification: *Aurelio Pop v The Queen* [2003] UKPC 40; *Holland v H M Advocate* [2005] UKPC D1, 2005 SC (PC) 1; *Pipersburgh and Another v The Queen* [2008] UKPC 11; *Tido v The Queen* [2012] 1 WLR 115; and *Neilly v The Queen* [2012] UKPC 12. **Where there has been no identification parade, dock identification is not in itself inadmissible evidence**; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. **But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care**. In *Tido v the* [sic] *Queen* Lord Kerr, in delivering the judgment of the Board, stated (at para 21):
>
> > '…Where it is decided that the evidence [i.e. the dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the

> jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged.'" (Emphasis supplied)

[55] One of the reasons for allowing a dock identification is if the witness claims prior knowledge of the perpetrator in circumstances where the sighting at the time of the offence would amount to recognition. This principle was set out in **Peter Stewart v The Queen** [2011] UKPC 11, which was cited at paragraph 79 of the recent Privy Council decision of **Stubbs and Davis v R** [2020] UKPC 27. Where prior knowledge is only by way of an alias or "nickname", a formal identification parade may be appropriate (see **R v Forbes, R v Meggie** (2016) 88 WIR 400), unless the previous association is such that the identification parade would be a mere formality. The failure to hold one, where the knowledge is only by way of an alias, is not necessarily fatal. The circumstances of the prior knowledge would be determinant of the reliability of a dock identification.

[56] In **Dwayne Douglas v R**, Phillips JA, in delivering the judgment of this court, confirmed the principle that a dock identification is allowable where the witness claims previous knowledge of the perpetrator. The learned judge of appeal said, in respect of the dock identification that had been allowed in that case:

> "[59] The learned trial judge also stated that the parade is not a complete safeguard but is at least better than a dock

> identification. She set out the dangers of the identification in the dock but stated that the danger is minimized if, as in this case, the witness and the accused are known to each other. In our view, this was a fair comment. The law is clear that a dock identification is admissible once the appropriate warnings are given, and so would be allowed in evidence. Also generally, the judge should direct the jury when a parade is not held, on the advantage that the appellant is deprived of with regard to the results of an inconclusive parade. In **Aurelio Pop v the Queen** (Privy Council Appeal No. 31 of 2002, delivered 22 May 2003) Lord Rodger of Earlsferry in delivering the decision of the Board made this very clear."

[57] The learned judge in this case allowed the dock identification based on Mrs Brown-Anderson's testimony as to prior knowledge of Mr Edwards, whom she only knew as "Mad Dem". Mrs Brown-Anderson said that she would see "Mad Dem" in the common twice per day. She also said that she would see him "all the while". She testified that she last saw him earlier that afternoon, at about 3:00. He was walking on the same common.

[58] On the night that Ishmael was killed, she said that she saw "Mad Dem" enter Ishmael's room. He was wearing a brown peak hat and had a long gun. She saw his face for about a minute while he was in that room. It was he, she said, who entered her room after the door was broken. He came within inches of her and she viewed him from head to toe. She said she focussed on him. He sat while he was in the room. He was close to her, because, she said, he hit her with his gun.

[59] The evidence of prior knowledge and the opportunities for viewing the person on the night of the incident was sufficient to justify allowing the dock identification in this case. The learned judge cannot be faulted for that exercise of her discretion.

[60] The comments of the learned judge in this case in respect of the dock identification comply with the guidelines provided by **Dwayne Douglas v R** and **Lawrence v The Queen**. A portion of those directions have already been quoted above, at paragraph [42], but for this ground it is necessary to state that that direction was preceded by the learned judge informing the jury about the importance of an identification parade. In this regard, she said, in part, at page 452:

> "Now, the normal function of an I.D. parade is to test the accuracy of a witness' recollection of persons who they say they saw committing the offence. Experience has shown that it is not by any means a complete safeguard against error; it is a test of the witness' assertion that she saw these persons, and in his case, where aliases were used, the test was also one to see if she did in fact know the persons she said she knew by those aliases…"

She gave further context at pages 454 and 455. At page 455, she said, in part:

> "…So the I.D. parade test [sic] the honesty of the witness' assertion that indeed she knew the suspects even if she did not know their right names and even though she had never spoken to any of them before…"

[61] Having told the jury that the absence of an identification parade was a weakness, the learned judge explained the nature and effect of the deviation from the norm. She further said, at page 455- 456:

> "…[Mrs Brown-Anderson] has come and she has done what we called [sic] in law, a dock identification of Mr Edwards. One of the harm [sic] there, is also the fact that because she

> sees him sitting there with the other three, she could say, 'yes, that is him.' So you still have to consider – although she said she knew him before, describe the circumstances under which she saw him. Did she in fact see him on that night? As I said, it would not have been allowed if she said she didn't know him before so it is allowed here because of her purported previous knowledge of him. **He has been denied the opportunity of seeing this assertion that she knew him tested under an identification parade circumstance**, and in this case too, there is another point we need to consider. She is saying she is accustomed to seeing the men together on the football field playing football, or at least some of them.
>
> So, you have to consider if she has come to associate them as to always being together so that when she sees any of them she would associate the others with them. These are other factors you have to consider that I am obliged to bring to your attention because, as I said, identification evidence has to be carefully, cautiously approached and considered." (Emphasis supplied)

[62] Those directions are consistent with the learning in **R v Forbes, R v Meggie**, and are, with respect correct. The learning in that case, and **Goldson and McGlashan v R** (2000) 56 WIR 444, is to the effect that the dock identification is admissible in evidence, provided that the appropriate warnings are given to the jury.

[63] Mr Edwards' complaints in respect of this issue are without merit.

The learned judge's directions on joint enterprise

[64] Miss Anderson, for Mr Thomas, and Mr Fletcher both argued that the learned judge's directions, in respect of the issue of joint enterprise, were deficient. Learned counsel advanced two main criticisms of the learned judge's directions in this regard. Firstly, they said that she failed to make it clear that mere presence at the scene of an offence was not evidence of participation in the offence and secondly, that she failed to

make it clear that the jury had to be satisfied that Messrs Thomas and Ellis had both intended to assist in causing death. Learned counsel asserted that the learned judge ought to have left for the jury the option of a conviction for manslaughter. Miss Anderson submitted that a possible inference that could be drawn, was that the men outside were there only to terrify, and did not know what had transpired inside. Mr Fletcher submitted that there was a possibility that the men outside the house were not doing anything to support the men on the inside. Learned counsel placed heavy reliance on **R v Jogee; Ruddock v The Queen** [2016] UKPC 7.

[65] Learned counsel for the Crown submitted that the learned judge gave proper directions on mere presence and joint enterprise. She argued that the judge directed the jury that they must consider, based on all the circumstances, what was the intention of the men who were outside the house. Learned counsel contended that the judge indicated to the jury that they must be sure that they were present at the scene and intended to commit the offence and that mere presence at the scene was insufficient to prove guilt. She asserted that the applicants were at Mrs Brown-Anderson's home, late in the night, armed with firearms. The inference to be drawn, she contended, is that they were present to cause serious bodily harm. She further asserted that there was no evidence in the case to show an intention to commit any other offence but murder. She relied on **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25. Accordingly, she submitted, the learned judge could not have left manslaughter to the jury.

[66] The evidence in the case undermines the foundation of Miss Anderson and Mr Fletcher's submissions. Mrs Brown-Anderson's testimony is that immediately after the gunmen left her children's room, she looked outside and saw "Lasha", "Shawa" and "Rocky" had "three guns holding on the house" (page 36 of the transcript). She explained that she meant that they were all pointing the guns at the house. Immediately thereafter, the two men who had been in her children's room came to her door and broke it in.

[67] The learned judge was quite correct in asking the jury to consider what the intention of those persons was. She said, in part, at pages 405-406:

> "…In this case, you have to ask yourselves, what would be the intention of the persons who went to that premises that hour of the night, armed with firearms, kicking off the door, entering the room, shooting the persons inside the room. In those circumstances, what would have been their intention? The Crown is saying that their intention was to kill, or to cause really serious bodily harm. You have to look at those circumstances, and it is for you to say, if you are satisfied, that that was, in fact, the intention."

[68] Apart from directing the jury that they had to consider the case against each accused separately, the learned judge gave copious and correct directions in respect of joint enterprise. She said at pages 406-409:

> "Firstly, in this case, is that there are four persons sitting before the court, one person dead from one injury to the –his head; the doctor spoke of two injuries, but said the fatal injury was the injury to the head. So, of course, the question is, how can there be four persons before the court for this one act? But the prosecution's case is that they committed this offence jointly.

You see, where a criminal offence is committed by two or more persons, each of them may play a different roll [sic], but if they are in it together as part of a joint plan, or agreement, to commit it, they would each be guilty.

Now, it needs to be made clear to you that in law, plan or agreement does not even mean there has to be any formality about it. Agreement to commit an offence can be on the spur of a moment, but agreement can be inferred from the behaviour of the persons.

So, the essence as it were, is a joint responsibility for a criminal offence, is that each person played a different roll [sic], but they shared the intention to commit the offence, and played some part in it, however great, however small, so as to achieve that gain. **You approach the case, therefore, by looking at the case and the intention of each defendant. You have to be sure that the intention, I just discussed, that they committed by some act, and as a part of committing the overall offence that occurred there that night. Mere presence at the scene of a crime is not enough to prove guilt. You have to be satisfied that you feel sure that the particular accused was on the scene. You have to be satisfied that they intended, and did, by his presence, encouraged** [sic] **the commission of the offence. In those circumstances only, would they be found guilty**.

The Crown presented, through Miss Thompson, the prosecution present their picture of what they think the entire plan was there that night. They are saying that each of the accused men were there as part of other [sic] act. They invaded that house, shoot the persons in that house. One person entered the house, two persons may have entered the house, while the others remained outside, but they are saying, the others out there with their guns pointing at the house, this is the evidence of Mrs Brown-Anderson, in those circumstances, they are inviting you to infer that those persons on the outside were there at the house, were there to prevent persons from leaving the house, intention of continuing the act on the persons in the house if they tried to get out. What the prosecution presented to you, is that two men entered from one door, while others were by the other door. They were all armed,

> the prosecution says. One tells you that they were all armed. In those circumstances, we [sic] are asking you to consider, if they were there, were they there to participate in one plan, armed with guns, all of them, to carry out that act, concerning the persons in this house? What were they doing there [that] night, if you think they were there, all of them armed with guns? This is what the Crown is asking you to consider, if they were there that night. Certainly it is for you, to my mind, the most important thing. Were they there? Individually, was Mr. Ellis there? Was Mr. Edwards there? Was Mr. Smith there? And was Mr Thomas there? …" (Emphasis supplied)

The learned judge repeated the essence of that direction at page 420 of the transcript.

[69] The emphasised portion of that extract demonstrates that the learned judge made it plain that mere presence was insufficient and that the jury had to be satisfied as to the reason for that presence. That aspect of learned counsel's submissions, therefore, must fail.

[70] The difficulty with the submissions, which are based on the principles emanating from **Ruddock v The Queen**, is that there is no evidence from any of the applicants to suggest that he was present but for a purpose that did not include killing or inflicting grievous bodily harm. A similar submission was made to this court in **Joel Brown and Lance Matthias v R**, which Mrs Johnson O'Connor cited in support of her submissions. In addressing that issue in that case, McDonald Bishop JA, first, explained the principle of joint enterprise. She said, in part, at paragraph [77]:

> "…The core of the principle, as restated in **R v Jogee; Ruddock v The Queen**, is that a person who assists or encourages another to commit a crime (the secondary party or the accessory) is guilty of the same offence as the actual perpetrator of the crime (the principal) if he 'shares the physical act', that is, through assisting and encouraging the

physical act. In their Lordships words, '[h]e shares the culpability precisely because he encouraged or assisted the offence'. Their Lordships further explained:

> 'Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other.'

These basic principles, their Lordships said, are 'long established and uncontroversial'."

[71] Her Ladyship then demonstrated the flaw in the submissions. She said, in part, at paragraph [79]:

> "The danger in the learned trial judge intimating to the jury that Lance Matthias may have been at the premises for the purpose of intimidation or anything else, other than to kill or do serious bodily harm, as [counsel for Mr Matthias] suggests, is that his defence was that he knew nothing about what had transpired and that the case against him was a fabrication. Furthermore, and even more importantly, even if the jury were to reject his defence and accepted that he was there, there was no evidence that he could have been there merely to intimidate or to do anything else other than to do serious bodily harm to someone in the bedroom."

[72] She distinguished **Ruddock v The Queen** at paragraph [102]:

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

[73] It is true that Mr Matthias' case was different from this case because he was present in the room where the fatal shots were fired. However, a similar approach to that used by McDonald Bishop JA was taken by this court in **Shawn Campbell and Others v R** [2020] JMCA Crim 10, where the specific action of each of the accused was more left to inference. The court said, at paragraph [421] of its judgment, that **Ruddock v The Queen** did not apply where there was no evidence to suggest an intention other than to kill or cause grievous bodily harm:

> "…As [counsel for the Crown] pointed out, the appellants were indicted jointly for murder. The case for the prosecution was that they acted together and in concert in murdering the deceased. Their defences were a denial that they committed the offence. **There was therefore nothing in the evidence to ground a suggestion that any of them may have had an intention other than the intention to kill or to cause grievous bodily harm. In these circumstances, in our view, the question of manslaughter did not arise and the judge was entirely correct to remove it from the jury's consideration**." (Emphasis supplied)

[74] There was no obvious basis for the learned judge to leave any alternative offence for the jury to consider in these circumstances. Each of the applicants specifically denied being present at the scene. There is nothing that suggests an intention to commit any offence other than murder. This aspect of the submissions for Messrs Thomas and Ellis must also fail.

The learned judge's directions on unsworn statements

[75] There were, for this issue as well, different aspects to the complaint about the learned judge's directions in respect of the applicants' unsworn statements. Miss Anderson identified the aspects. She said that the learned judge erred when she:

a. repeatedly used the word "deprived" when stating that the applicant's unsworn statement was not tested by cross-examination;

b. stated that the jury was "obliged" to consider the unsworn statement, to give it such weight as they thought it deserved and to consider if it assisted them;

c. failed generally to deal separately with the unsworn statement of each applicant; and

d. referred to the unsworn statements as constituting an "alibi".

[76] Learned counsel, during oral submissions, readily conceded that the respective unsworn statements did constitute an alibi. She did so without prompting and was correct in doing so.

The direction about the consideration of the unsworn statement

[77] The portion of the summation, which learned counsel criticises, appears at pages 395-396 of the transcript. There, the learned judge said, in part:

> "…So, it is safe to say that you have been deprived of seeing their story tested under cross-examination, but because it is their right to do exactly what they did, you cannot hold it against them, or infer anything against them, because they told you their story from where they stood. You are to [sic] obliged to consider what they said. You are obliged to give it what weight you think it deserves. You are obliged to decide whether their statements can assist you, bearing in mind, they have no responsibility to prove their innocence."

[78] It is true, as Miss Anderson pointed out, that in **Alvin Dennison v R** [2014] JMCA Crim 7, Morrison JA, as he then was, expressed disapproval of the use of the term "deprived" in the context in which the learned judge used it. The term had been similarly used in **Alvin Dennison**. It is also true, however, that Morrison JA did not find the use in that context to be fatal to that aspect of the summation. He said at paragraph [54] of the judgment:

> "In reviewing the applicant's defence, the learned judge quite properly reminded the jury that, as was his right, he had not gone into the witness box. [Counsel for the applicant] was critical of the judge's repeated use of the word 'deprived' in telling the jury that they had not had an opportunity to hear his account tested in cross-examination. But, while we tend to agree that this may have been a rather loose choice of word, we doubt that, had that stood alone, it would have given rise to serious objection."

[79] There really can be no serious complaint about the learned judge's directions in this context. Miss Anderson's complaints in reference to the direction about the obligation to consider the unsworn statement, and to give it the weight that the jury thought that it merited, are similarly misplaced. Indeed, such directions are required for directions to the jury in this context. It is better, however, not to use the term "story" in reference to the unsworn statement, as it may cast it in a less credible light.

The failure to give individual treatment to the unsworn statements

[80] Miss Anderson's complaint about the failure to give individual treatment to the respective unsworn statement cannot be supported. The learned judge, at pages 394-396 of the transcript, gave general directions about treating with unsworn statements. There was no need to individualise the treatment in that context. She however specifically told the jury the essence of each applicant's unsworn statement. Each of those statements was terse. The applicants respectively told the jury their name, address, where they were at the relevant time, and denied being involved in the killing.

[81] The learned judge communicated that to the jury. She said, in part, at page 459 of the transcript:

> "We heard from the four accused men. As I said, having exercised their right in law and made a statement to you from where they were. So, you consider what they had to say separately. Mr. Ellis told you he was with his baby mother that night. Mr. Edwards told you he was at home that night. Mr. Smith told you he was at home that night and Mr. Thomas said he was at home with his mother that night.
>
> So, in effect, each of those men have [sic] raised what we call in law an alibi, saying they were somewhere other than the scene where the crime took place…."

[82] The learned judge's treatment of the unsworn statements is unobjectionable and the complaints are baseless.

Conflict of interest in defence counsel

[83] Mr Fletcher argued that Mr Ellis was prejudiced in his defence by the fact that the same counsel who represented Mr Edwards also represented him. This was

because, learned counsel submitted, the case against each of these applicants was substantially different. Mr Fletcher pointed out that the prosecution alleged that Mr Edwards was one of the persons who had entered the house and fired shots, while the case against Mr Ellis cast him in a different role. The joint representation, learned counsel submitted, would have tainted Mr Ellis's position, in the context of the prosecution's assertion of a joint enterprise. The jury's perception of the link between the two applicants, Mr Fletcher argued, cannot be disregarded.

[84] Learned counsel relied, for support of his submissions, on Canon IV (k) of The Legal Profession (Canons of Professional Ethics) Rules (the Canons), and their Lordships' judgment in **Mills, Mills, Mills and Mills v The Queen** [1995] UKPC 6; (1995) 46 WIR 240.

[85] Mrs Johnson O'Connor submitted that the joint representation did not prejudice Mr Ellis' case. She argued that the fact that:

a. the prosecution's case that there was a joint enterprise and that each participant played a different role;
b. each applicant steadfastly asserted and maintained a defence of alibi;
c. defence counsel put the case of each of the applicants separately; and
d. the learned judge dealt with the respective cases of each of the applicants separately and directed the jury to treat them as such,

destroyed the assertion that Mr Ellis's case was prejudiced by the joint representation. Learned counsel argued that **Mills v The Queen** does not assist Mr Fletcher's submissions on this point.

[86] In considering these submissions, it should first be noted that Canon IV (k) as well as (l) and (m) address the issue of counsel representing multiple clients. The Canons respectively state:

> "(k) Subject to the provisions of Canon IV (l), an Attorney shall not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if the independent professional judgment of the Attorney is likely to be impaired.
>
> (l) Notwithstanding the provisions of Canon IV (k), an Attorney may represent multiple clients if he can adequately represent the interests of each and if each consent to such representation after full disclosure of the possible effects of such multiple representation.
>
> (m) In all situations where a possible conflict of interest arises, an Attorney shall resolve all doubts against the propriety of multiple representation."

[87] **Mills v The Queen** is a decision of the Privy Council in an appeal emanating from this court. The situation in **Mills v The Queen** was similar, but not identical to this case. In that case, the same counsel represented all four accused, despite the fact that the defence for one of them was self-defence or provocation, while the defence for the others was alibi. The prosecution's case was that all four, armed with machetes, inflicted multiple chops on the victim.

[88] In considering the complaint that there should have been separate representation for the accused who alleged self-defence or provocation, their Lordships set out the general principles requiring counsel to consider the prudence of representing multiple accused. They said, in part, at page 252 of the WIR:

> "It is axiomatic that counsel engaged on behalf of more than one defendant in a criminal case must consider whether there is a conflict of interests between them which might inhibit his proper and effective defence of one of them. Counsel must consider the matter in the light of the prosecution case and the instructions he receives from the defendants. If there is, or might be, a conflict of interests, he must promptly advise separate representation. Any doubt must be resolved in favour of separate representation. Those duties of counsel arise as soon as he is engaged. It is, however, a continuous duty. If at any time before the trial a conflict arises, counsel must advise separate representation of the defendants. If, contrary to all expectations such a position arises at trial, counsel may be obliged to seek a discharge of the jury in order to enable separate representation at a new trial. These propositions flow from the right of an accused to have his defence properly and effectively placed before the jury. It is an integral part of his constitutional right to a fair trial. **But their lordships add one qualification. The province of the law is practical affairs. The question is whether there is, or might be, a real risk of a conflict of interests inhibiting counsel in the discharge of his duties on behalf of one or more defendants. In a practical world wholly theoretical or fanciful risks can be disregarded**." (Emphasis supplied)

[89] In their analysis of the complaint, their Lordships noted that neither the defence counsel nor the trial judge raised the issue during the trial. They found that an examination of the prosecution's case, and the case for each of the accused, by itself, did not raise an apparent conflict of interest. Their Lordships, particularly, did not raise

any issue of conflict of interest for the three accused, whose defence was alibi. They said, in part, on page 253 of the report:

> "…But their lordships are willing to accept counsel's invitation to assume that the content of the unsworn statements of the defendants reflects counsel's instructions. On this basis, three defendants raised alibi defences and the fourth self-defence and provocation. **That fact did not by itself raise any conflict of interests. Clearly, identification was always going to be a major issue on behalf of all the defendants. On that aspect there was a common interest**. But his multiple representation did not in any way preclude counsel from exploring, in cross-examination on behalf of Balvin, the defences of self-defence and provocation. What counsel in fact did, and the justification for it, will be considered later. But their lordships do not consider that counsel, in acting for Balvin, was in any way constrained or inhibited by instructions on behalf of the co-accused." (Emphasis supplied)

[90] As in **Mills v The Queen**, there was no issue raised at the trial by the fact that one counsel represented Messrs Ellis and Edwards, whilst another represented Messrs Smith and Thomas. Assuming, as their Lordships did in **Mills v The Queen**, that counsel's instructions were reflected in the unsworn statements, there was, on the face of it, no conflict of interest that should have alerted counsel to require separate representation pursuant to Canon IV (k).

[91] Mrs Johnson-O'Connor is also correct that defence counsel separately advanced the case of each of the appellants, and the learned judge separately analysed each case. The learned judge, as mentioned above, also directed the jury to separately consider the case against each of the applicants. She warned them, in the consideration of the identification evidence, to be wary of inferring presence at the scene merely

because of prior association. In a practical world, those directions would have obviated any hint of association because of joint representation by counsel, as Mr Fletcher suggests.

[92] This ground also fails.

The length of the sentences

[93] The learned judge sentenced Messrs Ellis, Smith and Edwards to each serve 35 years imprisonment before becoming eligible for parole. Mr Wilson argued that the sentence was manifestly excessive, when compared to the sentences in the cases such as **Lescene Edwards v R** [2018] JMCA Crim 4.

[94] Mr Fletcher submitted that the learned judge's approach to the sentencing exercise fell short of what, now, is expected of such an exercise. He submitted that the learned judge's reasoning on sentencing was "scant and unrevealing". He argued that she mostly decried the crime and did little else. He relied, in part, on **Callachand and Another v The State** [2008] UKPC 49 and **Daniel Robinson v R** [2010] JMCA Crim 75.

[95] Mrs Johnson-O'Connor accepted that the learned judge did not utilise the, now well-established, sentencing process. She conceded that the learned judge also failed to demonstrate that she considered the time that the applicants had spent on remand pending trial. That period, she said was, in Mr Ellis's case, three years and five months. Learned counsel relied, in part, on **R v Evrald Dunkley** (unreported), Court of Appeal,

Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002, and **Paul Brown v R** [2019] JMCA Crim 3.

[96] There is much merit in Mr Fletcher's submissions. This trial predated the sea change that the, now well-known, case of **Meisha Clement v R** [2016] JMCA Crim 26 brought to the sentencing process. Nonetheless, the principles, which coalesced in **Meisha Clement**, constituted part of the juridical landscape before 2012.

[97] The sentencing must necessarily be reconsidered for all the applicants. Whereas, for these purposes, Messrs Smith, Edwards and Ellis, may be considered together, for the most part, the sentencing for Mr Thomas, for the reasons that will follow, will be considered separately.

[98] The Offences against the Person Act requires a minimum sentence of 10 years' imprisonment before a person, convicted for the offence of murder, may be eligible for parole (see section 3(1C)(b)(ii)). A custodial sentence is therefore required. The court is, however, to determine the length of that sentence. The Sentencing Guidelines for Use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the Sentencing Guidelines) have been developed from an analysis of the principles set out in cases such as **Meisha Clement**. Paragraph 6.3 of the Sentencing Guidelines states as follows:

> "Having determined the normal range, the sentencing judge should then sentence the offender in accordance with the following steps:
>
> (i) identify the appropriate starting point within the range for the particular offender;

(ii) consider the impact of any relevant aggravating features;

(iii) consider the impact of any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, whether to reduce the sentence on account of a guilty plea;

(v) decide on the appropriate sentence;

(vi) make, where applicable, an appropriate deduction for time spent on remand pending trial; and

(vii) give reasons for the sentencing decision."

[99] This court has provided guidance as to the range of sentences for murder in circumstances that are similar to this case. The important case of **Peter Dougal v R** [2011] JMCA Crim 13 also involved a home invasion. The intruder killed the two occupants of the house while they were in bed. Mr Dougal was convicted for the murders. A five-member panel of this court sentenced him to imprisonment for life and ordered that he should serve 45 years before becoming eligible for parole.

[100] In **Ian Gordon v R** [2012] JMCA Crim 11, a group of men, at 4:00 am, surrounded a small wooden shack. The group fired shots into the building killing two men inside. Mr Gordon was one of the attackers. He was sentenced to imprisonment for life and this court ordered that he should serve 30 years before becoming eligible for parole.

[101] In **Massinissa Adams and others v R** [2013] JMCA Crim 59 three men entered a house which a senior police officer was visiting. They killed him and took his firearm. This court sentenced the mastermind, Mr Adams, to imprisonment for life, and

that he should serve 30 years before becoming eligible for parole. It dismissed the appeal of one of the others and upheld the sentence of life imprisonment and a pre-parole period of 30 years. It sentenced the third offender to a determinate term of 20 years' imprisonment.

[102] **Calvin Powell and Another v R** [2013] JMCA Crim 28 also involved a home invasion. The two offenders killed a couple in their home and disposed of the bodies in a dump. Both offenders were sentenced to imprisonment for life and it was ordered that they should each serve 35 years imprisonment before becoming eligible for parole.

[103] **Paul Brown v R** did not involve a home invasion, but F Williams JA, in delivering the judgment of the court, set out a number of cases from which he extrapolated the range of sentences for murder. He found that the range was that an offender was required to serve between 25 and 45 years' imprisonment before becoming eligible for parole. That range is consistent with the, admittedly limited, survey conducted above.

[104] **Lescene Edwards v R**, cited by Mr Wilson, was a different category of case. It did not involve a home invasion, but rather, involved a police officer killing his lover. This court used a starting point of 25 years, which is within the range. However, because of certain factors such as the murder not being gruesome, the lengthy delay in bringing the case to trial, the appellant's previous good character and his service as a police officer, he was sentenced to 20 years' imprisonment.

[105] From that analysis, it may be said that a starting point of 30 years may be appropriate for this case. That starting point would include the facts that this was a home invasion and that a firearm was used to inflict the fatal injury. Those facts, therefore, will not be again considered as aggravating factors.

[106] It must be said, however, that sight of the array of men, with firearms trained on the house, must have been a terrifying experience for the family and that must be considered an aggravating factor. That justifies an addition of five years of imprisonment for each of them. Mr Smith had a previous conviction for the illegal possession of firearms and was serving a sentence of nine years for that offence, at the time that he was sentenced for this murder. This could be a factor to warrant an increase, but will not be implemented in this case.

[107] There are no mitigating factors to be taken into account for any of these three applicants. Although they are relatively young men, they would not satisfy the requirement of "youth" that would be deemed a mitigating feature. Mr Ellis was not one of the men who entered the house. That is a factor, which should be taken into account. A deduction of five years for that element would be appropriate.

[108] Based on the above, the sentences for Messrs Smith and Edwards should be imprisonment for life, with the requirement to serve 35 years before becoming eligible for parole. The sentence for Mr Ellis should be imprisonment for life with a requirement to serve 30 years before becoming eligible for parole.

[109] It must also be considered the fact that they each spent a significant amount of time on remand awaiting trial. There is no indication that any of them contributed to that period. They, therefore, are each entitled to full credit for the period. The time spent on remand was as follows:

Mr Smith - three years and six months;

Mr Edwards – three years and six months; and

Mr Ellis – three years and five months.

It is not known when Mr Smith was convicted for the firearm offences. Therefore, no adjustment will be made to the reduction to which he would be entitled according to the principle of granting full credit for the time spent on remand.

Sentencing for Mr Thomas, considering his age

[110] Miss Anderson argued that, because he was 16 years of age, and therefore a child, at the time of the killing, Mr Thomas's case requires separate treatment from that of the other applicants. Learned counsel cited a number of authorities to demonstrate that children should be treated differently than adult offenders for a number of reasons, including the facts that:

a. they are impetuous and more susceptible to peer pressure;

b. their immaturity reduces their level of culpability for their acts; and

c. they are more susceptible to be trained to avoid anti-social behaviour in the future.

[111] Learned counsel, in that vein, argued that section 78 of the Child Care and Protection Act (the CCPA) is unconstitutional. Miss Anderson submitted that, the section, in stipulating that a child, who commits murder, "shall be liable to be imprisoned for life", is in breach of:

a. the fundamental rights of children, which are recognised in the Charter of Fundamental Rights and Freedoms in the Constitution (the Charter), and

b. the principle that children should not be sentenced to indefinite imprisonment but should be subject to the monitoring of the court by periodic reviews.

[112] Learned counsel submitted that in all the circumstances, the sentence that was passed on Mr Thomas was manifestly excessive.

[113] The Director of State Proceedings, Ms Jarrett, provided the court with a comprehensive outline of the international conventions on the rights of children, to which this country is a signatory. Learned counsel also provided a broad outline of the approach used by the legislatures and courts of other countries in the sentencing of children. Ms Jarrett asserted that the internationally accepted approach is that children must be treated differently from adults in respect of sentencing. An important part of sentencing children, she argued, which is not usually a priority with adults, is the issue of the best interests of the child. Ms Jarrett also suggested that section 78 of the CCPA was susceptible to being declared unconstitutional.

[114] Since the submissions in this appeal were heard, this court has had the benefit of the comprehensive judgment of Phillips JA in **Tafari Morrison v R** [2020] JMCA Crim 34. Phillips JA, in delivering the judgment of the court, dealt with a number of issues concerning the sentencing of children. The court, in that case, also had the benefit of Ms Jarrett's assistance, in a very similar way to that which she provided in this case.

[115] Among the several fundamental findings made by the court in **Morrison v R** is that section 13(7) (which is a part of the Charter), of the Constitution, excludes from the operation of the Charter, all sentences that were in force prior to the promulgation of the Charter in April 2011. Accordingly, the court, in that case, found that a sentence of a child to a mandatory minimum period of imprisonment, imposed by the Firearms Act, was not unconstitutional. The penalties provided by the Firearms Act were in force before the Charter became law.

[116] As part of its judgment, the court stated that despite its observance of its undertakings to the international community, the legislature of this country has decided that there are certain provisions that are required for the good governance of this country, despite the fact that they may be harsh on the children that those undertakings were meant to insulate. The court said:

> "[82] In the light of the provisions of the CCPA discussed above, it is clear that the legislature has given due and important consideration to the vulnerability of children in order to afford them special treatment under the law. It is also clear that the legislature considered the provisions of the [United Nations Convention on the Rights of the Child, 1989 (CRC)], and adopted or reformulated certain provisions of the CRC to accord with our own Jamaican reality. Even before the CRC, Parliament would have been

> cognisant of the [United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)] which stipulate that imprisonment is a measure of last resort and only for the shortest possible time; and yet, that principle has not been given special statutory force in Jamaica in the CCPA.
>
> …
>
> [84] ...In the light of Parliament's stipulation that children under the age of 14 years may be imprisoned for up to 25 years **and those over the age of 14 years may be imprisoned for life**, we cannot say that the imposition of a mandatory minimum sentence of 15 years on a child for a firearm related offence (as stated in the Fourth Schedule) is grossly disproportionate.
>
> …
>
> [98] In our opinion, it is fair to say, in the light of all the statutory provisions, Jamaica's laws with regard to the sentencing of children may be described or criticised as being rather archaic, strict and not in conformity with modern pronouncements of children's rights, which have been accepted internationally. There may yet come a time when these laws have to be reviewed and changed. **But, as the Privy Council stated in [Lambert Watson v R [2004] UKPC 34], it is within Parliament's prerogative whether to make those changes, and it is not for the court to impose its own moral predilections.**" (Emphasis supplied)

[117] Although the issue of a sentence of imprisonment for life was not specifically before the court in that case, it was specifically mentioned in paragraph [84] of the judgment and was accepted as being a legitimate sentence. The submissions by learned counsel, that section 78 of the CCPA is unconstitutional, cannot succeed.

[118] It should also be noted that section 78 does not mandate a sentence of imprisonment for life, but rather establishes it as the maximum penalty that may be inflicted on a child. The section states, in part:

> "(1) Sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years, but in place thereof such person shall be liable to be imprisoned for life.
>
> (2) A person sentenced under subsection (1) shall, notwithstanding anything in the other provisions of this Act, be liable to be detained in such place including, save in the case of a child who has not attained the age of fourteen years, an adult correctional centre, and under such conditions as the Minister may direct, and, while so detained, shall be deemed to be in legal custody.
>
> (3) Notwithstanding the provisions of the Parole Act, on sentencing any child under subsection (1), the court may specify a period which that child should serve before becoming eligible for parole.
>
> …"

[119] Nonetheless, it has already been established that the sentencing process for all of the applicants was flawed. In considering the sentence for Mr Thomas, the question should be "at what stage is his youth to be factored into the exercise". The Sentencing Guidelines, quoted above, suggest that it is to be considered as a mitigating feature. The learned judge applied a deduction of 10 years, when she took into account the fact that Mr Thomas was a child when he committed the offence. That is not an unreasonable deduction. It must also be considered that Mr Thomas was not one of the persons who entered the house. A five-year deduction was granted to Mr Ellis for that

factor. Mr Thomas is entitled to a similar deduction. The result is that 15 years would be subtracted from the 35-year calculation set out above. In addition, it is noted that Mr Thomas was on remand for three years and four months. He is entitled to credit for that period. Accordingly, he should be sentenced to life imprisonment but serve a period of 16 years and eight months before becoming eligible for parole.

Mr Thomas's constitutional right to a trial within a reasonable time

[120] Miss Anderson argued that the delay in bringing the case to trial is also in breach of Mr Thomas' constitutional right to a trial within a reasonable time.

[121] Three main points are to be considered in this regard. Firstly, this was not raised as an issue in the court below. Whereas the failure to raise it below does not permanently deprive Mr Thomas of the relief, it is a factor to be considered in all the circumstances.

[122] Secondly, the length of time does not by itself, entitle Mr Thomas to this particular constitutional relief. In a carefully considered judgment on the constitutional right to a trial within a reasonable time, McDonald-Bishop JA explained in **Julian Brown v R [2020]** JMCA Crim 42, that the applicant has to show that he has not contributed to the delay. The learned judge stated at paragraph [89]:

> "It means then that the enquiry into an alleged breach of section 16(1) cannot properly start and end with the length of the delay. The mere fact of delay, without more, is not sufficient to ground liability within the Charter. The investigation of the issue must necessarily involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case. This balancing exercise is necessary

> because the constitutional right of the applicant to a fair trial within a reasonable time is to be balanced against 'the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica'."

[123] Thirdly, in **Melanie Tapper v Director of Public Prosecutions**, [2012] UKPC 26: [2012] 1 WLR 2712, the Privy Council stated that it was for local courts to determine what would amount to a breach of the constitutional requirement of a trial within a reasonable time. Their Lordships said, in part, at paragraph 19 of their judgment:

> "…On their exercise of discretion it would require something exceptional to justify the Board substituting its opinion for that of the domestic court. In particular, the domestic court is much better placed to judge the significance of delay having regard to local conditions and pressures on the courts (see *Bell v Director of Public Prosecutions* [1985] AC 937, 953E-G)…." (Italics as in original)

[124] Unfortunately, the level of crime over the past two decades has provided more cases than the criminal courts in this jurisdiction, are able to accommodate in short order. As a result, a lapse of almost four years before a case comes on for trial is not considered so unreasonable, as to constitute a breach of section 16(1) of the Constitution, which guarantees that right. In the event that the lapse was found to be unreasonable and unconstitutional, the court would have been able to grant a remedy by a reduction in the sentence (see paragraphs 24-28 of **Tapper v DPP**). That remedy is not available in this case.

[125] Ms Anderson's submissions concerning the length of time that Mr Thomas spent awaiting trial (approximately three years and four months), being a breach of his constitutional right to a trial within a reasonable time, must accordingly fail.

Conclusion

[126] The various grounds of appeal, which challenged the respective convictions of these applicants, have failed. The learned judge correctly rejected the submission of no case to answer and properly directed the jury on the various issues, which they were to have considered.

[127] The learned judge was not wrong in imposing sentences of imprisonment for life on each of the applicants, including Mr Thomas. There is nothing to prevent a sentence of life imprisonment being imposed on a person who was a child at the time that that child commits a murder.

[128] She, however, did fail to apply an individual, systematic approach to the sentencing of the applicants. She stressed the heinousness of the crime without outlining any other reason for arriving at the sentences that she pronounced. The exception to that statement is that she made a deduction of 10 years in consideration of Mr Thomas' youth. She also did not grant credit to the applicants for the time that they had spent on remand pending trial.

[129] In light of those failures by the learned judge, this court is obliged to review the sentences using the now established procedure set out in the Sentencing Guidelines.

[130] As a consequence, the following orders are made:

1. The applications for leave to appeal against conviction are refused.

2. The applications for leave to appeal against sentence are granted, and the hearing of the applications is treated as the hearing of the appeals.

3. The appeals against the sentences are allowed, in part. The sentences of imprisonment for life are affirmed, but the periods stipulated that each applicant shall serve before becoming eligible for parole are set aside, with the following periods imposed instead:

    a. Mr Smith is sentenced to serve 31 years and six months.

    b. Mr Edwards is sentenced to serve 31 years and six months.

    c. Mr Thomas is sentenced to serve 16 years and eight months.

    d. Mr Ellis is sentenced to serve 26 years and seven months.

4. The sentences shall all be reckoned as having commenced on 16 March 2012.