[2021] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 103 & 105/2015 & 90/2017

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA

TROY SMITH v R
PRECIOUS WILLIAMS
ANDINO BUCHANAN

Ms Nancy Anderson for the applicant Andino Buchanan

Leroy Equiano for the applicant Troy Smith

Ms Nasha-Kaye Virgo for the applicant Precious Williams

Ms Paula Llewellyn QC, Director of Public Prosecutions, and Kemoy McEkron for the Crown

1, 2 October 2019 and 26 February 2021

EDWARDS JA

Background

[1] The three applicants in this case, Andino Buchanan, Troy Smith and Precious Williams, were all indicted for the offence of capital murder, in respect of the death of Mr Clayton Byfield. The indictment related to a robbery and murder which took place on 16 March 2012, in the parish of Saint Andrew, in which Mr Byfield was shot and killed and

his gold chain, which he had worn since he was 18 years old, stolen. At the commencement of their trial on 12 October 2015, all three pleaded not guilty. When their trial recommenced on 14 October 2015, and after the jury was empanelled, Precious Williams and Troy Smith asked to be re-pleaded and both pleaded guilty to non-capital murder. The prosecution and the learned trial judge accepted their pleas as appropriate, in all the circumstances of this case.

[2] On 14 October 2015 the trial of Andino Buchanan proceeded before G Smith J, sitting with a jury. At the close of the evidence, the prosecution asked that he be re-pleaded on an amended indictment charging him with murder. To that amended indictment he pleaded not guilty. On 29 October 2015, the jury found him guilty of the murder of Clayton Byfield. On 11 December 2015, all three applicants were sentenced to life imprisonment, with the stipulation that Andino Buchanan and Troy Smith were to serve 25 years, before becoming eligible for parole, and that Precious Williams was to serve 20 years, before becoming eligible for parole.

[3] All three applied to a single judge of this court for leave to appeal; Andino Buchanan in respect of both his conviction and sentence; Precious Williams and Troy Smith in respect of their sentences only. Leave to appeal was refused for all three. This is their renewed application, to this court, for leave to appeal.

[4] Counsel for the applicant Andino Buchanan, Ms Nancy Anderson, sought and obtained leave to abandon the proposed grounds of appeal which were originally filed,

and was permitted to pursue the renewed application on the basis of five supplemental grounds, which were as follows:

> "i. The learned trial judge erred in her directions to the jury on joint enterprise by not explaining that a person can be a party to a violent attack on another, without an intent to assist in the causing of death, and leaving the option of guilty of manslaughter to the jury;
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> ii. The learned trial judge erred in her directions on joint enterprise, when she told the jury that presence at the scene is not necessarily proof that the Applicant had the necessary intention to commit the offence but went on to misdirect the jury (page 679-680) that the jury must feel sure that the accused was present and did, by his presence encourage the commission of the offence;
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> iii. The learned trial judge failed to give appropriate identification directions to the jury;
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> iv. The direction by the learned trial judge on 'good character' was insufficient and the impact of an explicit positive statement would have affected the determination by the jury of its verdict and amounts to a miscarriage of justice;
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> v. The sentence imposed was manifestly harsh and excessive."

[5] Counsel for Precious Williams, Ms Nasha-Gaye Virgo, was permitted to abandon the revised grounds of appeal against conviction and sentence, which had been filed and to pursue the application for leave to appeal against sentence only. Counsel for Troy Smith, Mr Leroy Equiano, pursued the application for leave to appeal sentence, only. The basis of the application for both was on the ground that the sentence imposed was manifestly harsh and excessive.

The case for the prosecution

[6] The prosecution's case was that, on 16 March 2012, sometime after 3:00 pm, in the Rock Hall Square, in the parish of Saint Andrew, Mr Byfield, who was known as Yowa, was shot and killed inside a variety shop and robbed of a tri-coloured gold rope chain he was wearing around his neck. The prosecution's case, as presented to the jury, was that there was a common plan between all three applicants to rob Mr Byfield of his chain, using force, if necessary.

[7] On the morning of Friday, 16 March 2012, at about 11:00 am, Mr Byfield was in the shop which was set up in a converted container. Also in the shop were Mr Vinroy Campbell, Ms Coleshia Jones and Ms Oleen Lee. A silver-gray Nissan panel van with registration number 5916 GB passed the shop and stopped some distance away on the Sligoville Road. Troy Smith and Precious Williams exited the van and it drove off. They went to the shop window and Troy Smith purchased a cigarette, after which both he and Precious Williams left in the direction of the town square. Shortly thereafter, they were seen entering a taxi which drove off past the shop going in the direction of Waugh Hill. About ten minutes later they were seen walking back past the shop towards a gas station across the road.

[8] Sometime thereafter, the panel van drove up from the direction of Waugh Hill and stopped behind the shop. Andino Buchanan exited the van, entered the shop, and ordered a box drink and a 'tiggaz' cheese trix. There was no box drink, so he purchased two 'tiggaz' cheese trix and went back to the panel van. The panel van remained there, with the engine running for about 15 minutes. It then reversed down the Waugh Hill road.

Rain began to fall heavily. After the rain stopped, at some point the panel van drove back up towards the shop and turned in the direction of Kingston. About 10 minutes later, the panel van drove back up the Waugh Hill road, stopping about 400 feet from the shop. Precious Williams and Troy Smith walked up from the square towards the shop. Precious Williams approached from the side of the shop, stepped up into the shop and demanded that Mr Byfield give her the chain. Mr Byfield tried to get it off and when he could not Precious Williams grabbed the chain but it still did not come off his neck. Troy Smith then ran around from behind the shop, came to the door and demanded the chain. He then took a rifle from his bag and shot Mr Byfield in the head, killing him. He then removed the chain and fled. Precious Williams fled with him leaving her slippers behind. They ran down the Waugh Hill road towards the panel van and were picked up by Andino Buchanan. The panel van drove off with them turning towards the Sligoville Road.

[9] An alarm was made and the panel van was followed by the police who made attempts to intercept it. The panel van crashed head on into one of the police vehicles, and was subsequently abandoned by the three applicants. Precious Williams and Troy Smith, however, were apprehended on that same day in bushes and taken into custody. The stolen chain was later found in the boxer shorts that Troy Smith was wearing at the time. The panel van was searched and a AK-47 rifle containing 29 live rounds was found hidden in the seat. The seat had been ripped out to make a slot to hide the rifle and the sponge from the seat was found scattered on the floor of the panel van. A bag containing 13 rounds of ammunition was also found in the van. Andino Buchanan's passport was found in the front section of the panel van. Copy documents for the panel van were found

in the glove compartment which revealed that Andino Buchanan, along with another person, were registered as owners of the van. A multi-coloured exercise book containing a bail bond in relation to Troy Smith, was also found in the van. Andino Buchanan was subsequently arrested and thereafter pointed out on an identification parade as the driver of the panel van on the day Mr Byfield was killed. All three applicants were charged with murder.

[10] Of the three other persons who were at the shop at the time of the incident gave evidence, only one, Mr Vinroy Campbell, identified Andino Buchanan as the driver of the panel van who had entered the shop and purchased the "tigazz' cheese trix.

[11] Andino Buchanan gave sworn evidence at his trial. His evidence, in brief, was that, although he was the co-owner of the van, he was not the one driving it on 16 March 2012. He told the jury that he was at home at the material time 'chilling' with a girlfriend. He said that he had employed a driver, a man named Clayon (also spelled as Cleon in the transcript), who also had a key for the vehicle. He said that the last time he saw the panel van during the week of 16 March 2012, Clayon was driving it. He was unable to say exactly which day it was he saw Clayon driving the van.

[12] He said further that he was not in Rock Hall at 3:00 pm on 16 March 2012, and he was not a part of any plan to cut up his passenger seat and hide a gun in it. Nor was he a part of a plan, with Troy Smith and Precious Williams, to rob a gold chain from Mr Byfield and kill him. Furthermore, he did not know Precious Williams and Troy Smith, nor did he know the Sligoville or Rock Hall areas.

[13] He told the jury that on the evening of 16 March 2012, he received a call from the police informing him that his vehicle was found on Sligoville Road and that it was at the Half Way Tree Police Station. Thereafter, he went looking for Clayon, who he did not find until the following day. He took a call outside of Clayon's presence, and when he got back, Clayon was gone before he could ask him about the vehicle. He never saw him again after that.

[14] Under cross-examination he said that he could not be sure that he had not driven the panel van for the entire week of 16 March 2012. He claimed to have been driving a rental car, which he had had for a couple of months. It was paid for by another girlfriend. He could not say for sure when was the last time he drove his vehicle before that day but Clayon, whose last name he did not know, was driving the panel van during this time. The last time that he saw that vehicle, which was earlier in the week, Clayon was driving it.

[15] He also told the jury that, although he told the police Clayon's name, he did not report Clayon in respect of what may have happened to his van, and he did not tell them where they could find Clayon, who lived on his street. This, he said, was because he had made checks and Clayon was not there. He did not see Clayon between that time and when he was taken into custody, because he was busy doing deliveries by himself. He never reported the damage to his van to the insurance company because he did not know that he was supposed to. He did not go to the police immediately after they called him about the van because he preferred to go and look for Clayon to find out what had

happened. He said that when he went to the Half Way Tree Police Station on 18 March 2012, the van was not there and he was told by a 'police lady' that she would call him when it arrived. The "police lady' did not call him neither did he call the police station to find out what had happened to the van. Further, although he went to the police station on two occasions in April 2012, he did not find the van and he made no further enquiries about it after that.

[16] He maintained under cross-examination that he was not driving the van at the material time, and he was not a part of a common plan to rob Mr Byfield of his jewellery, using a gun. He denied that his role was to scout out the scene and drive the getaway vehicle. He denied he purchased any 'tiggaz' cheese trix at the shop on the day Mr Byfield was killed. He said it was not him. He admitted that at no time, before or after he was arrested, did he tell the investigating officer, Corporal Davidson, about the phone call he received about the van on 16 March 2020, nor did he tell him that Clayon had been driving the van on that day.

Andino Buchanan's application for leave to appeal

[17] The application brought by Andino Buchanan raises the following issues:

1. whether the learned trial judge erred in her directions to the jury on joint enterprise and in failing to leave manslaughter to the jury (grounds 1 and 2);

2. whether the learned trial judge erred in her directions to the jury on identification (ground 3);

3. whether the direction by the learned trial judge on 'good character' was insufficient (ground 4); and

4. whether the sentence imposed was manifestly harsh and excessive (ground 5).

[18] In assessing this application, we bear in mind that section 14(1) of the Judicature (Appellate Jurisdiction) Act, which sets out the parameters of the court's jurisdiction in criminal appeals, limits the court's interference with a conviction to circumstances where: (1) the jury's verdict was unreasonable or cannot be supported by the evidence, (2) the judge erred on a question of law, or (3) where there was, for some other reason, a miscarriage of justice. Even if these circumstances exist, pursuant to the proviso of that section, the court may dismiss the appeal if it is of the view that there was no actual substantial miscarriage of justice.

[19] Section 14(1) provides:

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

> Provided that the Court may, notwithstanding that they are of [the] opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." (Emphasis added)

[20] This court will not, therefore, disturb a verdict and sentence lightly, and will not grant leave to appeal if there is no reasonable prospect of success in the appeal.

Issue 1 - Whether the learned trial judge erred in her directions to the jury on joint enterprise and in failing to leave manslaughter to the jury (grounds 1 and 2)

[21] Ms Anderson, submitted that the issues in respect of these grounds surrounded the applicable principles of joint enterprise. Counsel contended that the learned trial judge erred when she told the jury that they must feel sure that the accused was present and did, by his presence, encourage the commission of the offence. Counsel argued that the directions focused too much on the applicant's presence at the scene, and the prosecution's explanation for his presence, where there was no evidence to support it. Counsel also maintained that the learned trial judge failed to deal effectively with the question of whether Andino Buchanan had the requisite intention for the offence of murder. Instead, counsel submitted, she concentrated solely on the fact of his presence as driver of the van, and that he was in the company of the of the other applicants. Counsel contended that the learned trial judge erred in doing so as presence did not equate to intention.

[22] Counsel argued that the learned trial judge failed to properly direct the jury on the requisite intention in respect of a joint enterprise and failed to direct them that even

if they were sure he was present and that he drove the getaway van, they must feel sure that he had the requisite intention to commit murder.

[23] Counsel submitted that, on the basis of the evidence that Andino Buchanan was only the driver of the panel van, this on its own was not indicative of an intention to commit murder, and the learned trial judge was duty bound to leave manslaughter to the jury. Counsel pointed out that the entire sequence of events on the fateful day, seemed to have surrounded the theft of Mr Byfield's chain and the shooting seemed to have been done on the spur of the moment. There was therefore, counsel contended, no evidence on which a jury properly directed could find that Andino Buchanan had the intention to kill or cause really serious bodily harm.

[24] Counsel submitted that, on that basis, the learned trial judge was wrong not to have directed the jury that they had the option of finding the applicant guilty of the lesser offence of manslaughter. She argued that it was incumbent on the learned trial judge, in the circumstances of the case, to direct the jury that although the applicant may have participated in the act of robbery with the use of violence, he may have lacked the intent to inflict really serious bodily harm or death. In such a case, counsel said, it would be open to the jury to find him guilty of manslaughter, rather than murder.

[25] Counsel submitted that the learned trial judge having failed to leave manslaughter to the jury, it was open to this court to substitute a verdict of guilty for that offence, if it is satisfied that the jury ought to have been given the option of returning a verdict of guilty to manslaughter, based on the evidence in the case. In that regard, counsel asked

this court to grant leave to appeal, treat the hearing of the application for leave as the hearing of the appeal, and substitute a verdict of manslaughter.

[26] Counsel cited **R v Jogee and Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7; (2016) 87 WIR 439 at paragraphs 27, 89, 90 and 96; **Shirley Ruddock v R** [2017] JMCA Crim 6; and **Joseph Bullard v The Queen** [1957] AC 635.

[27] The Director of Public Prosecutions, Ms Paula Llewellyn QC (DPP), submitted on behalf of the Crown that Andino Buchanan's continued presence in the company of the principal actors, after the killing, was sufficient evidence upon which the jury could have correctly found that he was present at the scene, aiding and abetting the other applicants in the physical act, and therefore, participating in the common design to murder. The authority of **R v Dennie Chaplin, Howard Malcolm and Peter Grant** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3 and 5/1989, judgment delivered 16 July 1990 was relied on in support of this submission.

[28] The DPP also argued that there would have had to have been some overt act on the part of the applicant to show that he was distancing himself from the actions that led to the commission of the offence, in order for him not to be found to be a part of the joint enterprise. She cited the decision of **R v Clyde Sutcliffe** and **Randolph Barrett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 148 and 149/1978, judgment delivered 10 April 1981 in support of this proposition. In that regard, the DPP asked this court to note that the evidence led by the prosecution was that, at all

material times, Andino Buchannan was the driver of the getaway car, and the other applicants ran from the scene of the murder into the van being driven by him.

[29] The DPP submitted that, not only did the learned trial judge correctly warn the jury in law about the dangers of mere presence, but the learned trial judge explained and clarified the issue, as she had a duty to do, by applying the law to the facts of the case. She also disagreed with Ms Anderson's contention that the learned trial judge failed to explain the necessity for the jury to consider whether they felt sure that he had the necessary intention to commit murder. The DPP submitted that, at no time did the learned trial judge give any direction that foresight of the possibility of the commission of murder was acceptable as the mental element sufficient to ground joint criminal responsibility. In that regard, the DPP relied on the judge's summation at lines 13 to 20 of page 677, line 24 of pages 679 to 680, and lines 3 to 8 of page 752 of the transcript, as well as the judge's statement on the burden of proof at lines 1 to 19 of page 665.

[30] The DPP also argued that the option of manslaughter could not have been left open to the jury, having regard to the evidence led by the prosecution, and the fact that it did not arise on the defence, which was one of alibi. It was submitted that the cases of **Jogee and Ruddock**, particularly **Ruddock**, were distinguishable from the instant case, as there was no evidence that Andino Buchanan assisted and encouraged the other two applicants to commit only the robbery and not the murder. Therefore, it was contended, the long-established principles of joint enterprise were applicable. The DPP also argued that if manslaughter had been left to the jury, in the circumstances of this case, it would

have served only to confuse the jury. She pointed to the length of time the perpetrators were in the community, that is, from 11:00 am until 3:00 pm, which, she said pointed to 'sinister' planning. She also pointed to the empty packets of the 'tiggaz' cheese trix found in the area of the driver's feet in the panel van and the fact that the retrofitting of the compartment in the van to hide the gun could only have been done with the knowledge and permission of the owner, one of whom was Andino Buchanan. There was, she maintained, no ground on which the learned trial judge could have properly left manslaughter to the jury.

[31] The DPP submitted, therefore, that this case does not fall into the category of cases where the substitution of a verdict of manslaughter was warranted. She sought to distinguish the case of **Shirley Ruddock v R**, which applied **Dwight Wright v R** [2010] JMCA Crim 17 and **Bullard v The Queen**, on the basis that there was no evidence, in the instant case, on which such a verdict could have been returned.

[32] The DPP also contended that, in any event, grounds 1 and 2 were diametrically opposed, since, in order for the court to consider a substitution of manslaughter for murder, the jury must first accept that the accused was not merely present at the scene. Therefore, since the prosecution's case was that Andino Buchanan was voluntarily and purposely present, close to the scene; was the driver of the getaway car; had the gun which was used to shoot Mr Byfield hidden in a slot in the seat of the panel van cut out for that purpose; and had a bag with ammunition which was also found in the panel van; it was open to the jury to find that the appellant aided and encouraged the invasion of

the shop which led to the shooting of the deceased. This, the DPP said, was sufficient evidence on which the jury could have found that he had been present aiding and abetting the others, thereby participating in the common design to murder.

[33] The DPP submitted that the learned trial judge's summation was unassailable.

Discussion and analysis

[34] In this case, the learned trial judge, in her directions to the jury in respect of common design and joint enterprise, at page 678 of the transcript, gave the generally accepted directions on joint enterprise based on the authority of **Anderson v Morris** [1966] 2 All ER 644. In that case it was said that where two or more persons act together as part of a plan to commit an offence, despite the fact that each may play a different role, they will all be guilty of that offence. The learned trial judge also directed the jury that the 'plan' did not have to include a formal agreement and could arise on the spur of the moment with a nod, wink or knowing look. She further instructed the jury that they were to infer from the behaviour of the persons involved, whether they had agreed to commit the offence and whether "they were in it together".

[35] At page 679 of the transcript she went on to state the following:

> "Let me point out that **mere presence at the scene of the crime is not enough to prove guilt**, **but if you find that the accused was at the scene and intended by his presence alone, to encourage the others in the offence and that it did encourage them by his presence, then he is also guilty**." (Emphasis added)

[36] The law is that mere presence on the scene by itself is insufficient proof of 'assistance or encouragement', but may very well be evidence relevant to such a finding (**Jogee and Ruddock**, paragraph 11). The law is also clear that a person present on a crime scene does not only participate in the commission of the crime by assisting with physical acts, but may also participate by encouraging it, by way of words and other deeds. This participation is evidence upon which a jury could infer that there was a joint agreement between the parties to commit the crime.

[37] Ms Anderson complained that the learned trial judge's direction, cited above, amounted to a misdirection in law. In our view, however, the words used by the learned trial judge meant no more than that it was open to the jury to find that the accused was not merely present at the scene but was, in fact, present to aid, abet and encourage the commission of the offence.

[38] In any event, had there been any confusion caused by this statement to the jury, this would have been cleared up by the learned trial judge's instructions, thereafter. She went on to tell the jury that the case against the accused was that he "was not merely present", but that he had actively participated by being the driver of the get-away van, and that they, the jury, would have to look at all the evidence to determine whether or not he was a part of the plan to carry out the robbery and to kill Mr Byfield. She further told them that, if they were "satisfied beyond a reasonable doubt that he, along with others…did an act or acts as part of a joint plan, then he would be guilty as charged".

[39] At pages 679 to 680 of the transcript, this is how she put it:

> "In this case the Prosecution is saying that the accused, Andino Buchanan, was not merely present, but he was there and he was the driver of that get-away van on the faithful [sic] day of the incident. In addition, you heard counsel for the Prosecution say that he had gone on that scene to buy Tiggaz and that he was verifying the situation and checking out the scene. **You will have to look at all the evidence presented and to see whether or not you find that he was a part of the plan to carry out that robbery and to kill Mr. Byfield**. Your approach to the case should therefore be as follows:
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> **If looking at the case for the accused you are satisfied beyond a reasonable doubt that he, along with others, committed the offence, that is, did an act or acts as part of a joint plan, then he would be guilty as charged.** If you do not believe he was there and that it is a case of mistaken identity, then you would have to find him not guilty. (Emphasis added)

[40] These words made it clear that the jury was to determine whether Andino Buchanan was not only present, but also whether he actively participated in the crime as part of a joint plan, as alleged. The jury, therefore, could not have been misled into believing that presence alone was sufficient to find guilt without participation in the commission of the offence. That of course dealt only with the issue, of what in law, is known as the *actus reus* (the guilty act) of the crime.

[41] On the question of intention, the *mens rea* of the crime, the learned trial judge, at page 675 of the transcript, told the jury that the prosecution needed to prove that Andino Buchanan, along with the other persons, "intended either to kill Mr Byfield, or to inflict really serious bodily harm to him". This, she explained, in the absence of expressed intention, was to be inferred from the words or conduct of the persons involved, to determine whether "as ordinary, responsible persons, they must have known that death

or really serious bodily injury would have resulted from their actions" (page 676, lines 3 to 18). She then concluded, at page 677, lines 8 to 20, that:

> "If you find that he must have so known, then you may infer that he intended the result of the actions that took place and this would be satisfactory proof of the intention required to establish the charge of Murder.
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> **It is the actual intention of the accused and the others that you are trying to discover**, so you must take into account any evidence given by him and any other evidence in the case, that is the totality of the evidence in the case and come to your decision as to whether the required intention has been proved." (Emphasis added)

[42] As was found in **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25 at paragraph [104], the learned trial judge, in the instant case, gave the jury the 'orthodox direction on joint enterprise', and did not "run afoul of the principles laid down in **Jogee and Ruddock**" by giving a direction falling within the "**Chan Wang-Siu** error" that 'foresight of the possibility of the commission of the offence of murder was acceptable as the mental element sufficient to ground joint criminal responsibility'. The learned trial judge made it clear to the jury that foresight was a factor from which they could infer intention but that they were to feel sure that Andino Buchanan, intended either to kill the deceased, or to inflict really serious bodily harm to him.

[43] The challenge raised by counsel Ms Anderson, however, questions whether the learned trial judge went far enough and whether she ought to have left the option of a verdict of guilty of manslaughter to the jury. In our view, counsel's complaint, in this regard, has substance. It seems to us that in the circumstances of this case, the directions given by the learned trial judge did not go far enough, in so far as she left only two

options to the jury. Those options were that Andino Buchanan was present on the scene with the intent to aid and abet the commission of the crimes of robbery and murder or he was not there at all. She did not leave a third option that he may have been present with the intent to aid and abet the commission of the offence of robbery only. She did not direct the jury on what to do if they took the view, from any reasonable inference drawn from the evidence, that Andino Buchanan had intended to commit the offence of robbery but had no intention to kill or cause really serious bodily harm. Ms Anderson says it was incumbent on the learned trial judge to do so. The DPP says there was no requirement for the learned trial judge to do so, as it was not supported by the evidence.

[44] It has been well accepted that, where two or more persons embark on a plan to commit a crime, and act in furtherance of that plan, each will be liable for the acts to which they have agreed or assented, whether expressly or by implication. Even where there is no prior agreement and the parties come together spontaneously to commit the offence, the intentional giving of support or encouragement is sufficient to attract secondary liability. That principle is to be found in **Jogee and Ruddock** at paragraph 78.

[45] The case of **Jogee and Ruddock** was a joint decision from an appeal to the United Kingdom Supreme Court (UKSC) (**Jogee**), and an appeal from this court to the Judicial Committee of the Privy Council (**Ruddock**) which were heard together. In both matters, the appellants were found to be an accessory to murder, not having been the person who did the act that had caused the death. In both cases, the principal pleaded

guilty to murder. In the case of **Jogee**, the facts were that the appellant Jogee, after a night of indulging in drugs and alcohol with his friend, Hirsi, and both being intoxicated and angry, attended on the premises the deceased shared with his girlfriend. Having refused to leave after being asked several times to do so, Hirsi used a kitchen knife to stab the deceased in the chest, killing him. During the confrontation, whilst Hirsi was armed with the knife, and immediately before the stabbing, Jogee was outside the house shouting encouragement to Hirsi to do something to the deceased, and at one point came to the doorway raising a broken bottle over his head saying he wanted to smash the bottle over the deceased's head. Having rejected a no case submission on behalf of the appellant, the trial judge directed the jury that "the appellant was guilty of murder if he had participated in the attack by encouraging Hirsi, realizing that Hirsi might use the knife to stab the deceased with intent to cause him really serious harm". The conviction was quashed solely on the basis that the learned judge had directed the jury based on principles from the case of **Chan Wing-Siu v R** [1984] 3 All ER 877, which the Board pronounced were wrong. In respect of those principles, the Board took the view that foresight alone, without intent, was insufficient, in law, to make an accessory guilty of the same offence as the principal. The correct approach was to direct the jury that the accessory must have had the same intent as the principal. In the circumstances of that case of murder, the requisite intent was an intent to kill or cause serious bodily harm. However, the Board found that the jury's verdict must have meant that at least manslaughter was established on the evidence, and invited submissions as to whether a

verdict of guilty for the lesser offence should be substituted or if the matter should be sent back for re-trial.

[46] In the case of **Ruddock**, the appellant had been convicted of the murder of a taxi driver who had been found on a beach with his hands and feet tied and his throat cut. Following the murder, the appellant was found in the deceased's vehicle with his co-accused, Hudson, and a woman. It had been the evidence of the investigating officer that, under caution, Ruddock admitted that he had tied up the deceased but said that he was not the one who had cut the deceased's throat, and that it was Hudson who used a ratchet knife to do so. Ruddock, however, at his trial, gave an unsworn statement from the dock to the effect that he had not been present at the scene of the murder and knew nothing about it. He alleged that he had been beaten by the police and was offered a bribe to build a case against his co-accused, who had pleaded guilty at the beginning of trial.

[47] The Board quashed Ruddock's conviction on three bases, one of which was that the directions based on **Chan Wing-Siu**, that common intention to commit the offence could be inferred from the defendant knowing there was a real possibility that the other had a particular intention but nevertheless went on to partake in it, were wrong in law. The other notable basis was that the judge, in her summing up, had failed to tell the jury that participation in the robbery did not automatically mean participation in the murder, and that they were to consider the evidence of the defendant that he was not involved in the murder.

[48] It is useful to set out *in extenso* what the Board in **Jogee and Ruddock** opined in respect of liability for secondary participation in a crime generally, as well as, in circumstances where a secondary crime arises out of a prior joint venture. The Board began, at paragraph 7, with a reminder that in cases involving accessory liability, proof of the conduct element (the *actus reus*) and of the mental element (the *mens rea*) is still a requirement. For our purposes, the relevant discussion in the decision surrounds the accessory's liability, where the offence committed is one which goes beyond the scope of the common enterprise. The Board considered several lines of cases, some of which it approved, and others it disapproved and overruled.

[49] The Board approved **R v Collison** (1831) 4 Car & P 565, a case in which two men went to steal apples and were met by the watchman whom one of the thieves severely bludgeoned. The Board held that the ruling in that case highlighted the importance of identifying what the common purpose was at the time the thieves set out on their enterprise. If the purpose was only to steal apples, the secondary party was not guilty of the greater offence. He would only be guilty if the common purpose included using severe violence to resist apprehension, should the occasion arise (see paragraph 22). It approved other cases such as **R v Turner** (1864) 4 F&F 339 at 341 and **R v Spragget** [1960] Crim LR 840 which support the principle that where violence is used in furtherance of a criminal venture, a co-adventurer will be liable only if he shared an intention to use violence to resist interference or arrest. The jury must be directed that the accused will be guilty of murder only if they are sure that there had been a common intention to use violence, if it became necessary.

[50] The Board then considered (at paragraphs 26 and 27) the relevance, to the question of intention, of the fact of a weapon being carried on the adventure. It held that the carrying of a weapon, as evidence of intention depended on the circumstances. In certain circumstances, it may be "powerful" evidence of a common intention to use violence to resist apprehension or overcome resistance. However, the Board made it plain that this was not conclusive. The Board then considered cases in which there was evidence that there was a joint intent to use a weapon to resist arrest or overcome resistance, but in which the secondary party had no shared intent to kill or cause grievous bodily harm. In such a case, the principal who had the intent to kill would be guilty of murder but the secondary party, who had no such intention when he took part in the attack which resulted in death, would be guilty of manslaughter. He would be guilty of nothing if the act which caused the death was a supervening event, which was so far removed from what was agreed, that it could not be regarded as a consequence of it (which was the actual finding in the case of Morris in **Anderson and Morris v R**).

[51] The Board approved the principle as stated in **R v (Smith) Wesley** [1963] 1 WLR 1200 and **R v Reid** (1976) 62 Cr App R 109, that only the perpetrators who intended that unlawful and grievous bodily harm or death should result from the common enterprise is guilty of murder. The party who had no such intention or who intended only that the deceased be frightened, hit or hurt is guilty of manslaughter only, if death results. The Board quoted Lawton LJ in **R v Reid,** stating, at paragraph 35 as follows:

> "Dealing with Reid, he said at p 112:

> "The intent with which the appellant was in joint possession of the weapons with the others has to be inferred from the circumstances. He did not share the murderous intent…The first problem for us is whether this court would be entitled to infer from the fact of joint possession an intent to do some harm to Colonel Stevenson…If men carrying offensive-indeed deadly-weapons go to a man's house in the early hours of the morning for no discernible lawful purpose, they must, in our judgment, intend to do him harm of some kind, and the very least kind of harm is of causing fright by threats to use them. The second problem is whether, on the evidence in this case, Colonel Stevenson's death resulted from the unlawful and dangerous act of being in joint possession of offensive weapons. The appellant did not intend either death or serious injury. On the jury's findings O'Conail must have gone beyond anything he may have intended…
>
> When two or more men go out together in joint possession of offensive weapons such as revolvers and knives and the circumstances are such as to justify an inference that the very least they intend to do with them is to use them to cause fear in another, there is, in our judgment, always a likelihood that, in the excitement and tensions of the occasion, one of them will use his weapon in some way which will cause death or serious injury. *If such injury was not intended by the others, they must be acquitted of murder; but having started out on an enterprise which envisaged some degree of violence, albeit nothing more than causing fright, they will be guilty of manslaughter."*

[52] It was based on the principles in those cases, and others it approved, that the Board overruled **Chan Wing-Siu** [1985] AC 168, in so far as that case, partly as a matter of policy, deviated from those hitherto settled principles and held that foresight of the consequences (and not necessarily intent) was sufficient to ground accessory liability. More specifically, the Board stated that **R v Anderson and Morris** provided no foundation for the rule stated in **Chan Wing-Siu** regarding the liability of secondary parties. Foresight, the Board held, at paragraph 83, is ordinarily no more than evidence from which the jury may infer the presence of the requisite intention and it was incorrect to adopt it as a test of the mental element for murder in the case of a secondary party.

[53] At paragraphs 89 to 96, the Board restated the applicable principles as follows:

> "89. In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation.
>
> [90] The second issue is likely to be whether the accessory intended to encourage or assist D1 to commit the crime, acting with whatever mental element the offence requires of D1 (as stated in para 10 above). **If the crime requires a particular intent, D2 must intend (it may be conditionally) to assist D1 to act with such intent**…
>
> 92. In cases of secondary liability arising out of a prior joint criminal venture, it will also often be necessary to draw the jury's attention to the fact that the intention to assist, and indeed the intention that the crime should be committed, may be conditional. The bank robbers who attack the bank when one or more of them is armed no doubt hope that it will not be necessary to use the guns, but it may be a perfectly proper inference that all were intending that if they met resistance the weapons should be used with the intent to do grievous bodily harm at least. The group of young men which faces down a rival group may hope that the rivals will slink quietly away, but it may well be a perfectly proper inference that all were intending that if resistance were to be met, grievous bodily harm at least should be done.
>
> 93. Juries frequently have to decide questions of intent (including conditional intent) by a process of inference from the facts and circumstances proved. The same applies **when the question is whether D2, who joined with others in a venture to commit crime A, shared a common purpose or common intent** (the two are the same) **which included**, if things came to it, **the commission of crime B**, the offence or type of offence with which he is charged, and which was physically committed by D1. **A time honoured way of inviting a jury to consider such a question is to ask the jury whether they are sure that D1's act was within the scope of the joint venture**, **that is, whether D2 expressly or tacitly agreed to a plan which included D1 going as far as he did, and committing crime B, if the occasion arose**.

94. **If the jury is satisfied that there was an agreed common purpose to commit crime A, and if it is satisfied also that D2 must have foreseen that, in the course of committing crime A, D1 might well commit crime B, it may in appropriate cases be justified in drawing the conclusion that D2 had the necessary conditional intent that crime B should be committed, if the occasion arose; or in other words that it was within the scope of the plan to which D2 gave his assent and intentional support. But that will be a question of fact for the jury in all the circumstances.**

95. **...If D2 joins with a group he realises is out to cause serious injury, the jury may well infer that he intended to encourage or assist the deliberate infliction of serious bodily injury and/or intended that that should happen if necessary. In that case, if D1 acts with intent to cause serious bodily injury and death results, D1 and D2 will each be guilty of murder.**

96. **If a person is a party to a violent attack on another, without an intent to assist in the causing of death or really serious harm, but the violence escalates and results in death, he will be not guilty of murder but guilty of manslaughter. So also if he participates by encouragement or assistance in any other unlawful act which all sober and reasonable people would realise carried the risk of some harm (not necessarily serious) to another, and death in fact results: *R v Church* [1965] 1 QB 59,** approved in *Director of Public Prosecutions v Newbury* [1977] AC 500 and very recently re-affirmed in *R v F (J) & E (N)* [2015] EWCA Crim 351; [2015] 2 Cr App R 5. The test is objective. As the Court of Appeal held in *Reid*, if a person goes out with armed companions to cause harm to another, any reasonable person would recognise that there is not only a risk of harm, but a risk of the violence escalating to the point at which serious harm or death may result. Cases in which D2 intends some harm falling short of grievous bodily harm are a fortiori, but manslaughter is not limited to these.

...

98. ...**What matters is whether D2 encouraged or assisted the crime, whether it be murder or some other offence. He need not encourage or assist a particular way of committing it, although he may sometimes do so. In particular, his intention to assist in a crime of violence is not determined**

> **only by whether he knows what kind of weapon D1 has in his possession**. The tendency which has developed in the application of the rule in *Chan Wing-Siu* to focus on what D2 knew of what weapon D1 was carrying can and should give way to an **examination of whether D2 intended to assist in the crime charged. If that crime is murder, then the question is whether he intended to assist the intentional infliction of grievous bodily harm at least, which question will often, as set out above, be answered by asking simply whether he himself intended grievous bodily harm at least**. Very often he may intend to assist in violence using whatever weapon may come to hand. In other cases he may think that D1 has an iron bar whereas he turns out to have a knife, but the difference may not at all affect his intention to assist, if necessary, in the causing of grievous bodily harm at least. Knowledge or ignorance that weapons generally, or a particular weapon, is carried by D1 will be evidence going to what the intention of D2 was, and may be irresistible evidence one way or the other, but it is evidence and no more." (Emphasis added)

[54] In **Clyde Sutcliffe and Randolph Barrett**, this court rejected the argument by the appellants that the common plan to rob did not include a common plan to kill, stating the following, at page 7:

> "It was in the continuance of that joint enterprise that D'Aguliar used the firearm which was in the joint possession of the others in order to effect their escape. The others had done nothing to disassociate themselves from the joint venture and under the doctrine of common design each person would be liable for the act of the co-adventurer. The common venture was the robbery with the use of firearms and prevention of apprehension, if necessary, by the use of these firearms with such force as necessary; this extended to effecting their escape."

[55] A similar complaint was made in the case of **Joel Brown and Lance Matthias v R**, and was readily dismissed by this court. The facts in that case were that, in the early hours of the morning, the deceased was at home where he lived with two of the witnesses, his aunt and cousin, along with another cousin who was the son of his aunt.

His door was kicked off by armed men who fired shots into the room. One of these armed men was identified by the witnesses to be the appellant, Lance Matthias. Two other armed men waited outside the gate. The deceased was able to run from the house into the yard and over a wall, where more gunshots were heard. The deceased was later found suffering from gunshot wounds to the upper body and was pronounced dead. Both accused gave unsworn statements from the dock denying involvement in the murder, Brown asserting an alibi, and Matthias asserting that one of the witnesses had an axe to grind and was telling a lie on him. Both were convicted of the murder of the deceased. On appeal, one of the grounds put forward by counsel for Matthias was that the trial judge's treatment of common design and joint enterprise was inadequate, and that she failed to leave manslaughter for the consideration of the jury in light of **Jogee and Ruddock**. Counsel argued that although Matthias was present in the house at the material time armed with a firearm, the evidence did not show that Matthias had the requisite intent to kill or cause grievous bodily harm, or to assist or encourage in same.

[56] At paragraphs [88] to [89] this court said this:

> "The important thing to note in treating with the judge's failure to tailor her directions in the terms proposed in grounds 1(b), (c) and (d), argued on behalf of Lance Matthias, is that **there was no evidence led by him, and there was nothing arising on the prosecution's case, or from anywhere else, that raised any possibility that he was present but had no intention to, at least, inflict serious bodily harm on someone**. All the men seen by the witnesses were allegedly armed with firearms, including him. Furthermore, following the discharge of gunshots on the outside of the premises, after the deceased had fled from the bedroom, **Lance Matthias did nothing to disassociate himself from the enterprise. Instead, he continued in pursuit of Raymond**

> **Miller, with firearm in hand for a second time**. By this time, Raymond Miller had already been shot and injured.
>
> [89] The fact that the appellant did not fire at that point in time, as argued by Mrs Shields, does not take away from other evidence from which the jury could have properly found that he had the intention to, at least, cause serious bodily harm. **The evidence was that he was in the company of the other armed men until he was seen leaving with them following the shooting of the deceased. And even after they withdrew from the premises, they continued to fire shots within the vicinity**. The decision in **R v Clyde Sutcliffe and Randolph Barrett** directs that in order for a defendant not to be found to be a part of a joint enterprise, there has to be some overt act, on his behalf, which demonstrates that he was distancing himself from the actions that took place at the material time, which led to the commission of the offence. **There is no such evidence in this case showing any departure from the activities of the group on the part of Lance Matthias. He was there, from start to finish, actively participating in the events which led to the fatal shooting of the deceased**." (Emphasis added)

[57] Then, having discussed several cases, including **Jogee and Ruddock**, the court concluded that the learned judge did not err in not leaving the lesser offence of manslaughter to the jury in the circumstances, as:

> "[101] …Lance Matthias **had not given evidence pointing to a lesser state of mind than that for murder and there was no evidence before the jury from any other source, which would reasonably point to a joint enterprise/common design to commit any other offence**, during the course of which murder was committed.
>
> [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.

> [103] We conclude that there is no evidential basis on which the learned trial judge could have pointed the jury to a common purpose merely 'to intimidate' or to 'cause some harm' but not serious bodily harm, as posited by Mrs Shields. **For the learned trial judge to have directed the jury in those terms, it would have been not only highly speculative but would have amounted to her putting fanciful possibilities to the jury, which had no realistic or credible evidential support in fact or law to commend them**…" (Emphasis added)

[58] We do not agree with the DPP that the situation in those cases is similar to the instant case. In our view, there was evidence in this case which could reasonably point to a common enterprise to commit the offence of robbery, during the course of the commission of which murder was committed.

[59] The Board in **Jogee and Ruddock** said, at paragraph [118]:

> "…the judge failed to tell the jury that if they were sure that Ruddock was a party to carrying out the robbery, it did not automatically follow that he was also party to the murder of the deceased. That question required separate and further consideration. **Ruddock's alleged statements to the police were, or were at least capable of being understood as, a denial that he was responsible for the deceased's murder. He admitted to tying up the deceased, but that was consistent with a simple intent to rob**. The fact that the defence advanced by Ruddock at trial was a total denial of involvement in the incident did not remove the judge's obligation to point out to the jury that there was evidence in Ruddock's words to the police which was intended to exculpate himself from the murder." (Emphasis added)

[60] In Ruddock's case, therefore, there was evidence on which the lesser offence of manslaughter could have been established had the jury rejected Ruddock's unsworn statement that he was not there.

[61] In **Jogee and Ruddock**, at paragraphs 27 and 96, the court acknowledged that there could be cases where, although the defendant may have taken part in an attack with intent to use force to repel resistance or arrest, he may not have had the intent of the principal to cause death or serious harm. In such cases he would be guilty of manslaughter and not murder.

[62] It is worth quoting here the following words of Lord Tucker in **Bullard**, at page 644, which were cited with approval by this court in **Dwight Wright** and in **Shirley Ruddock**, that:

> "Every man on trial for murder has the right to have the issue of manslaughter left to the jury **if there is any evidence upon which such a verdict can be given**. To deprive him of this right must of necessity constitute a grave miscarriage of justice and it is idle to speculate what verdict the jury would have reached." (Emphasis added)

[63] The duty of the learned trial judge to leave the issue of manslaughter to the jury for its consideration, would only have arisen if there was evidence on which the jury could properly return a verdict of guilty of manslaughter. If there was such evidence and manslaughter was not left, this court cannot speculate as to whether the jury would have returned a verdict of guilty to murder, in any event.

[64] In the instant case, the learned trial judge did not tell the jury that Andino Buchanan's participation in the robbery did not necessarily mean he intended to be a party to the murder. The question is whether, in the circumstances of this case, she ought to have done so. The answer to this question depends on whether there was any evidence before the court on which the jury could have concluded, or from which they could have

inferred that Andino Buchanan took part in the robbery knowing some degree of violence would be used to rob the deceased but that he had no intent to cause death or really serious bodily harm. Andino Buchanan denied being a participant in the robbery and murder of the deceased, and we agree that manslaughter did not arise on his case. His defence throughout was one of alibi. However, the prosecution's case was that there had been a joint plan to rob the deceased of his chain, using deadly force, if necessary. The question is whether the evidence points inescapably in support the prosecution's theory, or whether, on the prosecution's case, there is evidence from which it could be inferred that the common intention was to rob the deceased but the circumstances escalated resulting in death.

[65] The evidence is that Andino Buchanan dropped off the other two applicants and left the area. Troy Smith and Precious Williams entered the shop and left without incident. Andino Buchanan later returned, entered the shop, purchased the "Tiggaz" and left without incident. Thereafter, Precious Williams re-entered the shop and demanded the chain. She also attempted to grab the chain from Mr Byfield's neck, both attempts done without the use of a weapon. It was only after she failed to dislodge the chain from Mr Byfield's neck, that Troy Smith stepped to the door of the shop, demanded the chain and when Mr Byfield was not quick enough in removing it, he pulled the rifle from a bag, shot him and took the chain. At this point Andino Buchanan was in the panel van some distance away down Waugh Hill. In our view, on those facts a jury, properly directed, could infer that the plan to which Andino Buchanan was a party, was to rob the chain and if necessary, use some degree of force, for example to frighten or intimidate, if necessary,

but not necessarily to cause any really serious bodily harm in doing so, and further, that by the actions of Troy Smith and Precious Williams, it escalated into a killing. In our view, on those facts, Andino Buchanan was entitled to have manslaughter left to the jury.

[66] It is not sufficient to say Andino Buchanan had the intent to cause grievous bodily harm to the deceased because he entered the shop, the firearm and ammunition were found in his panel van, and he drove the getaway car. This is, of course, evidence from which the jury could be invited to draw the inference that he did, in fact, have that intention but on its own, it is not conclusive of the issue.

[67] The evidence throughout, if accepted by the jury, was that there was a plan to steal Mr Byfield's chain. The plan was clearly for Andino Buchanan to play an active role in the robbery by driving the getaway car. However, the manner in which the robbery was effected provided a sufficient basis, in our view, for the jury to be properly directed that if they were sure that Andino Buchanan was a party to the robbery, it did not automatically mean he was a party to the murder. The jury ought to have been told that they were to convict Andino Buchanan for murder only if they reject the notion that he was only a party to a plan to rob Mr Byfield and were sure that he had the same intention as Troy Smith and Precious Williams, to kill or inflict serious bodily harm on Mr Byfield, in order to steal his chain. They ought to have been directed also that, if in all the circumstances, they found that he did not have that intent, but ought reasonably to have realized that there was a risk of harm, not necessarily serious bodily harm or death, and

death results, they were to find him guilty of manslaughter. This was entirely a matter for the jury to consider, taking into account all the other circumstances in the case.

[68] Consequently, Ms Anderson was correct that the learned trial judge erred in failing to leave the option of manslaughter to the jury, and this ground, therefore, succeeds.

[69] In **Shirley Ruddock v R**, the appellant's appeal having been remitted by the Privy Council for reconsideration on the issue of manslaughter, Brooks JA, giving the judgment of the court, considered whether a retrial should be ordered or a conviction for manslaughter should be substituted. Brooks JA, at paragraph [20], made note of section 24(2) of the Judicature (Appellate Jurisdiction) Act, which authorizes this court to substitute a verdict of guilty for an offence of which the jury could have convicted the appellant. That provision states:

> "Where an appellant has been convicted of an offence and **the Resident Magistrate or jury could on the indictment have found him guilty of some other offence**, **and** on the finding of the Resident Magistrate or jury **it appears to the Court that the Resident Magistrate or jury must have been satisfied of facts which proved him guilty of that other offence**, the Court may, instead of allowing or dismissing the appeal, substitute for the judgment passed or verdict found by the Resident Magistrate or jury a judgment or verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity". (Emphasis added)

[70] Then, having looked at previous cases where this court had substituted convictions for manslaughter, including **Dwight Wright v R** which had applied the approach of the court in **Joseph Bullard v The Queen**, Brooks JA, at paragraph [22], found that, based on the evidence before the court on which the jury could have found that Ruddock had

voluntarily been involved in the robbery with intent to use violence, but that it was possible that he had lacked the requisite intention to kill the deceased, manslaughter should have been left for the jury's consideration. Owing to that error, he found, the court would substitute the verdict of manslaughter, in place of the murder conviction that had been quashed by the Privy Council.

[71] In this case, neither side considered a retrial to be appropriate and neither side argued that one should be ordered. We also do not believe a retrial would be appropriate in this case. Applying the same principles as was applied in **Shirley Ruddock**, we would substitute a verdict of guilty of manslaughter in this case.

Issue 2 - Whether the learned trial judge erred in her directions to the jury on identification (ground 3)

[72] It is well settled that in a case in which the identification of the accused is in issue, and the case depends substantially on the correctness of that identification, it is the duty of the trial judge to warn the jury as to the danger of the witness mistakenly identifying the accused, even if they believe the witness to be honest and that a convincing witness can be mistaken.

[73] In the following oft-cited passage in **R v Turnbull and others** [1976] 3 All ER 549, Lord Widgery CJ laid down what has been accepted as the appropriate guidelines a trial judge should follow in summing up to a jury, when the case against the accused is centred around the identification of the accused, which he alleges to be mistaken. At pages 551 and 552, he stated:

"First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken**, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken**. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?... Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence…

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment, when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate and the like, the jury can safely be left to assess the value of the identifying evidence even though there is no other evidence to support it; provided always, however, that an adequate warning has been given about the special need for caution." (Emphasis added)

[74] At page 553, he went on to say:

"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult

> conditions, the situation is very different. The judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification. This may be corroboration in the sense lawyers use that word; but it need not be so if its effect is to make the jury sure that there has been no mistaken identification.
>
> …
>
> The trial judge should identify to the jury the evidence which he adjudges is capable of supporting the evidence of identification. If there is any evidence or circumstance which the jury might think was supporting when it did not have this quality, the judge should say so. A jury, for example, might think that support for identification evidence could be found in the fact that the accused had not given evidence before them. An accused's absence from the witness box cannot provide evidence of anything and the judge should tell the jury so. But he would be entitled to tell them that when assessing the quality of the identification evidence they could take into consideration the fact that it was uncontradicted by any evidence coming from the accused himself.
>
> Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. False alibis may be put forward for many reasons: an accused, for example, who has only his own truthful evidence to rely on may stupidly fabricate an alibi and get lying witnesses to support it out of fear that his own evidence will not be enough. Further, alibi witnesses can make genuine mistakes about dates and occasions like any other witnesses can. It is only when the jury are satisfied that the sole reason for the fabrication was to deceive them and there is no other explanation for its being put forward, that fabrication can provide any support for identification evidence. The jury should be reminded that proving the accused has told lies about where he was at the material time does not by itself prove that he was where the identifying witness says he was.

[75] Then, at page 554, he concluded:

> "A failure to follow these guidelines is likely to result in a conviction being quashed and will do so if in the judgment of this court on all the evidence the verdict is either unsatisfactory or unsafe…It is for the jury in each case to decide which witnesses should be believed. On matters of credibility this court will only interfere in three

> circumstances: first, if the jury has been misdirected as to how to assess the evidence; secondly, if there has been no direction at all when there should have been one; and, thirdly, if on the whole of the evidence the jury must have taken a perverse view of a witness, but this is rare."

[76] In the instant case, Ms Anderson submitted that the learned trial judge gave insufficient directions on the dangers of mistaken identification in the light of the fact that there was only one witness who identified Andino Buchanan and that evidence was uncorroborated. Counsel submitted that it was the duty of the learned trial judge to give a comprehensive warning as to the danger of a mistaken identification in all cases where identification is in issue, particularly where there is only one witness. This is required, counsel submitted, regardless of whether the issue is raised by the defence or not. Counsel cited **Keith Nichol v R** [2018] JMCA Crim 8 and submitted that, in the instant case, the direction given was not comprehensive and, therefore, amounted to a miscarriage of justice.

[77] In **Keith Nichol**, this court referred, at paragraph [28], to the following quotation by Lord Ackner in the Privy Council decision of **Reid and others v R** (1989) 37 WIR 346, at page 362 where he referenced a statement from Lord Griffiths in the case of **Barnes, Desquottes and Johnson v R, Scott and Walters v R** (1989) 37 WIR 330, as follows:

> "If convictions are to be allowed upon uncorroborated identification evidence there must be strict insistence upon a judge giving a clear warning of the danger of a mistaken identification which the jury must consider before arriving at their verdict. **It is only in the most exceptional circumstances that a conviction based on uncorroborated identification evidence will be sustained in the absence of such a warning. This was not an exceptional case**." (Emphasis added)

[78] In her summation, at pages 703 to 708, the learned trial judge dealt with the issue of identification as follows:

> "Now as I said, Mr. Vinroy Campbell is the eyewitness who identified and placed Mr. Buchanan on the scene. Mr. Buchanan is saying, by way of his defence, that that is not so, he was never there, and it is a case of mistaken identity.
>
> Now, this is a trial where the case against the accused depends, to a large extent, on the correctness of identification of him by the witness that I have just dealt with, Mr. Campbell, and which the Defence alleged to be mistaken. I must, therefore, warn you of the special need for caution before convicting the accused in reliance on the evidence of identification. There have been wrongful convictions in the past as a result of such mistakes. An apparently convincing witness can be mistaken. You, therefore, must examine carefully the circumstances in which the identification by Mr. Campbell was made.
>
> How long did he have the person he says was Mr. Buchanan under observation? Well, in evidence before you he said he had observed him for seven minutes. In cross-examination he admitted that he had told the police shortly after the incident that he was able to observe this person for seven to eight seconds and he admitted that that was true.
>
> Now, the question you will have to ask yourself, Mr. Foreman and members of the jury, is he a credible witness as it relates to the time that he said he had this person under observation? If you accept that he had said earlier in his statement that he observed him for seven to eight seconds, then you will have to ask yourselves, was that sufficient time under all the circumstances for him to have observed this person whom he says was Mr. Buchanan, and whom he identified as such. Can you believe him? Because counsel for the defence is saying that he exaggerated by at least sixty times the period that he said he had him under observation. It is for you to determine whether or not he is a credible witness, or did you find him to be somebody who exaggerated and had come here to try and mislead you. You saw him in the witness box. You will have to assess him and you will have to determine whether or not you thought he was being truthful.
>
> Now, you will also have to look at what distance he observed this person whom he said was Mr. Buchanan. He said he came within a

foot of him when he passed him that day and he was able to see him. You will have to also ask yourself what were the lighting conditions like, in what light. Now, this incident took place in daytime, but bear in mind it is said that rain had been falling and that there was fog in the area and that type of condition prevailed. You will have to determine whether in that type of lighting he was able to see the person that he says he identified as Mr. Buchanan.

The other thing you will have to look at, did anything interfere with that observation. Well, he said he passed very close to him. The next thing you would have to look at, has the witness ever seen this person he observed before. Well, he said that he had never seen this person before and that is the evidence before this court.

Now, the other thing you will have to consider is how long was it between the original observation on the 16th of March 2012, and the identification to the police, which was on the date of the identification parade. And this parade was held sometime in May of 2012.

You will also have to look at the description that he gave to the police to see if there is any marked difference between the description given by the witness to the police, when he was first seen, and the appearance of the accused. Well, you heard the description, the evidence I just read back to you and you will have to consider it as it relates to this accused before the Court, but bear in mind that he made this observation and give [sic] the description in 2012, and the accused is now before you in 2015. So he described him as being slim built. Some of us put on weight readily, some lose weight, so is there a marked difference? However, Mr. Foreman and members of the jury, those are questions of fact and that is your province. You're supreme when it comes to the findings of facts in this case. So you will have to look at all those things that I just enumerated.

I must remind you of the following, what I regard as weaknesses which appeared on the identification evidence. There was the discrepancy in the time that the witness says he observed the accused for. In the evidence, he said seven seven [sic] minutes; in his statement to the police he said seven to eight seconds. Bear in mind that the statement was given a short time after the incident. But at the end of the day, Mr. Foreman and members of the jury, you will have to determine whether or not you accept Mr. Vinroy Campbell as a witness of truth, a credible witness or not."

[79] The DPP submitted that these passages show that the learned trial judge dealt extensively and meticulously with the issue of identification. She pointed out that in these passages, the learned trial judge reminded the jury of the opportunities for the sole eyewitness to identify the accused, highlighting the evidence as to the lighting conditions and the length of time he claimed to have been able to view the accused. The DPP submitted that although there was an inconsistency in the witness' evidence as to the length of time within which he saw Andino Buchanan, this inconsistency was dealt with by the learned trial judge. The DPP argued that, in any event, this inconsistency raised an issue of credibility, and therefore, the learned trial judge was correct to invite the jury to examine the identification evidence itself.

[80] The DPP further submitted that the learned trial judge was not bound by any form of words, but had only the duty to recount the evidence with accuracy and to fully and fairly present the defence to the jury. This, she said, the learned trial judge did. The DPP further submitted that the learned trial judge satisfied the essential requirement, which was to bring all the weaknesses in the evidence to the jury's attention, and that overall, there was no deficiency in the learned trial judge's direction on this issue. In support of these submissions, the DPP cited relied on the case of **Michael Rose v The Queen** (1994) 31 JLR 462, at page 465.

[81] Alternatively, the DPP submitted, even if there was an omission by the judge in respect of her direction, this would not have amounted to a miscarriage of justice sufficient to render the appellant's conviction unsafe. There was ample evidence by the

prosecution's witness to support a proper identification of Andino Buchanan, and the jury's verdict, she submitted, demonstrated that they accepted these witnesses as witnesses of truth. The DPP submitted, therefore, that, on the totality of the evidence and the judge's summation, no substantial miscarriage of justice occurred.

[82] In our estimation, the DPP is correct in her assessment. The learned trial judge gave adequate directions in respect of the evidence given by Mr Campbell, the sole witness who identified Andino Buchanan. Importantly, she pointed out to the jury that Andino Buchanan had denied being on the scene and that Mr Campbell was the sole witness to place him there. She warned the jury of the special need for caution, particularly because the case against Andino Buchanan depended, to a large extent, on the correctness of that identification. She warned them that a convincing witness can be mistaken and that such mistakes have led to wrongful convictions, therefore, they were to carefully examine the circumstances in which the identification had been made. She summarized the evidence as to those circumstances, including the lighting conditions and the distance from which the witness said he viewed Andino Buchanan, as well as the amount of time that had passed between the original observation and the identification parade. She directed the jury to take into account that the witness had never seen the assailant before the day in question. She also urged them to consider whether there were any differences in the description given to the police and Andino Buchanan's appearance in court.

[83] The learned trial judge also pointed out the inconsistency in the evidence of Mr Campbell, as to the length of time he said he had observed Andino Buchanan, which she regarded as a weakness in the identification evidence. She urged the jury to determine whether Mr Campbell was a credible witness, and whether they considered that the time stated was sufficient for him to have observed that the perpetrator was, in fact, Andino Buchanan. She then concluded by directing the jury that it was their duty to determine whether they accepted Mr Campbell as a witness of truth and as a credible witness.

[84] We, therefore, cannot agree with Ms Anderson's assertion that the learned trial judge's directions were inadequate. The directions were in keeping with the guidelines set out in **Turnbull**, and crucially, the learned trial judge warned the jury of the special need for caution and urged them to take care in evaluating all of the evidence because "[a]n apparently convincing witness can be mistaken", such mistakes having led to wrongful convictions. This, along with the overall effect of the learned trial judge's directions as a whole, was in our view sufficient to convey to the jury the essence of that set out in **Turnbull**.

[85] In **Michael Rose v R**, the Privy Council, at page 465, in dealing with the appellant's complaint that the trial judge had failed to say in his summing up that a "convincing" witness may nevertheless be mistaken, found that, having regard to the strong warning given by the trial judge and the repeated references as to the possibility of a mistaken identification, including that an honest witness could also be mistaken, the failure to use the word "convincing" was not fatal. The Board opined that, in respect of

the weaknesses in the identification evidence, no particular form of words was required. What is important, the Board said, is that the trial judge draws all the weaknesses in the evidence to the attention of the jury and critically analyse them, where appropriate. This, the learned trial judge in the instant case, certainly did.

[86] We think it useful, at this juncture, to point out that in **Turnbull**, in addition to the identification evidence, the court found that there was additional evidence in the case which supported the correctness of the identification of the appellants by the eyewitnesses, and in so doing said this, at page 556 of the judgment:

> "Counsel for the Crown accepted that what we have called the quality of the identification by Det Con Smith could not be said to have been good, and indicated that had there been no other supporting evidence he would not have been disposed to argue that the appellants' conviction should stand. In the circumstances of the present case, however, and seeking to apply the general principles to which we have referred, he contended that there was ample other evidence which went to support the correctness of Det Con Smith's identification. He pointed out that Det Con Smith already knew Turnbull and that his was more recognition than mere identification. Both Det Con Smith and Mr Alderson gave a general description of the man they each saw and of the coat which he was wearing that night which was consistent with the facts**. A van recently hired by Camelo was in the vicinity at the relevant time and Det Sgt Wakenshaw had recognised Camelo at the wheel as the van passed the bank. A few minutes later, when the van was stopped a mile or so away, both Camelo and Turnbull were in it and there was substantial evidence that at about that time the latter at least had been in possession of housebreaking implements.**
>
> We agree. **All this was in our judgment clearly evidence which went to support the correctness of Det Con Smith's identification of Turnbull, and thus the implication that both he and Camelo had conspired as charged.** Given the honesty of Det Con Smith's identification which, as we have said, the jury must

> have accepted, our opinion is that there can be no real doubt about its accuracy." (Emphasis added)

[87] Similarly, in this case, whilst there was no other witness placing the appellant on the scene except Mr Campbell, in our view, there was other circumstantial evidence which supported the identification. The witness gave evidence that Andino Buchanan was the person who entered the shop and purchased two "tiggaz" before leaving and driving off in the van. After the shooting, when the van was intercepted and searched the two "tiggaz" wrappers were found in the van along with the passport belonging to Andino Buchanan and the papers for the van bearing his name as part owner. He could give no explanation for his passport being in the van or how long it had been there, other than to state that it was his van so it had a right to be in there. In our view, on any reasonable view of taken of these bits of evidence, they could support the correctness of the identification of Andino Buchanan.

[88] The inconsistency in the witness' evidence regarding the length of time he viewed Andino Buchanan did not rise to the level of discrediting the witness so completely so as to warrant a withdrawal of the case from the jury, and the learned trial judge appropriately pointed to the inconsistency as a weakness in the case. From the jury's verdict, it is apparent that they accepted the witness as credible and rejected the applicant's defence that he was not there.

[89] We, therefore, see no merit in this ground.

Issue 3 - Whether the direction by the learned trial judge on 'good character' was insufficient (ground 4)

[90] Andino Buchanan gave sworn evidence and placed his character in issue. He was therefore entitled to a full good character direction. It is well settled, as stated by this court in **Christopher Thomas v R**, [2018] JMCA Crim 31, that where a defendant gives evidence at trial, and he puts his good character in issue, he is entitled to both limbs of the good character direction. The first limb of the direction is as to credibility and the second as to propensity. The English Court of Appeal in the case of **R v Vye; R v Wise; R v Stephenson** [1993] 3 All ER 241, which is one of the cases in which the modern formulation of the good character direction was espoused, noted, at page 247, that the form of the direction is in the discretion of the judge based on the circumstances of the case, provided the relevance of the two limbs are stated to the jury:

> **"...[I]t must be for the trial judge in each case to decide how he tailors his direction to the particular circumstances.** He would probably wish to indicate, as is commonly done, that good character cannot amount to a defence. In cases such as that of the long serving employee exemplified above, he may wish to emphasise the 'second limb' direction more than in the average case. By contrast, he may wish in a case such as the murder/manslaughter example given above, to stress the very limited help the jury may feel they can get from the absence of any propensity to violence in the defendant's history. **Provided that the judge indicates to the jury the two respects in which good character may be relevant, ie credibility and propensity, this court will be slow to criticise any qualifying remarks he may make based on the facts of the individual case**." (Emphasis added)

[91] In **Christopher Thomas v R** this court also indicated, at paragraph [58], that the good character direction should contain that which was set out by the Privy Council

in **Teeluck and John v The State** [2005] UKPC 14; (2005) 66 WIR 319, at paragraph 33(iii):

> "The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged."

[92] The direction need not take any particular form of words, once it is sufficient to convey the essence of the direction. In that regard, in **Christopher Thomas v R**, at paragraph [62], having considered the cases of **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22 and **R v Moustakim** [2008] EWCA Crim 3096, Morrison P stated:

> "**Ronald Medley [sic] and Rohan Meikle v R** and **Regina Moustakim** therefore make it clear that, where a full good character direction is called for, the trial judge must make an explicit, positive statement to the jury, using whatever language he or she considers appropriate, that the defendant's good character (i) supports his or her credibility; and (ii) renders it less likely than otherwise that he or she would have committed the offence in question."

[93] **Christopher Thomas v R** involved an application for permission to appeal against conviction and sentence imposed after the applicant's third trial for the murder of a detective corporal of police. The prosecution's case was largely based on the identification evidence of two eyewitnesses. The applicant gave evidence as to his good character. One of the complaints, on appeal, was that the trial judge's directions in relation to the applicant's good character were defective, in that, the trial judge had merely told the jury what the applicant was saying, rather than directing the jury as to the effect of 'good character' in law. At paragraph [56], having outlined the applicant's

evidence as to his good character, Morrison P recited the trial judge's directions to the jury which were as follows:

> "…[All] of those really design [sic] to say, this man, Mr. Thomas, is not any gunman…this is a man who is on a steady path, academic progress from basic school right through. So, people who have that kind of background and suppen [sic], they don't walk up and down shooting people he is saying to you, he is a man of good character, because when he said that he does not have any previous conviction, what he is really saying, you know, I am an honest, upstanding law abiding citizen of the land and so, people of good character enjoy, correct that is to say that they are more likely to speak the truth rather than tell a lie, because they are people of good character, you don't call a liar a good character, so that is what he is saying to you.
>
> He is also saying to you, that, people of good character don't commit crime, don't have any propensity for criminal activity, so, you take in good character into account, not because he has a duty to prove anything, you know, but it is part of the assessment process, and you ask yourselves, 'boy, but Mr. Thomas is a man who go to school, go to JC and study book and if it leaves you in a state of doubt, reasonable doubt as to whether he was doing these things that have been attributed to him as Mr. Gallimore and Mr. Smith, that is, have heard it, is not guilty. If you believe his story, not guilty. You can only convict if you reject his evidence 'contract' come back to the prosecution's case, examine it closely, bearing in mind all the warnings I have given you about identification, SUPTS [sic] witness, discrepancy, inconsistency and omission, all of these things, and it is only when you conduct that kind of assessment and you say to yourselves, 'Well, yes, I am satisfy [sic] so that I feel sure that Mr. Thomas was indeed the man doing all these things attributed to him.' Then and only then, can you say he is guilty. Because the presumption of innocence applies from the beginning to the end, until you, by your verdict, say he is guilty."

[94] Morrison P concluded that those directions fell short of what was required, as the way in which the judge had framed the issue of the applicant's good character gave the impression that it was a "part of the applicant's argument, rather than an objective factor which supported his innocence". He also stated that the "judge was required to explain

to the jury in affirmative terms, the significance which the applicant's good character had for his case, not just as a matter of argument, but as a matter of law" (see paragraph [63]).

[95] **Ronald Webley and Rohan Meikle v R** was a case in which the appellants appealed their convictions for the offence of wounding with intent to cause grievous bodily harm, arguing that the trial judge prejudiced the good character direction by giving it with one hand and taking it back with the other. The part of the direction complained of was recounted, at paragraph [34] of the judgment of this court, as follows:

> "'Another thing that I will tell you about is there, as far as we know, these two young men have no previous convictions. Yes, which means that they are to be regarded as men of good character and what that means in practical terms these are persons of good character are not involved, usually in criminal activity.
>
> **So, person[s] of good character don't go around chopping off people [sic] hand or almost chopping off people [sic] hand and standing at kitchen door lending support to people doing chopping. And persons of good character are likely [sic] to speak the truth than persons without good character...**"

[96] This court, having examined several cases, including **R v Moustakim**, found that, although the direction did not use the recommended language, the words were sufficient to convey the essence of the direction, in that the judge properly addressed both limbs of the direction.

[97] In **R v Moustakim**, a case from the Court of Appeal of England and Wales, the appellant had been convicted of being knowingly concerned in the fraudulent evasion of the prohibition on the importation of a Class A controlled substance. On appeal, the

substantive complaint was that the trial judge's summing-up as to the appellant's good character was deficient. The direction was recounted at paragraph [10] of the judgment, as follows:

> "You know from the officer that the Defendant is aged 42 and you know Mrs Lieden and the Defendant that she has no convictions in this or any country, she therefore falls to be dealt with by you as a Defendant of good character. Now, how does that impact upon her trial?
>
> Well, a Defendant of good character is entitled to say that I am as worthy of belief as anyone, so in the first place it goes to the question of whether or not you believe Mrs Moustakim's account. Secondly, she is entitled to have it argued on her behalf that she is perhaps less likely than a Defendant of bad character to have committed this or any criminal offence. Good character is not a defence to a criminal charge. We all start life with a good character, some of us lose it on our way through, and it will be for you to decide what weight is proper to put upon this lady's good character when you come to consider the evidence which is your principal focus."

[98] In agreeing that this direction was inadequate, and that the conviction was unsafe in all the circumstances, the court stated the following, at paragraph [15]:

> "[15] In our judgment, this direction, which we have read, in the present case was inadequate because:
>
> 1. There is no explicit positive direction that the jury should take the Appellant's good character into account in her favour.
>
> 2. The judge's version of the first limb of the direction did not say that her good character supported her credibility. The judge only said that she was entitled to say that she was as worthy of belief as anyone. It went, he said, to the question whether the jury believed her account.
>
> 3. The judge's version of the second limb of the direction did not say that her good character might mean that she was less likely than otherwise might be the case to commit the crime. He said that she was entitled to have it argued that she was

> perhaps less likely to have committed the crime. The use of the word 'perhaps' is a significant dilution of the required direction.
>
> 4. In the judge's direction each limb is expressed as what the Defendant is entitled to say or argue, not as it should have been a direction from the judge himself."

[99] That court came to that decision having opined, at paragraph [13], that:

> "The two limbs of the direction required are reflected in the Judicial Studies Board guideline directions which include that a good character cannot of itself provide a defence to a criminal charge, but it is evidence which the jury should take into account in the Defendant's favour. First, as with any person of good character it supports his credibility. This means that it is a factor which the jury should take into account when deciding whether they believe his evidence. Second, the fact that the Defendant is of good character may mean that he is less likely than otherwise might be the case to commit the crime of which he is charged."

[100] In the instant case, Ms Anderson contended that the good character direction, given by the learned trial judge, was inadequate, as it failed to demonstrate to the jury that it had the force and authority of a direction from the court. Counsel submitted that because the evidence against Andino Buchanan was not so overwhelming, a proper direction on his credibility and propensity to commit an offence could have affected the jury's decision as to whether to accept the identification evidence of Mr Campbell, or the applicant's assertion that whilst it was his Nissan panel van involved in the incident, he was not the driver. It was submitted that in those circumstances, the lack of an adequate good character direction amounted to a material miscarriage of justice. Counsel relied on this court's decision in **Christopher Thomas v R.**

[101] The DPP contended, however, that the learned trial judge's good character directions were adequate and that all she was required to do, based on the case of **Ronald Webley and Rohan Meikle v R**, was to make an explicit positive statement to the jury, in appropriate language, to the effect that the defendant's good character: (i) supported his credibility, and (ii) rendered it less likely that he or she committed the offence.

[102] The DPP sought to distinguish the case of **Christopher Thomas v R** from the instant case, on the basis that the learned trial judge, in the instant case, did not dilute the force of the direction, and that the words and phraseology used by her communicated the essence of what the direction was intended to convey. It was submitted further, that there was no question that the jury could have understood the issues that they were required to resolve.

[103] We agree with the DPP that the learned trial judge's direction in this case was adequate. At pages 881 to 882 of the transcript, the learned trial judge gave the following direction in respect of the applicant's good character:

> "Now, you heard in this Court that the accused is a young man of good character. He has never been convicted of any crime, neither Jamaica, or elsewhere. Of course, good character by itself cannot provide a defence to a criminal charge, but when deciding whether the Prosecution has proved the charge against him beyond a reasonable doubt, you should take his good character into account in his favour, and you do that in the following ways:
>
> In the first place, the accused had given evidence, and as with any man of good character, this supports his credibility. This means, it is a factor which you should take into account in deciding whether you believe his evidence.

> In the second place, the fact that he is of good character may mean that he is less likely, than otherwise might be the case, to commit this crime. So you will have to consider his good character."

[104] Whilst this direction might not be regarded as expansive by some, there is no force to Ms Anderson's contention that it "failed to demonstrate to the jury that it had the force and authority of a direction from the court". The learned trial judge gave both limbs of the direction as required. It conveyed that Andino Buchanan was of good character, that this (1) supported his credibility, and (2) that it may mean that he was less likely than otherwise to have committed the crime with which he was charged. Whilst the learned trial judge did not specifically state that "a person of good character is more likely to be truthful than one of bad character" as stated in **Teeluck**, her statement that his good character "as with any man of good character, supports his credibility" was a positive statement which conveyed that his good character increased his level of believability. She then explicitly told them that it was a factor they should consider when deciding whether they believed Mr Buchanan's evidence. We, therefore, do not agree that there was a 'dilution' in the direction comparable with that done in **Christopher Thomas v R.** Again, by comparison, the direction given in **R v Moustakim** can also be distinguished from that given in the instant case. The learned trial judge spoke in explicit and positive language, expressly stating that Andino Buchanan's good character supported his credibility and that the jury ought to consider this when assessing whether they believed him.

[105] It is important to note that the above wording of the direction is almost identical to that found in the Supreme Court of Judicature of Jamaica Criminal Bench Book 2017,

which states at page 148, based on the case of **R v Hunter and other appeals** [2015] EWCA Crim 631 (page 147), that:

> "12. A full good character direction is as follows:
>
> (1) Good character is not a defence to the charge.
>
> (2) However, evidence of good character counts in D's favour in two ways:
>
> (a) his good character supports his credibility and so is something which the jury should take into account when deciding whether they believe his evidence (the 'credibility' limb); and
>
> (b) his good character may mean that he is less likely to have committed the offence with which he is charged (the 'propensity limb')."

[106] The learned trial judge's directions in this regard cannot be faulted. This ground, therefore, has no merit.

Issue 4 - Whether the sentence is manifestly harsh and excessive (ground 5)

[107] Andino Buchanan, unlike the other two applicants, did not plead guilty and was sentenced after a full trial. He complained that his sentence of life imprisonment with the stipulation that he serve 25 years before eligibility for parole was manifestly excessive. That sentence was with respect the jury's finding of guilty for murder. In the light of our conclusion that manslaughter ought to have been left to the jury, and our conclusion that this court, being so empowered, ought to substitute a verdict of guilty of manslaughter, Andino Buchanan's sentence must be determined on the basis of a finding of guilt for the offence of manslaughter.

The sentence for manslaughter

[108] Having concluded that a verdict of manslaughter should be substituted, this leaves the remaining question of what is the appropriate sentence.

[109] Ms Anderson submitted that, in sentencing Andino Buchanan, this court should consider that the range of sentence for manslaughter is from a fine to a sentence of life imprisonment and urged the court to consider the following factors:

> "(1) violence and a firearm were involved in the shooting of the deceased;
>
> (2) the Applicant was the 'secondary party' – he was not present in the shop when the shooting took place; and
>
> (3) the Applicant had no opportunity to plead to manslaughter and if he had pleaded guilty, he would be entitled to a deduction in his sentence.
>
> (4) there is no evidence that the Applicant knew that Smith was armed."

[110] Counsel cited the case of **Gareth Dougal v R** [2014] JMCA Crim 2 and submitted that an appropriate sentence for manslaughter in the circumstances is 10 to 12 years, with a reduction of three and a half years for time spent in custody. In that case the appellant, who had been convicted for manslaughter, in circumstances where provocation was indicated, had his sentence reduced from 15 to 10 years. Counsel asked the court to note that this was done, even though he was the person who caused the death, unlike in the case of Andino Buchanan.

[111] The Crown made no alternative submission in respect of a sentence for manslaughter.

[112] On no account can it be said that a fine is an appropriate sentence in this case. A custodial sentence is the only appropriate sentence in a case of this nature. The issue is where to start. Ms Anderson suggested a term of 10 years. We do not agree. In **Shirley Ruddock v R**, Brooks JA, did an impressive overview of some of the recent sentencing decisions in cases of manslaughter. He found that the most common sentence passed for convictions for manslaughter involving personal violence was 15 years; the typical range being from seven to 21 years, with a few exceptions. Sentences of 15 years, he found, mostly involved domestic situations where the parties were known to each other and in some cases involved pleas of guilty. The court formed the view that the circumstances in that case were more consistent with the decision in **Emilio Beckford and Kadett Brown v R** [2010] JMCA Crim 26. That case, like **Shirley Ruddock v R**, was one where the killing was done during a robbery. In **Emilio Beckford** the conviction for murder was set aside and substituted therefor was a verdict for manslaughter, on the basis that there was evidence from which the jury could have concluded that the weapon was accidently discharged during the robbery. A sentence of 18 years was imposed in that case. This court, in **Shirley Ruddock v R**, took the view that, like in **Emilio Beckford**, a sentence in the higher range was warranted and imposed a sentence of 18 years, before credit was given for time spent in pre-trial custody.

[113] At the sentencing hearing evidence was led that Andino Buchanan, up to the time of his arrest, was a businessman who operated a game shop, an internet café, and a wholesale business. He had no previous convictions recorded against him. He was 29

years old at the time of his sentencing, was the father of a three year old son, and was viewed by his community as a hard worker. These are all mitigating features in this case.

[114] However, the egregious nature of the offence, the prevalence of this type of crime in the society, the premeditated nature of the offence in which he participated and the brutality and futility of it all, are aggravating features, to say the least.

[115] We take the view that the participation of Andino Buchanan, in this case, was more egregious than that of the appellant in **Shirley Ruddock v R**. Whilst Mr Ruddock participated in the crime by helping to tie up the deceased, whose neck was then cut by another man, Andino Buchanan provided assistance to the killers by way of the transportation to, and from the scene of the robbery. Even after the shooting, of which he must have by then become aware, he drove away with the perpetrators and the murder weapon, driving the getaway vehicle and only distanced himself from them, by running away, when the vehicle had crashed and they were cornered by the police. This calls for a starting point at the higher end of the range. We would therefore start at 15 years. Taking account of the aggravating factors this would increase the sentence to 20 years. Applying the mitigating factors, and determining that the aggravating factors far outweigh the mitigating factors, an appropriate sentence in this case would be 18 years imprisonment at hard labour.

[116] We also take account of the fact that Andino Buchanan was in custody for three years. He is entitled to the full credit for that time spent in pre-trial remand. This will reduce the sentence to 15 years.

The applications of Troy Smith and Precious Williams for leave to appeal sentence

[117] In dealing with the question of whether the sentences imposed by the learned trial judge on Troy Smith and Precious Williams are manifestly excessive, this court is reminded that it ought not to readily interfere with a sentence, unless the sentencing judge erred in principle. In that regard, in **R v Alpha Green** (1969) 11 JLR 283, at page 284, the court adopted the following dictum of Hilbery J in **R v Ball** (1951) 35 Cr App Rep 164, at page 165:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this court will intervene."

[118] This court's task, therefore, is that which was so succinctly stated by Morrison P in **Meisha Clement v R** [2016] JMCA Crim 26, at paragraph [43]:

> "On an appeal against sentence…this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

(a) *Troy Smith*

[119] The applicant, Troy Smith, subsequent to his guilty plea, was sentenced to life imprisonment with the stipulation that he must serve 25 years before being eligible for parole.

[120] Counsel Mr Equiano submitted that whilst the sentence of life imprisonment was appropriate, the learned trial judge failed to properly apply the relevant legislation and the guidelines set out in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (the "Sentencing Guidelines") in setting the period which Troy Smith should serve before, being eligible for parole. Counsel argued that the learned trial judge failed to indicate a normal range or starting point for the sentence, and although she indicated that the applicant's guilty plea was one of the mitigating circumstances, she did not indicate a discount for that guilty plea, as provided for in section 42E of the Criminal Justice (Administration) Act (as amended by the Criminal Justice (Administration) (Amendment) Act 2015 (CJA). Also, although she indicated that she took into consideration the time the applicant spent on remand, prior to trial, there was no indication as to how she treated with it.

[121] Counsel further complained that the learned trial judge failed to consider the fact that the applicant had no previous convictions as a mitigating factor, in reducing the sentence. Hence, it was submitted, the appropriate starting point would be life imprisonment with a stipulation of 25 years before eligibility for parole. In that regard, the applicant has relied on the cases of **Lincoln Hall v R** [2018] JMCA Crim 17, **Anthony Russel v R** [2018] JMCA Crim 9, **Nario Allen v R** [2018] JMCA Crim 37, **Troy Jarrett**

and Jermaine Mitchell v R [2017] JMCA Crim 38, and **Trevor Whyte et al v R** [2017] JMCA Crim 13.

[122] Since the applicant pleaded guilty at the commencement of trial, counsel also submitted that the 25 years should be reduced, pursuant to section 42E of the CJA by 15% to 21.25, and then by a further three years and nine months for the time spent on remand, prior to trial.

[123] Mr McEkron for the Crown submitted that although the learned trial judge, at the time of sentencing in 2015, did not have the benefit of the guidance in **Meisha Clement v R**, nor of the Sentencing Guidelines which took effect in December 2017, the learned trial judge, nonetheless, demonstrated an appreciation of the general principles in exercising her discretion in handing down the appropriate sentences.

[124] Crown Counsel submitted that, before coming to her decision the learned trial judge considered all the relevant mitigating and aggravating factors, including that the applicant had no previous conviction, that he had spent over three years on remand, was remorseful, and that he was a father. He submitted further that, even though the learned trial judge did not state a starting point, the sentence imposed was within the usual range of sentences for murder. He concluded by stating that the applicant had not demonstrated that the learned trial judge erred in principle sufficient to allow this court to intervene to alter the sentence.

[125] It is a fact that the learned trial judge sentenced the applicants on 11 December 2015, and so she would not have had the benefit of the authority of **Meisha Clement v**

R, which was delivered in July of 2016, nor the Sentencing Guidelines which came into effect in December 2017. However, the principles in the authority of **R v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, which were adopted by this court in **Meisha Clement v R**, would have been available to her.

[126] At paragraph [41] of **Meisha Clement v R**, Morrison JA (as he then was) noted the following approach to be taken by sentencing judges:

> "i. identify the appropriate starting point;
>
> ii. consider any relevant aggravating features;
>
> iii. consider any relevant mitigating features (including personal mitigation);
>
> iv. consider, where appropriate, any reduction for a guilty plea; and
>
> v. decide on the appropriate sentence (giving reasons)."

[127] This approach, which has since been incorporated into the Sentencing Guidelines, is in keeping with the dictum of Harrison JA in **R v Everald Dunkley**, at page 4, that the sentencing judge ought to "make a determination, as an initial step of the length of the sentence, as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise". This guideline is equally applicable to sentencing after a guilty plea, as it is to sentencing after a trial and conviction.

[128] Troy Smith pleaded guilty to non-capital murder. Section 2(2) of the Offences Against the Person Act (OAPA) provides, subject to subsection (3), that every person convicted of murder other than in circumstances specified in subsection (1)(a) to (f) or to whom section 3(1A) applies (which refers to capital murder), shall be sentenced in accordance with section 3(1)(b).

[129] Section 3 (1)(b) of the OAPA provides that:

> "3. – (1) Every person who is convicted of murder falling within –
>
> (a)…
>
> (b)…section 2(2), **shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years**." (Emphasis added)

[130] Section 3 (1C)(b)(i) further provides that, where the court imposes a sentence of life imprisonment, pursuant to subsection (1)(b), the court should specify a period not less than 15 years that the defendant should serve before becoming eligible for parole.

[131] The learned trial judge would also have had the discretion, pursuant to section 42E of the CJA, which came into effect in November 2015 (before Troy Smith was sentenced and so was applicable to him), to reduce the sentence based on the time at which he pleaded guilty. Section 42E provides:

> "42E. – (1) Subject to subsection (3), **where a defendant pleads guilty to the offence of murder, falling within section 2(2) of the Offences Against the Person Act**, the Court may, in accordance with subsection (2), reduce the sentence that it would otherwise have imposed on the defendant had the defendant been tried and convicted of the offence.

(2) Pursuant to subsection (1), **the Court may reduce the sentence in the following manner** –

(a) where the defendant indicates to the Court, on the first relevant date, that he wishes to plead guilty to the offence, the sentence may be reduced by up to thirty-three and one third *per cent*;

(b) where the defendant indicates to the Court, after the first relevant date but before the trial commences, that he wishes to plead guilty to the offence, the sentence may be reduced by up to twenty-five *per cent*;

(c) **where the defendant pleads guilty to the offence after the trial has commenced**, but before the verdict is given, **the sentence may be reduced by up to fifteen per cent**.

(3) Notwithstanding subsection (2), the Court shall not impose on the defendant a sentence that is less than the prescribed minimum penalty for the offence as provided for pursuant to section 3(1)(b) of the *Offences against the Person Act*.

(4) In determining the percentage by which the sentence for an offence is to be reduced pursuant to subsection (2), the Court shall have regard to the factors outlined under section 42H, as may be relevant." (Emphasis added)

[132] This section gives the sentencing judge a discretion, based on the factors set out in section 42H of the CJA, to determine the ultimate percentage of discount to be given to a defendant, in accordance with the provisions of the section (see **Lincoln Hall v R**, at paragraph [22]).

[133] Where the sentencing judge would have imposed a sentence of life imprisonment had the defendant been convicted at trial, for the purpose of calculating a reduction on account of a guilty plea, such term shall be deemed to be term of 30 years (see section 42F of the CJA).

[134] At the sentencing hearing for Troy Smith, the learned trial judge had before her the benefit of a social enquiry report, his antecedent report and a report from the correctional institution. A plea of mitigation was also done on his behalf.

[135] In addressing her approach to sentencing generally, at page 933 of the transcript, the learned trial judge, quite correctly, indicated the purposes and aims of sentencing and outlined that her task was to consider the aggravating and mitigating circumstances, in the light of these aims, in order to determine the appropriate sentence. She noted that the sentence should be fair and just to society, the family of the deceased, as well as the convicted person. She also considered that in arriving at the appropriate sentence, the court had to look at the seriousness of the offence, the prevalence of this type of crime in society, the weapon used, and the circumstances in which the crime was committed.

[136] The learned trial judge also rightly applied her mind to the fact that in sentencing the applicant, she had to consider such mitigating factors as age, antecedent records, employment, whether there were dependants, any remorse or contrition shown, if any, and that mercy had to be balanced with justice, in all the circumstances.

[137] At page 936, she considered that the aggravating factors were that the deceased was a young man, killed in the prime of his life, and that from all accounts he was a hardworking and productive member of society. She also considered that this type of offence has a high prevalence in Jamaica.

[138] The learned trial judge noted that Troy Smith seemed to be remorseful and to have taken responsibility for his actions, by pleading guilty. She then went on, at pages

937 and 938, to indicate the mitigating and aggravating factors that guided how she came to the sentence she considered appropriate to impose on him. She said the following:

> "In the case of Mr. Troy Smith, he is 29 years old. He was gainfully employed up until the time of his arrest, he operated a cookshop. He has pleaded guilty. He has spent three years plus in custody, and he described the incident as a robbery that had gone wrong. Now, those are some of the mitigating factors.
>
> On the aggravating side, he was the person who fired that assault rifle that day, which caused the death of that young man; because, if I am not mistaken, he was about 27 years old at the time when he was killed. And it is a situation where Miss Williams had initially grabbed the chain, and when she was unable to get it from around the neck of the deceased, it was then that Mr. Smith intervened, and he was the one who grabbed the chain and ran out of the shop, leaving the deceased on the floor, bleeding to death.
>
> In the case of Miss Williams – oh, before I move on, Mr. Smith has no previous conviction, and that will also be taken into consideration when I come to deal with the question of sentencing."

[139] At page 939, the learned judge went on to state the following:

> "I omitted to mention that in the case of Mr. Troy Smith, he is the father of four young children, and I will also have to look at those factors.
>
> Now, as I said, there are different things in respect of each of the accused. Mr. Smith was the one who had the gun, he was the one who fired the shot which caused the death of the accused. In relation to him, having pleaded guilty, I will have to make some sort of discount for the time – for the fact that he has pleaded guilty. I will take into account that he has been in custody; and, I will also bear the other things that I have mentioned before, into account in sentencing him."

[140] Without more, the learned trial judge went on to sentence him to the sentence which forms the basis of his complaint.

[141] Although the learned trial judge correctly indicated the aggravating and mitigating factors guiding her consideration, she did not indicate a starting point and what deduction she made in respect of the applicant's guilty plea, having stated that she would allow a discount for it, and, similarly failed to indicate a deduction for time spent on remand. The deeming provision in section 42F does not divest the trial judge of her duty to indicate a sentence within the range of like for like, which she would have given had the case gone to trial. It may be that a trial judge decides that 30 years, at the higher end of the scale, is appropriate in a particular case, bearing in mind that the maximum sentence is to be reserved for the most egregious cases, but the trial judge must so state and give reasons for so doing.

[142] Undoubtedly, owing to the egregious nature of the offence, and the trivial circumstances of the murder, being that the deceased was shot point blank in the head by Troy Smith, simply because he wanted the deceased's chain, and also the high prevalence of this type of offence in Jamaica, life imprisonment would have been an appropriate sentence had Troy Smith been convicted after a trial. This is deemed to be 30 years for the purpose of calculating a reduction of the sentence on account of the guilty plea, pursuant section 42F of the CJA. The learned trial judge however, would still have had to consider what was the appropriate period for the appellant to serve before being eligible for parole, if he had gone to trial, within a range of up to 30 years and taking into account, mitigating and aggravating factors.

[143] For those reasons, we are of the view that this is a case which calls for the court's intervention. We will now have to determine whether the sentence imposed was outside the range of sentences for the offence, and is therefore manifestly harsh and excessive.

[144] In **Lincoln Hall v R** this court (per Morrison P) considered that there was no basis to interfere with the learned judge's discretion not to grant any discount for the guilty plea, where she considered 30 years before being eligible for parole, to be an appropriate sentence, in the circumstances of that case. This was a matter, the court said, to be left entirely to the discretion of the sentencing judge, given the range of factors set out in section 42H of the CJA, which it found the judge had taken account of (see paragraph [24].

[145] In our view, in the light of the egregious nature of the crime, this is a case where a starting point anywhere between 25 to 30 years, at the upper range was appropriate. This was a case with very little redeeming features, outside of the fact that the applicant had no previous convictions recorded against him. A starting point of 25 years would be appropriate. Taking into account the aggravating features, which were that the deceased was killed with a rifle shot to the head, in broad daylight, the trivial reason for the commission of the crime, the traumatic effect on the witnesses present at the shop and in the square, as well as on the deceased's mother who gave him the chain for which he was killed, this would take the sentence to 30 years. Taking account of the mitigating features, the significant ones being that he had no previous convictions and was self-employed at the time of his arrest, an appropriate sentence, if the case had gone to trial,

would have been life imprisonment with a stipulation that he serve 28 years before being eligible for parole.

[146] An example of one case in a similar range is **Troy Jarrett & Jermaine Mitchell v R**, where the appellants were sentenced to life imprisonment with a stipulated period of 30 years before parole for the killing of a security guard, in the course of robbing him of his firearm and this court held that that sentence would have been appropriate, if the case had gone to trial. Having pleaded guilty at the earliest possible stage, however, they were entitled to the maximum discount available under the section.

[147] Although the learned trial judge said she took account of Troy Smith's guilty plea, it is entirely unclear what discount she applied. Troy Smith pleaded guilty after the commencement of the trial, therefore, he would have been entitled to a discount of up to 15%. The actual percentage applied would be determined by factors, inclusive of those set out in section 42H. That section requires the court to have regard to the following seven factors set out there. The section reads as follows:

> "42H. Pursuant to the provisions of this Part, in determining the percentage by which a sentence for an offence is to be reduced in respect of a guilty plea made by a defendant within a particular period referred to in 42D (2) and 42E(2), the Court shall have regard to the following factors namely-
>
> (a) whether the reduction of the sentence of the defendant would be so disproportionate to the seriousness of the offence, or so inappropriate in the case of the defendant, that it would shock the public conscience;
>
> (b) the circumstances of the offence, including its impact on the victims;

(c) any factors that are relevant to the defendant;

(d) the circumstances surrounding the plea;

(e) where the defendant has been charged with more than one offence, whether the defendant pleaded guilty to all of the offences;

(f) whether the defendant has any previous convictions;

(g) any other factors or principles the Court considers relevant."

[148] The section gives the court a wide discretion based on a range of factors, all of which would also encompass some of the mitigating and aggravating factors relevant to the offender and the offence.

[149] In the instant case, counsel for the applicant Troy Smith has accepted that life imprisonment was appropriate and only seeks to challenge the pre-parole period. The factors relevant to the applicant are, as the judge rightfully considered, that he had no previous convictions, that he was gainfully employed up to the time of his arrest, and he was a relatively young man of the age of 29 years. The circumstances surrounding the plea are that he pleaded guilty after the commencement of the trial, a fact which the learned trial judge considered demonstrated some sort of remorse. However, the fact that he was caught escaping from the scene of the crime and was found in possession of the stolen item belonging to the deceased, is also relevant to the circumstances of the guilty plea.

[150] The other factors include the circumstances of the offence. This would incorporate aggravating features such as the use of a firearm, in broad daylight, the fact that the deceased was a young man of 27 years and a contributing member of society and was

gunned down by the applicant and left bleeding on the floor of the shop for no reason other than to steal a gold chain. We therefore, consider that, taking into account the factors in section 42H, a 12% discount for the guilty plea ought to be applied to the 28 years resulting in a period of 24 years and four months. That is a reduction which would not be so disproportionate or so inappropriate that it would shock the public's conscience.

[151] The applicant spent three years and nine months in custody prior to his sentence. He is entitled to full credit for the time spent in pre-trial remand. The appropriate sentence is, therefore, 24 years and four months and taking account of the credit for time spent, this would be further reduced to 20 years and five months.

(b) *Precious Williams*

[152] Counsel for Precious Williams, Ms Virgo, submitted that the learned trial judge failed to indicate a starting point within the normal range of sentence for the offence, and that although the learned trial judge correctly identified some of the factors to be considered in sentencing, she erred in failing to say what weight was to be given to each factor, as well as not mentioning several other factors. Counsel further submitted that, although the learned trial judge considered the mitigating circumstances of Precious Williams' remorse, her guilty plea, and the fact that she had a young child at the time of sentencing, the learned judge failed to indicate whether she considered that the child was dependent on her mother, who was a single parent. Counsel submitted that no mention was made of the fact that Precious Williams was 20 years old at the time of the offence, and that even though she was semi-literate, notwithstanding that she was unemployed at the time of the incident, she had found gainful employment at a young

age, as a bartender. This, she said, showed a willingness to be a productive and a contributory member of society. Counsel further asserted that the judge seemed to have overlooked the fact that Precious Williams had no previous convictions, and failed to show that she considered the prospect of her rehabilitation.

[153] Counsel argued further that the most glaring omission of the learned trial judge, however, was her failure to consider the role that Precious Williams played in the incident, being that she did not spontaneously grab the chain from the deceased; the deceased was ordered to remove it, by Troy Smith, and when that proved futile, it was then that Troy Smith took the gun out and shot the deceased. In those circumstances, counsel submitted, an appropriate sentence would be 15 years, considering 25 years as the starting point. Counsel pointed out that an examination of the cases reveals that for cases where there had been a conviction for the offence of murder, the range of sentences is between 20 to 30 years. She noted that cases such as **Lincoln Hall v R** and **Troy Jarrett and Jermaine Mitchell v R** show that the higher end of the range was normally left for the worst cases. A sentence of 25 years, being a mid-point in the range would be more appropriate to this case, she contended. Counsel also submitted that taking account of all the factors, and the fact that she pleaded guilty after the commencement of the trial, Precious Williams should be afforded a discount on the sentence of 25 years, of the full 15%. This she said would result in a sentence of 21.25 years. She further submitted that credit of three years and nine months for time spent on remand should be given to reduce it to 17 years and six months. Counsel was also of the view that a further reduction should be made taking account of further factors should as the fact that Precious Williams had

no antecedents, was of a young age, has the possibility of rehabilitation, has a young dependent, and was not the shooter.

[154] Mr McEkron submitted that it has not been demonstrated that the learned trial judge erred in principle in sentencing Precious Williams. The learned trial judge, he argued, considered all the mitigating and aggravating factors, including that this appellant had no previous conviction, she was the mother of a young child, she had spent three years and some months on remand, and she was remorseful. Crown Counsel submitted that, although the learned trial judge did not indicate a starting point, the sentence is within the usual range of sentences for murder.

[155] As indicated, Precious Williams was sentenced to life imprisonment with eligibility for parole after a period of 20 years, following her guilty plea at the commencement of trial. In addition to her comments as to her general approach to sentencing, at page 936 of the transcript the learned trial judge noted that Precious Williams had pleaded guilty which seemed to show some remorse, then at pages 938 to 939, the learned trial judge noted the following:

> "In the case of Miss Williams, she pleaded guilty. She has also spent three years in custody. She is a mother of a four-year-old son. She declined to comment about her involvement in the incident, but with what is evident from the evidence which was accepted, which was put forward in this case, is that she was the one who attempted to grab the chain first, and when it didn't burst, then Mr. Troy Smith took over.
>
> Now, at the time when this incident occurred her child would have been a mere six months old. And on a Friday afternoon, instead of being home tending her 6-month-old, here she was with two men,

> robbing and killing another young person just like herself, in Rock Hall Square."

[156] The learned trial judge correctly considered that Precious Williams had pleaded guilty which was indicative of some remorse, that she spent over three years on remand, and that she had a young child. It is not correct in our view, as asserted by counsel, that the learned trial judge did not consider Precious Williams' young age, that she had a young child depending on her, and her role in the incident. The learned trial judge's comment that "on a Friday afternoon, instead of tending to her 6-month old baby, Ms Williams was robbing and killing another young person like herself" makes clear that the learned trial judge had in contemplation her youth, which was indicated in the reports and the plea in mitigation in her favour, as well as that she had a young baby at the time of the incident. The learned trial judge also indicated that she was the mother of a four-year-old son. We can see no other reason for the learned trial judge mentioning the child, other than that the mother was to play a role in the child's life and the child was a dependent. The learned trial judge would have also noted from the plea in mitigation and the reports on Precious William's behalf, that the father of the child was in his life assisting and 'trying his best'. We, therefore, see no merit in the complaint that the learned judge failed to consider that the child was dependent on her.

[157] We also see no merit in the complaint that the learned trial judge did not consider Precious Williams' role in the incident. The learned trial judge clearly indicated that even though Precious Williams had declined to comment on her involvement in the incident, she considered the evidence that was accepted by the court as to what had occurred. It

was noted that Precious Williams pleaded guilty to the case presented by the prosecution, which is, in fact, not materially different from the account in counsel's submissions on her behalf. It was noted by the learned trial judge that she was the one who initially grabbed the chain and tried to remove it but was unsuccessful. The learned trial judge would have had this in mind when she said, "Mr Troy Smith took over" and that he was the shooter.

[158] However, we do not see any indication that the learned trial judge considered that Precious Williams had no previous convictions, nor did the judge consider her work history or her prospects for rehabilitation and the fact that she was semi-literate, as complained by counsel.

[159] As was the case with Troy Smith, the learned trial judge did not indicate a starting point nor did she illustrate how she reduced or increased that number based on the mitigating and aggravating factors she identified. Further, having not stated a starting point, she did not indicate what would have been the appropriate sentence had the matter gone to trial. As a result, she did not demonstrate what deduction she made if any for the guilty plea. We are, therefore, of the view that this warrants the court's intervention.

[160] The question now arises as to whether, in applying the proper approach to this case, the sentence imposed by the learned trial judge was still outside of the range of appropriate sentences so as to be manifestly harsh and excessive. Counsel submitted that an examination of the cases reveals a range of sentences for murder of between 20-30 years. We see no basis to disagree with that, except to say further examination would reveal cases at an even higher range of between 30 to 45 years.

[161] Again, we bear in mind the egregious nature of the offence, and that, notwithstanding that she was not the shooter, Precious Williams pleaded guilty to murder, in circumstances where it was alleged that she participated in a joint enterprise to rob and to inflict really serious bodily harm on Mr Byfield, if necessary. She, therefore, shares equal culpability in the act that killed him. As in the case of Troy Smith, we take the view that the sentence of life imprisonment was appropriate. We have already seen that in such a case, for the purpose of a guilty plea, that is deemed to be a term of 30 years. This is a notional statutory maximum and does not divest the learned trial judge of her duty to identify a sentence that she would have imposed, if the matter had gone to trial before directing what discount to apply for the guilty plea.

[162] Bearing in mind the role played by Precious Williams in this case, we take the view that a starting point at the maximum of the statutory scale is not appropriate. Rather, a starting point of 22 years is indicated. Taking into account the aggravating features of this case this would result in an increase to 27 years. Allowing for the mitigating factors which were that she had no previous convictions, her age and antecedents, the fact that she had young children dependent on her, her prospects for rehabilitation and the fact that she is semi-illiterate, a sentence of life imprisonment with a stipulation that she serves 23 years before being eligible for parole, would have been appropriate, if the case had gone to trial. Considering a discount of 12% for the guilty plea, this would have reduced it to 20 years and three months. Giving full credit for time spent on remand of three years and nine months, this would further reduce that term to 16 years and six months before becoming eligible for parole.

[163] It is clear, therefore, that the sentence imposed by the learned trial judge was not manifestly excessive and warranted intervention solely because of her failure to show how she arrived at the sentence she imposed and to indicate clearly that full credit had been given for the time spent on remand awaiting trial.

Conclusion

[164] In respect of the applicant Andino Buchanan's challenge to his conviction, we agree that the learned trial judge ought to have left to the jury, the option of convicting on the lesser charge of manslaughter, in the circumstances of this case. We would, therefore, substitute a verdict of guilty for manslaughter and impose a sentence of 18 years. We would also give credit for pre-trial remand of three years, which would result in a sentence of 15 years' imprisonment at hard labour.

[165] In respect of the challenge by the applicant Troy Smith, the learned trial judge did not indicate a starting point or demonstrate how the aggravating factors and mitigating factors affected it, so as to determine a sentence which would have been appropriate had the matter gone to trial and conviction. Neither did she indicate the level of discount given for the plea of guilty having indicated that she would exercise her discretion to give such a discount. It is also unclear whether full credit had been given for pre-trial remand, even though the learned trial judge stated that she took that into account. Having applied the relevant principles, it is determined that a sentence of life imprisonment with a period of 28 years imprisonment to be served before eligibility for parole would have been appropriate had the matter gone to trial. Applying a discount 12% to that period, taking into account the factors in section 42H of the CJA, including the circumstances of the

plea, the appropriate period before eligibility for parole would be 24 years and four months. However, the applicant Troy Smith is entitled to full credit of three years and nine months spent in pre-trial remand, which would reduce the period to 20 years and 5 months before becoming eligible for parole.

[166] In respect of the challenge by Precious Williams to her sentence, the learned trial judge did not indicate a starting point, neither did she demonstrate how she accounted for the discount for the guilty plea. It is also not clear whether full credit for time spent in pre-trial remand was given, even though she did indicate she would take it into account. We take the view that, applying the relevant factors, a sentence of life imprisonment with a stipulation that she serves 23 years before being eligible for parole would have been appropriate, if the matter had gone to trial. Applying a discount of 12% taking into account the factors in section 42H of the CJA, that would be reduced to 20 years and 3 months. Credit should also be given the time spent in custody of three years and nine months, which would result in a reduction to 16 years and six months before eligibility for parole.

Order

1. The application for leave to appeal against conviction and sentence in respect of the applicant Andino Buchanan is granted. The hearing of the application is treated as the hearing of the appeal. The appeal against conviction and sentence is allowed. The conviction for murder is set aside and substituted therefor is a conviction for manslaughter. The sentence of life imprisonment with the stipulation

that Andino Buchannan serve 25 years before being eligible for parole is set aside. Substituted therefor is a sentence of 15 years' imprisonment at hard labour, taking into account the three years spent in pre-trial custody.

2. The application for leave to appeal against sentence in respect of the applicant Troy Smith is granted. The hearing of the application is treated as the hearing of the appeal. The appeal against sentence is allowed. The sentence of life imprisonment with the stipulation that Troy Smith should serve 25 years before becoming eligible for parole is set aside. Substituted therefor is a sentence of life imprisonment with a stipulation that Troy Smith serve 20 years and 5 months before becoming eligible for parole, taking into account the three years and nine months spent in pre-trial custody.

3. The application for extension of time within which notice of application for leave to appeal is to be given with respect to the applicant Precious Williams is granted. The application for leave to appeal against sentence is granted. The hearing of the application is treated as the hearing of the appeal. The appeal against sentence is allowed. The sentence of life imprisonment with the stipulation that Precious Williams should serve 20 years before being eligible for parole is set aside. Substituted therefor is a sentence of life imprisonment with a stipulation that Precious Williams serve 16 years and 6 months before becoming eligible for parole, taking into account the three years and nine months spent in pre-trial custody.

4. The sentences for all three are reckoned as having commenced on 11 December 2015.