[2018] JMCA Crim 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 78/2012

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE EDWARDS JA (AG)

DANNY WALKER v R

Miss Jacqueline Cummings for the applicant

Mrs Sahai Whittingham-Maxwell and Mrs Natiesha Fairclough-Hylton for the Crown

7, 8 November 2016 and 15 January 2018

MCDONALD-BISHOP JA

[1] Following a retrial in the Home Circuit Court, conducted before Thompson-James J sitting with a jury between 14 and 24 May 2012, the applicant, Danny Walker, was convicted on an indictment that charged him with the offence of murder. The particulars of the offence are that on 1 October 2002, he murdered Nyrokie McDonald. On 13 July 2012, he was sentenced to life imprisonment with the stipulation that he should serve a minimum of 25 years before being eligible for parole.

[2] The applicant sought leave to appeal his conviction and sentence. On 8 June 2015, the application for leave to appeal was considered and refused by a single judge of the court. The applicant renewed his application before this court.

The prosecution's case at trial

[3] The main witness, on whom the prosecution depended to prove their case against the applicant, was Mr Christopher Robinson, who was the sole eyewitness. His evidence established that on 1 October 2002, at about 10:00 in the night, he was among a group of five men standing on a sidewalk in the Bowerbank area in the parish of Kingston. The deceased was a member of the group. Whilst the men were on the sidewalk, a white Nissan Sunny motorcar drove up and Mr Robinson noticed that the driver of the vehicle was the applicant, whom he knew as "Mr Piggy". The back windows of the motorcar were up while the front ones were down.

[4] The motorcar drove pass the men, then reversed and stopped beside Mr Robinson. When the motorcar came to a stop, Mr Robinson observed that the applicant was in the company of a female who occupied the front passenger seat. The applicant, who was in the driver's seat, pointed a firearm through the window by the driver's seat and fired in the direction of the men. Mr Robinson ran off and upon his return to the scene of the shooting, he saw the deceased, who appeared to be dead. The deceased was taken to the Kingston Public Hospital and Mr Robinson also went to the hospital.

[5] Later the same night, after having returned from the hospital, Mr Robinson returned to the scene of the incident and saw the applicant drive up and park the same

Nissan Sunny motorcar that he was driving at the time of the shooting. He then came out of the motorcar, took out a black firearm, placed it on the top of the motorcar and lit a cigarette. The applicant remained at the location for a while and then drove off.

[6] The police commenced investigations into the fatal shooting of the deceased and on the early morning of 2 October 2002, visited the scene of the shooting and collected an expended bullet and two spent shells. These items were subsequently taken to the Government Forensic Laboratory on 3 October 2002, where ballistic testing was conducted.

[7] On 30 May 2003, almost eight months after the shooting, the applicant was seen by Detective Inspector Phillip McIntosh in a bar acting suspiciously. A search was conducted of his person and a firearm containing eight live rounds was recovered from him. When he was cautioned, he said, "[o]fficer, a me brethren gimme feh sell". The applicant was arrested and charged with the offences of illegal possession of firearm and illegal possession of ammunition and the items taken from him were submitted to the forensic laboratory for testing.

[8] Ballistics tests done on the firearm recovered from the applicant revealed that the expended bullet and two spent shells that the police had recovered from the crime scene at Bowerbank came from that firearm.

[9] On 27 June 2003, a warrant of arrest for the offence of murder was executed on the applicant. Upon being cautioned, the applicant denied committing the offence and also denied knowing the deceased.

[10] No identification parade was held in respect of the applicant because the investigating officer was of the view that the applicant's attendance at court on the previous charges of illegal possession of firearm and ammunition had exposed him to the public.

[11] A post mortem examination conducted on the body of the deceased revealed that the cause of death was a gunshot wound to the chest.

The applicant's case at trial

[12] The applicant gave sworn evidence and put forward a defence of alibi. He said that he was in Clarendon in the company of a female cousin at the time of the incident. He denied involvement in the commission of the offence and denied knowing Mr Robinson and the deceased. He admitted, however, that he is called "Piggy" and that he owned a white Nissan Sunny motorcar at the time of the incident.

The grounds of appeal

[13] The applicant filed four grounds of appeal (the original grounds) and Miss Cummings, on his behalf, sought and obtained leave to argue what she posited as being four supplemental grounds. The original grounds and one supplemental ground relate to conviction and the other three supplemental grounds concern sentence. In substance, the grounds of appeal argued before us in relation to conviction and sentence were as follows:

Conviction

"1. **Mis-identity by the witness:-** That the prosecution witnesses wrongfully identified me as the person or among any persons who committed the alleged crime.

2. **Lack of Evidence:-** That during the trial the prosecution, witnesses presented to the Court, conflicting and contrary testimonies in respect of the material evidence which calls into question the integrity of the witnesses testimonies and the fairness of the verdict.

3. **Unfair trial: -** That the evidence and testimonies upon which the learned trial judge relied upon for the purpose to direct the jury, lack facts and credibility thus rendering the verdict unsafe in the circumstances."

3a. The disclosure to the jury of the applicant's conviction for illegal conviction for illegal possession of firearm and ammunition has rendered the trial unfair. [supplemental ground]

"4. **Miscarriage of Justice:-** That the Court wrongfully convicted me based on hearsay evidence versus facts as is evident in the case."

Sentence

"5. The [s]entence is not in our opinion excessive having regard to the conviction for murder.

6. However we would like the court to consider amending it to instead of [l]ife [i]mprisonment with 25 years before he can apply for parole would the court be minded to substitute the term of imprisonment of 25 years instead.

7. There is a disadvantage suffered by person who are given a term of year before parole than those who are given a term of year to serve."

[14] Five core issues for the determination of this court have been distilled from the grounds of appeal and the arguments advanced on behalf of the applicant. They are as follows:

i. whether Mr Robinson was mistaken in his identification of the applicant, thereby rendering the conviction unsafe;

ii. whether the verdict is unfair and unsafe due to lack of evidence and credibility of the prosecution witnesses;

iii. whether the learned trial judge erred in allowing evidence of the applicant's previous convictions for illegal possession of firearm and ammunition to be admitted in evidence;

iv. whether there has been a miscarriage of justice as a result of:

    a. an omission in the statement of the eyewitness;

    b. the break in the chain of custody;

    c. the jury's reliance on hearsay evidence; and

v. whether the sentence of life imprisonment imposed on the applicant is unfair.

(i) Whether Mr Robinson was mistaken in his identification of the applicant, thereby rendering the conviction unsafe (ground one)

[15] The applicant contended that the main prosecution witness, Mr Robinson, wrongfully identified him as the person who committed the alleged offence. Miss Cummings indicated that although she could find no fault with the learned trial judge's directions on identification, the conditions under which the witness purported to identify the applicant were such as to render the evidence of identification weak, unreliable, incredulous and ought not to have been believed. Miss Cummings pointed to the following facts as establishing the unfavourable circumstances in which the purported identification was made:

(i) 10:00 at night;

(ii) the assailant was in a motor vehicle;

(iii) no light in the car;

(iv) car windows tinted;

(v) witness viewed the assailant for 13 seconds;

(vi) frightening experience as shots were fired;

(vii) street lights 15 feet and 30 feet away;

(viii) applicant and his brother resemble and can only be differentiated when they are beside each other;

(ix) witness last saw the applicant two years before the incident;

(x) no identification parade was held for the applicant; and

(xi) dock identification.

[16] For the Crown, Mrs Whittingham-Maxwell submitted that that the identification evidence was sufficient to found a conviction particularly as it rested on recognition and not on a fleeting glance. She maintained that the argument advanced by the applicant is untenable within the context of the evidence as to prior knowledge, the duration of the observation, the lighting, the distance, and the admission of the applicant that at the time in question, he owned and drove a white Nissan Sunny motorcar. We accept the contention of counsel for the Crown.

(a) *Prior knowledge*

[17] It was the evidence of Mr Robinson that he had known the applicant for two years prior to the incident. He knew the applicant's alias to be "Mr Piggy", and he would see him every week or every two or three days. Mr Robinson further said that he would see the applicant sometimes in the day and also during the night. The last time he saw him was a week before the incident standing outside a bar called Macomba in Bowerbank.

[18] Mr Robinson did not know the applicant to converse with him but the applicant, he said, resided in the community of Bowerbank, the same area where his child's mother resides. He knew the applicant would always drive the white Nissan Sunny motorcar. He also knew the brother of the applicant whom he described as a carpenter who was working in a building off Windward Road. He did not know the name of the applicant's brother.

(b) *The purported recognition of the applicant*

[19] The incident took place at night and the applicant was seated in a motorcar in which there was no light. The windows to the car were also tinted but the front window to the driver's side was wound down while the back windows were up. Mr Robinson testified that when the applicant drove pass him on Sheffield Road, he recognized him as the driver. The applicant was about 20 feet from him as the motorcar passed where he was standing on the sidewalk. He observed the face of the applicant for 13 seconds during which the motorcar "was not going at too high a rate of speed". After driving pass the witness on Sheffield Road, the applicant reversed on to Bellevue Avenue and came to a halt beside the witness. When the motorcar stopped, the witness said that he again observed the applicant for approximately 25 seconds before he heard two explosions that sounded like gunshots. At this time when he saw the applicant's face, the applicant was within arm's length of him and he was looking in the motorcar to see who it was before he heard the explosions.

[20] Mr Robinson said that he again saw the applicant later during the same night after he had returned from the Kingston Public Hospital. The applicant was seen driving the same motorcar and was armed with a firearm, which he placed on top of the car.

(c) *The witness' ability to see the applicant*

[21] Mr Robinson also contended that he was able to identify the applicant as there was lighting in the area produced by three street lights, one each at Bellevue Avenue and Sheffield Road and at the intersection of both streets. The street light on Sheffield

Road was 30 feet from the applicant and when the applicant stopped on Bellevue Avenue, the street light closest to him was 19 or 20 feet away.

[22] Mr Robinson observed something like fire coming from the motorcar and also felt fire on his belly. This would suggest some measure of closeness between the applicant and Mr Robinson, when the applicant pointed the firearm through the driver's door window.

[23] Upon Mr Robinson's return from the Kingston Public Hospital on the night of the incident, when he said he saw the applicant again with the firearm, the applicant was 6 feet away from him and he was again able to identify the applicant by his face.

[24] Throughout the incident, the applicant was wearing nothing on his head or his face, which would have interfered with Mr Robinson's observation of him. Although Mr Robinson admitted that the incident was frightening, he spoke to having observed the applicant clearly.

(d) *The resemblance between the applicant and his brother*

[25] Miss Cummings also challenged the reliability of the purported identification of the applicant by Mr Robinson on the basis of his evidence that there is a close resemblance between the applicant and his (the applicant's) brother. However, it is our view that the jury would have heard the evidence and it was a matter for them to treat with that evidence in the context of the rest of the evidence in the case and the directions given to them by the learned trial judge. We can discern no adverse effect

that this evidence would have had on Mr Robinson's purported identification of the applicant, so as to render the conviction unsafe.

(e) Dock identification

[26] Another contention of the applicant is that the absence of an identification parade and the resultant dock identification has weakened Mr Robinson's identification evidence, rendering it unreliable. This argument, however, is untenable in the light of all the evidence in this case and the relevant law. In **Pipersburgh and another v R** [2008] UKPC 11, the Privy Council, in affirming the principles laid down in **Pop v R** [2003] UKPC 40, reiterated that where an identification parade was not held, the trial judge should make it clear to the jury that although dock identification is not inadmissible, the proper practice is to hold an identification parade. The judge should further explain that dock identification is undesirable and that the jury should approach it with great care. Their Lordships instructed that the learned trial judge should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the applicant.

[27] In the instant case, the learned trial judge did exactly what was required of her by law. She dealt adequately with the fact of the failure of the police to hold an identification parade. She then dealt with the issue of dock identification at page 473 of the transcript in this way:

> "Based on this, what he has said, the next time therefore that the witness Christopher would have seen the accused is at court quite likely in the dock.
>
> Now, this is what is called dock identification, Madam Foreman and your members.
>
> Now, I have to tell you that dock identification is undesirable in principle and just like identification be approached with great care and caution [sic].
>
> It is unsatisfactory, but it does not mean that the identification is inadmissible. Identification of an accused by a witness, the first time after the alleged incident, in the dock, though undesirable, is not worthless.
>
> The concern with dock identification, Madam Foreman and members of the jury, is that the accused would be sitting in a prominent place, where the dock is, but remember Robinson told you that he knew the accused man before, and he told you about the length of time he knew him. And how, when and where he has seen him.
>
> Therefore I am leaving this dock identification for your consideration, and remember the warning I gave to you about how you should approach this with great care and caution."

[28] In relation to the issue of the absence of an identification parade the learned trial judge made it clear to the jury that an identification parade is a safeguard that is not available when the witnesses are asked to identify the accused in the dock. She then went on to advise the jury as to the risk inherent in a dock identification and the absence of a parade in these terms:

> "The implication may well be that the Prosecution is asserting that he is the perpetrator, and he is in view, and that he is the perpetrator is plain view for all to see. So there is considerable risks in asking that the accused be identified when he is in the dock."

[29] The learned trial judge directed the jury as to the purpose of an identification parade which "is to test the reliability of the witness' identification at a much earlier stage before the witness has had time to see the accused in the dock". She told them that an identification parade is "good practice" and that it is useful and in the interests of justice to hold one in order to establish that a witness can or cannot identify a suspect. The jury were properly advised by the learned trial judge that the failure to hold an identification parade may affect the fairness of the identification of the applicant. She made it plain to the jury that they must approach the identification of the applicant without the holding of an identification parade with care and caution because an identification parade can be an advantage to an accused person if he is not pointed out. The loss of that advantage to the applicant would have been made plain to the jury. The learned trial judge then ended that aspect of her directions in this way:

> "So look at the identification evidence in the case in total, and you Madam Foreman and your members, say whether in the circumstances of this case, there was an obligation to hold an identification parade.
>
> And take this into consideration and decide whether the Prosecution has satisfied you so that you feel sure of that identification of Mr. Walker without the Parade, whether that is reliable."

[30] Although the learned trial judge did not expressly point out to the jury that another purpose of an identification parade would have been to test the honesty of the witness' assertion that he knew the applicant (see **Goldson (Irvion) and McGlashan (Devon) v R** (2000) 56 WIR 444), this omission does not affect the reliability of the identification evidence so as to render the verdict unsafe. We have formed this view

because there was strong evidence of the witness' prior knowledge of the applicant on which the jury could have found him to be honest in his assertion that he knew the applicant.

[31] The learned trial judge's direction on dock identification and the absence of an identification parade cannot be faulted.

[32] When all the circumstances surrounding the purported identification of the applicant are considered, it can safely be said that the period of observation was long enough and the observation was made in good condition and within sufficiently close proximity for a positive and reliable recognition to have been made. This would have been so, although the witness admitted to having been frightened. All these were matters for the jury's consideration in determining whether the prosecution had established the identity of the applicant to the extent they were sure. They would only have required the requisite warning, within the guidelines established in **R v Turnbull** [1976] 3 All ER 549 and adequate assistance from the learned trial judge, on how to approach the evidence.

[33] We find that the learned trial judge's directions in relation to the issue of visual identification were well within the letter and spirit of the law and, not surprisingly, there has been no challenge to them. It follows, therefore, that once the jury were properly directed in law concerning the issue of identification, the absence of an identification parade and the dock identification, it was ultimately for them to consider as a question of fact, whether the applicant was the perpetrator, having regard to the pertinent

directions including the clear and careful warnings given to them by the learned trial judge. The jury unanimously found that the applicant was properly identified as the perpetrator. There is therefore no basis on which this court could legitimately interfere with such a finding.

[34] Accordingly, the jury's verdict cannot be impeached on the ground that there was mistaken identification of the applicant. Ground one lacks merit.

(ii) Whether the verdict is unfair and unsafe due to lack of evidence and credibility of the prosecution witnesses (grounds two and three)

[35] In setting out his complaint in ground two, the applicant contended that, "during the trial, the prosecution witnesses presented to the court conflicting and contrary testimonies in respect of the material evidence which calls into question the integrity of the witnesses' testimonies and the fairness of [the] verdict". In ground three, he further complained that the "evidence and testimonies upon which the learned trial judge relied upon for the purpose to [sic] direct the jury, lack facts and credibility thus rendering the verdict unsafe in the circumstances".

(a) Conflict between the eyewitness' evidence and the medical evidence

[36] Miss Cummings submitted that the medical evidence did not support Mr Robinson's account as to how the deceased was shot. According to learned counsel, Mr Robinson said that the applicant was seated in the car when he fired the shot, while the deceased was up on the sidewalk, however, medical evidence of the pathologist, Dr Ademola Adunfa, about the trajectory of the bullet was that it entered the body of the

deceased at a higher level and exited in a downward slope. Learned counsel submitted that the pathologist's evidence would suggest that the assailant would have been standing in front of the deceased at an angle and that this would have conflicted with Mr Robinson's account that the applicant was seated in the car at the time the firearm was discharged.

[37] Counsel for the Crown submitted in response, that it is not accurate to say that the medical evidence contradicted the eyewitness' account. According to Mrs Wittingham-Maxwell, one cannot say for a fact the point at which the fatal bullet connected with the deceased and therefore, "it would be illogical to question the medical evidence as being inconsistent with the eyewitness evidence".

[38] A perusal of the transcript of the notes of evidence reveals that when the pathologist was asked by Crown counsel whether he was able to give an opinion as to where the shooter would have been at the time the firearm was discharged and the wound inflicted on the deceased, the doctor responded, "I cannot say for certain, I can only say ... where the gun is pointing, but I cannot say where the person who discharged the weapon was". He then explained that the gun would have been pointing in front of the deceased from the left side, towards the right, at an angle.

[39] Learned defence counsel upon cross-examining the doctor then asked:

> "Q. In response to my learned friend when she asked you if the shooter would be **standing in front** of the deceased person when the shot was fired, you said yes, but at an angle?" (Emphasis added)

The following exchange then took place:

> " A. I didn't say yes.
>
> Q. Can you clarify that?
>
> ...
>
> Q. Yes, doctor, you may clarify that for the court please, if in your opinion, based on the entry wound on the deceased's body, can you give an opinion as to where the shooter was standing at the time when this gun was fired?
>
> A. No, I cannot. I already said I can't say where the shooter was standing."

[40] The pathologist had made it clear in response to Crown counsel that he was not in a position to say where the shooter would have been positioned in relation to the deceased. Therefore, when defence counsel proceeded to say that the evidence in response to Crown counsel was that the shooter was standing in front of the deceased that was a clear misstatement of the evidence. It was defence counsel, in cross examining the pathologist, who had introduced the notion that the shooter was standing. The pathologist, in responding to defence counsel's question, reiterated that he could not say where the shooter was standing. There was, therefore, no positive evidence from the pathologist that the shooter was standing at the time the deceased was shot. Furthermore, the pathologist also explained in cross-examination that although the exit wound was 5 centimeters lower than the entry wound, it did not necessarily mean that the shooter was standing on an elevation above where the deceased was standing.

[41] It is also noteworthy, that at no time did Mr Robinson give evidence as to the exact position of the deceased, relative to the applicant, at the time the deceased was shot. He gave evidence that they were all on the sidewalk before the shooting but that he ran when he heard the explosion. He was therefore not able to say, and did not attempt to say, in what position the deceased would have been at the exact point in time that the bullet hit his body. In all the circumstances, there was nothing in the pathologist's evidence that conflicted with Mr Robinson's account that when the firearm was discharged, the applicant was seated in the motorcar.

[42] The argument advanced on behalf of the applicant that there were discrepancies between the medical evidence and the eyewitness' evidence, relating to the position of the deceased and the shooter, at the time of the shooting, cannot be accepted.

[43] In any event, even if there were such contradictions in the case for the prosecution, the learned trial judge gave the jury clear and accurate directions on how to treat with inconsistencies and discrepancies. The learned trial judge took the time to highlight examples of such contradictions and directed the jury that it was for them to examine the evidence to see whether there were others. She drew the jury's attention to the significance of contradictions in the evidence to the evaluation of credibility and reliability of the witnesses. The directions that relate to contradictions in the evidence were sufficiently accurate and clear and stand as unimpeachable. There has been no challenge to them.

[44] The learned trial judge also discharged the duty cast on her in law, to direct the jury on how to treat with the evidence of expert witnesses, having pointed out to them the witnesses who were put forward as expert witnesses by the prosecution. Within this context, she dealt extensively with the status of the pathologist as an expert witness and highlighted those aspects of the evidence elicited from him during the course of cross-examination concerning the possible positioning of the shooter and the deceased at the relevant time. Her directions in this regard have also not been challenged.

[45] In the final analysis, the acceptance or rejection of the evidence of Dr Adunfa and Mr Robinson was one for the jury, after proper directions from the learned trial judge, which they had received. There is nothing to cast doubt on the integrity of the evidence of the prosecution witnesses and on the safety of the verdict as a result of any contradictions in the case presented by the prosecution.

(b) Recovery of firearm

[46] The applicant also relied on the fact that the firearm was recovered from him, approximately eight months after the incident, as part of his complaint that there was lack of evidence against him, which affected the fairness of the verdict. This contention is, however, without merit. The evidence of the firearm being in the possession of the applicant was evidence capable of supporting Mr Robinson's identification, once the identification evidence was accepted as being credible and not mistaken. The evidence of the applicant's possession of a firearm, which was undisputedly found to have matched the murder weapon, was, therefore, highly probative of his guilt, when all the

evidence is considered as a whole. Therefore, that evidence cannot be said to have been of no evidential value, albeit that such evidence did require careful and accurate directions from the trial judge, which she gave to the jury in clear terms.

(c) Recall of a prosecution witness

[47] In further advancing the argument that the trial was unfair, Miss Cummings pointed to the recall of Detective Inspector McIntosh by the prosecution to correct an error in his evidence. According to learned counsel, the learned trial judge should not have allowed the prosecution to recall the witness to correct the serial number of the firearm. She argued that it gave the prosecution "a second bite at the cherry" to correct the witness' error and this resulted in an unfair trial.

[48] Detective Inspector McIntosh, in his evidence-in-chief, had stated that the serial number of the firearm that he had taken from the applicant was KM 656 US. However, after giving his evidence, he was recalled by the prosecution to correct what he said was an error in his evidence as to the correct serial number of the firearm. He explained, upon being recalled, that after reviewing his statement in the evening after giving evidence, he realized that he had made a mistake and that the correct serial number was KM 565 US. He told the court that he had made a "genuine mistake".

[49] Detective Inspector McIntosh explained that he had made a statement regarding the matter closer to the time he had taken the firearm from the applicant in which he had stated the correct serial number. He said that in writing his statement relating to the murder, he wrote down the wrong serial number because he did not look back on

his earlier statement that was written in relation to the charges of illegal possession of firearm and ammunition but wrote from memory, which he said, was unfortunately faulty. In giving evidence from the witness box he repeated the error that was in the later statement.

[50] A trial judge always has the discretion to allow the recall of a witness at any stage of the trial prior to summing up and this court will not interfere with the exercise of that discretion unless there is some injustice done. In the circumstances of this case, we find that there was no injustice done by the learned trial judge in exercising her discretion to permit the prosecution, before closing their case, to recall the witness to correct his error.

[51] It is true that the serial number of the firearm taken from the applicant was important to the prosecution's case and so recalling the witness to correct an error pertaining to the identification of the firearm was potentially prejudicial to the applicant. However, the probative value of the evidence would have outweighed its prejudicial effect when the evidence of Detective Inspector McIntosh and the ballistic expert was considered in its totality. The serial number given by Detective Inspector McIntosh when he was recalled was clearly not a recent invention by him and there was no suggestion that it was. The evidence of the correct serial number of the firearm that was received by the ballistic expert from Detective Inspector McIntosh would have formed part of the prosecution’s case to the jury. It was ultimately for the jury to consider and to say what they made of the evidence, having regard to the explanation given by Detective Inspector McIntosh for his error.

[52] The argument that the learned trial judge erred in allowing the witness to be recalled to correct the error and that it has resulted in an unfair trial is unsustainable.

(iii) Whether the learned trial judge erred in allowing evidence of the applicant's previous convictions for illegal possession of firearm and ammunition to be admitted in evidence (ground three)

[53] The applicant's further contention on ground three is that the learned trial judge erred in allowing evidence of his conviction for illegal possession of firearm and ammunition to be adduced into evidence. This, counsel contended on his behalf, also affected the fair outcome of the trial.

[54] There is nothing in the notes of evidence which reveals that the fact of the applicant's convictions for illegal possession of the firearm and ammunition was led before the jury. The evidence led was confined to the fact that he was found in possession of the firearm and ammunition and was charged. In fact, it is observed that the learned trial judge was careful to ensure that no evidence was led as to the outcome of those charges. The applicant's complaint that the learned trial judge had wrongly permitted evidence of his previous convictions to be admitted in evidence is baseless.

[55] The real question is whether the learned trial judge was correct in permitting evidence of the recovery of the firearm and the fact that the applicant was charged by the police, to be put before the jury. We conclude that the learned trial judge was correct in doing so. As the learned trial judge opined in ruling the evidence admissible, the evidence as to the applicant's subsequent possession of the firearm in question was

more probative than prejudicial in the light of the finding of the ballistic expert that the spent shells and expended bullet found at the crime scene were fired from that firearm. The applicant's possession of the firearm was therefore directly relevant to an issue in the case as he was allegedly seen in possession of a firearm on the night in question, which was used to fatally wound the deceased. The fact of possession in him at a subsequent date of what was established to have been the murder weapon was highly relevant and significantly probative. It was also evidence capable of supporting the identification evidence of Mr Robinson, provided the jury was properly directed about its drawbacks and they accepted it as true and reliable.

[56] In relation to the evidence concerning the applicant's possession of the firearm, the learned trial judge made it abundantly clear to the jury that before acting on the evidence of the firearm being linked to the applicant and the scene of the crime, they must take into account the lapse of time between the incident and the time he was found in possession of the firearm, which was eight months. She made it painstakingly clear to the jury that firearms can easily pass into the hands of persons in various ways. She directed at page 479-481 of the transcript:

> "Remember Dr. Williams told you about the shotgun and as Jamaicans you must be aware, even from the news, the gun, culturally speaking, that the guns can be had, this is at your convenience, so if you want a gun, guns can be rented, guns can be borrowed, guns can be sold. In arriving at your determination you must look at when the Glock was recovered from Mr. Walker.
>
> I don't know, eight months after, could be that he obtained it after. These are all matters for you, Madam Foreman and your members."

[57] From the foregoing portions of the summation, it can be seen that the jury would have been alerted by the learned trial judge to the fact that the applicant could have come in possession of the firearm after the incident and so may not be confirmation that he was on the scene at which the eyewitness had placed him as the shooter. At no time were they directed to automatically conclude that the applicant was properly identified as the shooter because the firearm allegedly connected to the commission of the crime was found in his possession. In other words, the jury could not have been led to believe that the mere fact that the applicant was charged or even convicted for illegal possession of the firearm meant that he had committed the offence of murder.

[58] Furthermore, the prosecution had led evidence that upon being held with the firearm, the applicant explained that he was given the gun by "a brethren" to sell. The jury would have had that exculpatory explanation from the applicant to consider in assessing what weight to attach to the evidence that the firearm, which was said to be the murder weapon, was recovered from his person.

[59] The learned trial judge cannot be faulted in allowing evidence of the firearm to be led and her subsequent directions to the jury as to how to treat with the evidence are unimpeachable. This aspect of ground of appeal three also lacks merit.

(iv) Whether there has been a miscarriage of justice (ground four)

(a) The jury's reliance on hearsay evidence

[60] The applicant complained in ground four that there has been a miscarriage of justice as "the Court wrongfully convicted [him] based on hearsay evidence versus facts

as is evident in the case". Learned counsel on his behalf did not specifically argue this point in the terms asserted by the applicant in his original grounds of appeal and she did not highlight any hearsay evidence that was put before the jury which could have improperly influenced the verdict so as to lead to a miscarriage of justice. Even more importantly, there is no hearsay evidence identified by the court on its own examination of the transcript on which the jury could have relied to come to a verdict adverse to the applicant. This argument is therefore unsustainable.

[61] There is no merit in the contention that a miscarriage of justice has resulted from the jury's reliance on hearsay evidence.

(b) Omissions in the witness' statement to the police

[62] Miss Cummings, in presenting the applicant's contention in ground four, pointed to two other matters that she said have led to a miscarriage of justice. In the first place, she submitted that a miscarriage of justice occurred because there were omissions of general importance to the case in the police statement of Mr Robinson. This, counsel argued, raises the question of whether the evidence of the witness consists of recent concoctions. We however find no merit in this contention.

[63] The jury heard all the evidence in the case and they were properly instructed in law by the learned trial judge as to how to approach the evidence of each witness as the sole judges of the facts. Even more importantly within this context, the jurors were told that it was for them to determine, among other things, whether there was "honest

mistake" or "wicked invention" in the evidence of the witnesses and that it was open to them to accept or reject the evidence of a witness in part or wholly.

[64] The credibility of the witnesses was therefore for the jury alone to decide and so issues concerning omissions in evidence or police statements were for them to decide upon proper directions from the learned trial judge. The jury was properly directed about matters that would have affected the credibility of the witnesses as well as about the burden and standard of proof. There is no good and compelling reason for this court to interfere with the jury's decision on the basis that there were omissions in the police statement or the evidence of Mr Robinson. The argument that there has been a miscarriage of justice on this basis is not accepted.

(c) Break in the chain of custody

[65] The second matter highlighted by Miss Cummings as resulting in a miscarriage of justice is the break in the chain of custody of the expended bullet and spent shells recovered from the crime scene. The break in the chain of custody to which Miss Cummings referred is that the inspector of police who primarily handled the objects taken from the crime scene, Inspector Ramsarupe, did not give evidence at the trial. The prosecution, however, led evidence through two other policemen, Detective Inspector Daniel Walters and Detective Sergeant Douglas Marner, as to what transpired at the time the objects were recovered, sealed and labelled by Detective Inspector Ramsarupe in their presence.

[66] Detective Inspector Walters testified that he saw two spent shells and an expended bullet at the scene and that he pointed them out to Detective Inspector Ramsarupe and handed them over to him. Detective Sergeant Marner said that Detective Inspector Walters pointed out to him the two spent shells and expended bullet and gave him instructions. As a result, he photographed the objects and after he was finished taking the photographs, he saw Detective Inspector Ramsarupe pick up the spent shells and expended bullet and place them in an envelope. He saw the inspector seal and label the envelope. He testified also that he had seen Inspector Ramsarupe write before the morning of 2 October 2002 and that he was able to recognise Detective Inspector Ramsarupe's handwriting. He identified the inspector's handwritings on envelopes presented to him in court, and identified the envelope in which the relevant objects were placed and which he saw Detective Inspector Ramsarupe seal and label at the crime scene.

[67] Superintendent Carlton Harrisingh, the government ballistic expert, gave evidence for the prosecution. He testified that he got the spent shells and expended bullet in a sealed envelope from Detective Inspector Ramsarupe on 3 October 2002 and he conducted test on those objects and came to a finding that they were fired from the firearm bearing serial number KM 565 US that was submitted to him by Detective Inspector McIntosh on 5 June 2003. This firearm, as the evidence of Detective Inspector McIntosh would have disclosed, was the one he had taken from the applicant in May 2003.

[68] The learned trial judge addressed the issue of the absence of the evidence of Detective Inspector Ramsarupe and the break in the chain of custody of the exhibit quite extensively for the benefit of the jury. She highlighted clearly the evidence of Detective Inspector Walters and Detective Sergeant Marner about the evidentiary items. She then said this at pages 483-484 of the transcript:

> "Detective Ramsarupe was not called to testify.
>
> The Government Ballistic Expert, Carlton Harrisingh testified that on the 30th [sic] of October, 2002, he received an envelope from Mr. Ramsarupe, and he gave the file number, and he wrote his signature on the back. And the envelope contained spent shells and warhead.
>
> Now, the purpose of establishing a chain of custody, Madam Foreman and your members, is to guarantee the integrity of the physical evidence and to prevent the introduction of evidence that is not authentic. This is to prevent alterations or tampering with the exhibit.
>
> So it is necessary for the Prosecution to satisfy you so that you feel sure that the spent shell and expended cartridges taken from the scene were properly kept thereafter, and transported and delivered to the expert, Inspector Harrisingh for testing. Bear in mind that Officer Ramsarupe did not give evidence.
>
> Madam Foreman and members of the jury, you have to make up your minds whether or not when Officer Marner, say the spent shells being placed in the envelope, you have to make up your minds whether or not it was the same items that were handed to Inspector Harrisingh.
>
> The Prosecution is asking you to believe that it is the same item. It is a matter for you, Madam Foreman and members of the jury, as to whether you believe it is so."

[69] The question as to the weight to be attached to the evidence in the light of the break in the chain of custody was one for the jury. It was open to the jury to conclude that the sealed envelope that was handed to the ballistic expert was the same one that was sealed and labelled at the crime scene with the evidentiary items inside. While it would have been far more helpful to the court for the inspector himself to have given evidence regarding how he handled the evidentiary items, the absence of his evidence is not fatal to the prosecution's case so as to cause prejudice to the applicant, resulting in an unfair trial. There is no suggestion in the evidence that the integrity of the items was in any way compromised, at any stage, when they were in the physical custody of Detective Inspector Ramsarupe.

[70] In arguing that the break in the chain of custody is not fatal to the prosecution's case, Mrs Whittingham-Maxwell brought to the court's attention the cases of **Chris Brooks v R** [2012] JMCA Crim 5, **Damian Hodge v R** HCRAP 2009/001, judgment delivered 10 November 2010 and **Gazette v The Queen** [2009] CCJ 2 (AJ).

[71] In **Chris Brooks**, Morrison JA (as he then was) relied on dicta of Baptiste JA, in the British Virgin Islands' Court of Appeal case of **Damian Hodge v R** to highlight the true purpose of establishing a chain of custody. Baptiste JA stated:

> "The underlying purpose of testimony relating to the chain of custody is to prove that evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and

> gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the exhibit's integrity."

[72] There is nothing in this case that would have raised a reasonable doubt about the exhibits' integrity and so the learned trial judge had properly directed the jury on how to treat with the lacuna in assessing the reliability of the evidence, and the effect it would have had on the case they had to decide. As a result, although there was a break in continuity, it cannot be held to be fatal to the prosecution's case so as to lead to an unsafe verdict and miscarriage of justice, especially in light of the fact that the prosecution was relying more substantially on the eye witness' visual identification of the applicant. Ground four also has no prospect of success.

[73] In all the circumstances and after a consideration of the grounds of appeal touching and concerning the applicant's conviction, there is no basis on which the summation of the learned trial judge can be impugned and the jury's verdict disturbed. There was no unfairness in the trial and no miscarriage of justice that would render the applicant's conviction unsafe.

[74] The application for leave to appeal conviction must be refused.

(v) Whether the sentence of life imprisonment imposed on the applicant is unfair (grounds five, six and seven)

[75] Miss Cummings submitted that the sentence is not manifestly excessive but asked that the sentence of life imprisonment with eligibility for parole after 25 years, imposed on the applicant, be changed to a fixed term of 25 years. She contended that

there is a disadvantage suffered by persons who are given a term of years before parole than those who are given a fixed term.

[76] Learned counsel also pointed out that at the time the sentence was imposed, the applicant had been in custody continuously from the date of arrest for the offence of illegal possession of firearm, for which he was previously sentenced to five years after pleading guilty. Learned counsel contended that the learned trial judge had made no allowance for time spent in custody.

[77] The relevant sections of The Offences Against The Person Act, which prescribe the sentence to be imposed on the applicant, read:

> "2.- (2) Subject to subsection (3), every person convicted of murder other than a person –
>
> (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3 (1A) applies,
>
> shall be sentenced in accordance with section 3(1)(b).
> …
>
> 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.
> …
>
> (1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those

> provisions had been substituted for section 6(1) to (4) of the Parole Act-
>
> (a) ...
>
> (b) where, pursuant to subsection (1)(b), a court imposes-
>
> (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
>
> (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should serve before becoming eligible for parole."

[78] The learned trial judge had the option to fix a term of imprisonment, being not less than 15 years with eligibility for parole being no less than 10 years, or to impose a sentence of life imprisonment, with a stipulated minimum period for eligibility for parole being 15 years. She decided that the appropriate sentence was life imprisonment with a minimum period for parole eligibility instead of a fixed term. There is no basis on which this court could properly find that the learned trial judge erred in law in selecting the sentencing option she did. The fact that persons with a fixed term sentence "have an advantage" cannot be a proper basis to interfere with the exercise of the learned trial judge's discretion in imposing the sentence she did, especially in the light of the applicant's conviction for illegal possession of firearm and ammunition, which are offences which also attract a penalty of life imprisonment.

[79] The only issue worthy of consideration, in relation to the sentence, is the minimum period fixed for eligibility for parole. The statute provides a minimum of 15 years, the applicant was given 10 years above the minimum. The learned trial judge, in

seeking to determine the appropriate sentence for the applicant, considered both the aggravating and mitigating factors present in the case, albeit that she did not expressly identify a starting point or a range of sentences within which this type of murder would fall.

[80] However, in considering the aggravating features, the learned trial judge took into account the fact that the crime of murder is an egregious offence against society; the use of a firearm in the commission of the offence; the "design and manner" in which the murder was committed; and the applicant's two previous convictions for firearm and ammunition. The mitigating features she considered included his employment history and the positive social enquiry report which labeled him as a good member of the community. The learned trial judge also took into account the fact that the applicant was in custody for "some time" as a matter going to his credit but she did not state the discount that was given for that time spent in custody awaiting the trial.

[81] The applicant was sentenced to five years imprisonment in 2003. That sentence would have come to an end in 2008. The applicant went through a first trial and after a successful appeal, his conviction and sentence were quashed and a new trial ordered. He would have been in custody for at least a period of four years relating to the murder.

[82] At his first trial, the applicant was sentenced to life imprisonment with eligibility for parole set at 30 years. It does appear that the learned trial judge took that original sentence into account, and reduced it by five years, obviously having regard to time

spent in custody before the completion of the retrial before her. It cannot be said that the learned trial judge sentenced the applicant on any wrong principle of law, which would be of such materiality as to justify interference by this court. The sentence imposed by the learned trial judge cannot be said to be manifestly excessive in the circumstances. It is well in keeping with the range of sentences for such an offence. There is therefore no basis on which the sentence imposed can properly be disturbed by this court. The grounds of appeal challenging the propriety of the sentence must fail.

Conclusion

[83] The applicant has failed to satisfy this court that the learned trial judge erred in law in her conduct of the trial and in her directions to the jury. There is no basis on which to impugn the jury's verdict and so the conviction is unassailable. The applicant has also failed to persuade this court to the view that the sentence imposed on him should be disturbed. We agree with the learned single judge that leave to appeal both conviction and sentence should be refused.

[84] Accordingly, we order that:

1. Leave to appeal conviction and sentence is refused.
2. The sentence is to be reckoned as having commenced on 13 July 2012.