[2024] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE DUNBAR GREEN JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00011

OWAYNE WARREN v R

Kemar Robinson for the appellant

Miss Ashtelle Steele, Janek Forbes and Miss Sharelle Smith for the Crown

12, 13 July 2022 and 25 October 2024

Criminal law – Conviction – Murder – Whether discrepancy between evidence of alleged eyewitness and post-mortem report – Whether trial judge failed to give adequate directions on discrepancies and inconsistencies – Hearsay evidence – Whether applicant prejudiced

Criminal law – Sentence – Life imprisonment – Failure of trial judge to give reasons for the sentence imposed – Whether judge failed to take account of applicable principles and took account of irrelevant factors in computing sentence – Whether sentence manifestly excessive

DUNBAR GREEN JA

Introduction

[1] On 17 October 2018, after a trial before a judge of the Supreme Court ('the learned judge') and a jury, in the Home Circuit Court, Mr Owayne Warren ('the applicant') was convicted for the murder of Horatio Davy (otherwise called 'Papa') on 3 September 2000, in the parish of Saint Andrew. On 11 January 2019, the applicant was sentenced to life imprisonment and ordered to serve 23 years and nine months' imprisonment before being eligible for parole.

The prosecution's case

[2] The prosecution relied on agreed facts in the post-mortem report that there were multiple penetrating wounds to the deceased, described as follows:

> "(a) 7 cm laceration (deep cut) on the right side of his back 5 cm in the middle of his shoulder bone.
>
> (b) 5.5 cm laceration (deep cut) on the left side of his chest; upper border of 11th rib in mid auxiliary line (side line).
>
> (c) 4 cm laceration (deep cut) to his back, shoulder region, 6 cm from the side to the midline.
>
> (d) 5.5 laceration (deep cut) on his right arm, 11 cm above his elbow towards the back side of his arm.
>
> (e)4 cm laceration (deep cut) to his left forearm, 13 cm below elbow towards the side.
>
> (f) 0.7 cm jagged laceration (deep cut) to his lip, just left of midline."

[3] It was the doctor's opinion that the deceased died because of exsanguination (blood loss) due to stab wounds to the chest, with injuries to both lungs.

[4] The prosecution relied centrally on the evidence of Robert Cleghorn (brother of the deceased and neighbour of the applicant) and Deputy Superintendent of Police Alvin Allen (previously, a Detective Corporal stationed at the August Town Police Station) ('DSP Allen'), who were said to be eyewitnesses to the stabbing incident that led to the death of the deceased.

[5] Mr Cleghorn gave evidence that he was standing on "a curve wall" opposite to where he saw the deceased exiting an intersection, in the vicinity of "Gunning shop" in the community of August Town. The deceased had a "bath" (wash basin) containing clothes on his head. As the deceased passed the entrance to the shop, the applicant exited the shop and approached him. Mr Cleghorn then observed the applicant pulling a "kitchen bitch" (knife) out of the deceased's back only to thrust it back in. The deceased

spun around, faced the applicant, and the "bath" fell to the ground. The deceased asked the applicant, "What mi and you have?" The applicant did not answer. Mr Cleghorn then went across the road to where the deceased was, and the applicant jumped on a bicycle and rode down the road.

[6] Mr Cleghorn then noticed an unmarked F150 pickup truck driving onto the scene. It was driven by a policeman he knew from the August Town Police Station. The policeman exited the pickup truck and moved towards the applicant as if to give chase but then turned away. Mr Cleghorn and others then helped to get the deceased (then injured) inside the back of the pickup truck, and the policeman left with him for the hospital. Mr Cleghorn went home and informed his mother about what had transpired.

[7] Subsequently, Mr Cleghorn visited the August Town Police Station to give a statement to the police. He said he was told that it was not necessary to do so as the investigating officer had witnessed the stabbing incident. He was also supposedly told that such a statement would only become necessary after the applicant is arrested. He gave his statement some 14 years later, on 28 June 2014, consequent on the applicant's arrest.

[8] DSP Allen's evidence corroborated Mr Cleghorn's as to how and when he came onto the scene. He gave evidence that he was driving an F150 pickup truck along the August Town main road when he saw a small crowd and a man ('the assailant') holding onto the front of another man's shirt (the deceased), as they faced each other. The assailant then stabbed the deceased with a knife, at least twice. The deceased collapsed. The assailant turned to look at him (DSP Allen) then got on a bicycle and rode away.

[9] After he transported the deceased to the hospital, DSP Allen returned to the scene, where he got information that led him to the home of the deceased. He also went next door and spoke to a female. He then returned to the August Town Police Station, where he made an entry in the station diary. He subsequently attended the post-mortem examination, after which he wrote a statement. That statement was submitted to the

Divisional Inspector. He also conducted "informal interviews" about the incident. 14 years later, following the applicant's arrest, he wrote a second statement.

[10] DSP Allen further testified that he did not know the deceased nor the assailant and had only witnessed the stabbing for a few seconds.

[11] Four other witnesses were called by the prosecution - Camille Davy, sister of the deceased and neighbour of the applicant; Corporal Calvin Allen, the arresting officer; Detective Inspector Radcliffe Levy, the investigating officer; and Detective Constable Lucien Bloomfield, the officer who conducted the question - and - answer interview (Q&A) when the applicant was arrested.

[12] Ms Davy testified that shortly after the stabbing incident, the applicant moved away from the home he had occupied in August Town, as well as the community. She saw him next, on 17 June 2014, along Westchester Drive, in the parish of Saint Catherine, and alerted the police. She pointed him out to Corporal Calvin Allen as the person who had killed her brother. He, however, denied knowing her and that he had lived in August Town.

[13] Corporal Calvin Allen ('Corporal Allen') was stationed at the Waterford Police Station, on 17 June 2014, when Ms Davy pointed out the applicant to him. Based on the information she provided, he took the applicant into custody.

[14] Detective Inspector Radcliffe Levy gave evidence that, on 24 June 2014, he received instructions from DSP Winston Hunt and made enquiries at the Halfway Tree police lock-up. There, he introduced himself to the applicant and told him of the murder allegations against him. According to Detective Inspector Levy, the applicant said under caution, "Officer, a long time dis ting a bother mi". Detective Inspector Levy then commenced investigations into the murder of the deceased. He obtained a copy of a diary entry from the August Town Police Station, collected written statements and arranged for

the Q&A to be conducted with the applicant. Thereafter, he charged the applicant for the murder of the deceased.

[15] The evidence of Detective Cons Lucien Bloomfield, and the edited version of the Q&A that was admitted into evidence, will be referred to as the need arises.

The applicant's defence

[16] In an unsworn statement from the dock, the applicant said he was wrongly accused of the murder. He had previously heard it being rumoured that he was involved. He, therefore, went to the August Town Police Station, more than once, to inquire whether there was a statement against him. On the first occasion he did so, no information was received. On a subsequent occasion, he was chased out of the station by "a big fat police" who told him to go home.

[17] The applicant stated that the allegations against him were born out of malice, resulting from a dispute with Mr Cleghorn and persons connected to him. This arose from a quarrel in 2014, when he saw Mr Cleghorn and "Maggie" (Mr Cleghorn's brother) in his (the applicant's) sister's shop and remarked to Mr Cleghorn that he was "round the road a cuss over thiefing light and [he had] bandooloo [bandulu] light too". Mr Cleghorn's response was that he was going to "serve him [the applicant] a sauce". Within two weeks of that quarrel, the applicant was arrested and charged with the murder of the deceased. Upon being charged, he told the police, "A long time it a bother mi…all the while a dem people deh always a seh a mi kill Papa and mi know seh mi nuh kill nobody".

[18] The applicant said, whilst in jail, other detainees advised him to deny everything during the police interrogation. He followed the advice during the Q&A and realised that he had lied to the police.

[19] The applicant stated further that he had been abused in jail, and reflected on Mr Cleghorn saying he would "serve him a sauce". He surmised that a relationship with 'Maggie's' former lover, whom he had poached and impregnated to the dismay of

Maggie's family, was the motive for the case alleged against him. He also admitted to knowing the deceased, and said he was kind to him.

[20] Mr Iain Shirley, Justice of the Peace, gave character evidence in favour of the applicant.

The appeal

[21] A single judge of this court refused the applicant leave to appeal his conviction and sentence. The applicant renewed his application before us.

[22] He sought and obtained permission to abandon his original grounds of appeal, and argue, instead, five supplemental grounds. There being no objection from the Crown, he was granted an extension of time to file skeleton arguments.

[23] The supplemental grounds of appeal were as follows:

> "(i) The Learned Trial judge failed to give sufficient directions to the jury regarding the discrepancy between the eyewitness' evidence and that of the Post-mortem Report.
>
> (ii) The learned trial Judge allowed prejudicial, hearsay evidence without giving the jury any direction on how to deal with this hearsay evidence.
>
> (iii) The learned trial Judge misquoted the evidence in her summation which had the impact of confusing the jury as to whether there was corroboration for Robert Cleghorn's evidence in support of the appellant[sic] being the person responsible for the deceased's death.
>
> (iv) The Learned Trial judge failed to adequately direct the jury on the issues of inconsistencies and discrepancies which resulted in the jury failing to appreciate the effect of these on the credibility of the witness.
>
> (v) The sentence is manifestly excessive."

Ground (i): the learned judge failed to give sufficient directions to the jury regarding the discrepancy between Mr Cleghorn's evidence and the post-

mortem report, and misquoted the evidence thereby amplifying the case for the prosecution

Summary of submissions

For the applicant

[24] Counsel for the applicant, Mr Kemar Robinson, pointed to what he contended was an unexplained material conflict between the direct and medical evidence, as to how the deceased came by his injuries. He contrasted Mr Cleghorn's evidence that he had seen the entire incident, but only mentioned seeing the deceased being stabbed in the back, with the post-mortem report of six stab wounds, including wounds to the chest. Counsel submitted that the conflict was not resolved at the close of the prosecution's case.

[25] The argument was then developed to say that the jury would have had to be directed on how to treat the absence of any explanation for Mr Cleghorn's evidence which did not mention the chest wounds. Further, it was a non-direction for the jury simply to be told that it was a matter for them, when there were no adequate and appropriate directions. The cases of **Dwayne Douglas v R** [2010] JMCA Crim 66, **Danny Walker v R** [2010] JMCA Crim 35, **The State v Kerry Samad** Crim App No P042 of 2005, and **Mani Ram and Ors v State of U P** 1994 Supp (2) SCC 289 were cited in support of these arguments.

[26] Counsel indicated that he took no issue with the evidence given by DSP Allen that he witnessed an incident in which the deceased was stabbed by his assailant while they faced each other but contended that DSP Allen's evidence would not support a conclusion that the assailant was the applicant.

[27] Issue was taken with an aspect of the learned judge's recollection of the evidence as set out at pages 254 and 267 of the transcript of the proceedings ('the transcript'). The complaint was that Mr Cleghorn's evidence, about the way in which the deceased was stabbed, was misquoted, and had the effect of misleading the jury into believing that his evidence had some degree of consistency with the post-mortem report that the

deceased was stabbed to the front of his body. Counsel posited that this was an error, which amounted to a misdirection, and caused substantial prejudice to the applicant.

For the Crown

[28] Ms Steele, appearing for the Crown, disagreed with the argument that there was a discrepancy in the prosecution's case as regards the injuries. Rather, she argued that the direct evidence from both eyewitnesses had to be taken together, along with the medical evidence. She recalled both eyewitnesses' testimonies, and pointed to the eyewitnesses' different vantage points, at different times. Together, the eyewitnesses' evidence was about stabbing to both the back and chest areas, which was consistent with the post-mortem report, she submitted.

[29] Turning to how the learned judge treated the evidence, counsel pointed out that, although there was not a listing of discrepancies from "an eyewitness versus medical evidence" standpoint, both of those aspects of the prosecution's case were highlighted in detail, as well as the perspectives of the prosecution and defence about the evidence. Counsel also contended that Mr Cleghorn's evidence, taken by itself, was not at variance with the medical evidence because they both revealed that the deceased was stabbed in the back.

[30] Counsel did not agree that the learned judge misquoted the evidence.

Discussion

The trial judge's duty as regards discrepancies in the evidence

[31] When there are conflicts in the evidence, it is the duty of the trial judge to direct the jury to consider such conflicts, consonant with their, the jury's, role to weigh up such conflicts (see **R v Garth Henriques and Owen Carr** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 97 and 98/1986, judgment delivered 25 March 1988). As a first step, the trial judge is to bring examples of discrepancy to the jury's attention and direct them to resolve whether the difference is of a major or minor consequence to the root of the case. The jury must be told that they need not pay

particular attention to minor discrepancies, but if it is determined that the discrepancy is major, they must go on to consider whether any or satisfactory explanation has been given for it. They must also be instructed to weigh up any explanation of the discrepancy or absence of one. If the explanation is deemed to be inadequate or none is provided, the jury must still determine whether, irrespective of the inadequate explanation or absence of one, the evidence on the point in conflict can still be accepted, in part or at all.

[32] This is the approach outlined by Harrison JA (as he then was) in **R v Carletto Linton and Others**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered on 20 December 2002, at page 16. That case cited, with approval, the observation by Carey P (Ag) in **R v Peart et al** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1986, judgment delivered on 18 October 1988, that the existence of a discrepancy in the evidence does not necessarily eviscerate the witness' credibility or severely impugns it. Evidently, the impact on the witness' credibility will depend on the materiality of the discrepancies, as weighed up by the jury.

[33] Any material discrepancy between the post-mortem report and the direct evidence, in the instant case, would go to the root of the prosecution case, and failure by the prosecution to provide a satisfactory explanation of the conflict would be 'a fundamental defect', capable of discrediting the entire prosecution case (see **The State v Kerry Samad**, para. 35). The learned judge was alert to this and focused the jury on the evidence about the way in which the deceased was stabbed, as well as the evidence contained in the post-mortem report.

[34] At page 253, lines 16-25 to page 257, lines 1-10 of the transcript, she said:

> "So let me just remind you of what it is that Mr Cleghorn and Mr Allen has [sic] said in relation to the circumstances. Mr Cleghorn told you that he saw Mr. Warren step from the shop and approach his brother. He told you that Haratio [sic] was at the entrance of the shop, and he saw when Nell pulled the

knife from his brother's back. He said because to how he was turned, he never saw when he pushed it in the first time, because his back was to him, but he saw when he pulled it out. He said both of them back was turned to him at that moment, and Nell was pulling the knife from his brother's back. People were in the shop and were on the sidewalk. It was a busy Sunday morning. He observed Nell's hand went down after that. So, he saw the hand go back down and Horatio spin around, and it went down into his back once more, and that is when his brother spin around. He said when his brother spun around, Nell's hand was on its way down back. So that is what he says. And then he tells you that when Haratio spin around he faced Nell. He was still standing across the road, and the bath with the clothes fell to the ground and Haratio said to Nell 'what me and you have', and Nell did not respond, and that was when he Mr Davy, came to the sense of what happened to him, and he stepped from the curve and went to his brother. That is what he saw.

And then Mr Allen is telling you that while he was driving that day on August Town Road, he saw a small crowd. It aroused his interest and then he saw a man holding another one in the front of his shirt. The man doing the holding stabbed the other man. So, he stopped the van. And then he told you that the man who was stabbed fell. He went on further to describe to you that nothing blocked his view and the man was using the knife to stab the other. He said he saw at least twice, the stabbing twice. The one who was receiving the stabs, he had both hands by his side and he was just standing there. He did not observe him with anything. The man doing the stabbing, he heard him say nothing, and he heard the man being stabbed said nothing.

So, he was still in the vehicle when he observed the stab. So, both of them saw this stabbing going on. So, when that you are looking at the intention, and bear in mind what the doctor said about the injuries.

Bear in mind, you will have the document, where the doctor saw the injuries, because you will no doubt recognise, based on what the doctor is saying, at least two injuries are to the back. I see where he refers to the back twice, and then he has other injuries to the left side of the chest, back side of right arm, below elbow towards his side, on the lip. So these

are other areas where he saw injuries, you are to look at that, because what the Crown is saying, it is an unprovoked attack, Mr Davy had nothing, no weapon, nothing; a man just came and inflicted these injuries. And so, in you examining that you have to examine what could his intention have been...

And I was to say to you Madam Foreman and your members, that the most important witness in relation to which the stabbing is Mr Robert Cleghorn, because you will appreciate that he is the only witness who has come and said, is this man, 'Nell', stab my brother. So, you have to assess Mr Cleghorn in particular for his credibility and reliability as a witness, and remember, you are to bear in mind when you are assessing him that the Defence is saying he is acting out of malice and spite."

[35] At pages 278, lines 20-25 to page 280, lines 1-15, she continued:

"The Crown is saying now, that when you examine Mr Cleghorn's evidence and even Mr Allen's, you bear in mind what the doctor has said, because I told you, the doctor found six injuries and at least two of them - - he has stab wounds, at least two based on my understanding, I did not know of certain other areas. It is not clear but at least two. He is speaking about two to the back, and what the Crown is saying to you, what did Mr Cleghorn tell you? Cleghorn say him stand up deh and him see, and him see pulling out of the back and then he saw another one going in and the doctor said two to the back, and there were four others the doctor described. And you heard about chest and some other areas. So, what the Crown is saying to you, between Cleghorn and Mr. Allen, they are accounting to you for the injuries that were seen on Mr Davy, because there were injuries to the back and there were other injuries to the chest area. And the Crown is also saying to you that although the defence is saying, could they have been seeing the same incident? What the Crown is saying, Mr Cleghorn saw from the beginning of the incident when Warren was behind Davy, but by the time Mr Allen came on the scene, remember they were now facing each other. The Crown is saying, remember Mr Cleghorn himself told you that Davy turned around to Warren and say, 'a what you and me have', and he said by the time of that turning, the pan drop down, drop off him head. What the Crown is saying to you, the fact that Mr Allen don't say him see no pan on the

> man's head, they can explain that because it's just that he came on the scene after certain things had already taken place.
>
> Mr. Allen don't tell you about any back view, but we know there were injuries to the back, so they are saying, consider all of that. He is seeing the incident, Mr. Cleghorn, from the beginning, Mr Allen, at another stage. The Crown is saying there is no discrepancy, it can be explained based on what Mr. Allen came and what he saw. It's a matter for you."

[36] By those directions, the learned judge called the jury's attention to the evidence that Mr Cleghorn was first on the scene, followed by DSP Allen, and of the narrative given by both, contrasted with the post-mortem report in relation to the injuries sustained by the deceased. She specifically recalled the evidence of Mr Cleghorn and DSP Allen about the way in which they said the deceased came by his injuries, and the vantage point from which they each viewed the incident. She directed the jury to consider the prosecution's position that the conflation of both eyewitnesses' narrative accounted for the injuries sustained by the deceased. She instructed the jury to consider the defence's contention that Mr Cleghorn had lied in his assertion that he saw the stabbing incident, and that he had been motivated by malice and spite. Further, she instructed the jury to compare the way in which both eyewitnesses said the injuries were inflicted with the injuries described in the post-mortem report.

[37] The learned judge also gave instructions on the treatment of conflicts, generally. At the beginning of her summation, at pages 220-229, she directed the jury as follows:

> "Where there are different accounts in the evidence, about a particular matter, your job would be to weigh the reliability of the witnesses who gave evidence about the matter, taking into account how far, in your view, their evidence is honest and accurate. You alone are responsible for weighing the evidence and in deciding what has and what has not been proved…
>
> Another way you assess the reliability is considering inconsistencies and discrepancies in the evidence, and I will

> now be directing you as to what these are, how to treat with them, and remind you of some of those inconsistencies and discrepancies."

[38] Further, at pages 237-241, the learned trial judge directed the jury in this way:

> "…You have seen and heard the witnesses, and it is for you to say whether these discrepancies are profound and inexplicable, or whether the reasons which have been given, if any, for discrepancies, are satisfactory. And you are to bear in mind that you are entitled to accept the evidence of one witness on a particular point and reject what another witness says on the same point, if you find one witness to be more reliable than the other [Page 238- lines 1-10]
>
> So those are some discrepancies…Do you believe that the witness is making it up, inventing it because of a wicked invention or do you put it down to honestly what one witness recalls in regards to another witness? …you can accept what one witness says… [Page 240 lines 21-25, page 241, lines 1-6]"

[39] The jury were also told that it was the prosecution's burden to establish the case beyond reasonable doubt, which meant also proof that the injuries to the deceased were caused by the applicant in the manner alleged.

[40] In our view, the summation accords with guidance from this court not only in **R v Carletto Linton and others**, but also **Albert Edmondson v R** [2020] JMCA Crim 32 (approving the dicta of Carey JA in **Fray v Deidrich** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991), that the trial judge must guide the jury but there is no requirement "to comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial", although they must be reminded of material conflicts.

[41] Therefore, while we accept Mr Robinson's submission that the learned judge did not specifically instruct the jury to consider whether there was any internal conflict in Mr Cleghorn's evidence, particularly the testimony that he had seen "the entire incident" but

only accounting for stab wounds to the deceased's back, we nevertheless, do not consider this omission to be fatal to the conviction. We believe the learned judge gave adequate directions to the jury about how they should treat with conflicts in the evidence, including a direction to make their own findings as to what evidence could be characterised as contradictory. As the tribunal of fact, it was for the jury, ultimately, to make up their minds as to the presence, materiality and effect of any such conflict.

[42] That said, we do not share Mr Robinson's view that there was necessarily an internal inconsistency in those aspects of Mr Cleghorn's evidence. We believe it is a matter of common sense that a witness can be truthful that he witnessed an incident for its entire duration (the entire incident) but not observe every detail of it, dependent on his vantage point. It should be recalled that Mr Cleghorn said he viewed the incident from an angle while he was across the road. He had also pointed out that after the stabbing to the back, the deceased turned to face his attacker, at which point he was seeing the back of the deceased. In the context of that explanation, it was left to the jury to decide whether Mr Cleghorn was telling the truth and whether they could accept his evidence as being reliable.

[43] There remains the question of whether the direct evidence of Mr Cleghorn conflicted with the post-mortem report and, therefore, the prosecution's case lacked credibility, as the applicant contended. At the outset, we observe that Mr Cleghorn's evidence was not the only direct evidence being relied on by the prosecution, and the jury was made aware of that. His evidence placed him at the scene of the stabbing from the beginning. After he observed the deceased turn to face his attacker, he saw the policeman arrive on the scene. When DSP Allen arrived, he (DSP Allen) saw the deceased and the assailant facing each other, after which the assailant stabbed the deceased, at least twice, while they were still facing each other. If believed by the jury, these accounts would form the basis of a continuing narrative as to the way in which the deceased came to receive his injuries both to his back and chest.

[44] It is worth noting that counsel for the applicant stated that DSP Allen's evidence was not being disputed, and the learned judge placed squarely before the jury that DSP Allen's evidence, albeit supportive of the way in which the deceased came to his death, was not capable of supporting the identification of the applicant.

[45] In these circumstances, it was well within the jury's remit, as judges of the facts, to consider both eyewitnesses' evidence in making up their minds about the way in which the deceased was killed, and to compare any aspect of the evidence they found to be proved with the agreed evidence in the post-mortem report. If they believed the eyewitnesses' narrative, they were then entitled to find that, together, they accounted for the injuries to the deceased, although DSP Allen did not identify the applicant as the assailant. Were that the case, there would be no need to consider whether Mr Cleghorn's evidence conflicted with the post-mortem report, though they (the jury) were ably instructed by the learned judge that they had that option.

[46] We believe that there was no prejudice to the applicant as the learned judge had forcefully brought to the jury's attention the limits of DSP Allen's evidence, particularly that it could not be used to support the identification.

[47] The case of **Dwayne Douglas v R**, and the other authorities cited by Mr. Robinson, do not help the applicant, as they are quite distinctive from the instant matter. The conviction in **Dwayne Douglas v R** was quashed because the medical evidence contradicted the sole eyewitness' evidence as to the circumstances in which the deceased was shot. The eyewitness said the shooter was standing over the deceased, almost touching, when he was shot. The pathologist found no evidence of close-range firing. Similarly, in **Andrew Manning v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 199/2006, judgment delivered 16 October 2009, the conviction was quashed as the evidential base of the prosecution's case appeared "less than slender". There was no evidence of gunpowder deposits despite the sole eyewitness' evidence that the gun was close to the deceased's head (an inch or more) when he was shot.

[48] In **Byfield Mears v The Queen** [1993] UKPC 13, the purported confession was at variance with the pathologist's report. The main prosecution witness claimed that the appellant had confessed to her that he had shot the deceased in "the ears" and burnt his body; but the pathologist found no evidence of gunshot injury to the skull, whether to the ears or elsewhere. The appellant had also denied making any confession to the killing.

[49] In **The State v Kerry Samad**, there were three eyewitnesses who gave different accounts, none of which was consistent with the pathologist's report about the way the deceased sustained his injuries. This case supports a proposition that the measure is not so much about matching up the direct and medical evidence 'injury for injury' but whether the two are "totally inconsistent" such that it can be concluded that the direct evidence is not supported by the expert evidence.

[50] **Dwight Robinson v R** [2018] JMCA Crim 38 concerned the failure of the trial judge to consider aspects of the medical evidence which pointed to the possibility of another version of the incident that might have exonerated the appellant. The convictions were quashed because, among other reasons, the medical evidence did not comport with the prosecution's case that there was a shootout between the police and the appellant. The prosecution's case was presented by three police officers, one of whom testified that upon exiting a police service vehicle and shouting, "police", the appellant pulled a firearm from his waist, which caused her to fire two shots in his direction while he was facing her. The firearm then fell from his hand, and he ran off. The police officer who testified to having seen injuries to the appellant spoke of seeing injuries to the arm. None of the police officers could recall where on the arm the injuries were. The medical report indicated that one injury was to the posterior area of the right arm and the other along the side, but it did not say which was entry or exit wounds. None of the officers spoke of injuries to the leg, yet the report indicated injuries to the appellant's foot. The appellant did not deny a confrontation with the police but denied pulling a firearm at them. He said that it was after he ran off that one of the police officers "open up fire". This court

concluded that the location of the injuries "could well have supported the [appellant's] contention that he received them as he ran off".

[51] Unlike those cases, the jury were entitled to find, in the instant case, that the direct evidence of both eyewitnesses, taken together, established that stabbing occurred to the chest and back of the deceased's body; and that this was materially consistent with the evidence in the post-mortem report that there were deep cuts to the back and chest of the deceased. In our view, any discrepancy would have been minor and would not have had any adverse impact on the integrity of the prosecution's case or the fairness of the trial. In the circumstances, there was no miscarriage of justice.

Whether the learned judge misquoted the evidence, and if so, what was the effect?

[52] The applicant's next complaint, under this ground of appeal, is that the learned judge misquoted the evidence of Mr Cleghorn, and this had the effect of misleading the jury on a material aspect of the evidence. Mr Robinson pointed to Mr Cleghorn's direct evidence where he stated, "**But when my brother spin around his hand was on his way back down towards his back, because it is coming from a up angle**" (emphasis added). However, in her summation, the learned judge is recorded to have said: "…**when the deceased spun around, the accused's hand was on its way down back**" (emphasis added).

[53] When the learned judge's version is looked at contextually, it is quite plain that Mr Cleghorn was saying that he saw the applicant's hand going down the deceased's back. In any event, at page 253, lines 23-25 to page 254, lines 1-11, the learned judge represented the evidence faultlessly, as follows:

> "He said because to how he was turned, he never saw when he pushed it in the first time, because his back was to him, but he saw when he pulled it out. He said both of them back was turned to him at that moment, and Nell was pulling the knife from his brother's back. People were in the shop and were on the sidewalk. It was a busy Sunday morning. He observed Nell's hand went down after that. So, he saw the

> hand go back down and Horatio spin around, **and it went down into his back once more,** and that is when his brother spin around. **He said when his brother spun around Nell's hand was on its way down back**." (Emphasis added)

[54] At page 267, lines 9-18, she continued:

> "And as he said, he couldn't see when Nell had actually pushed in the knife this first time, his back would have been to him. Nell's back would have been to him. Both of them backs would have been turned to him at that moment. **And when he saw Nell's hand go down again and went down in Horatio's back once more, and when Horatio spun around, Nell's hand was on its way down back**, and it was at an angle." (Emphasis added)

[55] In our view, those instances were sufficient to remind the jury of what Mr Cleghorn said. Moreover, it did not escape our attention that Mr Cleghorn himself, in at least one instance, used similar words as those contained in the impugned statement attributed to the learned judge. At page 21 of the transcript, he is recorded to have had the following exchange with counsel for the prosecution:

> "A. I observed when **his hand went down again** and my brother spin around.
>
> Q. Whose hand went down?
>
> A. Nell hand went down and Haratio spin around.
>
> Q. And when you said Nell hand went down, went down where?
>
> A. **Down to his back again**." (Emphasis added)

[56] Mr Cleghorn was prompted to clarify his answer, and did so, but what he said was not, in our view, markedly different from the learned judge's attribution.

[57] Even had the impugned statement been a misrepresentation of the evidence, we are not of the view that it could be said, had it not been for the misstatement, the reasonable probability would be a verdict of not guilty (see **R v Wavel Richardson and Michael Williams o/c Everton Simpson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 240 and 241/2002, judgment delivered 8 November 2006).

[58] For those reasons, ground i fails.

[59] We have found it convenient to deal next with ground iii. Grounds iv, ii and v will follow in that order.

Ground iii: the learned trial judge misquoted the evidence in her summation which had the impact of confusing the jury as to whether there was corroboration for Mr Cleghorn's evidence that the applicant was the person responsible for the deceased's death.

Summary of submissions

For the applicant

[60] Mr Robinson took issue with this aspect of the direction at page 242, line 13 of the transcript, "**[H]e was also seen by Detective Allen stabbing Mr Davy as they faced each other**" (emphasis added). The contention is that DSP Allen was being treated as an eyewitness to the incident, but he did not identify the applicant as the person who stabbed the deceased. Thus, when the learned judge gave that direction to the jury, it amounted to a misdirection and may have left them confused as to whether DSP Allen saw the applicant stabbing the deceased. This misdirection was prejudicial to the applicant and thus fatal to the conviction, counsel argued.

For the Crown

[61] Counsel for the Crown submitted that the learned judge was merely recounting the prosecution's case when the impugned words were used. In any event, when the summation is taken as a whole, it is highly unlikely that the jury would have been

confused about whether Mr Cleghorn was the only person who identified the applicant. In support of that argument, counsel referred to the learned judge's reminder to the jury, at page 257, lines 1-5 of the transcript, that:

> "…the important witness in relation to who did the stabbing is Mr Cleghorn, because you will appreciate that he is the only witness who has come and said, this man, 'Nell' stab my brother."

Further, before delving into the caution regarding identification, the learned judge reminded the jury, at page 262, lines 4-6 that "… Mr Cleghorn [was] the only one who [was] identifying Warren [applicant] as the one who stabbed his brother".

[62] The learned judge, it was further argued, went on to explain that the evidence led from Ms Davy did not corroborate what Mr Cleghorn purportedly saw (page 262, lines 6-25 to page 262, line 1). Further, she explained, again, and in more detail, why DSP Allen's evidence could not assist with identification of the applicant. Counsel pointed out that the learned judge then emphasised, at page 263, lines 23-25 to page 264 that, "[t]he only person whose evidence [could assist them] with identification of the person who stabbed Mr Davy [was] Mr Robert Cleghorn".

Discussion

[63] We accept the Crown's submission that the learned judge's use of the words attributed to her was in the context of recalling the theory of the prosecution's case. This is manifest when one looks at the entire passage from which the words are extracted. She began summarising the prosecution's case in this way, at page 242, lines 3-24 of the transcript:

> "What is the Crown telling you? The Crown is telling you that Mr Horatio Davy was stabbed several times by the accused on the 3rd of September 2000 in the front of Gunning's shop in August Town. At the time he would have had a bath pan on his head, which was held by his two hands, and this accused was seen stabbing him in the back area before Mr Davy turned to him and asked, 'What me and you have?'.

> He was also seen by Detective Allen stabbing the accused--- the accused stabbing Mr Davy as they faced each other. The Crown is saying it was a violent and unlawful attack without any justification…So that in summary is what the Crown is saying." (Emphasis added)

[64] In the ensuing pages, she referred, repeatedly, to Mr Cleghorn as the sole witness to give evidence about the visual identification of the applicant. This can be seen at pages 253-255; pages 256, lines 24-25 to 257, lines 1-10 and pages 262-264. And, at pages 256, lines 24-25 to 257, lines 1-10, she directed the jury thus:

> "And I want to say to you, Madam Foreman and your members, that the most important witness in relation to who did the stabbing is Mr Robert Cleghorn, because you will appreciate that he is the only witness who has come and said, is this man, 'Nell', stab my brother. So, you have to assess Mr. Cleghorn in particular for his credibility and reliability as a witness, and remember, you are to bear in mind when you are assessing him that the Defence is saying that he is acting out of malice and spite."

[65] The learned judge further directed the jury, at pages 262-264, as follows:

> "…Mr Cleghorn is the only one who is identifying Warren as the one who stabbed his brother. You heard from Miss Camille Davy that she pointed out the man who she heard stabbed her brother. You would appreciate that she did not see it, and you would appreciate that the only reason that this evidence was allowed that she pointed out the man who she heard stabbed her brother, is to assist you in understanding the circumstances under which Mr Warren was identified 14 years later. So, that is why that evidence was allowed. But as you know, you can't put any value or weight on hearsay. It was only allowed so you can understand why Constable Calvin Allen, in June 2014, took up this man and took him to the station. You had to understand why. So, that is the only reason that evidence was allowed….. She did not see, so no matter what you hear her say about she heard, you have to disregard that as valuable evidence in terms of whether the Crown has proved that this man stabbed Mr. Davy.

> You also heard that Mr. Allen, Detective Allen now, not Constable Allen in Portmore, but Detective Allen, the one who drove the pick-up on the scene on the 3rd of September, said he saw the man who stabbed the other man. And you would appreciate, of course, that Mr. Allen's evidence has no – cannot assist you with the identification of anyone, and why Madam Foreman and your members? He didn't know the man before. He saw him for a few seconds. Him never write no description of the man that he never know before in his statement, and its 2014 that this man is arrested. And you would appreciate that once this man was arrested, he would have been coming to court from 2014, and of course Mr Allen would have seen him coming to court so that is why he was not asked to point out anybody, because his evidence would have no value to assist you in identifying the person. So, I don't want you to speculate on who Mr. Allen might have pointed out. It can't help you. Nobody. The only person whose evidence can assist you with the identification of the person who stabbed Mr. Davy is Mr. Robert Cleghorn."

[66] Based on these directions, the jury should not have been in any doubt that the evidence pointed to Mr Cleghorn as the only witness to have identified the applicant as the assailant. For these reasons ground iii fails.

Ground iv: the learned trial judge failed to adequately direct the jury on the issues of inconsistencies and discrepancies which resulted in the jury failing to appreciate the effect of these on the credibility of the witnesses.

Summary of submissions

For the applicant

[67] Mr Robinson submitted that the learned judge gave general directions on credibility and some examples of inconsistencies and discrepancies in the evidence but failed to direct the jury on how to treat with unexplained inconsistencies and discrepancies. Counsel argued that several material inconsistencies and discrepancies required careful analysis as they went to the root of the Crown's case. These included whether Mr Cleghorn, who gave a statement 14 years later, had witnessed the incident, and that whilst there were two witnesses to fact, one had a malicious intent.

[68] Counsel submitted that the learned judge ought to have indicated to the jury what evidence amounted to a discrepancy rather than simply direct them to determine whether aspects of the evidence could be regarded as such. One such instance, counsel referenced, was where the learned judge stated at page 239, line 25- page 240, lines 1-7:

> "Remember Mr. Cleghorn too, Robert Cleghorn told you that he did not see Mr. Warren hold on to his brother at any time. Detective Allen said when he came on the scene, he saw a man holding another man in the front of his shirt. And you have to decide whether you find that this is a discrepancy, this one I am now going to give you is for you to decide."

[69] It was unsatisfactory, counsel argued, to direct the jury that it was either "a matter for them to decide" or "those are some discrepancies to remember to deal with". **Morris Cargill v R** [2016] JMCA Crim 6, para. [30], **R v Flett** (1943) 2 DLR 656, **Vernaldo Graham v R** (2017) JMCA Crim 30, para. [104], and **R v Hugh Allen and Danny Palmer** (1988) 25 JLR 32 were cited in support of those submissions.

For the Crown

[70] Counsel for the Crown argued that the learned judge's treatment spanned over 10 pages, and she not only gave careful directions on how to treat with the inconsistencies and discrepancies generally and specifically, in the context of the case, but also highlighted the main inconsistencies and discrepancies. This was illustrated by how the learned judge dealt with the discrepancies about the size of the crowd at page 240, lines 8-25 of the transcript; whether the assailant was holding on to the deceased at pages 239 to 240; and in relation to the "bath" at page 234, lines 16-25. The treatment, counsel submitted, was in line with the guidance given in **Demone Austin et al v R** [2017] JMCA Crim 32.

Discussion

[71] We have already pointed to the guidance, in **R v Carletto Linton**, regarding the duty of the trial judge as regards conflicts in the evidence of witnesses and the absence

of any need to comb through the evidence for every instance of inconsistency or discrepancy, provided examples are given and the jury reminded of the major ones (**Albert Edmondson v R**). It is then for the jury to decide whether the witness is discredited (see, for example, **Vernaldo Graham v R**).

[72] In addition to the extracts, we referred to earlier, the following directions, at pages 229 – 231 of the transcript, are also relevant as the learned judge not only focused the jury's mind on the importance of assessing the materiality of inconsistencies and discrepancies but also the effect of a previous inconsistent statement (the latter according with guidance in **Steven Grant v R** [2010] JMCA Crim 77):

> "Now the inconsistencies or contradictions may be slight or serious, or to put it another way, they may be material or immaterial. If they are slight or immaterial, you the jury, may think that they do not really affect the credibility of the witness concerned. On the other hand, if they are serious, or material, you may say that because of them, it would not be safe to believe the witness on that point, or at all. It is a matter for you to say, in examining the evidence, whether there are any such inconsistencies, and if so, whether they are slight or serious, and you will apply the principles as I have described to you.
>
> In considering inconsistencies also, you need to take into account the witness' level of intelligence and his or her ability to put accurately into words what he or she has seen, and you may assess also the powers of observation that the witness may have, and any defect.
>
> Now, where a witness has made a previous statement inconsistent with his evidence before you, the previous statement, whether it was sworn or unsworn, does not constitute evidence on which you can act, unless the witness has admitted that what he or she has said on a previous occasion was the truth. However, if what was said previously conflicts with the witness' sworn evidence before you, you are entitled to take into account that conflict, having regard to any explanation the witness offers for the inconsistency, for the purpose of deciding whether the evidence of the witness ought to be regarded as unreliable either generally or on the

> particular point. And I must point out to you that you are free to accept all of what a witness says, some of what a witness says, or none of what a witness says, depending on your view of the witness' credibility.
>
> Now, I am going to remind you of some of these inconsistencies, and if there are any others that you recall that I do not mention, you are to treat with them the same way, and some of these inconsistencies Madam Foreman and your members, let me say to you, are really omissions. Things that they are telling you today were not in their statement, and you can apply the same principles in looking at what they omitted from their statement to say whether you see it as slight or serious, and how it affects your view of the witness' credibility."

[73] The learned judge then pointed out omissions from Mr Cleghorn's statement to the police and deposition at the preliminary enquiry. These included Mr Cleghorn's allegation that a policeman had told him there was no need to give a statement until the assailant was held; that the deceased had a "bath" on his head at the time of the incident; and that DSP Allen appeared as if he was going to give chase to the applicant then stopped. She reminded them of the omission from Ms Davy's statement that the applicant had denied knowing her or living in August Town, and that he had left the community after the incident. In the latter example, she told the jury they had to decide whether there was an inconsistency.

[74] Further, the learned judge reminded the jury of the explanations given by the witnesses. They were told to consider whether the explanations were satisfactory and instructed that if they were unsatisfactory there should be consideration whether to accept the evidence on that point or the evidence of the witnesses.

[75] We accept Mr Robinson's submission that the learned judge did not specifically tell the jury how to treat with unexplained inconsistencies in the evidence. The directions did not specifically explain to the jury that they should treat unexplained contradictions in the same manner as unsatisfactory explanations, that is, they could decide whether to accept

the witness' evidence on that point or at all. However, we do not agree that this resulted in any miscarriage of justice as the unexplained inconsistencies did not, in our view, relate to aspects of the evidence that went to the root of the prosecution's case. We refer, for example, to the omission that the deceased had carried a "bath" on his head, particularly in the absence of any contrary position.

[76] The learned judge's directions also included instructions as to conflicts in the evidence going to the credibility of the witnesses and reliability of their evidence, pointing out that for conflicts that may be material, the jury had to decide whether it would be safe to believe the witness on that point or at all. The jury were told that having been instructed as to what would amount to an inconsistency, they had to say whether aspects of the evidence amounted to same.

[77] The meaning of a discrepancy, how the jury should treat with discrepancies, and a reminder of evidence to which they should have specific regard, are set out at pages 236-238 of the transcript, as follows:

> "Now, apart from inconsistencies, Madam Foreman and your members, there are also what we describe as discrepancies. Now, discrepancies are differences in the evidence between one witness and the other. And, I have to direct you, that in most cases, differences in the evidence are to be expected.
>
> The occurrences of disparity in testimony recognises that in observation, recollection and expression, the ability of individuals vary, in other words, Madam Foreman and your members, if all seven of you could leave this building and go outside and witness an incident, but because you have different abilities to recollect, to observe and to express, you may have some variations in your reports about the incident. So that is to be expected…
>
> So, now, I am going to remind you of some of the discrepancies in the evidence…"

[78] The discrepancies highlighted include Ms Davy's evidence that upon being pointed out to the police, the applicant denied knowing her, but Corporal Calvin Allen's statement was that the applicant made no comment.

[79] We believe that where there was a clear discrepancy in the evidence, the learned judge could have characterised it as such. One such example was the difference in the evidence of Mr Cleghorn and DSP Allen as to whether the assailant held on to the deceased. However, there was no dereliction of duty on the learned judge's part in not doing so because conclusions of fact are ultimately for the jury. Further, the learned judge having pointed out evidence which could amount to discrepancies, the jury should have had no difficulty deciding what other evidence was discrepant.

[80] We are not persuaded by Mr Robinson's submission that there was a material discrepancy in the evidence about the presence or absence of a crowd. We note that the learned judge highlighted the difference in that evidence, but there was no need to specifically direct the jury on its magnitude or any likely effect of it. The evidence from DSP Allen alluded to a 'small' crowd of about eight people. Mr Cleghorn said there was "no crowd around [the deceased] when he was being stabbed". However, he also said "people were on the sidewalk [and it] was a busy Sunday morning" (pages 20-21 of the transcript). The jury were, therefore, entitled to find that there was no material conflict as, evidently, both eyewitnesses gave evidence that there were persons around. The more important question for the jury, we believe, would have been - whether the eyewitnesses were able to see what they said occurred - and we believe they were sufficiently alerted to that question by the learned judge's directions.

[81] There was also no obligation on the learned judge to have told the jury that there was any discrepancy about the "bath". That was a matter for them to decide based on the evidence they accepted. Mr Cleghorn's evidence was that after the deceased was stabbed to the back, he spun, and the "bath" fell from his head. DSP Allen's evidence was that when he came upon the scene, both men were facing each other, and he did not observe the deceased with anything. On that evidence, the jury were entitled to find that

by the time DSP Allen got to the scene the "bath" had already fallen from the deceased's head.

[82] Having examined the purported inconsistent and discrepant evidence, we found no instance where the learned judge's failure to refer to an aspect of the evidence as an inconsistency or discrepancy was prejudicial to the applicant and fatal to the conviction. The jury were adequately directed on what would amount to inconsistencies and discrepancies, and significant examples were given. The learned judge also made it plain to the jury that it was for them to say whether any conflict was profound and satisfactorily explained. She also instructed them on the effect of contradictions in the evidence on a witness's credibility and the reliability of his evidence. As regards discrepancies, she also told them that they were entitled to accept the evidence of either witness on a particular point and reject another witness' evidence on the same point if they found one witness to be more reliable than the other. Additionally, the jury were told that they were at liberty to accept or reject any evidence they did not find proven and reliable.

[83] Whether any difference in the evidence of witnesses amounted to an inconsistency or discrepancy was a finding the jury were entitled to make having been instructed on the meaning of inconsistencies and discrepancies, given examples of evidence which could be in conflict, and told that conflicts in the evidence go to the witness's credibility and reliability of the evidence. These instructions should have made them sufficiently aware that it was for them to decide what, if any, evidence was conflicting and analyse the effect of any such differences. There is no requirement in law for the learned trial judge to go beyond the standard directions. Accordingly, her directions to the jury were not inadequate.

[84] For those reasons, the conviction cannot be impeached on this ground.

Ground ii: the learned trial judge allowed prejudicial hearsay evidence without giving the jury any direction on how to deal with this hearsay evidence

Summary of submissions

For the applicant

[85] Mr Robinson submitted that the evidence from DSP Allen that, "based on information gathered [he] needed to find a gentleman by the name of Nell [and] …[he] went there to locate the person who it was said stabbed Horatio", introduced prejudicial hearsay evidence that the applicant was a murder suspect in circumstances where the informant remained unknown and gave no evidence. The prejudice was not cured by the learned judge's summation since it would have already been conveyed to the jury that persons who remained unidentified and gave no evidence at the trial had told DSP Allen that the applicant stabbed the deceased. The prejudicial statement would have also provided support for Mr Cleghorn's evidence which was being disputed. This rendered the conviction unsafe. Counsel referred to cases including **Norman Holmes v R** [2010] JMCA Crim 19 and **Delroy Hopson v R** (1994) 45 WIR 307, as being supportive of those submissions.

For the Crown

[86] Counsel for the Crown posited that even though DSP Allen's statement might be deemed hearsay, no prejudice was occasioned to the applicant as it was not among the critical issues joined in the trial. Furthermore, it had no bearing on the jury's findings because of the learned judge's narrowing of the issues for determination, the general warning on hearsay evidence, and the totality of directions which were given to the jury. Counsel relied on **Dal Moulton v R** [2021] JMCA Crim 14.

[87] **Delroy Hopson v R** and **Norman Holmes v R** were distinguished on the basis that unlike those cases, Mr Cleghorn was not under attack when he made the identification of the applicant, and that it was not challenged that he spoke to the police

before giving a statement. Furthermore, the applicant himself stated that he had heard about him being 'fingered' in the murder.

Discussion

[88] We can make short shrift of the impugned statement. No witness was called by the prosecution as to the source of the information. DSP Allen's evidence was that he did not know the applicant prior to the incident, and the other eyewitness, Mr Cleghorn, gave no written statement to the police prior to the arrest. In these circumstances, the hearsay statement of DSP Allen amounted to inadmissible hearsay and was of no probative value.

[89] The question arises, however, whether the hearsay evidence caused any undue prejudice to the applicant, thereby resulting in the conviction being unsafe. To resolve this issue, we cannot avoid examining the circumstances surrounding the arrest, the applicant's assertions about the murder, and his related conduct.

[90] DSP Allen had nothing to do with the arrest of the applicant nor was the arrest directly related to the impugned hearsay statement. When his search of the community bore no fruit, DSP Allen documented details of the stabbing incident as witnessed by him in the station diary, and he wrote a statement. He had no recollection of issuing any warrant of arrest. Further, he gave no evidence supporting the applicant's identification, and the jury were directed that his evidence could not support the identification.

[91] The applicant was taken into custody based on the information received from a person who was called as a witness in the trial. The evidence of Corporal Calvin Allen was that the applicant was taken into custody based on a report he received from Ms Davy, the sister of the deceased and former neighbour of the applicant, on 17 June 2014. This was 14 years after the commission of the murder. Corporal Allen gave evidence that after the applicant was pointed out to him, he told the applicant that Ms Davy had reported that he stabbed and killed her brother, Horatio, in August Town, on 3 September 2000, and he made no statement. Corporal Allen then escorted him to the Waterford Police

Station. Corporal Allen said he had no prior knowledge that the applicant was wanted by the police.

[92] Ms Davy, having been called as a witness, corroborated Corporal Allen's evidence about the source and nature of the report about the applicant. She knew of the killing, that the applicant was implicated, and made a report to the police because she wanted him arrested. The applicant was no stranger to her, as he had been her neighbour for five years, and she would see him every day until he left the community shortly after the killing.

[93] Detective Inspector Radcliffe Levy gave evidence that, acting on the instructions of Deputy Superintendent of Police Winston Hunt (then crime officer for the Saint Andrew Central Division), he visited the lock-up at Halfway Tree Police Station, and spoke with the applicant. He told him of the allegations against him and cautioned him. The applicant stated under caution, "Officer, a long time dis ting a bother me". Detective Inspector Levy, thereafter, commenced investigations into the killing including securing statements from Mr Cleghorn and DSP Allen; retrieving relevant information from the station diary, leading to the murder charge; and conducting a Q&A interview with the applicant.

[94] Further, Mr Cleghorn and the applicant were known to each other, as the applicant himself stated. This included having been in a dispute with Mr Cleghorn and others. The applicant also stated that he was aware that he was suspected of committing the murder, such that he even took repeated steps to possibly ventilate the issue at the police station.

[95] This fact pattern, in our view, does not support the defence's view that the inadmissible hearsay evidence caused undue prejudice to the applicant.

[96] The instant case can be distinguished from those relied on by the applicant, in which the conviction was quashed because of prejudicial inadmissible hearsay. The arrest and trial of the appellants in those cases were predicated on the inadmissible hearsay evidence given by the arresting or investigating officer.

[97] **Delroy Hopson v R** concerned a conviction for murder based on evidence that a police officer was given information by the victim of a shooting who subsequently died. The Judicial Committee of the Privy Council concluded that the evidence was hearsay, highly prejudicial and wholly inadmissible. This was not surprising as the information that the officer received from the victim was tantamount to a dying declaration about which the legal requirements had not been satisfied.

[98] In **Norman Holmes v R**, a police officer reported that she was held up by robbers who were not known to her but whom she identified some weeks later at an identification parade. The arresting officer gave evidence that "acting on information" she went to a location where she saw the applicant "who fit the description of [the] suspect". She also said that she went in search of the applicant based on "certain information" and took him into custody. None of the informants were called as witnesses at the trial. The appellant's appeal against conviction was quashed on the basis that the arresting officer's evidence was inadmissible hearsay which "carried absolutely no probative value and could have had no effect other than prejudice". The court characterised the evidence at paras. [30] - [37] of the judgment, thus:

> "In our view, the evidence given by Detective Corporal Jennings in this case (which passed completely without comment by the judge either at the time it was given or in his summing up) clearly falls into the same category, with the result that it was, as Mr Harrison contended, hearsay and entirely inadmissible. It could have had no other effect than to convey the impression that information had been received by her from some unnamed and unknown source or sources that the applicant was the person who had held up the complainant at gunpoint on the night of 1 November 2007 in Central Plaza. It accordingly carried absolutely no probative value and could have had no effect other than prejudice, which the judge made no attempt whatsoever to dispel or mitigate in his summing up..."

[99] The only thing in common with **Gregory Johnson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 53/1994, judgment delivered 3 June 1996, is the long period between the incident and the taking of eyewitness statements. The sole eyewitness, in that case, did not give a statement to the police until 10 months after the appellant had been arrested (19 months after the murder). Prior to that he had seen the appellant only on a few occasions, including on the day of the incident. The investigating officer's evidence was that he had begun the investigation based on "a report". Two days after the incident, he obtained a warrant for the arrest of the appellant. This court allowed an appeal against conviction, having concluded that the officer's evidence was inadmissible hearsay, and of no probative value, which "must have conveyed to the jury that the appellant had been identified by a person or persons other than [the sole eyewitness] as the murderer". The court determined that the summation was no cure for the prejudicial effect of such evidence.

[100] Similar circumstances led to a successful appeal in **Brian Russell v R** [2024] JMCA Crim 11. The prosecution led no evidence as to the source of the "information", which was acted on, nor did any witness account for how the officer obtained the "information" that resulted in the arrest. This court found that "[oblique] mentioning [of] the hearsay evidence [by] the learned trial judge did not address its deficient nature, or its effect on the prosecution's case and its effect on the applicant's defence".

[101] The common thread in those cases is that the evidence tended to show that the appellants were arrested and prosecuted based on information from unidentified sources, and that the inadmissible hearsay evidence was highly prejudicial.

[102] The situation in **Dal Moulton v R** stands in stark contrast. There, the appeal was dismissed on the basis that the inadmissible hearsay evidence caused no prejudice to the applicant. It matters not, as Mr Robinson urged, that the trial was by judge alone. The same principles on inadmissible hearsay are applicable.

[103] The brief facts, in **Dal Moulton v R,** are that the arresting officer and the investigating officer both gave hearsay evidence in relation to the circumstances under which Mr Moulton was arrested and placed on an identification parade, but the aspect of the case directly relevant to the instant case pertains only to the actions of the arresting officer. He was on patrol and stopped a car in which Mr Moulton and another man were travelling. The arresting officer was then "told something", because of which he arrested the men and took them to the police station. The complaint, on appeal, was that the evidence, about being "told something", constituted inadmissible hearsay which had a prejudicial effect on the judge's mind as it would have given the impression that Mr Moulton was being sought by the police and that there was a reason for his arrest. This was significant, it was argued, because the complainant did not know the assailant prior to the commission of the crime.

[104] This court concluded at paras. [83] – [85] of the judgment that:

> "The evidence of the arresting officer that he had made enquiries and was told something, as result of which he took the applicant into custody, clearly offended the hearsay rule. It had no probative value. [I]n cross-examination, the arresting officer said he had no knowledge as to whether the applicant had been wanted by the police, he was just given instructions and all he did was to take the applicant into custody. Furthermore, the applicant gave evidence on his case that he was told by the officer who took him and his cousin into custody, that they were being taken into custody based on the instructions of the superintendent of police at the Lucea Police Station, who wanted to see them. He also said that the investigator had told him that he was going to be charged for murder, and that it was after he was placed on an identification parade that he knew that the matter involved a shooting.
>
> ……[but] there was no prejudice to the [applicant]…. [A]s… neither of the officers' statements could have given the impression that the applicant had been identified as the perpetrator by anyone not called as a witness."

[105] Returning to the instant case, the learned judge did not address the issue of whether the impugned evidence of DSP Allen was inadmissible hearsay and prejudicial to the applicant, or how the jury should treat it. However, unlike **Delroy Hopson v R**, where the prejudicial effect was a real danger, it was not here a material consideration.

[106] In **Delroy Hopson v R,** at page 311 of the reported judgment, their Lordships commented on the likely effect of the inadmissible hearsay evidence on the jury in this way:

> "[The inadmissible hearsay evidence] could only be understood as implying that the victim had named the appellant as his attacker. …The foreman of the jury must surely have had this implication in mind when he asked the judge why the jury could not be told what the victim had said. The judge's reply, including the words 'suffice it to say that the next day he got a warrant for the [appellant]' left it open to the jury to conclude that the statement of the victim to the corporal could be added to the evidence of [the two eye-witnesses] identifying the appellant as the murderer…"

[107] The words used by the learned judge, in the instant case, would not have likely had a similar effect since she sought to caution the jury by focusing their attention on discrete elements in the evidence of Mr Cleghorn and DSP Allen in relation to identification. At pages 256-257 of the transcript, she said:

> "Madam foreman and your members, you will no doubt appreciate that as you are examining the information from what the Prosecution has said, you will no doubt recognize that the major issue is who did the stabbing. So, the major issue in the case are two-fold: identification and credibility. And I want to say to you, Madam foreman and your members, that the most important witness, in relation to who did the stabbing is Mr Robert Cleghorn, because you will appreciate that he is the only witness who has come and said, is this man, 'Nell' stab my brother..."

[108] She also said at pages 263-264:

> "So, I don't want you to speculate on who Mr Allen might have pointed out. It can't help you. Nobody. The only person whose evidence can assist you with identification of the person who stabbed Mr Davy is Mr Robert Cleghorn."

[109] After that the learned judge gave the jury the **Turnbull** warning (**R v Turnbull** [1976] 3 All ER 549) and assisted them in analysing the identification evidence, in the context of the **Turnbull** guidelines.

[110] Having been so instructed, it should have been quite clear to the jury that DSP Allen's evidence had nothing to do with the identification of the applicant. Neither could his evidence have supported Mr Cleghorn's identification of the applicant as the murderer or provide consistency or credibility to the prosecution's case in that regard. Therefore, although the learned judge's directions fell short, having omitted to give specific directions in relation to the inadmissible hearsay evidence from DSP Allen, and to tell the jury in express terms to disregard it, this was ameliorated by the specific directions to the jury on the limits to DSP Allen's evidence and the contrasted value of Mr Cleghorn's.

[111] In these circumstances, the absence of a specific direction was not fatal to the safety of the conviction since the inadmissible hearsay was not prejudicial to the applicant, nor can it be said that an actual miscarriage of justice occurred (see section 14(1) Judicature (Appellate Jurisdiction) Act. See also **Stafford and Carter v The State** (1998) 53 WIR 417 pages 422 to 423) in which the Privy Council, citing **Woolmington v Director of Public Prosecutions** [1935] AC 462 at page 482, states the threshold test to be applied where the court has misdirected itself in material respects).

[112] For those reasons ground ii fails.

[113] In its totality, we found nothing in the conduct of the trial to make it unfair to the applicant or otherwise result in a miscarriage of justice. Accordingly, there is no merit in the grounds of appeal on which the applicant sought to challenge his conviction.

Ground v: The sentence is manifestly excessive

Summary of submissions

For the applicant

[114] Mr Robinson took no issue with a starting point of 15 years, as indicated by the learned judge, or the highlighted mitigating factors and the account of time spent on pre-sentence remand by the applicant. He, however, faulted the sentence imposed because the learned judge did not indicate how she arrived at it, including the basis on which to impose a life sentence rather than a determinate sentence (fixed term of years). It was also submitted that the learned judge erred in concluding that the absence of remorse was an aggravating factor, resulting in an increase to the starting point. Rather, counsel argued, remorse should be treated only as a mitigating factor, in keeping with the guidance in **Bernard Ballentyne v R** [2017] JMCA Crim 23, and the Sentencing Guidelines for use by Judges of the Supreme Court and Parish Courts, December 2017 ('the Sentencing Guidelines'). By contrast, the aggravating factors identified by the learning judge relate to ingredients that are inherent in the offence and were, therefore, not appropriate for use in computing the sentence.

[115] Counsel submitted that those errors resulted in a manifestly excessive sentence. This court was urged to substitute the life sentence with a determinate sentence and a parole ineligibility of 10 years. Counsel relied on multiple cases including **Meisha Clement v R** [2016] JMCA Crim 26.

For the Crown

[116] Counsel for the Crown had a different take on the treatment of remorse by the learned judge, pointing out that it was never mentioned as one of the aggravating factors and appeared to have been given little weight, if any. The Crown, however, conceded that the learned judge was not specific as to how she arrived at the sentence, particularly the parole ineligibility period of 25 years, nor did she show the deduction for time spent. Notwithstanding, the sentence was within the normal range and obviated the need for

this court's interference. We were referred to **R v Kenneth John Ball** (1952) 35 CR App R 164.

Discussion

[117] This court is authorised to substitute a sentence for that imposed by a sentencing judge where it considers that either the sentencing judge has erred in principle or otherwise has misdirected himself or herself, thereby resulting in the imposition of a sentence that is manifestly excessive or inadequate. See section 14(3) of the Judicature (Appellate) Jurisdiction Act for the legislative basis of this principle. See also the general approach to arriving at an appropriate sentence outlined in **Meisha Clement v R**, and **Daniel Roulston v R** [2018] JMCA Crim 20. Our point of departure is, therefore, to examine the learned judge's sentencing approach for any significant deviation from the authorised approach.

[118] The learned judge began her sentencing remarks by considering the classical principles and relevant factors including the likelihood of rehabilitation, the gravity of the offence, the applicant's blameworthiness, and whether he had taken responsibility for the offence. It was in relation to these considerations that remorse was mentioned. This is what she said at page 326, lines 23-25 to page 327, lines 1-8 of the transcript:

> "**I have to look at whether you took any degree of responsibility for the offence to which you have been found guilty**, although your attorney has said you have issues, although it is your right and it is your right to maintain your innocence, I don't know, so I am not going to make too much of that, but **one of the factors that the court considers in passing sentence is whether any remorse has been expressed by the offender for the conduct of what took place**." (Emphasis added)

At pages 330, lines 16-25 to 331, lines 1-3, she remarked further:

> "So, can you be rehabilitated? Well, I would expect so. I can't say I know that you can, because you have not really expressed anything to the court except to say you have not accepted the jury's verdict You have accepted [sic] – that may

> be a starting point for your rehabilitation that you did accept what the jury has decided. But **whether or not you can be rehabilitated, I don't know, because the first thing one has to do to be rehabilitated is to accept that one he has done something wrong and make that turn away from that type of behaviour.** I am sure you can be rehabilitated. You are not a habitual offender…" (Emphasis added)

[119] We agree with Mr Robinson that the absence of remorse is not generally regarded as an aggravating factor (see Sentencing Guideline 8.1). There is also authority from this court (**Bernard Ballentyne v R)** which emphasises that "the absence of remorse as an aggravating factor should be approached with caution", since, as in the instant case, an accused has a right to maintain his innocence. The presence of remorse, on the other hand, may be of mitigating value (see Sentencing Guideline 9.2).

[120] From the learned judge's sentencing remarks, she clearly recognised the right of the applicant to maintain his innocence even in the face of a conviction, and said she was not going to make too much of the issue about the absence of remorse. However, she went on to state, among other things, that that was a factor that the court considers in passing sentence. Therefore, it is not clear what, if any, weight was given to the absence of remorse in deciding on the 10-year addition to the starting point for aggravating factors.

[121] The learned judge correctly remarked that the sentence should be proportionate to the offence, and that she had a discretion whether to impose a life sentence or a fixed term of years. She then embarked on an analysis of a starting point, the aggravating factors and the mitigating circumstances. The learned judge considered features and circumstances of the offence, characterised as "aggravating factors". These were, particularly, an absence of any motive for the killing, an absence of any provocative act by the deceased, and the way in which the deceased was killed, including being stabbed from behind while carrying out domestic errands. Reference was also made to evidence that the applicant and deceased were neighbours.

[122] In addressing Mr Robinson's complaint that the learned judge considered irrelevant factors, we make the point that the learned judge was entitled to consider the circumstances of the offence, such as the manner of the killing, in deciding what were the aggravating factors. This would include the multiple stabs inflicted on the deceased, and the fact that he received two stabs from behind. What she could not properly characterise as aggravating factors were the ingredients inherent in the offence such as the absence of any provocative act.

[123] Having completed the said analysis, the learned judge concluded that the applicant was capable of rehabilitation and imposed a life sentence. This is what she said, at page 331, lines 4-22 of the transcript:

> "**You are not a habitual offender**. There is nothing here to suggest that you are and I think that against the fact that it is murder, if it is a serious matter (sic) and, **sir, what I will do is to say that you are imprisoned for life, but I am going to recommend 25 years before you will be considered for parole**…" (Emphasis added)

[124] This approach was incorrect. The imposition of a life sentence, without stating the reasons for doing so, is a wrong application of the law. Under section 3(1)(b) of the Offences Against the Person Act (the 'OAPA'), there is discretion to impose a life sentence or an alternative fixed term sentence for murders occurring in circumstances captured under section 2(2) of the OAPA (hereinafter referred to as a 'section 2(2) murder'). A person who is convicted of a section 2(2) murder, such as the type of murder in the instant case, is subject to a maximum sentence of life imprisonment or a fixed term, not being less than 15 years' imprisonment. Where a life sentence is imposed, there must be a stipulated minimum pre-parole period of not less than 15 years. In cases where a fixed term is imposed, the sentencing judge is required to specify a minimum pre-parole period of not less than 10 years.

[125] As the imposition of a life sentence is discretionary for a section 2(2) murder, the justice of the situation requires that the sentencing judge expressly give reasons for

preferring the harsher sentence of life imprisonment to the imposition of a fixed term. To similar effect, McDonald-Bishop JA (as she then was), writing for this court in the recent case of **Roland Bronstorph v R** [2024] JMCA Crim 29, at para. [81], said that, "in keeping with established sentencing practice and procedure, sentencing judges [should] demonstrate in their sentencing remarks that they have considered the relevant law, sentencing principles and guidelines applicable to the particular offence and indicate the reasons for electing to impose the sentence they feel is more appropriate in the circumstances". It has also come to be generally accepted, as indicated by Major J, in the Canadian case of **R v R (D)** [1996] 2 S C R 291, that appellate courts do not intervene "where the reasons demonstrate that the trial judge has considered the important issues in a case, or where the record clearly reveals the trial judge's reasons, or where the evidence is such that no reasons are necessary…".

[126] We make the further observation, as was done in **Ronald Bronstorph v R**, that there is no statutory guidance in this jurisdiction as to what principles should guide a sentencing judge in the exercise of the discretion whether to impose a life sentence or a fixed term of years, and as far as we are aware there is no decision from this court prior to **Ronald Bronstorph v R**, which cogently lays out the applicable principles at common law. Nonetheless, we believe that the learned judge was not entirely bereft of guidance, considering that in **Meisha Clement v R**, which was decided prior to the trial in the instant case, Morrison P, at para. [41] of the judgment, emphasised the need for sentencing judges to give reasons when deciding on an appropriate sentence.

[127] On a proper interpretation of section 3(1)(b) of the OAPA, and a review of the decided cases, we agree with Mr Robinson that the learned judge erred in not giving reasons for electing to impose a life sentence, as opposed to a fixed term, in the exercise of her discretion. She also erred in not expressly considering any relevant principle or circumstance which would have assisted her in making the choice, contrary to the guidance at para. [62] in **Meisha Clement v R -** that the judge must determine the appropriate sentence range to be applied when a range of sentencing options is available,

guided by statute and/or judicial precedent (see also **Ronald Bronstorph v R**). The learned judge, therefore, erred in principle, and on that basis we are entitled to consider afresh the sentencing options.

[128] In **Ronald Bronstorph v R**, citing **R v Wilkinson** [2009] EWCA Crim 1925, McDonald-Bishop JA observes, at para. [46] of the judgment, that life imprisonment is to be imposed only for section 2(2) murders that are deemed, "the worst examples of the offence likely to be encountered in practice". Some of the applicable principles for consideration in making that assessment, as outlined at paras. [74]-[81] of the judgment, are: "… (i) the gravity of the offence before the court; (ii) the likelihood of further offending; and (iii) the gravity of further offending should such occur" (see para. [74](3)(c)). The learned judge of appeal also states that the sentencing judge must consider, "[the] crucial and overarching question" as to "whether the gravity or serious nature of the offence which was committed and/or the dangerousness of the defendant, warrants placing the defendant under the jurisdiction of the state for the remainder of his or her life through the imposition of a life sentence (see **AG's Ref No 32** and **R v Chapman**)".

[129] At para. [75] of the said judgment, McDonald-Bishop JA went on to illustrate circumstances which would ordinarily warrant the imposition of a life sentence for section 2(2) murders, as distinct from murders falling under section 2(1) of the OAPA. These include whether there was a substantial degree of pre-meditation and planning; the involvement of prolonged suffering or torture; murder relating to membership in a criminal gang; the offender being assessed as likely to commit further offences of serious violence, therefore posing a substantial danger to the community; and an offender with multiple previous convictions for serious offences of violence.

[130] In the instant case, we have considered that the deceased was stabbed multiple times, initially from behind, with no opportunity to defend himself. He was then left for dead. This was a heinous and odious act, but the circumstances of the case did not disclose a substantial degree of pre-meditation, or planning. Neither did the social enquiry

and antecedent reports indicate a high risk of the applicant re-offending. The applicant, at the time of commission of the offence, was 24 years old and 42 years old at the time of sentencing. At 42 years old, he had no previous convictions or recorded history of violent behaviour, and his community report was good. His only infraction is this offence. The learned trial judge herself noted that he was "capable of successful rehabilitation". Her only indication of the reason for imposing life imprisonment was that "it was a serious matter". When measured against the profile of murders in the society, this case does not stack up against "the worst examples of the offence likely to be encountered in practice". In the circumstances, the imposition of a life sentence, without expressed reasons, seems disproportionate. A lengthy term of years would be more appropriate.

[131] Consistent with the sentencing approach outlined in **Meisha Clement v R** [2016] JMCA Crim 26 and refined in **Daniel Roulston v R [2018] JMCA Crim 20**, for arriving at an appropriate sentence, we now seek to identify the range of fixed-term sentences which is usually given in circumstances like the instant case. **Roland Bronstorph v R,** referencing decided cases, has indicated, at para. [107], a range of 18 to 35 years for cases of section 2(2) murders involving one count, by stabbing. In that case, where the stabbing arose from an altercation between the appellant and the deceased, the sentence of life imprisonment, imposed by the sentencing judge, was set aside and substituted therefor was a sentence of 27 years and nine months' imprisonment with parole ineligibility of 15 years.

[132] In this case, the stabbing did not occur during an altercation. The commission of the offence bears the hallmark of being premeditated, but there is no evidence of substantial premeditation and planning. The deceased was stabbed several times, including to his back when he was unarmed and defenceless with a bath pan on his head. He died from multiple stab wounds . Therefore, the injuries were more serious than those inflicted on the victim in **Ronald Bronstorph v R**. In all the circumstances, we would commence by reference to a range of 18 – 35 years. Given those aggravating features, a starting point of 32 years is appropriate. The starting point is then increased to reflect

the aggravating effect of the commission of the offence in broad daylight in a public thoroughfare at which members of the public were present, the attempt to avoid apprehension by fleeing the community for a prolonged period, and the prevalence of murders in the society. These push the starting point to the top of the range.

[133] A downward adjustment is then made for previous good character and the absence of any previous conviction. The applicant's age is not a relevant mitigating factor as we believe that 24 years was old enough for him not to be excused for behavioural excesses. The offence he committed is all too common among Jamaican youth.

[134] Having balanced the aggravating and mitigating factors, we found them to be evenly balanced, resulting in a fixed-term sentence of 32 years' imprisonment. Having considered the relevant principles of sentencing, we conclude that a sentence of 32 years' imprisonment is proportionate, having balanced the need for retribution and deterrence against the applicant's potential for successful rehabilitation.

[135] However, a credit of one year and three months (as determined by the learned judge), for time spent on pre-sentence remand, must then be applied to the sentence of 32 years' imprisonment (in keeping with the principles outlined in relevant authorities including **Romeo Dacosta Hall v The Queen** [2011] CCJ 6 (AJ) and **Callachand and Another v The State** [2009] 4LRC 777). In the result, a sentence of 30 years and nine months' imprisonment should be imposed.

[136] Having arrived at the sentence, the next step is to determine the parole ineligibility period. As indicated earlier, when a fixed term is imposed for section 2(2) murders, the minimum pre-parole period is 10 years (section 3(1C) of the OAPA). At para. [117] of **Ronald Bronstorph v R**, this court reiterated that both the sentence and the minimum pre-parole period (minimum term) "fall within the sentencing process and are to be determined by having regard to the same principles of sentencing".

[137] The range of minimum pre-parole periods for a single count of murder from multiple stab wounds, indicated in previously decided cases, including **Ronald Bronstorph v R** (see para. [128]), is 15 – 25 years with a starting point of 20 years.

[138] In all the circumstances, we are of the view that given the extent of the injuries in this case and the circumstances of the commission of the offence, a starting point of 21 years is justified. The aggravating and mitigating factors, having been found to be evenly balanced, the minimum term before eligibility for parole is 21 years. This minimum term we consider to be proportionate when all the objects of sentencing are balanced. The applicant is, however, entitled to a credit for the one year and three months spent in pre-sentence custody, which results in a minimum term before eligibility for parole of 19 years and nine months. Mr Robinson had recommended 10 years, but the circumstances of this case warrant the higher parole ineligibility period we have arrived at. The appropriate sentence would, therefore, be a determinate sentence of 30 years and nine months' imprisonment with a minimum term of 19 years and nine months before eligibility for parole.

[139] Accordingly, the sentence imposed by the learned judge was manifestly excessive and should be set aside. In the result, we grant the application for leave to appeal the sentence imposed by the learned and treat the hearing of the application as the hearing of the appeal.

[140] The orders of the court are as follows:

1. The application for leave to appeal conviction is refused.

2. The application for leave to appeal sentence is granted and the hearing of the application is treated as the hearing of the appeal against sentence.

3. The appeal against sentence is allowed.

4. The sentence of life imprisonment with the stipulation that the applicant serves 23 years and nine months' imprisonment before being eligible for parole is set aside and substituted therefor is a sentence of 30 years and nine months' imprisonment at hard labour with the stipulation that he serves 19 years and nine months' imprisonment before being eligible for parole (after applying a credit of one year and three months for time spent in pre-sentence custody).

5. The sentence is to be reckoned as having commenced on 11 January 2019, the date on which it was imposed.