[2022] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

BEFORE: **THE HON MR JUSTICE BROOKS P**
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN-BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 66/2015

TUSSAN WHYNE v R

Mrs Melrose Reid instructed by Melrose G Reid & Associates for the appellant

Mrs Kimberley Dell-Williams and Dwayne Green for the Crown

19 April 2021 & 29 July 2022

EDWARDS JA

Introduction

[1] On 23 July 2015, the appellant was convicted for the offence of murder. This followed a trial which took place over several days in the Home Circuit Court, in the parish of Kingston, before D Fraser J (as he then was) ('the learned judge'), who sat with a jury. On 18 September 2015, the learned judge sentenced the appellant to life imprisonment, with a stipulation that he serves 20 years before becoming eligible for parole.

[2] On 28 September 2015, the appellant filed a notice of application for leave to appeal both conviction and sentence. The application was considered by a single judge of this court, and on 9 January 2019, it was refused. On 19 April 2021, we

heard the appellant's renewed application for leave to appeal his conviction and sentence and made the following orders:

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

2. The application for leave to appeal against sentence is granted.

3. The hearing of the application in respect of sentence is treated as the hearing of the appeal.

4. The appeal against sentence is allowed, and the sentence imposed by the learned sentencing judge is varied so that the sentence of imprisonment for life is affirmed, but the period that the offender is to serve before becoming eligible for parole is reduced from 20 years to 19 years by virtue of redress for the breach of his Constitutional Rights to a fair trial within a reasonable time.

5. The sentence is to be reckoned as having commenced on 18 September 2015."

Background to the case

A. The prosecution's case at trial

[3] The case against the appellant was that, on 28 October 2007, in the parish of Kingston, he murdered Webster Bailey, otherwise known as "Bald Head" and "Bigga", in a brazen attack in the vicinity of the Hannah Town Police Station situated in Kingston.

[4] The incident was witnessed by Sergeant Wayne Spence, who was stationed at that police station on the day in question. The sergeant gave evidence that he was inside the police station, when at about 12:05 pm, he heard an explosion sounding like a gunshot. He ran out to the main gate of the station along Hannah Street, and saw the deceased, a man known to him before as "Bald Head", running towards the station from the direction of Rose Lane. The appellant, who he had

also known before, was chasing the deceased with a pistol in his hand. He saw the appellant point the gun in the direction of the deceased and he heard a loud explosion. He then heard another loud explosion and saw flashes of fire coming from the pistol the appellant had in his hand. The sergeant took cover against the column of the police station's gate. He then saw the appellant turn around and run back in the direction of Rose Lane.

[5] At this time, according to the witness, the appellant was about 25 yards away from him. He could identify the appellant as he saw his face and "from his head straight down to his feet". The appellant had nothing on his head and there was no obstruction between them. When he first saw him, the appellant was about 40 yards away. The appellant was running towards him and he could see him from his face down clearly. He saw the appellant's face for about eight to 10 seconds. He had last seen the appellant the day before the incident when the appellant had come to the station. The incident took place on a bright and sunny day. During the entire incident, he never lost sight of the appellant.

[6] He had known the appellant for over four years prior, from the community of Hannah Town, where he had worked since 1999. Over that period, he would see the appellant at least four times per week. He had spoken with the appellant several times, knew where he lived and knew some of his relatives.

[7] At the time the appellant had turned and ran away, he saw that the deceased had collapsed on the compound of the police station, at the secondary entrance to the station. He said he was about 15 to 20 yards away from where the deceased collapsed. Blood was all over him. The deceased was a taxi operator he had known for a year and a half prior, who had also lived in Hannah Town at the time. He called the Hannah Town Patrol Unit for help. Constables Carridice, Afflick and Burford came to the scene. The Sergeant's evidence was that, whilst the officers were lifting the deceased to place him into a service vehicle, the deceased uttered the words "Help me, Tussan just shot me".

[8] Under cross-examination, the Sergeant agreed that 40 yards, the distance from which he said he first saw the appellant, was 120 feet, and that there was a vast difference between 120 feet and "beyond the courtroom" which he had said was the relevant distance (the judge noted that the courtroom was 45 feet).

[9] The body of the deceased was identified by five witnesses, in addition to Sergeant Spence. These were Constable Carridice, who assisted in transporting the deceased from the crime scene to the Kingston Public Hospital; Sergeant Dawes, the investigating officer; Cassandra Thomas, the girlfriend of the deceased; Laura Brown, the mother of the deceased; and Dr Prasad Kadiyala, the doctor who performed the post-mortem examination.

[10] Constable Carridice gave evidence that, having received a radio message from Sergeant Spence he attended on the crime scene and assisted to place the body of the deceased in the service vehicle and transport it to the Kingston Public Hospital ('KPH'). A doctor came to check on the body, and then Madden's Funeral Home came, took the body from the vehicle and took it to the area of the hospital morgue. He could not recall if he saw any other officers at KPH, and he did not see Sergeant Dawes there.

[11] Sergeant James Dawes gave evidence that, on 28 October 2007, he attended on the Hannah Town Police Station and cordoned off a section of Hanna Street in the vicinity of Rose Lane. He summoned Scene of Crime personnel, spoke with Sergeant Spence and then proceeded to KPH where he observed the body of a male with what appeared to be gunshot wounds. He spoke with Constable Carridice who identified the body to him as the person he had assisted from the crime scene at "Rose Lane along Hannah Street" to the hospital. He later returned to the KPH morgue with Corporal Marner (the forensic crime investigator and photographer) and Detective Sergeant McGill, to whom he showed the body identified to him earlier by Constable Carridice. Those officers processed the body and took photographs and prints. He then returned to the Hannah Town Police

Station and took a statement from Sergeant Spence. At that time, the deceased was known only as "'Bald Head".

[12] On 30 October 2007, Sergeant Dawes took Laura Brown and Cassandra Thomas to Madden's Funeral Home where they both identified the same body that had been identified to him previously by Constable Carridice on 28 October 2007. Ms Brown identified the body as that of her son, and Ms Thomas identified the body as that of her boyfriend, known to both women as Webster Bailey. Statements were then collected from the ladies by Corporal Stuart on the instructions of Sergeant Dawes. These statements were agreed by counsel on both sides, and with the permission of the learned judge, were edited and read into evidence.

[13] On 31 October 2007, Sergeant Dawes interviewed the appellant at the Denham Town Police Station, at which time he told the appellant that he was investigating the murder of Webster Bailey. The appellant allegedly said to him "Bald head woman know sey a nuh mi kill her husband".

[14] On 6 December 2007, Sergeant Dawes attended the post-mortem examination of Webster Bailey conducted by Dr Kadiyala, at the Spanish Town Hospital Morgue, in the presence of the deceased's mother, Laura Brown. Before that date, Sergeant Dawes had last seen the body of Webster Bailey on 30 October 2007, at the Madden's Funeral Home, where Laura Brown and Cassandra Thomas were also present. Sergeant Dawes' evidence was that it was the same body that had been pointed out to him by Constable Carridice at the KPH morgue.

[15] Cassandra Thomas, in her statement, said that in 2007 she was living in Hannah Town with her boyfriend Webster. On 28 October 2007, she heard explosions sounding like gunshots. She ran to the main road on Hannah Street where she saw a crowd, and then rushed to the Hannah Town Police Station where she saw Webster Bailey suffering from wounds. She saw a police officer take him

into a police vehicle. She subsequently went to Madden's Funeral Home with Webster's mother where she saw Webster's body clad in a white merino and mutli-coloured short pants lying on its back.

[16] Laura Brown, in her statement, indicated that she visited the Madden's Funeral Home on 30 October 2007, where she saw the body of her son Webster Bailey on its back clad in a mutli-coloured shorts and white merino.

[17] Dr Kadiyala conducted the post-mortem examination of the deceased on 6 December 2007 and gave evidence that he examined the body of the deceased, identified to him by Laura Brown as her son Webster Bailey. Sergeant Dawes was also present. The body had two gunshot wounds, one on the right forearm through to the chest and the other in the lower part of the chest. He noted the cause of death as "gunshot wound to right forearm involving chest". The absence of gunpowder at the point of entry of that wound, he said, indicated that the deceased was beyond 2 feet from the firearm at the time it was discharged.

B. The defence

[18] The appellant gave sworn evidence at the trial denying that he committed the crime and that he was even in the vicinity. On the day of the incident, he said, he was at his family's yard on Slipe Pen Road, with his granny and uncle, where he would go every Sunday to eat dinner. He went there at 8:30 am that day, and watched Jet Lee movies with his uncle until 3:30 pm when he left the house.

[19] Ms Jennifer Simpson, a friend of the appellant's family, who lived on Hannah Street and knew the appellant since he was born, gave evidence for the defence. She said that on the day of the incident, she was standing by a light post at the corner of Hannah Street and West Street when "Bald Head"' came and spoke to her and another lady for about five to ten minutes. "Bald Head" walked off in the direction of Rose Lane, and then moments later she heard what sounded like gunshots and saw a man running behind "Bald Head" on Hannah Street. "Bald

Head" ran across the street towards the police station. She heard another explosion. "Bald Head" ran and fell at the station gate. She deliberately tried not to look at the man's face. She only saw his back, but she knew that the person she saw chasing "Bald Head" was not the appellant. She had never seen the man before. She went to the station garage and saw an officer standing in the guardroom beyond a mesh. Five minutes later a police jeep came and parked beside "Bald Head". Officers came out to assist "Bald Head". She recognised Constable Carridice. She did not see Sergeant Spence whom she had known before. She was standing close to the jeep and leaning on the 'jeep back'. Constable Carridice said "Him dead already, just put him in the jeep". She did not hear "Bald Head" say anything, before taking his last gasp.

The grounds of appeal

[20] At the commencement of the hearing of the notice of application for leave to appeal, counsel for the appellant, Mrs Melrose Reid, sought and was granted permission to abandon the original grounds of appeal filed and to argue the following supplemental grounds:

> "GROUND 1. That the Learned Trial Judge (LTJ), should have taken the Supreme power granted to him, to dismiss the case on the unreasonable delay of eight years before the matter was brought to trial.
>
> GROUND 2. The LTJ failed to adequately and sufficiently address the issue of identification/recognition of the accused, resulting in the jury convicting him.
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> GROUND 3. The LTJ did not carefully and systematically address the issue of 'the nexus' in light of the evidence resulting in a miscarriage of justice.
>
> SENTENCE
>
> GROUND 4. The LTJ failed to have given additional discount for the long delay in his trial, which delay ***breached his constitutional right*** to a reasonable and fair trial and at a reasonable time.

> GROUND 5. The LTJ was wrong when he stated that if the accused maintains his innocence, it amounts to an aggravating fact." (Emphasis as in original)

[21] Counsel subsequently withdrew ground 2, having conceded that she had nothing averse to argue in respect of that ground.

[22] The remaining grounds of appeal raised the following issues:

(i) Whether the learned judge should have dismissed the case due to the unreasonable delay of eight years prior to trial (ground 1);

(ii) Whether the learned judge failed to carefully and systematically address the issue of 'the nexus' in light of the evidence (ground 3);

(iii) Whether the learned judge ought to have given an additional discount for the long delay which amounted to a breach of his constitutional right to a reasonable and fair trial at a reasonable time; (ground 4) and

(iv) Whether the learned trial judge was wrong in considering as an aggravating fact that the appellant had maintained his innocence (ground 5).

For convenience, issues (i) and (iii) will be dealt with together and discussed after issues (ii) and (iv).

Whether the learned judge failed to carefully and systematically address the issue of 'the nexus' in light of the evidence (ground 3)

A. <u>The appellant's submissions</u>

[23] The appellant complained that the evidence of the witnesses did not sufficiently provide the nexus between the person named as the deceased on the

indictment, and the person who the witnesses alleged that the appellant had murdered. In this regard, it was argued that Sergeant Spence who had known the deceased before and was the only alleged eyewitness to the shooting, was not the person who identified the body of the deceased, as ought to have been done. The officers who did identify the body, it was argued, did not know the deceased before and did not know his name. Counsel pointed to a grave inconsistency between the evidence of Sergeant Dawes and that of Constable Carridice. Sergeant Dawes' evidence that Constable Carridice had pointed out the body of the deceased to him at the hospital as the man who was killed on the scene was not supported by Constable Carridice, whose evidence was that he had not seen Sergeant Dawes at the hospital.

[24] It was contended that this discrepancy was a crucial flaw in the case that went to the root of the case regarding the identity of the person it was alleged the appellant had murdered, which the learned judge failed to properly address, even though he did comment on it. This flaw, it was contended, was not cured by the fact that the mother of the deceased had identified him to the doctor who conducted the post-mortem examination.

[25] The authorities of **R v Florence Bish** (1978) 16 JLR 106 and **Jason Brown and Ricardo Lawrence v R** [2017] JMCA Crim 20 were relied on in support of these submissions.

[26] As a consequence, counsel submitted that the conviction should be overturned, and, in the interests of justice and based on **Reid v R** (1978) 27 WIR 254, **Au Pui-Kuen v The Attorney General of Hong Kong** [1980] AC 351, and **Nicholls v R** [2000] All ER (D) 2305, no re-trial should be ordered.

B. The Crown's submissions

[27] Counsel for the Crown, Mrs Dell-Williams, submitted that the 'Bish nexus', which requires no rigid formula, was sufficiently satisfied by the evidence elicited

by the prosecution from Sergeant Spence, Constable Carridice, Sergeant Dawes, Cassandra Thomas, Laura Brown, and Dr S N Prasad Kadiyala.

[28] Further, the Crown argued, the learned judge had acknowledged the issue, and rightly highlighted the importance of the 'Bish nexus', directed that the issue was dependent on the credibility of the witnesses, and pointed out to the jury the discrepancies between the evidence of Sergeant Dawes and Sergeant Spence.

C. Analysis and disposal of issue (ii)

[29] It is well established that, on a charge of murder, the prosecution must establish, by evidence, that the person the accused is alleged to have killed is actually the deceased named on the indictment (see **R v Florence Bish** and **Jason Brown and Ricardo Lawrence v R**, at paragraph [61]). In other words, there must be evidence of a nexus between the deceased named on the indictment and the unlawful actions of the accused.

[30] We agreed with the Crown, that, notwithstanding the discrepancy between the evidence of Sergeant Spence and Sergeant Dawes, there was sufficient evidence of a nexus provided in the evidence before the jury "from which they could have drawn a reasonable and inescapable inference" that the person who Sergeant Spence witnessed being chased and shot by the appellant, and who Dr Prasad performed the autopsy on, was the same person named in the indictment as the deceased, Webster Bailey, otherwise called "Bald Head" and "Bigga".

[31] That nexus is to be found in the evidence of Sergeant Spence, Constable Carridice, Sergeant Dawes, Cassandra Thomas, Laura Brown and Dr Kadiyala, and also the evidence of Jennifer Simpson, the appellant's own witness. The evidence of those witnesses, in addition, to the circumstantial evidence, supports the conclusion that the named deceased was indeed the same person shot and killed at the material time outlined in the indictment.

[32] Sergeant Spence had known the deceased for over one and a half years before the incident, and identified him at the scene as a taxi-operator known to him only as "Bald Head" and "Bigga" who lived in Hannah Town. The injured man was taken from the Hannah Town Police Station to KPH by three officers including Constable Carridice, the only one of the three who gave evidence. Constable Carridice, who did not know the deceased before, admittedly, gave no evidence of the body being identified to him by anyone, and denied seeing Sergeant Dawes at the hospital. However, the significant part of his evidence is that the body that he transported to KPH, on 28 October 2007, was the said body he helped to retrieve from the Hannah Town Police Station gate on that day.

[33] Sergeant Dawes' evidence was that he visited the KPH morgue on 28 October 2007, shortly after he had cordoned off the crime scene at the Hannah Town Police Station. At that time, he took a statement from Constable Carridice, at which time Constable Carridice identified the body to him as being "the said person he had assisted from Rose Lane along Hannah Street to the hospital". Admittedly, he gave no evidence of anyone else identifying the body to him at that time. He returned to the crime scene and subsequently went back to the morgue with Corporal Marner and Detective Sergeant McGill, from the Major Investigation Task Force, to whom he identified the same body, as identified to him earlier by Constable Carridice, for processing and the taking of photos. He, thereafter, went back to the Hannah Town Police Station, where he took a statement from Sergeant Spence. At that time, the deceased was still only known as "Bald Head". However, on 30 October 2007, Sergeant Dawes took Laura Brown and Cassandra Thomas to the Madden's Funeral Home, where he showed them the same body Sergeant Dawes asserted had been identified to him by Constable Carridice. Ms Brown identified the body as that of her son Webster Bailey, and Ms Thomas identified the body as that of her boyfriend Webster Bailey, otherwise called Dwight. The statements of both women, which were edited and read into evidence as permitted

by the trial judge pursuant to section 31(c) of the Evidence Act, substantiated same.

[34] Dr Kadiyala gave evidence that the body on which he conducted a post-mortem examination, on 6 December 2007 at the Spanish Town Hospital Morgue, was identified to him by Laura Brown as Webster Bailey, in the presence of Sergeant Dawes, to whom he gave the bullet retrieved from the deceased's body. Sergeant Dawes also gave evidence that he was present at the post-mortem, at which time Ms Brown again identified the same body to Dr Kadiyala.

[35] Ms Thomas' evidence created a further link between the deceased man Sergeant Spence identified as "Bald Head" and her deceased boyfriend Webster Bailey, as she stated that on the said day of 28 October 2007, around midday, she heard explosions sounding like gunshots, and when she ran to the Hannah Town Main Road, she saw Webster suffering from wounds. Thereafter police officers took Webster into a police vehicle. Ms Thomas' evidence that she lived with Webster in Hannah Town, having recently moved from Torrington Park, also substantiated Sergeant Spence's evidence that the man who he recognised as "Bald Head" had recently moved from Torrington Park to Hannah Town.

[36] Finally, the evidence of Ms Jennifer Simpson, who was a friend of the appellant and his family, and who also lived on Hannah Street and knew "Bald Head", was that on 28 October 2007, she spoke to "Bald Head" at the corner of Hannah Street and West Street, he walked off in the direction of Rose Lane and moments later she heard what sounded like gunshots. She saw a man chasing "Bald Head", heard another explosion and then saw "Bald Head" fall at the Hannah Town Police Station's gate. She went to the "station gate" where she witnessed officers, including Constable Carridice (who she knew as "Dice"), place "Bald Head" into a police jeep. This evidence in fact supports the evidence of Sergeant Spence, that the person he saw being chased and wounded by the appellant on 28 October 2007, on Hannah Street in the vicinity of the Hannah Town Police Station, was in

fact, a man known as "Bald Head". It also supports the reasonable conclusion that the man known by the alias "Bald Head" was one and the same person identified by Cassandra Thomas as her boyfriend Webster Bailey who she saw wounded at the Hannah Town Police Station's gate on the said day; the same person also identified by Laura Brown as her son Webster Bailey and on whom the post-mortem was performed.

[37] Based on the foregoing, and notwithstanding the discrepancy and deficiency in the evidence, there was more than sufficient evidence from which the jury could have "reasonably and inescapably" found that the person Sergeant Spence witnessed being chased and wounded by the appellant was one and the same person named in the indictment as the deceased Webster Bailey, otherwise known as "Bald Head".

[38] The learned judge properly left the discrepancy between the evidence of Sergeant Dawes and Constable Carridice to the jury. He rightfully pointed out the discrepancy, the significance of it in relation to the need for the deceased to be properly identified, and pointed the jury to the other evidence in the case which could provide the nexus between the deceased and the accused.

[39] In dealing with the discrepancies between the evidence of Sergeant Spence and Constable Carridice, the learned judge stated the following, at pages 307 to 309 of the transcript:

> "The second area I have [sic] wish to highlight on the Prosecution's case is an example of discrepancy arising between the evidence of Constable Corridice [sic] and Sergeant Dawes concerning the point of the body of the deceased at the K.P.H., hospital morgue. You might recall Constable Corridice [sic] said he didn't see Sergeant Dawes at the hospital when he was asked by the Prosecution. Sergeant Dawes came to give evidence. He said he saw Constable Corridice [sic] at the hospital, actually pointed out the body to him and he gave him a statement. Then Sergeant Dawes said that the body had been pointed out to him by Constable Corridice [sic]; was subsequently identified as

> Webster Bailey by Laura Brown, mother of the deceased and also by Cassandra Thomas, girlfriend of the deceased. Then Laura Brown has subsequently pointed out the same body to the doctor at the post mortem later on 6th of December, 2012.
>
> Now, it is a matter for you what you make of the difference between Constable Corridice [sic] and Sergeant Dawes. Was it simply an error in memory that Constable Corridice [sic] did not remember that he saw Sergeant Dawes or is it that Sergeant Dawes was lying or mistaken when he said Constable Corridice [sic] pointed out the body of this man to him? The pointing out of Constable Corridice [sic] of this man testified by Sergeant Dawes is significant, as the Prosecution needed to prove that the deceased man named in the indictment was actually the person who was shot and killed.
>
> Sergeant Spence did not give the correct name of this man, only 'Bald Head'. Constable Corridice [sic] didn't know him at all. He speaks of an accused man. It is important for explaining the chain of identification of the body following from Sergeant Spence, Constable Corridice [sic], Laura Brown, Cassandra Thomas and through to Dr. Prasad Kadiyala. It is a matter for you to make the determination whether or not you – as I said is it simply an error; Corridice [sic] may have forgotten that he did not [sic] point out the body, especially, while bearing in mind that Sergeant Dawes said Corridice [sic] pointed the body [sic] at the time and also gave a Witness Statement as to what had happened."

[40] The resolution of discrepancies is a matter for the fact finder, in this case the jury, unless it is that the evidence is so slender that no jury properly directed could find on that evidence that an essential element of the crime was substantiated. At pages 304 to 306, the learned judge properly explained to the jury how to assess the evidence to determine if there were discrepancies and how to treat with them, including that they did not necessarily mean that the witness or witnesses were not telling the truth, that the passage of time may have played a role in the discrepancies, and that it was a matter for them to decide how and to what extent the discrepancies affected the case. Simply put, the issue was one of credibility, the resolution of which rested with them.

[41] In the case of **Jason Brown and Ricardo Lawrence v R**, the appellants, who had been convicted of murder, argued on appeal that the body of the deceased named in the indictment was not proven to be the same body recovered from the crime scene. This court rejected the argument on the basis that the eyewitness to the incident had known the deceased prior, by both his proper name and his alias, and that the body had been identified to an officer on the scene by the deceased's common law wife and son. Although the common law wife and son did not give evidence in court, the officer again saw the same body that he saw at the crime scene, at the post-mortem examination, which the court noted, was the same crime scene described by the eyewitness to the incident, and the same body seen by both witnesses. The court concluded, at paragraph [66], that:

> "There was sufficiently cogent evidence before the jury, once they accepted it, that the body that was seen by Detective Corporal Roache, both at the scene of the crime and at the post-mortem examination, and which was identified to the pathologist by Nicola Laing, was one and the same. That body was Errol Miller as established on the evidence of Sabene Forrest. That body was examined by the pathologist who found that the cause of death was due to multiple gunshot wounds. There was enough evidence placed before the jury from which they could have drawn a reasonable and inescapable inference and therefore ultimately found, as a fact, that the body of the person on whom the post-mortem examination was conducted, and who was declared to have died from gunshot injuries, was Errol Miller, the person named in the indictment. The nexus was properly established to prove that Errol Miller died at the hands of the appellant."

[42] The case of **R v Florence Bish** is distinguishable from this case. In that case, Florence Bish was convicted of killing a man on the basis of the evidence of two witnesses who claimed to have seen her take a knife from her bosom and stab the man in the left breast at the intersection of Princess Street and Barry Street, following her boisterously accusing the man of certain things. The witnesses had not known either the victim or attacker before. The appellant, in her defence, had given evidence that three men had attempted to rob her, one of the men thumped

her in her face and tried to tear off her blouse to get at her money which he knew to be there. She "chucked'" the man away but was unable to say if the knife she had had in her hand had caught him. The court, in quashing the conviction, reasoned that, although there was admittedly an encounter with a man who was wounded, the prosecution had failed to prove that the man the appellant had wounded had died as a result of those injuries, and was the same man named in the indictment on whom the doctor had performed the post-mortem examination. There was no evidence that the man wounded at the said intersection was taken to KPH, and, although a police witness did view a man with a wound to the chest at KPH and later saw the dead body of the same man at the morgue, he had not known the man before, and was not present at the post-mortem to connect the man named as the same man he had seen before. There was no further evidence linking the deceased named in the indictment to the appellant or from which it could have been inferred that he was the same man she had wounded.

[43] In this case, there was more than sufficient cogent evidence, as outlined above, from which it could have been inferred that the man named in the indictment was the same man that Sergeant Spence witnessed being wounded by the appellant on Hannah Street. Ground 3, therefore, had no merit.

Whether the learned trial judge was wrong in considering as an aggravating fact that the appellant had maintained his innocence (ground 5)

A. The appellant's submissions

[44] At the hearing, counsel for the appellant submitted that the sentence imposed was excessive. Counsel complained that the learned judge ought not to have considered the fact that the appellant had maintained his innocence as an aggravating factor, and asked that the minimum mandatory be applied.

B. The Crown's submissions

[45] Counsel for the Crown argued that the learned ludge did not in fact do so, and prayed in aid the judge's statement, at page 398 of the transcript, that he would not hold it against the appellant. Otherwise, it was submitted, the learned judge made no error in the sentencing exercise and properly weighed the mitigating and aggravating factors, giving full credit for time served.

C. Analysis and disposal of issue (iv)

[46] It is clear from the transcript that the learned judge did not in fact do what counsel for the appellant alleged that he did.

[47] At page 398, the learned judge said this:

> "Now, it is stated in the Social Enquiry Report that you continued to profess your innocence. And certainly, that's a view which your mother and members of the community, spoken to by the Probation Officer, holds. **It is a factor which is treated as an aggravating factor in a number of cases**, **but I am going to accede to the submissions of your lawyer, I am not going to hold that against you** **in the context in which it has been said**. I think it can be addressed in the way in which the community generally sees you, which is a factor in your favour which I will get to." (Emphasis added)

[48] The foregoing passage demonstrates that the learned judge, in fact, considered it a mitigating factor going to the appellant's credit. This factor, along with the others that the learned judge considered as mitigating, persuaded him to deduct two years, in addition to the eight years he deducted for time spent on pre-trial remand, off the pre-parole period, having started at a period of 30 years.

[49] This ground, therefore, was without merit.

Whether the learned judge should have dismissed the case due to the unreasonable delay of eight years prior to trial (ground 1); and

Whether the learned judge ought to have given an additional discount for the long delay which amounted to a breach of his constitutional right to a reasonable and fair trial at a reasonable time (ground 4).

A. The appellant's submissions

[50] Counsel for the appellant argued that, notwithstanding that it was not raised before the learned judge at trial, the appellant's constitutional right to a fair trial and to a trial within a reasonable time (under section 16(1) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica ('the Charter')) were breached due to the delay of eight years in having the matter brought to trial, and that as a consequence, the learned judge ought to have dismissed or stayed the case.

[51] It was submitted that the learned judge, having seen the indictment and that the incident had occurred from 2007, ought to have enquired into the delay, considered the rights of the appellant, and concluded that if the trial was not done "speedily to avoid injustice and prejudice to the accused", the case should be dismissed or stayed.

[52] The delay in this case, it was argued, was through no fault of the appellant, and the court had an 'inescapable duty', as the guardian of the Constitution, to ensure that the accused had a fair trial within a reasonable time. **Connelly v DPP** (1964) 48 Cr App Rep 183, at pages 268 to 289, was relied on in this regard. It was submitted that, in the context of the right to a fair hearing under our Constitution, an accused "will be prejudiced when his trial is drawn out for an inordinately long time". Relying on the case of **DPP v Nasralla** [1967] 2 AC 238, counsel submitted that the appellant need not prove that he had suffered injury and prejudice from the delay in order to seek redress.

[53] In this case, it was submitted, an eight-year delay before trial was unreasonable. Relying on dicta from **Dyer (Procurator Fiscal, Linlithgow) v Watson and another; K v Lord Advocate** [2002] UKPC D1, which counsel said

was instructive, she argued that the accused ought not to suffer, and that the administrative and judicial authorities are not relieved of their duty to secure the reasonable time guarantee because of the inadequacies of the justice system, whether it results from underfunding or shortage of judges, prosecutors, court rooms, jurors, or because of the corona virus pandemic or any other national crisis.

[54] As it related to the failure of the appellant to raise this issue in the court below, counsel submitted that this court has the unlimited jurisdiction, based on section 9 and 13 of the Judicature (Appellate Jurisdiction) Act, in matters of appeal or leave to appeal, to give directions in cases brought before the court, and on any ground of appeal involving a point of law, notwithstanding it was not raised in the court below.

[55] It was also argued that, notwithstanding the findings in **Flowers v The Queen** [2000] UKPC 41, which required the accused to raise the issue in the court below, the realities of our court system are such that this was not possible. Counsel submitted that our system does not allow for a pre-trial hearing in respect of a point on an application in respect of delay, and such an application must be made to the constitutional court which occasions further delay.

[56] In respect of how the court should measure whether delay was reasonable, it was submitted that, since the Constitution does not identify what is a reasonable time, resort must be had to the case law. The test, it was said, is subjective. To show that the delay was unreasonable in this case, counsel cited the cases of **Herbert Bell v Director of Public Prosecutions and Another** [1985] AC 937, **Sooriamurthy Darmalingun v The State** [2000] 1 WLR 2303, **Flowers v The Queen**, and **R v Thanabalasingham** 2020 SCC 18, all cases in which it was said the delay was deemed to be inordinately long and a breach of the reasonable time guarantee, based on delays of 32 months, five and a half years, approximately six years, and 45 months, respectively.

[57] Nonetheless, it was argued that the framework and test of reasonableness laid down in **R v Morin** [1992] 1 SCR 771, which required that the accused establish the length and reason for delay, whether there can be a waiver, and whether any prejudice was caused to the accused, was 'pro-prosecution', and was in fact overturned in material respects by **R v Jordan** 2016 SCC 27; [2016] 1 SCR 631, which, counsel said, established fixed time limits within which a trial must be held. Counsel asked this court, notwithstanding that the case of **R v Jordan** is merely persuasive, to adopt a similar approach and dismiss the case, based on the principles expressed in that case. It was not enough, she submitted, for the court to deduct time based on pre-trial remand as in **Callachand and Another v State** [2008] UKPC 49, **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ) and **Meisha Clement v R** [2016] JMCA Crim 26, to give additional credit for a constitutional breach as in **Curtis Grey v R** [2019] JMCA Crim 6 and **Techla Simpson v R** [2019] JMCA Crim 37, or to give non-custodial consideration as in **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26.

[58] Counsel, therefore, asked this court to overturn the appellant's conviction and to set time ceilings and guidelines for future proceedings.

[59] Further, and alternatively, in respect of sentence, Mrs Reid argued that the learned judge, notwithstanding that he discounted the appellant's sentence by the eight years he spent in custody, failed to grant an additional discount for the breach of his constitutional right to a fair trial within a reasonable time. Although, he also deducted another two years for mitigating factors, this, it was submitted, did not represent the delay. Counsel asked this court, if the conviction was not overturned, to reduce the appellant's sentence on account of the delay. The cases of **Curtis Grey v R** and **Techla Simpson v R** were relied on in this regard.

B. The Crown's submissions

[60] Counsel for the Crown took no issue with the appellant raising the constitutional point at this stage, notwithstanding that it was not raised in the court

below. Counsel, however, argued that the delay of almost eight years, which was admittedly long and not ideal, was due mostly to the appellant's own doing, and that it could not be reasonably said to have been due to any deliberate action on the part of the State. In this regard, although counsel noted that the reasons for the delay were numerous, and outlined circumstances to include Crown witnesses being absent and the appellant being brought to court late, she posited that, on an examination of the court's records, there were at least 27 occasions in the Circuit Court on which the matter was delayed because the appellant had either changed his representation or needed to have it settled.

[61] The cases of **Flowers v The Queen** and **Techla Simpson v R**, in which this court approved the former case, were also relied on as to the law and approach the court should take in assessing a complaint of this nature. The cases were also cited for the proposition that where the delay was not caused by something within the control of the State, it should be given less weight.

[62] In respect of the question of prejudice to the appellant, it was submitted that no prejudice was caused to the appellant, the learned trial judge having "deliberately and carefully" directed the jury on how to treat with the issue of the delay and potential prejudice to the appellant, and to resolve any such prejudice in the appellant's favour. His directions at pages 302 to 303 of the transcript were highlighted in this regard. It was argued further, that it could not be said that the defence was impaired, as the eyewitness to the incident was available and did in fact give evidence at trial. The appellant also gave sworn evidence and raised the issue of alibi in his defence. Further, it was submitted, no assertion was ever made that the defence was "impaired or embarrassed" due to the lapse in time.

[63] In respect of the sentencing, counsel posited that the learned trial judge acknowledged the delay, advised himself as to the law, and explicitly stated that he would discount the sentence by the full number of years the appellant had

spent in custody, which is the full length of time that elapsed before the matter was tried.

[64] Finally, counsel submitted that the court should not quash the conviction on account of delay, which, based on **Techla Simpson**, **Melanie Tapper v DPP** and **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72, is not the normal remedy for such a constitutional breach. Further, the appropriate remedy of a sentence reduction, it was contended, was already applied by the learned judge when he took account of the eight years the appellant had spent in custody.

C. Analysis and disposal of issues (i) and (iii)

[65] Section 16(1) of the Charter provides:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[66] The appellant alleged that his right to a fair trial within a reasonable time was breached due to the length of time it took for him to be brought to trial. The questions that arose for determination under this ground, therefore, were whether the appellant's right to a fair trial within a reasonable time was breached due to the delay, and whether that delay was such as to render it unfair to try the appellant at all.

[67] There is no dispute that this issue was not raised before the trial judge. However, the complaint before this court is that the learned trial judge, at the commencement of trial should have, on his own volition, and having seen the length of time that had passed since the appellant was charged, stayed or dismissed the case. Not having done so, it was said, the learned judge erred and this court ought to quash the conviction on that basis.

[68] It is well accepted that this court has jurisdiction to assess an issue raised as to a breach of an appellant's constitutional right arising from delay, and to grant an appropriate remedy, notwithstanding that the issue was not raised in the court below. Indeed, this court has on several occasions granted relief to appellants on account of a breach of the reasonable time guarantee, and an appellant need not bring separate proceedings in the Supreme Court (see **Evon Jack v R** [2021] JMCA Crim 31, at paragraph [44]; **Techla Simpson v R**, at paragraph [36]; and generally, Melanie **Tapper v DPP**).

[69] In this case, the offence was committed on 28 October 2007, the appellant was charged on 31 October 2007, and the trial took place between July and September of 2015. This amounts to a delay of approximately eight years.

[70] There is no gainsaying, and the respondent did not seek to challenge, that such a period was inordinately long. It could also hardly be said that such a period, on its face, was reasonable, in the context of the reasonable time guarantee in section 16 of the Charter. What then, would have been the duty of the learned trial judge in those circumstances, especially where the issue was not directly raised before him?

[71] The law is as set out in the case of **Attorney General's Reference (No 2)**, which was considered and approved by the Privy Council in **Melanie Tapper v DPP**. In cases of long delay, there is no duty on the trial judge to simply dismiss the case based on the mere passage of time. The duty of the trial judge is to ensure that the trial process is fair to the accused. What fairness dictates may differ based on the circumstances of each case. Undoubtedly, a trial judge must intervene or stop the case if it is apparent to him or her that the accused may not or cannot receive a fair trial. The judge must consider, whether in all the circumstances, despite the delay, it is possible for the accused to still get a fair trial. If any perceived unfairness can be cured by the exercise of the trial judge's

discretion, then a stay will not be appropriate (see **Attorney General's Reference (No 2),** at paragraph 13).

[72] There is also no duty on a trial judge to raise the issue of a breach of the constitutional rights of the accused on his or her own volition. This position was made clear by this court in **Julian Brown v R**, at paragraphs [83] to [84], in which the court applied the dicta of the Privy Council in **Melanie Tapper v DPP** in dealing with a similar complaint by that appellant. In **Melanie Tapper v DPP**, the Board considered the argument by counsel for the appellant that the Court of Appeal ought to have considered that the delay in the whole course of proceedings had breached the appellant's constitutional right, regardless of whether it had been relied on in argument by counsel. The Board declined to accept that there was any obligation on this court, "of its own motion, to extend the argument beyond that advanced by the experienced advocates representing the appellant" (paragraph 18). As was found in **Julian Brown v R**, we think that such reasoning is equally applicable to a trial judge. Indeed, an accused who perceives that his constitutional rights have been, are being, or are likely to be breached, may apply to the Supreme Court for redress following the procedure set out in the Civil Procedure Rules ('CPR'), pleading the matters required therein (see section 19 of the Charter, and Part 56 of the CPR). A trial judge before whom such an issue is raised, in circumstances of delay, would only be charged with addressing delay in the context of how such delay affects the fairness of the trial. *A fortiori*, in circumstances of delay where counsel has not raised such an issue, the trial judge's duty must also be limited to considering how any such delay will impact the fairness of the trial.

[73] The case of the **Attorney General's Reference (No 2)** involved a reference to the House of Lords from the English Court of Appeal on two points of law involving article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which is equivalent to our reasonable time guarantee in section 16 of the Charter (then set out in section 20 of the

Constitution). The point of law relevant to this case was whether "criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement…in circumstances where the accused cannot demonstrate any prejudice arising from the delay".

[74] The House of Lords found that that would not ordinarily be the case, and that the staying or dismissal of a case where there has been found to be a breach of the reasonable time guarantee, even where there has been egregious delay, is not automatic. Where circumstances of delay arise, a trial judge must be satisfied "that the prosecution had been guilty of serious delay such as to cause serious prejudice to the accused, to the point that no fair trial could be held", or that the actions of the authorities were such as to render any trial of the defendant unfair. In those circumstances, further proceedings would be an abuse of the Court's process and should be stayed (see **Attorney General's Reference (No 2)**, paragraph 17). The Law Lords made it clear, however, that the remedy rests on the fair trial guarantee and not on the reasonable time requirement.

[75] At paragraph 13 of the said case, the House of Lords in assessing the issue of delay, said the following:

> "It is accepted as 'axiomatic' 'that a person charged with a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all': *R v Horseferry Road Magistrates' Court, Ex p Bennett* [1994] 1 AC 42, 68. In such a case the court must stay the proceedings. But this will not be the appropriate course if the apprehended unfairness can be cured by exercise of the trial judge's discretion within the trial process: *Attorney General's Reference (No 1 of 1990)* [1992] QB 630."

[76] Even where a breach of the reasonable time guarantee is found by the court, the dismissal or staying of the case, or the quashing of conviction on appeal, will not be the ordinary remedy. In that regard, at paragraph 24, Lord Bingham opined:

> "If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."

[77] The House of Lords noted that there may be cases in which the delay may be of such a nature as to render it unfair that proceedings should continue, however, such cases would be exceptional and would be recognizable when they appear (see paragraph 25).

[78] These principles were accepted by the Privy Council in **Melanie Tapper v DPP** as the law applicable to Jamaica (see paragraph 28), and have been applied by this court in numerous decisions since the promulgation of the Charter, including the case of **Techla Simpson v R** which was relied on by both parties, and the recent decision of **Evon Jack v R**.

[79] These authorities make it clear that, in seeking to find an appropriate remedy, it is now well accepted that the staying or dismissal of the case, or the quashing of the conviction on appeal, is not the usual remedy. In **Melanie Tapper v DPP**, the Privy Council made it clear that the case of **Darmalingum**, that was relied on by counsel for the appellant in **Melanie Tapper v DPP** and in which the conviction was quashed, is an exceptional case, and that the law applicable to our jurisdiction is that stated in the case of **Attorney General's Reference (No 2)** and **Boolell v The State** [2006] UKPC 46. The Board opined, at paragraph 28:

> "…even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time."

[80] In **Attorney General's Reference (No 1 of 1990)** [1992] QB 630, which was applied by the House of Lords in **Attorney General's Reference (No 2)**, the English Court of Appeal opined, at pages 643 to 644, as follows:

> "**Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances**. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J. in *Jago v. District Court of New South Wales* (1989) 168 C.L.R. 23.
>
> In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases

> where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.
>
> In answer to the second question posed by the Attorney-General, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict.
>
> It follows from what we have said that in our judgment the decision of the judge to stay the proceedings in the instant case was wrong. The delay, such as it was, was not unjustifiable; the chances of prejudice were remote; the degree of potential prejudice was small; the powers of the judge and the trial process itself would have provided ample protection for the respondent; there was no danger of the trial being unfair; in any event the case was in no sense exceptional so as to justify the ruling." (Emphasis added)

[81] In the case of **Flowers v The Queen**, the Privy Council considered several factors which it found relevant in assessing whether an appellant's right had been breached. These include the length of the delay, the reason for the delay, the assertion of Charter rights by the appellant, and the prejudice to the appellant. A long period of delay, the Board said, would be "presumptively prejudicial" and ought to trigger an inquiry into the other factors.

[82] In the instant case, as was said before, the delay was inordinate. However, the mere passage of time by itself does not amount to a breach of the reasonable time guarantee. It must be shown that the appellant did not cause or contribute

to the delay. It must be attributable to the 'action or inaction' of the State, for delay not caused by the State cannot be laid at its feet (see **Melanie Tapper v DPP** at paragraphs 24 and 26, relying on **Taito v The Queen** [2002] UKPC 15, and **Attorney General's Reference (No 2 of 2002)**). The right of the appellant must be balanced against the "the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica" (see **Julian Brown v R** [2020] JMCA Crim 42 at paragraphs [88] and [89], relying on **Bell v The Director of Public Prosecutions** at page 953).

[83] The parties join issue as to the cause of the delay. Whilst counsel for the appellant simply asserted that the delay was due to no fault of the appellant, counsel for the Crown set out, in the Crown's submissions, detailed reasons for the delay in both the Resident's Magistrates Court ('RM Court') (as it then was) and the Circuit Court, which it was said showed that the delay was, in large part, due to the fault of the appellant and his counsel. The reasons set out accounting for the delay in the RM Court between November 2007 and October 2010 were various, and appeared to include the absence of witnesses, evidence and the investigating officer, as well as the absence of defence counsel. In the Circuit Court, between January 2011 when the matter first came on for trial, and July 2015, when the trial actually commenced, counsel for the Crown admitted that, on occasion, the delay was caused by witnesses for the Crown being absent, the accused being brought to court late, disclosure to new counsel, disclosure of outstanding documents and counsel for the appellant being involved in other matters. However, it was asserted that the main cause of the delay was the settling of representation and changing of counsel by the appellant, which it was said occasioned at least 27 adjournments.

[84] No affidavits were filed to support any of the assertions made in respect of the cause of the delay. However, counsel for the appellant did not appear to

challenge the assertions made by the Crown in this regard. The transcript discloses documentation from the Jamaica Constabulary Force (the Denham Town Police Station), in respect of the appellant, which includes notations as to the history of his remand and court visits in the RM Court between 29 November 2007, when the matter first came before it, and 6 October 2010. The notations accord with the Crown's submissions as it relates to the reasons for the delay in that court. The delay during that period appears to have been equally contributed to by both sides. Unfortunately, there is no evidence on record before this court to substantiate the reasons asserted for the delay in the Circuit Court.

[85] In cases of this nature, where an issue is raised as to delay, it is imperative that the parties put before the court evidence on which it may properly assess the cause of the delay. It bears repeating that the State will only be held to have breached an appellant's section 16 Charter right, if it is the cause of the unjustifiable delay (see **Julian Brown v R**, at paragraph [85]).

[86] We took the view that the delay was equally contributed to by both parties, and that the appellant's constitutional right to a fair trial, within a reasonable time, was breached to the extent of the State's culpability. The appellant would, therefore, be entitled to an appropriate remedy. However, we do not think the delay in the circumstances was such that rendered the trial unfair, as it is our considered view that the directions given by the trial judge were appropriate and sufficient to warn the jury of the risks attendant on the delay.

[87] The case was centred around the identification of the appellant by the eyewitness, Sergeant Spence, who was alleged to have known the appellant before. The appellant denied involvement and raised the issue of alibi. He called a witness in his defence who alleged that she had seen the deceased's attacker who was not the appellant. The case, therefore, would have turned on the issue of the reliability and credibility of the witnesses. There was no assertion by the appellant, then or before this court, that his defence had been hampered in any way. We

agreed with the Crown that it was not. The appellant gave evidence raising a defence of alibi, and although he did not call an alibi witness, he was able to call a witness in support of his case.

[88] Further, notwithstanding that the issue was not raised by the appellant's counsel, the learned judge acknowledged the delay, warned the members of the jury of the possible negative effect of that delay on the memories of the witnesses and on inconsistencies and discrepancies, and advised them that if they believed that the lapse in time had disadvantaged the appellant in his defence that the case should be resolved in his favour. He said, at pages 302 to 303:

> "Now, we are concerned with the event which took place in 2007, almost eight years ago. You should make allowance for the fact that with the passage of time, memories fade. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events which occurred almost eight years ago. We all know sometimes the passage of time may even play tricks on memories. You should also make allowances for the fact that, from the accused man's point of view, the longer time since the alleged incident, the more difficult it may be for him to answer it. You can only imagine what it may be like to have to answer questions about events which are said to have taken place almost eight years ago to appreciate the problems that may be caused by the delay. Even if you believe that the delay in the [sic] is understandable; if you should decide that because of this delay, the accused was placed at a real disadvantage in putting forward his case, you should take this into account in his favour when deciding whether the Prosecution has made you feel sure of his guilt.
>
> In most criminal trials, it is always possible to find inconsistencies and discrepancies in the evidence of the witnesses, especially when they -- as in this case – speak of events that took place long ago."

[89] The learned judge then explained to the jury what inconsistencies and discrepancies were, and how to treat with them in determining whether they were material or not. From a reading of the transcript, it was not demonstrated that any of the witnesses were so discredited, or that the appellant's defence was so

impaired by the delay, that the matter should have been withdrawn from the jury. There was more than enough evidence before the jury on which they could have found, if they believed the prosecution's witnesses, that the elements of the charge had been made out.

[90] There would have, therefore, been no basis upon which to find that the trial was unfair to the appellant or that he should not have been tried at all, and thus, no basis to find that the trial judge ought to have stayed or dismissed the case. Consequently, we found no basis upon which this court ought to quash the conviction.

[91] We did find, however, that as there was indeed a breach of the appellant's right to a fair trial within a reasonable time, an appropriate remedy was called for. The appropriate remedy, we found, was in the form of a reduction in sentence.

[92] In respect of sentencing, the learned judge followed the accepted principles of sentencing available at the time, chose an appropriate starting point of life imprisonment with the eligibility for parole after 30 years, and properly weighed the aggravating factors as against the mitigating factors. He deducted eight years for time spent on remand (which was a little more than the appellant actually spent in custody), and considered that the other mitigating factors, including that the appellant had had no previous convictions, was literate and gainfully employed, was 27 years old, had two young children, was viewed by his community positively, and was himself injured by gunfire in an unrelated incident, should result in the deduction of another two years.

[93] The learned judge did not specifically take into account the delay in the context of a constitutional breach. He clearly stated that the eight years he deducted from the sentence was made on the basis of the principles in **Callachand and Another v State** and **Romeo Da Costa Hall v The Queen**

that defendants should be given full credit for time spent in custody (see page 400 of transcript).

[94] We disagreed with the Crown that the credit for time spent on pre-trial remand appropriately addressed the issue of the delay, because time spent in pre-trial custody and redress for a breach of the right to a fair trial within a reasonable time are two discrete issues. The appellant was entitled to separate redress to vindicate the breach of his constitutional right.

Conclusion

[95] It was for these reasons that we made the orders outlined at paragraph [2] allowing the appeal against sentence, and in so doing reduced the period to be served, before eligibility for parole, from 20 years to 19 years.

[96] It was not necessary to mention all the other cases cited by counsel for the appellant, nor was it necessary or appropriate, in this case, to accede to her request that we set fixed time limits within which criminal trials must be held, as was done in the case of **R v Jordan**.