

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA  
THE HON MISS JUSTICE SIMMONS JA  
THE HON MR JUSTICE BROWN JA**

**SUPREME COURT CRIMINAL APPEAL NOS 33, 34 & 45/2018**

**ANDREW WILLIAMS**

**KIRK DRUMMOND v R**

**ONEIL SHAW**

**Lloyd McFarlane for Andrew Williams**

**Miss Venice Brown for Kirk Drummond**

**Mrs Melrose Reid for Oneil Shaw**

**Andre Wedderburn, Miss Dainty Davis and Kemar Setal for the Crown**

**26, 28, 29 June 2023 and 29 May 2026**

**Criminal Law – Murder – Illegal possession of firearm – Wounding with intent – Application for leave to appeal convictions and sentences – Inconsistencies in identification evidence – Credibility and reliability of witness – Duty of the judge in view of submission of no case to answer – The proof and use of previous inconsistent statements – Whether the right of the applicants to have their case tried within a reasonable time was breached – Whether breach amounted to a miscarriage of justice**

**BROWN JA**

**Introduction and background**

[1] The applicants were convicted, on 19 March 2018, before L Pusey J ('the learned judge') and a seven-member jury, on an indictment which charged them with two counts of murder (counts one and two), one count of illegal possession of firearm (count three) and one count of wounding with intent (count four), in the Circuit Court

Division of the Gun Court in Kingston. On 5 April 2018, the learned judge imposed sentences of life imprisonment on all three applicants on both counts of murder. In respect of count one, all the applicants were ordered to serve a minimum period of 15 years' imprisonment before becoming eligible for parole. In respect of count two, the periods of parole ineligibility varied: (i) Andrew Williams: 15 years and three months; (ii) Oneil Shaw: 20 years; and (iii) Kirk Drummond: 15 years and nine months. On counts four, each applicant was sentenced to 15 years' imprisonment. All the sentences were ordered to run concurrently.

[2] The applicants made separate applications for permission to appeal their convictions and sentences. A single judge of this court considered their applications and, on 20 April 2021, refused the applicants leave to appeal both their convictions and sentences. In further exercise of their right to apply for leave to appeal, the applicants now pursue that right before the court. However, none of the applicants filed any ground of appeal challenging their sentences.

[3] The charges arose out of a shooting incident on the sunny Sunday afternoon of 4 May 2008, at about 3:00 o'clock. Miss Gayon Curtis ('Miss Curtis'), the sole eyewitness for the prosecution, testified that she was standing at her gate, holding in her arms Regina Williams, her infant daughter, aged one year and three months. This was at a section of August Town in the parish of Saint Andrew known as Vietnam. Miss Curtis was standing there in the company of her two other daughters and two other adults. Walking on the roadway nearby was a man, later identified as Narado Brooks. It was during this time that gunshots were fired, killing the infant Regina Williams and Narado Brooks and seriously wounding Miss Curtis.

[4] At the close of the submissions, upon the concession of the Crown, we made the following orders in respect of Oneil Shaw:

- "I. The application for leave to appeal against conviction and sentence is granted. The hearing of the

application is treated as the hearing of the appeal. The appeal is allowed.

- II. The convictions are quashed and the sentences set aside. A judgment and verdict of acquittal is entered.”

At the time of making those orders we promised to put our reasons in writing in respect of Oneil Shaw and reserved our decision in relation to Andrew Williams and Kirk Drummond. Our reasons for making the foregoing orders, together with our reasoning and decision concerning Andrew Williams and Kirk Drummond appear below.

[5] We will first set out the case for the prosecution, which will be followed by a summary of the case for the defence.

A. Case for the prosecution

[6] According to Miss Curtis, in examination-in-chief, while she stood there, she observed four men walking towards her group, from the direction of the bus stop. When she first saw the men, they were about 40 feet away and did not appear to have anything in their hands. Reaching about half that distance (20 feet) from her, the men brandished firearms and fired upon her group. In her words, the men “rise up with guns”. After the gunshots, Miss Curtis found herself sitting on the ground with her infant daughter, who now had a hole in her neck, across her leg. Miss Curtis placed her daughter on the ground and tried, unsuccessfully, to stand. When she tried to stand there was pain in her legs. Lifting her skirt, Miss Curtis discovered that she had been shot in both legs.

[7] From that immobilised position on the ground, Miss Curtis saw Kirk Drummond, alias Leggie Murray, and Andrew Williams, otherwise called Andy, walking away from the scene in the direction of a factory. Oneil Shaw, also known as Skilly, and another man identified as Bucky Marshall, who was never apprehended, remained on the scene. Bucky Marshall told Oneil Shaw, using expletives, that they were not to leave any witnesses. When that was said, both men went to where Miss Curtis sat on the ground. Oneil Shaw pointed the firearm (a long gun with a small mouth) at her, and she heard a

clicking sound four times. However, no bullets came from the firearm. Following that failed attempt to inflict further injuries to Miss Curtis, Oneil Shaw and Bucky Marshall walked away from the scene in the direction from which they came (towards the bus stop).

[8] Miss Curtis testified further that while she was on the ground, she saw a guy (presumably 23-year-old Narado Brooks, an unemployed resident of August Town, the subject of the second count for murder) walking towards where she was, then he fell. She could not say if Narado Brooks had also been shot.

[9] Miss Curtis and her infant daughter were later taken to the University Hospital of the West Indies ('UHWI'). Miss Curtis was admitted for nine months, but her daughter was pronounced dead on their arrival at the UHWI.

[10] Miss Curtis testified that the three applicants were well-known to her before the date of the incident. The applicants all hailed from August Town, and she was acquainted with several of their relatives. Although she was unsure of the last time she had seen Andrew Williams before the incident, he was someone she would greet, and she usually saw him in the community at Ivis Corner or Vietnam. Miss Curtis also testified that Andrew Williams attended the August Town Primary School. In the case of Oneil Shaw, Miss Curtis last saw him one week before the shooting, at about 9:00 am. However, she did not see him often. Neither could Miss Curtis remember ever having spoken to Oneil Shaw. Turning to Kirk Drummond, Miss Curtis said she grew up with him, and he once lived near her in August Town before removing to the Jungle 12 area of the community. For the most part, Miss Curtis would see Kirk Drummond standing at a wall, about 50 feet from her, when she was on her way from work.

[11] So how was Miss Curtis able to recognise the applicants? She recognised Andrew Williams from the initial distance of 40 feet away and then 20 feet away. She was able to see his face as he was not wearing anything on either his head or his face. Miss

Curtis confirmed her initial identification of Andrew Williams as one of the gunmen on an identification parade, held at the Half-Way-Tree Police Station.

[12] The identification of Oneil Shaw, as one of the gunmen on the day of the shooting, was also confirmed by Miss Curtis by pointing him out on an identification parade. In relation to Oneil Shaw, Miss Curtis said he was distinguished by a physical trait she described as "heavy knock-knee". On the day of the incident, when she first saw him, he was wearing what looked like either a black tam or a handkerchief over his face, but it fell off after the first explosion. Consequently, she was able to see his entire face. When Bucky Marshall said no witness should be left alive, Oneil Shaw was 15 feet away from Miss Curtis. Furthermore, at the time he pointed the firearm at Miss Curtis, he stood at about an arm's length away from her. At the identification parade, Oneil Shaw and all the volunteers wore headgear. Before Miss Curtis pointed him out, she asked that all the men remove their headgear.

[13] Unlike Oneil Shaw, but like Andrew Williams, Kirk Drummond was not wearing anything on either his head or his face. Therefore, Miss Curtis was able to see his face from the distance of 40 feet, and he too came within 20 feet of where she stood with the group. Miss Curtis also sought to validate her identification of Kirk Drummond as one of her assailants by pointing him out at an identification parade, also held at the Half Way Tree Police Station.

[14] All the identification parades were conducted on 29 January 2010, approximately one year and eight months after the incident.

[15] Cross-examination of Miss Curtis was an evidentiary minefield when she was confronted with her previous statements and deposition. Tested as to how the shooting started, Miss Curtis denied saying in her first police statement (6 May 2008), "whilst I was standing along the main road, I heard a loud explosion sounding like gunshot coming from the direction of the bus stop. I suddenly heard my baby cried out and her head drop down on my shoulders" (see page 107 lines 13-18 and 23-24 of the

transcript). When it was sought to tender this portion of the statement into evidence, Miss Curtis, who confessed to being illiterate, initially could not recall if the statement had been read over to her but asserted that she told the police the truth. She later stated that the statement was not read over to her. From that position, Miss Curtis vacillated to not remembering whether the statement was read over to her. When the relevant portion of the statement was read to her, Miss Curtis first denied that she said so to the police then said she did not remember saying so.

[16] Cross-examination about the number of assailants yielded similar responses. Miss Curtis denied saying in the same statement, after the baby cried out, "I looked up to the bus stop and saw three men coming towards me from the direction of the bus stop" (see page 125 lines 15-23 of the transcript). That became exhibit three. Miss Curtis insisted she always said there were four men. Consistent with this denial and assertion, Miss Curtis could not remember naming the three men as "Leggy Murray", Andy and "Hype it up". Miss Curtis specifically denied saying in her statement that "Hype it up" was one of the men. Instead, she advanced that it was the police who asked her about "Hype it up". Miss Curtis later admitted that at the time of giving her statement of 6 May 2008, she knew "Hype it up" had a broken leg.

[17] Miss Curtis went on to deny also saying in that statement, "at the time when 'Leggy Murray', Andy and 'Hype it up' shot my baby and myself and kill the other man, I could see them clearly" (see page 130 lines 5-10 of the transcript). Another denial concerned whether there was gang violence in the area at the material time. The part of her statement in which she said there was ongoing gang violence in August Town which had political undertones was read to her, which she denied.

[18] Continuing with the identity of the gunmen, Miss Curtis vehemently denied that she never gave the names "Skilly" and "Bucky/Bucky Marshall" in her statement of 6 May 2008 but in fact gave the names Andy, Leggy Murray and "Hype it up". Furthermore, Miss Curtis also denied saying in her statement of 1 July 2008:

"...due to my statement given to the police on the sixth day of May 2008 at the University hospital of the west Indies, I wish to add that 'Bucky Marshall' and Mr Brown grandson known to me as 'Skilly' were among the group of men I saw who opened gunfire on a group of us in the vicinity of my home killing my baby daughter Regina Williams and another person, a young man, also injuring two other person and myself." (See page 136 lines 6-15 of the transcript)

This section of the statement was admitted into evidence as exhibit three.

[19] Miss Curtis was also tested on Oneil Shaw's participation in the incident. While Miss Curtis admitted saying in her deposition that Oneil Shaw fired a shot at the man on the ground after he and Bucky Marshall walked away from where she was, she denied saying in her statement of 6 May 2008 that all three men went over the man on the ground and fired shots at him. These matters became the subject of exhibit six.

B. Case for the defence

(i) *Case for Andrew Williams*

[20] Andrew Williams testified under oath and called Chada O'Gilvie-Brown ('Chada', as she was referred to in his evidence) as a witness to fact. Andrew Williams testified that at the time of the incident, he worked on a construction site, although he previously worked in several other occupations. He also said he was a father of six children, ranging in age from 24 to one year old. He had no previous convictions and lived at number 13 August Town Road.

[21] He admitted knowing Miss Curtis from he was approximately eight years of age and that she knew his "whole family". He swore that he never had any problems with Miss Curtis.

[22] According to Andrew Williams, the day of the incident was preceded by a period of hostilities, marked by the firing of gunshots for between one week and one month. The hostilities ceased on the Thursday before the Sunday on which the incident occurred. This period of calm was brokered by someone described as an elder, who led

a peace initiative. Therefore, on the day of the incident, everybody in the community had come out. So, he, Andrew Williams, and others were playing ludo at his corner. He left the ludo game to watch a televised English Premier League football match, scheduled to start at 2:00 pm. The match did not start as scheduled, and he went back on the road to purchase smoking material.

[23] It was while he was about that task that he heard the gunshots. Hearing the gunshots, he ran to a nearby house (presumably Miss Janet's) for refuge but could not get inside as the door was locked. He stayed at this door, apparently trying to gain entry by banging on it. In his words, he was there "a beat down the door". The door remained locked. He stayed in that vicinity until the firing of the gunshots stopped.

[24] When the firing of the gunshots ceased, people gathered on the roadway. It was then that Chada looked out from Miss Janet's door and asked him what happened. He expressed an opinion about what happened and voiced his disbelief at the shooting considering the calm since the previous Thursday. Chada asked him to accompany her home, which he set out to do. Accordingly, Andrew Williams denied having a firearm and declared he was not a gunman. He asserted that he had never been charged before for shooting or being in the company of men who were shooting.

[25] He was cross-examined. In essence, his evidence was that the televised football match started at about 2:45 pm and he watched it for one and a half hours. At halftime he went to his gate, looked around then went back inside. Notwithstanding, he could not say where he was at 3:00 pm.

[26] Andrew Williams denied saying in his question-and-answer session that Kirk Drummond was his stepbrother. He accepted knowing "Hype it up" from about 2008 and knew where "Hype it up" lived. However, he had said in his question-and-answer session that he did not know "Hype it up".

[27] He denied the suggestion that on the day of the incident, he was in the company of the other two applicants; that he was armed with a firearm, shot Miss Curtis and murdered Regina Williams and Narado Brooks.

[28] Chada then took the stand. She too was a resident of August Town. She had known Andrew Williams for about 24 years. At the time of the incident, she was visiting Janet at the Capitol Hill section of August Town. Chada was standing at Janet's gate in the company of Janet and one other person, when she observed Andrew Williams walking towards them. As he did so, Chada heard gunshots. The sound of the gunshots seemed to come from the direction of the area called Vietnam, which was down the road from where they were. Hearing gunshots, Chada, Janet and two others ran into Janet's house.

[29] When the firing of the gunshots ceased, Chada and the others exited the house. Upon reaching outside, Chada saw Andrew Williams standing there. According to her, Andrew Williams volunteered to accompany her home. He walked with her for a part of the way, then turned back.

[30] Cross-examination of Chada left her evidence undisturbed. She disagreed with the suggestion that she had not seen Andrew Williams walking towards her when the shooting started.

(ii) *Case for Oneil Shaw*

[31] Oneil Shaw gave an unsworn statement, which was to the following effect. He was educated to the secondary level. His prowess at football earned him the moniker "Skilly". At the time of this incident, he was out of the community, putting those skills on display. Specifically, he was in the Saint Catherine community of Naggo Head for a football match which was scheduled to start at 3:00 pm. Ahead of the start of that match, he was at the home of his girlfriend, which was within walking distance of the selected venue. He walked to the playing field. The football match took place, ending at approximately 5:30 pm. Following the close of the match, he went back to his

girlfriend's home. While he was at his girlfriend's home, he received a telephone call warning him not to return home as gunshots were being fired. Consequently, he spent the night at his girlfriend's home.

[32] Oneil Shaw also said he knew Miss Curtis, although not by name. He had no reason to shoot her or her child. Neither was he a gunman nor owned a gun. He took issue with the complexion (brown) given of him by Miss Curtis. He countered that his skin tone is black and knew nothing of this brown-complexioned person Miss Curtis testified about.

[33] Oneil Shaw did not call any witness.

(iii) *Case for Kirk Drummond*

[34] Kirk Drummond also spoke from the dock. The following was gleaned from his unsworn statement. He was born in August Town. He had been employed at the University of the West Indies from he ceased attending school and up to the time of his arrest on 16 May 2008.

[35] He admitted knowing Miss Curtis.

[36] He asserted he was not a bad person and would never do anything like what was alleged. Furthermore, he was not in August Town at the time of the incident. Rather, he was at his sister's (Andrea Drummond) home in Liguanea, in the parish of Saint Andrew. He was in the habit of staying at her home when there was "war" in the August Town community. As a result, Miss Curtis "could never have seen [him] that day" (see page 375 line 8 of the transcript). Accordingly, he did not "know why she would have to do this, tell a lie on me like that".

[37] Miss Andrea Drummond ('Miss Drummond') testified to being Kirk Drummond's sibling and that she resided at a Liguanea address. Her testimony was to the further effect that Kirk Drummond stayed at her home "most times". She elaborated, "[a]nytime things happen up there [August Town] he stay[ed] at my house and go to

work" (see page 379 lines 1-2 of the transcript). He was at her home from the previous Thursday. On the date of the incident, Kirk Drummond had breakfast at her home and remained there throughout the day.

[38] When Miss Drummond was cross-examined, she did not contradict herself. In this vein, she insisted Mothers' Day was not the second Sunday in May, contrary to her earlier assertion that the Sunday of this incident (the first Sunday in May) was Mothers' Day. Miss Drummond also disagreed with the suggestion that Kirk Drummond was not at her home on Sunday, 4 May 2008.

#### The decision below on no case submission

[39] Mr McFarlane, who also appeared below for Andrew Williams, submitted that the case rested on the uncorroborated identification evidence of Miss Curtis. That evidence, he submitted, was so manifestly discredited, especially on the issue of identification, that none of the applicants should be called upon to answer the charges. Mr McFarlane then referred the learned judge to what he categorised as numerous "inconsistencies, discrepancies and contradictions" but said he would endeavour to focus the mind of the learned judge on a "few which are material to the question of identification" (see page 267 lines 1-4 of the transcript).

[40] Mr McFarlane referred the learned judge to exhibit one. That is, in evidence, Miss Curtis said, whilst in conversation, she saw four men approaching on foot from the direction of the bus stop. However, in the statement that she gave on 6 May 2008 her recollection was to the contrary. She was recorded as having said, "[w]hilst I was standing along the main road, I heard a loud explosion sounding like gunshot coming from the direction of the bus stop. I suddenly heard my baby cry out and her head drop down on my shoulder" (see page 267 lines 11-16 of the transcript).

[41] The materiality of this inconsistency is its alteration of the circumstances under which Miss Curtis made her identification of the assailants. In Mr McFarlane's submission before the learned judge, the circumstances cast by the description in the

statement showed a witness who would have made her identification under difficult circumstances. The difficulty in the circumstances arose in this way. By the sequence of events in the statement, Miss Curtis would have already been shot and fallen into a seated position on the ground when the gunmen came into view. According to Mr McFarlane, the witness never tried to explain this inconsistency. Instead, Miss Curtis flatly denied making the statement.

[42] The next inconsistency Mr McFarlane highlighted in Miss Curtis' evidence to the learned judge related to the number of attackers. Miss Curtis denied saying in her statement that there were three men, and that one of them was "Hype it up". What became exhibit 6 was put to her: "at the time when Leggie Murray, Andy and 'Hype it up' shot my baby and myself and killed the other man, I could see them clearly, as there was nothing blocking my view and it was broad daylight" (see page 268 lines 21-25 of the transcript).

[43] In Mr McFarlane's submission, Miss Curtis' attempt to suggest that the name "Hype it up" found its way into her statement through questioning by the police and not that she mentioned his name, was unsupported by her statement. He argued that in fact, her statement contradicted her on the point. In this vein, Mr McFarlane noted Miss Curtis' repeated denials that she had said what was recorded in her statement.

[44] Although he did not appear for Oneil Shaw, Mr McFarlane submitted that the omission of his name from Miss Curtis' statement of 6 May 2008 was most significant and "far more material" (see page 269 lines 18-20 of the transcript). The significance of that omission is bound up in the naming of three persons in that statement and the absence of any explanation for her silence regarding Oneil Shaw's name in re-examination. It was noteworthy, according to Mr McFarlane, that Miss Curtis even denied adding Oneil Shaw's name in her statement of 1 July 2008. This, he argued, was no small inconsistency, having regard to the assertion that Oneil Shaw and Bucky Marshall played a more pivotal role than the other assailants.

[45] From this out-of-court omission, Mr McFarlane next adverted the learned judge's mind to a disparity between the evidence and what Miss Curtis had said at the preliminary inquiry about where the firearms were taken from. In examination-in-chief, Miss Curtis said she did not see where the firearms were removed from. However, she admitted under cross-examination that she had said at the preliminary enquiry that the men pulled the firearms from their bodies. The learned judge did not consider this a fair criticism of the witness as, he said, Miss Curtis' evidence was at this point accompanied by a motion of the hand which suggested "pulling [the firearms] from somewhere" (see page 271 lines 1-3 of the transcript). Mr McFarlane, however, did not regard this a major point.

[46] Lastly, Mr McFarlane reminded the learned judge of the inconsistency between the evidence and what was said at the preliminary enquiry about the deceased Narado Brooks. In her evidence-in-chief, Miss Curtis said she did not see what happened to the man on the ground (Narado Brooks), as she had been taken back to the house. However, at the preliminary enquiry she testified to seeing Oneil Shaw shooting that man while he was on the ground.

[47] Concluding, Mr McFarlane argued that Miss Curtis' evidence raised too many questions about her credibility, in circumstances where her evidence was without corroboration. Consequently, the learned judge was pressed to say it would be entirely unsafe to leave the case to the jury on a serious charge of murder and against the background of Miss Curtis' denial of the statement she gave a mere two days after the incident. Therefore, the court should not call upon any of the applicants to answer.

[48] Although each applicant was separately represented at the trial, Mr McFarlane purported to submit on behalf of all three. At the end of his submissions, the learned judge enquired, "[t]hat is for all? That is for the entire defence?" Mr McFarlane responded, "[y]es, m'Lord" (see page 272 lines 10 -12 of the transcript).

[49] Despite that, Mr Philmore Scott, who appeared for Oneil Shaw below, added his voice to the submissions. He adopted the submissions of Mr McFarlane then sought to amplify as follows. The quality of the evidence of identification "was too poor, non-existent, woefully inadequate [and] manifestly unreliable" having been made under "less than ideal circumstances" (see page 273 lines 2-6 of the transcript). Reliance was placed on **R v Lenford Harris** (1987) 24 JLR 60.

[50] Mr Scott contended, before the learned judge, that **R v Lenford Harris** "fits ideally in the circumstances ... in respect of Oneil Shaw or 'Skilly'," (see page 275 lines 8-11 of the transcript). In both cases, the eyewitness first gave a statement in which the name of the perpetrator was not given.

[51] Additionally, Mr Scott drew the learned judge's attention to exhibit seven, where Miss Curtis, in her statement to the police, spoke to Oneil Shaw's genealogical connection and residential address, as well as his physical description. Miss Curtis described Oneil Shaw as of brown complexion, thick build and about five feet nine inches tall. However, Miss Curtis denied giving this description to the police; hence, its admission into evidence as exhibit seven. Miss Curtis asserted in re-examination that Oneil Shaw is not brown. The point of the submission being the description was factually inaccurate.

[52] Continuing with the physical features of Oneil Shaw, Mr Scott took aim at Miss Curtis' description that Mr Shaw had "heavy knock-knees" (genu valgum) and wore locked or twisted hair. Mr Scott considered Oneil Shaw's marked knock-knees a distinguishing feature. In any event, the submission was that neither feature was mentioned in any of Miss Curtis' statements.

[53] All those matters led Mr Scott to urge the learned judge to say Miss Curtis could not be believed and so Oneil Shaw should not be called upon to answer the charges.

[54] A separate submission of no case to answer was not made on behalf of Kirk Drummond.

[55] For the most part, learned counsel for the prosecution replied to the submissions of no case to answer without regard for the nuances posed in the prosecution's case against Oneil Shaw. In his assessment, the submissions of no case to answer were based on identification and the attendant inconsistencies, which, it argued, made it dangerous to leave the case to the jury. Learned counsel for the prosecution considered the arguments advanced to be "mispremised" (not a standard English word) in arguing that the issue upon which the case turned was identification. We understand counsel for the prosecution to have meant wrongly premised. This is evident from his succeeding arguments. Namely, as he said, his juxtapositional examination of the evidence and guidelines laid down in **R v Turnbull and Another** [1977] 1 QB 224 (the **Turnbull** guidelines') persuaded him that identification was not the issue. The real issue, in his submission, was credibility. Accordingly, he relied on the second limb of **R v Galbraith** [1981] 1 WLR 1039, namely, the issue being one of credibility, it was a question of fact to be decided by the jury with the appropriate directions from the learned judge.

[56] In this vein, learned counsel for the prosecution submitted before the learned judge that **R v Lenford Harris** was distinguishable from this case. He advanced two points of distinction. Firstly, in that case, there was a letter from the complainant to the mother of the accused demanding money in return for terminating the case against him. On the contrary, there was no such conduct in this case. Secondly, in that case, the witness not only gave no name of the assailant to the police but also described the gunman as someone not known to her. However, in this case, all Miss Curtis had done was to name Oneil Shaw two months later. This eleventh-hour naming of Oneil Shaw was a matter of credibility and so a matter of fact for the jury's resolution, prosecution counsel argued.

[57] At this stage, the learned judge engaged learned counsel for the prosecution on the question of withdrawing the case from the jury. Since the views the learned judge expressed during this exchange were not repeated, in pith and substance, in his ruling,

his views are captured here. The learned judge agreed that the issue to be resolved was the credibility of Miss Curtis. Considering that, the learned judge expressed the view that the burden the prosecution had to meet was whether Miss Curtis' credibility had been so damaged because of the several inconsistencies "that it would be manifestly unsafe to send the matter to the jury" (see page 284 lines 1- 8 of the transcript).

[58] Unsurprisingly, learned counsel for the prosecution disagreed with that position. His only concession (later withdrawn) was in relation to Oneil Shaw, and then, on a "worst case scenario" (see page 284 line 11 of the transcript). However, reverting to his earlier position, the fact of Miss Curtis naming Oneil Shaw, for the first time, two months after the incident amounted to an inconsistency. All these matters, according to counsel for the prosecution, brought into sharp focus, the function of the court (learned judge) in the circumstances.

[59] The learned judge is confined to directing the jury regarding how to treat with the inconsistencies, prosecuting counsel argued. The learned judge could go so far as to point out the inconsistencies, noting where they were explained or denied. However, inconsistencies alone were an insubstantial basis upon which to withdraw the case from the jury. Learned counsel for the prosecution went on to entreat the learned judge not to follow the learning in the **R v Collin Shippey, Steven Jedynak and Malcolm Jedynak** [1988] Crim LR 767 as that case was without precedential value. In that case, Turner J upheld submissions of no case to answer on the basis that taking the prosecution's case at its highest meant that he could not ignore the inconsistencies. Or, as is said in the report, "picking out the plums and leaving the duff [of very poor quality] behind".

[60] Responding, the learned judge spoke to a "thin line" between the decision not to take over the jury's role and withdrawing the case from the jury. He explained, "thin line" raises questions as to whether when the judge withdraws the case from the jury, he becomes, by that act, a factfinder. That "thin line" notwithstanding, the learned

judge acknowledged that he had the power, even after the commencement of the case for the defence, to withdraw the case from the jury where the evidence is replete with inconsistencies. He opined that the case before him was an iteration of that sort of case. The learned judge instanced the evidence concerning when Miss Curtis said she saw a firearm. Whereas Miss Curtis testified to the men walking up and not seeing any firearms at first, the evidence disclosed the presence of at least one AK47 rifle, which, in the opinion of the learned judge, was not something easily hidden.

[61] The learned counsel for the prosecution made a response to this observation of the learned judge that elided the point. Learned counsel for the prosecution grudgingly conceded Miss Curtis gave “a measurement to a gun that was not particularly small” (see page 287 lines 16-18 of the transcript). That, he argued was a consideration for the jury. In a supposed answer to the learned judge’s forensic description of this “gun that was not particularly small,” as an AK47, learned counsel for the prosecution made the platitudinous remark that Miss Curtis was not a ballistic expert and advanced his own reason for her failure to mention seeing the rifle before the men came to within 20 feet of her. He speculated that Miss Curtis “was perhaps observing their faces rather than their weapons at the time, until it [sic] came into being [sic]” (see page 287 lines 19-22 of the transcript). That was his platform to submit that the **Turnbull** guidelines had no application to inanimate objects such as cars and guns but to human beings.

[62] The learned judge cut across that submission to assert that the case was not about **Turnbull** but credibility. The real question, according to the learned judge, was “whether or not these aspects of [the] evidence, which indicate a serious doubt as to whether or not her evidence is reliable ...” (see page 288 lines 5-8 of the transcript). Learned counsel for the prosecution interjected that the serious doubt should be located in the mind of the jury, not the judge. The learned judge rejoined, “[t]hat is why I am going further – are so great, so extensive that the witness’ credibility is so damaged that the jury ought not to be called upon” (see page 288 lines 12-15 of the transcript).

[63] In seeking to hammer home his central argument that the issue was credibility and ought properly to be left for the jury's consideration, learned counsel for the prosecution treated the learned judge to a recollection of the facts of **R v Galbraith**, emphasising that some of the witnesses for the prosecution in that case had to be treated as hostile. Even in the face of that recantation, the English Court of Appeal still held that the case was one for the jury's deliberation. That prompted the learned judge to remark that the only thing the prosecution had going for it in this case was the steadfastness of Miss Curtis.

[64] Following that exchange and a post-luncheon attempt by learned counsel for the prosecution to rely on further authorities, the learned judge ruled that all three applicants had a case to answer. The ruling was expressed in a mishmash of the language of limbs 2(a) and 2(b) of **R v Galbraith** (see para. [99] below). The learned judge noted that Miss Curtis was not internally inconsistent, but the differences arose between her evidence and her previous statements and deposition. He concluded that those were matters for his direction to the jury.

[65] The learned judge opined that his view of Miss Curtis' credibility was irrelevant as credibility is a matter for the jury's resolution. In his articulation, "despite the view I have of the evidence, I believe it is a matter that has to be left to the jury" (see page 297 lines 13-15 of the transcript). This view was capped by the learned judge's expression of regret that he was not sitting alone, as both judge and jury, in which case he would have upheld the no case submission. He would have done so on the technical basis that he would then have known what the jury was thinking.

### **The applications for leave to appeal**

[66] Each of the applicants filed several grounds of appeal, challenging his convictions and sentences. At the commencement of the hearing, Mr McFarlane sought and obtained the permission of the court to abandon the original grounds of appeal, filed in Andrew Williams' Criminal Form B1, and argued in their stead two supplementary

grounds. The supplementary grounds of appeal filed on behalf of Andrew Williams are quoted below:

Ground one

"The learned trial judge should have upheld the no case submission as the evidence of the sole eyewitness had been manifestly discredited in circumstances where a reasonable jury, properly directed, should not have convicted."

Ground two

"That the learned trial judge erred when he ruled that although there were inconsistencies and discrepancies between the witness' evidence and her previous statements and depositions, that because the witness had simply denied making the previous statements, then the previous statements were not actually evidence."

[67] The applicant Oneil Shaw filed four original grounds of appeal in his Criminal Form B1 challenging his convictions. His counsel obtained the permission of the court to reword original ground of appeal one into supplemental ground of appeal one, condense original grounds of appeal two, three and four into supplemental ground of appeal two and to add supplemental ground of appeal three. The grounds of appeal, as reformulated (one and two) and added (three) are reproduced below:

"Ground 1 The [learned trial judge] failed to show the jury how identification was crucial to the applicant's case and merely gave general directions on identification.

Grounds 2-4 being combined and re-worded as Ground 2 – The [learned trial judge] erred when he did not uphold the no case submission and abdicated his role as Judge of the law to the Jury, resulting in the Jury convicting the Applicant.

Ground 3- The [learned trial judge] failed to effectively sum up and wrap up the evidence/the case for the Jury to understand the total combined effect resulting in the Jury convicting the Applicant." (Emphasis as in the original)

[68] Miss Venice Brown, counsel for Kirk Drummond, with the permission of the court, abandoned the original grounds of appeal filed in the applicant's Criminal Form B1 and argued six supplemental grounds, filed on 21 June 2023. The supplemental grounds appear immediately below:

- "1. The Prosecution's evidence was unreliable and insufficient to sustain the convictions.
2. The verdict is unreasonable and cannot be supported having regard to the weight of the evidence.
3. That the Learned Trial Judge fell into error when he failed to withdraw the case from the jury and direct them to enter a formal verdict of not guilty that is, he failed to uphold the submission of NO CASE to answer thus depriving the Applicant of a decision of acquittal in his favour.
4. That the issue of the applicant's good character ought to have been raised at his trial.
5. That the applicant's constitutional right to a fair hearing was breached.
6. That the Learned Trial Judge erred in not giving a sufficient delay direction to the jury."

#### The submissions

[69] Each applicant complained that the learned judge erred when he did not uphold the submission of no case to answer (Andrew Williams in ground one, Oneil Shaw in grounds two, three and four, and Kirk Drummond in ground three). Consequently, we will now consider the submissions made under those grounds although, in the case of Kirk Drummond, the submissions encompassed grounds one and two also.

#### *(i) Andrew Williams*

[70] Mr McFarlane commenced his oral submissions by pointedly announcing that his arguments are based on **R v Curtis Irving** (1975) 13 JLR 139. Mr McFarlane directed the court's attention to the headnote. In essence, the principle to be extracted from the

headnote is this. The creditworthiness of a witness is, as a rule, a matter to be determined by the jury. However, where the evidence of the sole witness to fact has been discredited, by virtue of confessed untruths, as well as flagrant contradictions and inconsistencies which are left without explanation, the trial judge would be justified in concluding (i) the evidence is manifestly unreliable; (ii) no reasonable tribunal could safely convict upon it; (iii) and consequently, the case ought to be withdrawn from the jury. From there, Mr McFarlane submitted that, in essence, this case is indistinguishable from **R v Curtis Irving**.

[71] In Mr McFarlane's submission, the learned judge believed the sole witness for the prosecution to be manifestly discredited. In purported support of this submission, Mr McFarlane highlighted several passages from the transcript of the learned judge's remarks for the court's consideration. The first passage of note came from an exchange between the learned judge and counsel who appeared below for the prosecution as to whether the main issue in the case was identification or credibility. The learned judge agreed that "the situation is in relation to the credibility of the witness" (see page 283 lines 23-25 of the transcript). The learned judge commented on the power of the court to withdraw the case from the jury even after the start of the case for the defence, then said:

"... and in a case where this one is so replete, you have name [sic] them as exhibits, but it go [sic] so much further in relation to that. So, for example, there is the issue of the firearm, which is the fact that the other evidence so far, indicates the presence of at least an AK 47, and her evidence is about persons walking up and not seeing any guns at first, and then the guns rise up or somewhere else, that the guns taking out of their bodies." (see page 286 lines 17-25; page 287 lines 1-2 of the transcript)

In our view, the learned judge was here making a frank acknowledgement that the evidence of the sole eyewitness was filled with inconsistencies. That recognition does not logically translate to the conclusion of 'manifestly discredited' for which Mr McFarlane argued, although that is a reasonable characterisation.

[72] The matter, however, did not end there. On his way to ruling that there was a case to answer, the learned judge made statements which, on a fair reading, could lead to the inference that he either disbelieved the evidence or felt it was manifestly discredited, as Mr McFarlane contended.

[73] It was Mr McFarlane's further submission that none of the several inconsistencies was explained by the witness.

[74] Mr Wedderburn, who submitted on behalf of the Crown, took the opposite position. In Mr Wedderburn's submission, a close examination of the inconsistencies which touched and concerned Andrew Williams, revealed their immateriality in the context of the case. To that end, he isolated the three inconsistencies he considered impacted Andrew Williams. For ease of reference and coherence, we set out below the inconsistencies he considered relevant to Andrew Williams.

[75] The first inconsistency was tendered and admitted into evidence as exhibit one. In her examination-in-chief, Miss Curtis testified to seeing the four gunmen approaching her from 40 feet and that when they reached about 20 feet from her, they "rise up" guns, opened fire, and she found herself on the ground with her baby lying across her legs with a hole in her neck. Consistent with her failure to recall having signed the declaration of truth that was endorsed on her statement of 6 May 2008, and her denial that it was read over to her, she denied saying in that statement, "[w]hilst I was standing along the main road I heard a loud explosion sounding like gunshot coming from the direction of the bus stop. I suddenly heard my baby cried out and her head drop back on my shoulder. I looked up to the bus stop and I saw three men coming towards me from the direction of the bus stop" (see page 123 lines 23-24 and page 124 lines 1-9).

[76] The second inconsistency concerned the number of men Miss Curtis saw approaching her. In her examination-in-chief, she testified to seeing four men approaching. She was asked, and denied saying in that statement, "I looked up to the

bus top and saw three men coming towards me from the direction of the bus stop". The quoted words were tendered and admitted into evidence as exhibit two.

[77] The third inconsistency arose from the failure of Miss Curtis to mention the names, "Skilly" and "Bucky" or "Bucky Marshall", in her first statement, after the incident. In her examination-in-chief Miss Curtis said after the shooting two of the gunmen walked away but "Skilly" and "Bucky" remained. "Bucky Marshall" told "Skilly" that they were not leaving any witnesses. After that was said, "Skilly" trained his firearm on her and she heard it "clicking" but no projectile came from its barrel. After that failed attempt to further wound her, both "Skilly" and "Bucky Marshall" walked away in the direction of the bus stop.

[78] However, in cross-examination by Mr McFarlane, Miss Curtis disagreed that in her statement of 6 May 2008 she never once mentioned the names "Skilly" and "Bucky". Furthermore, she disagreed that the names she called in that statement were of three men only, Andy, "Leggy Murray" and "Hype it up". Miss Curtis denied giving a further statement on 1 July 2008 in which she named Skilly and Bucky Marshall for the first time. The part of the statement recording her as having said so was tendered and admitted into evidence as exhibit three. For context, exhibit three is extracted below:

"That due to my statement given to the police on the sixth ... day of May, 2008 at the University Hospital of the West Indies I wish to add that 'Bucky Marshall' and Mr. Brown grandson known to me as 'Skilly' were among the group of men I saw who opened gunfire on a group of us in the vicinity of my home killing my baby daughter, Regina Williams and another person, a young man and also injuring two other person [sic] and myself."

[79] Mr Wedderburn concluded his submission under ground one, by arguing that **R v Curtis Irving** is distinguishable from this case. In Mr Wedderburn's submission, the sole eyewitness in that case admitted to telling lies. On the contrary, he advanced, Miss Curtis never vacillated in her evidence about Andrew Williams' involvement.

*(ii) Kirk Drummond*

[80] Miss Brown condensed grounds one, two and three and adopted the submissions that were made by Mr McFarlane, on behalf of Andrew Williams, concerning inconsistencies. Miss Brown underlined the contention that Miss Curtis offered no explanation for the inconsistencies in her evidence.

[81] Notwithstanding the adoption of Mr McFarlane's submissions, Miss Brown took a somewhat different approach in her attack on the inconsistencies. Her major contention was that the inconsistencies undermined Miss Curtis' asserted ability to see her assailants. In this regard, Miss Brown submitted that, contrary to her evidence, Miss Curtis said in her statement that she heard explosions before she saw the men. Accordingly, stress was placed on the sequence of the unfolding events as, taking the cue from the statement, her identification of Kirk Drummond would have been made under difficult circumstances. In this submission, the difficult circumstances probably manifested themselves in Miss Curtis' apparent confusion about the number of men participating in the attack.

[82] In Miss Brown's submissions, another iteration of the negative impact of the inconsistencies on the quality of the identification evidence is the fact of the use of an AK47 rifle in the assault. Miss Curtis did not testify to seeing any of the men with a rifle. Miss Brown submitted an AK47 rifle is so large that an honest witness would not have missed it. In Miss Brown's submission, this inconsistency is linked to the sequence given by Miss Curtis in her statement that she heard an explosion before seeing the gunmen. The omission of seeing any of the men armed with an AK7 amounts to a material inconsistency, she argued.

[83] Continuing her attack on the quality of the identification evidence, Miss Brown pointed to Miss Curtis' description of the headgear and how it was being worn by the person identified as Kirk Drummond. In cross-examination Miss Curtis was asked if any

of the men was wearing a cap and she answered no. However, it was put to her that she said in her statement of 6 August 2008, “[a]ll these three men are from ‘Jungle 12’ area. One of them I know him as ‘Leggie Murray’... he was wearing a hat that he pulled down in his face” (see page 241 lines 7-12 of the transcript). This inconsistency was admitted into evidence as exhibit 10.

[84] Turning to the inconsistency about the assertion that there was war in the area, Miss Brown submitted that this spoke to whether Miss Curtis had a motive to believe that it was men from the other side of the track who attacked her. Critically, this also raised the question of whether she knew who attacked her.

[85] In concluding her submissions, like Mr McFarlane, Miss Brown adverted to the exchange between the learned judge and counsel for the prosecution. During that exchange, the learned judge told the prosecutor that the case did not raise a **Turnbull** issue. Rather, the issue was one of credibility; raising the question whether there was serious doubt concerning Miss Curtis’ reliability, so much so that the jury should not be called upon.

[86] Miss Brown submitted that the evidence of Miss Curtis was materially discredited, unreliable and consequently unable to sustain the conviction. Considering the inconsistencies, it was an error not to have withdrawn the case from the jury, Miss Brown submitted.

[87] Mr Wedderburn’s reply, in relation to this ground, was confined to the quality of the identification evidence. This case, he argued, was not one of identification of strangers, rather, it was one of recognition. He detailed the circumstances under which the identification was made and Miss Curtis’ previous knowledge of Kirk Drummond. Based on those two factors, Mr Wedderburn submitted that the quality of the identification evidence and its attendant credibility and reliability were matters that fell squarely within the province of the jury. Therefore, he concluded, the learned judge was correct in allowing the case to go to the jury.

*(iii) Oneil Shaw*

[88] Mrs Melrose Reid, who appeared for Oneil Shaw, relied on her written submissions. Her ground attacking the learned judge's refusal to uphold the submission of no case to answer expanded to charging the learned judge with an abdication of his role as judge of the law to the jury. Mrs Reid sought and obtained the leave of the court to combine original grounds two, three and four and reword them as supplemental ground two.

[89] In her submissions under the reformulated ground two, Mrs Reid highlighted several of the inconsistencies and omissions in the evidence of Miss Curtis. Mrs Reid pointed to the difference between the evidence and previous statements in the number of the attackers (four and three, respectively) and the fact that Oneil Shaw was not named in Miss Curtis' first statement (recorded 6 May 2008). Oneil Shaw was first named in a statement given almost two months after the recording of Miss Curtis' first statement; that is, on 1 July 2008. The relevant section of the statement was admitted into evidence as exhibit three. In her written submissions, Mrs Reid incorrectly stated the gap between these statements as six months.

[90] Mrs Reid also underlined the fact that Miss Curtis, while omitting from her statement of 6 May 2008 any direct involvement of Oneil Shaw in the shooting of Narado Brooks, admitted under cross-examination to explicitly naming him as such at the preliminary enquiry. At page 149 lines 5-10 of the transcript, the question and answer went as follows:

"Q. ... Did you tell the court, he [Oneil Shaw] point the gun at the individual on the ground and fired the shot. I heard the shot. I heard blowww. When I heard and saw the shot being fired, I was still seated on the ground.

A. Yes, sir.

Q. You told the court that at Half-Way-Tree?

A. Yes, sir.”

[91] Another inconsistency of note, in the submission of Mrs Reid, concerned the type or size of the firearm with which Miss Curtis said Oneil Shaw was armed. In her evidence, Miss Curtis described the firearm Oneil Shaw carried as having a long point and about 2 feet long (demonstrated by Miss Curtis and estimated by the court and counsel). It was put to her that, in her statement of 1 July 2008, she said Oneil Shaw was firing a small handgun. That portion of the statement was admitted into evidence as exhibit nine.

[92] In seeking to press home her point that the no case submission should have been upheld, Mrs Reid posed some 15 questions, based on her conclusion that Miss Curtis’ evidence was riddled with inconsistencies and, consequently, unreliable. We will not list all the questions but cite five as examples:

- i. “Were there three, four or five men?
- ii. With respect to the Applicant/Skilly why did [Miss Curtis] not give the police his name when she made the first statement two (2) days after the incident?
- iii. Why had she not state in her first statement that he was present and what role he played, when Skilly is [sic] a man that she knew.
- iv. Why did she wait 6 [sic] months after to call his name?
- v. Why is she denying her own statement that she made to the police where she named three men and did not name Skilly?”

Mrs Reid claimed that these “are not merely issue[s] of credibility but ... are **blatant inconsistencies** and which were material to the liberty of the subject” (emphasis as in the original). Reliance was placed on **Andrew Stewart v R** [2015] JMCA Crim 4.

[93] In its written submissions, the Crown, while acknowledging that several grounds of appeal were filed on behalf of Oneil Shaw, argued that the issue is whether the

verdict of the jury can be considered safe, having regard to the circumstances of this case. To that end, the Crown cited the seminal authority on the treatment of visual identification evidence, **R v Turnbull**, and extracted swathes of Lord Widgery's speech for the court's consideration. **Adrian Forrester v R** [2020] JMCA Crim 39, paras. [22] and [23], was also referred to. Two propositions are gathered from those paragraphs. Firstly, there is no set formula by which a summation is to be assessed. What is of importance is the substance of the summation, not the form. Secondly, in essence, the duty of the trial judge, in delivering a summation, is to give the jury such assistance as the issues in the case before him demand and, in doing so, ensure that the summation is fair and balanced.

[94] The Crown advanced that while the learned judge gave a general warning in keeping with the guidelines in **R v Turnbull**, the specific weaknesses in that evidence were not mentioned until much later in the summation when he highlighted several of the inconsistencies. The relevant sections of the transcript were extracted for our perusal. Having done that, the Crown, in their written arguments, conceded the insufficiency of the evidence to ground the conviction against Oneil Shaw (see para. (12)):

"The Crown concedes that the weight of [the] evidence does not support a conviction in the case at bar against the Applicant. The Crown in reliance on ***Turnbull*** ... is of the view that looking on the whole of the evidence the jury must have taken a perverse view of the credibility of Ms. Curtis and thus the conviction is unsafe. The inconsistencies identified by the Learned Trial Judge though [sic] the jury by its verdict implicitly did not find them material, the Crown submits that taken together these inconsistencies were in fact material." (Italics and emphasis as in the original)

To bolster this point, the Crown submitted that it was important and noteworthy to have regard to the chronology of events giving rise to the charges, which they set out.

[95] Consistent with their argument that the conviction is unsustainable against Oneil Shaw, the Crown considered whether this court should order a re-trial. To that end, we

were referred to section 14(2) of the Judicature (Appellate Jurisdiction) Act ('JAJA') and **Mark v R** [2021] JMCA Crim 34, paras. [60] and [61], that discussed the relevant principles. Against the background of those principles, the Crown submitted that the balance weighed in favour of Oneil Shaw and so a re-trial should not be ordered.

### Discussion

[96] It has long been established that the trial of criminal cases embraces the dichotomy of two tribunals, one of fact and the other of law. The former, generally, comprises a jury of laymen and the latter a professional judge. A reference to the standard directions that should be given by a judge to a jury, encapsulated in the Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book'), epitomises the duality which inheres a criminal trial. At page 44, item 5, the learned editors say:

"The jury should be directed as follows:

- 1) The judge and jury play different parts in a criminal trial.
- 2) The judge alone is responsible for legal matters. When summing up the judge will tell the jury about the law which is relevant to the case, and the jury must follow and apply what the judge says about the law.
- 3) The jury alone are responsible for weighing up the evidence, deciding what has or has not been proved, and returning a verdict/verdicts based on their view of the facts and what the judge has told them about the law.
- 4) Where there are different accounts in the evidence about a particular matter the jury must weigh up the reliability of the witnesses who have given evidence about the matter, taking into account how far in the jury's view their evidence is honest and accurate. It is entirely for the jury to decide what evidence they accept as reliable and what they reject as unreliable.

- 5) ....
- 6) The jury do not have to resolve every issue that has arisen, but only those that are necessary for them to reach their verdict(s).
- 7) The jury are permitted to draw sensible conclusions from the evidence they accept as reliable, but they must not engage in speculation or guesswork about matters which have not been covered by the evidence.
- 8) It is important that the jury's verdict(s) should be based only on their own independent view of the evidence and the facts of the case. Therefore:
  - a) Although the jury should consider the points made about the evidence and the facts by the advocates in their speeches, it is for the jury alone to decide which of these points are good and which are not.
  - b) Should the judge give the impression when summing up the case that he has formed a view about any of the evidence or any of the facts of the case, the jury are not in any way bound by this, and must form their own view.
  - c) When summing up the case, the judge will summarise the evidence but will not attempt to remind the jury of all of it. The jury should not think that the evidence which the judge does not mention in the summing up is unimportant, or that evidence which the judge does mention must be important. It is for the jury alone to decide about the importance of different parts of the evidence.
- 9) If appropriate: the jury must not allow themselves to be influenced by any emotional reaction to the case and/or any sympathy for anyone involved in the case and/or by any fixed ideas/preconceptions/prejudices they may have had."

[97] The separation of roles and functions of the judge and jury, described in the Bench Book, reflects the fine line between the two, when there is a submission of no case to answer. The submission of no case to answer is both heard and ruled upon in the absence of the jury. This is so because this is entirely a legal question. If the ruling is that there is a case to answer, the jury are not to be informed of this. The jury are simply invited back into the courtroom and the trial continues. In every case, the submission of no case to answer raises the question, in what circumstances should the judge withdraw the case from the jury and direct them to enter a verdict of not guilty?

[98] For present purposes, the exposition of Lord Widgery CJ in **R v Patrick Brian Barker** (1977) 65 Cr App R 287 ('**R v Barker**'), is as apt as it is succinct. The withdrawal of the case from the jury where the credibility of the witness or witnesses is assailed should occur in rare circumstances. At page 288 Lord Widgery explained:

"... even if the judge has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury..."

Lord Widgery restricted the judge's duty to stop the case primarily where there was an insufficiency of evidence to establish the crime charged. That is, the judge's duty to withdraw the case from the jury is chiefly concerned with cases where the evidence cannot satisfy the legal requirements of the offence charged or establish a connection between the offence charged and the accused. However, from Lord Widgery's stress on the supremacy of the jury's adjudicative role to weigh the evidence, those cases calling for the judge's intervention must, of necessity, be rare.

[99] In any event, the question of the judge's function when faced with a submission of no case to answer was decisively disposed of in **R v Galbraith** (1981) 73 Cr App R 124. Pivoting from **R v Barker**, two classes of cases were identified as appropriate for the withdrawal of the case from the jury: (i) the prosecution's inability to establish the constituent elements of the crime charged; and (ii) where the most favourable view of the case for the prosecution returns the judgment that no reasonable jury, properly directed, could return an adverse verdict upon it.

[100] At page 127, Lord Lane rhetorically asked, "[h]ow then should the judge approach a submission of 'no case'?" His answer declared the law as follows:

"(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could possibly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

This court, in **Herbert Brown and Mario McCallum v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/2006, judgment delivered 21 November 2008 (**Brown and McCallum v R**), considered the above extract from Lord Lane's speech. Morrison JA (as he then was) observed that the first limb contemplates cases in which there is an evidentiary gap in the case for the prosecution which renders a conviction a legal or logical impossibility, after the fashion of Lord Widgery in **R v Barker** (see para. 25 of **Brown and McCallum v R**).

[101] However, Morrison JA was apparently sympathetic to the view that the second limb is not crystal clear. The diminution in clarity finds expression in appearing to give to the trial judge, with one hand, the competence to weigh the evidence and, with the other hand, pluck it from him and thereby maintain the conventional jury function of deciding questions of credibility and reliability (see para. 25 of **Brown and McCallum v R**). According to Morrison JA, although **R v Galbraith** carved out a limited juristic discretion to withdraw the case from the jury, in the face of evidence adjudged to be tenuous, the nub of the decision was the prevention of judges taking cases from the jury because they thought the witnesses were mendacious (see para 26 of the judgment).

[102] It is against that background, we discuss **R v Curtis Irving**, and the submissions advanced under this ground of appeal. In that case, as here, the success or failure of the case for the prosecution rested on the evidence of a sole eyewitness, one Dennis Simpson ('Mr Simpson'). The incident giving rise to the charge of murder occurred near Mr Simpson's dwelling. Mr Simpson lived in a wooden house at the back of the Tavares Market in the parish of Kingston. A shed faced Mr Simpson's house. A passage separated the shed from the market.

[103] Mr Simpson's evidence unfolded as follows. He retired to bed on the night of 1 August 1971. At about 1:30 the following morning, he was awakened by a "swishing" sound. That is, the sound of a cutlass hitting zinc. That sound led him to peer through a crevice in the wood facing the shed. He saw the deceased lying at the door of the shed. Curtis Irving was standing at the door of the shed, armed with a cutlass. Curtis Irving chopped the deceased, but he did not say how many times. The deceased received three chop wounds, the fatal one being at the neck and one on each of his lower extremity. Curtis Irving then left the shed, swallowed up by the passage between the shed and the market.

[104] The straight paths of Mr Simpson's examination-in-chief were transformed into a tortuous web of inconsistencies and admitted untruths, by the end of his cross-

examination. In this version, Mr Simpson saw the deceased inside the shed, not at the door, while Curtis Irving was at the door of the shed. Although his evidence at the trial, under cross-examination, was that he saw both the deceased and Curtis Irving at the same time, he admitted that at the preliminary inquiry he had said when he saw the deceased in the shed, he did not see Curtis Irving. That admission was repeated during cross-examination.

[105] Mr Simpson attempted to jettison his evidence at the preliminary enquiry by declaring that he never told the truth in that forum. He recanted seeing Curtis Irving chop the deceased but maintained that he was armed with a cutlass. He also admitted that, after witnessing the incident, he went to his sister's home and went off to sleep. Although the deceased was his friend, Mr Simpson neither divulged what he had seen nor returned to the scene to check on the deceased. In the face of his earlier protestation that his evidence at the preliminary enquiry was not true, Mr Simpson admitted that at the preliminary enquiry he testified that he had seen the deceased lying in the yard in front of his house and that he saw Curtis Irving in the yard and not in the shed. Mr Simpson contended that this evidence was the truth. However, in the same breath, Mr Simpson did another about face and asserted that he had seen the deceased in the shed and Curtis Irving was outside in the yard. The court noted that cross-examination revealed several other areas of conflict between his evidence and what he said at the preliminary enquiry. The effort to rehabilitate him in re-examination was fruitless.

[106] In the court's assessment, Mr Simpson was "completely discredited". Consequently, the court was of the view that no reasonable jury could have convicted upon his evidence. According to Graham-Perkins JA, at page 141:

"By virtue of the incomprehensible maze of admitted untruths and blatant and unexplained contradictions and inconsistencies in the evidence of Simpson we find it quite impossible to understand how any reasonable jury could have returned a verdict adverse to [Curtis Irving]."

In the light of that evaluation of Mr Simpson's evidence, the court took the view that the trial judge would have been justified in withdrawing the case from the jury. Although the court accepted as good law the pronouncements of Wooding CJ in **R v Daken** (1964) 7 WIR 7 (and approved in **R v Bernard** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 26/1973, judgment delivered 2 November 1973) that (a) questions of fact are for the jury and not the judge; (b) it is the judge's duty to give directions fit to assist the jury in the assessment of the veracity of the witnesses whose credibility has been impugned; and (c) the circumstances warranting a judge to go beyond assisting the jury in that assessment should be rare, in which case more was called for. The pivotal point was the fact that Mr Simpson was held to be a self-confessed liar who asserted in one breath and recanted in the next, on a material issue. It was a short step from there to adjudge the guilty verdict of the jury, "patently unreasonable" (see page 141I).

[107] In his review of the law in this area, Morrison JA in **Brown and McCallum v R**, considered that **R v Curtis Irving** sits "easily within part (a) of the second limb of Lord Lane CJ's judgment" (see para 26 of the judgment). This view is consonant with that expressed by Graham-Perkins JA that it was inconceivable that a reasonable jury could have returned a verdict of guilty upon the discredited evidence of Mr Simpson. The question for us in this application is whether Miss Curtis' evidence falls squarely within that class of cases warranting the characterisation that, taken at its highest, a jury properly directed could not properly convict upon it.

[108] From the foregoing reconsideration of the authorities, the following principles may be gleaned. Upon a submission of no case to answer being made:

- a) if the evidence tendered on behalf of the prosecution is insufficient to satisfy the legal ingredients of the crime charged or, there is evidence to establish the legal elements of the crime charged but no evidence

linking the accused to the crime, the judge should withdraw the case from the jury.

- b) the evidence reaches the threshold established at (a) above, but is weak because, for example, it has internal weakness or vagueness associated with the nature of the evidence or there is inconsistency with other evidence, the judge ought to make a qualitative assessment of it. If the judge takes the view that that evidence, taken at its highest, is such that a jury properly directed could not convict upon it, he is obliged to withdraw the case from the jury (**R v Galbraith**). Put another way, if the judge considers that the witness is “completely discredited”, on account of “admitted untruths, blatant and unexplained contradictions and inconsistencies” or the like, he should not allow the case to go to the jury (**R v Curtis Irving**).

[109] Consistent with the authorities, the learned judge was called upon to make that initial assessment of Miss Curtis’ evidence, when the submission of no case to answer was made (see **R v Galbraith** and **Brown and McCallum v R**). The learned judge appears to have been acutely aware of the breadth of his responsibility at this stage of the trial. Beginning at page 295 lines 23-25, and continuing to page 296 lines 1-25 of the transcript, he said:

“Having reviewed the submissions in law, I adopt the position that the question is whether or not the evidence taken at its highest, the prosecution’s evidence at it’s [sic] highest that there could be conviction on that and I know that despite the several -- the evidence taken as [sic] its highest would prove the case and despite the fact that in this particular matter there are several inconsistencies ... in

relation to the difference between the witness' evidence and the statement that she has given; things dealing with exactly who was there, how many persons were there and so on. But I note in particular in relation to that, that when challenged in terms of all those things, it is not that the witness is internally inconsistent; it is not that she is saying with her evidence, ... that on one stage it is fact four and then it is three and so on. the difficulty that she has, is the fact that her previous statements, both the statements given to the police and in some respects the depositions are saying different things from what she says here."

[110] The learned judge adjudged that the question raised concerning the evidence of Miss Curtis was not that she, in one breath, swore to the truth of a fact, then in the next breath recanted. In this assessment, the problem posed was one of having made previous inconsistent statements. The question is, what is the import of these previous inconsistent statements?

[111] The proof and use of previous inconsistent statements are dealt with under sections 16 and 17 of the Evidence Act, extracted below:

"16. If a witness, upon cross-examination as to a former statement made by him relative to the subject-matter of the cause, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness and he must be asked whether he has made such statement.

17. A witness may be cross-examined as to previous statement made by him in writing or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it intended to contradict such witness by the writing, his attention must, before contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of contradicting him:

Provided always that it shall be competent for the Judge at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he shall think fit.”

There is no complaint about the procedure adopted at the trial in drawing Miss Curtis’ attention to the previous statements and deposition said to be inconsistent with her testimony. Each portion of those documents that Miss Curtis did not distinctly admit that she had made or, contended that she did not omit, was properly admitted into evidence as an exhibit. Consequently, we are, in this application for permission to appeal, concerned with the use of the statements (whether police statements or depositions).

[112] Before going any further, the inconsistency having been established during cross-examination of the witness, the usual next step is for attempts to be made in re-examination to obtain an explanation from the witness for the previous inconsistent statement. Mr McFarlane submitted that none of the inconsistencies was explained. Mr Wedderburn did not seek to contradict him. However, during re-examination, about the third inconsistency (exhibit three), Miss Curtis insisted that she gave the police Oneil Shaw’s full name when she was interviewed at the hospital on 6 May 2008. Miss Curtis was not re-examined on the first and second inconsistencies.

[113] So, on the analysis of Miss Curtis’ evidence in relation to Andrew Williams, we are constrained to agree with the Crown’s submissions that **R v Curtis Irving** is distinguishable. Our perusal of the transcript does not reveal a witness who vacillated in her testimony in relation to Andrew Williams. There were, admittedly, variances between her evidence and statements she had previously made, but, unlike the witness in **R v Curtis Irving**, Miss Curtis never jettisoned her evidence and substituted the passages read to her from any of her statements or deposition made outside of the trial. In short, Miss Curtis never adopted any of the passages by which it was sought to discredit her evidence. Miss Curtis was no “self-confessed liar” who had wandered into an “incomprehensible maze of half-truths”. While the majority of the inconsistencies in

her evidence were left unexplained, the materiality of all the inconsistencies was a matter for the jury, applying the instructions of the judge.

[114] Much the same can be said about Kirk Drummond. Although his counsel tried to make the case against Mr Drummond one requiring a consideration of the **Turnbull** guidelines, his case was palpably one requiring an assessment of Miss Curtis' reliability and credibility. Whether Miss Curtis was shot before the gunmen came into view, as she said in her statement, or when they came to within 20 feet of her; her failure to mention the AK47 rifle and her demonstration in evidence when explaining where the men 'rise up' with guns; whether any of the men was wearing headgear and that it was pulled down over the face; and that she may have had a motive to tag Kirk Drummond with the shooting simply because he was from the other side of the warring factions, were all matters for the jury's resolution. Critically, the jury had to determine if Miss Curtis had been shot before she laid eyes on the men because if that was accepted, that sequence would undermine her entire narration of the incident in examination-in-chief.

[115] Therefore, the situation which faced the learned judge at the close of the case for the prosecution, fell squarely within item four of the standard directions in the Bench Book, adverted to above (see para. [95] above). That is, the jury would have to be directed that the reliability of Miss Curtis in relation to the different accounts, given in the statements and deposition and her evidence, were matters for them, considering, how far, in their view, Miss Curtis was honest and accurate. In short, this was clearly a matter for the jury's consideration.

[116] This is a principle of some vintage. White JA, in **R v Garth Henriques and Owen Carr** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 97 & 98/1986, judgment delivered 25 March 1988, summed it up this way:

"... whether the inconsistency is explained or not, the matter of its immateriality or materiality is for the jury. And where the witness gives an explanation accounting for the

discrepancy between a previous inconsistent statement and his evidence at the trial, the judge must leave it for the jury's determination as a question of fact, in that, it is for them to decide whether the inconsistency or discrepancy is of so material a nature, that it goes to the fundamentals of the Crown's case resulting in the jury not being able to accept the witness' evidence on the point, and in the long run, maybe reject him as a witness of truth. The issue of credibility is a matter for the jury. Insubstantial contradictions do not, in any way, or in any extent, cancel the effect of the witness' testimony at the trial."

The basic proposition is that reliability and credibility are matters for the jury, since they comprise the tribunal of fact. The presence of inconsistencies raises questions of reliability and credibility. Therefore, the first question for the jury is whether the inconsistency is material or immaterial, taking into their consideration any explanation that was given for the inconsistency. If they decide that the inconsistency goes to the foundation of the case for the prosecution, they must decide if they accept the witness on the point or at all. If they decide that the inconsistency is immaterial or insubstantial, that leaves the witness' evidence unaffected.

[117] We will return to this aspect of the application for leave to appeal when we come to consider ground two in relation to Andrew Williams. In so far as the complaint goes that the learned judge erred in not upholding the submission of no case to answer, we take the view that the compendious ruling, calling upon all the applicants to state their defence, was ill-suited to this case. While the case against Andrew Williams was virtually indistinguishable from that against Kirk Drummond, the case against Oneil Shaw was sufficiently nuanced to require separate treatment.

[118] The identification of Oneil Shaw as one of the gunmen was fraught with enough pitfalls to reduce it to the status of running the ghastly risk of mistaken identity, at best, to warrant a withdrawal from the jury's consideration. Firstly, not only did Miss Curtis not name Oneil Shaw in her statement of 6 May 2018, but she also denied adding his name in her subsequent statement of 1 July 2018. The consequence of that denial was the squandering of an opportunity to explain that omission from her earlier statement.

In the end there was no explanation. Secondly, and as a corollary to the first, Miss Curtis' description of the number of attackers in her statement left no room for the presence of a fourth man. Thirdly, the narration of the incident in the evidence which allotted the significant role of attempted witness elimination to Oneil Shaw, further begged for an explanation for his omission from the statement of 6 May 2018. Fourthly, leaving aside for the moment the issue of Oneil Shaw's complexion, his obvious knock-knees should have so imprinted itself on the mind of Miss Curtis, together with his attempt to eliminate her, that it is reasonable to expect that his name would have been mentioned in her 6 May 2018 statement.

[119] At the end of the case for the prosecution, Miss Curtis had been completely discredited on every material assertion in relation to Oneil Shaw. Her evidence was littered with blatant and unexplained contradictions and inconsistencies. This evidence only escaped the additional epithet of untruths by Miss Curtis' not so clever design of simply denying what her statement clearly showed that she had either said or omitted to say. However, this only revealed Miss Curtis to be an artful prevaricator.

[120] Accordingly, in our view, the case against Oneil Shaw loudly beckoned the learned judge to act within the limited juristic discretion carved out by **R v Galbraith** (see para. [100] above). His task was not to pronounce on the mendacity or veracity of Miss Curtis. His obligation was simply to put her evidence and the relevant exhibits (portions of the statements and deposition that contradicted her) in the scale and weigh them. In our opinion, any fair evaluation of the evidence against Oneil Shaw would return the answer that that evidence, taken at its highest, was such that a jury properly directed could not convict on it. In that vein, we are sympathetic to the Crown's submission that the jury must have taken a perverse view of Miss Curtis' credibility in their return of a verdict of guilty. Considering our assessment of Miss Curtis' evidence against Oneil Shaw, we are at a loss to understand how a reasonable jury could have returned an adverse verdict upon it. This ground of appeal succeeds. It was for those

reasons that we accepted the concession of the Crown in relation to Oneil Shaw and made the orders at para. [4] above.

[121] We will now turn our attention to ground two, filed on behalf of Andrew Williams.

**Ground two: "That the learned trial judge erred when he ruled that although there were inconsistencies and discrepancies between the witness' evidence and her previous statements and depositions, that because the witness had simply denied making the previous statements, then the previous statements were not actually evidence."**

#### Submissions

[122] In this ground, Mr McFarlane charged that the learned judge's ruling on the submission of no case to answer betrayed a misunderstanding of the law concerning the status of previous inconsistent statements. That is, the learned judge said that Miss Curtis' denials of her previous inconsistent statements were not actually evidence, but matters affecting her credibility. The statements and depositions were in fact evidence that were properly admitted, counsel argued. It was, therefore, an error to categorise them as "not actually evidence". Mr McFarlane concluded his submission by arguing that the previous statements were admitted into evidence as an exception to the hearsay rule, not for the truth of the statements but the fact that they were made. **Subramaniam v Public Prosecutor** [1956] 1 WLR 965 and **Regina v Lenford Harris** were cited in support of this statement of the law.

[123] This was the Crown's response. The Crown agreed, during oral arguments, that the learned judge's characterisation of the previous inconsistent statements as "not actually evidence" was a misstatement of the law. However, the Crown made the counterargument that the learned judge's faulty statement of the law was not made to the jury. Further, in their written submissions, reliance was placed on the proviso to section 14(1) of JAJA. That provision empowers this court to dismiss an appeal in circumstances where a point must be decided in favour of an appellant, but no substantial miscarriage of justice was done. This position was underlined by copious

references to the learned judge's summation in which the multitude of inconsistencies were dealt with, to demonstrate that the impugned remark was not repeated to the jury.

### Discussion

[124] The passage complained of is set out below in the context in which it was expressed. The portion called into question is highlighted. The extract is taken from page 296 lines 6-25 and page 297 lines 1-15 of the transcript:

"... despite the fact that in this particular matter there are several inconsistencies ... the difference between the witness' evidence and the statement that she has given; things dealing with exactly who was there, how many persons were there and so on. But I note in particular in relation to that, that when challenged in terms of all those things, it is not that the witness is internally inconsistent; it's not that she is saying with her evidence, which is what is in the box, that one stage it is fact four and then it is three and so on. **The difficulty that she has, is the fact that her previous statements, both the statements given to the police and in some respects the depositions are saying things different from what she says here. That is – those are factors which were I to direct the jury, I would have the [sic] say to the jury that those inconsistencies and discrepancies, those especially in particular things which were said that were different, are not actually evidence, but an indication that she said somethings different and they are matters that go to credibility.** Whatever view that I may have in relation to her credibility at this stage, the situation is that credibility is in fact a matter for the jury, and if the jury accepts her evidence at the highest, then they could come to a conviction. So in those circumstances, despite the view I have of the evidence, I believe it is a matter that has to be left to the jury." (Emphasis added)

[125] We agree with the submissions of both sides that the learned judge was in error when he said the previous statements were not actually evidence, in the strict use of the word evidence. But as will become clear shortly, this was more in the nature of a

loose use of language rather than an egregious error that goes to the root of the conviction. What, then, is the true character of an inconsistency? Any inconsistency between the evidence of a witness at trial and previous statements and/or deposition he made goes to the witness' credibility. According to the learned authors of Phipson on Evidence 20<sup>th</sup> ed, at para. 12-40, "[t]he common law rule was that the earlier statement could not be treated as evidence of the truth of its content".

[126] Although a previous statement is not evidence of the truth of its content, it is evidence of the fact that the earlier statement was made. **Subramaniam v Public Prosecutor**, cited by Mr McFarlane, amply demonstrates this. In that case, the accused was prevented from giving evidence of the contents of a conversation between himself and alleged terrorists which, he asserted, compelled him under duress to go to their camp and carry ammunition. The basis of the exclusion was that none of the terrorists was being called, therefore evidence of the conversation was hearsay and inadmissible. In holding that that exclusion was an error, their lordships of the Privy Council said, at page 970:

"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made."

The previous statement, once admitted into evidence, is therefore evidence, although not for the truth of its content.

[127] An intermediate question is, what did the learned judge mean by "not actually evidence"? In our view, the learned judge could only have meant that the contents of the previous inconsistent statements could not be substituted for the evidence at the

trial, in the face of the witness' denials of having made them. That is, not evidence of the truth of the matters stated in the previous inconsistent statements. This finds consistency with the law pronounced in **Subramaniam v Public Prosecutor**. The Bench Book, at page 187, offers the following guidance:

"... You may take into account the fact that he made such a statement when you consider whether he is believable as a witness. However, the statement itself is not evidence of the truth of its contents, except for those parts of it which he has told you are true."

[128] In **Anthony Atkinson and Paulston Mairs v R** [2016] JMCA Crim 4 (**Atkinson and Mairs**), the trial judge directed the jury that what was said by the witness at the preliminary enquiry was not evidence in the trial. This court found that direction inadequate in not going on to link "the inconsistency with the possible impact on the witness' credibility" (see paras. [27]-[28] of the judgment). Consistent with authority, this court found it unexceptionable that the trial judge in **Atkinson and Mairs** used stronger language than the learned judge in this case, and that while directing the jury.

[129] What, then, is the significance of this "error", in the context of the case against the appellants generally, and Andrew Williams in particular? Mr McFarlane, in his oral submissions, argued that had the learned judge not made this error, the fact that he regarded Miss Curtis as manifestly discredited, was enough for him to have stopped the case in accordance with **R v Curtis Irving**. We have already disposed of submissions claiming this case is indistinguishable from **R v Curtis Irving**. That aside, the submission may be given short shrift. Respectfully, it is something of a quantum leap to say a correct characterisation of the previous inconsistent statement would have led the learned judge to the conclusion that the case was not fit for the jury's deliberation. It should be recalled that the learned judge correctly said the previous inconsistencies were to be resolved as a credibility issue. Furthermore, the learned judge's ultimate position was that whatever his view of the evidence, it was a matter for the jury.

[130] Beyond the unlikelihood of the result for which Mr McFarlane argued, the mischaracterisation of Miss Curtis' previous inconsistent statements and deposition was a benign error without consequence. That is, had the learned judge repeated the error in his directions to the jury that may well have resulted in a miscarriage of justice. That, however, was not Mr McFarlane's complaint. And, as amply demonstrated by extracts from the transcript, referred to by the Crown, the learned judge correctly directed the jury that the previous inconsistent statements were tools to assess the credibility of Miss Curtis. The learned judge, although in error when pronouncing on the law for the sake of his ruling, did not go a step further as did the trial judge in **R v Lenford Harris**.

[131] In **R v Lenford Harris**, the trial judge, labouring under a comprehensive misconception of the nature of previous inconsistent statements, told the jury to expunge the contents of the earlier statements from their minds when considering the evidence. That instruction was directed at both the statements the witness admitted making, and those the jury found she made, despite her denial. This court found, at page 11 of the judgment, that it was an error to have told the jury to put the contents of the earlier statements out of their minds when considering the evidence led at the trial. Pivoting from there, it may be said that the impact of the learned judge's underappreciation of the status of the previous inconsistent statements and deposition must be assessed from the perspective of his directions to the jury. Since the error was not repeated in his directions to the jury and was supported by correct directions on the value of the previous inconsistent statements and the deposition, the sting of the complaint has been removed. Although Mr McFarlane relied on **R v Lenford Harris**, it is clearly distinguishable from this case. This ground fails.

**Ground 4: "That the issue of the applicant's good character ought to have been raised at his trial."**

[132] This ground concerned Kirk Drummond only. His counsel was allowed to withdraw this ground during her oral presentation.

**Ground 5: "That the applicant's constitutional right to a fair hearing was breached."**

**Ground 6: "That the Learned Trial Judge erred in not giving a sufficient delay direction to the jury."**

[133] Both Andrew Williams and Kirk Drummond filed affidavits and made submissions under these grounds. In the case of Andrew Williams, he deposed that he was arrested on 9 June 2008 and charged with the offences for which he was afterward indicted and convicted. He remained in custody until 15 March 2012, when he was offered bail. That offer of bail carried with it a reporting condition. He remained on bail until 2018 when he was taken back into custody at the commencement of his trial. He asserted that neither he nor his lawyer was responsible for any of the delays pending his trial, which ended in his conviction on 19 March 2018. The delay impacted him in two ways. One, it was "massively stressful", especially since he was innocent of the charges. Two, his ability to recall the details of all material events was adversely affected.

[134] Unlike Andrew Williams, Kirk Drummond was arrested 12 days after the incident, that is, on 16 May 2008. He too remained in custody until the grant of bail on 15 March 2012, with a similar reporting condition. Kirk Drummond was required to report at the police station every day. Like Andrew Williams, his bond was rescinded at the start of his trial in 2018. He, too, asserted that he did not contribute to the delay in the holding of his trial.

[135] Kirk Drummond subdivided the impact of the delay into the four years' pre-bail incarceration, the six years post-bail, and the conduct of his defence. The four years in custody resulted in the loss of his job in the maintenance department at the University of the West Indies, Mona Campus, where he had been employed for 20 years prior to his arrest. The loss of his job negatively affected his ability to take care of his daughter and other family members. Additionally, the four years in custody were stressful; and, akin to serving a sentence.

[136] Being on bail did not result in his mind being free because he had the charges hanging over his head. Furthermore, some employment opportunities were closed to him because of his reporting condition.

[137] In relation to the conduct of his defence, the delay had the overarching effect of preventing him from putting forward his best defence as: (a) it affected his memory of certain details and may also have had a like effect upon his witness; and (b) he was prevented from calling other witnesses who could have come to a trial held earlier. He believed that the system treated him unfairly.

[138] Ms Judi-Ann Edwards, Assistant Director of Public Prosecutions, swore to an affidavit and a further affidavit on behalf of the Crown, filed 27 and 29 June 2023, respectively. These affidavits sought to apportion the responsibility for the delay. In the further affidavit, the Crown apportioned to itself one year, three months, and three weeks and eight months and two weeks to both Andrew Williams and Kirk Drummond.

#### Submissions on behalf of the applicant Kirk Drummond

[139] Miss Brown advanced a convergence of the positions of the applicants and the Crown regarding the 10 year-pretrial delay, as well as the five-year post-conviction delay. Miss Brown referred the court to **Flowers v Regina** [2000] UKPC 11 for what she submitted were the relevant considerations on delay, namely: the length of the delay, the reason for the delay, the defendant's assertion of his right and the prejudice to the defendant.

[140] Following on from that, Miss Brown submitted that Kirk Drummond's rights, as guaranteed under section 16(1) and 16(2) of the Constitution, had been breached. Miss Brown argued that the delay was excessive, unreasonable and prejudicial to Kirk Drummond. Specifically, Miss Brown advanced that Kirk Drummond was prejudiced in his ability to put forward his defence. Consequently, she said, the learned judge should have given a direction to the jury that if there was any prejudice or perceived prejudice, it must be resolved in Kirk Drummond's favour. She elaborated, that the jury should

have been directed that they must be sure the delay did not affect Kirk Drummond's defence and, if they were not sure that it did not, they were to acquit.

#### Submissions on behalf of the applicant Andrew Williams

[141] Mr McFarlane adopted the submissions made on behalf of Kirk Drummond by Miss Brown.

#### Submissions for the Crown

[142] Mr Wedderburn, in oral argument, made the general observation that the applicants' affidavits did not allege that they took any steps either to file a constitutional motion to have the charges stayed because their Charter right had been breached. While Mr Wedderburn accepted that the alleged breach of their right could also be raised post-conviction, he argued that the only evidence at the trial concerning the breach was the length of time the case took to come to trial.

[143] Turning to the question of prejudice, neither applicant could complain that the trial was unfair in consequence of the delay in the trial taking place, according to Mr Wedderburn. Both applicants relied on the defence of alibi. In respect of Andrew Williams, he testified and called a witness in support of his defence that although he was in the area, he was not at the location where the shooting occurred. Likewise, Kirk Drummond, who made an unsworn statement, called a witness in support of his defence of alibi. In those circumstances, according to Mr Wedderburn, neither applicant could complain that it was unfair to try him or that the trial process was unfair. Neither applicant was hampered in mounting his defence nor placed any evidence before the court to provoke the learned judge to direct the jury on prejudice.

[144] In any event, the submission ran, the learned judge reminded the jury, at intervals, that the incident took place 10 years before the trial date and of the difficulty that posed. Those directions, Mr Wedderburn urged, were sufficient in the circumstances of this case. **Tussan Whyne v R** [2022] JMCA Crim 42 was relied on in respect of what was required of the learned judge.

[145] Mr Wedderburn attributed 60% of the delay to the Crown and 40% to the applicants. Mr Wedderburn also contended that no material had been placed before the court to show what happened post-conviction.

### Discussion

[146] A person charged with a criminal offence is clothed with the constitutional right to a fair hearing of that offence within a reasonable time, unless the charge is sooner withdrawn. The hearing is to be conducted before an independent and impartial court founded under the laws of Jamaica. Section 16(1) of the Charter of Fundamental Rights and Freedoms ('the Charter') reads:

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

This application for permission to appeal is concerned only with the reasonable time guarantee, not the legality of the forum in which the trial took place. It is now settled law that the reasonable time guarantee under section 16 (1) embraces the right of a convicted person to have his conviction and sentence reviewed by a superior court under section 16 (8) (see **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26 and **Evon Jack v R** [2021] JMCA Crim 31, at para. [21])

[147] The reasonable time guarantee has been the subject of much judicial exposition. The issues raised in this case do not warrant a retracing of those judicial footprints, some of which were made by their Lordships, sitting in the United Kingdom Privy Council, our highest court. A number of those authorities were either considered or referred to in **Tussan Whyne v R**, a recent decision of this court. In that case there was a delay of approximately eight years between the date of arrest and charge and the commencement of the trial. That period was found to be inordinate.

[148] The following principles may be distilled from the decision in **Tussan Whyne v R**:

- I. The length of the delay itself is not synonymous with a breach of the reasonable time guarantee (see para. [82] of the judgment).
- II. It must be demonstrated that the applicant/appellant neither caused nor contributed to the delay (see para. [82] of the judgment).
- III. The delay must be attributable to either the State's action or inaction (see para. [82] of the judgment, relying on **Melanie Tapper v DPP, Taito v The Queen** [2002] UKPC 15 and **Attorney General's Reference (No 2 of 2002)**).
- IV. Neither the trial judge nor the court of appeal bears the responsibility, on his/its own motion, to raise the issue of a breach of the constitutional reasonable time guarantee (see para. [72] of the judgment, referencing **Julian Brown v R** and **Melanie Tapper v DPP**).
- V. Proof of a long delay does not correspondingly impose a duty on a trial judge to dismiss a case, by virtue of the fact of delay only (see para. [71] of the judgment, relying on **Attorney General's Reference No 2**) and **Melanie Tapper v DPP**).
- VI. Evidence of delay carries with it a commensurate judicial obligation to ensure that the trial process is fair to the defendant. The predicate question is, can the defendant get a fair trial, notwithstanding the

delay, in the circumstances of the case? (see para. [71] of the judgment).

- VII. The requirements of fairness may be coloured by the circumstances of the case (see para. [71] of the judgment).
- VIII. A stay of execution may be appropriate where the exercise of the trial judge's discretion cannot cure apprehended unfairness within the trial process (see para. [71] of the judgment, relying on **Attorney General's Reference No 2**)).
- IX. Before staying or dismissing a case on account of the breach of the reasonable time guarantee, a trial judge must be satisfied further proceedings against the defendant would amount to an abuse of process. That could manifest itself in either of two things. Firstly, the gravity of the prosecution's culpable delay caused the type of prejudice to the defendant which nullified the possibility of a fair trial. Secondly, the actions of the Crown were of a class that made any trial of the defendant unfair (see para. [75] of the judgment, citing **Attorney General's Reference No 2**)).
- X. Stays ordered on the ground of delay emanating from the breach of the reasonable time guarantee should only be made in exceptional circumstances (see para. [80] of the judgment, relying on **Attorney General's Reference No 1 of 1990** [1992] QB 630 as applied in **Attorney General's Reference (No 2)**)).

[149] The prefatory question of whether there was delay in commencing the applicants' trial is uncontroversial. Both sides agree there was a delay of about 10 years. That takes us to the question of whether the applicants' Charter right to trial within a reasonable time was breached in the wake of this inordinate delay. From the affidavit provided by the Crown, the preliminary enquiry did not commence until approximately two years after the case first entered the system. Between those two landmark dates, there were numerous mention dates. However, none of the dates in between carried a corresponding endorsement setting out the reasons for the adjournment. The preliminary enquiry was conducted on several dates over a 13-month period, resulting in the committal of the case for trial in the Supreme Court. There was a similar absence of endorsements concerning the reasons for this protracted preliminary enquiry.

[150] The case was first mentioned before the Supreme Court on 16 September 2011. However, the case was not set down for trial until 4 February 2013, about 17 months later. Various reasons were responsible for this delay, most of which were attributable to the Crown. The trial did not proceed because the Crown was not ready. The trial did not commence until the 15<sup>th</sup> trial date, in the 10<sup>th</sup> year since the case was first mentioned in the Supreme Court. There was a myriad of reasons for the several trial dates. Without getting into the minutiae, both the Crown and the defence shared the responsibility for the adjournments, with the preponderance of the responsibility falling on the Crown, according to Mr Wedderburn's apportionment. To the extent that the State was responsible for the preponderance of the delay, either by its action or inaction, the right of the applicants to have their case tried within a reasonable time was breached (see items II and III of para. [147] above, extracted from **Tussan Whyne v R**). In that case, the State and the accused shared equally in the delay, but this court nevertheless found a breach of the constitutional right to a fair trial within a reasonable time, commensurate with the State's attributed culpability.

[151] The next question is, did the applicants assert their right to trial within a reasonable time before the learned judge? Mr Wedderburn's submission on this point is unanswerable. The issue was never raised before the learned judge, and neither applicant submitted otherwise before this court.

[152] And so, we come to the question of prejudice. It is axiomatic that proof of actual prejudice would be absent in the wake of a failure to assert the right before the learned judge. As Mr Wedderburn submitted, no claim was made that either applicant was impaired in the preparation and presentation of his defence. Each called a witness in support of his defence of alibi. It was not contended that either the witnesses or the applicants suffered such material lapses of memory that their recall of where each was at the relevant time was undermined by the delay.

[153] Notwithstanding that factual position, Miss Brown argued that Kirk Drummond was prejudiced in his ability to put forward his defence. Since Mr McFarlane adopted this submission, it is taken that Andrew Williams made the like claim. However, having regard to the factual position outlined above, this contention is plainly a theoretical assumption rather than an empirical deduction. In short, it is suppositional and, accordingly, must be rejected.

[154] Nevertheless, it was contended that the jury should have been directed that, to refine the submission, before they could convict, they had to be sure that the delay did not prejudice the applicants in their defence and if they were unsure, the inevitable conclusion was an acquittal. Both Miss Brown and Mr Wedderburn cited the same sections of the learned judge's summation in support of their opposing positions. Miss Brown argued that the directions did not go far enough, while Mr Wedderburn contended they were sufficient in the circumstances of this case.

[155] We will now examine the relevant passages of the summation. Beginning at page 453 line 20 through to page 454 lines 1-23 of the transcript, the learned judge directed the jury as follows:

"Now, am beginning to say in relation to Mr Williams and these statements, but also it is a factor to take into consideration with Miss Curtis. This incident, as we know, happened ten years, nearly ten years now and one of the things that we point out is that the court is not a memory test and that's one of the reason [sic], why especially when Miss Curtis had said that you need to look to see whether or not it is reliable evidence; it's reliable or credible evidence. Because sometimes somebody might be uncertain, because they don't remember or because they are inaccurate, rather than just saying whether they are lying or not and that's something for you to take into consideration, both from Miss Curtis and also from Mr Williams in relation to the [sic] these kinds [sic] things. I will make this comment, that it is for you, the fact that now ten years later when he's asked if you are called anything else and he says am called Andy and at that time he said, he said nothing and he gave his explanation. I thought you meant do I have an alias am I also known as James Brown or something as unusual as that. So [sic] it's a question for you, because you are examining his evidence in relation to that and you are going to determine whether or not you accept him or no."

In these directions the learned judge endeavoured to bring home to the jury four points. First, although the trial process depends on the recount of events from memory, for the most part, the giving of evidence is not a memory test. Secondly, the passage of time (long delay) might negatively impact the witness' memory to the extent that he becomes uncertain of the events he seeks to recall. Thirdly, and in consequence of that, the jury needed to test the evidence for its reliability and credibility. Fourthly, the jury should consider whether the uncertainty in the evidence is attributable to failing memory before rushing to the conclusion that the witness is lying.

[156] In somewhat the same vein, the learned judge adverted the jury's attention to Chada's (Andrew Williams' witness') evidence and urged them to consider the possible impact of the delay on its accuracy. The prosecutor successfully taxed Chada on the date of the incident, showing her to be inaccurate. However, Chada recalled the day that the baby died. The learned judge, therefore, invited the jury to consider whether it

was reasonable to expect a recollection of the tragic event of the child dying, while not recalling the date (see pages 455 lines 1-9 and 456 lines 1-18 of the transcript).

[157] The learned judge elaborated on his directions on the impact of delay, intertwining directions on lying, and instanced Andrew Williams' defence. The prosecution, through cross-examination, tried to falsify Andrew Williams' defence that he left a ludo game to watch an English Premier League football match at the material time. He was cross-examined on details such as the names of the teams, the date of the match and the scoreline (see page 327 line 1 through to page 329 lines 1-25; page 330 lines 9-25; and page 331 lines 1-23 of the transcript). The jury was directed that before considering anything the applicants had said was a lie and using it against the applicants, they had to be sure it was a deliberate untruth, not something about which the applicants were either unsure or had made a mistake (see page 460 lines 14-25 of the transcript).

[158] Following on that, the learned judge directed the jury in these terms:

"So let us use Mr Andrew Williams, for example. You saw him when he was confronted by the thing which says that the Liverpool, Tottenham match, the same team that he says the Liverpool Tottenham match was not on the 4<sup>th</sup>, but on the 11<sup>th</sup>, and you see [sic] how he responded in relation to that. It is a question for you to see whether or not you could determine that, what he was telling you was a deliberate untrue [sic]. He know [sic] that it was not that and he was telling you something else, or this might have been a mistake. **It has been a long time and even though this might have been a significant event for you to miss, and I will put it to you. It is a matter for you. If I am asking you about something that happened ten years ago, even though it might have been significant for you to miss it by one week, is that really so much of a material difference? Most of us would struggle to get the month right after ten years much less to get it within seven days.** And so, it is a matter for you in relation to that... (see page 461 lines 1-23 of the transcript). Emphasis added.

In these directions, particularly the section in bold, the learned judge captured, in part, the spirit of the specimen directions in the Bench Book, at page 136 (example 2).

[159] Example 2, so far as is relevant, reads:

“We are now concerned with events which are said to have taken place a long time ago. You must appreciate that because of this there may be a danger of real prejudice to a defendant. This possibility must be in your mind when you decide whether the prosecution has made you sure of the defendant’s guilt.

.....

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 [many years ago]. Sometimes the passage of time may even play tricks on memories.

You should also make allowance for the fact that from the defendant’s point of view, the longer the time since an alleged incident, the more difficult it may be for him to answer it. ... You only have to imagine what it would be like to answer questions about events which are said to have taken place [10] years ago to appreciate the problems which may be caused by delay. Even if you believe that the delay in this case is understandable, if you decide that because of this the defendant has been placed at a real disadvantage in putting forward his case, take that into account in his favour when deciding if the prosecution has made you sure of his guilt ...”

[160] Based on the guidance provided in this specimen direction, the danger of real prejudice to the applicants, resulting from the delay, must be put to the jury. The prejudice is made manifest in the disadvantages to which delay may have exposed the applicants. Typical disadvantages resulting from delay are: (a) inability to recall crucial details because of fading memory; (b) the loss of previously available defences, for example alibi; (c) hamstrung in calling supporting witnesses by reason of either their unavailability due to death or now untraceable, or, available but memory-impaired or

any other impairment that developed during the lapse of years; (d) inability to tender documents on account of loss, destruction or becoming untraceable. For clarity, we emphasise that this is not a closed list.

[161] In this case, there was no evidence that the applicants were disadvantaged in matters falling under categories (b), (c) or (d). The learned judge, therefore, cannot be faulted in casting his directions on delay in the mould of its likely deleterious impact on memory. As was said above, the learned judge invited the jury to put themselves in the place of the applicants in trying to recall decade-old events. He essentially instructed the jury, in applying their common sense, to take the approach of Atticus in Harper Lee's *To Kill a Mockingbird*; that is, to climb into the skin of the applicants and walk around in it, to understand the difficulty of recalling aged events, from their perspective.

[162] As correct as this direction was, the learned judge needed to go a step further. As is evident from the specimen directions, the learned judge should have gone on to instruct the jury to decide on the likely impact of the delay and dovetail that decision with their finding on the prosecution's discharge of its burden of proof (see para. [158] above). In fine, the jury should have been told, even if they took a benign view of the delay, if they found that the delay had disadvantaged the applicants in putting forward their defence, that should be considered, in the applicants' favour, when deciding if the prosecution had proved the case to the requisite standard (**Tussan Whyne v R**, at para. [88] of the judgment). Insofar as this direction fell short of the mark, it was a non-direction.

[163] The question is, did this non-direction result in a miscarriage of justice? To put this short discussion in context, the learned judge omitted to direct the jury to specifically take the disadvantage of the delay, if they found any existed, into consideration when coming to their ultimate decision of guilty or not guilty. The crucial question is, therefore, was it inevitable that the jury's verdict would have been

different, had they been adequately directed in the vein of **Tussan Whyne v R**? We return an unqualified no to this question for the reasons which follow.

[164] First and foremost, the correct direction would have required the jury to make an initial determination whether the applicants were disadvantaged by the delay. Having regard to the absence of evidence of actual prejudice, they may well have answered that question in the negative. Secondly, assuming their decision went the other way, they had the discretion either to arrive at a guilty or not guilty verdict, having considered in the applicants' favour the real disadvantage of the delay. Thirdly, ultimately, the case came down to a contest of credibility between the sole witness to identification for the prosecution and the applicants. Their verdict is ample testimony whom they believed. Fourthly, although the learned judge failed to relate the possible negative impact of delay to the discharge of the prosecution's burden of proof at the required standard, his summation was replete with references to the burden and standard of proof. Therefore, it cannot reasonably be said that the jury was left in any doubt as to the circumstances in which an adverse verdict could be returned.

[165] Although the learned judge's summation did not go the distance articulated in the Bench Book and **Tussan Whyne v R**, neither in quality nor effect was the learned judge required to go where Miss Brown's submission would have him tread. That is, while the jury is to take into their consideration the impact of the delay in deciding if the prosecution has made them feel sure, they are not at large to say if they are unsure the applicants were prejudiced, they should acquit. It is no small wonder that no authority was cited in support of this novel proposition. Therefore, we conclude that the learned judge's directions on delay, although unfortunately sparing, did not amount to a misdirection that resulted in a miscarriage of justice. The convictions of the applicants are, therefore, satisfactory.

[166] There is still, however, the question of the remedy for the breach of the applicants' Charter right, on account of the pre-trial delay, compounded by the post-trial

delay. We are of the view that a reduction in the sentences imposed is a just remedy for the breach. A brief review of the authorities reveals the following:

- i. In **Tussan Whyne v R**, a delay of eight years resulted in reduction of one year.
- ii. In **Absolom v R** [2022] JMCA Crim 50, a delay of seven years resulted in a two-year reduction.
- iii. In **Techla Simpson v R** [2019] JMCA Crim 37, there was a delay of eight years for which two years' reduction was awarded.
- iv. In **Jerome Dixon v R** [2022] JMCA Crim 2, there was a delay of 10 years that resulted in reduction in sentence of five years.
- v. There was a delay of nine years and two months in **Lloyd Forrester v R** [2023] JMCA Crim 20. The sentence was reduced by one year.
- vi. In **Campbell and Cooper v R** [2023] JMCA Crim 24, a delay of seven years attracted one year's reduction in sentence.
- vii. In **Rockel West v R** [2023] JMCA Crim 14, a delay of nine years had the consequence of a reduction in sentence of two years.
- viii. In *Garfield Green v R* there was a 13-year delay from the date the appellant was charged to final disposal in this court. His remedy was a reduction in sentence of three

years and three months, together with a reduction in his parole ineligibility period of incarceration.

[167] In this case, there was a delay of approximately 10 years between arrest and charge and the commencement of the trial. The applicants filed their applications for permission to appeal on 19 April 2018, but the transcript was not received until 2 February 2021, followed by the ruling of the single judge on 29 April 2021; the hearing of the application for leave to appeal commenced on 26 June 2023, with a further delay of three years to delivery of judgment. Therefore, the appellate process has added approximately eight years. All told, there was a 17-year delay. Based on the authorities, it seems appropriate to grant the applicants Andrew Williams and Kirk Drummond a declaration that their constitutional right to a fair hearing within a reasonable time has been infringed, and, where necessary, reduce the sentences by five years, as a remedy for the breach.

[168] In light of the foregoing, we make the following orders:

Andrew Williams and Kirk Drummond

1. The application for leave to appeal against conviction and sentence is refused.
2. It is hereby declared that the applicants' constitutional right to have the case brought against them in the courts below as well as the appeal determined within a reasonable time, in accordance with sections 16 (1) and 16 (8) of the Constitution, has been breached by the 17-year delay in the determination of this case.
3. As a remedy for the breach of the applicants' constitutional right, the minimum terms to be served before eligibility for parole are reduced as follows:
  - (a) Count 1: Both applicants- from 15 years to 10 years.

(b) Count 2: (i) Andrew Williams – from 15 years and three months to 10 years and three months; and Kirk Drummond – from 15 years and nine months to 10 years and nine months.

(c) Counts 3 and 4 – Both applicants – from 15 years to 10 years.

4. For the avoidance of doubt, the sentences of life imprisonment imposed by the learned judge remain undisturbed.
5. The sentences are to run concurrently and are reckoned to have commenced on 5 April 2018, the date they were imposed.

### **Apology**

[169] We unreservedly apologise for the delay in delivering this judgment.