[2016] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 89/2012

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA (AG)

MORRIS CARGILL v R

Ms Jacqueline Cummings for the applicant

Mrs Sharon Milwood-Moore for the Crown

15, 20, 29, 30 July 2015 and 19 February 2016

BROOKS JA

[1] On 3 May 2009, Mr Ijah Young was chased, shot and killed by a lone gunman in an area in the parish of Saint Andrew, known as Back Bush. In July 2012, Mr Morris Cargill was convicted of murder arising from that death. His defence at the trial was one of alibi. He testified that he was elsewhere, at work, at the time of the killing. He did not, however, call any witness to support his alibi.

[2] In this application for leave to appeal he sought permission to adduce, as fresh evidence, the testimony of Mr Dunstan Baker. Mr Baker's testimony was in support of Mr Cargill's alibi. The basis of the application to adduce the fresh evidence is that Mr

Baker was not available at the time of the trial, but that his testimony could cast doubt on the prosecution's case against Mr Cargill.

[3] This court considered Mr Cargill's application to adduce the fresh evidence and decided that, as the proposed testimony was possibly capable of belief, the court would hear Mr Baker's testimony in order to assist it in deciding on Mr Cargill's application for permission to appeal. The court heard Mr Baker's testimony and ruled, by a majority, that his evidence was plainly capable of belief. The next question for the court is what effect that fresh evidence should have in the circumstances. This question has to be considered in addition to any other concerns that could call the validity of the conviction into question. Before examining those issues, however, an outline of the evidence adduced at the trial and a summary of Mr Baker's testimony before this court would be helpful.

The evidence at trial

[4] The sole eyewitness for the prosecution at the trial was Mr Rudolph Wildman. He testified that he was a motor vehicle mechanic. At the time of the killing, he lived and had his garage at No 8A Bygrave Avenue. Bygrave Avenue is a road running from Mountain View Avenue to Back Bush. Mr Wildman testified that on 3 May 2009, at about 11:00 am, he was at his home, working on a motor vehicle when he heard explosions sounding like gunshots. He looked out to the roadway and saw Mr Cargill, whom he knew before as "Myra" or "Chinie", chasing Ijah Young. Both were running along Bygrave Avenue. Mr Cargill was armed with a gun and was firing shots at Mr Young, who, at times, is referred to in the transcript as "Ijay".

[5] Mr Wildman said he went out by his gate and he saw Mr Young stop and ask Mr Cargill, "Rastaman [Mr Cargill is of the Rastafarian faith, and wears his hair in dreadlocks], a whey mi do yuh?" Mr Cargill's response, according to Mr Wildman, was to fire another shot, which hit Mr Young. Mr Wildman testified that the shot "lift [Mr Young's] shirt". Mr Young ran off again but didn't get far. He fell at the entrance to Back Bush. Mr Wildman said Mr Cargill then went and stood over Mr Young, "and fire 'bout four [shots] pon him ah ground".

[6] Mr Wildman's testimony was severely tested in cross-examination. There were at least three areas in which it would have caused the jury to pause in assessing his credibility. The first was an inconsistency as to whether he was able to see where Mr Young fell and received the final shots. The second was a discrepancy between his testimony and that of the police officers, who came on the scene after the shooting. It concerned the clothing that Mr Young was wearing at the time of his death. The third concerned the weather. The police officers stated that it was a rainy day. So did Mr Cargill. Mr Wildman, however, said that "it wasn't raining, it was a clear day".

[7] Three police officers gave evidence. Two of them visited the scene and saw Mr Young's body on the ground. The third conducted an identification parade in which Mr Cargill was the suspect and was pointed out as Mr Young's killer.

[8] Dr Prasad Kadiyala conducted the post mortem examination on Mr Young's body. He found that four bullets penetrated the body. From the entrance wounds and the trajectory of the respective bullets, Dr Prasad, concluded, that for three of the four

shots, the assailant fired from behind Mr Young, although two of those three were more from Mr Young's right side. The fourth injury, which was to the face, could have been inflicted from any direction as the head, being mobile, could have been in any position in relation to the attacker.

[9] Mr Cargill testified that he was at work at the time of the incident. He was doing construction work by Excelsior High School, which is along Mountain View Avenue. He lived at No 11 Bygrave Avenue at the time, but had gone to work at about 7:00 that morning and was at that worksite until early afternoon. He said that his job that day, at the Excelsior site, was to move dirt that had been thrown from upstairs a building at the worksite, and to place it in a heap so that it could be taken away. He also "cast a little manhole".

[10] At about 1:00 in the afternoon, said Mr Cargill, he went directly to another construction site, "up by Digicel complex…at the top of Mountain View". This was on the instruction of his employer. His job at the Digicel site was to dig out a foundation for a building. He remained at that second site until after 3:00 pm. Rain interrupted the work and he left the site and went home.

[11] When he got home, he said, he saw a lot of police and soldiers. He, however, made no enquiries as to the reason for their presence. He said that it was after he was taken into custody in August 2009 that he learnt about a shooting having taken place on Bygrave Avenue. He said that he did not know anyone named Ijah Young.

[12] He accepted that he knew Mr Wildman personally and knew that Mr Wildman lived right opposite where he lived. He, however, only knew him as "Toot". Mr Cargill had spoken to Mr Wildman when he, Mr Cargill, first moved to Bygrave Avenue. In fact, it was Mr Wildman who had transported his things to Bygrave Avenue. They had since had a disagreement but, by the "mercy of God, it don't get major". He said, however, that they "never have live good, but [tried to do so]". He testified that between the day of the shooting and the day when he was arrested he saw Mr Wildman every day.

[13] Mr Baker testified that he is a building contractor and that he lived at No 100 Mountain View Avenue. He was a character witness for Mr Cargill after Mr Cargill was convicted and before he was sentenced. He said, at the sentencing hearing, that he found Mr Cargill to be a good worker and always employed him on his work sites. He said that in 2009, Mr Cargill was employed to him at a site in which he was "doing something for Digicel".

Mr Baker's testimony in this court

[14] Mr Baker's explanation for not having given testimony at Mr Cargill's trial was that he had been out of the island at the time that Mr Cargill was arrested and that he wasn't sure whom he should contact concerning assisting Mr Cargill. It is important to note that the application to adduce fresh evidence from Mr Baker came at a time subsequent to the death of the prosecution's sole eyewitness, Mr Wildman.

[15] In his testimony before this court, Mr Baker said that Mr Cargill worked at the construction site at Excelsior High School. They were both at the Excelsior worksite on

Sunday, 3 May 2009. He said that he first saw Mr Cargill at about 8:00 that morning. They were working on the site continuously and at about 11:30 or thereabouts he heard "some explosions further down the road". At that time Mr Cargill was still on the site at Excelsior. "He was still working with the carpenter putting up the decking, cause [sic] it is a big decking".

[16] Mr Baker testified that at about 1:00 pm he sent Mr Cargill to a worksite at the corner of Fairway Avenue and Lady Musgrave Road, where he, Mr Baker, had a contract to "set up a scrimmage football field on a parcel of land owned by Digicel". Not long after sending Mr Cargill away, Mr Baker said that he called off the work at Excelsior and went to the Fairway Avenue site, where he saw Mr Cargill at about 1:30 pm. They all left that site together at about 3:00 that afternoon.

The grounds of appeal

[17] Ms Cummings, on behalf of Mr Cargill, argued, with the permission of the court, the following supplementary grounds of appeal:

> "1. The Learned Trial judge failed to make sufficient reference to and point out the weaknesses, contradictions and inconsistency [sic] in the case for the prosecution given in the evidence of the sole prosecution alleged witness of the incident.
>
> 2. The verdict is unreasonable and inconsistent with the evidence given by the sole prosecution alleged witness of the incident.
>
> 3. The Trial Judge erred when he failed to place the same emphasis on the Applicant's evidence of alibi as he placed on the testimony of the sole prosecution alleged witness of the incident.

4. The trial was unfair to the Applicant as several damning and prejudicial statements were made against him by the sole prosecution alleged witness of the incident that it would have influenced the jury adversely to the Applicant in addition to how this witness was taken to court.

5. The identification parade held for the applicant was unfair as limited other persons with dread lock [sic] hairstyle were in the line-up which would be prejudicial to his identification by the prosecution witness.

6. The Learned Trial Judge should have left provocation to the jury as the sole prosecution alleged witness of the incident made reference to evidence which could have suggested it and there was no evidence of malice.

7. Having regard to the fresh evidence given at the sentencing hearing by Mr Dunstan Baker that was not heard by the jury it makes the verdict is [sic] unsafe and unsatisfactory.

8. The crown in the form of the police failed to disclose certain evidence which could have assisted the Applicant in his trial and making the verdict unsafe."

[18] Ground three was withdrawn, and properly so. Grounds five, six and eight are without merit and deserve no detailed examination. Firstly, an identification parade is to be held only where it would serve a useful purpose (**Goldson and McGlashan v R** [2000] UKPC 9 (23 March 2000)). The evidence in this case was that Messrs Cargill and Wildman were so familiar with each other, despite the fact that they did not know each other by their respective correct names, that the identification parade was only confirmatory of that knowledge. There could be nothing unfair about that parade, in terms of testing Mr Wildman's knowledge of Mr Cargill. It should also be noted that Mr

Cargill was represented by counsel when the parade was conducted and steps were taken to conceal a distinctive mark which Mr Cargill had.

[19] Secondly, there was no evidence of any act or word, to which the learned trial judge could have directed the jury's attention that could have been said to possibly constitute provocation. Thirdly, in respect of ground eight, learned counsel submitted that a communication by the Constabulary Communication Network that Mr Young was killed by a group of men, suggested that the police had material which they did not share with the defence. That communication was subsequent to Mr Cargill's conviction. The submission amounted to mere speculation and was of no assistance to the appellate process.

[20] The other grounds may be considered under headings dealing, respectively, with the inconsistencies in the prosecution's case (grounds one and two), the unfair prejudicial elements of the prosecution's case (ground four) and the fresh evidence (ground seven). These headings shall be dealt with separately.

The inconsistencies in the prosecution's case

[21] Ms Cummings submitted that there were glaring inconsistencies in the evidence of Mr Wildman. The first, she submitted, concerned where he was at the time that Mr Young was shot. In examination in chief Mr Wildman gave the impression that he saw the entire incident from his gate. In particular, he said that he did not go to the spot where Mr Young fell. He said at page 23 of the transcript:

> "Well, I don't quite remember Ijay clothes, because when Ijay dead up di road, I don't goh up dere."

[22] Learned counsel also pointed to the following exchange in cross-examination at pages 40-41 of the transcript:

> "Q And you saw when [Ijah] run off.
>
> A Mi si when him run off.
>
> Q And you saw when he dropped?
>
> A Yea, him drop.
>
> Q And all of that you saw by standing at your gate, 8A Bygrave Avenue?
>
> A Well, all…
>
> Q It is a yes or no answer, sir. **You were standing at your gate at 8A Bygrave Avenue?**
>
> A **Yea**." (Emphasis supplied)

[23] Later in the cross-examination it was suggested to him that he could not, from his gate, see the spot where Mr Young had fallen. It was at that time that he indicated that he did not remain at his gate but went toward the spot. The exchange is recorded at pages 52-53 of the transcript:

> "Q. I am going to suggest to you Mr Wildman…that when you stand at 8A Bygrave Avenue…you could not have seen where Ijah was shot and killed?
>
> A. Well...
>
> Q. You agree or disagree?
>
> A. That is if I was standing by Bygrave Avenue, I was standing definitely at my gate when the thing happen, **we run to see what going on**.

Q. Mr Wildman you told a story this morning?

A. Yea.

Q. You changing that story now, remember I asked you…where you were, and you said you were at your gate, and I asked if you moved from your gate, and you said, "No". Do you remember saying that earlier, Mr Wildman?

A. Yea."

Q. Is that not correct that's not the truth?

A. Well, I wouldn't even say it wasn't the truth, definitely when the thing what happen we run up the road to see what going on when the complete thing finish.

Q. Mr. Wildman, when you say to me this morning that you stayed at your gate, that is not the truth?

A. That is the truth I was at mi gate, of course.

Q. When – if you were at your gate when Ijah fall was that [the] truth?

A. Yea, that's the truth I see him fall." (Emphasis supplied)

[24] The suggested inconsistency was brought to Mr Wildman's attention again. That exchange is recorded at page 56 of the transcript:

"Q. I am suggesting to you Mr. Wildman, that Ijah was killed in "Back Bush" and not along Bygrave Avenue, do you agree with me?

A. I agree with you with that.

Q. Suggest to you that the part in "Back Bush" where Ijah was killed you cannot stand anywhere by 8A Bygrave Avenue and see from there, do you agree or disagree with me?

A. That is true."

[25] Further statements on the point, which Ms Cummings submitted were contradictory, were also made later in the cross-examination. One was at page 67 where Mr Wildman said "I was not at my gate the entire time". The other is at pages 68-69 of the transcript:

"Q. Mr. Wildman…I am asking when Ijah fell you were standing at your gate and saw that?

A. Yea, I was standing at my gate.

Q. Good. And when you said somebody fired more shots at him [on] the ground, you stood from your gate and saw that?

A. A nuh somebody, a whey him name fire the rest of the shot dem.

Q. You stood at your gate and saw that?

A. I see when him turn back, Ijah was right at the corner.

Q. Mr. Wildman, you stood at your gate and saw him?

A. When him rushing, when the crowd going…

Q. Did you stay at your gate and see that?

A. And see what?

Q. When the shots were fired at Ijah at the ground?

A. No, I didn't see it, I was running up the road at the time."

[26] Learned counsel accepted that Mr Wildman said, in re-examination, that he went "almost up to 14 Bygrave Avenue". This, however, she submitted, resulted from a leading question and ought to be considered in that light.

[27] Ms Cummings also identified other areas of difficulty with the credibility of Mr Wildman's testimony. She pointed out that, on his testimony, the attacker would have shot Mr Young some 10 times. Yet, she argued, the forensic evidence showed otherwise. Firstly, there were only four entry bullet wounds found on the body. Secondly, only two spent shells found on the scene.

[28] Ms Cummings submitted that the learned trial judge did not bring these important inconsistencies and discrepancies in the prosecution's case to the attention of the jury. The failure, she argued, was fatal to the conviction. She relied upon, among others, **R v Hugh Allen and Danny Palmer** (1988) 25 JLR 32.

[29] Mrs Milwood-Moore, for the Crown, submitted that the learned trial judge did explain to the jury the nature and significance of inconsistencies and discrepancies. She also submitted that he very practically and carefully gave them an example of that important inconsistency in Mr Wildman's testimony that Ms Cummings had identified and stressed. With respect to the gunshot wounds, learned counsel argued that it didn't necessarily follow that shots fired from a firearm would result in injuries to the person fired at.

[30] In addressing the issues raised by these grounds, it must be pointed out that trial judges are required to explain to juries the nature and significance of inconsistencies

and discrepancies and give them directions on the manner in which they should treat with those elements that occur in the evidence. Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case. Three previous decisions of this court assist in outlining the duties of a trial judge in this regard.

[31] Firstly, Carey JA explained, in **R v Fray Deidrick** SCCA No 107/1989 (delivered 22 March 1991), the general obligation on the trial judge in respect of this aspect of a case. In addressing a complaint that a judge had failed to bring to the attention of the jury the fact that there were inconsistencies between a witness' testimony and a previous statement made by that witness, Carey JA said at page 9 of the judgment:

> "...Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with other witnesses in the case.
>
> The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. **There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses**." (Emphasis supplied)

[32] Secondly, in **Lloyd Brown v R** SCCA No 119/2004 (delivered 12 June 2008), Harrison P, in delivering the judgment of the court gave guidance, similar to that given by Carey JA, but explained that the trial judge should point out some of the major contradictions in the evidence. He said at pages 15-16:

> "A further complaint is made in this ground that the learned trial judge erroneously failed to point out certain discrepancies arising in the evidence of the various witnesses.
>
> There is no duty on a trial judge to point out to the jury each and every discrepancy which arises in a case. It is sufficient that the learned trial judge points out some of the major discrepancies, as illustrations of such discrepancies, give proper directions of the manner of identifying such discrepancies and further advising the jury to decide whether they are material or immaterial and the way in which they should be treated."

[33] The third case is **R v Lenford Clarke** SCCA No 74/2004 (delivered on 29 July 2005). In that case, Smith JA, in delivering the judgment of the court, explained the care with which the issue of major discrepancies, and whether they are material or immaterial, is to be treated. He said at page 12:

> "In our view restricting the consideration of inconsistencies to the so-called central issue is not helpful and may indeed be confusing to the jury.
>
> Invariably the so-called 'central issue' in a case involves many material issues. A witness might speak to one or more of these issues. Whether or not an inconsistency is material would, we venture to think, depend on the nature, degree and relevance of the inconsistency. Where, for example, credibility is in issue, discrepancies in respect of peripheral matters may be relevant and thus, we think, material. On the other hand a discrepancy or conflict may be in respect of a material issue but its degree de minimis and so

> insignificant that the discrepancy may properly be regarded as slight or immaterial."

R v Allen and Palmer does not place any higher standard on a trial judge. In that case, however, the inconsistencies were so linked to the critical element of identification that this court held that the trial judge's directions in that case fell short of what was required for a full direction to the jury.

[34] In the present case, the learned trial judge did address the issue of discrepancies and inconsistencies that occurred in the evidence. He carefully explained what each category was, how they could have originated, and the ways in which the jury could address them. Thereafter, he gave an example of an inconsistency. He used, as his example, Mr Wildman's inconsistent evidence regarding whether or not he moved from his gate during the incident in which Mr Young was killed. An extract from the summation demonstrates the learned trial judge's approach. He said, in part, at pages 193-196 of the transcript:

> "The first question is, is there an inconsistency or discrepancy. Secondly, is there an explanation for the inconsistency or discrepancy, whether coming from a particular witness or witnesses, or from any other evidence. And thirdly, is the inconsistency or discrepancy important. One way of deciding whether it is important, is deciding whether for you the point on which the inconsistency or discrepancy occurs is vital to the case or credibility of the witness or witnesses. If you say that it's vital, you have two options, you may say that a particular witness or witnesses cannot be believed on the particular point, or you may say that the witness or witnesses are not to be believed at all. That is, you reject the entire evidence. If, however, the inconsistency or discrepancy is not important, you simply acknowledge that it exists but that it doesn't affect the credibility or [sic] witness or witnesses.

> Now, by way of example, I am sure you recall the witness, Mr Wildman, when he gave evidence in the morning section on Wednesday last week. He was asked if he was standing at his gate when he saw Ijay turned around and asked the accused say, 'Rasta, what me do you', or words to the effect and that he saw the accused fired shots, that the deceased ran off and fell and that the accused went over him and fired some shots and he was asked if he saw all of that standing at his gate and you might recall he started to answer and said well, all right he was, and he was cut off and he was asked for either a yes or no answer and he then say, yeah.
>
> We broke for lunch and in the afternoon session on Wednesday it was suggested to him, that if you stand at your gate at 8a Bygrave Avenue, you could not see where Ijay was shot. His response at that point was, when the thing happen me run up the road to see what, if anything happen. He was then asked if he remembered saying in the morning that he saw all of that episode, the begging, the shooting, the running off and dropping, the firing of the shots when he was on the ground when he was standing at his gate and he said, yes, he remembered saying that, but he said when the complete thing finish, he was standing at his gate and you recall when he was giving evidence that defence counsel said that if he was standing at his gate he could not actually see where Ijay was killed.
>
> In re-examination he was asked to clarify what happened by prosecuting counsel. He said when Ijah was shot and fell, he was not directly at his gate, he had reached almost up to 14 Bygrave Ave. So, you therefore have to consider whether you find there to be an inconsistency in respect of his positioning at the time, he said he saw Ijah being shot, get shotrun [sic] off and drop. You have to consider, in light of the explanation he has given, he was not actually at his gate or in the vicinity of the gate number 14 when he said he saw what he saw, decide what effect do you find that body of evidence has on his credibility, that is your ability to believe him and to determine what you accept to be the truth; what you find as the proven facts in this case...."

[35] Ms Cummings argued that that direction did not go far enough. Learned counsel submitted that the learned trial judge should have asked the jury to consider whether Mr

Wildman had changed his testimony because he had been confronted with photographs of the scene. That, however, would only be an example of an explanation for the discrepancy. The learned trial judge gave the jury examples of possible explanations. He told them that differences could arise from the passage of time and he told them that it also spoke to the issue of credibility. His failure to specifically mention the display of photographs would not be fatal against the background of those general directions.

[36] The learned trial judge also identified an example of a discrepancy. He used the difference between the evidence of Mr Wildman and one of the police witnesses concerning the clothing that Mr Young was wearing on that day. The learned trial judge then directed the jury, at pages 196-197 of the transcript:

> "...You therefore should consider what you make of that [difference]. How does it affect your assessment of the credibility of the witnesses and in this case the accuracy of Mr Wildman's powers of observation and recall. If Mr. Wildman made a mistake in relation to the deceased clothing might he be making a mistake in relation to the identity of the deceased's attacker? Or you may say accuracy in respect of clothing is not crucial and does not affect your assessment of the reliability of his identification of the accused...[sic] a matter for you, how this affects your view of the main witness' evidence."

The learned trial judge then addressed the issue of Mr Wildman's credibility and then finalised his directions on inconsistencies and discrepancies at pages 198-199:

> "Now, I have just highlighted one example of an inconsistency and one example of discrepancy, but as you go through the evidence, if you find there to be any others, please treat them in the way I have directed you."

[37] Those directions are consistent with the guidance given in **Fray Deidrick**, **Lloyd Brown** and **Lenford Clarke**. The learned trial judge's approach cannot be faulted in this regard. To the extent that he failed to address the issue of the number of shots fired versus the number of injuries, and the number of spent shells found on the scene, that may be explained by his comment made to defence counsel during her cross examination on the point. The learned trial judge pointed out to defence counsel that there were variables that had to be taken into account. With respect to the number of spent shells the learned trial judge said to counsel at page 126:

> "You, are not sure how long after the incident the [police] witness would have gone to the scene, or what had happened prior to him going to the scene. So, I'm just saying that you have established that certain things are left after the bullets were fired, but to ask him if a certain amount were fired, there are certain variables that may have or may not have impacted from that. That's all I am saying."

[38] In similar vein, Mrs Milwood-Moore's submission, concerning the marksmanship of the attacker, is valid in blunting the effect of the discrepancy between the number of shots fired and the number of entry wounds on Mr Young's body. Mr Wildman's evidence concerning the number of shots fired did not specifically indicate that those shot hit Mr Young. The witness said at page 19 of the transcript: :

> "Him [Mr Cargill] coming to me when he fire about four to five shot aready [sic], when ah si him out dere, and then him turn back and goh back and goh fire 'bout four to five more."

[39] The other aspect of the issues raised by these grounds is whether the verdict is unreasonable having regard to the number of inconsistencies and discrepancies in the

prosecution's case. In this regard, guidance may also be found in the judgments of **Lloyd Brown** (at page 16) and **R v Vidal and Thompson** SCCA Nos 266 and 269/2001 (delivered 25 May 2005), which stressed that the issue of credibility of the witness is one for the jury. In **Vidal and Thompson**, K Harrison JA addressed the issue at page 8 of the judgment of the court:

> "...It is our opinion, that once the learned trial judge explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of the witness at the trial, and reminds them of the major inconsistencies in the witness' evidence, it is a matter for the jury to decide whether or not the witness has been so discredited that no reliance at all should be placed on his or her evidence...."

[40] Based on the above analysis, the complaints about the learned trial judge's summation and the finding of the jury, on the issue of inconsistencies and discrepancies, cannot succeed. The conflicts in the prosecution's case were fairly placed and explained to the jury and, despite them, it chose to accept Mr Wildman's testimony as to the way in which Mr Young was killed and as to the identity of the perpetrator.

The unfair prejudicial elements of the Crown's case

[41] Ms Cummings also argued that there were certain elements of the prosecution's case which were manifestly unfair to Mr Cargill and his case. These elements were mainly from Mr Wildman's testimony, but there was also an incident which occurred during the trial, which Ms Cummings submitted was improperly prejudicial to his case.

[42] Ms Cummings, in her written submissions, identified the areas of the evidence about which she complained. They are the following portions of the testimony of Mr Wildman, where he:

> "i. ...in reference to [Mr Cargill's] residence stated that '*ah pure gunman live ova deh'* implying that [Mr Cargill] was a gunman and only persons who do illicit activities live at his residence. (page 12)
>
> ii. ...said '*mi all beg dem to hold down di war'* in reference to whenever he spoke to [Mr Cargill] implying that [Mr Cargill] was in a conflict or war. (page 13)
>
> iii. ...said '*The only thing I know about* [where Mr Cargill used to work]*, they are wanting* [sic] *man*, [that's the only thing I know]' thereby suggesting that [Mr Cargill] was a wanted man... (page 61)
>
> iv. ...said '*and den di war start wid di odda side and dem....'* suggesting that [Mr Cargill] was in a war with other persons and it escalated. (page 24)
>
> v. ...said '*I am not living there true dem'* which would make the jury think [Mr Cargill] was the reason he removed from living in the Avenue. (page 27)"

[43] It should be noted that all these comments by Mr Wildman, except for the last, went by without any comment by the learned trial judge. They were all made without any prompting from the prosecutor, who, in fairness to her, sought in each case to bring the witness back on track. The learned trial judge, in respect of Mr Cargill's comment at page 61 of the transcript, directed the jury to "totally disregard what the witness just say [sic], not relevant".

[44] The incident which occurred in court, and to which Ms Cummings referred, was the occasion when Mr Cargill entered the courtroom to commence his testimony. The transcript revealed that Mr Wildman was the prosecution's first witness. He was not in the precincts of the court when he was first called and the prosecutor was obliged to ask the court to wait for Mr Wildman to "come from across the road" (page 4).

[45] Although it is not revealed in the transcript, there is no dispute that Mr Wildman entered the court along with the Director of Public Prosecutions and police personnel. Ms Cummings submitted that the sight and presence of the director in that situation, "was also prejudicial to [Mr Cargill] and would have influenced the jury's decision adversely to [him].

[46] The Director of Public Prosecutions, in response to Ms Cummings' complaint, provided an affidavit to this court in which she explained her reason for accompanying Mr Cargill to court. The learned director deposed that Mr Cargill was in the witness protection programme and expressed reluctance, on the day of the trial, to testify. She stated that she went with him to the court so to allay his fears. The learned director stated that she did not address the court, as she was not robed. She however, "extended the usual courtesies to the Court by bowing before making [her] exit".

[47] Mrs Milwood-Moore submitted that although one of Mr Wildman's statements "was troubling", the authorities made it clear that the treatment of prejudicial statements was a matter to be left to the discretion of the trial judge. Learned counsel was concerned, however, that the learned trial judge's intervention in respect of one of

the comments could have left the impression with the jury that they were entitled to consider the others. She relied on the cases of **R v Coughlan** (1976) 63 Cr App Rep 33, **R v Doherty** [1999] Cr AR 274 and **Machel Gouldbourne v R** [2010] JMCA Crim 42 in support of her submissions.

[48] Learned counsel submitted that the circumstances in which Mr Cargill entered the courtroom could not have influenced the jury. She submitted that the directions to the jury by the learned trial judge on their role and the manner of carrying out their duties would have been sufficient for the jury "to recognize that mere association with an individual or office holder could not deliver to any witness the "*presumption of credibility*". Mrs Milwood-Moore did accept, however, that the jury could have been given the impression that Mr Wildman was a "reluctant witness".

[49] It would be fair to say that in each instance of the impugned statements, in which the learned trial judge failed to give the jury any caution, the statement, although indirectly, linked Mr Cargill to improper, if not illegal, activity. In those circumstances, the learned trial judge had the option, to either say nothing, hoping that the jury would forget the statement, tell the jury immediately to disregard the statement, direct the jury during the summation to disregard it or to give both an immediate warning as well as a warning during the summation. Where the statement is irremediably unfair, the trial judge may be obliged to discharge the jury and order a new trial. Those options were outlined in **Machel Gouldbourne**. In that case, Morrison JA (as he then was) pointed out that the appellate court would not lightly interfere with the course adopted by trial judges who are faced with those situations. Morrison JA accepted as accurate, the

statement made in **R v Weaver** [1967] 1 All ER 277 by Sachs LJ, who said, at page 280 of the report, that the correct course to be adopted "depends on the nature of what has been admitted into evidence and the circumstances in which it has been admitted".

[50] A more recent outline of the point was made by their Lordships in the Privy Council in **Quincy Todd v R** [2008] UKPC 22. In that case their Lordships said, at page 25 of their opinion:

> "In their Lordships' view, an appellate court, remote from the atmosphere and nuances of the trial process, should be slow to interfere when a trial judge continues with a trial after the jury has heard inadmissible evidence and will not do so merely because it would have decided differently. In this case the judge immediately, and effectively, directed the jury to disregard the evidence; no further reference was made to it; and none of those involved in the trial appears to have thought that the evidence was so damaging that consideration should be given to discharging the jury. The trial was in its third week and all the evidence was completed on the following day. It is clear that the judge thought about what she was doing and must have been satisfied that the jury would be able to return a proper verdict. The local appeal court upheld her decision."

[51] The effect of the statements identified by Ms Cummings, did, however, require, at least, a comment from the learned trial judge, during his summation. Their cumulative effect was such that it would have been easy for the jury to draw the impression that Mr Cargill was fully integrated into activities that were violent in nature and that he was a member of one of two warring factions in the Bygrave Road area. Each case, as the decided cases point out, will depend on its own facts. The nature of the killing described by Mr Wildman made it necessary, in this case, for the learned trial judge to have warned them that those statements were not probative of any of the events involved in

Mr Young's death. Ms Cummings is on good ground in her submission that his failure to do so is fatal to the conviction.

The fresh evidence

[52] The court having found, by majority, that Mr Baker's testimony is capable of belief the question for the court to analyse is what use is to be made of his evidence.

[53] Ms Cummings submitted that, having regard to the inconsistencies in the prosecution's case, Mr Baker's independence and his knowledge of Mr Cargill, had the jury heard Mr Baker's testimony as to Mr Cargill's alibi, they would have come to a different verdict.

[54] Mrs Milwood-Moore argued that Mr Baker's demeanour and testimony undermined his credibility. She argued that, in contrast, the jury saw Mr Wildman and heard his testimony and decided that he was credible. Learned counsel submitted that there were three aspects of Mr Wildman's testimony that were compelling, namely, his evidence that he saw his neighbour chasing a man with a gun, his testimony that he heard a verbal exchange between the two where Mr Young asked, what he had done, and the verbal exchange after the killing, when a man named "Fiesta" asked Mr Cargill if he had caught the man, and Mr Cargill's reply to Fiesta was, "[m]i mash up dat" (page 10 of the transcript).

[55] In **Patrick Taylor v R** SCCA No 85/1994 (delivered 24 October 2008), Panton P stated that there were two tasks which this court should undertake in the consideration of fresh evidence. The first is to decide whether or not to accept the fresh evidence.

The second task is to decide whether or not to allow the appeal. In performing this second task the court has to decide whether the fresh evidence raised any doubt as to whether the verdict is unreasonable or there had been a miscarriage of justice, as contemplated by section 14(1) of the Judicature (Appellate) Jurisdiction Act.

[56] It is a decision that the court must make based on its view of the evidence and not based on what it considers would have been the effect of that evidence on the jury. Their Lordships in **Bonnett Taylor v R** [2013] UKPC 8, in an appeal from a judgment of this court, confirmed, at paragraph 41, the validity of the view stated in **R v Pendleton** [2001] UK HL 66; [2002] 1 All ER 524 concerning the correct approach of an appellate court, in such circumstances. Their Lordships, in **Pendleton**, reminded appellate courts that their duty is not to determine whether or not the appellant is guilty, but rather to decide whether the conviction was safe. Their Lordships stated that the appellate court may, in a case of any difficulty, test its own view by considering whether the evidence "might reasonably have affected the decision of the jury to convict" (paragraph 19 of **R v Pendleton**).

[57] In **Orville Murray v R** SCCA No 176/2000 (delivered 19 December 2008) this court accepted the validity of the principles laid down in **Pendleton**. Harrison JA adopted the following passage from paragraph 31 of Lord Brown's judgment, in the Privy Council decision of **Dial and Another v The State of Trinidad and Tobago** [2005] UKPC 4; [2005] 1 WLR 1660:

> "In the Board's view the law is now clearly established and can be simply stated as follows. Where fresh evidence is adduced on a criminal appeal it is for the Court of Appeal,

> assuming always that it accepts it, to evaluate its importance in the context of the remainder of the evidence in the case. If the Court concludes that the fresh evidence raises no reasonable doubt as to the guilt of the accused it will dismiss the appeal. **The primary question is for the Court itself and is not what effect the fresh evidence would have had on the mind of the jury**…" (Emphasis supplied)

[58] In applying the law to this case, this court is tasked to assess the fresh evidence, in the light of all the evidence presented at the trial, in order to determine whether or not the verdict is unreasonable or cannot be supported having regard to the evidence, or resulted from a miscarriage of justice. In carrying out that assessment, with a majority of this court having found that Mr Baker's testimony was plainly capable of belief, the court finds that that fresh evidence raises a reasonable doubt as to the safety of the conviction. This may be stated another way, which is more consistent with the terms of section 14(1) of the Act, namely, that the majority finds that the conviction should be set aside on the basis that, in the light of Mr Baker's evidence, the conviction arose from a miscarriage of justice.

[59] There are, therefore, two bases on which the court finds that the conviction cannot stand. It is now to be determined whether a new trial should be ordered.

Should there be a new trial?

[60] Section 14(2) of the Judicature (Appellate Jurisdiction) Act empowers this court, if it decides that a conviction should be quashed, to order a new trial, "if the interests of justice so require". In **Dennis Reid v R** (1978) 16 JLR 246, the Privy Council ruled that a "distinction must be made between cases in which the verdict of the jury has been set

aside because of the inadequacy of the prosecution's evidence and cases where the verdict has been set aside because it had been induced by some misdirection or technical blunder" (see the headnote). In delivering the judgment of the Board, Lord Diplock pointed out that a number of considerations should factor into the decision of whether or not to order a new trial. He said at pages 250-251:

> "...It is not in the interests of justice as administered under the common law system of criminal procedure that the prosection [sic] should be given another chance to cure evidential deficiencies in its case against the Accused.
>
> At the other extreme, where the evidence against the Accused at the trial was so strong that any reasonable jury is properly directed would have convicted the accused, *prima facie* the more appropriate course is to apply the proviso to s. 14 (1) and dismiss the appeal instead of incurring the expense and inconvenience to witnesses and jurors which would be involved in another trial.
>
> In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor; so may its prevalence; and, where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the *onus* of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the Accused. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

> The strength of the case presented by the prosecution at the previous trial is always one of the factors to be taken into consideration but, except in the two extreme cases that have been referred to, the weight to be attached to this factor may vary widely from case to case according to the nature of the crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from that course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, "it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery". This was said by the Full Court of Hong Kong when ordering a new trial in *Ng Yuk Kin v Regina* (1955) 39 H.K.L.R. 49 at p. 60. This was a case of rape, but in their Lordships' view it states a consideration that may be of wider application than to that crime alone.

[61] Their Lordships stressed that the factors, to which they had referred, did not pretend to constitute an exhaustive list. These considerations have been approved in a number of recent Privy Council cases such as **Nicholls v R** [2000] UKPC 52; (2000) 57 WIR 154, **Bennett and Another v R** [2001] UKPC 37; [2001] 5 LRC 665 and in judgments handed down by this court, such as **R v Sergeant** (2010) 78 WIR 410 and **Kenrick Dawkins v R** [2015] JMCA Crim 23. These authorities also suggest that the weight to be attached to the factors stated in **Reid v R** depends on the particular facts of each individual case.

[62] It is unnecessary to assess the present case against each of these factors individually. It cannot be gainsaid, however, that murder is not only a serious offence, but it has become distressingly commonplace in our society. It is important, therefore, that murder cases, wherever possible, are tried so that juries, and the society in general, derive a sense that the State does not accept the killing of its citizens lightly, and conscientiously takes steps to apprehend and place before the courts, those persons who are suspected to be the perpetrators of that particular type of crime.

[63] Despite those observations, however, it is apparent, in light of the death of the prosecution's sole eyewitness, that Mr Cargill's defence would be placed at an unfair disadvantage at a re-trial. The analysis of the record shows that it was only on cross-examination that the difficulties in Mr Wildman's testimony came to the fore. A re-trial in his absence would severely restrict the defence, in that it would have the task of confronting his evidence on paper without the benefit of demonstrating the difficulties in that evidence. It is the unanimous finding of this court that it would not be in the best interests of justice to allow a re-trial in those circumstances.

Summary and conclusion

[64] The cumulative effect of various utterances by the prosecution's sole eyewitness, Mr Wildman, during the course of his evidence, was such that it would have been easy for the jury to draw the impression that Mr Cargill was fully integrated into activities that were violent in nature, and that he was a member of one of two warring factions in the Bygrave Road area. Those utterances were unfairly prejudicial to Mr Cargill's case.

They were important in the context of the manner in which Mr Ijah Young was killed. They required at least a direction by the learned trial judge that the jury should ignore them. His failure to do so is fatal to the conviction.

[65] The credibility of Mr Baker's testimony, in the eyes of the majority of the court, is also another reason for setting aside the conviction. That testimony, in support of Mr Cargill's alibi, was in direct contrast to Mr Wildman's evidence. The difficulties in Mr Wildman's testimony and the credibility of Mr Baker's testimony are bases for finding that the conviction was unsafe, or, put another way, a miscarriage of justice.

[66] Mr Wildman's death creates a major difficulty for the fairness of any re-trial. Mr Cargill's defence would be unfairly prejudiced by the inability to cross-examine Mr Wildman. The result is that a re-trial should not be ordered. The court is unanimously of the view that a judgment and verdict of acquittal should be entered in Mr Cargill's favour.

[67] The delay in delivering this judgment is regretted.

ORDERS

1. The appeal is allowed.
2. The conviction is quashed and the sentence set aside.
3. A judgment and verdict of acquittal is entered.