[2019] JMCA Crim 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 59 & 65/2013

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

CRAIG THOMPSON &
ANTHONY BLAKE v R

Michael Lorne, Miss Damelia Young and Mikael Lorne for the appellants

Mrs Natalie Ebanks-Miller and Mrs Taniesha Evans-Bibbons for the Crown

15, 16 February 2017, 31 May and 7 June 2019

PHILLIPS JA

[1] After hearing submissions in this appeal, we gave judgment on 31 May 2019 in the following terms:

> "1. Mr Blake's appeal against conviction and sentence is dismissed.
>
> 2. Mr Thompson's appeal against conviction is dismissed.
>
> 3. Mr Thompson's application for extension of time and for leave to appeal his sentence relating only to giving credit for the full time spent in custody before sentence is granted. The hearing of the application

> for leave to appeal is treated as the hearing of the appeal and is allowed. The sentence of life imprisonment with eligibility for parole after 25 years' imprisonment at hard labour is set aside, and in giving credit for the three years and five months spent in custody before sentence, a sentence of life imprisonment with eligibility for parole after 21 years and seven months' imprisonment at hard labour is substituted therefor.
>
> 4. The sentences of both appellants are to be reckoned as having commenced on 29 July 2013."

These are the promised reasons.

[2] The appellants (Mr Craig Thompson and Mr Anthony Blake) sought to challenge their convictions (and, in the case of Mr Blake, his sentence) for the offence of murder on the grounds of misrepresentation of evidence; and the absence of adequate directions on circumstantial evidence, identification, and alibi. They were tried and convicted before Pusey J (the learned trial judge) for the said offence in the Home Circuit Court. On 29 July 2013, both men were sentenced to life imprisonment at hard labour, with Mr Thompson being eligible for parole after 25 years, and Mr Blake being so eligible after 15 years. They sought leave to appeal against their convictions, and with regard to Mr Blake, he also sought leave to appeal his sentence. On 3 August 2016, Morrison P granted leave to both appellants to challenge their convictions (and, in respect of Mr Blake, also his sentence), due to his concern as to the adequacy of the learned judge's directions on identification.

The Crown's case

[3] The Crown called seven witnesses in support of its case against the appellants.

[4] The first was Mr Edward Pryce (father of Mr Dwight Pryce (the deceased)), who testified that on 4 February 2010, sometime after 12:00 pm, he visited Glen Drive, in the parish of Saint Andrew, where he saw his son lying face down motionless, with wounds to his forehead and chest. He also testified that he had identified his son's body to the doctor and the police at the post mortem examination.

[5] Mr Timothy Allen was the Crown's second and sole eye witness. He testified that on 4 February 2010 at 1:30 pm, he was standing at the fence inside his friend Bobby's yard on Glen Drive. Whilst there, he saw both appellants with guns "[w]alking and looking and 'schreechying'" up towards the deceased, who was "coming up Dead Man's Lane towards Glen Drive". He stated that he knew both men before, Mr Thompson as "Rass" or "Rasta" for three to four years, and Mr Blake as "Barry" for over 15 years. The deceased was coming from the "gully bank" where he went to buy cash pot. After he saw the deceased, Mr Allen said he heard "[a] very loud gunshot" and then the deceased fell on his face. He stated that other people were on the lane at the time but he indicated that only the appellants had guns. Both appellants ran, and Mr Allen testified that thereafter he went to look at the deceased, and observed blood coming from his head, chest and "all over". He then ran off to call a relative of the deceased and saw Judith, the deceased's sister. He made a report to the police that day and later gave a statement to the police. On 16 February 2010, he identified both men at an identification parade.

[6] Mr Allen was asked questions in relation to photographs of the scene that had been placed on a CD and tendered and admitted into evidence as exhibit two. Mr Allen

identified where he was at the time of the incident, and indicated that nothing had obstructed his view of the incident. Mr Allen testified that photographs numbered 29, 30 and 31 depicted where he was standing, and that from where he was standing, he could "see everything clean and clear".

[7] Under cross-examination it was suggested to Mr Allen that during the preliminary enquiry at the Half-Way-Tree Parish Court, he had told the court that he was "sitting under a mango tree about to eat a mango". He denied eating the mango but indicated that at times he was sitting and sometimes standing. Mr Allen denied that he was at his house at the time of the shooting. Mr Allen admitted that trees and flowers were at the fence from which he had observed the incident, and that portions of the fence were built with blocks and mesh wire, but denied that they would have restricted his ability to see. He also admitted that the deceased was his "good friend" and that he had known him since he was a child.

[8] The scene of crime expert, Detective Corporal Leighton McAnuff, testified that when he visited the scene on the date of the incident, he had examined, photographed, sketched and processed the scene. He observed a male body lying motionless face down, and several spent shells in close proximity to the body. After returning to the Constant Spring Police Station, he swabbed the appellants' hands to test for gunshot residue, and the samples were bagged and labelled. The photographs he took of the scene were placed on a CD that was, as indicated, admitted into evidence as exhibit two. Under cross-examination, he described a wall in the photograph as a "high concrete block wall" with "bushes and trees on both sides".

[9] Detective Sergeant Desmond Roache conducted the identification parade where Mr Allen identified both men. Detective Corporal Sophia Pink was the investigating officer in the matter. She indicated that upon visiting the scene, she saw the body of the deceased with wounds to the head, foot and bottom. She collected the ballistic certificates that were tendered and admitted into evidence as exhibit three. Dr S N Prasad Kadiyala, medical practitioner and consultant forensic pathologist, testified that he conducted the post mortem on the body of the deceased and he observed six gunshot wounds to the: (i) right upper buttocks; (ii) right mid buttocks; (iii) right mid thigh; (iv) right lower anterior chest; (iv) right temporal region of the head; and (vi) right occipital region of the head. The cause of death was multiple gunshot wounds to the head.

[10] The Crown's final witness was Miss Marcia Dunbar, government analyst at the Forensic Science Laboratory. She testified that on 12 February 2010, she received samples in envelopes marked 'A', 'B' and 'C' which she had analysed for gunshot residue. Envelope A contained four samples taken from the hands of the deceased; envelope B contained four samples taken from the hands of Mr Blake; and envelope C contained four samples taken from Mr Thompson's hands. Only two samples taken from the deceased revealed the presence of gunshot residue where an elevated level was found on the back of his right hand, and gunshot residue at an intermediate level was found on the swab taken from his right palm. Two samples from Mr Blake revealed the presence of gunshot residue at the trace level on the palm and the back of his left hand. Of the samples taken from Mr Thompson, gunshot residue at trace level was

found in the right palm. She later compiled a certificate based on her findings. Under cross-examination by counsel for Mr Thompson, Miss Dunbar admitted gunshot residue could be transferred to a person who came in contact with it; that trace level is the lowest form of contamination; and that gunshot residue from an elevated level could be transferred to a person being handcuffed.

The case for the defence

Mr Anthony Blake's case

[11] Mr Blake gave an unsworn statement in which he denied killing the deceased or being present when he was killed. He stated that on the date in question, he and Mr Thompson were playing a game. They later went "on the Gully Bank in a shop buying some weed when [they] heard gunshots". He then saw people running "up and down, coming from Glen Drive side" on to the "Gully Bank". He was there for a while and decided to leave once the police had arrived because he had some weed in his possession. After leaving the shop, he went to the next lane to "build" and smoke his weed. He later received a phone call that the deceased's sister was crying at the police station and saying that he had killed the deceased. He therefore went to the police station. He lamented the fact that he had been in custody since 4 February 2010, almost four years, for a crime that he had not committed. He said that Mr Allen could not have seen him because he had not been there.

[12] Mr Ricardo Blake, Mr Anthony Blake's brother, testified on his behalf. He stated that on the date in question, between 12:00 pm to 1:00 pm, he was on Dead Man's Lane where the deceased went to buy cash pot. Upon the deceased's return, Mr Blake

stated that he heard "a loud explosion". He then turned around and saw two men who "were strangers in the area", firing shots at the deceased until he fell to the ground. After firing at the deceased, one of the men bent down and picked up something. He ran off to go home and on his way back, he saw Mr Allen "coming out his house and heading in the direction where the shots [were] fired". He was walking behind him. He spoke to the police and gave a statement that he did not sign.

[13] Under cross-examination, despite photographic evidence showing that the deceased died near the van, Mr Ricardo Blake denied that the deceased had walked up near to a van before he was shot. He described the men as follows: "[o]ne was a rasta man, wrap hair with turban. Stout built, about five six tall. The other one around six nine, slim built... And him have chiney bump hairstyle". He stated that about 10 shots were fired. In sharp contrast to what his brother had said, Mr Ricardo Blake did not see his brother or Mr Thompson on the "gully bank", and he had also denied that cash pot and weed were sold there. The last time he had seen his brother that day was at about 11:00 am, and he was in the company of Mr Thompson going to the "gully side". He admitted that he did not go into Bobby's yard to see if anyone was there.

[14] Mr Garnet Daley also testified on Mr Blake's behalf. He is a resident of Glen Drive and knows both appellants. He stated that at about 1:00 pm that day, he was standing at his gate when he saw "two strange guys walking coming toward[s] [him] from Gully Bank side". One was a rasta that was "[v]ery well dressed and neat", in a "white shirt and black turban" with "the gun dem at his side". The other person had "picky head, jus a ras or chiney bumps or something like that" and "had a gun". Both men were

walking side by side. After they had passed him he heard explosions, and so, he walked towards where he had heard the explosions. While on the scene of the incident for about one to two minutes, he saw "Timothy Allen coming down the lane towards the scene". He testified that the appellants had never been on the crime scene. He further stated that sometime thereafter he spoke to Mr Allen who told them "somebody have to pay for it", "anything a anything" because the deceased was his (Mr Allen's) best friend.

[15] Under cross-examination he admitted that the last time he saw Mr Thompson that day was at 10:30 am. He further stated that he only saw Mr Ricardo Blake after the shooting had finished, and that both Mr Ricardo Blake and Mr Allen arrived on the scene of the incident at the same time. He testified that, in his view, "the rasta" was about five feet six or seven inches tall, and the other man was about five feet eight or nine inches tall. He disagreed with a suggestion that the other man was six feet nine inches tall, and indicated that anyone who stated otherwise would be lying.

Mr Thompson's case

[16] Mr Thompson also gave an unsworn statement. He stated that on the said date he was on the "gully bank" at a shop in Cassava Piece buying ganja to smoke when he heard several shots. He looked outside and saw people running up and down. He went to visit his "common law son" and his daughter and then to the supermarket. When he returned to Glen Drive he saw yellow tape. He was told that the deceased was killed, and he was named as the killer, so he went to the police station where he was attacked by the deceased's sister who had accused him of killing her brother.

The appeal

[17] As indicated, the appellants were convicted and sentenced for murder. Mr Blake was granted leave to appeal his conviction and sentence, while Mr Thompson was granted leave to appeal his conviction. At the hearing of the appeal, the appellants relied on both their original grounds of appeal and supplemental grounds of appeal (with the leave of the court). Counsel for the appellants, Mr Michael Lorne, had initially sought leave to abandon some grounds, but at the close of their submissions, sought leave to restore ground 3 for Mr Blake as it related to identification. The grounds of appeal for each appellant were numerous, varied and repetitive. For ease of reference, we have summarised them according to the issues to which they relate as follows:

1. Both Crown Counsel and the learned trial judge misrepresented the evidence, and in so doing severely prejudiced the appellants' case.
2. The learned trial judge failed to direct the jury on the law of circumstantial evidence.
3. The learned trial judge's directions on identification were inadequate.
4. The learned trial judge failed to provide adequate directions on the alibi defence.

Discussion and analysis

Misrepresentation of the evidence by Crown Counsel and the learned trial judge

[18] Mr Lorne submitted that there were serious misrepresentations of the evidence by both Crown Counsel and the learned trial judge. He stated that Mr Allen had testified that after he saw the deceased, he heard "[a] very loud gunshot". However, Crown Counsel at the trial asked Mr Allen whether anyone else was present at the time he had heard "loud gunshots"; how far from the deceased had he been when he heard "these loud gunshots"; and whether anything happened after he had "heard the shots". Counsel further submitted that the learned trial judge himself had misrepresented the evidence in his summation when he stated that "two men with guns shot [the deceased] several times", and that two men "fired several shots at [the deceased]". Counsel contended that this was a significant misrepresentation of the facts that ought to render the appellants' convictions unsafe, especially in the light of the appellants' defence that neither they, nor Mr Allen, were present at the time the incident occurred.

[19] Mrs Ebanks-Miller, on the Crown's behalf, submitted that Mr Lorne's submission on this point was without merit, as Crown Counsel at the trial merely pluralised what Mr Allen had said. In any event, it had been the case for the Crown and the appellants that multiple gunshots were fired at the scene. As a consequence, this pluralisation, she submitted, would not have rendered the convictions unsafe, and would not have prejudiced the appellants' case, as the fact of multiple gunshots was not material to the case. There was therefore no misrepresentation of the facts and hence no basis to disturb the convictions.

[20] On this point we must say that we agree with the submissions of Crown Counsel. It was indeed the Crown's case and that of the appellants that two men shot the deceased multiple times.

[21] At the start of the Crown's case, Mr Edward Pryce had testified that he had observed gunshot wounds to the deceased's forehead and about four shots to the chest. At page 35, lines 14-15 of the transcript, Mr Allen indicated that when he went to look on the deceased, he saw "blood coming out of his head, coming out of his chest, all over". Under cross-examination, at page 44 of the transcript, Mr Allen stated that he saw the men lift the guns from their waist "and started to fire the gunshots". Under further cross-examination at page 65 of the transcript, when Mr Allen was questioned as to why it is that other persons were present but only he was under the tree, he stated that everyone came around when there was a loud explosion "bam, bam, bam". Detective Corporal McAnuff stated that he had observed "several spent shells in close vicinity of the deceased" at the scene. Dr Prasad testified that he had observed six gunshot wounds to the deceased's body. Detective Corporal Pink had also testified that she had observed several wounds on the deceased's body.

[22] On the appellants' case, Mr Blake in his unsworn statement indicated that he heard "gunshots" while he was on the "gully bank". Mr Ricardo Blake testified in his examination-in-chief that "[w]hen I turned around, I saw two men. I saw two men firing shots on 'Bada Ford' till he fell to the ground", and that he saw Mr Allen coming out of his house "heading in the direction where the shots [were] fired". Under cross-examination he said that he heard "about ten shots fire". Mr Garnet Daley stated that

after hearing "explosions", he walked towards the incident. He also stated, under cross-examination, that he heard "a bag of explosion up the road from me", and "[a] whole heap a shots mi hear. About eight, nine shots, about ten". Mr Thompson, in his unsworn statement, indicated that he had "heard several shots" while he was on the "gully bank".

[23] In all these circumstances, while it would seem that although Crown Counsel's pluralisation of "gunshot" was premature, it is nonetheless evident on the Crown's case, that more than one gunshot was fired at the scene. Mr Allen himself had said later in his testimony that he heard gunshots. The appellants in their unsworn statements and the witnesses for Mr Blake also illustrate that more than one gunshot had been fired. In our view, the reference to 'gunshot' as opposed to 'gunshots' would not have significantly affected Mr Allen's credibility as both sides had contended that more than one 'gunshot' was fired. The premature pluralisation of 'gunshot' by Crown Counsel in the trial cannot therefore be regarded as a substantial misrepresentation of the evidence. As a consequence, the reference by the learned trial judge to the existence of more than one 'gunshot' in his summation had been supported by evidence, had not been a misrepresentation of the evidence, and would not have rendered the convictions unsafe.

Circumstantial evidence

[24] Counsel for the appellants contended that the instant case was based on circumstantial evidence and necessitated directions from the learned trial judge in that respect. This was so, he submitted, since Mr Allen's testimony had revealed no direct

evidence of the murder, as he had testified that he heard "a very loud gunshot" and "only saw when [the deceased] drop on his face". Counsel posited that nowhere in his testimony did Mr Allen say that he saw when the appellants had shot the deceased, nor was he asked if he saw who shot the deceased. He further submitted that directions on this aspect of the evidence were necessary since Mr Allen himself had placed other persons at the scene (the youth sitting on the car in the lane and other people gambling), which opened the possibility of there being other suspects. Counsel urged this court to accept that it was indeed entirely possible that, had the jury been given specific directions on circumstantial evidence, they would not have returned a finding of guilt, and so the absence of that specific direction would render the convictions unsafe.

[25] In response to that argument, Crown Counsel argued that the law in relation to circumstantial evidence is as stated by the House of Lords in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 that there was no duty on a trial judge to give special directions on circumstantial evidence, and it was sufficient to direct the jury that they had to be satisfied of the accused's guilt beyond a reasonable doubt. Crown Counsel also relied on **R v Ronald Higgins** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 55/1987, judgment delivered 29 January 1988, to show that a non-direction on circumstantial evidence was not fatal to the conviction. Nonetheless, she contended, that the case at bar was not one based on circumstantial evidence, as Mr Allen had testified that the men took guns from their waists and fired shots. While Crown Counsel conceded that it was unfortunate that some aspects of the evidence had not been fully explained, she submitted that the learned trial judge had

given a balanced summation and adequate directions on inference, and accordingly, the convictions ought not to be disturbed.

[26] The learned authors of Blackstone's Criminal Practice 2019, Part F, section F1.21 define circumstantial evidence as "evidence of *relevant facts* i.e. facts from which the existence or non-existence of facts in issue may be inferred". Circumstantial evidence has been described by Pollock CB in **R v Exall** (1866) 4 F & F 922 at 929; 176 ER 850 at 853 in this way:

> "One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.
>
> Thus it may be in circumstantial evidence — there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is, with as much certainty as human affairs can require or admit of."

[27] In our view, this was not a case based on circumstantial evidence as there was direct evidence from Mr Allen that he saw when both appellants fired shots and immediately thereafter he saw the deceased's body on the ground. Mr Allen testified in his examination-in-chief at page 25 of the transcript that he saw both appellants "wield off two 'matic' [guns] and come around". At pages 34-35 he said that "[a]fter dem [the appellants] shot, dem run off" and pointed to both appellants. He said thereafter, he saw the deceased on the ground with "blood coming out of his head, coming out of his

chest, all over". In cross-examination at page 44, Mr Allen was asked whether he was sure that the men he saw had guns in their hands, and he responded in this way:

> "No. I never saw them with any guns in their hands when they were coming. It was in their waist. Is when they come up now, they lift it from their waist and started to fire the gunshots."

Under further cross-examination at page 63 of the transcript, Mr Allen stated that both appellants "ran off after they shot him [the deceased]".

[28] In relation to the issue as to whether other persons from the community who were present at the scene could have shot the deceased, this possibility was eliminated by Mr Allen himself in his examination-in-chief at pages 32-33 of the transcript, where he testified that the people he saw gambling down the lane had nothing, but he saw both appellants with guns. Mr Blake's witnesses had also eliminated that possibility as they testified that the deceased was shot by two strange men, but these men, they said, were not members of the community.

[29] While, it is true that certain aspects of the evidence in relation to what Mr Allen saw were never thoroughly explored, this lack of clarity does not automatically transform the case into one based on circumstantial evidence. Mr Allen gave evidence indicating that both men, who he knew before, fired shots at the deceased resulting in his death, and the jury clearly accepted his testimony. As a consequence, this was not a case that necessitated specific directions on circumstantial evidence from the learned trial judge to the jury.

[30] It must also be noted that in keeping with the dicta of the House of Lords in **McGreevy v DPP**, which has been cited with approval by this court in a number of cases such as **Sheldon Palmer v R** [2011] JMCA Crim 60, special directions are not required on circumstantial evidence, and it was sufficient for the learned trial judge to direct the jury that they had to be satisfied of the accused's guilt beyond a reasonable doubt. Additionally, this court in **R v Ronald Higgins** has held that a failure by the learned trial judge to give clear and precise directions on circumstantial evidence will not necessarily result in the conviction being quashed. However, despite not being required to give specific directions on circumstantial evidence, it would appear that the learned trial judge gave appropriate directions to the jury in accordance with the principles enunciated in **McGreevy v DPP**. At pages 315, 316 and 322 of the transcript, the learned trial judge gave, in our view, adequate directions on the burden and standard of proof to the jury, and at page 311 said:

> "...One of the things that we point out – and I think that you heard a lot about this so far – is that you can draw what we call inferences. An inference is a commonsense conclusion which is based on the evidence which you accept. That is, if you accept these evidence, you can come to a commonsense conclusion on it. So, if they are proved, then the next commonsense conclusion is that you can draw that inference, but we warn you that you should not speculate about what evidence might have been or allow yourself to be drawn into speculation."

[31] In these circumstances, it would seem that there is no merit to the grounds and arguments from the appellants' counsel on circumstantial evidence, and hence there is no basis to disturb the appellants' convictions on that issue.

Identification

[32] Counsel for the appellants had contended that the learned trial judge's directions on identification were woefully inadequate, as he had failed to highlight to the jury inconsistencies and discrepancies in Mr Allen's testimony that illustrate weaknesses in his identification evidence. These, counsel submitted, related to whether Mr Allen saw the deceased on Glen Drive or Dead Man's Lane; whether he could see the incident based on the height of the wall; whether he was sitting or standing; even if he was sitting, whether he could have seen over the fence; and the position of the van close to the deceased's body, and whether Mr Allen would have been able to look over the van to see the incident. He submitted that the learned trial judge's failure to highlight these weaknesses, in the context of identification, severely prejudiced the appellants' right to a fair trial and rendered the verdicts unsafe.

[33] Crown Counsel posited in response that the learned trial judge had placed before the jury all the salient aspects of the case for both the prosecution and the defence. He is not duty bound to comb through every single aspect of the evidence that was favourable or unfavourable to each party's case. The learned trial judge, she submitted, was correct to categorise the case as one of recognition and credibility. Crown Counsel contended that the quality of the identification evidence marshalled in the case was good, and pointed out various aspects of the evidence that bolstered Mr Allen's identification of the appellants. She also submitted that the learned trial judge had given the requisite identification direction pursuant to **R v Turnbull and Others** [1976] 3 All ER 549, and had also given adequate directions on inconsistencies and

discrepancies. The circumstances of the identification evidence, she submitted, were neither tenuous nor unreliable, and so there were no bases to quash the convictions.

[34] The principles governing the direction to be given to juries in identification cases have been set out by Lord Widgery CJ in **Turnbull**, and expressly approved by the Judicial Committee of the Privy Council in **Reid, Whylie and Others v R** (1989) 37 WIR 346. However, the Board in **Langford and Another v The State** [2005] UKPC 20, in adopting the principles stated by the Board in **Mills and Others v R** (1995) 46 WIR 240 indicated that:

> "...the *Turnbull* principles do not impose a fixed formula for adoption in every case, and it will suffice if the judge's directions comply with the sense and spirit of the guidelines. The provision of a sufficient direction in cases which depend on identification evidence is nevertheless an essential principle and the Board has made it clear that it will scrutinise the summing-up in such cases and, if necessary, set aside verdicts if there has been a significant failure to apply the guidelines: see *Bernard v R* (1994) 45 WIR 296, 306, per Lord Lowry." (paragraph 22)

Thus, in assessing whether the learned trial judge's directions were adequate, this court must, therefore, examine whether his directions comply with the "sense and spirit" of the **Turnbull** guidelines, or whether there was a significant failure to apply these guidelines.

[35] In his summation at pages 333 and 334, the learned trial judge warned the jury of the special need for caution before convicting the appellants on the correctness of identification. He told the jury that an honest witness can be mistaken, and informed them that the fact that Mr Allen knew the appellants before did not mean that Mr Allen

had correctly identified them or that they were guilty. In his summation, at pages 340-341 of the transcript, the learned trial judge also examined the circumstances in which Mr Allen made his identification of the appellants, such as: the fact that when they were seen it was "broad daylight"; the distance between Mr Allen and the appellants, which was about 20 to 25 feet; the length of time Mr Allen had them under observation (eight to 12 seconds); whether there was any interference with Mr Allen's observation; and that Mr Allen had known the appellants for a long time before the incident (Mr Blake for 15 years and Mr Thompson for three years).

[36] Although immediately after highlighting these points, the learned trial judge could have brought the jury's attention to the weaknesses in Mr Allen's identification evidence, which one would have expected, he instead went on to state discrepancies brought out by the defence in Mr Allen's cross-examination. It, however, cannot be said that the learned trial judge had failed to illustrate any weaknesses in Mr Allen's identification evidence to the jury. This is because in his summation, at pages 325-327 of the transcript, the learned trial judge examined these weaknesses in the context of inconsistencies and discrepancies as follows:

> " ... [S]ome of the things that we will ask you to examine, is what we call inconsistencies and discrepancies. An inconsistency is when someone says something different from what they said before. And, in this case, I will go through some of them later on.
>
> We have circumstances where witnesses will come here and give evidence and the lawyers will ask them questions about things that they said either in their statement to the police or in their statement at an earlier stage in the process and so you have to look at them.

> A discrepancy is when somebody says something different from something else. So, in this case in particular, somebody was saying, '**I was there at the time**' and somebody else said, '**You were not there**' or we have in this case, somebody which says that you know, the gentleman Mr. Allen said, '**I could see from over the wall**' and somebody says, '**Well, the only way somebody can see is through the gate**'.
>
> ...
>
> But also, you have to look at whether these inconsistencies and discrepancies are what we call slight or serious. In other words, are they important to the case or are they things which you don't consider to be significant? So you might say -- it's a matter for you but **you might say whether or not somebody was eating a mango at the time is something you were going to remember in any details three years later. I am sure most of us don't remember every mango we eat, no matter how good the mango is**..." (Emphasis added)

[37] The learned trial judge, at pages 342-345 of the transcript, also highlighted issues as to whether Mr Allen was under, beside or in front of the mango tree; whether he was eating a mango at the time of the incident; and whether he was in Bobby's yard, and indicated that those discrepancies were all a test of his credibility. At pages 349-354 of the transcript, the learned trial judge made a clear distinction between the case for the Crown and that of the appellants.

[38] Though we cannot say that the learned trial judge's treatment of the weaknesses in Mr Allen's identification evidence was ideal, we also cannot say that there was a significant failure to apply the **Turnbull** guidelines. The directions given to the jury by

the learned trial judge complied with the guidelines in "sense and spirit" and cannot, therefore, be said to be inadequate.

[39] The adequacy of the directions issued by the learned trial judge must also be viewed against the background of the quality of the identification evidence elicited. We agree with Crown Counsel that the quality of the identification evidence was good.

[40] As indicated, Mr Allen testified that the first time he saw the appellants he was about 26 feet away from them. The incident had occurred at about 1:30 pm and he described the weather as being "bright and shiny". He said he saw the appellants' faces and he knew both men before. He testified that he had known Mr Blake who was called "Barry" from the area for about 15 years and knew where he lived; he would see him every day; and the last time he had seen him was two to three days before the incident. He stated that he had known Mr Thompson, who was also called "Rass" or "Rasta", for three to four years; and he would see him as often as he would see Mr Blake. At the time of the incident he had observed both men for eight to 12 seconds. A video identification parade was also held where Mr Allen positively identified both appellants. Photographs were taken of the scene, exhibited at the trial and shown to the jury. Mr Allen was, thereafter, able to identify specifically where he was standing at the time of the incident. Mr Daley, who gave evidence on behalf of Mr Blake, in his cross-examination at page 254, also testified that when one is in "Bobby's yard" there is "a grill gate and mesh wire, so if you look through the gate you can see right down Dead Man's Lane". This supports Mr Allen's testimony that he could see the incident

from "Bobby's yard". Ms Dunbar, the forensic expert, had testified that trace levels of gunshot residue was found on the appellants' hands.

[41] The inconsistencies and discrepancies which relate to the issue of identification were thoroughly explored by the appellants' counsel in the trial, and they all appear to have been explained by Mr Allen for example:

1. Mr Allen had testified that the incident occurred on Glen Drive, but that he saw the deceased coming up Dead Man's Lane towards Glen Drive. Based on the descriptions Mr Allen gave that Glen Drive "meets up" with Dead Man's Lane, and the crime scene photographs tendered and admitted into evidence, it is clear that both Glen Drive and Dead Man's Lane intersect.
2. Mr Allen stated that the deceased was shot in front of a parked van. The scene of crime photographs confirmed that contention. The appellants had stated that Mr Allen would not have been able to see over the van. However, Mr Allen rejected all suggestions that the van would have blocked his view.
3. Mr Allen testified that while he was in "Bobby's yard" he had a clear view of the incident despite there being a fence, trees and flowers. The case for the defence was that the said wall was made up of blocks, mesh and shrubbery that

would have blocked Mr Allen's view. Mr Allen rejected those suggestions, and indicated that he could see the appellants, and did see them for eight to 12 seconds. As indicated, Mr Daley stated that when one is in Bobby's yard you could see "right down" Dead Man's Lane.

4. Mr Allen's testimony fluctuated as to whether he was standing or sitting at the fence at the time of the incident. Indeed, exhibit one was a quote from the deposition he gave at the preliminary enquiry in which he said "I was sitting under the mango tree, no one else was with me under the mango tree. Mi did just pick some mango and was sitting down". However, Mr Allen stated at pages 58-59 of the transcript that sometimes he had been sitting and sometimes he had been standing, and he had been standing when the incident occurred, and so he could see.

[42] In all these circumstances, it would appear that the quality of the identification evidence given by witnesses for the Crown was good. It is also evident that Mr Allen himself had rejected all suggestions that he either was not present at the time the incident had occurred, or that his view of the incident would have been impaired. It would, therefore, appear that there was indeed sufficient evidence upon which to convict the appellants. Although the directions given by the learned trial judge on

identification did not logically progress, they were nonetheless in keeping with and not violative of the "sense and spirit" of the **Turnbull** guidelines.

Alibi

[43] Mr Lorne pointed out to the court that the learned trial judge only gave an alibi direction to the jury after being asked to do so by Crown Counsel at the trial. He also submitted that the alibi direction given by the learned trial judge was inadequate as he gave no warnings in keeping with the principles stated in **Regina v Lucas (Ruth)** [1981] QB 720. In reliance on **Fuller (Winston) v The State** (1995) 52 WIR 424 and **R v Johnson** [1961] 3 All ER 969, counsel stated that the learned trial judge had failed to direct the jury unambiguously that there was no onus on the appellant to prove his alibi, but it was for the Crown to disprove it. He further contended that the learned trial judge's failure to refer to the evidence supporting the alibi is a misdirection. Counsel contended that the absence of clear directions on alibi, would have left the jury without a clear understanding of the law, and would therefore render the appellants' convictions unsafe.

[44] Crown Counsel submitted that the learned trial judge had given sufficient directions on alibi. She further argued that there was no rule or practice of law that a trial judge must give a **Lucas** direction in every case where alibi is raised. Mrs Ebanks-Miller relied on **R v Damion Thomas** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 236/2002, judgment delivered 20 December 2004, to show that even where an alibi direction is not fully given, it would not necessarily amount to

a misdirection. Accordingly, she argued that counsel's arguments were without merit and ought to be rejected.

[45] An alibi defence was raised by both appellants as they had positively asserted that they had been somewhere else at the time when the offence was committed. Additionally, Mr Ricardo Blake had testified that men other than the appellants shot the deceased, and Mr Daley gave evidence that he saw two strange men with guns, heard shots, and later saw the deceased on the ground at the entrance of Dead Man's Lane. In his summation, at page 360 of the transcript, the learned trial judge said:

> "Both persons indicated they were at a particular place at the time. In relation to what he said, you need to consider very carefully if you believe that. If you accept it, that's the end of it. Even if you don't accept what they have said in relation to them being somewhere else, if you don't accept their version, you have to realize that for particular reasons persons may give another explanation. They may have said I was somewhere else and it is not satisfactory for you, but that of itself does not mean that they are guilty. So they have sometimes misguided you saying, I will put myself as far away as possible and say I was somewhere else. But even that of itself is not an indication of guilt because you have to go and look at the Crown's case and say if you believe the Crown's case beyond a reasonable doubt. Does the Crown convince you in all of this?
>
> Even if you think that Ricardo Blake is a liar, you think Garnet Daley is a liar, you think that the two men and Mr. Blake and Thompson are telling a lie, even if that is your position, you don't believe them, that alone is not sufficient. You must look at the Crown's case. You must be satisfied that you believe Timothy Allen beyond a reasonable doubt so that you are sure, before you find these men guilty of this offence."

[46] In our view, there was no need for the learned trial judge to say anything more in respect of the alibi directions given by him. The learned trial judge told the jury that it is the Crown who must prove its case. He cautioned the jury that even if they do not believe the appellants' alibi that did not mean that they were guilty, and that they had to consider whether they believed the Crown's case beyond a reasonable doubt. The learned trial judge went on to tell the jury how to treat with any lies that might have been told on the appellants' case. We agree with Crown Counsel that there was no need, in the instant case, to give a **Lucas** direction as the learned trial judge did not invite the jury to look for corroboration based on lies told; and the Crown did not rely on any lies told as evidence of guilt. We are also cognizant of the guidance given by the Privy Council in **Mills and Others v R**, where their Lordships noted that where an accused makes an unsworn statement, directions about the impact of the rejection of the alibi need not be given. In the instant case, despite the fact that the appellants gave unsworn statements, and so were not entitled to directions on the impact of the rejection of their alibi, the learned trial judge nevertheless gave those directions to the jury. We can therefore find no basis in the grounds filed and submissions made that the directions on alibi were inadequate.

Sentence

[47] As indicated, both men were sentenced to life imprisonment with Mr Thompson being eligible for parole after 25 years and Mr Blake being eligible for parole after 15 years.

[48] At the time we heard this appeal, Mr Thompson had not appealed the sentence imposed on him. In any event, the sentence imposed of life imprisonment with eligibility for parole after 25 years, could not be considered to be manifestly excessive in the circumstances of this case. Subsequently, he applied for an extension of time to make an application for leave to appeal and applied for leave to appeal the sentence imposed on him, relating only to giving him credit for the full time spent in custody before sentence. We hereby grant the applications. Having reviewed submissions on his behalf, we agree that he should be given full credit for the time spent in custody pursuant to **Callachand and Another v The State** [2008] UKPC 49 and **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ). In the circumstances, we will allow the appeal in respect of sentence on that basis only. The sentence imposed on Mr Thompson of life imprisonment with eligibility for parole after 25 years' at hard labour, with full credit being given for time spent in custody before sentence of three years and five months, would therefore be life imprisonment with eligibility for parole after 21 years and seven months.

[49] Mr Blake filed an appeal against sentence. In arriving at Mr Blake's sentence, the learned trial judge took into consideration his antecedent report, which stated *inter alia*, that he was 49 years of age and was employed as a painter and carpenter for over 20 years, but was unemployed when apprehended by the police. He had three previous convictions, two for possession of ganja and one for dealing in ganja, which the learned trial judge indicated that he would not consider as they were not relevant, and which for him was indicative of Mr Blake not having had a history of violence. He also

considered the fact that the murder was deliberate and that a firearm had been used to shoot the deceased multiple times.

[50] Counsel advanced no grounds or arguments with regard to Mr Blake's appeal against sentence. As a court of review we have examined the sentence imposed on him since it was evident that the learned trial judge failed to give adequate consideration to the issue of sentence. He failed to identify a range for the said offence; choose the starting point; account for the aggravating and mitigating factors; and he also seemed to have given no consideration to the three years and five months that Mr Blake had spent in custody prior to being sentenced. We must now therefore examine whether the sentence imposed on Mr Blake was appropriate in all the circumstances.

[51] The sentence of life imprisonment with possibility for parole after 15 years imposed on Mr Blake, was well below the range normally given for murder committed in circumstances similar to that described in the instant case. Indeed, in **Paul Brown v R** [2019] JMCA Crim 3, a case with facts similar to those in the instant case, F Williams JA stated that a starting point of 20 years would not be appropriate and found that a starting point of 26 years would be more appropriate. The learned trial judge, in the instant case, in our view, was rather lenient, as although he imposed a sentence of life imprisonment, he specified a period of 15 years before Mr Blake would be eligible for parole, which is the statutory minimum period before one can be eligible for parole pursuant to section 3(1C)(b)(i) of the Offences Against the Person Act.

[52] In **Ewin Harriott v R** [2018] JMCA Crim 22, Pusey JA (Ag), on behalf of the court at paragraph [19] stated, in reviewing provisions under the Sexual Offences Act, that once a mandatory minimum time before parole can be considered has been prescribed, then the appellant cannot be considered for parole until he has served that period in custody, in spite of the time spent on remand. No deduction can therefore be made for the time Mr Blake had spent in custody prior to being sentenced. We cannot therefore, in the all the circumstances, say that the sentence imposed on Mr Blake was manifestly excessive or unjust, and we would not disturb it.

Disposition

[53] The appeal against conviction and sentence in respect of Mr Blake is dismissed. Mr Thompson's appeal against conviction is also dismissed, but his application to extend time for leave to appeal and for leave to appeal his sentence in respect of the time spent in custody is granted. His appeal against sentence on that basis is allowed. The sentence imposed on Mr Thompson of life imprisonment with eligibility for parole after serving 25 years' imprisonment at hard labour, with full credit being given for time spent in custody before sentence of three years and five months, would therefore be life imprisonment with eligibility for parole after serving 21 years and seven months.

[54] It would be remiss of us not to apologise to the appellants and counsel for the lengthy delay between the hearing of this appeal and the delivery of the judgment. It occurred due to circumstances beyond our control and is indeed regrettable.

[55] In the result, we made the orders as indicated in paragraph [1].