

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 63/2012

APPLICATION NO 74/2014

**BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE LAWRENCE BESWICK JA (AG)**

KEVON WILLIAMS v R

**Ian Wilkinson QC and Miss Annmarie Jordan instructed by Annmarie C Jordan
& Associates for the applicant**

**Miss Paula Llewellyn QC, Director of Public Prosecutions, and Mrs Karen
Seymour-Johnson for the Crown**

3, 17, 28, 29 July, 3 October 2014 and 5 February 2016

MORRISON JA

Introduction

[1] This is an application for leave to appeal against conviction and sentence in the Circuit Court Division of the Gun Court holden in the parish of Kingston for the offence of murder. We heard the application on various dates between 3 and 29 July 2014 and granted it on 3 October 2014. The hearing of the application was treated as the hearing of the appeal and the appeal was allowed. In the result, the applicant's conviction for murder was quashed and the sentence of life imprisonment imposed on him in the

court below was set aside. With profuse apologies for the delay in providing them, these are the promised reasons for this decision.

[2] On 2 December 2009, an eight year old girl, Colby Lewis, was shot and killed along Davidson Avenue, Drewsland, Kingston 20, in the parish of Saint Andrew. The deceased girl was also known as 'Monae' and this is the name by which we will refer to her in this judgment.

[3] The applicant was jointly indicted with Mr Oran Palmer for murdering Monae. Both men pleaded not guilty and they were accordingly tried before Straw J and a jury over a period of two weeks, starting on 14 May 2012. On 28 May 2012, the jury returned a unanimous verdict of guilty of murder against the applicant, but they were unable to agree on a verdict in relation to Mr Palmer. The latter's case was accordingly set for mention at a later date with a view to his retrial in due course. On 22 June 2012, the learned trial judge sentenced the applicant to imprisonment for life, with a direction that he should serve a minimum of 28 years in prison before becoming eligible for parole.

The trial

[4] The prosecution's case against the applicant was based on the evidence of Miss Keneisha Robb and Mr Kenneth Robb, who were Monae's mother and grandfather respectively. Both persons testified as eye-witnesses to the killing. At the material time, Mr Robb operated a barbershop at 105 Davidson Avenue and Miss Robb, who was a hairdresser, also did business from the same location. In the mid-afternoon of 2

December 2009, they were both together inside the barbershop. Monae and her younger brother, Dantae, were nearby and Miss Robb's cousin, Nicholas Duncan (also known as 'Weed Seed'), was also there. At around 3:30 pm, Nicholas took Monae and Dantae with him for a ride on his motorcycle and, not long afterwards, the sound of gunshots was heard coming from up Davidson Avenue. As a result, both Mr Robb and Miss Robb ran out of the barbershop. As the motorcycle, with Nicholas and the two children still on board, Dantae in front and Monae behind him, came down towards the barbershop, four men armed with guns were seen running behind them. One of the men stopped, but the other three continued running behind the motorcycle. Then two others also stopped, while the fourth continued to run down the motorcycle, gun in hand. A nearby crowd of onlookers hollered "murder" and, eventually, all four men ran off, back in the direction from which they had come.

[5] When the motorcycle came to a stop, both Miss Robb and Mr Robb ran towards it. Nicholas, who was holding on to Monae on the back of the motorcycle with one hand, bawled out, "She get shot. I get shot." Miss Robb's evidence was that she observed "three shot [sic]" in Monae's back and a hole in her side. She also saw "a little tear" at the back of Monae's blouse. Mr Robb held on to Monae and felt her "just drop" in his hands. He shook her, but she did not appear to be moving. He then lifted her up and ran towards Washington Boulevard (the boulevard), where he flagged down a minibus which he saw transporting some passengers. When the minibus stopped, Mr Robb saw that the driver was a friend of his and, when he was told what had happened, the driver emptied the minibus of passengers and took Mr Robb and Monae

directly to the Kingston Public Hospital (KPH). En route, Mr Robb observed gunshot wounds on Monae's body. She was pronounced dead upon their arrival at the hospital.

[6] The post-mortem examination would subsequently reveal that Monae had sustained two gunshot wounds to her body. One was a perforating entrance wound on the front of the left thigh and the other was a perforating entrance wound at the front of the left chest. The injury to the chest was the fatal injury, causing Monae to bleed to death as a consequence of lacerations of the spleen and lungs. The pathologist's opinion was that, in relation to the injury to the thigh, the person who shot Monae would have had to be in front of her. In relation to the chest injury, his opinion was that it was inflicted from the front, but that it was unlikely that Monae would actually have been facing the shooter at the time. Given the direction of the bullet, upwards to downwards through Monae's body, the person who fired the shot which caused this injury must have been either in an elevated position at the time of shooting, or "abnormally tall". The pathologist went on to explain that, by "abnormally tall", he meant at least seven feet tall.

[7] Both Miss Robb and Mr Robb positively identified the applicant as one of the four men whom they saw chasing Nicholas' motorcycle with Dantae and Monae on board that afternoon; and they both said that the applicant was the one who continued running behind the motorcycle even after the others had stopped. On Miss Robb's account, the applicant was armed with a shine, short gun and two of the other men also had guns in their hands. Although Miss Robb said initially that the applicant

continued to fire at the motorcycle as he ran behind it, under cross-examination she admitted that she did not actually see him firing.

[8] Both witnesses testified that the applicant was well known to them as "Duckman" and Miss Robb said that he was someone whom she was accustomed to seeing in the community and whom she had known for 22 years, from he was a little boy. She also said that she knew his mother and father, where he lived, and that for a long time he used to stay at her grandmother's house at 105 Davidson Avenue: that is, the same address as Mr Robb's barbershop. She would also see him at school and on a couple occasions he had in fact come to the barbershop for a "line up" from her father. For his part, Mr Robb testified that he knew the applicant "from him a likkle yute growing up", as someone who attended the same school as his daughter. He was accustomed to seeing the applicant all the while and described him as his friend.

[9] Both witnesses also said that they had had sufficient time within which to identify the attackers that afternoon and had a clear, unobstructed view of the applicant. However, they differed on what he was wearing at the time: Miss Robb said that he was dressed in a "camouflage top", wore Timberland shoes and had nothing on his head, while Mr Robb said that he wore an "army hat", a "soldierly, cloth, soldier hat, camouflage", with the peak turned back ways.

[10] On 9 February 2010, the applicant was placed on an identification parade, where he was pointed out by Miss Robb as the person who she had seen running behind and

firing shots at the motorcycle ridden by Nicholas with Monae and Dantae as his passengers.

[11] After an unsuccessful no-case submission was made on his behalf, the applicant made an unsworn statement in his defence. He denied any involvement in the incident and said that he did not know either Mr or Miss Robb. He also denied that he was called "Duckman", or that his co-defendant, Mr Palmer, was known to him. On the afternoon of 2 December 2009, the applicant stated, he was actually at his doctor's office on Hagley Park Road in the parish of Saint Andrew. He had arrived there (accompanied by his aunt) at some point between 2:30 and 2:45 pm. After waiting his turn, he saw the doctor between 3:00 and 3:30 pm and he did not leave the office until about 4:30 pm, at which time he left, still accompanied by his aunt, and went home.

[12] The applicant called his doctor, Dr Terrence Nunez, as a witness. Dr Nunez testified that the applicant had been his patient from 2008. His records indicated that the applicant had been seen by him between 3:00 and 4:00 pm on 2 December 2009, when he had diagnosed him as suffering from swine flu and prescribed certain medication for him.

[13] The single issue in the case was therefore whether the identification of the applicant as one of the persons who had shot and killed Monae along Davidson Avenue on the afternoon of 2 December 2009 was correct. In her directions to the jury, Straw J said as much, pointing out that "what is most critical in this case, is identification evidence"; and that "[t]here is no other evidence apart from the identification evidence

linking each accused to this crime". In the result, as we have already indicated, the applicant was convicted of murder on the unanimous verdict of the jury on 28 May 2012. And, on 22 June 2012, he was sentenced to imprisonment for life, with a direction that he should serve a minimum of 28 years in prison before becoming eligible for parole.

The application for leave to appeal

[14] The applicant applied for leave to appeal. The grounds of the application were that (i) the learned trial judge erred in refusing to grant the no case submission; and (ii) the identification evidence was "manifestly unreliable and riddled with inconsistencies, discrepancies and contradictions so as to render the conviction unsafe". The application having initially been refused by a single judge of the court on 6 January 2014, the applicant, as he was entitled to do, then renewed his application before the full court. When the matter came on for hearing on 22 May 2014, the applicant moved the court, pursuant to section 28(b) of the Judicature (Appellate Jurisdiction) Act (the Act), for leave to adduce further evidence from Mr Darrion Brooks, who did not give evidence at the trial. This application was granted and it was ordered that Mr Brooks' evidence should in due course be heard by the court in order to determine its credibility.

The fresh evidence

[15] Accordingly, on 3 July 2014, Mr Brooks gave evidence before us. Immediately upon completion of his evidence, we also heard evidence in rebuttal from Mr Robb. The matter was then adjourned to 17 July 2014, at which time Mr Ian Wilkinson QC for the

applicant made a further application for leave to adduce fresh evidence from Mr Oral Gary. Subject to it being allowed, if necessary, to recall Mr Robb to the witness stand at the end of Mr Gary's evidence, the prosecution offered no objection to this application. The application was therefore granted and Mr Gary gave evidence that same day. As it had indicated that it might, the prosecution then recalled Mr Robb to give further evidence and he was followed into the witness box by Miss Robb.

[16] The result of all of this was that we heard fresh evidence from Mr Brooks and Mr Gary and rebuttal evidence from Mr Robb and Miss Robb. What follows is a summary of this evidence.

Mr Darrion Brooks

[17] When he testified before us, Mr Brooks gave his current place of residence as the parish of Trelawny. However, he said that on 2 December 2009 he was a resident of Davidson Terrace, Drewsland, in the parish of Saint Andrew. At that time, he had lived there for "[r]oughly bout five years", and he had known Mr Robb (who, he said, was also known to him as 'Erroll' or 'Barber') for about the same time. He also knew Miss Robb as Mr Robb's daughter, as well as her children, Monae and Dantae. He also knew Miss Robb's cousin, Nicholas Duncan, who was also called Weed Seed. He (Mr Brooks) was also known as 'Country'. Mr Brooks told us that before the incident he was accustomed to speaking with the members of the Robb family and in fact, he insisted, "Mi and dem was friend".

[18] On Mr Brooks' account, he was present in Drewsland on 2 December 2009 and had a clear recollection of the events of the circumstances in which Monae was murdered. His evidence was that he had seen Mr Robb earlier that day as he passed by the barber shop. At that time, Mr Brooks said, Miss Robb and her sister were also inside the shop and Mr Robb was in the process of trimming someone's hair. After greeting Mr Robb and Miss Robb, he continued on his way out to the boulevard, where he stopped and waited for a taxi or a bus to arrive. While there, he heard the sound of gunshots and stood listening in an effort to determine where they were coming from. Then, after forming the view that "a up a di top a Davidson Avenue the shot a fire", he ran back to Davidson Avenue.

[19] It was now a little after 3:00 pm. Back on Davidson Avenue, Mr Brooks saw Monae and her brother Dantae on Nicholas' motorcycle coming down from what Mr Brooks described as the top of Davidson Avenue. At that end of the avenue, there was a turn in the road and he first saw the motorcycle a little bit above the turn and as it came around the turn. Mr Robb's barbershop was at the other end of the avenue and it was not possible for someone to see up the avenue to the turn from the barbershop. Mr Brooks testified that he did not see either Mr or Miss Robb at that time. Nor did he see anyone running behind the motorcycle firing shots at it. In fact, according to Mr Brooks, there were no shots being fired at all by this time. However, he did see two men, known to him as Mario and Caana, respectively, both with guns in their hands, run out of a yard and across Davidson Avenue about two yards behind the motorcycle. It would later emerge during cross-examination that both Mario and Caana had since died.

[20] Mr Brooks' evidence was that, as the motorcycle came towards him, Nicholas appeared to be holding on to Monae, who was seated behind him on the motorcycle. When the motorcycle stopped close to where Mr Brooks was standing, Nicholas said, "Country, Monae get shot". Mr Brooks then lifted Monae off the motorcycle and observed that she appeared to be bleeding. He then set off running, with Monae in his arms, in the direction of the boulevard. As he ran off with Monae, Mr Brooks said, "her mother, her grandfather and her sister was [sic] running from the barbershop". Miss Robb fell on the sidewalk bawling, "Dem kill mi daughter, dem kill Monae". When he got to the boulevard, he saw a bus turning into Drewsland and he signalled the driver to stop. When the bus stopped, Mr Brooks spoke to the driver and then opened the door of the bus. The three children who were in the bus came out of it and he placed Monae on a seat inside the bus. Mr Robb immediately ("same time") came up behind him and went into the bus to join Monae. Mr Robb then put Monae's head in his lap and started crying, at which point he (Mr Brooks) locked the door of the bus and the driver drove off with Mr Robb and Monae on board.

[21] After the bus had driven off, Mr Brooks returned to Davidson Avenue, where a crowd of people had gathered. There, he saw Nicholas, "siddung on the sidewalk", with "[t]he bike drop down pan the sidewalk right beside him same way". Nicholas, who was bleeding, appeared to have been shot in the foot. After they had spoken, Mr Brooks put his hand around Nicholas and lifted him up into another bus which was parked in front of a bar nearby. Mr Brooks told us that the driver of that bus was a friend of his by the name of Oral and that together they then took Nicholas to the KPH, where they left

him. However, it appears that they may have travelled by a different route, because, as they left the hospital premises after leaving Nicholas there, the bus in which Monae and Mr Robb were travelling was just arriving.

[22] Mr Brooks told us that he did not know anyone called 'Duck Man'. Although he had met Mr Oran Mason at the Half Way Tree Police Station lock-up in 2010, he met the applicant for the first time in June 2012, at the Central Police Station lock-up in Kingston. At that time, he (Mr Brooks) was himself being held in the lock-up on an unrelated charge of murder, having first been taken into custody on 24 December 2009, a few weeks after Monae was killed. While there, he overheard some talk between the person who dispensed food to the prisoners and another man about the killing of a little girl in Drewsland in December 2009. It was in those circumstances that he came to make himself known to the applicant, who was also being held in the lock-up, and to tell him what he knew about the killing. This is what ultimately led to him speaking with the applicant's legal advisers and to the successful fresh evidence application pursuant to which he was now giving evidence. In July 2012, Mr Brooks said, he was finally dismissed of the charges in respect of which he had been in custody since December 2009.

[23] Mr Brooks was vigorously cross-examined by the learned director. When certain inconsistencies between his evidence and the statement which he had earlier given to the applicant's legal advisers were put to him, Mr Brooks stoutly maintained (i) that he was present on Davidson Avenue on the afternoon of 2 December 2009; (ii) that he was the person who took the injured Monae off of Nicholas' motorcycle and ran with

her to the boulevard, where she was placed in the minibus stopped by him; and (iii) that he did not see the applicant – or anyone else – running behind the motorcycle and firing shots at it before it finally came to a stop on Davidson Avenue.

Mr Robb

[24] Giving evidence in rebuttal before us, Mr Robb picked up the story at a point shortly before Dantae and Monae were taken for a ride on his motorcycle by Nicholas. He had taken a break from the barbershop to go to his nearby home, where he used the bathroom and watched television for a bit before returning to the barbershop. As he was returning to the barbershop on Davidson Avenue, he saw a 'Coaster' bus come down the road and turn down Davidson Terrace, where a noisy crowd had gathered. As he started to go towards the sound, he saw Nicholas let off the pair of twin boys who he had been giving a ride on the motorcycle right in front of the barbershop. It was after this that Nicholas took Dantae and Monae for their turn at a motorcycle ride. After watching them embark, Mr Robb went back into his barbershop, where he sat watching as Miss Robb gave a customer a shave. While there, he heard shots and he and Miss Robb ran out of the shop onto the street. Looking up the road, he saw the motorcycle with Nicholas and the two children on board coming down towards him, with four men armed with guns running behind them "a fire shot at them". He recognised three of the men and, as he had done at the trial, he identified the applicant, who was also known as 'Duck Man', as one of these men. He said that the applicant was known to him "from him a child growing up" and that, indeed, the applicant and one of his daughters had even attended school together. After Nicholas' motorcycle came to a halt, Mr Robb told

us, he held on to Monae and shook her, "fi see if she still alive or something, for she nah seh nutten". He immediately took her up and ran to the boulevard with her in his hands to see if he could get help for her. On the boulevard, a van driven by someone known by him stopped and took him and the injured Monae straight to the KPH where she was taken from him by a doctor. Mr Robb told us that, about half an hour later, while he was still at the KPH, he saw Nicholas being questioned by a policeman in a room in the hospital. Although he did not actually see when Nicholas arrived at the hospital, it appeared to him that Nicholas had been shot in his bottom.

[25] Mr Robb said that Mr Brooks was well known to him. However, he insisted that he did not see Mr Brooks in the Davidson Avenue vicinity at any time that day and that he (Mr Robb) was the only person who had assisted Monae to get to the KPH. Further, Mr Robb stated, he did not see Mr Brooks at any time while he was at the KPH with Monae after the shooting. Indeed, he had not seen him for "couple months well". However, after the shooting, he did recall seeing the Coaster bus parked nearby, right in front of "Wappy' bar". Mr Robb also recalled that the driver of that bus, whose name he did not know, had received some injury to his head, though he did not know in what circumstances. All he knew about it was that "dem seh some man from over Marverly buss up him head".

Mr Oral Gary

[26] As we have already indicated, Mr Gary did not give evidence at the trial. Before us, his evidence was that he was a driver. At about 3:00 pm on 2 December 2009,

driving his 'coaster' bus, he went to Drewsland to see a friend. He was coming from Half Way Tree, where he had been involved in an altercation ("a little friction") with a bus conductor, which had got out of hand. As a result, he had received a cut over his right eye from which he was bleeding. When he got to Drewsland, he parked on Davidson Terrace and, while there, he heard explosions sounding like gunshots, whereupon he and others who were nearby ran towards Davidson Avenue. Looking up the road, he saw a motorcycle coming down towards him. At first, he was not able to identify the rider of the motorcycle, but as it came closer to him he saw that it was a man known to him as 'Weed Seed' (the name by which Nicholas was also known). He also observed that a little boy and a little girl were on the motorcycle, the former in front of and the latter behind the rider. He did not see anyone running after the motorcycle, nor did he hear any further explosions as the motorcycle came towards him. Next, he saw a man known to him as 'Country' (whom he had known for about two years) run in the direction of the motorcycle. Before the motorcycle came to a halt, 'Country' held on to it, "grab the little girl off of the bike ... hold [her] cross-way his hand, and run towards the Boulevard side". Mr Gary then jumped into his bus and drove towards the boulevard, stopping at a point on Davidson Avenue from which he had a view out to the boulevard. There, he saw 'Country', still holding the little girl, trying to stop an oncoming vehicle. A bus finally stopped and 'Country' placed the little girl in it. Mr Gary then saw an "elderly man" go into the bus with the little girl and the bus drove off. In court, Mr Gary identified Mr Brooks as the man he referred to as 'Country'.

[27] After the bus carrying the little girl and the elderly man had driven off, 'Country' came back onto Davidson Avenue. There, Mr Gary said, assisted by another person, 'Country' put 'Weed Seed', who was also injured, into his (Mr Gary's) bus. Thereupon Mr Gary set off for KPH, with 'Weed Seed' and 'Country' on board. As it turned out, according to Mr Gary, he arrived at KPH before the bus carrying the little girl; because, after he had let 'Weed Seed' off at the hospital and was about to exit the premises, he saw that other bus just driving in.

[28] Mr Gary was cross-examined at length by the learned director. The cross-examination focused in particular on how it was that Mr Gary, having not seen it fit to offer his bus to transport Monae to KPH, nevertheless came to be involved in taking 'Weed Seed' to the same destination within the same compass of time. We cannot avoid reproducing in full the exchange between the director and Mr Gary that best captures both the thrust of the questioning and the general tenor of Mr Gary's responses:

"Q. Now, tell me, is there any reason you knew why 'Country' was running with the little girl?

A. Well, when he was running, I realize that the little girl get shot.

Q. Yes, but did you know why he was running with her?

A. Mus' to get a drive to bring her to the hospital.

Q. To get a drive to bring her to the hospital. Why didn't you volunteer, since your bus had gas in it, that would carry you all the way Downtown, why didn't you volunteer ...

- A. At the time ...
- Q. ... to take her to the hospital?
- A. At the time, no one didn't ask me and I didn't volunteer at the time.
- Q. I beg your pardon?
- A. No one didn't ask me, I see dem grab the little girl and I was standing there watching what was going on, I didn't know – nobody never said—and a matter of fact, the bus what I was driving, the boss that I driving for, I know how him stay, I didn't want to get involved with the bus, because, I don't want mi boss to in argument with me.
- Q. So how you get involved here today? How come you are getting involved in courthouse business? ...
- A. Because after that happen, I run – after 'Country' run off with the little girl, I run towards my bus, not run, I walk towards my bus, drive off the bus. I was going to leave ...
- Q. So you were going to leave?
- A. Yes, ma'am
- Q. You didn't drive the bus to see if you could ketch up 'Country' and the little girl to offer to help to carry them to the hospital?
- A. No, ma'am, I was just about – I was going to leave and same time, I hear a voice shout out and call mi name and seh the rider get shot, so mi haffi go assist.
- Q. Who was this voice?
- A. I didn't know it was who.
- Q. ... So you heard this voice telling you that the rider got shot?
- A. Yes, ma'am.
- Q. What did you do?

A. Well, they say the rider got shot, I got to help them, so I stop. So when I stop, I didn't get out of my bus, I still sit around the steering.

Q. So you allowed them to carry the – well, who carried the rider on to your ...

A. Well, when 'Country' come back 'round, off Darby Terrace on to Davidson Avenue, that's the time I saw 'Country' and someone else helping the rider into the bus.

Q. So tell me something now, I thought you said – well – why did you allow it, why did you allow that?

A. Because they done stop me already and ask me to carry him.

Q. But Mr. Gary didn't you just tell us that the reason why you didn't help the little girl is because you know how the owner of the bus stay?

A. Yes, ma'am.

Q. You didn't want to help a little girl but you helping a big strapping man?

A. No, because, I didn't know what was going on. I didn't know, I didn't know that the rider did get hurt neither. I thought it was the little girl only. I didn't know ...

Q. But how come you decide to help the rider?

A. Because after I was driving away, dem stop me.

Q. But you didn't have to stop.

A. Well, that's true.

Q. So what happened to the owner, don't you say the owner is a funny man?

A. It happen that the same day, me and him in a argument.

Q. No, I don't want to hear about the argument. You said earlier, the reason why you didn't help the little girl is because the owner is a funny man. So how

come that did not obtain in your considerations when it came to 'Weed Seed'?

- A. Well, I just stop, I don't know what would happen, if I didn't stop, so I just stop. I don't know what would happen and dem ask me to bring him, so I said okay and dem lift him into the bus."

[29] When Mr Gary completed his evidence, the prosecution recalled Mr Robb to give further evidence. After Mr Robb was reminded of his previous evidence about the bus that had come into the community before the shooting took place, Mr Gary was called into court. Mr Robb immediately identified him as the driver of the coaster bus, "weh the man did get him head 'burs' up". However, he said, he did not recall seeing Mr Gary in the area where Nicholas' motorcycle came to a halt after Monae was shot. Nor could he recall having seen Mr Gary in the community before that day.

Miss Robb

[30] Miss Robb did not see when Monae and Dantae embarked on the ride on Nicholas' motorcycle on the afternoon of 2 December 2009. Her evidence was that, at about 3:30 pm that afternoon, she was inside the barbershop shaving a customer when she heard explosions, which sounded like gunshots, coming from the Davidson Avenue direction. Not knowing where her children were, she ran out of the barbershop immediately. She saw Nicholas' motorcycle at the top of the road and there were three men running it down and shooting after it. The motorcycle was tilting to one side and Nicholas was using one hand to hold Monae and the other to hold his side. Miss Robb

said that, "Dantae was the one who was steering the bike coming down". On her account, the following then ensued:

- "A. I was crying and saying my kids is [sic] on the bike.
- Q. So what was the next thing to happen?
- A. And then the bike stopped.
- Q. Well, how did it stop? Did you see how the bike stopped?
- A. Yes, ma'am.
- Q. How did it stop?
- A. A guy name ...
- Q. Just take your time.
- A. Yes, ma'am.
- Q. 'Even'?
- A. 'Even', ma'am, 'Even' was the one that stop the bike, ma'am.
- Q. How did he stop it?
- A. Run and hold on on [sic] the handle that Dantae holding on on [sic].
- Q. Okay, did you know 'Even' by any other name?
- A. No, ma'am.
- Q. Now, after 'Even' stopped the bike, what was the next thing to happen?
- A. My father took Monae off the bike, head towards Boulevard and then I took off behind those guys up the road.
- Q. Just a moment. When you say he took her off the bike, what you mean?
- A. He take her off.

Q. Took her off how?

A. By her side, lift her up and put her to stand up and then her hand fell like this and mi seh 'she dead' and then I took off behind the gunman, off, up the road."

[31] Miss Robb identified the applicant as one of the three men, adding that at the time he was armed with "a short gun". She had known him from "him was a kid" and he had attended Drews Avenue Primary School with her cousin Nicholas. Further, when he was "much younger", the applicant used to stay with her grandmother on Davidson Avenue. She also identified Mr Brooks as someone whom she knew (in fact, she described him as "a friend"), but insisted that she did not see him "anywhere near the bike at all" that afternoon. Nor, she also insisted, did Mr Brooks pass by the barbershop at any time earlier during the course of that day.

[32] Under cross-examination, Miss Robb was challenged as to whether she had said at the trial that she did not see who shot Monae. Even after Mr Wilkinson put the relevant portion of the transcript of the evidence given at trial to her, she maintained stoutly that she had not said that. Asked whether she remembered seeing a coaster bus on Davidson Avenue that afternoon, Miss Robb said that she had seen the bus and that, although she did not know the driver's name, she did see him once that day. At the time when she saw him, he had "[w]aa 'big ever' buss ... on his forehead". But, when she returned from chasing the men whom she had seen shooting at the motorcycle up the road, she no longer saw either the coaster bus or the driver. Nor did she see her cousin Nicholas. As regards the question whether the applicant was wearing anything on his head when she saw him chasing the motorcycle, Miss Robb told us initially, as

she had done at the trial, that he had nothing on his head. However, under further cross-examination on the point, she then said that he was wearing a “black hat”, with the peak turned front ways.

The supplementary grounds of appeal

[33] At the conclusion of the hearing of the fresh evidence, Mr Wilkinson successfully sought leave to argue the following supplementary grounds of appeal (in substitution for the grounds originally filed by the applicant):

- “1. The trial judge erred in law by failing to give adequate and appropriate directions in relation to the visual identification evidence pursuant to the principles enunciated in **R v Turnbull** [1977] 2 QB 224.
2. The learned trial judge failed to deal, adequately, with specific weaknesses in the visual identification evidence which were exposed in the evidence of Keneisha Robb and Kenneth Robb, respectively, and failed to address, sufficiently, the material inconsistencies that cast doubt on the reliability of the said visual identification evidence. Consequently, the learned trial judge failed to assist the jury adequately or properly and this deprived the Applicant of a fair trial and resulted in a substantial miscarriage of justice.
3. The learned trial judge erred in law in directing the jury as to how to treat the evidence of the Prosecution’s witnesses vis-à-vis their previous inconsistent statements or inconsistencies. For instance the learned trial judge said (p 707 of Transcript) ‘... *if you find it to be slight or serious, you put it down to human frailty, it’s a matter for you to decide...*’ This was a material misdirection particularly as the learned trial judge did not assist the jury by highlighting the weaknesses in the Crown’s case due to the said inconsistencies. The Applicant was,

therefore, denied a fair trial and this led to a grave miscarriage of justice.

4. The glaring and inexplicable contradictions and inconsistencies involving the evidence of Keneisha Robb, Kenneth Robb and Dr. Dinesh Rao, respectively, were not adequately or properly drawn to the jury's attention by the learned trial judge and this denied the Applicant a fair trial and resulted in a substantial miscarriage of justice.
5. The learned trial erred in law in failing to uphold the '**no case**' submission made on behalf of the Applicant.
6. The '*fresh evidence*' of Darrion Brooks (also called '*Country*' or '*Countryman*') and Oral Gary coupled with the admissions or concessions made by the Crown's witnesses (Kenneth Robb and Keneisha Robb) in rebuttal of the said '*fresh evidence*' provided material which revealed that the Applicant did not have a fair trial. The said '*fresh evidence*' casts serious doubt on the veracity of the Prosecution's key witnesses, Keneisha Robb and Kenneth Robb, and if it had been available at the trial would have resulted in the acquittal of the Applicant.
7. The conviction is manifestly unreasonable and cannot be supported having regard to the weak and unreliable visual identification evidence."

[34] In the light of the basis upon which we ultimately arrived at our decision in this matter, we will for the purposes of these reasons deal with the issue raised by ground six only; that is, the impact of the fresh evidence. But, by doing so, we naturally intend no disrespect to the industry of counsel, both of whom treated us to careful and wide-ranging submissions on all of the supplementary grounds of appeal.

The submissions on the effect of the fresh evidence

[35] For the applicant, Mr Wilkinson's basic submission was that the evidence given by Messrs Brooks and Gary should be accepted as credible, particularly as it served to strengthen the case for the defence and to highlight the weaknesses in the prosecution's case. In addition, Mr Wilkinson submitted, if this evidence had been before the jury, the trial judge would have been obliged to uphold the no-case submission made on his behalf; or, alternatively, the jury would have reached a different verdict. Further, Mr Wilkinson pointed out, no evidence was adduced by the prosecution to suggest that Messrs Brooks and Gary were not speaking the truth and/or were witnesses of convenience; nor was there any evidence that Mr Brooks and the applicant were known to each other or to support any suggestion of collusion between them. Mr Wilkinson went on to submit that the evidence of Messrs Brooks and Gary clearly established that (a) they were both present at the material time and saw what happened; (b) there were no men, including the applicant, running behind Nicholas' motorcycle and firing shots at it; (c) it was Mr Brooks who took the mortally wounded Monae from off the motorcycle and ran with her to the boulevard in search of transportation to take her to the hospital; and (d) Messrs Brooks and Gary were the persons who took the injured Nicholas to the hospital for treatment.

[36] For the prosecution, the director submitted that, after the presentation of the fresh evidence from Messrs Brooks and Gary and the rebuttal evidence from Mr Robb and Miss Robb, the credibility of the former was "severely impugned". Accordingly, the court was invited to find that, rather than being witnesses of truth, Messrs Brooks and

Gary were witnesses of convenience. In the skeleton arguments presented on behalf of the prosecution, the fresh evidence was dissected in detail, with a view to demonstrating that it was incapable of belief.

The approach to fresh evidence

[37] The fresh evidence in this case was received pursuant to section 28(b) of the Act, which empowers the court to "... order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial ...". Once fresh evidence has been received, the duty of the court is to consider its effect on the case as a whole, within the wider context of the power given to the court by section 14(1) of the Act to set aside any verdict –

"... on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice ..."

[38] Mr Wilkinson helpfully referred us to some of the relevant authorities. In the leading case of **R v Pendleton** [2002] 1 All ER 524, the House of Lords considered the effect of legislative provisions *in pari materia* to those contained in the Act¹. It was held (confirming the earlier decision in **Stafford v Director of Public Prosecutions** [1973] 3 All ER 762) that, where fresh evidence has been received on appeal against

¹ The court applied the provisions of sections 4(1) and 9 of the Criminal Appeal Act 1907, as amended, upon which sections 14(1) and 28 of the Act are based.

conviction, the correct test to be applied by the Court of Appeal in determining whether to allow the appeal is what is the effect of the fresh evidence on the minds of the members of the court, not the effect that it would have had on the members of the jury. But it is also important for the court to bear very clearly in mind that the question for its consideration is whether the conviction is safe, and not whether the appellant is guilty. Lord Bingham of Cornhill added this (at page 535):

“The Court of Appeal can make its assessment of the fresh evidence it has heard, but save in a clear case it is at a disadvantage in seeking to relate that evidence to the rest of the evidence which the jury heard. For these reasons it will usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict. If it might, the conviction must be thought to be unsafe.”

[39] In the subsequent decision of the Privy Council in **Dial & Dottin v State of Trinidad & Tobago** [2005] UKPC 4, the Board summarised the applicable principles in this way (at paragraph 31):

“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. That said, if the Court regards the case as a difficult one, it may find it helpful to test its view ‘by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict’ (*Pendleton* at p 83, para 19). The guiding principle

nevertheless remains that stated by Viscount Dilhorne in *Stafford* (at p 906) and affirmed by the House in *Pendleton*:

'While ... the Court of Appeal and this House may find it a convenient approach to consider what a jury might have done if they had heard the fresh evidence, the ultimate responsibility rests with them and them alone for deciding the question [whether or not the verdict is unsafe].''

[40] Both **Pendleton** and **Dial & Dottin** were cited with approval and applied by this court in **Patrick Taylor v R** (SCCA No 85/1994, judgment delivered 24 October 2008); **Orville Murray v R** (SCCA No 176/2000, judgment delivered 19 December 2008); and **Nickoy Grant v R** [2013] JMCA Crim 30 (see also **Constantine Atkinson v R** [2013] JMCA Crim 25 and, most recently, **Omar Neil v R** [2015] JMCA Crim 30).

[41] In the light of what is now an unbroken line of authority, it therefore falls to this court to consider and evaluate the effect of the fresh evidence on the verdict of the jury in this case. If, having heard that evidence, the court entertains no reasonable doubt as to the guilt of the applicant, then its duty will be to dismiss the appeal. However, if the fresh evidence generates a reasonable doubt in the court's mind as to the applicant's guilt, then it follows that the jury's verdict of guilt must be regarded as unsafe; or, to put it in terms of the language of section 14(1) of the Act, the jury's verdict will have resulted in a miscarriage of justice. (As the late Miss Dana Seetahal demonstrated in her admirable work on Commonwealth Caribbean Criminal Practice and Procedure, 4th edn, page 336, the practice of the Judicial Committee over the years has been to assimilate the concept of "a miscarriage of justice" referred to in section 14(1) to the

notion of an “unsafe” verdict, which is the language currently in use in the comparable English legislation². The example cited by Miss Seetahal is **Lincoln de Four v The State** [1999] 1 WLR 1731, an appeal from the Court of Appeal of Trinidad & Tobago, where the statutory language is identical to section 14(1). In allowing the appeal, the Board simply concluded (at page 1738) that “the conviction was unsafe and should be quashed”.)

Resolving the case

[42] Having heard the fresh evidence, the only issue for this court’s consideration was, as it had been at the trial, whether the applicant was correctly identified as one of the men who ran down Nicholas’ motorcycle and shot Monae on the afternoon of 2 December 2009. At the trial, the reliability of the identification of the applicant rested entirely on the evidence of Mr Robb and Miss Robb. On the evidence of both Mr Brooks and Mr Gary, who testified that they were present at the time of the fatal shooting, Mr Robb and Miss Robb’s testimony that they saw men running behind Nicholas’ motorcycle could not be true. On Mr Brooks and Mr Gary’s evidence, no such thing took place. So everything therefore turned on the court’s view of the fresh evidence.

[43] We will say at once that Mr Brooks made a very favourable impression on the court, both as regards the manner of the giving of his evidence as well as the steadfast consistency of the story that he told. He was unshaken by vigorous and, as was to be expected, skillful cross-examination by the learned director. There was no contest about

² See the Criminal Appeal Act 1968, section 2

the fact that he was not only familiar with the area, but was well known to Mr Robb and Miss Robb as someone with links to the Drewsland community. Because of this, notwithstanding Mr Robb's evidence that he had not seen him for "a couple months well" before 2 December 2009, there would have been nothing unusual about him being in the area that afternoon.

[44] While Mr Robb and Miss Robb both insisted that Mr Brooks was not present that afternoon, they both agreed that Mr Gary was there. On the critical question of who took the injured Monae from off of Nicholas's motorcycle and ran with her in his arms to the boulevard, Mr Brooks' evidence derived clear support from Mr Gary's testimony. In addition, Mr Gary provided a further detail not previously supplied by anyone, which was that, after Monae and Mr Robb had been driven away on the boulevard, it was he who took the injured Nicholas to the KPH. Further, that as he was leaving the hospital compound, he saw the vehicle carrying Monae just arriving. There was, it is true, some veiled suggestion that Mr Brooks was a witness of convenience. However, as regards Mr Gary, who was, on everyone's account, present on Davidson Avenue that afternoon, there was absolutely no reason advanced for him to have chosen to fabricate a story about Mr Brooks' involvement.

[45] As we have seen (at paragraph [28] above), Mr Gary was cross-examined at length and in great detail on the question of why, not having offered to take Monae to the hospital in the first place, he was later willing to take Nicholas the same distance. Mr Gary's explanation was, it will be recalled, that despite his initial reluctance to get involved ("I don't want mi boss to in argument with me"), he later felt obliged to assist

Nicholas when, as he was about to leave, he heard someone call out his name, telling him that "the rider get shot, so I haffi go assist". Mr Gary's evidence of what happened at that point bears repeating:

"I just stop, I don't know what would happen, if I didn't stop, so I just stop. I don't know what would happen and dem ask me to bring him, so I said okay and dem lift him into the bus."

[46] Despite the obvious reasonableness of the director's line of enquiry ("[y]ou didn't want to help a little girl but you helping a big strapping man?"), we could not help but be impressed by Mr Gary's candid sincerity. His explanation struck us as entirely plausible in all the circumstances described by him, particularly given the problems that he had earlier had with a conductor on the bus and the fact that, as both Mr Robb and Miss Robb confirmed, he had himself suffered an injury to his head.

[47] On the other hand, neither Mr Robb nor Miss Robb gave impressive evidence before us. To be fair to them, they suffered from the disadvantage of having had to give evidence at the trial some three years before, in relation to an incident that took place almost three years before that. Some of the various inconsistencies and discrepancies in their evidence, of which the applicant complained, could undoubtedly be explained on that basis. But others, such as Miss Robb's unequivocal position at the trial that the person whom she identified as the applicant wore no headgear, as against her ultimate insistence before us that he was in fact wearing a black hat, are more difficult to dismiss on the ground of mere forgetfulness. Indeed, before us, it was difficult to avoid the impression that Miss Robb had decided to change her evidence on

this point in order to harmonise it with that of her father, who had said at the trial that the applicant was wearing some form of headgear at the material time. Another example, equally difficult to reconcile, was Miss Robb's evidence at the trial that she did not see who shot Monae and her evidence before us that the applicant was one of three men whom she saw chasing after Nicholas' motorcycle and firing shots at it.

[48] In the result, we came to the clear conclusion that the fresh evidence gave rise to a reasonable doubt in the court's mind as to the applicant's presence on Davidson Avenue on the afternoon of 2 December 2009. Even if we had found it difficult to arrive at this conclusion, which we did not, we also considered that the fresh evidence was such that, had it been given at the trial, it might reasonably have affected the decision of the trial jury to convict the applicant on the strength of the evidence of Mr Robb and Miss Robb. In particular, it appeared to us that the fresh evidence might reasonably have affected the jury's assessment of (i) whether Miss Robb's account of the circumstances in which Monae was shot was reconcilable with the pathologist's evidence of the likely position of her assailant at the time of the shooting (see paragraph [6] above); and (ii) the evidence of the applicant's doctor who gave alibi evidence on his behalf (see paragraph [12] above).

[49] It is for these reasons that we arrived at the decision and made the orders set out at paragraph [1] above. In the light of the decision to quash the applicant's conviction, the court entered a judgment and verdict of acquittal.