[2012] JMCA Crim31

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 5, 6 & 7/2006

BEFORE: THE HON MR JUSTICE PANTON P
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

MICHAEL ALLISON
ONIEL HAMILTON
MARLON JOHNSON v R

Mrs Nadine Atkinson-Flowers for the appellant Allison

Gladstone Wilson for the appellant Hamilton

Delano Harrison QC for the appellant Johnson

Mrs Caroline Hay and Mrs Paula Rosanne Archer-Hall for the Crown

10, 11, 13 and 31 July 2012

BROOKS JA

[1] On 7 July 2004, the appellants, Messrs Michael Allison, Oniel Hamilton and Marlon Johnson were each convicted for murdering Dezreen Meghoo, Latanya McDonald and Oliver Lawrence. The convictions were the culmination of a trial at the Home Circuit Court in Kingston before P. Williams J in which the appellants were charged on an indictment containing three counts. The victims were each the subject of one of the counts. Each man was, on 20 January 2006, sentenced to serve

imprisonment for life at hard labour in respect of the first count and to suffer death as the penalty for the remaining counts. It was, in fact, the second trial for these appellants for these offences.

[2] Because the death sentence had been passed, these matters came before this court as appeals, without applications for leave to appeal having been first considered by a single judge. It is to be noted, however, that the Governor General, on 23 July 2009, pardoned all three appellants in respect of the sentence of death and substituted therefor, in respect of each, a sentence of imprisonment for the remainder of his natural life.

[3] The main issues raised by the grounds of appeal concern the learned trial judge's treatment of four important elements of the evidence. The first element concerned the reason given by the sole witness as to fact, for not informing investigators of the names of the killers, although he testified that at the time of the incident he knew them before but by their aliases. The second concerned evidence of the character of the appellant Allison and the third was in respect of the conduct of the identification parades at which each appellant was pointed out. Finally there was the issue of the cogency of the identification evidence. Counsel, on behalf of the respective appellants, advanced concise submissions in respect of these issues. Each issue will be addressed in turn, but first an outline of the facts is necessary.

The factual background

[4] The convictions arose out of an incident which occurred on 14 April 1998. At about 9:00 pm that day, Mr Veanrist McKenzie was at his home at Swallow Road in Cockbourne Gardens in the parish of Saint Andrew. He was at that time entertaining friends and relatives in his room. Electric lights were on in the room and outside in the yard. Other family members occupied other sections of the house. In fact, one door to his room led to a sister's room where his mother lay on a bed with his baby brother. That door was open. The only other door to the room opened to the yard outside. It was also open at the time.

[5] While there, he heard some explosions to the front of the yard and saw his younger brother run into the room from outside. Shortly thereafter, Mr McKenzie saw the three appellants come to the door of the room that led outside. He knew them all before and saw that all were armed with hand-guns. He said that the appellant Johnson had two guns. Someone in the room said "A weh dis fah?" The three appellants, on his testimony, then all opened fire through the open doorway.

[6] The occupants of the room then shut the door and placed a bed behind it. While this was going on, there was the sound of other explosions coming from the front of the yard. The shooting into the room subsided briefly but shortly thereafter, someone kicked the same door from outside, the bed shifted slightly, the door opened somewhat and three more shots were fired through the opening created thereby.

[7] After the shooting had subsided it was noticed that at least five people had been shot, three of whom had been seriously injured. The injured were taken to the hospital. Mr McKenzie's mother, Dezreen Meghoo, was pronounced dead on arrival there. His girlfriend, Latanya McDonald, and his friend, Oliver Lawrence, later succumbed to the injuries that they had received during that attack.

[8] Mr McKenzie later pointed out the three appellants on identification parades. On 8 May 1998 he pointed out Mr Johnson. On 12 May 1998 he pointed out Mr Allison and on 30 May 1998, he pointed out Mr Hamilton.

Mr McKenzie's reason for not having given the name of the killers

[9] During the course of the re-trial Mr McKenzie was tackled in cross-examination for his failure to have informed investigators that he knew the names of the attackers and his failure to have supplied those names. He agreed with defence counsel that he gave a statement to the police concerning the incident. He agreed that in that statement he told the police the physical description of the assailants, their build, heights, complexion, shapes of their faces and the clothing each was wearing. He did this, he agreed, because he wanted the police to catch the killers. Against this background the following exchange then occurred, as is recorded at page 135 of the transcript of the trial:

> "Q. And yet still, Mr McKenzie, not once, not once, in that statement did you call the name of any of the three men sitting in this dock.
>
> A. I have my reason why.
>
> Q. I'm not concerned about that…."

The point was similarly made in cross-examination by at least one other counsel for the appellants.

[10] It is not surprising, against that line of questioning, that at the beginning of the re-examination, counsel for the Crown asked if Mr McKenzie had a reason for not having given the names in his statement to the police. Upon Mr McKenzie giving an affirmative response, defence counsel promptly rose to alert the court of the impending danger. The following exchange took place. It is set out at page 184 of the transcript:

> "MR. GOLDING: Before the witness answers that question m'Lady, this is a re-trial and I see potential for something to come out which is so extremely prejudicial.
>
> HER LADYSHIP: The reason is…
>
> MR. GOLDING: My Lady, the prejudicial effect of the possible answer.
>
> HER LADYSHIP: I am not going to speculate as to what his answer is going to be. So let us hear it and then I will deal with it accordingly….Yes, madam Crown….go ahead."

[11] Mr McKenzie then gave this evidence at pages 184 – 185 of the transcript:

> "A. For the reason I had relatives who is [sic] in the police Force [sic].
>
> HER LADYSHIP: Yes.
>
> WITNESS: And I even receive threats from the very day after the killing I hear that if we call anybody name, them a goh kill off the whole of wi."

[12] In this court, Mr Harrison QC, on behalf of the appellant Johnson, submitted that the learned trial judge erred in the handling of that matter. The essence of his submissions may be summarised thus:

a. The learned trial judge erred in failing to have the jury leave before hearing the objection on the question of the admissibility of Mr McKenzie's answer and deliberating thereon.

b. The learned trial judge erred in admitting the evidence which defence counsel sought to exclude. That evidence was not properly admissible, being hearsay upon hearsay, and its prejudicial effect greatly outweighed its probative value.

c. The learned trial judge having allowed the jury to hear the evidence, erred in failing to warn them not to consider it at all.

[13] When asked whether the jury would not have been unfairly deprived of Mr McKenzie's reason, had his suggested course been adopted, Mr Harrison submitted that the jury had enough evidence on which they could consider the question of guilt. He pointed to the evidence concerning the visual identification and the fact that the appellants had been pointed out on identification parades.

[14] We cannot agree with learned Queen's Counsel on these points. Firstly, the question concerning Mr McKenzie's reason for not naming the attackers would have been a 'live' question for the jury, bearing in mind the cross-examination on the point. There would have been no reason to send out the jury in order to hear an objection to

that question. There was no reason to have a *voir dire*, as learned Queen's Counsel has submitted before us.

[15] The second reason for disagreeing with Mr Harrison is that the evidence was in fact admissible as an exception to the rule against hearsay. In the well known case of **Subramaniam v Public Prosecutor** [1956] 1 WLR 965, it was accepted that if the purpose is to tender the statement as evidence of the witness' state of mind, then the statement may be admissible. We find that, despite the fact that what Mr McKenzie stated, was not something that had been said to him directly, it spoke directly to his state of mind and was, therefore, admissible.

[16] The third reason for disagreeing with learned Queen's Counsel is that the learned trial judge, we find, put the statement in proper context for the jury so as to minimise, if not nullify, the prejudicial effect of the evidence. She said, as is reported at pages 450 -451 of the transcript:

> "Now one intention of identification that you have to consider is that the fact [sic] he did not and he admitted from the very outset that he did not give the name of Johnson or indeed of any of these accused men to the police; not that night, not the next day. Not when he gave his statement. He admitted to you that. And as you have heard, he had known those men so well. Why didn't he tell the police that these where [sic] the men who shot my mother, my girlfriend. He gave you a reason and it is a matter for you what you make of that reason. He said that he received threats and that is why he did not give any names. **We do not know from whom he got those threats, if he did, in fact, get those threats, but you are not to assume that it was these men, because it is not the evidence**. He just said he got threats and as a result of those threats he did not give any names because of the threats. Said if he gave names he would be dead. That is what he said. You

saw Mr McKenzie. This is the reason he said for not giving names. So you need to consider that when you review the evidence." (Emphasis supplied)

[17] At page 457 of the transcript, the learned trial judge is recorded as having given similar directions to the jury:

> "Under re-examination, you remember Mr. McKenzie was asked about again, what was the reason for not giving names was [sic], one of those reasons he says that 'Papa' [the appellant Hamilton] has a relative in the Police Force. He received threats after the incident that if anybody name call them ago [sic] dead. **We have no evidence that it was these men who threatened him but you use what he said in order for you to determine whether having seen or heard this witness, you believe his reason why he didn't give any names to the officer**…." (Emphasis supplied)

[18] The learned trial judge made an error concerning the relative in the police force. It was Mr McKenzie who had the relative in the police force. She was, however, correct in attempting to eliminate the prejudicial element of the evidence and focussing on its true intent, namely, the credibility of the witness as opposed to the culpability of the appellants. The learned trial judge cannot be faulted for her handling of this portion of the evidence.

[19] Mr Harrison cited, in support of his submissions, the case of **Wesley Patterson v R** [2010] JMCA Crim 69. We, however, agree with Mrs Hay, for the Crown, that that case is distinguishable on the facts. In **Patterson**, the witness launched prejudicial denigrating comments, in the presence of the jury, against the character and propensities of not only the accused but also his counsel. Harris JA, in giving the

judgment of this court ruled that, in those circumstances, if the trial judge decided not to discharge the jury, they should have been given a very strong warning to disregard the prejudicial evidence. In the absence of such a warning, a new trial was ordered. There was no direct attack in the instant case and the learned trial judge did warn the jury that there was no evidence that these appellants had anything to do with the alleged threats. The grounds filed by Mr Johnson should, therefore, fail.

Whether Mr Allison raised the issue of his good character

[20] Mrs Atkinson-Flowers, on Mr Allison's behalf, submitted that Mr Allison, having given sworn testimony from which he may be categorised as a hardworking person, had raised the issue of his good character. On this basis, learned counsel submitted, Mr Allison was entitled to have the benefit of a direction to the jury on both limbs concerning good character as set out in the case of **R v Vye** [1993] 1 WLR 471; [1993] 3 All ER 241 at page 248, that is, both in respect of his credibility and his lack of propensity to commit the offences.

[21] Learned counsel submitted that because there was only one witness as to fact, the good character direction was essential in the case and it could not be said that the jury would have convicted even if the directions had been given. As the learned trial judge did not give the required directions, learned counsel submitted, Mr Allison was deprived of their benefit and therefore, the chance of an acquittal. She relied on, among others, the cases of **Samuel Robie v R** PCA No 23/2010 (delivered 20 December 2011) and **Chris Brooks v R** [2012] JMCA Crim 5, in support of her

submissions. The former case addressed the principle of the entitlement and the result of the deprivation.

[22] The issue of the entitlement to a good character direction has recently been given much attention in this court. In **Michael Reid v R** SCCA No 113/2007 (delivered 3 April 2009), Morrison JA examined the issue and carefully set out the applicable principles. Among the relevant principles, alluded to by Morrison JA, is that where the issue of good character has not been raised during the trial, the trial judge has no obligation to give a direction thereon to the jury. Their Lordships in the Privy Council in **Thompson v R** [1998] AC 811 at page 844 stated the principle plainly. They said:

> "Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge."

The question, for these purposes, is whether Mr Allison raised the issue of his good character.

[23] In his testimony Mr Allison said that he was a baker and seller; that he baked and sold "peanut, grater cake and peanut cake". He gave details as to how he carried out his trade; including the hours spent each day in plying that trade. In addition to that evidence, he did say at one point, "I don't really gamble" (page 321 of the transcript).

[24] Mrs Atkinson-Flowers' submission in respect of that evidence was that:

> "We therefore have unquestionably a presentation of someone who is hard-working in his efforts to earn his livelihood. The questions [sic] must then be if the evidence

> so elicited was enough to require the direction by the Learned Trial Judge?"

We would answer Mrs Atkinson-Flowers' question in the negative. We find that the evidence in the instant case does no more than state that Mr Allison is hard-working and does not "really" gamble. Mrs Hay is correct in saying that that was not sufficient to have triggered an obligation to give a good character direction. The evidence was more directed at providing his alibi concerning his whereabouts at the time of the killings; he was at his home preparing his goods for sale on the following day.

[25] The case of **Chris Brooks**, is distinguishable from the instant case. In **Chris Brooks**, Morrison JA, at paragraph [29] of the judgment, pointed out that the evidence of Mr Brooks' witness "was plainly directed to establishing that [Mr Brooks] was a serious and reliable person, employed to a security company and to whom a responsibility of trust had been assigned by a financial institution". The witness had, in fact, said, among other things, that he considered Mr Brooks "to be someone whose word he could take on matters of importance". No such feature exists in Mr Allison's case.

[26] In light of the above, the complaints in respect of the absence of good character directions must fail.

The issue of the identification parade

[27] Mr Wilson argued two grounds on behalf of Mr Hamilton. The first concerned the identification parade held for Mr Hamilton. It was formulated thus:

> "That the Learned trial judge treated any infringement of the rules of an identification parade as procedural and not mandatory in circumstances where the placing of 3 other suspects already identified by the witness ought not to be a mere technical glitch. It was left to the judge to emphasize to the jury that the flawed procedure tended to diminish the cogency of the identification."

[28] The factual background to this first ground is that these appellants were pointed out in identification parades held on three different dates. Mr Johnson's parade was held on 8 May 1998, Mr Allison's, four days later, on 12 May and Mr Hamilton's on 30 May 1998. The first in time was conducted by Inspector Dean Crawford, while both of the others were conducted by Sergeant Isiah Hamilton. All three parades were held at the Hunts Bay Police Station using the one-way mirror facility at that location.

[29] It is important to note that Sergeant Hamilton testified that he did not know either of the appellants before arranging the parades for them. Whereas he had seen and spoken to Mr Allison two or three days before his parade, in order to secure legal representation for him on the parade, Sergeant Hamilton had not seen Mr Hamilton before the day of Mr Hamilton's parade.

[30] It is also important to note that on each parade the other persons who appeared on the parade were chosen by the, then, suspect. Sergeant Hamilton is recorded, at pages 226 – 227 of the transcript, as saying, "I was there to ensure that [the men picked out by the suspect] were of similar height, colour, and general appearance". Each suspect had legal representation at the time of his parade and Mr Hamilton's

attorney-at-law made no complaint about the conduct of that parade (page 228 of the transcript).

[31] At the trial, Sergeant Hamilton agreed in cross-examination, that on the parade with Mr Hamilton, at which he was pointed out by Mr McKenzie, were Mr Allison, Mr Johnson and another person named Dwayne Lee. Mr Lee, apparently, had also been charged in respect of the killings which gave rise to the instant case but was not committed to stand trial therein.

[32] Defence counsel cross-examined Sergeant Hamilton on the integrity of the identification parade. The sergeant agreed that he would not have conducted an identification parade with less than nine persons, including the suspect. When asked about a parade with five persons other than the suspect, Sergeant Hamilton agreed that such a parade would have been invalid, unfair, illegal and irregular. He said "[a]s long as there are not nine men on the parade, I would not have conducted the parade".

[33] Sergeant Hamilton also agreed that he would not have placed "a man other than the suspect on a parade that has already been identified by the said witness that was coming on the parade" (see page 245 of the transcript). He testified that, at the time of conducting these parades he was not aware of that principle that such an act would reduce the number of appropriate persons on the parade. In that context, the following exchange occurred, as is recorded at pages 246 - 247 of the transcript:

> "Q. ...You know you are require [sic] to put eight men on the parade along with the suspect; but one of them has already been identified on a [sic] another parade. I am just asking you that if you agree with me, that if

you placed that person on the parade, you would be reducing the number certainly from eight to seven?

A. I'll say, 'Yes'.

Q. If you were to place two persons on the parade who had been previously identified by the same witness, you would be reducing the number to six?

HER LADYSHIP: I didn't hear the answer.

WITNESS: Yes, m'Lady.

Q. And, by extension, if you place three persons who had been identified by the same witness, you would be reducing the number to five?

A. Yes, sir.

Q. And, five persons on a parade, you agree would be illegal, irregular and all the other adjectives that we used.

A. I would think so."

[34] In re-examination Sergeant Hamilton stated that Mr Allison's presence on the identification parade was as a result of his oversight. He said, however, that he was not aware that Mr Johnson had been previously identified by Mr McKenzie.

[35] Learned counsel who appeared for Mr Johnson at the trial also explored the issue of other persons suspected of being perpetrators of the killings, having been placed on the same parade with Mr Johnson. None of those were, apparently, committed for trial.

[36] Against that background, Mr Wilson made two specific complaints. Firstly, he highlighted the flawed conduct of the parade held for Mr Hamilton. Secondly, he argued that the learned trial judge erred in her summation in respect of the defects.

[37] In respect of the first, Mr Wilson stated that the regulations in this country are similar to the corresponding code used in England. That code is entitled Code D of the Police and Criminal Evidence Act 1984. Learned counsel then quoted from D:8 of that code to show the egregious nature of the flaw in Mr Hamilton's parade. The relevant part of Code D states:

> "In no circumstances shall more than two suspects be included in one parade and where there are separate parades they shall be made up of different people."

[38] Concerning the summation, Mr Wilson pointed to this portion of the learned trial judge's direction:

> "So the fact that other suspects were placed on the same parade with some of the accused men in this case means that there was no breach of the rules."

[39] In considering these matters we agree that, despite the fact that our regulations do not use the terminology adopted in the English Code D, the spirit of that formulation is intended to be adopted in practice in this country. Paragraph 552 of the rules governing the conduct of identification parades, which were published in the Jamaica Gazette Extraordinary dated 29 July 1939, Rules and Regulations relative to the Jamaica Constabulary Force, states:

> "Identification Parades – In arranging for personal identification, every precaution shall be taken (a) to exclude any suspicion of unfairness or risk of erroneous identification through the witnesses' attention being directed to the suspected person in particular instead of indifferently to all the persons paraded, and (b) to make sure that the witnesses' ability to recognise the accused has been fairly and adequately tested."

[40] The case law in this jurisdiction has amply demonstrated, however, that our regulations are procedural and not mandatory.

[41] The main modern local authorities in respect of the treatment of evidence concerning identification parades hark back to 1975 with the decision of **R v Cecil Gibson** (1975) 13 JLR 207. In that case, one of the investigating officers selected the participants for the parade and remained on the parade throughout its duration. This court overturned the conviction because of the failure of the trial judge in that case, to inform the jury that the investigating officer's participation was a breach of the regulations concerning identification parades. It may be gleaned from the judgment, however, that the officer's participation, although the cause of the difficulty, would not have, by itself, been fatal to the conviction. That can be understood because, firstly, a new trial was ordered. Secondly, Graham-Perkins JA, who gave the judgment of the court, stated that the matter was one for the jury. He said at page 211:

> "If, on the other hand, **the jury had been told as they ought in our view, to have been told that [the investigating officers] had been guilty of breaches of regulations** designed to ensure the exclusion of any suspicion of unfairness or the risk of erroneous identification and that they had not had an opportunity to hear from [the investigating officer who stayed on the parade] the reason for those breaches, we are quite unable to say what effect this knowledge would have had on their deliberations." (Emphasis supplied)

What the court decided was that the jury ought to have been told of the breaches. The jury, being thus informed, would then be the arbiters of the effect of the improprieties.

[42] A similar principle may be extracted from **R v Graham and Lewis** (1986) 23 JLR 230. In that case there was a disparity in the respective heights of the suspect and the majority of the other members of the parade. In addition, there was no attorney-at-law present to assist the suspect. Rowe P, who gave the judgment of the court, said that where there are no clear breaches of the identification parade rules, the matter was essentially one for the jury (page 243 D). He, however, went on, at page 244 C to decline to hold that the regulations concerning the conduct of identification parades were mandatory.

[43] The finding in **R v Graham and Lewis** has been followed in a number of cases, including, **R v Michael McIntosh and Anthony Brown** SCCA Nos 229 and 241/1988 (delivered on 22 October 1991). Forte JA said, concerning the regulations (at pages 6 - 7) of the judgment:

> "The case of Graham and Lewis (supra) made it very clear that the Rules are not mandatory, but procedural and that any failure to adhere to any of the Rules, would go to the weight of the evidence and not to the validity of the parade. What must be the important consideration for the jury is whether in all the circumstances the identification parade was fair, and gave the witness the opportunity to independently and fairly and without any assistance identify his assailant." (Underlining as in original)

[44] We are grateful for the assistance of Mrs Hay in bringing to our attention the case of **R v David Thompson** SCCA No 39/99 (delivered 6 March 2000). In that case an identification parade was held in circumstances where the witness said he knew the perpetrator before, but by an alias. There was, however, a disparity in the heights of the persons on the parade. In giving the judgment of the court, Walker JA repeated

the principle that the rules are not mandatory. After referring to the disparity between the heights of the participants on the parade, he went on to say at page 7 of the judgment:

> "Furthermore, it is to be observed that this was a recognition case as the learned trial judge found...Indeed, in the circumstances of this case, it would seem that an identification parade was held primarily for the benefit of the police who had apprehended the appellant entirely on the basis of a physical description and an alias name and needed to be satisfied that they had got the right man."

We respectfully adopt that dictum as being pertinent to the instant case.

[45] We find, as Sergeant Hamilton and the learned trial judge accepted, that there were breaches of the guidelines contained in the regulations concerning the holding of identification parades. The breaches did not, however, invalidate the parade. They certainly did not seem to have been deliberately committed, since it was Mr Hamilton who chose the other members for the parade. It was, therefore, incumbent on the learned trial judge to have informed the jury of the nature of the breaches that occurred and the effect that they would have had. In order to ascertain whether she did so, we now turn to the relevant portions of the summation.

[46] In her summation, the learned trial judge informed the jury that the parade for Mr Hamilton had been conducted in breach of the rules. She stated that more than once. This is recorded at pages 429 – 432 of the transcript. We, therefore, regard the portion identified by Mr Wilson as a slip of the tongue by the learned trial judge (that is if she has been accurately recorded). The comment complained about was made in the following context at pages 429 – 430:

> "Now, one rule is that the police were to have ensured that one suspect was placed on each parade with at least eight other men and those men were as far as possible to be of the same height, general appearance and position in life. That was the term that was actually used. The suspect should be allowed to pick out any position in the line up and should be expressly asked if he has any objection to any of the persons present with him or to the arrangements made. **So the fact that other suspects were placed on the same parade with some of the accused men in this case means that there was no breach of the rules.** As I said, the rules are not mandatory. They are provided to guide the police as to the proper way to conduct the parade. You have to decide whether in the case of Johnson, the placing of the suspect with persons who are suspects on the same parade with Mr. Johnson would have operated unfairly to Mr. Johnson." (Emphasis supplied)

[47] What the learned trial judge said thereafter, would, however, have left the jury in no doubt that a breach had been committed in the conduct of the parade. After she had amply given the context of the need for fairness in the conduct of the parade, she said at page 431:

> "So too when the parade was held, in relation to the identification of Hamilton, three other suspects were placed on that parade. **As I tell you** [sic] **from the outset, that that was a breach of the rules**...
>
> **So as I said, if there were breaches, it is a matter for you to take that fact into account and you take into account all the other circumstances of the case**. If you, as the judges of facts, determine that the identification parades which were held in respect of the accused men, in particular Johnson and Hamilton, were unfair because of these breaches, then you would not put any weight to the evidence that Mr. McKenzie gave that he pointed out these men on the parade." (Emphasis supplied)

She also said at page 432:

> "But **I'm directing you it was a breach of the rules** of guidelines and you take it into account when you consider the weight of the evidence, the weight of the identification parade evidence." (Emphasis supplied)

[48] The learned trial judge went on to place the breaches in the context of the evidence as to how they occurred. This, no doubt with a view to assisting the jury in determining the issue of the fairness of the parade. We find that the directions given by the learned trial judge were fulsome and fair in that regard and we, respectfully, disagree with Mr Wilson that, other than for the slip identified, they were wanting in any respect.

The weaknesses in the identification evidence

[49] Mr Wilson also submitted that since the prosecution's case rested solely on the testimony of Mr McKenzie, that the weaknesses in that testimony were "insufficient to satisfy a conviction [for] a capital offence". Learned counsel focussed on the fact that, although he had seen Mr Hamilton more than once over the period of five weeks following the killings, Mr McKenzie did not point him out to the police.

[50] In our view, Mr Wilson is not on sure ground. The evidence given by Mr McKenzie, as to the commission of the offences and the perpetrators thereof, was sufficient for the jury, if they believed him, to rely upon. The fact that he was the sole witness as to fact could not, by itself, prevent a conviction. The issue, thereafter, was his credibility. That issue was in the sole province of the jury. The learned trial judge amply instructed the jury on the issue of assessing evidence, amply instructed the jury on the issue of assessing discrepancies, brought to their attention the weaknesses in

the identification evidence and thereafter generally left the issue of Mr McKenzie's credibility for their deliberation. The jury clearly believed him. In our view, there was ample evidence on which they could have done so.

[51] In respect of Mr Wilson's specific complaint that no explanation was given as to how Mr Hamilton came into custody, we agree with Mrs Hay that there is evidence from which that could be gleaned. Mr McKenzie said that from time to time when he would see Mr Hamilton, he would make attempts to contact the investigating officer. He had no success in the majority of those attempts but did manage to do so on one occasion having seen Mr Hamilton at a particular location. This evidence meshed with the evidence of the investigating officer, Detective Inspector O'Connor, who said that upon receiving a telephone call, he went to the location in question where he saw and apprehended Mr Hamilton. These were all matters placed before the jury for their deliberations. In fact, at the end of the summation, defence counsel acting for Mr Hamilton raised the matter specifically and the learned trial judge reminded the jury of the relevant evidence of Mr McKenzie making efforts to contact the investigating officer.

[52] In the circumstances, the grounds argued on behalf of Mr Hamilton also fail.

Sentence

[53] The decision of the Governor General to commute the sentences, in respect of each appellant, to one of imprisonment for life was made pursuant to section 90 of the Constitution of Jamaica. None of the instruments that communicated the Governor General's decision, specified a period before which the appellant would be eligible for

parole. That is properly so, because, based on the decisions of the Privy Council in **The Director of Public Prosecutions v Kurt Mollison** (2003) 64 WIR 140, and in **Lambert Watson v R** PCA No 36/2003 (delivered 7 July 2004) and section 3 of the Offences Against the Person Act, the length of that period is a decision to be made by a court.

[54] It is to be noted that section 6(4) of the Parole Act stipulates that a person who has had his sentence of death commuted to imprisonment for life, in the absence of a time period having been specified concerning his eligibility for parole, shall be eligible for parole after having served a period of not less than seven years. In that context, we are of the view that it would be appropriate to fix that period in respect of each of these appellants. We therefore invited counsel to make submissions on an appropriate period to be served before eligibility.

[55] Mrs Atkinson-Flowers, in her written submissions on the point, helpfully reminded us of the time the appellants spent in custody awaiting trial and then re-trial. She cited the case of **Ajay Dookee v State of Mauritius** [2012] UKPC 21 in support of her submissions. In that case, their Lordships were of the view that "credit should ordinarily be given for time spent in custody on remand to the extent of 80 – 100% (80% being the default position unless, for example, the detainee is a foreign national whose family lives abroad and cannot visit)" (paragraph 17 of the judgment).

[56] These appellants were taken into custody between April and May 1998. It is Mr Harrison QC's submission that they have been "uninterruptedly, in custody since arrest".

Although the record does not reflect whether they were on bail prior to the first trial, they were, it seems, in custody up to the commencement of and during the re-trial in 2004. We also notice that approximately 18 months elapsed between conviction and sentence. No explanation for the delay appears on the record.

[57] Despite the decision in **Ajay Dookee v State of Mauritius**, it is important to note that the learned trial judge, having heard the evidence, seen the appellants, heard the character evidence and considered the social enquiry and other reports, directed, in respect of the first count of murder, that the appellants should each serve a period of no less than 40 years before being eligible for parole. There is no indication that the Governor General's order affected the sentences in respect of count one.

[58] In considering the appropriate period before eligibility for parole, the circumstances of these killings must be borne in mind. The significant factor of these murders, in our view, is that these people were in a domestic setting, in Mr McKenzie's family home, when they were shot. Three lives were taken in those circumstances and other persons were injured. Such an attack should attract a severe penalty. Bearing these matters in mind and having considered the submissions of counsel for the appellants, we find no reason to disturb the sentence passed in respect of count one on the indictment. We also direct, considering all of the above, that the appellants should, in respect of counts two and three, each serve a minimum period of 40 years before becoming eligible for parole.

Conclusion

[59] We have considered the complaints concerning the issue of the cogency of the identification evidence, the question of whether Mr Allison's character had been placed in issue so as to require a good character direction and the directions concerning the breaches which occurred in the conduct of the identification parade. We have found that there was no basis upon which the learned trial judge should have given a direction on Mr Allison's character and on all the other matters in issue we find that the learned trial judge's directions were adequate and cannot be faulted. The issues concerning the identification evidence were fairly placed for the jury's consideration and, having deliberated on them, they arrived at the verdicts that the appellants were guilty of the offences charged on the indictment.

[60] On these bases, we find that the appeals against conviction should be refused.

[61] Because of the heinous nature of the killings, we find no reason to disturb the sentence imposed by the learned trial judge in respect of the first count on the indictment. We, therefore, also ordered, that in respect of each of the other two counts, the appellants should each serve 40 years imprisonment before becoming eligible for parole.

[62] The appeals are dismissed. The convictions are affirmed. The sentence in respect of count one of the indictment is affirmed in each case. In respect of counts two and three, the appellants shall each serve 40 years imprisonment before becoming

eligible for parole. All the sentences are to be reckoned as having commenced on 20 January 2006.