[2023] JMCA Crim 11

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

SUPREME COURT CRIMINAL APPEAL NO 55/2015

OMAR ANDERSON v R

Terrence Williams and John Clarke instructed by John Clarke for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Ms Jamelia Simpson for the Crown

Written submissions filed by the Director of State Proceedings for the Attorney General of Jamaica as an interested party

17, 19-23, 30 July 2021 and 10 March 2023

EDWARDS JA

Introduction

[1] Mr Omar Anderson ('the appellant') was convicted on 11 June 2015 by Dunbar-Green J (as she then was) ('the learned judge') in the High Court Division of the Gun Court for illegal possession of firearm and two counts of robbery with aggravation, and sentenced on 17 July 2015, to five years' imprisonment for the firearm offence and seven years for each of the robbery offences. The sentences were ordered to run concurrently. On 26 July 2015, he filed an application for leave to appeal against his convictions and sentences, but due to a delay in the provision of the transcript of his

trial, which was only received by this court on 21 July 2020, the hearing of his application was, regrettably, unduly delayed. A single judge of this court, on 12 August 2020, considered the appellant's application, but refused it in respect of both conviction and sentence.

[2] The appellant renewed his application for leave to appeal to the full court, as was his right to do. On 25 March 2021, whilst awaiting the hearing of his renewed application, he filed an application for bail pending appeal, on grounds that included the fact that he had served a substantial part of his sentence and that his constitutional rights were being infringed, due to the delay in the hearing of his application for permission to appeal. His application to be admitted to bail was heard on 13 and 15 April 2021 and was refused, primarily on the basis that, pursuant to section 4 of the Bail Act 2000, this court had no jurisdiction to grant bail where the applicant had not previously been on bail (see the decision of the single judge in **Omar Anderson v R** [2021] JMCA App 11).

[3] The result of the foregoing is that, at the time this matter commenced before the full court, the appellant, who had been in custody since his arrest on 19 May 2013, had spent approximately eight years and two months in custody, six of which he spent in prison following his conviction, and whilst awaiting the hearing of his appeal. His 5-year sentence in relation to count 1 would have already been served on 16 July 2020, and there would have been only one year remaining for the expiration of his 7-year sentences in relation to the counts of robbery. That sentence would have expired on or about 16 July 2022. His early release date, for the latter sentence, would have been in and around March of 2020, and so undoubtedly, had Mr Anderson not pursued his appeal he would, likely, have been a free man since March of 2020.

[4] This appeal, in addition to the issues raised by the original grounds of appeal filed, raised issues as to the ability of an individual, in the unfortunate situation as the appellant herein, to obtain constitutional redress in this court, for breaches of his rights under the Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica.

In the appellant's case, the rights alleged to have been breached were his right to be provided with a transcript of the proceedings of his trial on a timely basis, the right to have his conviction reviewed by a superior court within a reasonable time, and his right to liberty.

[5] On 19 July 2021, the day set for the hearing of the renewed application for leave to appeal, we heard an application by the appellant, filed on 18 May 2021, pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), seeking orders that the court permit the admission into evidence of his affidavit filed 22 April 2021, as well as order the production of several items by the Jamaica Constabulary Force ('JCF') pertaining to the investigation of the offences for which the appellant was convicted, which were said to be relevant to the fair hearing of the appeal. On 20 July 2021, we refused the orders sought, except for the admission of the appellant's affidavit, insofar as it affected the grounds of appeal relating to the incompetence of counsel. In the interests of fairness, the court also admitted the affidavit of counsel Mr Paul Wayne Gentles, filed on 3 May 2021, and its exhibits in relation to the same ground of appeal.

[6] We heard the application with respect to permission to appeal, and on 30 July 2021, having granted leave to appeal, we dismissed the appeal but determined that the appellant was entitled to some relief on account of the undue delay in the hearing of his appeal. As a result, we made the following orders:

> "1. The application for leave to appeal against conviction and sentence is granted. The hearing of the application is treated as the hearing of the appeal.
>
> 2. The appeal against conviction is dismissed and the conviction is affirmed.
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> 3. The appeal against sentence is dismissed and the sentence is affirmed.
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> 4. The sentence is to be reckoned as having commenced on 17 July 2015.

5. The appellant, having effectively served his 5-year sentence in respect of the offence of illegal possession of firearm as at 16 June 2020, and having served 6 of 7 years in respect of the offence of robbery with aggravation, in which his early release date has passed, is to be immediately released.

6. It is declared that the right of the appellant under section 16(7) of the Constitution of Jamaica, to be given a copy of the record of the proceedings made by or on behalf of the court, within a reasonable time and the right under section 16(8) of the Constitution of Jamaica to have his case reviewed by a superior court within a reasonable time, was breached by the excessive delay between his conviction and the hearing of his appeal.

7. It is declared that consequent upon the delay the right of the appellant to liberty under section 14(1)(b) of the Constitution of Jamaica was breached from the time he would have become entitled to early release in March 2020 and he, therefore, is entitled to compensation from the date of his application for bail, 25 March 2021, to the date of this order, 30 July 2021."

At the time, we promised to put our reasons in writing and we do so now.

The background facts

[7] The evidence against the appellant, led at his trial, was that he had advertised a 1999 "police shaped" Toyota Corolla motor car for sale in the newspaper, indicating a telephone contact. This advertisement was responded to by one of the two complainants in this case. Arrangements were made by the two, via the telephone, to meet with the appellant to view the car. The meeting was to take place at the Hunts Bay Police Station. Having met the two complainants at the police station, the appellant told them that the car was at a car mart and asked them to drive him there. After the relevant identifications were exchanged, they left the police station and proceeded, at the direction of the appellant. The appellant directed them, not to the car

mart as agreed, but to an open yard, where a car, not fitting the description of what was advertised, was parked. As soon as the complainants began examining the car, two men approached brandishing firearms, and robbed the complainants of cash, cell phones and other items. One of the complainants told the court that the appellant had participated in the robbery and took money, a phone, a wallet and other items from him. That complainant was told to run, which he did. The other complainant was also robbed of phones, his watch, and keys by the other robbers. After that, he also ran back to the car, and both complainants escaped leaving the appellant with the gunmen. They went straight to the Hunts Bay Police Station and made a report there.

[8] On the day following the robbery, another individual also answered the appellant's advertisement for the sale of the motor car. During his transaction with that person, the appellant was arrested and charged. His house was searched and a cellular phone was found, which was later identified by one of the complainants as the phone stolen from him by the gunmen. Another cellular phone was also found which belonged to the appellant. That cell phone was discovered to have the number which was used in the newspaper advertisement for the sale of the motor car by the appellant. A few days later, one of the complainants attended a video identification parade, where he identified the appellant as the person he had met who was selling the car.

[9] The appellant gave evidence at his trial admitting to placing the advertisement and meeting with the complainants. He said he had parked his Nissan Blue Bird at a yard on Delacree Road to show prospective buyers, and that there had been a mistake in the description of the car in the advertisement. He denied that he was a part of the robbery and claimed that he too was a victim.

The prosecution's case at trial

[10] At the trial, the prosecution led evidence that, on 18 May 2013, the appellant, along with two other men who were armed with guns, robbed the complainants, Ranique Laing and Warren Minto, at an abandoned premises on Delacree Road, in the parish of Kingston. Cash in the amount of $390,000.00, a Blackberry cellular phone

valued at $55,000.00, and other important documents were taken from Mr Laing. A Blackberry cellular phone, a Nokia cellular phone, and a watch, all valued at about $40,000.00, were taken from Mr Minto, along with his wallet, keys, and important documents. The prosecution's case was that the appellant had lured the complainants to the abandoned premises, by arranging to meet with Mr Laing under the false pretence of showing him a car which the appellant had advertised in the Saturday Gleaner newspaper, for sale on that same day.

[11] The prosecution called seven witnesses in support of its case. Along with the two complainants, the prosecution led evidence from Corporal Donovon Mckoy, the arresting officer; Detective Corporal Peter Pike, the investigating officer; Sergeants Desmond Roache and Duliet Mckay, the officers who conducted the identification ('ID') parade and Frederick Thompson, a complainant in a separate matter involving the appellant. Their evidence will only be recounted insofar as is relevant to the grounds of appeal. The cellular phones, which were recovered, were not physically put into evidence or produced at trial.

[12] The complainant, Mr Laing, gave evidence that on the day of the incident, he saw an advertisement in the Saturday Gleaner newspaper for the sale of a 1999 "police-shaped" Toyota Corolla for $330,000.00. He contacted the telephone number in the advertisement and spoke to a man who identified himself as Omar Anderson. It is not disputed that this person was the appellant. The two agreed to meet at the Hunts Bay Police Station so that the appellant could show him the car. Mr Laing, accompanied by his friend, Mr Minto, who is a police officer, met with the appellant at the police station. Mr Laing showed the appellant his identification card as requested. The appellant told Mr Laing that the car for sale was at a car mart down the road and asked him to drive them there. Mr Minto asked to see the appellant's identification, which was shown to both complainants. The three men left the police station in Mr Laing's car, driven by Mr Minto, to a location dictated by the appellant.

[13] During the journey, Mr Laing and the appellant conversed about the car purportedly for sale. Mr Laing asked the appellant about the description of the car being "police-shaped", as he was unaware of a 1999 Toyota Corolla being of that shape. The appellant told him that the description was a mistake. The appellant also told him that the car needed two tires and that he was selling the car for that price because he owed the bank money and did not want them to seize the car.

[14] Between 3:00 and 3:15 pm, they arrived at the premises that the appellant had directed them to. Mr Minto parked outside the gate, and they exited the car and walked into the premises. The appellant was at the front, followed by Mr Laing and then Mr Minto. Whilst they were walking to the left side of the house on the premises, a man came from the other side of the house and pointed a gun at Mr Minto. Mr Laing gave evidence that he said to the appellant, "there is a person there with a gun", but he did not reply. Another man then approached from the back and said, "hands up, hands up". That man pointed a gun at Mr Laing's face. Mr Laing said that the appellant then searched his pockets, and without his permission, took $330,000.00 from one of his pockets, and $90,000.00 from another pocket. The appellant then took his Blackberry phone, wallet, voter's ID, driver's licence, USD$1.00, TRN card, Scotia Bank card and some photographs. The gunman then told Mr Laing to run, which he did. At the time the items were being taken from him, he could not see where Mr Minto or the other gunman were, but when he turned to run, he saw them. He said he heard Mr Minto asking the gunman for his house key. Mr Laing ran back to the car, with Mr Minto following behind him. When they reached back to the car, the appellant was still inside with the gunmen. The complainants made their way back to the Hunts Bay Police Station where they made a report to Corporal Pike. Following the report, the complainants took a team of police to the location where the robbery had occurred. However, they did not see the gunmen or the appellant.

[15] Mr Laing was never shown the car that was purportedly for sale and was never taken to a car mart by the appellant. Under cross-examination, Mr Laing could not recall

if the gunmen had greeted the appellant by name, if there had been any physical contact between them or if they had given him any instructions. However, Mr Laing disagreed that the gunman had searched or stolen any items from the appellant.

[16] Mr Minto's evidence was substantially the same as that of Mr Laing, except in relation to what transpired when the men with guns had approached them in the yard. According to Mr Minto, after they entered the yard, he heard a man shout from behind "weh unno a do in a mi yard"? He turned around and saw a man pointing a black metal pistol at him. The man told him to put his hands in the air and he complied. In his evidence in chief, Mr Minto stated that the gunman had then searched him and took from him, without his permission, a Blackberry phone, a Nokia phone, his watch and his keys. At this time, he was unable to observe what if anything happened in relation to Mr Laing and the appellant. The appellant, he said, was there but he was not sure what the appellant was doing at the time. After Mr Minto's belongings were taken, the gunmen told him and Mr Laing to run. They ran to the car and drove off. He did not see any of the items again except for the Nokia phone, which he identified at the Hunts Bay Police Station about a day or two after the robbery, in the presence of Corporal Pike and Mr Laing. He could not recall if anyone else was there when he identified the phone. He described the phone as a black flashlight phone with a cracked screen. He later pointed out the appellant at a video identification parade as the person he had met as Omar Anderson, and who was selling the car to Mr Laing.

[17] Under cross-examination, Mr Minto could not recall in what order they had entered the yard on the day of the robbery, nor could he recall how far they each were from each other. He did, however, support Mr Laing's evidence that there were two gunmen, one who had approached him from behind, and the other, who had approached Mr Laing from in front.

[18] Although, in his examination-in-chief, Mr Minto had said that the gunman that had pointed the gun at him had taken his belongings, under cross-examination he said that it was the appellant who had taken his watch, cell phone and keys. Mr Minto

maintained that this was so, even after the inconsistency was pointed out to him that he had previously stated he did not know what the appellant was doing at the time he was being robbed. He also could not recall if the appellant had taken anything from Mr Laing. Mr Minto said that throughout the robbery he was focused on the man pointing the gun at him and was not at all times paying attention to what was happening to Mr Laing and the others behind him. Upon re-examination on this point, he said that what he meant was that he could not recall what the appellant was doing after he had taken the items.

[19] Mr Minto's evidence-in-chief was also inconsistent as it pertained to his evidence as to who was present when he identified the Nokia phone as his own. Under cross-examination, he said the appellant was present, although, in examination-in-chief, he had said he could not recall if anyone other than Corporal Pike and Mr Laing were present. Mr Minto further contradicted himself, when, under cross-examination, he stated that he had identified the phone after the identification parade, whereas, in examination-in-chief, he had said he had identified it before, one or two days after the incident. Upon re-examination, when asked to clarify the inconsistency, he reiterated that he had identified the phone after the identification parade, which occurred about 31 May 2013.

[20] The prosecution also called, as a witness, Mr Thompson, an automotive technician, who gave evidence that on 19 May 2013, (which was the day after the robbery), he saw an advertisement in the Daily Gleaner newspaper, dated 18 May 2013, for the sale of a Toyota Corolla motor car, and called the telephone number in the advertisement. Mr Thompson spoke with a man who indicated that the car was being sold for $330,000.00. The man asked Mr Thompson to meet him at a gas station in the Three Miles area to view the car. Mr Thompson drove from Old Harbour to the location, but neither the car nor the man were there. He called back the number and the man told him to meet him on Hagley Park Road. Upon reaching a bus stop on that road, a man signalled him to stop and identified himself as the person who Mr Thompson had

been conversing with on the phone. Again, it was not disputed that this man was the appellant. The appellant directed him to drive to Maxfield Avenue to view the car, which was not at the gas station, as he had previously indicated, as according to the appellant, the tires were worn. Mr Thompson was directed to drive from Hagley Park Road to Waltham Park Road, to Spanish Town Road and then to Maxfield Avenue.

[21] During this time, his friend Corporal McKoy, who was a police officer from the Hunts Bay Police Station, followed behind his vehicle, Mr Thompson having contacted him because his suspicions had been aroused. At the intersection of Maxfield Avenue and Wellington Road, the appellant asked him to stop the car, which he did. The parties exchanged words and Corporal McKoy arrived on the scene, spoke briefly with Mr Thompson, and then removed the appellant from the car. The officer searched the appellant and found a kitchen knife in his bag. The officer arrested the appellant and took him back to the Hunts Bay Police Station.

[22] Corporal McKoy's evidence substantiated Mr Thompson's evidence. Corporal McKoy said that he had searched the khaki-coloured bag the appellant was carrying and removed what appeared to be a kitchen knife with a green and white handle and a long stainless-steel blade. He did not notice anything else in the bag, and he did not find anything on the appellant's person. He caused the appellant to be taken to the Criminal Investigations Branch ('CIB') office at the Hunts Bay Police Station, where he spoke with corporal Pike. He handed the knife over to personnel at the CIB office and left the appellant in the custody of the police personnel.

[23] Sergeants Roache and McKay were the officers involved in the identification parade held in respect of the appellant. Sergeant Roache made arrangements for the identification parade to be held on 29 May 2013 and conducted parts of the process on that day, and Sergeant McKay completed the process on 31 May 2013, at which time, he said, Mr Minto identified the appellant as a suspect in the robbery.

[24] The evidence of Corporal Pike was that on the day of the robbery, the complainants had attended on the Hunts Bay Police Station and reported to him that they had been robbed. He, along with other police personnel, took the complainants to the premises where they alleged the incident had taken place, made certain observations and spoke to persons there. He was shown the Daily Gleaner advertisement about the car for sale and called the number in the advertisement. He spoke to a man in relation to the car. He recorded an entry in the station diary in respect of the report.

[25] On the next day, 19 May 2013, whilst he was on duty, Corporal McKoy brought the appellant into the station, along with Mr Thompson. He spoke with Mr Thompson in the presence of the appellant. What he was told caused him to check his notebook in relation to the robbery of the complainants. He checked the telephone number in the advertisement which the complainants had called. He then told the appellant about his investigation into the robbery of the complainants and cautioned him. The appellant did not respond. In the presence and view of the appellant, Corporal McKoy handed him a bag with a kitchen knife and a Nokia cellular phone, that he said he had taken from the appellant. Corporal Pike checked the number of the cell phone by dialling on it, "star 129 number sign, send". He asked the appellant for the property of the complainants, but the appellant denied having them and invited the police to search his home. The appellant took him and a team of police to 16 Glenn Road, where, he said, he lived. On arrival, the appellant used a key which he had in his possession to open the door to a room which he said he alone occupied. Corporal Pike searched the room in the appellant's presence and view. During the search, Corporal Pike found a Nokia cell phone and a Coral cell phone. He asked the appellant where he got the phones from and the appellant responded that he had found them in a vehicle he was operating as a taxi two weeks before. The officer confiscated the phones and caused them to be sent to the Communications Forensics and Cyber Crime Unit ('CFCU'). All the items were photographed, and the knife and the bag were handed to the exhibits' storekeeper. Corporal Pike said that before the phones were sent to CFCU, the Nokia phone that had

been found in the appellant's house was identified by Mr Minto, in the presence of the appellant, as one of the phones taken from him on the day of the robbery.

[26] During the search of the appellant's premises, Corporal Pike had observed new clothing and shoes that the appellant had indicated were purchased the day before. A silver 1996 Nissan Bluebird, without registration plates, was also observed parked on the premises, which, Corporal Pike claimed, the appellant had indicated belonged to him. Corporal Pike caused the vehicle to be removed and taken to the Hunts Bay Police Station.

[27] Corporal Pike noted that the appellant's home at 16 Glenn Road was located in the same Whitfield Town community, as the premises on which the robbery was alleged to have occurred was located. It was about three minutes away, if walking, and one minute, if driving. The intersection of Maxfield and Wellington Road, he said, is also located in the Whitfield Town Community. He subsequently applied for an identification parade and caused a question-and-answer session to be conducted, after which he charged the appellant with robbery with aggravation.

[28] Under cross-examination, Corporal Pike admitted that he did not put in his statement that he had seen any new clothing or shoes at 16 Glenn Road. He did not include that in his statement. The Corporal admitted that he did not find any personal documents or photos identifying the appellant at 16 Glenn Road. In respect of the explanation he said the appellant gave about finding the phones in a taxi, he said he had enquired about the licence number of the taxi but the appellant refused to give him. He did not include that in his statement. He admitted that he did not ask the appellant to show him the taxi in which he said he found the phones. He made enquiries about the taxi but they did not bear any fruit. He did not record in his statement the nature and quality of those enquiries.

[29] In respect of the Nissan, Corporal Pike said he did not obtain documentation for the vehicle. Although his checks revealed the car was registered to a female, he did not

further investigate the car since the car had not been reported stolen. He denied that the phones had been found in the Nissan in the yard as opposed to in the room, and he denied that the appellant had disavowed all knowledge of the phones to him, and insisted, in the face of suggestions made to him that it was otherwise, that the appellant had said he had found the phones in a taxi. Corporal Pike also denied that the reason he did not further investigate the alleged taxi in a meaningful way was because the appellant had not said anything to him about a taxi.

[30] None of the witnesses knew the appellant before their interactions with him, and none of the police witnesses knew the complainants before they made their complaints.

The defence

[31] The appellant, who described himself as a tiler and part-time taxi operator, gave sworn evidence at his trial. Whilst he admitted to having placed the advertisement in the Daily Gleaner newspaper, speaking with Mr Laing, meeting with the complainants at the Hunts Bay Police Station, and taking them to the location where the robbery had taken place, he denied that he had robbed the complainants or that he was a part of any common design to do so. Instead, he asserted that he himself was robbed by the gunmen at the material time. He denied that the sale of the car was a ruse to lure the complainants to the premises to be robbed, and said he had parked his 1999 Nissan Bluebird that he wanted to sell at a yard on Delacree Road to show prospective buyers. He explained the fact that the car which he advertised for sale was a Toyota Corolla by maintaining that there had been a mistake in the car description in the newspaper.

[32] His version of events was that, upon entering the yard with the complainants, they began to view the car. He opened the door on the driver's side of the car, went inside, started the car, opened the bonnet and opened the trunk. He said that whilst they were viewing the car, two men entered the yard from Delacree Road saying "What unu a do inna mi yard". One of the complainants was standing at the front of the car. One of the gunmen "held on to him with a handgun". The other gunman instructed him not to exit the car and went to the back of the car. He said he could not see what was

happening at the back of the car. He said he saw items being taken from the complainant that was at the front of the car. Thereafter, that same gunman told the appellant to give him whatever he had. He gave him $25,000.00. The gunman asked for his gold ring and he gave it to him. The gunman then instructed him to come out of the car, which he did. The gunman went into the car and took out the radio. The gunman said to him "yuh a sell di car in a di community, and not paying any extortion, yuh don't come from bout yah, and come a sell vehicle and naw run no money". The gunman then told him he knew the school which the appellant's daughter attended and he knew where the appellant lived. The gunman then threatened "if yuh report this bwoy, straight gunshot to yuh, tek you robbery and hold it". The gunman then threw the car key to him and told him to drive out the car and not to let them see him back around there. The appellant took the car home, parked it in his yard, put the for-sale sign in the garbage and locked up the car.

[33] The following day, he said he received more calls relating to the car. Although he told the callers he was no longer interested in selling the car, he arranged to meet one of the persons. He met a man, who it was undisputed was Mr Thompson, in the Three Miles area. The man asked the appellant to take him to where the car was parked. He took the man onto Hagley Park Road, Waltham, down Spanish Town Road and onto Maxfield Avenue. Near Sunlight Street and Wellington Road, the man offered him $250,000.00 for the car papers and said he would bring the rest of the money the following day. He told the man to stop the car. He refused the offer and exited the vehicle. He had a bag in his hand with a knife, lotion, receipt book, wallet and a new pair of slippers. Mr Thompson exited the vehicle, pulled a firearm and started boxing and kicking him. A car came up from behind and Corporal McKoy came out. Corporal McKoy spoke to Mr Thompson, took the appellant from Mr Thompson and started boxing and kicking him as well. Corporal Pike then took him home, searched his house and took new and old clothes, two watches, a gold chain, a suitcase with documents such as pictures, his laptop computer and a tablet. Corporal Pike called a wrecker to

take his car from the yard and took him to the police station, where he was again beaten.

[34] He denied that he had taken any items from the complainants, denied that the complainants had left him behind in the yard with the gunmen, and denied that Corporal Pike had recovered two cell phones belonging to the complainants at his home.

[35] Under cross-examination, the appellant admitted that the telephone number in the advertisement was his personal cell phone number, and that the advertisement contained an error in description. The description he said should have been a 1999 Nissan Bluebird, instead of Toyota Corolla and should not have included that it was "police-shaped". He owned the car, although it was not registered in his name. Of the condition of the car, he said it was "somewhat" capable of being driven but was not roadworthy. He said the Nissan was not the car he operated as a taxi. The car was valued $350,000.00 which was what he had bought it for.

[36] He admitted that he lived at 16 Glenn Road but said he had occupied the room with his "baby-mother" and his 11-year-old daughter. He denied that the premises where the robbery occurred was near to his home, and said that he did not know who owned the abandoned premises. He did not know anyone on that road. There were other cars in the yard for sale, he said. He had driven his car there that morning and walked back home. It took him about seven to eight minutes to walk home. Two other persons viewed the car on the day of the robbery prior to the complainants. When he arranged with Mr Thompson to view the car the following day, it was parked back at his home.

[37] He agreed that he had made no report about having been robbed and made no mention of it after he had been taken into custody nor whilst he was being beaten, even though he said Corporal Pike told him he was beating him to tell him who the robbers were. However, he said after he was charged, he had told Corporal Pike, in the

presence of his lawyer, that he too was robbed. He did not report the robbery because he was fearful, since the gunmen had threatened him.

The application under section 28 of the JAJA

[38] On 30 April 2021, the appellant, by way of amended notice of application for court orders, sought leave to admit his affidavits filed 22 April 2021 and 30 April 2021, as fresh evidence on appeal. He also sought an order for the following documents to be produced by the Superintendent in Charge of the Hunts Bay Police Station to this court, to wit:

> "a. The station or CIB diary entry in relation to the 18 May 2013 in relation to reports from Ranique Laing/Constable Warren Minto
>
> b. The station or CIB diary entry in relation to the 19 May 2013 in relation to the arrest of Omar Anderson and which details the number of items seized by the police in relation to him
>
> c. The store keeper's log in relation to items collected on the 19 May 2013 and other entries which showed the same items especially the Nokia phone being delivered from safe keeping either to the investigation officer Detective Corporal Pike or any other officer."

[39] The appellant further sought discovery of the actual mobile phones alleged to have been recovered from the appellant and any report of the Communication Forensics and Cybercrime Unit ('CFCU') of the JCF in relation thereto. Counsel Mr Williams, on behalf of the appellant, submitted that the application was not a "fresh evidence" application "per se" but was one made pursuant to section 28 of JAJA, on the grounds that the orders sought were "just, necessary and expedient in the interest of justice", and that the items sought to be produced and adduced were relevant to the issues arising in the appeal.

[40] Mr Williams submitted that these items were necessary for the fair prosecution of the appellant's appeal and for him to properly put forward his ground of appeal on incompetence of counsel and the failure of the learned trial judge to deal adequately with the inconsistencies in the case. He pointed out that the criteria for admission of evidence under section 28 of JAJA, is not as restrictive as that for a fresh evidence application. He argued that the requisite test is whether the evidence sought to be adduced, is necessary or expedient in the interests of justice. He argued that the fact that these items were available at the time of the trial ought not to be decisive of the outcome of the application. He submitted that the application ought to be permitted because the prosecution had failed to disclose them at the trial and the trial counsel had failed to request them. He also asserted that the trial judge had failed to ensure that the best evidence was made available.

[41] Counsel argued that, if the relevant diaries, reports, books and mobile phones are not produced to this court, it would not be able to properly assess the potential unfairness that their absence would have had on the trial. These items were crucial, he argued, in light of the inconsistencies in the evidence, particularly having to do with the divergence in the accounts of the two complainants as to what transpired during the robbery, as well as that of the police officers as to how one of Mr Minto's phones was recovered and identified by him. This was especially so, given the fact that Mr Minto had given no clear evidence as to when he identified the phone, and the appellant had denied that any such phone identification took place in his presence. The identification of the phone, he said, was a key reason for the conviction, since a central issue to the case was whether the appellant had been found in recent possession of Mr Minto's phone.

[42] Counsel submitted that the law as set out in **R v Parks** [1961] 3 All ER 633 is no longer good law, and that, in any event, the law in **Benedetto v The Queen; Labrador v The Queen** [2003] 1 WLR 1545; [2003] UKPC 27, was the law applicable to the application. Counsel also relied on **Winston Solomon v The State** (1999) 57

WIR 432, **Mark Sangster and Randall Dixon v R** [2002] UKPC 58, **Mardio McKoy v R** [2010] JMCA Crim 27, extracts from Blackstone's Criminal Practice 2021 at F8.45, and Halsbury, Volume 28, para. 557, note 6, for the principle that real evidence is the best evidence and its non-production goes to the weight of the evidence, and this may lead to an adverse inference against the prosecution.

[43] In the light of the ground of appeal which dealt with incompetence of counsel and the failure to disclose by the State, it was argued that this court ought to require the Crown to carry out its continuing duty to disclose the evidence, in order for this court to properly assess the impact their absence would have had on the fairness of the trial, and to assist the appellant in the preparation of his appeal. If the items could not be produced, counsel argued, it would, in respect of the abuse of process ground, show real injustice caused by the delay and impede the appellant in having a fair appeal.

[44] In respect of the affidavit of the appellant, Mr Williams argued that it was necessary as, in it, the appellant explained the delay in the hearing of his appeal, the late production of the transcript, his treatment whilst in prison, as well as issues regarding the incompetency of his counsel. Counsel also urged the court to admit Mr Gentles' affidavit in response, which addressed the concerns surrounding his conduct of the defence at the trial and his instructions from the appellant.

[45] In response to the application, the learned Director of Public Prosecutions ('the DPP'), Ms Paula Llewellyn QC, submitted that, in exercising its discretion pursuant to section 28, the court must still have regard to the principles relevant to fresh evidence applications, as outlined in the cases of **R v Parks**, **Shaw and others v R** [2002] UKPC 53 and **Brian Smythe v R** [2018] JMCA App 3. In that regard, the appellant, it was submitted, had not fulfilled the requisite criteria as four of the items sought to be admitted were available at trial.

[46] The DPP said that, whilst she was well aware of the duty on the Crown to disclose all the evidence it has in hand, in a case such as this, in the normal course of

things, the Crown would not have gathered the material being asked for by the appellant, and therefore, would not have had it to disclose. Nothing occurred at trial that would have caused the prosecution to go outside of the norm, in order to produce those things, and the defence did not request them. The DPP pointed to the fact that the identification of the appellant had not been in issue, as he had placed himself on the scene, and he had admitted, in cross-examination, that he lived alone at the premises where the Nokia phone was alleged to have been found. The DPP also maintained that the accounts given in the statements to the police and in evidence at trial, including that of the defence, would not have necessitated the production of the station diaries, CFCU reports or the phone. The finding and ownership of the Nokia phone had not been contested, and the only issue in dispute was regarding where the phone had been found. The issue at trial was one of credibility in that respect, and the production of the phone, she said, would not have advanced the case of the prosecution or the interests of the appellant.

[47] Based on the strength of the evidence before the court, the instructions of counsel (signed by the appellant), and the basis upon which the learned trial judge came to a finding of guilt in her summation, it was further submitted, the production of the items, particularly the phone, would have made no difference to the defence, and trial counsel could not have been faulted for advancing the case for the defence, without seeking the production of the phone.

[48] The DPP raised no objection to the affidavit of the appellant, and herself provided an affidavit from his trial counsel Mr Gentles in response to the allegations of incompetence raised by the appellant. She, however, objected to the court making an order for the other documents to be adduced.

Disposal of the application

[49] Section 28 of JAJA provides, in part, that:

> "28. For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;…"

Parts IV and V deal with the jurisdiction of this court in criminal cases.

[50] The discretionary power under section 28 of JAJA is to be exercised only if the court, having considered all the circumstances of the case, considers it necessary or expedient in the interests of justice in a particular case. In the instant case, therefore, the question for this court is whether it is necessary or expedient in the interest of justice, for the items requested to be disclosed at this stage (see also the statements of the Privy Council in **Benedetto v R**, at para. 65).

[51] Having heard oral submissions on the application, we agreed that the duty of disclosure by the Crown was an ongoing one. However, we concluded that the contents of a station diary would not ordinarily be disclosed unless it was relevant to the prosecution's case or the defence's case. We also agreed that the entry in the station diary of the appellant's arrest was not relevant to the case advanced by the prosecution against the appellant, and that he had not demonstrated to us how it had been, or would have been, relevant to his case. The same with regard to the storekeeper's log, as the evidence of what was logged there was in regard to items taken from the appellant, which was not a matter of dispute in the case.

[52] Having considered the submissions of counsel as to the effect the evidence would likely have had at the trial and the effect it would likely have on an appeal, we determined that the evidence afforded no ground for allowing the appeal. We determined that there was no challenge in the case to the fact that there was a robbery, as also there was no challenge that the appellant was charged. There was also no challenge to the fact that phones were found when his premises were searched. The

only challenge was to whether they were found in his house as opposed to in his car. In those circumstances, the diary entries and the storekeeper's log would not have taken the case of the defence any further and therefore, it was neither expedient nor in the interest of justice to receive that evidence at this stage. We also could not see how the report of the CFCU would be useful to the appellant in his appeal. There was no allegation that any content on the phone was used as evidence against the appellant in the case. It was not made clear to the court how such a report would have taken the case any further.

[53] The absence, at trial, of the physical phone identified by the complainant, caused us more concern. It was not clear why the recovered items, which were potential exhibits in the case, were not produced at trial. However, we came to the conclusion that, in the final analysis, there was no challenge to the fact of the finding of the phones at the premises of the appellant, whether in his car or in his house. There was also no challenge to the fact that the complainant had owned a phone and was robbed of that phone. The only issue was whether the appellant was a part of the robbery or, was himself, a victim. We found that, based on the evidence, the absence of the phone was not detrimental to the appellant's defence, did not affect the safety of the conviction, and, in our view, would not have affected the ultimate decision arrived at by the judge (the jury impact test set out in **Maharaj v The State** [2021] UKPC 27). Its production or non-production at this stage, takes the case no further one way or the other.

[54] For a more in-depth assessment of the relationship between an application under section 28 of JAJA, and a fresh evidence application, see **Jerome Dixon v R** [2022] JMCA Crim 2, at paras. [22] to [28].

[55] Counsel having failed to demonstrate, to any degree, that the production of the requested material would have had a real prospect of affecting the safety of the conviction, we did not find it necessary or expedient in the interests of justice to order the production of the phone and the other documents, at this stage. However, in view

of the ground of incompetence of counsel, the affidavits of both the appellant and the trial counsel, Mr Gentles, were accepted and considered in the hearing of the appeal.

The grounds of appeal

[56] The appellant filed a notice of appeal on 26 July 2015, with which he filed three original grounds of appeal. On 21 April 2021, he filed seven supplemental grounds of appeal, and on 18 May 2021, filed five further supplemental grounds of appeal. At the hearing, Mr Williams, sought and was granted permission to abandon ground 3 of the supplemental grounds of appeal, and to argue the three original grounds, together with the remaining six supplemental grounds, and the five further supplemental grounds. The grounds of appeal argued at the hearing were, therefore, as follows:

1. "The learned Trial Judge erred when she failed to take into account, by arithmetical deduction, all the time spent by the Appellant in custody prior to conviction (2 years 1 months [sic] and 29 days or 790 days) in assessing the length of the sentence that is to be served by the Appellant from the date of sentencing. The Appellant did not received [sic] any credit for time spent in custody pending trial."

2. "The appellant was deprived of a fair trial by virtue of:

    a. The failure of his trial counsel to take full written instructions from the appellant prior to the trial or to disclose to the appellant the material statements or even a gist of each statement prior to the trial. The trial counsel did not visit the appellant at Hunts Bay Police Station or Horizon Remand Centre [to] take instructions or to prepare for the trial or to make arrangement to ensure the defence could provide witnesses to the court.

    b. The ineffective assistance of counsel:

        i. in putting the appellant's full instructions/case to each prosecution's witness including the aborted attempts to challenge crown witnesses on certain aspects of their case;

ii. when he aborted his attempt, during the examination in chief of the appellant to get the appellant to comment on the evidence of the prosecution's witness and at one point explicitly prohibiting the appellant from recounting what the crown witness Fredrick Thompson said to him whilst he was in the car;

iii. seek to gather other evidence or subpoena witnesses in relation to crucial issues which affects the credibility of the crown witnesses including information around the (a) seizure of the car, (b) the phone and its chain of custody, (c) the official diary entries in relation to medical and police visits and (d) the receipts of purchase of car;

iv. failed to request disclosure or production of the mobile telephone found to be the telephone stolen from the virtual complainant Minto (the mobile phone);

v. failed to apply for proceedings to be stayed for non-production of the mobile phone;

vi. failed to object to the prejudicial evidence of Fredrick Thompson.

c. The failure of counsel to carry out his established duty to assist the appellant to raise the issue of his good character;

d. The cumulative effects of the foregoing, severely prejudiced the appellant and his right to a fair hearing, as a result the conviction is unsafe."

3. "In circumstances where an issue of 'lies' told by the accused had arisen, the learned trial judge failed to direct herself on the issue and failed to give a critical warning in law, which amounts to a material misdirection."

4. "The learned trial judge failed to point out or to properly address inconsistencies in the evidence of the prosecution witnesses as well as how she received these inconsistencies in arriving at the verdict especially in light of the defence [sic] case. In particular, the learned trial judge:

a. failed to give any, or any sufficient, attention to the inconsistencies regarding the recovery of a mobile telephone found to be the telephone stolen from the virtual complainant Minto (the mobile phone); and

b. failed to consider the impact on the fairness of the proceedings, and on the weight of the evidence, the fact that the mobile phone was not exhibited at trial."

5. "The learned trial judge failed to properly assess the evidence in totality, in particular, she failed to adequately deal with the [appellant's] defence and failed to consider critical evidence given by the [appellant]."

6. "Based on the cumulative effect of the learned Trial Judge's treatment of the evidence, the failures of trial counsel, the verdict of the learned trial judge is rendered unsafe and unsatisfactory."

7. "The delay in relation to the hearing of this appeal breaches the Appellant's constitutional guaranteed right of a fair hearing as well as his rights guaranteed by section 16(1), (2) and (8) of the constitution. The delay resulted in such prejudice to the appellant that his conviction should be quashed or his sentence reduced or this court use its discretion to decline to order a retrial."

8. "The learned trial judge improperly admitted and relied on evidence from an incident not on the indictment, viz. namely the discussions with Frederick Thompson for the sale of a motor car, adversely to the [appellant] (see page 305, line 20 – 24) despite having ruled that said evidence had been wrongly admitted (see page 289 line 1 – 21)."

9. "The learned trial judge erred in finding that the prosecution had proven that the weapon used in the commission of counts 2 and 3 was a firearm, and in applying the presumption at s.20(5)(a) of the Firearms Act as, on its true construction, the said presumption is inapplicable to cases of imitation firearms."

10. "The indictment is a nullity to the extent that counts 2 and 3 disclose no offence known to law."

[57] Although, counsel did not abandon the original grounds, which involved unfair trial, lack of evidence, and miscarriage of justice, they were subsumed into the

supplemental and further supplemental grounds. Ground 10 dealt with the form of the indictment and the discussions will begin there.

Whether the indictment was a nullity (ground 10)

[58] Counsel Mr Williams submitted that counts 2 and 3 of the indictment, as contained in the record, and which outlines the statement of offence as, "robbery with aggravation contrary to section 31A of the Larceny Act", disclosed no offence known to law, and as such amounted to nullities. The error in the use of the words "with aggravation" compounded with the use of the wrong section from the Act, he argued, made those counts nullities, and as a result, the convictions for those counts should be quashed.

[59] Counsel relied on the case of **Marc Wilson v R** [2014] JMCA Crim 41, and submitted that, the offence of robbery with aggravation was not known to law, and on that basis the conviction on that count could not stand. He also argued that although the court could regularize an irregularity on an indictment, this should only be done where to do so would cause no injustice. In this case, he argued, to substitute an offence known to law for one not known to law would cause injustice, as the offence stated would have been uncertain. The appellant, he said, ought to be able to look in the statute book and see the offence with which he is charged so that he can be able to answer it.

[60] This court was furnished with a copy of the indictment from the Supreme Court's electronic filing system which showed the charge as "robbery with aggravation contrary to section 37(1)(a) of the Larceny Act". Mr Williams argued that that indictment was in a "further state of egregious error" as the copy shown to the court was unsigned and the appellant had a right to see an accurate original record and to have his counsel not be led astray. He intimated that the court could not be sure which indictment the appellant was tried upon.

[61] Counsel further argued that even if this court did not agree that the error in the statement of offence rendered the indictment null and void, it was, he said, a material irregularity that should be considered by this court, along with all the other errors when considering whether or not to apply the proviso.

[62] The DPP, argued that based on her file, the trial was conducted on an indictment for the offence of robbery with aggravation, contrary to section 37(1)(a) of the Larceny Act, in counts 2 and 3 and not section 31(a). What is reflected in the transcript, she said, was not a true reflection of what occurred and was inaccurately recorded by the court reporter. The error, she said, goes so far as to incorrectly name the prosecutor who appeared at trial as the one who signed the indictment. She submitted that in the circumstances, the court should have regard to the presumption of regularity, as cited in Blackstone Criminal Practice 2006 at page 2230, para. F3.33, and that, an irregularity in an indictment can easily be cured, at this stage, and does not undermine the validity of the indictment, once the particulars are adequately stated. She cited the case of **R v Bernice Spence and Stanford Tomlinson** (1970) 12 JLR 234, in support of her contentions. The learned director asserted that the particulars of the offences, in this case, were sufficiently outlined, and the appellant would have been aware, at the time of arraignment, what the Crown was alleging and what the case was that he had to meet. There would have, therefore, been no miscarriage of justice. Section 4(1) and (2) of the Indictment Act was also relied in support of those contentions.

Disposal of ground 10

[63] Section 4 (1) of the Indictments Act states as follows:

> "4. -(1) Every Indictment shall contain, and shall be sufficient if it contains, a statement of the specific offences with which the accused is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge.
>
> (2) Notwithstanding any rule of law or practice, an indictment shall not, subject to the provisions of this Act, be

> open to objection in respect of its form or contents if it is framed in accordance with the rules."

The rules are contained in the Schedule to the Act.

[64] Section 6 of the Indictments Act provide for amendments to be made to an indictment, at any stage of the trial, if it appears to the court that it is defective, unless the amendment cannot be made without causing injustice.

[65] Section 37 of the Larceny Act of 1916 provides as follows:

> "37. -(1) Every person who-
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person;
>
> (b) robs any person and, at the time of or immediately before or immediately after such robbery, uses any personal violence to any person,
>
> shall be guilty of felony and on conviction thereof liable to imprisonment with hard labour for any term not exceeding twenty-one years.
>
> (2) Every person who robs any person shall be guilty of felony and on conviction thereof liable to imprisonment with hard labour for any term not exceeding fifteen years.
>
> (3) Every person who assaults any person with intent to rob shall be guilty of felony and on conviction thereof liable to imprisonment with hard labour for any term not exceeding ten years."

[66] This provision was modelled on the United Kingdom (UK) Larceny Act 1916, (which is now repealed in the UK) and, save for the penalties to be imposed, is in the same terms as section 23 of that Act. The section recognises that robbery may be committed in various ways. Section 37(2) for instance makes robbing a person a felony

offence. In Archbold Pleading, Evidence & Practice, 36th edition, at para. 1760, the learned authors, in describing the draft form of the indictment, refer to the form of robbery in section 37(2) as "simple robbery", whilst the draft statement of offence for the indictment describes the offence as "robbery". This is to be contrasted with section 37(1)(b) which creates a separate offence of robbery using violence. Any person who is proved to have committed a robbery using personal violence will be guilty of an offence. The learned authors of Archbold, at para. 1772, in describing the equivalent of the offence in the English section 23 (1)(b) of the UK Act, use the term "robbery with violence". The draft of the indictment for that offence in the Archbold sets out the offence in the statement of offence as "robbery with violence".

[67] In the Schedule to the Indictments Act, the draft indictment for robbery where the robbery was committed using violence sets out the statement of offence as "robbery with violence" even though section 37(1)(b) of the Larceny Act does not name the offence as "robbery with violence", but merely describes the manner in which the offence of robbery may be committed. The substance of the offence is, therefore, robbery, but if the facts set out in the section allow, it may be described as "robbery with violence" to differentiate it from "simple robbery" and to show, as it does in the draft particulars of offence, that violence was used in the commission of the offence.

[68] Section 37(1)(a) outlines another way in which a robbery might be committed. Where it is proved that the robbery took place whilst the robber was in the company of another, or was armed with a weapon, the robber will be guilty of a felony. In the 36th edition of Archbold Pleading, Evidence & Practice, the learned authors, at para. 1774, in relation to the draft form of the indictment for robbery by a person armed, refers to the statement of offence as "robbery with aggravation". The actual statement of offence in the draft indictment is "robbery with aggravation". It, therefore, recognises that the robbery was committed in one or more aggravated forms. The particulars of offence then outline the circumstances of that aggravation, indicating that, at the time of the robbery the person was armed. Where the particulars are that at the time of the

offence the robber was in the company of two or more persons, the statement of offence in the draft form is also noted as "robbery with aggravation".

[69] The terminology "robbery with aggravation" for offences under section 37(1)(a) is, therefore, not unknown to the law and is merely a reference to the fact that the offence of robbery was not a "simple robbery", but was committed in one of the ways set out in the section that aggravates the offence, as particularised in the particulars of offence. Accepting as we did, that the correct indictment was the one that was produced to this court from the Supreme Court electronic filing system, it became clear that the appellant was charged with robbery with aggravation, contrary to section 37(1)(a) of the Larceny Act. Those charges alleged that he was armed with a firearm and in the company of another when he robbed the complainant. This has, for many decades been the format of indictments for such offences with such aggravated features, and we are not aware of any legal challenge to that form, until now. Just two of the earliest examples need be cited. The first is **R v Brown** (1964) 8 JLR 506, (where this court refused leave to appeal against a conviction for robbery with aggravation, under what was then section 34(1) of the Larceny Act, which, similarly to what is now section 37(1), provided that every person who committed the offence of robbery in any of the circumstances of aggravation contained therein shall be guilty of a felony). The second is **R v Eustace Locke** (1966) 9 JLR 496), where the appellant was also convicted for the offence of robbery with aggravation under section 34(1) of the Larceny Act. The indictments charging that offence were never impugned in those cases.

[70] In this case, nothing was shown to this court to suggest that the appellant was prejudiced by this old tried and true form of the draft of the indictment, a variation of which, namely, "robbery with violence" can be found in the Schedule to the Indictments Act. Neither did the appellant show how he suffered any injustice from this form of the indictment. The offence of robbery is one known to law, and the allegation was that the appellant committed robbery in the aggravated form set out in the particulars of

offence in the indictment on which he was pleaded, and which is an offence under section 37(1)(a). The statement of offence referred to the correct offence and section of the statute under which the appellant was charged, and the particulars of offence correctly outlined the aggravated circumstances of the charge. There was no need for us to consider an amendment to the indictment, as the appellant was made aware, in plain language, of what the charge was against him. Even if the word aggravation was removed from the statement of offence, the charge would remain the same, as the particulars of offence clearly outlined the circumstances of how the robbery was alleged to have been committed. The appellant pleaded not guilty to this charge and mounted a robust defence.

[71] With regard to the indictment being unsigned, what was before this court was a copy of what was before the court below. In the absence of evidence to the contrary, we accepted that a properly signed indictment would have been before the court below, on which the appellant was pleaded. There was no indication in the transcript that defence counsel had indicated he was not given a copy of the indictment, nor did he raise any issue with regard to it being unsigned or having the wrong section in the statement of the offence. In any event, it is not the law in this country that an unsigned indictment invalidates the trial. The Indictments Act sets out the form the indictment should take in order to be valid. It makes no reference to a signature. Indeed, The Supreme Court of Judicature of Jamaica Criminal Bench Book, at page 50, does refer to the fact that there is no statutory requirement, in this jurisdiction, for an indictment to be signed. Although it is settled practice to proffer a signed indictment, it is not a requirement in law, and the absence of a signature where the indictment is drafted in the form prescribed by the rules, would not, in our view, invalidate the indictment. We would adopt the position taken by the former Court of Appeal in the case of **R v Joscelyn Williams at al** (1958) 7 JLR 129, at page 133, where the court observed that:

> "[I]t is desirable in keeping with good procedural practice for the Clerk of the Courts to sign his bill of indictment and so

> identify himself with his indictment prior to its presentation, but failure to do so would not invalidate proceedings."

[72] We did not find the case of **Marc Wilson v R** useful, as that case dealt with an indictment for the offences of conspiracy to defraud and possession of a forged document contrary to common law, *to wit*, a forged CXC certificate, the latter of which was not an offence known to law (neither at common law or by virtue of the Forgery Act). The case of **R v Bernice Spence** was also not helpful, as that case was decided based on section 303 of the Judicature (Resident Magistrates) Law, which specifically provided that no appeal should be allowed in respect of any error or defect in the form or substance of any indictment or information where the court was of the view that no injustice had been caused to the appellant. The case of **DPP v Stewart** (1982) 35 WIR 296, cited by the Crown (which was a case in which a count on the indictment stating the wrong section of the law was amended, on appeal to the Court of Appeal), was only helpful in so far as the Privy Council commented that the Court of Appeal was empowered to amend the count and was entitled to find the amendment would cause no injustice to the appellant, since the defect was only of a technical nature and the particulars of the offence had given full and correct notice to the defendant of the allegations against him.

We found no merit in this ground of appeal.

Whether the presumption in section 20(5)(a) of the Firearms Act is applicable to the appellant (ground 9)

[73] Mr Williams submitted that, in respect of the charge for illegal possession of firearm contrary to section 20(1)(b) of the Firearms Act, the prosecution would have been required to prove that the weapon used in the attack was a firearm, that the appellant was in possession of it, and that he had no licence for it. Counsel contended that, in the circumstances of this case, where the appellant was not armed with a weapon and there was no proof that the weapons used by the gunmen were firearms (as opposed to imitation firearms), the learned trial judge was wrong to apply the presumption in section 20(5)(a) of the Firearms Act. That section, he said, had the

effect of reversing the burden of proof, so that the appellant was required to prove that he was not present aiding and abetting the commission of the offence. He also pointed to the fact that section 20(5)(a) referred to a firearm but not to an imitation firearm. It was submitted that as a matter of ordinary statutory interpretation, the presumption did not apply to circumstances where the weapon alleged to have been used was an imitation firearm. He argued further, that, although any person proved to have used or attempted to use an imitation firearm to commit a felony would be deemed (pursuant to section 20(5)(c)) to be in possession of a firearm, contrary to section 20(1), the question whether another person in the company of the possessor of the imitation firearm is to also be deemed to be in possession of that imitation firearm, is to be determined on basic joint enterprise principles and not pursuant to the imposition of any rebuttable presumption or reverse burden. Counsel asked the court to note that, section 20(5)(a) refers to a presumption only in the case of persons in the company of another who was using, or who had used a "firearm", and that section 25, which criminalises the use of an "imitation firearm", contains no such presumption.

[74] Mr Williams further submitted that, in any event, presumptions such as that in section 25(1)(a), potentially infringe section 16(5) of the Constitution and, therefore, the court should only find that such a presumption exists upon clear words in the statute. It was submitted that the relevant provision did not provide such clear words, and that if Parliament had wanted to include an imitation firearm in the presumption as to possession, it would have done so in clear language. An extract from Bennion, Bailey and Norbury on Statutory Interpretation, at para. 24.20, was relied on in support of this submission.

[75] The authorities of **R v Jarrett; R v James; R v Whylie** (1975) 14 JLR 35, **Stevon Reece v R** [2014] JMCA Crim 56, paras. [23] to [28], **R v Neville Purrier and another** (1976) 14 JLR 97, **R v Henry Clarke** (1984) 21 JLR 72, were also relied on.

[76] In respect of the authority of **R v Kenneth Rose, Morris Dixon and Laurel Dixon** (unreported), Court of Appeal, Jamaica, Resident Magistrate's Court Appeal No 108/1974, judgment delivered 28 January 1977 ('**R v Rose and others**'), provided to the parties by this court, Mr Williams asked us to follow the minority judgment over that of the majority, on the basis that section 20(5) was wrongly interpreted by the majority in that case. The error by the learned trial judge in this case, counsel contended, was a material irregularity, which, when combined with the other errors in the case, would make the application of the proviso inappropriate.

[77] The DPP contended that the arguments on behalf of the appellant were flawed because of the deeming provision in section 20(5)(c). She submitted that the learned trial judge did not err in applying the presumption to this case. Based on the mischief the Firearms Act was passed to address, and the fact that section 25 of the Firearms Act criminalizes the use of an imitation firearm in the commission of a felonious offence, the deeming provision in section 20(5)(a), she submitted, would also embrace the use of an imitation firearm. The sections, the DPP argued, reversed the burden, regardless of whether a real firearm or an imitation firearm was used in the commission of a felony. She argued that the definition of imitation firearm in section 25, which is "anything that has the appearance of being a firearm", embraced the reasoning of Swaby JA in **R v Rose and others**, once that object was being used to perpetrate a felonious offence. If this were not so, she said, the section would have made an artificial separation, which could not have been the intention of Parliament.

[78] The DPP argued further, that it was quite clear that the appellant's presence on the scene was voluntary and calculated and could be inferred as having been pre-meditated. Further, she said, if the two principals were to be deemed to be in possession, having used a firearm or imitation firearm to commit the robbery, it would mean that any 3rd party who was there, clearly aiding and abetting the commission of a felony, would also be in possession and would also be liable as a principal.

[79] She submitted that, in any event, if this court did not agree that section 20(5)(a) provides for a rebuttable presumption in the case of an imitation firearm where the appellant was the aider and abettor, then the common law would apply to these circumstances. In that regard, she contended that the evidence clearly showed that the appellant was an aider and abettor of the principals in their possession and use of the firearm or imitation firearm, to commit the robbery, and was, therefore, liable to be charged, tried and convicted as a principal in respect of all three counts.

[80] Counsel, therefore, urged the court to find that the conviction was well grounded and should be upheld, and the sentence affirmed.

Disposal of ground 9

[81] On this ground, we also agreed with the Crown for the reasons expressed below.

[82] Admittedly, there was no evidence at the trial to support a conclusion one way or the other that the object pulled on the complainants, which was described at trial as resembling a firearm, was indeed a lethal barrelled weapon capable of discharging deadly bullets.

[83] The appellant in this case was charged under section 20(1)(b) of the Firearms Act for illegal possession of firearm. It provides: -

> "20. — (1) A person shall not-
>
> (a) …
>
> (b) Subject to subsection (2), be in possession of any other firearm or ammunition except under and in accordance with the terms and conditions of a Firearm User's Licence."

[84] Section 25(5) of the Firearms Act defines what is a firearm and an imitation firearm. Section 25 of the Firearms Act provides:

> "(1) Every person who makes or attempts to make any use whatever of a firearm or imitation firearm with intent to

commit or to aid the commission of a felony or to resist or prevent the lawful apprehension or detention of himself or some other person, shall be guilty of an offence against this sub-section.

(2) Every person who, at the time of committing or at the time of his apprehension for, any offence specified in the First Schedule has in his possession any firearm or imitation firearm, shall, unless he shows that he had it in his possession for a lawful object, be guilty of an offence against this subsection and, in addition to any penalty to which he may be sentenced for the first mentioned offence, shall be liable to be punished accordingly.

(3) Any person guilty of an offence against subsection (1) or (2) shall be liable on conviction on indictment –

…

(5) In this section –

'firearm' means any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged and includes any prohibited weapon and any restricted weapon, whether such a lethal weapon or not;

'imitation firearm' means anything which has the appearance of being a firearm within the meaning of this section whether it is capable of discharging any shot, bullet or missile or not."

[85] Section 20(5)(a) to (c) provides as follows:

"(5) In any prosecution for an offence under this section –

(a) any person who is in the company of someone who uses or attempts to use a firearm to commit –

(i) any felony; or

(ii) any offence involving either an assault or the resisting of lawful apprehension of any person,

shall, if the circumstances give rise to a reasonable presumption that he was present to aid or abet the

> commission of the felony or offence aforesaid, be treated, in the absence of reasonable excuse, as being also in possession of the firearm;
>
> > (b) any person who is proved to have in his possession or under his control any vehicle or other thing in or on which is found any firearm shall, in the absence of a reasonable explanation, be deemed to have in his possession such firearm;
> >
> > (c) any person who is proved to have used or attempted to use or to have been in possession of a firearm, or an imitation firearm, as defined in section 25 of this Act in any of the circumstances which constitute an offence under that section shall be deemed to be in possession of a firearm in contravention of this section."

[86] There are, therefore, effectively two relevant deeming provisions in section 20(5). There is, firstly, the rebuttable presumption in section 20(5)(a) that a person in the company of someone who uses a firearm to commit a felony was present to aid or abet the commission of the felony, and therefore, is deemed to also be in possession of that firearm along with the user. That presumption places an evidential burden on such a person to give a reasonable excuse for being in the company of the firearm user. In **R v Clinton Jarrett** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 81/2004, judgment delivered 20 April, 2005, at page 10, four requirements for that section to be fulfilled are set out. At page 12, the court indicated that the effect of the section is that the prosecution need not prove prima facie, that the person had a firearm. By operation of section 20(5)(a) the person is treated as being in possession, in the absence of a reasonable excuse.

[87] There is, secondly, a deeming provision in section 20(5)(c), which is an irrebuttable presumption that where a person uses or attempts to use a firearm or imitation firearm to commit an offence under section 25, he is deemed to be in possession of a firearm in breach of section 20. Section 20(5)(c) deems an imitation firearm used in the commission of certain offences to be a firearm. This means that if a

person uses an object like a toy gun, which has all the appearances of a firearm, to commit a felony robbery, the object will be deemed to be a firearm by virtue of section 20(5)(c) and the user will be guilty of an offence under section 20(1)(b).

[88] It is true, as pointed out by Mr Williams, that section 20(5)(c) refers to the actual person who uses or attempt to use the firearm or imitation firearm. However, by virtue of section 25, and when read in conjunction with section 20, the persons who were in possession of the object used to rob the complainants, which was described as a firearm, would be deemed to be in possession of firearms at the time of the robbery (it being a felony) regardless of whether the object they had were real or imitation firearms. Robbery being a felony, any person, who is in the company of another at the time he is using an object deemed to be a firearm to commit a robbery, would also be deemed in possession of that firearm in the circumstances outlined in section 20(5)(a), unless that person gives a reasonable explanation for his presence.

[89] The upshot of the sections (20(5)(a), 20(5)(c) and 25) when read together, is that, if a person uses an imitation firearm to rob a bank, robbery being a felony, that person is deemed to be in possession of a firearm. If another person, therefore, is in his company aiding and abetting him in the robbery of the bank with the imitation firearm, that second person will also be deemed to be in possession of a firearm (the object having already been deemed to be a firearm the moment it was used in the robbery).

[90] That simple example is sufficient to show, clearly, that the interpretation suggested by Mr Williams would lend itself to the illogical conclusion that the object described as a firearm would be deemed to be a firearm for the principal user but it would remain an imitation firearm in the case of the aider and abetter. The literal and purposive interpretation of the relevant sections is that once the object used by the principal is deemed to be a firearm, it becomes a firearm for the purpose of section 20(1)(b). Therefore, when section 20(5)(a) refers to a firearm, it is also a reference to any object deemed to be a firearm by virtue of its user in section 20(5)(c).

[91] In our view, the interpretation placed on the sections by the Crown, which is the position held by the majority in **R v Rose and others**, is correct. The circumstances of the robbery given in evidence by the witnesses, in this case, did give rise to a reasonable presumption that the appellant was present to aid or abet the commission of the robbery. The judge having rejected his excuse and his defence, it was entirely within her remit to find him guilty of also being in possession of the firearm.

[92] The case of **Purrier v R** was not helpful, as the decision was based solely on the question of whether the object used in the commission of the offence was sufficiently described so that a proper finding could be made that the object so described was a firearm or something which had the appearance of a firearm. Neither was the case of **Henry Clarke v R** helpful, as that case dealt with the use of a legal firearm to commit an offence. The case of **Jarret, James and Whylie v R**, was equally of little assistance to the appellant, as there was nothing said therein which supported the appellant's contentions.

[93] For those reasons ground 9 failed.

Whether defence counsel was incompetent in his conduct of the appellant's case (ground 2a and 2d)

[94] Mr Williams argued ground 2 of the supplemental grounds of appeal and ground 2(b) of the further supplementary grounds of appeal together, under the rubric of incompetence of counsel. He argued that the defence counsel was guilty of several failures in his duty as counsel for the appellant. It was asserted that the trial counsel had failed to take full written instructions prior to trial and to take proper steps to adequately prepare the appellant's defence. It was also asserted that during trial, counsel failed:

i. to properly put the defence to the prosecution's witnesses;

ii. to gather pertinent evidence or subpoena witnesses to challenge the credibility of the prosecution's witnesses

relating to the seizure of the car, the phone and its chain of custody, the diary entries and the receipts for the purchase of the car;

iii. to request disclosure or production of the mobile phone found to be that of Warren Minto;

iv. to apply for proceedings to be stayed for non-production of the phone;

v. to object to the prejudicial evidence of Frederick Thompson; and

vi. to raise the issue of the [appellant's] good character.

[95] Mr Williams argued that these failures by trial counsel resulted in the appellant not getting a fair trial. These claims were supported by the affidavit evidence of the appellant.

[96] Mr Williams argued that the inadequacy of counsel, in law, is concerned with (1) whether counsel's conduct had a deleterious effect on the fairness of trial, or (2) whether counsel's conduct by itself was so egregious. The circumstances of this case, he said, raised the first limb. Mr Williams argued that the Nokia phone, said to have been identified as Mr Minto's phone, was a key piece of evidence against the appellant which required scrutiny. This phone was not produced for Mr Minto to identify it in court as his, and this was not only a failing of the Crown, counsel argued, but was also a failing on the part of trial counsel. This was so, he said, because the statement of Mr Minto made no mention of him seeing the phone again or of him identifying it, even though his statement was recorded three days after the incident and he had said, in his evidence in the witness box, that he had identified it one or two days after the incident. The Crown, Mr Williams argued, ought to have had a statement from Mr Minto saying that he had seen his phone again and had identified it. There was also no providence for the evidence of Corporal Pike that a phone was taken from the appellant by

Corporal McKoy (the appellant's phone). Corporal McKoy made no mention of recovering any phone from the appellant, neither in his statement nor in his evidence in court. It was curious, counsel said, that Corporal Pike described the phone given to him by Corporal McKoy (allegedly the appellant's phone) as a Nokia flashlight phone with a cracked screen.

[97] Mr Williams submitted that the inconsistencies in Mr Minto's evidence, and the fact that the appellant was saying that he did not know anything about Mr Minto's phone being found and that it was not identified in his presence, behoved his trial attorney to do something about it in his preparation and presentation of the case. Trial counsel's failure to do so, he said, was egregious. Mr Williams argued, further, that trial counsel should have objected to the evidence being taken and require that the phone be produced. Mr Williams also submitted that trial counsel did not facilitate the proper presentation of the defence to the court in relation to the phone, in that he yielded to improper objections from the Crown when this issue was being canvassed.

[98] In relation to trial counsel's failure to raise the appellant's good character, it was submitted that trial counsel failed to lead evidence that the appellant had no previous convictions. As a result, the judge failed to take that fact into account. The authorities of **Nyron Smith v R** [2008] UKPC 34 and **Linton Berry v R** (1992) 41 WIR 244, were relied on for the principle that a good character direction is important in cases where credibility is important and the defendant has given sworn testimony.

[99] On behalf of the Crown, the DPP submitted that the overarching consideration in cases of this nature, is whether incompetent, unreasonable, or negligent conduct of trial counsel "caused the [appellant's] conviction to be occasioned by a miscarriage of justice". That was not the case here, she said. She asserted that when the evidence of trial counsel and that of the appellant before this court were compared, it was clear that the allegation that trial counsel had failed to take full instructions was insincere. The DPP submitted that the instructions attached to trial counsel's affidavit, which was signed by the appellant, was dated 25 April 2015, at least one and a half weeks before

the trial. There were also further instructions taken by trial counsel and signed by the appellant, in which it was said that the appellant was informed of the strength of the prosecution's case and of his option to plead guilty. This advice was in keeping with the contents of the statements of Corporal Pike and the two complainants that would have been available to trial counsel at the time. The only material not canvassed by trial counsel, at trial, the DPP submitted, was the appellant's assertion that he was beaten by the police, which trial counsel asserted was not told to him prior to trial and was not contained in the written instructions.

[100] It was submitted, further, that trial counsel's strategy and approach could not be faulted in light of the material disclosed by the prosecution, the circumstances of the case, and the law. This included, the DPP argued, the assertions by Corporal Pike that the phone had been identified by Mr Minto, in the appellant's presence, and that he had observed Mr Minto unlock the phone using a code; that the appellant was not claiming ownership of the phone; that the phone was found on the table in a house that the appellant had opened with a key; and that the location of the robbery was one minute away from his home.

[101] It was argued that the conduct complained of in this ground, fell short of showing any miscarriage of justice or unfairness to the appellant. The requisite test, it was submitted, based on the authority of **Tyrone Dacosta Cadogan v The Queen** [2006] CCJ 4 (AJ), which endorsed statements made in **Weekes v The Queen** (unreported), Court of Appeal, Barbados, Criminal Appeal No 4 of 2000, judgment delivered 30 April 2004, is that no reasonable counsel would have adopted the course taken by trial counsel. In this case, the learned director asserted, trial counsel acted as a reasonably competent attorney would have, and explored, in the interest of his client, all possible questions and suggestions, in keeping with his instructions. Nothing in the instructions given to counsel or the statements on the prosecution's case would have necessitated a reasonably competent attorney to call for the items complained about. A reasonably competent attorney may not have, the DPP asserted. This, she argued, was

so, because it would have been unhelpful and even incompetent on counsel's part, to have sought to have the phone produced at the trial, as it may have further undermined the appellant's credibility.

[102] As for the station diary, she said, that would only have become relevant if it was needed to attack the credibility of the police witnesses, as a matter of strategy. It was argued that prosecuting counsel properly put the Crown's case to the appellant so that he was able to deny it, and fully put his defence to the prosecution's witnesses, including putting the appellant's version of events regarding where the phone had been found, to Corporal Pike.

[103] The learned director submitted also, that there would have been no value in trial counsel soliciting the appellant's comments on the evidence of Mr Thompson, which would have, perhaps, in light of how the learned trial judge dealt with it, been more prejudicial than probative. No reasonably competent attorney, it was said, could have done anything more.

[104] The DPP also implored this court to consider, based on **Christopher Bethel v The State** (1998) 55 WIR 394 and **Ann Marie Boodram v The State** [2001] UKPC 20, the risk of a convicted person concocting allegations of incompetence to avoid the consequences of conviction, which she suggested seemed to be the case here.

[105] In respect of trial counsel's alleged failure to raise the appellant's good character, the DPP conceded that, although there were no written instructions as to the appellant's criminal record, trial counsel should have solicited that information from the appellant and presented it. Nonetheless, it was submitted, this failure would still not have been enough to establish that trial counsel was incompetent. Furthermore, the DPP argued, the absence of a good character direction by itself was not enough to quash a conviction. She submitted that, in any event, given the strength of the case against the appellant, good character evidence would have made no difference to the outcome.

Disposal of grounds 2a and 2d

[106] These grounds complain that as a result of the conduct of counsel, the appellant did not receive a fair trial. In assessing these grounds, we took account of the several authorities cited for our consideration by counsel on both sides. We considered the words of Rougier J in **Regina v Clinton** [1993] 1 WLR 1181, cited with approval in **Leslie McLeod v R** [2012] JMCA Crim 59, which state that cases in which such a complaint will succeed are extremely rare. Whether this will continue to hold true with the frequency with which these complaints now appear in grounds of appeal before this court, is left to be seen. However, what still holds true is the fact that, in any criminal trial, trial counsel "…is called upon to make a number of tactical decisions…Some of these decisions turn out well, others less happily" (see **Regina v Clinton** at page 1187).

[107] The standard of assessment in matters of this nature is set out in the cases that have dealt with such issues. The principles may be summarised (and not in any particular order) as follows: (a) the actions of trial counsel cannot be successfully impugned unless, in the light of the information available to him and his instructions, no reasonably competent attorney would have taken the course he took; (b), where counsel takes a decision in defiance of or without proper instructions, when 'all the promptings of reason and good sense point the other way', the conviction may be set aside as unsafe (see **Regina v Clinton** at page 1187 to 1188, and **R v Doherty & McGregor** [1997] 2 Cr App Rep 218 at page 220, as cited in in **Leslie McLeod v R,** at paras. [54] to [56]); (c) where counsel's conduct is so extreme that it may be described as misconduct that results in a denial of due process to his client, the conviction will be set aside as being a miscarriage of justice (see **Christopher Bethel v The State (No 2**) (2000) 59 WIR 451 at page 460, **Balson v The State of Dominica** [2005] UKPC 2 and **Weekes v The Queen**), and (d) in considering whether to set aside a conviction on the basis of the impugned conduct of trial counsel, the general principle by which the court is to be guided is what impact that conduct may have had on the trial and verdict (see **Bethel (No 2), Regina v Clinton**, **Boodram v The State**, **Sankar v**

The State of Trinidad & Tobago [1995] 1 WLR 194, all cited with approval by this court in **Leslie McLeod**).

[108] We dealt separately with each contention by the appellant, in determining whether the conduct complained of was faulty and if so, the impact it may have had on the trial and verdict.

A. The failure to take full written instructions prior to trial; to disclose to the [appellant] the material statements prior to trial; to visit the [appellant] at the Hunts Bay Police Station or Horizon Remand Centre to take instructions or to prepare for trial; or to arrange for the provision of witnesses for the defence in court.

[109] In his affidavit filed 22 April 2021, the appellant alleged that he did not get a chance to fully instruct his trial lawyer in relation to the "factual assertions" in his matter, until the day of trial, and that the trial lawyer did not visit him in custody to take instructions. This, he alleged, affected the trial lawyer's ability to present his side of the case. He also alleged that, on 28 April 2015, the date set for trial, before the trial commenced, his trial lawyer spoke to him in court for 20 minutes, at which time he gave his side of the story and the lawyer took it down in writing. He claimed the trial lawyer did not explain the importance of giving evidence or do a "dry run" of what he should tell the court. He also alleged that the trial lawyer did not speak to him before the trial about whether he could or should obtain the relevant station diary entries, police reports or the CFCU analysis of the phones to see if they buttressed his case or how they could be "utilised to prevent the miscarriage of justice which was occasioned…". He also maintained that the instructions he gave prior to the commencement of the trial were not adequately used by trial counsel. He asserted that, for these reasons (and others), he received ineffective assistance from counsel, which affected the fair hearing of his case.

[110] The affidavit of trial counsel, Mr Gentles, furnished to this court, had attached to it, the first set of instructions he alleged were given to him by the appellant. They were signed by the appellant and dated 15 April 2015, 13 days before trial. In this affidavit,

trial counsel asserted that the appellant had given him instructions on at least six occasions, before, during, and after the trial but he could not recall visiting the appellant at the lock-ups. Also attached to the affidavit were further instructions taken by trial counsel and signed by the appellant, in which it was said that the appellant had been informed of the strength of the prosecution's case and of his option to plead guilty. Trial counsel pointed to the fact that the appellant had given sworn testimony, which he said showed that the appellant would have had to have been told of his options, before he decided to give evidence. Trial counsel also denied that the appellant was not shown the statement as "the [appellant] could not have given written instructions on the 15th April 2015 in such detail if it were true that he had no gist of the contents of each statement". For the same reason, trial counsel said it could also not be true that the appellant was hearing the allegations against him for the first time when the witnesses were giving evidence. He said, however, that he would not have given the appellant copies of the complainant's statements, as these are, generally, for reasons of security.

[111] The appellant had also complained that the instructions he gave to counsel moments before trial were not adequately used to challenge the Crown witnesses as to the fact that he was beaten and threatened by them to assist in locating the robbers. These allegations were not put to the witnesses. However, trial counsel denied, in his affidavit, that this allegation had been disclosed to him or formed part of his instructions. Trial counsel maintained also that, the appellant having given sworn evidence, he was at liberty to give his version of the events.

[112] The appellant gave evidence in which he said he was beaten by Mr Thompson, Corporal Pike and all his colleagues at the Hunts Bay Police Station. The appellant also gave evidence that he was beaten to get him to say who were the other men who had robbed the complainant. These allegations are not contained in the written instructions to counsel.

[113] The appellant further signed a statement to the effect that he was told he could plead guilty or not guilty, he was told of the availability of a discount for a plea of guilty and was told of the strength of the prosecution's case and indicated his wish to plead not guilty and go to trial. On 6 May 2015, he endorsed counsel's brief to the effect that he thought trial counsel "did well during his trial."

[114] We found that these allegations against defence counsel were not supported, not made out to any satisfactory degree and were without merit.

B. Failure to properly put the defence to the prosecution's witnesses, to gather pertinent evidence and subpoena witnesses to challenge the credibility of the prosecution's witnesses relating to the seizure of the car, the phone and its chain of custody, the official diary entries of medical and police visits, and the receipts for the purchase of the car.

[115] The appellant's defence, in keeping with his written instructions, were put to the prosecution witnesses by the trial counsel, in suggestions made to them. The appellant gave sworn evidence in which he stated his case. There was no indication as to what pertinent evidence was available which trial counsel failed to gather. The appellant did not indicate what evidence or which witnesses for the defence were available and not subpoenaed by the trial counsel, to challenge the credibility of the prosecution's witnesses regarding the seizure of the appellant's motor car. Corporal Pike gave evidence that he had caused the appellant's Nissan Blue Bird to be taken to the Hunts Bay Police Station. He did nothing further with respect to it as it had not been reported stolen. In his affidavit, trial counsel indicated that he had received no instructions as to any alibi witness or any other witness to call on the appellant's case. Furthermore, trial counsel asserted, in his affidavit, that the appellant was asked if he had any witnesses to call and he responded that he had none.

[116] It seemed to us, taking a pragmatic view of the defence, that there could have been no alibi witness, as the appellant was not denying he was present at the scene of the robbery, but only denied that he had been acting in concert with the robbers.

[117] With regard to the receipts for the purchase of the car, it was not made clear how this would have assisted in the defence, since the appellant was not charged for a stolen motor vehicle, and the prosecution had made no allegation that the car the appellant was selling had been stolen.

[118] As to the appellant's contention that trial counsel did not obtain the station diary entries of medical and police visits, or police reports in relation to the chain of custody and CFCU analysis of the phones, in order to see if they "buttressed" his case or if they could be used to prevent a miscarriage of justice, that seemed to be little more than a view by counsel on appeal as to the approach he would have taken had he been trial counsel. The only reference to an entry in a station diary in the evidence at trial, was that made by Corporal Pike, where he said that after the report had been made to him, he made an entry in the station diary. There is nothing in the written instructions to trial counsel which would point to the need for the station diary regarding medical and police visits which would buttress the appellant's case. The appellant gave sworn evidence, at trial, that he was beaten to give information about the whereabouts of the robbers. He gave no evidence that he was beaten to give a confession or that he made any confession as a result of being beaten. There was no evidence that he had to be taken for medical treatment as a result of being beaten. It, therefore, remained unclear at the close of Mr Williams' submissions, what were the possible circumstances under which such entries into the station diary regarding medical and police visits would have occurred, and if they in fact existed, how they would have "buttressed the appellant's case".

[119] With regard to the phone and the chain of custody, trial counsel indicated in his affidavit, that the instructions given to him, which were signed by the appellant, in respect of the phone allegedly taken from the appellant's house, were that this was not true as "the phone was taken from the car when they first searched it". Trial counsel maintained that he would not have requested CFCU analysis, in that instance, as the appellant clearly placed the phone in his car. Suggestions were made to the

prosecution's witnesses in keeping with trial counsel's written instructions regarding the phone.

[120] Of course, we recognise that it is the duty of the prosecution, armed with the knowledge that a reference had been made to the CFCU for analysis, to furnish the defence with the result, if any, whether it is requested or not. It is part of the duty of disclosure (see **R v Williams (Neville)** [2005] 3 JJC 1805). However, in this case, no result was forthcoming nor does it appear that it had been requested.

[121] The appellant gave evidence but did not mention the phone at all in his evidence-in-chief. The prosecution merely mentioned in cross-examination of the appellant, that Mr Minto was robbed of phones. The appellant was not cross-examined as to the finding of any phone in his house or car. It is difficult to say whether that was deliberate or if it was an oversight. What is clear is that nothing in the prosecution's case turned on any finding from an analysis of the phone, and the appellant's defence was not dependent on any such finding, nor did it hinge on the identification of the phone that had been taken from Mr Minto.

[122] On any view taken of the prosecution's case and the appellant's defence, whilst a reasonable competent attorney may have taken a different approach to the case, as a matter of strategy, the approach taken by trial counsel regarding the matters complained of cannot be said to be one that no reasonably competent attorney would have taken.

[123] We found these allegations were not satisfactorily made out.

C. Failure to request disclosure or production of the mobile phone found to be that of Warren Minto, or to apply for proceedings to be stayed for non-production of the phone.

[124] It is generally good practice that any tangible material that is intended for use as evidence, at trial, be produced as an exhibit for inspection. However, it must be borne in mind that there is no rule of law or practice that an object must be produced, or that

an explanation must be given for its non-production, before oral evidence can be given of its existence (See Blackstone's Criminal Practice 2021, Part F, Evidence, Section F8, Documentary Evidence and Real Evidence Tangible Objects F8.45 citing **Hocking v Ahlquist** Bros Ltd [1943] 2 ALL ER 722). The learned editors of Blackstone's Criminal Practice noted, however, citing the authority of **Francis** (1874) LR 2 CCR 128, that non-production may lead to adverse inferences and may affect the weight of the oral evidence adduced. See also Halsbury's Laws of England 2015 Volume 28 para 557, which also cited **Francis**, as well as **R v Uxbridge Magistrates Court & Another *ex parte* Sofaer** (1987) 85 Cr App Rep 367 DC.

[125] It is also to be remembered that, where counsel, in the course of trial, makes a decision or takes a course which later appears to be an unwise or mistaken one, that alone, generally, will not be regarded as a proper ground of appeal. Authority for that is to be found in **R v Ensor** [1989] 2 ALL ER 586, where at page 590, the English Court of Appeal referred to that authoritative statement which had been made in **R v Gautam** (1987) Times, 4 March. Of course, a possible proviso to that statement is that it will hold true, unless the course taken by trial counsel is so 'flagrantly incompetent'.

[126] In the instant case, the physical phone taken from Mr Minto, recovered in the appellant's possession and subsequently identified by Mr Minto as his, was not produced in the trial. Trial counsel did admit to failing to request the production of this phone. This, he said, was based on his instructions from the appellant that the phone was found in his car. He, clearly, also did not request an adjournment of the trial for the phone to be produced. The issue here is whether this failure affected the fair trial of the appellant. It is a fact that Mr Minto did not put in his written statement that he saw his stolen phone again and identified it to the police. The police officer to whom the phone was said to have been identified did not put that in his written statement either. Nevertheless, oral evidence of the recovery of the phone was allowed to be given at the trial by Mr Minto and the police witness.

[127] In this case, there does not seem to have been any dispute that items, including a phone, were stolen from the complainants, including Mr Minto. Neither did it appear that the appellant was denying that a phone had been recovered. His only demurrer, based on his instructions to trial counsel, was that it was not found in his house, but in his car, and that it was not identified in his presence. The only explanation as to how the phone came to be in his possession, whether in the car or in his house, came on the prosecution's case in which it was alleged that the appellant had told the police that it was found in the taxi. This statement was, however, denied by the appellant. There was, therefore, no explanation, on his account, how the phone came to be in his car, where he said it had been found.

[128] Mr Minto asserted that the phone belonged to him and there was no challenge to that assertion. Trial counsel could not challenge it, as he had no instructions on which to do so. Trial counsel stayed faithful to his instructions regarding the phone and suggested to Corporal Pike that the phone was found in the appellant's car. Corporal Pike had testified that when the phones were found in the appellant's home, he told him that he had found them in a taxi but trial counsel suggested to him that the appellant did not tell him that.

[129] The appellant's defence was that he too was a victim of that robbery. We agreed that the fact that an item which had been stolen was found in the appellant's possession was of utmost importance to the prosecution's case. The appellant denied that any phone belonging to someone else was found in his house. He admitted that a phone which was not his was found in his car. That phone fit the description of the phone which Mr Minto claimed had been taken from him during the robbery and which he later identified. If the court believed that a phone had been taken from Mr Minto and was recovered in the appellant's possession, be it in a car or in a house, then the presence of the actual phone in court would have made little difference, except to seal the appellant's fate, by removing any lingering doubt which may have existed in his favour. As it stood, the absence of the phone could only have gone to the weight of the

evidence. Since the appellant was not claiming that the phone he said was found in his car was his, its absence from the court would not have affected the fairness of the trial. The decision by trial counsel not to call for its production, based on his instructions cannot, in those circumstances, be said to be egregious or flagrantly incompetent.

[130] As for the absence of the CFCU report, it did not appear that one had been generated up to the time of the hearing of this appeal. Counsel for the appellant was unable to point to anything within the realm of probabilities that such a report, if made available, could possibly state, which would have been of benefit to his client.

[131] These allegations were found to be without merit.

D. Failure to object to the prejudicial evidence of Mr Thompson

[132] Mr Thompson gave evidence of his interaction with the appellant, having seen the advertisement for the sale of the car and having contacted the appellant. It was during this interaction that the appellant was taken into custody. Mr Williams contends that this evidence was prejudicial and ought not to have been led. In considering the evidence, the trial judge also took this view and determined that she would not take account of it in arriving at a decision of guilt or innocence.

[133] For our part, we could not say that trial counsel is to be faulted for not objecting to this evidence. It is not clear to us that the evidence is as prejudicial or potentially prejudicial as the appellant contends. Firstly, it was not in dispute that the appellant had advertised his car for sale in a public newspaper. It was, therefore, not unlikely that several persons would have called enquiring about the said motor car. Mr Thompson happened to be one such person. Secondly, it was during their meeting in respect of that car that the appellant was taken into custody. Without Mr Thompson's evidence, the evidence of Mr Pike of taking the appellant into custody would have made little sense and could possibly only have been led in breach of the rules against hearsay evidence. Thirdly, Mr Thompson's evidence did not show, neither did it tend to show,

that the appellant was guilty of any other offence not named on the indictment or that he was a person of bad character.

[134] In fact, trial counsel showed that he was sensitive to this fact at trial, when he made sure to ask Mr Thompson if the appellant had taken out any weapon or taken any cash or property from Mr Thompson during their interaction, to which Mr Thompson answered in the negative. So rather than being prejudicial, in our view, it did lend some credence to the appellant's case that he was innocently selling his car. The trial lawyer determined, as a matter of strategy, to object to the dock identification of his client and to cross-examine the witness to put his client in the best light in support of his defence. We cannot determine this to be incompetence simply because Mr Williams would have taken a different approach.

[135] Trial counsel properly objected to any attempt, by prosecuting counsel, to make any connection between the incident involving Mr Thompson and that involving the complainant, during the testimony of Mr McKoy. Trial counsel also properly pointed out to the court, at pages 144 and 148 of the transcript, that the appellant was not charged for any other offence. The learned trial judge also correctly noted that, although factual narrations were made about the incident on the '19th', involving Mr Thompson, the appellant was not charged with an offence arising from it, and that no nexus was established between the two sets of facts: an observation with which trial counsel agreed.

[136] In her summation the learned trial judge said, at page 289, that she had disregarded the evidence of Mr Thompson, except in so far as it established how the appellant came to be in custody. She also said she disregarded the evidence of Corporal McKoy, except in so far as it explained how the appellant came to be in his custody. She correctly found that the remaining evidence lacked probative force and that the appellant had not been charged with any offence in relation to Mr Thompson.

[137] This complaint was entirely without merit.

E. Failure to raise the issue of the appellant's good character

[138] With regard to this complaint of trial counsel's failure to lead evidence of his good character, the appellant maintained that he was not advised about the importance of character witnesses and character evidence. He was only asked if he had brought any witnesses. The appellant relied heavily on the series of propositions set out in para. 33 of the Board's judgment in **Teeluck v The State of Trinidad and Tobago** [2005] UKPC 14, and the statement, at proposition (iv), that "where credibility is in issue, a good character direction is always relevant". However, an examination of a trilogy of cases following **Teeluck**, shows that doubt has been cast on the accuracy of some of those statements. In **Teeluck**, at para. 33, proposition (ii), the court said that the good character direction:

> "…will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given…If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial..."

[139] This statement was examined in **Bhola v State** [2006] UKPC 9. Lord Brown of Eaton-under-Heywood observed in that case, at para. 17, that the above proposition in **Teeluck** had to be applied with caution, for, having examined a trilogy of cases, he found that the proposition was not always supported. In **Bhola v State**, the Privy Council tacitly agreed that, where the appellant was a police officer with an unblemished record, the appellant's counsel was at fault in not adducing evidence of the appellant's good character at trial, as was expressly accepted by Counsel for the State. Nonetheless, the Board concluded that that, by itself, was not sufficient for that ground of appeal to succeed. The Board quoted, at para. 12, with approval, the following observation made by the Court of Appeal in its decision in respect of the matter when it was before them, that:

> "Notwithstanding the importance of good character evidence, it does not necessarily follow that a failure to lead

> such evidence or even the omission by the trial judge to direct the jury on the issue in his summation when the issue is raised, will result in the conviction being set aside (see *Barrow v The State* [1998]AC 846 at 852)."

[140] The Board also noted that the Court of Appeal went on to say that, although counsel was at fault:

> "…[I]t does not necessarily follow *ipso facto* that there was a miscarriage of justice. Each case must depend on the particular circumstances. **The question at the end of the day is whether the jury would necessarily have reached the same verdict if they had a full direction as to the Appellant's good character**." (Emphasis added)

[141] The Board then turned to consider the evidence which the Court of Appeal had also considered and which bore on the critical question, that is, "whether in any event the jury would inevitably have convicted", and concluded that there was no basis for criticizing the Court of Appeal's approach, either on the law or in relation to the evidence.

[142] In doing so, the Board examined the cases of **Bally Sheng Balson v The State** [2005] UKPC 2, **Brown (Uriah) v The Queen** [2006] 1 AC 1, and **Jagdeo Singh v State of Trinidad and Tobago** [2005] UKPC 35. In **Balson**, (which was a case of murder, in which all the circumstantial evidence pointed to the appellant as the murderer) the Board found that a good character direction would have made no difference to the result in the case. In **Uriah Brown**, the appellant was a police officer charged with manslaughter, and the Board concluded that, in a case of that nature, a good character direction will be of less significance in assisting a jury, where his credibility and that of the eyewitness could be judged by them. In **Jagdeo Singh's** case, the appellant was an attorney who was convicted of corruption after a trial in which the judge failed to give the credibility limb of the good character direction. The Board found that such omission was not necessarily fatal.

[143] As a result of this examination of the cases, the Board concluded that cases where the outcome would not have been affected by a good character direction are not so "rare" as had been intimated in **Teeluck**. This approach by the Privy Council was considered by this court in **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009.

[144] In **Carlos Hamilton and Jason Lewis** [2012] UKPC 37, counsel for the appellants failed to adduce evidence of their good characters. In that case, the appellant Lewis gave sworn evidence but the appellant Hamilton did not. The Board accepted that the trial judge would have been obliged to give a suitable good character direction, appropriate for the circumstances of each appellant. However, having considered the case against the appellants which was led at the trial, the Board concluded that even if the jury had been told about the good character of each appellant, it would have made no difference to the verdict because "such was the strength of the evidence".

[145] In this case, the appellant gave sworn evidence that he was a tiler and a taxi driver. After his conviction it came out, in his antecedents, that he had no previous convictions, believed in Christianity and sometimes attended church. Those things, it was said, spoke to his good character and he was entitled to have them considered in his favour. Trial counsel, if he knew of it, ought to have led such evidence from the appellant. It is not entirely clear, however, that this omission can be said to be egregious incompetence. That being said, the appellant did not demonstrate with any degree of coherence how that evidence, if it had been led and considered by the learned trial judge, would likely have affected the outcome of the trial, in his favour. The trial judge, who was the judge of fact and law, saw and heard the witnesses, including the appellant, who gave sworn testimony. She heard from two witnesses who indicated that the appellant took them to a spot, ostensibly to sell them a car, but instead aided and abetted strange men with guns to rob them. She found the witnesses for the prosecution credible, especially Mr Laing, from whose evidence she accepted

that the appellant was the one who took his property from him whilst he was held at gun point by a man with a gun. She rejected the appellant's evidence that he had done no such thing and had also been a victim of the robbery. She could not have failed to note that whilst the complainants went straight to the police station to report the robbery, the appellant went home and parked his car and made no report. We took the view, that even if trial counsel had led such evidence as to the good character of the appellant, in the circumstances of the case, it would have made no difference to the outcome, such was the strength of the case the learned trial judge had found proved against him.

[146] We found no merit in this complaint.

[147] Having considered all the complaints in grounds 2a and 2d, we concluded that although there was no gainsaying that incompetence of counsel was a legitimate ground of appeal, the allegations of incompetence of counsel made in in this case were spurious. In **Boodram,** the Privy Council opined, at para. 38, that complaints about counsel's incompetence must be approached with a healthy dose of scepticism. No doubt there is a great deal of wisdom in this view. It is only in the face of "flagrantly incompetent advocacy" on the part of trial counsel, or where the alleged failures of counsel are of a fundamental nature, that the appellate court must proceed with great care to determine whether the failures caused material prejudice to the appellant and that even if they had not occurred, the jury's verdict would inevitably have been the same (see **Boodram**, at para. 38).

[148] Having taken account of all these things, we did not find that there was any miscarriage of justice occasioned by incompetence of counsel.

Whether the learned trial judge failed to properly address the issue of lies told by the accused, the inconsistencies in the evidence of the prosecution's witnesses (**including that relating to the recovery of the phone**)**, the appellant's defence, and the evidence in its totality; (grounds 3, 4 and 5)**

Whether the cumulative effect of the learned trial judge's treatment of the evidence and the failures of trial counsel rendered the verdict unsafe and unsatisfactory (ground 6)

[149] Mr Williams identified three issues which, he said, the learned trial judge ought to have dealt with, which she did not. These included the absence, from the trial, of Mr Minto's phone said to have been recovered from the appellant, and the effect of that on the weight of the evidence; the inconsistency in Mr Minto's evidence relating to his identification of the phone; and the repetition by the learned trial judge in her summation of Corporal Pike's evidence that he was given a Nokia flashlight phone with a broken screen by Corporal McKoy, when Corporal McKoy had given no such evidence.

[150] The first two sub-issues have to do with whether the second Nokia phone spoken of by the prosecution's witnesses was properly identified as the complainant Mr Minto's phone, and whether there was evidence to properly find that the appellant was found in recent possession of it. In respect of the non-production of that phone in court, counsel submitted, relying on the case of **The Director of Public Prosecutions v Williams James Sugden** [2018] EWHC 544, that the best evidence is real evidence, and where that evidence is not being produced in court, a good explanation must be given as to why it has not been produced. In this case, no such explanation was given at trial. In circumstances where the accused man denied involvement in the robbery, that a phone was found in his house, and that the complainant had identified the phone in his presence, counsel submitted that the complainant ought to have been made to prove his recognition of his phone in court. The issue of the identification of the phone by Mr Minto, and thus the recent possession of the phone by the appellant was a key element of the case that led to a finding of guilt against him, counsel argued. Without the recent possession of the phone, counsel submitted, the case would have been so weak that no jury would have convicted the appellant. The learned trial judge, he said, failed to appreciate the importance of this issue and to treat it with the appropriate scrutiny it deserved.

[151] Counsel further submitted that the identification evidence of the phones was "muddled", because Mr Minto's evidence was "thoroughly inconsistent", particularly regarding the date he said he had pointed out his phone in the presence of the officer and the appellant. The only person who spoke to two Nokia flashlight phones with cracked screens was Corporal Pike, and the evidence that one of those phones had been given to him by Corporal McKoy was not mentioned by Corporal McKoy in his own evidence. The state of the evidence, counsel said, ought to have left a doubt as to whether one of the Nokia phones with a cracked screen was actually Mr Minto's Nokia phone that had been taken in the robbery.

[152] The DPP, however, submitted that the learned trial judge adequately dealt with the discrepancies and inconsistencies in the case and revealed her mind as to how she dealt with them, at pages 280 to 283 and 311 to 313 of the transcript. The DPP argued that it was clear that the learned trial judge was aware of the law as to how to treat with inconsistencies, and even though the learned trial judge said she did not see any major discrepancy in the evidence of the two witnesses, she pointed out the main discrepancy as the divergence between the evidence of Mr Minto and the evidence of Mr Laing, with respect to who had taken Mr Minto's property from him. The learned trial judge, it was said, also showed that she was aware of the minor inconsistencies and discrepancies in relation to how certain events took place simultaneously during the robbery, and resolved the discrepancy in the evidence as to how Mr Minto was relieved of his belongings.

[153] In respect of ground 5, the DPP submitted that the learned trial judge went through the evidence of the witnesses on both sides and advised herself as to the effect of sworn evidence and how it was to be treated, as well as how lies should be dealt with. She also gave herself a Lucas direction (see **R v Lucas** [1981] 3 WLR 120) and warned herself of the requisite standard of proof. The DPP pointed to the fact that the learned trial judge had taken note of the fact that the appellant had placed himself at the scene of the robbery, and highlighted 10 points, from page 292 to 293, that she

considered to be critical evidence that supported the prosecution's case. The DPP also submitted that, having considered the critical elements of the appellant's defence, the learned judge outlined, at pages 302 to 304 of the transcript, why she did not believe him, and that, notwithstanding this, she had to find that the prosecution had proved its case beyond a reasonable doubt. The learned trial judge's treatment of the evidence in this regard, it was submitted, was unassailable.

Disposal of grounds 3, 4, 5 and 6

[154] We agreed entirely with the submissions of counsel for the Crown and found no merit in any of these grounds.

[155] In assessing the evidence in the case, the learned trial judge reminded herself how to treat with discrepancies and inconsistencies and found that there was no material discrepancy in the evidence of the complainants. This was so, notwithstanding her finding that there was a major inconsistency in the evidence of Mr Minto, as to who had taken his phone and keys. She noted that in examination-in-chief he had said it was the gunman, but in cross-examination, he said it was the appellant. She considered that his only explanation for this inconsistency was that they had been robbed by the three men, even though the appellant had had no gun. She accepted Mr Laing as a credible witness and accepted, as true, his evidence that it was the appellant who had taken his money and his phone whilst he was held at gunpoint by the man with the gun. Having accepted Mr Laing's evidence, she did not rely on the inconsistent evidence of Mr Minto as regards who took items from him, although she had no doubt he was also robbed. In the final analysis, (at page 312 of the transcript) she rejected the evidence of Mr Minto with regard to who took his property whilst he was held at gun point, and found that, having accepted the evidence of Mr Laing as to how the robbery took place, it could not have been the appellant who had taken Mr Minto's property from him. She found Mr Minto's initial evidence that it was one of the men with the guns who had taken his property more consistent with Mr Laing's evidence, and based on the principle of common design and joint enterprise, she found that the appellant

was equally guilty of the charge of robbery, having been present aiding and abetting the commission of the offence. The learned judge, therefore, did not find the inconsistency in Mr Minto's evidence as to which of the three men took his property to be material, and thus, concluded that it did not have the effect of weakening the prosecution's case.

[156] A major complaint by the appellant was about the treatment, by the learned trial judge, of one of the two Nokia phones in this case. One of the Nokia phones was alleged to have been taken from the appellant by Corporal McKoy and handed to Corporal Pike, and the other was removed from the appellant's home by Corporal Pike. It is the latter phone that Corporal Pike said was identified by Mr Minto as the one that had been taken from him. No issue was taken, in the case, with the first phone, which was taken from the appellant by Corporal McKoy and handed to Corporal Pike. The number and ownership of that phone was verified by Corporal Pike as he said in his evidence, by dialling "star 129 number sign send" (*129 # send). The fact that Corporal Pike said he got that phone from Corporal McKoy but Corporal McKoy did not give evidence of this, is of no moment as no issue was joined between the appellant and the Crown regarding it. We agree, however, that Corporal McKoy, who searched the appellant ought to have spoken of taking a phone from him in the same way he spoke of taking the knife. The prosecution led no further evidence in respect of the appellant's Nokia phone.

[157] The fact is that the appellant was searched and taken into custody. The evidence is that he did have a phone on him before meeting with Mr Thompson. It is that phone on which Mr Thompson was able to contact him and speak to him. It is unlikely he would have been allowed to keep the phone whilst in custody. The appellant himself did not deny that he had a phone or that his phone was taken. That phone along with the knife and the bag it was in were handed to the exhibit storekeeper for safe keeping.

[158] The dispute, therefore, surrounded the phone that was said to have been found at the appellant's house. Corporal Pike's evidence was that he took the appellant to the address that the appellant had given to the police, and Corporal Pike, along with his team, searched the appellant's room and found two phones, one of which was a Nokia. In his evidence-in-chief, Mr Minto stated that he saw his Nokia phone again but not his Blackberry phone which had also been stolen. He said he saw the Nokia phone at the Hunts Bay Police Station in the possession of Corporal Pike. He could not recall the date and time but estimated it to be about a day or two days after the incident. However, having said that Mr Laing and Corporal Pike were present when he identified the Nokia as the phone robbed from him, he later said he could not recall if anyone else was present. In cross-examination, he said that when he had identified the phone, the appellant was present. In re-examination, he said it was after he had pointed out the appellant at the identification parade that he pointed out the phone. He described the phone as a black flashlight phone, with a cracked screen. He said he did not know where the phone was but that if he saw it again he could identify it by the cracked screen. Corporal Pike gave evidence that Mr Minto had identified the Nokia, in the presence of the appellant, as his, before he sent it to the CCFU for communication data analysis. It was Corporal Pike's evidence, at the time he was giving it, that the phone was still at the CFCU and no data analysis had been received.

[159] There was no challenge to the fact that a Nokia phone had been found on the appellant's premises. The appellant's case was that it had been found in a car which he accepted was in his possession and control, and which he was selling, and not in his house. Despite this, the appellant denied knowledge of the phone.

[160] Mr Minto's evidence was that he had identified the phone at the station, to Corporal Pike, in the presence of the appellant. Although the evidence was somewhat inconsistent as to who was present when the phone was identified by Mr Minto, we did not agree with counsel for the appellant that the evidence with regard to the phone was "muddled" and ought to have been rejected. In our view, the state of the evidence

regarding the recovery and identification of the Nokia phone by Mr Minto, was not so inconsistent so as to preclude the learned trial judge from relying on it. It was a matter for the learned trial judge whether she accepted, as true, the evidence that the phone was recovered as alleged and was identified by Mr Minto, as his.

[161] In respect of any lie told by the appellant on which the prosecution was relying to infer guilt, the learned trial judge properly addressed this issue at page 306 of the transcript, warned herself and gave a Lucas direction.

[162] We found no failure by trial counsel and no noteworthy failures in the treatment of the evidence by the learned trial judge which would have the cumulative effect of affecting the safety of the conviction. As said previously, these grounds had no merit.

Whether the learned trial judge improperly admitted and relied on the evidence of Mr Thompson (ground 8)

[163] The appellant submitted that the learned trial judge erred in relying on the evidence of Mr Thompson that the appellant had attempted to sell the car to him to challenge the appellant' credibility. Even though she had stated that the evidence should never have been led and that she would place no reliance on it, at page 303, lines 19 to 25, the learned trial judge considered that the appellant had made arrangements to sell the car and showcase it at his home.

[164] The DPP submitted that the learned trial judge did not place any reliance on the evidence of Mr Thompson, and she made that clear at page 289 of the transcript when she said the evidence was more prejudicial than probative. Although she later mentioned the attempt to sell the car to Mr Thompson the following day, that interaction, it was submitted, was referred to by the appellant in his own evidence (page 218, line 7). That evidence was used by the judge to demonstrate that the car was parked at his home on that day, as opposed to where the appellant said it was parked on the day the complainants were robbed. The learned DPP asserted, therefore, that the learned trial judge, did nothing wrong.

Disposal of ground 8

[165] At page 289 of the summation, the learned trial judge clearly stated that she had disregarded the evidence of Mr Thompson, except in so far as it assisted in establishing how the appellant came to be in the custody of the police. Accordingly, she said this:

> "I have done so on the basis that the prejudicial effect of that evidence outweighs his [sic] probative value. I have come to that conclusion because the accused man was never charged for any offense [sic] in relation to any complaint by Mr Frederick Thompson. In the absence of a charge I find that the evidence lacked probative force."

[166] In our view, the learned trial judge cannot be faulted for taking this approach. Nothing in the evidence of Mr Thompson suggests that the appellant had committed an offence on that day nor was it indicative of a tendency towards wrongdoing. It was not led as similar fact evidence. The only question for the learned trial judge was whether it was relevant evidence and of any probative value.

[167] The learned trial judge found the evidence of the appellant's interaction with Mr Thompson relevant in only two respects. The first was as to how the appellant came to be in the custody of the police. The second was in relation to her assessment of the appellant's evidence as to whether there was any explanation as to why the car had to be showcased to buyers at the abandoned premises. For this, the learned trial judge did not have to pay regard to Mr Thompson's evidence, as the appellant himself gave evidence that the day after the robbery, he made arrangements to show the car whilst it was parked at his home. Having considered that the premises where the car was parked at the time of the robbery had been described by the appellant as "abandoned", when his own home was only a "minute" away with adequate space to accommodate the car, the learned trial judge was concerned about the issue of the appellant's motive for doing so. In that vein, the learned trial judge mused:

> "It does not seem that he has any misgivings about showcasing the car at his home. Because, according to him on the Sunday, following, he made arrangements to meet

> with another potential buyer while the car was now parked at his home."

[168] This was evidence given by the appellant himself. Therefore, it is not correct to say that the learned trial judge relied on prejudicial evidence from Mr Thompson.

This ground of appeal is without merit.

Whether the sentence was manifestly excessive (ground 1)

[169] In respect of sentence, Mr John Clarke submitted, on behalf of the appellant, that the learned trial judge had failed to demonstrate that she had adhered to the accepted principles of sentencing as set out in **Meisha Clement v R** [2016] JMCA Crim 26, **Edwards v R** (2018) 92 WIR 477, and the Sentencing Guidelines for use by Judges of The Supreme Court of Jamaica and the Parish Courts, December 2017 ('Sentencing Guidelines'), as she failed to identify a starting point and did not show otherwise how the sentence she gave was arrived at. The learned trial judge, it was said, also failed to demonstrate that she considered the time spent by the appellant in custody, even though she mentioned that she would have.

[170] The Crown submitted that although the learned trial judge did not specifically state the time she added or subtracted for each factor, she considered all the relevant factors that a sentencing judge should consider. These included the time the appellant had spent in custody, that he had no previous convictions, that he had been gainfully employed, that the social enquiry report was unremarkable, that the community had nothing bad to say about him, and that he was 35 years old. The learned trial judge, it was submitted, balanced these factors against the seriousness of the offence and addressed her mind to the sentencing objectives of deterrence and punishment, and whether a non-custodial sentence would have been appropriate. She indicated the usual range for the offences and, based on the authorities of **R v Jerome Thompson** [2015] JMCA Crim 21 and **Lamoye Paul v R** [2017] JMCA Crim 41, she not only stayed within the usual range, but gave a sentence on the lower end of the range. In fact, his

sentence in respect of the robbery was less than that given to the appellant in **Paul v R**, who had pleaded guilty. There was said to be, therefore, no merit in this ground.

Disposal of ground 1

[171] The learned trial judge was assisted in the sentencing exercise by a social enquiry report and an antecedent report. In sentencing the appellant, the learned trial judge considered all the options available, and for reasons which she explained, properly determined that the imposition of a custodial sentence was warranted in this case. She took into account all the aggravating and mitigating circumstances, balancing them against each other. In imposing the sentence of five years for illegal possession of firearm and seven years for robbery with aggravation, the learned trial judge indicated, albeit belatedly, and without the required mathematical calculation, that she had taken into account the time he had spent on remand of two years and two months.

[172] Since the Privy Council decision in **Callachand & Anor v The State** [2008] UKPC 49**,** and the Caribbean Court of Justice's decision in **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 (AJ), this court has determined that trial judges are required to take a more structured approach to sentencing and, with some mathematical precision, give full credit for time spent in custody, (see **Meisha Clement v R** and the Sentencing Guidelines). This court, however, considered that the sentence in this case was imposed before those cases were decided, and before the Sentencing Guidelines were introduced.

[173] Taking into account the application of the structured approach suggested in **Meisha Clement v R** and the Sentencing Guidelines, we considered the statutory maximum for robbery with aggravation of 21 years. This, the learned trial judge took account of. According to the Sentencing Guidelines, the normal range for robbery with aggravation is 10-15 years. The learned trial judge found it to be seven to 10 years based on the authorities she considered. For illegal possession of firearm, the statutory maximum is life, the normal range being seven - 15 years. The learned trial judge found it to be five to nine years based on the authorities she considered. She considered that

there were aggravating and mitigating circumstances, the mitigating factor being that he had no previous convictions. She took account of the fact that he was gainfully employed, had a child, and was relatively young. She also took account of what was said in the social enquiry and antecedent reports.

[174] The learned trial judge considered that a term of imprisonment was justified for the reasons she outlined. Unfortunately, she did not state a starting point. The usual starting point for robbery with aggravation is 15 years. This was a robbery with a firearm with aggravating features. The men were lured to the premises by the appellant and they were attacked by two armed men. These gun offences, as noted by the learned trial judge are quite prevalent. Account could also be taken of the fact that the appellant himself was not armed when the robbery took place. So that, in fairness, if this court were to use the lower range used by the judge and the starting point of 10 years, and apply the aggravating features, it would increase the sentence to at least 12 years. Applying the mitigating factors, it would be reduced to at least 10 years. Giving credit for time spent in custody the sentence would be seven years and 10 months.

[175] For the offence of illegal possession of firearm, the usual starting point is 10 years. Using the range stated by the learned trial judge of five to nine years and starting at nine years, aggravating features would take that to at least 11 years. Applying the mitigating factors, that would reduce the sentence to at least nine years. Applying the two years and two months spent on remand the sentence would be six years and 10 months for the illegal possession of firearm.

[176] It is clear, therefore, that even though the learned trial judge did not demonstrate with the mathematical precision how she arrived at the sentence, the sentence she imposed of five years for illegal possession of firearm and seven years on each count of robbery with aggravation, was not excessive and having done the calculation ourselves, and having accounted for the time spent in custody on pre-trial remand, we found no basis on which to interfere with the sentence imposed.

[177] We found that there was no merit in this ground.

Whether the delay in relation to the hearing of this appeal breached the appellant's constitutionally guaranteed right to a fair hearing as well as his rights guaranteed by section 16(1), (2) and (8) of the Constitution and resulted in such prejudice to the appellant that his conviction should be quashed or his sentence reduced (Ground 7)

[178] This ground was argued under the rubric of abuse of process, and the submissions were made by Mr Williams in three parts, as follows: -

(a) The constitutionality of section 31(3) of the Judicature (Appellate Jurisdiction) Act (JAJA) and its infringement on the appellant's guaranteed rights;

(b) constitutional redress for the delay; and

(c) the unconstitutionality of section 13 of the Bail Act 2000.

We will deal with (a), the constitutionality of section 31(3), first. Part of the discourse in this court concerned the issue of whether it was proper to raise these constitutional questions for the first time before this court.

A. Whether section 31(3) of JAJA is unconstitutional and infringes guaranteed rights

(1) *The appellant's submissions*

[179] Mr Williams, on behalf of the appellant, asserted that section 31(3) of JAJA was in breach of the appellant's guaranteed rights to equality before the law and liberty under sections 13(1)(g) and 14 respectively, as well as his right to be treated humanely as a person deprived of his liberty under section 14(5). Mr Williams argued that the provision in section 31(3) of JAJA meant that the appellant could be incarcerated for a long period of time awaiting the hearing of his appeal, where that time would not be counted as being in execution of his sentence. This, he said, was unconstitutional, as there was no such exception to the right to liberty in the Constitution. Those exceptions to the right to liberty, he argued strenuously, in their proper interpretation, do not

include periods of detention on a committal from the sentence of a court that are not reckoned as part of that sentence. Counsel contended that the section is in breach of section 14(1) of the Constitution which states that "[n]o person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law" and that the State must prove that the right falls within a stated exception under section 14. Counsel maintained that 'loss of time' orders were not part of the process for enforcing or giving effect to a judgment of the court.

[180] A "loss of time" order, it was submitted, in and of itself, infringes the right to liberty, since the time 'lost' by an appellant pursuant to section 31(3) does not fall within the exception of being "in execution of the sentence or order of a court…in respect of a criminal offence of which he has been convicted" under section 14(b) of the Constitution. Counsel argued that it could never be a fair procedure where, pursuant to the provisions in section 31(3), an appellant could serve a period equivalent to their sentence, whilst awaiting appeal, and not know whether the time spent would be credited to their sentence. He argued that the provision itself was the problem, and not the operation of it caused by the failures in the system. The provision, he contended, has led to (1) appellants being incarcerated for indefinite periods, (2) appellants being incarcerated in execution of a sentence and that time not being credited to their sentences, (3) appellants being urged to abandon their appeals in return for their freedom, and (4) the requirement of an actual dismissal of the appeal by the court for such abandonment to take effect.

[181] The reference to fair procedure in section 14 of the Constitution, Mr Williams contended, meant fair procedure that supports and enhances the right to liberty. Parliament cannot lawfully pass a law, he argued, which resulted in a person being imprisoned, after conviction, for periods that do not count as part of their sentence ordered by the court. Any exception to the right to liberty in this respect should be founded on the Charter of Rights, and there is no such exception, he pointed out, as such would be repugnant to the Constitution. The rationale behind the provision, based

on case law in other jurisdictions with the same provision such as **Kumar Ali v The State**; **Tiwari (Leslie) v The State** (2005) 67 WIR 309, counsel maintained, is to prevent frivolous appeals. However, counsel noted, our section 31(3) provides no such rationale, and furthermore, the benefits of special treatment said to be given to appellants based on section 31, were not received by this appellant. Either way, he submitted, these "so called privileges" provide no justification for such a "clear infringement" of the right to liberty. The relevant principles, it was submitted, are that the State must prove that the breach falls within an exception provided for by law, for, otherwise, any detention outside of such exceptions would be arbitrary. Any derogation, Mr Williams stated, must be in "pursuit of a law", "legally certain", proportionate and reasonably justifiable in a democratic society. That, he submitted, was not so in this case. For those propositions, he relied on the learned authors Robinson, Bulkan and Saunders in Fundamentals of Caribbean Constitutional Law, at paras. 3-017 to 3-020 and 9-021 to 9-022, and Lester, Pannick & Herberg at paras. 3.12 and 3.13; as well as the case of **Winterwerp v The Netherlands** (1979) 2 EHRR 387, para. 39; and rule 3 of the Mandela Rules. Thus, it was contended, the exceptions in the Constitution to the right to liberty, on a proper interpretation, do not include detention of a convicted person for a period that does not count toward their sentence.

[182] It was also submitted that the fact that the appellant was in limbo whilst in prison, not knowing when his appeal would be heard and being unduly pressured to abandon his appeal, knowing that if he did, he would be released, amounted to inhumane treatment in breach of section 16(5) of the Constitution.

[183] Counsel argued that, having spent seven years in custody before his appeal was heard, it would be unfair to the appellant to embark on the appeal at this late stage. Counsel cited the Privy Council decision in the case of **Higgs and Mitchell v Minister of National Security and Others** [2000] 2 LRC 656, from the Bahamas (at pages 673 to 679), which he said had extended the principle in **Pratt and another v Attorney General for Jamaica and another** [1994] 2 AC 1 (at page 673H), that

uncertainty and delays in punishment breach the protection against inhumane treatment because it leads to hopelessness and despair. Counsel asserted that proof of suffering was not required to establish a breach of this protected right. He maintained that what was important was the impact on the individual, including psychological suffering.

[184] It was submitted that, due to the unconstitutionality of the section and the failure of the State, the appellant had been caused "to undergo pressure to abandon his rights, uncertainty as to his fate, and to suffer the indignity of inequality, hopelessness and arbitrariness". No remedy other than the quashing of the convictions would be sufficient to vindicate the breach of these rights, counsel argued.

[185] Based on the foregoing, counsel argued that it would be an abuse of process for the court to proceed with the appeal, and for the conviction to be upheld, as the appellant could not receive a fair appeal, in all the circumstances. Although counsel accepted that based on the case of **Melanie Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26, the quashing of the conviction was not the normal remedy, in this case, he contended, no other remedy would suffice to vindicate the appellant's Charter rights that have been breached. He determined that, on the basis of **AG's Reference (No 2 of 2001)** [2004] 2 AC 72, as summarised in **Boolell v The State** [2006] UKPC 46, the quashing of the conviction as an appropriate remedy formed part of the law in Jamaica. He argued that the case of **Sooriamurthy Darmalingum v The State** [2000] 1 WLR 2303, although it was an exceptional case, continued to be authority for circumstances, like in this case, where the delay was such as to make it unfair that the proceedings against a defendant should continue. The cases of **Taito v R; Bennett and others v R** [2002] UKPC 15, **Mills v HM Advocate and another** [2002] 3 WLR 1597, **Singh v Harrychan** [2016] CCJ 12 (AJ); 88 WIR 362 and **R v Williams** [2009] 5 LRC 693, were also cited in support of this point. **Graham and another v Police and other cases** (2010) 79 WIR 288, was also relied

on as authority for the quashing of a conviction on account of the failure to provide the record or reasons for the purposes of an appeal.

[186] The Constitution, counsel submitted, must be given a generous interpretation so as to give effect to the rights as intended by the legislator. The rights must be practical and effective and not illusory. It was submitted that it is the state's duty to ensure that appeals are conducted within a reasonable time so that an appellant's right to have his or her conviction and sentence reviewed is not frustrated. The longer the delay, the less likely it is that the proceedings could be fair, and prejudice, he said, although proved in this case, need not be proved, as the delay in and of itself was "presumptively prejudicial". Once there has been an inordinate delay, it was submitted, it is for the State to show why that delay did not breach the appellant's rights. The cases of **Darmalingum v The State**, **Porter v Magill; Weeks v Magill** [2002] 2 AC 357, **Herbert Bell v Director of Public Prosecutions and another** [1985] 1 AC 937, **R v Bow Street Stipendiary Magistrate**, ***ex parte*** **Director of Public Prosecutions; R v Bow Street Stipendiary Magistrate, *ex parte* Cherry** (1989) 91 Cr App Rep 283, **Regina v Telford Justices, *ex parte* Badhan** [1991] 2 QB 78, and **Gibson v Attorney General of Barbados** (2010) 76 WIR 137, were all relied on in this regard.

[187] It was also submitted that the "reasonable time guarantee" is a free-standing right and ought not to be balanced against the interests of the public or the prevalence of serious crimes in society (**Mills v HM Advocate and another** and **AG's Reference (No 2)**. The court in **Tafari Williams v R** [2015] JMCA App 36, **Techla Simpson v R** [2019] JMCA Crim 37 and **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04, it was said, erred in following **Herbert Bell v DPP** and **Flowers v The Queen (Jamaica)** [2000] UKPC 41 in considering the interests of the public as a factor.

[188] With respect to the record, counsel submitted that that the appellant's rights had been breached, because not only was the receipt of the record inordinately late, but the appellant had still not received the judge's notes and report of the case, to which he

was entitled. In this regard, counsel contended that the preparation of the appellant's case on appeal, was hindered by the absence of these items, and therefore, the conviction should be quashed. He relied on sections 16(7) and 16(8) of the Constitution, section 17 of JAJA, and rules 3.7 to 3.9 of the Court of Appeal Rules ('CAR') relating to the receipt of records, to support this argument.

[189] Counsel further submitted that the Caribbean cases in which appellate courts have declined to quash convictions, despite delays attributable to the State, did not involve delays as egregious as in this case, and that, furthermore, they reflected the failure of those courts to appreciate the prejudicial impact of delay itself. In those cases, he said, the courts erroneously balanced the individual's rights against the public interests; failed to place the onus on the State to prove the absence of prejudice; and, involved no consideration of the breaches of the reasonable time guarantee, including the right to the record of the trial, and the right to a review of the trial. The appropriate remedy, it was contended, must take account of the entirety of the breach.

[190] In respect of the possibility of the appellant having a fair appeal, counsel submitted that the failure of the prosecution to disclose the items already referenced, hindered the appellant in the preparation of his case on appeal, in that he was unable to access contemporaneous accounts of the virtual complainants and was unable to review the cogency of the witness' identification of the mobile telephone. Counsel cited the case of **Police Commissioner v Springer** (1962) 4 WIR 286, and several others, in which he said the court quashed a conviction due to the unavailability of the records. He suggested that a similar course be followed in the instant case. Although he accepted that there were cases in which the records were absent but the convictions were not quashed, he argued that those cases were distinguishable from the instant case. Counsel also submitted that even though the appellant could get damages in another court, that would not be adequate, based on what the appellant had already suffered. Public acknowledgment of the breach, counsel said, would also be inadequate.

[191] Counsel further urged this court to impose time limits as a benchmark from which "reasonable time" should be measured, as was done in **Jordan v The Queen and anor** [2016] 1 RCS 631.

[192] With regard to the jurisdiction of this court in constitutional matters brought *ab initio*, counsel submitted that this court has the jurisdiction to strike down section 31(3), as being unconstitutional, without the need for the initiation of a separate claim in the Supreme Court. Counsel attempted to distinguish the case of **Monnell and Morris v United Kingdom** (1988) 10 EHRR 205, where the United Kingdom (UK) court declined to strike down a similar provision, on the basis that the relevant provision in that case was worded differently. The CCJ case of **Solomon Marin Jr v The Queen** [2021] CCJ 6 (AJ) BZ, was also staunchly relied on, by counsel, for the proposition that this court had the jurisdiction to address the constitutionality of a statutory provision or other constitutional claim, once any such issue arose in the course of an appeal. The constitutionality of section 31(3), counsel maintained, arose in the instant case, as this court may have to apply the section in respect of the appellant's sentence. Counsel contended that it cannot, therefore, ignore the questions raised as to the section's constitutionality.

(2) *The submissions on behalf of the Attorney General*

[193] Written submissions were filed by the Director of State Proceedings, on the behalf of the Attorney General of Jamaica, pursuant to the order of this court, in respect of the constitutional points raised by the appellant.

[194] In those submissions, it was maintained that it was inappropriate for claims of breaches of the Constitution to begin in the Court of Appeal for the first time, especially where such claims required the averment and determination of facts and evidence to enable proper adjudication of the claims. It was contended that the claims by the appellant in his challenge to the constitutionality of section 31(3) of JAJA, involved findings of fact which needed to be substantiated, and which made it inappropriate for consideration by the appellate court.

[195] Additionally, it was submitted, such claims should only be entertained where, on the facts, there has been an incontrovertible unreasonable delay, and where the interests of judicial efficiency and fairness to the individual appellant required that consideration be given as to an appropriate remedy peculiar to the individual. The authorities of **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others** [2018] JMCA App 7 and **Dawn Satterswaite v The Assets Recovery Agency; Terrence Allen v The Assets Recovery Agency** [2021] JMCA Civ 28, were relied on as examples of cases where this court declined to adjudicate on the alleged breaches of the reasonable time guarantee in civil proceedings, on the basis that the Supreme Court was better placed to meet the evidentiary requirements as a fact finder of such complaints. Based on **Germaine Smith and others v R** [2021] JMCA Crim 1, at para. [124], it was submitted that a finding of delay by itself would not lead to a finding that the delay was unreasonable and in breach of an appellant's right, and that the court must, therefore, consider other factors such as the high crime rate and the public interest. It was also submitted that this court ought to determine whether the breaches alleged in this case required the assessment of evidence, before assuming jurisdiction over the complaint.

[196] Nevertheless, it was submitted that, even if this court was inclined to consider the constitutionality of the section, the claim that section 31(3) of JAJA was unconstitutional, was without merit. It was contended that the section is not unconstitutional, as its provisions are not given effect to in the ordinary course, but are imposed only with the reasonable objective of deterring unmeritorious or frivolous cases. Those cases, it was submitted, are dealt with at the discretion of the court in carrying out its sentencing function, in accordance with statute and the court's procedural rules. The section, the submissions continued, gives the Court of Appeal a discretion in determining the date on which an appellant's sentence should commence based on specified factors. The cases of **Ali v The State, Tiwari v The State** and **Bhola v State**, which it was said were relied on by this court in **Tafari Williams v R,** were cited for the assertion that the section does not impose indefinite detention. It

was submitted that, if, in this case, the court exercised its discretion to order the appellant's sentence to commence at the time of conviction, as the court was urged to do, no question of the appellant's sentence being extended would arise.

[197] In respect of the claim that section 31(3) was in breach of the right to liberty, the DSP also cited the case of **Monnell and Morris v The United Kingdom** which interpreted article 5(1)(a) of the European Convention on Human Rights ('ECHR'), a provision which, it was said, was equivalent to section 14(1)(b) of the Constitution of Jamaica. That case was relied on for the proposition that when a loss of time order is imposed with the legitimate aim of discouraging abuse of the court's procedures, it does not breach the right to liberty. Although the relevant section in the ECHR, on which the decision was based, is worded differently, it was submitted that, that difference was not in substance, and the same outcome should apply here, as both provisions provide that an individual's liberty may only be deprived based on a sentence imposed by a court of law.

[198] The submission went further to suggest that since the appellant was not on bail and was not claiming that he had received any special treatment, then the section would not strictly apply to him. In any event, it was submitted, the section itself was constitutional, once it was not being used to penalize an appellant for exercising his right to appeal and was only triggered in cases where this court believed the appeal was frivolous or vexatious. No right is absolute, it was submitted, and rights may be restricted where it is found to be demonstrably justifiable in a free and democratic society. It was further asserted that the purpose of the section, fell within that exception.

[199] With respect to the allegation that section 31(3) breached the right to a review of conviction and sentence within a reasonable time, it was submitted that this is not so, and the challenge ought to be dismissed because it is based on an objection to the case of **Tafari Williams v R**, which the appellant's counsel alleged resulted in the

appellant being encouraged to abandon his appeal. Such a challenge, it was argued, was not appropriate for determination by this court.

[200] In respect of the alleged breach of sections 16 of the Constitution, the submissions, whilst tacitly accepting that there was a delay, did not specifically address whether the delay was inordinate. Rather, it intimated that even if this court finds that the delay was so inordinate that the appellant's rights had been breached, the conviction ought not to be quashed, unless the hearing was unfair or it was unfair to try the defendant at all as the breach lay only in the failure to procure a hearing within a reasonable time. It was argued, therefore, that some other appropriate remedy should be afforded for any such a breach and that the applicable principles, in that regard, are those set out in **Tapper v DPP**, **AG's Reference (No 2)** and **Boolell v The State**. Where the breach is established after a fair hearing, the available remedies, it was submitted, include: (a) public acknowledgment of the breach, (b) reduction of the penalty imposed and (c) payment of compensation to an acquitted defendant.

(3) *Submissions by the DPP*

[201] The DPP adopted the position taken by the Director of State Proceedings and relied on the authorities of **Ali v The State, Tiwari v The State**; **The State v Young**, **Duncan and Jokhan v Attorney General of Trinidad and Tobago** [2021] UKPC 17, at para. 32, and **AG's Reference (No 2)**, with regards to the issues of the treatment of "loss of time" orders and the breach of the reasonable time guarantee.

[202] Although acknowledging the period of delay, the DPP did not expressly address whether that delay breached the appellant's Charter rights, in all the circumstances of the case. The DPP, however, submitted that, even if this court was of the view that there had been a breach, quashing the conviction would not be an appropriate remedy. The learned Director also relied on the authorities of **Tapper v DPP**, **Attorney General's Reference (No 2)** and **Techla Simpson v R** in that regard. The case of **Darmalingum**, it was said, was distinguishable on its facts, as, in this case, there was nothing to suggest that any pre-trial delay resulted in any unfairness to the appellant.

Nor, it was submitted, is it a case where the appeal hearing would be inherently unfair or there could be no hearing at all. Further, it was said, the delay between conviction and the hearing of the appeal had not resulted in the inability of the appellant to have a fair hearing of his appeal. The exclusion of the items sought to be adduced as fresh evidence, it was submitted, had no bearing on the fairness of the appeal, as such evidence would not have been probative in light of the appellant's defence at trial and the issues raised on appeal. It was, therefore, argued that there was no unfairness to the appellant which would justify quashing the conviction.

(4) *The appellant's reply*

[203] Mr Williams, on behalf of the appellant, contended, in reply, that **Monnell and Morris** was not applicable to this case because of the difference in wording of article 5(1)(a) of the ECHR. That article, he said, prohibited the deprivation of liberty save in accordance with procedures prescribed by law for "the lawful" detention of a person after conviction by a competent court.

Disposal of ground 7

(i) <u>The provisions</u>

[204] Before looking at section 31(3) of JAJA itself, it was necessary to look at the relevant provisions in the Constitution that the appellant claimed were breached by the section. The appellant alleged breaches of sections 13, 14 and 16 of the Constitution and we carefully considered those provisions insofar as was relevant to the issues raised.

[205] Section 13 states:

> "13.— (1) Whereas—
>
> (a) the state has an obligation to promote universal respect for, and observance of, human rights and freedoms;

(b) all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society; and

(c) all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,

the following provisions of this Chapter shall have effect for the purpose of affording protection to the rights and freedoms of persons as set out in those provisions, to the extent that those rights and freedoms do not prejudice the right and freedoms of others.

(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society—

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and

(b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.

(3) **The rights and freedoms referred to in subsection (2) are as follows**—

(a) the right to life, liberty and security of the person and the right not to be deprived thereof except in the execution of the sentence of a court in respect of a criminal offence of which the person has been convicted;

…" (Emphasis added)

[206] Sections 14(1)(b), 14(4) and (5) provide:

"14. — (1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair

procedures established by law in the following circumstances—

(a) …

(b) **in execution of the sentence or order of a court whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted**;

…

(4) Any person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody.

(5) **Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person**." (Emphasis added)

[207] Section 16 states:

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

(2) In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision averse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.

…

(7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and **subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.**

(8) **Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced.**

…" (Emphasis added)

[208] Section 19 of the Constitution gives the Supreme Court original jurisdiction to grant redress in cases where the provisions of the Constitution have been, is being or is likely to be contravened, a decision from which an appeal lies to the Court of Appeal. That section states as follows:

"19. – (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) ...

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

(5) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

> (6) Parliament may make provision or authorize the making of provision with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorize the conferment thereon of such powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section."

[209] Provisions similar to section 31 in the UK and other Commonwealth Caribbean legislation, have been referred to in the case law as 'loss of time' provisions, and the interpretation and proper application of those provisions have been dealt with extensively in the cases. Section 31(1) to (3) of JAJA provides:

> "31. - (1) An appellant who is not granted bail shall, pending the determination of his appeal, be treated in such manner as may be directed by rules under the Corrections Act.
>
> (2) The Court of Appeal may, if it seems fit, on the application of an appellant, grant bail to the appellant in accordance with the Bail Act pending the determination of his appeal.
>
> (3) **The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under his [sic] section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence passed by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into a correctional institution under the sentence**." (Emphasis added)

[210] A plethora of cases were cited to this court on these issues. It is beyond the scope of this judgment to deal with them all. However, we thank counsel for their industry and stress that consideration has been given to all of them. Reference will, however, only be made to those which adequately outline the relevant principles.

(ii) The jurisdiction question

[211] The appellant's appeal raised the issue of this court's jurisdiction to hear complaints regarding breaches of the appellant's Charter rights for the first time. The appellant maintained that this court has such a jurisdiction. The Attorney General and the DPP disagreed, contending that the Supreme Court had the original jurisdiction to hear such matters, pursuant to section 19 of the Constitution, and, therefore, this court's jurisdiction, in that regard is limited.

[212] This is not a new question, and the issue of the jurisdiction of an appellate court to hear questions dealing with the alleged breach of constitutional rights for the first time, has been answered in several authorities, by both this court and the Privy Council and also by the Caribbean Court of Justice ('CCJ'). The question is usually answered by this court and by the Board by way of a determination as to whether the constitutional question can properly be said to have arisen in the appellate proceedings.

[213] The CCJ's approach to the question is more nuanced, however. For instance, in **Solomon Marin**, a case originating from Belize, on an interpretation of provisions in the Constitution of Belize, the CCJ granted a declaration that the appellant's section 6(2) rights were breached by reason of post-conviction delay in the appeal. The delay in the hearing of the appeal was approximately eight years caused by the absence of the transcripts of the trial. The CCJ considered the jurisdiction of the Court of Appeal of Belize, as well as its jurisdiction, to deal with constitutional issues raised for the first time on appeal. It also considered the provisions in section 20(3) of the Constitution of Belize (which in one significant respect, is dissimilar to section 19 of the Jamaican Constitution). The CCJ found that by necessary implication from the wording of section

20(3), it gives to the Belizean Court of Appeal, the jurisdiction to deal with constitutional matters that arise in an appeal. Section 20(3) provides:

> "If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of this question is merely frivolous or vexatious."

[214] In concluding that section 20(3) of the Constitution of Belize gave the appellate courts the jurisdiction over constitutional questions raised for the first time within the appeal process, the CCJ said, at para. [60] of that case:

> "However, this s 20(3) jurisdiction is not open-ended and unlimited. Two pre-conditions apply. They emerge from the language of s 20(3). First, there must be extant proceedings before a court of appeal. In this case, an appeal against conviction. Second, the constitutional question must 'arise' from those proceedings. Here, as a direct consequence of the post-conviction delay related to the hearing, and then the determination, of the appeal."

[215] Further, at para. [74], the CCJ gave due regard to the case of **R v Pigott** [2015] 88 WIR 299, a judgment of the Eastern Caribbean Supreme Court arising from a case from Antigua and Barbuda, which considered whether a breach of the constitutional right to a fair hearing was a proper ground of appeal or whether separate proceedings in the High Court were required. The relevant provision in that case was section 18(3) of the Constitution of Antigua and Barbuda, which was similar to section 20(3) of the Constitution of Belize. The CCJ, at para. [75], referred to the judgment of Thom JA (Ag) in **R v Pigott,** where he said, at paras. [26]-[27] of that judgment, that:

> "[26] Where there is inordinate delay in the trial of an accused person, the issue of infringement of his/her constitutional right to a fair hearing within a reasonable time guaranteed under s 15(1) of the

> Constitution may be raised at the criminal trial. Similarly, where there is inordinate delay between conviction and the hearing of the appeal it may be raised in the Court of Appeal as a ground of appeal against both conviction and sentence. Indeed s 18(3) embraces this approach.
>
> [27] The effect of s 18(3) is that the Court of Appeal, the High Court and also a court-martial can determine issues of contravention of any of the constitutional rights outlined in ss 3-17 where those issues arise in proceedings before the court. It is only where the issue arises in other courts such as the Magistrates' Court then the court is required to refer the matter to the High Court if a party makes such a request."

In that said case, Thom JA (Ag) decried the necessity for a multiplicity of proceedings.

[216] In **R v Pigott**, the cases of **Flowers v The Queen (Jamaica)**, **Boolell v The State**, **Haroon Rashid Elaheebocus v State of Mauritius** [2009] UKPC 7, **Gangasing Aubeeluck v The State of Mauritius** [2010] UKPC 13, **Tapper v DPP**, **Rummun v State of Mauritius** [2013] 1 WLR 598, were relied on. For this reason, the CCJ noted at para. [76] that Thom JA (Ag) in coming to his conclusion on the matter had considered that the issue of delay, as a breach of constitutional rights, had been considered and determined by the Privy Council in a number of cases, in some of which, the issue had been raised for the first time before the Board.

[217] The CCJ, in **Solomon Marin**, also considered, (at para. [77]), the case of **Tyson v R** (2017) 92 WIR 328, a case from the Virgin Islands, where a preliminary issue arose as to whether the Court of Appeal had the jurisdiction to entertain a constitutional point which had not been raised in the High Court. Gonsalves JA (Ag), writing in **Tyson v R**, referred to section 31(7) of the Constitution of the Virgin Islands, (which is similar to section 20(3) of the Constitution of Belize, and section 18 of the Constitution of Antigua and Barbuda) and said that:

> "[23] …[U]nder s 31(7), the Constitution Order expressly contemplates the possibility of questions as to the contravention of any of the provisions of Ch 2 arising in any proceedings before the High Court, the Court of Appeal and the Privy Council. The provision allows for such matters arising in other courts to be referred to the High Court and the High Court is to determine such matters in accordance with s 31 (8). By inference, this must mean that questions arising as to the contravention of any of the provisions of Ch 2 in what are substantively non-constitutional proceedings in the High Court, can be determined within those proceedings without the necessity of bringing a separate constitutional application before the High Court. And constitutional questions arising in proceedings in the Court of Appeal or the Privy Council, can be determined by the Court of Appeal or the Privy Council as the case may be**. On a purely literal interpretation, one is led to the conclusion that if a question as to the contravention of any of the provisions of Ch 2 were to properly arise on an appeal before the Court of Appeal, such question not having been taken previously before the High Court, the Court of Appeal would have jurisdiction to hear and determine the question, and s 31(2) would not prevent the Court of Appeal from so acting**." (Emphasis added)

[218] Having examined those cases, and the case of **Bowe and another v The Queen** [2006] UKPC 10, the CCJ, in determining the issue in Marin's favour, asked itself the question whether any constitutional issue which arose in proceedings in one or other of the courts, including the Court of Appeal, should be resolved in those courts in those proceedings. The CCJ concluded, at para. [101], that there were sound and rational bases for interpreting the meaning of section 20(3) of the Constitution of Belize, as conferring jurisdiction on the Court of Appeal to hear and determine Marin's constitutional claim that his section 6(2) rights had been breached, and to provide a remedy. The CCJ, at paras [91] to [92], like Thom JA in **R v Pigott**, also decried the

necessity for a multiplicity of proceedings, which, it said, would have been the result, if any other interpretation were to be placed on the relevant provision.

[219] However, since there is no provision in section 19 of the Jamaican Constitution which is similar to section 20(3) of the Constitution of Belize, and it is well settled that the Supreme Court has original jurisdiction to hear matters alleging breaches of the constitution, by virtue of section 19, the question for this court is whether there is any constitutional issue raised in this appeal for the first time, over which this court could properly assume jurisdiction, in keeping with the approach of this court and the Privy Council. This court has consistently assumed jurisdiction over allegations of constitutional breaches caused by delay which arise in the appeal process, even if not raised in the courts below, in line with the authorities since the Privy Council's decision in The **Attorney General's Reference (No 2)** applied in **Tapper v DPP** (which admittedly was before the Charter of Rights) and more recently in **Techla Simpson v R**. This has been done, not on any interpretation of section 19 of the Constitution, but largely on the basis that such matters directly arose in the appeal. It has long been accepted, therefore, that the issue of inordinate delay which may be raised in a criminal trial, may be raised as a ground of appeal in this court. The pertinent question in this case, therefore, was whether any allegation of constitutional breaches, raised for the first time in this appeal, could be said to have arisen in these appellate proceedings.

[220] The actual issue in **Solomon Marin** concerned the question of delay and the appropriate remedy for that delay. The CCJ in concluding that section 20(3) of the Belizean Constitution granted the Court of Appeal the jurisdiction over constitutional issues when they arose in proceedings before it, then had to determine the same question as that which was pertinent in this case, that is, when, in fact, such constitutional issue could be said to have arisen in the appeal

[221] Anderson JCCJ, in answering that question in his judgment in **Solomon Marin**, accepted that the Court of Appeal had jurisdiction, even though the Supreme Court had the original jurisdiction, but he also accepted that there had to be an enquiry as to

when it can clearly and properly be said that constitutional questions "arise" in proceedings on appeal in the Court of Appeal. This enquiry, he intimated, was necessary, otherwise, it would give carte blanche to an appellant to raise any constitutional point at any level of adjudication, even though it had not been raised below. Also, he said, if this was allowed, it would give the Court of Appeal original jurisdiction rather than appellate jurisdiction over constitutional issues. That, he said, would completely undermine the primacy of the original jurisdiction of the High Court to hear and give redress for breaches of constitutional rights.

[222] At para. [141] Anderson JCCJ stated that:

> "An appellate court, then, may remit questions of constitutional rights as where, for example, the view of the relevant lower court on the question is considered desirable, but it is not obliged to do so. The jurisdiction of the appellate court pertaining to a violation of constitutional rights may be exercised both (a) on appeal from a final decision of the Supreme Court, where such issues were raised for determination; and (b) where such questions arise in extant appellate proceedings; a basic point which was illustrated in *Maycock v Commissioner of Police*... Accordingly, the right of application to the Supreme Court for constitutional redress is the predominant but by no means the unique or exclusive procedure for litigating the protection of constitutional rights and freedoms."

Further, at para. [142] he stated that:

> "Where there was inordinate delay between conviction and the hearing of the appeal the constitutional right to a fair trial within a reasonable time may be raised in the Court of Appeal as a ground of appeal against both conviction and sentence."

[223] Anderson JCCJ then referred to what, he said (at para. [149]), "was a very useful point made by the Privy Council in a series of cases", which was that "a constitutional point can *only* be said to 'arise' in appellate proceedings *if* its determination could have affected the validity or lawfulness of the appealed decision". He sought to refine this

point at para. [162], in what, he said, was a more "jurisprudentially defensible" formulation, and said this:

> "It is *if,* and only *if*, the issue raised in the appellate proceedings affected, or could have affected, the question of whether the conduct of the trial (including appellate proceedings) accorded with the constitutional protection of law guarantees that the matter could properly be said to 'arise' in the appellate proceedings. There is thus the possibility of upholding the validity of the conviction and lawfulness of the sentence when passed whilst nonetheless finding that the protection of the law guarantees was not fully met. This approach would appear to accord with the analysis of the composite and separable nature of the right to a fair trial within a reasonable time…"

[224] Anderson JCCJ noted that, although the final court may find it necessary to remit a case to the Court of Appeal for its views, there were cases that might raise a constitutional issue for the first time when it comes before the final court, and it may choose to proceed to hear and determine it. The circumstances in which it would do so include cases of urgency, or where for other reasons the 'justice of the case' so required. The remedies which would be available, he wrote, would be the same as those in the High Court.

[225] Determining that the court would not allow its processes to be abused by a litigant who had been unsuccessful in his appeal but who then launched a collateral attack by raising constitutional points for the first time in the appellate process, Anderson JCCJ said at para. [177]:

> "…[T]he Court of Appeal would have possessed jurisdiction to consider the Appellant's allegation that his s 6(2) right had been infringed if, and only if, that question could properly be said to have arisen in the appellate proceedings. For reasons that will shortly appear, I am of the view that the question of breach of the Appellant's s 6(2) right did, in fact, properly arise in the appellate proceedings before the Court of Appeal. There is no question here of abuse of process or the involvement of non-constitutional rights

> provisions. The Appellant took the constitutional issue of the delay in the hearing of his appeal at the first reasonable opportunity, namely at the hearing of the appeal."

[226] Anderson CJJ determined that in Marin's circumstances, his guaranteed right had been breached, and that the issue had properly arisen in his appeal.

[227] It is clear from this examination of the case of **Solomon Marin**, that even though the CCJ found that the Court of Appeal of Belize had jurisdiction to hear constitutional issues which arose for the first time in the appellate proceedings, it took the view, as does this court and the Privy council, that this jurisdiction should only be assumed where the constitutional issue can clearly be seen to arise in the appeal.

[228] It is, therefore, apposite that in the absence of any provision in the Constitution of Jamaica, similar to that in Belize, Antigua and Barbuda and the Virgin Islands, giving the Court of Appeal direct jurisdiction to hear constitutional matters *ab initio,* any claim of constitutional breaches raised before this court for the first time must arise not only from circumstances directly affecting the appeal but also directly involving the issue of delay, if this court is to assume jurisdiction to entertain it and provide the appropriate remedy, where justified. This, we contend, is consistent with this court's approach in **Paul Chen-Young** and **Dawn Satterswaite**, in which this court found that, in cases where breaches of the Constitution are alleged and factual issues arise for determination, such evidence ought to be led in the Supreme Court. This position was endorsed by the Privy Council in **Michael Chen-Young (as Executor of the Estate of Paul Chen-Young (Deceased)) and others v Eagle Merchant Bank and 3 others** [2022] UKPC 30. The Board, at para. 20 of its judgment in that case, acknowledged that this court, in that case, had been asked to hear an application for constitutional redress, raised for the first time, in proceedings regarding the validity of a judgment delivered by judges of appeal, who had already retired when the judgment was delivered. It found, at para. 21, that the application for constitutional redress, in that case, was not "truly ancillary" to the appeal which had been brought before this court.

[229] The Board went on to consider the issue of whether this court ought to have heard the application for constitutional redress, and confirmed that this court had no original (as opposed to appellate) jurisdiction to grant constitutional redress. The Board, however, adopting the approach taken by this court in the matter, dealt with the question as one involving the discretion of the court, in determining the more appropriate forum to hear the application, rather than considering the matter as a strict jurisdictional issue. The Board determined that, the matter being one of discretion, it would not lightly interfere with the discretion of this court. I, however, concurred with the decision of this court that the Supreme Court was the more appropriate forum, on the basis that the issues raised by the application were novel and without precedent and the fact that, in such case of public importance, the Court of Appeal would benefit from a first instance judgment as the basis for its deliberation. At para. 26, the Board made plain its view that, important issues about constitutional redress should, if possible, first be considered by the local courts, both at first instance and on appeal.

[230] We, therefore, in keeping with the authorities, assumed jurisdiction to hear issues raised for the first time here, regarding breaches of the appellant's guaranteed rights, allegedly caused by the delay in the hearing of his appeal.

(iii) Section 31(3) and the breach of the right to protection from inhumane treatment in section 14(5) of the Constitution

[231] We agreed with the Attorney General and the DPP that the appellant's contention that his constitutional rights under section 14(5) was breached by the operation of the provisions in section 31(3) was not an issue which directly arose in the appeal and furthermore that this court was not the proper forum, to raise for the first time, a fact specific complaint of this nature. Furthermore, the appellant provided no evidence of a connection between the provisions of section 31(3) and its application, and his alleged inhumane treatment. Neither did he provide any instance of the alleged inhumane treatment. The appellant sought to rely on a notion, perhaps one akin to *res ipsa loquitur*, that the section resulted in inhumane treatment simply from just being in existence and coinciding with the circumstances of a delay, without the need for proof

of harm or that the application of the section had actually caused such harm. Although the appellant filed an affidavit before this court, there were no allegations in it suggesting that the agents of the State, in applying the section, subjected him to any inhumane punishment or treatment.

[232] Furthermore, we found the appellant's attempts to compare his case with the case of **Pratt and another** and **Higgs and Mitchell**, to be misconceived (see para. [117] of **Solomon Marin** and the reasoning therein). The CCJ, in **Solomon Marin**, at para. [94] stressed the importance of all the facts being put before the court, and, furthermore, that court was in a position to determine the issues raised in that case, as only pure questions of law were involved.

[233] A similar complaint of a breach of the guaranteed right of protection from inhumane treatment was raised by the applicant, Mr Dixon, in the case of **Jerome Dixon v R**, in which this court determined that it was not appropriate to decide such an issue, for the first time, in the criminal appeal process. In that case, this court declined to determine whether section 31(3) was unconstitutional in that it breached section 14(5) of the Constitution, as any such determination would require evidence which was not before this court and that, in such a case, this court was not the appropriate forum. This court, in the said case, also considered counsel's attempt to place Mr Dixon's case in the same category as the case of **Pratt and another**, and **Higgs and Mitchell** by analogy, and determined that those cases should be confined to their own category of delays in the context of the death penalty.

[234] In **Higgs and Mitchell**, the Privy Council made no connection between the delay in carrying out the death penalty and the prison conditions in general. The Privy Council also clearly indicated that in order for such a complaint regarding prison conditions to succeed, it was necessary to connect the sentence to the matters complained of, and to show that those conditions amounted to something more than what was applicable to all prisoners under the conditions of their incarceration. Delay was not to be considered as an additional punishment.

[235] For the same reasons as expressed by this court in **Jerome Dixon v R**, we declined to assume jurisdiction over this complaint of a breach of the Constitution in this appeal.

(iv) Breach of the guaranteed right to liberty under sections 13 and 14 of the Constitution resulting from the provisions in section 31(3)

[236] Provisions similar to section 31 of JAJA exist in several Caribbean territories and the interpretation of the section has been the focus of Privy Council decisions in several cases. The complaint by this appellant, calls for an examination of whether the application of the section breached sections 13 and 14 of the Charter of Rights. The appellant maintained that any period of incarceration which was not treated as part of his sentence was unconstitutional and that section 31(3) was not a fair procedure established by law.

[237] The Privy Council considered a similar provision in the Supreme Court of Judicature Act of Trinidad and Tobago (section 49 (1)) in the case of **Ali v State; Tiwari v The State**, and sought to give guidance to jurisdictions with similar provisions on the correct approach to adopt in the application of such provisions for "loss of time" orders. The Privy Council advised that backdating sentences to the date of conviction should not be restricted to exceptional cases. "Loss of time" orders, the Board said, should be proportionate, in that they should impose a penalty for bringing or persisting with a frivolous appeal, which "fairly reflects the need to discourage" the waste of the courts time without unfairly extending the prisoner's term of imprisonment for a long period of time. The Board was of the view that such orders should not exceed a few weeks in the majority of cases and should only be made with regard to the abuse they were meant to curb. It was also wrong in principle to take account of the heinous nature of the crime or the prisoner's lack of remorse or his conduct after conviction. The Board considered that the discretion should only be exercised to add the time spent awaiting appeal to the sentence if "the appeal is one devoid of merit". It concluded that in Tiwari's case there was no evidence of a deliberate attempt to deceive the appellate court, and it could not be said his appeal was devoid of merit. The Board held that the

time added to the sentence must be proportionate to the purpose of the section which was to deter frivolous appeals. In both cases, it was ordered that the full term between conviction and appeal should count towards the sentence.

[238] In **Bhola v State**, the Board made it clear, that the sentence should be backdated to the point of conviction since it could not be said that the appellant's appeal was "frivolous or time-wasting" and that there was no basis for the court of appeal not to have given the requisite direction "to ensure that the appellant was not penalized as to his time in custody through having exercised his right of appeal". This was in keeping with its decision in **Ali v The State; Tiwari v The State**. The same approach was taken, by the Privy Council, in **Carlos Hamilton and Jason Lewis v The Queen** [2012] UKPC 31, at para. 67, which was a case on appeal from this court's decision to give credit for all but three months of the time spent in custody awaiting the determination of the appeal. The approach of the Board in its application of the provision was applied by this court in **Tafari Williams v R**.

[239] The approach of the Board is consistent with that of the European Court of Human Rights taken in **Monnell and Morris**. In that case, the ECHR was of the view that the periods of detention not counted towards the service of the applicants' sentences of imprisonment fell within the ambit of Article 5(1)(a) and pursued a legitimate aim when "exercised to discourage abuse of the court's own procedure". The ECHR concluded that loss of time orders under section 29(i) of the Criminal Appeal Act was consistent with article 5(1)(a).

[240] The issue was reconsidered in the case of **Duncan and Jokhan**, which was a case that came on appeal to the Privy Council from the Court of Appeal's decision in a constitutional motion. In that case, the Court of Appeal of Trinidad and Tobago, having heard the appellants' appeals against conviction and sentence dismissed them, but failed to consider the exercise of its discretion under section 49(1) of the Supreme Court of Judicature Act of Trinidad and Tobago, as it should have done, in keeping with the precedent set by the Board in **Ali v The State, Tiwari v The State** and **Bhola v**

State. The Court of Appeal had simply applied the general rule in section 49(1) which meant that the time spent by the appellants in prison awaiting their appeals to be heard did not count towards their sentence. As a result of this failure, the appellants were imprisoned for a period beyond the date on which they should have been released had the Court of Appeal exercised their discretion, as they ought to have done. Their appeals against conviction and sentence were dismissed by the Privy Council. The appellants brought a constitutional motion claiming a violation of their right to liberty under section 4(a) of the Constitution of Trinidad and Tobago and sought orders for their immediate release as well as for compensation. The constitutional motion was heard and dismissed both by the Supreme Court and the Court of Appeal. On appeal to the Privy Council, the Board had to consider the application and effect of section 49(1) of the Supreme Court of Judicature Act of Trinidad and Tobago, which is similar to section 31(3) of JAJA, and the effect of its application on section 4(a) of the Constitution of Trinidad and Tobago (right to life, liberty, security of the person and enjoyment of property).

[241] The Board held, at para. 31 of that case, that there had been no violation of section 4(a) of the Constitution at the point at which the Court of Appeal hearing the appellant's appeals against conviction and sentence had to consider what to do pursuant to section 49(1). The Board said that the "legal system as it operated at that stage, made it possible for the law to be applied properly and with due respect for the right to liberty and security of the person which due process of law was supposed to provide. The legal system as a whole was held not to be unfair at this stage.

[242] At para. 32 of that case, the Board went on to say:

> "It seems to the Board that the position might have been otherwise if the legislation made the general rule in section 49(1) a mandatory blanket requirement with no possibility of relaxation, since the effect of that would have been tantamount to making the legitimate exercise of appeal rights in circumstances where the appeal was unsuccessful into a punishable offence. Although the analysis in *Ali* was

> directed to section 49(1) and the Board did not need to address constitutional arguments which were raised in the appeal, the reasoning of the Board tends to support the view that a mandatory blanket requirement to issue a loss of time direction in every case would have been incompatible with section 4(a)."

[243] The Board in coming to this view considered the decisions of **Ramesh Lawrence Maharaj v The Attorney General of Trinidad and Tobago (No 2)** [1979] AC 385, and **Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago and another; Trinidad and Tobago News Centre Ltd and others v Attorney General of Trinidad and Tobago and another** [2005] 1 AC 190. At para. 20, the Board quoted Diplock LJ in **Maharaj (No 2)**, where he said:

> '"…no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. **The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by [section 4(a)]; and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice**.
>
> …
>
> … even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 [now section 14 of the Constitution] unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or

order cannot be put right on appeal to an appellate court…'"
(Emphasis added)

[244] The reasoning in those authorities on the application and effect of the provisions similar to section 31(3), seems to us to be a full answer to the claim that section 31(3) is unconstitutional. The provision is not a mandatory blanket requirement. The purpose and interpretation of section 31(3) was fully traversed in **Tafari Williams v R** and more recently in **Ray Morgan v R** [2021] JMCA App 15, particularly at paras. [23] to [26] and **Jerome Dixon v R**, particularly at paras. [257] to [276] and [278] to [287].

[245] The appellant, in this case, was imprisoned under a lawful sentence, after a fair trial by a court of competent jurisdiction, in keeping with section 14 of the Constitution. He exercised his right to have that sentence reviewed. His sentence was not suspended, as he claimed, by virtue of that exercise but his treatment whilst incarcerated was impacted. His appeal was conducted fairly and without any procedural error. There was no subversion of due process and to that extent his constitutional right to liberty was not infringed by the operation of the section. Section 31(3) provides for how he, as an appellant is to be treated whilst incarcerated awaiting the disposal of his appeal. The section affords an appellant the right to special privileges. It does not take away any rights or liberties. The authorities cited in this case, hold that the provision serves a useful purpose. The provision that this period should not count as part of the sentence is not mandatory. As stated by the Privy Council, 'loss of time' orders do carry a risk of oppression but do not breach any right to liberty, if the orders are not made indiscriminately.

[246] This court has long since adopted a general practice of not making "loss of time" orders and has generally exercised a discretion to order that sentences be reckoned to commence from the date on which they were imposed. The appellant could not show how he was in jeopardy of a loss of time order being made against him to his detriment. In this case, where no allegation had been made that the appeal was frivolous and vexatious and brought in order to manipulate or abuse the court's procedures, this court would have been obliged to backdate the appellant's sentence to

commence at the date of its imposition (see **Carlos Hamilton and Jason Lewis v The Queen** at paras. 67 to 70). There was no basis for this court to conclude, therefore, that section 31(3) is inconsistent with any guaranteed rights under sections 13 and 14 of the Constitution as complained of or that the appellant was deprived of his liberty by the unlawful application of the provision.

(v) Breach of the reasonable time guarantee, the right to due process and the application of the provisions of section 31(3)

[247] In respect of the delay, we accepted that the right to a fair hearing within a reasonable time extends to the hearing of appeals, notwithstanding that section 16(1) and 16(8) of the Constitution do not explicitly say so. The authorities are replete with affirmations of this interpretation of the reasonable time guarantee (see **R v Pigott**, **Singh v Harrychan**, **Solomon Marin**, **Tapper v DPP**, **Attorney General Reference No (2)** and **Gibson v Attorney General of Barbados** (2020) 76 WIR 137, at para. 46).

[248] A breach of the reasonable time guarantee lies in the failure to conduct the appellant's trial timeously. Separately, there is the right to due process from a fair hearing. Therefore, any breach calling for a remedy, could comprise the State's failure to ensure that the appellant's trial, including his appeal, took place, fairly, or within a reasonable time, or before an independent and impartial tribunal (see **Attorney General's Reference (No 2)**, at para. 40). All three are separate and independently guaranteed rights.

[249] The appellant was convicted on 11 June 2015 and sentenced on 17 July 2015. He filed a notice of application for leave to appeal and grounds of appeal on 26 July 2015. The transcript was received by the court on 21 July 2020, by the Crown on 23 October 2020 and by the appellant on 25 March 2021. There was, therefore, a five-year delay in the production of the transcript, during which period, the appellant had served his full sentence on one count of the indictment for which he was convicted, and had reached his early release date on the second count.

[250] In this case, there was a delay in the hearing of the appellant's appeal due to the systematic failure of the State to provide the necessary transcripts, as requested. In fact, so egregious was the delay, that the period of incarceration for his conviction on the second charge was in danger of expiring, before his appeal was heard. Therefore, there is no dispute in this case that there was a delay. Equally, there was no dispute that the delay was caused by the failure of the State apparatus. There was also no dispute that this court had the jurisdiction to deal with an assertion by the appellant that his constitutionally guaranteed right to a fair hearing within a reasonable time had been breached due to the delay in the hearing of his appeal caused by the failures of the State. The dispute was largely whether, as a result of the delay, the appellant could not have been afforded a fair hearing and, if so, what was the appropriate remedy. The appellant's appeal had been expedited, following the late receipt of the transcript of his trial, which was in and of itself a remedy, but, nevertheless, the appeal was heard after there had been substantial delay.

[251] The effect of delay and the remedy it calls for, has to be determined in each case on its own facts. In the appellant's case, the delay in the provision of the transcript did not affect the fair hearing of the appeal, as, as soon as the transcript was received, the appeal was expedited and he was given a fair hearing. Although the appellant complained that he had not received some record of the judges notes in the court below, pursuant to rule 3.9 of the CAR, he did not assert that any such record had been made by or on behalf of the court separate from the transcripts which he received. Nor is it a known practice for any such report or judges notes to be made or requested by the registrar of this court in criminal cases, in addition to the official transcript of the criminal proceedings.

[252] The delay in the provision of the transcript did not prejudice the appellant in the hearing of his appeal, nor did it affect the fair hearing of the appeal, therefore, although there was a delay, there was no basis to draw the conclusion that as a result of that delay the appellant's right to a fair hearing was breached. The appellant failed to

show any connection between the application of section 31(3) and the breach of the reasonable time guarantee. Indeed, the appellant's convictions have been reckoned to commence from the date of his sentence. He, therefore, failed to show that the hearing of his appeal in those circumstances, was an abuse of the process of the court.

[253] We, however, gave anxious consideration to what the appropriate remedy, if any, for the breach of the reasonable time guarantee caused by the delay, ought to be.

(vi) <u>The appropriate remedy for the breach of the appellant's reasonable time guarantee</u>

[254] Barrow JCCJ, in **Solomon Marin**, at para. [115], and Anderson JCCJ, at para. [145], both referred to the case of **Anthony Evans v Attorney General** (unreported), Court of Appeal, Commonwealth of the Bahamas, SCCR App No 181 of 2010, judgment delivered 6 December 2018, wherein that Court of Appeal found that the failure of the legal system to hear the appeal for more than eight years was a breach of the constitutional right to a fair trial within a reasonable time for which the appellant should be "compensated". In so concluding, the court relied on this court's decision in **Tapper v DPP**, as noted in the Privy Council's decision, that a reduction in the sentence would be sufficient to compensate the appellants for the effects of the delay, and also took note of the fact that the Board did not disturb that decision. The compensation afforded Evans by the Bahamian Court of Appeal was a reduction in his sentences from life imprisonment for murder and armed robbery, to a term of 40 years and 25 years respectively.

[255] The mere fact that there was a breach of the reasonable time guarantee does not mean that the appropriate remedy is a quashing of the conviction or a stay of further proceedings (see Anderson JCCJ at para. [187] in **Solomon Marin**; **Gibson v Attorney General of Barbados** [2010] 76 WIR 137, at paras. 53 to 68 and **R v Pigott**), nor even in cases of long and extreme delays (see **Tapper v DPP**). Despite the decision in **Darmalingum**, the quashing of a conviction or a stay imposed on the grounds of delay or for any other reason, should only be considered and granted in

exceptional cases (see **Attorney General's Reference** (**No 1 of 1990**) [1992] 3 WLR 9).

[256] In **Tapper v DPP**, the Board considered the possible range of remedies available in cases of a breach of the reasonable time guarantee, depending on the stage at which the breach occurred. In cases where the breach occurred after there had been a hearing, the Board said, the appropriate remedies could include; a public acknowledgment of the breach; a reduction in the penalty imposed or in the case of an acquitted defendant, a payment of compensation. These remedies would be granted to vindicate the right which had been breached. The Board pointed out, however, that unless the hearing had been unfair or it would have been unfair to try the defendant at all, quashing a conviction was not an appropriate remedy. At para. [28] of **Tapper v DPP**, the Board opined that the decision in **Darmalingum**, as an authority, has been "reduced almost to a vanishing point", in the light of the decisions in **Attorney General's Reference (No 2)** and **Boolell**. It went further to state that the law in Jamaica is as stated in those two latter cases. The court, in the case of **Pigott** (at para. 44), in considering the decisions in the **Attorney General's Reference (No 2)**, **Elaheebocus**, **Boollel** and **Aubeeluck**, concluded that those cases had established that a breach of the reasonable time guarantee does not automatically result in the quashing of a conviction, which was otherwise sound.

[257] In **Pigott**, the appellant had served his sentence before his appeal was heard and at the hearing of the appeal he sought to have his conviction quashed solely on the basis of the delay in the hearing of his appeal. The evidence that had been led against him, at his trial, was described as "overwhelming". His conviction was affirmed and monetary compensation was thought to be inappropriate in those circumstances. Since the appellant had already served his full sentence, it was not possible to vary it and it was, therefore, held that a declaration was the most appropriate remedy.

[258] In **Gibson v Attorney General of Barbados**, the CCJ recognized that effective remedies were available for post-conviction delay but that these had to be carefully

fashioned, taking into account the public interest and the rights and freedoms of the individual. The court said that a permanent stay or a quashing of the conviction was not the inevitable consequence of unreasonable delay which resulted in a breach of the reasonable time guarantee where a fair hearing was still possible. The remedy of a permanent stay or a dismissal for a breach of the reasonable time guarantee could only be available in those exceptional circumstances where to try the accused would be unfair or prejudicial (see paras. [62] and [63]). It also recognized, at para. [69], that damages may also be an appropriate remedy, depending on the circumstances.

[259] There have been, of course, cases where a stay was imposed but this is usually granted in cases where a fair hearing was no longer possible or where no other remedy would do. For example, in **Bridgelall v Hariprashad** (2017) 90 WIR 300, the court indicated, at para. [42], that its principal concern was with "fashioning a remedy that was effective given the unique features of the particular case" and decided that the appropriate remedy, in that appeal, would be to stay further action against the appellant, with respect to the enforcement of the imposed prison sentence. The same approach was taken in **Mark Fraser v The State** [2019] CCJ 17 (AJ). However, fashioning an appropriate remedy must be approached on a case-by-case basis. What may be appropriate in one case may not be appropriate in another.

[260] In **Solomon Marin**, at para. [114], the CCJ, in deciding on an appropriate remedy, considered the factors which ought to be taken into account. The court referred to the need to balance the public interest in ensuring that convicted criminals serve their full sentence, against the public interest in ensuring that constitutional rights are safeguarded. At para. [159], Anderson JCCJ considered the question of whether there were any limits to the power of the appellate court to craft a remedy for redress of a constitutional wrong. At para. [188] he indicated that the remedies included a declaration, an award of damages, a stay of proceedings, the quashing of the conviction or a combination of some or all of those or some other remedy. In justifying the imposition of a remedy of a stay of further enforcement of the sentence for breach

of the reasonable time guarantee, the CCJ, at para. [119] pointed to the fact the delay could not be undone and that Mr Marin was entitled to compensation for the breach and, more fundamentally, to an effective remedy which recognized that to leave the threat of further imprisonment over his head would compound the delay and be a further breach of due process.

[261] With respect to the appellant in this case, the time for him to be considered for early release was in March of 2020, which time had passed, before the hearing of his appeal. The latest date for early release being June 2020. Early release is dependent on the Correctional Institution (Adult Correctional Centre) Rules, 1991, made pursuant to section 81 of the Corrections Act. Based on rule 178, a prisoner may earn early release depending on the correctional services assessment of his or her good behaviour. Section 21 of the Corrections Act provides for every inmate to be released immediately on his becoming entitled to release, including by remission of sentence. Section 35 of the Corrections Act provides for the circumstances in which remission may be forfeited. The appellant asserted, in his affidavit, however, that he would have been considered for early release in or around March of 2020 but for the delay in his appeal. There was no challenge to this assertion from the Crown. There was no evidence provided by the State that the appellant was not likely to have been granted early release, if he had not appealed or that there were any existing circumstances which would cause his remission to be forfeited. We received no report from the prison authorities regarding the appellant's ineligibility for release. If the appellant had been required to serve his full sentence, his release date would have been in July of 2022.

[262] We took into account the fact that the appellant was in custody by due process of law, having been tried and convicted in a fair trial by an impartial tribunal, and that his convictions have been upheld (see **Forbes v Attorney General of Trinidad and Tobago** [2002] UKPC 21]). In **Forbes v Attorney General**, the appellant who had previously had his conviction overturned by the Privy Council on the basis of a Magistrates failure to comply with his statutory obligation to give reasons for his

decision, filed two constitutional motions alleging various breaches of his constitutional rights and claiming monetary compensation. The question was whether a person who had served a term of imprisonment before his sentence is quashed on appeal has been deprived of his constitutional rights to due process and the protection of the law, or whether the errors were remediable within the judicial system itself. The motions were dismissed by the judge at first instance and by the Court of Appeal. The Board in determining the question, the matter having been appealed to the Privy Council, considered that a similar question had been raised in **Maharaj (No 2)** [1979] AC 385, **Chokolingo v Attorney General of Trinidad and Tobago** [1981] 1 ALL ER 244 and **Boodram v Attorney-General of Trinidad and Tobago and another** [1996] AC 842. Having considered those cases, the Board held that the appellant had been deprived of his liberty after a fair and proper trial under due process of law. He was able to challenge his conviction by way of an appeal which was conducted fairly. He enjoyed the full protection of the law and its internal mechanisms for correcting errors in the judicial process. The Board found, therefore, that his constitutional rights had not been infringed and he was not entitled to compensation. The Board held that the Courts of Trinidad and Tobago were right to dismiss his constitutional motions.

[263] In the instant case, the appellant asserted that the delays in the system had resulted in him failing to secure an early release, where there would have been no justification for his imprisonment beyond his eligible date. He was also unable to secure his release on bail, pending his appeal. At the point at which his appeal had been heard, his date for early release had passed. For a period of time, therefore, the system did not operate, as it should have.

[264] In **Duncan and Jokhan**, the effect of the order made by the Court of Appeal, was that the appellants sentences were not calculated to run from the date they were imposed by the trial judge. The practical effect of this, was that, whereas the appellants should have been released on 4 June 2009, making allowance for the reduction of the

sentence for good behaviour, they were instead released on 30 November 2011. At para. 36 of their decision, the Board said:

> "[B]y virtue of the fundamental nature of the right to liberty and security of the person and its due protection by law it is of great importance that an individual who is detained and claims the detention is unlawful should be able to come to court very quickly to test the matter and secure their prompt release if there is no proper or sufficient justification in law for their detention. That was the objective of the habeas corpus statutes, and the value accorded by them to vindicating the right of liberty has been recognised by the common law over centuries. It is also inherent in the European Convention and the ICCPR. Similarly, it has been identified by the Board in *Maharaj (No 2)* and *Independent Publishing* as inherent in the Constitution, particularly as reflected in section 4a and section 14. The ability to apply promptly for bail where a court has ordered detention of an individual is the functional equivalent of a prompt application for habeas corpus in other contexts involving detention."

[265] At para. 37, the Board indicated that the ability to apply for bail strikes a balance between liberty and the due application of the law, where a court may have made an error. Later, at para. 38, the Board said this:

> "Two points may be made. First, the legal system as a whole will be unfair and there will be a breach of the right under section 4(a) if there is no avenue allowing a prompt application for bail to be made and heard pending the hearing of an appeal against conviction or sentence, in order to provide the possibility for speedy release where it can readily be identified that a court has made a serious error of law."

[266] Further, at para. 39, it was said that:

> "… [I]n so far as a claimant seeks to rely on a violation of section 4(a) as the basis for a claim for monetary compensation pursuant to section 14 of the Constitution, as distinct from immediate release (bail) he or she would have to show that the absence of the ability to apply for bail had caused them loss. To do that they would have to show (a)

> that they would have moved to apply for bail, if afforded the opportunity, and (b) that they would have to obtained bail if they had been able to apply for it."

[267] At para. 40, it was said that whilst the absence of the right to apply for bail pending the hearing of an appeal constitutes a general problem with the legal system as a whole, it is only at the point when an individual would have wished to exercise such a right that he or she is denied "due to process of law" to protect their liberty and security of their person. Having considered the time at which the appellants asserted their claim to immediate release, they having not done so before that time, the Board said further of the appellants in that case, that:

> "Accordingly, it is only as from these dates that the appellants can say that their constitutional rights to protection by "due process of law" under section 4(a) came to be infringed in their particular cases. They suffered a personal violation of their constitutional rights at those times by reason of the inability of the ordinary legal system to react to their complaints of unjustified detention when they made them, and this entitled them to seek to vindicate their rights to liberty at that point by assessing their rights under the constitution."

[268] Then at para. 41 the Board said:

> "Again, however, it should be pointed out that the absence of a right to apply for bail means that the individual is deprived of the opportunity to seek to persuade a court that the error is serious or obvious enough to warrant the making of an order to restore their liberty straightaway**. The right to 'due process of law' under section 4(a) is a right to be able to have the question of immediate release pending the hearing of an appeal tested before a court, not a right in every case to be released pending the hearing of the appeal**." (Emphasis added)

[269] The Board recognized (see paras. 45 to 46, as well as 49) that even though the appellants could have sought their release by an appeal to the Board, that did not dilute the fact that the "loss of time" orders had a practical impact on them which was

ongoing and that had they been able to apply to the court for bail, it would have been granted. The Board found that there was no sound legal justification for their continued incarceration, after 4 June 2009, and that they were entitled to seek to vindicate their rights at any time thereafter. The Board expressed the view that the appellants had established that they suffered material harm, by reason of the absence of a right to apply locally for immediate release (by means of an application for bail, the Court of Appeal being *functus*, having delivered its judgment), and were entitled to monetary compensation, in respect of that harm. The period for that compensation was to be calculated from the date they had asserted their individual right to be released, by letter to the Attorney General dated 23 March and 21 June 2020, respectively. The matter was remitted the High Court for assessment of damages.

[270] In coming to its decision, in that case, the Board was careful to make a distinction between cases where persons were detained in the past under loss of time orders and had not sought their release, and those currently in custody pursuant to such orders. The former, it was said, were not entitled to compensation and the latter could seek immediate release from continuing detention, by constitutional motion, as a remedy. The Board made it clear that if a person was subject to ongoing detention by virtue of such orders, which are unjustified and unlawful, and seeks release, he may be entitled to monetary compensation for the continuing violation of rights, at that stage, if his claim for release is resisted by the State.

[271] In that case also, the Board recognized that imprisonment might take effect before an appeal could be heard, but that it was not in every case that constitutional relief would be awarded. It considered two cases, that is, **Maharaj (No 2)** and **Independent Publishing**, both of which involved committal for contempt of court, where the imprisonment took effect before the appeal. In the former, there was no right of appeal or right to bail pending appeal from the High Court judge's finding of guilt for contempt of court, and Mr Maharaj had served his sentence before his appeal was heard. The contravention of his rights, as found by the Board, was in the past and,

therefore, there was no other "practicable form of redress" other than monetary compensation. In the circumstances which befell Mr Maharaj, a constitutional claim would have been the only appropriate means of seeking relief for the violation of his rights under the right to liberty provision in the Constitution, because, as there was no other avenue of redress, the system could be characterized as unfair. The Board recognized that, in the case of Mr Maharaj, his sentence had been unlawfully imposed and had been fully served before the determination of the appeal, in breach of fundamental principles of justice and hence in violation of his right under section 4(a) of the Constitution of Trinidad and Tobago. This, however, as made clear in para. [87] of **Independent Publishing,** was not the basis of his right to be compensated. His right to compensation arose because the system was not able to address the contravention of his right to due process, because he had no right of appeal and no right to bail. The appellant was, therefore, entitled to seek monetary compensation, under the Constitution, for the inability of the system to correct the wrong. The Constitution provided a "gap filling" right of redress in cases under section 4(a) of the Constitution, where ordinary legal regime did not sufficiently protect the interests which the section required be protected by due process of law.

[272] The Board also recognized that, whereas in **Maharaj (No 2)** there was no avenue of redress, except by a constitutional motion, in the case of **Independent Publishing**, that was not the case. In that latter case, one appellant was fined and the other was sentenced to 14 days. They both lodged appeals and after four days in prison, the incarcerated appellant was granted bail pending appeal. They also brought constitutional motions asserting their rights under section 4(a) of the Constitution of Trinidad and Tobago. The Board, hearing the appeal from the Court of Appeal's decision, distinguished this case from **Maharaj (No 2)** indicating that, unlike Mr Maharaj, those appellants had a right of appeal which each was able to secure promptly, using the ordinary avenue of redress available to them. This, the Board said, meant the system was fair, and therefore, no constitutional breaches had occurred. The Board determined that, the appellant who had spent four days in jail, before bail was

granted, was in no different position from a person who had been convicted, imprisoned, and acquitted after a successful appeal but who was not entitled to compensation under the Constitution. The ordinary processes of a fair appeal offered the appellants an adequate opportunity to vindicate their rights.

[273] The Board in **Maharaj (No 2)**, had made it clear, at page 399, that it was only in cases of imprisonment or corporal punishment already undergone before an appeal could be heard, that the consequences of such could be put right by an appellate court. At page 400, the Board indicated the type of compensation which would be available for such a claim for compensation in public law, which, it said, were not at large.

[274] It must always be made clear, that convicted persons who have an avenue of appeal and who, even if they are ultimately successful and are acquitted, cannot, ordinarily get compensation, by alleging breaches of the Constitution, for the time spent in prison before they are acquitted on appeal. As noted by the Board, in **Independent Publishing**, at para. 89, the authorities on that point are clear. For such persons the ordinary appellate process operates to vindicate their rights.

[275] Although the dicta in **Duncan and Jokhan's** case was in respect of a breach of the right to liberty clause under the Constitution, and the failure of the court to move quickly to correct errors of law (unlike in this instance where we are considering a breach of the reasonable time guarantee), we found that there was much persuasive and applicable wisdom in the dicta.

[276] In this case, due to the delay in the hearing of his appeal, the appellant applied for bail, under the Bail Act and it was refused in April of 2020, as he was not entitled to it by virtue of section 13 of that Act. Bail being a safety net, and his application having failed as a result of his lack of entitlement under ordinary law, the only other means of seeking release was by a constitutional motion or an expedited appeal.

[277] The effect of a delay can usually be alleviated or corrected where necessary or required. In the appellant's case, the delay in hearing the appeal had a practical impact

on him. It meant that he was left in danger of not only serving his sentence imposed by law but as long as the delay continued, the appellant was in jeopardy of having to serve an unnecessary additional period of incarceration, without justification. In his affidavit to this court, the appellant maintained that had he been eligible to apply for bail it is likely that, in the circumstances of the delays in his case, he would have been granted bail. Indeed, the single judge who heard the application for bail noted that there were exceptional features in the case for the grant of bail, had he been entitled to it. Therefore, from the date of his application for bail pending appeal, notice was given to the State that the delay was causing hardship to the appellant and that his continuing detention after March 2020, the earliest time for him to be considered for early release under the Correctional rules, may have been unjustified. The State did respond by expediting the hearing of the appeal but by that time the appellant's rights had already been infringed, since at the time he received the transcript of his trial, the date for him to be considered for early release had already passed, due to the delay. Although he did not file a constitutional motion, it is unlikely that such a motion would have been responded to by the State and heard by the courts, before the appeal was heard.

[278] The appellant having established that there was an inordinate delay in the hearing of his appeal, that this delay had resulted in his incarceration beyond the point at which he was entitled to be considered for early release, and that he had no right to be considered for release on bail pending appeal, the appellant successfully established that the delay was a breach of his reasonable time guarantee, resulting in prejudice to him. This entitled him to seek to vindicate those rights under the Constitution.

[279] The Board in **Duncan and Jokhan**, at para. 35, reiterated that the Constitution "affords no general right to be paid compensation by reason of the fact that the offending order was given effect for a period of time before being corrected", and in cases where the conviction is upheld, such compensation would be inappropriate. Although this was a reference to the Constitution of Trinidad and Tobago, it would be applicable to most, if not all, the Constitutions of the Commonwealth of Nations, whose

legal systems are similar in nature. Even in cases of acquittal, monetary compensation is not the norm, once the system has been able to act to correct the errors, through the appellate process. However, "an individual who is detained and claims the detention is unlawful should be able to come to court very quickly to test the matter and secure their prompt release if there is no proper or sufficient justification in law for their detention" (see **Duncan and Jokhan** at para. 36)

[280] In **Duncan and Jokhan,** the court made it clear that the absence of a right to apply for bail meant that an individual would be deprived of the opportunity to seek to persuade a court that there was a serious error which would "warrant the making of an order to restore their liberty immediately" (see para. 41). It was said that "the right to due process of law" under the right to liberty provisions is to be able to have the question of immediate release pending the hearing of an appeal tested before a court. We saw no reason why this reasoning should not be applied to the reasonable time guarantee, if the effect of a delay is serious enough or obvious enough for an order to alleviate the situation to be made.

[281] In **Maharaj (No 2),** at page 398, the Privy Council said:

> "What then was the nature of the "redress" to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford English Dictionary, 3rd ed. 1944 is given as: 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss resulting from this'. At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. **The contravention was in the past; the only practicable form of redress was monetary compensation.** It was argued on behalf of the Attorney-General that section 6(2) does not permit of an order for monetary compensation despite the fact that this kind of redress was ordered in *Jaundoo v. Attorney-General of Guyana*. Reliance was placed upon the reference in the subsection to "enforcing, or securing the enforcement of,

> any of the provisions of the said foregoing sections." (Emphasis added)

The Privy Council noted, in that case, that a critical aspect of the case was that Mr Maharaj had had no right of appeal against his conviction and sentence of committal for contempt of court and no right to apply for bail pending appeal.

[282] In the instant case, it had been suggested that an order for monetary compensation for time spent incarcerated beyond the appellant's date for early release was not appropriate, based on **Paul Chen-Young** and **Dawn Satterswaite**, at paras. 188 to 189, where the court agreed with the reasoning in **Paul Chen-Young**, that any assessment as to whether compensation should be made, ought to be done in the Supreme Court. It was submitted that the extent of this court's remedy, should be an acknowledgment of the breach. As said previously, in **Independent Publishing**, at para. 89, the Privy Council stressed that convicted persons "cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison. The authorities are clear on the point". With this clear statement of the law, we agree. However, this is not the case with this particular appellant, and as said earlier, each case must be determined on its own facts. In those cases, the system was able to respond to right itself. In the case of the appellant, the complaint was in regard to the delays in the system, where the system was unable to respond, at the time he asserted his right to have his appeal heard within a reasonable time.

[283] In our view, the appropriate remedy, in the light of the fact that the appellant's time to be considered for release passed before the hearing of his appeal, and he could not get bail pending appeal, is a declaration of the breach and a declaration that he is entitled to compensation in respect of that breach. The period that entitled him to compensation was from the date of the failed application to be considered for bail, to the date of the decision of this court.

[284] We agreed with the Board's observation in the case of **Independent Publishing**, that it is unacceptable that an appellant, waiting for his appeal to be

heard, should have to face the prospect of being forced to serve the entire sentence whilst so waiting. We took the view, also, that the appellant, having missed the opportunity to be considered for early release due to the delays caused by the failure of the State apparatus, should not be made to face the jeopardy of any further incarceration and, therefore, his immediate release should be secured.

Whether section 13 of the Bail Act is unconstitutional

[285] Mr Williams argued that bail should be reconsidered in relation to the appellant, as bail, pending appeal, should not have been denied. He submitted that, the interpretation of section 13 of the Bail Act in a manner which led the single judge of appeal to find that the Court of Appeal had no jurisdiction to grant bail where the appellant had not been previously admitted to bail prior to his conviction, was repugnant to the appellant's right to equal treatment under the law.

[286] Counsel submitted that, if section 13 of the Bail Act restricted this court's power to grant bail where an applicant had not previously been admitted to bail during trial, as was the case with this appellant, and as it was in **Ray Morgan v R**, then that provision is unconstitutional and of no effect. Counsel argued further, that such an interpretation of section 13 of the Bail Act, had significant implications for delayed appeals and the operation of section 31(3) of JAJA. He submitted that the grant of bail was recognized, in the case of **Tapper v DPP**, as a common law remedy in cases of inordinate delay. The absence of this relief, in this case, by the interpretation placed on the section, he said, was unconstitutional.

[287] Further, counsel argued, the inability of the appellant to get bail in the circumstances of his case, contravened the equality principle, in that it places appellants in separate categories without any rationale justification. There was no rationale, it was argued, for a category of persons who could never get bail, even in circumstances where their detention had or may soon have exceeded their sentence, due to a delay on the part of the State in hearing their appeal.

Disposal

[288] It is important to note that section 14 of the Constitution does not guarantee an entitlement to bail to a person convicted of an offence. Section 14(4) states that "[any] person awaiting trial and detained in custody shall be entitled to bail on reasonable conditions unless sufficient cause is shown for keeping him in custody". The appellant, having been already tried and convicted, does not fall into this category.

[289] Nevertheless, despite counsel's spirited arguments, we declined to rule on the constitutionality of section 13 of the Bail Act. We took the view that this appeal was not the proper forum for such a challenge, as this issue did not directly arise in nor does it directly affect this appeal.

Conclusion

[290] It was for the foregoing reasons that we made the orders set out at para. [6] above.