[2022] JMCA Crim 24

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 88/2014

TROY BARRETT v R

Kemar Robinson for the applicant

Mrs Kameisha Johnson O'Connor for the Crown

10 May 2021 and 8 April 2022

BROWN BECKFORD JA (AG)

Introduction

[1] On the evening of 12 December 2010, a terrifying ordeal began for Mrs Sylvia McDonald. It culminated in her husband, Mr Neville McDonald, being found dead the following morning from gunshot wounds. Mr Troy Barrett ('the applicant') was charged and convicted for Mr McDonald's murder, after a trial by a judge sitting with a jury on 10 October 2014 in the Circuit Court Division of the Gun Court for the parish of Saint James. He was sentenced to life imprisonment at hard labour with the stipulation –"not eligible for parole until 25 years have been served".

[2] By way of an application for leave to appeal dated 23 October 2014, the applicant sought permission to appeal his conviction and sentence on four grounds of appeal as follows: (1) unfair trial, (2) insufficient evidence to warrant a conviction, (3) conflicting

statements and (4) further grounds to be filed by my attorney upon (receipt) of the transcript.

[3] Permission for leave to appeal having been denied by a single judge, the applicant renewed his application for leave to appeal before the court, which he is given the right to do under section 13(1)(b) of the Judicature (Appellate Jurisdiction) Act.

[4] At the hearing of the application on 10 May 2021, Mr Kemar Robinson, counsel for the applicant, sought and was granted permission to abandon the original grounds of appeal on the Form B1 and to argue the four supplemental grounds of appeal as filed, which are set out below:

> "(1) unfair trial;
>
> (2) the evidence does not support a verdict of guilty which was compounded by the fact that the learned trial judge failed to sufficiently address the material inconsistencies and discrepancies on the Crown's case;
>
> (3) the sentence is manifestly excessive; and
>
> (4) the applicant should benefit from the current law on joint enterprise which, if was settled at the time of his trial, would have allowed the applicant to benefit from the lesser offence of manslaughter being left for the jury's consideration."

[5] After taking time to consider the submissions of both counsel, this court made the following orders on 10 May 2021:

> "1. The application for leave to appeal conviction and sentence is refused.
>
> 2. The sentence is reckoned as having commenced on 10 October 2014."

We promised to provide our reasons in writing. This judgment is in fulfilment of that promise.

[6] A summary of the case for both the prosecution and the defence at the trial sets the background for the application.

The prosecution's case

[7] At trial, the prosecution's case was presented mainly through the evidence of two eyewitnesses Sylvia McDonald and Vanessa Williams; Detective Corporal Joseph Spence, the first responding police officer; and Dr Murani Sarangi who performed the post mortem examination on the body of Mr McDonald ('the deceased'). Their evidence is summarised below.

Sylvia McDonald

[8] Mrs McDonald gave evidence that she was at home with the deceased and their two grandchildren. Sometime between 6:30 pm and 6:45 pm, she was in her bedroom watching television with the deceased. After the completion of "Hill and Gully Ride", the programme they were watching, the deceased went to shower. He returned and closed the door. She heard a "boom boom" on their bedroom door. This sound, she said, was similar to someone attempting to "kick down" the bedroom door.

[9] The deceased then approached the door and appeared to look through a window. He asked her to pass him the machete which was under the bed. This she did. The deceased then went towards the grandchildren's bedroom. She then heard a sound as if the louvre blades in the window were being chopped. She also heard as if he jumped outside. She then heard three to four gunshots coming from the direction in which he ran, which she believed to be towards the fowl coop leading to the bush.

[10] When she heard these shots, she was leaving her bedroom and heading towards the grandchildren's room. She went outside the house and called the deceased's name about three times. When she heard no response, she returned inside. She went to the grandchildren's room where she saw the machete on the bed. She also saw blood all over, from the window to the room and on the bed where the machete was resting. After

seeing this, she called out to the grandchildren and found them in the closet in her room. She saw Vanessa praying and Oneisha using a phone to call the police.

[11] The police arrived and, along with community members who had gathered, they conducted a search for the deceased. They were not successful in locating him. However, a search on the following day revealed his body in an open lot about a quarter of a mile from his house.

Vanessa Williams

[12] Vanessa Williams gave testimony that in December 2010 she was attending high school. On 12 December 2010, she was at home with her grandmother, the deceased and Oneisha. Sometime around 6:30 pm and 6:45 pm, she was in the hall by herself doing her assignment. The room was lit by a 100-watt electric light bulb. Oneisha was previously in the living room with her for a time but then left. She was not sure where Oneisha went. She believed that her grandmother and the deceased were in their room watching television as they usually did.

[13] While sitting at the table doing her assignment, she heard a sound like a 'bang' coming from the door leading to the veranda behind her. The sound was as though someone was beating on a door or shaking something. She turned towards the door to look and when she did, someone put a gun to her head, commanding her not to move. A second individual then entered the room. He was also armed with a gun. He was about eight feet away from her and looking around. He was dressed in a hoody that covered his eyebrows to the middle of his forehead and a 'kerchief'. which covered his nose and his mouth to the back of his ears. These coverings left only his eyes in view. Whilst the second man was gazing around the room, the 'kerchief' fell from his face onto his chest. At that time, he was about seven feet from her. She was able to see this man's entire face and she realised that it was the applicant whom she had known for about nine years. They had both attended the same primary school and lived in the same community. She knew his name to be Troy Barrett otherwise called "Cruise". She stared at his face for about 25 to 30 seconds until she was forced to hold down her head by the man with the

gun to her head. She raised her head back up and saw the applicant fixing his 'kerchief'. She again stared at him and he pointed his gun at her, then held it back down. As he did so, she heard what sounded like gunshots coming from the veranda and saw someone with a gun run past the veranda towards the kitchen.

[14] The man who had the gun pointed at her head then took up her cell phone and ran towards the kitchen. The applicant stared at her and then walked briskly in the same direction. She heard her grandmother call her and Oneisha and she met up with her grandmother in the bathroom. Oneisha came out of her grandmother's closet and the three of them went outside through the back door where her grandmother then called out the deceased's name. She then heard three more explosions sounding like gunshots. All three went back inside the house.

[15] Upon returning inside, Vanessa Williams went into her room and observed that her window appeared "smashed out"; there was a machete and muddy footprints on the bed and blood on the door leading to her room. She then went into her grandmother's closet with Oneisha. Oneisha was calling the police while she prayed.

[16] The police arrived and a search was carried out on the same night for the deceased; however, he was not found. Another search was carried out on the following morning and his body was found. She did not tell the police that night that she recognised the applicant as one of the intruders. In fact, she told the police she did not recognise any of the men and that they had just passed through the hall. She said this was because she had to be careful with whom she spoke as she was scared they might return to kill her. She gave a statement to the police on 16 December 2010 in which she named the applicant.

[17] There were some conflicts in her evidence which manifested in cross-examination. She explained that this was due to the passage of time. She denied that she was making up the evidence as she went along.

Detective Corporal Joseph Spence

[18] The evidence of Detective Corporal Joseph Spence was that on 12 December 2010, he received a call to attend the home of the deceased. Upon arrival, he saw both Vanessa Williams and Mrs McDonald and they made a report to him. He then examined the room said to be occupied by Mrs McDonald and the deceased. He saw damage to a chest of drawers and a bullet warhead on the floor in front of the chest of drawers. He then proceeded to the adjoining bedroom, where he saw what appeared to be bloodstains on a bed leading to a window. He also saw the impression of a footprint in blood on the bed.

[19] He also observed that almost all of the glass louvre blades were now outside of the bedroom. Whilst outside, he saw a trail of blood leading to the bushes. He was part of the search team that conducted the search for several hours for the deceased. However, the deceased was not located.

[20] Based on information he received the following day, he returned to the area. A short distance from the house, he saw a crowd around the body of the deceased. The scene was processed, photographs were taken and the body was removed. He subsequently went to the Anchovy Police Station and made an entry in the station diary. He then handed over the matter to Detective Corporal Linton, the investigating officer.

Dr Murani Sarangi

[21] Dr Murani Sarangi, consultant forensic pathologist for the western region of Jamaica, conducted the post-mortem examination on the body of Neville McDonald. He noticed five gunshot wounds in total to the body of the deceased. Gunshot entrance wounds were seen to the front right side of the chest and the front of the abdomen. There were also three gunshot wounds on his hands which the doctor suggested were defensive wounds from the deceased trying to block bullets with both hands. Death was due to excessive blood loss or internal bleeding from gunshot wounds to the chest and abdomen.

The defence case

[22] A submission of no case to answer was made on behalf of the applicant at the trial, on the grounds that the evidence adduced by the prosecution, including the evidence of identification, was so manifestly unreliable that no reasonable tribunal could safely convict on it. After hearing the response from the prosecution, the learned trial judge ruled that there was a case for the applicant to answer.

[23] The applicant gave an unsworn statement from the dock, which is set out in full due to its brevity. He stated:

> "My name is Troy Barrett. I was born August the 8, 1993. I was picked up and taken from my home on the 24th of December and the policeman take me to the station, said he is going to charge me for murder. I am innocent. I never involve in any murder ever before and I don't know anything dat dey talking about."

The application for leave to appeal

[24] We will treat firstly with the grounds relating to the application for leave to appeal against conviction and then with the grounds regarding leave to appeal sentence.

Ground 1 – unfair trial

[25] Counsel for the applicant, Mr Robinson, submitted that the applicant did not receive a fair trial on the basis that: (i) his trial attorney did not properly put forward his instructions and defence for consideration by the jury and (ii) the absence of the station dairy at the trial impeded the applicant's case as it was needed to create doubt as to the credibility of the witness Vanessa.

(i) Conduct of Counsel

[26] The foundation of this contention is the affidavit of the applicant filed on 3 December 2020. In his affidavit, the applicant contended that Mr Morrell Beckford, his counsel at his trial, failed to properly put his case to the jury as:

i. His instructions were not put to the witnesses during the course of his trial;

ii. No witnesses were called to support any defence of alibi even though his counsel was aware that such witnesses were available;

iii. No witnesses were called to speak to his good character even though counsel again was aware that such witnesses were available; and

iv. That he was not advised that he could call witnesses to give evidence on his behalf.

[27] Mr Robinson submitted that while there was a general attack on the prosecution's case as it concerned the issues of credibility and identification by counsel at the trial, the specific instructions from the applicant were not put. This, he further submitted, was borne out by a perusal of the transcript, which showed that no witnesses were called on the applicant's behalf to support the defence of alibi and with regards to the issues of identification and credibility raised in his defence.

[28] Mr Robinson relied on the case of **Rohan Squire v R** [2015] JMCA Crim 27 in which Morrison JA (as he then was) explained at para. [19] that "it is open to this court to allow an appeal in an appropriate case in which complaint is made of the conduct of counsel on the ground that there has been a miscarriage of justice". Counsel, however, acknowledged that as said in the case of **Leslie McLeod v R** [2012] JMCA Crim 59, ('**Leslie McLeod**'), the cases in which the conduct of counsel could afford the prospect for a successful appeal must be exceptional. Counsel also relied on the cases of **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009, **Nigel Brown v The State** [2012] UKPC 2 ('**Nigel Brown**') and **Calvin Walker and Lorringston Walker v R** [2019] JMCA Crim

27 in relation to the approach to be taken by the appellate court when such allegations are made and the standard of competence expected from counsel at trial.

[29] Mr Robinson further submitted that the court, in making its determination as to whether to intervene in a case where the conduct of counsel is raised, ought to be guided by **Leslie McLeod** which directs at para. [64] that the court should look at "… (i) the impact which the alleged faulty conduct of the case has had on the trial and the verdict; and/or (ii) whether the misconduct alleged on the part of counsel was so extreme as to result in a denial of due process to the applicant".

[30] Mr Robinson contended that, in this case, the calling of witnesses to give evidence in support of the applicant's defence of alibi would have given the jury an opportunity to consider any weakness in the prosecution's case. Moreover, as credibility was one of the main issues in the trial, the calling of character witnesses would have allowed the jury to assess the applicant's case more favourably, as they would have considered the applicant's credibility and propensity to commit murder, especially as he was a minor at the time of the incident. Additionally, the learned trial judge may have been disposed to show leniency towards the applicant, had she had the benefit of hearing from character witnesses at the stage of sentencing. In support of this submission, counsel noted that in **Nigel Brown** the Privy Council said at para. 33 that:

> "33.…Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case."

[31] Mr Robinson concluded that the applicant's defence was, therefore, not conducted by his attorney in a manner that would cause the jury to give his case sufficient consideration and in such circumstances his trial was unfair.

[32] Counsel for the Crown, Mrs Johnson O'Connor, in her response to the applicant's submissions, relied on evidence from Mr Beckford contained in an affidavit filed on 30 December 2020. Mr Beckford asserted in his affidavit that:

i. he took written instructions from the applicant;

ii. the applicant did instruct him that persons were available to speak to his whereabouts on the night of the incident. He advised him to make the necessary arrangements to provide a further statement in relation to these persons and also for their statements to be collected;

iii. a further statement was recorded from the applicant and his mother. One of his proposed alibi witnesses also provided a statement in support of this defence. However, the applicant's father did not wish to provide a statement;

iv. no arrangements were made by the applicant or his parents to have any other person provide a statement in support of this defence. He recalled that the applicant advised that the persons noted in his further statement did not wish to get involved. He explained to the applicant and his parents, the importance of having witnesses at the trial to support an alibi defence;

v. having read the statement of the applicant's mother and interviewed her, he concluded that her evidence "even if accepted by the jury would not be very likely to assist in establishing that the applicant could not have been at the scene of the murder". Rather, calling her as a witness may have had a negative impact on the jury as they could have viewed this as a failed attempt to construct an alibi defence. Therefore, he thought, it would have been "imprudent and irresponsible" to call her as a witness to support an

alibi defence. This assessment was discussed with the applicant and his parents who appeared to understand and expressed no reservations or objection;

vi. It was the applicant who made the decision to give an unsworn statement. In respect of this, he advised the applicant to give a concise statement and not to provide details of an unsupported alibi defence which would give him little advantage but could be used negatively by the prosecution in addressing the jury;

vii. on the failure to call witnesses to speak to the applicant's character, he could not recall having any such discussion with the applicant. However, any such deliberation on his part would have taken into account that the applicant had been convicted of a minor offence at a young age and had been detained, though not charged, for robbery. The applicant was also viewed in an unfavourable light by the police. In light of this background, the prosecution could challenge any evidence of the applicant's good character;

viii. on the failure to call witnesses to speak to the applicant's character at the sentencing hearing, he could not recall having any such discussion with the applicant. However, it was his usual practice to call such witnesses and their absence was most likely due to the unavailability of such witnesses.

[33] Mrs Johnson O'Connor submitted that the court, in assessing whether the applicant should succeed on this ground, would need to consider: (i) whether the alleged act of incompetence fell below the standard of a reasonable attorney in the circumstances and (ii) whether the alleged incompetence had an adverse effect on the outcome of the trial, which caused the trial process to be unfair or denied the applicant due process.

[34] Reference was made to the case of **Paul Lashley and John Campayne v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) for the approach to be taken to these questions. There the court at paras. [11] – [13] stated that:

> "[11] In resolving both issues raised, the proper approach does not depend on any assessment of the quality or degree of incompetence of counsel. Rather this Court is guided by the principles of fairness and due process. There is no need for any sliding scale of pejoratives to describe counsel's errors: see *Nudd v R*. This Court is therefore concerned with assessing the impact of what the Appellants' retained counsel did or did not do and its impact on the fairness of the trial. In arriving at this assessment, the Court will consider as one of the factors to be taken into account the impact of any errors of counsel on the outcome of the trial. Even if counsel's ineptitude would not have affected the outcome of the trial, an appellate court may yet consider, in the words of de la Bastide CJ in *Bethel* that the ineptitude or misconduct may have become so extreme as to result in a denial of due process. As this Court said in *Cadogan v The Queen* the Court will evaluate counsel's management of the case 'with a reasonable degree of objectivity.' If counsel's management of the case results in a denial of due process, the conviction will be quashed regardless of the guilt or innocence of the accused. See also *Teeluck and John v The State*.
>
> [12] An appellate court, in adjudicating on an allegation of the incompetence of counsel which resulted in an unfair trial, has to bear in mind that the trial process is an adversarial one. Thus all counsel, including in this case the police prosecutor and retained counsel for the Appellants, are entitled to the utmost latitude in matters such as strategy, which issue he or she would contest, the evidence to be called, and the questions to be put in chief or in cross-examination subject to the rules of evidence. The judge is an umpire, who takes no part in that forensic contest. Therefore, in an appeal such as the instant one where no error of the magistrate prior to sentencing is alleged, the trial does not become unfair simply because the Appellants or their counsel chose not to call evidence, or not to put the accused in the witness-box and to rely on their unsworn evidence.

> [13] A conviction can only be set aside on appeal if in assessing counsel's handling of the case, the court concludes that there has not been a fair trial or the appearance of a fair trial: see *Boodram v The State*. Hypothetical examples of such incompetence were given by the Privy Council in *Bethel v The State* (No. 2 as follows:
>
> > 'It is not difficult to give hypothetical examples of how such a situation might occur. An obvious example would be if the accused had the misfortune to be represented by counsel whose judgment was proved to have been impaired by senility, drugs or some mental disease. Another example … is if counsel conducted the defence without having taken his client's instructions'." (Emphasis as in the original)

[35] The Crown's position was that there was no merit to this contention as counsel for the applicant at trial sufficiently put forward the applicant's case before the jury. Counsel, using his discretion, did not cross-examine the witnesses on details of the case, which would not have been in their knowledge. Mrs Johnson O'Connor submitted that an examination of the transcript would reveal that counsel thoroughly questioned Vanessa Williams to the extent possible to support an alibi defence. Furthermore, she contended, it was put to the witness by Mr Beckford that she was mistaken when she identified the applicant as one of the intruders at the house on the night of the incident or that alternatively, she was deliberately lying.

[36] The Crown further submitted that Mr Beckford's affidavit showed he made a strategic decision not to call the applicant's mother as a witness to support an alibi defence. Mrs Johnson-O'Connor distinguished this position from that of **Andrew Mckie v R** [2021] JMCA Crim 17 ('**Andrew McKie**') where defence counsel did not have a good reason for his failure to call witnesses on Mr McKie's behalf. Furthermore, this decision was taken by Mr Beckford after a discussion with the applicant and his family.

[37] Notwithstanding the absence of testimony of the applicant's good character, the Crown highlighted that he did benefit from a good character direction by the learned trial judge on both the credibility and propensity limbs. As such, it could not be said that the

applicant suffered from any disadvantage from the absence of testimony from character witnesses.

[38] The Crown submitted finally that there was no misconduct of the case on the part of Mr Beckford, and there was no unfairness to the applicant.

Analysis

[39] Phillips JA, writing for the court in **Kenyatha Brown v R** [2018] JMCA Crim 24, conducted a review of cases dealing with this issue of incompetence of counsel and extracted the following principles:

1. Counsel should ensure as a matter of course that there is a written record of the instructions received (**Bethel (Christopher) v The State** (1998) 55 WIR 394).

2. The court should be guided by the principles of fairness and due process rather than an assessment of the quality or degree of incompetence of counsel (**Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ)).

3. Counsel may not disregard his instructions and conduct the case as he feels best (**Sankar v The State of Trinidad and Tobago** [1995] 1 All ER 236).

4. It would be the exceptional case where the conduct of counsel will afford a basis for appeal (**Leslie McLeod v R** [2012] JMCA Crim 59).

5. Each case must be examined in the context of its own circumstances (**Michael Ewen v R** [2016] JMCA Crim 19).

6. Counsel should adequately put the defendant's case to the jury (**Daryeon Blake and Vaughn Blake v R** [2017] JMCA Crim 15).

Phillips JA writing for the court in the recent decision of **Andrew McKie** relied on the approach stated in **Kenyatha Brown**.

[40] In summary, the following principles guided the court in considering this complaint:

> (i) the misconduct of counsel will not be a basis to interfere with the decision unless there is a denial of due process to the accused;
>
> (ii) defence counsel is given a discretion to conduct the case in the way they believe is in the best interest of their client;
>
> (iii) New counsel should be generally wary of criticizing the steps taken by the former counsel in advancing the case; and
>
> (iv) in examining this issue, the court ought not to focus on the alleged incompetence of counsel but rather the impact which it may have had on the case of the accused.

[41] We were also mindful that defence counsel has the discretion, by virtue of the skills attendant on the profession, to decide on the tactical steps to take in advancing the accused's case, hence the caution given in **R v Doherty & McGregor** [1997] 2 Cr App R 218:

> "[83] Unless in the particular circumstances it can be demonstrated that in the light of the information available to him at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced."

[42] We took note that no response was made to Mr Beckford's affidavit by the applicant. Mr Beckford set out fully why no witnesses were called on the applicant's behalf. He highlighted the refusal of the applicant's father to give evidence; the failure to

produce any alibi witnesses despite being advised of the importance of this, save for his mother, whose evidence counsel determined would be more likely to prejudice his defence than assist him. The decision was taken not to call his mother after a discussion with the applicant and his parents and there was no demurral. It was reasonable to suppose that presenting an unsupported alibi defence could have been used to the applicant's disadvantage by the prosecution. In the absence of any evidence that the applicant was at some other place at the time the offence was committed, the learned trial judge would also not have been obliged to give a direction on the impact of rejection of his alibi, it being raised solely on an unsworn statement (see **Mills, Mills, Mills and Mills v R** (1995) 46 WIR 240).

[43] In the circumstances, counsel's advice to the applicant not to include the alibi defence in the unsworn statement could not be faulted.

[44] Additionally, counsel for the applicant is discontented by the fact that Mr Beckford did not call witnesses in support of the applicant's good character. Mr Beckford's assessment was that putting the applicant's good character in issue at the trial could have been successfully challenged losing him the shield and good character direction available to him. Character evidence is not an end in itself. Its purpose is to enable the applicant to get the benefit of a good character direction in assessing his credibility. The applicant in this instance benefited from the learned trial judge giving the jury directions on both the credibility and propensity limbs even though the applicant was only entitled to a direction as to propensity as he gave unsworn evidence. This was the position of the court in **Tino Jackson v R** [2016] JMCA Crim 13 at para. [24], where it was stated that:

> "[24] …If an accused raises the issue of his good character in an unsworn statement only, the cases suggest that whereas he is entitled to a good character direction on the propensity limb, a direction on the credibility limb may be of limited effect….[This point] was considered at paras [128]-[130] of **Leslie Moodie** [2015] JMCA Crim 16. If, however, the accused gives sworn evidence, in which he distinctly raises his

> good character, he is entitled to a full direction on both limbs."
> (Emphasis as set out in the original)

[45] The applicant also gave no details of the instructions that he gave to Mr Beckford and which were not followed (see paras. 6 and 7 of the applicant's affidavit). Such instructions as he said he gave, also lacked particularity. For example, who are the persons he told the attorney about? (see paras. 8 and 9 of the applicant's affidavit). We were quite unable to say what questions counsel ought to have posed to the prosecution's witnesses and did not.

[46] The question we considered was: Did the conduct of the attorney in the presentation of the applicant's case fall below the acceptable standard of competence? On an objective analysis of the circumstances of this case, we were of the view that it did not.

[47] We concluded that there was nothing in the manner in which Mr Beckford conducted the case for the applicant at trial that fell below the standard reasonably expected in the circumstances. His conduct did not affect the fairness of the trial. Therefore, the applicant's right to due process was not infringed.

(ii) Absence of the Station Diary

[48] Mr Robinson also submitted under this ground of appeal that the applicant was denied a fair trial by the absence of the station diary at trial. He submitted further that the entry made by Detective Corporal Spence was crucial, as it would have contradicted the account given in evidence by Vanessa Williams at the trial as to whether the men entered the house. The station diary was in the possession of Detective Corporal Spence up to the time of the trial in January (which was aborted), when he left it on a desk and had not seen it since. This, it was submitted, was a breach of the duty of the prosecution, in its broader context, to preserve potential exhibits for use by the defence.

[49] Counsel argued that the inability to properly challenge the witness on a material aspect of the case placed the defence at a disadvantage, which resulted in the trial being

unfair and the conviction unsafe. Mr Robinson relied on the case of **R v Charles Jones and Raymond White** (1976) 15 JLR 20 where the court said that an entry in a station diary could be used at trial to contradict the account given by a witness. Mr Robinson also relied on the cases of **Seian Forbes and Tamoy Meggie v R** [2014] JMCA App 12 ('**Seian Forbes**') in support of this submission. Reliance was also placed on **Lescene Edwards v R** [2018] JMCA Crim 4, in support of the submission that the prosecution was under a duty to preserve the evidence. Counsel argued finally that in the circumstances of this case, the applicant was disadvantaged by the absence of the station diary as he was unable to effectively challenge the credibility of the eyewitness without it.

[50] The Crown admitted that the prosecution failed in its duty to preserve the station diary. However, it was Crown Counsel's submission that the presence of the station diary would not have assisted the defence to challenge the credibility of the main witness, Vanessa Williams. This is so as the witness did not deny that on the night of the incident, she did not inform the police that she knew the name of any assailant or that any assailant entered the house that night. Her evidence was that she did not reveal the name of the applicant until four days after the incident occurred. This was notwithstanding that the police had been at her house and spoken to her on the night of the incident. Mrs Johnson O'Connor submitted that defence counsel in cross-examination extensively questioned her on this issue. The salient questions are set out below:

> "Q: Before the Thursday you told the police that men had come inside the hall?
>
> A: Yes.
>
> Q: But you told them that you don't see the faces of any of these men?
>
> A: No. I told them they just come through.
>
> Q: All right. So you told them that you did not recognize any of the men.

A: Right.

…

Q: Right. You didn't tell the police that any of the three men had any interaction with you?

A: No.

Q: All right. And by Thursday now, you tell them that there was this incident in the hall where [a] gun was held at your head, right? "

[51] Mrs Johnson O'Connor pointed out, however, that Vanessa Williams in her re-examination explained that the reason for the delay was that she was careful as to whom she told that she had seen the applicant as she was fearful that they would come back and kill her. Counsel submitted that in light of the transparency in the evidence of Vanessa that she did not identify the applicant to the police and the reason therefor, the station diary would have been of no assistance to impair her credibility. The learned trial judge also gave adequate directions to the jury on how to treat with inconsistencies. In the circumstances, there was no unfairness to the applicant.

Analysis

[52] In the oral submissions, counsel for the applicant pointed out that the entry in the station diary could have been used to impeach the credit of Vanessa as to whether the men had entered the house. This presumably was to discredit the evidence of identification. This case can be distinguished from **Seian Forbes**.

[53] In **Seian Forbes**, the applicants sought permission to adduce fresh evidence, being extracts of the station diary to resolve the question of whether the complainant had told the police the names of her attackers when they first attended her home, the usefulness being that nowhere in the entry did the constable who had spoken with the complainant the day after the incident, state the name or names of the perpetrators. This is despite the fact that at trial there was evidence that the complainant told the police

the names of the perpetrators at the time that the police first visited her home. At para. [42] Brooks JA concluded that:

> "These applicants do not seek to use the diary entry for the truth of its contents. They seek to adduce it to throw doubt on Constable Ricketts' assertion that the complainant told him the names of the perpetrators. They would have been entitled to use it in that way at the trial."

[54] We can clearly see how in such circumstances the use of the station diary was quite relevant. However, here the question on which the witness was sought to be impeached was conceded by her. There would, therefore, have been little or no evidential value to the production of the station diary. We were unable to see how any prejudice could have been suffered by the applicant by its absence.

[55] We concluded that this ground of appeal was without merit.

Ground 2 – The evidence does not support a verdict of guilty which was compounded by the fact that the learned trial judge failed to sufficiently address the material inconsistencies and discrepancies on the Crown's case.

[56] Counsel for the applicant submitted that the prosecution's case was riddled with inconsistencies and discrepancies and as such, the evidence could not support a verdict of guilty. Rather, he submitted, the evidence supported the version of events first recounted to the police by Vanessa Williams that she did not have any interaction with the applicant, as no one had entered the house that night.

[57] Mr Robinson asserted that the inconsistencies affected the identification evidence of Vanessa, making her evidence unreliable when combined with the evidence that she was only able to partially view the face of the applicant, in what he submitted was a fleeting glance. Additionally, he submitted that the learned trial judge failed to properly analyse and direct the jury on these inconsistencies and discrepancies which were very important, as they went to the root of the prosecution's case.

[58] The main inconsistencies, discrepancies and omissions highlighted by counsel are set out below:

i. Vanessa recounted that after her interaction with the men she met up with her grandmother and her cousin. The three of them went outside and this is when the explosions were heard. Mrs McDonald's recount of the incident was that it was when she was inside the house that she heard the explosions and sometime after went outside to call out to the deceased.

ii. Vanessa recounts having an interaction with two of the men inside the living room whilst Mrs McDonald gave no evidence of seeing anyone coming inside the house.

iii. Mrs McDonald's evidence was that it was after she returned inside from calling the name of the deceased that she found Vanessa and Oneisha in the closet, whilst Vanessa recounts that she met up with Mrs McDonald and Oneisha in the bathroom.

iv. At trial, Vanessa also gave evidence that there were footprints on the bed below the window where the glass had been removed by a machete. This was the first time that she was mentioning this and the photographs did not support this version of events.

[59] Mr Robinson submitted that, in directing the jury on the inconsistencies and discrepancies, the learned trial judge omitted to give any direction on the third item highlighted above. Counsel further submitted that the directions which were given amounted to a rehearsal of the evidence and did not analyse for the jury the impact these would have on the case for the Crown on the issue of credibility of the witnesses. Given that the issue of credibility was central to the case, the learned trial judge's failure to go beyond simply identifying some of the inconsistencies and discrepancies created the likelihood that a miscarriage of justice had occurred.

[60] In describing the duty of the learned trial judge in directing the jury on these issues, the Crown relied on the case of **Vernaldo Graham v R** [2017] JMCA Crim 30 paras. [106] and [109]. The Crown also referred to **The State v George Mootoosammy and Henry Budhoo** (1974) 22 WIR 83 and **R v Hugh Allen and Danny Palmer** (1988) 25 JLR 32.

[61] The Crown made the following observations of the directions given by the learned trial judge:

i. The jury was made aware that in a trial, there may be inconsistencies and discrepancies and the usual definition of both was provided to the jury.

ii. The jury was advised as to how to identify an inconsistency and discrepancy by reference to what occurred during cross-examination at the trial.

iii. The impact of discrepancies and inconsistencies in the case and how to treat with them.

iv. How a discrepancy and inconsistency could impact the credibility of a witness. She also went further to highlight for the jury a few of the discrepancies and inconsistencies in the case.

v. The impact of the delay of Vanessa in giving a statement to the police of the incident and the explanation provided for this delay. The jury was also advised of how they could treat with this issue.

[62] The Crown submitted that, when looked at holistically, these directions were adequate and that the learned trial judge had fulfilled her duty in keeping with the case of **Dwayne Brown v R** [2020] JMCA Crim 31.

[63] The Crown also submitted that there was a sufficient nexus between the evidence and the applicant to ground his conviction. Mrs Johnson O'Connor argued that the case is one that centred around the issue of recognition. It was submitted that Vanessa, in her evidence, clearly explained that she was able to see the face of the applicant in circumstances where there was adequate lighting. She had more than a fleeting glance despite the inconsistencies as to how long she was able to view his face. Vanessa recognised him as someone whom she had known previously for about nine years. They both attended the same primary school where she saw him two to three times a week. Furthermore, after primary school she saw him about once a week mostly during the day. She also knew his parents and other family members.

[64] It was submitted that the learned trial judge correctly advised the jury of the difficult circumstances under which Vanessa would have identified the applicant. That they were given the usual direction that even convincing witnesses could be mistaken and the evidence would need to be approached carefully. In light of all the directions given to the jury, it was submitted that a sufficient nexus was provided on the evidence for the jury to safely convict the applicant.

Analysis

[65] Though expansive in his written submissions, counsel for the applicant quite rightly was considerably more concise in his oral submissions. We agree with the Crown that the learned trial judge fulfilled her duty as set out in **Vernaldo Graham v R**, at para. [103] and reproduced here:

> "[103] In **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, Carey JA, in delivering the judgment of this court, said at page 9:
>
> > 'The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in

> the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness'evidence or as between different witnesses.'
>
> This passage was cited with approval in **R v Rohan Vidal and Kevin Thompson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 266 and 269 /2001, judgment delivered 25 May 2005 at page 6. In that case this court held that once the trial judge explained to the jury the effect which a proved or admitted previous inconsistency should have on the evidence at trial and reminds the jury of the major inconsistencies in the witness' evidence, it is a matter for the jury to decide whether or not the witness has been so discredited that his evidence cannot be relied on at all." (Emphasis as in the original)

[66] The learned trial judge gave the jury an adequate definition of inconsistency and discrepancy. With respect to the inconsistencies in Vanessa's evidence, at pages 335 lines 13 to 25 and 336 lines 1 – 14, the learned trial judge directed the jury as follows:

> "But you have to look at the inconsistencies because although in this case there were times when I think Mr. Beckford challenged her on things she had said before, she didn't deny saying them before. But she gave an explanation. One, she was trying to forget some of the things but now she remembers them. You have to consider her explanation for why there could have been a difference but she accepts that there may have been but she is accepting that she is speaking the truth now. You have to look at it, because if the inconsistencies could have been serious and went to the very root, the very base of the Crown's case, then you could say that because of this inconsistency you can't believe the witness on this point or at all, if it is a serious one. If it is slight, then you might say yes, he may have said something different before but it don't [sic] really affect the overall case so I am still going to accept that it was made but I am still going to believe her on other aspects because remember you can do that with any one witness, accept the part that you believe to be true, reject the parts you do not believe to be true, reject it all if you don't believe it at all."

[67] At pages 336 lines 23 to 25 and page 338 lines 1-7, the learned trial judge also guided the jury as to how to assess the discrepancies between the evidence of Vanessa and Mrs McDonald. She told the jury this:

> "You have to look at the discrepancies and there are some in this case, between what Vanessa told us and between what her grandmother told us and you have to look at them in the same way. If it is a serious discrepancy that goes to the root goes to the whole base of the Crown's case. And if it is a serious discrepancy can you accept those witness on that point or at all?
>
> If it is a slight discrepancy, you can again say, yes, it exists, but I believe the rest of what the witness said and I am satisfied so that I feel sure, because that is the standard that you have to reach before you can say that this man is guilty."

[68] The learned trial judge also pointed out possible discrepancies and inconsistencies as she reviewed the evidence for the jury. She also ensured that this consideration would be alive to the jury in their deliberations by ending her summation at page 376 lines 7 to 13 with the caution as follows:

> "You bear in mind whether you can believe Miss Williams based on all the discrepancies that arise between her and her grandmother. The different things she has said before that she has now accepted before you but has left an explanation as to why she is making those mistakes."

[69] From these passages, it certainly could not be said that the learned trial judge merely rehearsed the evidence. The learned trial judge gave the jury proper and sufficient guidance on how to deal with the conflicts in the evidence as guided by **Dwayne Brown**, wherein it was stated at para. [58]:

> "[58] [I]n **R v Carletto Linton and Others**, where Harrison JA stated:
>
> 'Discrepancies occurring in the evidence of a witness at trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.

> The duty of the trial judge is to remind the jury of the discrepancies which occurred in the evidence, instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which need [sic] not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all... Carey, P (Ag.) as he then was, in **R v Peart and Others** [(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 24 and 25/1986, judgment delivered 18 October 1988], said of discrepancies, at page 5:
>
> > 'We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies'." (Emphasis as set out in the original)

[70] Nor could it be said that the inconsistencies and discrepancies were such that they completely destroyed the fabric of the prosecution's case. It was open to the jury to accept or reject the explanations given and, ultimately, what evidence to accept.

[71] We also agreed with the Crown that the learned trial judge gave the jury the proper directions including the requisite warnings on identification. There was sufficient identification evidence given by Vanessa Williams on which the jury could properly convict the applicant.

[72] This ground of appeal was without merit and failed.

Ground 4 – The applicant should benefit from the current law on joint enterprise which, if was settled at the time of his trial would have allowed the applicant to benefit from the lesser offence of manslaughter being left for the jury's consideration.

[73] It was submitted by counsel for the applicant that the cases of **R v Jogee** [2016] UKSC 8 ('**Jogee**') and **Ruddock v The Queen** [2016] UKPC 7 ('**Ruddock**') re-established the principle of joint enterprise which would have been applicable to the case even though the applicant's trial was in 2014. In **Jogee** and **Ruddock**, it was affirmed that even where there was a joint intent to use weapons to overcome resistance or to avoid arrest, the participants might not share an intent to cause death or serious bodily harm. If the principal solely had that intent and caused the death of another, he alone could be convicted for murder, whilst another party who lacked the intent but took part in the attack would be guilty of manslaughter.

[74] It was submitted that there was no evidence that the men went to the house with the intention to murder. Given the theft of the phone, it was possible the intent was to rob. Counsel pointed out, in support of this argument, that the evidence was that the applicant was looking around when he entered the hall. He submitted that it was, therefore, erroneous on the part of the learned trial judge to equate foresight that a person may be injured whilst committing a robbery with the intention to possibly commit murder during the course of the robbery. It was submitted that her direction to the jury at page 345, lines 17 – 24 that:

> "…Mere presence at the scene of the crime is not enough to prove guilt. But if you find that Mr Barrett was there and intended to commit an offence and did participate in that home invasion that led to the death of Mr McDonald, then that would be enough for you to find that he was part and parcel of the plan that night."

was given in error and that the lesser offence of manslaughter should have been left for the jury to consider.

[75] This was especially so as the 'trigger man' remained unknown and at the time Vanessa heard the explosions, she would have placed the applicant inside of the home in

the living room. The Crown submitted that similar to the decision of **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25 (‘**Brown and Matthias**’), this would not have been an appropriate case for manslaughter to be left for the jury to consider. In **Brown and Matthias**, the court was tasked to determine whether the learned trial judge misdirected the jury on joint enterprise/common design, in the light of the decision in **Jogee** and **Ruddock** and consequently erred in failing to leave manslaughter for the jury's consideration. The Crown further submitted that in this case there was no intention to commit anything other than murder given the time of the commission of the offence, the intruders were disguised, they were all armed with guns, the guns were pointed on the witness and the phone was taken after the explosions. The Crown relied on **Germaine Smith et al** v R [2021] JMCA Crim 1 (‘**Germaine Smith’**); and **Hunte and Khan v The State** [2015] UKPC 33 (‘**Hunte and Khan**’).

Analysis

[76] The learned trial judge’s directions to the jury were in keeping with the law as it was understood then but which was subsequently clarified in **Jogee** and **Ruddock**. For context, the United Kingdom Supreme Court and the Privy Council restated what they said was long established as basic principles of the criminal law relating joint enterprise. An accessory or secondary party is one who assists or encourages another to commit a crime with the necessary intention to do so. Such a person is guilty of the same offence as the actual perpetrator or principal. Even if the prosecution is unable to prove whether a defendant was the principal or accessory, it does not matter as long as it can be proved that he participated in the crime as one or the other with the necessary intention to assist or encourage the commission of the offence that was actually committed.

[77] **Jogee** and **Ruddock** were concerned with what has become known as “parasitic accessory liability”. As was explained in **Brown and Matthias** at para. [90] “parasitic accessory liability…doctrine covers situations where two persons (D1 and D2) set out to commit an offence (crime A) and in the course of that joint enterprise one of them (D1)

commits another offence (crime B). The question is whether the person who does not commit crime B, (D2) can be held liable for it".

[78] In **Jogee** and **Ruddock**, it was firmly established that it was an error as a matter of law to equate foresight with the intention to assist. The correct approach, according to the court, is to treat foresight as evidence of intent. It had to be proved that both parties shared the requisite intention to commit both crimes.

[79] In **Brown and Matthias,** one ground of appeal for the applicant, Lance Matthais, was that the learned trial judge failed to leave an alternative verdict of manslaughter for the consideration of the jury. It was counsel's position that the learned trial judge failed to direct the jury that if there was a common design to use unlawful violence short of the infliction of grievous bodily harm, then the applicant, could be found guilty of manslaughter if the victim's death was an unexpected consequence of the carrying out of that common design.

[80] At trial the prosecution's case concerning Lance Matthias was that he was a part of a group of men who entered the home of the deceased armed with firearms and killed the deceased. It was their contention that he aided and abetted the murder and had the intention to do so as part of a joint enterprise. On appeal, his counsel argued that this interpretation of the events occurring on that night was erroneous and that he had no such intention to kill or cause grievous bodily harm, which is the necessary intention for murder. Rather that it could only have been viewed that he had an intention, at most, to intimidate or cause harm but not serious bodily harm. As such, it was submitted that the learned trial judge ought to have left the lesser offence of manslaughter to the jury to consider.

[81] This court found that there was nothing on the evidence, either as presented by the prosecution or the defence at trial, to prove that he could have been there merely to intimidate or to do anything else other than to do serious bodily harm to someone in the bedroom. On this basis, the court concluded that to bring to the attention of the jury that

the he went there to commit any offence other than murder would have been speculative in the absence of any such evidence.

[82] This court recently reviewed **Jogee** and **Ruddock** and **Brown and Matthias** in **Germaine Smith**. At paras. [70] – [73] Brooks JA (as he then was), writing for the court, said:

> "[70] The difficulty with the submissions, which are based on the principles emanating from **Ruddock v The Queen**, is that there is no evidence from any of the applicants to suggest that he was present but for a purpose that did not include killing or inflicting grievous bodily harm. A similar submission was made to this court in **Joel Brown and Lance Matthias v R**, which Mrs Johnson O'Connor cited in support of her submissions. In addressing that issue in that case, McDonald Bishop JA, first, explained the principle of joint enterprise. She said, in part, at paragraph [77]:
>
> > '…The core of the principle, as restated in **R v Jogee; Ruddock v The Queen**, is that a person who assists or encourages another to commit a crime (the secondary party or the accessory) is guilty of the same offence as the actual perpetrator of the crime (the principal) if he 'shares the physical act', that is, through assisting and encouraging the physical act. In their Lordships words, '[h]e shares the culpability precisely because he encouraged or assisted the offence'. Their Lordships further explained:
> >
> > > 'Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter so long as it can prove that he participated in the crime either as one or as the other.'
>
> These basic principles, their Lordships said, are 'long established and uncontroversial'.'
>
> [71] Her Ladyship then demonstrated the flaw in the submissions. She said, in part, at paragraph [79]:

> 'The danger in the learned trial judge intimating to the jury that Lance Matthias may have been at the premises for the purpose of intimidation or anything else, other than to kill or do serious bodily harm, as [counsel for Mr Matthias] suggests, is that his defence was that he knew nothing about what had transpired and that the case against him was a fabrication. Furthermore, and even more importantly, even if the jury were to reject his defence and accepted that he was there, there was no evidence that he could have been there merely to intimidate or to do anything else other than to do serious bodily harm to someone in the bedroom.'

[72] She distinguished **Ruddock v The Queen** at paragraph [102]:

> 'In sum, this was not a case which, on the evidence, involved a plan to carry out one crime (crime A) and during the course of carrying out crime A, to which the appellant was a voluntary participant, murder, which was another crime (crime B), was committed by someone else. In short, the circumstances of this case do not warrant the application of the principles emanating **from R v Jogee; Ruddock v The Queen** treating with parasitic accessory liability.'

[73] It is true that Mr Matthias' case was different from this case because he was present in the room where the fatal shots were fired. However, a similar approach to that used by McDonald Bishop JA was taken by this court in **Shawn Campbell and Others v R** [2020] JMCA Crim 10, where the specific action of each of the accused was more left to inference. The court said, at paragraph [421] of its judgment, that **Ruddock v The Queen** did not apply where there was no evidence to suggest an intention other than to kill or cause grievous bodily harm:

> '…As [counsel for the Crown] pointed out, the appellants were indicted jointly for murder. The case for the prosecution was that they acted together and in concert in murdering the deceased. Their defences were a denial that they committed the offence. **There was therefore nothing in the evidence to ground a suggestion that any of them may**

> **have had an intention other than the intention to kill or to cause grievous bodily harm. In these circumstances, in our view, the question of manslaughter did not arise and the judge was entirely correct to remove it from the jury's consideration**'." (Emphasis as in the original)

[83] In the case at bar, the applicant invaded the home of the deceased with a group of men who were all dressed in a manner to conceal their identity and all armed with firearms. The applicant and another held the witness at bay with firearms while another went elsewhere in the house. The applicant left with the other intruders after shots were fired. There was no evidence of any intention to do anything other than to kill or cause grievous bodily harm to the deceased.

[84] Furthermore, the fact that robbery was committed does not mean the original enterprise must have been or was an intention to rob. As in **Hunte and Khan**, this was neither a "realistic" nor "obvious alternative" on the evidence. Indeed, the evidence suggests it was a crime of opportunity as the robber only took the item as he fled. This was after he had a firearm pointed at the witness for some time. There is also no indication that either the applicant or the other man showed any reaction on hearing the explosions or desisted from their task at hand until after the third man ran through the hall.

[85] The applicant's defence was that he could not possibly have been one of the perpetrators. He was not there. Therefore, there could have been no other offence to which he had agreed to be a party to which his actions would have been limited. As the court explained in **Brown and Matthias**, to direct the jury's mind to any other offence other than that of murder would have been "highly speculative" and amount to the learned trial judge "putting fanciful possibilities" to the jury for their consideration.

[86] The Law Lords in **Jogee** and **Ruddock** made it clear that the effect of putting the law right was not to make convictions invalid where the law as it was understood was faithfully applied, if it had not been important on the facts to the outcome of the trial or

to the safety of the conviction. This court in **Tyrone Brown and Techla Simpson v R** [2020] JMCA Crim 8 at para. [55] made note of commentary concerning the effect of **Jogee** and **Ruddock** on previous convictions:

> "[55] The learned authors of Blackstone's Criminal Practice (2017) had this to say in relation to the impact of **Jogee** on previous convictions at paragraph A4.13:
>
> > 'The Supreme Court in Jogee [2016] 2 WLR 681 emphasised that the correction of the previous error in the law – 'equating foresight with intent to assist rather than treating the first as evidence of the second' -- did not mean that previous convictions under the old law were necessarily invalid. The error, though important as a matter of legal principle, may not have been important on the facts to the outcome of a particular trial or to the safety of a particular conviction.'"

[87] There is no benefit to be had by the applicant from the restatement of the law relating to joint enterprise as it did not apply to the facts of this case and did not affect the safety of the applicant's conviction.

[88] We, therefore, found that this ground was also without merit.

Ground 3 – The sentence is manifestly excessive

[89] It was submitted, on behalf of the applicant, that the learned trial judge failed to explain how she arrived at the sentence of life imprisonment with the stipulation that he serves 25 years before becoming eligible for parole. There was no detailed application of the aggravating and mitigating factors more than a mere mention of their existence. It was counsel's position that whilst there is no usual starting point for the offence of murder a trial judge is obligated to set out the reason for the sentence imposed on the accused. The learned trial judge would have failed in this regard. Additionally, there was said to be no consideration of the positive aspect of the applicant's social enquiry report. In the circumstances, counsel asked that the sentence be reduced to 15 years before being eligible for parole.

[90] Counsel made reference to the case of **Daniel Roulston v R** [2018] JMCA Crim 20 where this court set out the correct approach and methodology to be taken by a sentencing judge. At para. [17], it was explained by McDonald-Bishop JA that:

> "[17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[91] Mr Robinson submitted that the necessity of setting out the reasons for the sentence was explained by Simmons JA, writing for the court in **Delton Smikle v R** [2020] JMCA Crim 48 at para. [61], that:

> "[61] The principles of sentencing must also guide the process. The learned trial judge correctly identified those principles. However, she fell into error when she failed to indicate how she arrived at the sentence in respect of this count." It was acknowledged by the Crown that the learned trial judge did not adopt the usual procedure of setting out a starting point and then go on to consider the mitigating and aggravating factors. It was, however, noted that she did take into consideration the mitigating features that the applicant was a minor at the date of the offence and that the actual 'trigger man' remained unknown. It was, however, submitted given this was a home invasion, the weapon used, the time

> of day and the number of invaders the sentence could not be considered to be manifestly excessive.

[92] Counsel in support of this submission made reference to several home invasion cases where the sentences imposed ranged from 25 years to 45 years before eligibility for parole (see **Peter Dougal v R** [2011] JMCA Crim 13, **Ian Gordon v R** [2012] JMCA Crim 11, **Massinissa Adams and Others v R** [2013] JMCA Crim 59 and **Calvin Powell and Another v R** [2013] JMCA Crim 28).

Analysis

[93] It is true that the learned trial judge, in her summation, was of few words when sentencing the applicant. She said at page 393, lines 11-25:

> "Your lawyer is right. We do not know the actual trigger man and at the time the offence was committed, you were under the age of 18. So I will take those factors into account when you're sentenced. You have committed a very serious offence and I will have to start at the very top of the scale, when it comes to sentencing. A man's life has been lost. A family disrupted and the jury has found that you were one of the persons responsible for it. In the circumstances, the sentence of this court is life imprisonment and you will not be eligible for parole until you have served 25 years…."

We realiSe that this sentencing exercise was carried out in 2014 before the guidance of this court in **Daniel Roulston v R** and **Meisha Clement v R** [2016] JMCA Crim 26 and the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts promulgated in December 2017. However, as this court has pointed out before, trial judges were not without the benefit of some guidance. Such was given in **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002. At page 4 of the judgment, P Harrison JA (as he then was), writing for the court, stated:

> "If therefore the sentencer considers that the 'best possible sentence' is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence,

> as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
>
> (a) pleaded guilty;
>
> (b) made restitution; or
>
> (c) has any previous conviction.
>
> These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

It is accepted that the learned trial judge did not follow this guidance which enabled this court to conduct a review of the sentence imposed.

[94] This court has reiterated on many occasions that its ability to interfere with the sentence of an accused is as was described by Justice Hilbery in **R v Kenneth John Ball** (1952) 35 Cr. App. R. 164 at page 165:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene."

[95] The approach to be taken by the court in considering an appeal against sentence was set out in **Meisha Clement v R**, at para. [43]:

> "[43] On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like

> offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[96] It is true that not much was said which reflects the considerations of the learned trial judge in making a decision as to the appropriate sentence. We, therefore, examined whether the sentence of the learned trial judge fell outside of the usual range of sentences for murder. In so doing we noted the decision of the court in **Paul Brown v R** [2019] JMCA Crim 3 that:

> "[19] It has often been said that sentencing is the most difficult part of a criminal trial. It is often similarly a most difficult exercise for a court of review. Whilst trying to see whether the sentencing court arrived at a sentence that was suitable for the offence and the offender, this court will review cases that might be similar in facts and circumstances; but, as each case and each offender involves its own peculiarities, the cases canvassed will never be the same as the one under review. They must therefore be used only as a general guide."

See also **Lescene Edwards v R** [2018] JMCA Crim 4 at para. [127].

[97] A review of the cases showed that the current range of time to be spent before eligibility for parole in cases of murder range between 25-40 years. In **Lescene Edwards v R** the applicant was convicted for killing his partner in her home. He was sentenced to life imprisonment not becoming eligible for parole before 35 years. On appeal, the court found that the applicable starting point for a murder of that nature based on an assessment of similar cases was 25 years (a range of 15 to 45 years was identified). The court further considered the delay he suffered in the matter, time spent in pre-trial custody, his good character and the absence of previous convictions and concluded that a sentence of 20 years before eligibility for parole was warranted in the circumstances.

[98] Secondly, in **Peter Dougal v R**, the applicant was charged for the murder of two individuals whom he had killed whilst they were sleeping in their bed. The sentencing judge ordered that the applicant should be subject to the death penalty. On appeal the

court concluded that a sentence of life imprisonment with the stipulation that he serve 45 years before becoming eligible for parole was reasonable in the circumstances.

[99] In **Ian Gordon v R** [2012] JMCA Crim 11, the applicant along with two other men entered unto private property and fired several shots into a home thereon killing two men who were inside. The applicant was convicted for murder and ordered to serve 30 years' imprisonment before being eligible for parole.

[100] Also in **Paul Brown v R**, the applicant had been convicted for murder and sentenced to serve 35 years' imprisonment before becoming eligible for parole. The applicant opened gunfire on the deceased who tried to run but was chased by the applicant who continued to fire shots at him and killed the deceased. The applicant sought leave to appeal on the basis that his sentence was manifestly excessive. In light of the fact that at the time the offence was committed the applicant was 43 years old, had no previous criminal history and was gainfully employed, it had been submitted that not enough consideration had been given to the principle of rehabilitation.

[101] The court in **Paul Brown** found that a summary of cases showed a range of stipulated pre-parole period to be between 25 years' and 45 years' imprisonment. with the higher figures in the range being stipulated in cases involving multiple counts of murder. The court, in making its decision, considered that there was no evidence that the learned trial judge considered the time the applicant spent in custody on remand and the fact that this was his first offence. In light of these factors, the court found that a sentence of 29 years' imprisonment before eligibility for parole was appropriate. From this figure, the court further deducted five years and six months that the applicant spent in custody prior to his trial.

[102] In the case of **Massinissa Adams et al v R**, the applicant had been convicted with two others for the murder of an Assistant Commissioner of Police. The applicant was sentenced by the trial judge to the death penalty. On appeal, the court substituted the

sentence to that of life imprisonment with the stipulation that he was to serve 30 years before becoming eligible for parole.

[103] The last case for consideration is that of **Calvin Powell Lennox Swaby v R**. In this case, the applicants had been convicted of the murder of a couple in their home. The bodies were found to be badly decomposed bodies in a garbage dump. The applicants were jointly convicted of two counts of murder and sentenced to life imprisonment on count one and on count two the death penalty. The court found that the death penalty was not appropriate and substituted the sentence of death penalty to life imprisonment and ordered that both men serve 35 years before becoming eligible for parole.

[104] It can be seen from this review that a pre-parole period of imprisonment of 25 years for murder of this nature cannot be said to be manifestly excessive. The learned trial judge considered the mitigating factors such as the applicant's age, the fact of this being his first conviction and that the trigger man was unknown. There appeared to have not been much to consider from the social enquiry report other than that he was employed and there was mixed feedback from members of the community. Even though the learned trial judge did not state a starting point or show how the aggravating and mitigating factors were weighed against each other, the period stipulated for parole of 25 years in a case involving home invasion at night by multiple assailants armed with firearms, which, we noted, is a prevalent occurrence in our society, is at the lowest end of the range. Therefore, we did not find any basis to interfere with the sentence imposed by the learned trial judge.

[105] This ground of appeal also failed.

Conclusion

[106] The applicant having failed on the four supplemental grounds of appeal, we made the orders as set out in para. [5] of this judgment.