[2016] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 54/2012

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA (AG)

EDWARD BITTER v R

Ian Wilkinson QC and Mrs Shawn Wilkinson for the applicant

Miss Paula Llewellyn QC Director of Public Prosecutions and Miss Trichana Gray for the Crown

22 February and 18 March 2016

F WILLIAMS JA (AG)

[1] On 22 February 2016 when this matter came before us, we made the following orders:

(i) application for leave to appeal against conviction and sentence refused.

(ii) sentence to be reckoned as having commenced on 11 May 2012.

[2] This is a fulfillment of our promise made then to put our reasons in writing.

Background

[3] The applicant was convicted of the murder of Mr Horace Smellie, a taxi operator, after a trial before G Smith J and a jury in the Home Circuit Court. The trial began on

25 April 2012 and he was found guilty on 3 May 2012. The applicant was sentenced to life imprisonment on 11 May 2012 and it was ordered that he was not to be eligible for parole until after serving 25 years' imprisonment.

The Crown's case

[4] The Crown's case was based primarily on circumstantial evidence, the main strands of which were these:

i. Mr Smellie was found around 6:10 pm on 18 May 2006 at Rosewell Terrace, St Andrew with gunshot wounds; and pronounced dead on arrival at hospital.

ii. Around 11:30 pm the same night the applicant was found seated around the steering wheel of a motor car which was last in the possession of the deceased. It was identified by the person who had lent it to the deceased: Ms Joan Bowerbank, its owner. The car bore registration plates that could not be traced. However, other plates were found in the trunk of the car which was opened by keys given to the police by the applicant. Those other plates were those assigned to the motor car that belonged to Ms Bowerbank.

iii. The applicant, when accosted by the police, attempted to flee, but was held and searched and a .38 Smith & Wesson revolver taken from the front of his waistband. Forensic tests established that a bullet taken by the forensic pathologist at

the post-mortem examination from the body of the deceased was fired from the gun taken from the applicant.

iv. The hands of the applicant were swabbed shortly after he was taken into custody; and the tests done on those swabs showed that the applicant had gunshot residue (a) at an elevated level on his right palm; (b) at an intermediate level on the back of his right hand; (c) at an intermediate level on the palm of his left hand; and (d) at a trace level on the back of his left hand.

v. The applicant was found wearing jewellery which was identified as belonging to the deceased by the brother of the deceased, Mr Francoise Kirlew; and Ms Bowerbank.

Witnesses for the Crown

[5] The evidence for the Crown came from 12 witnesses. They were: (i) Mr Francoise Kirlew; (ii) Ms Joan Bowerbank; (iii) Constable Karl McClarthy; (iv) Dr S N Prasad Kadiyala; (v) Sergeant Donovan Allen; (vi) Constable Dovern McKenzie; (vii) Constable Steven Carridice; (viii) Miss Camille Ramsay; (ix) Miss Marcia Dunbar; (x) Detective Corporal Kevin Brown; (xi) Detective Sergeant Norman Smith; and (xii) Deputy Superintendent Carlton Harrisingh.

[6] Only the briefest outline of their evidence will be given, as the applicant's complaints in this case relate, in the main, not so much to any deficiency in the

evidence itself, but more so to alleged deficiencies in the summation of the learned trial judge.

Mr Francoise Kirlew

[7] In summary, the main bit of evidence led from Mr Kirlew was as to his identifying as belonging to Mr Smellie, his brother, the items of jewellery that the police testified were taken from the applicant at the time of his detention at the Denham Town Police Station on the night in question. The identification was done on 12 June 2006 at the Constant Spring Police Station. These items of jewellery included a "lion-face gold ring"; "a wedding band, gold with some stones in it, a small, thin, round ring, and there was another one with the letter 'F'." Additionally, he identified: "…a necklace, red green and gold with a gold pendant, a basketball gold pendant" (page 11 of the transcript). He owned and had worn two of the rings (the lion-faced one and the one with the letter 'F') for about two years, before giving them to the deceased. The deceased would wear them all the time. He also identified his deceased brother's photograph on a funeral programme, which programme was admitted into evidence through him as exhibit 1. He additionally identified his brother's body to the doctor who conducted the post-mortem examination.

[8] In relation to the jewellery, the position taken by the applicant (seen in pages 411 to 412 of the transcript) was to claim ownership of: "…the chain with the Jamaica flag on it…" (which, he stated, was given to him by a girlfriend of his named Nicky); as well as: "the gold chain, the silver chapparita, the gold ring, flat top ring, the two ring,

the married ring and the flat head ring." He denied knowledge of any other item of jewellery.

Miss Joan Bowerbank

[9] Miss Bowerbank was called to establish her ownership of the motor car that the police testified that they had seen the applicant in, just before he was apprehended; and that she had lent the said motor car, which was a 1992 white Toyota Corolla registered 9105 AR, to the deceased. She had lent the vehicle to the deceased some time in mid May of 2006 – possibly the 15th. She identified the vehicle at the Grant's Pen Police Station; and also at the Half Way Tree Court.

Constable Karl McClarthy

[10] Constable Karl McClarthy was the next witness for the Crown. In a nutshell, he testified that he and other police personnel received a transmission from police control, as a result of which they proceeded to a location in the vicinity of lot 24 Rosewell Terrace in the Shortwood area of St Andrew. There he saw the body of a man lying on the ground, face down, with what appeared to be bullet wounds. They took him to the University Hospital of the West Indies, where he was pronounced dead. The crime scene was left unprotected. He identified the photograph on exhibit 1 (the funeral programme) as seeming to be that of the person whom the police took to the University Hospital.

Dr S N Prasad Kadiyala

[11] Dr S N Prasad Kadiyala was the next witness for the prosecution. It was he, in his capacity as forensic pathologist, who performed the post-mortem examination on the body of the deceased, which, he confirmed, was identified by Mr Francoise Kirlew, the brother of the deceased. In his opinion, the cause of death was a gunshot wound to the chest. There were two gunshot wounds to the body. Of perhaps greatest importance in his testimony is that part in which he indicated that he removed from the body of the deceased, a slightly-deformed lead bullet, washed the blood from it, wrapped it in a piece of tissue, placed it in an envelope, sealed, labeled and signed the envelope and handed it over to Sergeant Smith, #1708. He put masking tape on the envelope and signed the masking tape and the envelope. He had made a diagram of the bullet in his notes of the post-mortem examination and had made the inscription of a part of his initials ('P') on the base of the bullet. The post-mortem examination was done on 1 June 2006.

Sergeant Donovan Allen

[12] Thereafter, Sergeant Donovan Allen testified. He gave evidence that on the night in question, around 11:30 pm he, Constable Steven Carridice and Woman Corporal Newell were on mobile patrol, when they came upon a parked white Toyota Corolla motor car with a male sitting behind the steering wheel. It was parked in the vicinity of number 171 Orange Street, near to Torrington Bridge and was parked facing Cross Roads. The accused, after handing a white paper cigar to Woman Corporal Newell, attempted to hasten away to the rear of the Corolla motor car, when he,

Sergeant Allen, held him. With the assistance of the others, he was searched and a .38 Smith & Wesson revolver with two live rounds taken from him.

[13] Sergeant Allen's evidence continued to the effect that keys to the trunk of the Corolla motor car were handed to him by the applicant. When the trunk was opened, licence plates 9105 AR were found inside and confirmed by police control as properly belonging to that vehicle. There was no record of the licence plates that were on the vehicle at the time: PB 1658. The applicant stated that he had found the motor car at Clock Tower Plaza at Half Way Tree. The applicant was taken to the Denham Town Police Station with the firearm and ammunition in his presence and view. A wrecker took the motor car there as well. There the firearm and ammunition were placed in separate envelopes which were sealed and labeled in the applicant's presence and handed over to the station guard on duty (whose name he could not recall). A short time after, he retrieved the envelopes and took them with him to the Trench Town Police Station where he handed them over to a corporal who put them in a 'strong pan'.

[14] He subsequently (on 22 May 2006) took the two envelopes to the forensic laboratory and handed them over to the ballistics expert, whom he believed was named 'Harrison'. Woman Corporal Newell took the items of jewellery from the applicant. Through Sergeant Allen, the firearm and the envelope in which it was contained were admitted into evidence as exhibit 3.

Detective Constable Donvern McKenzie

[15] Detective Constable Donvern McKenzie next testified. He was at the time attached to the Area 5 Scene of Crimes section and had the responsibility of, *inter alia*, swabbing hands for gunshot residue. He testified to swabbing the hands of the applicant around 11:00 am on 19 May 2006. This was done with the applicant's consent. In addition to taking swabs (which he sealed and labeled) from the palm and back of each of the applicant's hands, he also sealed and labeled a 'control swab', meant to indicate to the analyst whether the other swabs were contaminated. Also placed in an envelope, labeled and sealed by him were the pants and shirt that the applicant was wearing on the night in question. The applicant also signed all the envelopes in which the exhibits were contained. Detective Constable Allen, that same day, delivered those exhibits to the analyst at the Government Forensic Laboratory. He also took photographs of the motor car.

Constable Steven Carridice

[16] Constable Steven Carradice was the next witness. His evidence was, in large measure, and with the exception of some discrepancies, similar to that of Sergeant Allen in respect of the apprehension of the applicant. He indicated, for example, that he was the one who held onto the applicant. Then he said it was Sergeant Allen who searched the applicant and he rushed to Sergeant Allen's assistance. He confirmed as well the seizure of the firearm.

Miss Camille Ramsay

[17] Evidence was then led from Miss Camille Ramsay. She had met the deceased in January 2006 and he would transport her to school and work. She last saw him alive on 18 May 2006, around 4:30 pm. She last spoke with him on the telephone around minutes to 6:00 pm the same day and tried to get through to him after that, but could not.

Miss Marcia Dunbar

[18] Miss Marcia Dunbar next testified in her capacity as government analyst at the Government Forensic Laboratory, where she has been employed since 1981. She confirmed receipt from Constable McKenzie of the exhibits in relation to the swabbing of the applicant's hands and testified to conducting tests on them. Those tests revealed gunshot residue: (i) at an elevated level on the swab taken of his right palm; (ii) at an intermediate level on the swab of the back of his right hand; (iii) at an intermediate level on the swab taken of his left palm; and (iv) at a trace level on the swab taken of the back of his left hand. The control swab was negative, indicating that none of the swabs had been contaminated. She also received swabs of the hands of the deceased. Those tests revealed the presence of gunshot residue at elevated levels on the palm and back of the right hand of the deceased; and at trace levels on the palm and back of his left hand. No control sample was received, however, in relation to the swabs of the hands of the deceased.

Detective Corporal Kevin Brown

[19] Detective Corporal Kevin Brown's evidence was given next. He said that around 3:00 am on 19 May 2006 he was introduced to the applicant by Sergeant Allen, who also handed over certain items, including jewellery, to him. This was done in the applicant's presence and hearing at the Denham Town Police Station. On 22 May 2006 the applicant and items received by him were handed over to Detective Sergeant Norman Smith. Through Detective Corporal Brown, the items of jewellery were admitted into evidence as exhibit 5. On receiving the items, he had locked them away in a drawer to which only he had a key, at the Grant's Pen Police Station.

Detective Sergeant Norman Smith

[20] The penultimate witness was Detective Sergeant Norman Smith, the investigating officer. He received information about the murder on the night in question and went to the murder scene. He later went to the University Hospital where he was shown the body of the deceased. He also viewed the motor car. He additionally conducted a question-and-answer interview with the applicant.

[21] He testified that when the applicant was questioned about where he had gotten the motor car, on caution he said: "Me fine it down a Half Way Tree near Clock Tower with the lights on." He also confirmed receipt of the items of jewellery from Detective Corporal Brown. He confirmed, as well, attending the post-mortem examination and of receiving the sealed envelope with the bullet from Dr Prasad, and testified that he handed it in for testing at the forensic science laboratory. Additionally, he confirmed

that Mr Kirlew identified the items of jewellery. Miss Bowerbank did the same and also identified the motor car. When the applicant was arrested and charged with the offence of murder and other offences and cautioned, he replied: "you can't prove it". Through this witness, the question and answer interview was read into evidence as exhibit 6.

Deputy Superintendent of Police Carlton Harrisingh

[22] Carlton Harrisingh, then deputy superintendent of police, was the final witness. He was called in his capacity as a ballistics expert, which he had been for some 14 years. He testified to receiving on 22 May 2006, from Detective Sergeant Allen, sealed envelopes with the firearm and ammunition that he later tested. He testified to conducting tests on the weapon and a round of the ammunition. His conclusion (to be found at page 398 of the transcript) was that the bullet handed to him by Detective Sergeant Smith was fired from the .38 revolver that he had received from Sergeant Allen. The firearm had also recently been fired.

The defence

[23] The defence, which was advanced by means of an unsworn statement, was an alibi. The applicant contended that he had been at a "nine night" for a deceased friend known as "Big Youth" on the night in question, had thereafter gone to the park in Half Way Tree and had left there for his home on a bus. When he alighted from the bus at Torrington Bridge, he saw a white Toyota Corolla parked in that vicinity as well as a marked police motor car. He was accosted by the police, taken into custody and later detained at the police station. There he observed a policeman remove a firearm from

his waistband and declare that he had taken it from him, the applicant. He was never in the motor car, was not in possession of a firearm and knows nothing about the killing of Mr Smellie. He owns two of the rings of the jewellery the police say that he had; and some of the other pieces.

[24] That was the evidence from which the Crown sought to pull together the various strands of circumstantial evidence in presenting its case against the applicant.

[25] It is important to note that the applicant did not seek to challenge the directions on circumstantial evidence given in the summation – in our view, rightly so. Neither did he seek to challenge the sentence that was imposed- again, in our view, rightly so.

[26] The applicant's application for leave to appeal was refused by the single judge on 5 December 2014. This matter came before us as a renewal of that application.

The appeal

[27] The applicant filed four original grounds of appeal as follows:

> "1) Misidentify by the Witness
>
> 2) Lack of Evidence
>
> 3) Unfair Trial
>
> 4) Miscarriage of Justice"

[28] Counsel for the applicant hereinafter filed, sought permission and was granted leave to argue the following additional or supplementary grounds of appeal, encompassing those originally filed:

"1) The learned trial judge erred in law in failing to assist or direct the jury, adequately or properly, in relation to the discrepancies or inconsistencies which arose on the evidence for the prosecution. More particularly, the learned trial judge failed to highlight major inconsistencies and their possible effect *vis-a-vis* the prosecution's *onus probandi* and/or legal burden and standard of proof. This omission was fatal as it deprived the Applicant of a fair trial with the inevitable consequence that there was a grave miscarriage of justice.

2) The learned trial judge erred in failing to assist or direct the jury adequately or sufficiently in relation to the issues or problems which adversely impacted the chain of custody, and significantly weakened the prosecution's case, regarding the items allegedly recovered from the Applicant, in particular the firearm and ammunition.

3) The learned trial judge erred in failing to deal adequately or sufficiently with the Question and Answer interview given by the Applicant and adduced as evidence on the prosecution's case (exhibit six). Further, the learned trial judge failed to direct the jury that some aspects of the statements made by the Applicant in the said Question and Answer interview were exculpatory evidence upon which they could act to acquit the Applicant.

4) The verdict is unreasonable and cannot be supported having regard to the evidence."

We may now proceed to consider these grounds individually.

Ground 1

The learned trial judge erred in law in failing to assist or direct the jury, adequately or properly, in relation to the discrepancies or inconsistencies which arose on the evidence for the prosecution. More particularly, the learned trial judge failed to highlight major inconsistencies and their possible effect *vis-a-vis* the prosecution's *onus probandi* and/or legal burden and

standard of proof. This omission was fatal as it deprived the Applicant of a fair trial with the inevitable consequence that there was a grave miscarriage of justice.

The applicant's submissions

[29] On behalf of the applicant, Mr Wilkinson QC submitted that there were crucial discrepancies and inconsistencies in the prosecution's case that undermined the evidence materially. He submitted that the learned trial judge failed to deal adequately with the issue of inconsistencies and discrepancies in the evidence and failed to highlight crucial instances of these to the jury. Pointing in particular to pages 429-433, 447 and 481 of the transcript, he noted that the main inconsistencies and discrepancies were reflected in the evidence of Sergeant Allen and Constable Carridice. These related primarily to how the applicant had been apprehended.

[30] The learned trial judge's failure to deal adequately with this aspect of the evidence in her summation, it was submitted, deprived the applicant of a fair trial and resulted in a grave miscarriage of justice. He cited the case of **R v Baker, White, Tyrell, Johnson, Brown and Phipps** (1972) 12 JLR 902, in support of his submissions.

[31] It would appear that the part of the judgment on which the submission was based was that part to be found at page 910 E-F in which Smith JA (as he then was), in delivering the judgment of the court, noted:

> "It was contended that where a witness is proved to have made inconsistent statements on a material issue in a case, the jury should be directed in accordance with the principle laid down in **R v Leonard Harris**, (1927) 20 Cr App R 144, 48 and 149, namely that –

> '…The effect of the previous statement, taken together with the sworn statement was to render (the person) a negligible witness and that the jury must consider whether the case was otherwise and by others made out'."

The respondent's submissions

[32] On behalf of the Crown, the learned Director of Public Prosecutions submitted that the learned trial judge gave adequate directions to the jury in relation to the discrepancies and inconsistencies. In support of this, the court was referred, for example, to page 429 lines 19-25 of the transcript, at which, by way of introductory remarks, the learned trial judge stated the following:

> "In most trials, Madam Foreman and members of the jury, it is always possible to find what are known as inconsistencies and or contradictions or discrepancy in the evidence of the witnesses, especially when the facts about which they are speaking are not of recent occurrence…"

[33] More specifically in relation to this issue, the court was also referred to page 431 lines 2-22 of the transcript as an example of how the matter of inconsistencies and discrepancies was there dealt with by the learned trial judge:

> "Now, these discrepancies or contradictions may be slight or they may be serious. They may be material or they may be immaterial to the issue to be determined. If they are slight, you the jury will probably think that they really do not affect the credit or the credibility of the witness or witnesses concerned. On the other hand, if they are serious, or they are material to the issues to be determined then you may say that because of them it would not be safe to believe the witness or witnesses on that point or at all. It is a matter for you, Madam Foreman and members of the jury, to say, in examining the evidence whether or not there are any such inconsistencies, contradictions or discrepancies, and if you find that they are, then you will go on to consider whether

> they are slight or they are serious or are they material or immaterial, and then determine how it infringes on the credibility of the witness."

[34] We were also pointed by the Crown to other parts of the summation in relation to this issue. For example, we were referred to page 481 in order to illustrate how the learned trial judge treated with discrepancies between the evidence of Sergeant Allen and Constable Carridice as to which of them first exited the vehicle. Page 506, line 6 was also pointed out as being of relevance in this regard. Also highlighted, for example, were page 442 and pages 509 to 514, line 16 of the summation.

Discussion

[35] We found ourselves to be in agreement with the Crown in relation to this ground. From our perusal of the transcript, there are several instances throughout the summation in which the learned trial judge gave careful and practical directions in relation to the inconsistencies and discrepancies in the case. Two such examples are to be found at page 506, line 2 to line 20 and at page 506, line 21, to page 507, line 6 where the learned trial judge addressed the jury as follows:

> "He said he came out of the vehicle and held on to the accused and he started to resist. As he started to resist, Sergeant Allen came out of the vehicle and held on to the accused as well. And, of course, I pause here, because you will recall when Mr. Allen was giving his version, he said something different, but remember what I said to you about inconsistencies and discrepancies. You will have to look if you find that there are, in fact, these discrepancies and inconsistencies, are they slight, or are they serious; are they material, or are they immaterial to the issues that are there to determine, because the issues that we are determining relate to the offence of murder and also, bear in mind that

> this incident took place from 2006, but he says that is what happened.
>
> He said it was at that stage now, Sergeant Allen started to search the accused and he heard him, Mr Allen, say, quote, 'The man have a gun on him', and then, surprisingly, he said, 'I rushed to his assistance and held on to him also'. Because why I said surprisingly, he had said he came out of the vehicle and held on to the man, but, of course, as I said, you would have looked at all these things and look at the totality of the evidence to determine whether he was speaking the truth."

[36] Similarly, at page 481, lines 3 to 21, the learned judge addressed the jury as follows:

> "He says he was the first to come out of the vehicle, and that the other two officers were still seated in the service vehicle, and it is interesting because you would have to bear in mind what he says and also bear in mind when Constable Carridice comes to give his evidence about certain things that he said in cross-examination and in doing that you also have to bear in mind the instructions I gave you about how you treat such discrepancy and inconsistencies.
>
> If you find that there are discrepancies and inconsistencies, then you have to go further and look to see whether they are slight or serious; whether they are material to the issue to be determined because you remember, you know, the issues we are dealing with here is the issue of whether this accused murdered Mr Horace Smellie."

[37] In our view, these examples, although not meant to be exhaustive, are sufficiently demonstrative of the care and attention that the learned trial judge brought to the task of highlighting the inconsistencies and discrepancies in the case and making the jury aware of their significance to the case and how they were to deal with them.

[38] In relation to the authority of **R v Baker and others**, we found that that case, apart from being distinguishable on the facts, contained dicta as to the true position in relation to how inconsistencies and discrepancies are to be dealt with. For instance, on page 912 F-H of the judgment, Smith JA observed as follows:

> "…in a proper case… the judge is under a duty to assist the jury in assessing the credit-worthiness of the evidence given by a witness whose credibility has been so attacked. This duty is usually sufficiently discharged in our opinion, if he explains to the jury the effect which a proved or admitted previous inconsistent statement should have on the sworn evidence of a witness at the trial and reminds them, with such comments as are considered necessary, of the major inconsistencies in the witness' evidence. It is then a matter for the jury to decide whether or not the witness has been so discredited that no reliance can be placed on his evidence."

[39] In our view, the learned trial judge sufficiently discharged this onus.

[40] In relation to the different facts which make the **Leonard Harris** case (on which the principle stated above is based) distinguishable from the instant case, Smith JA thought it important not to lose sight of the particular facts and context in which the directions as to how to treat with the evidence of what the court there referred to as "a negligible witness" were given in that case. That case had dealt with a daughter who accused her father of incest in a written statement but recanted at the trial; and, when cross-examined, stated that her previous inconsistent statement (that he had committed the act) was untrue. In the instant case, there are two witnesses giving similar accounts of an incident with variations in the details.

[41] It was in light of all of this that we found that there was no merit in ground 1 of this application.

Ground 2

The learned trial judge erred in failing to assist or direct the jury adequately or sufficiently in relation to the issues or problems which adversely impacted the chain of custody, and significantly weakened the prosecution's case, regarding the items allegedly recovered from the Applicant, in particular the firearm and ammunition.

The applicant's submissions

[42] In respect of this ground of appeal, learned Queen's Counsel for the applicant submitted that the learned trial judge erred in failing to assist or direct the jury in relation to the importance of the sanctity of the chain of custody – especially in relation to the firearm and ammunition.

[43] Learned Queen's Counsel highlighted certain parts of the evidence in which, for example, the witness, Sergeant Allen, testified that he did not remember the name of the policeman with whom he had left the firearm at the Denham Town Police Station (referring to page 173 of the transcript); did not remember if an entry was made in the station diary in relation to the firearm; and (in relation to the jewellery) did not make a list of them (page 187).

[44] It was further submitted that the problems with the chain of custody were more significant in light of the fact that the firearm bore no serial number. Additionally, the

learned trial judge dealt with the issue of chain of custody only briefly and inadequately when invited to do so by defence counsel at the close of her summation.

[45] It was sought to fortify these submissions by reliance on the case of **Chris Brooks v R** [2012] JMCA Crim 5 paragraphs [44] to [46] – per Morrison JA (as he then was).

The Crown's submissions

[46] For the Crown, it was submitted that the learned trial judge had adequately dealt with the issue of the chain of custody at, for instance, page 475 of the transcript where she is recorded as having said to the jury the following words:

> "At the Denham Town Police Station he placed the ammunition in another envelope which he labeled and sealed and marked 'B' and that was done in the presence of the accused and the both of those envelopes were handed over to the station officer at the guard room. He said some personal articles that the accused had were also taken and he told us that it was the jewellery consisting of ring, 'chapparita' and, I think, a chain, were taken from the accused. He said these articles were handed over to the station guard. He didn't make a note of what these items were. He said Woman Corporal Newell was the person who took the personal items from the accused. He could not remember how many rings there were that were taken from the accused. He had marked the envelope with two live rounds of ammunition 'B' and he said he would have been able to identify those envelopes because of his handwriting on them. He wrote on the envelope at the station and he put A and B on them as well as his signature."

[47] Other parts of the summation were highlighted by the Crown in support of its position and submission that the directions in relation to the chain of custody were

adequate. For example, the court was referred to page 476, lines 24 onward; page 434, lines 5 to 19 and pages 588 to 591 of the transcript, the last reference being to the learned trial judge's further directions on the chain of custody when asked by defence counsel at the end of her summation to add to what she had said.

[48] The Crown further submitted that the matter of the chain of custody was a question of fact to be left for the consideration of the jury. Additionally, that gaps in the continuity of the chain of custody were not necessarily fatal, citing in support the cases of: (i) **R v Larsen** (2001) BCSC 597; (ii) **Chris Brooks v R** paragraphs [45] to [46]; (iii) **Grazette v R** (2009) 74 WIR 92, [2009] CCJ 2 (AJ), (judgment delivered 3 April 2009); (iv) **Damian Hodge v R** HCRAP 2009/001 (judgment delivered 10 November 2010); and (v) **Garland Marriott v R** [2012] JMCA Crim 9.

Discussion

[49] We accept as correct the Crown's reliance on the proposition stated in the above cases: that gaps in the chain of custody are not necessarily fatal in a trial. In **Hodge**, for example, Baptiste JA, on behalf of the Court of Appeal of the territory of the British Virgin Islands, stated, at paragraph [12], as follows:

> "[12] The underlying purpose of testimony relating to the chain of custody is to prove that the evidence which is sought to be tendered has not been altered, compromised, contaminated, substituted or otherwise tampered with, thus ensuring its integrity from collection to its production in court. The law tries to ensure the integrity of the evidence by requiring proof of the chain of custody by the party seeking to adduce the evidence. Proof of continuity is not a legal requirement and gaps in continuity are not fatal to the Crown's case unless they raise a reasonable doubt about the

> exhibit's integrity[1]. There is no specific requirement, neither is it necessary, that every person who may have possession during the chain of transfer be called to give evidence of the handling of the sample while it was in their possession. It is a question of fact for the jury whether or not there is reason to doubt the accuracy of DNA results because of the possibility that security or continuity of samples was not maintained. See **R v Stafford**[2] at paragraph 116, where the case of **R v Butler**[3] is cited for that proposition."

[50] In **Chris Brooks v R**, this court, adopting and accepting those dicta as reflecting the correct statement of the legal position, made the following observation (per Morrison JA – as he then was), at paragraph [46]:

> "[46] It follows from this statement of the legal position, which we accept and adopt, that the purpose of establishing the chain of custody…was to demonstrate its integrity, so that the court could be satisfied that the sample which was examined by the analyst was that which was taken from him. This is not so much a legal issue, as it is one which goes to the degree of reliance which the court can properly place on the findings of the analyst in the particular circumstances…"

[51] There are two parts of the evidence in relation to the custody of the firearm and ammunition which we think are of considerable importance and which, in our view, provided a sufficient basis for and rendered adequate the learned trial judge's direction on the chain of custody in relation to these two items. First, there is the evidence of Sergeant Allen that he placed the items into envelopes – the one with the firearm which he marked 'A'; and the one with the ammunition which he marked 'B'. These items were placed in the envelopes, which were sealed and labeled in the presence and view of the accused. This is reflected, for example, in the following exchange to be found at page 173, lines 15 to 24 of the transcript, among other places:

"Q. What exactly did you do with the accused man at Denham Town?

A. Well, I labeled, parceled and sealed the exhibits in his presence and then I handed him over to the station guard.

Q. You labeled and sealed the exhibit?

A. Yes, sir, in an envelope.

Q. And that's about what time?

A. At about 40 minutes after he was held or thereabout, sir."

[52] Sergeant Allen testified as well to retrieving these sealed envelopes on 22 May 2006 and of taking them on that day to the ballistics expert, whose name he thought was 'Harrison'. Sergeant Allen also gave a description of the firearm at pages 114-115 of the transcript, including the fact that it had an unusual handle.

[53] The second important observation that ought to be made about the chain of custody of the firearm and ammunition is in respect of the evidence about these exhibits coming from the ballistics expert. On page 385, lines 20 to 24, the ballistics expert is recorded as saying as follows:

"A. On the 22nd of May, 2006, I received 2 sealed envelopes from Sergeant D. Allen of the Denham Town Police Station. They were labeled 'A' and 'B' respectively. Ballistics case number 41752 was assigned to this case."

[54] The ballistics expert also confirmed Sergeant Allen's description of the unusual handle of the firearm. At page 401, lines 4 to 12 these were the questions and answers in relation to this issue:

"A. It was a homemade handle. It was cut from board.

Q. And just to be clear, cut from board, in terms of the Smith and Wesson firearm, in terms of what the manufacturer would do when you say homemade, there is a difference between the two?

A. Yes, the manufacturer would not make a grip or handle like this."

[55] Although questions were asked in cross-examination about the names of the persons with whom this witness had left the exhibits before eventually retrieving them on 22 April 2006 and taking them to the ballistics expert, (some answers to which might be viewed as having been lacking in certainty), there is nothing to suggest that the seals of the envelopes had been broken or the contents tampered with or that the integrity of the exhibits was otherwise compromised. The ultimate issue for the jury, therefore, would have been a choice between (a) whether to accept the applicant's account that he did not have a firearm at the material time, on the one hand; or, on the other hand, (b) whether to accept the account of Sergeant Allen that the firearm was indeed taken from the applicant and that it was that firearm that was tested by the ballistics expert.

[56] Against the background of these considerations, we were of the view that the directions of the learned trial judge adequately addressed the chain of custody – particularly in relation to the firearm and ammunition.

[57] In relation to the chain of custody of the items of jewellery that were said to have been taken from the applicant, again there are two important observations that

deserve to be made. For one, it is to be remembered that, although questions were asked on the applicant's behalf about whether a proper record was made of the items and by whom, at the end of the day, the items were tendered and admitted into evidence as exhibit 5 with no objection (see page 289, line 20 to page 291, line 3 of the transcript). The other observation (which ties in with the first) is that the applicant actually claimed ownership of at least some of the items of jewellery. So that what would have been an issue for the jury was not the integrity of that set of exhibits. On the contrary, it would have been an issue, in large part, as to whether to accept that at least some of the items belonged to the applicant, as he was contending, or that they belonged to the deceased, as the Crown was contending.

[58] Without a doubt, we had a concern about the quality (or the lack of it) of the evidence given by Sergeant Allen (in which too many answers featured expressions such as 'I think so…'; 'I can't recall…' and 'I don't remember…', coming from an experienced member of the Jamaica Constabulary Force with, at the time, about 18 years of service – see page 144 of the transcript). However, in light of all the matters previously mentioned, there was no evidence showing that the integrity of any of the exhibits had been breached. We therefore took the view that this ground of appeal was not made good by the applicant.

Ground 3

The learned trial judge erred in failing to deal adequately or sufficiently with the Question and Answer interview given by the Applicant and adduced as evidence on the prosecution's case (exhibit six). Further, the learned trial judge failed to direct the jury that some aspects of the statements made by

the Applicant in the said Question and Answer interview were exculpatory evidence upon which they could act to acquit the Applicant.

The applicant's submissions

[59] In support of this ground, it was submitted on behalf of the applicant that the learned trial judge did not give adequate directions in respect of the written record of the question-and-answer interview (the Q & A) which was admitted into evidence as exhibit 6. It was further submitted that the learned trial judge ought to have directed the jury that there were statements in the Q & A that could be treated as evidence and be regarded as exculpatory and that those statements, made six years earlier, were consistent with the unsworn statement being made by the applicant at the trial. The learned trial judge's failure to do so, it was submitted, was a grave error, which resulted in a substantial miscarriage of justice. In this regard, reference was made to **R v Michael Stewart** SCCA No 52/1997, judgment delivered 26 February 2003.

The Crown's submissions

[60] The Crown, on the other hand, submitted in relation to this ground that, although the learned trial judge did not deal specifically with the Q & A, there was no miscarriage of justice occasioned, as the contents of the Q & A were reiterated in the unsworn statement. That unsworn statement raised primarily the defence of alibi, which was adequately dealt with by the learned trial judge. In support of this, reference was made to, for example, page 585 of the transcript in which the judge directed the jury on the defence of alibi.

[61] As regards the **Michael Stewart** case, that case, it was submitted, is distinguishable on the facts, as in that case the judge had failed to direct the jury on the defence of alibi which was raised in the trial.

Discussion

[62] At page 541 of the transcript, the learned trial judge indicated to the jury, in dealing with the Q & A, that they would have an opportunity to look at it when the time came for them to deliberate on their verdict, it being exhibit 6 in the case. In the normal course of things, therefore, the jury would have been able to peruse its contents.

[63] Additionally, when one peruses the contents of the Q & A at pages 331 to 349 of the transcript, it becomes clear that those contents amounted to a foreshadowing of the unsworn statement. The effect of the Q & A was to deny the allegations that made up the Crown's case and to put forward an alibi. The unsworn statement was to the same effect.

[64] In light of this, we shared the Crown's view that there was no injustice occasioned to the applicant, as the main points of the unsworn statement were dealt with adequately by the learned trial judge at pages 579 to 587 of the transcript. This was how the substance of his defence was put to the jury by the learned trial judge at page 584, line 13 to page 585, line 10:

> "He said he never had a gun and he never shoot anyone and he was never in any car, in particular the car that he said he saw parked outside the gate with the lights flashing. He

> said he just walked. He had just come off the bus and walked in front of it. He said he wasn't in any gang war to shoot anyone and that he is innocent of this [sic] charges.
>
> As I said he gave you an unsworn statement, you have to attach what weight you think fit, if what he has given you in his explanation is acceptable to you and you feel that he is speaking the truth, then you would act upon it and you would acquit him. In essence, his defence is one of an alibi."

[65] His defence of alibi and the required alibi warning were dealt with by the learned trial judge specifically at pages 585 to 586 of the transcript.

[66] We note as well in respect of the Q & A that the applicant was given the protection of a **Lucas** direction in relation to an answer he gave that might have been considered a lie by the jury. (See **R v Lucas** (1981) 1 QB 720 at 724.) They were warned, for example, *inter alia*, that to rely on it to infer guilt, they had to be sure that it was a lie; and a lie told for other than an innocent reason, the learned trial judge pointing out to them that persons might lie for different reasons, so that lying by itself is not necessarily indicative of guilt. Even if it could be argued that the **Lucas** direction given was deficient, it would appear to us that this is one of those matters in which it is questionable whether such a direction was necessary in the circumstances of this case at all.

[67] This query arises from a consideration of dicta in the case of **The Queen v Dehar** (1969) NZLR 763, where at page 765, lines 33-39, Turner J, delivering the judgment of the Court of Appeal, observed as follows:

> "…where lies constitute an important element in the chain of proof put forward by the Crown a clear direction from the trial Judge is necessary.
>
> We do not say that in every case in which lies are put forward in aid of the Crown case to reinforce the other evidence it is always necessary for the trial Judge to give any specific form of direction. How far a direction is necessary will depend upon circumstances."

[68] It does not appear that lies featured prominently as an important part of the Crown's case in this matter, necessitating the giving of the **Lucas** direction. Nonetheless, one was given. In our view, the fact that it was given could only have redounded to the applicant's benefit.

[69] At the end of the day, we considered the Q & A to be of doubtful evidential value; and to have been a foreshadowing of the unsworn statement which was adequately put to the jury with the necessary warnings. In all the circumstances, therefore, we found that there was no merit in this ground of appeal.

Ground 4

The verdict is unreasonable and cannot be supported having regard to the evidence.

The applicant's submissions

[70] This was the "umbrella" ground advanced by the applicant. Its essence was that, because of the weaknesses and deficiencies in the evidence, it was unreasonable or unsafe for a jury to have convicted the applicant.

The Crown's submissions

[71] For the Crown, the substance of the submissions made was that the conviction was neither unsafe nor unreasonable as the learned trial judge had adequately directed the jury on all the elements of the offence; on matters such as the onus and standard of proof and had adequately put the applicant's case to them, along with directions on how to treat with circumstantial evidence.

Discussion

[72] A perusal of the transcript confirms, in our view, the submissions made by the Crown in relation to this ground. We were unable to discern, for example, how the non-production of the motorcar and its original documents could have had any impact on the fairness and outcome of the trial. There was sufficient evidence before the jury on the basis of which they could have arrived at the verdict that they did. We are unable to say that in this case the verdict is "so against the weight of the evidence as to be unreasonable and unsupportable", which is the threshold that an applicant has to meet in order to succeed on such a ground (see for example **R v Joseph Lao** (1973) 12 JLR 1238), 1240 H). Our findings in relation to the previous grounds made it impossible for us to have found any merit in this ground.

Conclusion

[73] After giving careful consideration to the written and oral submissions made by learned counsel on both sides; and after carefully perusing the transcript, we took the view that the learned trial judge gave a summation that was commendable for its

clarity, comprehensiveness, fairness and balance. The learned trial judge, in our view, attempted to convey to the jury the issues, evidence and necessary directions, not in an abstract, theoretical manner, but, as we would have expected of a judge of experience, by relating her directions on the issues to examples taken from the evidence in the case.

[74] In our view the summation could not be faulted; none of the grounds of appeal was made out, and it was for these reasons that we refused the application.