[2020] JMCA Crim 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 8/2013

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA

JULIAN BROWN v R

Miss Nancy Anderson for the applicant

Leighton Morris and Miss Trichana Gray for the Crown

1 November 2017 and 13 November 2020

MCDONALD-BISHOP JA

[1] On 12 October 2012, Mr Julian Brown ("the applicant") was convicted in the Home Circuit Court for the offence of murder following a trial by Straw J (as she then was) ("the trial judge") sitting with a jury. He was charged on a single-count indictment for the murder of Howard Thompson, otherwise called Val ("the deceased"). On 11 January 2013, he was sentenced to life imprisonment at hard labour with the stipulation that he serves 28 years before being eligible for parole.

[2] Aggrieved by the outcome of the trial, the applicant filed an application for leave to appeal his conviction and sentence on 21 January 2013. The application was

considered by a single judge of this court who refused leave to appeal. He opined that the main issues in the case were the correctness of the identification and credibility, and they were adequately dealt with by the trial judge in her summation to the jury. The applicant renewed his application for leave, before the court, as he was entitled to do.

[3] On 1 November 2017, the court heard the renewed application for leave to appeal. After considering the arguments of counsel on both sides, the court refused the application and deemed the sentence to have commenced on 11 January 2013.

[4] We promised then to put the reasons for our decision in writing; this is in fulfilment of that promise, with sincerest apologies for the delay.

The case at trial

(a) *The prosecution's case*

[5] At trial, the prosecution relied on the evidence of eight witnesses. However, the witness to fact, whose evidence was pivotal in the conviction of the applicant, was Mr Norman Burton. His evidence, in summary, was as follows.

[6] Sometime in early June 2005, at approximately 6:00 pm, he was standing alone near the gate to his home located in a lane at a Portmore address in the parish of Saint Catherine. He saw three men, whom he knew before, as Cougar, Coutinay and Markie, walking in the lane. He identified the applicant in court as the person he referred to as Markie. The three men walked past him and went into Cougar's yard.

[7] About two minutes later, Mr Burton saw the applicant coming back out unto the lane and approaching two men, who were also in the lane. One of these two men was the deceased. Mr Burton heard two explosions and observed the applicant firing a gun at the men. The man who was with the deceased ran away, but the deceased fell. The applicant walked up to where the deceased had fallen and fired more shots at him while he lay on the ground. The applicant then walked away. As the applicant walked past Mr Burton, Mr Burton spoke to him saying, "what a go on, what a go on". The applicant answered him, saying, "everything kris". Mr Burton explained that he asked the question of the applicant because, "I know him just done shoot Val and mi just want to know why, so I ask him what happen".

[8] Mr Burton and two women went to assist the deceased. Up to then, the deceased was alive. While they were seeking transportation to assist the deceased to the hospital, the deceased said, "What a do, What a do Markie". The women put the deceased in a car and took him away from the lane.

[9] It was not until June or July 2009, being four or so years later, that Mr Burton gave a statement to the police. He explained to the court that he only gave his statement to the police after shootings occurred in his yard sometime in 2009. He also explained that he thought it was safe to give his statement as he thought that Cougar and Coutinay had gone abroad, and he had heard that the police were holding the applicant. No one else gave a witness statement to the police.

[10] On 1 August 2009, Mr Burton pointed out the applicant at an identification parade that was conducted at the Portmore Police Station by Woman Sergeant Maureen Hall, another witness for the prosecution at the trial. The attorney-at-law for the applicant was present at the identification parade.

[11] On 16 June 2013, a post-mortem examination was conducted on the body of the deceased by consultant forensic pathologist, Dr Ere Seshaiah, who recorded his findings and conclusion as to the cause of death in a post-mortem report. Despite the objection of the defence, the post-mortem report was adduced into evidence at the trial, through the testimony of Dr S N Prasad Kadiyala, pursuant to section 31D(c) of the Evidence Act. The post-mortem report revealed that the deceased sustained four gunshot wounds to several parts of his body, including his neck and thigh. In the opinion of Dr Seshaiah, death was due to multiple gunshot injuries.

[12] Detective Corporal Dennis Davis was the investigating officer, having been assigned in July 2009 to continue investigations in the case. During the conduct of his investigations, he saw and spoke with the applicant at the Portmore Police Station cellblock, where the applicant was in custody. Detective Corporal Dennis told the applicant that he was investigating the murder of the deceased and that he was a suspect. The applicant, having been cautioned, responded saying, "[o]fficer, anything a anything". Detective Corporal Davis arranged for an identification parade to be held in respect of the applicant after informing him of his intention to do so. Following the conduct of the identification parade on 1 August 2009, Detective Corporal Dennis

charged the applicant for the murder of the deceased. The applicant made no statement upon being cautioned.

(b) *The applicant's case*

[13] The applicant made an unsworn statement from the dock in which he stated that he knew nothing about the murder of the deceased. His defence, in essence, was that Mr Burton acted out of spite, malice and ill-will arising from a shooting incident between Mr Burton and his (the applicant's) friends. He said that his friends were acquitted of the charge of shooting brought against them by Mr Burton and, as he put it, "[Mr Burton] seh like how my friend dem get weh off a di shooting case, him say him nah stop try until mi go to prison". He later reiterated, "me and [Mr Burton] don't have nothing in personal... Him and my friend dem, [Mr Burton] and my friend dem have shoot out two times. This is where he put me on spot like this?"

The grounds of appeal

[14] In his application for leave to appeal, which was initially considered by the single judge, the applicant relied on four grounds which were, broadly speaking, "misidentify by the witness", unfair trial, lack of evidence and that, "the prosecution witness presented to the court conflicting and contrary testimonies, ...thus calling into question the soundness of the verdict". At the hearing of the application in open court, leave was granted to Miss Nancy Anderson, counsel who appeared on his behalf, to abandon the original grounds of appeal and to argue four supplemental grounds.

[15] The supplemental grounds of appeal were stated in these terms:

"Ground #1

The Learned Trial Judge failed to direct the jury that in a recognition case there is a danger of the witness mistakenly thinking he recognized the applicant.

Ground #2

The Learned Trial Judge erred in her failure to direct the jury on how to treat the procedural breaches in the identification parade with respect to the weight of the identification evidence.

Ground #3

The Learned Trial Judge erred in allowing the witness, Burton, to adduce hearsay evidence by stating what the deceased allegedly said as (1) there was insufficient evidence that it was a dying declaration and (2) the jury was not properly directed on how to treat the hearsay evidence.

Ground #4

The Learned Trial Judge erred in allowing the admission of the Post Mortem report prepared by Dr [Seshaiah] under section 31(D)(c) of the Evidence Act.

Ground #5

The sentence was manifestly harsh and excessive, unfair and unjust as the Sentencing Judge failed to take into account (a) the applicant's Constitutional right to a fair trial within a reasonable time, (b) the time the applicant was in custody and [c] the good character of the applicant."

The appeal against conviction

[16] The challenge to the applicant's conviction by the jury, as reflected in the grounds of appeal, centred on the trial judge's directions regarding the issue of visual identification and her conduct of the trial as it relates to the admissibility of hearsay evidence. Therefore, the questions for the determination of the court, in treating with

the application for leave to appeal the conviction, fell under two broad areas of the law of evidence, namely, identification and hearsay. These were the questions that arose for the court's consideration concerning these matters:

i) whether the trial judge erred in her directions to the jury on their approach to the evidence of visual identification based on recognition (ground one);

ii) whether the trial judge erred in her directions to the jury regarding procedural breaches at the identification parade (ground two);

iii) whether the trial judge erred in allowing Mr Burton to adduce hearsay evidence of what the deceased reportedly said at the crime scene regarding the applicant (ground three); and

iv) whether the trial judge erred in permitting the post mortem report of Dr Ere Seshaiah to be admitted into evidence under section 31D(c) of the Evidence Act (ground four).

A. <u>Identification</u>

Issue one

Whether the trial judge erred in her directions to the jury on their approach to the evidence of visual identification based on recognition (ground one)

[17] The applicant's complaint embodied in ground one is that the trial judge failed to direct the jury that in a recognition case, there is a danger of the witness mistakenly

thinking he had recognised the accused. Miss Anderson submitted that in a recognition case, the risk is not that the witness will pick out the wrong person on an identification parade, but that at the time of the offence, he mistakenly thinks he recognises the offender. According to counsel, this danger of mistaken identity in a recognition case should have been brought home to the jury in this case, and the trial judge failed to do so. Counsel pointed out that although the trial judge directed the jury on the dangers of mistaken identity, she failed to explain that risk in conjunction with the identification of a suspect at an identification parade by a witness who knows him. This error, according to counsel, is fundamental to the identification of the applicant and went to the centre of his defence –"it was not me". She maintained that a failure by the trial judge to give a proper direction to the jury in this regard rendered the trial unfair.

[18] In response on behalf of the Crown, Mr Leighton Morris submitted that the trial judge addressed all the relevant concerns in her directions on identification, which were adequately tailored for the purposes of the matter before her. He pointed to several portions of the transcript to reinforce his point that the trial judge could not be faulted in her summing-up to the jury on the issue of visual identification.

[19] Having examined the relevant portions of the trial judge's summing-up on the issue of identification, we accepted the submissions of the Crown that the directions to the jury on visual identification were accurate and unimpeachable. The directions were in keeping with the letter and spirit of the well-known guidelines laid down in **R v**

Turnbull and others [1976] 3 All ER 549 ("the **Turnbull** guidelines") and nothing more was required of the trial judge concerning that issue.

[20] Lord Widgery CJ, in his landmark statement of the law in **R v Turnbull**, opined, among other things, that recognition may be more reliable than the identification of a stranger, but that even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made. The trial judge, having made it clear to the jury that identification was an issue in the trial because the defence "was saying the identification is mistaken" and that "malice is involved", proceeded to follow the **Turnbull** guidelines in these terms (page 382 line 2 to page 384 line 11 of the transcript):

> "... **I have to warn you of a special need for caution before convicting the [applicant] in reliance on the evidence of identification. This is because it is possible for an honest witness to make a mistaken identification. And an apparently convincing witness can be mistaken, even in a case of recognition. I don't know if any of you ever find yourself in a situation where you have seen someone you thought that you knew and went to the person and you recognize that it was not the person. So even an honest witness in a recognition case can be mistaken. And you realize that it is a case where Mr Burton is saying he knew the [applicant] before**. In fact, when the [applicant] gave his statement from the dock, he was referring to Mr Burton as Christy. **So it is a recognition case and there is no denying that they knew each other. So you still have to be careful when you examine the identification evidence. Because you have to look at what Mr Burton say [sic] about the circumstances of identification**. What you will have to

> examine, is how long did he have the [applicant] under observation at the time.
>
> At what distance, in what light did anything interfere with his observation of the [applicant], his knowledge of the [applicant] because it is a recognition case so you are going to consider how well and how long he had known him before. You would consider, also, how long it was between his observation of the [applicant] at the time he identified [him] on the identification parade." (Emphasis added)

[21] That having been said, the trial judge proceeded to highlight to the jury the evidence of Mr Burton concerning those elements of the identification evidence that they had to examine carefully. She painstakingly directed the jury's attention to the circumstances in which the purported identification of the applicant was made, with faithful adherence to the dictates of the **Turnbull** guidelines.

[22] Quite apart from assisting the jury on the approach they should take, by reference to an assessment of the circumstances in which the purported identification of the applicant was made at the time of the shooting, the trial judge also indicated the purpose of the identification parade within the context of a recognition case. Furthermore, even more importantly, she highlighted to the jury that the identification parade was held four years after the killing. She noted at page 392, line 6 – 20 of the transcript:

> "Now, Mr Foreman and your members, you no doubt appreciate that those are the circumstances of the identification. You no doubt appreciate that he gives no statement to the police about what he saw until four years later. And four years later is when he identifies [the applicant] on an identification parade. So the first thing that you going to have to do in assessing if the Crown had proven to you the identity of the shooter, the first thing you

> are going to do is to assess the opportunity Mr Burton would have had to view the shooter. If he knew him before, well known to each other, whether you believe he had sufficient opportunity to view…."

[23] At page 394, line 4 - 23 of the transcript, she continued, still on the purpose of the identification parade:

> " ... You maybe saying to yourself, but the man know the man so why does he have to go on an identification parade. Well, you would appreciate that he is referring to the man as 'Markie' and the police would have to be satisfy [sic] as to who he is saying this 'Markie' is. So, what the Crown is saying, the purpose of him going on the identification parade is to point out who [sic] he is saying is the 'Markie' that he says shot 'Val'.
>
> Now, what is the purpose of an identification parade? Now, all properly conducted identification parades are generally accepted as being the most satisfactory measure of testing the reliability of a witness' identification of a suspect. The purpose is to allow a witness the opportunity to substantiate the accuracy of a prior description of an alleged offender."

Then, at page 395, line 15 of the transcript, she reiterated:

> "Now, an identification parade in a recognition case can confirm the witness' ability to pick out the person identified; and the function of the identification parade under those circumstances is not only to test the accuracy of the witness' recollection of the person whom he says he saw commit the crime, but to test the honesty of the witness' assertion that he knew the person identified."

[24] The trial judge extensively addressed the issue of visual identification and the purpose and significance of an identification parade in the context of a recognition case. It would have been clear to the jury that the witness, even if they had found him to be honest or credible, could have been mistaken. This possibility of mistake would have existed, even though it was not disputed that he had known the applicant before the

time of the shooting. It was made clear to the jury by the trial judge that it was the first purported identification of the applicant, at the time of the commission of the offence that was of critical importance in proving that he was the shooter as alleged. The jury would have been mindful, based on the "**Turnbull** warning" which the trial judge gave them that the risk of mistaken identity would have been at the time of the alleged commission of the offence and not at the identification parade.

[25] The possibility of a mistaken identification in a case of recognition was clearly brought home to the jury in the summing-up, and there was no error in the trial judge's directions that would render the trial unfair.

[26] This complaint of the applicant in ground one was found to be baseless, and so, had no realistic chance of succeeding.

Issue two

Whether the trial judge erred in her directions to the jury regarding procedural breaches at the identification parade (ground two)

[27] Miss Anderson contended that it was incumbent on the trial judge to inform the jury of the nature of the breaches that occurred at the identification parade and the effect that they would have had on the case. She relied on the case of **Regina v David Thompson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal 39/1999, judgment delivered 6 March 2000, in which an identification parade was held in circumstances where the witness knew the perpetrator before by an alias, but there was a disparity in the heights of the persons on the parade.

[28] From a perusal of the transcript, it does seem that what the applicant was referring to as breaches in the conduct of the identification parade relate to (a) the identity of the police personnel who called Mr Burton to the line-up of the men on the identification parade; and (b) what Mr Burton had said as to his reason for being at the parade.

[29] In cross-examination, Woman Sergeant Hall, who conducted the parade, was asked about a statement she made about Constable Powell calling Mr Burton to come to the room in which the identification parade was being held. Constable Powell was on duty assisting with the parade. Woman Sergeant Hall was not sure where at the police station Mr Burton had been before he was called and whether Constable Powell was the one who had called him.

[30] At pages 401 to 402 of the transcript, the trial judge reviewed the evidence of Woman Sergeant Hall on this issue. She reminded the jury that the Sergeant was not sure whether Constable Powell had called Mr Burton. Woman Sergeant Hall had said too that, "I don't think it was someone who left the parade room to get [Mr Burton]... I asked to call the witness I don't know who went". The highest that the witness' testimony could have been taken to mean was that she did not remember who went for the witness; it was not definitive that Constable Powell either did so or did not do so. Despite that unreliable bit of evidence, the trial judge, nevertheless, highlighted very clearly to the jury that there would have been a potential breach in the conduct of the

identification parade if it were the case that Constable Powell had called Mr Burton to the room. She directed at page 401, line 24 to page 402, line 20 of the transcript:

> "**Now this is what she has said, remember she had said it was Constable Powell who went. I just have to leave that to you because you have to assess the fairness of the parade and what weight to attach to it because you no doubt understand that Constable Powell was in the parade room while the line-up was going on. So, if Constable Powell was the one sent outside to call [Mr Burton] it is a possibility that Constable Powell could have said, well, he is under number seven so this is why you would have to assess the fairness**. But when you are assessing this remember the men are saying that they knew each other. So, you will have to ask yourself if really and truly, Mr Burton would need assistance to point out this man. But I have to leave this to you because it is in the evidence and you have to assess the fairness of the parade. So I am just leaving that to you because you would have to decide what weight, is it any value to you, was Mr Brown properly pointed out by Mr Burton..." (Emphasis added)

[31] It is clear from the preceding excerpt of the summing-up that the trial judge did what she was required to do in assisting the jury to focus on the fairness of the identification parade as the critical issue. We concluded that neither her approach to, nor her directions on, the evidence concerning the identification parade could be faulted.

[32] It should also be specially noted, as pointed out by the trial judge in her directions to the jury, that it was never put to Mr Burton that Constable Powell or anyone else assisted him to point out the applicant. It ought to have been put to the witness for him to be given the opportunity to respond. Fairness dictated that course of action during cross-examination. Although the trial judge indicated to the jury that it

was never put to the witness that he was assisted in his identification, she did not indicate to them the effect of that failure on the part of the defence, which would be that the jury need not attach any weight to those assertions. Such a direction would not have been favourable to the applicant's case. Therefore, this point taken by the applicant, regarding Constable Powell calling Mr Burton to the parade, would not be sufficient to vitiate the propriety and fairness of the identification parade, even if the trial judge had not directed the jury on it. It was an undisputed fact that Mr Burton knew the applicant sufficiently well to be able to identify him in a line-up of nine men without the help of anyone. If the defence sincerely believed that that was not the case, they ought to have put it to Mr Burton. This aspect of ground two could not avail the applicant in having his conviction disturbed.

[33] The other aspect of the conduct of the identification parade that raised criticism from the applicant was the absence of an endorsement on the identification parade form of what Mr Burton had said when he was asked about his reason for being at the parade. The applicant’s contention at the trial, which was suggested to Mr Burton as well as Woman Sergeant Hall, was that he said that he was there to point out a man who with others had shot up his yard. That, however, was denied by both witnesses.

[34] We found that the trial judge correctly left for the jury's consideration, with proper directions, the evidence of what Mr Burton said when he was asked his reason for being at the identification parade. She also gave the appropriate direction concerning the reasons given by Woman Sergeant Hall for the absence of any notation

on the identification parade form of what Mr Burton may have said. She told the jury that they had to decide as to whether they felt sure that they were satisfied with the conduct of the identification parade and the reason Mr Burton went on the parade (page 405, lines 16 – 18 of the transcript). The trial judge made it clear to the jury that the ultimate question for their consideration was whether the parade was fair. She told them that they had to examine the evidence in order to conclude the point and that it was for them to decide what, if any, weight, they would attach to the identification parade. She conducted a thorough review of the evidence for the benefit of the jury, pointing out to them, at page 397, that there was "no challenge to the fact that [the applicant] was pointed out on the ID parade by Mr Burton".

[35] In **Michael Allison, Oniel Hamilton and Marlon Johnson v R** [2012] JMCA Crim 31, Brooks JA usefully conducted an extensive review of some relevant authorities on the subject of procedural breaches in the conduct of identification parades. He, among other things, affirmed the dictum of Graham-Perkins JA in **R v Cecil Gibson** (1975) 13 JLR 2017, "that the jury ought to have been told of the breaches. The jury, being thus informed, would then be the arbiters of the effect of the improprieties".

[36] The trial judge's directions to the jury concerning the alleged shortcomings in the conduct of the identification parade were adequately aligned with the guidance provided by the two authorities cited above, as well as others that were brought to the attention of the court by both sides (see, for instance, **Regina v Bradley Graham and Randy Lewis** (1986) 23 JLR 230 and **Regina v David Thompson**). As Mr Morris

submitted, the trial judge "appropriately highlighted the possibility of [a] breach for the jury and left it for them to determine what weight if any it merited". We endorsed this view. In the light of the settled authorities, the trial judge's directions were balanced and accurate, and therefore, could not be impeached. We could not discern any merit in ground two.

B. Hearsay evidence

Issue three

Whether the trial judge erred in allowing Mr Burton to adduce hearsay evidence of what the deceased reportedly said at the crime scene regarding the applicant (ground three)

[37] The contention of the applicant in ground three is two-fold. The first aspect of the complaint is that the trial judge erred in allowing Mr Burton to give hearsay evidence of what the deceased allegedly said, as there was insufficient evidence that it was a dying declaration. The second aspect is that the jury was not properly directed on how to treat the hearsay evidence of what the deceased allegedly said. Each issue will be considered in turn.

(a) *Admissibility of the deceased's statement*

[38] The trial judge allowed the prosecution to adduce evidence of what the deceased had said to Mr Burton and the women who were helping him after he was shot, which was, "what a do Markie". There was no prior objection to the admissibility of this alleged assertion of the deceased. Therefore, the trial judge did not expressly rule on its admissibility or made any assertion that she admitted the statement on the basis that it was a dying declaration.

[39] The applicant contended that the statement would not have qualified as a dying declaration, and so was inadmissible. The rule applicable to dying declarations, in its most straightforward formulation, is that a statement of a deceased is admissible as evidence of the cause of his death at a trial for his murder or manslaughter if the deceased was under a settled hopeless expectation of death at the time he made the statement (see **Neville Nembhard v The Queen** [1981] 1 WLR 1515).

[40] Mr Morris, however, while advancing the argument in his response that the statement was part of the *res gestae*, also put forward what he called an "alternative argument". He argued that there is authority to suggest that there are circumstances in which, having regard to the apparent severity of the injury, a court can infer a settled hopeless expectation of death at the time of an utterance by a deceased. He cited Archbold, 36th edition, page 397, paragraph 1084, in support of this argument.

[41] We concluded that this was not an appropriate case in which an inference of hopeless expectation of death could be drawn. We agreed that there was, indeed, insufficient evidence to render the assertion of the deceased a dying declaration and, so, we accepted the contention of the applicant on this point. The matter did not end, there, however, because as Mr Morris pointed out, the question of whether it was part of the *res gestae* arose for consideration.

[42] In **R v Andrews** [1987] 1 All ER 513, the House of Lords clarified and refined *res gestae* as an exception to the hearsay rule. In dismissing that appeal, their Lordships agreed with the judgment of Lord Ackner, who opined at page 520:

> "...[M]ay I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the *res gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as 'hearsay evidence'. (1) The primary question which the judge must ask himself is: can the possibility of concoction or distortion be disregarded? (2) To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity. (3) In order for the statement to be sufficiently 'spontaneous' it must be so closely associated with the event which has excited the statement that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading. (4) Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion ... (5) As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error."

[43] Also, as noted by counsel for the Crown, this court, in **Jordon Thompson v R** [2013] JMCA Crim 62, in examining the question relating to *res gestate* and dying declarations, stated:

> "[18] The principle of *res gestate* is well accepted as a common law exception to the hearsay rule. Statements by the deceased made immediately upon the occurrence which caused the death, but not under such circumstances as would render them admissible as dying declarations may be admitted in evidence as part of the *res gestate*."

[44] The issue that arose on this appeal, regarding the deceased's statement at the time of the incident, is reminiscent of the treatment by the Privy Council of a similar statement made by the deceased in the Jamaican case of **Arthur Mills, Garfield Mills, Julius Mills and Balvin Mills v The Queen** (1995) 46 WIR 240. In that case, which involved a charge of murder, the deceased was fatally chopped and injured by the appellants who were members of the same family, being a father and his three sons. The deceased, after he was injured, and while at the scene of the crime, uttered the words to a person who was not called as a witness that, "Jules and him bwoy dem chop me up". This piece of evidence emerged unexpectedly at the trial as the person to whom they were said could not be found to give evidence, and the prosecution did not intend to elicit the evidence. However, the witness in whose presence it was uttered blurted out the evidence while testifying. Defence counsel did not seek a ruling on the admissibility of the statement from the trial judge, and he did not cross-examine on the point.

[45] Counsel for the appellants, on appeal before the Privy Council, argued that the admissibility of the deceased's statement should have been tested against the law governing dying declarations. In considering that argument, the Board made this salutary pronouncement at page 11 of the opinion:

> "Their lordships accept that the modern approach in the law is different: the emphasis is on the probative value of the evidence. That approach is illustrated by the admirable judgments of Lord Wilberforce in the Privy Council in *Ratten v R* [1972] AC 378 and Lord Ackner in the House of Lords in *R v Andrews* [1987] AC 281, and notably by the approach in the context of the so-called *res gestae* rule that the focus should be on the probative value of the statement rather than on the question whether it falls within an artificial and rigid category, such as being part of a transaction. *Non constat* that their lordships should now reject the exception governing dying declarations. On the contrary, a re-examination of the requirements governing dying declarations, against the analogy of *Ratten* and *Andrews*, may permit those requirements to be restated in a more flexible form. How far such a relaxation should go would be a complex problem."

[46] Their Lordships did not enter into an examination of how far a re-examination of the law governing dying declarations should go because, as they opined, "it [was] self-evident that the deceased's last words were admissible under another exception to the hearsay rule, namely the so-called *res gestae* rule". In coming to that conclusion, their Lordships took into account the following matters:

i) The deceased's last words were closely associated with the attack that triggered his statement;

ii) It was made in conditions of proximate contemporaneity;

iii) The dramatic occurrence and the deceased's serious wounds would have dominated his thoughts; and

iv) The inference was irresistible that the possibility of concoction and distortion could have been disregarded.

[47] Their Lordships concluded that, "[w]hile in a sense something had gone wrong at the trial, good sense and fairness did not require the judge to exclude highly probative evidence which the jury had heard".

[48] We adopted this approach of the Privy Council in examining the circumstances of this case. We found, on the strength of the authorities, that the trial judge properly admitted the statement of the deceased as an exception to the hearsay rule, namely, *res gestae*. The applicant's argument that the statement ought not to have been admitted because it was not a dying declaration could not be accepted as a correct statement of the law.

(b) *The judge's direction on the deceased's statement*

[49] The trial judge correctly treated the statement attributed to the deceased as part of the *res gestae* (albeit that she did not specifically use the words "*res gestae*") and gave directions in law as to how it ought to have been treated by the jury. This is seen at pages 412 to 415 of the transcript, where she directed the jury that they must be satisfied of several pertinent matters, which included the following:

i) that the deceased uttered the words attributed to him by Mr Burton (page 412, line 15 - 17);

ii) that Mr Burton was not mistaken about what he reportedly heard the deceased say (page 412, line 17 - 21);

iii) that Mr Burton is not concocting or distorting the evidence to his advantage or the disadvantage of the applicant (page 412, line 21 - 24);

iv) that Mr Burton was not actuated by ill-will or malice (page 413, line 12 - 13);

v) what was the meaning of the words, if it was accepted that the deceased uttered them (page 413, line 23 - 25);

vi) if the words were interpreted to mean that the deceased was saying that applicant had shot him, what were the circumstances in which the purported identification was made by the deceased (page 414, line 1 - 12); and

vii) there was no evidence as to the length of time the deceased would have had the applicant under observation, the opportunity he had to see his face and that the deceased knew the applicant before (page 415 line 2-10).

[50] Having directed the jury's attention to those matters which were for their consideration, the trial judge then said (page 415, line 10 - 15):

> "So you have to consider all of that before you could come to any conclusion or draw any inference that those words -- that [the deceased] is saying that [the applicant] shot him. You have to be very careful with that, Mr Foreman and your members."

[51] Miss Anderson argued, however, that the trial judge failed to remind the jury that, usually, evidence is given by witnesses who can be seen in the witness box and did not explain to them that, the absence of the opportunity to test the accuracy of what the deceased said, represented a significant disadvantage to the applicant. The trial judge, counsel argued, should have instructed the jury that they needed to take into account the absence of the deceased when assessing what he had allegedly said. Counsel relied on the principle enunciated at paragraph 17 of **Stoutt v The Queen** [2014] UKPC 14 that "hearsay evidence is indeed admissible, providing the necessary statutory conditions are met... But it always suffers from the disadvantage that the jury cannot see the source of it and cannot see his accuracy tested".

[52] It is, indeed, correct that the trial judge did not direct the jury, in the words advanced by counsel, about their inability to assess the deceased, having not seen him as a witness to observe his demeanour and hear his statement tested in cross-examination. The omission of such a direction in the circumstances of this case, however, could not render the verdict of the jury flawed to affect the applicant's conviction because the case for the prosecution was not mounted on the hearsay evidence, but rather on the direct, 'I-see' evidence of Mr Burton. Furthermore, counsel in his cross-examination, and the applicant in his unsworn statement, did not elicit any fact to suggest that the deceased would have been actuated by malice or ill will to accuse the applicant falsely of shooting him.

[53] The trial judge made it clear to the jury that the same kind of evidence, given by Mr Burton regarding the identification of the applicant, was required from the deceased and that there was no such evidence. The jury was advised to approach the evidence of what the deceased purportedly said with caution for these reasons.

[54] By and large, the trial judge's directions to the jury, regarding the approach they should take in considering Mr Burton's evidence of what the deceased reportedly said, were sufficient and fair and not flawed in any material respects to vitiate the conviction. Indeed, even if the trial judge had given the directions in the terms proposed by Miss Anderson, it is highly improbable that a different verdict would have been returned. The evidence from Mr Burton, once accepted by the jury as credible and reliable, would have been sufficiently cogent to support the conviction.

[55] Ground three could not assist the applicant in his bid to have his conviction quashed.

Issue four

Whether the trial judge erred in permitting the post mortem report of Dr Ere Seshaiah to be admitted into evidence under section 31D(c) of the Evidence Act (ground four)

[56] It is considered prudent first to set out the relevant provision of section 31D(c) of the Evidence Act for a clearer appreciation of the context within which the applicant's complaint in ground four was considered. Section 31D(c) provides:

> "31D. Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him

would be admissible if it is proved to the satisfaction of the court that such person-

(a) …

(b) …

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

…"

[57] It was the applicant's primary contention on this ground that insufficient evidence was adduced for the court to determine that it was not reasonably practicable to secure Dr Seshaiah's attendance to give "crucial evidence at the trial".

[58] The prosecution relied on the evidence of three witnesses to satisfy the conditions of the statutory provision. The kernel of each of these witnesses' evidence is summarised below.

(a) *District Constable Glenford Stewart*

[59] District Constable Glenford Stewart knew Dr Seshaiah from 2006 to 2011 and had spoken to him often, in person, and by telephone at a number, bearing an English area code that was furnished to the court. He said during his examination-in-chief that he had spoken to Dr Seshaiah up to the day of the trial on 8 October 2012. In cross-examination, he, however, said that he called Dr Seshaiah on 3 October 2012, which would have been five days before the trial.

(b) *Mr Vivian Brown*

[60] Mr Vivian Brown was, at the time, the Acting Technical Director of National Security in the Ministry of National Security. He gave evidence that Dr Seshaiah was no

longer contracted to Jamaica as a pathologist as of 2008 or 2009 and that the Ministry was unable to facilitate any request for the return of pathologists from overseas in respect of cases due to severe budgetary restraints. The decision was taken that Dr Seshaiah could not be brought back to Jamaica, as the cost to secure his presence would be some $350,000.00 for one week.

(c) *Mr Kevin Hibbert*

[61] Mr Kevin Hibbert was attached to the Passport Immigration and Citizenship Agency. He gave evidence that Dr Seshaiah left Jamaica for Miami on 8 August 2009 and had not returned to Jamaica.

Discussion

[62] The trial judge was satisfied that the prosecution, upon the evidence of the three witnesses, had established the condition-precedent for admissibility of the post mortem report. The question for this court was whether she was correct in her conclusion. The finding of the trial judge was a mixed one of law and fact and so could not be interfered with by this court, merely on the basis that it would have decided the matter differently. The authorities are clear that in so far as findings of fact are concerned the appellate court should only interfere if the judge is plainly wrong **(Watt (or Thomas) v Thomas** [1947] 1 ALL ER 582 and concerning issues of law, she must be shown to have made an error of law. It was following this standard of review that the trial judge's decision on the question of admissibility of the post mortem report was examined.

[63] We observed that there was no challenge to the Crown's case on appeal that Dr Sheshiah had left Jamaica and not returned. The issue in controversy was whether it was not reasonably practicable to secure his attendance. The meaning of this requirement was explored in the case of **Luis Angel Castillo** [1996] 1 Cr App R 438, in respect of section 23 of the United Kingdom's Criminal Justice Act 1988, which made provisions, in more or less identical terms to section 31D(c). Stuart-Smith LJ, in delivering the judgment of the English Court of Appeal at page 442 paragraphs C-E, referenced the dictum of Beldam LJ in **Maloney** (unreported) 16 December 1993, that:

> "The word `practicable' appears in many statutes as a qualification of duties or obligations imposed on those required to carry out the relevant acts by the statute. It is to be noted that in section 23, the statements referred to may be statements of the prosecution or of defence witnesses, and the obligation which normally attaches to those who are presenting cases in the Crown Court is to secure, so far as possible, the attendance of witnesses to give evidence orally in court, but the word 'practicable' is not equivalent to physically possible. It must be construed in the light of the normal steps which would be taken to arrange the attendance of a witness at trial. Reasonably practicable involves a further qualification of the duty to secure the attendance at trial by taking the reasonable steps which a party would normally take to secure a witness's attendance having regard to the means and resources available to the parties."

[64] Stuart-Smith LJ further made the point that "... the mere fact that it is possible for the witness to come does not answer the question". The judge, he said, has to consider several factors, such as the importance of the evidence the witness can give, whether or not it was prejudicial, and how prejudicial it would be to the defence that the witness did not attend.

[65] This learning had been applied in several cases within our jurisdiction and was relied on by the trial judge in determining the admissibility of the post-mortem report. Having combed through the dicta of Stuart-Smith LJ in **Luis Angel Castillo**, the trial judge opined that, "[t]he issue in this case [was] just one of finances. There [was] no other reason". She resorted to the Oxford dictionary for the meaning of the word 'reasonable'. With that dictionary meaning in mind, she proceeded to examine the steps taken by the prosecution to secure the attendance of Dr Seshaiah, the response of Dr Seshaiah to the request for him to return to Jamaica and the effect of the evidence in question in the case. The trial judge made the appropriate observation that the evidence being relied on was that of a pathologist. She then opined that there might be some cases where the evidence is such that it would be absurd for the witness not to be brought because of the nature of the evidence in the specific case. Having taken into account all the circumstances of the case before her, against the background of the applicable standard of proof, the trial judge concluded that the prosecution had satisfied this statutory requirement. Accordingly, she ruled that the post-mortem report was admissible, without the attendance of Dr Seshaiah, because it was not reasonably practicable to secure his attendance.

[66] The ruling of the trial judge on the admissibility of the post-mortem report could not be disturbed. She gave due consideration to all relevant matters, and it could not be said that she considered irrelevant matters. She applied the correct law and, as far as her findings of fact were concerned, she could not be said to have been plainly

wrong. Any interference by this court with her finding that the evidence was sufficient, reliable and credible would not be justified.

[67] In any event, even if it were found that the evidence was insufficient to satisfy the statutory condition for the post-mortem report to be admissible, there was no prejudice or injustice to the applicant. The issue in the case for resolution by the tribunal of fact did not involve the cause of death of the deceased or the proof of death, itself. Nothing in controversy between the prosecution and the defence turned on the evidence of the pathologists, that is, of either Dr Seshaiah or Dr Persaud. There was no miscarriage of justice resulting from the absence of Dr Seshaiah. Therefore, the court would not have hesitated to apply the proviso under section 14(1) of the Judicature (Appellate Jurisdiction) Act, to this ground of appeal.

[68] The applicant had no realistic prospect of succeeding on ground four.

The appeal against sentence

Issue five

Whether the sentence was manifestly harsh, excessive, unfair and unjust (ground five)

[69] The applicant complained that the sentence imposed on him was "manifestly harsh and excessive, unfair and unjust", as the trial judge failed to take into account his constitutional right to a fair trial within a reasonable time, the time he was in custody, and his good character.

(a) *The constitutional right to a fair hearing within a reasonable time*

[70] Section 16(1) of the Constitution, which is part of the Charter of Fundamental Rights and Freedoms ("the Charter") (formerly section 20(1) of the Constitution) provides that:

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

[71] It was the submission of counsel on the applicant's behalf that the delay in disposing of the case between the time of the applicant's arrest and the hearing of the appeal (approximately eight years) had breached the 'reasonable time requirement' of his constitutional right. She argued that the remedy for the breach was a reduction in the sentence imposed on him; that is, the period before he would be eligible for parole. She placed reliance on **Melanie Tapper and another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/2007, judgment delivered 27 February 2009, as well as the Privy Council decision in the same case reported as **Melanie Tapper v Director of Public Prosecution** [2012] UKPC 26.

[72] Miss Anderson pointed out that the trial in **Melanie Tapper** had taken three years, the appeal was heard over five years after her conviction and that Smith JA, speaking on behalf of this court, held that the delay between conviction and appeal was inordinate. According to counsel, Smith JA stated that "such delay without more, constitutes a breach of the appellants' constitutional right to a hearing within a

reasonable time" and the custodial sentence was reduced and suspended because of the breach.

[73] The Privy Council, in **Melanie Tapper v Director of Public Prosecutions**, affirmed the following dictum from **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72, on which Miss Anderson placed reliance:

> "[24] … If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant."

[74] In paragraph [27] of their opinion, their Lordships, after citing the case of **Boolell v The State** [2006] UKPC 46, an appeal from Mauritius, continued to express the opinion of the Board (paragraph 32) in that case as correctly representing the law of Mauritius:

> "(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

[75] We noted the ground in respect of which leave was sought and granted for the applicant to argue before this court. That ground was that the sentence was manifestly harsh, excessive, unfair and unjust because of the failure of the trial judge to take into

account the breach of his constitutional right to a fair hearing within a reasonable time. The submissions regarding the delay in the progress of the application for leave to appeal was, therefore, a departure from the ground of appeal in respect of which leave was granted. There was no application made for an amendment. The Crown was, therefore, not placed in a proper position to respond appropriately to the newly advanced ground and to put material before the court to explain or justify the delay. This was taken into account in determining whether the ground of appeal and the belated complaint of the applicant, advanced by way of submissions, had merit.

[76] The applicant's contention that his constitutional right was infringed because of the delay in the disposal of the case at trial was never raised before the trial judge. Therefore, the question arose as to whether the applicant should have raised the issue of the breach of his constitutional right in the court below.

[77] In the case of **Flowers v The Queen (Jamaica)** [2000] UKPC 41, the appellant had been tried on three occasions on the charge of capital murder between 1992 and 1997. He was charged in 1991. He was convicted and subsequently applied for leave to appeal his conviction to this court. The application for leave to appeal was determined in 1998.

[78] On appeal to the Privy Council, the appellant raised, among other things, the issue of delay in the trial. The delay between him being charged and the commencement of the trial had amounted to approximately six years. No arguments were advanced by counsel who appeared on his behalf at the trial as to what caused

the delay. When the third trial commenced, no application was made to stay the proceedings or to have the appellant discharged. Instead, at the commencement of the third trial, counsel appearing on behalf of the appellant, made an application for an adjournment on the basis that the defence was not ready. This application was refused. At the hearing of the appeal, no arguments were advanced that if a retrial were to be ordered, this would also constitute a breach of the appellant's constitutional rights.

[79] The contention of the appellant before the Privy Council was that the trial and conviction, after such a long delay, was, among other things, in breach of his constitutional right to a fair hearing within a reasonable time under section 20(1) of the Constitution of Jamaica. He maintained that the only appropriate remedy was a ruling that the third trial should not have taken place and that the conviction should be quashed.

[80] Their Lordships considered that the delay between the time the appellant was charged, and the commencement of the third trial, was "very lengthy" and "cause[d] their Lordships very serious concern". They, however, did not quash the conviction on the mere basis of the length of the delay. They proceeded to consider several factors and whether those factors had a bearing on the issue (see paragraph 40 of the opinion). The first factor that their Lordships considered was that no argument was advanced by counsel, who appeared for the appellant at the trial or at the court of appeal, that his constitutional rights were infringed.

[81] At paragraph 43 of the opinion, their Lordships considered that the failure to raise the issue before the courts in Jamaica was a factor which weighed against the appellant's submissions in the case. In this connection, their Lordships proceeded to make the salient observations in paragraphs 44 and 45 that:

> "44. Where the appellant has relied before the local courts on a breach of his constitutional right and raises the issue before the Board, the judgment of the Board in *Bell v Director of Public Prosecutions* makes it clear that there are a number of factors to be taken into account. The judgments of the Supreme Court of the United States in *Barker v Wingo* (1972) 407 US 514 identified four factors in considering the sixth amendment to the Constitution of the United States which provides:-
>
> > 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ….'
>
> 45. The factors are: **the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.** In *Bell* the Board acknowledged the relevance and importance of these four factors, stating that the weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case." (Emphasis added)

[82] In speaking to the factor regarding the assertion of the right by the defendant, the Board in paragraph 49 of the opinion, relied on dicta from the judgment of Powell J in **Barker v Wingo** (1972) 407 US 514, 528. Powell J stated that the defendant's assertion of or failure to assert his right to a speedy trial is one of the factors to be considered in an enquiry into deprivation of rights and that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial. Their Lordships concluded, after having regard to the facts, and what they described to have

been a "lengthy chronology" furnished to them, that the appellant "wholly failed to assert his right to a trial within a reasonable time before the local courts".

[83] There was no material placed before this court to show that the applicant had alleged that his constitutional right to a trial within a reasonable time was breached. This failure on the part of the applicant to raise the point in the court below went to the heart of his ground of appeal that his sentence was manifestly excessive, harsh, unfair and unjust, on account of the breach of his constitutional right, to which, he said, the trial judge had failed to have regard. The trial judge had no duty in law to raise the issue and embark on an enquiry into the constitutional right of the applicant of her own motion.

[84] The Privy Council took the same approach in **Melanie Tapper v the Director of Public Prosecutions**, in which the appellant had failed to raise the issue of pre-trial delay before this court, but contended before the Privy Council that the court erred in not taking it into account. In rejecting that argument, their Lordships made it clear that there was no "obligation on the court, of its own motion, to extend the argument beyond that advanced by the experienced advocates representing the Appellant" (paragraph 18). We endorsed this view.

[85] It must also be stated that, quite apart from the applicant's failure to raise the point of breach of his constitutional right in the court below, another relevant factor that was of critical importance in establishing a breach of section 16(1) of the Charter would have been the reason for the delay. The reason for the delay must be

demonstrated to be attributable to the State before an infringement of the right can properly be established for the purposes of redress under the Charter. The disclosure of the reason for the delay would have been critical because if the applicant was responsible for it, then that could not have been lawfully placed at the feet of the State. This was made clear by the Privy Council in **Taito v The Queen** [2002] UKPC 15, (referenced in **Melanie Tapper v Director of Public Prosecutions** at paragraph 24) when it stated that "... [d]elay for which the state is not responsible, present in varying degrees in all the relevant cases, cannot be prayed in aid by the appellants".

[86] Within the same context, their Lordships in **Melanie Tapper v Director of Public Prosecutions**, at paragraph 26, cited the dicta of Lord Bingham in the **Attorney General's Reference (No 2 of 2001)**. At page 24 in that case, Lord Bingham spoke to the issue of delay within the context of the equivalent provision of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. His Lordship opined with the agreement of the majority that, "if, **through the action or inaction of a public authority**, a criminal charge is not determined at a hearing within reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1)…" (Emphasis supplied). It is indisputable that, for there to be a breach of the section 16(1) of our Charter, there must be evidence that the delay complained about is due to the action or inaction of organs of the State.

[87] Furthermore, the right is not absolute and, so, can be limited by the State if the breach is demonstrably justified in a free and democratic society as provided by section 13(2) of the Charter. Section 13(2) of the Charter states:

> "Subject to sections 18 and 49, and to subsections (9) and (12) of this section, **and save only as demonstrably justified in a free and democratic society** –
>
> a) This Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, **16** and 17; and
>
> b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights...." (Emphasis added)

[88] Indeed, the Privy Council, in **Flowers v The Queen**, in speaking of the right as it was then under section 20(1) of the Constitution, affirmed its dicta in **Bell v The Director of Public Prosecutions** [1985] AC 937 that "...the right of an individual accused to be tried within a reasonable time [was] not an absolute right but must be balanced against the public interest for the attainment of justice". In this regard, Lord Templeman, speaking on behalf of the Board in **Bell v Director of Public Prosecutions**, stated, in part, at page 953:

> "Their Lordships accept the submission of the respondents that, in giving effect to the rights granted by section 13 and 20 of the Constitution of Jamaica, **the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica** the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter"). (Emphasis added)

[89] It means then that the enquiry into an alleged breach of section 16(1) cannot properly start and end with the length of the delay. The mere fact of delay, without more, is not sufficient to ground liability within the Charter. The investigation of the issue must necessarily involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case. This balancing exercise is necessary because the constitutional right of the applicant to a fair trial within a reasonable time is to be balanced against "the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica".

[90] Professor Peter Hogg, in his most useful text, Constitutional Law of Canada, Fifth Edition, Volume 2, examined section 1 of the Canadian Charter of Rights and Freedoms, which is similar to section 13(2) of our Charter. He, among other things, explained the evidence required in Charter cases, which we have accepted as a correct statement of the law applicable to Charter cases in this jurisdiction. He noted, in part (page 120):

> "... **With respect to evidence in Charter cases, in the stage-one inquiry into whether the law infringes a Charter right, the burden of proof does rest on the individual asserting the infringement. That, however, is simply a consequence of the rule of civil procedure that 'the one who asserts must prove'.** The burden of proof is the normal civil one, uncomplicated by any doctrine that the government need have only a 'rational basis' for its legislation. Once the stage-one inquiry has been answered yes, there is no presumption that the law is a reasonable limit that can be demonstrably justified in a free and democratic society. On the contrary, the burden is on the government to prove that the elements of s. 1 justification are present." (Emphasis added)

[91] Therefore, within the context of the Charter, the onus was on the applicant to not only assert but to establish in the court below a *prima facie* infringement of his constitutional right at the instance of the State. Once it was established that the State was responsible for the delay, which was such as to infringe his right to a trial within a reasonable time, then an evidential burden, as well as the legal burden, would have shifted to the State to demonstrably justify the breach, in accordance with section 13(2) of the Charter. It would then be upon the failure of the State to justify the breach that the issue of constitutional redress in the form of a reduction in sentence (or otherwise) would have properly arisen for consideration. This is so because if the breach were justified, then the delay, even if lengthy, would not be unconstitutional and the applicant would have been entitled to no relief under the Constitution.

[92] In our view, the pre-Charter authorities must now be carefully read in the light of the Charter. Therefore, the dictum of Smith JA in **Melanie Tapper v R**, which was relied on by the applicant, that delay, without more, constitutes a breach of section 20(1) of the Constitution (now section 16(1)) had to be re-evaluated within the context of the letter, sense and spirit of the Charter. As a result, that case provided no material support for the applicant's arguments that his sentence ought to have been reduced by this court because of breach of his constitutional right to a fair trial within a reasonable time.

[93] The foregoing analysis led this court to the conclusion that the length of the delay in the circumstances of the case, albeit regrettable, did not automatically mean a

breach of the applicant's constitutional right under section 16(1) of the Charter, as contended by him. The court could not properly arrive at a finding that there was a breach because the reason for the delay was never disclosed to the court. Furthermore, the delay may have been justifiable in a free and democratic society. However, the Crown was not given the fair opportunity to prepare its case to respond to the constitutional challenge that was belatedly raised on the appeal by way of submissions. For, as their Lordships pointed out in **Flowers v The Queen**, at paragraph 57, by reference to the dictum of Powell J in **Barker v Wingo**, at page 522:

> "Thus, as we recognized in Beavers v Hubert [(1905) 198 US 77] **any inqury into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:**
>
> '**The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances.** It secures rights to a defendant. **It does not preclude the rights of public justice**'." (Emphasis added)

[94] This court was not placed in a proper position to conduct any 'functional analysis' of the applicant's right to a speedy trial 'in the particular context of the case', bearing in mind that his rights did not preclude the rights of public justice.

[95] Accordingly, we concluded in all the circumstances, that the trial judge could not be faulted for failing to take into account the applicant's constitutional right to a fair trial within a reasonable time as a basis on which to reduce the sentence she imposed, because it was never asserted before her. Similarly, this court had no legal basis to take

account of the alleged breach of the Constitution to hold, in the applicant's favour, that the sentence imposed on him for the offence of murder, was manifestly excessive, harsh, unfair and unjust and ought to be reduced. The breach of the Constitution was never established in either court.

(b) *Time spent in custody and good character*

[96] Miss Anderson submitted that in **Meisha Clement v R** [2016] JMCA Crim 26, at paragraph [34], this court stated that it is now accepted that an offender should generally receive full credit for time spent in custody before trial. Counsel noted that at page 453 of the transcript, the trial judge asked about the time in custody, and was told by counsel for the applicant that he had spent three years and seven months in custody. In calculating the applicant's sentence, the trial judge stated, at page 454 line 13 - 17 of the transcript, that she started at 30 years for the pre-parole period, and having taken into account the number of years in custody, reduced it to 28 years. According to Miss Anderson, the accepted reduction would have reduced the period for eligibility for parole to close to 26 years.

[97] Counsel also noted that the applicant stated that he was living with his mother and four siblings. He had no previous convictions and, according to the probation officers, community members spoke favourably of his character. Counsel argued that given the time spent in custody and his good character, coupled with the breach of his constitutional right to a fair hearing within a reasonable time, a further reduction was appropriate and 20 years should be substituted as an appropriate pre-parole period.

[98] The Crown, in response, submitted that the sentence could not be said to be manifestly excessive, having regard to the factors that the trial judge took into account and the fact that the sentence was within the normal range of sentence for an offence of this nature. We entirely agreed with the submissions of the Crown, for reasons which will now be detailed.

[99] The trial judge did not employ a formulaic approach in determining the sentence as the courts have adopted in recent times, following the decision of this court in **Meisha Clement v R**, on which the applicant relied. The sentencing of the applicant predated that case, and so, the trial judge would not have benefitted from that guidance. There were also no formal sentencing guidelines in this jurisdiction that were available to the trial judge that would have guided her in her sentencing reasoning in the manner stipulated by Miss Anderson. She would, nonetheless, have had valuable guidance from such older authorities as, **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002. However, she failed to demonstrate that she had applied those principles in the manner prescribed.

[100] Despite the failure of the trial judge to follow a prescribed mechanism in the sentencing process, she did have regard to the objectives of sentencing and the need to balance the various aggravating and mitigating factors in arriving at an appropriate sentence, which she was obliged to do.

[101] She correctly took into account relevant factors relating to the nature and commission of the offence, chief of which was the use of a firearm to shoot the defenceless deceased multiple times. The trial judge noted the manner of the shooting, which was that even when the deceased fell to the ground, having sustained injuries, the applicant "stood over him and fired some more shots" in his body. She regarded the attack on the deceased as being, among other things, cowardly and wicked. In the same breath, she spoke to the prevalence of gun murders in Jamaica, which she said, "has caused numberless people in this country to be mourning as if we have been a country at war". The trial judge took into consideration and accorded due weight to retribution, deterrence (of the applicant and others), the need to protect society from such behaviour on the part of the applicant, and the need for his rehabilitation or reform (see page 451 to 452 of the transcript).

[102] She then indicated that she had borne in mind that he had no previous convictions as well as the length of time that he was in custody as mitigating factors (page 453 lines 14 to page 454 line 7).

[103] It is clear that, although the trial judge had indicated that she "started" at 30 years, it does appear that, in actuality, that was the sentence she had arrived at after balancing the various factors she had highlighted.

[104] She did not indicate a sentence range in which the offence would have fallen and a "starting point" within that range, which would have been in keeping with the authorities (even those before **Meisha Clement v R**) and be more helpful to this court

in evaluating the appropriate sentence. To that extent, she would have erred in principle. For that reason, this court had to objectively examine the sentence to determine whether it was manifestly excessive, having regard to the now more formulaic sentencing guidelines.

[105] Murder of this nature would fall within a sentencing range of anywhere between 25 and 40 years before eligibility for parole (see **Paul Brown v R** [2019] JMCA per F Williams JA, paragraphs 7 and 8). It warranted a starting point of no less than 27 years by virtue of the use of an illegal firearm and the number of times the applicant, as the sole perpetrator, shot the deceased.

[106] Aggravating the serious nature of the commission of the offence would have been the manner or execution of the shooting. The evidence was that when the deceased was helpless and defenceless on the ground, the applicant stood over him and continued shooting him. There was evidence that also suggested that the deceased did not know the reason for the applicant's actions as he had reportedly asked what had he done to the applicant. As the trial judge noted, the applicant had no quarrel with the deceased and there was no evidence that "either of [them was] in any gang fight against each other" (page 450, line 24 to page 451, line 2 of the transcript).

[107] On top of this, the commission of the offence was premeditated. The applicant went into the home of one of the men with whom he was walking and then returned to the lane where he fired the firearm in the direction of the deceased and the other man

with whom he was speaking. That man had to run to avoid injury. It could easily have been a double-murder.

[108] Furthermore, the applicant committed the offence in evidently good visibility in a residential area. This suggested a degree of brazenness that cannot be overlooked. In addition, upon his apprehension, he did not cooperate with the police in any way, for instance, by assisting in the recovery of the firearm that was used in the commission of the offence.

[109] The prevalence of these types of killings with the use of firearms in the communities of Jamaica (Saint Catherine, in which this offence was committed, not excluded), was another factor taken into account by the trial judge, and again, she could not be faulted for so doing. As she aptly noted, the firearm is a lethal weapon that "**has caused numberless persons in this country to be mourning as if we have been a country at war**" (emphasis supplied). We endorsed this viewpoint. There is no question that Jamaica is under the tyranny of the gun.

[110] When all these aggravating factors were taken into account, we concluded that the applicant would have deserved a sentence of 35 years' imprisonment before eligibility for parole.

[111] It was recognised, however, that there were mitigating circumstances in relation to him as the offender. The mitigating factor would have been his previous good character as extracted from the social enquiry and antecedent reports. This included the absence of previous convictions, which the trial judge did take into account. She,

however, did not specifically refer to his "good character", as argued by Miss Anderson. This court has had regard to the social enquiry report, and although it cannot be described as depicting him to be of unblemished character, it was in acceptably favourable terms. He was about 28 years old at the date of sentencing and described as illiterate but self-employed up to the time of his arrest. It was not lost on the court that he would have been a young adult at the time of the commission of the offence. The persons who were interviewed in the community described him as "a polite and conforming member of the community and that the charges laid against him were malicious and done as a means of vindictiveness". The report noted that the community in which he lived (Manley Lane) "could be regarded as volatile and noted for the upsurge of violence".

[112] When the mitigating factor was considered and balanced against the aggravating factors, we found that the heavy weight of the aggravating features of the case overwhelmingly outweighed the mitigating effect of his previous good character. His good antecedents would have paled in insignificance in the harsh light of his criminal conduct. As the trial judge opined, and which we accepted, he "committed a very heinous and wicked and cruel act when he saw [the deceased] standing under a tree that day speaking with someone". The deceased was 23 years at the time of his death, being not much older than the applicant was. Therefore, a proper balancing of the mitigating factor, arising from his good character, with the aggravating features in the commission of the offence, would have brought the sentence to 32 years' imprisonment before eligibility for parole.

[113] Concerning the issue of the applicant being given credit for time spent in custody before sentencing, the decision in **Meisha Clement v R** is instructive. In that case, this court stated:

> "[34] ... [I]n relation to time spent in custody before trial, we would add that it is now accepted that an offender should generally receive full credit, and not some lesser discretionary discount, for time spent in custody pending trial. As the Privy Council stated in **Callachand & Anor v The State** [[2008] UKPC 49, paragraph 9], an appeal from the Court of Appeal of Mauritius –
>
> > '... [a]ny time spent in custody prior to sentencing should be taken fully into account, not simply by means of a form of words but by means of an arithmetical deduction when assessing the length of the sentence that is to be served from the date of sentencing'."

[114] The trial judge at the time (being pre-**Meisha Clement v R**) would not have been bound by the decision in **Callachand & Anor v The State** [2008] UKPC 49, it being a case from another jurisdiction. It would have been, however, of considerable persuasive authority but it was never brought to her attention for her to decide whether to apply the guidance.

[115] However, in the light of the recent authorities from this court since **Meisha Clement**, fairness dictated that, in reviewing the sentence, this court should have regard to the fact that he was not sufficiently credited for the full time spent in custody while awaiting trial and sentencing. His counsel had told the trial judge, without any challenge from the prosecution that he was in custody for three years and seven months. We had no reason to reject counsel's computation. Based on the method of

assessment employed by this court, a reduction of the applicant's sentence because of the time spent in custody would mean a term of 28 years and five months' imprisonment before he is eligible for parole.

[116] It means, on the assessment of this court within the context of the new sentencing dispensation informed by more recent authorities and guidelines, that it could not reasonably be said that the sentence of 28 years imposed by the trial judge was manifestly excessive, harsh, unjust or unfair. It was a reasonable and proportionate sentence, which, as the Crown submitted, was well within the range of sentences imposed after a trial for the murder of this nature.

[117] There was absolutely no compelling reason for this court to interfere with the sentence imposed by the trial judge. Accordingly, we concluded that the appeal against sentence could not succeed.

Conclusion

[118] It was for all the reasons detailed above that the court concluded that the applicant had no prospect of success on any of the grounds of appeal he intended to pursue on appeal. Therefore, the decision set out at paragraph [3] above was made refusing the application for leave to appeal both conviction and sentence.