JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 65 & 66/2011

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE FRASER JA

KEVOL BROWN

SHANOVAN BROWN v R

Mrs Valerie Neita-Robertson QC for the applicants

Jeremy Taylor QC and Nicholas Edmond for the Crown

20, 21 October 2020 and 22 January 2021

STRAW JA

[1] These proceedings are concerned with two renewed applications for leave to appeal convictions and sentences brought by Messrs Kevol Brown and Shanovan Brown ("the applicants"). Where it is necessary to refer to the applicants individually, they will be referred to by their first names. This is merely for convenience, no discourtesy is intended.

[2] On 22 July 2011, the applicants (who are brothers) were convicted of murder after a trial before McDonald-Bishop J (as she then was) sitting with a jury in the Home Circuit Court. On 28 July 2011, the applicants were sentenced to imprisonment for life.

Kevol was ordered to serve 18 years before becoming eligible for parole, while Shanovan was ordered to serve 20 years before becoming eligible for parole. On 8 August 2011, the applicants filed applications seeking permission to appeal against their respective convictions and sentences. Their separate applications were considered by a single judge of this court. The grounds in each application were identical and were as follows: (i) "misidentify" by the witness, (ii) lack of evidence, (iii) unfair trial, and (iv) miscarriage of justice. The single judge found no merit in these grounds and refused leave to appeal against conviction. Further, the single judge regarded the sentences to be in line with previous sentences imposed and also refused leave to appeal against sentence. The applicants' respective sentences were deemed to have commenced on 28 July 2011.

[3] The applicants renewed their applications for leave before the court, as they are so entitled to do.

[4] On 20 October 2020, when the renewed applications for leave to appeal came before the court for hearing, learned counsel for the applicants, Mrs Valerie Neita-Robertson QC, sought and obtained permission to abandon the original grounds of appeal and to argue, instead, four supplemental grounds of appeal. These supplemental grounds were:

> "GROUND 1
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> That the Learned Trial Judge erred in admitting into evidence in their entirety the witnesses' [sic] Police Statement, her Deposition and the Transcript of her evidence in the first trial. This offended the rule against self-

corroboration, was therefore a material irregularity and denied the [applicants] a fair trial.

GROUND 2

The Learned Trial Judge failed to direct the jury adequately or at all on the issue of sublime duress of imprisonment on the witness, which saw her serving a sentence of three months for lying to the police; which imprisonment could have caused her in the first trial to conform to her police statement. This is especially important since there is no evidence as to what matter in her police statement she had lied about.

GROUND 3

The evidence of threats to the witness was so prejudicial to the Applicants that in spite of the warning of the Learned Trial Judge, the prejudice could not be cured.

GROUND 4

The sentence of both [applicants] is excessive in all the circumstances."

Background

[5] The Crown's case against the applicants depended primarily on a statement, a deposition taken at the preliminary enquiry commenced into this matter against the applicants and the transcript of testimony from a previous trial (which was aborted), all of which were taken from Miss Tashena Bell ("Ms Bell"). At the time of this trial, Ms Bell could not be found and as such, she did not give evidence. These documents were all tendered into evidence pursuant to section 31D(d) of the Evidence Act after a voir dire (trial within a trial) was held by the court.

[6] The statement and evidence as contained in the transcript above-mentioned, were essentially consistent in the narrative, except for some inconsistencies that will be

later highlighted. The transcript revealed that, on 12 January 2008, Ms Bell and her boyfriend, Mr Kerron Dunbar ("the deceased") were in bed at his house in Race Course, Falmouth in the parish of Trelawny. On the said day, at or about 6:45 am, Ms Bell heard a loud noise coming from outside, by the gate to the premises. The deceased got out of bed, took up a pair of shorts, and went toward the front door of the room that they were in; that door led directly outside. Before the deceased got to the door, it burst open and three men entered through the doorway. She saw two men in front and the other behind them. The two men in front opened fire with guns on the deceased. He ran and exited the room through a rear door, which also led outside.

[7] The three attackers exited through the front door, the same one which they entered from, and Ms Bell heard footsteps as if persons were running. She went outside and saw the deceased lying in the grass in the yard. He was bleeding from his chest area. Ms Bell went over to him and he hugged her and tried to speak. At this time, she heard further explosions coming from the direction of the road. She called for help. Persons eventually came and the deceased was taken to the hospital.

[8] Ms Bell recognised the two attackers who were in front. She knew them before as Kevol (who she also knew as Jubbie) and Copper. She also knew their father, whom she called "Jah B". At the time of the attack, Copper had on a cream coloured hoodie jacket, with the hood up. He had a shine short gun. Kevol o/c Jubbie also had on a hoodie. She identified in court Shanovan as Copper and Kevol as Jubbie.

[9] Another witness, Miss Doreen McLeish ("Ms McLeish"), gave evidence as to the events of that morning. She testified that she was at her home in Race Course, which was about a chain away from where the deceased lived. Her brother also lived in the same yard as the deceased. That morning, she heard a bang and a number of gunshots thereafter. She saw Copper, whom she knew before, walking along the road. Her evidence was that he had on a cream coloured hoodie and a shine short gun in his hand. He fired a number of shots from that weapon while he was on the road. She also saw Jubbie, whom she knew before. He too had a gun. It was broad daylight. Ms McLeish called the police. She then went by her brother's yard and in that yard, she saw the deceased bleeding and being cradled by Ms Bell. Ms McLeish identified both applicants in court, Shanovan as Copper and Kevol as Jubbie.

[10] The deceased succumbed to his injuries. The forensic pathologist, Dr Morandi Sarangi, who gave evidence at the trial, stated that the cause of death was hemorrhagic shock consequent upon wounds to the deceased's abdomen and chest, with injuries to a number of major organs accompanied by blood loss due to gunshot injuries.

[11] Both applicants turned themselves in to the police, because they were told that the police wanted to see them in relation to the killing of the deceased. The applicants were arrested and charged. No identification parade was held.

[12] At the preliminary enquiry, Ms Bell contradicted the account that she had given in her statement to the police. She deposed that she did not see who had entered the

room and shot the deceased. She deposed also that she had told some lies to the police because she was panicking. However, when she subsequently testified at the aborted trial, she admitted to lying at the preliminary enquiry. She explained that she had done so as a result of fear due to threats. She said that she had been imprisoned for telling those lies and insisted that she was speaking the truth at the trial.

[13] Both applicants gave unsworn statements denying all involvement in the shooting. They relied on the defence of alibi and asserted that they had been at Newton Street at the time of the incident. Kevol specified that he had been at his girlfriend's home. He also stated that he knew the deceased as they had gone to school together. He claimed that they had never had any contention in the past so he bore no malice against the deceased. Shanovan stated that the police had killed two men in relation to the deceased's murder and that he had read about it in the newspaper.

Ground one

That the Learned Trial Judge erred in admitting into evidence in their entirety the witnesses' [sic] Police Statement, her Deposition and the Transcript of her evidence in the first trial. This offended the rule against self-corroboration, was therefore a material irregularity and denied appellant [applicants] a fair trial.

Submissions on behalf of the applicants

[14] The applicants' contention was that, on the hearing of the Crown's application to admit into evidence the police statement, the deposition (taken at the preliminary enquiry) and the transcript of the aborted first trial (hereinafter collectively referred to as "the disputed documents"), the learned judge wrongfully exercised her discretion to admit all of them. In the interests of justice and in order to ensure a fair trial, the

learned judge ought to have excluded one or the other of the disputed documents on two bases; (i) the rule against self-corroboration and (ii) the unfairness to the applicants.

[15] Alternatively, it was submitted that, if the disputed documents were admitted in evidence, this could only properly have been done by editing the documents and only leaving for the jury's consideration relevant material, including the inconsistencies and contradictions.

[16] Queen's Counsel, Mrs Neita-Robertson, indicated that no issue was being taken with the satisfaction of the requirements of section 31D of the Evidence Act. The gravamen of the complaint was that the admission of the disputed documents in their entirety created a consistent narrative of the events of the morning of 12 January 2008. She contended that section 31D of the Evidence Act ought not to be used to adduce into evidence, the untested account of a witness, which is contained in a statement and which served to corroborate the sworn evidence of that same witness.

[17] By reference to the case of **R v Beattie** (1989) 89 Cr App R 302, Mrs Neita-Robertson sought to remind the court of the rule against self-corroboration, which was that the evidence of a witness cannot be corroborated by proof of statements to the same effect made by the same witness. In this regard, she quoted the Lord Chief Justice of England (Lord Lane), "[t]he general well known rule is that it is not competent for a party calling a witness to put to that witness a statement made by the witness consistent with his testimony before the Court in order to lend weight to the

evidence". She stated that, as set out in **Beattie,** there are three well known exceptions to that rule, and that none of those exceptions would have been applicable to the case at bar.

[18] Further, the jury was handicapped in assessing the credibility of Ms Bell in a fulsome way because she was not present in court for her demeanour to be observed; therefore, more reliance had to be placed on the contents of the disputed documents. In particular, reliance would have been placed on the consistency in the series of events. It was acknowledged, however, that the learned judge did tell the jury that they had been deprived of the valuable element of demeanour in assessing and evaluating the credibility of the witness. Queen's Counsel referred the court to page 614, lines 1 to 24 of the transcript.

[19] She also took issue with the Crown's reasons for applying to have the disputed documents admitted into evidence, namely that the jury should be presented with all possible material to make a proper assessment of Ms Bell's credibility, particularly since they would be deprived of seeing the witness. She contended instead that the Crown put forward the disputed documents because of their consistency with each other, and for the purpose of sustaining Ms Bell's credit.

[20] It was acknowledged, that while the learned judge considered the issue of editing, this exercise was not pursued. She referred the court to page 2015, lines 18 to 19 and page 2017, lines 9 to 15 of the transcript (it appears that this was intended to be references to pages 205 and 207).

[21] Mrs Neita-Robertson submitted that the disputed documents contained details of the events, which were substantially the same, save and except what she termed, "the striking feature of the identification issue" and a few minor inconsistencies and discrepancies. This striking inconsistency relating to the identification issue was highlighted by Queen's Counsel, by reference to Ms Bell's evidence at the preliminary enquiry, when the witness stated that she was unable to identify the assailants who entered the house. In this regard, she referred the court to page 256, line 25 and page 257, lines 1 to 2 of the transcript which reflected as the evidence of Ms Bell in her deposition:

> "When I heard the door kick off and the gunshots I drop down in the side of the bed.
>
> The bed was to the corner and I fell between the bed and the corner. I did not notice anything because I was in shock."

This was compared with Ms Bell's police statement, as set out at page 244, lines 8 to 14 of the transcript:

> "While we were there inside the house, I heard sounds as if the gate to enter the yard was kicked off. "Bredda Bredda" then got up and was going to look, as he had moved towards the window, when suddenly I saw the front door flew open. After hearing a banging sound and I saw three (3) men stepped inside the house and I saw Copper and 'Jubbie' and another man who I did not recognize, as he was behind Copper and 'Jubbie'. Immediately when the men came inside the house, I heard several explosions as the three men that entered the house were firing pure shots from guns that they had."

[22] Queen's Counsel pointed out that, in the same police statement, Ms Bell also gave a description of the men and what Copper was wearing (set out at page 244, lines 23 to 25 and page 245, lines 1 to 6). This statement was corroborative of Ms Bell's evidence at the first trial (which was aborted).

[23] In the circumstances, Mrs Neita-Robertson submitted that the repetition in the disputed documents, insofar as the series of events were substantially the same, was unavoidably compelling and had the inescapable result of bolstering the credibility of the absent witness. Further, the repetition made it impossible for the jury (wittingly or unwittingly) not to use each document in corroboration of the other. In spite of any warning by the learned judge, not to view each statement as corroborative of the other when assessing the credibility of the witness, the repetition of the series of events was so striking, that it was impossible for the jury not to use them in aid of strengthening the credibility of Ms Bell. Queen's Counsel contended that this is so, because consistency has always been one of the tests of credibility.

[24] It was submitted that, had the reasons for putting the disputed documents into evidence been to put before the jury:

> (a) the striking feature of Ms Bell's inability to identify the assailants in the deposition as against her clear identification of the applicants as the assailants, accompanied by the descriptions in the police statement; and/or

(b) Ms Bell's evidence in the deposition that she lied to the police together with her explanation that she was scared;

then it would have been best that the disputed documents be edited to accord with the rule against self-corroboration.

[25] Mrs Neita-Robertson expanded on her submission by contending that the police statement and deposition should have been edited by removing the series of events. In that event, what would have been before the jury was that (i) Ms Bell lied to the police; and (ii) the inconsistencies between the various documents and her explanation in the deposition - in particular, the evidence of her inability to identify the assailants at the preliminary enquiry as well as her descriptions of the applicants in the police statement. The effect of this would be that the narrative of the series of events would have been left in the transcript of the first trial and the significant issue of the contrast of the identification issues in the police statement and deposition properly placed before the jury. She stated that the complete reading of the documents had the effect of strengthening Ms Bell's consistency so, there was in effect, self-corroboration.

[26] Further, it was submitted that the admission of the disputed documents created an insurmountable difficulty for the defence as it related to Ms Bell's evidence (in the deposition) that she had lied. Reference was made to page 258, lines 5 and 18 to 19 of the transcript where Ms Bell stated:

"Some of what I told the police in the statement are lies."

> "The reason I told the police lies in my statement is because I was panicking."

[27] It was submitted that once Ms Bell admitted to lying, then her credibility became innately questionable. Mrs Neita-Robertson argued that there was no evidence from Ms Bell as to what the lies were that she told to the police, and it is to be noted that these lies would have had to be contained in the police statement. By contrast, Ms Bell did not state that she lied at the preliminary enquiry when she deponed that she was unable to identify any of the assailants. The logical inference, Mrs Neita-Robertson advanced, was that when Ms Bell called the names in the police statement, she was lying. However, she complained that the entire drift of the prosecution's case was that Ms Bell lied when she failed to call the names at the preliminary enquiry. While she conceded that there would have been a strong tendency for the change in Ms Bell's identification to be viewed as one of the lies, that in all the circumstances, the jury could only have formed that view by speculation.

[28] Mrs Neita-Robertson submitted further that the learned judge conceded that the police statement and the deposition were corroborative of the evidence in the transcript when she stated that the statement was "not totally corroborating" (page 238, line 25). Also, while the learned judge directed the jury that the documents were not put in for the purpose of self-corroboration, it was submitted that this direction was undermined, when the learned judge invited the jury to use all the statements to determine where there had been a variation. The jury was also directed to follow the progression of the events in the various documents from one to the other. Queen's Counsel referred the

court to page 625, lines 13 to 17. She said this direction would have had the effect of making it almost impossible for the jury not to determine Ms Bell's credibility by using self-corroborating material.

[29] Queen's Counsel also took issue with the learned judge leaving to the jury, the identification of "Jah B" as being the father of the applicants; and that the learned judge indicated to the jury that this material was contained in both the police statement and the transcript of the first trial. It was submitted that the learned judge fell into the very same pitfall she directed the jury to avoid. Queen's Counsel contended that this amounted to a material irregularity, as it offended the rule against self-corroboration.

[30] Further, it was submitted that the learned judge erred in directing the jury that Ms Bell "really has not changed her story", and that this had the effect of inducing the jury to form an opinion about the consistency of Ms Bell. In this regard, Queen's Counsel referred the court to page 664, line 25 and page 665, line 1 of the transcript.

[31] Given that trial judges have a power to exercise their discretion in the interest of a fair trial, Mrs Neita-Robertson contended, it was open to the learned judge in the instant case not to admit any of the disputed documents. This would not have disadvantaged the Crown, since Ms Bell was not the only witness available. In fact, the Crown had also relied on the circumstantial evidence of another witness, Ms McLeish.

Submissions on behalf of the Crown

[32] At the outset, Mr Taylor QC stated the common law position in relation to the rule against self-corroboration, namely that the evidence of a witness cannot be

corroborated by proof of statements to the same effect made by the same witness. In support, the cases of **R v Oyesiku** (1972) 56 Cr App R. 240 and **R v Beattie** were cited. It was submitted that, much akin to the test for the related species of hearsay, one has to approach this issue, not necessarily from the vantage point of the possible effect but rather from the purpose test.

[33] Reference was made to a decision of this court in **Rupert Wallace, Rohan Masters and Howard Lindsay v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 42, 33 and 40/2003, judgment delivered 20 December 2004, which was a case of kidnapping, resulting in murder. Queen's Counsel stated that in that case, the accomplice Shem Rowe did not live to give oral testimony, having died before trial. Both his statements to the police, were admitted into evidence. Queen's Counsel then referred the court to the dictum of Panton JA (as he then was) at paragraph [21] where the rule against self-corroboration was considered.

[34] The court was also referred to the case of **Richard Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 28/2003, judgment delivered 11 March 2005, wherein a similar route of admitting a deposition and statement had been taken at trial. Queen's Counsel stated that this court noted there had been no dispute that the statement and the deposition of the deceased were substantially the same with regard to the circumstances in which the deceased had been shot and killed, but rejected the submission of counsel for the appellant, that the only conceivable purpose for admission was to sustain the credibility of the deceased

witness. The court ultimately affirmed the conviction and sentence. Reference was made to the dictum of McCalla JA (Ag) (as she then was) for this court's consideration.

[35] It was submitted that a similar approach of examination in the instant case would reveal that the learned judge did make the inquiry at the onset of the voir dire as to the need for the disputed documents going into evidence. Reference was made to page 138, line 15 to page 139, line 8 of the transcript where Crown Counsel had indicated:

> "M'Lady having regard to the fact that prior [sic] to the statement that Miss Bell gave to the police, she mentioned a particular viewing of the accused men and gave a particular account when she went to the preliminary inquiry. She did not give a similar account. In fact, I believe that she indicated that she did not see who did what, having gone to the trial, though, before the Circuit – I believe it was the Hilary term of 2009 at Duncans, in Trelawny—she had given a full account as to what she saw that morning, to include the naming of the accused men which was now consistent with the statements which she gave to the police officer. In light of that, m'Lady, I would seek if Her Ladyship accedes to my application and I have satisfied this Court that the reasonable steps have been exhausted in locating Miss Bell."

[36] It was further submitted that the learned judge had considered **Brian Rankin and Carl McHargh v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 72 & 73/2004, judgment delivered 28 July 2006, specifically as it related to the need for sufficient, not exhaustive steps, to prove that reasonable steps had been taken to locate the witness. However, it was contended that the learned judge also directed her mind to the fact that the jury would not have been able to visually assess Ms Bell, but what was most critical was that the witness had been

thoroughly cross-examined on the issue of identification at the aborted trial, and that all three of the disputed documents would have to be given to the jury. Further, the learned judge went on to say (at page 205, lines 19 to 25) that "barring anything that needs to be [edited] when we come to each statement because the defence has the right to show discrepancy and inconsistence [sic] between the statements and even between what that witness might have said and what another witness in the case might have said".

[37] Reference was also made to the objection as to previous consistent statement which had been taken on the application before the jury of the tendering of Ms Bell's initial statement to the police. It was contended that, although the statement's reception into evidence by itself without more, could have on one view, be deemed as corroborative, its purpose could not have been so.

[38] It was submitted that the learned judge directed her mind to the issue of self-corroboration even then and revealed that she had considered that the deposition be allowed, as it would show the jury how Ms Bell "moved away and came back".

[39] Further in the exchange, the learned judge indicated that she was minded to admit the transcript as it would be incomprehensible due to the reference to Ms Bell giving a statement and the cross-examination bearing on the discrepancy between statement and notes of evidence. Also, rather than totally corroborating that, the documents conflicted with each other. It was further submitted that the learned judge was also of the mind that the statement could have proved to be of some benefit in

comparing it with Ms McLeish's testimony at the aborted trial. In relation to the deposition itself, the learned judge's directions, rather than directing the jury to corroborative features, had the effect of assisting or explaining to them why defence counsel had not challenged Ms Bell at the preliminary enquiry. She also told them, what the possible implications were in respect of the issue of credibility, as it related to the transcript from the aborted trial.

[40] In relation to the issue of editing, Queen's Counsel rejected counsel for the applicants' contention, that editing had merely been considered and submitted that the record demonstrated that editing was not only discussed but actively pursued with the participation of the learned judge, defence counsel and Crown Counsel. Queen's Counsel contended that the record reflected that the learned judge was very careful to edit portions of Ms Bell's testimony in the transcript of the aborted trial. These related to passages in the transcript which had been ruled inadmissible, as well as comments and directions to the jury (in the aborted trial) and accordingly, they were not allowed into the evidence. Queen's Counsel referred the court to page 331, lines 8 to 15 of the transcript as a demonstration of the learned judge's careful approach to the issue of editing:

> "You see, it's a bit tricky because this is a witness who has changed her story and she is obliged to give an explanation if she can as to why that is so. Let Mr. Colman look because she is not alleging that the accused or anybody affiliated to the accused or anyone has threatened her. We don't know."

[41] Further, it was submitted that the transcript of the aborted trial was not mere corroboration, but it had amplified and gone into areas of identification and distance

that would have assisted the jury in their assessment of the credibility and identification issues in the case. On the other hand, it was contended that the surgical editing that was suggested by counsel for the applicants, would have been liable to confuse the jury rather than afford them or the learned judge the ability to contrast identification issues from either the statement or deposition, or both.

[42] Queen's Counsel, also, in written submissions, contended that the statement of Ms Bell stood to be adduced under the first exception of **Beattie** (suggestion of recent invention), as a matter of common sense and law.

[43] In that regard, reference was made to the transcript from the aborted trial, in particular, where defence counsel suggested to Ms Bell that this was the first time she was identifying the applicants, as her deposition had her saying that she could not see who were the attackers that morning. It was contended that this suggestion of recent invention would have opened the door to the original statement going in, in respect of identification.

[44] In response to the contention that the details of the events were substantially the same, excepting the striking feature of the identification issue and what has been described as minor inconsistencies and discrepancies, Mr Taylor submitted that those similar details were not in issue and would have been available as unchallenged facts. Further, the available evidence (from the investigating officer visiting the scene) revealed a scene of a home invasion, by means of the door being forcibly taken off its hinges. Shots were fired in the house and this evidence was supported by the recovery

of two warheads in the house; that the occupant of the house had suffered wounds near the back door of the house due to the presence of blood there. In these circumstances, it was submitted that the substantially similar details were not corroborative of the main issue before the jury for consideration, namely, who were the persons who shot and killed the deceased. It was submitted that the repetition in the disputed documents was not "unavoidably compelling" nor did it inescapably bolster the credibility of the absent witness, Ms Bell.

[45] While Queen's Counsel conceded that consistency is one of the tests of credibility, he advanced the view that Ms Bell had been anything but consistent Accordingly, this required that her varying accounts and the issue of her answers under cross-examination at the aborted trial, be placed before the jury for consideration as well as in juxtaposition to the other witnesses; that issues arose as to possible discrepancies with the Crown's other witnesses, such as Ms McLeish, as well as whether the investigating officer, who recorded her statement, had accurately done so.

[46] Further, it was not agreed that there was any unsurmountable difficulty for the defence as to the lies Ms Bell had indicated she told the police in her statement. Mr Taylor submitted that, even had Ms Bell been directed to outline each lie told, which invariably would have given greater reason for the statement to have gone into evidence, the issue of what she had been lying about was still a matter for the jury, as the judge of the facts. It would have been for the jury to consider what Ms Bell may or may not have been honest about. As such, Ms Bell's statements as to the truth or

falsehood of anything she said, would not have been definitive. In assessing her credibility, as the jury was entitled to do, assistance was had from the provision of the statement juxtaposed with the deposition.

[47] It was also submitted that the learned judge's direction to the jury, that they were not to use the disputed documents for self-corroboration, had not been undermined by her earlier direction to use all the statements to determine where there had been a variation. In fact, that direction strongly supported that it had been necessary for the assessment of credibility in the absence of a live witness, the real purpose for the admission of all three documents.

[48] Rather than erring, Mr Taylor argued that the learned judge approached the evidence in relation to the absent witness in a faultless and clinical fashion. She began by indicating that the jury did not have the benefit of observing Ms Bell's demeanour or seeing her. The record reflected that the learned judge repeatedly told the jury that, if there was any corroboration from the one witness, they were to take it as one thing. She went even further by giving the reason that would have made it clear to the jury why repetition did not assist in establishing credibility. The learned judge stated that, if Ms Bell had been lying or speaking the truth, then repetition of the lie or truth would be expected. In these circumstances, the learned judge was balanced, in that she prevented the jury from treating consistency as meaning truth.

[49] From an examination of the learned judge's summation, it was submitted that, rather than dwelling on the consistent areas, she was mindful to take the jury through

the inconsistencies as it related to the ingredients of the **Turnbull** direction (from **R v Turnbull and others** [1976] 3 All ER 549) relevant to distance, lighting, opportunity to see, possible obstructions, recognition, timing, as well as the assessment of injuries, and the description of the gun. Further, the learned judge assisted the jury with the inconsistencies, and how to treat with these in assessing Ms Bell's ability to judge distance and estimate time.

[50] Queen's Counsel submitted that the "change of mouth" reference (at page 651, line 14) that the learned judge employed, was really her borrowing of defence counsel's term rather than an acceptance of defence counsel's views. The learned judge used it to treat with the core issue of credibility in treating with the issue of Ms Bell saying that she had told lies and her motive. Thus the reference to a "change of mouth" was the learned judge addressing the jury on the importance of discrepancies and inconsistencies going to credibility.

Analysis and determination on ground one

[51] The fundamental concern of Mrs Neita-Robertson, was that the disputed documents should not have been allowed into evidence, as either one or the other should have been excluded in their entirety or carefully edited so as to avoid the offending rule against self-corroboration.

[52] In **Brian Rankin and Carl McHargh v R**, the rule against self-corroboration was reiterated by this court. In that case, the prosecution had tendered into evidence, pursuant to section 31D of the Evidence Act, the deposition and three police statements

of a witness, Christopher Salmon, who had died prior to the trial. Panton JA (as he then was) referred to the case of **R v Beattie** and stated that the evidence of a witness cannot be corroborated by proof of statements to the same effect made by the same witness. At paragraph 16 of the judgment, having rehearsed the facts in **R v Beattie**, Panton JA (as he then was) quoted from the judgment of the Lord Chief Justice of England:

> "16. … In that case, the complainant made two statements to the police alleging a sexual relationship with her father, the appellant, starting from she was only seven or eight years old. When he was interviewed by the police, the appellant denied the allegation. At his trial for incest and indecent assault, he denied any sexual activity with the complainant. The cross-examination of the complainant was confined to two limited matters. Nevertheless, there emerged evidence which differed markedly from the account given in her first statement to the police. The second statement corrected the inconsistency which had surfaced. Both statements were admitted in their entirety. The Court agreed that there had been a material irregularity, allowed the appeal, quashed the conviction and entered a verdict of acquittal. In delivery the judgment of the Court, the Lord Chief Justice of England said at page 306:
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> > 'The general well-known rule is that it is not competent for a party calling a witness to put to that witness a statement made by the witness consistent with his testimony before the Court in order to lend weight to the evidence. There are three well-known exceptions to that rule. The first one is where it has been suggested to the witness that the evidence he or she has given on oath is a recent invention, that the witness has just made it up. If that suggestion is made, then it is obviously a rule of common sense as well as of law, that a previous consistent statement can be shown in order to demonstrate that the evidence has not recently been fabricated. The second exception is complaints made in sexual cases,

> complaints which are made at the first opportunity, are admissible in order to show consistency. Finally, a matter which has nothing to do with this case, where the statement forms part of the actual events in issue, sometimes known as the **res gestae** rule'."

[53] Panton JA also referred to two other judgments of this court dealing with the same issue:

> "16A. This Court has, in recent times dealt with this issue. Two such instances were in **Wallace et al. v R** (SCCA 42, 33 and 40/03) (delivered on December 20, 2004) and **Richard Brown v. R** (SCCA 28/03) (delivered on March 11, 2005). In the former, the Court had this to say:
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> > 'We have examined the statements, and cannot say that the second statement was aimed at providing corroboration for the first. It is a fact that there are certain similar details in both; however, the striking feature of the second statement is that it refers to a meeting on July 27 when certain matters were discussed, but the follow-up that was anticipated, based on those discussions, did not materialize. That meeting, it should be noted, was not mentioned in the other statement. There was no question of the statements being put forward because of their consistency with each other. We do not think that the learned judge was in error in admitting both statements. Indeed, the admission of both statements seems to have provided healthy fodder for the defence as, in their addresses to the jury, they sought to exploit the differences and discrepancies therein….
> >
> > We cannot agree that given the context of events in this case that the second statement was put forward 'for the purpose of sustaining his (Shem Rowe's) credit". It seems that it was put forward simply as a full narrative of that which he claimed to have witnessed;' (para, 21)
>
> In **Brown**, the date of the death stated in the indictment for murder differed from the dates in the deposition and the statement. The witness, having given evidence at the

> preliminary examination, died before the trial. His deposition was admitted in evidence under section 34 of the Justice of the Peace Jurisdiction Act, whereas the written statement was admitted by virtue of section 31D of the Evidence Act. McCalla, J.A. (Ag.) (as she then was) said:
>
> > 'Having regard to the differing dates in the deposition and statement, as well as the suggestions made to the witness at the preliminary inquiry, the prosecution was obliged to place before the jury the statement which it contended the witness had given to the police. The purpose must have been to seek to show that the witness could have been mistaken as to the date of the incident.'"

[54] In **Brian Rankin and Carl McHargh v R**, this court found that the statements were put forward in support of the deposition of the witness, Christopher Salmon, and that the learned judge invited the jury to compare them in testing the credibility of the absent maker. This court found that this was impermissible in the circumstances and, since there was no other evidence from any other source, the convictions were quashed and verdicts of acquittal entered.

[55] However, as reflected in the summary of Panton JA of both **Wallace et al v R** and **Richard Brown v R**, in assessing the purpose for which the various documents were put into evidence in those instances, this court came to the conclusion that there were legitimate bases for their reception into evidence.

[56] Mr Taylor is therefore correct in his submissions that the court must assess the purpose for which the impugned documents were admitted into evidence. Based on the transcript at the trial as set out at paragraph [35] above, Crown Counsel had requested that all the documents be put into evidence, because of the dissimilar accounts relating

to the identification of the applicants given by the witness in her statement to the police and what she said at the preliminary enquiry; also, that she had given a full account, including the identification of the applicants at the aborted trial, consistent with her statement to the police.

[57] At page 204, line 18 to page 207 of the transcript, the learned judge, at the completion of the voir dire, made the following ruling:

> "In the particular circumstances of this case I have to look to see further whether fairness dictate; [sic] nevertheless, this statement, August, [sic] to be excluded because I have that residue decision [sic] to exclude evidence even if it is admissible by law. The question is fairness to the accused persons. The only draw back [sic] in this case is, can a proper direction in law could resolve, is that the jury would not see the witness if it is, if the statements were admitted to visual assessing her. The important thing in this case was that the witness was cross-examined thoroughly in my view on the issue that arise [sic] in this case which seems to be identification when the case went to the Trelawny Circuit in 2009. So, the accused persons were at least to test the credibility of the witness and to challenge her assertion that they were where she said they were. The cross-examination that was competently bound [sic] by counsel in this same matter the prosecution is asking that all statement [sic] be admitted, the police statement, the deposition and the notes of evidence from the last trial. And I see where, if anything, all three would have to be given to the jury barring anything that needs to be ED [sic] when we come to each statement because the defence has the right to show discrepancy and inconsistence [sic] between the statements and even between what that witness might have said and what another witness in the case might have said. So the question for me is, really, whether as a matter of law I find that the provision of the Evidence Act is satisfied. I have consider [sic] the question broadly, the question of fairness to both sides and in balancing the interest of justice I believe it goes in favour of admitting these statements given the particular

> circumstances on this case where we would have even embark [sic] on the trial before in which the evidence was taken…The Privy Counsel [sic] itself has said in many cases and other courts of other jurisdiction that the court must exercise great care in admitting these documents for the jury to assess in light of direction in law that I will be compel [sic] to give them."

[58] Further, in the face of objections by counsel for the applicants below after the voir dire had been completed, but prior to the statement of Ms Bell being tendered into evidence through the investigating officer, the transcript reveals the final ruling by the learned judge on the issue (in the absence of the jury). This is seen at page 238, lines 2 to 25, and page 239, line 1:

> HER LADYSHIP: I have seen the documents and on the face of them the witness would have given conflicting accounts pertaining to this incident because she would have said one thing in her police statement and deposition something different, and back to the trial said something different. So in my mind the police statement would stand as a previous statement inconsistent to what she in [sic] now, what she said at the preliminary; and then it would also go to the question for the jury's understanding. Why is it at the trial she ended up saying the thing and going back to her statement because she said what she had said is true. It is a question for the jury, whether you can believe a woman who is coming and going. It is for - - it may be for your benefit because it would go to her credibility. I don't think it should be kept back from the jury and again there are differences between her police statement and the statement that Miss McLeish took which could be to the benefit of the accused men; so I think in the interest of justice **the statements are not totally corroborating,** they conflict each other." (Emphasis supplied)

[59] It is apparent therefore that the learned judge adverted her mind to the issues relating to the admission into evidence of the disputed documents and appreciated that the documents were necessary, as the focus would be on the credibility of the witness

based on the inconsistencies and discrepancies that had arisen. It is evident also, that her reference to the fact that "the statements are not totally corroborating" was made in the absence of the jury. There can be no complaint therefore that, on this basis, the jury would have been influenced to view the disputed documents in the manner complained of by Mrs Neita-Robertson.

[60] In her actual address to the jury, the learned judge sought to warn them against any use of the disputed documents for the purpose of self-corroboration. At page 613, lines 8 to 23, and page 615, she said:

> "…Miss Tashena Bell said she saw men firing at the deceased. Now, Tashena Bell's testimony or the evidence that the Crown is seeking to rely on is to be found in three different documents admitted into Evidence Act [sic] because, as I said before, she was not called.
>
> Mr. Foreman and members, the first document, the statement she gave the police, you will appreciate that the statement to the police was a document or were assertions made not on oath. So, she did not take any oath to give this statement which makes it of a lesser quality than when she takes the oath on the Bible, swear to speak the truth, so you have to take into account in looking at what the statement contained."
>
> "I want to say to you and heed the warning that all of these three documents cannot be taken to say, 'Oh, because she said it in the statement, she said it in the deposition, and she said it in the transcript she is speaking the truth. Why you can't use that it is the same person telling you the same story so if she in lying in one she will continue to say the same thing and it don't [sic] mean she is speaking the truth. So, for these things you might find she say [sic] in the statement and she repeat [sic] in the notes of evidence at trial. The fact that there are inconsistencies [sic] doesn't mean that because of that she is speaking the truth. She can't corroborate herself. Any corroboration, any support

> must come from another witness, so you can't use the consistent portions of her document to say she is a witness of truth. No, it will only shower [sic] you, take it as one thing these parts which she repeat [which] which is consistent like she is saying it one time and one time only."

[61] In particular, having referred them to the need to assess whether the witness could be credible based on the inconsistencies within the disputed documents, the learned judge, at page 616, line 18 to page 617 line 17, again reiterated the scope and purpose of the jury's assessment of the evidence as contained in the said documents:

> "…Because she is not here, so all three documents are put before you for you to examine them and if you find inconsistencies and discrepancies, you must ask yourself the question, can I believe this witness. But in asking yourself that question, you must look for any explanation given in any – given by the witness and say what you make of the explanation because there can be inconsistency but she explain [sic] them and you are satisfied with it. If you are not satisfied with the explanation, you are not sure whether you accept it, give the benefit to the accused men and reject the part of her evidence that you [sic] not sure about or you don't accept and then you see whether you can rely on the other portion that you accept and this is in particular to identification of the perpetrator because that is the material issue in this case. But that is not to say, or that is not to say you should ignore other parts because anything touch [sic] and concern [sic] her credibility, you are the judges of the facts, you must determine."

[62] Practically speaking, what were the circumstances facing the Crown at the trial? Ms Bell could not be found to give evidence, but at a previous trial she had given her testimony in full and was cross examined before that trial was aborted. Her testimony was, for the most part, in line with her statement to the police, save that the testimony was expanded in relation to details important to an assessment of the opportunity she would have had to view the assailants. It was also expanded by cross-examination and

challenges to her credibility, in particular as regards inconsistencies between her statement and her evidence at the aborted trial. There were also some discrepancies that had to be considered between Ms Bell's evidence and the other witness, Ms McLeish.

[63] At the preliminary enquiry, Ms Bell had departed substantially from her identification of the applicants that had been set out in her statement. She deposed that she was unable to see the assailants. However, at the aborted trial, she identified the applicants as the assailants and offered an explanation for her contradictory testimony at the preliminary enquiry. In the deposition also, Ms Bell placed herself in a position where she was unable to see and identify any of the men who entered the room. This is in contrast to her evidence at the aborted trial as well as her statement to the police. Also in that deposition, she admitted that some of what she had told the police had been lies. It was not ascertained what aspects of her statement were lies.

[64] It would have been nonsensical to exclude the police statement in light of the above circumstances. The jury would have needed to appreciate the content of that document, since she admitted lying to the police. Ultimately, it would have been up to them to assess what those lies were, what it related to, and how this would affect her reliability. Ms Bell's deposition would have also had to be put into evidence, as a major inconsistency was created in relation to whether she could have seen the men and also, whether she had actually identified any one of the assailants by name to the police. In relation to the transcript at the aborted trial, as Queen's Counsel, Mr Taylor submitted,

it contained details of evidence relevant to issues of identification including distances, length of time for viewing the faces of the assailants, physical description of windows in the room, positions of the assailants and the deceased. These were largely absent from the statement she had given. Ms Bell had also given an explanation at the aborted trial, as to why she gave inconsistent evidence at the preliminary enquiry. These assertions were issues relevant to the jury in relation to their role as judges of the facts.

[65] However, the submission of the Crown, that the statement of Ms Bell could properly have been adduced under the first exception as set out in **Beattie**, cannot be accepted. Defence counsel below, had suggested to the witness that this was the first time she was identifying these men in court, as, in her deposition, she had said she could not see them. This, however would not provide a basis for the Crown to admit evidence in rebuttal to an allegation of recent invention. Defence counsel did not suggest to the witness, that she had never identified the applicants in her statement to the police, but that it was the first time she was identifying them in court, which was true. Ultimately this does not diminish the force of the reasons, as set out above, as to why it was necessary to place all of the disputed documents before the jury for their consideration.

[66] The learned judge, directed the jury correctly in relation to the inconsistencies that arose, as demonstrated at page 613, line 24 to page 615, line 1 and page 616, line 1 to page 617, line 19 of the transcript:

> "Remember what I told you too you haven't seen her so you are deprived of that valuable element of demeanour or the

opportunity to evaluate that witness, some things can't be captured on paper, you would imagine so that is something that you are robbed of [the] ability to look in her eyes and to turn her upside down and to say what you make of her because the law says even that is so and mindful of it you say how you treat her evidence in relation to all evidence in the case because you would have to determine whether you believe her or not. And I am saying to you in determining your[sic] credibility, you have to look at all matters that touch on her credibility and reliability, remember I told you about inconsistencies you have to look to see where there are inconsistencies in the documents that are produced to be her evidence because consistency go [sic] to the issue of credibility. And you will have to, if you find an inconsistency as I have explained what it is to you. You will have to examine the nature of the inconsistency and the extent of that inconsistency to see how it affected her credibility. The documents are not put in before you to show that she is repeating what she says and that makes it truth.

How do you treat the parts that you might find to be conflicting. Now, those conflicting parts what she says in the statement and I will point them out, conflict with what she says at the prelim and what she says at trial. You have to take those into account not, as being relevant to whether you can believe her. So the inconsistent portion goes to her credibility, **the consistent parts don't go to her credibility**, is just to show you that she say [sic] that you must determine whether you believe her, and I must point out another thing that you look at, is whether what she says in the statement, in the deposition and at the aborted trial conflict [sic] with anything. In addition say in the trial, because again, that touch and concern whether you can rely on her. Because she is not here, so all three documents are put before you for you to examine them and if you find inconsistencies and discrepancies, you must ask yourself the question, can I believe this witness. But in asking yourself that question, you must look for any explanation given in any - - given by the witness and say what you make of the explanation because there can be inconsistency but she explain [sic] them and you are satisfied with it. If you are not satisfied with the explanation, you are not sure whether you accept it, give the benefit to the accused men and reject the part of her evidence that you [sic] not sure about or you

> don't accept and then you see whether you can rely on the other portion that you accept and this is in particular to identification of the perpetrator because that is the material issue in this case. But that is not to say, or that is not to say you should ignore other parts because anything touch [sic] and concern [sic] her credibility, you are the judges of the facts, you must determine. Let us look at her statement to the police and I am not going to go through everything now, statement in evidence." (Emphasis supplied)

[67] However, Mrs Neita-Robertson also complained that, while the learned judge directed the jury that the documents were not put in for the purpose of self-corroboration, the direction was undermined when she invited the jury to use all the statements to determine whether there had been a variation. Queen's Counsel referred to page 564, line 13 to 24, page 625, lines 13 to 17:

> "…So, you will have to use all the statements to determine where there has been a variation but I will come back to that. There is nobody really that said, show me, although she was shown the statements, the deposition and the statement, there is no evidence for her to say this part is [a] lie, this part is true and that is why everything is put before you because all this will go down to the weight, the issue of reliability of these statements that was made - - this statement that was made at the deposition."
>
> "…So, we go to what she had to say when she went to the preliminary enquiry and now I note that her deposition because we have to see the progression and you have to view them with each other."

[68] The learned judge, at pages 625 to 673, then went through the disputed documents highlighting the various inconsistencies. So, when one examines the context of those words complained of by Mrs Neita-Robertson (as set out above from page 564) they are used at a time when the learned judge was asking the jury to consider the issue of variation in relation to Ms Bell's evidence at the preliminary enquiry that she

had told lies to the police. This difficulty would have arisen as there was no evidence solicited as to what those lies were. It would have been for the jury to assess, what they made of this, in light of the fact that her evidence at the aborted trial was that she lied when she had stated on a previous occasion that she could not identify the assailants. The learned judge, thereafter, went through the inconsistencies that arose in Ms Bell's evidence and statement and highlighted the variation in the evidence. The emphasis of her directions was not pointed towards any consistency in the documents.

[69] There is no substance therefore to the submission by Mrs Neita-Robertson, that the learned judge's direction relevant to self-corroboration was undermined in this regard.

[70] Mrs Neita-Robertson also complained of the learned judge's remarks, that the witness "really has not changed her story" and the effect this would have had on the jury. At page 664, line 13 to page 665, line 4, the learned judge stated:

> "Now, she was asked again if she had indicated to the police that three men stepped in the house, right. Remember she had said earlier in her examination-in-chief, that the two accused men had stepped in and -- but in her police statement, she had said three men stepped in. Now this is before you, you might see it as an inconsistency. Of course it might well be an inconsistency because she said, or there it is three men had stepped in and she said the doorway but you have to ask yourself is it a critical inconsistency that goes to the very heart of her credibility, because really, she has not changed her story -- well at the trial, that these two men actually came at the doorway inside the house. So whether the third man was there or not, is a matter for you."

[71] The impugned statement was made by the learned judge in relation to the evidence of Ms Bell, whether it was two or three men that had stepped into the doorway. The learned judge indicated that they had to decide whether it was really an inconsistency, and if it was, whether it was a critical inconsistency that went to the very heart of the witness' credibility. This would not have had the effect of inducing the jury to form an opinion about the consistency of Ms Bell as it was, essentially a comment of the learned judge in relation to a limited and specific piece of evidence. The learned judge also made it clear to the jury, that whether the third man was there, was a matter for them.

[72] Mrs Neita-Robertson also pointed to the direction at page 645, lines 1 to 6 of the transcript, in relation to the identification of the father of the applicant, Kevol as Jah B. She contended that the learned judge said that it was also in Ms Bell's statement, where she said that she knows Copper's father too as Jah B. This, she complained, is an example of the learned judge using the disputed documents as corroborative of each other.

[73] The learned judge, when rehearsing the evidence in relation to Ms Bell's prior knowledge of both applicants stated, in speaking of Kevol, "[s]he said she could not remember the last time before January 2008 but she knows his father as Jah B. Now in the statement, she says she knows Copper's father too to be Jah B, so you have to say, does she know these names. She say [sic] she don't know these names but in the statement she say [sic] Jah B name Brown - - was it in the statement or deposition. In

the statement she say Brown, it is a matter for you, it's an inconsistency, you have to say whether it is light or serious, material or immaterial" (see page 644, line 25 to page 645, lines 1 to 10).

[74] The learned judge was actually referring the jury to an apparent inconsistency in the evidence, although there appears to be a lack of clarity in the summation as to which documents were being highlighted as to the source of the inconsistency. This submission fails therefore, in substantiating any complaint that the learned judge fell into error by comparing the disputed documents for the purpose of corroboration of Ms Bell's evidence.

[75] The tenor of the entire summation, when assessed, revealed that the learned judge was at pains to make it clear to the jury that the documents could not be used to establish consistency. Therefore, any reference by the learned judge to the documents in the context of the rehearsal of inconsistencies, would not be sufficient to create the danger asserted by counsel for the applicants.

Should there have been editing of the disputed documents?

[76] The submissions of Queen's Counsel, Mrs Neita-Robertson is that the learned judge ought to have edited all the series of events in the documents, particularly the statement and the deposition, leaving only the inconsistencies, contradictions and other relevant material to be placed before the jury.

[77] During the voir dire, the learned judge did state that editing would be done where necessary, but there is no evidence that the deposition or statement was edited.

There was editing of the transcript (of the aborted trial), however to excise certain statements made by Ms Bell, as well as those of the judge who presided in that trial, including words to the jury and other comments by counsel below, that were deemed to be superfluous in terms of the account of the incident.

[78] Should the other documents have also been edited? Based on a consideration of the totality of the issues that had to be dealt with by the learned judge, there is merit in the submissions of Mr Taylor that it would have been difficult to edit the statement so as to allow the inconsistencies and discrepancies to emerge in a coherent manner for the jury's consideration. Additionally, bearing in mind, the contents of the deposition, that document could not be edited as it contained the material inconsistency relating to Ms Bell's inability to see the applicants, the fact that she lied to the police and that she had indicated that she was afraid to come to court. Any editing of the statement or the deposition would have made it difficult for the jury to assess the flow of the evidence at various points in the incident, in order to consider the impact of the inconsistencies.

[79] Mrs Neita-Robertson also contended that the learned judge had the discretion, not to admit any of the disputed documents and the prosecution would not have been at a disadvantage, as Ms Bell was not the only witness available, since there was circumstantial evidence provided by the witness Ms McLeish.

[80] Queen's Counsel has provided no reasonable basis for the learned judge to have made such a decision. Within the strictures of the law and principles relating to the admissibility of evidence, a party should be allowed to present the best available

evidence. The law, by virtue of the Evidence Act, allows for documents to be put in evidence under circumstances where witnesses are not available. A trial judge should refuse to allow those documents in evidence, if the provisions of the Act have not been satisfied or it is otherwise deemed unfair, or that the prejudicial effect of the evidence would outweigh its probative value (see section 31L of the Evidence Act). It has not been established that any of the disputed documents ought to have been excluded for any of these reasons.

[81] The fact that the Crown had another witness, Ms McLeish, was not a barrier to the reception into evidence of the documents relevant to Ms Bell. Based on the transcript, the learned judge considered all the relevant issues and was correct in the ultimate exercise of her discretion to allow the disputed documents into evidence.

[82] This ground of appeal therefore fails.

Ground two

The learned trial judge failed to direct the jury adequately or at all on the issue of sublime "duress of imprisonment" on the witness, which saw her serving a sentence of three months for lying to the police; which imprisonment could have caused her in the first trial to conform to her police statement. This is especially important since there is no evidence as to what matter in her police statement she had lied about.

Submissions on behalf of the applicants

[83] The essence of the submissions under this ground was that the learned judge's direction in the issue of "sublime duress" was inadequate, as it did not put the issue of the possibility of undue pressure of incarceration on Ms Bell, in a sufficiently clear and particularised manner.

[84] Queen's Counsel submitted that it was obvious that the imprisonment of Ms Bell for three months, had a great debilitating effect on her. Reference was made to the following portions of the transcript (page 443, lines 3 to 6 and 9 to 13) from the aborted trial, where Ms Bell expressed her reaction to spending time in jail:

> "For me to face that experience, went to jail and all of that, I just want to tell the truth and nothing but the truth…
>
> When I went to jail at that time and come back now, and I am here at court, I want to tell the truth and nothing but the truth, because I don't want to go back in that position."

[85] Reference was also made to the relevant portion of the learned judge's summation (page 652, lines 20 to 25 and page 653, lines 1 to 11) dealing with this aspect of the evidence.

[86] It was submitted that this issue was also underscored by a gap in the sequence of the narrative. Queen's Counsel contended that it is the evidence that Ms Bell was charged after the preliminary enquiry in relation to her evidence that she had told some lies to the police; she, therefore, would have returned to court on another occasion where she pleaded guilty. Queen's Counsel further contended that this raised a number of questions, namely whether she was afforded counsel? If not, then why not? If Ms Bell was afforded counsel, whether there was a statement given to that counsel which helped to set out what exactly she lied about?

[87] Another question, which Queen's Counsel urged, was whether the Crown had in its possession any data about what transpired at that level, and if so, whether it was disclosed or merely treated as a procedural fact irrelevant to the issue of the instant

trial. In her oral submissions, Mrs Neita-Robertson expounded in this regard, by stating that the issue of non-disclosure would have been of vital importance, as it would have stressed what the lies were and even though, at the trial, Ms Bell said what she was telling the court was the truth, the question still remained as to what the lies were. Without knowing this, the defence would not have been in a position to make the challenge that what she said was not the truth.

[88] In summary, it was submitted that these issues may have helped to resolve sequential matters which were ultimately relevant to the decision of the learned judge and critical to the applicants' defence.

Submissions on behalf of the Crown

[89] In the written submissions, it was noted that Ms Bell had been imprisoned, not for the act of lying to the police, but more accurately for the offence of attempting to pervert the course of justice, which may or may not have been established by her own admission on the depositions, that she had lied to the police. In the circumstances, it was contended that it was well within the learned judge's discretion as to the type of warning to be given and to tailor the direction accordingly.

[90] Mr Taylor submitted that the learned judge was constrained to leave the answer as an explanation of Ms Bell's state of mind and not to go any further in that regard. Such answers, as given by Ms Bell, are allowed, not for the truth of it but rather for the purpose of the explanation allowed to a witness. For the learned judge to go further in her directions to the jury, would have had the deleterious effect of (i) reducing or

amplifying the reason proffered and (ii) lending or subtracting credence to the issue, effectively usurping or trespassing on the fact-finder's role.

[91] The court was referred to the case of **R v Makanjuola** [1995] 3 All ER 730 and in particular the dictum of Lord Taylor of Gosforth CJ at page 733 of his judgment written on behalf of the Court of Appeal.

[92] Reference was also made to a decision of the Judicial Committee of the Privy Council in an appeal from this court, **Jason Lawrence v R** [2014] UKPC 2, wherein it was stated by the Board, at paragraph 15, that a judge has a discretion in the circumstances of the particular case, whether to give a warning that a witness's evidence might be tainted by an improper motive.

[93] It was submitted that in these circumstances, the impact of lawful imprisonment of Ms Bell for a criminal offence (arising from circumstances which arose from the deposition), would not have been an improper motive for which a **Pringle** direction (as referred to by the Board in **Jason Lawrence**) would be required.

[94] Queen's Counsel also submitted that, although he wished not to speculate, "on the face of the aborted trial, it seemed the impact, far from being duress in the criminal sense, appears to have been the term of imprisonment having its deterrent, preventive and rehabilitative effects. Without the further suggestion on the face of the transcript, that hanging over the witness' head at that time of giving evidence were definitively threats of imprisonment by the police, the prosecutor or even that Court or any Court, if she did not conform to her statement to the police, then any 'subtle duress of

imprisonment' was that self-imposed by the witness from her own prior experience and the record from the aborted trial suggested it was the wish for a non-repetition of that experience".

[95] It was contended that a direction suited to improper motive or interest to serve would have risked emboldening her further evidence that she just wanted to tell the truth and was indeed telling the truth. The learned judge would have been entitled, in fairness to the witness, to raise the issue of whether the threat of imprisonment had been real at the time and it was further submitted, that in the absence of the witness attending court, the learned judge could not have properly so done.

[96] It was also submitted that in the circumstances of an absent witness, "the learned judge was further constrained to place further weight on Ms Bell's motive at the time of the aborted trial. The witness was not at the trial to be questioned and asked if, hanging over her head was the real threat of imprisonment again if she did not stick to the account given to the police". Further, it was submitted that having already served three months' imprisonment before the aborted trial, there is no indication that hanging over her head or impelling her was the threat of future incarceration for her testimony, either for conforming to her statement to the police, or for diverting from said statement. For the learned judge to have delved into that area would have been speculative in the absence of the witness.

[97] In these circumstances, it was contended that the learned judge adequately directed the jury on the issue of Ms Bell's imprisonment by warning the jury to exercise caution.

Analysis and determination on ground two

[98] Ms Bell gave evidence at the aborted trial, that she had told the court, during the preliminary enquiry, that some of what she told the police were lies; and that she was imprisoned for three months subsequently. The learned judge reminded the jury that the Resident Magistrate who gave evidence before them, testified that she caused Ms Bell to be arrested for the offence of attempting to pervert the course of justice upon the conclusion of her deposition (see pages 563 to 564 of the transcript). She had also deponed, at the time of the preliminary enquiry, that the reason she told the police lies in her statement, was because she was panicking (see page 437 of the transcript); that she was afraid to come to the court as "any witness me know always dead" (see page 258 of the transcript).

[99] All this evidence would be important in the jury's assessment of Ms Bell's credibility, since she had given material inconsistent evidence on the issue of the identification of the applicants.

[100] Further, Ms Bell at the aborted trial, when questioned by counsel then appearing for the applicants, whether she had the same fear at the trial as she had when she had been placed in custody after the preliminary enquiry, stated the following as set out at

page 442, line 25, to page 443, lines 1 to 25 and page 444, lines 1 to 3 of the transcript:

> "when I went to court at that time, I was very scared because I was getting a lot of threats and people were telling me a lot of things. For me to face that experience, went to jail and all of that, I just want to tell the truth and nothing but the truth.
>
> His Lordship: Repeat that-- repeat the statement.
>
> The Witness: When I went to jail at that time and come back now, and I am here at court, I want to tell the truth and nothing but the truth, because I don't want to go back in that position.
>
> Question: So you agree with me from what you just said, you do have that fear that you could go back in that position. You have that fear?
>
> Answer: I know if I am not telling the truth. . .
>
> HER LADYSHIP: Go again.
>
> Answer: I know if I am telling the truth I won't.
>
> Question: You agree with me?
>
> His Lordship: Allow her to answer.
>
> Mr. Colman: Asking about the fear?
>
> Question: She answered in her own way.
>
> The Witness: I know if I tell the truth, I won't be back in that position. I am willing to tell the truth."

[101] The learned judge dealt with this issue in her directions to the jury at page 652 to line 20 on page 653 of the transcript as follows:

> "Eventually, she was shown her document and she was shown the pages and she identified the deposition and she

> was asked, 'You agree with me that you had told that Magistrate that some of what you told the police in the statement are lies?' And she said 'Yes, sir'. Now, remember, you have the deposition, so what you have happening here, she is accepting at the trial, now being cross-examined, that she had told the police, what she said to the Magistrate was that what she told the police are lies. She also admitted to counsel that she was placed in custody after she told that to the Magistrate, which is not anything new because the Magistrate had already told you during the course of her evidence, and he asked her whether she felt scared when she was placed in custody and he sought to explore this issue of whether she felt scared because what Mr. Colman was doing and it is before you was to show that there might have been some motive for her now to be coming to the trial to say she has identified these men, because having already said you didn't see anybody, now you are changing your mouth to say you saw them. Could it have been because she was scared after she was placed in custody? You will have to determine which account you think is true, because she told you, when you go further on, when the Crown Counsel questioned her, that the account that she gave the trial court in Duncans, is the truth. And she told you the reason why she's now saying the truth, because she told you she has been locked up and she didn't want to go back in that position again and she is now prepared to speak the truth and nothing but the truth. Do you accept her explanation? She told you too, that she was -- not you, sorry -- the court then, but it is before you that she was scared and that she was threatened and I will tell you how to deal with that aspect, but that is only to go to her statement that she is putting forward as part of her explanation."

[102] The learned judge properly identified for the jury, the purpose of counsel bringing out the evidence of the lies and the fear of the witness about going back to prison; that it was to suggest that the witness might have had some motive for now coming to the trial to identify the applicants. The learned judge dealt adequately with the issue, leaving the jury to consider whether the witness could be trusted as reliable and leaving them to assess, whether a motive for identifying the applicants was

because she feared being locked away again. She also directed the jury to consider which account of the inconsistent evidence they believed to be true and whether they accepted her explanation. It was the duty of the jury to assess the credibility of Ms Bell in relation to all these issues and whether they could ultimately accept her evidence of identification of the applicants. The learned judge made it clear that they should not rely on her evidence as to identification at all, if they rejected her as a credible witness.

[103] The learned judge stated at page 669, line 5 to 12 and page 671, lines 1 to 10:

> "Can you explain why you give two different accounts? This is quite permissible, in law, because a witness can have a legitimate explanation and it is for you to say, as the tribunal of fact, do you accept her explanation, and can you believe her now, that the account that she has given last in court, is the true account…"
>
> "…she has told the court there, that she has gone through the position of going to prison and she realized that she told a lie that sent her to prison and she is saying, if you accept her, that because she has seen what that -- where that put her, according to her, she doesn't want to be placed back in the same position and now she's prepared to speak the truth. It is totally, totally a question for you."

[104] The two accounts in relation to the identification evidence, were repeatedly flagged as an inconsistency by the learned judge who made it clear what should be the result, if the jury rejected Ms Bell as a reliable witness.

[105] Could Ms Bell have been described properly as a witness with an interest to serve, with the result that a further direction ought to have been given to the jury in this regard? In **Jason Lawrence v R**, the Privy Council held that the need for such a direction arises from a demonstrated risk of the witness having an improper motive for

the evidence. In that case, Lord Hodge, at paragraphs [15] to [21], dealt with the issue of an "axe to grind" direction to the jury in respect of the evidence from the brother of the appellant's co-accused:

> "15. … The Board affirms that a judge has a discretion in the circumstances of the particular case whether to give a warning that a witness's evidence might be tainted by an improper motive (*Benedetto v The Queen* [2003] 1 WLR 1545 PC, Lord Hope of Craighead at para 31). But, as Lord Ackner stated in *R v Spencer* [1987] 1 AC 128, 142, 'the overriding rule is that he must put the defence fairly and adequately'.
>
> 16. The courts have recognised the need for a judge to warn a jury about the possibility of an improper motive in cases where the witness is of bad character. The paradigm is the accomplice. The courts have also required a judge to give a warning in other circumstances, including (i) where patients detained in a secure hospital after committing criminal offences complained of ill treatment (*R v Spencer* (above)), (ii) where a prisoner gives evidence of a confession made in a cell (*Benedetto* (above); *Pringle v The Queen* [2003] UKPC 9), and (iii) where a person awaiting sentence for an unrelated offence had his sentencing hearing postponed to enable him to give evidence against an accused and use his cooperation with the authorities as a mitigating factor (*Chan Wai-Keung v R* [1995] 2 Crim App R 194 PC). But the need for such a direction arises from a demonstrated risk of the witness's having an improper motive for his evidence. That risk is not confined to persons shown to be of bad character.
>
> 17. There must be evidence which supports the possibility that a witness's evidence is tainted by an improper motive. In *Pringle v The Queen* (above) Lord Hope stated (at para 31):
>
> > 'The indications that the evidence may be tainted by an improper motive must be found in the evidence. But that is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such

> indications are present, the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence'

18. What, if anything, the judge needs to say will depend on the circumstances of the particular case. In *R v Spencer* (above) Lord Ackner (at 141D-E) rejected the use of formulaic warnings and stressed that the good sense of the matter be expounded with clarity and in the setting of the particular case.

19. In this case, in order to put the defence fairly and adequately, the judge needed to refer to the appellant's denial that he spoke to anyone after the incident. In the Board's view, because the evidence of the confession was, as the judge recognised, an important part of the prosecution case, he should also have directed the jury, when assessing Elwardo's evidence, to consider whether they were prepared to rely on that evidence which incriminated the appellant. He should have reminded the jury that when Elwardo gave his evidence in court his brother had been a co-accused. He should have explained that Elwardo might have had an interest in giving the police his account of the confession, because he had been aware that the police wished to speak to his brother when he spoke to them at his home on the morning after the incident. The judge should have invited the jury to consider the possibility that Elwardo's evidence might be tainted by a wish to protect his brother.

20. The judge could also have pointed out with fairness that Elwardo's evidence of the confession was consistent with the evidence of Leroy Williams. If he had done so, it is likely that this would have diminished the effect of his warning on the jury. But the Board is not persuaded by the Crown's submission that this would have cancelled out the benefit of a warning. In our view the judge's failure to refer to the defence's challenge to Elwardo's evidence of the confession, his mistaken statement that the appellant had not denied the confession, and his failure to invite the jury to consider the possibility of an improper motive for Elwardo's evidence meant that he did not put the defence case fairly and adequately to the jury."

[106] The facts of the case at bar can be easily distinguished from **Jason Lawrence v R**. Ms Bell was an eye witness, who had given a statement subsequent to the incident, implicating the two applicants. None of the applicants had made any purported confession to her, neither was she related or connected to any of the persons charged as in **Jason Lawrence**. In that case, it was the actual relationship of the witness to the co-accused that gave rise to the risk of an improper motive. The witness, whose brother had been charged jointly with the appellant, was alleging that the appellant had confessed committing the crime to him.

[107] Further, Ms Bell's sentence was not postponed until after she had given evidence at the trial of the applicants as in **Benedetto v The Queen** [2003] 1 WLR 1545. In that case, the witness was a cellmate to whom a confession had been purportedly made and stood to derive a benefit for giving evidence for the Crown. Ms Bell could not therefore be considered as a witness with an "axe to grind" as such.

[108] The issue that had to be determined by the jury was, whether, she had properly identified the applicants to the police and whether her evidence at the aborted trial could be accepted as credible. The circumstances do not fit easily into the category of a witness with an improper motive, and, although the category of circumstances that may require this type of warning is not closed, the learned judge had identified the factors sufficiently for the jury's consideration in relation to their assessment of Ms Bell in the particular set of circumstances. The learned judge's directions, therefore, cannot be impugned.

[109] However, Queen's Counsel had also complained that there is a gap in the evidence concerning the issue of Ms Bell's appearance in court at the time at which she would have been sentenced to a term of imprisonment and that this resulted in unfairness to the defence.

[110] Ms Bell was thoroughly cross-examined by defence counsel at the aborted trial. If there were any relevant issues requiring such specific disclosure, certainly defence counsel could have attempted to raise the issue at that time. The information, indictment as well as statements relevant to the charge against Ms Bell, would have been part of the records of the court. It is also recognised that the information that ought to be disclosed by the prosecution will vary on a case-by-case basis (see Disclosure: A Jamaican Protocol, principle 12 – page 5). In the absence of such a request, it is doubtful whether the prosecution would have been under any obligation to make disclosure in the case at bar.

[111] Although Mrs Neita-Robertson had contended that this issue may be relevant to the appeal, she had not sought to obtain this disclosure from the prosecution in order to pursue any potential application to adduce fresh evidence before this court. In light of all these circumstances, it is highly speculative how this alleged "gap" in evidence would have resulted in any unfairness to the applicants. These submissions lack merit and do not advance this ground any further, since no tangible unfairness to the applicants has been demonstrated.

[112] This ground of appeal also fails.

Ground three

Whether the evidence of threats to Ms Bell were so prejudicial to the applicants that in spite of the learned trial judge's warning, the prejudice could not be cured

Submissions on behalf of the applicants

[113] It was submitted that in the circumstances of this particular case, the cumulative effect of Ms Bell being scared to give evidence because of the threats, was so prejudicial, that no direction could cure the prejudice caused. Queen's Counsel contended that it was evident that threats could only have related to the instant case and so must have been connected to the applicants and this evidence would not have enured to their benefit. The clear inference would have been that, even if, threats did not come from the applicants directly, it must have been to assist them, hence the prejudicial effect of the evidence.

[114] Further, the overpowering evidence of threats should have been edited as that would not have affected the witness' explanation for crying at the trial (it is presumed that counsel intended to say preliminary enquiry) and changing her evidence due to being scared. It was contended that Ms Bell's evidence of being scared would have been sufficient to explain her actions, without introducing the irreparable prejudice of threats.

[115] The court was referred to the portions of Ms Bell's evidence, at pages 442 and 443, lines 25 and 1 to 6, respectively from the transcript of the aborted trial, where she spoke of being threatened. Queen's Counsel pointed out that the learned judge's direction (at pages 669 to 670) was to the effect that the threats were an explanation

or reason given by Ms Bell for her changing evidence. However, it was acknowledged that the jury had been directed that they could not use the threats in any way against the applicants as there was no evidence that they had threatened her.

Submissions on behalf of the Crown

[116] On behalf of the Crown, Mr Taylor, contended that the directions of the learned judge could not be faulted, as she emphasized that there was no evidence of threat from the applicants, or evidence of instruction to others on their behalf to make threats. Quite rightly, the learned judge was quick to highlight that there was no evidence that the threats related to this matter and she went on to rightly restrict the jury in the following terms (at page 670, lines 7 to 9), "[y]ou must only view it as part of the state of mind of the witness, that she's explaining as a reason for changing her mind".

[117] Reference was made to **Michael Allison, Oniel Hamilton and Marlon Johnson v R** [2012] JMCA Crim 31 where similar threats had been received by one of the witnesses, who stated at the retrial, that his reason for not providing names of the accused men, was because he "…even receive threats from the very day after the killing I hear that if we call anybody name, them a goh kill off the whole of wi". The dictum of Brooks JA (as he then was) at paragraph [14] was commended for consideration.

[118] Queen's Counsel submitted further that, Brooks JA indicated that the response was permissible as an exception to the rule against hearsay and that the purpose of the

explanation was evidence of the witness' state of mind citing **Subramaniam v Public Prosecutor** [1956] 1 WLR 965.

[119] It was submitted that this court has held that placing such reasons as threats in proper context for a jury, may be able to minimize, if not nullify the prejudicial effect of that bit of evidence. In **Michael Allison**, Brooks JA referred to portions of the transcript and found that the learned judge had minimized, if not nullified the prejudicial effect in summing up to the jury. This court was referred to paragraph [16] and [17] of that judgment, where the trial judge's directions to the jury were highlighted.

[120] Further, it was pointed out that in the case at bar, the reason for having allowed in evidence the disputed statements, is that at the stage of the preliminary enquiry, the jury would have also had an opportunity to assess Ms Bell's other reason, which was provided for her fear. On examination of the deposition, her reason for fear then was so open-ended as to be of a general nature of attending court, fear for her life and in relation to, it seems, an overall appraisal of participation in court attendance as a witness. In the depositions at closing she stated: "I'm scared because any witness me know always dead".

[121] It was submitted that the threats were not overpowering evidence, as the learned judge rightly indicated that Ms Bell's statement could not be considered as truth that she had been threatened. Queen's Counsel also contended that the threats were not so irreparably prejudicial and urged this court, in considering prejudicial utterances,

to consider whether the utterances have "tainted" or "smeared" the applicants, in being directed against their character and propensities or even their counsel. In support of this, the case of **Wesley Patterson v R** [2010] JMCA Crim 69 was cited.

[122] Mr Taylor further submitted that any editing, so as to limit the evidence as to the witness being or feeling scared, would not have been fair. In the shadow of the deposition, where Ms Bell's fear had been in relation to attending court, fear for life and seeming participation, the jury may have been invited to speculate or presume her fear was one and the same from the deposition, without her having given the subsequent explanation at the trial.

[123] Learned Queen's Counsel also invited the court to consider the decision of the Caribbean Court of Justice in **Japhet Bennett v R** [2018] CCJ 29 (AJ) (at paragraph [4]), an appeal from Belize's Court of Appeal, speaking on the duty of a judge to ensure fairness of the trial. It was noted that fairness in this context was not limited to the defendant, as the trial should be fair to all - defendants, victims, witnesses and society as a whole. It was expressly recognised that procedural fairness is the overriding objective of the trial.

[124] Finally, it was submitted that the supposed "wounding and corrosive" effect of the evidence of the threats, were blunted and minimized by a good character direction given by the learned judge. Queen's Counsel highlighted that, although the applicants both gave unsworn statements, the learned judge, nonetheless, gave both limbs of the character direction (at 737, lines 2 to 8 of the transcript).

Analysis and determination on ground three

[125] In **Michael Allison**, this court had to deal with a similar issue of prejudicial evidence being given before the jury. This arose in circumstances where the witness, although claiming to have known the names of his assailants, did not give their names to the police at the time of giving his statement. The witness was allowed, in re-examination, to explain why he did not do so. At that time, the witness said he had been receiving threats from the very day after the killing, that he heard that "if we call anybody name, them a goh kill off the whole a wi". Brooks JA, who wrote the judgment on behalf of the court, in examining the issue as to whether the prejudicial effect of that evidence outweighed its probative value, stated at paragraph [14]:

> "We cannot agree with learned Queen's Counsel on these points. Firstly, the question concerning Mr. McKenzie's reason for not naming the attackers would have been a 'live' question for the jury, bearing in mind the cross-examination on the point. There would have been no reason to send out the jury in order to hear an objection to the question. There was no reason to have a *voir dire*, as learned Queen's Counsel has submitted before us."

[126] At paragraph [15], Brooks JA also stated that the evidence was admissible as an exception to the rule against hearsay, as its purpose was to present evidence of the witness state of mind (see **Subramaniam v Public Prosecutor**). At paragraph [16], he highlighted the following portion of the learned judge's summation from the transcript "…[w]e do not know from whom he got those threats, if he did, in fact get those threats, but you are not to assume that it was these men, because it is not the evidence". In the following paragraph, another portion of the summation was referred to where the learned judge restricted the use of that bit of evidence. She stated "…[w]e

have no evidence that it was these men who threatened him but you use what he said in order for you to determine whether having seen or heard this witness, you believe his reason why he didn't give any names to the officer…"

[127] In the deposition, the evidence of Ms Bell at page 258, line 5 to 18 is as follows:

> "Having seen the statement, I now say it is true that by the time the gate kick off, Bredda jumped up and the door kick off and is bare shot and I could not see anything and I could not identify anyone.
>
> Q Why have you been crying since coming into the witness box at least ten minutes after?
>
> A I am crying because I did not want to come up here.
>
> Q Why?
>
> A Because I am scared.
>
> Q Why are you scared?
>
> A Because of everything.
>
> I'm scared of coming to court. I'm scared of my life. Me no want anything happen to me. I'm scared of my life to come and witness and talk, to talk about Bredda. I'm scared because any witness me know always dead."

[128] Ms Bell was confronted about her inconsistent evidence during cross examination at the aborted trial. Under re-examination, Crown Counsel would have been entitled to and did ask her, if she had any explanation for the different accounts. Although this evidence can be described as prejudicial, it would also be probative, as it would go the jury's ability to assess her credibility relevant to her explanation for two differing accounts, similar to the treatment of the evidence of the witness in **Michael Allison**. This was not evidence that could have been edited and the evidence that she gave (as

set out above) at the preliminary enquiry, would also have been relevant to this issue. The jury was entitled to her various explanations for this crucial and material inconsistency.

[129] What is important, is the manner in which the learned judge directed the jury on this issue. Did it at least minimise the prejudicial effect of the evidence? (per Brooks JA in **Michael Allison**)

[130] The learned judge dealt with this issue at pages 669 to 670 of the transcript:

> "…So what is happening here, Crown Counsel now is seeking to get an explanation from her, as to why she has given two different accounts. Can you explain why you give two different accounts? This is quite permissible, in law, because a witness can have a legitimate explanation and it is for you to say, as the tribunal of fact, do you accept her explanation, and can you believe her now, that the account that she has given last in court, is the true account, because there she identified these two men and before that she said she didn't identify anybody, and she didn't see anything. She said, 'Yes, sir, the reason why, I was scared. I have been getting threats, people dem seh dem ago kill mi. I have been getting threats. Private number call me seh dem ago kill me' and dis and dat. Let me pause here. This is only put before you, not for the truth that people threaten her as to what they say they are going to kill her but for the fact that she has said she reacted because of threats. Behold, and bear it in mind, there is no evidence that these two accused men threatened her. There is no evidence that they instructed anyone to threaten her. There is no evidence, in fact, that the threats relate to this matter, so you might have seen it there where she said it. You cannot use that against the two accused men or any of them. You must only view it as part of the state of mind of the witness, that she's explaining as a reason for changing her mind.
>
> Now, if you believe her that she was scared and you look back at her deposition, it shows she was crying in court.

> She said every witness she know dead [sic]. She has not said, Mr. Foreman and your members, that these accused men called her. You cannot use it against any of them, it is only relevant to show you that she's giving an explanation as to why she changed her account. She was asked by the Crown Counsel now, which of the accounts is true, Miss Bell? Of the two accounts, the one at Falmouth, or this one now, where you are saying you saw what happened. She said, the one at Falmouth -- at Duncans, I'm sorry, the prelim was at Falmouth…"

[131] The learned judge directed the jury in similar terms to the directions given in **Michael Allison**. This court, in that case, concluded that it was sufficient. We are of the same view and find that the learned judge directed the jury adequately in relation to how to view this evidence, so as to minimise any prejudicial effect on the applicants.

[132] This ground of appeal also fails.

Ground four

The applicants' sentences are excessive in all the circumstances

Submissions on behalf of the applicants

[133] Queen's Counsel sought to remind the court of the four classical principles of sentencing, namely retribution, deterrence, prevention and rehabilitation (as adopted from the dictum of Lawton LJ in **R v Sargeant** (1974) 60 Cr App 74, at page 77). The Australian case of **Veen v R (No 2)** (1988) 164 CLR 465 was also cited as instructive in relation to the exercise of sentencing which was described as "not purely logical".

[134] It was reiterated that sentencing is not an exercise which ought to be approached in a trite manner and that each case ought to be considered based on its own peculiar facts. It was contended that in accordance with the common law, having

determined the normal range, the following steps should be taken by the sentencing judge:

i. Identify the appropriate starting point within the range for the particular offender;

ii. Consider the impact of any relevant aggravating features;

iii. Consider the impact of any relevant mitigating features (including personal mitigation);

iv. Consider, where appropriate, whether to reduce the sentence on account of a guilty plea;

v. Decide on the appropriate sentence;

vi. Make, where applicable, an appropriate deduction for time spent on remand pending trial; and

vii. Give reasons for the sentencing decision.

[135] In particular, it was contended that the sentencing judge must always keep in mind the character and antecedents of the individual offender. Reference was made to the dictum of Graham-Perkins JA in **R v Cecil Gibson** (1975) 13 JLR 207, at pages 211 to 212:

> "…it should never at any time be thought that a convicted person standing in a dock is no more than an abstraction. He is what he is because of his antecedents and justice can

> only be done to him if proper and due regard is had to him as an individual, and a real attempt is made to deal with him with reference to the particular circumstances of his case. To ignore these is to ignore an essential consideration in the purpose of punishment, namely, the rehabilitation of the offender."

[136] Queen's Counsel contended that the antecedent reports of both applicants were favourable and that favourable antecedent reports are an important mitigating factor in the imposition of sentences. She also contended that the learned judge failed in several regards to properly consider all the relevant factors in the sentencing exercise and that the sentences imposed on both applicants were unfair, without the application of the guiding principles and therefore manifestly excessive.

[137] She then highlighted the alleged failings of the learned judge in relation to each applicant.

Shanovan Brown

[138] It was submitted that Shanovan's antecedent report was favourable, insofar that it stated that he was gainfully employed up to the time of his arrest as a steel worker/labourer on a construction site. This showed that he was a hard worker. The antecedent report also revealed that he was educated up to high school and that he had one previous conviction for a lesser offence, which was not similar in nature (namely, assaulting a Constable). He was 26 years old at the time of the report.

[139] Mrs Neita-Roberston contended that the failure to obtain a social enquiry report ("SER") meant that the learned judge failed to take into account several other factors, which would have provided mitigating information in relation to Shanovan.

[140] Further, the learned judge incorrectly took into account Shanovan's previous conviction for assaulting a police officer and was wrong in concluding that he has a problem with lawful authority (in that regard, the court was referred to page 770, lines 1 to 4). This previous conviction ought not to have been considered, since it occurred while he was incarcerated for the instant murder case and thus, could not have indicated his posture to the law or authority before the commission of the murder of the deceased.

[141] The learned judge failed also, to take into account the three years and seven months spent by the applicant in pre-trial custody, when she stated that the minimum term should be 20 years' imprisonment before parole should be considered, but that her belief was that an offence of this nature should really be 30 years.

[142] She stated that the learned judge failed to explain in a detailed way, how she arrived at her sentence, having regard to the mitigating and aggravating factors. That her decision was "ad hoc", demonstrative of "weak analysis" and provided "flawed substantive reasons" for arriving at the sentence of life imprisonment, with 20 years to be served before becoming eligible for parole.

Kevol Brown

[143] It was submitted that Kevol's antecedent report was favourable, insofar that it stated that he was an accountant by profession and was at the time of his arrest, engaged in "higglering". Further, that he had no previous convictions.

[144] Mrs Neita-Robertson contended that the learned judge did not fulsomely address the mitigating circumstances (reference was made to page 773, lines 16 to 23 of the transcript). She contended also, that the absence of a SER, meant that the learned judge failed to take into account several factors, as she was not put into a position to consider other factors which would have provided mitigating information in relation to Kevol. This SER, she submitted, would have provided a fuller view and allowed for an appropriate sentence in accordance with the classical principles.

[145] There was, also, a failure on the part of the learned judge to take into account the length of time spent in custody, as it was neither presented, nor did she insist on finding out. Had this been done, the learned judge could have addressed her mind to it and this would have aided her in her determination of the ultimate sentence that should be passed.

[146] Similar complaints were launched that the learned judge failed to explain in a detailed way, how she arrived at her sentence having regard to the mitigating and aggravating factors; that her decision was "ad hoc", demonstrative of "weak analysis" and provided "flawed substantive reasons" for arriving at the sentence of life imprisonment, with 18 years to be served before becoming eligible for parole.

Submissions on behalf of the Crown

[147] The Crown's position was that this court should affirm the sentences handed down by the learned judge as the transcript revealed that her primary goal for the sentences imposed, was rehabilitation and secondary, deterrence.

[148] It was pointed out that, in this case of murder, there was a unique feature in that it could not be determined who fired the fatal shot. This meant that the applicants were principals in the first degree and aiders and abettors. As such, the learned judge could have sentenced both applicants as principals in the first degree but she decided to give them the benefit of doubt.

[149] Further, it was observed that the case at bar was tried in 2011, the same year as the case of **Romeo Da Costa Hall v The Queen** [2011] CCJ 6, but that the principles as regards pre-trial detention set out therein, had yet to be extended to our courts. However, reference was made to page 769, lines 18 to 21 of the transcript, where the learned judge stated that she took into account the period spent in pre-trial custody by Shanovan. Although she did not indicate any calculations made in that regard, the learned judge expressly remarked that she had given the benefit of those 3.5 years to the applicant. Further, an examination of the transcript showed that the learned judge considered the mitigating factors in relation to both applicants in her determination of appropriate sentences.

Shanovan Brown

[150] In respect of Shanovan, the antecedent report revealed that he had no previous convictions as such, save for the offence committed while he was incarcerated; he was of good character, from a good back ground, industrious, that he had a high school education and was literate. He was regarded by the learned judge as having an unblemished character. Reference was made to page 772, lines 1 to 18, where the learned judge demonstrated her regard for the classical principles of sentencing. She

also considered what were aggravating features, that the murder took place in circumstances where the deceased's door was kicked off at 7:00 am and that there was no regard for the fact that someone else was present in the room; that the deceased was naked and was afforded no dignity at the time he suffered the fatal injuries. He tried to escape and was followed and that firearms were used. In imposing the sentence, the learned judge balanced all the relevant factors and gave Shanovan the benefit of 20 years' imprisonment before parole should be considered; and she went on to indicate that she believed that this would allow him sufficient time for reflection.

Kevol Brown

[151] In respect of Kevol, Crown Counsel, Mr Edmond indicated that the copy of the transcript (in their possession) was missing the final three pages, but nonetheless, it appeared that Kevol had the greater benefit of mitigating circumstances being considered. He was treated as a person of unblemished character that was led astray by his older brother, Shanovan. It was considered by the learned judge also, that he had a child and that he went to high school.

[152] In imposing the sentence of life imprisonment with eligibility for parole in 18 years, the learned judge was not required at this time to show how she arrived at this. The sentence was imposed prior to the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ("Sentencing Guidelines").

[153] It was submitted that any reduction in this sentence, may have the effect of outraging the conscience of the nation, and even if a reduction was not made for pre-trial remand, there would be no prejudice caused. This is so, because the term of sentence was comparatively short and as the learned judge observed, Kevol would be eligible for parole when he reached 40 years old, which could be considered relatively young.

[154] In all the circumstances, it was submitted that the sentences for both applicants could not be said to be unreasonable or excessive.

Analysis and determination on ground four

[155] At the outset of her deliberations, the learned judge had regard to the statutory minimum of 15 years for this offence (see page 768 of the transcript) and was bound to sentence the applicants in accordance with section 3(1)(b) of the Offences against the Person Act. Section 3(1)(b) states:

> "3 (1) Every person who is convicted of murder falling within–
>
> (a) …
>
> (b) Section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

[156] It is recognised that she would not have had the benefit of the Sentencing Guidelines which came into existence in 2017, or the guidance from the notable case of **Meisha Clement v R** [2016] Crim 26, where Morrison P superbly set out the procedure which should guide sentencing judges. At paragraph [41] he stated:

> "[41] As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the [Sentencing Guidelines Council's] definitive guidelines, derives clear support from the authorities to which we have referred:
>
> (i) identify the appropriate starting point;
>
> (ii) consider any relevant aggravating features;
>
> (iii) consider any relevant mitigating features (including personal mitigation);
>
> (iv) consider, where appropriate, any reduction for a guilty plea; and
>
> (v) decide on the appropriate sentence (giving reasons)."

[157] However, it is acknowledged that the learned judge would have had the benefit of guidance from **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002, wherein Harrison JA explained, that the judge's first task would be to make a determination, as an initial step, of the length of the sentence as a starting point, and then, go on to consider any other factors that would serve to influence the sentence, whether in mitigation or otherwise.

[158] In reviewing pages 767 to 777 of the transcript, it is quite apparent that the learned judge considered the classical principles of sentencing (rehabilitation, retribution, deterrence and prevention, (per **R v Sargeant**). She also took into consideration the character and antecedents of each applicant (per **R v Cecil Gibson**)

Further, it cannot be accepted that the learned judge failed to explain in a detailed way how she arrived at the sentences, having regard to the mitigating and aggravating factors. The learned judge was far from ad hoc in providing her reasons.

[159] She weighed the mitigating factors for both applicants. It is to be noted that the learned judge proceeded to sentence Shanovan before Kevol and in so doing she adopted considerations common to both applicants without repeating them in as much detail with respect to Kevol. The mitigating factors for Shanovan, were identified as his good background, that he had no previous conviction recorded against him up to the time of the commission of the offence; that he was the beneficiary of a good character direction before the jury; that he was industrious, as he had been working with his father as a labourer since leaving school and that he had a certain level of education. Regarding Kevol, the learned judge stated, "[t]he same things I've said in relation to Shanovan Brown, in terms of the mitigating factors in considering what minimum term should be imposed on you, I have looked at the mitigating factors in your case". She specifically considered that Kevol had no previous convictions, he was not an "idler", had a high school education and was only 22 years old.

[160] The learned judge considered also the aggravating factors, namely the nature and circumstances of the offence; that it was a gun crime and the prevalence of these types of offences. She considered also the fact that the murder was premeditated, which she stated, "smack[ed] of terrorism" (page 775, line 13), and the disregard for

law, order and peace in society. Also the brazenness of the applicants, as they walked on the public road with the firearm.

[161] In respect of Shanovan specifically, the learned judge also considered that he was the "bigger brother" and he should have been the one to tell Kevol not to follow him (page 772, lines 22 to 25). She reiterated this in respect of Kevol and expressed that Shanovan ought to have guided him better than he did (page 774, lines 16 to 19).

[162] Mrs Neita-Robertson took issue with the learned judge's consideration of Shanovan's previous conviction, which related to an offence committed while he was incarcerated for the instant murder case. It is quite clear that the learned judge was cognizant of this. She expressly stated (at page 769, lines 21 to 25 and page 770, lines 1 to 11):

> "I take into account, though, that you have had a previous conviction albeit after the commission of this offence. But what I recognize is that the commission would have come while you were in custody in this charge and looking at the nature of the offence, it is assaulting a police, which would suggest to my mind that you have a problem with lawful authority. And although it might not be as weighty as murder or any other felony, it points to you having a difficulty complying with lawful authority and that will be used in assessing how long it will take for a person like you to be rehabilitated. You must have respect for the people who represent law and order."

[163] Mrs Neita-Robertson has not relied on any authority in support of her contention that the learned judge ought not to have had any regard to this conviction. There can be no dispute that it would have formed a part of Shanovan's antecedents as it was duly recorded. Further, it is noted that among the non-exhaustive list of aggravating

factors illustrated in the Sentencing Guidelines (at paragraph 8.2) is "offence[s] committed whilst on bail for other offences".

[164] By logical extension if offences committed whilst on bail, while one is awaiting trial, can be regarded as an aggravating factor, then it stands to reason that an offence committed whilst in custody, while awaiting trial, can similarly be considered. It must be borne in mind that in our jurisdiction, there is no exhaustive list of potentially aggravating factors collected in one place (per Morrison P in **Meisha Clement v R**, paragraph [32]).

[165] In any event, the learned judge clearly demonstrated that she linked this consideration to one of the principles of sentencing, that is, rehabilitation. The fact that Shanovan found himself in conflict with the law, which manifested in the assault of a police constable, cannot be said to be irrelevant to that issue. The list of aggravating factors not being a closed one, means that the learned judge was reasonably entitled to consider the commission of the offence by Shanovan, insofar that it related to his character, in particular, his capacity for rehabilitation.

[166] The learned judge did indicate her thoughts as to a starting point, when she considered whether she should move further than the statutory minimum for parole, which would be 15 years (see page 760 of the transcript). At page 771 of the transcript, in considering an appropriate sentence for Shanovan, the learned judge went on to say that, if there had been specific evidence as to who had fired the fatal shot, she would have been considering at least 30 years. This, no doubt, would have been the same

consideration in relation to Kevol. The learned judge demonstrated therefore, an application of the above-mentioned principles that can be considered as sufficient.

[167] Mrs Neita-Robertson has, however, made two specific complaints that will be necessary for this court to consider, in order to properly assess whether the sentences as applied could be deemed to be unfair. These relate to the failure of the learned judge to obtain a SER for each applicant and the failure to mathematically subtract the pre-trial custody period from the actual sentences imposed.

A. *Failure to obtain a social enquiry report ("SER")*

[168] Noticeably absent from the submissions of Queen's Counsel, on behalf of the applicants, was any suggestion of what an appropriate sentence would have been in the circumstances as they existed before the learned judge. Heavy weather was made of the absence of a SER, however it cannot be ignored that after the jury found the applicants guilty, the learned judge set a date for sentencing (28 July 2011) and her immediate question to counsel for the applicants was "[y]ou were hoping for a report?" To which Mr Colman responded, "I wouldn't need one, I won't ask for it". The learned judge then responded (at pages 747 t0 748, lines 25 and 1 to 2), perhaps presciently:

> "Just put that on the record; Mr Colman won't need for a social enquiry report, just the antecedent report."

[169] This court has previously considered whether the failure to procure a SER to assist in the determination of an appropriate sentence was an error in principle which rendered the sentences manifestly excessive (see: **Michael Evans v R** [2015] JMCA Crim 33, paragraphs [7] to [12]). It was recognised that SERs are useful and important

to the sentencing process and it was regarded a good sentencing practice to obtain a SER before sentencing an offender, even where there is no statutory requirement to do so. It is useful to set out at paragraph [9] of **Michael Evans v R**, which referred to an illuminating passage from a text:

> "We do recognize the utility of social enquiry reports in sentencing and cannot downplay their importance to the process. Indeed, obtaining a social enquiry report before sentencing an offender is accepted as being a good sentencing practice. John Sprack in A Practical Approach to Criminal Procedure, tenth edition, page 395, paragraph 20.33, in his discussion of the provisions of the Powers of Criminal Courts (Sentencing) Act 2000, as they relate to the use of pre-sentencing reports in the UK, noted:
>
> > '**Even if there is no statutory requirement to have a [social enquiry] report, the court may well regard it as good sentencing practice to have one, particularly if it is firmly requested by the defence.** Nevertheless, even where the obtaining of a pre-sentence report is 'mandatory', **the court's failure to obtain one will not of itself invalidate the sentence.** If the case is appealed, however, the appellate court must obtain and consider a pre-sentence report unless that is thought to be unnecessary.'" (Emphasis supplied)

[170] It is accepted that even in the absence of any mandatory requirement or a request from defence counsel, the learned judge could have requested a SER on her own initiative (the Sentencing Guidelines also promote the need for adequate pre-sentence information). The question for this court, as in **Michael Evans v R**, is whether the learned judge erred, in principle, when she failed to obtain a social enquiry report in the circumstances of this case, thereby rendering the sentences imposed on the applicants manifestly excessive.

[171] Despite her emphatic submissions, Mrs Neita-Robertson has not pointed to these "several other factors" which would have provided mitigating information in relation to the applicants. The learned judge had the benefit of considering the antecedents as well as the plea in mitigation made on behalf of each of the applicants where the statutory minimum of 15 years before becoming eligible for parole was urged for each applicant.

[172] Specifically, in relation to the SER, the learned judge had this to say in respect of Shanovan (at pages 768 to 769, lines 24 to 25 and 1 to 18):

> "I take into account that your attorney said that he would not require a social enquiry report. So I - - I do not have any information concerning your background which perhaps could assist me but then again, I wouldn't want to conduct an enquiry that could put before me things that could seem prejudicial to you and therefore I will go along with counsel and I will treat you as a man coming from a good background. I will treat you as a person who has been industrious because it shows that you have been engaged in an occupation with your father. I take you as a man who has been educated, having the benefit of high school education at William Knibb, **so the fact that I do not have any social enquiry report, does not go against you in any way because I treat you as if you were of unblemished character up to the time that you committed this offence**." (Emphasis supplied)

[173] In respect of Kevol, the learned judge stated in similar terms (at page 774, lines 4 to 7):

> "…based on the fact that I am treating you as a person of unblemished character, sound background – because I have no social enquiry report."

[174] The learned judge expressly stated that in the absence of SERs, she was giving the applicants the full benefit of being treated as having unblemished characters. Accordingly, the court is able to say with some confidence, that it is highly unlikely that SERs would have been of any real benefit to either of the applicants. It could not be contended in any serious way, that the applicants were prejudiced by the absence of SERs. It is for these very same reasons, as set out by the learned judge, that this court also concludes that it is unnecessary to obtain such a pre-sentence report for our consideration.

B. *Length of time spent in custody*

[175] Queen's Counsel contended that the learned judge failed to consider the fact that Shanovan spent three years and seven months in custody when she stated that the minimum term should be 20 years' imprisonment. With respect to Kevol, it was submitted that there was a failure on the part of the learned judge to take into account the length of time spent in custody, as it was neither presented nor did she insist on finding out.

[176] At the time of the sentencing hearing, the learned judge, would have been without the benefit of the decisions such as **Meisha Clement v R**, **Charley Junior v R** [2019] JMCA Crim 16 and **Techla Simpson v R** [2019] JMCA Crim 37, wherein this court endorsed the decision of **Romeo Da Costa Hall v The Queen**. The principle established in these cases, is that pre-trial detention should be fully counted as part of the time served pursuant to the sentence of the court. However, as Morrison P pointed out in **Meisha Clement**, the principle as applied by the Caribbean Court of Justice in

Romeo Da Costa Hall had been set out in the Privy Council decision in **Callachand & Anor v The State** [2008] UKPC 49 (see paragraphs [34] and [35] of **Meisha Clement**). It is now expected therefore that, sentencing judges will conduct a mathematical calculation which will involve subtracting the time spent in custody pre-trial from the sentence ultimately imposed.

[177] Bearing in mind that the trial of the instant case was completed in 2011, the submissions of the Crown in respect of Shanovan are well-founded. Also, the learned judge expressly stated that she took into account the time spent in pre-trial custody in relation to him (at page 769, lines 18 to 21):

> "I have taken into account, though, that you have been in custody for three and a half years, in determining the minimum sentence."

There is no doubt that Shanovan had the benefit of this consideration. It also cannot be ignored that the learned judge actually reduced her initial figure of 30 years by 10 years, to impose a term of 20 years before eligibility for parole was to be considered for Shanovan, having weighed all the mitigating and aggravating factors.

[178] Turning to Kevol, the learned judge sought to consider the time he spent in custody. When she sought to ascertain the length of time, she was unaided by defence counsel. As a part of the learned judge's consideration of the mitigating factors, the following exchange was set out at page 773, lines 21 to 25:

> "…although counsel did not say you were in custody the same time - - is it the same length of time?

> MR. C. COLMAN: It would be shorter, ma'am. He came out on bail for a while."

This was the extent of the exchange before the learned judge returned to the consideration of the mitigating factors.

[179] Up until the hearing of this application, this court was placed in no better position than the learned judge. Queen's Counsel was similarly unable to specify the period spent in custody by Kevol. Based on a review of the learned judge's deliberations as seen in the transcript, it can be reasonably inferred that she gave Kevol the benefit of time spent, although there was no arithmetical calculation and it was never stated specifically.

[180] There can be no doubt that it was far from ideal that defence counsel (or Crown Counsel) failed to assist the learned judge in this regard. It seems that this is something that should be easily ascertainable/calculated, from a review of the file or by taking the necessary instructions, so that it could have been considered with a degree of precision and demonstrated by an arithmetical deduction. However, based on the egregious circumstances and the consideration of the learned judge of the actual issue before passing sentences, we are not minded to disturb the determination of the learned judge, as there is a sufficient demonstration that the time spent in custody was factored into the actual sentence passed.

[181] It cannot be said that the sentences imposed for either applicant were manifestly excessive for an offence such as this. They are in line with sentences previously imposed for similar offences having regard to the nature of the killing and

could be said to be favourable to the applicants. The respective sentences of the applicants cannot be faulted.

Conclusion

[182] This court, in examining the sentences imposed by the learned judge, is satisfied that due regard was paid to the four classical principles of sentencing (as espoused by Lawton LJ in **R v Sargeant**) and at the end of the day, the learned judge imposed a condign sentence, which fitted the offenders as well as the crime (see the dictum of Morrison JA (as he then was) in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26).

[183] This ground of appeal also fails.

Disposition

[184] The applications for leave to appeal against conviction and sentence are refused. The sentences are reckoned as having commenced on 28 July 2011.