JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 68/2011 & 7/2012

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

TYRONE BROWN v R

TECHLA SIMPSON

Miss Melrose G Reid instructed by Melrose G Reid & Associates for the appellant Tyrone Brown and the applicant Techla Simpson

Miss Cheryl-Lee Bolton for the Crown

9, 11 July 2019 and 3 April 2020

STRAW JA

[1] We heard submissions from counsel on 9 and 11 July 2019, in respect of an appeal against conviction in relation to Mr Tyrone Brown ("Mr Brown") and an application for leave to appeal conviction and sentence in relation to Mr Techla Simpson ("Mr Simpson"). On 11 July 2019, we made orders in the following terms:

> "In relation to criminal appeal number 68 of 2011, **Tyrone Brown v R –**
>
> 1. The appeal is allowed.
> 2. The conviction is quashed and the sentence set aside.
> 3. Judgment and verdict of acquittal is entered.

In relation to criminal appeal number 7 of 2012, **Techla Simpson v R –**

1. The application for leave to appeal against conviction and sentence pursuant to section 2(1)(a)(i) of the Offences against the Person Act is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal is allowed, the conviction for murder pursuant to section 2(1)(a)(i) of the Offences against the Person Act is quashed, and substituted therefor is a verdict of guilty for murder contrary to the common law.

4. The sentence for the offence of murder pursuant to section 2(1)(a)(i) of the Offences against the Person Act is set aside, substituted therefor in relation to murder contrary to the common law is a sentence of life imprisonment with the stipulation that he serves a minimum of twenty four (24) years before being eligible for parole.

5. The sentence is reckoned as having commenced on 19 December 2011."

These are the reasons which we promised to give.

[2] The appellant, Mr Tyrone Brown, and the applicant, Mr Techla Simpson, sought to challenge their convictions and sentence for the offence of murder, pursuant to section 2(1)(a)(i) of the Offences against the Person Act. They were tried and convicted after a trial before Morrison J, sitting with a jury, in the Circuit Court Division of the Gun Court on 4 July 2011. Mr Brown was sentenced to life imprisonment on 8 July 2011 and mandated to serve 15 years before becoming eligible for parole. Mr Simpson was

sentenced to life imprisonment on 19 December 2011 and mandated to serve 25 years before becoming eligible for parole.

[3] Both Mr Brown and Mr Simpson filed applications for leave to appeal their convictions and sentences. The applications were considered by a single judge of appeal. On 10 September 2018, Mr Brown was granted leave to appeal against his conviction only and Mr Simpson was refused leave to appeal against conviction and sentence. As would be observed from the orders, we, ultimately, granted Mr Simpson leave to appeal and treated the hearing of the application as the hearing of the appeal. Although it would be more precise to refer to Mr Simpson as an applicant rather than an appellant, he will, sometimes, be referred to as an appellant, as a matter of convenience only. Therefore, where appropriate, Messrs Brown and Simpson will be referred to collectively as "the appellants". No confusion is intended.

The case for the prosecution

[4] The case for the prosecution was that on 22 January 2005, in the parish of Clarendon, the appellants murdered Mr Lawrence Meeks (also known as "Cat") in the course or furtherance of a robbery. A summary of the evidence on which the prosecution relied is as follows: On 22 January 2005, between the hours of about 7:00 pm and 11:00 pm, the appellants were seen multiple times in the vicinity of Mr Meeks' bar (which is also operated as a shop) located in Coley, in the parish of Clarendon. Both Mr Meeks and his girlfriend, Miss Nordia Jackson (also known as "Tameka"), were at the said bar.

[5] At about 7:00 pm, Mr Brown (who was known to Miss Jackson as Paul Brown) parked his green Nissan Sunny motor vehicle in front of the said bar. He alighted from the motor vehicle and called to Miss Jackson. He went inside the bar and purchased some cigarettes from Mr Meeks. While Mr Brown was inside the bar, Miss Jackson observed Mr Simpson seated in the passenger side of the parked motor vehicle, she recalled that he looked at her. Mr Brown exited the bar and drove away in the said vehicle with Mr Simpson.

[6] At about 8:00 pm, Miss Jackson saw the appellants drive by the bar in the same motor vehicle. Then, for the third time at about 11:00 pm, she, again, saw the appellants at the bar. At that time, Mr Brown went to Mr Meeks and said, "a mi a carry out Cat" to which Mr Simpson responded, "No, a me a carry out Cat". Sometime after this exchange, Mr Meeks locked up the bar and left with Miss Jackson and another man called Melton.

[7] The three walked along the Coley Main Road. Melton turned off into his yard and Mr Meeks and Miss Jackson continued walking until they reached the house of Mr Meeks' aunt. Mr Brown drove up and asked Mr Meeks, "if round a di shop clear up" to which Mr Meeks answered, "yes, man". Mr Brown drove off.

[8] Mr Meeks and Miss Jackson continued to walk along the road and about three minutes later, Mr Simpson came up on foot and approached Mr Meeks and said, "Nobody don't move". Mr Meeks responded "eeh" and then Mr Simpson shot him. Mr Meeks fell and Miss Jackson ran away and sometime later returned with another man, who was the

driver of a bus. She observed that Mr Meeks appeared to be dead. A crowd had gathered by the time she returned and the police were called to the scene.

[9] Detective Sergeant Wiggins gave evidence that at about 1:00 am, on the morning of 23 January 2005, he received a call from Mr Brown, who was known to him. Mr Brown told him that on 22 January 2005, at about 11:45 pm, he was in McNie District in Clarendon when he saw a man robbed and shot by another man. This man (the shooter) who he said he knew as "Techla", jumped into the car that he was driving, pointed a gun at his neck and ordered him to drive to Ocho Rios. Detective Sergeant Wiggins testified that Mr Brown told him that he was presently at the Ocho Rios Shell gas station and that "Techla" was sitting in the car with the gun. Detective Sergeant Wiggins stated that he made contact with the Ocho Rios Police Station.

[10] Detective Corporal Wynter gave evidence that he was stationed at the Ocho Rios Police Station and that on 23 January 2005, he received a call which caused him to go to the Ocho Rios Shell gas station. When he arrived, he observed a green Nissan sunny motor vehicle in which Mr Simpson was sitting. He detained Mr Simpson and took a firearm from him after searching him. Detective Corporal Wynter stated that he also saw Mr Brown and spoke with him. He then allowed Mr Brown to drive the Nissan motor vehicle to the Ocho Rios Police Station. He stated that Mr Simpson was taken there in the police service vehicle. Detective Corporal Wynter also indicated that he took a Motorola cell phone from Mr Brown and a Nokia cell phone from Mr Simpson that morning.

[11] Subsequently, an identification parade was held and Miss Jackson pointed out Mr Simpson as the man who killed her boyfriend, Mr Meeks.

[12] On 15 February 2005, at about 10:00 am, Miss Jackson went to the police station in May Pen where she saw a police officer who she called "Detective Mr Norman" and Mr Brown. She described Mr Meeks' phone to the said police officer and Mr Brown responded that he had nothing to say. Miss Jackson recalled that she saw the phone belonging to Mr Meeks at the police station that day. This was the said Nokia phone taken from Mr Simpson by Detective Corporal Wynter. In a question and answer document recorded from an interview conducted with Mr Brown, (which was tendered into evidence and read into the record) he claimed to own three cellular phones including Mr Meeks' phone (described as a Nokia cellular phone). He stated that he bought the Nokia cellular phone from a "youth" whom he described as "a little coke head".

[13] In addition to the three witnesses mentioned above, the prosecution called the following witnesses in support of its case - (i) Dr Desmond Brennan, who conducted the post-mortem examination on the deceased, (ii) Retired Superintendent Sidney Porteus, ballistic expert, (iii) Detective Sergeant Fitzgerald Porter, who escorted the appellants from the Ocho Rios Police Station to the May Pen Police Station (iv) Detective Sergeant Ransford Durrant, who swabbed the appellants' hands (v) Miss Marcia Dunbar, government forensic analyst and (vi) Detective Inspector Michael Norman, investigation officer and head of the Clarendon Homicide Unit which deals with murder investigations.

[14] A spent shell recovered from the scene and a bullet recovered from Mr Meeks' body were found to have been fired from the gun recovered from Mr Simpson.

The appellants' case

[15] Mr Brown made an unsworn statement from the dock, while Mr Simpson gave sworn evidence. They both denied involvement in the murder of Mr Meeks. Neither of the appellants called any witnesses, despite advancing that they were elsewhere, in the company of others, at the time of the shooting of the deceased.

Tyrone Brown

[16] Mr Brown stated that on 22 January 2005, he was operating a taxi from McNie, Collie District. when a man jumped out into the road and stopped him. This man was Techla Simpson. He stopped the motor vehicle and Mr Simpson entered and sat behind the driver's seat and indicated that he needed to go to Ocho Rios. Mr Brown told him that he did not have sufficient gas to go to Ocho Rios and agreed to take him to Pedro, another district.

[17] Upon reaching Pedro, Mr Simpson pulled a firearm from his pocket and demanded to be taken to Ocho Rios. Mr Brown complied and upon reaching Ocho Rios he stopped at a gas station. While at the gas station, he purchased some gas as well as some food. He spoke with the security guard and told him that his passenger (Mr Simpson) had a gun. The security guard indicated that he was going to call for back up. Mr Brown told him that he had a police friend, Mr Wiggins, who he could call. He spoke to Mr Wiggins, who told him not to move from the car and that he should watch Mr Simpson.

[18] Mr Brown remained at the gas station until he saw two "radio cars" arrive. He observed the police apprehend and search Mr Simpson. The police took the gun from him. Subsequently, Mr Brown introduced himself to the police. Mr Brown was allowed to drive his vehicle behind the police to the police station. After he parked his car, he handed over the keys and when asked what else he had, he indicated that he had a Motorola cellular phone. The police informed him that they needed to do some checks to see if his phone made any contact with "this man" phone (presumably he was referring to Mr Simpson) and that they were going to contact Digicel (a telecommunication provider) for this purpose.

[19] He was held for investigations and eventually told that he needed to go to May Pen for an identification parade, and he agreed. Prior to departing, he signed for some money and that it was placed in a bag (described as a black scandal bag) and given to another policeman. He was handcuffed, placed into a car and taken to May Pen. Upon arrival, he was told that because he was facing an identification parade, he could not go into the guard room as no one was supposed to see him. He was then questioned by "Mr Norman". On 25 January 2005, Mr Norman placed a shirt and a black scandal bag before him and asked what he had. Mr Brown stated that he had a shirt and some money, he was then asked "Brown a nuh your phone" to which he said, "no, I didn't have no phone, a motorolla the police tek, tek from me that him want to carry to Digicel to get the details off mi phone". After a couple of days, Mr Norman came back with Miss Jackson and showed him a phone which Mr Brown said he knew nothing about. He was also asked if he knew a man called Jim, to which Mr Brown said yes. Mr Norman informed him that he

received information from Jim that he (Mr Brown) carried a man to kill Mr Meeks (the deceased).

[20] Mr Brown denied having any involvement in the killing of the deceased and stated that he had more than five witnesses who could account for him being in McNie district at the time Mr Norman said the deceased was killed. There was a car crash around that time in the said district. He said that at 8:00 pm, he went to a shop owned by Shane and Annette who could speak to his whereabouts at that time.

[21] Mr Brown also stated that he only picked up Mr Simpson once and this was around 11:00 pm. He denied that he told anyone that he saw Mr Simpson kill at any time. He also denied knowing Mr Simpson in the following terms "Mi and this man not friend even in custody Your Honour this man try to kill mi…"

Techla Simpson

[22] Mr Simpson stated that on 22 January 2005, he was travelling by bus, from Spanish Town to Ocho Rios to visit his girlfriend, Kadian Russell (also known as "Kay"). His recollection of that evening involved going out to eat with Kay at the Strawberry Restaurant on James Street, followed by going to the nearby nightclub, the Roof Club. After spending some time at the nightclub, he said that he left Kay in the town to take a taxi and walked to the Shell gas station. He recalls it being after 3:00 am when he was at the said gas station.

[23] He said he did not shoot the deceased, who he also denied knowing. His evidence was that at no time on 22 January 2005 did he fire a firearm and that the police never found a firearm on him when he was taken into custody the following day.

[24] In relation to Mr Brown, he stated that he did not know him and that the first time he saw him was when he was brought into the jail cell with him at the Ocho Rios police station. While he admitted being at the Shell gas station in Ocho Rios, he denied seeing Mr Brown or his green Nissan Sunny motor vehicle there. He denied being in the said motor vehicle at any time and that he forced Mr Brown to drive him.

[25] Mr Simpson admitted that it was his intention to go to Longsville, in the parish of Clarendon, after leaving the gas station. His plan was to take a taxi back to Spanish Town and then another to Clarendon. He denied knowing the McNie district in Clarendon.

The grounds of appeal

[26] At the outset, counsel for the appellants, Miss Reid, made an application to abandon the original grounds of appeal and rely on six supplemental grounds in respect of both appellants. Permission was granted. These grounds are as follows:

> "GROUND 1 – CAPITAL MURDER – The [learned trial judge] LTJ erred in leaving capital murder to the Jury for Simpson.
>
> GROUND 2 – The LTJ misdirected the Jury on the Law of Joint Enterprise, resulting in the conviction of Brown.
>
> GROUND 3 – AMENDMENT OF THE INDICTMENT – The LTJ erred in not inviting the Crown to amend the Indictment for both Brown and Simpson, instead of addressing the issues in his summation.

> GROUND 4 – CO-ACCUSED WARNING – The LTJ erred in not giving the Jury the Co-Accused Warning.
>
> GROUND 5 – NO CASE SUBMISSION – THE LTJ erred in not upholding the No Case Submission for Tyrone Brown.
>
> GROUND 6 – The Sentences are Manifestly Excessive."

During oral submissions, Miss Reid indicated that she would be abandoning ground 3 and leave was granted for her to do so.

Ground 1: The learned trial judge erred in leaving capital murder to the jury in respect of Techla Simpson

Submissions on behalf of Mr Simpson

[27] Counsel, Miss Reid, submitted that there was no evidence, and in particular no evidence from the sole eyewitness, Miss Jackson, to support the learned judge's direction to the jury that the murder was committed in the course of or in furtherance of a robbery. In particular, the learned judge erred when he directed the jury that on the prosecution's case there was a common design to rob and in the execution of that common design, Mr Meeks was shot and killed. The court's attention was directed to the following portions of the learned judge's summation (page 616, lines 19 -25 and page 617, lines 1-3):

> "and I say that because it is important in the context of this case again, because on the Prosecution's thesis, clearly, there was a common design to rob and in the execution of that common design, based on the evidence, one person, Nordia Jackson, [sic] says came up to her while she and 'Cat' were walking, fired a shot which hit him; that she ran and when she came back, she saw what appeared to be his dead body…"

[28] Absent from the evidence of Miss Jackson was that she saw any attempt at robbery on the four occasions that she saw the men. Counsel contended that even at what she

called "the fatal moment", there was no evidence from Miss Jackson that there was any demand made of Mr Meeks to give over anything, nor was there any evidence that his body was searched and anything removed at that point in time.

[29] Counsel in written submissions stated that the learned judge erred in relying on a "non-evidential suggestion" that Mr Meeks had money in his pocket and that some money was found on the appellants at the time of their arrests. There was no evidence that this money was the same money that was in Mr Meeks' possession.

[30] In relation to the Nokia cellular phone, Miss Reid, similarly, submitted that there was insufficient evidence that the said phone, which was taken from Mr Simpson and later identified by Miss Jackson as belonging to the deceased, was stolen in the course of a robbery. Further, the said phone was claimed by Mr Brown (in the question and answer interview) as belonging to him and even on the Crown's case, he was not on the murder scene. As such, there could be no reasonable inference that while Mr Simpson fired the shot, Mr Brown was committing the robbery.

Submissions on behalf of the Crown

[31] Crown Counsel, Miss Bolton, appropriately conceded that there was insufficient evidence to bring the instant case within the realm of capital murder, which required the deceased to be killed in furtherance of the course of a robbery (per section 2(1)(a) of the Offences against the Person Act). Miss Bolton also agreed that the evidence of Miss Jackson did not provide an evidential basis that Mr Meeks was shot and killed in the

furtherance of a robbery, and that she would not have been able to say what took place after the shooting as she had run away.

[32] It was submitted that the possibility existed that the theft of the deceased's phone was merely a crime of opportunity or an afterthought incidental to the murder, rather than the motive for the murder.

[33] Counsel submitted however, that despite the fact that the case in relation to Mr Simpson ought to have been treated as one of non-capital murder, this did not impact the sustainability of the conviction for murder, given the nature of the evidence. The case against him was so strong that the jurors would still have convicted him. In particular, the following pieces of evidence were highlighted:

(i) Although disputed by Mr Brown in his question and answer, Mr Brown made a telephone call to Detective Sergeant Wiggins saying that he witnessed Mr Simpson rob and shoot another man and thereafter Mr Simpson ordered him to drive after placing a gun to his neck;

(ii) An illegal firearm was found on Mr Simpson's person when he was searched by the police and a ballistic examination revealed that the firearm recovered was the one which fired the bullet recovered from the body of the deceased and the spent shell found on the scene of the crime;

(iii) Mr Simpson's hands were swabbed and a scientific examination revealed gunshot residue at intermediate level on both of his hands (including the palms and back of the hands); and

(iv) A Nokia 3310 cellular phone identified as belonging to Mr Meeks was taken from Mr Simpson.

Discussion and analysis

[34] In light of Crown Counsel's concession on this ground, which we regarded as quite appropriate, it is unnecessary to engage in any lengthy discourse. However, we would just wish to comment that there is no basis to suggest that the learned judge erred, as submitted by Miss Reid, regarding the reliance on a "non-evidential suggestion" in relation to the monies taken from the appellants. The transcript reveals[1] that the learned judge directed the jury that they were not to speculate about monies found in the possession of the appellants, as there was no evidence where the monies came from.

[35] The indictment on which both appellants were jointly charged read as follows:

> "**Techla Simpson and Tyrone Brown** are charged with the following offences:
>
> **STATEMENT OF OFFENCE – COUNT I**
>
> Murder contrary to section 2(1)(d)(i) [sic] of the Offences Against the Person Act.
>
> **PARTICULARS OF OFFENCE**

[1] Page 645 lines 23 to 25 and page 646 lines 1 to 6 of the transcript

> **Techla Simpson and Tyrone Brown** on the 22nd day of January, 2005 in the parish of Clarendon, murdered Lawrence Meeks in the course of [sic] furtherance of a robbery."

[36] The reference to section 2(1)(d)(i) of the Offences against the Person Act is clearly a typographical error and was intended to read section 2(1)(a)(i), which provides:

> "2(1) Subject to subsection (3), every person to whom section 3(1A) applies or who is convicted of murder committed in any of the following circumstances shall be sentenced in accordance with section 3(1)(a), that is to say –
>
> (a) any murder –
>
> (i) committed by a person if, in the course or furtherance of, arising out of, or ancillary to, that murder, the person commits an offence referred to in subsection (1A); or
>
> (ii) …
>
> whether or not the individual murdered was an individual that the offender intended to murder in committing the offence;

Included in the subsection (1A) offences is robbery.[2]

[37] On the factual scenario that was presented by the prosecution, the Crown did not have sufficient evidence to ground such a count of murder. We concluded, therefore, that the learned trial judge ought to have withdrawn from the jury any consideration of the count of murder in furtherance of a robbery and give directions in relation to the offence of murder contrary to common law. This ground of appeal, therefore, was found to be meritorious.

Ground 2: The learned trial judge misdirected the jury on the law of joint enterprise, resulting in the conviction of Tyrone Brown

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[2] See: section 2(1A)(c) of the Offences against the Person Act

Ground 5: The learned trial judge erred in not upholding the no case submission for Tyrone Brown

[38] Both grounds 2 and 5 were considered together as ground 2 had a significant impact on our determination in relation to ground 5.

Submissions on behalf of Mr Brown

[39] In relation to ground 2, Miss Reid submitted that since the trial took place in 2011, the learned trial judge would not have had the benefit of the 2016 decision of **R v Jogee; and Ruddock v The Queen** [2016] UKSC 8, [2016] UKPC 7 (which overturned the principle of parasitic liability established in **Chan Wing-Siu v The Queen** [1985] AC 168). She referred the court to a summary of the principle gleaned from **Jogee:**

> "The accessory either assisted or at least encouraged the principal in committing the offence. The mental element is discharged by proving that the accessory intended to so assist or encourage the principal. The mental element however is not discharged by mere foresight that the principal might commit an offence."

[40] Counsel deemed it unnecessary to refer to the portions of the learned judge's summation as it was in line with **Chan Wing-Siu**, which has now been reversed. She stated, however, that even on the principle that was established in **Chan Wing-Siu**, there was no evidence to infer foreseeability on the part of Mr Brown as there was no evidence linking Mr Brown to either murder or a robbery. She stated also that the learned judge linked Mr Brown to the murder by virtue of the evidence that he had claimed Mr Meeks phone as belonging to him, which he said he had bought on the night of the incident from a "coke head". However, the evidence of Detective Corporal Wynter was to the effect that he had taken the phone from Mr Simpson.

[41] Counsel asked the court to bear in mind also that Mr Brown had indicated in his unsworn statement that he had been threatened by Mr Simpson, the inference being that certain pressures may have been influencing him at the time in relation to his acknowledgement of ownership of the phone. She contended that, in light of all the above circumstances, even if the Nokia cellular phone was accepted to have been claimed by Mr Brown, that would not have been sufficient to infer that he was part of any common design to commit murder.

Submissions on behalf of the Crown

[42] Miss Bolton agreed that the law governing joint enterprise at the time of the trial was as it was expressed in **Chan Wing-Siu**, and that the trial judge in his summation gave directions along the then accepted principle. This principle being that, all those who take part in an unlawful joint enterprise would have the necessary intent to be guilty of murder or grievous bodily harm if they had foreseen that the infliction of serious bodily harm would be a possible incident of the joint enterprise.

[43] It was submitted that it was not the learned trial judge's directions to the jury that were flawed, but his handling of the legal principle and the application of the evidence in support of same. It was contended that this took place from as early as the stage in which the no case submission was made. Miss Bolton conceded that there was insufficient evidence to satisfy the requirements of joint enterprise/common design.

Ground 5

Submissions on behalf of Mr Brown

[44] In relation to ground 5, the essence of Miss Reid's submission was that there was no evidence to show that Mr Brown was involved in the murder of the deceased, nor did the prosecution prove that Mr Brown had the requisite knowledge of the murder in order to convict him. Reliance was placed on **R v Lockley Muir** (1972) 12 JLR 882 and in particular, the dictum of Smith JA on behalf of this court, wherein he said:

> "It is well established that if at the end of the prosecution's case there is no evidence against a person charged, he should not be called upon to state his defence and, in effect, convict himself or to allow the evidence [of] a co-accused to bring about his conviction."

[45] It was also submitted that in the absence of evidence, the jury would have based their conclusion, that Mr Brown was with Mr Simpson and that this was to commit the murder, on suspicion/speculation. It was emphasised that speculation could not amount to evidence. The cases of **Anneth Livingston and anor v The Queen** [2012] UKPC 36 and **Hayden Jackson and ors v The Queen** [2009] UKPC 28 were relied on in support of counsel's contention that the conviction of Mr Brown should not be allowed to stand as the *mens rea* for murder had not been established.

[46] Miss Reid contended that there was no inescapable inference to be drawn that Mr Brown was acting in concert with Mr Simpson as demonstrated by her in relation to her submission under ground 2. Some further aspects of the evidence were highlighted. Firstly, it was pointed out that there was some doubt as to whether Mr Brown was operating a taxi. On Miss Jackson's evidence, under cross-examination, she stated that

(on the last occasion by the shop) she saw persons other than the appellants in the motor vehicle and that she heard Mr Brown telling someone that his car "full up" and he was unable to take them.

[47] She then referred the court to her previous submissions concerning the Nokia cellular phone which belonged to Mr Meeks and made the following observations noting that the evidence substantially linked Mr Brown with a Motorola cellular phone:

(i) Mr Brown called Detective Sergeant Eric Wiggins using his Motorola cellular phone; and

(ii) Detective Corporal John Wynter gave evidence that he took a Motorola cellular phone from to Mr Brown, when he was taken into custody.

Submissions on behalf of the Crown

[48] Crown Counsel, having conceded in relation to ground 2, relied on the principles from **R v Galbraith** [1981] 1 WLR 1039. She conceded that the circumstantial evidence adduced by the prosecution was not sufficient to ground a prima facie case against Mr Brown for murder.

[49] In relation to the robbery, Crown Counsel admitted the prosecution was hard-pressed to show that there was any intention (much less a common intention) to rob the deceased, as submitted earlier in relation to ground 2 and that it would have been difficult to prove same.

[50] Crown Counsel also highlighted a portion of Miss Jackson's evidence that was contradictory. When asked in examination-in-chief if she could see the car (previously driven by Mr Brown) at the time she saw Mr Simpson (while walking on the main road with the deceased), she said no.[3] She stated that Mr Brown drove off about three minutes before. In cross-examination, when she was asked where she saw Mr Simpson come from she responded: "from the green car". Miss Bolton submitted that if the latter version was accepted, it would place Mr Brown in the vicinity before the shooting. This did not square with her evidence that she did not see Mr Brown at the time of the shooting and that he was not physically present at that time.

[51] She stated that, even if it were accepted that Mr Brown was in the vicinity of the shooting at the material time, coupled with the prior sightings of him with Mr Simpson that night, this, when taken at its very highest, would not be enough to ground a common intention with Mr Simpson to rob and/or murder the deceased. There was no evidence that Mr Brown, if he was close by, assisted, encouraged or even participated in the murder of the deceased and the authorities were clear that mere presence without more is not enough to ground criminal liability. She referred to **R v Coney and others** (1882) 8 QBD 534 and **R v Clarkson and others** [1971] 3 All ER 344.

[52] Equally, Miss Bolton conceded that merely claiming ownership of the Nokia cellular phone would not have been enough to ground criminal liability for the murder of the deceased. She described Mr Brown's claiming of the said phone, which was admitted into

[3] Page 58, lines 15 to 17 of the transcript

evidence, as riddled with problems. When taken at its highest, it was not enough to ground a common intention with Mr Simpson to rob and/or murder the deceased. It would only make Mr Brown the recipient of a stolen phone and would not take it any further.

[53] Counsel also contended that since the case against Mr Brown was circumstantial, it was important to examine his conduct on the Crown's case. He was the one who called the police and gave them the location of Mr Simpson and stated that he was held up by him. He freely approached the police when Mr Simpson was apprehended. This was conduct unbecoming of a participant in a joint enterprise and the very common intention was not borne out by the evidence.

[54] On an overall assessment of the evidence, she submitted that the learned judge, upon a proper application of the law in relation to joint enterprise, ought to have found that there was no case for Mr Brown to answer.

Discussion and analysis

[55] The learned authors of Blackstone's Criminal Practice (2017) had this to say in relation to the impact of **Jogee** on previous convictions at paragraph A4.13:

> "The Supreme Court in Jogee [2016] 2 WLR 681 emphasised that the correction of the previous error in the law – 'equating foresight with intent to assist rather than treating the first as evidence of the second' -- did not mean that previous convictions under the old law were necessarily invalid. The error, though important as a matter of legal principle, may not have been important on the facts to the outcome of a particular trial or to the safety of a particular conviction.

[56] That being said, however, this court considered all the following factual circumstances in this case: the fact that Mr Brown was not present at the time Mr Meeks was shot; that there was evidence from Detective Sergeant Wiggins, that Mr Brown called him to report that Mr Simpson had shot and robbed a man and stated that Mr Simpson had forced him to transport him to Ocho Rios; and that the said Nokia cellular phone identified as belonging to Mr Meeks was actually taken from Mr Simpson by Detective Corporal Wynter. These are certainly pieces of evidence that could lead to a conclusion that Mr Brown was not involved in any plot to murder or to rob Mr Meeks but had knowledge concerning the incident that took place. We also considered that the evidence of the police was that at some point in the investigation, Mr Brown claimed that the phone belonged to him; that in his statement from the dock, he denied ever stating that he observed anyone being killed and that he denied knowing anything about the Nokia cellular phone. Within the context of all the evidence presented by the prosecution, this could be considered as highly suspicious behaviour.

[57] However, as expressed in our earlier discourse, the evidence as presented was insufficient to allow the offence of murder to be left to the jury in relation to Mr Brown based solely on the principle of joint enterprise/common design. This fact remained true, whether under the legal principle established under **Chan Wing-Siu** or under the principle established under **Jogee**.

[58] On this basis also, we concluded therefore, as conceded by the Crown, that the learned judge erred in not upholding the no case submission as the gravamen of the case

against Mr Brown would be non-existent without sufficient evidence to leave to the jury in relation to the issue of joint enterprise. Both grounds 2 and 5 therefore had merit and while these grounds were sufficient to treat with the appeals in relation to both appellants, we thought that it was necessary to make some remarks in relation to ground 4.

Ground 4: The learned trial judge erred in not giving the jury the co-accused warning

Submissions on behalf of Mr Simpson

[59] Miss Reid submitted that, although the learned judge was not required to give a "co-accused warning", the fact that Mr Brown made an unsworn statement from the dock implicating Mr Simpson left the jury with no choice but to convict him. She submitted that the jury ought to have been directed on how to treat with the unsworn statement as they would not have been cognisant of the difference between (sworn) evidence and an unsworn statement. She also submitted that the learned judge ought to have assisted the jury with the evidence from Detective Sergeant Wiggins relating to what the Mr Brown had told him. She asked the court to consider whether an accomplice warning was required or a direction about whether Mr Brown had an interest to serve. Counsel did concede, however, that based on the evidence and the totality of the summation by the learned judge, the issue was not so significant that the court would override the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act.

[60] The court was referred to the cases of **Jason Lawrence v The Queen** [2014] UKPC 2, **Benedetto v The Queen** [2003] 1 WLR 1545 PC and **R v Spencer** [1987] 1

AC 128, in support of the type of warning that counsel contended the learned judge ought to have given.

Submissions on behalf of the Crown

[61] Miss Bolton refuted the accuracy of Miss Reid's contentions under this ground. She submitted that the learned judge gave the co-accused warning, as well as directions in respect of the options available to the appellants and how to treat with those options. In respect of the co-accused warning, she referred to court to the following portions of the summation:

> Pages 727 (lines 10 – 25)
>
> "…a principle of law, which you have to take into account in this case is where one co-accused said something about another co-accused, it is not evidence against that other co-accused unless that [sic] who said his thing gives it from the witness box, it is not evidence against that other man. That is an important consideration because he only became – Brown, only became a co-accused after he had spoken to Wiggins and after Wynter have spoken to the police at Clarendon and they decided that he is a part of the case now anything which Brown said after that, which is against the interest of his other co-accused is not evidence. You follow me?"

[62] Miss Bolton also referred the court to three different instances where the learned judge, in his summation, directed the jury on the distinction between Mr Simpson giving evidence and Mr Brown giving an unsworn statement from the dock. He did so generally at pages 617 – 618 (lines 12 to 25, and 1 to 6), where he explained the options of remaining silent, giving evidence or giving an unsworn statement. He repeated these options at page 791 (lines 11 to 24), just before summarising the evidence of Mr Simpson.

Then at page 800 (lines 2 to 8), just after his review of the unworn statement of Mr Brown, he explained how the jury ought to treat with it in the following terms:

> "You must give to his unsworn statement whatever weight you think it deserves. That is how you deal with it. It is not evidence in the sense where somebody goes to the witness box and takes the oath or be affirmed, but you must give it whatever weight you think it deserves."

[63] In answer to the submission that the jury was left with no choice but to rely on Mr Brown's unsworn statement to convict Mr Simpson, Miss Bolton submitted that Mr Brown's statement did not implicate Mr Simpson for the murder of the deceased. He only spoke of what took place after Mr Simpson entered his motor vehicle. The only thing which would have been unfavourable to Mr Simpson was when Mr Brown stated that the police searched Mr Simpson and found a firearm on his person. Miss Bolton contends that this merely spoke to the possession of a firearm, which, in any event, was corroborated by the arresting officer, Detective Corporal John Wynter.

Discussion and analysis

[64] We agreed with Crown Counsel that the learned judge did indicate to the jury that what Mr Brown said in his statement from the dock was not evidence against Mr Simpson. We considered also that the Mr Brown, in his statement from the dock, did not speak to Mr Simpson committing any act of murder. In that regard, we disagreed with the submission of Miss Reid that it was necessary for a warning to be given that Mr Brown was a witness with an interest to serve, as he could not be categorized as such.

[65] The case of **Benedetto v R**, relied on by Ms Reid, is distinguishable as the impugned evidence in that case came from a witness who testified in court that the appellant had confessed to him while they were both in custody together, that he had committed the crime.

[66] The case of **Jason Lawrence** is also distinguishable. One of the successful challenges on appeal related to the failure of the trial judge to give a direction on improper motive, where evidence of a confession was given by the brother of a (former) co-accused. This was compounded by the judge's failure to refer to the appellant's challenge of this evidence and the mistaken statement that the appellant had not denied the confession. The judge's failure to invite the jury to consider the possibility of an improper motive meant that he did not put the defence case fairly and adequately to the jury (per Lord Ackner in **R v Spencer** [1987] 1 AC 128, 142). None of the above circumstances are applicable to the case at bar.

[67] We were somewhat perturbed by the failure of the learned judge to give any directions to the jury as to how to treat with the evidence of Detective Sergeant Wiggins concerning what the Mr Brown had told him concerning the Mr Simpson. This evidence was to the effect that he (Mr Brown) had seen the Mr Simpson "rob and kill a man"**.** The jury ought to have been told that this piece of evidence was not to b**e** used in the assessment of guilt against Mr Simpson but only to be considered in the context of the case against Mr Brown himself. This would be so, as Mr Brown was neither a Crown witness nor did he give any such evidence in relation to Mr Simpson during the trial.

However, as conceded by Miss Reid, this omission would not be a material non-direction that would lead this court to a conclusion that there had been a miscarriage of justice. There was cogent and weighty evidence against Mr Simpson on which the jury would have convicted, even if they were given the proper direction in law on this point. So, even if this ground is resolved in favour of Mr Simpson, it has no effect on his conviction because there was overwhelming evidence against him that rendered the verdict inevitable. The proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act would have availed the Crown in any event. While there was some merit in this ground, we did not deem it to be sufficient to affect the outcome of the appeal relevant to the Mr Simpson.

Ground 6: The sentences are manifestly excessive.

Tyrone Brown

[68] Given that both counsel were *ad idem* with regard to the quashing of Mr Brown's conviction, it is unnecessary to detail Miss Reid's alternative submissions concerning a reduction in Mr Brown's sentence. Mr Brown's sentence had to be set aside as Crown Counsel herself accepted.

Techla Simpson

[69] Turning now to Mr Simpson, Miss Reid contended that the learned judge did not follow the principles of sentencing. She submitted that the sentence of life imprisonment with 25 years before parole should be set aside and substituted with a sentence of life imprisonment with no more than 18 years before parole. She asked that this sentence run concurrently with two other sentences that Mr Simpson is currently serving.

[70] In reliance on **R v Ball** (1951) 35 Cr App R 164, Miss Reid submitted that this court is entitled to disturb Mr Simpson's sentence as the learned judge failed to apply the principles of sentencing.

(1) The learned judge did not state how he arrived at the 25 years and he did not give a starting point.

[71] Miss Reid submitted that the importance of adopting a structured approach to sentencing was recognised from as far back as 2002, when Harrison JA, on behalf of this court held in **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002 –

> "If therefore the sentencer considers that the "best possible sentence" is a term of imprisonment, he should again make a determination, as an initial step, of the length of the sentence, **as a starting point**, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise." (Emphasis supplied)

[72] It was acknowledged that section 3(1)(b) of the Offences against the Person Act, imposed a mandatory minimum sentence of 15 years, however, the learned judge did not state that this was used as the starting point. The term of 25 years was imposed without proper regard for mitigating factors such as having two minor children whom Mr Simpson supported financially from his gainful employment.

(2) The learned judge did not take into consideration the time spent in custody.

[73] On counsel's calculation, Mr Simpson was in custody for six years less one month prior to sentencing (that is, from 23 January 2005 to 19 December 2011, the date of

sentencing). The case of **Callachand and Another v State** [2008] UKPC 49 was cited in support of the point that time spent in custody prior to sentencing should be taken fully into account "not simply by means of a form of words but by means of an arithmetical deduction". Counsel also referred the court to **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 and **Meisha Clement v R** [2016] JMCA Crim 26.

[74] It was acknowledged that Mr Simpson had three previous convictions as he was serving time for related firearm offences. Though his antecedent report indicated four previous convictions, counsel submitted that there was no record of the fourth. The first conviction for unlawful wounding earned him 18 months' imprisonment in 2000. The second and third were for illegal possession of a firearm and illegal possession of ammunition, for which terms of 10 years and four years were imposed, respectively in 2006.

(3) The learned judge had not considered imposing a concurrent sentence for the related firearm offences.

[75] It was submitted that since the convictions for the firearm offences occurred from the same incident as the murder, the learned judge ought to have ordered that the sentence for murder run concurrently with the firearm offences.

(4) The social enquiry report and psychiatric report were not considered by the learned judge.

[76] Counsel submitted that the learned judge requested the social enquiry report, antecedents and written submissions. The antecedents were read into the record but there is no mention of the social enquiry report, psychiatric report or the written

submissions. The failure to mention these, in particular the two reports, counsel submitted, amounted to a failure to consider them and thus the learned judge erred in principle.

Submissions on behalf of the Crown

[77] In response, Crown Counsel submitted that this court should not disturb the sentence. She argued that it was not manifestly excessive and was consistent with the length of sentences usually imposed for offences of this type. Further, the learned judge did not err in principle. Though reasons for his sentencing were succinct, he demonstrated that he (i) addressed his mind to both the favourable and unfavourable aspects of the antecedent report; and (ii) took into account the mitigating factors. In oral submissions, counsel stated that having regard to the nature of the offence, and the psychiatric report as well as the social enquiry report speaking to the potential for recidivism, 25 years was not unreasonable.

[78] It was conceded that the learned judge did not mention whether he considered the time spent in custody, prior to trial, and that Mr Simpson ought to have had the benefit of this consideration based on the principle in **Meisha Clement v R**. In that regard, it was submitted that one year ought to be deducted for time spent in custody based on the fact that he would have been serving sentences, relating to the possession of the firearm, at the time of his trial for murder.

[79] In the round, it was contended that the sentence imposed was proportionate with the gravity of the offence of murder and falls with the range. This was supported by a

consideration of section 3(1) of the Offences against the Person Act, **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25 and the Sentencing Guidelines.

Discussion and analysis

[80] This court had to consider the sentencing process anew as Mr Simpson's conviction for murder, contrary to section 2(1)(a)(i) of the Offences against the Person Act, was set aside and murder contrary to common law substituted. For the purposes of sentencing, section 3(1) makes the following distinction between these two types of murder:

> "3(1) Every person who is convicted of murder falling within –
>
> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;
>
> (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."

Section 3(1C) is also relevant:

> "(1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act –
>
> (a) where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole; or
>
> (b) where, pursuant to subsection (1)(b), a court imposes –
>
> (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
>
> (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years,

> Which that person should serve before becoming eligible for parole."

[81] The sentence hearing for Mr Simpson commenced on 28 July 2011 with his counsel, Dr Williams, present. On that date, the antecedent report was received into evidence and indicated that the Mr Simpson had four previous convictions. No questions were asked by the attorney of the officer who gave evidence in relation to the antecedent report. The matter was then adjourned with a further date set for mention in order to fix an appropriate continuation date. Mr Simpson was never asked if he agreed that he had four previous convictions.

[82] The matter was again heard on 23 September 2011, when it was indicated that Dr Williams was incapacitated by an injury and had requested the date of 28 November 2011 for continuation. There is no record of the matter being heard on that date. The transcript then reflects that on 19 December 2011, Dr Williams being absent, the learned judge referred briefly to the previous convictions, the occupational history of Mr Simpson and the fact that he had two children before sentencing him to life imprisonment with no possibility of parole before 25 years.

[83] It is therefore apparent that no mitigation was heard before sentencing. However, although the learned judge did not refer to any of the reports, psychiatric or social enquiry in his sentencing remarks, this court would presume he had sight of them. Furthermore, both reports which we have seen are, for the most part, uncomplimentary to the Mr Simpson. In particular, as pointed out by Crown counsel, the psychiatric report indicated that he met the criteria for the presence of antisocial personality disorder.

[84] The principles of sentencing were aptly summarised by McDonald-Bishop JA in **Daniel Roulston v R** [2018] JMCA Crim 20, by reference to the Sentencing Guidelines[4] and **Meisha Clement v R** [2016] JMCA Crim 26:

> "[16] Although the learned judge did not have the benefit of the methodology set out in **Meisha Clement v R** and the Sentencing Guidelines, she was, however, not without guidance, as this court has, over the years, laid down, in various cases, some fundamental principles of law and a basic methodology that should be used by judges to assist them in the sentencing process. In **Meisha Clement v R**, Morrison P, after a thorough examination of several relevant authorities from this court as well as from outside the jurisdiction, provided an amalgam of those principles that should be employed by judges in the sentencing process.
>
> [17] Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point within the range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and
>
> g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[4] Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017

[85] The normal range for sentencing is between 15 years' imprisonment and life imprisonment based on the Sentencing Guidelines. There is no question that life imprisonment is more appropriate than a fixed term. The question for the court concerned the minimum period to be stipulated for parole. Based on the nature, time and location of the commission of the offence, we chose the period of 20 years as an appropriate starting point. There were, however, several aggravating factors, which included the fact that a firearm was used to commit the offence and that the commission of the offence appeared to have been premeditated. There was no evidence to suggest that the parties were previously known to each other and had previously been involved in any dispute.

[86] There was also the issue of his antecedents, which included four previous convictions. The social enquiry report only indicated three previous convictions - one count of wounding with intent for which he was sentenced to 18 months' imprisonment in 2004 and two counts of illegal possession of firearm and ammunition for which he received 10 years' and 4 years' imprisonment respectively. The antecedent report as disclosed to this court, did not list the previous offences but merely indicated there were four. The offences of illegal possession of firearm and ammunition are related to the firearm that was taken from him by the police on 23 January 2005 at the time of his detention for the murder of Mr Meeks. In relation to the previous convictions, we noted that Mr Simpson was never asked if he agreed to all these, so this court only took into consideration the two relating to the possession of illegal firearm and ammunition connected to this murder.

[87] We found no mitigating factor. The aggravating features were sufficient to push the sentence upward from the starting point to 25 years.

[88] At the time of his trial, although he had been in custody since January 2005, at some point, he would have been serving concurrent sentences of 10 years and four years for the firearm offences. Counsel, Miss Reid indicated that he commenced serving time in prison in relation to these in 2006. He would, therefore, not be entitled to the discount for the full time spent in custody at the time of sentencing as he would have been incarcerated on other charges (see **Romeo Da Costa Hall v The Queen** [2011] CCJ 6 and **Charley Junior v R** [2019] JMCA Crim 16). We therefore considered that he should be given the benefit of the one year spent in remand prior to the commencement of his trial for murder in 2006.

[89] On the totality of all the above circumstances, we concluded that an appropriate sentence would be life imprisonment with no eligibility of parole before 25 years. Although we had to conduct a sentence rehearing, we concluded that the original sentence imposed by the learned judge could not be described as manifestly excessive. Ultimately, ground 6 was considered to be devoid of any merit. We then discounted the period of 25 years by one year for the time spent in custody. Mr Simpson would therefore not be entitled to parole before 24 years.

Conclusion

[90] The appeal in relation to Mr Brown succeeded on grounds 2 and 5 of the supplementary grounds of appeal. The appeal in relation to Mr Simpson succeeded on

ground 1 of the supplementary grounds of appeal. As a result, we made the orders as described in paragraph [1] of this judgment.