

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA (AG)**

SUPREME COURT CRIMINAL APPEAL NOS COA2019CR00006 & 7

**MIKHAIL CAMPBELL
ERROL CLARKE v R**

Miss Courtney Foster for the applicant Mikhail Campbell

Keith Bishop and Janoi Pinnock for the appellant Errol Clarke

Miss Kathy-Ann Pyke and Miss Kristen Anderson for the Crown

21, 22 November 2023 and 16 October 2026

Criminal law – Murder – Arson - Causing grievous bodily harm with intent – Submission of no case to answer – Voice identification evidence – Sufficiency and reliability – Threats and motive – Evidential value - Inconsistencies and discrepancies – Effect on credibility and reliability - Whether case ought to have been withdrawn from jury – Adequacy of jury directions on voice identification and inconsistencies and discrepancies – Consecutive sentences – Whether sentences are manifestly excessive

Criminal procedure - Murder – Jury – Majority verdict – Statutory minimum period of deliberation – Majority verdict returned before expiry of two hours – Whether premature receipt of verdict rendered trial a nullity – Retrial – Applicable principles and considerations – Whether retrial appropriate in the circumstances – Judicature (Appellate Jurisdiction) Act, section 14(2) – The Jury (Amendment) Act, section 44

V HARRIS JA

Introduction

[1] On the night of 8 October 2015, an unimaginable act of cruelty and brutality unfolded at a residence on Campbelton Road, Logwood, March Town, in the parish of

Hanover ('the house'). At approximately 10:30 pm, the perpetrators forcefully entered the house and took the lives of six family members. They then set the house on fire, leaving four others with severe burns as they desperately tried to escape the flames.

[2] Messrs Mikhail Campbell and Errol Clarke, the applicant and appellant, respectively, were apprehended in connection with that incident and charged on an indictment containing 11 counts for the offences of arson (count 1), murder (counts 2 to 7) and causing grievous bodily harm with intent (counts 8 to 11). They were jointly tried before Gayle J ('the learned trial judge') and a jury in the Circuit Court for the parish of Hanover on divers days between 6 and 30 November 2018. The jury convicted both men on all 11 counts, unanimously in the case of Mr Campbell and by a majority of five to two in the case of Mr Clarke.

[3] On 14 December 2018, Messrs Campbell and Clarke were sentenced to 20 years' imprisonment for arson and 20 years' imprisonment for each count of causing grievous bodily harm with intent. Mr Campbell was sentenced to life imprisonment on each of the six counts of murder, with the stipulation that he would not be eligible for parole until after serving 43 years for the first three counts of murder and 40 years for the remaining three. Mr Clarke was also sentenced to life imprisonment for each of the six counts of murder; however, it was stipulated that he should serve 40 years before becoming eligible for parole on each count. For both Messrs Campbell and Clarke, counts 1 to 4 and counts 5 to 11 are to be served concurrently. However, counts 5 to 11 are to be served consecutively to counts 1 to 4, resulting in a total minimum sentence of 80 years' imprisonment before becoming eligible for parole (Mr Campbell having been credited three years for time spent in pre-sentence remand).

Background

[4] The prosecution relied on six witnesses, who testified about what transpired, sought to identify the assailants, or provided evidence of threats and a possible motive (in addition to an agreed witness statement and the expert's reports on the forensic results). The defence did not call any witnesses, but Messrs Campbell and Clarke each

gave an unsworn statement from the dock. Despite discrepancies between their respective accounts, the following sequence of events is uncontested. Given the familial ties and shared surnames, the individuals involved will generally be referred to by their first names for ease of identification and reference; no disrespect is intended.

[5] At around 4:30 pm on 8 October 2015, a celebration was underway at the house to welcome Ms Kerry-Ann Bloomfield ('Kerry-Ann'), the daughter of Mr Norvin Bloomfield ('Norvin') and Mrs Linnette Bloomfield ('Linnette'), who had returned that day from a brief overseas visit. Several family and community members were in attendance. Later that evening, after their guests had left, Kerry-Ann was in the living room with Mr Oneil Mahabee (Oneil'), with whom she shared two children, Miss Alia Mahabee ('Alia') and Mr Davian Mahabee ('Davian'), a minor. At about 10:30 pm, they were alerted to a group of men entering the yard. Kerry-Ann went to her bedroom while Oneil attempted to peep through the slits in the doorway. Upon confirming the presence of intruders, Oneil ran to a bedroom. There, Alia, Davian, and their cousin, Mr Phillip Hill ('Phillip'), were lying on two beds ('the children's bedroom'). Adjoining that bedroom was another bedroom, separated by a door, where Norvin and Linnette were also lying in bed ('the grandparents' bedroom').

[6] A loud explosion shattered the stillness of the night, blowing the living room door open. Two men with firearms entered the house and began calling for Oneil, whom they referred to as "Ricey". They began questioning Kerry-Ann, who denied that Oneil was at the house. At that time, three other persons were hiding in another bedroom: Norvin and Linnette's son, Mr Mark Bloomfield ('Mark'); Mark's son, Mr Demarco Bloomfield ('Demarco'); and Linnette's nephew, Mr Brian Mangaroo ('Brian').

[7] The assailants ordered everyone in the house to present themselves. Norvin, Linnette, Alia and Davian then joined Kerry-Ann in the living room. They were ordered to lie on the ground, and all complied except Norvin, who went to the kitchen to fetch water to extinguish a small fire. By then, Brian was partially lying on the couch, bleeding. The assailants continued to ask for Ricey and demanded the keys to his motorcycle.

Throughout the ordeal, the family pleaded for their lives and those of their loved ones as the assailants sporadically shot six of them, killing Kerry-Ann, Linnette, Mark, Alia, Brian and Davian.

[8] The assailants then set the house on fire before leaving. Norvin, Demarco, Oneil and Phillip escaped the flames but sustained severe burns to their bodies. The police arrived as a crowd gathered in front of the house and took the injured men to the hospital for treatment. They each gave statements to the police. Both Norvin and Oneil identified Mr Campbell, whom they knew as "Troy", as one of the perpetrators who had remained outside in the yard, having heard him speaking. Oneil also recognised the voice of one of the men in the living room as that of Mr Clarke, whom he knew as "Scarcha".

[9] In their unsworn statements from the dock, both Messrs Campbell and Clarke denied any involvement. Mr Campbell stated that, at the time of the incident, he was at home with his girlfriend when he received a phone call. As a result, they went to the house, where he discovered it was on fire. He spoke with Phillip, then returned home. He asserted that he had no disagreement with the family, was not a violent person, and did not associate with violent people. Mr Clarke maintained that he knew nothing about the incident and that, at the relevant time, he was in bed. He also stated that he knew Oneil and would see him occasionally, but they were not friends.

[10] After they were convicted and sentenced, Messrs Campbell and Clarke sought permission to appeal against their convictions and sentences. A single judge of this court granted both applications for an extension of time to file their appeals. However, he refused leave for Mr Campbell to appeal his convictions and sentences. As for Mr Clarke, the single judge refused leave to appeal his convictions but granted leave to appeal his sentences. Before us, Mr Campbell has renewed his application for leave to appeal his convictions and sentences. Mr Clarke, as a result of certain discussions with the court, has renewed his application for leave to appeal his convictions.

[11] When the renewed applications came on for hearing, we reserved our decision. We apologise for the delay in delivering this judgment. In proceeding, it will be convenient to deal with each case in turn.

Mikhail Campbell

The application for leave to appeal

[12] On behalf of Mr Campbell, Miss Courtney Foster sought and was granted permission to abandon the original grounds of appeal and instead argue the following supplemental grounds, which were filed on 1 December 2022:

“Ground 1

The Learned Trial Judge erred in allowing the case to go to the jury when the circumstances by which the purported identification of [Mr Campbell] were of a sufficiently poor quality. [‘No case submission’]

Ground 2

The Learned Trial Judge failed to give sufficient directions to the jury in relation to the reliance on the voice identification. The central issue in this case was whether there was a mistake, deliberately or honestly made, in identification by the witnesses, Norvin Bloomfield and Oneil Mahabee. The jury ought to have been sufficiently directed on the dangers involved in voice identification evidence even in cases where the alleged perpetrator was previously known to the alleged, the special caution that is required in cases where voice identification is the only form of identification used, the circumstances under which the voice identification was purportedly made, anything which impeded the hearing of the alleged and the inconsistencies regarding the alleged previous encounter between the alleged and the perpetrator. [‘Directions on voice identification’]

Ground 3

The Learned Trial Judge failed to adequately instruct the jury on their approach regarding the inconsistencies in the evidence of the prosecution eyewitnesses, thereby denying [Mr Campbell] of the full protection of the law. The credibility of the witnesses is a direct issue that was challenged by [Mr Campbell] when he raised the defence

of alibi during the trial. [‘Directions on inconsistencies and discrepancies’]

Ground 4

The sentence is manifestly excessive.” [‘Sentence manifestly excessive’]

Discussion

Ground 1- No case submission

[13] At the close of the prosecution's case, defence counsel made a submission of no case to answer. The main complaint was that the prosecution's case rested upon the correctness of the identification of Mr Campbell as one of the assailants. He contended that the purported identification evidence was inconsistent, insufficient, and unreliable. Counsel for the prosecution responded by highlighting the strength of the identification evidence, which was bolstered by the witnesses' degree of familiarity with Mr Campbell. The learned trial judge ruled that both Messrs Campbell and Clarke had a case to answer on all counts of the indictment. The argument under this ground is that the no case submission should have been upheld because, among other things, the circumstances of the purported identification were poor.

Submissions on behalf of Mr Campbell

[14] On behalf of Mr Campbell, Miss Foster submitted that the voice identification evidence was so poor that it was “a possible source of injustice”. She argued that only two of the four surviving victims in the house recognised Mr Campbell's voice, despite all being familiar with him. She further argued that the words attributed to Mr Campbell were so few as to be equivalent to a fleeting glance (**R v Devlin** [1997] EWCA Crim 739 was cited in support). Additionally, she submitted, there was evidence that other sounds could reasonably have impeded the witnesses' ability to hear. Counsel noted that, during the no case submission, defence counsel had highlighted the circumstances in which the voice identification was purportedly made.

[15] Miss Foster also criticised the learned trial judge for failing to compare the witnesses' accounts. She highlighted numerous inconsistencies and discrepancies in the prosecution's evidence, including differing descriptions of the voice they claimed was Mr Campbell's. She asserted that the differences were so significant that the case should not have been left to the jury. She pointed out, for instance, that Oneil described the voice as "aggressive", while Norvin said he spoke normally and not loudly. She also highlighted the disparity between Norvin's evidence and that of Ms Elaine Bloomfield ('Elaine') regarding the alleged threats made by Mr Campbell, which the prosecution advanced as the motive for the murders.

[16] Miss Foster referred to Norvin's cross-examination, in which he confirmed that Mr Campbell stutters when speaking. She contended that his stutter was a distinguishing feature that the witnesses had failed to mention to the police and that the omission was material to Oneil's and Norvin's purported identification of Mr Campbell's voice. Counsel took issue with the learned trial judge's rejection of that point on the basis that a person with a stutter does not stutter continuously. On the contrary, she submitted, it was for the prosecution to adduce evidence demonstrating that Mr Campbell did not stutter continuously.

[17] Relying on the case of **Larry Jones v R** (1995) 47 WIR 1, Miss Foster submitted that the voice identification evidence was not sufficiently reliable, particularly in the light of the inconsistencies and discrepancies that emerged on the prosecution's case. She contended that the learned trial judge ought to have removed the case from the jury's consideration because the prosecution's evidence had been discredited and rendered manifestly unreliable, such that no reasonable tribunal could safely convict upon it.

Submissions on behalf of the Crown

[18] Crown Counsel, Miss Kathy-Ann Pyke, submitted that the learned trial judge was correct to have called upon the accused, Mr Campbell. The prosecution's case was "very cogent and strong", she submitted. The evidence of voice identification was reliable, having regard to the circumstances in which the voices were heard and the "strong

degree of recognition". The case of **Rohan Taylor and Others v R** (1993) 30 JLR 100 (**Rohan Taylor**) was relied upon for the law on the cogency of voice identification evidence, which was supported by evidence of motive and threats. It was the Crown's position that the evidence satisfied the test in **R v Galbraith** [1981] 2 All ER 1060, since there was sufficient material for a jury properly directed to come to a finding of guilt.

The law governing no case submissions

[19] It is convenient to commence the discussion on the law governing submissions of no case to answer by referring to Lord Parker CJ's oft-cited **Practice Direction (Submission of No Case)** [1962] 1 WLR 227, which is still highly regarded as establishing the correct test to be applied in determining whether an accused should be called upon to answer the case against him:

"A submission that there is no case to answer may be properly made and upheld: (a) when there is no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecutor is so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it..."

[20] Further refinement of this test was made in **R v Galbraith**. At page 1062, Lord Lane CJ, writing for the English Court of Appeal, provided helpful guidance on the approach a judge should adopt when a submission of no case to answer is made at the close of the prosecution's case:

"How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which

are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[21] In identification cases, however, a trial judge's duty to withdraw the case from the jury following a submission of no case to answer is broader than the general duty (see **R v Ivan Fergus** (1994) 98 Cr App R 313). Lord Widgery CJ, in the oft-cited case of **R v Turnbull and Another** [1977] QB 224 ('**Turnbull**'), stated at pages 229 to 230:

"When, in the judgment of the trial judge, the quality of the identifying evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions ...[t]he judge should then withdraw the case from the jury and direct an acquittal unless there is other evidence which goes to support the correctness of the identification."

[22] In **Daley v The Queen** [1993] UKPC 32, Lord Mustill re-stated the principles in **R v Galbraith** within the context of identification evidence governed by **Turnbull**. On page 10, he stated:

"...in the kind of identification case dealt with by *R. v. Turnbull* the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction: and indeed, as *R. v. Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their Lordships see no conflict between them." (Italics as in original)

The evidence

[23] The case for the prosecution was wholly based on voice identification and evidence of threats, which the prosecution relied on to establish the motive for the offences. As established by the authorities above, if the strength or weakness of that evidence depends on the jury's view of the witnesses' reliability and it is possible for the jury to

properly determine guilt, then the learned trial judge would have correctly left the case to the jury. Accordingly, it is necessary to examine that evidence in detail to determine whether it was tenuous and unreliable, and whether the learned trial judge erred in failing to stop the case.

[24] We begin by describing the *locus* before turning to the evidence. The house, owned by Norvin, was described as a “board” house with a solitex ceiling (understood to be a brand name for a particular ceiling material) and a zinc roof. It had five bedrooms, a living room, a veranda, two bathrooms, and a kitchen. The partitions between the rooms were made of board, and there were no hallways. A veranda outside the house was accessible from both the living room and the grandparents’ bedroom. The kitchen was built of hardboard and had a concrete floor. It had one large board window with gaps and a hardboard door leading outside.

(a) Voice Identification evidence

1. Mr Oneil Mahabee

[25] Oneil testified that while Kerry-Ann was overseas, he resided at the house to care for their children. On the day in question, he travelled to the house on a blue motorcycle and parked it on the veranda. During the gathering, he saw Mr Campbell and heard him speaking with other attendees, but they did not speak to each other. Mr Campbell then left in the afternoon, around 2:30 pm.

[26] That evening, upon being alerted to the men outside the house, he ran to the children’s room and then proceeded through the door into the grandparents’ bedroom. With the help of Alia and Davian, he used furniture to block the door to the veranda and the doorway to the children’s bedroom. He heard Kerry-Ann crying and pleading for her life. Linnette opened the veranda door, and along with Norvin and the children, they went to the living room.

[27] At that moment, Oneil returned to the children’s bedroom and hid under the smaller of the two beds. The children’s bedroom had three doorways. The doorway to

the living room had no door, only a curtain. The other two doorways led to the grandparents' room and a bathroom. While under the bed, which was estimated to be about seven metres from the living room, he faced the living room, his ears uncovered. Oneil heard two voices in the living room, one of which was a familiar male voice asking, "[w]eh Ricey deh?" He recognised the voice as that of Mr Clarke. He then heard Alia respond, "[d]addy noh deh yah", followed by loud explosions that sounded like gunshots.

[28] Oneil also heard two voices grumbling from the direction of the kitchen. It sounded as if those men were outside at the back of the house, less than a foot from the kitchen wall. During a moment of silence, he heard and recognised Mr Campbell's voice saying "[h]im di deh man". Oneil explained that he heard Mr Campbell say "[h]im deh deh, man" more than once, loud enough for him to hear.

[29] He heard Mr Clarke's voice say, "[w]eh 'Ricey' deh, yuh si di bwoy?" or "[w]eh di bwoy 'Ricey' deh?". Subsequently, there were four explosions, followed by silence. Mr Campbell then directed from outside the kitchen door, "[s]earch di house". Again, Mr Clarke asked, "[w]eh di bwoy 'Ricey' deh, weh di bwoy 'Ricey' deh?".

[30] Oneil remained hidden. No one searched the house. Over a period of 20 to 25 minutes, he heard several gunshots. Then he heard the voice of a man he did not recognise say, "[b]urn down di place". Later, he heard Norvin exclaim from the living hall, "[m]an, oono a bun dung di place". Subsequently, Norvin came beside the bed where Oneil was hiding in the children's bedroom. A piece of flaming fabric that had been thrown onto the bed fell beneath it and struck Oneil in the face, burning his ears, forehead, and nose. The curtain by the doorway and the sheet on the larger bed in the children's bedroom were also set ablaze. Lying on his stomach, Oneil backed away from the fire beneath the bed.

[31] After six minutes, Oneil emerged from under the bed. He attempted to leave the room through the grandparents' bedroom, but deterred by the flames, he turned around and went into the bathroom adjoining the children's bedroom. Phillip entered the

bathroom behind Oneil. Although Oneil had heard shuffling beneath the larger bed, he had not seen Phillip before then.

[32] In the bathroom, Oneil burst a plastic pipe in the shower to release water, as his back, hands, and right knee had been burnt. Both Oneil and Phillip stood under the flowing water for relief. As the fire grew, Oneil jumped through the bathroom window (which was approximately two feet in width and height) and landed on the ground outside. Phillip followed. They ran in different directions into bushes about 24 feet away, where they hid. By then, approximately 30 minutes had passed since the ordeal began.

[33] While hidden in the bushes, Oneil noticed a flashlight beam sweeping through the foliage. He also saw that the house was on fire. After about 10 minutes, he no longer saw the beam. When he saw police sirens, he ran to the road and jumped into the police pickup truck, where he saw Norvin. They were taken to Noel Holmes Hospital in Lucea, Hanover. Oneil's burns were treated there, and he and Norvin were subsequently transferred to Cornwall Regional Hospital in Saint James.

[34] Oneil's further evidence was that he had known Mr Campbell for about 24 years. He was accustomed to seeing Mr Campbell, who frequently visited the house and occasionally slept and ate there. Oneil would see him approximately three to four times a week, with visits lasting five minutes on some occasions and an hour or more on others. They had a good relationship as "associates" and would converse during those visits. At other times, Oneil would hear Mr Campbell call out to Linnette as he passed the house. Oneil, therefore, heard him speak "regularly", approximately four times a week, and sometimes for 40 minutes or more when he visited and stayed at the house.

[35] At the gathering earlier that day, Mr Campbell remained in the front yard while Oneil was on the veranda. They were approximately 40 to 50 feet apart, and Oneil heard him speaking to Linnette and Norvin. This occurred sometime before 2:30 pm. Mr Campbell operated a motorcycle taxi service and sometimes gave Oneil a ride, for which Oneil occasionally paid. The last time Oneil spoke to Mr Campbell was during a

disagreement they had two weeks before the incident. Two weeks before that disagreement, they last spoke when Mr Campbell gave Oneil a free "lift" on his motorcycle from March Town to Logwood. The journey took five minutes, during which they spoke briefly.

2. Mr Norvin Bloomfield

[36] Norvin's account of events occasionally overlapped with and contradicted Oneil's. However, his close encounter with the assailants provided further insight. At the material time, Norvin and Linnette were lying in bed at the house when Alia and Davian ran into his bedroom and told him that some men were in the yard. Seconds later, he heard an explosion. He stood on the bed and looked over the glass louvre window, but he did not see anyone. Subsequently, he heard two more explosions, and the bedroom door to the veranda swung open and back, but it did not fully close. Alia, Davian and Linnette used a vanity table to block the door. Norvin then heard gunshots, so he knelt and looked through the gap in the door. He saw two men wearing headlamps (headgear with a light attached) standing on the veranda. He heard one of the men ask, "[w]eh di bwoy Ricey deh". Linnette, Alia and Davian, who were stooping behind the vanity table, responded, "[h]im nuh deh yah". The person on the veranda said, "[e]verybody come out yah". Linnette, Alia and Davian pulled away the vanity table, and they all walked out.

[37] As soon as they reached the veranda, the men, pointing firearms, ordered them to go to the living room, where they further instructed, "[e]verybody lie down". The two men he had seen earlier each had a nine-millimetre handgun. The only light in the living room came from their headlamps. Norvin observed Kerry-Ann lying face down in the living room, and Brian was partially on the couch, making a gurgling sound. Linnette, Alia and Davian complied with the order to lie face down. Norvin remained standing. He noticed a fire on the bed in Kerry-Ann's room. He told the men that his daughter's bed was on fire and that he was going to get water to extinguish it.

[38] As he made his way to the kitchen, Norvin heard the men asking for the motorcycle keys, and he instructed Kerry-Ann to find them. During this time, Linnette was pleading

for her life, and Alia and Davian were crying. When he entered the kitchen, he approached the door, intending to open it and escape, but he heard voices. He recognised Mr Campbell's voice saying to another person, "[n]oh follow dem, 'Ricey' in deh". That voice, at a normal pitch, came from outside, approximately one to two feet from the kitchen door. It was not difficult for him to hear what Mr Campbell was saying. He listened to the voices outside the kitchen door for about five minutes. Based on "...the voices outside and the carrying on and different guns firing", Norvin surmised that about 10 men were in the yard. Consequently, he left the kitchen and went to the children's bedroom. Linnette, Kerry-Ann, Alia and Davian were still lying on the floor while the two gunmen stood in the living room.

[39] In the children's bedroom, Norvin tried to crawl under the small bed, which was closer to the doorway between the two bedrooms, but felt someone beneath it, so he stood up. While standing between the two beds, he heard Linnette pleading, "[I]ord God, oono noh kill mi. Have mercy, oono noh kill mi". Norvin looked through the half-closed curtain in the doorway to the living room and saw one of the men shoot Linnette. He heard another round of gunfire, then one of the men said, "light di house ah fire". The fire started in the living room and spread to the children's bedroom. He fled to his bedroom, which was also on fire. Consumed by smoke and flames, Norvin jumped onto the flaming bed and scorched his back. He then jumped through the louvre window and ran.

[40] The gunshots continued. As Norvin collapsed at the gate, he saw a police pick-up truck. In his estimation, up to that point, about two hours had passed since Alia and Davian ran into his bedroom. The police officers took him and Oneil to the hospital, where they were treated.

[41] Norvin testified that he had known Mr Campbell since he was a little boy, which he estimated was nearly 20 years. Over those years, he would see him every day when he visited the house. They would have conversations lasting from half an hour to an hour. Mr Campbell sometimes slept at the house in Demarco's room. Before the attack, he last

heard Mr Campbell speak at the gathering earlier that day, from about 1:00 pm to 1:30 pm, and again at about 4:00 pm. Norvin further testified that, during the time he knew Mr Campbell, he would have heard him speak more than 1,000 times.

3. Mr Phillip Hill

[42] An agreed witness statement detailed Phillip's account of how the events of that night unfolded. Although Phillip did not identify any of the assailants by their voices, his evidence supported both Oneil's and Norvin's accounts of the words spoken during the ordeal. He also saw and spoke with Mr Campbell at the scene of the incident afterwards.

[43] Phillip stated that he was lying on his bed in the children's bedroom when he heard two loud explosions. He hid under the larger of the two beds. While there, he heard a rough voice say, "[w]eh di boy Rice deh?", followed by a loud bang. A second voice, soft and youthful, asked, "[w]eh Rice deh". He also heard the voices of Linnette, Alia and Davian coming from the living room.

[44] After hearing several gunshots and more dialogue, the living room fell quiet for a minute. The men then set the house on fire. When the smoke reached the area beneath the bed he was under, he crawled towards the bathroom door. Oneil opened the door, and they both went into the bath and turned on the shower to wet themselves. He followed Oneil when he jumped out of the bathroom window and hid in the bush behind the house. Phillip remained there for about half an hour.

[45] Phillip further stated that he later emerged from his hiding place and walked to the front of the yard, where he saw several persons and the police. There, he also saw Mr Campbell, whom he knew well, as they had been friendly and often greeted each other. Mr Campbell asked him whether Linnette had died, and he confirmed that she had. Mr Campbell then said, "Look how yuh leave from whey yuh madda deh and come yah soh and couldda dead". Phillip did not answer. As he walked away, he heard Mr Campbell say, "[m]i ah leave now because mi feel like mi ah black out". Mr Campbell then left on his motorcycle with his girlfriend.

(b) Evidence of threats and motive

1. Mr Oneil Mahabee

[46] In his testimony, Oneil described a disagreement he had with Mr Campbell two weeks before the incident. The disagreement occurred at a candlelight vigil on a road in Logwood held in memory of two brothers. While Oneil was present, he noticed Mr Campbell travelling down the road on his motorcycle. He stated that Mr Campbell was "... blowing out di candle with his tail pipe, dallying around di candle, blowing dem out". Oneil approached him, and Mr Campbell "...tried to ride off and use his bike handle and hit [him] underneath [his] side". Oneil grabbed the carrier (a rail at the back of the bike). Mr Campbell stopped and chucked him, after which Oneil hit him in the face about three or four times. After exchanging heated words during this altercation, Mr Campbell rode off. Defence counsel for Mr Campbell suggested to Oneil that he identified Mr Campbell as one of the assailants because he had reported Oneil to the police after their scuffle at the candlelight vigil.

2. Ms Elaine Bloomfield

[47] Another prosecution witness, Elaine (daughter of Norvin and Linnette), gave evidence about the aftermath of the dispute between Oneil and Mr Campbell. On a day in early July 2015, while at her house (approximately three chains from Norvin's house), Mr Campbell approached Elaine and said, "Oniel [sic] box mi last night at the candle light [sic] in Logwood. ... Him say mi a ride mi bike and a blow out di candle dem...and if him no apologize to mi, him haffi dead".

[48] Elaine testified that she had a close relationship with Mr Campbell. She had known him for about 25 to 26 years, since he was a young boy attending school. She considered him a family friend because he would sleep and eat at her house and her parents' house from time to time. Following the interaction with Mr Campbell in July 2015, her relationship with him remained good. However, she noticed that when he saw her niece and nephew (presumably Alia and Davian from the context of the questioning), "...like him si dem him look pan dem an' wring up him face and all those things".

[49] Later in August 2015, Elaine was at Norvin's house cooking. Norvin was in the front of the yard with Mr Campbell and other family members. While she was sharing food for Norvin, she observed him turn to Mr Campbell and say, "[m]i hear that yuh sey oono a goh kill mi grand pickney dem... because oono and Oniel [sic] inna some argument. ... You and Oniel [sic] have oono difference, oono left mi daughter and har pickney dem outta dis. Remember sey ... Oniel [sic] and mi daughter noh deh. Dem only get pickney".

[50] During Elaine's cross-examination, she confirmed that she did not speak to Norvin in Mr Campbell's presence about the issues between him and Oneil (as put forward by Norvin).

3. Mr Norvin Bloomfield

[51] Norvin's account of that discourse was dissonant with Elaine's version. He stated that on a Sunday in September 2015, Mr Campbell approached Elaine at the house, and they engaged in conversation. Norvin was positioned approximately two chains away. Elaine called Norvin. She told him, in Mr Campbell's presence, that he (Mr Campbell) said that if Oneil does not apologise, "him gwain duh him tings" and "...if him no ketch Harry him wi ketch him shut". Norvin's response to Mr Campbell was "... that my family and him have nothing ... so he should leave my family alone... cause if him hurt my family, him gwain hurt me."

Law and analysis

[52] The gravamen of the complaint under this ground is predicated on the insufficiency of the voice identification evidence, as well as the inconsistencies and discrepancies in the evidence given by the prosecution's witnesses.

[53] The well-known and widely accepted principle of law is that the prosecution bears the burden of proving that Mr Campbell committed the offences. In the context of Miss Foster's submission that at the close of the prosecution's case, the voice identification evidence was poor and riddled with inconsistencies and discrepancies, the learned trial

judge was obliged to look at the prosecution's case holistically. In particular, he was required to assess the adequacy of the voice identification evidence and to evaluate the cumulative effect of any specific weaknesses that were exposed in order to determine whether the overall quality of the evidence was rendered too poor to be left to the jury (**R v Vincent Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 187/2004, judgment delivered 7 April 2006 and **R v Ivan Fergus**). It was also the learned trial judge's responsibility to consider and weigh any other evidence that supported the voice identification evidence, in this case, the evidence of the threats made by Mr Campbell which tended to illustrate a motive for the commission of the offences, as well as the inconsistencies and discrepancies that arose on the prosecution's case, to determine whether he ought to withdraw the case from the jury.

[54] The legal principles governing the assessment of the sufficiency of voice identification evidence are well established. In **Rohan Taylor**, this court affirmed the following principle from **Bowlin v Commonwealth** 242 SW 604, 195 Ky 600:

"The law regards the sense of hearing as reliable as any other of the five senses, so that testimony [that a] witness recognized [an] accused by his voice is equivalent to testimony he was recognized by sight."

[55] At page 107, Gordon JA stated the relevant principles for assessing evidence of voice identification as follows:

"In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for mere spoken words to render recognition possible and therefore safe on which to act. ..."

[56] Gordon JA also made it pellucid that in such instances, it is the jury's function to determine the weight to be given to the evidence of voice identification.

[57] There was more than ample evidence for the learned trial judge to have determined that the jury should consider Oneil's and Norvin's identification of Mr Campbell. Both Norvin and Oneil gave compelling evidence, which was largely unchallenged, demonstrating a significant degree of familiarity with Mr Campbell's voice. They both knew Mr Campbell for many years. He often visited and stayed at Norvin's house (about three to four times per week), and on those occasions, they would hear him speak for extended periods. Oneil would also hear Mr Campbell speaking whenever he travelled with him on his motorcycle, which he operated as a taxi.

[58] Both witnesses also testified that they heard Mr Campbell speak at the gathering earlier that day. Oneil heard him speaking with Linnette and Norvin before 2:30 pm. Norvin testified that Mr Campbell arrived at the house between about 7:30 am and 8:00 am and greeted his wife, Linnette. Between about 1:00 pm and 1:30 pm, Mr Campbell returned to the house and told them (Norvin and Linnette) "not to eat off the food and to leave food for him". Mr Campbell then left but returned at about 4:00 pm, when he spoke with Linnette and Norvin again. This evidence establishes that Norvin and Oneil had many prior opportunities to hear Mr Campbell's voice, including hearing him speak just a few hours before the offences were committed.

[59] Nevertheless, the critical issue for the learned trial judge's consideration at this stage of the proceedings was whether Mr Campbell had spoken enough words at the time of the incident to make recognition of his voice safe for the jury to act upon. The evidence of the two witnesses differed as to the number of words Mr Campbell spoke and what he said. According to Norvin, he was at the kitchen door when he heard a voice just outside the kitchen door (about one to two feet away) say, "No listen to dem, di boy Ricey in a di house". Norvin said that it was Mr Campbell who spoke those words. He also testified that Mr Campbell said, "No follow dem, Ricey in deh" and "Di bwoy Ricey in deh, no mek dem tell yuh nutten". Oneil, on the other hand, who was inside the children's bedroom,

hiding beneath a bed, heard Mr Campbell say twice, “Him di deh man”, and once, “Search the house, di bwoy di deh”.

[60] So, even if the number of words attributed to Mr Campbell could be said to be few, given the length of time the witnesses knew him and their familiarity with his voice, the learned trial judge could not be faulted for refusing to uphold the no case submission on this basis. As stated in **Rohan Taylor**, the longer the familiarity with a person’s voice, the fewer words that are needed to identify them. Also, despite the witnesses’ varied accounts of what they heard Mr Campbell say, the substance of both witnesses’ testimony was that he was telling the men inside the house that Oneil was there. This aspect of the evidence was also for the jury’s consideration following the appropriate instructions from the learned trial judge on conflicts in the evidence and credibility (which is discussed in more detail later in the judgment).

[61] There was also Phillip’s evidence. Although Phillip neither reported hearing a voice from the back of the house, nor identified any of the assailants (even though he was hiding in the same room as Oneil), he testified that he heard the same words spoken by one of the men asking for Oneil, as did Norvin and Oneil. Although his evidence does not attribute those words to Mr Campbell, it was entirely a matter for the learned trial judge’s consideration and ultimate determination whether this aspect of Phillip’s evidence could lend credence to Norvin and Oneil’s credibility as to the words spoken by one of the perpetrators during the incident.

[62] Consequently, it could not be said that the evidentiary material before the court, as it concerned the voice identification, was so weak or insubstantial that the case ought not to have been left for the jury’s consideration.

[63] Although the arguments on this ground focused on the sufficiency of the voice identification evidence, the prosecution also relied on evidence of threats to establish a motive to support it.

[64] In **Siccaturie Alcock v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 88/1999, judgment delivered 14 April 2000 (cited with approval in **Ronique Raymond v R** [2012] JMCA Crim 6), this court assessed the evidence of voice and visual identification. It held that “the evidence of voice identification was not decisive to the conviction” but was to be considered alongside other evidence.

[65] In the more recent decision of **Terron White v R** [2022] JMCA Crim 8, the evidence of voice identification was considered in conjunction with other evidence to determine the weight to be given to it.

[66] At the close of the prosecution’s case, the learned trial judge was also obliged to consider that the threats Mr Campbell made to kill Oneil and his children if Oneil did not apologise for hitting him in the face were a question of fact for the jury to determine whether they provided a possible motive for his involvement in the crimes.

[67] It is trite that motive is not an essential element of a criminal offence. This means the prosecution has no obligation to prove motive to secure a conviction. In other words, it is irrelevant to liability. However, if the prosecution has evidence establishing a motive for the commission of an offence, that evidence is admissible to provide the underlying reason for the offence, notwithstanding that it reveals the accused’s criminal disposition.

[68] In the case of **R v Ball and Ball** [1911] AC 47 at page 68, Lord Atkinson observed during argument as follows:

“Surely in an ordinary prosecution for murder you can prove previous acts or words of the accused to shew he entertained feelings of enmity towards the deceased, and that is evidence not merely of the malicious mind with which he killed the deceased, but of the fact that he killed him... it is more probable that men are killed by those who have some motive for killing them than by those who have not.”

[69] Lord Atkinson’s observation was subsequently approved and applied by the Court of Appeal in **R v Williams (Clarence Ivor)** (1987) 84 Cr App R 299. In that case, the accused was charged with threatening to kill the complainant, intending that she would

fear the threat would be carried out. Evidence was admitted of previous acts of violence by the accused against the complainant, including an assault for which he had been convicted and sentenced to a term of imprisonment. He had been released six weeks before the alleged threats. The prosecution's case was that the threats had been made because of resentment arising from the imprisonment and that the previous acts of violence tended to show that the accused intended his threats to the complainant to be taken seriously. The Court of Appeal held that the evidence was admissible and dismissed the appeal.

[70] As indicated above, it is now commonplace that the prosecution need not prove a perpetrator's motive for committing an offence but may seek to establish one if it exists. Similarly, evidence that an accused lacked a motive to commit the crime may be admissible to show the comparative improbability of his having committed it (see **R v Grant** (1865) 4 F & F 322). However, and most importantly, it does not follow from this discussion that evidence of motive or its absence is necessarily relevant to the facts that are in issue in relation to a particular offence (see **R v Graham-Kerr** (1989) 88 Cr App R 302 and **R v Rowley** (1992) 94 Cr App R 95).

[71] Turning now to the inconsistencies and discrepancies in the prosecution's evidence at the close of its case, this area of the law is irrefutable. These are quite common features in criminal cases. Differences in the evidence of witnesses raise questions of credibility. As eloquently stated by Harris JA in **Steven Grant v R** [2010] JMCA Crim 77, "[c]redibility is anchored on questions of fact", which are entirely matters for the jury's consideration as the judges or arbiters of the facts. In this case, an assessment of the cumulative variances in the evidence of the witnesses at the close of the prosecution's case neither caused the prosecution's case to be "so discredited as a result of cross-examination" nor "manifestly unreliable" that the jury properly directed could not convict upon it. Since the prosecution's case rested primarily on the view to be taken of the witnesses' reliability and credibility, it was for the jury to determine whether they believed

the witnesses, and, if so, which parts, if any, of their accounts they accepted as truthful and reliable.

[72] Harris JA in **Steven Grant v R** helpfully stated the applicable principles on the approach to be taken by a trial judge where there are inconsistencies and discrepancies in the evidence presented by the prosecution at the close of its case:

“[69] It must always be borne in mind that discrepancies and inconsistencies in a witness’ testimony give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury’s domain as they are pre-eminently the arbiters of the facts. Consequently, it is for them to determine the strength or weakness of a witness’ testimony.

[70] Even in circumstances where a judge is of the view that, by reason of discrepancies and inconsistencies, a conviction could not be supported by the evidence, it is not the judge’s duty to stop the case and this is so, even if he believes the witness to be lying. In **Kissooa and Singh v The State** (1994) 50 WIR 266 Kennard JA at page 289, said:

‘Even if the judge has taken the view that the evidence could not support a conviction because of inconsistencies, he should nevertheless have left the case to the jury. It cannot be too clearly stated that the judge’s obligation to stop a case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge’s job to weigh the evidence, decide who is telling the truth and stop the case merely because he thinks that the witness is lying. To do that is to usurp the function of the jury.’”

[73] When the prosecution’s evidence is considered in its totality, it cannot be said to be of a tenuous character that would require the learned trial judge to stop the case. The strength or weakness of the prosecution’s case depended on the jury’s assessment of the reliability of the voice identification evidence and the credibility of the witnesses. The learned trial judge was, therefore, entitled to leave the inconsistencies and discrepancies in the evidence for the jury to resolve. Since there was evidence on which a jury, properly directed, could conclude that Mr Campbell was guilty, it was appropriate for the learned

trial judge to allow the matter to proceed. He, therefore, quite properly rejected the submission of no case to answer. Accordingly, this ground has no merit and fails.

Ground 2- Directions on voice identification

[74] The objective of this ground was to challenge the learned trial judge's directions to the jury on voice identification. This is a matter of critical importance, as the prosecution's case relied heavily on the evidence of two witnesses' recognition of Mr Campbell's voice.

Submissions on behalf of Mr Campbell

[75] Miss Foster submitted that identification by voice is even less reliable than eyewitness identification or recognition and that even a confident recognition of a familiar voice by a lay listener could be wrong (citing **R v Roberts** [2000] Crim LR 183 and **R v Flynn and St John** [2008] EWCA Crim 970). Accordingly, she submitted that the learned trial judge should have highlighted the difficulty of correctly identifying a voice, even where there is evidence of familiarity with that voice.

[76] Additionally, counsel advanced that the learned trial judge did not sufficiently caution the jury, particularly given the absence of other evidence placing Mr Campbell at the scene. She argued that he did not tell the jury that even a witness who claims to recognise a voice can be mistaken. The jury might have misunderstood his direction to mean that, where the voice is previously known, the likelihood of making a mistake is minimised, notwithstanding the time period over which the voice was observed. It was counsel's contention that the learned trial judge had a duty to identify the weaknesses in that evidence. He also failed to address the witnesses' accounts regarding the layout of the house and their ability to hear what was being said. Miss Foster asserted that, under such dire circumstances, Oneil's and Norvin's purported identification amounted to fleeting glances.

[77] Miss Foster also relied on the Privy Council decision of **Jason Lawrence v The Queen** [2014] UKPC 2 and submitted that the warnings given by the learned trial judge

regarding the alleged comments made by Mr Campbell to Elaine and Norvin prior to the incident were grossly insufficient. Those comments demonstrated motive, and were “prejudicial and hearsay”, as defence counsel argued during the trial. The learned trial judge ruled that the evidence was admissible even though the Crown was not required to prove motive. That evidence also presented a risk that the jury would assume that Mr Campbell was one of the assailants without more. She concluded that the learned trial judge’s non-direction and misdirection to the jury had compromised the verdict.

Submissions on behalf of the Crown

[78] Crown Counsel submitted that the learned trial judge gave the jury comprehensive directions, in accordance with the authorities, on the special need for caution when assessing voice identification evidence. Those directions included the reasons for exercising such caution and the pertinent factors to consider in determining whether the voice identification evidence was accurate and reliable. In his summation, the learned trial judge referred to the applicable law and the factors the jury was required to consider in determining whether Mr Campbell was correctly identified. In doing so, he guided the jury on the pertinent aspects of the voice identification evidence and placed it in the context of the witnesses’ credibility. Counsel also submitted that, contrary to Miss Foster’s submission, the learned trial judge pointed out that the incident occurred in a board house with features that could have affected the witnesses’ ability to hear the assailants.

Law and analysis

[79] The law on voice identification has already been set out in **Rohan Taylor** and the other cases discussed at paras. [54] – [56] and [64] – [65] above. **Rohan Taylor** involved evidence of voice identification, where the main witness recognised the assailants’ voices while she was inside the house and they were outside.

[80] In the case of **Davies v The Crown** [2004] EWCA 2521, their Lordships pronounced (para. 29):

“...voice identification (or here, more precisely, recognition) evidence needs to be approached with even greater care than visual identification or recognition evidence. But the general principles governing identification stated in *Turnbull* applied to both.”

[81] There are several authorities emanating from this court, including **Donald Phipps v R** [2010] JMCA Crim 48 (which was endorsed by the Privy Council in **Donald Phipps v The Director of Public Prosecutions and Attorney General of Jamaica** [2012] UKPC 24), which affirm the principle enunciated in **Davies v The Crown** that the guidelines established in **Turnbull** should be modified and applied to voice identification evidence.

[82] In **Donald Phipps v R**, Morrison JA (as he then was) reviewed the English authorities and academic commentary on voice identification and provided comprehensive guidance on the appropriate directions, which is worth setting out in full:

“[136] The proper approach to voice identification has also been the subject in recent years of both judicial decision and academic comment in the United Kingdom. In **R v Hersey** [1998] Crim LR 281 and **R v Gummerson** [1999] Crim LR 680, the Court of Appeal held that **in cases of identification by voice, the judge should direct the jury by a careful application of a suitably adapted Turnbull direction.** In **R v Hersey**, the court considered that in such cases, as in cases of visual identification, **it was vital that the judge should spell out the risk of mistaken identification and the reason why a witness may be mistaken, point out that a truthful witness may yet be mistaken, and deal with the strengths and weaknesses of the identification evidence in the case before him.** In the later case of **R v Roberts** [2000] Crim LR 183, the court referred to academic research which indicated that **voice identification was more difficult than visual identification and concluded that the warning given to the jury should be even more stringent than that given in relation to visual identification.** Indeed it has been suggested by one learned commentator that ‘the dangers of mistaken voice identification are much greater than those of visual identification’ (D. Ormerod, ‘Sounds Familiar? - Voice Identification Evidence’ [2001] Crim LR 595, 620; see also R. Bull and B. Clifford, ‘Earwitness Testimony’, in Heaton-Armstrong, Shepherd and Wolchover (eds), *Analysing Witness Testimony*, London, 1999; Ormerod, ‘Sounding

Out Expert Voice Identification' [2002] Crim LR 771; and **R v Chenia** [2004] 1 All ER 543, esp. per Clarke LJ, as he then was, at [99] – [105]).

[137] In our view, the considerations which have influenced these developments in the United Kingdom and elsewhere are equally applicable to this jurisdiction, with the result that **in cases of voice identification the judge should at the very least give to the jury a Turnbull warning, suitably adapted to the facts of the particular case before him. As with visual identification, much will depend on whether the defendant's voice was known to the witness before and with what degree of familiarity, but even in such cases the danger of mistaking one voice for another will need to be highlighted for the jury. It will also be necessary for the jury to consider whether at the time of recognition there was a sufficient opportunity for the identifying witness to properly identify the voice in question.** While much of the standard **Turnbull** warning will probably be appropriate in most cases, the actual warning given in a particular case should nevertheless take into account the fact that some aspects of that warning may carry less, but sometimes more, importance in cases of voice identification. So that, for example, the circumstances of the actual identification in cases of violent crime, may be less stressful to the witness than in visual identification, but on the other hand, unlike with visual identification, the effects of the stress of the situation could well affect the speaker's voice (see the editorial commentary on **R v Hersey**, at page 283). **These are but examples and what is important is that the warning given in each case should reflect all the nuances of the particular case.**" (Emphasis supplied)

[83] The court also demonstrated its approach to an omission in the directions to the jury concerning voice identification. It was acknowledged that the trial judge in that case had not warned the jury that witnesses had previously made mistakes in relation to voice recognition evidence. The court, however, held that the omission was outweighed by his repeated cautions and that no precise form of words was required, provided the essential elements of the warning had been adequately conveyed to the jury (applying **Shand v R** [1996] 1 WLR 67).

[84] It is accepted that, when directing a jury on assessing identification evidence, there is no requirement for a trial judge to follow a precise formula, provided that he or she

alerts the jury to the dangers of visual and, as was necessary in this case, voice identification, explains why care is needed in evaluating that evidence, and links those cautions to the evidence in the case (see **Raymond Hunter v R** [2011] JMCA 20 at para. [29]).

[85] In his summation to the jury, the learned trial judge devoted significant attention to the prosecution's witnesses' evidence, with particular focus on the voice identification testimony. He repeatedly emphasised that the prosecution's case depended wholly on the correctness of the identification of the assailants' voices. He also reminded the jury that Mr Campbell's case was that the identifying witnesses were either mistaken or lying, and that he had raised the defence of an alibi in his unsworn statement.

[86] The learned trial judge gave the classic **Turnbull** directions, which, as required, were adapted for voice identification. He warned the jury of the special need for caution when relying on voice identification evidence and directed as follows (for counsel's reference see pages 807 to 808 of the transcript):

"...I must warn you, Mr. Foreman and your members, of the special need for caution when it comes to identification evidence or a reliance on identification evidence, namely voices in this case. It is possible for a [sic] honest witness or a witness to make mistake in identification and also even a convincing witness can also be mistaken. It has happened before. I must tell you, Mr. Foreman and members of the jury, it is easier, always easier to identify a person or person's voice whom you have known before or familiar with. ..."

[87] He also directed them that it was a recognition case, so the witnesses would not have to hear many words to recognise a voice. The learned trial judge, however, again earnestly cautioned the jury as follows (at pages 809 to 811, and 814 to 815 of the transcript):

"Mr. Foreman and your members, you must look at the circumstances under which the accused men's voices were identified or took place or were heard. Persons have made mistakes with voices they knew before. Bearing in mind, Mr. Foreman and your members,

it takes a shorter time to recognize a voice you knew before or is [sic] familiar with.

Also, the amount [sic] of words if you are familiar with voice, you recognize it. ... So when you look at voice identification you have to look on [sic] the distance between the speaker and the person who is hearing the voice; you have to look at that. In this case both witnesses told you that the voice was outside the kitchen. You have to also look on the amount [sic] of times both Mr. Oneil Mahabee and Mr. Norvin Bloomfield spoke to either of these men. Mr. Norvin told you he knows Troy over the years and Mr. Oneil told you of the time he met Mr. Scorchner or Clarke. You have to bear in mind that this is recognition of a voice, so it means less words. ... Was there any obstruction for [sic] the area of the voice. Was the word cogent enough, meaning clear.

...

Mr. Foreman and your members, let me say this again because it is important, in order for the evidence of a witness that he recognized an accused person by his voice, to be accepted as cogent, there must be evidence of degree of familiarity. They know him. They are familiar with the accused [sic] voice, to include the prior opportunities that he had spoken to him, meaning he had heard the voice before, the occasion when the recognition of the voice occurred, must be such that there were sufficient words, so as to make recognition of that voice or voices, safe on which to act, correlation between the parties, that means, the accused and the witnesses, and the words spoken. The greater and [sic] knowledge of the accused, where you knew him and where you have spoken to him, the fewer words are needed, ...The less familiar, the more words are needed. So the degree of familiarity, how long you knew him, how often you have spoken to him, these are things you use to recognize voices."

[88] So, while the learned trial judge gave the standard directions on voice identification, and preliminarily related the voice identification evidence to those directions as he reviewed Norvin's and Oneil's evidence, he again devoted a significant amount of time to instructing the jury to consider the period that Mr Campbell was known to them, the number of times they would have heard him speak prior to the incident, their proximity to him during those conversations, and all the relevant circumstances of their identification of his voice during the incident.

[89] As he reviewed the prosecution's case, the learned trial judge canvassed, for the jury's benefit, the evidence to be assessed in determining the sufficiency of the voice identification, including the witness' familiarity with Mr Campbell's voice. He instructed the jury that since this case concerns the recognition of voices, they should consider the circumstances in which the voices "were identified or took place or were heard" (see page 809, lines four to six of the transcript). For instance, he pointed out that the incident took place in a board house. The learned trial judge explained, "[m]ost board, two by eight, or one, whatever, just like so, very thin. You have groove and tongue and they put them together. This house is a board house". He also directed their attention to the diagram of the house that was tendered as exhibit one and pointed out that there were no passages; the house layout was "room to room". Importantly, he noted, there was no door to enter the kitchen, and he reminded them of Norvin's description of the kitchen window (see pages 811 to 813 of the transcript). It was for the jury to determine whether, given this aspect of the evidence, either Norvin or Oneil was in a position to hear the words spoken by Mr Campbell.

[90] The learned trial judge also directed the jury's attention to evidence of threats to the lives of Oneil and his children made by Mr Campbell. This evidence was given by Norvin and Elaine and relied on by the prosecution to show motive for the crimes. It could not be said that the evidence was hearsay because, on Norvin's account, the threats were made to Elaine, who reported to Norvin what Mr Campbell said in his presence. Elaine's version of this aspect of the evidence was that Norvin confronted Mr Campbell about the threat he purportedly made in her presence.

[91] The learned trial judge, while being terse, correctly directed the jury that the prosecution was not required to prove motive, but that if such evidence was presented, they were entitled to consider it (see page 896, lines 18 to 20 of the transcript). He, however, failed to direct that this was evidence which the jury was entitled to consider as supportive of the voice identification evidence, as it was capable of establishing that Mr Campbell "entertained feelings of enmity" towards Oneil, and of demonstrating the

underlying reason for his involvement in the commission of the offences, that is, to carry out his previously expressed intention to murder Oneil (or his children, if he was unable to kill Oneil), if Oneil did not apologise to him. Accordingly, this omission by the learned trial judge would have inured to Mr Campbell's advantage and did not occasion a miscarriage of justice or render the convictions unsafe.

[92] Having considered the learned trial judge's summation as a whole, it is fair to say, as the Crown submitted, that the directions on voice identification were comprehensive and aligned with the requisite instructions established by the relevant authorities on this subject. The jury was properly directed on this issue and received the assistance they needed to assess the voice identification evidence in reaching their verdicts. Accordingly, the complaint under this ground will not result in the conviction being set aside. This ground, therefore, fails.

Ground 3- Directions on inconsistencies and discrepancies

[93] As already established, the prosecution's case was dependent on witness testimony. There were inconsistencies and discrepancies between the oral evidence and the witness statements, making credibility a live issue for the jury to consider. This ground has criticised the learned trial judge's directions to the jury on how to assess those inconsistencies and discrepancies as inadequate, rendering the trial unfair and the convictions unsafe.

Submissions on behalf of Mr Campbell

[94] Miss Foster submitted that the learned trial judge merely recounted the evidence and noted that an alibi defence had been raised. He did not point out the discrepancies between Elaine's and Norvin's accounts of the same incident, nor did he direct the jury on how to address them. The disparity in those accounts significantly undermined the witnesses' credibility. There was a greater need for the learned trial judge to warn the jury about their accounts, since Norvin was a complainant and Elaine had an interest to serve. The learned trial judge, counsel argued, failed to highlight the risk of collusion.

[95] Counsel also highlighted discrepancies in the evidence regarding Mr Campbell's familiarity with the house, particularly his knowledge of its layout, including the location of the back door of the kitchen, and the frequency of his visits to the house. It was further submitted that the learned trial judge failed to give proper warnings about Oneil's evidence regarding where he was in the house, and from where he purportedly heard Mr Campbell's voice, since that inconsistent evidence would affect his ability to recognise Mr Campbell's voice. She argued that the learned trial judge did not direct the jury that reasonable inferences could be drawn regarding the witness' credibility where multiple statements contained discrepancies and omissions. He should also have pointed out to the jury that voice identification is likely to be more reliable when carried out by an expert listener using auditory phonetic analysis and/or an expert in voice analysis using acoustic recording and measurement, as opposed to laypersons, the argument continued.

Submissions on behalf of the Crown

[96] Miss Pyke cited the case of **R v Carletto Linton and others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered 20 December 2002 (**'R v Carletto Linton'**), as providing guidance on the duty of the trial judge in treating with inconsistencies and discrepancies in evidence. She submitted that the learned trial judge directed the jury on credibility; he defined inconsistencies and discrepancies and explained how to assess such evidence. He also highlighted inconsistencies in the prosecution's evidence, and, as a result, the learned trial judge's directions cannot be reasonably faulted.

Law and analysis

[97] Before considering Miss Foster's complaint regarding the learned trial judge's directions on inconsistencies and discrepancies, the concerns raised about his failure to warn the jury about the evidence of threat given by Norvin and Elaine, and their discrepant accounts, will be briefly addressed.

[98] Regarding the complaint that the learned trial judge ought to have warned the jury about their discrepant accounts, since Norvin was a complainant, and Elaine had an interest to serve, Miss Foster's reliance on **Jason Lawrence v The Queen** is misconceived for two reasons. Firstly, there is no known requirement for a trial judge to specifically warn the jury when a complainant gives evidence, whether solely as a complainant in his or her own cause or as a witness, in circumstances such as the present case. Miss Foster has, notably, presented no authority to support this proposition. Secondly, the facts in **Jason Lawrence v The Queen** are distinguishable, given that the witness' brother was a co-accused, and it was against that background that the Board found that the trial judge should have warned the jury and invited them to consider that the witness' evidence "might be tainted by a wish to protect his brother".

[99] It is acknowledged that a judge has a discretion, depending on the circumstances of a particular case, whether to give a warning that a witness' evidence may be tainted by improper motive (per Lord Hope of Craighead at para. 31 in **Benedetto v The Queen** [2003] 1 WLR 1545). However, such warnings are usually reserved for cases where, for instance, the witness is of bad character, the witness is an accomplice, or a prisoner gives evidence of a confession made in a cell. However, "the need for such a direction arises from a demonstrated risk of the witness's having an improper motive for his evidence" and "there must be evidence which supports the possibility that a witness's evidence is tainted by an improper motive" (per Lord Hodge at paras. 16 and 17 in **Jason Lawrence v The Queen** and see also **Pringle v The Queen** [2003] UKPC 9 at para. 31).

[100] There is no evidence that Elaine was a witness of bad character, nor was she one of Mr Campbell's accomplices. The mere fact that she is related to Norvin (and the other victims) and that her testimony about the threat was discrepant with his was, without more, insufficient to demonstrate a risk that she had an improper motive for her evidence that would necessitate the learned trial judge issuing a warning to the jury. As noted by the learned trial judge, the proper approach for the jury to take to Elaine's and Norvin's evidence about the threat was to determine whether they were truthful, against the

background of the directions he gave them on credibility and conflicts in the evidence. There was, therefore, no basis for the learned trial judge to specifically warn the jury about this aspect of their evidence.

[101] The learned trial judge's directions on the credibility factor will now be explored.

[102] The authorities establish that, although a trial judge need not identify every conflict in the evidence, the jury must be adequately guided in assessing those inconsistencies and discrepancies and their effect on the witnesses' credibility. In **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered on 22 March 1991, Carey JA explained (page 9):

"The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred in the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[103] In **R v Carletto Linton**, Harrison JA further explained the trial judge's duty to guide the jury in assessing the significance of discrepancies in the evidence (page 16):

"Discrepancies occurring in the evidence of a witness at a trial ought to be dealt with by the jury after a proper direction by the trial judge as to the determination of their materiality.

The duty on the trial judge is to remind the jury of the discrepancies which occurred in the evidence instructing them to determine in respect of each discrepancy, whether it is a major discrepancy, that which goes to the root of the case, or a minor discrepancy to which they need not pay any particular attention. They should be further instructed that if it is a major discrepancy, they the jury, should consider whether there is any explanation or any satisfactory explanation given for the said discrepancy. If no explanation is given or if the one given is one that they cannot accept they should consider whether they can accept the evidence of that witness on the point or at all: (**R v Baker et al** (1972) 12 J.L.R 902). Carey, P (Ag.) as he then was, in **R v Peart et al** S.C.C.A. 24 and

25/1986 delivered October 18 1988, said of discrepancies, at page 5:

'We would observe that the occurrence of discrepancies in the evidence of a witness, cannot by themselves lead to the inevitable conclusion that the witness' credit is destroyed or severely impugned. It will always depend on the materiality of the discrepancies.' "

[104] McDonald-Bishop JA (Ag) (as she then was) further examined the scope of this duty in **Jason Brown and Ricardo Lawrence v R** [2017] JMCA Crim 20. Relying on **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008, she reiterated that a trial judge is not required to identify every inconsistency or discrepancy, provided that some major examples are highlighted and the jury is properly directed on their significance and treatment. The directions would need to make it clear to the jury that it was for them to decide "who and what they believed and that, in doing so, they could accept or reject a witness' testimony or part of it".

[105] That is precisely what the learned trial judge did in the present case. He commenced by instructing the jury that they were free to accept or reject all the evidence given by a witness, or to accept part of a witness' testimony if they felt the witness was truthful about the evidence they accepted but otherwise untruthful or unreliable as to the evidence they rejected. The learned trial judge also directed the jury to examine the witnesses' demeanour, as this could assist them in determining their credibility. He emphasised that one of the "fundamental issues" in the case was that of credibility.

[106] In explaining the jury's duty regarding inconsistencies and discrepancies, the learned trial judge first defined those concepts. He then directed the jury to determine whether the conflicts in the evidence were serious or slight, material or immaterial, and to consider their impact on the credibility of the witnesses. They were also instructed on how to assess whether the reasons given for the inconsistencies and discrepancies were sufficient. So far as is relevant, the learned trial judge directed the jury in the following terms (see pages 778 to 781 of the transcript):

"Mr. Foreman and your members, inconsistencies and discrepancies are only differences. An inconsistency occurs... when a witness in speaking about a particular thing say [sic] one thing about it at one time and at a later date, stage, or later date in speaking about that same thing say [sic] something quite different about it;... A discrepancy, which is also a difference, arising [sic] where one witness in speaking of a particular thing tells you something about it and another witness comes along and speak [sic] about the same thing, tells you something quite different from what the first witness has said. ...These discrepancies and inconsistencies in evidence may be slight. Or they may be serious, or go to the root of the case. They may be material or immaterial. ... If they are slight you, the members of the jury, Mr. Foreman and your members, may probably think they do not really affect the credibility of the witness concern [sic] if it is slight. On the other hand if they are serious, you, the jury may say because of it, it may not be safe for you to believe that particular witness on that part of the evidence.

...Remember I told you that you can reject a part of a witness' evidence and accept a part of a witness' evidence or reject the whole or accept the whole. It's entirely a matter for you in this case, to say whether you find inconsistencies or discrepancies and if they exist, whether they are serious or slight; material or immaterial; whether they are profound or not; if any reasons were given for these inconsistencies and discrepancies, whether the explanation given for them is satisfactory or not. Are these inconsistencies or discrepancies so fundamental that you will feel it unsafe to accept the witness' evidence or part of the witness' evidence? I will tell you if there are any inconsistencies, I will point them out to you, but you must determined [sic] that."

[107] In keeping with his indication that he would point out the conflicts in the evidence to the jury, the learned trial judge, as he reviewed the evidence of the witnesses for the prosecution, brought to their attention several inconsistencies and discrepancies that arose during the trial. For example, while recounting Norvin's evidence of what occurred in the grandparents' bedroom, he highlighted the fact that he did not mention seeing Oneil. This discrepancy contradicted Oneil's evidence that he was also hiding in the grandparents' bedroom and barricading the doors with furniture. The learned trial judge also pointed out the inconsistency in Oneil's evidence regarding which bed he was hiding under. He reminded the jury of his oral evidence that he hid under the small bed, which

was inconsistent with his statement to the police that he was under Norvin's bed. The learned trial judge also recapped for the jury's benefit Oneil's insistence that he did not tell the police that he was under Norvin's bed. He also did not say that he saw Phillip hiding (as reflected in his statement), but rather that he saw Phillip in the bathroom.

[108] Another inconsistency emphasised by the learned trial judge was between Oneil's evidence that the voice he heard in the living room asking "[w]eh Ricey deh" was Mr Clarke's, and his statement to the police that the voice belonged to Mr Campbell. The learned trial judge indicated to the jury that Oneil maintained that the correct account was that the voice that asked for him was Mr Clarke's, and that he heard Mr Campbell's voice from the back of the kitchen; that the statement to the contrary was the police's mistake. He told the jury that this was a matter for their consideration in light of the directions he had given them regarding inconsistencies and discrepancies.

[109] The learned trial judge also reminded the jury that Norvin explained the conflict in his evidence regarding the omission from his first statement that he had heard and recognised Mr Campbell's voice when he was speaking outside in the yard close to the kitchen door. The reason given for that omission, as pinpointed by the learned trial judge, was that he had not finished giving his first statement because he was in pain, but he mentioned it in the second statement given to the police. The jury was also reminded that Norvin had denied telling the police that when he was at the kitchen door, the entire house was on fire and that he insisted that the correct evidence was that only Kerry-Ann's bedroom was on fire.

[110] It was also reiterated to the jury that in Elaine's statement, she did not mention that Mr Campbell had said: "[c]aan ketch 'Ricey', kill children" (as paraphrased by the learned trial judge). The jury was reminded that she had agreed this was omitted from her statement, but she maintained that Mr Campbell had, in fact, said so, and it was left to them to determine what to make of the omission.

[111] The learned trial judge periodically took this approach throughout his summation, identifying for the jury several conflicts in the testimony of the prosecution's witnesses and presenting to them any explanations they offered for the inconsistencies in their evidence, as he was required to do.

[112] Nonetheless, as Miss Foster has complained, the learned trial judge failed to mention the discrepancy between Norvin's and Elaine's evidence as to who spoke to Mr Campbell on the day of the alleged threat. It was Norvin's evidence that Elaine and Mr Campbell were speaking, and Elaine repeated what Mr Campbell said. Whereas it was Elaine's evidence that she overheard Norvin and Mr Campbell speaking about it.

[113] However, as distilled from the authorities discussed above (paras. [102]–[104]), it is not required that trial judges highlight every inconsistency or discrepancy that arises during a trial. Rather, what is necessary is for them to explain to the jury "the nature and significance of inconsistencies and discrepancies, and to give them directions on how such matters are to be treated" (per McDonald-Bishop JA (Ag) in **Jason Brown and Ricardo Lawrence v R** at para. [41]).

[114] In any event, the learned trial judge's failure to point out the discrepancy between Norvin's and Elaine's evidence was not so significant as to render the verdicts unsafe. The directions given by the learned trial judge on conflicts in the evidence, as set out above, provided sufficient guidance to the jury on how they should treat with them. Additionally, it was entirely for the jury to determine whether, and how, the disparity in the evidence affected the witnesses' credibility. Also, even if the jury considered this discrepancy and accepted the evidence of one witness over the other, or even rejected it, it cannot be said that their verdicts would have been any different in the light of the cogent voice identification evidence and the comprehensive directions they received from the learned trial judge. Consequently, this omission did not result in a miscarriage of justice.

[115] Having examined the directions given by the learned trial judge, it is our judgment that he did what was required of him in accordance with the established principles of law in his directions to the jury on inconsistencies and discrepancies. The directions he gave to the jury in this regard were therefore adequate and proper. Ultimately, it was for the jury to determine whether the witnesses were credible, given the conflicts in their evidence. It was for them, as the learned trial judge directed, to decide whether the evidence presented by the prosecution made them feel sure of Mr Campbell's guilt. The arguments presented under this ground provide no justification for impeaching the verdicts for the reason that the trial was unfair and the convictions unsafe. This ground, also, fails.

Ground 4 - Sentence manifestly excessive

[116] Mr Campbell has not challenged the sentences imposed for the offences of arson and causing grievous bodily harm with intent. His chief complaint, however, is that the sentences for murder are manifestly excessive.

[117] The learned trial judge considered the horrifying nature of this incident. He noted that Mr Campbell had no previous convictions, but his social enquiry report was unfavourable. He also considered the principles of sentencing, such as deterrence, rehabilitation, retribution, and denunciation. He ruled that the case warranted consecutive sentences and sentenced as follows: Count 1 for arson sentenced to 20 years' imprisonment; Counts 2 to 4 for murder sentenced to life imprisonment, to serve 43 years before being eligible for parole; Counts 5 to 7 for murder sentenced to life imprisonment, to serve 40 years before being eligible for parole; Counts 8 to 11 for causing grievous bodily harm with intent, sentenced to 20 years' imprisonment at hard labour.

[118] He ordered that counts 1 to 4 and counts 5 to 11 would run concurrently, but that counts 5 to 11 would run consecutively to counts 1 to 4. Having given credit for the three years spent in pre-sentence remand, he imposed a total minimum sentence of 80 years to be served before Mr Campbell would be eligible for parole.

Submissions on behalf of Mr Campbell and the Crown

[119] Miss Foster highlighted that the social enquiry report contained statements from community members alleging that Mr Campbell had criminal associations. She argued that the court should have formally indicated on the record that those allegations were disregarded. Having failed to do so, the court may have placed undue reliance on those unproven allegations in determining Mr Campbell's eligibility for parole. Counsel also expressed that there was no evidence that Mr Campbell played an active role, and so this factor should have been taken into account in determining the sentence. She suggested that, in the circumstances, an appropriate range for the murder convictions would have been 33 to 35 years' imprisonment before eligibility for parole.

[120] Crown Counsel, on the other hand, was of the view that, having regard to the occurrences of that night, the sentence was not manifestly excessive.

Law and analysis

[121] The significant issue under this ground is whether the learned trial judge erred in imposing consecutive sentences, resulting in sentences that were manifestly excessive. As will be seen later in the judgment, this issue also arises on the appeal against sentence advanced by Mr Clarke.

[122] In arriving at the sentences he imposed, the learned trial judge described the offences as amounting to "unadulterated criminal behaviour affecting the security of those persons who lived in Campbelton Town, March Town, and to [a] greater extent Jamaica" (a reference to domestic terrorism). He classified the manner in which the offences were committed as "a premeditated and efficiently [sic] execution, snuffing out the lives of six persons and burning four". He characterised the offences as brutal and egregious. He further indicated that it was unheard of for persons to just go into people's houses and execute them in the manner in which the deceased persons were killed. The learned trial judge expressed that these factors would influence his sentence as he was focused on deterring like-minded individuals from committing similar offences and on

protecting the public. He indicated that the sentences he intended to hand down would ensure that “this would never happen again”.

[123] The learned trial judge also stated that he was aware of the principles “surrounding concurrent and consecutive sentences” and that he considered the imposition of consecutive sentences to be “important” in this case. He further indicated that “there is enough egregious material [in the case] to do consecutive sentences”. The learned trial judge referred to **Jeffrey Perry v R** [2012] JMCA Crim 17 (in which the appellant was convicted for stabbing to death his three cousins who were minors. He was originally sentenced to death on each count of the indictment, but on appeal, the sentences of death were set aside, and concurrent sentences of life imprisonment with a minimum pre-parole period of 45 years were imposed on each count of the indictment). After considering the police antecedent and social enquiry reports, the principles of sentencing and then remarking that “people who do things like this must be punished severely, because it reaffirm [sic] the validity of moral attitudes”, the learned trial judge imposed the sentences outlined at paras. [117] - [118] above.

[124] The relevant legislative provisions applicable to the present case will, firstly, be briefly outlined. In respect of the first count of murder (count 2 of the indictment which relates to the murder of Kerry-Ann), the applicable provision is section 2(2) of the Offences Against the Person Act (‘OAPA’), and where life imprisonment is imposed (as it was in this case), the statutory minimum pre-parole period is 15 years’ imprisonment (see section 3(1C)(b)(i) of the OAPA).

[125] Regarding counts 3 to 7 of the indictment (concerning the killings of Linnette, Mark, Alia, Brian and Davian, respectively), the relevant provision is section 3(1A) of the OAPA. That section states that a person who has a previous conviction for murder (committed on a different occasion) or another murder committed on the same occasion is liable to suffer the death penalty or life imprisonment (see section 3(1)(a)). Where a sentence of life imprisonment is imposed under section 3(1)(a) of the OAPA (instead of

the death penalty), the minimum period that is to be stipulated to be served before eligibility for parole is 20 years (section 3(1C)(a)).

[126] Secondly, the remit of this court when reviewing a sentence imposed by a judge at first instance is well established. The leading case on point is **R v Kenneth John Ball** (1951) 35 Cr App Rep 164 (**'R v Ball'**), the principle from which was adopted by this court in **Alpha Green v R** (1969) 11 JLR 283 and has since been applied in numerous cases from this court, including **Meisha Clement v R** [2016] JMCA Crim 26 at para. [42], **Paul Brown v R** [2019] JMCA Crim 3 at para. [16], **Jowayne Alexander v R** [2022] JMCA Crim 64 at para. [28] and **Quacie Hart v R** [2022] JMCA Crim 70 at para. [20]. The relevant precept is stated at page 165 of **R v Ball**:

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

[127] Finally, the principles governing the imposition of consecutive sentences are now well settled. Where multiple offences arise from the same facts or form part of a single transaction, the general practice is to order the sentences to run concurrently. However, in an appropriate or exceptional case, consecutive sentences may lawfully be imposed (see **R v Delroy Scott** (1989) 26 JLR 409 and **R v Walford Ferguson** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 158/1995, judgment delivered 26 March 1999). It is accepted that when the court is contemplating consecutive sentences, the totality principle ought to be applied. Brooks JA (Ag) (as he then was) gave an admirable exposition on the law in this area in **Kirk Mitchell v R** [2011] JMCA Crim 1 (**'Kirk Mitchell'**):

“[46] The ‘totality principle’ has been, in our view, accurately, explained by D.A. Thomas in the second edition of his work **Principles of Sentencing**:

‘The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate.’ (page 56)

[47] The learned author submitted that having decided on the sentence for each offence the court should not, then, merely carry out an arithmetic exercise and pass the sentence which the addition produces. The court should, instead, consider ‘the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences’. He recommended that:

‘Where the totality of the sentences does appear to be excessive and some adjustment is necessary, it is usually preferable to make the adjustment by ordering sentences to run concurrently, rather than by reducing the length of individual sentences and allowing them to remain consecutive.’ (page 57)

[48] The learned author suggested, at page 58 that the totality principle has two limbs:

‘The first limb of the principle can be seen as an extension of the central principle of proportionality between offence and sentence, while the second represents an extension of the practice of mitigation.’

[49] In respect of the first limb, the learned author suggested that:

‘A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender ‘a crushing sentence’ not in keeping with his record and prospects.’ (page 57)”

[128] The Caribbean Court of Justice (‘the CCJ’) addressed the question of consecutive and concurrent sentences in **Vishnu Bridgelall v Hardat Hariprashad** [2017] CCJ 8

(AJ) (**'Bridgelall'**). Delivering the judgment of the court, Saunders JCCJ (as he then was) stated:

"[31] Generally speaking, a Magistrate has the power to impose consecutive sentences. In this case, however, having regard to the circumstances, it was a mistake for the Magistrate to order the five-year sentences to run consecutively. **Barring special circumstances**, where a person is convicted of multiple offences which arise out of the same set of facts or the same incident, it will be appropriate to impose concurrent, and not consecutive, sentences. If, for example, a single incident of dangerous driving results in injuries or death to multiple victims, one would normally expect the court to impose concurrent sentences in respect of the separate charges related to each victim.

[32] On the other hand, consecutive sentences may be given where the offences arise out of unrelated facts or incidents. ...

[33] **Consecutive sentences may also be imposed where the offences are of the same or similar kind but where the overall criminality will not sufficiently be reflected by concurrent sentences.** ..." (Emphasis supplied)

[129] In **Linton Pompey v The Director of Public Prosecutions** [2020] CCJ 7 (AJ) GY (**'Linton Pompey'**), Saunders PCCJ delivered the majority judgment of the court:

"[2] Appellate courts reviewing sentences must steer a steady course between two extremes. On the one hand, courts of appeal must permit trial judges adequate flexibility to individualise their sentences. The trial judge is in the best position to fit the sentence to the criminal as well as to the crime and its impact on the victim. But a reviewing court *must* step in to correct discrepancies, reverse excesses or aberrations, secure consistency and promote observance of the rule of law." (Italics as in original)

[130] The learned jurist also expounded on what the court meant by the term "special circumstances" in **Bridgelall**:

"[15] There were two problems with what the Magistrate did [in **Bridgelall**]. Firstly, *barring special circumstances*, courts should normally impose concurrent sentences where a person is convicted of multiple offences which arise out of the same set of facts or the

same incident. If the Magistrate had given regard to this norm the Magistrate should have ordered Bridgelall's sentences to be served *concurrently*. ...

[16] The 'special circumstances' mentioned in the previous paragraph is, **in part**, a veiled reference to what is known as 'the totality principle'. The principle may be thought of in much the same fashion as one may express the principle of proportionality. The sentence imposed upon a convicted person should ultimately be neither too harsh nor too lenient. It must be proportionate. The totality principle requires that when a judge sentences an offender for more than a single offence, the judge must give a sentence that reflects all the offending behaviour that is before the court. But this is subject to the notion that, ultimately, the total or overall sentence must be just and proportionate. This remains the case whether the individual sentences are structured to be served concurrently or consecutively.

[17] If, therefore, a judge is minded to order that two or more sentences should be served consecutively, before pronouncing the order, the judge must factor the totality principle by considering the effect of the total sentence. The judge must ensure that this total is proportionate and not excessive. As was stated by DA Thomas [in Principles of Sentencing], as cited in *Mill v The Queen* [(1988) 166 CLR 59]:

... when... cases of multiplicity of offences come before the court, the court must not content itself by doing the arithmetic and passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentence for all the offences. ..." (Emphasis supplied) (Italics as in the original)

[131] Finally, on this point, is the relatively recent case of **Jowayne Alexander v R** [2022] JMCA Crim 64. The appellant, Alexander, was convicted of two counts of murder, committed in the course of the same transaction. He was sentenced to life imprisonment with the stipulation that he serve 26 years' imprisonment on both counts before becoming eligible for parole. The sentences were ordered to run consecutively. On appeal, the consecutive sentences were challenged on the basis that, given the facts of the case and applicable law, they were wrong in principle and concurrent sentences ought to have

been imposed. The appeal against sentence was allowed, and the consecutive sentences were set aside.

[132] McDonald-Bishop JA (as she then was), applying **Kirk Mitchell** and **Linton Pompey**, opined as follows:

“[21] It is not unreasonable to argue that the learned judge seemed not to have considered the principles governing the imposition of consecutive sentences, especially the totality principle.

...

[25] As it relates to the circumstances in which consecutive sentences may be appropriate, it is a long-established principle of law, accepted by this court over the years, that consecutive sentences are not usually imposed when the offences arise out of the same transaction.”

[133] It is acknowledged that at the time of sentencing, the learned trial judge would have had the benefit of the guidance in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 (‘the Sentencing Guidelines’), **Meisha Clement** and **Daniel Roulston v R** [2018] JMCA Crim 20 (‘**Daniel Roulston**’). Noticeably absent from the learned trial judge’s sentencing remarks and approach is the deployment of the methodology established in **Meisha Clement** and further refined in **Daniel Roulston**. This was conceded by Crown Counsel in oral and written submissions. It was also contended that this was an error in principle that would entitle the court to embark on its own sentencing exercise and disturb the sentence.

[134] It is noted that although the sentencing methodology (set out in **Meisha Clement**, **Daniel Roulston** and the Sentencing Guidelines) is now routinely employed to determine minimum pre-parole periods when a sentence of life imprisonment is imposed, at the time of sentencing in this matter, this was not the case. The methodology outlined in the authorities above was formulated to determine appropriate fixed-term sentences. However, it was subsequently adapted for use in determining minimum pre-parole periods. Nevertheless, the learned trial judge did not demonstrate how he arrived

at the minimum pre-parole periods imposed. In any event, the Crown's proposition is that even if this were done, it would be readily apparent that the sentences cannot be said to be manifestly excessive in the circumstances of this case.

[135] It is also observed that in handing down the sentences, the learned trial judge did not address each count of the indictment separately but instead imposed higher global sentences for the minimum pre-parole periods on the earlier counts of murder on the indictment (43 years' imprisonment on counts 2, 3 and 4) and shorter sentences on the latter counts (40 years' imprisonment on counts 5, 6 and 7). This again amounts to an error in principle as there is precedent for the position that more substantial sentences are to be imposed on the second and subsequent counts of an indictment for murder (see para. [33] of **Jowayne Alexander v R**).

[136] Concerning the imposition of consecutive sentences, as explained earlier, the general principle is that where offences arise from the same transaction or incident, consecutive sentences are generally inappropriate. However, this rule is not without exceptions. One exception is where concurrent sentences would not sufficiently reflect the overall criminality (see **Bridgelall**). As observed earlier, the CCJ also pronounced in **Bridgelall** that "barring special circumstances" where offences arise from the same set of facts, concurrent sentences ought to be imposed. The term "barring special circumstances" was described by the CCJ as a "reference in part" to the totality principle in **Linton Pompey**. This leaves room for the consideration that there may well be no appellate intervention when consecutive sentences are imposed for offences arising from the same incident, provided there is no breach of the totality principle.

[137] This very posture was articulated again by Brooks JA (as he then was) in **Jermaine Barnes v R** [2015] JMCA Crim 3:

"[19] ...[I]t is the totality of the sentences that should be considered by the sentencing judge and the appellate court. ...[H]owever, it is to be noted that consecutive sentences will not be disturbed, even if arising out of the same transaction, if the total effect on the offender does not amount to a manifestly excessive sentence. ..."

[138] It is also worth mentioning that this court, applying **Jermaine Barnes v R**, recently upheld the imposition of a consecutive sentence where the offences arose from the same set of facts for the reason that the aggregate sentence did not offend the totality principle, given the nature and circumstances of the case (see the recent case of **Timothy Tulloch v R** [2025] JMCA Crim 7).

[139] In terms of the parity principle, which requires that sentences be comparable for those convicted of similar offences in similar circumstances, although the sentencing process is individualised, there were no comparable cases (involving conviction for six counts of murder after trial) available to the learned trial judge at the time of sentencing. Therefore, in principle, the argument that an 80-year minimum pre-parole period is outside the usual range for this type of offending is not supported by any authority. Neither, for the very same reason, could it be said, without more, that the totality principle has been breached.

[140] Since consecutive sentences will be disturbed only where, having regard to the nature and circumstances of the offences, their aggregate effect results in a manifestly excessive sentence that offends the totality principle, we will now consider the complaint that the sentences imposed by the learned trial judge are manifestly excessive.

[141] It cannot be denied that this matter could be regarded as an exceptional case and represented, as the single judge of this court noted in his ruling on the application for leave to appeal conviction and sentence, “the worst of the worst” for this type of offending. It is also difficult to disagree with the Crown’s position that, given the nature and extent of the violence used in the commission of the offences, this was an act of domestic terrorism calculated to create a state of fear in the public or a section of the public. It is worth recognising, and neither should sight be lost of the fact, that the prosecution could have, at the very least, sought the death penalty with respect to the second and subsequent murders.

[142] Therefore, it is necessary to determine whether the aggregate minimum pre-parole period of 80 years' imprisonment falls outside the normal range for six counts of murder following a trial, whether the imposition of consecutive sentences offends the totality principle, and whether those sentences are otherwise appropriate. This examination will be conducted in the context of the nature and seriousness of the offences and will include an analysis of the aggravating and mitigating factors, taking into account, Mr Campbell's conduct and culpability, his antecedents, and any other factors relevant to the calculation of the sentences.

[143] In light of the errors identified in the learned trial judge's approach to sentencing (see paras. [133] – [135] above), it is fair to say that his sentencing approach lacked the required structure and clarity essential in a case of this magnitude, thereby entitling this court to embark on its own sentencing exercise.

[144] However, this is not to say that the difficulty the learned trial judge faced in arriving at the appropriate sentences is not appreciated. He had to grapple with a novel case, involving the brutal execution-style slaying of six persons, all family members spanning generations: a 62-year-old matriarch, a pregnant 36-year-old woman, two men in the prime of their lives (40 and 29 years old, respectively), a young woman who had just attained the age of majority and a minor aged 15 years, following a home invasion at night, by a group of men armed with firearms. The assailants then set the house ablaze, burning the house and the deceased beyond recognition and leaving four survivors with thermal burns affecting 13% to 25% of their respective bodies.

[145] As previously indicated, the learned trial judge did not employ the structured methodology that has since become well established for determining appropriate minimum pre-parole periods, nor did he otherwise demonstrate how he arrived at those periods. In the absence of comparable cases to provide guidance, it was especially important for the basis of those periods to be apparent from his reasoning. The learned trial judge also failed to consider each count separately and he imposed lesser sentences on the latter counts of murder.

[146] He did not mention the application of section 2(2) of the OAPA to the first count of murder (count 2 of the indictment), or of section 3(1A) to the remaining counts of murder (counts 3 to 7). He also failed to identify the normal sentencing ranges applicable to the various categories of murder before the court by referring to relevant comparative authorities (where available), nor did he identify any appropriate starting points within the ranges. While he identified aggravating and mitigating factors, the learned trial judge did not indicate how those factors impacted the sentences. Mr Campbell was, however, credited for time spent in custody after the pronouncement of the final sentences.

[147] Given the errors in principle made by the learned trial judge, this court is permitted to conduct a fresh assessment of the minimum pre-parole periods to determine whether they can nevertheless be justified by reference to the applicable sentencing principles. However, it is important to mention that it does not follow that a failure by a judge to adhere to the established principles of sentencing will automatically result in the sentences being set aside on the ground that they are manifestly excessive (see **Jermaine McIntosh v R** [2020] JMCA Crim 28 at para. [30]).

[148] In assessing the appropriateness of the minimum pre-parole periods imposed, this court will employ the structured methodology, as outlined in **Meisha Clement** and further refined by McDonald-Bishop JA (as she then was) in **Daniel Roulston** at para. [17]. These are:

- “a. identify the sentence range;
- b. identify the appropriate starting point within the range [for the particular case];
- 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[]).”

[149] Concerning the first murder conviction (count 2 for the murder of Kerry-Ann), given that it is difficult to refute that the murders in this case can be categorised as the “worst of the worst” for this type of offending, involving a home invasion during the middle of the night and the manner in which Kerry-Ann met her demise (by means of an execution-style killing), the imposition of a life sentence for the first count of murder, as distinct from a determinative sentence (see **Roland Bronstorff v R** [2024] JMCA Crim 29), is justified and appropriate in the circumstances.

[150] As previously discussed, the first count of murder falls under section 2(2) of the OAPA, with the minimum pre-parole period being 15 years’ imprisonment where a life sentence is given. On this count of the indictment, the learned trial judge imposed a minimum pre-parole period of 43 years. It is necessary to determine whether that sentence is manifestly excessive, that is, it falls outside an appropriate range. To resolve this issue, a recalculation of the minimum pre-parole period, taking into account the established methodology, the relevant statutory provisions, and comparative authorities (where available), is imperative.

[151] In addressing the parity principle, as discussed above at para. [139], the following cases were considered in relation to this count of the indictment. In **Lloyd Forrester v R** [2023] JMCA Crim 20, the appellant was convicted following a trial for the offences of murder and wounding with intent in circumstances where he, armed with a firearm and along with another man, invaded the home of the deceased and shot him multiple times. On appeal, his sentence of life imprisonment for murder was affirmed, but the period before eligibility for parole was reduced from 25 to 24 years. His sentence of 25 years’ imprisonment for wounding with intent was also reduced to 15 years. Similarly, in **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25, the appellants were convicted of the murder of the deceased after a trial, which involved a home invasion at night by heavily armed men. They were sentenced to life imprisonment, with the stipulation that they serve 25 years before becoming eligible for parole. **Troy Barrett v R** [2022] JMCA

Crim 24 involved a home invasion at night by two men in which the deceased was shot and killed. The appellant was convicted after trial and sentenced to life imprisonment with a minimum pre-parole period of 25 years. In **Kevin Reid et al v R** [2020] JMCA Crim 35, the deceased was shot and killed during an invasion of her home during the night by five men armed with firearms. The appellants were convicted following a trial, and each was sentenced to life imprisonment with the stipulation that they serve minimum pre-parole periods of 35 years. On appeal, the sentences of life imprisonment for all the appellants were affirmed. The minimum pre-parole period for one of the appellants was affirmed, but he was credited with six years and six months for pre-sentence custody, so that he would serve 28 years and six months before becoming eligible for parole. The minimum pre-parole periods of 35 years for the other three appellants were reduced to 33 years, and each appellant was credited with the six years spent in pre-sentence custody, so they would serve 27 years before becoming eligible for parole.

[152] The usual range for murder is indicated as 15 years to life imprisonment in the Sentencing Guidelines. The starting point is not stated, but it is now well appreciated that an appropriate starting point is the “notional point within a broad range, from which the sentence should be increased or decreased to allow for aggravating or mitigating features” (**Meisha Clement** at para. [26]). The starting point also reflects the offence's intrinsic seriousness and the harm caused.

[153] At the time of her death, Kerry-Ann was 36 years old. The pathologist found that she was about 10 to 13 weeks pregnant. She was shot in her chest and head (execution-style) in the living room of her home during an attack that was sustained and deliberate. Given that this particular killing exhibited several features that are far more appalling than the authorities referred to above, a starting point of 20 years is appropriate in the circumstances, as it adequately reflects the intrinsic seriousness of the offence and the gravity of the harm caused.

[154] The aggravating factors are as follows:

- (a) All the persons killed were harassed and pressured to disclose Oneil's location prior to being executed in the presence of other occupants in the house. Kerry-Ann's parents and children would have witnessed her murder and suffered mentally with the knowledge that their death was imminent.
- (b) Their bodies were subsequently burnt beyond recognition when the house was set on fire.
- (c) The murders occurred during a home invasion at night.
- (d) The offence was perpetrated by a group of men armed with firearms.
- (e) The firearms used to commit the offences have not been recovered.
- (f) The perpetrators strategically positioned themselves at the front and back entrances of the house, thereby preventing any means of escape by the occupants.
- (g) The crime was premeditated and motivated by revenge on the part of Mr Campbell. He took the men to the house to exact vengeance on Oneil for "disrespecting" him and failing to apologise.
- (h) Breach of trust. Mr Campbell was a close, trusted family friend of the deceased, and had previously resided in the house. He was also present at the get-together for Kerry-Ann that took place earlier on the day of the incident, partaking of food and drink and conversing with members of her family.
- (i) Greater harm was intended than caused, as the house was set ablaze for any survivors to be burnt alive.
- (j) The nature and extent of the violence used in the commission of the killing and the number of persons who were killed (six members of the

same family) amounted to an act of domestic terrorism calculated to create a state of fear in the public or a section of the public.

(k) Mr Campbell's unfavourable social enquiry report in which members of the community reported that he associated with "unwholesome peers" and was affiliated to a gang.

These egregious aggravating features justify moving the starting point upwards to 32 years.

[155] The mitigating factors are quite few. Mr Campbell had no previous convictions and appeared to be self-employed as a bike taxi operator prior to his arrest for the offences. A reduction to 29 years to be served before he is eligible for parole is merited for these factors.

[156] Mr Campbell was in custody for three years awaiting trial. It is an established legal principle that an offender is to receive full credit for time spent in pre-sentencing remand and this period is to be deducted arithmetically when arriving at a final term of imprisonment (see **Callachand and Another v The State of Mauritius** [2008] UKPC 49 (**Callachand v The State**)). When an accused is in custody for multiple offences credit for time awaiting trial is given once (**Callachand v The State** per Sir Paul Kennedy at para. [10]: "...a defendant who is in custody for more than one offence should not expect to be able to take advantage of time spent in custody more than once"). However, in order to ensure that Mr Campbell receives the full benefit of the credit for the three years spent on pre-sentencing remand, the allotment of that time will be deferred and applied to the highest minimum pre-parole period (see para. [170] below).

[157] From this analysis, it is apparent that the minimum pre-parole period in relation to count 2 of the indictment (the first count of murder) was manifestly excessive and requires this court to intervene to adjust it.

[158] Regarding the additional five counts of murder, no comparable or factually analogous cases within this jurisdiction could be located. However, it is noted that in **Paul Brown v R** [2019] JMCA Crim 3, F Williams JA, after considering a number of cases involving multiple murders, including **Jeffrey Perry v R** (see para. [123] above), **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008 (the appellant was convicted of three counts of murder and originally sentenced to death; the death sentence was commuted and he was resentenced to life imprisonment with eligibility for parole after serving 40 years), and **Patrick Taylor v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 85/1994, judgment delivered 24 October 2008 (the appellant was convicted of four counts of murder and originally sentenced to death; the death sentence was commuted and he was resentenced to life imprisonment with eligibility for parole after serving 35 years), remarked:

“[8] These cases show a range of sentencing of between 45 years’ and 25 years’ imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder.”

[159] The following cases, all of which involved trials, were also considered. In **Jowayne Alexander v R**, the appellant was sentenced to life imprisonment with the stipulation that he should serve a minimum of 32 years’ imprisonment before becoming eligible for parole for a double murder; minimum pre-parole periods of 28 and 38 years were considered appropriate, from which six years were deducted for time spent in pre-sentencing custody. In **Peter Dougal v R** [2011] JMCA Crim 13, the appellant was sentenced to life imprisonment with parole eligibility after 45 years for two counts of murder; and in **David Russell v R** [2013] JMCA Crim 42, a case involving a double murder; the appellant was sentenced to life imprisonment with parole eligibility after 40 years on the second count of murder.

[160] However, since the hearing of this appeal, this court has upheld minimum parole periods exceeding 45 years for multiple murders in which the appellants pleaded guilty,

a feature absent from the present case (see **Adrian Campbell et al v R** [2026] JMCA 2, where a minimum pre-parole period of 46 years' imprisonment was upheld in respect of one of the appellants for the second count of a double murder in which the victims were shot, chopped and beheaded, and **Kemar Thompson v R** [2026] JMCA Crim 12, where an aggregate minimum pre-parole period of 66 years and seven months' imprisonment, based on consecutive sentences, was upheld where eight persons were shot and killed by the appellant in three separate incidents). Consequently, it is fair to observe that recent jurisprudence from this court demonstrates that, depending on the number of victims and the circumstances of the killings, minimum pre-parole periods in cases involving multiple murders may exceed the previous upper range of 45 years' imprisonment, even where the offender has pleaded guilty.

[161] The magnitude of the brutality and callousness surrounding the killing of all six deceased cannot be overemphasised. After being summoned by the two perpetrators who had entered the house to disclose Oneil's location, and when this information was not forthcoming, they were summarily executed, one at a time, in each other's presence. The house was subsequently set ablaze, no doubt to ensure that anyone left alive would be killed. Although four persons managed to escape the fire, they were severely burnt. The other five counts of murder will now be considered separately.

[162] Count 3 of the indictment concerns the murder of Linnette. She was the matriarch of the family and, at the time of her death, was 62 years old. She was in bed with her husband Norvin when the perpetrators forced their way into her home. She repeatedly begged for her life during the brutal ordeal before being shot in her neck and head. Regard must be had to the fact that this was the killing of a second victim on the same occasion, which enhances the gravity of the offence. A starting point of 35 years is, therefore, appropriate in the circumstances.

[163] The aggravating factors delineated at para. [154] above are equally applicable and will move the starting point to around 47 years. While Mr Campbell's previous gainful employment is a mitigating factor, his previous unblemished criminal record is no longer

relevant because he was convicted on count 2 of the indictment. Accordingly, the adjusted minimum pre-parole period would be 46 years.

[164] In the light of the above, the minimum pre-parole period of 43 years imposed by the learned trial judge on count 3 of the indictment is not manifestly excessive, and the intervention of this court is unwarranted.

[165] Count 4 of the indictment is in regard to the murder of Mark. He was Norvin's and Linnette's son. He was 40 years old at the time of his death. He was shot in the chest and head. This was the killing of a third victim on the same occasion, which significantly enhances the seriousness of the offence. A starting point of 45 years is considered appropriate in these circumstances. The aggravating factors already identified would move the starting point upward to 57 years' imprisonment. The sole mitigating factor would result in a marginal reduction of the minimum pre-parole period to 56 years. Therefore, it cannot be said that the 43-year minimum pre-parole period imposed on this count of the indictment was manifestly excessive.

[166] Count 5 of the indictment involves the murder of Alia, the daughter of Oneil and Kerry-Ann, who was 18 years old at the time of her death. She was shot in the head. The threat made by Mr Campbell that he would kill Oneil's children if he was unable to get him (which, from all indications, was duly carried out), the fact that she would have witnessed her mother and grandmother being executed, and that she was the fourth victim killed on the same occasion make the gravity of this murder particularly severe. A starting point of 55 years is proper in the circumstances. The aggravating features would move the starting point to 67 years, with a marginal downward adjustment for the mitigating factor to 66 years. The learned trial judge's imposition of a minimum pre-parole period of 40 years is not manifestly excessive in the circumstances and requires no adjustment.

[167] Count 6 of the indictment concerns the murder of Brian, who was 29 years old at the time of his death. He was shot in the head. He was the fifth victim killed on the same

occasion, which further exacerbates the magnitude of the offence. A starting point of 60 years is warranted in the circumstances. The aggravating factors would move the starting point to 72 years with a marginal downward adjustment to 71 years to account for the mitigating factor. The 40-year minimum pre-parole period imposed on this count of the indictment is, therefore, not manifestly excessive. It will not be disturbed.

[168] The seventh count on the indictment relates to Davian, Kerry-Ann's and Oneil's son, who was 15 years old at the time of his death. He was shot in the head. His killing is particularly egregious for all the reasons stated in respect of Alia but is compounded by the fact that he was a minor when he was murdered. He was the sixth victim killed on the same occasion. The sentence on this count of the indictment must reflect the enormity and seriousness of the offence in that context. A starting point of no less than 70 years is appropriate in the circumstances. The starting point would be adjusted upward to 82 years for the aggravating factors and then marginally reduced to 81 years to reflect the mitigating feature. So, the 40-year minimum pre-parole period imposed by the learned trial judge on this count of the indictment is significantly below what is warranted in the circumstances.

[169] It is clear from the preceding analysis that, while the sentence imposed by the learned trial judge on count 2 of the indictment is outside the usual range for a single count of murder and manifestly excessive, the sentences imposed on the other counts were not. It is also apparent that the aggregate minimum pre-parole period of 80 years, although arrived at after the imposition of consecutive sentences for offences arising out of the same transaction, does not offend the totality principle and is not manifestly excessive, notwithstanding the learned trial judge's failure to demonstrate how he arrived at those periods. This is so because, given the circumstances of the murders and their senseless motive, it cannot be disputed that this is an exceptional case, warranting minimum pre-parole periods far above the usual recognised range identified in **Paul Brown v R** and subsequent cases. In any event, had the minimum pre-parole periods of

43 and 40 years been ordered to run concurrently, this certainly would not “sufficiently reflect the overall criminality” in this matter.

[170] Having completed the resentencing exercise, we recognise that the aggregate minimum pre-parole period now amounts to 83 years’ imprisonment, an increase of three years on the initial sentence imposed by the learned trial judge. This increase arose because he deducted the three years Mr Campbell spent in pre-trial custody from the global minimum pre-parole period of 43 years he imposed on counts 2 to 4 of the indictment, resulting in minimum pre-parole periods of 40 years’ imprisonment for those counts. In practical terms, Mr Campbell received credit of three years for time served on each of the first three counts of murder. Once again, this approach was flawed. As discussed above at para. [156], where a defendant is in custody for multiple offences (as Mr Campbell was), the credit for time spent awaiting trial is given once. Considering that the highest minimum pre-parole periods were imposed on counts 3 and 4 of the indictment, Mr Campbell shall be credited for the three years spent in pre-sentencing remand on count 4. This will result in a minimum pre-parole period of 40 years imprisonment on that count of indictment.

[171] Nonetheless, although the credit for time spent in pre-sentencing remand was applied to count 4, the aggregate minimum pre-parole period remains at 83 years imprisonment. However, it is well recognised that while this court is empowered, by virtue of section 14(3) of the Judicature (Appellate Jurisdiction) Act (‘JAJA’), to impose more severe sentences than those given by the sentencing judge, the exercise of that power is subject to the principles of natural justice. Where the court is considering increasing a sentence, notice should be given to the applicant or his or her counsel, so that the court may be addressed on this issue or the applicant may withdraw his or her appeal (see **Cornel Dawns v R** [2022] JMCA Crim 17 and **Linford McIntosh v R** [2015] JMCA Crim 26). In the present appeal, no such notice was given. Accordingly, although the principle in **Jermaine Barnes v R** will be applied and the consecutive sentences will not be set aside, the aggregate minimum pre-parole period of 80 years’ imprisonment cannot be

increased, in keeping with the authorities above. As a result, Mr Campbell shall serve an aggregate minimum term of 80 years' imprisonment before becoming eligible for parole, as ordered by the learned trial judge.

Conclusion

[172] The learned trial judge did not err in rejecting the submission of no case to answer that was made on Mr Campbell's behalf. The quality of the evidence was sufficient for the learned trial judge to determine that it merited the jury's consideration. He also gave the jury all the appropriate directions on voice identification and on inconsistencies and discrepancies. It was for the jury, the judges of credibility, having heard the evidence and being properly and adequately directed, to determine the weight to be attached to the evidence and arrive at the verdicts they considered appropriate. It is pellucid from their unanimous verdicts that they were convinced beyond a reasonable doubt that Mr Campbell was guilty as charged. The application for leave to appeal conviction is, therefore, refused.

[173] While the learned trial judge erred in failing to adhere to the established methodology in arriving at the sentences he imposed, resulting in the sentence on count 2 of the indictment being manifestly excessive, the sentences imposed on the other counts of indictment for the offence of murder were, quite frankly, very lenient. As such, while the minimum pre-parole period of 43 years' imprisonment on count 2 of the indictment will be set aside and a period of 29 years' imprisonment will be substituted therefor, the sentences on counts 3 to 7 as well as the consecutive sentence will not be disturbed. The aggregate minimum sentence of 80 years before eligibility for parole, in the circumstances of this case, does not offend the totality rule, and is not manifestly excessive. The consecutive sentence was also required to sufficiently reflect the overall criminality and seriousness of the offences given the significant role Mr Campbell played in the perpetration of these extremely violent, brutal and devastating crimes.

[174] Finally, as discussed, the deployment of the requisite methodology and principles during the resentencing exercise has resulted in an increase in the aggregate minimum

pre-parole period, for the reasons already stated. However, in the light of the authorities that there can be no increase in Mr Campbell's sentence on appeal without notice to him and/or his counsel of the court's intention to do so, and given the absence of any such notice, Mr Campbell shall serve an aggregate minimum term of 80 years' imprisonment before eligibility for parole, as ordered by the learned trial judge.

Errol Clarke

[175] Mr Clarke's appeal will now be considered.

[176] A single judge of this court refused permission for him to appeal his convictions but granted permission for him to appeal his sentences on the basis that he was not credited with the three months he spent in pre-sentence remand.

[177] Before us, the application for permission to appeal against convictions was renewed on the narrow question of whether the jury was deprived of its statutorily mandated time for deliberating the six counts of murder against Mr Clarke. If the answer to that question is affirmative, it would render the murder convictions unsafe.

[178] The circumstances that led to this issue are that on 30 November 2018, the seven jurors retired at 12:16 pm to deliberate and reach a verdict. They returned 58 minutes later at 1:14 pm. The foreman indicated that they had not arrived at a unanimous verdict. The learned trial judge directed them to continue deliberating. The jury retired again at 1:18 pm and returned 40 minutes later at 1:58 pm. In respect of Mr Clarke, the foreman announced their verdict, by a majority of five to two, of guilty on all counts. The total time of deliberation was one hour and 38 minutes.

Submissions on behalf of Mr Clarke

[179] On behalf of Mr Clarke, Mr Keith Bishop advanced that it cannot be disputed that the jury did not deliberate for the requisite two hours before the court received the majority verdict of five to two, in accordance with section 44 of the Jury (Amendment) Act, 2016 ('the Jury Act'). Accordingly, the convictions against Mr Clarke should be

quashed (reliance was placed on **R v Barry** [1975] 2 All ER 760, **R v Pigg** [1982] 1 WLR 762 and **Jason Collins v R** [2018] JMCA Crim 41 in support).

Submissions on behalf of the Crown

[180] Crown Counsel conceded that the notes of evidence showed the jury did not deliberate for the stipulated two hours before returning a majority verdict, in which case the trial should be considered a nullity (**Jason Collins v R** was also cited). Notwithstanding, Miss Pyke expressed concerns about the accuracy of the record and has requested that this court exercise its powers under section 28 of the JAJA to call for the production of the records of the learned trial judge and the registrar.

Law and analysis

[181] The relevant provisions of section 44 of the Jury Act are:

“44. - (1) On trials on indictment for-

(a) murder committed in any of the circumstances specified in section 2(1)(a) to (f) of the Offences Against the Person Act, or murder upon the conviction of which section 3(1A) of that Act would apply; or

(b) treason,

the unanimous verdict of the jury shall be necessary for the conviction or acquittal of any person for such murder or treason.

(1A) On trials on indictment for murder not falling within subsection (1)(a), after the lapse of two hours from the retirement of the jury a verdict of a majority of not less than five to two, of conviction or acquittal of any person for such murder, may be received by the Court as the verdict of the jury.

...

(3) On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may, after the

lapse of one hour from the retirement of the jury, be received by the Court as the verdict of the jury.” (Emphasis supplied)

[182] It is well settled that the trial court is bound to comply with statutory provisions, and so, as was held in **R v Pigg**, where there was a clear breach of the requirements of the Juries Act 1974 (United Kingdom), the verdict was a nullity, and the conviction should be quashed. This court has affirmed that principle in **Jason Collins v R**, on which both counsel relied. In that case, the appellant was convicted of murder and sentenced to life imprisonment with the stipulation that he serve 18 years before becoming eligible for parole. The trial judge accepted a majority verdict after one hour and 12 minutes, which is less than the two hours stipulated in section 44(1A) of the Jury Act. This court concluded that the jury was deprived of the full opportunity to consider the evidence and, in keeping with the authorities, determined that the trial, conviction and sentence were a nullity.

[183] The record produced by the registrar of the Circuit Court for the parish of Hanover in this matter, pursuant to section 28(a) of the JAJA (which allows this court to order the production of any document, exhibit or any other thing connected with the proceedings which appears to the court to be necessary for the determination of the case), was unhelpful. The Registrar’s Book dated 30 November 2018 contained no record of the times the jury retired for or returned from their deliberations. Therefore, in the absence of any other record indicating otherwise, we are obliged to accept the official record of the court (the transcripts provided by the court reporters) that the jury, in fact, deliberated for a total of 1 hour and 38 minutes, after which the majority verdicts on all counts of the indictment, including those for the offences of murder, were received. This falls short of the two hours required by law before a majority verdict can be accepted for the offence of murder.

[184] As already established, the court’s power to accept a majority verdict in a murder case is grounded in section 44(1A) of the Jury Act. That section mandates that such a verdict may be received only after “the lapse of two hours from the retirement of the jury”. As the authorities cited above show, the trial court is obliged to observe and uphold

this statutory provision. Regrettably, in the instant case, the learned trial judge failed to do so, thereby depriving the jury of the specified minimum time required to arrive at their verdicts in relation to the murder charges.

[185] As a result, Mr Clarke's trial, conviction and sentence on counts 2 to 7 of the indictment amount to a nullity. Therefore, the convictions on those counts will be quashed and the sentences set aside. The question that must now be considered, in the light of this outcome, is whether a retrial ought to be ordered.

The issue of retrial

[186] Having concluded that the convictions for murder were a nullity because the court received the majority verdict of five to two before the required two hours had passed, we now turn to counsel's submissions on whether a retrial should be ordered.

Submissions on behalf of Mr Clarke

[187] Mr Bishop cited the case of **Reid v The Queen** [1979] 2 All ER 904 and contended that he would be unable to resist an order for a retrial. He asked this court to quash the murder convictions, set aside the sentences for those convictions, and order a retrial on the six counts of murder.

Submissions on behalf of the Crown

[188] Miss Pyke referred to the court's power to order a new trial under section 14(2) of the JAJA. She cited **Rushon Hamilton v R** [2023] JMCA Crim 40 for the relevant principles and considerations that guided the court in reaching that decision. Crown Counsel submitted that, if the previous proceedings are deemed null and void, the court should order a retrial. She contended that the public interest in the administration of justice requires Mr Clarke to be tried, given the "heinous, callous, and grievous circumstances surrounding the murders".

Law and analysis

[189] Subject to the other provisions of the JAJA, section 14(2) requires the court, upon allowing an appeal against conviction, to quash the conviction and direct that a judgment and verdict of acquittal be entered. Alternatively, where the interests of justice so require, the court may order a new trial at such time and place as it considers appropriate.

[190] In the Privy Council decision in **Reid v The Queen**, the Board reviewed an order from this court for a new trial, as the verdict was rendered unsafe. Their Lordships set aside that order and provided guidance on the principles to be applied in deciding whether it is proper and reasonable to order a new trial. Their Lordships expressed as follows (at page 909):

“...it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that on a fresh trial an acquittal is on balance more likely than a conviction, ‘it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery’. This was said by the Full Court of Hong Kong when ordering a new trial in *Ng Yuk Kim v The Crown* ((1955) 39 HKLR 49 at page 60). ...”

[191] The Board also outlined other considerations, warning that they are not exhaustive and that their relevance is subject to the circumstances of each case. Those considerations were succinctly summarised in **Jason Collins v R**:

“[8] ...The first consideration that their Lordships outlined was that:

‘the interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some technical blunder by the judge in the conduct of the trial or [in] his summing-up to the jury.’

[9] Their Lordships also stated other factors for consideration, such as: (i) the power to order a retrial ought not to be exercised where the evidence adduced at the trial was insufficient to justify a conviction by a reasonable jury - even if properly directed; (ii) on the other hand, the power to order a retrial would be expected to be exercised where the evidence at trial was so strong that any reasonable jury, properly directed, would have convicted; (iii) the seriousness of the offence and its prevalence; (iv) the expense and length of time which a fresh hearing would involve; (v) the effect on the defendant; (vi) the length of time that has elapsed between the commission of the offence and the likely date of the new trial, etc."

[192] There can be no doubt that it is in the public interest for a serious crime such as this to be fully ventilated and for those responsible, if the jury so finds, to be brought to justice. Having applied our minds to the relevant principles, we will not express a view on the strength or weakness of the evidence in deciding whether to exercise the court's power to order a new trial. This determination is due to the circumstances that led to the trial being deemed a nullity, namely, the verdict being entered before the statutory mandatory minimum period had elapsed.

[193] Mr Bishop having prudently intimated that he would be unable "to resist any order for a retrial", a detailed analysis and discussion of this issue need not detain us. Suffice it to say that having considered the authorities cited above, the submissions of the parties, and, in particular, the seriousness of this case, we agree with the position taken by both counsel for the Crown and Mr Clarke that a retrial in respect of the murder charges should be ordered in the interests of justice.

Re-sentencing

[194] While the total deliberation time of one hour and 38 minutes was insufficient to allow the majority verdicts for the murder charges to be received, it was sufficient to allow the majority verdicts for the other offences to be received (see section 44(1)(3) of the Jury Act set out at para. [181] above).

[195] Upon being convicted of the 11 counts, the learned trial judge considered Mr Clarke's antecedent history and police records, which revealed seven previous convictions

mostly for violent crimes. As already established, he was sentenced as follows: count 1 for arson, sentenced to 20 years' imprisonment; counts 2 to 7 for murder, sentenced to life imprisonment, 40 years to be served before being eligible for parole; and counts 8 to 11 for causing grievous bodily harm with intent, sentenced to 20 years' imprisonment at hard labour.

[196] The learned trial judge ordered that counts 1 to 4 would run concurrently as would counts 5 to 11, but the latter counts would run consecutively to the first four counts. This amounted to a sentence of at least 80 years to be served before eligibility for parole. The learned trial judge noted that Mr Clarke was in prison on pre-sentence remand for three months and acknowledged that that period was to be subtracted.

[197] Once the murder convictions are quashed and the respective sentences set aside, the remaining convictions and sentences would be count 1 for arson to run consecutively with counts 8 to 11 for causing grievous bodily harm with intent. The aggregate sentence would, therefore, be 40 years' imprisonment.

Submissions on behalf of Mr Clarke

[198] Mr Janoi Pinnock argued that the learned trial judge had abandoned the methodology set out in **Meisha Clement v R** and the Sentencing Guidelines. This is not disputed by the Crown. Furthermore, he failed to demonstrate how he credited Mr Clarke for the three months he spent in pre-sentence remand. Finally, it was submitted that the sentences should all run concurrently. There was, therefore, no argument that the individual sentences of 20 years' imprisonment for arson and the four counts of causing grievous bodily harm were manifestly excessive. The complaint concerned the consecutive sentences passed by the learned trial judge.

Submissions on behalf of the Crown

[199] Miss Pyke considered the aggravating and mitigating factors and expressed that the total sentence did not exceed what was reserved for the "worst" cases and was "too

lenient". She, however, agreed with the concerns regarding the consecutive sentences (**Kirk Mitchell** was cited for guidance).

Law and analysis

[200] The discussion on consecutive sentences and the learned trial judge's flawed approach to determining the appropriate sentences discussed above (see paras. [127] – [141]) is applicable to the present analysis. There is no need to repeat what has already been said. Additionally, although the learned trial judge acknowledged that the three months Mr Clarke spent on pre-sentence remand would be deducted from his final sentence, there is no indication on the record that this was in fact done. On account of these deficiencies, a fresh analysis consonant with the relevant statutory framework and sentencing principles, along with Mr Clarke's conduct, culpability and antecedents, is required. It is also necessary to determine whether the consecutive sentences imposed by the learned trial judge were a proper exercise of his discretion. We reiterate that this court will not interfere merely because the minimum pre-parole periods were ordered to run consecutively. The question is whether, viewed as a whole, the resulting aggregate minimum pre-parole period is manifestly excessive (see **R v Delroy Scott**).

[201] The sentence for arson will now be examined. Section 3 of the Malicious Injuries to Property Act ('MIPA') provides:

"3. Whosoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof, shall be liable to be imprisoned for life, with or without hard labour."

[202] While section 4 of the MIPA prescribes a maximum penalty of life imprisonment for arson, the Sentencing Guidelines do not prescribe a normal range or usual starting point for this offence. However, several decisions of this court provide useful guidance on this point.

[203] Arson is recognised as a serious offence because it poses a significant risk of danger not only to the targeted individual or property but also to the lives and property

of others (see **R v Regan** [2007] EWCA Crim 2343 at para. [30], applied in **Lindell Howell v R** [2017] JMCA Crim 9 at para. [31] ('**Lindell Howell**') and **Charles McDonald v R** [2022] JMCA Crim 48 at para. [37] ('**Charles McDonald**'). In **Lindell Howell**, the appellant was sentenced to 18 years' imprisonment following a guilty plea, for setting fire to a house with persons inside. A starting point of 15 years was deemed appropriate, taking into account the aggravating factor that the appellant had barred the door to prevent the occupants from escaping. The court applied a three-year discount for the mitigating factors, including the guilty plea and full credit of two years spent in custody awaiting trial. Ultimately, the sentence was reduced to 10 years' imprisonment on appeal.

[204] Brooks JA (as he then was) indicated that if a custodial sentence was appropriate for arson involving a dwelling house, the range of sentences is from three to 15 years' imprisonment "for the ordinary cases of arson". He also opined that an appropriate starting point would be between 12 and 15 years depending on the circumstances of the case. Importantly, he further stated that "[t]he sentencing judge may go higher than 15 years or lower than three years depending on the peculiarities of the offender before the court and the features of the offence" (see para. [41] of that judgment).

[205] The approach recommended in **Lindell Howell** was followed in **Charles McDonald**. At 1:00 am on the morning of the incident, the appellant, being in the company of other men armed with homemade firearms, gained entry by force into the home of the complainant (described as a tenement yard) where several persons resided. The appellant lit a match and threw it through a window into a room of the house. Most of the complainant's and his wife's belongings were destroyed.

[206] A starting point of 12 years was utilised. The starting point was increased to 18 years because of the aggravating features, then reduced to 15 years to reflect the mitigating factors. One year was then deducted for the time the appellant spent in pre-sentence remand. A sentence of 14 years' imprisonment was considered appropriate.

[207] In the present case, the learned trial judge correctly considered that a custodial sentence was proper. The seriousness of the offence cannot be overstated given that Norvin's home was destroyed by the fire and four survivors were seriously injured. Also, the bodies of the deceased were burnt beyond recognition. In light of the features of this case, the house being set ablaze following the deliberate and sustained execution of six persons, this represented a very high escalation of criminality. In these circumstances, a starting point at the top of the range, 15 years' imprisonment, is justified.

[208] The aggravating factors in relation to Mr Clarke are as follows:

- (a) The maturity of the offender. Mr Clarke was 51 years old when the offence was committed.
- (b) The offence was premeditated.
- (c) Mr Clarke was operating in a group or gang of men.
- (d) He was one of the men who forcefully entered the house.
- (e) He was armed with a firearm.
- (f) Use of firearms.
- (g) He played a significant or leading role inside the house by asking the occupants repeatedly to disclose Oneil's location.
- (h) The back and front entrances of the house were monitored to prevent any survivor from escaping.
- (i) The intention to commit more serious harm than actually resulted, as the fire was set to the house to kill any survivors and potential witnesses.
- (j) Mr Clarke had seven previous convictions, six of which involved violence. This offence illustrated an escalation of offending.

These aggravating factors would move the starting point to 27 years.

[209] The mitigating factors are few. Mr Clarke was gainfully employed until his arrest, and his social enquiry report was favourable. These factors would reduce the sentence to around 25 years.

[210] Full credit of three months for the time Mr Clarke spent in pre-sentence remand would then be deducted, leaving the remaining sentence at 24 years and nine months' imprisonment.

[211] It is, therefore, clear that the sentence of 20 years' imprisonment imposed by the learned trial judge for the offence of arson is not manifestly excessive. However, the learned trial judge erred when he failed to demonstrate that he had credited Mr Clarke with the three months he spent in pre-sentence remand. In line with **Callachand v The State** and several authorities from this court, that arithmetical deduction will be applied to count 1 of the indictment and will accordingly be adjusted to reflect this.

[212] The sentences imposed on counts 8 to 11 of the indictment for the offence of causing grievous bodily harm with intent will now be considered. Each count shall be considered discretely in order to determine whether the consecutive sentences are appropriate and whether the aggregate sentence of 40 years breaches the totality principle and is manifestly excessive.

[213] Section 20(1) of the OAPA prescribes life imprisonment as the maximum penalty for causing grievous bodily harm with intent. It states:

"20. - (1) Subject to subsection (2), whosoever, shall unlawfully and maliciously, by any means whatsoever, wound, or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent in any of the cases aforesaid, to maim, disfigure or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer or [sic] any person, shall

be guilty of [a] felony, and, being convicted thereof, shall be liable, to be imprisoned for life with or without hard labour.”

[214] The maximum sentence is generally reserved for the worst examples of that offence likely to be encountered in practice (**Kurt Taylor v R** [2016] JMCA Crim 23). The Sentencing Guidelines indicate that the normal range of sentence for shooting (or attempting to shoot) and wounding with intent to do grievous bodily harm, offences under section 20 of the OAPA, is five to 20 years’ imprisonment with a usual starting point of seven years (except where the statutory mandatory minimum of 15 years applies to shooting with intent or wounding with intent committed with a firearm). However, there is no similar provision for causing grievous bodily harm with intent. This omission can be conveniently addressed by treating the suggested range and starting point for wounding with intent as a useful guide in sentencing for the offence of causing grievous bodily harm with intent, given that the latter offence is also a section 20 offence.

[215] Regarding the parity principle, it was difficult to locate authorities from this court which featured this offence. In fact, the research found only **Oral Gammon v R** [2018] JMCA Crim 39. However, the facts in that case are distinguishable. Mr Gammon and the complainant were in a common-law relationship. During a dispute, he threw her off a balcony on the second floor of the house where they lived. The complainant fell to the ground approximately 27 to 30 feet below the balcony. As a result of the fall, she was paralysed from the waist down. The trial judge’s sentence of 18 years’ imprisonment at hard labour was upheld on appeal as being “in line with the normal range of the sentences for this offence” (per Brooks JA (as he then was) at para. [12]). The term of imprisonment related to a single count of causing grievous bodily harm with intent. It is more likely than not that, had the case involved multiple victims (as the present case does), the sentence would have been greater, subject to the application of the totality principle.

[216] Therefore, in determining the appropriate sentences for this offence, the principle enunciated in **Lindell Howell** that, given the “peculiarities of the offender before the court and the features of the offences”, sentences below or above the usual range can be imposed, is a relevant consideration in light of the number of victims, the nature of

the injuries and the circumstances of the case. The sentences on counts 8 to 11 will now be recalculated individually.

[217] Oneil is the named complainant in count 8 of the indictment. As a result of the fire, he sustained thermal burns to 13% of his body. The medical evidence indicates that the injury is serious and likely to be permanent. He was the intended target of the perpetrators. His evidence described, in harrowing detail, how he escaped the burning house. A starting point of 15 years, at the higher end of the range, is appropriate.

[218] The aggravating factors (listed at para. [208]) would move the starting point to 27 years, while the mitigating features (see para. [209]) would further reduce the sentence to 25 years. Having been given full credit for time spent in pre-sentence remand, there will be no further reduction of the sentence (see para. [211] above). Therefore, the sentence of 20 years' imprisonment imposed by the learned trial judge on this count of the indictment cannot be said to be manifestly excessive.

[219] Count 9 of the indictment concerned Norvin, the patriarch of the family, who, as a result of the fire, suffered thermal burns to 23% of his body. The injuries he sustained are serious and likely to be permanent, as the medical evidence discloses. His evidence also described in horrifying detail how he escaped from his burning home. The pain and suffering he would have endured is unimaginable. Given the significant injuries he received, a starting point of 20 years is appropriate. The aggravating features would result in an upward adjustment of 32 years, while the mitigating factors would reduce the sentence to 30 years. The 20-year sentence imposed on this count of the indictment was, therefore, well below what was warranted in the circumstances and will not be disturbed.

[220] The complainant named in the 10th count of the indictment is Demarco, Norvin's grandson. He suffered the most severe physical injury with thermal burns to 25% of his body. As the medical evidence revealed, the injuries are serious and likely to be permanent. Like his grandfather, he would have experienced pain and suffering that are

inconceivable. A starting point of 25 years is justified. That figure would be adjusted upward to 37 years because of the aggravating factors, with a marginal reduction to around 35 years to reflect the mitigating features. Accordingly, the sentence of 20 years' imprisonment is not manifestly excessive, and the court's intervention is not warranted.

[221] The final count on the indictment (count 11) relates to Phillip, who suffered thermal burns to 21% of his body. According to the medical evidence, his injuries are serious and likely to be permanent. He, too, would have endured significant pain and discomfort. Although his injuries were less severe than those of Norvin and Demarco, the principle in **Jowayne Alexander v R** that more substantial sentences are to be imposed on the second and subsequent counts of an indictment is kept in mind in determining the appropriate sentence.

[222] A starting point of 30 years on the final count of the indictment is deemed appropriate. The aggravating factors would adjust this figure upwards to 42 years. A reduction to 40 years for the mitigating features would be proper.

[223] Recalculating the sentences shows that the 20-year term on counts 8 to 11, following a trial, in the circumstances of this case, fell well below what was warranted. Concurrent sentences of 20 years' imprisonment, as proposed by counsel for Mr Clarke, would not adequately reflect the seriousness of the offending. It follows that the aggregate sentence of 40 years' imprisonment could not be described as manifestly excessive or in breach of the totality principle for four counts of causing grievous bodily harm to four victims following a home invasion in which six persons were brutally executed, for the ghastly reason of ensuring that no person left alive inside the house would live to tell the tale.

Conclusion

[224] For the reasons stated above, Mr Clarke's trial, conviction and sentence on counts 2 to 7 of the indictment for the offence of murder amount to a nullity. Therefore, the

convictions on those counts will be quashed and the sentences set aside. A retrial of those counts of the indictment will be ordered, in the interest of justice.

[225] In the circumstances of this case, the aggregate sentence of 40 years' imprisonment, comprising two 20-year terms ordered to run consecutively, was neither manifestly excessive nor disproportionate, and did not breach the totality principle. However, the learned trial judge erred in failing to deduct the three months Mr Clarke spent in pre-sentence remand. In accordance with the authorities, this period will be deducted from the sentence imposed on count 1 of the indictment. This will result in a sentence of 19 years' and nine months' imprisonment at hard labour. This is the only basis for interfering with the sentences imposed by the learned trial judge.

[226] These, therefore, are the orders of the court:

Mikhail Campbell

1. The application for leave to appeal conviction is refused.
2. The hearing of the application for leave to appeal sentence is treated as the hearing of the appeal against sentence.
3. The appeal against sentence is allowed, in part.
4. The sentence of life imprisonment at hard labour with the stipulation that the appellant serve a minimum of 43 years' imprisonment before becoming eligible for parole on count 2 of the indictment is set aside and substituted therefor is the following sentence:

Life imprisonment at hard labour with the stipulation that the appellant serve a minimum of 29 years before becoming eligible for parole.

5. The sentences on counts 1 and 3 to 11 of the indictment are affirmed.
6. The sentences on counts 1 to 4 are to run concurrently. The sentences on counts 5 to 11 are also to run concurrently but consecutively to the sentences on counts 1 to 4, as imposed by the learned trial judge.
7. The appellant shall serve an aggregate minimum sentence of 80 years' imprisonment at hard labour before becoming eligible for parole, namely 40 years on counts 2, 3, and 4 (to run concurrently) and 40 years on counts 5, 6, and 7 (to run concurrently but consecutively to counts 2, 3, and 4).
8. The sentences on counts 1 to 4 are to be reckoned as having commenced on 14 December 2018, the date on which they were imposed and the sentences on counts 5 to 11 are to commence after completion of the sentences on counts 1 to 4.

Errol Clarke

1. The application for leave to appeal conviction is granted.
2. The hearing of the application is treated as the hearing of the appeal.
3. The appeal against conviction is allowed in part.
4. The convictions on counts 2 to 7 of the indictment for the offence of murder are quashed and the sentences are set aside.
5. In the interests of justice, a retrial is ordered on counts 2 to 7 of the indictment for the offence of murder.

6. The convictions on counts 1 and 8 to 11 of the indictment are affirmed.
7. The appeal against sentence is allowed in part.
8. The sentence of 20 years' imprisonment at hard labour on count 1 of the indictment is set aside and substituted therefor is a sentence of 19 years' and nine months' imprisonment at hard labour, with three months spent on pre-sentence remand being fully credited.
9. The sentences on counts 8 to 11 are affirmed.
10. The sentences on counts 8 to 11 are to run concurrently but consecutively to the sentence on count 1 as imposed by the learned trial judge. The appellant shall therefore serve an aggregate term of 39 years and nine months' imprisonment at hard labour.
11. The sentence on count 1 is to be reckoned as having commenced on 14 December 2018, the date on which it was imposed. The sentences on counts 8 to 11 are to commence after completion of the sentence on count 1.