**[2021] JMCA App 30**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MR JUSTICE BROWN JA (AG)**
**THE HON MRS JUSTICE BROWN-BECKFORD JA (AG)**

**SUPREME COURT CRIMINAL APPEAL NO 80/2016**

**MOTION NO COA2020MT00026**

**STEVEN CAUSWELL v R**

**Garth McBean QC for the applicant**

**Jeremy Taylor QC and Nicholas Edmond for the Crown**

**7, 8 July and 10 December 2021**

**BROWN JA (AG)**

[1] The applicant, Steven Causwell, was tried and convicted for the murder of Nadia Mitchell on 8 September 2016. He was sentenced on 10 October 2016 to life imprisonment, with the stipulation that he should serve 20 years' imprisonment at hard labour before being eligible for parole.

[2] The applicant applied to this court for leave to appeal his conviction and sentence. His application for leave to appeal was first refused by a single judge of the court. He then renewed the application for leave to appeal his conviction and sentence before the court. His application was heard and dismissed by this court on 18 November 2020 with written reasons recorded in the judgment cited as **Steven Causwell v R** [2020] JMCA Crim 41 ('**Causwell v R**').

[3] By an amended notice of motion filed on 8 December 2020, the applicant is now seeking leave to appeal this court's decision to Her Majesty in Council, pursuant to section 110(1)(c) of the Constitution and section 35 of the Judicature (Appellate Jurisdiction) Act ('JAJA').

**The application for leave pursuant to section 110(1)(c) of the Constitution**

[4] The applicant is seeking leave to appeal to Her Majesty in Council, as of right, pursuant to section 110(1)(c) of the Constitution in these terms:

> "1. An order that conditional leave be granted to the [applicant] as of right to appeal to Her Majesty in Council pursuant to Section 110(1)(c) of the Constitution of Jamaica the decision of the Court of Appeal delivered on the 18th November 2020 for consideration of the following questions: -
>
> (a) Whether a delay of eight (8) years during which evidence and witnesses which could support the [applicant's] case were either lost or otherwise unavailable is in breach of the Applicant's/Applicant's right to a fair trial within a reasonable time pursuant to Section 16(1) of the Constitution of Jamaica.
>
> (b) Whether the [applicant] was deprived of his right to a fair trial under section 16(1) of the Constitution of Jamaica and suffered prejudice as a result of the following: -
>
> I. The cellular telephones of the deceased and the Appellant were unavailable for analysis. The condition of the deceased phone could assist in determining whether the deceased fell from a height.
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> II. Witnesses Detective Roye of the Scenes of Crime unit had left the Police force resulting in his statement being read into evidence without the opportunity for the Appellant [sic] or his Counsel to examine him in detail in relation to aspects of his duty which compromised the investigation.
>
> III. The pair of jeans worn by the [applicant], the comforter and clothing were missing/or [sic] could not

be found and examination of same could assist in determining whether a struggle took place and the nature of same.

IV. Witness Joseph Dereck Simmonds, the Head of Business risk for Digicel was no longer employed there and was now unavailable resulting in his statement being read into evidence without the opportunity to examine him in detail as to the nature of the request made by the [p]olice in relation to call data records and specifically the lack of records for the deceased as well as the text message data, voice mail data, roaming calls and third party network calls.

V. Detective Wilks who carried out the forensic analysis on the phone instruments and who could have given evidence of the unavailability of the said instruments as well as the potential data that should have been lifted from the cellular phones of the deceased including voicemail, text messages, call logs, videos and other such data was sent on leave out of the jurisdiction.

(c) Whether the [applicant] right to a fair trial under Section 16 (l) of the Constitution of Jamaica was breached by the Learned trial Judge not presenting and placing the [Applicant's] defence fully and fairly to the Jury when the Learned Judge directed the Jury to consider whether in respect of evidence of telephone calls made by the [applicant] after the deceased stormed out of the apartment the [applicant] '**had started to build his defence immediately and that he made those calls knowing that no one would answer**'. (Emphasis as in the original)

(d) Whether the [applicant] was deprived of his right to a fair trial under Section 16(1) of the Constitution of Jamaica by the Learned Trial Judge failing to direct the Jury that in assessing the credibility of witnesses they should take into account objective reliable and unchallenged evidence such as photographs, telephone records and forensic evidence and if such evidence contradicts the oral evidence of witnesses the Jury should reject such oral evidence.

(e) Whether the [applicant's] right to a fair trial under Section 16(1) of Constitution of Jamaica was breached by poor and

inefficient investigation by the Police in the following respects:

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I. No fingerprint impressions were taken from the scene or from the deceased's cellular phone.

II. There was no collection of blood, nail and hair samples for testing by the Forensic Department from the passage below the washroom area.

III. No detailed and comprehensive photographs were taken of the cellular phone of the deceased.

IV. The Apartment of the deceased or the scene of death was not secured by the Police investigators.

V. Loss of the telephones of the Appellant and the deceased.

VI The failure to procure any telephone records for the deceased to assist the investigation.

(f) Whether the Prosecution breached their duty of disclosure resulting in a breach of the [applicant's] Constitutional right to a fair trial by failing to disclose and make available the four telephone instruments for independent analysis at the instance of the Defence and to disclose the person or persons who were responsible for the availability or non-availability of the said telephone instruments despite repeated applications by the Defence.

(g) Whether such non-disclosure, particularly of the telephone instruments of the deceased which could have had vital evidence of video images of the movements and actions of the deceased shortly before her death, caused prejudice to the [applicant]."

**Analysis**

[5] The applicant has set out a number of questions claiming that he was deprived of his right to a fair trial due to delay, the unavailability of witnesses and potential exhibits at the trial, failure by the learned trial judge to fully and fairly put his case to the jury and lack of disclosure. At this juncture it is necessary to set out section 110(1)(c) of the Constitution. The relevant portion states:

> "An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases –
>
> ….
>
> (c) final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution; …"

[6] The applicant will, therefore, have to satisfy the requirements in this section in order to succeed in his application. It must be established that the decision being appealed is (a) a final decision of this court, (b) in respect of a criminal case and (c) involve questions as to the interpretation of the Constitution (see **Shawn Campbell, Adidja Palmer, Kahira Jones and Andre St John v R** [2020] JMCA App 41 ('**Shawn Campbell v R**' ).

[7] The decision, in this case, is a final decision of this court in criminal proceedings. The requirement in relation to whether there are "questions as to the interpretation of this Constitution" is the only criterion on which issue is joined. In this case, the court is required to consider whether the applicant's right to a fair hearing has been breached in a way that required this court to take a "fresh look" at the provision given the circumstances outlined by the applicant in support of his notice of motion. Section 16(1) of the Constitution is extracted below:

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

[8] In the light of this court's decision in **Shawn Campbell v R**, it is important to determine whether the complaint involves a misapplication of the relevant principles or an interpretation of the provision.

[9] In **Shawn Campbell v R**, this court found that the applicants had failed to:

> "… show that in considering the issue of a fair hearing or trial, this court, in its judgment considered elements that are so

> unique or novel that they are not well-established principles that help to comprise a fair hearing …"

Brooks JA (as he then was) went on to state say:

> "… To be plain, therefore, the inclusion of the term 'fair hearing' in a proposed question does not automatically qualify it for referral to their Lordships' Board."

[10] In examining the issues raised in the questions posed by the applicant, it will have to be determined whether the court interpreted section 16(1) of the Constitution based on new or novel circumstances or applied the established principles regarding the right to a fair trial. The applicant can only succeed in having the matter referred to the Privy Council if the court had to interpret the section based on new or novel circumstances in the case. We will now consider the questions posed by the applicant.

[11] The issues arising in the questions posed will be summarized and dealt with below.

**Whether the delay of eight years before the matter was tried led to a breach of the applicant's right to a fair trial within a reasonable time – Question 1(a)**

**Whether the applicant suffered prejudice and was deprived of a fair trial as a result of the unavailability of witnesses and missing potential exhibits – Question 1(b)**

[12] These two questions will be dealt with together.

Applicant's submissions

[13] The applicant argued that in **Shawn Campbell v R**, this court outlined the applicable principles in relation to an appeal as of right and stated that the authorities establish that the questions must involve misinterpretation of the Constitution and not just misapplication.

[14] The applicant went on to submit that the dicta of Brooks JA (as he then was) in **Shawn Campbell v R** declared that the approach of this court should be to "decide on the facts of each case". It was submitted that in this case, all the questions raised required

this court to take "a fresh look" at interpreting the constitutional provision requiring a fair hearing.

[15] The applicant argued that in relation to the issues raised in questions 1(a) and (b), this case is similar to **Lescene Edwards v R** [2018] JMCA App 48. It was also submitted that the delay in this case and its consequences undoubtedly caused prejudice to the applicant, as was held in **Lescene Edwards v R**.

[16] However, in his supplemental submissions, the applicant advanced that apart from the inordinate delay, which was conceded by the prosecution; there are more factors than in **Lescene Edwards v R** which caused or were capable of causing prejudice to the applicant and which resulted in an unfair trial in breach of his constitutional rights. These are set out in question 1(b) of the amended notice of motion (see para. [4] above). Further, there are questions raised in this motion or application that were not raised in **Lescene Edwards v R** that are of fundamental importance. These are questions 1(c), (d) – (g) of the amended notice of motion (see para. [4] above).

Crown's submissions

[17] The Crown agreed that an issue arose in relation to delay and its consequences on the fairness of the trial as detailed in questions 1(a) and (b) of the applicant's amended notice.

[18] The Crown then sought to distinguish this case from **Lescene Edwards v R**. The points made may be summarized as follows:

(a) unlike in **Lescene Edwards v R** the pathologist was available in this case;

(b) there were items that were not available at the trial but they were described and examined and the findings were made available to the defence;

(c) the witnesses whose statements were admitted into evidence would have been subject to a voir dire pursuant to section 31D of the Evidence Act;

(d) in **Lescene Edwards v R**, the cumulative effect of the pre-trial delay and the delay at the Court of Appeal was pleaded;

(e) the Court of Appeal (in the instant case) found that the delay was not entirely attributable to the Crown;

(f) the effect of the particulars pleaded in this case had a negative effect on how the prosecution presented its case which, it is submitted, inured to the benefit of the applicant. Furthermore, there is no pleading that there were witnesses and evidence that he wished to adduce on his case and that delay prevented him from having them available.

[19] Counsel for the Crown argued that although the pre-trial delay, taken by itself, is a breach of the applicant's right, it cannot be said that the consequences had a deleterious and prejudicial effect on the conduct of the trial producing unfairness and a violation of section 16(1) of the Constitution.

Discussion

[20] In dealing with the issue of delay, P Williams JA, who delivered the unanimous decision of the court in **Causwell v R**, examined the law and the applicable principles. Although she made sure to point out that it is now accepted that delay constitutes a breach of the constitutional right to a fair trial, she relied on this court's decision in **Lescene Edwards v R**. The learned judge of appeal cited, in particular, Brooks JA's (as

he then was) reliance on the Privy Council's decision in **Bell v Director of Public Prosecutions** (1985) 32 WIR 317, where he stated at para. [48] of the judgment that:

> "Their Lordships held that '[i]n determining whether delay in bringing an accused to trial constituted a breach of his right to a fair trial within a reasonable time under section 20(1) of the Constitution a court should have regard to the length of the delay, the reasons alleged to justify it, the responsibility of the accused for asserting his rights, and any prejudice to the accused' (page 318d). This approach was adopted in **R v Dalton Reynolds** … In **R v Dalton Reynolds**, this court also specifically considered the strength of the prosecution's case."

[21] P Williams JA stated at para. [176] of the judgment that:

> "… It is no longer whether the delay constituted a breach as it is now accepted that a delay does in fact constitute a breach and this is so whether there is prejudice to the appellant. The question then becomes what, if any, remedy should be afforded to the accused person and the issue of fairness to the accused must then be factored in."

[22] The learned judge of appeal then outlined the circumstances in relation to the delay in this case at para. [177]. Which we now encapsulate. The case first came before the court on 24 March 2009. The applicant was granted bail on that date. Several mention dates preceded the fixing of the first trial date on 19 October 2010. The absence of the doctor resulted in an adjournment on that date. After that date, the case was listed for trial eight times before commencing on 12 July 2016. The delay between the date of the offence, 15 or 16 July 2008, and the eventual commencement of the trial was eight years, which was accepted as inordinate. On four of the trial dates the case was not reached, on account of the court before which the case was listed being engaged in other trials. The illness of the investigating officer was responsible for the trial being postponed on two occasions. In the interim, there were several mention dates to enable the Crown to satisfy disclosure obligations. Inexplicably, one disclosure requirement, the service of a fingerprint report, occasioned several mention dates, only for it to be discovered that no fingerprints had been taken.

[23] It was against this background that the court concluded that "there was no overriding unfairness to the applicant given the reasons for the delay and especially since it was not due entirely to the prosecution". The court went on to note, at para. [178], the silence in the records on the issue being raised as a bar to the trial going ahead.

[24] In dealing with the issue of delay, the court applied the principles relevant to section 16(1) of the Constitution. Therefore, the court did not embark upon an interpretation of the section in relation to a novel set of circumstances. Accordingly, we conclude that question 1(a) that raises the issue of delay, in this case, does not involve an interpretation of section 16(1) of the Constitution and, consequently, cannot be referred as of right to Her Majesty in Council pursuant to section 110(1)(c).

[25] And so we come to question 1(b). The court in arriving at its decision went through each complaint, examined the circumstances of the case and made certain findings. In relation to the absence of the deceased's and the applicant's telephones, the court found, at paras. [182]–[183], that the evidentiary materials from the phones were placed before the jury for the consideration of the applicant's case. That finding had two bases. The first was that the statements of Constables Shawn Brown and Kemar Wilks, as well as that of Joseph Simmonds, which pertained to the missing telephones, were read to the jury. Secondly, extensive call records from the applicant's telephone, together with similar records from the deceased's telephone were attached to the statements of these witnesses and, consequently, became part of the evidence. Another finding the court made was that counsel on both sides made use of extracts from these attachments during their closing addresses. The court also noted the use made of those extracts in arguments before it.

[26] At the end of this analysis, the court was of the view that two matters remained shrouded in doubt: the extent and nature of any further analysis of the phones; and how the failure in that regard could negatively impact the defence. That led the court to conclude the absence of the telephones did not result in any deducible prejudice to the applicant. In arriving at this conclusion, the court also observed that no questions relating

to damage of the telephone were asked of the relevant witnesses. The court found it remarkable that the applicant himself made no mention of the telephone. In short, no issue was joined at the trial in relation to the condition of the phone to afterwards assert, on appeal, that the applicant's trial was unfair by virtue of the absence of evidence of the condition of the telephone.

[27] Moving from the absence of the phone, attention was next directed to the fact that Detective Sergeant Roye, the scene of crime investigator, did not testify. The court considered the role played by Detective Sergeant Roye and concluded at para. [184] that:

> "From his statement, it is apparent that Detective Sergeant Roye did not make any visits to the scene alone and the other officers who accompanied him testified and were extensively cross-examined. The possibility of Detective Sergeant Roye being able to do anything to compromise the investigation was not raised with any of these officers. Whilst it is true that it would have been better for Detective Sergeant Roye to be confronted himself about that possibility, it is not apparent from his account of the role he played in the investigations and the eventual use that was made of the items that he collected, how he could have compromised the investigations such that his absence at the trial affected its fairness to the applicant."

[28] The court also assessed the circumstances of the case in the light of the missing items, such as the applicant's jeans, comforter and clothing and found, at para. [186], that although these items were missing at the time of the trial, they had been the subject of analysis and the analyst gave evidence of the tests and the results. The condition of the items and the likelihood of inferential support for a struggle was not raised with either the analyst or the witnesses who collected the items. Furthermore, no issue arose concerning evidence of a struggle in relation to the applicant's shirt, which was put into evidence. Therefore, in relation to the missing jeans pants, it would be a matter of speculation that whereas the applicant's shirt bore no evidence of a struggle, his pants did. Likewise, the absence of the comforter was mitigated by photographs that were admitted into evidence. Since it was a part of the applicant's case that he was involved

in an incident with the deceased, in which violence was used, the absence of the items did not carry in its wake any apparent unfairness to the applicant.

[29] The applicant also complained that he suffered prejudice due to the absence of Detective Wilks and Joseph Simmonds at the trial. Detective Wilks carried out forensic analysis on the phones, and Mr Simmonds was the Head of Business Risk for the telecommunications provider, Digicel, and had created a compact disk ('CD') containing call records.

[30] The court stated at paras. [187] – [188] of the judgment that:

> "[187] The final two instances referred to by Mr McBean as causing prejudice to the applicant are the absence of witnesses Joseph Simmonds and Constable Wilks from the trial, with their statements being read into evidence. As already noted, the defence was not deprived entirely of the information that came from the call records and data that these two witnesses had assisted in collating and which were exhibited for the jury's consideration. In relation to the CD that had been produced by Mr Simmonds which was admitted into evidence, another witness called by the defence was permitted to explain and comment on its contents. Whilst the presence of these witnesses would have facilitated their being able to explain, themselves, the information contained in the exhibits, there is nothing to indicate that any unfairness to the applicant, occasioned by their absence, is sufficient to have an impact on the jury's verdict.
>
> [188] In conclusion on this ground, the matters that were relied on as causing prejudice to the applicant do not support the contention that, as a result of the delay of eight years, the trial of the applicant was unfair and the unfairness was of such a nature that the jury's verdict ought to be disturbed."

[31] From the findings made by the court it is clear that the court was applying the relevant principles in determining whether or not there was a breach of the appellant's right to a fair trial. There was no question as to the interpretation of the Constitution relating to the matters raised in questions 1(a) and (b). Therefore, the applicant has

failed to establish that these questions should be submitted to her Majesty in Council as of right.

**Whether the applicant was deprived of his right to a fair trial as a result of the learned judge's failure to fully and fairly present the applicant's defence to the jury - Question 1(c)**

**Whether the applicant was deprived of a fair trial by learned judge's failure to direct that in assessing the credibility of the witnesses they should take into account objective reliable and unchallenged evidence such as photographs – Question 1(d)**

These two questions will be dealt with together as they both deal with the trial judge's directions to the jury.

Applicant's submissions

[32] The applicant submitted that the issue raised in question 1(c) falls within the category of cases outlined by Brooks JA, at para. 18(f) in **Shawn Campbell v R**. The applicant contends that the learned trial judge did not allow his case to be fairly presented when she commented that the applicant "had started to build his defence immediately and that he made those calls knowing that no one would answer".

[33] The applicant argued that although a trial judge is allowed to comment on the evidence, the learned trial judge went too far as there was no evidence to show or support the comment made by her in relation to the telephone calls made by him. This, it was urged, undermined the applicant's defence. Further, he contended, in **Rupert Crosdale v R** [1995] 2 All ER 500 at 509, the Privy Council allowed an appeal where the judge's comments undermined the defence.

[34] It was submitted that question 1(d) of the notice of motion fell in the category of cases contemplated by Brooks JA in para. [18](c) of his judgment in **Shawn Campbell v R**, as the learned trial judge failed to give fair and clear guidance to the jury as to the assessment of the oral evidence. Also that the learned trial judge failed to direct the jury as to how to treat the objective, reliable and unchallenged evidence such as photographs,

telephone records and forensic evidence which adversely affected the oral evidence of certain witnesses.

Crown's submissions

[35] The Crown submitted that the learned trial judge was neither commenting nor expressing an opinion on the evidence. Instead, she was posing competing views of the evidence as questions to be and resolved by the jury.

[36] The Crown also referred to the view taken by this court based on the context and its conclusion that "[t]here is nothing unfair or prejudicial about this comment in these circumstances". It was also argued that in the end, the learned trial judge directed the jury that it was their duty to resolve the issue.

[37] Counsel for the Crown argued that this court adequately dealt with the issues raised by the applicant; and went on to argue further that the issue of whether any bit of evidence is objective and reliable is a matter for the fact-finder, not one of automatic acceptance even in relation to expert reports, findings and conclusions.

[38] Counsel for the Crown also submitted that there is nothing in the way the learned trial judge dealt with the evidence that rises to the level of unfairness and consequently a breach of the Charter of Fundamental Rights and Freedoms ('the Charter').

Discussion

[39] The applicant complained that the learned judge failed to fairly put his case to the jury and to properly direct them as to how they should assess the credibility of the witnesses. Concerning the complaint as to whether the learned trial judge had fairly put the applicant's case to the jury, the court at para. [145] considered the context in which the comment was made to be significant. Accordingly, the court proceeded to set out the portion of the summation from which the remark was taken. Having examined the comment in its context, the court opined that the comment was no more than the juxtaposition of the evidence with the view the prosecution urged upon the jury. The

court then went on to find that the comment lacked the kernel of either unfairness or prejudice.

[40] In examining the learned trial judge's approach, P Williams JA, at para. [139] of the judgment, cited para. [26] of **Lescene Edwards v R**, where Brooks JA concisely set out the duty of a trial judge when summing up to the jury. The basic proposition is that a trial judge is not required to delve into the minutiae of the evidence to explain the case for the prosecution or the defence. The summation will be generally sufficient if the judge (a) gives a fair and balanced compendium of the case for the prosecution and the defence, highlighting the material discrepancies or inconsistencies; and (b) includes directions on how to treat with discrepancies and inconsistencies. Based on that guidance, the court concluded, at para [140] of the judgment, that the learned trial judge's directions to the jury concerning their functions and duty to arrive at the truth, was unexceptional.

[41] In support of this conclusion, the court first extracted a section of the learned judge's opening remarks in which matters regarding the assessment of, and conclusions on the evidence, were discussed with the jury. In this regard the jury were advised: (i) it was unnecessary to decide all the points raised in the trial; (ii) they only had to decide matters which assisted them in arriving at a verdict; and (iii) the way to come to those decisions was by a consideration of all the evidence and forming their own judgment about the reliability and credibility of each witness. The court remarked that it was against this background that the learned judge reviewed the evidence and repeatedly reminded the jury to consider all the evidence in coming to their decision. The court opined that the focus of this ground was the learned judge's treatment of the call data and their likely impact on the assessment of the witnesses' credibility. In this vein, the court observed that the learned judge both reviewed that evidence and invited the jury to consider it. The court also observed that the learned judge's comments on this evidence attracted no adverse criticism(see para [141] of the judgment).

[42] P Williams JA went on to conclude at para. [142]:

> "In any event, it may not have been fair or accurate for the learned trial judge to have invited the jury to accept that evidence of several phone calls, made between the applicant and the deceased, contradicted the evidence from Mr McCormack that he formed the view that the deceased was afraid of the applicant. Neither could it be fairly said that such evidence should be used to assess the credibility of Miss Prendergast in the manner that Mr McBean posited. The learned trial judge did not err, in our view, when she dealt with this evidence in the manner she did."

[43] The court examined the trial judge's approach in the light of the applicable principles and the complaints made. This was clearly an application of the principles relating to the duty of a trial judge to direct the jury based on the circumstances of the case to ensure that the trial of the applicant was fair. Accordingly, this process did not involve an interpretation of section 16(1) of the Constitution.

**Whether the applicant's right to a fair trial was breached by poor and inefficient investigation – Question 1(e)**

Applicant's submissions

[44] It was argued that poor and inefficient police invetogations has become a fairly common practice, which requires an interpretation of the constitutional provision for a fair hearing as it deprived or was capable of depriving the applicant of a fair trial.

[45] The applicant complained that the fact that the learned trial judge commented on the poor and inefficient investigation does not adequately deal with this issue. And that coupled with the other missing evidence, it deprived or was capable of depriving the applicant of a fair trial, in breach of his constitutional rights and, therefore, is a question to be considered by Her Majesty in Council.

Crown's submissions

[46] Counsel for the Crown agreed that the investigation was of less than stellar quality. It was, however, contended that this enured to the benefit of the applicant at the trial. Consequently, there was no Charter breach by the police in the way they conducted their

investigation. It was submitted that it is not the investigator or evidence gatherer that guarantees a fair trial; it is the court.

[47] Further, deficiencies in investigations do not necessarily give rise to a Charter breach unless they are systematic rather than operational, or if operational, rise to such a level that they cannot be ignored. In support of this submission, the Crown relied on the decision of the United Kingdom Supreme Court in **DSD and another v Metropolitan Police Commissioner** [2018] 3 All ER 369.

[48] It was submitted that, in any event, the errors in the investigation are not egregious and serious, so as to give rise to section 110(1)(c) being invoked and the Charter right to a fair trial being breached.

Discussion

[49] This question raises the issue of the quality of the investigation by the police and whether it prejudiced the applicant's right to a fair trial. The applicant complained that his right to a fair trial had been breached due to the poor and inefficient investigation conducted by the police. It should be noted that the applicant did not pursue the complaints regarding the failure to collect fingerprint impressions and secure the crime scene, these were itemised at 1(e) (i) and (iv).

[50] In addressing the learned trial judge's approach in dealing with the quality of the investigations, P Williams JA cited a passage from the trial judge's summation, which addressed the issue and concluded at para. [190] of the judgment that:

> "The learned trial judge, here, very fairly and appropriately, pointed out to the jury that they were to focus and be satisfied on the evidence that was presented, in determining whether the applicant was guilty."

[51] P Williams JA then cited the dictum of Brooks JA in **Lescene Edwards v R** concerning the factors that ought to be considered where "there has been a failure to collect evidence or where though collected has been lost or destroyed …". The learned

judge of appeal stated that Brooks JA also opined that some level of reasonableness should be applied when assessing whether or not there is a breach of duty in this regard.

[52] P Williams JA then went on to say that:

> "[193] The fact that there were no independent eyewitnesses to what had happened between the applicant and the deceased meant that the police were indeed under an obligation to collect all the possible available evidence that would assist in determining the events that had led to her death …"

[53] Having so expressed herself, P Williams JA addressed complaints made by the applicant regarding the police investigation. She found the investigation wanting as it related to the substance in which the telephone was found. The learned judge of appeal opined:

> "[194] There, however, seems to have been a breach in the obligation to collect all relevant evidence by the failure to have any analysis done in relation to the substance in which the phone of the deceased was found. Although the opinions of the expert witnesses were solicited as to what the substance could have been, there was no scientific confirmation of whether the substance was in fact blood …"

She also pointed out that the learned trial judge commented several times in the summation on this issue.

[54] The complaints regarding the telephones were dealt with as follows by the learned judge of appeal at para. [195]:

> "The breaches pointed to, in relation to the telephone of the deceased, concerned failure to take pictures of it, its eventual loss and the failure to procure records from it. Also, added to that, there was the loss of the telephone belonging to the applicant. It has already been discussed how requests were made for the telephones from shortly after the matter was placed before the court. Eventually, when it was made known that the telephones were missing, call records and data from the telephones were provided to the defence. The applicant

> was therefore able to, and did, rely on the records which were provided. It would be speculative to presume that there was other material on the telephone, the absence of which impacted adversely the case for the defence …"

She also highlighted the trial judge's treatment of this issue and continued:

> "… In the circumstances, the breach occasioned by the missing telephones was adequately addressed and dealt with in a manner that did not interfere with the fairness of the trial."

[55] Having assessed the complaints about the poor and inefficient investigation, P Williams JA found that they did not rise to a level that would warrant interference with the conviction. She concluded that:

> "[198] Although it was conceded by the Director at the trial that there was indeed poor and inefficient investigation, the examples highlighted were not of such a nature that it can be said that it resulted in a breach of the constitutional right of the applicant to a fair trial, which could only be addressed by interfering with his conviction …"

[56] The court found that even though the police had breached their duty to collect all relevant evidence, the applicant's constitutional right to a fair trial had not been breached. Accordingly, in dealing with this complaint, the court applied the applicable principles regarding the applicant's right to a fair trial to arrive at its conclusion. There was no interpretation of the relevant provision of the Constitution.

**Whether the prosecution's breach of their duty to disclose deprived the applicant of his right to a fair trial – Question 1(f)**

**Whether the non-disclosure resulted in prejudice to the applicant – Question 1(g)**

Applicant's submissions

[57] It was submitted that questions 1(f) and (g) in the amended notice of motion raise the issue of the duty of disclosure on the part of the prosecution. The applicant contended that, although there are several decisions dealing with the duty of disclosure, which have

established that it falls under the constitutional right to a fair trial, the circumstances of this case fall for consideration under section 110(1)(c) of the Constitution.

[58] The applicant complained that the court's approach in relation to the deceased's telephone not being available was incorrect. The applicant argued that the court erred in holding that the issue of the missing phones did not arise; because no questions were asked of the witnesses who handled the telephone, taken from what appeared to be blood at the back of the apartment, and the applicant made no mention of it. This, it was argued, placed the burden on the applicant to raise the issue rather than analysing this evidence on the basis that the very fact that the cellular phone belonged to the deceased raised the real possibility of video images being recovered from it. Also, that, as well as its physical condition, could have assisted the defence.

[59] It was also argued that the mere fact that there is a real possibility that the telephone could contain evidence and the applicant was deprived of such evidence could vitiate a fair trial. In support of this submission, the applicant relied on **Willard Williamson v R** [2015] JMCA Crim 8.

Crown's submissions

[60] The Crown submitted that although there was non-disclosure of the actual items, the extracts from those phones were disclosed, and the defence was able to deploy the material effectively in presenting its case to the jury.

[61] Concerning question 1(g), the Crown relied on the court's decision in **Causwell v R** at para. [203] where it was stated that the issue of the missing telephone was not raised at the trial and that to consider it at this stage "would be an exercise in speculation".

Discussion

[62] It is well-established that the prosecution has a duty to disclose all relevant information to the defence. The court found that there was a breach of the prosecution's

duty to disclose the telephone instruments, which included the applicant's phone. At para. [201], P Williams JA found that:

> "The prosecution was clearly unable to provide the items that the defence had requested, but took steps to try to ensure the applicant was not deprived of material from them. Ultimately, however, there was non-disclosure of material the defence requested which could have assisted them in advancing the case for the applicant."

[63] In **Williamson v R**, this court relied on the Privy Council decision in **Bonnett Taylor v The Queen** [2013] UKPC 8 in identifying the test to be applied in determining whether there has been a miscarriage of justice due to the failure to disclose. In **Bonnett Taylor v R** the Privy Council held at para. 13 that when there is a failure to disclose:

> "…The focus must be on the impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than on attempting to assess the extent to which either the prosecution or the defence counsel were at fault: *Teeluk v State of Trinidad and Tobago* [2005] UKPC 14 … The court must have material before it which will enable it to determine whether the conviction is unsafe … It is not enough to engage in speculation ..."

In **Williamson v R**, McDonald-Bishop JA (Ag), as she then was, in commenting on the Privy Council decision in **Bonnett Taylor v R**, held at para. [82] that:

> "Their Lordships did go on to establish clearly in paragraph 20 that the relevant test in determining whether a miscarriage of justice had occurred, is whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome …"

[64] P Williams JA, in applying the relevant principles, stated at paras. [203]–[204] of the judgment that:

> "[203] The defence was able to include in its case the data and call records taken from the telephones of the applicant and the deceased. From the summation of the learned trial judge, it is apparent that both Queen's Counsel were able to

> use this material in the addresses they made to the jury. The learned trial judge appropriately left the matter of the missing telephones to the jury and also used the records in a fair and balanced manner in her summation. The records were exhibited and the jury had them to assist in their deliberations. It is noted that the complaint is that the missing telephones "could have had vital evidence of video images of the movements and actions of the deceased shortly before her death". The possibility of this did not arise from the applicant himself during the trial and, for this court to consider at this stage if they could have had such evidence, would be an exercise in speculation.
>
> [204] In the circumstances of this trial, it cannot be said that there is a real possibility there would have been a different outcome, hence there is no miscarriage of justice."

[65] It is clear from the court's approach and the decision made that the court applied the relevant principles applicable to disclosure and the impact of the failure to disclose.

[66] The court, in addressing the complaints in relation to the breach of the applicant's right to a fair trial, as guaranteed by the Constitution, was applying the relevant principles to the circumstances of this case in order to determine if there were any breaches that could constitute a violation of the applicant's right to a fair trial that could have impacted his conviction. It is palpable that the court did not engage in interpreting the Constitution in any novel way or at all.

[67] We conclude, therefore, that the applicant's application for leave to appeal to Her Majesty in Council as of right must fail.

**The application for leave pursuant to section 35 of the JAJA**

[68] We will now turn our attention to the second basis upon which the applicant seeks leave, that is, pursuant to section 35 of the JAJA. The application is in the following terms:

> "2. An order that leave be granted to the [applicant] pursuant to section 35 of the Judicature (Appellate Court) Jurisdiction Act to appeal to Her Majesty in Council the decision of the

> Court of Appeal on the ground that the following questions in the appeal involve points of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought:-
>
> (a) Whether trial judge [sic], such as in the instant case should withdraw the case from a [j]ury where expert evidence called by the Prosecution as to the cause of a fatal injury is inconclusive and another expert called by the [d]efence is conclusive as to the cause of death, neither of which implicates the accused.
>
> (b) Whether a Trial Judge is obliged to withdraw a case from a Jury in circumstances where there is no evidence linking the accused to the fatal injury."

The applicant also sought and was granted leave to argue the questions considered pursuant to section 110(1)(c) of the Constitution under section 35 of the JAJA.

Applicant's submissions

[69] The applicant submitted that an unusual but legally permissible event occurred when the learned trial judge, after rejecting a no case submission and after the evidence of the defence witnesses, requested further submissions as to the nexus between the applicant and the fatal injury.

[70] It was submitted that the questions posed in paragraphs 2(a) and 2(b) raise points of law of exceptional public importance.

[71] The applicant argued that there was no evidence that he inflicted the fatal blow that shifted the deceased's brain from one side to the other side of her head. The applicant went on to argue that this is not a case of competing experts as the court of appeal held.

Crown's submissions

[72] In relation to the questions pursuant to section 35 of the JAJA, the Crown submitted that there are a number of applicable principles and relied on this court's decision in **The General Legal Council v Janice Causewell** [2017] JMCA App 16. The

Crown also submitted that the court should not refer a question to the Privy Council if the Board has previously given its opinion on that question.

[73] The Crown argued that, in essence, the issue is one of duelling experts and the law on expert evidence is settled. Further that the Privy Council recently re-stated the law on expert evidence in an appeal from Bermuda in **Myers v R; Brangman v R** [2016] AC 314.

[74] The Crown submitted that it is not the function of the Judicial Committee to act as a second court of criminal appeal. The Crown referred the court to the Privy Council's decision in **Michael Gayle v The Queen** (1996) 48 WIR 287 at 288.

It was argued that this is a question of fact that was ultimately within the province of the jury as to which expert they preferred, the local pathologist who examined the body of the deceased or the foreign pathologist who made his assessment based on photographs and reports.

Discussion

[75] Section 35 of the JAJA was enacted by Parliament pursuant to section 110(2)(b) of the Constitution. Section 110(2) of the Constitution states:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases –
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and
>
> (b) **such other cases as may be prescribed by Parliament**." (Emphasis added)

Section 35 of the JAJA provides:

> "The Director of Public Prosecutions, the prosecutor or the defendant may, with the leave of the Court appeal to Her Majesty in Council from any decision of the Court given by virtue of the provisions of Part IV, V or VI where in the opinion of the Court, the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal should be brought."

[76] In a very comprehensive judgment, Brooks JA, in **Shawn Campbell v R,** examined, among other things, the law in relation to applications for leave to appeal to the Privy Council based on section 110(2) of the Constitution and section 35 of JAJA. In commenting on the connection between these two legislative provisions Brooks JA observed that:

> "[43] Parliament, by section 35 of JAJA, has prescribed, pursuant to section 110(2)(b), the types of criminal cases that may be sent on appeal to the Privy Council. Section 35 mirrors, in some ways, the standard prescribed, in respect of civil cases, by section 110(2)(a) …"

[77] Brooks JA later noted that "the difference in terminology suggests a higher standard in criminal cases". The learned judge of appeal cited the principles as expounded by the Privy Council in **Edith May Hallowell Carew v The Queen** [1897] UKPC 32 and **Nirmal son of Chandar Bali v The Queen** [1971] UKPC 39 in relation to the standard to be applied in criminal cases.

[78] At para. [44], Brooks JA cited with approval the following passage from page 2 of **Edith May Hallowell Carew v The Queen**:

> "…it is only necessary to say that, **save in very exceptional cases, leave to appeal in respect of criminal investigation is not granted by this Board**. The rule is accurately stated as follows, in the case to which their Lordships referred in the course of argument, *re Abraham Mallory Dillett* ((1887) 12 App. Ca. 459): 'Her Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process, or by some violation of the principles of natural

> justice, or otherwise, substantial and grave injustice has been done'." (Emphasis supplied) (Italics as in original)

[79] He also cited at para. [45], the following passage from **Nirmal son of Chandar Bali v The Queen**, which also explains the standard for reviewing appeals alleged to be of "exceptional public importance":

> "…In *Ibrahim v. R*. Lord Sumner said at pp. 614 615 '…Their Lordships' practice has been repeatedly defined. Leave to appeal is not granted 'except where some clear departure from the requirements of justice' exists: *Reid v Reg*. (1885) 10 App. Cas 675; nor unless 'by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done': *Dillet's case*. It is true that these are cases of applications for special leave to appeal, but the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being on the same footing: Reil's case. *Ex parte Deeming* [1892] A.C. 422. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself: and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it. Misdirection, as such, even irregularity as such, will not suffice: *Ex parte Macrea* [1893] A.C. 346. **There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future**: *Reg v. Bertrand*.'" (Emphasis supplied) (Italics as in original)

[80] In **Shawn Campbell v R**, Brooks JA, in addition to the guidance given by the Privy Council, held that the principles applicable to section 110(2)(a) based on previous decisions, including this court's decision in **The General Legal Council v Janice Causewell** [2017] JMCA App16, were relevant in determining whether or not to grant leave pursuant to section 35 of the JAJA. He cited the following passage from McDonald-Bishop JA's judgment in that case:

"The principles distilled from the relevant authorities may be summarised thus:

i. Section 110(2) involves the exercise of the court's discretion. For the section to be triggered, the court must be of the opinion that the questions, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

ii. There must first be the identification of the question involved. The question identified must arise from the decision of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal.

iii. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue, which requires debate before Her Majesty in Council. If the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general or public importance.

iv. Thirdly, it is for the applicant to persuade the court that the question identified is of great general or public importance or otherwise.

v. It is not enough for the question to give rise to a difficult question of law; it must be an important question of law or involve a serious issue of law.

vi. The question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations.

vii. The question should be one of general importance to some aspect of the practice, procedure or administration of the law and the public interest.

viii. Leave ought not be granted merely for a matter to be taken to the Privy Council to see if it is going to agree with the court.

xi. …"

[81] Brooks JA also considered two additional principles. They are that the court should not refer a question to the Privy Council if the Board had previously given its opinion on

that question and as stated in **Michael Gayle v R** [1996] UKPC 18 that "it is not the function of the Judicial Committee to act as a second Court of Criminal Appeal". Although the learned judge of appeal expressed some reservation about the applicability of the latter principle, it was, nevertheless, highlighted by him.

[82] To succeed, the applicant must satisfy all of the requirements in section 35 of the JAJA. In the light of the circumstances of this case, it is clear that the main issue will be whether "the decision involves a point of law of exceptional public importance and it is desirable in the public interest that a further appeal be brought".

[83] The questions listed at 2(a) and (b) of the notice of motion raise the issue as to the power of the trial judge to withdraw the case from the jury. In a trial with judge and jury, the role and function of the trial judge and the jury are clearly defined.

[84] The issue highlighted in question 2(a) is a matter to be decided by the jury. The court held at para. [118] of the judgment that:

> "The assessment of the conflicting opinions of the two pathologists was the purview of the jury. It was for them to determine which, if any, they preferred and whether on the totality of the circumstantial evidence, they were satisfied beyond a reasonable doubt that the applicant had caused the death of the deceased. The learned trial judge did not fall into error when she ruled that the matter was to proceed to the jury …"

[85] In relation to question 2(b), the Crown relied on circumstantial evidence to prove that the applicant murdered the deceased. In the judgment of the court, P Williams JA adverted to the decision in **Baugh-Pellinen v R** [2011] JMCA Crim 26 where Morrison JA (as he then was) applied the decision in **McGreevy v Director of Public Prosecutions** and held that "[t]here is no rule requiring a special direction in which the prosecution places reliance either wholly or in part on circumstantial evidence …"

[86] In dealing with the power and duty of a trial judge to withdraw a case from the jury, P Williams JA, at the outset, correctly stated the law, at paras. [113]-[114] as follows:

> "[113] It is undisputed that a trial judge has a power and a duty to withdraw a case from the jury at any time even after the close of the prosecution's case, if he is satisfied that no jury, properly directed, could convict. The learned authors of Archbold noted that in **R v Ramsey** [2000] 6 Archbold News 3, the English Court of Appeal said that in a borderline case, even if the judge properly rules that there is a case to answer, he may be under a duty to re-visit the issue of the evidence, taking account of the evidence called on behalf of the defence.
>
> [114] It is, however, the same principle that guides the judge in coming to a decision on whether to uphold a no case submission that should guide him in deciding whether to withdraw the case from the jury, which is that he must not appear to be assessing all the evidence himself and coming to a decision on the guilt or innocence of the accused, thereby usurping the role of the jury."

[87] The applicable principle that should guide the trial judge in determining whether or not to withdraw a case from a jury or uphold a no case submission is stated in **R v Galbraith** [1981] 2 All ER 1060. In that case, Lord Lane CJ at page 1062 stated:

> "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. It follows that we think the second of the two schools of thought is to be preferred. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[88] In addressing the approach to be taken by a trial judge, when considering a no case submission in relation to circumstantial evidence, P Williams JA relied on the Privy Council's decision in **DPP v Varlack** [2008] UKPC 56 and this court's decision in **Melody Baugh-Pellinen v R**. Having done so, she then concluded at paras. [106]-[107] that:

> "[106] It is to be noted that Mr McBean was primarily focused on the sufficiency of the evidence seeking to connect the applicant with the inflicting of the fatal injury. Certainly there was no witness who could speak to exactly where, when and with what the deceased received the fatal injury. However, such is the nature of reliance on circumstantial evidence that it was incumbent upon the prosecution to lead sufficient evidence of circumstances that a reasonable mind could have reached a conclusion that it was the applicant who had caused the death of the deceased. The evidence presented up to this stage clearly established that the deceased was last seen alive with the applicant who admitted engaging in some form of violence with her before taking her dead body to the hospital. The evidence of the pathologist supported the possibility of the deceased having been in a fight and having suffered a blow to her head which ultimately led to her death. The evidence at this stage also refuted the view that she may have fallen to her death out of the window above where her body was allegedly found.
>
> [107] Given what was required of the prosecution at the end of their case, there was indeed sufficient evidence presented by them for the learned trial judge to have properly left the matter for the jury to assess and draw inferences and to ultimately make a determination for themselves as to the guilt or innocence of the applicant. The stopping of the case at this stage would have amounted to the learned trial judge usurping the role of the jury. She therefore cannot be faulted for declining to uphold the no case submission and calling upon the applicant ..."

[89] The principles of law which guide a trial judge in deciding whether to withdraw a case from the jury are by now settled. Additionally, the questions do not raise any issue that requires debate or further debate before Her Majesty in Council, and, therefore, cannot be considered to be of exceptional public importance. Accordingly, conditional leave is refused.

[90] We will now examine, under section 35 of the JAJA, the questions previously considered under section 110(1)(c) of the Constitution. We gave due consideration to the questions as to whether or not they raise any point of law of exceptional public importance and found that the issues raised fell into two categories, either that the Privy Council had already stated its views on the issue or that it was an issue that the Board has already ruled is best dealt with by the local appellate court.

[91] In relation to the questions dealing with delay and disclosure, the Privy Council had already made a pronouncement on the issues raised. The questions pertaining to the directions given to the jury would fall in the category that the Privy Council has stated should be determined by the local appellate courts (see **Michael Gayle v R** [1996] UKPC 18).

[92] The poor and inefficient investigation, based on all the circumstances of the case, did not raise any point of law of exceptional public importance.

**Conclusion**

[93] The applicant has failed to satisfy this court that any of the questions call for an interpretation of the constitutional provisions said to be engaged. Likewise, the bar has not been met for us to conclude that the issues raised and questions posed by the applicant raise any question of exceptional public importance wherein it is desirable in the public interest that a further appeal should be brought.

[94] We, therefore, make the following order:

The motion for conditional leave to appeal to Her Majesty in Council, filed on 8 December 2020, is refused.