[2010] JMCA Crim 64

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS. 69 & 71/2005

BEFORE: THE HON. MR JUSTICE COOKE, J.A.
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

DERMID DALEY
SYLVANNUS M^{C}QUEEN v R

Miss Gillian Burgess for the appellant Dermid Daley
Miss Althea McBean for the applicant Sylvannus M^{c}Queen

Miss Opal Smith and Leighton Morris for the Crown

24 , 25 November 2009, 30 July and 24 September 2010

PHILLIPS, JA

[1] On 27 April 2005 the joint trial of Sylvannus M^{c}Queen, Dermid Daley and Evon Williams for the offence of murder commenced in the Circuit Court in Savanna-la–Mar in the parish of Westmoreland. The particulars of the offence were that on 17 February 2004, they had murdered Sean Isaacs. The trial lasted several days and on 5 May 2005, the Crown offered no further evidence against the accused Evon Williams and the judge directed the jury to return a formal verdict of not guilty, which they did and he was discharged. On 18 May 2005, Sylvannus

McQueen and Dermid Daley were convicted and sentenced to life imprisonment, with McQueen not to be eligible for parole before serving 25 years and Daley not before 20 years.

[2] Dermid Daley filed an application for leave to appeal against conviction and sentence on 30 May 2005. On 1 May 2006, a single judge of this court granted leave to appeal, "in order for the court to consider whether or not the learned trial judge gave adequate directions on the issues of visual identification, credibility and reliability". This, she said was "in light of the evidence given by Emmanuel Campbell (who testified that he identified the applicant by way of recognition at the time of the commission of the offence) as well as the evidence of Sergeant Cleveland Williams as to what transpired on the identification parade held for the applicant McQueen which Mr. Campbell attended".

[3] Sylvannus McQueen filed an application for leave to appeal against conviction and sentence on 2 June 2005 and a single judge of appeal reviewed the application and refused leave to appeal. That application was therefore renewed before us.

The appeal and application were heard on 24 and 25 November 2009 and on 30 July 2010 we delivered our decision. We promised then to reduce our reasons to writing. This we now do.

The case for the prosecution

[4] The case for the prosecution stated succinctly, is that Mr Sean Isaacs, otherwise called "Papa", was sitting at a bar in Retirement in the parish of Westmoreland with some people having a drink when one of those persons took out a firearm and shot him in the head and the chest, as a result of which he received injuries from which he died. The evidence led by the prosecution at the trial was to the effect that it was the applicant who had shot and killed the deceased and it was the appellant who had rented and was the driver of the "get away" car.

[5] Of 12 witnesses called by the prosecution, there were only two eye witnesses, namely Emmanuel Campbell and Dain Parkinson, the former in respect of the appellant and the latter in respect of the applicant.

[6] Mr Campbell testified that on the day that "Papa" died, 17 February 2004, he had been doing work for, "Killer Sanko" who was building a supermarket in Retirement. He recalled that at 2:00 pm he was mixing mortar when a red car drove up from the direction of Negril and stopped against the roadside, about eight feet from where he was. He said that the car was owned by a man known as "Berry". Mr Campbell said that as the car stopped, he was coming out of the building with two pans of concrete in his hands, when he saw the driver whom he had seen

before sitting around the steering wheel in the red car. He identified the driver as the appellant.

[7] Mr Campbell further said that he was able to see the appellant clearly as there was nothing covering his face. He said that he knew the appellant's father, who was called Danny, or "Danny Star", for a long time, "nuff years", indeed over ten years, and he used to see him often with "Papa" at the same place where "Papa" was killed, under the mango tree by the bar known as "Eddie". He also used to talk to Danny often. He however did not know the appellant's name. The bar, he said was about a chain away on the other side of the road. He said that the last time he had seen the appellant was at the said bar about 3-5 months previously, and on that occasion there had been a party and the appellant had been there for about five or six hours, from the day into the night. Danny had been there also. He described the bar at the time of the incident as being one big round table around which persons sit. This table was under a mango tree.

[8] Mr Campbell swore that he had known the appellant about one year before the incident and he said at first that he had not seen him often during that period and then when pressed by Crown Counsel and the learned trial judge to be more specific he stated, "every other month"

he "pass me and go a Berry", that is the owner of the said red car. He would see him both in the day and in the night.

[9] Mr Campbell said that on the day in question while working he heard "gunshot fire", coming from the bar at the mango tree. He said that he then saw a man running from that direction with a gun in his hand and while he was running he was firing his gun in the direction where the people were sitting. He said that he saw the man with the gun run to the red car, go inside the back seat of the car and "hide there." Then the car drove off "fast". He said that the appellant did not come out of the car at any time while the car was parked there, which was for about 20 minutes, and he observed his face for about three to four minutes.

[10] On 5 March 2005, he attended the Negril Police Station as he put it, to identify "Danny Star's"` son as it was he that he had seen at the wheel of the red car that day. He said there were nine persons on the identification parade and they all had on masks, that is, cloths around their heads, and without any assistance from anyone he said he pointed out "Danny Star's" son.

[11] In cross-examination Mr Campbell when pressured agreed that he had stated at another time before "a judge" that he had only seen the appellant's face once before. He agreed that the windows of the car were tinted but said that they were at half mast and so he could see who

was inside the car. It was then suggested to him that he had pointed out two different persons, which at first he said he did not recall doing and then he denied doing so, but accepted that he had said so at another time, and then finally agreed that he had pointed out two different persons on that day, but said that he could have made a mistake the first time.

It was then suggested to him that pointing out "Danny Star's son" as the person who drove the car on the day that "Papa" was killed was a mistake. It was further suggested that the other person that he first pointed out was a brown skinned person, which he denied, insisting that on the first parade he could not have made a mistake. Finally it was suggested to him that "Papa" was his good friend and used to buy him things and that was why he had come to court to make up this tale in respect of the appellant. Mr Campbell denied that "Papa" was his good friend, but said that he "just move with everybody ina the area… when him come ina the area". He said he bought liquor and food for everyone. It was further suggested to him, which he denied, that "Papa" gave him money.

[12] In re-examination Mr Campbell indicated that he had pointed out "Danny Star's" son the second time, and he endeavored to explain why he had pointed out somebody else on the first parade. He said that there was no reason, but it was the first time he had done anything like that, he was frightened and he had panicked. He said he was told that he could

point out anyone and so he did just that. He then confirmed that "Danny Star's" son was not on the first parade but he was on the second one. He also tried to make it clear that the appellant was not someone whom he had only seen once before but was someone whom he saw all the time.

[13] The eye witness to the actual shooting was Mr Dain Parkinson. He testified that he knew Sean Isaacs, and he knew that he was also called "Papa". On 17 February 2004 at about 2:00 – 3:00 pm he was under a graham mango tree at the bar in Retirement, Westmoreland with his brother, the deceased, a "rasta guy", and there were some other persons, who were sitting across the road, in a restaurant. He said that while drinks were being imbibed he noticed a Burgundy L Touring motor car drive up and stop on the left side of the road. This car, he said belonged to one "Berry" whom he did not know by any other name. He then saw someone come around the "flowers" tree and sit beside the deceased, whom he identified as the applicant. He said that the applicant was sitting there with them around the table. He said that he had seen the applicant before, on more than one occasion in Retirement District, but he did not know him, and he did not know his name. The first time that he had seen the applicant would have been about two months before in the daytime, and he had not spoken to him, save and except to say "hi". He had also seen the applicant about 4-6 times in the interim just driving past.

[14] On the day in question he said that he could see the applicant's face as there was nothing obstructing his view, nor was there anything covering his head. Further he was sitting only 10 -12 feet away from him. He said "Papa" greeted the applicant and invited him to have a drink. He was unable to say what was the content of the conversation, as he said they both had Bahamian accents and he did not understand what they were saying. They were sitting there for about 15 to 20 minutes when he heard more than one explosion coming from the direction of the applicant. He said he saw the applicant firing a gun and thereafter he saw the deceased with his head slanted to the left. He then saw the applicant run to the said burgundy motor car which had been parked opposite the bar which drove away with him in it. While running to the car the applicant still had the gun in his hand. Mr Parkinson said he then called some of his friends and they put the deceased in his (Parkinson's) car took him to the hospital in Savanna-la-Mar, and he has not seen him alive since that day. It was his evidence also that he saw the applicant's face for the full 15 to 20 minutes that they were around the table at the bar.

[15] Evidence was given by Dr Murari Prasad Sarangi, that the deceased Mr Sean Isaacs had sustained 4 gunshot wounds to the back of the side of the head, to the right side of the back of the chest, the left side

of the chest, and the left index finger. In the opinion of the doctor, death was due to cranio cerebral damage in association with injuries to both lungs, diaphragm, and the liver accompanied by blood loss, consequent upon gunshot wounds, especially to the head and chest.

[16] On 5 March 2004, Mr Parkinson attended an identification parade and he gave evidence that he told the police in answer to their query as to his purpose there, that he had come to identify the "one who shoot Sean Isaacs". He thereafter pointed out the applicant.

[17] He was cross-examined as to whether he had a rake in his hand which at first he denied, and stated that it was "kotch up" at the table. He said he had started to rake the place, and then after talking to the deceased he stopped. He admitted that he did not see anyone step out of the car. He was challenged that he had never said before, that he had seen the applicant many times before the incident, but that he had said that he had seen the applicant only one day before, in Good Hope, which was a different district from Retirement. He was further challenged that at the preliminary inquiry he had said that he could not have been there more than five minutes before he heard "the big explosion". He maintained in his evidence that he had always stated that he had been there for 15 to 20 minutes, so the previous inconsistent statement was admitted into evidence as exhibit 8. He was asked to indicate to the court

exactly what he was doing when he heard the explosions, and his response was that he was watching the deceased, his twin brother Dwight, and the Rasta man. He was also challenged, and after some persistence from counsel, agreed that he had said before that he had the rake in his hand "same way". He insisted however, that he was not raking the yard at the material time, but it was put to him that he had given a statement to the police in which he had stated, "I continued raking the yard when I heard loud explosions behind me which sounded like gunshots". He maintained that he had never said those words. The previous inconsistent statement was admitted in evidence as exhibit 9. Finally, he was also challenged that in his statement to the police he had said, "So I spun around and saw Shawn falling from his seat", which he denied, as he said he saw when Papa got shot and he saw him falling. This statement was also admitted into evidence as exhibit 10.

[18] In cross examination by counsel for the appellant Mr Parkinson said that he knew Mr Campbell and confirmed that he had seen him there that day, working on the building on the left had side of the road. He also said that the windows of the car that drove up to the bar were all "shine tint", and were all up when the car drove up, and were still up when the car drove away.

[19] On or around 19 February 2004, Inspector Ethel Haliman, who had been stationed at the narcotics division headquarters for about four years, and was specifically assigned to the Norman Manley International Airport, was at the airport when she received certain information which led her to the general aviation section of the airport. She indicated that this section of the airport was used by small aircraft, like chartered flights coming into or leaving the said airport, whether for internal or external destinations, and for the passengers who were travelling on them. She further indicated that on entering the building she saw five persons sitting in the waiting lounge, one female and four males, three of whom she identified as the accused persons before the court. Inspector Haliman testified that she observed the persons in the waiting room for a while, and then approached them by first identifying herself as a police officer, a sergeant as she was then.

[20] She said she asked the persons if they were travelling, and they all responded in the affirmative, and stated that they were waiting on a plane to go to the Bahamas. She asked them for their travel documents, and the applicant handed over his Bahamian passport and an immigration card with a signature on it. The appellant handed over a driver's licence. Having received these documents, the Inspector told them that they could not leave the island as they did not have the correct travel documents, and also that the police would like to speak

with them with regard to an investigation. Subsequent to that, she said she handed over the applicant and the appellant, all their documents as well as their cellular phones to Detective Superintendent of Police Dean Taylor of the Homicide Division. Inspector Haliman made it clear that she did not know the applicant nor the appellant prior to seeing them on that day at the airport.

[21] In cross-examination by counsel for the applicant, Inspector Haliman confirmed that persons using the general aviation area of the airport were still subject to the immigration and customs requirements of the country and that Jamaican citizens cannot travel through that section and cannot depart the airport without a passport. Initially, she insisted that the applicant in answer to her question if they were travelling, had said: "We are all travelling to the Bahamas", but when confronted with the statement that she had prepared in February, about a month after the incident, in which she stated, "one of them who was later identified as Corey McNab, told me that they were all travelling to the Bahamas", she accepted that those words were in the statement. She therefore accepted that she had put in her statement that only one person had said that they were travelling to the Bahamas and that that person was not before the court. She agreed that any words stated by a suspect in the course of her investigations would be important, and in particular those words, but she maintained that all persons had replied that they

were going to the Bahamas but she had not recorded that as at the time, she did not think it important.

[22] Counsel for the appellant also asked whether any question had been addressed specifically to him with regards to his travel arrangements and also whether the appellant had not said anything about going to the Bahamas. Indeed, it was put to Inspector Haliman that the only conversation that she had with the appellant, was to ask him for some identification, and it was at that point that she was given his driver's licence. She insisted however that she had asked for his travel documents as he had said that he was travelling. She confirmed that you do not need a passport if travelling from Kingston to Montego Bay but she also made it clear that small aircraft do not travel from that section of the airport from Kingston to Montego Bay, although to her knowledge they may go elsewhere in the island. She agreed that small aircraft come from Donald Sangster to Norman Manley International Airport.

[23] Deputy Superintendent of Police Dean Taylor gave evidence that he had received certain information on 17 February 2004, and on the following day, at about 9:00 am he spoke to Inspector Haliman who was at the airport, and later saw her at Homicide Headquarters at 230 Spanish Town Road, Kingston, where he was stationed. He said that she handed over to him the applicant with his Bahamian passport and an immigration

card, and also the appellant with his Jamaican driver's licence . He said that he spoke to all the accused separately. He spoke to the appellant second in the absence of the accused, Evon Williams to whom he spoke first, and in the presence of Inspector Campbell. He said that he asked him why he was at the airport and his response was that he had received a telephone call to go there, although he could not say from whom. In answer to the question posed to him as to whether if he received a call from everybody who told him to go somewhere, if he would go, he only smiled and did not answer. In answer to the question however, of where he was going, he said that he was going to the Bahamas. He said that he did not know any of the persons that had been picked up with him. He did not have his passport with him, but said that the Bahamas was a Caricom country and he did not need a passport to travel there.

[24] Then he spoke to the applicant who said that he was from the Bahamas and had been in Jamaica since 2003. He accepted that he had overstayed the time allotted to him. He also said that he was at the airport as Corey had called him and told him to be there. He said that of the persons who were picked up with him at the airport he only knew Corey.

[25] On 20 February 2004, subsequent to this dialogue with the applicant and the appellant, and having received certain information, DSP Taylor

went to the Horizon Remand Centre on Spanish Town Road, along with Superintendent Benjamin and Detective Inspector Errol Grant to see the appellant who had expressed a desire to see him. He said that before the appellant had expressed this desire to see him, he had not made any promises to the appellant, nor had he applied any force or any threat to him. He also said that the appellant did not complain of either Superintendent Benjamin, or Inspector Grant, or any other person at the Remand Center making any promises to him, or holding out any inducements, or using any force causing any hurt, harm or injury to him in order for him to express this desire to speak to him. He said that he cautioned the appellant, and inquired of him why he wished to speak to him. The appellant's response was, he said, that he "wanted to confess how Sean was shot and killed". He asked the appellant if he had a lawyer and if he wanted to speak to either his mother or his father, to which he said the appellant responded that his "father was too ignorant". He told the appellant that a lawyer could be provided for him, but his response was that he wanted to move from the Remand Centre before he confessed as he was afraid that they would kill him at the centre. Thereafter the officers left the centre and arrangements were made for the appellant to be moved from the Remand Centre and an attorney made available to him. Both were done. However DSP Taylor testified,

that to the best of his knowledge, the appellant did not make any confession.

[26] In cross-examination, he testified that a person could not legally board a plane and travel overseas on a Jamaican driver's licence, in fact he said one would need a ticket and a passport. He said that the appellant had been at the station for about nine hours on the first day, but he had not made the request to see him until the following day. He said that although a suspect wishing to make a confession is a very important aspect of an investigation, such a confession could not be taken right away, as the suspect first had to obtain an attorney from the roster of duty counsel on the legal aid programme. He was challenged as to how many attorneys were on the list as he had only attempted to contact two attorneys whom he named, but he said that he knew that the other officers were endeavouring to do so also, and one of them had been successful. It was suggested to him that the appellant never said that he wanted to confess anything, and that any such statement was a figment of his imagination, so too any statement that the appellant was going to the Bahamas. In fact, he was further challenged to the effect, that everything that he said that the appellant had said, was not true, and was due to the fact that he was blessed with an overactive imagination.

[27] Sergeant Cleveland Williams, who was stationed at the Negril Police Station, gave evidence that he had conducted a series of identification parades between 5 to 10 March 2004. He said that he had conducted six parades in respect of two suspects, that is the applicant and the appellant, on 5 March 2004. He said that he spoke to both suspects in their cells, and told them that he had been requested to conduct identification parades on their behalf, in respect of a shooting murder which took place at Retirement District, Westmoreland on 17 February 2004. Neither of the suspects said anything. All of the parades were done with the selection of persons by the suspects, who were taken from the cells, and then placed in the identification parade room, which had a one-way mirror so that the suspect could not see the witness, but the witness could see all persons in the line-up. There was also a justice of the peace in attendance, Mr Cliff Reynolds. The applicant was placed on the first parade and told again that he was suspected of shooting and killing the deceased on 17 February 2004 and then escaping with another man. He was also told that he could stand at any number, between 1-9 and he and his attorney selected where the persons should stand. He selected number 4. The height of all nine persons selected was noted. All the men were of similar height, complexion and status in life. He said the applicant was satisfied with the arrangements and the first witness who was called was Mr Emmanuel Campbell, who had been in the CIB Office away from

the parade room. He was asked if he knew why he was there and he said "yes to point out the man that drive the car that come and shoot Papa". He was instructed to look along the line from 1-9 and he did so and pointed out the man standing under number 3. He was then sent to sit in the general office away from the other witnesses, and the applicant was told that he had not been identified by the first witness. Of the three suspects it was only the applicant who had been on that first parade. The next witness Mr McFayden was called. The applicant decided to stay at the same position. Mr McFayden was asked if he knew why he was there at the parade, and he said "yes to point out the man that come rent mi car and took somebody wid him". He looked along the line of nine persons and said that he did not see the man. The applicant was told that he had not been pointed out by the second witness. He decided to stay in the same position in respect of the third witness and not to change any part of his clothing. Mr. Dain Parkinson then came into the parade room and he was asked if he knew why he was there, and he said: "Yes to point out the man that come to Retirement and shoot Sean". He was invited to look along the line of men from 1-9, and he did so, and immediately pointed out number 4 in the white shirt and blue pants. The applicant was told that he had been pointed out by the third witness, and asked to sign the parade form which he did, and which was adduced in evidence as exhibit No. 1. It was only the applicant, of the three suspects, who was on

the other two parades and at all times the applicant's attorney was present. The applicant, in fact, was not put on any other identification parade.

[28] The next three parades conducted on 5 March 2004 were in respect of the appellant, and it was only he, of the three suspects, who was placed on those parades. The same procedure was utilized. The appellant was also represented by an attorney, and the justice of peace was in attendance. The appellant was told of the allegations against him, that he was the driver of the get-away car with the man that went to Retirement on 17 February 2004 and who shot and killed one Sean Isaacs. There were three witnesses and therefore three parades. The appellant chose number 4 for the first parade. The first witness was Mr Emmanuel Campbell who said that he knew why he was there. He looked and pointed out No. 4, "the man in the black shirt, brown pants and slippers", which was the appellant. When the appellant was told that he had been identified by the witness he said: "Me did know seh dem did aggo point me out". The appellant then changed his shirt moved to the No. 5 position and the second witness was called. Mr McFayden indicated that he knew why he was there. He looked at the persons in the line-up and he then pointed out No. 5 and said, "a him carry man come rent me car". The appellant was informed that he had been identified by the second witness and he said nothing. He decided not to change either his clothing

or his position for the third witness. Mr Dain Parkinson looked at the persons and said that he "didn't see the man". The identification forms indicating that the appellant had been identified by the witnesses Campbell and McFayden were tendered in evidence as exhibits 2 & 3.

[29] In cross-examination by counsel on behalf of the appellant, Sergeant Williams said that on perusal of exhibit 1, it was clear that the appellant was 6' tall and of a dark complexion. The person pointed out by the witness Campbell at the number 3 position in the first parade was 5'6" tall and of a clear complexion. He had first indicated that Campbell had taken 60 seconds to pick out the person, one Sheldon Reid, but later, when it was suggested to him that he had given evidence at the preliminary inquiry and that he had said that it took him three minutes to point out number 3, which he said he did not recall, he later agreed that, "yes he looked long before he pointed out number 3". It is therefore clear that on the first parade Mr Campbell pointed out someone with characteristics which were strikingly dissimilar to the appellant's.

[30] Detective Sergeant Errol Usher gave evidence that he was the investigating officer, stationed at the Savanna-la-Mar Police Station in Westmoreland, and based on information received, on 17 February 2004, he went to the Savanna-la-Mar Hospital, he saw the body of a male person, he spoke to Dain Parkinson among others, had the body removed

to a funeral parlour, and he eventually attended a post mortem examination in relation thereto. He also went to the rum bar in Retirement, noticed some blood stains in the area where some seats were, and also two 9 mm cartridge casings, which he handed over to personnel at scenes of crime. He also indicated that subsequent to the identification parades, which were held on 5 March 2004, he initiated a series of questions in relation to two suspects, the applicant and the appellant. Both were represented by attorneys, and the questions were taken in the presence of DSP Wilby and Detective Sergeant Simpson in the Deputy Superintendent's office at the Negril Police Station. The results of these questions and answers did not seem to have been of any probative value.

[31] Sergeant Usher also gave evidence that he was aware that a statement had been taken from Mr Michael McFayden and that he had testified at the preliminary inquiry. He also said that Mr McFayden was popularly known as, "Berry". He then said that he had spoken to the witness several times in the preceding week, and the night before giving evidence, utilizing the cell phone, and the same overseas New York number, and as far as he was aware, the witness was in the State of New York in the United States of America. He also said that he knew Mr McFayden to be self-employed, in that, apart from being a mechanic, he had some motor cars that he rented.

[32] In re-examination Sergeant Usher said that he knew where Mr. McFayden lived in Jamaica, he had visited the address, he knew his common law wife, had spoken with her, had been to their house the day before he was giving evidence, but had not seen her on that occasion.

[33] The evidence taken from Jean Williams was preceded by objection firstly by counsel for the appellant as her name was not originally on the back of the indictment, and secondly by counsel for the applicant as the notice to produce her as a witness was not served on him, but on counsel for the appellant who had, no doubt, a greater interest in what she was going to say. Miss Williams was the Clerk of Courts for the parish of Westmoreland, who led the evidence at the preliminary inquiry. The appellant and applicant were represented and she marshaled the evidence on behalf of the Crown. Mr McFayden was one of the witnesses who gave evidence and the appellant and applicant were entitled to and were invited by the Honourable Resident Magistrate to cross-examine him, but they did not ask him any questions. The deposition was recorded by the Hon Resident Magistrate, signed by her, and by Mr McFayden, as true and correct, in open court, in the presence of the appellant and applicant and their attorneys. It was thereafter secured in the court's file and kept in the court's offices. Miss Williams indicated that she was familiar with the handwriting and signature of the Honourable Resident

Magistrate, having worked with her for approximately three years and an application was made for the deposition to be tendered and read into evidence, based on section 34 of the Justices of the Peace Jurisdiction Act. After much discussion between bench and bar, the deposition was marked for identity and a voir dire was held to decide on its admissibility.

[34] Two witnesses gave evidence in the voir dire. Detective Sergeant Usher again testified about his calls to the witness at an overseas number, and of his discussion with him about the case, its trial hearing dates and the witness' indication that he had travelled with his mother who had fallen ill, he had had to cancel his flight back home, and that he would not be able to come for that date, but was available for court on the following Monday. On Tuesday, 4 May 2004, when he spoke to the witness, he said that it was on a New York land line, given to him by the witness. He was challenged that he did not have personal knowledge that it was a New York land line which he used to speak with the witness, and he accepted that he had been told that it was. He also said that he knew about "roaming" and that people could forward calls to their own cell phones, and although he would not do it, possibly to their friends cell phones as well.

[35] There was a further challenge as to whether the evidence of Mrs Campbell-McFayden should be permitted on the voir dire, but that was

later withdrawn. Her evidence was very short. She said that she resided in Hopewell District, Negril, Westmoreland, she knew Michael McFayden, he was her husband and had been her husband as at February 2004. She said that he was also known as "Berry". She said in February 2004, he was self-employed as he rented motor vehicles. She said that at the time of giving evidence he was in New York. She told the court that he had travelled to New York with his mother, who had fallen ill. She testified about when he had left the island, when was his scheduled return, the fact that they called and had spoken to each other every day; sometimes she called, and at other times he did, and that it was she who was to go to the airport to pick him up on his return. She gave his cell number which she could readily recall, and a part of the land line in New York which she said she had written down, and which was also recorded in her phone. She said in cross-examination, that she did not accompany her husband to the airport and she had never been to the house in New York which she thought was connected to the land line number that she used. But she said that it was a family home, as his friends and children answer the phone, and that that house was called when her husband was in Jamaica.

[36] Submissions followed with regard to whether the deposition should be tendered and read into evidence. The learned trial judge ruled that he accepted that the witness was out of the island and in New York and so

the deposition was adduced into evidence as Exhibit 12, through Miss Jean Williams.

The deposition of Michael McFayden taken on 26 July 2004, essentially stated that he lived at Hopewell District, Westmoreland and he rented cars as a businessman. He remembered 17 February 2004, as the appellant came to his home at about 2:00 pm. He said that he had known the appellant a very long time, about 15 years. The appellant was accompanied by the accused, Evon Williams, whom he did not know before. He rented the appellant the car for two days. It was a 1999 L Touring burgundy 'deportee'. He was paid $6,000 for the rental of the car. The appellant was supposed to bring it back in two-three hours for an exchange to a silver one as the deportee needed tyres. He did not bring the car back and Mr McFayden did not see it again until at the police station. The next time he said that he saw the appellant was at the Negril Police Station in a line-up where he had been called to identify him. He said that before he had rented the car to the appellant, the appellant had been calling him so he knew that he wanted to rent a car. He said although he had not brought the car back, as had been agreed, he had not done anything about it, but after he left the station he went to Mariner's Inn and called the appellant and he answered. He asked about the whereabouts of his car and the appellant told him it was at the Mariner's Inn. He said that he went there and did not see it and so he

called the appellant again and accosted him thus, "Dermid, a mi car unno tek go murder Papa?" He said the appellant responded, 'No sah, nothing like that…the car suppose to be at Mariner's Inn". He said he went back to the Inn, his car was not there, and he spoke to the security but that did not assist him. It is unclear when all this took place.

[37] There was forensic evidence given by Detective Corporal Lauren Campbell and the Government Forensic Analyst Ms Marcia Dunbar with regard to swabs taken from the hands of the applicant and the appellant to ascertain if any, and if so the level of gunshot residue thereon. Detective Corporal Campbell took the swabs on 18 February 2004 at 10:15 pm in the homicide division at Spanish Town Road, at the request of DSP Taylor. He gave a detailed description of the manner in which the swabs were taken and preserved. He admitted in cross-examination that he had not done a control sample as he did not think it necessary and he was candid about the many ways in which the residue could be transmitted. The sealed bags containing the swabs were duly delivered to the forensic lab. Ms Marcia Dunbar, acknowledged receipt of the same and gave evidence of the analysis of the results of her examination, which was only of relevance in this case, to the applicant. There was the presence of gunshot residue at the intermediate level on the left palm, and gunshot residue of the trace level on the back of the right hand of the applicant, but no traces of any gunshot residue on either his right

palm or on the back of his left hand. Ms Dunbar testified that elevated level of gunshot residue could arise from an individual firing a firearm, or being in the direct path of gunshot residue as it is being emitted from the firearm. She also said that the passage of time will reduce the level of gunshot residue, approximately six hours from elevated level to intermediate level, and twelve hours to trace level. She indicated that rubbing the hand on a surface, washing the hand, and sweating would also reduce the levels. In her view, the absence of the control sample would not affect the testing or the analysis of the results, but she did admit in cross examination that it affected the interpretation of the results, and without a control sample one could not rule out the issue of contamination. In her opinion though, the use of the control sample was not compulsory. She explained the meaning of secondary transfer, which is the transfer of gunshot residue from a surface that has gunshot residue, to another surface that does not have, so that it was possible for gunshot residue to be transferred from one hand to the other.

The applications in the court below.

[38] There was a rather unusual situation which occurred at the beginning of day three of this 13 day trial. Three witnesses had already given evidence, Mr Owen Jackson, who identified the body of the deceased, Sergeant Cleveland Williams, and DSP Dean Taylor. Crown Counsel informed the court in the absence of the jury that certain

information had come to his attention which was that one of the jurors was related to the appellant. The learned trial judge inquired of the juror if that were true and he indicated that they did have close family ties, and he was asked if he had discussed the case with any of the jurors and he answered in the negative. When asked why he had not indicated the connection before, he stated that he was unaware that he ought to have done so. The learned trial judge took the decision to discharge the juror and the case continued without him and without any comment and or submissions from either counsel representing the accused. It is the subject of a ground of appeal, however, before this court on behalf of the applicant.

[39] There was an application made to the court on behalf of the applicant immediately after the voir dire, for the Crown to put up for cross-examination a witness whose name was on the back of the indictment, he having given a deposition in the matter, and whom the Crown did not intend to call as a witness, but was prepared to make available to the defence. It was the position of the defence that unless the prosecution could say that the evidence that the witness was going to give was incapable of belief, then even if inconsistent with the Crown's case, the witness should be called by the prosecution. In reply, Crown Counsel submitted that the prosecution enjoys a discretion whether or not to call witnesses named on the back of the indictment and the court

ought not to interfere unless it can be shown that that discretion was improperly exercised. The test he said was whether the action of the prosecution was against the interests of justice. The learned trial judge ruled in favour of the prosecution. This too became the subject of a ground of appeal.

No-case submissions

[40] The no-case submission on behalf of the applicant was focused on the issues of identification and credibility. Counsel challenged the credibility of the evidence of the sole eye-witness and said that he had been discredited. He submitted that there had been no firearm or spent shells recovered, that the forensic evidence was inconclusive, and there was no nexus between the murder and any flight plan or immigration record. It was further submitted that the applicant was a Bahamian and overstaying his time in Jamaica did not provide support for the offence of murder. Counsel also challenged the identification evidence along the guidelines pursuant to **R v Turnbull and others** [1977] Q.B. 224.

The no case submission on behalf of the appellant also raised the issue of identification. The credibility of the sole eye-witness in this instance was seriously challenged as he had pointed out two different persons on two different parades, who from all accounts had entirely different descriptions, particularly in height and complexion. The Crown responded

and the learned trial judge ruled that there was a case to answer for both the applicant and the appellant.

The case for the defence

[41] The applicant gave an unsworn statement. He indicated that he lived in Nassau, Bahamas, was a visitor to the island, and a salesman by occupation. He said that whilst in Jamaica he had met one Corey McNab, an agent of stage shows and on the day in question he had been asked to accompany him to the Norman Manley International Airport which he did. It was Corey McNab who was travelling to the Bahamas. It was there he said that he was approached by a female officer who asked questions of him, but who only received answers from Corey McNab. He said that he was later asked questions about possession of dangerous drugs, then handcuffed, led away, taken to the police station, continuously asked about "cocaine in his belly", given other threats, and finally taken to the Remand Centre.

[42] The appellant also gave an unsworn statement. He stated that he was a poultry farmer and a recruit for the Jamaica Defence Force, and resided in Orange Hill District in Westmoreland. He also recalled clearly the day in question, 17 February 2004, when he had received a request from a gentleman to rent a motorcar. He took the person to someone whom he knew rented cars, Mr Michael McFayden, and when the transaction

was completed the rented vehicle was given to the gentleman, and he went to Courts Furniture Store in Savanna-la-Mar to conduct some business accompanied by one Racquel Graham, a special education teacher at the School of Hope in Llandilo, Westmoreland. He was in the store for about 30-45 minutes when he received a call from Mr McFayden asking about his car. He called the person who had rented the car, who told him where the car was supposed to be, and he gave that information to Mr McFayden. He then started to receive threatening calls indicating that he was involved in a murder. He denied all allegations, and asserted his innocence, but feared for his life as he had heard that the person who had died was an area don. He called Mr. Corey McNab, "an outstanding citizen" and relative of the person who had rented the car, and whom he knew to be a show promoter and a policeman, who told him not to take the threats lightly, and to come up to Kingston to meet with him, which he did. Whilst in Kingston, on 18 February 2004, Mr McNab told him to go to the airport with him to fly from Kingston to Montego Bay, which was nearer to where the incident took place, and would thus facilitate attendance on the police station to sort out the matter. He insisted that he did not know what had transpired in Retirement on the afternoon of 17 February 2004, as he was not present. He was at Courts between the hours of 2:30 pm- 3:30 pm in the company of Miss Graham, being assisted by a sales representative.

The appeal of the appellant

[43] Counsel for the appellant abandoned the original grounds of appeal filed, and requested and was granted permission to argue four supplemental grounds of appeal, which are set out below. Counsel was also given permission to argue all grounds together:

> "1. The learned trial judge erred in law in failing to uphold the no case submission made on behalf of the appellant and/or withdraw the case from the jury on the basis that the evidence adduced by the prosecution against the appellant taken at its highest was such that no jury properly directed could convict upon it.
>
> 2. That the learned trial judge failed to give the Jury full and adequate directions in law on identification having regard to the defect in the evidence of Emmanuel Campbell; instead, he made a brief reference to the issue of identification at the beginning of his summation to the Jury. This failure to direct amounted to a non-direction in law
>
> 3. That the verdict is unreasonable and cannot be supported having regard to the evidence.
>
> 4. Whether the trial judge failed to direct the Jury on how to treat the evidence of Michael McFayden."

Grounds of Appeal 1 - 4

[44] Counsel submitted that the no case submission ought to have been upheld, as the identification evidence was of a tenuous nature and relied on the principles enunciated in ***R v Galbraith*** [1981] 2 All ER 1060**.** Based on the evidence of Mr Campbell, she submitted, this was a recognition

case as he claimed to know the appellant prior to the murder of Sean Isaacs. He was also, on the Crown's case, the only person capable of identifying the appellant, so the case for the prosecution rested heavily on his credibility. Counsel also submitted that the witnesses' evidence was that he could only identify the driver of the vehicle, whom he referred to as, "Danny Star's" son and it was clear that he attended the identification parade to identify the said driver of the 'get away' car. It was further submitted that in those circumstances the purpose of the identification parade was to test the veracity of the witness' claim that he knew the accused man before, and in this instance, Emmanuel Campbell was tested and failed. He could have indicated that he did not see anyone he knew on the first parade instead he chose one of the stand-ins. This, counsel said was an objective test to determine if he in fact knew the appellant as well as he said that he did. Counsel commented on the fact that the witness prevaricated about the fact that he had selected two different persons on two parades, and then in re-examination he tried to say that he thought he could just point out anyone he wanted. That evidence, counsel submitted, does not reflect that he understood the seriousness with which he should treat the task of identifying a suspect in a case of murder, nor could he inspire confidence that it would be safe to convict the appellant primarily on his evidence alone.

[45] It was further submitted that as the identification evidence was so weak, the Crown had sought to buttress the same with the deposition taken from Michael McFayden, the person who rented the car. However, counsel said that this evidence should have been withdrawn from the jury as there was not sufficient nexus established between the car that was rented from the witness and the car that was on the scene of the crime. There was no evidence of any identifying marks on the car and "deportees" were known to be "common vehicles". Additionally, there was no evidence that the witness Michael McFayden was called "Berry", which was the witness Campbell's evidence of his connection to the car, as it was stated by him to be owned by one "Berry". The evidence of the deposition was therefore more prejudicial than probative and ought to have been excluded.

[46] The summing up of the judge was attacked on several bases. With regard to the deposition of Michael McFayden, it was submitted that having ruled that the evidence was admissible, the learned trial judge failed to direct the jury as to how to treat with the evidence, with specific reference to the insufficiency of nexus mentioned above. Counsel relied on the Privy Council case of ***Barnes, Desquottes and Johnson v R*** (1989) 37 W.I.R. 330. Additionally, the learned trial judge only gave a mechanical warning on the issue of identification and failed to draw to the attention of the jury that this was a recognition case and so they should approach

the evidence of the witness very, very, carefully, particularly with regard to his credibility, in light of the evidence given in respect of his attendance at the two parades.

[47] Counsel was asked by the court to comment on the evidence given by DSP Dean Taylor with regard to the appellant's desire to give a confession, to which she responded that that evidence also should have been excluded, or at the very least been the subject of a voir dire. The appellant, she submitted, was only bartering "the confession" for his release from the prison as he was in fear for his safety, and in any event, what was important was that for whatever reason, he did not follow through with giving it, and the learned trial judge did not deal with the issue adequately, resulting in the trial being unfair.

[48] Counsel was also asked to address the evidence of Inspector Ethel Halliman, with regard to all three accused being apprehended at the airport on the day following the crime, with all trying to board a private plane to the Bahamas, given the particular homeland of the applicant. Counsel's response was that evidence only suggested that the appellant was attempting to go on the flight - nothing more.

[49] In response, the Crown submitted that the learned trial judge was correct in calling on the appellant to answer the prima facie case posited by the prosecution. Counsel further submitted that the directions by the

learned trial judge on identification were adequate, although he failed to address specifically the weakness in the same, due to the pointing out by the sole eye-witness of two different persons on the two parades, but submitted that there was other strong evidence with respect to the "get-away" motor car, and maintained that in all the circumstances, the conduct of the trial was fair to the appellant.

Analysis of grounds 1, 2,3, and 4.

[50] The singular issue in this appeal in respect of the appellant, pertains to identification. The questions to be answered were:

(a) whether there was a prima facie case to go to the jury, and if so;

(b) whether the evidence was such that the jury could have felt sure of the correctness of the quality of the identification evidence.

With regard to the issue of identification:

[51] The witness said that the car arrived on the scene at approximately 2:00 p.m, the visibility was clear, the car drove up on the left hand side of the road, the same side of the road where the building was located, where the witness was working. The car may not have had any identifying marks, which was the complaint of counsel, but the witness stated that it was a "red car" which he knew to be owned by "Berry". Dain Parkinson

also testified that the car, which was a "burgundy L Touring" belonged to one "Berry". Sergeant Usher testified that Michael McFayden was also known as "Berry", the car had stopped about 8 feet from the witness, remained there for about 20 minutes and he had seen the appellant's face for about 3-4 minutes. There was detailed evidence given in the deposition of Michael McFayden with regard to the car which was rented to the appellant, whom he had known for many years and whom the appellant did not deny knowing, when he gave his unsworn statement from the dock. In fact, Michael McFayden had no difficulty identifying the appellant at the identification parade. In our view there was more than sufficient evidence for the matter to go to the jury and for the jury to conclude that the said red car seen by Campbell and Parkinson at the scene of the crime was the same "1999 L-Touring burgundy deportee" rented to the appellant on the same day, shortly before the crime was committed.

[52] There was a serious inconsistency with the witness Campbell pointing out two different persons on two different parades. One must take the witness as one finds them, and that includes their level of intelligence and understanding. One would also have to weigh the explanation given by the witness as to why he did as he did. It was a matter for the jury. Counsel submitted that his evidence should be disregarded and that the learned

trial judge had not dealt with this particular inconsistency adequately. This is how the learned judge addressed this issue:

> "Mr. Foreman and your members, from the evidence which Mr. Campbell gave, Mr. Campbell had not said anything about being able to identify anybody else but the man who he said he saw around the steering wheel and that man was not in that line-up. It is a matter for you, but if that man was not in the line-up he could not have been pointed out but then the man was not in the line-up. It was open to Mr. Campbell to have said he didn't see him. But remember Mr. Campbell's explanation, he said he was doing that sort of thing for the first time and didn't know exactly what to do. He was frightened, that's the explanation that he gave, a matter entirely for you, but according to the officer who conducted the parade, Mr Campbell had said that he knew why he was there to point out the man that drive the car that shoot Pappa, a matter for you."

From the above, it is clear that the learned trial judge had indicated to the jury that it was open to the witness to say that he did not see anyone on the parade. To be fair also, he gave the witness' explanation. He also later told the jury that the witness said that "Danny Star's" son was not on the first parade but he was on the second parade.

[53] In our view, the learned trial judge ought to have brought to the attention of the jury, with greater force, the fact that the persons on the parade in respect of the applicant, would have been shorter and of clear complexion, whereas those on the parade for the appellant would have

been much taller and of dark complexion. This difference in appearance and the pointing out of someone dissimilar to the appellant, whom he said he saw drove the get-away car tended to seriously undermine the credibility of the witnesses' powers of observation, and therefore recollection, bearing in mind that this evidence was crucial to the Crown's case in respect of the appellant. The learned trial judge having been rightly criticized in this regard, can it be said that this omission is such as to impugn the verdict of guilt?

[54] In our view, the jury would have heard all the evidence, and the learned trial judge did recount it correctly. The issue of identification did not rest solely on the evidence of visual identification given by Emmanuel Campbell. There was other critical evidence which in our view supported the conviction, namely, the circumstances that both the applicant and the appellant were attempting to leave the island unlawfully, the following day, with evidence of gun shot residue on the hands of the applicant; the statement made to DSP Dean Taylor with regard to the promised confession of the appellant; and the evidence contained in the deposition of Michael McFayden.

[55] We do not agree with the submission of counsel that the statement made by the appellant that he wanted to confess how Sean was shot and killed was inadmissible, and/or that it should have been the subject of

a voir dire. The jury would also have heard the evidence that the appellant had not been coerced nor had he been given any promises. It was suggested that the statement was a figment of DSP Taylor's imagination. It was all a matter for the jury. Additionally, the forensic evidence of itself may not be conclusive, but the presence of gun shot residue of an intermediate level found on the left palm of the applicant and gun shot residue of the trace level on the back of the right hand of the applicant, cannot be ignored. He was with the appellant at the airport on the following day attempting to leave the country, the appellant attempting to do so with a drivers licence only, and both of them from a section of the airport where only chartered flights leave the country. This evidence could be indicative of the need for a quick departure from the "scene of the crime" and it would appear that the jury arrived at that conclusion.

[56] With regard to the deposition of Michael McFayden, in our view it was admissible in evidence. Two witnesses gave evidence on the voir dire. Mrs McFayden gave detailed evidence about her husband being out of the country, the reason why he had not returned to the island as scheduled, when he was scheduled to return, the fact that she had spoken to him using the numbers that she used often, even when he was in Jamaica. Detective Usher had also spoken to him using an overseas number. There was sufficient evidence to prove that Mr McFayden was

absent from the island at the time of the trial, and it could therefore be read into evidence, pursuant to the provisions of s. 34 of the Justices of the Peace Jurisdiction Act, the relevant portion of which reads as follows:

> "… and if upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, or is absent from this Island or is not of competent understanding to give evidence by reason of his being insane, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or solicitor had a fill opportunity of cross examining the witness, then if such deposition purport to be signed by the Justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not, in fact, signed by the Justice purporting to sign the same."

The statement was tendered into evidence by the Clerk of Courts who had marshaled the evidence at the preliminary inquiry, and who was familiar with the handwriting and signature of the Resident Magistrate who conducted the inquiry. The statement was clearly admissible, and the learned trial judge found that there was evidence, that the witness was out of the jurisdiction namely, overseas in New York, and therefore ruled that the deposition could be read into evidence, pursuant to the statute. In our view, the learned judge was correct in his ruling.

[57] The statement made a direct connection between the 1999 burgundy L Touring 'deportee' and the appellant. Mr McFayden said that the appellant rented the car. The appellant said that he facilitated the transaction but he left the rented car with the gentleman whom he took with him to rent the car, and then he went to Courts to conduct some business. The witness Dain Parkinson also gave evidence that he saw the, "burgundy L Touring motor car". This was a matter of fact for the jury to decide. The evidence of Mr Michael McFayden, Mr Emmanuel Campbell and Mr Dain Parkinson is capable of belief. The jury clearly did not believe the appellant but accepted the witnesses for the prosecution which they were entitled to do. The learned trial judge gave directions to the jury, over several pages of the transcript (pages 717-720), with regard to how to deal with the deposition. He warned them to treat the evidence with care as Michael McFayden had not been cross-examined.

[58] Counsel for the appellant relied on and referred the court to the case of ***Barnes, Desquottes and Johnson v R, Scott and Walters v R***, as indicated above, in support of the principle that it was the duty of the trial judge to scrutinize the deposition so as to exclude inadmissible evidence or evidence that is more probative than prejudicial. However, in that case, the Privy Council held, "the fact that the deponent cannot be cross-examined, or that it contains the only evidence against the accused, or that it relates to identification evidence is not of itself

sufficient to justify the exercise of the discretion to exclude the evidence". It was also held that, "in the interests of ensuring a fair trial a judge has power at common law to exclude the admission of a deposition, although that power must be exercised with great restraint, that is, only when the judge is satisfied that it would be unsafe for the jury to rely on the evidence in the deposition".

[59] In this case the learned trial judge obviously did not view the evidence in that light and in our view, he was correct. Based on the foregoing, it is our view that the learned trial judge correctly exercised his discretion when he ruled for the admission of the deposition into evidence. Taken together, as argued we can find no merit in grounds 1-4.

The application for leave to appeal on behalf of the applicant.

[60] The applicant abandoned the original grounds of appeal filed, sought and was granted permission to argue the supplementary grounds filed on 2 March 2009, which are set out below:

"1. That the Appellants had an unfair trial:

2. That the Prosecution failed to prove the guilt of each accused beyond a reasonable doubt;

3. That the Learned Trial Judge misdirected the Jury on the following points;

(a) in failing to direct the Jury adequately on the question of visual identification, credibility and reliability;

(b) he did not direct the Jury adequately in respect of the statement of Michael McFayden which was admitted in evidence;

(c) he ought not to have removed a Juror whom the Prosecution claimed was related to the accused Dermid Daley;

(d) The Learned Trial Judge ought to have discharged the entire Jury and empanel a new set of Jurors so that the accused may be tried by twelve (12) Jurors as provided by law."

Subsequently grounds 2 and 3 (c) were not pursued.

Ground of appeal 1

[61] Counsel submitted that the applicant had an unfair trial as witnesses who appeared on the back of the indictment were not made available for cross-examination, and witnesses were called who did not appear on the indictment. Counsel challenged the ruling of the court in the first instance, as being wrong in law and in the second instance as amounting to trial by ambush of the defence. Counsel also challenged the direction by the judge in respect of the forensic evidence and a statement made by the learned trial judge with regard to the burden of proof which the prosecution had to discharge in respect of intention.

[62] Counsel submitted that the learned trial judge had erred in ruling as he did that the prosecution has an unfettered discretion whether or not to call witnesses, unless there is evidence to the contrary, or the discretion

has been improperly exercised and there is no obligation on the prosecution to show that. The prosecution, she said, did not advise the defence until close to the end of the case, that they were not calling the witness Dwight Parkinson, the brother of Dain Parkinson. The record shows counsel for the applicant, as a result, trying to get the learned trial judge to call the witness, as the Crown would not, and as the defence wished to cross-examine the witness, and not to call the witness as part of its case. In support of this point, the defence relied on the English Court of Appeal case of ***Regina v Oliva*** [1965] 1 W.L.R.1028.

The question one must ask however is how did the prosecution by not putting up the witness or the learned trial judge not calling the witness adversely affect the prospect of the success of the applicant's defence. For this ground to succeed, this would have had to be demonstrated, and in our view, it was not. We will deal with this later on in this judgment.

[63] Counsel objected to the evidence of Miss Jean Williams as her name did not appear on the back of the indictment, and counsel for the applicant did not receive any advance notice of the intention of the crown to adduce that evidence. The defence saw it as a breach of the general principles of disclosure and failing to act in the interest of ensuring a fair trial. Counsel relied on the case of ***R v Linton Berry*** (1992) 41 WIR 244. Counsel also noted, without much conviction, that Miss Williams was in the court when other witnesses were giving evidence. However as her

evidence, as Clerk of the Court, was formal evidence relating to the record of proceedings at the preliminary inquiry, nothing more need be said about that.

[64] Counsel submitted that the learned trial judge failed to point out to the jury that there was a possibility of contamination of the swabbing samples as there was no control sample and, in any event, the presence of gunpowder residue in and of itself does not point to the murder of the deceased, and there can be no link between that evidence and the applicant unless there was good identification evidence, which was challenged under ground 3. Finally on this ground, counsel challenged the direction of the learned trial judge with regard to the statement made on page 639 of the transcript that the Crown does not have to prove intention. This is how the learned trial judge puts it:

> "Now, the Crown don't have to prove intention to you. You cannot look into a man's head, and decide what that man intends to do. Mr Foreman and your members. You can look to say what that person says, or what that person does, or both together either at the time the person did the act, or immediately after the person did the act."

Counsel therefore submitted that when all of the above are taken cumulatively, it is clear, that the trial of the applicant was unfair.

Ground of appeal 3(a)

[65] Counsel's complaint under this head related to the fact that although the learned trial judge pointed out the various discrepancies and inconsistent statements to the jury, he failed to indicate that there were weaknesses in the quality of the identification evidence, which detracted from the opportunity of the witness to accurately observe the unfolding events, particularly as it pertained to the applicant. Counsel provided a list of what she viewed as inconsistencies in the evidence of Dain Parkinson, which would have affected his ability to identify the applicant and which she said the learned trial judge failed to address.

(1) He said he had seen the applicant some 4, 5 or 6 times before the incident. (page 326)

He also said that he had seen the applicant one time before in Good Hope. (page 349)

(2) He said that he had seen the applicant for the first time two months before, the incident. (page 328)

He said that the last time that he had seen the applicant was two months before the incident (page328)… But he also said "That the last time that he had seen the applicant and the first time was not the same time… as the last time that he had seen the applicant was when he (the applicant) sat beside the deceased". (page 328)

Counsel submitted that the significance of this evidence was to ascertain the extent to which the witness knew the applicant and so would be in a position to be able to recognize him. The jury, she said, was not assisted with how to deal with these inconsistencies.

(3) He said that for the 15-20 minutes that the applicant was there he saw his face for the said 15-20 minutes (page 336). He said

that they were there for a while, around 15-20 minutes then the explosion went off, (page 332), then it was put to him that he had said previously that it could not be more than 5 minutes before he heard the big explosion, which he denied (page 402) (previous inconsistent statement admitted in evidence as exhibit 8)

(4) He said that he was sitting about 10-12 feet away from the applicant and the deceased (page 330), and that he had the rake in his hand, but he was challenged that he had said previously in his statement to the police that he had been raking the yard same way; that he had been raking the yard when he heard the big explosion; and that he continued raking the yard when he heard the loud explosions behind him, which sounded like gunshots, and he spun around and saw Sean falling from his seat; all of which he denied in the witness box and so as already indicated were admitted as exhibits 9 &10 (pages 408-419)

[66] Counsel submitted that this evidence showed that his observations may not have been that good, and/or that reliable, and may also have undermined his credibility, and that the learned trial judge had a duty to point this out to the jury, and not just rehearse the evidence as it unfolded, coupled with the general directions on inconsistencies, and or contradictions in the evidence (although counsel conceded that the former directions, that is, on inconsistencies generally, appeared appropriate). It was further submitted that failing to bring those weaknesses in the identification evidence to the attention of the jury, resulted in the conduct of the trial being unfair, and the verdict being unsafe.

[67] Counsel relied on three cases with regard to the mandatory aspect of the Turnbull warning, particularly when the defence is one of alibi, and also when the substantial issue raised is one of the credibility of an identifying witness, and whether a warning is required in respect of the danger of convicting on an uncorroborated evidence and if so, in what circumstances, and how should this be done - ***Regina v Carl Peart*** (1990) 27 JLR 13; ***Beckford v Reginam*** (1993) 97 Cr. App. R. 409; ***R v Makanjuola, R v Easton,*** [1995] 3 All ER 730.

Ground of appeal 3 (b)

[68] Counsel complained that the statement of Mr Michael McFayden ought not to have been adduced into evidence as the proper foundation had not been laid and the relevant requirements had not been met pursuant to the Evidence Act, which had resulted in unfairness and prejudice to the applicant. This submission was also made, although differently, on behalf of the appellant, and did not gain any cogency by repetition and has already been dealt with in this judgment. Suffice it to say that at no time in the case was there ever any indication that the application to read the deposition as evidence in the prosecution was being made pursuant to the Evidence Act. However, we do accept that s. 31D of the Evidence Act deals with the admissibility of hearsay statements in criminal proceedings in certain circumstances, and s. 31D(c) provides for evidence to be admissible if it is proved to the satisfaction of

the court that the person who made the statement "is outside of Jamaica, and it is not reasonably practicable to secure his attendance". While there may be some overlap with these provisions, and s. 34 of the Justices of the Peace Jurisdiction Act, the latter Act deals specifically with the admissibility in evidence of depositions, and in our view, is therefore directly applicable to the instant case.

Ground of appeal 3 (d)

[69] Counsel submitted that once it had been discovered that one of the jurors was a relative of one of the accused, the entire jury should have been discharged, as one could not say what bias may have been exhibited by that juror, against the applicant, during the time that he sat on and moved among the jury. Counsel acknowledged that although the discovery was made on the third day of trial, there had only been one day of hearing with only three witnesses having given evidence. However DSP Dean Taylor had deposed to the proposed confession of the appellant, which was potentially prejudicial to the applicant, and the jury could have been tainted against the applicant, by any person biased toward the appellant, in respect of that evidence. It was submitted that there should have been a voir dire to ascertain if any impropriety had taken place. In the alternative, it was submitted that the learned trial judge should at least have asked the foreman of the jury if any influence could have occurred. Finally it was suggested that the learned trial judge

could have conducted an inquiry, of his own motion, as to the circumstances of that juror's contact with the jury, which could also have been done through dialogue with the foreman, to ascertain if the jury was contaminated, and failing that inquiry, it was submitted that a great injustice would have been done to the applicant.

[70] Counsel conceded that by virtue of the Jury Act, it is a matter entirely within the discretion of the court as to whether the trial should continue subsequent to the discharge of one or more jurors (ss. 31 & 45). Section 31 of the Jury Act, reads as follows:

> "31 (1) On trials on indictment for murder and treason, twelve jurors shall form the array, and subject to the provisions of subsection (3) the trial shall proceed before such jurors.
>
> …
>
> (3) Where in the course of a criminal trial any member of the jury dies or is discharged by the Court through illness or other sufficient cause, the jury shall nevertheless, so long as the number of its members is not reduced by more than one, be considered as remaining properly constituted for all the purposes of that trial, and the trial shall proceed and a verdict may be given accordingly."

In those circumstances the Act provides that a verdict of 11 jurors in a trial for murder shall be deemed to be a unanimous verdict of the jury (s.31(4)). The Act also provides that if the number of jurors is reduced by more than one, for reasons stated therein, the judge may discharge the

jury (s 45 (2)). (Subsequent to the hearing of this appeal, Act 24/2010, which came into effect on 27 July 2010 was passed, amending the Jury Act, in certain respects. Section 31(4) as amended, now provides for a verdict of not less than 9 jurors for murder.)

[71] Counsel relied on an extract from **Blackstone's Criminal Practice 1992** section D10: Juries., particularly, D10.23. under the heading – Personal Knowledge of Accused or of Accused's Bad Character, and also the case of **Catherine Afulenu Sawyer** 1980 Criminal Appeal Reports, Volume 71, 283. In essence the principles to be distilled are that if the juror has any previous acquaintance with the accused however slight, the juror should be removed; that a person who knows facts detrimental to the accused should not be on the jury; if any knowledge of the juror about the accused is likely to create a real danger of prejudice, the juror will have to be removed and the circumstances of the case will decide if the entire jury ought to be discharged.

In the circumstances of this case, it was submitted that, in the interests of justice and to be fair to the applicant, the learned trial judge ought not to have discharged only the juror, the relative of the appellant. It was further submitted that the learned trial judge erred in so doing, as he should instead, have discharged the entire jury.

[72] In reply, counsel for the Crown conceded that the learned trial judge, although he had pointed out each and every inconsistent aspect of the evidence, had not indicated to the jury the impact that the inconsistencies could have on the identification evidence. On inquiry from the court of the effect on the conviction of the applicant of the failure of the trial judge to discharge an obligation which fell on him, the learned Crown Counsel submitted that there was powerful evidence pointing to the correctness of the conviction of the applicant, which therefore ought not to be disturbed. Counsel indicated for instance:

1. There were Bahamian accents around the table that day which the witness heard.

2. The applicant was held at the airport the following day with his Bahamian passport, the reasonable inference being that he intended to take flight.

3. There was evidence of gun powder residue on his right hand at the intermediate level.

4. The applicant and the appellant, were two persons found together at the airport, obviously hoping to travel to the Bahamas, the day after the shooting of a Bahamian.

5. He was pointed out without any difficulty at the identification parade.

Counsel entreated the court, if the court were not to find favour with her submissions, then the court ought to apply the proviso to section 14 (2) of the Judicature (Appellate Jurisdiction) Act as this was an appropriate case.

Analysis of Ground of appeal 1- unfair trial

[73] As indicated in paragraph 39, counsel for the applicant was given full opportunity to place before the court arguments in support of this ground. Counsel argued strenuously that it was the duty of counsel for the Crown not only to have the witness who had given a deposition in court available to the defence but that the prosecution must call that witness and put him up for cross-examination, unless his evidence was incapable of belief. It was submitted that the Crown had not indicated at any time that the evidence was of that quality. The case of ***Regina v Oliva*** relied on by counsel for the applicant is very helpful, as many authorities on this aspect of the law were canvassed therein and the principles derived therefrom are set out with clarity on page 1035 in the judgment of Lord Parker, CJ in delivering the decision of the court. This is how he puts it:

> "Accordingly, as it seems to this court, the principles are plain. The prosecution must of course have in court the witnesses whose names are on the back of the indictment, but there is a wide discretion in the prosecution as to whether they should call them either calling and examining them, or calling and tendering them for cross-examination.
>
> The prosecution do not, of course put forward every witness as a witness of truth, but where the witness's evidence is capable of belief then it is their duty, well recognized, that he should be called, even though the evidence that he is going to give is inconsistent with the case sought to be proved. Their discretion must be exercised in a manner which is calculated to further the

> interest of justice, and at the same time be fair to the defence. If the prosecution appear to be exercising that discretion improperly, it is open to the judge of trial to interfere and in his discretion in turn to invite the prosecution to call a particular witness, and if they refuse there is the ultimate sanction in the judge himself calling the witness."

[74] In the instant case the learned trial judge set out in his ruling the above principles. He recognized and said that the discretion of the prosecution is largely an unfettered one and the court should only interfere if it was being improperly exercised. He said the test was whether it was being exercised in the interests of justice and being fair to the applicant, which he felt in making the witness available to the defence, in this case, was fair. He also recognized that if the prosecution did not call the witness the court could do so, but in the circumstances of this case, he declined to adopt that course. We can find no fault with the trial judge's approach to the application.

[75] With regard to the attack by counsel for the applicant that he had not been served with the notice to adduce the evidence of Mrs Jean Williams, until the moment when she was to give evidence, this court finds pages 501- 511 of the transcript very instructive. It is true that counsel objected initially to the evidence on the basis that the actions of the Crown amounted to ambush, and that the resultant effect was grave harm, grave embarrassment, and prejudice to the applicant. However

subsequent to that objection, an apology was proffered from counsel for the Crown, an indication was given from the court that the evidence appeared to be, "sheer formality", and an offer was made from Crown Counsel that any application for an adjournment would not be opposed. Thereafter, an offer came from the court for an adjournment in order to avoid any harm to the applicant, and counsel for the applicant made an application for an adjournment for 15 minutes. This time was then reduced by counsel to 10 minutes, and then finally, counsel indicated to the court, that having had the opportunity to peruse the notice since service on him, and since the relevant part of the document was only 1 page, indicated that he would forego his request for the said adjournment. The evidence of the witness was duly taken thereafter, and the said deposition marked for identity, and a voir dire held with regard to its admissibility. One could readily say that it was all "much ado about nothing" and it is even more surprising that it became an aspect of the ground of appeal, claiming that the trial was unfair. There is no merit whatsoever in this ground.

[76] The complaint of counsel that the learned trial judge failed to point out to the jury that there was a possibility of contamination of the swabbing samples as there was no control sample, is inaccurate and also without merit. This is how the judge dealt with the evidence of Ms Marcia Dunbar:

> "She said a control sample of control swab which would be a swab never been used, that is clean, even sterile, swab is wetted with the solution would be used to start the process that is not rubbed on any other surface and she said that control swab can assist in aspects of interpretations such as contamination. Control sample subject to testing, should test negative. She said she can say that the absence of a control sample could not affect the results of her testing. What it would do is affect the interpretation of the result. If the control sample was positive, that would indicate that the swab, or solution was contaminated, therefore one would not, or should not rule out the result because of contamination.
>
> Now, Mr. Foreman and your members, she said if the control sample was positive and there is no evidence in this case that any control sample, or any test on a control sample being positive, but she said that she would not rule out contamination of sample because of the absence of control sample, but Mr. Foreman and your members, that is entirely a matter for you. Miss Dunbar's testing and assessment, or rather analysis and assessment of the swabs may not have been affected by the absence of control sample. It's entirely a matter for you, but I should remind you that there is no evidence that there is any control sample that has tested positive, but it's a matter entirely for you."

In our view the learned trial judge put the evidence properly before the jury and as it remained an issue as to fact, left it for their consideration, as he ought to do.

[77] Counsel's challenge to the judge's direction on the issue of intention is equally without merit. The direction to the jury about which there is

complaint, is set out in its entirety in paragraph 64, and it is clear when viewed as a whole, that what the judge was saying, is that intention can only be proved by words and or actions at the time they are uttered or effected or immediately thereafter, but intention per se cannot be proved as an element on its own by going into a person's head and extracting it for dissection and ultimately a finding.

Analysis of ground of appeal 3 (a)

[78] It is clear that the important issues in this case related to the correctness of the visual identification. Counsel for the applicant has quite properly conceded that the directions by the learned trial judge on inconsistencies in the evidence and how to deal with them could not be faulted. The learned trial judge explained that inconsistencies or contradictions in the evidence of a witness will occur, particularly when the facts about which they speak occurred a long time ago; he also explained that they can be slight or serious, material or immaterial and he directed the jury on how they should treat with contradictions in the evidence within one witness' testimony, and between one witness' evidence and another. He also exhorted the jury to take into consideration the levels of intelligence of the witness and their powers of observation.

[79] The jury consists of intelligent men and women with commonsense. There is no duty on the trial judge to point out every discrepancy and to show how each and every one could affect the evidence on identification. In this case the learned trial judge also gave detailed **Turnbull** warnings on identification, indicated that this was a recognition case, as the sole eye-witness in relation to the applicant, Mr Dain Parkinson had known the applicant for months before this incident, which took place in the early afternoon, where persons were sitting around a table, drinking and socializing, and before the incident occurred the witness would have had no reason to be either afraid or nervous.

[80] The principles enunciated in ***Regina v Carl Peart***, a case out of this court, are clear:

> "The law is well settled however that where a case depends wholly or substantially on the correctness of one or more identifications of an accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting in reliance on the correctness of that identification. The judge is also required to direct the jury as to the reason for the need of such a warning."

In that case the defence was saying that the witnesses were all lying. Carey, JA went on to say that, "whether the witness is making an honest mistake or a "deliberate mistake" the requirement for the warning is mandatory". In that case also the quality of the identification evidence was good but the trial judge gave no warning as is required and the court

found, in keeping with all the authorities, that that failure was a fatal flaw in the summing up, and the appeal was allowed and a re-trial ordered.

[81] In the instant case the learned trial judge gave the required directions, and one must remember that the case for the prosecution did not rely solely on evidence relating to visual identification. In ***Reginam v Beckford*** the above principles were endorsed and their lordships also stated that "a general warning on **Turnbull** lines were required in recognition cases as well as those involving the identification of a stranger, and that the warning was nonetheless required even if the sole or main thrust of the defence was directed to the issue of identifying witness' credibility, that is whether his evidence was true or false, as distinct from accurate or mistaken…" In the instant case, the judge warned the jury several times about the need to take care in assessing the credibility of the sole eye-witness. Although the learned trial judge regrettably failed to point out that the weaknesses in the evidence, by way of inconsistencies, could adversely affect the identification evidence, in our view the weaknesses were not so overwhelming as to render the visual identification of no value. Additionally, as we have stated, before this was not a case which depended solely on identification evidence. In our view, this ground of appeal fails.

Ground of appeal 3 (b)

[82] This ground relates to the admissibility of the deposition of Michael McFayden, which has already been dealt with in this judgment in respect of the appellant. It has no merit.

Ground of appeal 3 (d)

[83] When the information came to the attention of counsel for the Crown that a member of the jury was a relative of the appellant he quite properly put this information before the court in the absence of the jury. He requested the judge to ask the juror to return to the jury box so that an inquiry could be conducted, to ascertain if the information was correct, and, to discern the nature of any such relationship, and whether it could have tainted the other members of the jury, with whom he would have sat for three days. The judge inquired of counsel for the applicant and the appellant if they had any comments and they appeared to be happy to leave the matter in the capable hands of the judge who after dialogue with the juror discovered the close family ties, and also that the juror had not discussed the case at all with any of the members of the panel - (pages 131-137 of the transcript). In the exercise of his discretion the judge only discharged the juror, and the matter continued before the other members of the jury, without demur from counsel.

[84] This then is not a case where the juror had any personal knowledge about the alleged bad character of the accused, for there certainly was no such information disclosed on the record. In the case of ***Catherine Afulenu Sawyer***, the accused and four other defence witnesses saw a chief prosecution witness and another prosecution witness speak to three of the jurors in the court canteen. The judge questioned all persons and it appeared that the discussions only related to social greetings and an inquiry of the chief prosecuting witness whether the case would finish that day and if not then, when? On the facts in that case, and on the issue as to the role of the judge, the Lord Chief Justice said the following at page 285:

> "It seems to us that what he principally had to decide was whether there was any danger from anything done or said that the jury might have been prejudiced against the appellant. In our judgment there was no such danger. Certainly there is no ground for us in this case to interfere with the discretion which the judge exercised."

The court found that the exchanges were of no moment and unlikely to influence the jury with regard to whom they should or should not believe. The appeal was therefore dismissed. In the instant case, the juror said that he had not yet discussed the case with any of the other jurors and so the influence would have appeared to be non existent and the discretion of the judge exercised fairly and judicially.

[85] In a much older case not referred to by either counsel, ***Gibson v R*** (1963) 5 WIR 450, a case from the Court of Appeal of Trinidad and Tobago, a somewhat similar situation arose. The facts were that the case had started about 25 minutes before the end of day one of the trial. One police officer had started to give evidence, and then was stood down as exhibits that he was to produce were not yet at hand. Then a police photographer gave evidence, produced three photographs relating to the scene, and was cross examined, but by the next morning, as soon as court resumed, the appellant's counsel informed the court that one of the jurors was a brother of the deceased. He was questioned about that and he admitted that he was, but said that he had not said so when he was being sworn in to act as a juror, as he did not know the procedure. He was discharged forthwith, and counsel was asked if he had any objection to the trial proceeding with the remaining 11 jurors. He said he did not, and the trial proceeded. The judge warned the jurors that the case must be decided only on evidence heard in the witness box and not else where. The trial thereafter followed the normal course. On appeal however, although it was not suggested that the juror could have affected the jury while being empaneled on that first day, or that he had been seen talking to any of the jurors after he had been discharged, the complaint was made that having sat with them on that first day, and having been drawn together, the opportunity to bias them had arisen, and justice must not

only be done but must be seen to be done. The court analyzed the facts and decided that it would be mere speculation to assume that any adverse communications had been made. The court concluded, thus:

> "Accordingly, mere possibilities will not suffice, let alone speculative possibilities. To justify setting aside the jury's verdict requires the proof of some conduct or breach such as should lead a court to think that some injustice may have been done to the accused. We can find nothing on the facts before us on which to hold that the fair trial of the appellant had been, or might have been, in any way prejudiced."

We think that statement is also applicable to the instant case as there was no evidence that the close family ties between the juror and the appellant, without more, led to any injustice, and on the facts of this case, even less likely that there would have been any contamination or bias of the other members of the jury. Further, the judge accepted that the juror had not discussed the case with the other members of the jury thereby obviating any possibility of contamination. This aspect of ground 3 is therefore without merit and must fail.

Conclusion

[86] It is for the foregoing reasons that on 30 July 2010 we made the following order:

> "The appeal is dismissed in respect of Dermid Daley. Sentence is to commence on 18 August 2005. The application for leave to appeal in respect of Sylvannus McQueen was treated as the hearing of the appeal.

This also is dismissed. The sentence is to commence on 18 August 2005."