JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE STRAW JA
THE HON MISS JUSTICE EDWARDS JA

SUPREME COURT CRIMINAL APPEAL NO 17/2011

APPLICATION NO COA2021APP00081

JEROME DIXON v R

Terrence Williams instructed by John Clarke for the applicant

Mrs Tracy-Ann Robinson and Dwayne Green for the Crown

Written submissions filed by the Director of State Proceedings

26, 27, 28, 29 July and 26 November 2021 and 21 January 2022

STRAW JA

LAYOUT OF THE JUDGMENT	
	Paragraph Reference
Introduction	**[1] – [3]**
The Crown's case	**[4] – [8]**
The Defence's case	**[9]**
The grounds of appeal	**[10]**

The application pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA')	**[11] – [14]**
The Crown's response to the application	**[15] – [20]**
The applicant's response	**[21]**
Ruling on the application	**[22] – [28]**
The submissions on appeal	**[29]**
Abuse of process	**[30] – [57]**
Non-disclosure of transcripts and deposition	**[58] – [71]**
Inadequate representation	**[79] – [96]**
The calling of the complainant's husband	**[97] – [117]**
Inappropriate treatment of prejudicial evidence	**[118] – [149]**
Taking of the verdict and handling of the jury	**[150] – [184]**
Sentence	**[185] – [188]**
Delay and constitutional issues	**[189] – [291]**

Conclusion	**[292]**
Orders	

Introduction

[1] On 21 February 2011, following a trial in the Home Circuit Court before King J ('the learned judge') sitting with a jury, Mr Jerome Dixon ('the applicant') was convicted of the offence of wounding with intent. He was also sentenced, on the same day, to 15 years' imprisonment at hard labour.

[2] The applicant was refused leave to appeal against his conviction and sentence by a single judge of this court. This is a renewal of his application. The applicant was granted bail by a single judge pending the determination of his renewed application for leave to appeal, and his bail was extended until the date of delivery of this judgment.

[3] By way of background, it is important to state that the hearing of the application took place sequentially with the application for leave to appeal in the matter of SCCA No 55/2015 **Omar Anderson v R** and the appeal in the matter of **Evon Jack v R** [2021] JMCA Crim 31. This was done to accommodate counsel for the applicants and appellant, who indicated that they would be making submissions of a similar nature in respect of each of the three matters.

The Crown's case

[4] On 3 September 2005, at about 8:00 pm, Mrs Donna Allen ('the complainant') returned home from the supermarket with her husband and son. She described her house as a three-room board structure. On their return, her husband opened the door and turned on the outside light and the light in the front room. The complainant went inside and put down the groceries, and her husband went back outside. While she was standing in the front room, she heard an explosion like a gunshot and realised that she

had been shot when she saw blood coming through her jeans and felt her right leg starting to burn. She did not see who fired the shot. She called her stepmother.

[5] She started feeling weak in the leg, so she sat on the floor, and while there, she saw the applicant in the doorway. She had known him for about 17 years, and there was nothing to obstruct her view of him. The applicant had an open ratchet knife in his hand. The applicant stepped inside the house while the complainant was still seated on the floor; he held her blouse and started to stab her all over her body. In particular, the complainant stated that he stabbed her in her right breast, left forearm, left hand (her thumb was cut), left shoulder near her lungs. He also stabbed her twice in each leg and her right side, in the region of her waist. He also cut her throat. The complainant stated that she was trying to get up and when she managed to stand, that was when the applicant went behind her, held her head and cut her throat.

[6] After the applicant cut the complainant's throat, he ran outside and then came back and pushed the knife under her left breast. This caused her to fall. The applicant then ran. The complainant estimated that this ordeal lasted roughly ten minutes and that she was able to see the applicant's face right throughout.

[7] The complainant was taken to the hospital, where she was treated for serious injuries. She was admitted on 3 September 2005 and discharged five days later.

[8] On 31 October 2007, the complainant saw the applicant at a bus stop. She went to the police station and told the police that she had seen the applicant. Thereafter, she accompanied the police to the bus stop, where she pointed out the applicant. Upon being placed into the police service vehicle, there was an exchange between the complainant and the applicant. He said, "[m]ummy, you know is who dweet, yuh know is who dweet" and she responded, "[y]es, I know it was who, because it was you I saw when you came and cut my throat".

The defence's case

[9] The applicant made an unsworn statement denying all knowledge of the incident. He stated that he and the complainant were never in "noh fuss nor quarrelling" and that he did not hurt her. He called an alibi witness in the person of his mother, Ms Yvonne Montique ('Ms Montique'). She said that the applicant was at home on 3 September 2005. That day was memorable to her because she suffered a burn to her hand while cooking. Her evidence was that the applicant left to play football at about 5:00 pm, and he returned home at around 7:30, when "[c]ashpot was playing" just in time to assist her when her hand was burnt. She indicated that he never left the house again that night.

The grounds of appeal

[10] Counsel for the applicant, Mr Terrence Williams, obtained permission to argue 12 supplemental grounds of appeal but subsequently indicated that he would not pursue four of those grounds. Those were withdrawn. The following (as originally numbered) were argued:

> "1.[withdrawn]
>
> 2. The Prosecution exercised its discretion improperly in failing to call Mr. Allen the sole witness as to the eye-witness's first description.
>
> 3. [withdrawn]
>
> 4. The majority direction was improperly given as the directions failed to make it clear that the jurors were entitled to disagree.
>
> 5. The learned trial judge failed to adequately demonstrate how the sentence was arrived at.
>
> 6. The delays in the hearing of the appeal amount to an abuse of the court's process attributable to the Crown.
>
> 7. [withdrawn]

8. The Crown failed in its obligation to disclose to the applicant the transcript of the previous trial that had been on substantially the same facts and the deposition[s] [taken at] the preliminary inquiry.

9. The jury was pressurised in arriving at its verdict.

10. The trial was an abuse of process as it was a subsequent trial on substantially the same facts as a previous trial and no special circumstances were proffered to permit a trial in those circumstances.

11. The learned trial judge failed to properly, or at all, exercise his discretion to call the witness Mr. Allen.

12. The learned trial judge erred in conducting part of the trial, namely the arguments and decisions surrounding the calling of the witness Mr. Allen, in the absence of the applicant.

13. Defence counsel's representation was inadequate particularly as he failed to take appropriate instructions from the Applicant.

14. [withdrawn]

15. The jury heard prejudicial evidence as to:

    a. the murder that occurred at the time of the incident;

    b. the applicant being of poor repute;

    c. the applicant being a friend of someone who previously attacked the eyewitness; and

    d. that it was the first occasion that the alibi witness gave her account.

16. The learned trial judge failed to give the jury the appropriate directions as regards the prejudicial evidence referenced in the foregoing ground."

The application pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act

[11] By way of notice of application for court orders (filed 30 April 2021), the applicant sought leave to adduce fresh evidence. This evidence was contained in three affidavits –

i the affidavit of the applicant sworn to on 31 March 2021;

ii the affidavit of Leroy Equiano sworn to on12 May 2021; and

iii the affidavit of Gladstone Wilson sworn to on 29 April 2021.

[12] The affidavits sworn to by Messers Equiano and Wilson, of counsel, speak to the delay in the hearing of the applicant's appeal, his treatment awaiting appeal, a previous murder trial and acquittal on substantially the same facts, and the non-disclosure of the depositions and transcript of the previous murder trial.

[13] In the speaking notes, reference was made to the authorities on fresh evidence cited by the Crown, namely **R v Parks** [1961] 2 All ER 633, **Seian Forbes and Tamoy Meggie v R** [2014] JMCA App 12, and **Carl Pinnock v R** [2019] JMCA Crim 7. It was acknowledged that the criteria for the reception of fresh evidence from **R v Parks** (which the other cases followed) were that the evidence (i) must not have been available at trial, (ii) must be relevant to the issues, (iii) credible, that is well capable of belief. Also, the court must consider whether it would have caused a jury to have had reasonable doubt. It was submitted that these factors may be considered; however they did not establish the criteria for admissibility. The true test was whether the reception of the evidence was "necessary or expedient in the interest of justice". The court was referred to the case of **Benedetto v R and Labrador v R** [2003] UKPC 27.

[14] Mr Williams clarified orally that, in any event, the application was not for fresh evidence to be adduced but one pursuant to section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA'), to allow the applicant to rely on evidence that did not form

part of the record. He submitted that in order to advance certain arguments, there would need to be a factual basis, and it would be improper to try to prove facts by way of submissions. He contended that the reception of the evidence contained in the affidavits was necessary and expedient in the interests of justice, as the evidence was relevant to the grounds of appeal, which he would be arguing on behalf of the applicant.

The Crown's response to the application

[15] Crown Counsel, Mr Dwayne Green, objected to the application. Reliance was placed on the decision of this court in **Carl Pinnock v R**, which approved of the test in **R v Parks** which outlined the four criteria to be satisfied for the admission of fresh evidence.

[16] It was submitted that from a review of the three affidavits, there was no evidence that is contained in either of the three documents that was not available at the trial. Reference was made to an exchange between the learned judge and defence counsel, Mr Wilson (at page 96 to 97 of the transcript), which gave rise to the inference that Mr Wilson was aware of a previous trial involving the applicant. As such, both the deposition and transcript were within (or ought to have been within) the applicant's knowledge at the time of the trial and cannot be said to be new or fresh evidence.

[17] On the issue of relevance, it was submitted that the transcript from the murder trial was not relevant to the issues to be tried in the case of the wounding with intent. It was pointed out that prior to the amendment to the Criminal Justice (Administration) Act, in 2010, the offence of murder could not be tried with any other offence and thus, the Crown had to try them separately. In the case of the murder, the indictment laid charged the applicant for the murder of Robert Rose ('Mr Rose') on 3 September 2005. In the case of wounding with intent, the indictment charged the applicant for wounding the complainant with the intent to do her grievous bodily harm. The evidence adduced in respect of each were separate and as such the transcript would not have been relevant.

[18] Reference was made to the case of **Benedetto v R and Labrador v R**, which was cited by Mr Williams. The court's attention was invited to the wording of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance ('the Ordinance'), which governs the adducing of new evidence on appeal against a criminal conviction in the British Virgin Islands. It was submitted that section 42 of the Ordinance makes it mandatory for the appellate court to admit fresh evidence once certain conditions were satisfied. By contrast, section 28 of JAJA gives this court a discretion to admit, if the limbs are satisfied.

[19] Mr Green acknowledged that the affidavits of Messrs Equiano and Wilson raised the issue of non-disclosure of the transcript and the depositions. However, it was submitted that from a review of the deposition of the complainant (which was exhibited to the affidavit of Mr Wilson), it was clear that the spirit of the deposition was led in evidence at the trial. As such defence counsel was able to properly cross-examine the complainant, and no prejudice was caused to the applicant. In the circumstances, he repeated that the application to adduce fresh evidence ought to be refused as the requirements under section 28 of JAJA had not been satisfied.

[20] In respect of the applicant's affidavit, it was noted that it mainly spoke to the appellate process and not the trial. There was no allegation of any material that was not available at the time of the trial.

The applicant's response

[21] By way of response to the Crown's submissions on **Benedetto v R**, Mr Williams clarified that section 41 of the Ordinance was the same as our section 28 of JAJA. He invited the court's attention to paragraphs [62] and [63] of the judgment where the provision was set out and discussed:

> "[62] The mandatory duty to receive fresh evidence imposed by s 42 in cases where the specified conditions are met is supplementary to a wider discretionary power. This is found in s 41 of the Ordinance which, so far as relevant, provides:

> 'For the purposes of an appeal in any criminal cause or matter, the Court of Appeal may, if they think it necessary or expedient in the interest of justice – (a) exercise any or all of the powers conferred by section 32 on the Court of Appeal …'.
>
> For present purposes the relevant power conferred by s 32 is found in para (c) of that section:
>
> 'if they think fit receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not a compellable witness …'
>
> [63] Thus, under these provisions, the court has a discretionary power to receive fresh evidence, to be exercised when the court thinks it necessary or expedient to do so in the interest of justice. The provisions are similar in effect to s 23(1) and (3) of the Criminal Appeal Act 1968 as originally enacted, the ancestry of which can be traced back to s 9 of the 1907 Act."

Ruling on the application

[22] After hearing the submissions, the court ordered that the application for fresh evidence (as set out in the notice of application for court orders filed 30 April 2021) was allowed in respect of the affidavit of the applicant. The application to admit the affidavits of Messrs Equiano and Wilson was refused. At that time, we indicated that our reasons would be provided at a later date. The reasons are now set out below.

[23] We declined to allow the depositions of counsel Mr Equiano, who represented the applicant at a trial for the murder of Mr Rose ('the first trial'). The applicant was acquitted after a no case submission was upheld and a formal verdict of not guilty returned. The purpose of the affidavit of Mr Equiano being received into evidence was to establish those facts. There was no dispute by the Crown as to these factual assertions. In relation to the affidavit of Mr Wilson, he had asserted that he was unaware of the first trial, and he was not served with either the depositions taken at the preliminary enquiry or the transcript of that trial. The preliminary enquiry that was held was relevant to both the death of Mr Rose and the wounding of Mrs Allen. The

Crown does not contend that Mr Wilson was served with either the transcript of the first trial or the depositions.

[24] We were not of the opinion that the contents of Mr Wilson's affidavit satisfied the test for the reception of fresh evidence as set out in **R v Parks** and followed by this court in a number of cases including **Seian Forbes and Tamoy Meggie v R**, and **Carl Pinnock v R**. The criteria as established in **R v Parks** has been set out at paragraph [14] above. Based on the transcript of the trial for the offence of wounding with intent ('the second trial'), Mr Wilson's cross examination of Mrs Allen and exchange with the learned judge indicated that he was aware of the first trial. This is evident at page 65 of the transcript in his cross-examination of Mrs Allen, as well as pages 96 to 97 in his cross examination of Detective Sergeant Alvan Fearon ('DS Fearon'). This would impact the issue of credibility, which is the third criterion to be satisfied as set out in **R v Parks**. Also, there is no indication on the face of the record that he applied for the transcript of the first trial and that the Crown refused or neglected to disclose it, so the first criterion as set out in **R v Parks** would not have been satisfied.

[25] Mr Williams did, however, submit that he was not merely relying on the principles as set out in **R v Parks**, but that section 28 of the JAJA, would allow the court to apply its discretion and order the production of any document, exhibit or other thing connected with the proceedings, if it appears necessary for the determination of the case; that the statutory test for this determination is expediency and the interests of justice. He stated that this was, in essence, a complaint about the trial process and in any event, criterion number one of **R v Parks** would have been satisfied. We considered too **Benedetto v R** and looked at both sections 41 and 42 of the Ordinance. The Judicial Committee of the Privy Council ('JCPC') referred to the courts' discretionary power and the considerations in a number of cases, including **R v Pendleton** [2001] UKHL 66. At paragraph [65] of **Benedetto v R**, Lord Hope of Craighead stated:

> "[65] First, the integrity of jury trial depends on the presentation of a criminal defendant's full case at trial to the jury as the body charged with the all-important task of returning a verdict of Guilty or Not Guilty. Those representing a defendant should take all reasonable and practicable steps to gather and present at the trial all the evidence needed to present his defence. It is never legitimate to neglect to take reasonable and practicable steps to gather and present evidence at the trial, still less to hold back evidence available to be adduced at trial, in the expectation or calculation that it can be adduced on appeal if need be. But, secondly, the discretionary (and, where it applies, the mandatory) power to receive fresh evidence represents a potentially very significant safeguard against the possibility of injustice. **The court's discretionary power is one to be exercised if, after investigation of all the circumstances, the court thinks it is necessary or expedient in the interest of justice to do so. While it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice, to receive and take account of such evidence.** A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought." (Emphasis added)

Though not relevant to any decision concerning this application, it is to be noted that **R v Pendleton** modified the court's task (as originally set out in **R v Parks**) if fresh evidence has been admitted into evidence. It is no longer, as Crown Counsel submitted, whether there might have been a reasonable doubt in the minds of the jury if the fresh evidence had been given. What the court is to do, is to consider what effect the fresh evidence would have on the minds of the court and not the minds of the jury (see **Bryan Smythe v R** [2018] JMCA App 3, paragraph [19] which referred to the dictum of Panton P in **Patrick Taylor v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 85/1994, judgment delivered 24 October 2008 relying on **R v Pendleton**). Further clarity has also been given by the JCPC in **Maharaj v The State** [2021] UKPC 27 on the issue of whether the fresh evidence renders the conviction unsafe and the approach the court may take in that assessment. At paragraph [68],

Dame Julia Macur expressed that in a case of any difficulty, the appellate court may test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the jury to convict (the jury impact test). If it might, the conviction must be thought to be unsafe.

[26] The discretionary power under section 28 of JAJA is only to be exercised if, after investigation of all the circumstances, the court thinks it is necessary or expedient in the interests of justice to do so. However, this would still incorporate a consideration of the criteria as set out in **R v Parks**. It is recognised that in appropriate cases, the court need not be as stringent in its application of the first criterion as set out in **R v Parks**. It follows that any relaxation of the principle must be justified, based on the material presented and if it is in the interests of justice so to do (see **Anthony Gayle v R** [2021] JMCA Crim 30, paragraph [26] and **Calvin Reid v R** [2020] JMCA Crim 14, paragraph [19]).

[27] In addition to the fact that the first and third criteria of **R v Parks** have not been satisfied, the second criterion as to relevance would also be unsatisfied. This is so for the reasons stated earlier, that the Crown conceded that Mr Wilson was never served with the transcript of the first trial nor the depositions. Importantly, the depositions exhibited to Mr Wilson's affidavit did not reveal any material or significant variation with the evidence led at the second trial. We considered also that the absence of the transcript is a ground of appeal, which the court can assess without having regard to Mr Wilson's affidavit. In that regard, when we refused the application (for the affidavits of both counsel to be admitted as fresh evidence), we indicated that if it was necessary, counsel would be at liberty to make reference to the depositions in their submissions.

[28] It was for these reasons we made the orders as indicated at paragraph [22] above.

The submissions on appeal

[29] As stated previously, 12 grounds of appeal were advanced. However, Mr Williams did not argue the grounds in numerical order. Rather, he began with ground 10, followed by grounds 8 and 13. Thereafter, he collectively made submissions under grounds 2, 11 and 12. Grounds 15 and 16 were also argued together, followed by collective submissions on grounds 4 and 9. Reliance was placed on written submissions for ground 5 and he concluded with ground 6. To avoid confusion, the grounds are best dealt with by reference to the issues raised.

Abuse of process

Ground 10: The trial was an abuse of process as it was a subsequent trial on substantially the same facts as a previous trial and no special circumstances were proffered to permit a trial in those circumstances

Submissions on behalf of the applicant

[30] At the outset of his submissions, Mr Williams made it clear that there are two variants of double jeopardy. The first being *autrefois*, which he was not arguing since the applicant could not have been convicted of wounding with intent on an indictment for murder. However, the applicant having been acquitted of murder, it was argued that there is a bar for any subsequent trial arising on substantially the same facts. This was so even though the victims were different.

[31] He submitted that although this was not an absolute bar, in the circumstances, the prosecution was required to show special circumstances to the learned trial judge why the trial on the charge of wounding with intent should proceed. These special circumstances would then have to be assessed and a ruling made as to whether what would normally be an abuse would be permitted by allowing a subsequent trial. Mr Williams conceded that the learned judge may well have taken into account the fact that the charge of wounding with intent could not have been joined with murder, but he submitted that this did not permit the prosecution to usurp the function of the learned judge. It was wrong for the prosecution not to seek permission to pursue the second

indictment, and it was also a failure of due process for defence counsel not to be heard on whether there ought to have been a second indictment for wounding with intent.

[32] The essence of Mr William's arguments was that there cannot be subsequent trials arising from the same facts unless special circumstances were shown, as it has long been recognised that repeat trials on the same facts are potentially abusive of the court's process.

[33] Counsel further contended that the court must protect itself from abuse, and the double jeopardy rule is based on the issue of abuse of process. Excerpts from Blackstone's Criminal Practice (edition unknown, paragraphs F12.21 and F12.22) were commended to the court for consideration, and in particular the case of **Sambasivam v Public Prosecutor of Malaya Federation** [1950] AC 458, which was referred to in the excerpts. In that case, the defendant was charged with two offences, carrying a revolver (in respect of which a new trial was ordered) and being in possession of 10 rounds of ammunition (six were loaded in the revolver). The defendant was acquitted of the second charge. At a later trial in respect of the first charge, the prosecution relied on a statement allegedly made by the defendant in which he admitted both charges. He was convicted. The Privy Council quashed the conviction on the ground that the judge should have directed the tribunal of fact that the accused had previously been acquitted of being in possession of ammunition, and that in light of that fact, the prosecution was bound to accept that the part of the alleged statement relating to the ammunition must be regarded as untrue.

[34] The learned authors of Blackstone's stated (at paragraph F12.22) that the decision in **Sambasivam** is not to be regarded as an authority in support of the existence of the doctrine of issue estoppel, which is inapplicable in criminal cases. There was also reference to another case on which Mr Williams relied, **R v Z** [2000] 2 AC 483. In that case, the House of Lords found that the setting aside of the conviction in **Sambasivam** was correct, but the proper grounds for doing so were those given by Lord Pearce in **Connelly v DPP** [1964] AC 1254, namely that a person should not be

prosecuted a second time where the two offences were in fact founded on one and the same incident (the carrying of the revolver and the ammunition), and that a person should not be tried for a second offence (carrying the revolver in which some of the ammunition was loaded) which was manifestly inconsistent on the facts with a previous acquittal (acquittal of possession of the ammunition). The House of Lords also found that, provided an accused is not placed in double jeopardy in the way described by Lord Pearce in **Connelly**, evidence which is relevant on a subsequent prosecution is not inadmissible merely because it shows or tends to show that the accused was in fact guilty of an offence of which he had earlier been acquitted.

[35] It was also expressed in **Yam** [2010] EWCA Crim 2072 at paragraph [10] that **Sambasivam** is best explained as an example of the power of the court to prevent an abuse of the process of the court where a further trial would be unfair or oppressive. This assessment would involve a consideration of fairness in light of the individual facts of the case.

[36] Mr Williams submitted that it was the identification by the complainant (Mrs Allen) that formed the basis for the murder charge. Returning to the case of **R v Z**, the court's attention was invited to the discussion on the power of the court to stop abuses of its process. In particular, the dicta of Lord Hutton on pages 493C and 497 where reference was made to the cases of **Conelly**, **Sambasivam** and **R v Riebold** [1967] 1 WLR 674. Learned counsel also referred to the cases of **R v Wangige** [2020] EWCA Crim 1319 and **R v Beedie** [1998] QB 356.

[37] In conclusion, it was submitted that there was a manipulation of the proceedings by the prosecution, a failure by the judge to even appreciate that he had a discretion in a case where the only reasonable decision would have been to stay the proceedings and prevent the use of inadmissible evidence. Further, it was submitted that this court was not in a position to evaluate the special circumstances through no fault of the applicant, but through the State. In response to a question from the court, Mr Williams indicated

that the fact that the offences could not be charged on the same indictment was not a special circumstance.

Submissions on behalf of the Crown

[38] Crown Counsel, Mr Green, referred to the two trials which occurred in 2011. Firstly, the trial for the murder of Mr Rose and secondly, the trial for the wounding with intent of the complainant. He reiterated that at that time, the offences could not be joined on the same indictment. He submitted that it is clear that the offence of murder is different in both fact and law from that of wounding with intent. This was even more so in that the victim of the murder was different from the victim of the wounding with intent. Further, the applicant was never in any danger of being convicted for the offence of wounding with intent in his trial for murder.

[39] Reference was made to the case of **Connelly v DPP** as well as the decision of this court in **Paul Brown and Jeffrey Litwin v R** [2015] JMCA Crim 30, which referred to **Connelly**. These cases were cited in respect of the *autrefois acquit* principle, which is relevant only where the accused has previously been put in peril for the conviction of the offence with which he is charged, and the offence must be the same in both fact and law.

[40] In written submissions, it was contended that the fact that the scene of the offences and the witnesses were the same is not enough to ground a plea *of autrefois acquit* and, therefore, this ground should fail. Responding directly to the clarification by Mr Williams that this was not a case of *autrefois acquit*, it was submitted that there was no requirement to make any application in respect of the second trial. That would have only been necessary if the applicant had been acquitted of murder and the Crown was seeking to resuscitate that charge.

[41] Mr Green compared the position in **R v Beedie** with the instant case. He submitted that a distinguishing feature was that in the United Kingdom, there was an opportunity for the Crown Prosecution Service and the police to discuss the appropriate

charge. Additionally, by virtue of the Indictment Rules 1971 in that country, the relevant charges could be put on one indictment. It was submitted that, in this case, the Crown's hands were tied since there was no legislation at the time which permitted both charges to be placed on one indictment.

[42] In relation to the special circumstances, it was submitted that this must be determined on a case-by-case basis. The inability to try murder and wounding with intent charges together could have very well been regarded as a special circumstance. It was also submitted that there was no prejudice caused to the applicant by the lack of such a consideration and indeed there was no requirement for the Crown to seek permission to lay an indictment for the wounding with intent separately from one for murder.

Discussion and analysis

[43] It has long been recognised that the court has an inherent power to prevent an abuse of process (see **Connelly v DPP** at page 1301). An abuse of process has been defined as "something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all respects a regular proceeding". Further, it has been recognised that an abuse of process may be occasioned where (a) the prosecution has manipulated or misused the process of the court so as to deprive the defendant of the protection provided by the law or to take unfair advantage of a technicality, or (b) the defendant has been or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution (see Archbold Criminal Pleading, Evidence and Practice 2003 paragraph 4-54). It has also been recognised that in some circumstances, it may be an abuse of process where the prosecution deliberately fails to join offences arising out of one incident and seeks to hold separate trials (see **Bhola Nandlal v The State** (1995) 49 WIR 412).

[44] So important are these principles that they have been recognised and protected by section 16 of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter'), which is often referred to as the due process

section. In fact, section 16(9) essentially codified the common law doctrines of *autrefois con*vict and *autrefois acquit*. It provides:

> "No person who shows that he has been tried by any competent court for a criminal offence and either convicted or acquitted, shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence save upon the order of a superior court made in the course of appeal proceedings relating to the conviction or acquittal;…"

[45] It was common ground that the alleged abuse of process falls into none of these categories. If this was the case, it would have been for the applicant to plead accordingly. Section 7 of the Criminal Justice (Administration) Act states:

> "In any plea of autrefois convict or autrefois acquit, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted (as the case may be) of the said offence charged in the indictment, without setting out the same in any formal manner."

[46] The first trial of the applicant commenced on 12 January 2010, and he was acquitted on 13 January 2010. The indictment on which that trial was based, charged the applicant for murder and was prepared on 9 December 2008. The indictment in relation to the second trial had been prepared the day before the first trial commenced - on 11 January 2010. As mentioned earlier, Crown Counsel submitted that prior to the amendment to the Criminal Justice (Administration) Act, in 2010, the offence of murder could not be tried with any other offence and thus, the Crown had to try the offences separately. There was no reference to any particular section of the Act. Mr Williams seemed to accept this submission but his contention was that that there is a bar (though not absolute) for subsequent trials arising on substantially the same facts and that even if the offences could not be charged on the same indictment, this was not a special circumstance.

[47] It is accepted as correct that at the time of the first trial in 2010, the offence of murder could not have been tried with any other offence. This position has now

changed but not due to an amendment to the Criminal Justice (Administration) Act. As such, it is necessary to do a tracing of the legislative development and the established practice.

[48] It is noted that section 22 of the Criminal Justice (Administration) Act speaks to offences tried summarily (within the jurisdiction of the Resident Magistrate's Court, now Parish Court) and that offences arising out of connected acts may be tried at the same time, unless the court is of the opinion that this joinder will result in prejudice or embarrass the accused in his defence. This section, although amended by the Criminal Justice (Administration) (Amendment) Act, 2018, it remains applicable only to offences triable before the Parish Court. It will be recalled that both of the applicant's trials were held in the Supreme Court.

[49] Rule 3, contained in the schedule of the Indictments Act, speaks to the joinder of counts on an indictment. It provides:

> "3 Joining of charges in one indictment – Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of the same or similar character."

This rule has been subsequently amended by the Indictments (Amendment) Act 2018, which now puts the matter beyond doubt. The amendment provides:

> "3 Joining of charges in one indictment – Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are a part of a series of the same or similar character or are so connected as to form part of the same transaction, and as such joinder shall be subject to the provisions set out in rule 3A. It shall be at the discretion of the prosecution to determine whether or not to join any offence pursuant to this rule, but the court may in any event make an order that any offence charged jointly with another offence be tried on a separate indictment if the court is of the opinion that –

(a) there is a substantial risk of injustice if the offences are tried together; or

(b) the administration of justice would be better served if the offences are tried separately.

3A. Trial of offences joined pursuant to rule 3 –

(1) Except in the case of murder for which sentence of death may be imposed, the offence of murder and any lesser offence may be tried together, on a single indictment, by a Judge sitting with a jury." (Emphasis supplied)

[50] It should also be noted that this amendment to the rules, contained in the schedule of the Indictments Act, was made possible (as will be demonstrated below) by an amendment to the Jury Act; in particular, section 31 (by virtue of the Jury (Amendment) Act, 2015) which reduced the number of jurors required for murder in which the penalty is not death; it now reads:

"31 (1) On trials on indictment for –

(a) treason; or

(b) murder –

(a) committed in the circumstances specified in section 2(1)(a) to (f) of the Offences Against the Person Act; or

(b) upon the conviction for which section 3(1A) of the Offences Against the Person Act would apply,

twelve jurors shall form the array.

(2) **On trials on indictment before the Circuit Court other than for an offence specified in subsection (1), seven jurors shall form the array**." (Emphasis added)

[51] The practical result is that prior to the 2015 amendment to the Jury Act, the offences of treason and murder (regardless of the prescribed penalty) required an array

consisting of 12 jurors. As such, the practice became that no other offence (including wounding with intent) which required seven jurors was joined with murder. Crown Counsel would have been correct in his view that the applicant's trials for murder and wounding with intent had to be held separately.

[52] Interestingly, the issue of abuse of process, particularly, the fairness of not charging other offences on an indictment for murder arising out of the same facts, was considered in a constitutional motion raised before the full court and subsequently on appeal by this court in **Michael Heron v Director of Public Prosecutions and the Attorney General** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 13/2000, judgment delivered 4 December 2000 (an authority not relied upon by either party). It was held to be an abuse of process to proceed on an indictment (for firearm related offences) which had been preferred after a delay of almost four years, following three trials (for murder) arising from the same incident. Downer JA set out the provision of sections 31(1) and (2) of the Jury Act (as they stood then), and had this to say at pages 2 and 3:

> "Sec. 31(1) of the Jury Act makes provision for trials on indictment for murder. That section reads:
>
> > '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.'
>
> For other offences tried by jury, Sec. 31(2) is applicable. It reads:
>
> > '31.-(2) On trials on indictment before the Circuit Court for any criminal case, other than murder or treason, seven jurors shall form the array.'
>
> **In this context the position in St. Vincent as explained in Cottle v. The Queen [1977] A.C. 323 demonstrates that to combine the offence of murder with other offences would be unlawful in Jamaica.**

> **The correct and time honoured rule in the Office of Director of Public Prosecutions in preferring indictments for murder and other lesser offences which arise from the same criminal conduct was to prepare and prefer an indictment for all the offences at the same time and proceed on the indictment for murder. The learned presiding judge would be asked to endorse the indictment for the lesser offence 'Not to be, proceeded with without leave of the Court.'**…In this case the indictment charging the lesser offences was prepared and preferred during the course of the third murder trial. So the first irregularity raised in these proceedings gives rise to the question as to why there was a departure from the regular procedure…" (Emphasis added)

[53] Although disagreeing with the ultimate decision of the Full Court, Panton JA (as he then was) recognised this as a rule of practice which the Full Court considered. Albeit lengthy, it is necessary to set out Panton JA's dictum. In arriving at the same conclusion that there had been an abuse of process, he took a slightly different view in respect of the indictment. He found that because of the requirement in the Jury Act, no other offence could have been tried on the indictment for murder, but suggested that the second indictment ought to have been prepared at the time the appellant was indicted for murder, so that there would have been no uncertainty in anyone's mind as to what charges were to be faced. At pages 32 to 35 of the judgment, he stated thus:

> "The [Full] Court, as stated earlier, concluded that 'the argument concerning delay is wholly misconceived'. In arriving at that conclusion, it referred to the **'rule of practice existing in Jamaica as being that laid down in R v Jones (1918) 1 KB 416 where the Court held that notwithstanding Rule 3 of the Indictment Rules 1957, Counts charging other offences should not be inserted in an indictment for murder'.** The [Full] Court continued its reasoning thus:
>
> > 'I am not unmindful of the change in practice in England by virtue of the practice direction by Lord Parker CJ (see 1964 1 WLR 1244)

> In the light of this practice it could not be reasonably expected that the Director of Public Prosecutions would have proceeded with the minor charges before disposing of the very serious offence of murder. It is my view that where the law stipulates that certain offences cannot be joined in different counts of the same indictment, an accused person cannot plead delay if the Crown elects to proceed against him upon the disposal of the first indictment'.

I view as quite appropriate the Supreme Court's consideration of the practice in respect of not charging any other offence in the indictment for murder. However, it seems that the Court has apparently overlooked other established practices which to my mind are equally important. Howard Hamilton, Q.C., who, at the date of his affidavit (26th April, 1999), had practised at the Jamaican Bar for thirty-nine (39) years stated in his affidavit (see paragraph 11) that it frequently happened that other offences would be committed at the same time as the offence of murder, particularly when firearms were used to commit the murder, but to the best of his recollection and belief it was 'not the practice of the Director of Public Prosecutions to proceed with the lesser offences following the disposal of the murder charge irrespective of the outcome. No attempt has been made to refute this evidence. Indeed, it cannot be refuted as it coincides with the experience with many of us on the Bench. That practice, by itself, might not be sufficient to make an impact on the appellant's cause. However, in the instant case, it needs to be recognized that there was no second indictment on the file. This is a situation in which the Director of Public Prosecutions decided to lay one indictment – for murder. After a lapse of nearly four years after the arrest, he decided to lay another indictment after the appellant had endured three trials arising from the same incident. The appellant has been clearly led to believe that he had one indictment, and one indictment alone, to face arising from the incident. Therein lies the nub so far as the delay in this case is concerned. There has been no proper excuse, indeed no excuse whatsoever, offered for the tardiness on the part of the Crown. To say, as was said in the written submissions of the first respondent, that it was considered 'more appropriate' to proceed on the more serious charge of

murder before dealing with the lesser charges is no excuse at all for not preferring the indictment. It cannot be that the crown has a right to prefer an indictment whenever it feels like.

As said earlier, Mr Mahoney [for the Crown] made three concessions. Firstly, he conceded that the evidence to be presented at the trial in the Gun Court is the same that was presented at the three previous trials. Secondly, there was no information laid in respect of the complainant Franz Gordon. That count, he said, has at least to be stayed. Indeed, he added, it should be severed. Thirdly, he said that the facts of Connelly were similar to the case under review, and that **the preferment of the second indictment would prima facie be oppressive, but for the Jury Act. This reference to the Jury Act was a reminder that the murder charge had to be tried by twelve jurors so no other offence could have been tried on that indictment. I daresay that Mr Mahoney may have added a fourth concession by stating that the second indictment ought to have been prepared at the time the appellant was indicted for murder so that there would have been no uncertainty in anyone's mind as to what charges were to be faced.**

Lord Morris at page 409 H-I in **Connelly v DPP** [(1964) 2 All ER 401] said this:

'…there is inherent in our criminal administration a policy and a tradition that even in the case of wrongdoers there must be an avoidance of anything that savours of oppression.'

I find it difficult to avoid the classification of the behaviour of the Crown in this instance as anything but oppressive. To have taken nearly four years to lay the indictment is too long in all the circumstances, thereby violating the protection given in the Constitution as to a fair hearing within a reasonable time. To be seeking to try the appellant before a Judge alone in the Gun Court after he has already faced three trials before a jury on the same facts is in my view nothing but an abuse of process of the Court.

For the reasons above stated, I agree that the appeal should be allowed."

[54] The factual circumstances in **Michael Heron v DPP and AG** clearly differ from the case at bar, but it provides useful guidance. Perhaps even more so than some of the authorities cited by counsel in respect of this issue. In considering whether there was an abuse of process, this court had regard to the practice which existed at the time as well as principles from **Connelly v DPP**. In particular, regard was had to the dictum of Lord Devlin in examining the origin of the judicial discretion to prevent an abuse of process. Though lengthy, a portion of the judgment of Downer JA in **Michael Heron v DPP and AG** at pages 7 to 9 is reproduced:

> "Turning to the speech of Lord Devlin at page 438 he said:
>
> > 'My Lords, in my opinion, the judges of the High Court have in their inherent jurisdiction, both in civil and in criminal matters, power (subject of course to any statutory rules) to make and enforce rules of practice in order to ensure that the court's process is used fairly and conveniently by both sides. I consider it to be within this power for the court to declare that the prosecution must as a general rule join in the same indictment charges that 'are founded on the same facts, or form or are a part of a series of offences of the same or a similar character' (I quote from the Indictments Act, 1915, Schedule I, rule 3, which I shall later examine); and power to enforce such a direction (as indeed is already done in the civil process) by staying a second indictment if it is satisfied that its subject-matter ought to have been included in the first. I think that the appropriate form of order to make in such a case is that the indictment remains on the file marked 'not to be proceeded with.' I propose to put under three heads the reasoning which, in my opinion, supports this conclusion. First, a general power, taking various specific forms, to prevent unfairness to the accused has always been a part of the English criminal law, and I shall illustrate this with special reference to the framing of indictments. Secondly, if the power of the prosecutor to spread his case over any number of indictments was unrestrained there could be grave

injustice to defendants. Thirdly, a controlling power of this character is well established in the civil law."

In stressing the need for the public to have confidence in the administration of justice Lord Delvin continued thus at 442:

> `There is another factor to be considered, and that is the courts' duty to conduct their proceedings so as to command the respect and confidence of the public. For this purpose it is absolutely necessary that issues of fact that are substantially the same should, whenever practicable, be tried by the same tribunal and at the same time. Human judgment is not infallible. Two judges or two juries may reach different conclusions on the same evidence, and it would not be possible to say that one is nearer than the other to the correct. Apart from human fallibility the differences may be accounted for by differences in the evidence. No system of justice can guarantee that every judgment is right, but it can and should do its best to secure that there are not conflicting judgments in the same matter. Suppose that in the present case the appellant had first been acquitted of robbery and then convicted of murder. Inevitably doubts would be felt about the soundness of the conviction. That is why every system of justice is bound to insist upon the finality of the judgment arrived at by a due process of law. It is quite inconsistent with that principle that the Crown should be entitled to re-open again and again what is in effect the same matter.'

Then turning to the central issue of the role of the courts to prevent an abuse of process so as to protect the rights of the accused, Lord Devlin said on the same page:

> `The Solicitor-General does not dispute that if the prosecution were in fact to behave in all the ways in which according to his argument they could legally behave, there would be abuses which ought to be corrected. But in his submission the danger of abuse is a matter for the Crown; the Crown itself may be trusted not to abuse its powers and if a private prosecutor is abusing his, the Attorney-General can interfere by means of a nolle prosequi. The fact that

> the Crown has, as is to be expected, and that private prosecutors have (as is also to be expected, for they are usually public authorities) generally behaved with great propriety in the conduct of prosecutions, has up till now avoided the need for any consideration of this point. Now that it emerges, it is seen to be one of great constitutional importance. Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused. [Emphasis supplied]

In concluding Lord Devlin stated at page 446:

> 'The result of this will, I think, be as follows. As a general rule a judge should stay an indictment (that is, order that it remain on the file not to be proceeded with) when he is satisfied that the charges therein are founded on the same facts as the charges in a previous indictment on which the accused has been tried, or form or are a part of a series of offences of the same or a similar character as the offences charged in the previous indictment. He will do this because as a general rule it is oppressive to an accused for the prosecution not to use rule 3 where it can properly be used. But a second trial on the same or similar facts is not always and necessarily oppressive, and there may in a particular case be special circumstances which make it just and convenient in that case. The judge must then, in all the circumstances of the particular ease, exercise his discretion as to whether or not he applies the general rule.'

> The critical issue in the instant case is whether the facts and circumstance bring it within the exception…" (Underlining as in original)

[55] In the case at bar, there is nothing which demonstrates that there was any manipulation of proceedings by the prosecution or that any prejudice was caused to the

applicant. Unlike **Michael Heron,** there was no issue of delay, as the indictment in respect of the second trial was prepared a day before the commencement of the first trial. Further, although there is no evidence that an application had been made to the learned judge to proceed with the second trial, it would be unfair to contend that he was unaware of his discretion to stay proceedings where there had been an abuse of process. The true question is, on what basis (if any) would the learned judge have exercised his discretion to stay the second trial in respect of the wounding with intent of the complainant? We are satisfied that the learned judge was very much cognisant of the first trial (for murder) based on his response following a question by defence counsel to DS Fearon about the killing of the complainant's son. This was the exchange at page 96, lines 17 to 25 to page 97, lines 1 to 4 of the transcript:

> "Q. Sergeant, during the question and answer, was the following question put to the suspect at the time: 'Why did you have other men from Norbrook Gully by the names of Jermaine, 'Stumpy' and Dennis stab and kill Robert Rose?'
>
> A. That question was asked.
>
> Q. And what was the answer, did he answer, give an answer to that?
>
> HIS LORDSHIP: Mr. Wilson, I cannot see the relevance of that question to **these proceedings.**
>
> MR. G. WILSON: Okay, m'Lord.
>
> HIS LORDSHIP: **They may have been relevant at another time but bear in mind what is now being tried.**
>
> MR. G. WILSON: Yes m'Lord." (Emphasis added)

[56] In any event, it could be debated as to whether there would have been any necessity for the prosecution to seek the permission of the learned judge to commence the second trial. Based on the particular circumstances of this case, it could not be said that there was unfairness in relation to whether the prosecution was attempting a trial for a lesser offence, having failed on the more serious offence as in **Michael Heron**.

The police statements, depositions as well as the evidence presented at the second trial, reveal that Mrs Allen did not see who was responsible for the death of her son. However, she testified that it was the applicant who entered her room and used a knife to inflict several injuries on her. This, in our view, could be seen as special circumstances in any event (see **Connelly v DPP**). Mrs Allen's evidence had always been in respect of the applicant perpetrating a crime against her. This was a separate and distinct incident unrelated to the offence of murder for which the applicant was acquitted.

[57] In the round, therefore, there was no abuse of process and, accordingly, this ground is without merit.

Non-disclosure of transcripts and deposition

Ground 8: The Crown failed in its obligation to disclose to the applicant the transcript of the previous trial that had been on substantially the same facts and the deposition[s] [taken at] the preliminary inquiry

Submissions on behalf of the applicant

[58] It was submitted that it was the duty of the State to disclose the depositions from the preliminary enquiry and the transcript of the first trial. The failure to disclose was a material irregularity, and it resulted in at least one area being unexplored. Reference was made to **Ann Marie Boodram v The State** [2001] UKPC 20, which involved a retrial for the offence of murder and, in particular, the dictum of Lord Steyn at paragraph [32], wherein it was stated that the duty rests of the court system to ensure that on a retrial, counsel for the defence is provided with the transcript of the first trial, or the relevant part of it. The case of **Alfred Flowers v R** (2000) 57 WIR 310 was reaffirmed. It was also stated that there was a residual duty on the prosecutor, as a minister of justice, to ensure the transcript was delivered to the defence for the purpose of a retrial. This duty was also recognised in **Reid, Dennis and Whylie v R** (1989) 37 WIR 346 at 363.

[59] Mr Williams contended that a real injustice was caused to the applicant as a result of the non-disclosure. He sought to compare the depositions with the evidence led at the trial. He pointed out that the evidence of the complainant in the deposition was that she heard her son call the name 'Tulu' and in that same deposition, under cross-examination, she stated "[t]he accused is not 'Tulu'." It was submitted that the alleged statement by her son was a *res gestae* statement which should have been explored; that the name 'Tulu' was not referred to in the transcript but was referred to in the complainant's statement and in the question and answer interview with the applicant, where he indicated that he did not know anyone by that name.

[60] Turning to the transcript, it was submitted that although it was not possible to prove what could have happened if the transcript had been produced, one could not speculate that the evidence was consistent. It was a failure on the part of the State when it did not disclose something which would have assisted the applicant in preparing his defence.

[61] Mr Williams candidly observed that on the outside of Mr Wilson's brief was a notation that the transcript from the murder trial was needed. However, in his affidavit he stated that he was not aware of the murder trial. Mr Williams suggested that this could have been as a result of the time that had since passed. It was also noted that the backing of the deposition had a notation that the applicant was originally charged with murder, and this observation was made on 27 October 2010 before Sykes J (as he then was). There was no indication on that backing as to whether there was a trial or acquittal.

Submissions on behalf of the Crown

[62] It was contended that the transcript of the trial for the offence of murder was not relevant, and the Crown was under no duty to disclose it; **Franklyn and Vincent v R** (1993) 42 WIR 262 was cited in support. This was so, since it was not technically the first trial, as the trial for wounding with intent was not a retrial. Further, the evidence elicited for the offence of wounding with intent of the complainant was different from

the evidence elicited for the murder of Mr Rose. Even though the complainant was a witness in both trials, any evidence of her wounding and certain utterances that it was the applicant who wounded her would not have been admissible at the murder trial.

[63] In any event, Mr Green submitted, the evidence contained in the missing transcript of the murder trial would have been based on the deposition at the preliminary inquiry and the statement given to the police by the complainant. As a result of this, there would have been ample information in defence counsel's possession to cross-examine the complainant with regard to her allegations and it is doubtful whether defence counsel would have wished to ask the complainant about anything she had said before regarding a murder. The effect of doing so would have been to put the jury on notice that the applicant was on trial for another offence.

[64] Mr Green asked that, if the court was minded to find that this was an appealable issue, there should be an application of the proviso to section 14(1) of JAJA as there was no miscarriage of justice.

Discussion and analysis

[65] There is indeed a duty resting on the prosecution and a trial judge to ensure the overall fairness of proceedings (see **Steven Grant v The Queen** [2006] UKPC 2, paragraph [26]). Also, it has been recognised that the prosecution has a duty to disclose all relevant material in its possession, and to provide the accused with copies of, or access to, any material held by the prosecution which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused. This is so regardless of whether that material will be introduced as evidence (see paragraph [59] of the dictum of Brooks JA, as he then was, in **Ronald Webley and anor v R** [2013] JMCA Crim 22 where reference was made to **Linton Berry v R** (1992) 41 WIR 244 and **Franklyn and Vincent v R**). However, full disclosure does not mean that there is an unqualified right to disclosure of all possible information, and the information that ought to be disclosed will vary on a case-by-case basis. There is a caution contained in the Disclosure: A Jamaican Protocol

prepared by the Office of the Director of Public Prosecutions ('ODPP') at pages 1, 4 and 5 that prosecutors must not abrogate their duties by making wholesale disclosure and should not support speculative or indiscriminate requests for disclosure. This court propounds this principle as being correct.

[66] On a retrial, defence counsel is to be provided with the transcript of the first trial or the relevant part of it. Indeed, the residual duty on the prosecution is to ensure that the transcript (or relevant portions) is delivered to the defence for the purpose of a retrial (see **Boodram v The State**, and **Reid, Dennis and Whylie v R**). Crown Counsel has contended, however, that there was no retrial in the case at bar, which is technically correct.

[67] It appears that only Mrs Allen's police statement was provided to defence counsel. It is undisputed that neither the depositions (taken at the preliminary enquiry into the offences of murder and wounding with intent) nor the transcript of the first trial had been served on Mr Wilson. Crown Counsel is correct that the issue did not involve a retrial but, based on the list of witnesses on the back of the indictment for the first trial, Mrs Allen is listed as the only civilian witness. On the back of that indictment, it is noted that no *prima facie* case had been made out against the applicant for the murder. So, Mrs Allen would have been the sole witness as to fact against the applicant in his trial for the offence of murder.

[68] While we acknowledge the Crown's contention that the matter was not a retrial, the Crown does have an ongoing duty to disclose relevant material to the defence. The fact that both the murder and the wounding with intent took place on the same day, more or less at the same time and location and that the common factor at both trials included the evidence of Mrs Allen, it could easily be concluded that the transcript of her evidence at the murder trial might be considered to be relevant material at the trial for wounding with intent. However, relevant material would usually be something the prosecution intends to rely on or something favourable to the defence's case, whether the prosecution intends to rely on it or not. The Crown clearly did not rely on any

evidence emanating from the first trial, but Mr Williams' contention is that there might have been evidence in the transcript favourable to the defence, in terms of inconsistencies and contradictions in the evidence of Mrs Allen.

[69] In relation to the depositions, this would have been relevant material and ought to have been disclosed to the defence. However, the arguments relevant to the transcript of the first trial appear to be speculative and no application had been made by counsel below for that disclosure, although it appears that defence counsel, at that time, was aware that there was a previous trial.

[70] We considered the approach of the JCPC in **Bonnett Taylor v The Queen** [2013] UKPC 8, at paragraph 13. In that case the witness, Mrs Hartley, gave a statement to the police but her evidence was not taken at the preliminary examination nor was she called at the first trial or the retrial for murder. This was raised as an issue in the appeal before the JCPC, more particularly, it was submitted that Mrs Hartley's evidence was of such importance that its absence in the trial made it unfair. Additionally, it was submitted that if it was essential to establish fault, then the prosecution was at fault for not disclosing the statement in sufficient time to enable the appellant's lawyers to interview her and call her if they wished. Alternatively, it was submitted that if the statement was served sufficiently early to enable defence counsel to seek to call her, then defence counsel was negligent in failing to use her statement as a basis for cross-examination of other Crown witnesses, as well as in failing to call her or having her statement read under section 31D of the Evidence Act. The JCPC resolved these issues in this way:

> "13. Inquiries as to when Mrs Hartley's statement was disclosed to the defence and as to why, assuming that it was available to the defence at the second trial, no use at all was made of it have not produced a satisfactory answer. But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for not having made use of it, this would not be enough to justify a finding that there has been a miscarriage of justice. **The focus must be on the**

> **impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than on attempting to assess the extent to which either the prosecution or defence counsel were at fault**: *Teeluk v State of Trinidad and Tobago* [2005] UKPC 14, [2005] 1 WLR 2421, para 39, per Lord Carswell. **The court must have material before it which will enable it to determine whether the conviction is unsafe.** So the appellant must be able to show what effect Mrs Hartley's evidence would have had if use had been made of it at the trial. **It is not enough to engage in speculation.** He must be able to show what she would have said if her statement had been disclosed in time for the case for the defence to be prepared thoroughly. Only then can the court judge what the response of the prosecution witnesses would be likely to have been if proper use had been made of it in cross-examination." (Emphasis added)

[71] We recognise that there is a difference between the late disclosure of transcripts and non-disclosure altogether. That being said, the issue is whether the failure to serve both the depositions taken at the preliminary inquiry and the transcript of the first trial can be said to have resulted in a miscarriage of justice. In the case of **Boodram v The State**, the JCPC examined the previous transcript in order to determine the effect of counsel's incompetence in not obtaining the said document. In examining this issue, since it is clear that the depositions ought to have been disclosed, we will likewise take account of the contents of the deposition to examine whether its absence could be said to have resulted in unfairness to the applicant in his trial for wounding with intent.

The depositions

[72] There is no material difference between Mrs Allen's deposition and her evidence at the second trial. In the deposition, she said she heard her son bawl out, "Tulu what kind of foolishness is this" then she heard him say, "No help". She also stated that Tulu was not the applicant. In the trial, she repeats that evidence but it appears to be recorded as "too" rather than "Tulu" (page 14, line 15 to 16 of the transcript). The learned judge did refer to her calling the name Tully in his summation (page 8, line 15 of the summation). These variations could possibly be accorded to an error in the

recording. In the police statement, which was served on counsel below, Mrs Allen indicated that she heard her son call out the name of a man Tully. Although there was no evidence adduced at the second trial that the applicant was not Tulu/Tully, Mrs Allen did not state that Tulu/Tully and the applicant were the same person. In fact, she referred to the applicant throughout her police statement as Jerome. Therefore, Mr Williams' contention that an opportunity for exploration concerning the identity of Tulu/Tully was denied to the applicant, so as to establish that he was not Tulu/Tully, lacks substance. This is so, as it was never advanced by the prosecution that Tulu/Tully and the applicant were the same person. Therefore, we are of the view that the non-disclosure of the depositions could not be said to have had any impact on the trial, which would have resulted in any unfairness to the applicant.

The transcript

[73] In relation to the transcript of the first trial, there has been no production of this document. Unlike the case of **Boodram v The State**, where the JCPC had the previous transcript for their perusal, the difficulty in this case is that we have none. We have no opportunity therefore to determine, if there was anything in Mrs Allen's evidence at the first trial, that may have given an opportunity to defence counsel at the second trial to cross-examine on issues that could have affected her credibility. It is recognised that in cases of a retrial, the transcript of a previous trial may be critical and such instances where there is an appeal (from the retrial), clearly warrant special consideration. Even then, the court would still be engaged in assessing the impact of late disclosure or non-disclosure on the fairness of the trial (see **Bonnett Taylor** and **Boodram v The State**).

[74] In the case at bar, we consider first of all that there was no retrial but two distinct trials in relation to two separate offences. Secondly, we have considered the contents of Mrs Allen's police statement, her evidence contained in the deposition as well as her evidence at the second trial and conclude that Mr Williams' submission, with the greatest of respect to counsel, is speculative and in the realms of conjecture. We

find that the evidence adduced at the second trial and the contents of these documents are remarkably consistent. Therefore, it is highly unlikely that there would have been any significant impact on the outcome caused by the non-disclosure of the transcript of the first trial (for murder).

[75] The prosecution's case on the trial of the applicant for wounding with intent was based on recognition. The evidence revealed that Mrs Allen had sufficient opportunity and lighting to make a proper identification of her attacker (see paragraphs [5] and [6] above). The evidence revealed that she knew the applicant previously for 18 years and recognised him when he came into her room and repeatedly stabbed her; the incident lasted about 10 minutes, and the room was lit with an electric bulb. There was nothing obstructing the applicant's face, and when she first saw the applicant with the knife in his hand, she asked him "tell me what have I done to you why you want to kill me" (page 23, lines 7 to 8). The major issue would have been whether the jury would have been satisfied as regards her identification of the applicant as her assailant.

[76] Further, it can be deduced that the no case submission was upheld at the trial for murder because there was insufficient evidence to implicate the applicant on that charge; no evidence existed in the police statement or in the deposition that Mrs Allen saw what had happened to her son.

[77] In the round, having considered all the above, while we conclude that the prosecution failed in its duty to disclose the depositions, we find that there were was no miscarriage of justice. In relation to the transcript of the first trial, it is questionable whether the prosecution was under any duty to disclose it on the basis of relevance, in the absence of any request by defence counsel. In any event, any assertion that there was unfairness to the applicant as a result of this failure remains highly speculative.

[78] Accordingly, this ground of appeal fails.

Inadequate representation

Ground 13: Defence counsel's representation was inadequate particularly as he failed to take appropriate instructions from the applicant

Submissions on behalf of the applicant

[79] Mr Williams submitted that it was impossible that counsel, who had done their duty, could have been unaware of a previous trial. He referred to **Boodram v The State** and the Privy Council's agreement with the Trinidadian Court of Appeal (at page 504F) that it was regrettable that counsel failed to discover that there was an earlier trial and to inform himself of what evidence had been given by obtaining a transcript of the evidence. However, during the course of his submissions, Mr Williams conceded that there was a notation on defence counsel's brief to the effect "need transcript of murder trial"; and this would suggest that he knew of the first trial. Mr Williams went on to suggest that a benefit that was had in **Boodram v The State** was that the transcript could be examined, unlike the case at bar. Reference was also made to paragraphs [39] and [40] of the judgment in that case, which stated the principles relevant to situations where counsel's conduct is called into question.

[80] It was contended that where the conduct fell in the category of gross incompetence, the court was not required to evaluate or investigate the impact of the breach.

Submissions on behalf of the Crown

[81] It was submitted that the applicant failed to demonstrate how the actions of defence counsel at trial were inadequate. Based on the line of cross-examination adopted, it could even be inferred that defence counsel was aware of the murder trial and had been instructed by the applicant. Further, the only allegation contained in the applicant's affidavit (sworn to on 31 March 2021) was that his counsel at trial did not advise him on how to prepare for his appeal. There is no allegation of misconduct in relation to the trial and, accordingly, this ground should fail.

[82] In response to the submissions of Mr Williams, Crown Counsel adopted his submissions in relation to the non-disclosure. Reference was again made to the exchange at page 96 of the transcript, where defence counsel sought to ask DS Fearon certain questions in cross-examination, and the learned judge made certain indications.

[83] Further, it was submitted that the manner in which defence counsel conducted himself could be taken as a strategy. The spirit of the applicant's defence of motive of other persons and alibi is seen throughout the cross-examination and as such defence counsel could not be faulted in the conduct of the applicant's defence at trial, and there was nothing which would amount to a miscarriage of justice.

Discussion and analysis

[84] Since Mr Williams placed heavy reliance on the case of **Boodram v The State**, it is best to set out a brief overview of that case. This was an appeal of a conviction following a retrial for the offence of murder where the defendant was sentenced to death. The Crown's case was that the defendant poisoned her husband. She did so by adding a substance called paraquat to the lunch she packed for him.

[85] The retrial took place almost nine years after the defendant's arrest (the order for retrial being made eight years and two months after her arrest). She was unable to pay the legal fees of the counsel who represented her at the first trial, and there was a change in defence counsel. This occurred twice. It was not until the end of the retrial that new counsel (appointed by legal aid) became aware of the first trial. Counsel did not try to obtain the transcript or record of the first trial (prepared for the first appeal) in order to assess what could be done to redress any prejudice to the defendant. Astonishingly, counsel did not make any inquires, he did not raise the matter with the prosecution, he did not alert the judge to it, and he did not take any instructions about the course of proceedings at the first trial nor the reasons for the quashing of the first verdict. Of note, the first trial lasted 21 working days, and the retrial was completed in six working days.

[86] Paragraphs 17 and 18 reveal the state of affairs:

> "17. After her conviction at the retrial the defendant at first said through her solicitor by letter dated 15 September 1998 that Mr Sawh never took any instructions from her. She now accepts she was in error because Mr Sawh has produced three sets of brief instructions signed by her. In their letter of 15 September 1998 the defendant's solicitors also said that on the third day of the trial (the 17th) the defendant raised the question of obtaining 'the notes from the previous trial' to which Mr Sawh responded by saying that he 'did not need to go through the foolishness which other lawyers do'. The letter also indicated that she wanted him to withdraw. In his reply of 17 September 1998 Mr Sawh laconically observed 'I had no knowledge of the first trial' and rejected all allegations. In a letter of 1 October 1998 Mr Sawh enclosed the three sets of written instructions and said that he spoke to the defendant in the cells at the Supreme Court on 9 occasions from 14 January 1998.
>
> 18. In an affidavit sworn on 6 November 1998 the defendant deposed as follows:
>
> > '21. Now that I have seen these instructions I recollect having spoken to Mr Sawh in the cell at San Fernando downstairs of the Court. . .
> >
> > 22. I expected that as Mr Mohammed and Mr Ramlal had done, Mr Sawh would have come to Golden Grove to have a proper interview with me. After my trial started on the 13 February 1998 before Madam Justice Weekes I did not get an opportunity to speak to Mr Sawh until the trial was into the 3rd day by which time the alleged oral confession was admitted into evidence.
> >
> > 23. I had expected that Mr Sawh would have visited me at Marabella Police Station where I was kept over the weekend of the 14 and 15 February 1998 when I would have had a full opportunity to relate to him how I had been raped by Inspector Douglas prior to signing the statement of the 2 February 1998.
> >
> > 24. By the time I next got an opportunity to speak to Mr Sawh the alleged confession had been admitted

> into evidence and when I tried to tell him what had taken place at the first trial and that he should get the Notes of Evidence he told me that he 'did not need to go through the foolishness which other lawyers do'. When Mr Sawh told me that I was totally confused and felt helpless. From that time I lost confidence in him and told him that I did not wish him to continue to represent me.
>
> 25. Notwithstanding my communication to Mr Sawh he continued to represent me against my wishes. I was afraid to bring this to the attention of the trial Judge.'
>
> Mr Sawh swore an affidavit on 9 November 1998 in which he said that he took instructions from the defendant in or outside her cell on at least 9 occasions, one interview lasting two hours. He said that the defendant never instructed him that Inspector Douglas had raped her before she signed the statement of 2 February 1989. He accepted that he only became aware of the first trial on the afternoon of 17 February 1998, ie. after the end of the prosecution case. His affidavit is silent as to his reaction to this information. And he does not say that he did anything in response."

[87] The JCPC allowed the appeal. It was held that a duty rested on the court system to ensure that on a retrial, defence counsel was provided with the transcript of the first trial (or relevant part of it). Thus, reaffirming the approach in **Flowers v R** (see page 334). Further, there was a residual duty of the prosecution (as ministers of justice) to ensure that the transcript (or relevant part) was delivered to the defence for the purposes of the retrial. This duty was stated in **Reid, Dennis and Whylie v R** (see page 363).

[88] The JCPC also concluded that whilst an appellate tribunal must approach complaints about counsel's incompetence (and its effect) with a healthy scepticism, where it had been demonstrated that counsel's failures were of a fundamental nature, the court must proceed with great care before it can conclude that, had the failings not occurred, the verdict of the jury would inevitably have been the same. However, the failure of defence counsel at the retrial to carry out his duties in a criminal case had

been of such a fundamental nature, that the conclusion must be that the defendant had been deprived of due process. In such circumstances even without embarking on any investigation of the impact of the breaches, it could be concluded that the defendant has not had a fair trial.

[89] Not only did defence counsel in **Boodram** fall short in his professional duty, which led him to be unaware that he was engaged on a retrial, he was also unaware of (i) his client's allegation of rape by a police officer prior to the signing of an incriminatory statement, and (ii) the allegation of subornation of perjury by Simon Boodram (the defendant's son and Crown witness) against the police at the first trial.

[90] In relation to the allegation of rape, it is to be noted that at the retrial, the defendant said in evidence that something had transpired between Inspector Douglas and herself. The JCPC noted (paragraph 35) that it was possible that she wanted to mention the alleged rape, but defence counsel did not ask her to explain her veiled assertion. In finding that prejudice was caused, it was observed that at the first trial, Superintendent Philbert repeatedly mentioned Inspector Douglas' involvement in the investigation. However, at the retrial, he wrote Inspector Douglas out of the script. Had the rape allegation been made, Inspector Douglas would have to be called to give evidence. Adding to this, defence counsel did not challenge the admissibility of the first statement (as was done at the first trial). There were some other deficiencies, which the JCPC considered (at paragraph 37) and ultimately came to the view that one could not be confident that if defence counsel had conducted adequate interviews with the defendant, the course of the trial might not have been different.

[91] Returning to the case at bar, it bears repeating that the applicant was not facing a retrial. Rather, he was being tried for a different offence arising out of the same incident. This is an important distinction. Unlike the case of **Boodram**, this court does not have before it clear allegations from the applicant that defence counsel failed him. There is no specific complaint in the applicant's affidavit (admitted as fresh evidence) that defence counsel failed to properly take instructions or conduct interviews. The

alleged failure of defence counsel to obtain adequate instructions still remains speculative. However, it is quite clear that defence counsel knew of the first trial and made no request for the disclosure of the transcript.

[92] In dealing with the issue of non-disclosure (ground 8), we drew some conclusions which are relevant to this issue. There is no dispute that defence counsel was not served with the transcript of the first trial. We find that there is merit in Crown Counsel's submissions that defence counsel appeared to have been advancing a particular strategy during the second trial.

[93] When examining the issue of incompetence/inadequacy of counsel, the court "is concerned with assessing the impact of what the Appellant's retained counsel did or did not do and its impact on the fairness of the trial" (per Phillips JA in **Andrew McKie v R** [2021] JMCA Crim 17, at paragraph [61] quoting **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ). It is appropriate also to set out certain paragraphs in **Boodram**, which are commended for consideration:

> "39. In any event, their Lordships are of the view that de la Bastide CJ, when he revisited *Boodram* (the instant case), correctly stated the applicable principles. Where counsel's conduct is called in question the general principle requires the court to focus on the impact of the faulty conduct: *R v Clinton* [1993] 2 All ER 998, [1993] 1 WLR 1181; *Sankar v State of Trinidad and Tobago* [1995] 1 All ER 236, [1993] 1 WLR 194. On the other hand, as the Chief Justice observed there may be cases where 'counsel's misconduct has become so extreme as to result in a denial of due process to his client'. The Chief Justice gave examples including the case where counsel conducted the defence without having taken his client's instructions. Substantively, the Chief Justice explained:
>
> > 'In such a case, the question of the impact of counsel's conduct on the result of the case is no longer of any relevance, for whenever a person is convicted, without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence. In such circumstances the

> conviction must be quashed. It is not difficult to give hypothetical examples of how such a situation might occur.'
>
> Such cases are bound to be rare. But when exceptionally they do occur the conclusion must be that there has not been a fair trial or the appearance of a fair trial. Their Lordships would respectfully endorse the formulation of the Chief Justice.
>
> 40. In the present case Mr Sawh's multiple failures, and in particular his extraordinary failure when he became aware on 17 February 1998 that he was engaged on a retrial to enquire into what happened at the first trial, reveal either gross incompetence or a cynical dereliction of the most elementary professional duties. **Their Lordships do not overlook that the appellant has twice been found guilty by the unanimous verdicts of juries after they had enjoyed the advantage of seeing and hearing her give evidence. Nevertheless it is the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process. Even without embarking on any investigation of the impact of the breaches, the conclusion must be that in this exceptional case the defendant did not have a fair trial. For this reason also the conviction must be quashed.**" (Emphasis added)

[94] We are also guided by the dictum of Lord Carswell in **Teeluck and another v R** [2005] UKPC 14 (**Boodram** was cited in **Teeluck**). In that case, Lord Carswell stated, in part, at paragraph 39, "[t]here may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, **the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude**…" (emphasis added).

[95] This is not one of the exceptional cases in which the court need not consider the impact of the alleged breach. In considering the impact, therefore, the case at bar may be distinguished from **Boodram**, in that there was no discernible failure to fully explore the issues, and hence no impact that could be said to have resulted in the applicant being deprived of due process. Instead, we reiterate that it appears that defence counsel could have been employing a strategy, namely to put the motive on someone other than the applicant as well as relying on the alibi defence. This is apparent from the cross-examination of the Crown's witnesses. Further, this exchange in the transcript (as set out at paragraph [55] above), which tended to demonstrate defence counsel's awareness of the murder trial, fortifies us in the conclusion that this was likely a strategy employed. Even if it could be concluded that there was a failure on the part of defence counsel, it certainly did not rise to one of such a fundamental nature so as to have an impact on the trial or verdict, so as to result in a miscarriage of justice.

[96] In the circumstances, we are not persuaded that this ground of appeal has been made out.

The calling of the complainant's husband

Ground 2: The Prosecution exercised its discretion improperly in failing to call Mr Allen the sole witness as to the eye-witness's first description

Ground 11: The learned trial judge failed to properly, or at all, exercise his discretion to call the witness Mr Allen

Ground 12: The learned trial judge erred in conducting part of the trial, namely the arguments and decisions surrounding the calling of the witness Mr Allen, in the absence of the applicant

Submissions on behalf of the applicant

[97] In what he described as a strange feature of the case, Mr Williams referred to the statement taken from the complainant's husband, Mr Cornelius Allen ('Mr Allen') wherein he said that the complainant, while in hospital, named another man as the assailant. She gave the name Jermaine, which, it was submitted, was not a mistake as Jermaine was described as a person other than the applicant. Additionally, the

complainant's evidence was that she could not give any account in hospital as she was unable to speak and this was contradicted by Mr Allen and her doctor who witnessed her statement taken by the police at the hospital.

[98] Mr Williams indicated that there could be no challenge as to how the learned judge treated Mr Allen's evidence in his directions to the jury, and it was on that basis, ground 14 was withdrawn. The focus of his challenge was the decision taken in chambers, in the absence of the applicant, that Mr Allen would be called on the case for the defence. Reference was made to the exchange between defence counsel and the learned judge (on page 75 of the transcript), where Mr Wilson enquired about the calling of Mr Allen. The learned judge instructed counsel to meet in his chambers for it to be discussed. There was no court reporter present in chambers, and although rule 3.9 of the Court of Appeal Rules allows for the requesting of the judge's report and/or notes, this would not be possible, given the delay in the hearing of the appeal and the fact that the learned judge had retired and is now deceased.

[99] It was contended that this amounted to a denial of due process and as a result, this court should follow the approach taken in **Nash Lawson v R** [2014] JMCA Crim 29, and quash the conviction. In particular, reference was made to the dictum of Panton P (at paragraphs [16] and [17]) and the recognition of the principle that an accused is not to be excluded from any portion of his trial, unless there are very good reasons, and where this is done, the importance of a court reporter being present to record what transpires. Reference was also made to section 16(6)(g) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter'), which recognises the right of a defendant not to be tried in his absence.

[100] In response to the question from the court, as to how the absence of the notes amounted to a miscarriage of justice, Mr Williams stated that this court was unable to conduct any review as to how the decision was taken that Mr Allen would be called on the defence case. He argued that a part of the applicant's fair trial right included a fair

appeal and for this to be achieved, he would need to have the material, which included the record of the proceedings on which he was convicted.

[101] In response to the question as to why it mattered whether Mr Allen was called on the Crown's case as opposed to the defence's case, since he resiled from his statement and had to be treated as a hostile witness, Mr Williams responded that fairness required that Mr Allen be called by the learned judge. This would have allowed both the Crown and the defence to cross-examine him, and this would have spared the defence the "optics" of calling a witness who did not come up to proof. Reference was made to **The King v Dora Harris** [1927] 2 KB 587 and **Regina v Cleghorn** [1967] 2 QB 584. Also, no reason was advanced by the Crown for the failure to call Mr Allen. It was submitted that the Crown acted improperly in failing to call him and reference was made to the cases of **R v Russell-Jones** [1995] 3 All ER 239 and **Steven Grant v The Queen**.

Submissions on behalf of the Crown

[102] It was submitted that at common law, the prosecution has a discretion to decide whether or not to call a witness on its case. Reliance was placed on the case of **Leslie Moodie v R** [2015] JMCA Crim 16, where this court approved of the principles summarised by Kennedy LJ in **R v Russell-Jones**. In particular, the court's attention was invited to paragraph [138] of the dictum of Morrison JA (as he then was), where it was expressed that the prosecution has a discretion as to whether to call or tender a witness but this is to be exercised in the interests of justice, so as to promote a fair trial. It was also expressed that generally, the prosecution ought to call witnesses who give direct evidence of the primary facts of the case. It was contended that Mr Allen was not a witness who could speak to the primary facts of the case. He did not see the offence being committed. The extent of his evidence was that he was told certain things by the complainant.

[103] Mr Green contended that the prosecutor exercised his discretion correctly when he decided not to call Mr Allen as a witness on the Crown's case. No prejudice was

occasioned to the applicant by this decision as Mr Allen was ultimately called on the defence's case, treated as a hostile witness, and cross-examined by defence counsel. The reason that defence counsel would have wanted Mr Allen to be called was so that he could be cross-examined, specifically on (i) the name Jermaine which he said the complainant told him was the person who attacked her, and (ii) whether the complainant could speak when she was in the hospital. Both of these were achieved, as Mr Allen was cross-examined by defence counsel.

[104] Turning to whether Mr Allen should have been called by the learned judge once the prosecutor declined, it was submitted that on an analysis of the case of **The King v Dora Harris**, it was held that although a judge has the power, in the interests of justice, to call witnesses who have not been called by the prosecution or defence, that power should be exercised rarely. As such, there should be exceptional circumstances for the exercise of that power. In the case at bar, Mr Allen's evidence was not primary to the facts in issue and the effect of the prosecution not calling him could have been solved by him being cross-examined. Put another way, it was submitted that the single purpose for which the defence needed Mr Allen, was to cross-examine him, and this was done as the learned judge granted permission for him to be treated as a hostile witness.

[105] When asked if there was any tension between **The King v Dora Harris** and **Steven Grant v The Queen**, Mr Green sought to distinguish the case of **Steven Grant**, by stating that the witness in that case was a witness to the offence, whereas Mr Allen was not. On the "optics" point raised, it was contended that the learned judge reviewed the evidence and gave the jury directions on how to treat with credibility. In particular, he made reference to page 18, lines 17 to 25 of the summation, where the learned judge directed the jury on the inconsistences of Mr Allen and then to pages 19 to 20, where he told them to be very cautious when relying on such evidence. Additionally, there were several instances where the learned judge reiterated this caution. In the circumstances, it was submitted that no prejudice was occasioned by

the prosecution or the learned judge not calling Mr Allen and that this ground should fail.

Discussion and analysis

[106] In addressing Mr Williams three-pronged attack in relation to the witness, Mr Allen, the first issue is whether the prosecution was obliged to call that witness. Mr Allen was listed as a witness on the back of the indictment. In **Leslie Moodie v R**, Morrison JA considered the duty of the prosecution in this regard. He referred to **R v Russell-Jones**, which had been referred to in **Steven Grant v R**. At paragraphs [137] and [138] of the judgement, Morrison JA stated:

> "[137] …In that case, after a full review of some of the older authorities, Kennedy LJ summarised the general principles in this way (at pages 244-245):
>
> > '(1) Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intend to rely), if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served.
> >
> > (2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.
> >
> > (3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial....
> >
> > (4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving

statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say 'incredible', then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called....

(5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.

(6) The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others.

(7) A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken. Plainly, what we have said should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations to which we have not adverted; and in every case, it is important to emphasise, the judgment to be made is

> primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle.'
>
> [138] In our view, this summary makes it clear that the decision whether to call or tender a witness is a matter within the discretion of the prosecution, to be exercised in the interests of justice, so as to promote a fair trial. Generally speaking, the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case; or, as it was put by the Privy Council in **Seneviratne v R** [1936] 3 All ER 36, 49 (in a dictum referred to with approval by the court in **R v Russell-Jones**), '[w]itnesses essential to the unfolding of the narratives on which the prosecution is based'. In that case, the Board also made the telling point that confusion would be 'very apt to result…if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination'."

[107] Mr Allen was not a witness who could give direct evidence of the primary facts of the case. He did not witness the incident between his wife and the applicant. In his statement to the police, he had indicated that his wife had told him the night of the incident that it was one "Jermaine" who had stabbed her. He indicated also that Jermaine was the nephew of one Dennis, who was one of the men that he (Mr Allen) had chased with his machete that night. It was also established during the trial that Jermaine was not the same person as Jerome Dixon. This evidence was contradicted by the complainant, who said that she did not speak to her husband the night of the incident. The prosecutor, therefore, had a discretion as to whether this witness should be called on the Crown's case or offered to the defence. As stated in **R v Russell-Jones** "[a] prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the crown relies." The fact that the evidence was available to the defence would be a sufficient exercise of the prosecutor's discretion in the interests of justice. The Privy Council in **R v Steven Grant** referred to the principles as summarized in **R v Russell-Jones** and stated that they provided

authoritative guidance (see paragraph 25). It cannot be said that the defence in the case at bar would be prejudiced in calling Mr Allen based on the contents of his statement only.

[108] Secondly, whether the learned judge erred in the exercise of his discretion, by failing to call the witness himself? In **The King v Dora Harris**, the general principle has been enunciated. The judge at a criminal trial has the right to call a witness not called by either the prosecution or the defence, if in his opinion that course is necessary in the interests of justice; however, in order to ensure that there is no injustice to an accused person, the judge should not call such a witness after the defence is closed, except in a case where a matter arises *ex improviso*, which no human ingenuity can foresee, on the part of the defence.

[109] At page 75 of the transcript, while the Crown's case was still being presented, counsel for the applicant below enquired of the learned judge "whether it would be incumbent on counsel to call Mr Allen or would the bench". It is not clear, but it is presumed that by "counsel", he meant Crown Counsel. We do not know what arguments were raised, if any, by counsel for the applicant or how the determination was made as the learned judge invited counsel in the trial to his chambers to discuss the issue. This was in the absence of the applicant, and no reporter was invited to make a note of those proceedings. What the transcript reveals is that Mr Allen was called as a witness for the defence.

[110] At that time, permission was given to defence counsel to treat the witness as hostile as he maintained that his wife had told him the name "Jerome". He admitted that he called another name, Jermaine, in his statement to the police, but this was because "I was in shock and frighten". But he indicated when he saw his wife that night at the hospital, that, in fact, she said it was Jerome who stabbed her.

[111] In **Dora Harris**, the general discretion is that the judge can exercise that discretion, without the consent of either defence or prosecution, if the witness is not

being called by either the prosecution or the defence, if it is necessary, in his opinion in the interests of justice. In **Regina v Cleghorn** – the same principle is reiterated. However, Lord Parker CJ stated that the discretion to call such a witness should be carefully exercised. Reference was made by Lord Parker at page 588 to the case of **R v Oliva** [1965] 1 WLR 1028, a case dealing with the failure of the prosecution to call or tender for examination a witness whose name was on the back of the indictment, where the court said:

> "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 that witness."

[112] In the case at bar, we do not know from the record of proceedings whether the defence had indicated that they would not wish to call Mr Allen. There is nothing then on the face of the record to indicate that the defence had indicated an unwillingness to do so. Further, there are no submissions on the record to indicate that it was being urged that the prosecutor was exercising his discretion improperly.

[113] Also, this is to be contrasted with the circumstances in **Steven Grant v R**, where the prosecution had elected to tender only one of two statements that had been collected from B and K under section 31D of the Evidence Act. They had served notices of their intention to rely on their evidence. Both were statements of primary facts of a shooting incident, and there was no suggestion that either witness was incapable of belief or immaterial. Under those circumstances, the JCPC concluded that the prosecuting counsel mistook the nature and intent of her prosecutorial discretion when it was decided that only the statement of B would be admitted; that under those circumstances, the trial judge ought to have either invited prosecuting counsel to adduce that statement also or decline to admit B's statement, or as a last resort, introduced the statement herself.

[114] The factual circumstances of that case were entirely different, and it is to be noted that the JCPC pronounced that the judge could have introduced K's statement herself, but that was only to be done as a last resort. It is indeed a discretion to be exercised carefully, in the interests of justice. While fairness would have required the reception of Mr Allen's evidence, as the applicant would have been entitled to have his case assessed within that context, there was no overwhelming necessity that existed for the learned judge to have exercised his discretion to call Mr Allen. Although Mr Allen had to be treated as hostile on the applicant's case, the learned judge gave sufficient direction to the jury on how the evidence was to be assessed and treated, including the inconsistent statements to the police and the discrepancies with the evidence of Mrs Allen.

[115] Finally, whether it can be said that the failure of the judge to consider counsel's application in the absence of the applicant and the court reporter is such that it has led to a miscarriage of justice? The authorities are quite clear that all aspects of the trial process should be conducted in the presence of the defendant unless there are very good reasons to do otherwise (see **Nash Lawson**, where Panton P reiterated this principle at paragraph [16] and [17].

[116] However, the major issue is the effect of the failure of the trial judge on the fairness of the trial. We see no evidence of unfairness or any negative effect on the trial process that could be attributed to this failure of the learned judge. All the issues relevant to the hearing in chambers were eventually played out before the jury, and the applicant as Mr Allen was called, and the jury had the opportunity to assess his reliability and credibility. They would also have appreciated that he was resiling from the statement he made to the police, and adequate instructions were given to the jury concerning all these issues.

[117] It is for all the above reasons that we see no merit in grounds 2 and 11. As far as ground 12 is concerned, while the learned judge did err in the conduct of the

hearing in the absence of both the applicant and a court reporter, no miscarriage of justice can be said to have resulted from this failure.

Inappropriate treatment of prejudicial evidence

Ground 15: The jury heard prejudicial evidence as to (a) the murder that occurred at the time of the incident; (b) the applicant being of poor repute; (c) the applicant being a friend of someone who previously attacked the eyewitness; and (d) that it was the first occasion that the alibi witness gave her account

Ground 16: The learned trial judge failed to give the jury the appropriate directions as regards the prejudicial evidence referenced in the foregoing ground

Submissions on behalf of the applicant

[118] It was submitted that significant pieces of prejudicial evidence that had no probative value were adduced by the Crown without any rebuke by the learned judge and without any assistance to the jury as to how the evidence ought to be handled. Reference was made to four aspects of the evidence contained in the transcript.

[119] Firstly, the Crown led evidence from which it could be inferred that the complainant's son was killed in the incident. Mr Williams highlighted the portions of the examination in chief of the complainant at page 33, lines 7 to 8, where she was asked how many children she had, to which she responded that she had five children, but that one was deceased and that her son Robert Rose was now deceased. It was submitted that it was unnecessary for the jury to be told that someone was killed in the incident and would have no effect but to inflame passions.

[120] The second complaint was in respect of the complainant's evidence as to how she knew the applicant. In particular, when she was asked how they got along prior to the incident and her response that she used to encourage him to get a job because she used to see him on the street (page 22, lines 20 to 25). It was submitted that the jury was given the impression that the applicant was of low repute or an idler, and the standard good character direction was insufficient to counter the potential impact of the evidence.

[121] Thirdly and most egregiously, the Crown adduced evidence linking the applicant to another person who had previously attacked the complainant, even though the previous attack was inadmissible. In this way, the jury was likely to speculate that the applicant's friendship with the attacker was a motive. This evidence was adduced in the re-examination of the complainant at page 76, lines 6 to 17:

> "Q. Now, you also said, in answer to my learned friend, that you know someone by the name of Renny B?
>
> A. Yes, I do.
>
> Q. And you said also that Renny B came to your house on the 2nd of September, 2005?
>
> A. Yes, he did.
>
> Q. Armed with a firearm, is that correct?
>
> A. Yes, he did.
>
> Q. As far as you know, is there any connection between this person, Renny B and Jerome Dixon?
>
> A. Yes, they are good friends. They are friends."

It was submitted that this was a leading question asked in re-examination, which produced the prejudicial answer that they were friends. This was worsened by the fact that the Crown's case was not a strong one so as to dilute the prejudice.

[122] Mr Williams submitted that the Crown did not lead any evidence in examination in chief of the previous attack, and nowhere in the material disclosed was there any indication of a connection to the previous attack. As such, the question in re-examination amounted to an ambush on the defence, which was reminiscent of the case **of Linton Berry v Director of Public Prosecutions** (1996) 50 WIR 381. In that case, the defence counsel pursued a line of questions in cross-examination to suggest that other persons were motivated to and could have been the assailants; that line was taken based on the disclosed material. In re-examination, Crown Counsel was able to establish a connection, something which had not been disclosed, and this caused an

injustice to the appellant. Similarly, in the case at bar, injustice was caused to the applicant by the connection established between himself and the attackers in the prior incident. What was supposed to be a big point for him turned out to the motive being provided, where there was none before.

[123] Finally, there was a complaint in respect of Crown Counsel's suggestion to the applicant's mother (his alibi witness) that she never told the investigating officer that "this is the first time that you are coming with this evidence 'bout he was with you on the day of the attack". It was submitted that the untutored jury would have been led to believe that it was unusual and improper that the alibi witness was giving her account for the first time at the trial. The question implied that there was a duty on an alibi witness to give information to the police at an earlier juncture.

[124] Mr Williams submitted that it was unlikely that even a strong direction would have cured the prejudice caused and that discharging the jury would have been the only proper recourse. The case of **Arthurton v The Queen** [2005] 1 WLR 949 was cited in support. It was submitted that, in any event, since there was no direction, there was a substantial miscarriage of justice.

Submissions on behalf of the Crown

[125] Crown Counsel conceded that the evidence elicited in relation to the death of the complainant's son had no probative value and could be seen as prejudicial. However, the material being simply prejudicial is not enough to render a conviction unsafe and the court could consider the application of the proviso to section 14(1) of JAJA. Reference was made to the dictum of Carey JA in the case of **Peter McClymouth v R** (1995) 51 WIR 178, where it was reiterated that an appellate court will be slow to interfere with a trial judge's discretion unless it feels that the applicant would be justified in saying that what occurred was devastating. In that case, the prejudicial statement that the appellant was a repeat murderer and imputing wrongdoing to his attorney was said more than once before the jury, and the case depended wholly on the evidence and credibility of that witness. The court found that the appeal should

succeed on that point, as juries should not be called upon to exercise remarkable mental agility to divorce prejudicial remarks from their minds.

[126] Crown Counsel sought to distinguish **Peter McClymouth v R** by reference to the case of **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28, where the issue of prejudicial material placed before the jury was examined. The statement being "[n]o, only one of them I identified one time I see the one that kill his baby mother…". In determining whether that statement fell within the definition of devastating, it was considered that it was not because the witness did not identify the persons who were present when she identified the property to the police, nor did she ascribe the improper statement to any of the two appellants. It was contended that in the instant case, the evidence that was led about the death of the complainant's son cannot be said to be devastating. At no point did the complainant actually state the following, (1) that her son was murdered, (2) that the applicant was the one who murdered her son, (3) how her son died, (4) what type of injuries her son received; and (5) whether anyone was arrested for the death of her son. It was submitted, therefore, that the evidence led regarding the death of the complainant's son cannot be ascribed to the applicant.

[127] In relation to the complainant's evidence that she used to talk to the applicant and encouraged him to get a job because she used to see him on the streets, it was submitted that this merely amounted to background information establishing the identity of her assailant and the degree of familiarity she had with him. Further, the complainant never gave any evidence as to what the applicant was doing on the streets. She did not attach anything to that evidence that would have placed him in a discreditable light; the case of **Orville Brown v R** [2010] JMCA Crim 74 was cited in support.

[128] It was submitted that the learned judge (at page 30 of the summation) gave the jury a full and detailed character direction which was more than sufficient.

[129] In response to the assertion that the Crown adduced evidence linking the applicant, by friendship, to persons who previously attacked the complainant, Crown Counsel pointed out that it was defence counsel who cross-examined the complainant in relation to Marlon Laloo (otherwise called Ready B). Mrs Allen was asked by defence counsel whether she knew him and if there was any involvement between him and her family. It was in re-examination that she was asked by the prosecutor whether there was any connection between him and the applicant.

[130] It was submitted that although the bit of evidence complained of may have been undesirable and of no probative value, it did not have such a prejudicial effect so as to deprive the applicant of his right to a fair trial. There was ample and overwhelming evidence before the jury to establish the applicant's guilt. This included the fact that: (1) the complainant knew the applicant for over 18 years, during which time she would often see him, (2) on the night of the incident, the electric lights were on in the inside of the house, (3) the complainant saw the applicant from he arrived at the door with the ratchet knife in his hand, and there was nothing blocking his face or her view of him, (4) while the applicant was stabbing the complainant, she was looking at his face, (5) the entire incident lasted for approximately 10 minutes and (6) two years later, she saw him at the bus stop and went to the police immediately.

[131] It was contended that based on the other available evidence before the jury, it could not be said that the evidence adduced on re-examination was devastating (as was said in **Peter McClymouth v R**).

[132] Turning to the suggestion made to the applicant's mother and alibi witness, that the trial was the first occasion in which she was saying that the applicant was home with her on the night of the incident, it was submitted that the prosecutor was entitled to make this suggestion as he was putting the Crown's case to the witness. Further, the onus was on the prosecution to disprove the applicant's alibi.

[133] As regards the suggestion that the learned judge ought to have discharged the jury, Crown Counsel submitted that it was unclear what aspect of the trial ought to have caused the learned judge to do so, as there was no prejudice to the applicant that warranted such a course. The learned judge's summation was favourable to the applicant and included a full **Turnbull** warning, lengthy directions on credibility, direction on inconsistencies and discrepancies and how to resolve them, and a full good character direction. Therefore, on a cumulative assessment of the summation, it could not be said that the directions were inadequate and that the applicant was deprived of a fair trial.

[134] In concluding his submissions under this ground, Mr Green repeated his invitation to the court to consider the application of the proviso having regard to the overall evidence.

Discussion and analysis

[135] In **Carl Pinnock v R**, at paragraph [46], this court made reference to the judgment of Brooks JA (as he then was) in **Dwight Gayle v R** [2018] JMCA Crim 34, where he summarized the applicable principles to be considered when a potentially prejudicial statement is improperly made. Brooks JA referred to these principles as set out in **Machel Gouldbourne v R** [2010] JMCA Crim 42. He reiterated that the trial judge has a wide discretion to deal with prejudicial statements led before a jury, as each case will depend on its own facts; the choices open to the trial judge include (i) taking no action and making no mention of the matter, (ii) discharging the jury, (iii) immediately directing the jury appropriately, (iv) waiting until the summation to direct the jury on the matter or (v) combining both of the last two choices. An appellate court will only interfere in the most extreme cases and, in particular, will do so if the applicant would be justified in saying that what had occurred was devastating. The court must have regard to what was divulged, whether accidental or deliberate as well as to consider whether it was so prejudicial that it could not be cured (per Carey JA in **Peter McClymouth v R**, at page 185).

[136] In the instant case, two of the references of prejudicial statements complained of by Mr Williams can be easily disposed of. The first is the reference to prosecuting counsel's suggestion in cross-examination to the mother of the applicant, Ms Montique, who gave evidence of alibi on his behalf. She had stated that at the time of the attack on Ms Allen, her son was at home with her. Her son was arrested two years later, on 30 October 2007 (the evidence of the Crown witnesses speaks to his arrest on 31 October). At page 187, line 25 to page 188, lines 1 to 22 and page 189, lines 2 to 11, the following evidence is recorded:

> "Q. When your son was arrested, did you go to the police?
>
> A. Yes, sir.
>
> Q. You told them that he was home with you on the day of the attack?
>
> A. They did not ask me…
>
> Q. Did you tell them that your son was with you at the time of Mrs. Allen's attack?
>
> A. The police that arrested my son …
>
> Q. Listen to my question, I will ask the questions and you just answer them. If your lawyer wants you to say anything else, he will get it from you. All I want to know, is if you told the police your son was with you when Mrs. Allen was attacked?
>
> A. They did not take a statement from me, sir.
>
> Q. Did you offer to give a statement?
>
> A. They did not…
>
> Q. Did you tell them that you were willing to give a statement?
>
> A. Yes, sir.
>
> Q. Who you told this to?

A. Mr. Fearon

…

Q. You are not telling the truth, ma'am.

A. Mr. Fearon was in his office, C.I.B. office.

Q. You never spoke to Mr. Fearon about this matter.

A. I spoke to Mr. Fearon, he was the investigating officer, sir. He told me …

Q. I am suggesting to you that now is the first time that you are coming with this evidence 'bout he was with you on the day of the attack.

A. He was, he was."

[137] The suggestion to the witness was made within the context of her answers, that she did not speak to the police about the applicants' alibi, although she stated that she told the police officer, Mr Fearon (DS Fearon), that she was willing to give a statement. Her answer to this question was made near the end of the case for the defence, and there was no application made by the Crown or the defence to have the police officer recalled. The jury would have heard the context in which the suggestion was made. It would have been their duty to assess it and decide what they made of this evidence. It is difficult to understand what is inherently prejudicial about the suggestion of recent possession. She admitted she did not tell the police but that she was given no opportunity to do so. There was no basis for the learned judge to have given any caution to the jury on the point. In fact, in his reminder to the jury of her evidence, the learned judge stated, "it was suggested to her...that it is the first time she was giving any such evidence and she said no, this was not the first time she was saying it. She went and spoke to Mr Fearon". The learned judge would, therefore, have told the jury that the witness did not agree with the suggestion made by prosecuting counsel.

[138] The complaint in regard to Mrs Allen stating that her prior knowledge of the applicant included occasions when she saw him on the street and encouraged him to

get a job is also without any merit. The evidence was probative, as it grounded the opportunity for the complainant's previous knowledge and association of the applicant (see **Orville Brown v R** at paragraphs [27] and [30]). This evidence was never contradicted by the applicant in his unsworn statement.

[139] In these circumstances, the learned judge would have been under no duty to have given any warning to the jury concerning this evidence. In fact, if he had done so, it may have reinforced some negative connotations of the applicant's character in the eyes of the jury. Further, the learned judge gave the usual standard direction relevant to the good character of the applicant at pages 30 to 31 of the summation. So, what would have been reinforced to the jury (as a result of this evidence of good character), is the lack of evidence associating the applicant with any previous conflict with the law.

[140] As regards the murder which occurred at the same time Mrs Allen was wounded, she testified that at some point, she heard her son arguing with someone. She then stated that he cried out for help, and she did not hear him anymore. While continuing her examination in chief, Crown Counsel asked her certain questions as follows:

> "A. I have five children, one is now deceased.
>
> …
>
> Q. And what is the name of the one that is now deceased?
>
> A. His name is Robert Ricardo Rose."
>
> (page 4, lines 17, 20 to 22)
>
> "Q. Did you ever see your son, Robert again?
>
> A. No, I didn't see Robert."
>
> (page 33, lines 7 to 8)

[141] At page 8, lines 14 to 18 of the summation, the learned judge reminded the jury regarding the evidence of Mrs Allen as to what happened to her son as follows –

> "She then heard her son say ' 'Tully' [sic], wha' kind of foolishness is this.' He repeated it three times and then he cried out for help. That was the last she heard from her son."

[142] Mr Williams is correct that the portion of evidence is without any probative value in the trial against the applicant. However, it could be classified as forming part of the narrative of what occurred on the night in question, and it would have been difficult to compartmentalise her evidence. Also, it is to be noted that counsel below for the applicant introduced this issue of the murder of Mr Rose when cross-examining DS Fearon. This excerpt, at pages 96 and 97 of the transcript, has already been set out above at paragraph [55]. It appears, therefore, that the defence was attempting to use a strategy implicating the names of other men being present and responsible for the death of Mr Rose. While the learned judge made no reference in his summation concerning this impugned evidence and gave no directions to the jury, he did, however, prevent counsel from continuing with this line of questioning on the basis that it was irrelevant to these proceedings. He also indicated in his address to counsel that the evidence may have been relevant at another time. At page 65 of the transcript, while being cross-examined, Mrs Allen also stated that another son had attended the court hearing to give evidence concerning identifying the body of his brother. She indicated, however, in a further answer to counsel, that he did not come to give evidence in the present case. Again, the jury would have been able to deduce that there had been other court proceedings. On the other hand, the jury could have clearly drawn the inference that her son had died through acts of violence the same night that the complainant had received her injuries at the hands of the applicant and possibly could have inferred that these attacks were coordinated. The question is, what should a trial judge do in such circumstances.

[143] The learned judge did have the discretion to take no further action and remain silent on the matter in his directions to the jury. The appellate court will be slow to interfere with a trial judge's discretion and will only do so in the most extreme cases (see **Machel Gouldbourne v R**). The correct course depends on the nature of the

evidence and the circumstances in which it has been admitted (see paragraph [22] of **Machel Gouldbourne v R** where the dictum of Sachs LJ in **R v Weaver** [1967] 1 All ER 277, 280 was quoted).

[144] In considering all of the above, while it may have been prudent to indicate to the jury that the fate of Mr Rose should form no part of their deliberations, we see no basis to interfere with the learned judge's decision to say nothing, bearing in mind the circumstances in which the evidence was admitted. Further, based on the ruling of the judge in the face of questions by counsel below, it would have been clear to the jury that the issue of Mr Rose's demise was not relevant to the proceedings that were before them for their consideration.

[145] As regards the evidence of association with a person involved in a previous attack on Mrs Allen, it was deliberately led by the Crown and without any probative value and was potentially prejudicial. As submitted by Mr Williams, it linked the applicant with a person ('Ready B'), who is said to have visited the complainant's house with a firearm the night before; and to this extent, it could have provided a motive for the attack by the applicant the following day. In fact, after soliciting that the applicant and Ready B were friends, the Crown Counsel then asked "[a]nd the following day, this man attacked you with a knife?" (see page 77, lines 11 and 12 of the transcript). The learned judge failed to remonstrate with Crown Counsel; said nothing to the jury at the time and gave no directions subsequently to the jury as to how to deal with this evidence.

[146] However, in considering whether this was devastating to the applicant, the court has to give regard to the nature of the words as stated at paragraph [135] above. In **Carl Pinnock v R**, this court reviewed the circumstances of **Peter McClymouth v R** as well **R v Martin Coughlan and Gerard Peter Young** (1976) 63 Cr App R 33 (see paragraphs [52] and [56]) and concluded at paragraph [57]:

> "[57] In deciding whether this was a proper exercise of his discretion, this court is therefore to pay careful attention to

> the circumstances under which the words were admitted as well as the nature of the words (see **McClymouth** and **Machel Gouldbourne**). This court is also under a duty to examine the case in its entirety and to satisfy itself that, at trial, no miscarriage of justice had occurred. If the court is so satisfied a conviction will not be disturbed (per Harris JA in **David Russell v R** [2013] JMCA Crim 42 at paragraph [32]). Harris JA stated in **David Russell**, at paragraph [33], that this court will only interfere in circumstances where an accused would be justified in asserting that what had transpired at the trial was 'severely overwhelming, incurably wrong and unfair to him or her'."

[147] The factual circumstances can be distinguished from **Peter McClymouth v R**. This court allowed the appeal in **Peter McClymouth v R**, having considered that the whole case depended on the evidence and credit of the eye witness; that it was expecting too much of the jurors to divorce from their minds that a credible witness had said that the appellant was a repeat murderer and that he had also commented unfavourably on the character of his counsel. The case at bar can also be distinguished from that of **Arthurton v The Queen**, which was relied on by Mr Williams. In **Arthurton**, the appellant had been convicted of sexual offences. The central issue in the case was whether the complainant was to be believed. The appellant's good character was therefore critical and he had no previous convictions. Evidence was led in the trial that the appellant had been arrested on suspicion of similar offending on another occasion. The JCPC concluded that the propensity limb of the good character direction (and with it a major plank in the defence case) had been undermined. It opined that it was doubtful whether any directions could have overcome the unfairness caused by the disclosure, and the jury should have been discharged.

[148] In the case at bar, we consider that the words were deliberately obtained from the witness by prosecuting counsel, but it was defence counsel who had led evidence as to the attack the day before, which appeared to have been a strategy on his part. The transcript shows, at page 47, lines 2 to 25 and page 48, lines 1 to 25, that counsel for the applicant below elicited evidence from Mrs Allen, that one Ready B had come to

her house the night before, armed with a gun and robbed her. She stated that it was actually two men who came and stated that the applicant was not one of these men. Further, the witness did not indicate that the appellant was connected to or involved in any previous attack and specifically excluded him from that incident. No direct aspersions were cast on his character by this evidence (as in the manner of **McClymouth** and **Arthurton**) . We consider also that while credibility was an issue, identification was the major issue in the case and that there was sufficient evidence of identification established by the Crown. While we conclude that the learned judge ought to have directed the jury appropriately, either at the time Crown Counsel elicited the evidence of a connection between Ready B and the applicant, or during the summation, we are not of the view that what took place was so devastating to the applicant, so as to conclude there was a miscarriage of justice in all the circumstances.

[149] This ground therefore fails.

Taking of the verdict and handling of the jury

Ground 4: The majority direction was improperly given as the directions failed to make it clear that the jurors were entitled to disagree

Ground 9: The jury was pressurised in arriving at its verdict

Submissions on behalf of the applicant

[150] Mr Williams submitted that the jury would have felt pressure in arriving at a verdict because it was repeatedly discussed in their presence that the trial may run over the period of their service. Reference was made to the case of **Peter Holder v The State** (1996) 49 WIR 450. Mr Williams pointed to portions of the transcript where the learned judge made certain comments, for instance:

> "HIS LORDSHIP: Mr. Smith, I am a little concerned because I understand that the jurors stint finishes on Friday." (Page 101, lines 3 to 5)

Thereafter the learned judge commented that he needed Crown Counsel and defence counsel to give an indication as to whether the trial could be completed on the following

Monday, given the remaining witnesses to be called (page 123, lines 15 to 21). At the end of the sitting on Friday, the learned judge told the jury:

> "Mr. Foreman, that's as far as we will go today. We understand your stint would normally have finished today. I explained to you yesterday there was a likelihood that we would continue on Monday. That is how it's turned out. We will definitely conclude on Monday before this time, I hope." (Page 178, lines 12 to 19)

[151] Mr Williams also complained that the taking of the verdict was done in an atmosphere of haste. In support of that contention, he referred to page 32 of the learned judge's summation, where there was a notation that the jury retired under sworn guard at 3:08 pm and on the following page, the notation that they returned at 4:06 pm. At that stage, there was not a unanimous verdict, and the learned judge gave a majority direction. The jury retired again at 4:12 pm and returned at 4:31 pm, so in 19 minutes, the jury came back with a majority verdict. It was submitted that there ought to have been one hour of deliberation, not including the time it takes for the jury to go to and from the jury room, and the learned judge must exercise his discretion as to how much more time was needed for unanimity.

[152] Mr Williams complained that the learned judge should not have given the jury time limits; the proper direction would have been that they were entitled to disagree and to take their time. Further, it was submitted that the pressurising of the jury was exacerbated by the handling of the taking of the majority verdict and that the circumstances of the handling of the majority verdict were inconsistent with the common law principles explained in **Flavia Richardson v The Queen** (unreported), Court of Appeal, Saint Vincent, HCRAP 2009/019, judgment delivered 3 June 2010 (reissued on 1 September 2010) in so far that, (i) the directions risked that the jury would consider that their disagreement could cause inconvenience by failing to point out that they were entitled to disagree; and (ii) the direction was given too early without the learned judge exercising his discretion as to the appropriate time for the direction.

Submissions on behalf of the Crown

[153] Crown Counsel recognised as a cardinal rule of criminal procedure that trial judges must avoid any hint of pressure on a jury to reach a verdict. Reference was made to **Regina v Orville Fitzgerald** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 220/2001, judgment delivered 30 July 2004 which cited with approval the dictum of Sir Patrick Russell in **Lincoln De Four v The State** [1999] 1 WLR 1731. It was submitted that the learned judge, in the instant case, did not do or say anything which amounted to pressuring the jury to reach their verdict. At the time at which the comments complained of were made (at page 101 of the transcript), the jury had not yet retired and in any event, the learned judge was speaking to the prosecutor and not the jury.

[154] Crown Counsel distinguished the circumstances in **Peter Holder v The State**, relied on by counsel for the applicant; in that case, the charge was capital murder and the jury was sent to retire and deliberated at 6:40 pm. It was held that the late retirement of the jury was undesirable but that no prejudice was caused as a result. In the instant case, the jury retired for the second time at 4:12 pm and returned with a majority verdict (five to two) at 4:31 pm.

[155] It was contended that the direction given to the jury regarding the majority verdict was adequate and did not amount to pressure on the jury. The learned judge did not tell the jury of any time limit nor did he mandate them to return a unanimous verdict. From an evaluation of the learned judge's direction, he made it clear that they were entitled to disagree in their deliberations. It was highlighted that at the end of the direction, the learned judge told the jury, in essence, that if they were unable to reach a unanimous verdict, after trying again, they could return. In light of this, it was argued that it could not be said that pressure was applied. Reliance was placed on the case of **Junior Edwards and Vassel Davis v R** [2012] JMCA Crim 50 where a number of authorities were considered in relation to whether a direction amounted to pressure.

Ultimately, it was held (in that case) that the words of the judge were merely encouragement.

[156] It was also submitted that the learned judge did not fall into error in giving the majority direction when the jury initially returned at 4:06 pm without a verdict (that is, two minutes short of an hour). Reference was made to section 44(4) of the Jury Act, which empowered the learned judge to direct the jury to retire for further consideration where their verdict was not unanimous. It was pointed out that the jury retired for 19 minutes and returned at 4:31 pm, which was well beyond the statutory requirement.

Discussion and analysis

[157] There are two issues that arise for consideration. The first is whether the learned judge's discussions with Crown Counsel amounted to jury pressure, and the second is the propriety of the majority direction.

(1) Jury Pressure

[158] Mr Williams' contention that the learned judge put pressure on the jury by referring to the time when the trial may be completed, is totally unfounded. A trial judge is to take charge of his or her court and manage the process of the trial. The jurors, as in all cases, had been summoned for a particular period of time, which was to have ended on the Friday, that is the next day (following the learned judge's comment). He expressed concern to both prosecuting and defence counsel about the date of completion of the trial (see the portions of the transcript set out at paragraph [150] above).

[159] The judge would have been duty bound to enquire into matters that would have affected the jurors. If the matter was to proceed beyond that specified date, there could possibly be administrative issues - such as letters to places of employment or personal/family responsibilities - that may have needed to be settled in advance. No doubt, having those matters brought to the fore would have alleviated any anxiety the jurors may have had in this regard.

[160] These references could not have had the effect as contended by Mr Williams. Further, at page 178, lines 12 to 17 of the transcript, the learned judge addressed the jury directly on the matter on the following day, that while their duty was to have finished on that day (the Friday), the case would continue on Monday, when it was hoped it would be completed. This communication would have forewarned and prepared the jury for the extension of their period of service.

[161] In **Junior Edwards and Vassel Davis v R**, this court examined the issue of pressure on the jury and referred to several authorities, including **Watson** (1988) 87 Cr App R 1 and **R v McKenna et al** (1960) 44 Cr App R 63**, Regina v Clive Barrett, Ivan Reid and Linton Barrett** (1994) 31 JLR 221 and **Regina v Tommy Walker** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/2000, judgment delivered 20 December 2001. With reference to **R v McKenna**, Phillips JA, at paragraph [36] of the judgment in **Junior Edwards**, quoted the following excerpt:

> "[36] Cassels J in **R v Mckenna et al** in the English Court of Appeal at page 73 stated:
>
> > 'It is a cardinal principle of our criminal law that in considering their verdict, concerning, as it does, the liberty of the subject, a jury shall deliberate in complete freedom, uninfluenced by any promise, unintimidated by any threat. They still stand between the Crown and the subject, and they are still one of the main defences of personal liberty.'
>
> Later in his judgment in again endorsing the importance of the jury not being pressured while considering their verdict, he said:
>
> > '…it is of fundamental importance that in their deliberations a jury should be free to take such time as they feel they need, subject always, of course, to the right of a judge to discharge them if protracted consideration still produces disagreement.'
> >
> > …"

[162] At this stage, the jurors had not yet begun their deliberations, but in any event, the learned judge had used the opportunity to prepare them, in advance, so that they could do so unhindered by any concerns. Therefore, we saw no merit in these submissions of Mr Williams.

(2) Propriety of the majority direction

[163] Mr Williams' complaint in relation to the propriety of the majority direction is two-fold. He took issue with the timing of the majority direction, as well as the failure of the learned judge to make it clear to the jury that they were entitled to disagree.

[164] On the matter of timing, we note that, the jury first retired at 3:08 pm and returned at 4:06 pm (two minutes less than the required hour for a divided verdict). They were not unanimous. At that stage, the learned judge expressed thus (at page 33, lines 11 to 25 and page 34, lines 1 to 3):

> "HIS LORDSHIP: Mr. Foreman and members of the jury, I cannot at this stage accept a verdict which is not unanimous. So, I must ask you to retire and continue to try and reach a verdict on which you all agree. If you cannot all agree, I will accept a majority verdict in which at least five of you agree on either guilty or not guilty. If you are unable to reach a verdict even in which five of you agree on one or the other, then we come back. So, go back and see if you can reach a unanimous verdict. If not, I will accept a verdict on which at least five of you agree either for guilty of not guilty. That is, after you have gone back and tried again. But if you – even after you have tried, you are unable to reach a verdict in which five of you – then when we come back."

[165] In considering this issue of timing, it is appropriate to have regard to sections 44(3) and (4) of the Jury Act, which provides:

> "(3) On trials on indictment before the Circuit Court for offences other than murder or treason, the verdict of the jury may be unanimous, or a verdict of a majority of not less than five to two may, after the lapse of one hour from the retirement of the jury, be received by the Court as the verdict of the jury.

> (4) Whenever the verdict of the jury is not unanimous the Judge may direct the jury to retire for further consideration."

Additionally, it is observed that where the Jury Act is breached, and the jury is not allowed the stipulated minimum time in which to consider its verdict, then the conviction, sentence and even the trial itself would be considered a nullity (see paragraph [3] of the dictum of F Williams JA in **Jason Collins v R** [2018] JMCA Crim 41). This is not the issue in the case at bar, and there can be no complaint with regards to the length of time that the jury deliberated.

[166] Mr Williams' contention was that this handling of the majority verdict was inconsistent with principles laid down in **Flavia Richardson v The Queen**. With respect to counsel, this case, a decision of the Court of Appeal division of the Eastern Caribbean Supreme Court, is not particularly helpful to resolving this issue.

[167] The position in Saint Vincent and the Grenadines differs from ours for the reason that, in the absence of a statutory provision regulating jury management and the time when a majority verdict direction must be given, the practice observed by the Crown Court in England is applicable (see paragraph [12] of that judgment). Accordingly, the court applied a comparable English statutory provision, which states that the Crown Court shall not accept a verdict unless the jury has had at least two hours for deliberation. Reliance was also placed on an English practice direction, and neither the statutory provision nor the practice direction is applicable in our context. Additionally, a unique feature of the **Flavia Richardson** case was that the record did not disclose the time the jury retired or the time it returned and delivered the unanimous verdict. This did not comply with the requirement for the time to be stated publicly (see paragraphs [4], [13] and [16] of the judgment).

[168] We find that the statement of principles in **Flavia Richardson** was informed by various concerns of the court which included a consideration of the statutory provision and corollary practice direction reflecting the English position. At paragraph [14] of the judgment it was held, "[o]nce a jury has deliberated for over two hours, the question

whether to, and when to, give a majority direction is entirely one for the judge's discretion".

[169] There is a further distinguishing feature, as the court had to decide whether the directions of the trial judge were acceptable in relation to unanimous verdicts as well as majority verdicts (including time spans required) which were given at one and the same time at the commencement of the jury's retirement. However, there was some common ground as to the general issues of jury retirement.

[170] Thus, while we would have no difficulty in accepting as correct, the overriding principle that it is in the learned judge's discretion when to give a majority direction, as expressed by the court in **Flavia Richardson**, it is perhaps, more helpful to restate the principle as set out in Supreme Court of Judicature of Jamaica Criminal Bench Book ('the Bench Book'):

> "**It is for the judge to decide if or when a majority direction is to be given**, although it is good practice to inform the advocates of this intention. Sometimes advocates may ask the Judge when he is likely to give such a direction. The judge is under no obligation to give any indication, although in practice this may be done." (Page 348, paragraph 8)

[171] In **Shawn Campbell and others v R** [2020] JMCA Crim 10 at paragraph [202], this court has expressed that the Bench Book is to be considered as guidance to the best possible practice.

[172] In the case at bar, the learned judge, at the end of his summation, gave a very brief direction to the jury. No time limits or directions as to unanimity were included (page 32, lines 18 to 21 of the transcript). The record then notes that the jury retired under sworn guard at 3:08 pm and returned at 4:06 pm, indicating that they had not arrived at a unanimous verdict. It was at this point that the learned judge gave the majority direction in the terms set out at paragraph [164] above.

[173] While the learned judge did not inform the advocates of his intention as the Bench Book now recommends and did encourage unanimity, he made no mention of timelines, when directing the jury that a five to two verdict could be acceptable, if they found that they could not all agree.

[174] In **R v Fitzroy Greenland** (1990) 27 JLR 558 (CA), this court considered the appropriateness of the majority direction being given to the jury (after the jury had retired for 25 minutes and returned indicating they were partially agreed). The learned trial judge had directed the jury as follows:

> "Well, I cannot take a divided verdict at this stage. It is desirable that you should go back and further deliberate. What I would tell you, however, at this stage, is that none of you must refuse to listen to the views or arguments of the others. Although each of you have taken an oath to return a true verdict according to the evidence none of you must close your ears to the arguments and views of the other jurors. You are to talk it out, deliberate, discuss the matter amongst yourselves and arrive at a unanimous verdict. You have to bear in mind that these trials invariable [sic] involve a considerable amount of judicial and public time and with that in mind none of you should refuse to listen to the views of the others. Talk it out and discuss it amongst yourselves and arrive at a verdict…"

[175] Carey JA, who delivered the judgment of the court, stated at page 561:

> "The first observation we desire to make is that when the jury returned, and were asked whether they had arrived at a verdict, their response that they had arrived at a partial verdict did not necessitate any sort of direction. All that should have occurred was that they should have been told to go back and to deliberate further. So that there was no call for the direction which the learned trial judge chose to give. Having said that one must nevertheless look to see what possible effect it could have had on the jury. In our view, the learned trial judge was endeavouring to point out to them that at that particular time at which they had returned to the jury box, he was not able to take a divided verdict. To reasonable intelligent jurors that must mean that

> there may come a time when he could take a divided verdict. That must mean that some would agree on one verdict and others on another. If then they are told to go back and deliberate in an endeavouring to coerce them to arrive at a verdict. A jury is normally, at the end of the case, well aware that they are to go out and arrive for a unanimous verdict. There can be nothing wrong in principle in directing them in terms of unanimity at the time the directions were given."

[176] Carey JA expressed that the directions on unanimity (after the jury's response that they had arrived at a partial verdict) were not required at that time, and that the trial judge ought to have just sent them back for further deliberation. He considered that, at the time that the trial judge gave the impugned directions, no problem had arisen, so the directions on unanimity could be characterised as "a benign academic flourish".

[177] In **R v Noel Phipps, Shawn Taylor and Phillip Leslie** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 21, 22 and 23/1987, judgment delivered 11 July 1988, which was referred to by the court in **R v Fitzroy Greenland** (at page 562), this court indicated, at page 23, that "in practice a judge ought not to give a majority verdict until the necessity for such a direction arises due to the passage of time and an intimation that the jury are hopelessly divided, it seems desirable that a direction on unanimity can be most effectively given when a problem arises in the return of a verdict". These sentiments are also set out in the Bench Book (see pages 347 to 348).

[178] In the case at bar, the impugned directions were given on the jury's return at 4:06 pm, when it was indicated the verdict was not unanimous. While there was no indication that the jury would have been hopelessly divided at this point, the learned judge may have been of the view that it would have been impractical to send the jury for further retirement (just two minutes short of the required hour) without giving some remarks pertinent to unanimity as well as a majority verdict (see also the Bench Book, page 348, paragraphs 7 and 9).

[179] From a practical point of view, it cannot be said that the learned judge erred in the exercise of his discretion in directing the jury as he did. Further, as Carey JA stated in considering the trial judge's remarks in **R v Fitzroy Greenland** "…one must nevertheless look to see what possible effect it could have had on the jury."

[180] In the final analysis, in spite of those words used by the trial judge in **R v Fitzroy Greenland**, this court held that there was no merit in the ground that the directions of the trial judge amounted to an irregularity at the trial.

[181] In directing the jury at this particular juncture, the learned judge, in the case at bar, made it clear that if unanimity could not be reached, he could accept a verdict of which five members agreed but that if they were unable to have at least five in agreement, they were to return. Therefore, it is difficult to appreciate how the jury may have felt pressured to be unanimous in their decision or merely to agree on a verdict out of convenience. As the court found in **Junior Edwards and Vassel Davis v R**, we find the words used by the learned judge in the case at bar were words of encouragement and not words mandating or compelling the jury to return a unanimous verdict; and this is even more so, as the jury was sent back to do further deliberations without time constraints or time schedules as in **Flavia Richardson**.

[182] We have concluded, therefore, that no irregularity occurred based on the words used by the learned judge in his directions to the jury in relation to unanimity or the return of a majority verdict.

[183] Finally, on this ground, Mr Williams complains that no time was added so as to allow the jury to proceed to and from the jury room. The transcript reveals that the jury retired for the second time at 4:12 pm and returned at 4:31 pm. That would have allowed a further 19 minutes of deliberation to be added to the first period of 58 minutes (3:08 pm to 4:06 pm). Even if we were to give or take five minutes altogether, for the jury to travel to and from the jury room, in the context of the layout of the Supreme Court (with which this court is familiar), they would have had more than the

time allotted of one hour for their deliberations. We do ask, however, that trial judges bear in mind the principle as expressed in the Bench Book at page 348, paragraph 3:

> "In practice, it is best to allow the jury all the time it wishes in order to consider its verdict. Only in the most extreme circumstances should the jury be sent for to make an enquiry as to whether it will arrive at a verdict. **In addition, greater time than the minimum stipulated by the statute should be allowed for the jury to go from the courtroom to their retiring room** and *vice versa*." (Emphasis added)

[184] In all the above circumstances, we find that there is no merit in this ground.

Sentence

Ground 5: The learned trial judge failed to adequately demonstrate how the sentence was arrived at

Submissions on behalf of the applicant

[185] The essence of the submission under this ground was that the learned judge failed to state the starting point or to demonstrate how he arrived at the sentence imposed. Reference was made to the learned judge's remarks at pages 39 and 40 and the decision of this court in **Edwards v R** [2018] JMCA Crim 4, (2018) 92 WIR 477.

Submissions on behalf of the Crown

[186] Mr Green submitted that at the time of sentence at 2011, there were no established sentencing guidelines, and the learned judge did not have the benefit of the decision in **Meisha Clement v R** [2016] JMCA Crim 26. He conceded that he was unable to say what starting point was adopted by the learned judge in arriving at the sentence of 15 years. However, he asked the court to have regard to the aggravating and mitigating factors and to find that the learned judge did not err in arriving at the sentence. These factors were helpfully outlined. The mitigating factors being the applicant's age and that he had no previous convictions. The aggravating factors were the nature of the offence, the number of injuries, the cutting of the complainant's

throat, the applicant's conduct when he returned and stabbed her in the chest, and the fact that the attack was unprovoked. The applicant had also spent three years in pre-trial custody for which he ought to have been credited.

[187] Finally, Mr Green contended that although there were departures from the appropriate procedure, there was no miscarriage of justice.

Discussion and analysis

[188] We find that this ground is without merit. It is correct that in sentencing the applicant, the learned judge did not refer to the usual considerations such as a starting point, in determining an appropriate sentence. Of course, as Crown Counsel pointed out, the sentence was imposed before the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts were established. Nonetheless, the learned judge would not have been without guidance. In **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Parish Court Criminal Appeal No 55/2001, judgment delivered 5 July 2002, it was recognised that a sentencing judge's first task is to make a determination of the length of the sentence as a starting point, and then go on to consider any other factors that will serve to influence the sentence, whether in mitigation or otherwise. We considered the usual starting point for wounding with intent is seven years with the normal range being five to 20 years, and that the applicant's sentence is within this range. We are satisfied that the learned judge considered the aggravating and mitigating factors and that the sentence cannot be considered manifestly excessive or that the learned judge erred in that regard. In any event, Mr Williams did not submit that the sentence was manifestly excessive.

Delay and constitutional issues

Ground 6: The delays in the hearing of the appeal amount to an abuse of the court's process attributable to the Crown

Submissions on behalf of the applicant

[189] It was submitted that the case at bar revealed a failure of the State to promote universal respect for, and observance of, human rights and freedoms under section 13(1)(a) of the Charter with respect to the fundamental rights of the applicant concerning his appeal against his conviction. In circumstances where there is egregious delay, and this results in injustice or impedes the fairness of the appeal, the appropriate remedy may be a quashing of the conviction.

[190] Under the heading of reasonable time, it was argued that the State has a duty to ensure that criminal proceedings are conducted in a reasonable time. This includes the conduct of appeals and the strength of the evidence, and public interest issues are irrelevant. Reference was made to section 16(1) and (2) of the Charter.

[191] Fundamental to the arguments made on the applicant's behalf were the following points, (1) the right to a fair trial includes fairness at the appellate level, in respect of which reference was made to paragraph 36 of **R v Pigott** (2015) 88 WIR 299 and paragraph [29] of **Singh v Harrychan** [2016] CCJ 12 (AJ), 88 WIR 362); (2) undue delay is the same as unjustifiable delay, for which reference was made to paragraphs 10 to 12 of **R v Williams** [2009] 5 LRC 693; and (3) an aspect of the decision in **Sooriamurthy Darmalingum v The State** [2000] 1 WLR 2303, at pages 2307 to 2308, which has not been doubted, that the reasonable time guarantee is freestanding and a breach may be established without proof of prejudice. Further, it was argued, the guarantee extends to the conduct of appeals.

[192] The case of **Mills v HM Advocate and another** [2002] 3 WLR 1597 was also cited in support of the points made, as well as the Privy Council's disapproval of the reasoning that fair trial guarantees were "one embracing form of protection" to be balanced against the public interest. The court was asked to consider paragraphs 6 to

13 and 46 of that judgment as well as the rationale for the reasonable time provision, which included the avoidance of a defendant or appellant suffering long periods of uncertainty about his fate, the risk of loss or deterioration of evidence and the undermining of public confidence. Reference was made to paragraph 16 of **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72 where the rationale was discussed.

[193] Having been sentenced to 15 years' imprisonment on 21 February 2011, the applicant duly appealed the conviction and sentence and requested the records of the trial proceedings. Before being granted bail pending appeal, the applicant was held in custody for over 10 years awaiting his appeal, as the state was egregiously late in providing the records. The result being that the applicant's appeal could not be heard, although his time in custody (if he were entitled to early release), exceeded the period that he would have served, had he not appealed.

[194] Mr Williams referred to the chronology (filed 30 April 2021) wherein the attempts to get the transcript to pursue the appeal were set out. In particular, that the appeal was filed on 28 February 2011, the matter was taken out the list on 9 December 2011 for the registrar to obtain a copy of the transcript from the Supreme Court, and the applicant wrote on 27 March 2015, requesting the status of his appeal. Finally, on 18 May 2015, the registrar responded, stating that the notes of evidence were requested from the Supreme Court and that once it was obtained, it would be given to the applicant's attorney-at-law and a new date would be set. During this period of delay that was wholly attributable to the State, the applicant has undergone pressure to abandon his rights, uncertainty as to his fate and suffered the indignity of inequality, hopelessness and arbitrariness.

[195] It was submitted that once the threshold of delay has been surpassed, it is for the state to show that the constitution's reasonable time guarantee has not been breached and that there is no prejudice.

[196] In addressing whether this court could properly hear constitutional arguments, reference was made to section 19(1) of the Charter and in particular the recognition of "any other action", as well as the Eastern Caribbean Court of Appeal case of **R v Pigott**. That case illustrated that where there was inordinate delay in the trial or between conviction and the hearing of the appeal, it could be raised as a ground of appeal against both conviction and sentence. A separate action before the High Court was not required.

[197] Extensive reference was made to the recent decision of the Caribbean Court of Justice, **Solomon Marin Jr v The Queen** [2021] CCJ 6 (AJ) BZ. Mr Williams argued that this authority supported the point, that where constitutional issues arose on appeal, the appellate court ought to deal with them. This was done in the case of **Tapper v Director of Public Prosecutions** [2012] 1 WLR 2712, where it was held that five years of post-conviction delay, where four years were attributable to delays in preparing the record, was inordinate and in breach of the reasonable time provision of the constitution.

[198] The court's attention was invited to paragraphs [13] to [24] of the judgment of Jamadar JCCJ in **Solomon Marin Jr**. It was plainly expressed that "the Court of Appeal can in certain circumstances, grant relief and a remedy for a breach of an individual's fundamental rights where the breach arises during and in a case before it, even if not directly related to the issues that may or do arise from the substantive criminal trial. In such instances, there is no necessity for an aggrieved individual to seek such relief by way of a separate originating application in the Supreme Court". As a result, it was held that the appellant was entitled to relief for breach of his constitutional right to a fair hearing within a reasonable time.

[199] Counsel pointed out that in the applicant's case, the specific breach that was being alleged was that he was kept (since 2011) in a condition where his sentence had not begun to run because he filed an appeal. Mr Williams submitted that section 20 of the Belizean Constitution was the same as our section 19 and reference was made to

the judgment of Jamadar JCCJ at paragraphs [56], [60], [64] to [73] and [91] in **Solomon Marin Jr**. It was further contended that the applicant's case was not one of delay simpliciter, rather it was mixed with unconstitutional treatment which included (1) the breach of the right to liberty, (2) inhumane treatment, as well as (3) the breach of the right to review the conviction which included the right to receive the record of proceedings. All of these abuses aggregated to make out an abuse of process, but the route to reaching such a decision required a finding that these rights were breached. It was submitted that if the rights are found to have been breached, the court may then consider whether to apply section 31(3) of the JAJA. However, before doing so, he argued the court must determine whether that provision is constitutional.

Breach of the right to liberty and "loss of time" orders

[200] Mr Williams submitted that section 31(3) of the JAJA, in essence, provides that the time during which appellants in custody are given this special treatment shall not count as a part of their term of imprisonment and, subject to the court's direction, time is deemed to run from the day on which the appeal is determined. This has led to appellants being:

(a) incarcerated for indefinite periods;

(b) incarcerated in execution of a sentence, not accounted as part of that sentence;

(c) urged to abandon their appeals in return for freedom, and the abandonment must be followed by an actual dismissal by the court.

[201] Mr Williams outlined the history and development of "loss of time" orders which were based on section 14(3) of the English Criminal Appeal Act, 1907. The history was traced in the decision of the Privy Council in **Leslie Tiwari v The State** and summarised thus. The early practice was to backdate the sentence, if leave to appeal was given; in those times appeals were usually heard within a few weeks after the

convictions but when the delay grew longer in the 1940s, due to an increase in the number of appeals, the Court of Appeal adopted the practice of limiting the time lost to eight weeks. Section 38(2) of the Criminal Justice Act, 1948 capped time lost at six weeks, subject to contrary direction by the court. It became recognised that any privileges received by the appellant inmate were greatly outweighed by the fact that an appellant who had served notice of appeal (and not admitted to bail) lost his liberty and was confined to prison. Lord Donovan's Report opined that another basis for "loss of time" orders was to dissuade frivolous appeals and this led to an amendment in 1968 to provide that the time served by a prisoner between conviction and appeal should count towards his sentence, unless the court ordered to the contrary (which was rare). It is for the legislature in each jurisdiction to enact its own rules, reflecting conditions in its own State.

[202] Mr Williams sought to compare the exception to liberty, as worded in article 5(1)(a) of the European Convention on Human Rights ('ECHR') with section 14(1)(b) of the Charter. In particular, he referred to the case of **Monnell and another v United Kingdom** [1987] ECHR 9562/81, where the European Court of Human Rights considered that article and approved of the English practice of "loss of time" orders as provided for in section 29(1) of the Criminal Appeal Act, 1968.

[203] However, learned counsel argued, the Jamaican Constitution does not provide for the suspension of the right to liberty.

[204] It was submitted that there should be a broad interpretation of the right to liberty and a narrow interpretation of the exceptions as contained in section 14 of the Charter. Reference was made to an extract from the text, Fundamentals of Caribbean Constitutional Law by Tracy Robinson, at paragraphs 3-017 to 3-020. The constitutional exceptions to the right to liberty, in their proper interpretation, do not include periods of detention on a committal from the sentence of a court that are not reckoned as part of that sentence.

[205] The State would need to show that the applicant's detention as an inmate, fell within one of the exceptions to the right to liberty and the only relevant provision is section 14(1)(b) of the Charter, that it was "in execution of the sentence or order of a court … in respect of a criminal offence of which he has been convicted". It was submitted that the term "in execution of" means the process for enforcing or giving effect to the judgment of the court. Reliance was placed on the decision in **Re Overseas Aviation Engineering (GB) Ltd** [1963] Ch 24, 39; counsel stated that this definition could not apply to detention not reckoned as part of that sentence.

[206] Even if this submission was not accepted, learned counsel argued, the State would then need to show that the provisions are certain, proportionate and reasonably justifiable. The legal basis of section 31(3) of the JAJA, which gives the court the discretion to make "loss of time" orders, is stated to be the preferential treatment granted to inmates who have appealed or applied for leave to appeal their conviction and/or sentence. Also, this section provides that appellants must be treated according to the rules under the Corrections Act. These rules in turn provided for the said preferential treatment of appellants, in that they may, provide food and books for themselves, wear their own clothing and use their own bedding, and not be directed to be employed in the services or industries of the correctional centre, be relieved of keeping their cell, clothing and dormitory clean (for the payment of a small sum). The applicant's evidence alleged that he did not benefit from this privileged treatment.

[207] However, counsel contended that even if the preferential treatment was practised, the dictum of Lord Hutton in **Leslie Tiwari v The State** (2002) 61 WIR 452, paragraph 42 and the current international consensus on the nature of imprisonment (rule 3 of the Mandela Rules) reflect the disproportionality of emphasising the incarceration with privileged treatment over the fact of incarceration in itself.

Breach of the right to review one's conviction (including the right to receive the record of proceedings)

[208] Mr Williams' starting point on this issue was section 16(8) of the Charter. He candidly pointed out that there was no similar right expressed in the ECHR which could provide any guidance. He argued that rights must be practical and effective and not merely illusory. To that end, he said, the State cannot place conditions on the exercise of rights that impair their essence or effectiveness (reference was made to paragraph 3.08 of Human Rights Law and Practice, by Lester, Pannick & Herberg). It was generally submitted that the delays and the procedure were disproportionate and impaired this right.

[209] Subsumed under this, counsel argued, was the duty of the State to provide records and reasons. Reference was made to section 16(7) of the Charter which provided the basis of the applicant's entitlement to be given "a copy of or any record of the proceedings made by or on behalf of the court" within a reasonable time after judgment. The court's attention was also invited to section 17 of the JAJA and rules 3.7, 3.8 and 3.9 of the CAR which relate to the record.

[210] Counsel submitted that there were two items that formed part of the record which the applicant did not get. The absence of these impacted on the fairness of the appeal, namely the record of what took place in chambers in his absence and the transcript of the first trial. It was contended that the absence of these provided evidence of real prejudice, which made it impossible to argue the applicant's appeal and following the decision in **Tapper v Director of Public Prosecutions**, the conviction should be quashed. It was again emphasised that this was not a case of delay simpliciter; there was delay along with the non-production of records which continue to prevent the applicant from the advancing of his appeal. Mr Williams contended that it would be a wrong approach for the court to assume that the absent records would not have made a difference. In similar cases, courts have quashed convictions, for example, in the Canadian case of **R v Ovided**, 2008 ONCJ 317, where it was recognised that there could be no appeal without a transcript. Counsel quoted from paragraph [56] of

that judgment, where it was stated, "[t]ranscripts of trial proceedings are thus not a luxury; they are the staple of the practice of appeals". He also referred to **Graham and another v Police and other cases** (2010) 79 WIR 288.

[211] Mr Williams also referred to several authorities in support of the point that where there are missing documents which the State fails to provide, the appellate court ought to quash the conviction in the interests of justice. The cases included **Forbes v Chandrabhan Maharaj** (1998) 52 WIR 487, **Alexander v Williams** (1984) 34 WIR 340 and **Griffith v Niewenkirk** GY 2004 CA 2.

[212] He also brought some authorities to the court's attention which came to a different conclusion, but he sought to distinguish them. These included (i) **Cedeno v Logan** [2001] 1 WLR 86, where the absent reasons affected no ground of appeal and the same counsel represented the defendant at trial as on appeal; (ii) **Delevan Smith**, where the record was missing, but the circumstances of the case was considered; (iii) **Sylvester Stewart v R** [2017] JMCA Crim 4, where the record was absent but the matter could be dealt with on the available documents; and (iv) **Payne & Spillane**, where there was no competent shorthand writer and the problem was the quality of transcription of what appeared to be an edited summation.

[213] It was argued that one important reason that delay must be guarded against is the problem it causes for fading memories and, even more so, when the notes are needed. In respect of the first trial, this was conducted before a judge who is now retired and with a defence counsel who could not recall the details of that trial. Mr Williams referred to the reasoning in **Reid, Dennis and Whylie v R** that the transcript of the first trial should be provided in order for the defence to test consistency. The applicant's defence counsel did not have the transcript for this purpose, and this court should not be asked to speculate that all was "fine and dandy". In respect of the absent record of what took place in chambers in the absence of the applicant, it was submitted that it would be impossible to know if there were errors in law in reaching the decision taken.

Protection against cruel and inhuman treatment

[214] Mr Williams submitted that the instant case was analogous to that of **Earl Pratt and another v Attorney-General for Jamaica and another** [1994] 2 AC 1, where uncertainty and long delays in punishment were found to have breached the protection against cruel and inhuman treatment, as they led to hopelessness, despair, agony and suspense.

[215] The case of **Higgs and another v Minister of National Security and others** [2000] 2 LRC 656, which approved **Pratt** was cited in support of the following points:

> (a) proof of deliberate causing of very serious or cruel suffering is not required to breach the protection;
>
> (b) the impact on the individual must be considered;
>
> (c) where the State superimposes upon the inevitable consequences of the sentence further unnecessary physical or mental agony and suffering then that treatment, if substantial and prolonged, may be a paradigm of inhuman conduct; and
>
> (d) the guarantee is absolute, each provision is stand alone, and psychological harm is included.

Remedies

[216] It was submitted that **Tapper v Director of Public Prosecutions** does not provide that quashing can never be the appropriate remedy where the appellant cannot prove prejudice. The presumption of prejudice is provided for in the common law. The JCPC reconsidered its earlier decision in **Darmalingum**, that quashing the conviction was the normal remedy, and held that decision had been determined on its own facts and "reduced to a vanishing point". The JCPC specifically affirmed (at paragraph [28] of **Tapper**) that the law as stated in the **Attorney General's Reference (No 2 of**

2001) [2004] 2 AC 72 as summarised in **Boolell's case** [2006] UKPC 46 represented the law in Jamaica.

[217] Nevertheless, learned counsel submitted, the JCPC (at paragraph [26]) was careful not to disapprove of the result in **Darmalingum**. Again, reference was made to the **Attorney General's Reference (No 2 of 2001)**, wherein the appropriate remedy was described as depending on the nature and circumstances of the breach, and this included quashing the conviction where there has been prejudice. However, cases like **Darmalingum**, although exceptional, remained appropriate for the quashing of convictions, as they represented instances where the delay was of such an order so as to make it unfair that proceedings against a defendant should continue. The case of **Taito v R** [2002] UKPC 15 was referenced for its explanation that the decision in **Darmalingum** was dependent on the significant length of delay attributable to the State. In that very case, the JCPC opined that it did not wish to be overly prescriptive, as there may be circumstances where quashing would be inappropriate.

[218] In **Mills v HM Advocate**, it was reiterated that quashing a conviction remained a remedy (which was appropriate in **Darmalingum**), but it was not the normal remedy and as such **Darmalingum** ought to be read as modified.

[219] Returning to the case of **Tapper**, it was submitted that it did not doubt the decision in **Herbert Bell v the Director of Public Prosecutions** [1985] 1 AC 937, where a stay was granted for the lengthy delay without any other prejudice. In support of this point, two decisions of the Caribbean Court of Justice ('CCJ') were cited. First, **Singh v Harrychan,** where it was opined that quashing a conviction remains a remedy (paragraph [29]); and secondly, **Gibson v Attorney General of Barbados** [2010] CCJ 3 (AJ), (2010) 76 WIR 137, where the court did not agree that a mere breach of the reasonable time guarantee could never yield a permanent stay or dismissal of the charge or that such relief should be reserved only for instances where the trial will be unfair or the accused can show prejudice.

[220] Reference was made to the reasoning in **R v Williams** [2009] 5 LRC 693, [2009] NZSC 41, where egregious delay, in itself, was considered good grounds for a stay. It was submitted that a number of cases throughout the Caribbean have followed **Tapper** in refusing to quash convictions, despite delay attributable to the State. However, in some of these decisions, the delays were not egregious, and in others, there was (a) a failure to appreciate the prejudicial impact of delay in itself, (b) no consideration of the reasonable time breach as against breaches of the right to the record of the trial proceedings, and the right to review those proceedings, (c) improperly balancing the fundamental rights as against the public interest in the attainment of justice and/or (d) an omission to place the onus on the State to prove the absence of prejudice.

[221] In essence, it was submitted that the appropriate remedy, which includes the quashing of convictions, must contemplate the entirety of the breach.

[222] Reference was made to the factor of "unlawfulness and manipulation of proceedings" considered by the House of Lords in **Attorney General's Reference (No 2 of 2001)**, which, when considered with delay, could lead to the quashing of a conviction. It was submitted that in the instant case, the contravention of the right to provide the record and the pressure on the applicant to abandon his appeal provide sufficient evidence of unlawfulness and or manipulation. The evidence of actual prejudice, according to counsel, was to be found in the anxiety suffered by the applicant about the breach of his rights. In particular, this was so in relation to the inability to review the learned judge's decision that was made in chambers.

[223] Lastly, by way of comparison, the delay in some of the cases cited were itemised. In **Tapper** the appellate delay was five years, but she had been on bail throughout. In **Darmalingum** (save for 17 days on bail), there was a seven-year delay in respect of the trial and five years' appellate delay. In **Attorney General's Reference (No 2 of 2001)**, the defendants were serving time from another matter during the period of delay. In **Mills v HM Advocate**, the appellant was on bail during the period of inordinate delay. Lastly, in **Singh v Harrychan**, the appellate delay was

four years and five months. The overall delay was nine years; however, the appellant, in that case, was on bail throughout (save for five weeks).

Submissions by the Attorney General

[224] In light of the constitutional arguments, the court invited submissions from the Attorney General's chambers, and these were presented in writing.

[225] In relation to the jurisdiction of this court to hear this matter, reference was made to two decisions of this court, where claims were made in appellate proceedings for relief on the basis of breach of the Charter; and there was a consideration of whether it was appropriate to entertain such claims. Firstly, in **Paul Chen-Young et al v Eagle Merchant Bank Jamaica Limited et al** [2018] JMCA App 7, this court declined to adjudicate an alleged breach of the reasonable time guarantee in the context of civil proceedings. Reliance was placed on the language of section 19 of the Charter and the comparative advantage of the Supreme Court as the finder of fact. It was held that the allegation of delay required the submission and assessment of evidence. This approach was followed in **Dawn Satterswaite v The Assets Recovery Agency** [2021] JMCA Civ 28, where it was acknowledged that the evidentiary requirements imposed on the State by section 13(2) of the constitution to justify any abrogation or infringement of Charter rights, required the State to be given an opportunity to present evidence in discharge of this obligation.

[226] It was submitted that entertaining constitutional claims raised for the first time in criminal appeals, where there has been an alleged breach of the reasonable time for hearing the appeal, could be determined by the appellate court, where it is incontrovertible on the facts of the case that there has been an unreasonable delay and the interests of judicial efficiency and fairness to the individual litigant requires an appropriate remedy to be considered. Remedies in this context are peculiar to the individual and these may include declarations or reductions in sentence.

[227] Reference was made to **Germaine Smith et al v R** [2021] JMCA Crim 1, where this court noted that the existence of delay will not, by itself, lead to a determination of unreasonableness and the grant of relief. In particular, reference was made to the dictum of Brooks JA (as he then was), where he observed at paragraph [124] that where it is alleged that the delay in bringing a criminal case to trial has breached the appellant's right to a fair hearing within a reasonable time, the domestic context, which included high levels of crime, should be considered. This is relevant in determining whether the delay is so unreasonable as to constitute a breach of section 16(1) of the Charter.

[228] The court was asked to consider whether the resolution of any aspect of the constitutional claims required the assessment and determination of facts or evidence, to enable the proper adjudication of the claims. In that regard, the challenge to the constitutionality of section 31(3) of the JAJA was highlighted. It was submitted that certain assertions required findings of fact to be substantiated, these included the allegation of being incarcerated for indefinite periods and being urged by prison authorities to abandon the appeal in exchange for freedom.

Remedies

[229] It was submitted that if the court concludes that there has been a delay in the hearing of the appeals, which are significant enough to prejudice the right to a fair hearing within a reasonable time, as guaranteed by section 16(1) and (2) of the Constitution, then consideration should be given to the appropriate remedy that should be granted. To that end, the principles in **Tapper v DPP** (at paragraphs 26 and 27) were commended to the court where section 20(1) of the Constitution, which is equivalent to the current section 16(1) of the Charter (as contained in chapter III of the Constitution), was considered.

Delay

[230] In respect of the applicant, it was acknowledged that he was convicted on 21 February 2011 and sentenced to 15 years' imprisonment; that leave to appeal was refused by a single judge on 8 April 2013; the transcript was delivered to the office of the Director of Public Prosecutions on 10 June 2014 and bail was granted on 25 February 2021. It was indicated that the Attorney-General's position was at one with that of the Crown, that if the delay was found to be inordinate, then the quashing of the conviction was not an appropriate remedy.

The constitutionality of section 31(3) of the JAJA

[231] The starting point was the consideration of the meaning of section 31 of the JAJA. It was submitted that this section empowers this court to regulate the circumstances in which an appellant is treated whilst awaiting the conclusion of his appeal. Appellants who are denied bail are to be specially treated, while in custody, under the rules established under the Corrections Act. Subsection (3) was highlighted and it was submitted that it gives this court the discretion to determine the date on which an appellant's sentence should commence, and the factors to be considered are contained in subsection (3A).

[232] Reference was made to cases in which provisions similar to section 31 were interpreted. The Trinidadian provision was initially considered in **Leslie Tiwari v The State**, where the JCPC described the provision as providing for the imposition of a "loss of time" order. It was held that the provision gave a discretion to the appellate court to determine whether time spent in custody pending appeal should count towards the sentence and that the discretion should only be exercised to add to the sentence if the appeal is one devoid of any merit.

[233] The JCPC gave further consideration to the provision in **Kumar Ali v The State** (2005) 67 WIR 309, where it pronounced at paragraph [16], that the principles should be applied to other jurisdictions in the region with a similar statutory scheme and went

on at paragraph [17] to state that where "loss of time" orders are made, the time must be proportionate to the purpose of the section which is to deter frivolous appeals. However, this was underscored by the statement that the backdating of sentences to the date of conviction should not be restricted to exceptional cases.

[234] Reference was made to the cases of **The State v Young** (2008) 74 WIR 467 and **Vijai Bhola v The State** (2006) 68 WIR 449, where the JCPC backdated the sentences to the time of conviction, having concluded in both instances that the appeals were neither "devoid of merit" nor made with the intention to "manipulate the criminal appeal system for his own benefit; or deliberately wasting the court's time and resources". In **Vijai Bhola,** the JCPC made it clear at paragraph [25] that the sentence should be backdated to the point of the conviction to ensure that the appellant was not penalised as to his time in custody through having exercised his right of appeal.

[235] It was submitted that the Privy Council's interpretation of the "loss of time" provision has been applied by this court. Reference was made to the dictum of Morrison P (Ag) in **Tafari Williams v R** [2015] JMCA App 36 at paragraph [7], where he stated the practice of this court is to order that sentences should, in general, run from the date of sentencing at trial but it remained a matter for the discretion of the court to be dealt with in accordance with the circumstances of each case.

[236] It was submitted that unless the appeal is found to be devoid of merit, or made with the intention of the applicant to manipulate the criminal appeal system for his own benefit, or deliberately wasting the court's time and resources, the sentence of the applicant should be ordered to run from the date of conviction. In a consideration as to whether the appeal is devoid of merit, the court was invited to consider that the applicant was granted leave to appeal after being refused by the single judge and bail was granted on 25 February 2021. It was also submitted that the effect of the delay should be considered in the exercise of the discretion under section 31(3) of the JAJA and that this should weigh in favour of ordering sentences to commence at conviction. **Kumar Ali v The State** was cited in support, as the JCPC set aside the Court of

Appeal's order that the conviction was to run from the date of the appeal. Instead, the conviction was ordered to run from the date of conviction, taking into account the implications of the administrative delay, where four years elapsed between conviction and the hearing of the application for leave.

[237] It was submitted that if the court exercises its discretion, under section 31(3) of the JAJA, to order that the appellants' sentences are to commence at the time of conviction, then any contention that the effect of the provision was to extend their sentences, would be untenable and this aspect of their claims should be dismissed.

The right to liberty

[238] It was submitted that section 31(3) of the JAJA, as interpreted by the JCPC, is not unconstitutional. Specifically, it was not inconsistent with the right to liberty as guaranteed by sections 13(3)(p) and 14(1)(b) of the Charter.

[239] In the first place, "loss of time" will not be imposed in the ordinary case and as such, it adds nothing to the normal course of an appeal. Secondly, where it is imposed, this is determined by the appellate court in accordance with that court's procedural rules and for the reasonable objective of deterring unmeritorious or frivolous appeals. Any discretion so exercised is done by a court in carrying out its statutory function in respect of sentencing.

[240] It was submitted that the JCPC's interpretation of the "loss of time" provisions in **Leslie Tiwari v The State** and **Kumar Ali v The State** was consistent with the ECHR's reasoning in **Monnell and another v United Kingdom**. The effect was that time spent in custody pending appeal will not count towards sentence, if the appellate court concludes that the case is devoid of merit. It was contended that the court should follow the reasoning of the ECHR in **Monnell and another v United Kingdom**.

[241] It was acknowledged that article 5(1)(a) of the European Convention on Human Rights is worded differently from section 14(1)(b) of the Charter, however it was submitted that this is not a difference in substance. Both provisions acknowledge that

an individual may only be detained in connection with a sentence imposed by a court of law, in this context, the appellate court. In **Monnell and another v United Kingdom**, the ECHR acknowledged that the "loss of time" procedures empowered the appellate court to give directions as to the mode of execution of the sentence in the case of those who pursue frivolous appeals. It was contended that section 31(3) of the JAJA serves the same purpose: it gives this court a discretion to determine how the sentence imposed should be put into effect. In any event, if this court concludes that the appellants were not accorded treatment contemplated by the JAJA and rules under the Corrections Act, it would be open to this court to conclude that the sentencing feature of the "loss of time" provision does not apply.

[242] In respect of the contention that section 31(3) of the JAJA results in indefinite detention (with the period of incarceration not counting towards sentence), it was submitted that the statutory provision does not impose indefinite detention; and that the determination as to whether time spent in custody pending the appeal will count towards sentence is a determination for this court. This is to be exercised in accordance with the principles laid down in **Leslie Tiwari v The State** and **Kumar Ali v The State**.

The right to due process

[243] In addressing whether section 31(3) was inconsistent with the right of review (one of the due process rights) guaranteed by section 16(8) of the Charter, it was submitted that there was no inconsistency. The statutory provision operates when a superior court (whether the Court of Appeal or the Privy Council) is called upon to review the conviction and sentence of an individual who has been convicted of a criminal offence.

[244] It was the Attorney-General's understanding of the ground of appeal that it was not being claimed that section 31(3) was itself unlawful, rather that it was inconsistent with section 16(8) of the Charter, because of the delay and that the procedure following from **Tafari Williams v R** is disproportionate and impairs this right. In **Tafari**

Williams v R, this court ordered that upon the appellant filing a notice of abandonment, his sentence would be reckoned to have commenced on the date of his sentencing. In response to the applicant's contention that this decision has the effect of forcing him to abandon his appeal, it was submitted that such an assertion is a factual question that is not appropriate for determination before this court. Also, that if the applicant's challenge is to the decision in **Tafari Williams v R**, then it is not appropriate for this court to invalidate a statutory provision, when the applicant has not said that the provision itself is inconsistent with the right to review.

Additional submissions on behalf of the Crown

[245] Crown Counsel indicated that they would be relying on the Attorney General's submissions ('the A-G's submissions') in respect of the delay and the constitutional issues. However, additional submissions were made orally.

[246] Mr Green indicated that the Crown's record revealed that it was in possession of the transcript on 10 June 2014, and he noted that the applicant and the court received it in 2021. He noted that the last endorsement made on 9 December 2013, was that the registrar was to obtain the full transcript as all that was had at that time was the summation. He acknowledged that the Constitution provides for a right of review and that there was a failure in the administrative system, but he submitted that in 2021, the applicant was placed in the position of being able to pursue his appeal.

[247] It was conceded that there was a delay of eight years, and having regard to the time that it took for the applicant's appeal to be heard, it was submitted that this court should make an appropriate declaration. Mr Green submitted, however, that the acknowledgment of a breach of the applicant's right did not amount to a reason to quash the conviction, having regard to the strength of the evidence against him. He argued that, based on the authorities, a quashing should be the very last resort in terms of a remedy, and the breach in the instant case did not amount to such a high standard to warrant the remedy of a quashing. The Crown's position was that the court should look at the overall case, as opposed to the individual issues which Mr Williams

invited the court to consider. In respect of any prejudice found, the court was asked to consider applying the proviso and find that there was no miscarriage of justice occasioned.

[248] Further, counsel submitted, the issue of delay was considered by this court when the applicant was granted bail and that by itself could be a remedy. It was submitted that the court has other mechanisms for providing a remedy and the quashing of conviction should be reserved for cases where that is the only appropriate remedy. Mr Green reiterated that in respect of the delay, a declaration of the breach was appropriate, in support, he referred to paragraph [17] of **Sylvester Stewart v R**.

[249] Turning to section 31(3) of the JAJA, Mr Green indicated that he wished to add to the Attorney-General's submission by referring to the case of **Duncan and Jokhan v Attorney General of Trinidad and Tobago** [2021] UKPC 17, which dealt with a similar provision. He submitted that the JCPC acknowledged that the provision could be shown to be oppressive in its application, however, it was observed that this court has the opportunity to apply its discretion correctly. It was submitted that in the instant case, it cannot be said there is any breach, as the applicant was granted bail by this court, and such a breach would only occur, if this court makes an order prejudicial to the applicant. In effect, the applicant is asking the court to anticipate a future order but the ability of this court to apply section 31(3) correctly would remove the possibility of the section being applied unconstitutionally or any potential oppression.

[250] In addressing the incompatibility of section 31(3) with the section 14 right to liberty, it was submitted that the existence of section 31(3) is not the problem. It was acknowledged that ideally, appeals would be determined in a short time, but due to the failings of the State in producing timely records, the result is that there are long delays in hearing appeals; but section 31(3) provides the process for this court to provide a remedy, as the application of that section is not mandatory but discretionary. As such this power could cure hardships. Finally, reference was made to the case of **Ray Morgan v R** [2021] JMCA App 15, in particular paragraphs [24] and [25] where Brooks

P, on behalf of the court, demonstrated that the exercise of a discretion under section 31(3) could remove the label of unconstitutionality.

Discussion and analysis

The right to due process - hearing within a reasonable time and right to review

[251] Section 16(1) of the Charter provides:

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

[252] Based on the circumstances of any particular case, this court can determine that there has been inordinate delay relative to an individual's right to a hearing (whether pre-conviction or post-conviction), but that there has been no breach of the appellant's rights (see **Germaine Smith v R** and **Allan Cole v R** [2010] JMCA Crim 67). However, if it has been determined that there has been inordinate delay which is clearly not attributable to the conduct of the appellant, the court will proceed to consider the appropriate remedy for the breach (see paragraphs [18] and [19] of **Evon Jack v R**; paragraphs [17] to [19] of **Sylvester Stewart v R**; and paragraphs [30] to [38] **Techla Simpson v R** [2019] JMCA Crim 37).

[253] Section 16(8) of the Charter provides for the right to have one's conviction and sentence reviewed by the Court of Appeal. The applicant would also be entitled to a copy of any record of proceedings within a reasonable time after judgment (per section 16(7) of the Charter). Brooks P considered the provisions of sections 16(7) and (8) in **Evon Jack v R** and made certain findings, which are also relevant to the case at bar. They are set out as follows:

> "[20] Subsection (7) addresses an appellant's right to have, within a reasonable time, a copy of the record of his trial. The subsection states:

> 'An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.'
>
> There is, similarly, no doubt that Mr Jack's entitlement to this constitutional right has also been breached. The six-year delay in the production of the record of the summation, as well as the failure to provide the transcript of the evidence, are ample testimony of that breach.
>
> [21] The next provision is subsection (8). It addresses the right to the hearing of an appeal from a conviction. It states:
>
> > 'Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced.'
>
> The provision does not specifically include a reference to a time period, but it would be unarguable, considering the requirement of a 'reasonable time' in subsection (1), quoted above, and its applications to appeals, that subsection (8) does not incorporate the element of a reasonable time for the hearing of an appeal. The inherent interrelationship between subsections (1) and (8), given the length of the delay in this case, necessarily means that the 'reasonable time' aspect of the right conferred by subsection (8), has not been afforded to Mr Jack."

[254] It has not been disputed that the applicant's rights, as prescribed under sections 16(7) and (8) of the Charter, have been breached. There has been a period of 10 years' delay between conviction (February 2011) and the hearing of the appeal (July 2021). The period of delay is not attributable to the applicant in any respect. The transcript was only obtained by him, as well as this court, in May 2021, albeit the transcript was received by the ODPP in June 2014. There has been no explanation as to why there is a stark discrepancy in the dates when the parties received the said transcript.

[255] In relation to the record of proceedings relevant to the hearing in chambers, we have determined that the failure to receive this portion of the proceedings, while technically a breach under section 16(7) of the Charter, did not affect the applicant adversely in the trial or in the conduct of the appeal. In so far as the transcript of the first trial is concerned, there was no absolute entitlement to disclosure on the basis of relevance. In any event, it has been conceded that defence counsel was well aware that there was a previous trial. Hence, the absence of that transcript did not add to any violation of the applicant's rights under section 16(7). Further, even if it could be said that it ought to have been disclosed, we were unable to discern any impact on the fairness of the trial. Therefore, Mr Williams' submissions that the absence of these two items provided evidence of real prejudice to the applicant is grossly overstated.

[256] However, since it has been determined that there has been a breach of the applicant's right to a hearing within a reasonable time and his right to review of the entire record of proceedings, the issue of an appropriate remedy will be considered subsequently.

Constitutionality of section 31 of JAJA and "loss of time" orders

[257] In addressing Mr Williams' submissions on this issue, it would be appropriate to start with section 31(3) of the JAJA, which states:

> "The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under his section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the court of trial or the sentence by the Court of Appeal shall, subject to any directions which may be given by the Court as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody,

> as from the day on which he is received into a correctional institution under the sentence."

[258] The purpose of section 31 of the JAJA has been considered and addressed by this court in **Tafari Williams v R** and more recently in **Ray Morgan v R**. It is expedient to set out Morrison P's (Ag) summary at paragraphs [5] and [6] of **Tafari Williams**:

> "[5] ...Having filed an application for leave to appeal and having remained in custody, he was subject to section 31(1) of the Judicature (Appellate Jurisdiction) Act (the Act), which provides that, pending the determination of his appeal, an appellant must 'be treated in such manner as may be directed by [the rules]'. The result of this is that, as provided for by rules 189-199 of those rules, the applicant fell to be accorded special treatment within the correctional institution. Accordingly, the question of when time begins to run in relation to his sentence is governed by section 31(3) of the Act...
>
> [6] The upshot of all of this is that, in the absence of a direction from the court, the sentence of an appellant is deemed to begin to run as from the date upon which his appeal is determined and not before. In this case therefore, the applicant's sentences would not yet have begun to run, and will not do so until his appeal has been determined, unless this court gives a contrary direction. The only guidance provided in the Act as to what factors are to be taken into account in considering whether to give directions as to the date on which sentence shall be deemed to begin to run pursuant to section 31(3) is to be found in section 31(3A), which provides that the court 'shall take into account any election made by the appellant under rules under the Corrections Act to forego any special treatment accorded to the appellant pursuant to those rules'. However, in this case, since there is no evidence that the applicant made any such election, section 31(3A) is of no assistance."

[259] Section 31(3) gives this court the discretion to determine the date on which the appellant's sentences should commence ("loss of time" orders). The JCPC has considered the application of this provision as well as similar provisions in the statutes

of various Caribbean jurisdictions. The relevant cases include **Leslie Tiwari v The State**, **Kumar Ali v The State**, **The State v Young**, **Vijai Bhola v The State**, **Duncan and Jokhan v Attorney General of Trinidad and Tobago** and **Carlos Hamilton and Jason Lewis v The Queen** [2012] UKPC 37.

[260] In **Leslie Tiwari v The State**, the comparable Trinidadian provision (section 49(1) of the Supreme Court of Judicature Act, to our section 31(3)) was considered. The JCPC described the provision of the "loss of time order" as a discretion for the appellate court to determine when the sentences of an appellant should commence, which should only be exercised to add to the sentence if the appeal is one devoid of merit.

[261] Again, in **Ali v The State**, the JCPC considered the same Trinidadian provision (section 49(1)) and set out principles:

> "16. The legislation governing loss of time varies between the several Caribbean jurisdictions. The majority of enactments now are in terms similar to the Criminal Appeal Act 1968 in England, but several, including Trinidad and Tobago, make provision on the same lines as the Criminal Appeal Act 1907. Their Lordships are very conscious that it is a matter for the legislature in each jurisdiction to enact its own rules, reflecting conditions in its own state. They accordingly do not consider it appropriate to express a preference for either approach. In a jurisdiction which has a statutory provision similar to section 49(1), an appellate court must start with the statutory injunction regarding loss of time. It should consider in each case in the light of the relevant facts whether to exercise its discretion to backdate the sentence and, if so, for what length of time. Appellate courts are entitled to exercise their discretion in the manner which they think appropriate, provided it is consistently exercised and in accordance with proper principle. What their Lordships propose to do is to make clear the approach which appellate courts should adopt to provisions on lines similar to section 49(1), bearing in mind the rationale and objective of such provisions.

> 17. In the first place, their Lordships consider that the making of orders backdating sentences to the date of conviction should not be restricted to exceptional cases. Secondly, it is wrong in principle to take into account the heinousness of the offence or the prisoner's lack of remorse, for these are factors which are relevant only when the original sentence is passed. Counsel for the State cited to the Board an Australian decision, R v Wort [1927] VLR 560, also referred to by the Court of Appeal in Tiwari's case, in which the Court of Criminal Appeal of Victoria had regard to the prisoner's record and the leniency of the sentence. Their Lordships consider that this was incorrect in principle and that this decision should not be followed. Similarly, regard should not be paid to the prisoner's conduct since conviction, except in so far as it may tend to show his state of mind in applying for leave to appeal. Thirdly, any decision by which it is determined that there should be loss of time should be proportionate, that is to say, it should impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant. Their Lordships do not wish to be prescriptive about the appropriate length of loss of time orders, which is a matter for each appellate court in each individual case. They consider, however, that they should be made with regard to the abuse which they are designed to curb and would not expect them to exceed a few weeks in the large majority of cases."

[262] In both **The State v Young** and **Vijai Bhola v The State**, the JCPC reviewed the decision of the local court where "loss of time" orders were made. They concluded that the application of the principle had been disproportionate in those cases.

[263] In **Ali v The State**, the JCPC at paragraphs 13 to 15, considered the history of the "loss of time" orders in England, which had similar provisions (at one time) to both the Trinidadian and Jamaican provisions. Reference was made to the fact that the Donovan report explored the rationale for "loss of time" orders and as a result of its recommendation, section 29 of the Criminal Appeal Act, 1968 was enacted, which reversed the presumption (that time does not begin to run) and prescribed that the

time served by a prisoner between conviction and appeal should count towards his sentence, unless the court ordered to the contrary.

[264] While the presumption has not been reversed in this jurisdiction (and indeed it may be sensible for Parliament to do so), the JCPC determined that the exercise of the discretion of the court to order "loss of time" orders must be proportionate and within the context of that the appeal. Accordingly, time would be added to the sentence, only if the appeal was hopelessly devoid of merit or was one tending towards the manipulation of proceedings (see paragraph 18 of **Ali v The State**).

[265] In **Duncan and Jokhan**, the application of section 49 (1) of the Trinidadian provision was again considered by the JCPC. Paragraphs 32 and 33 of Lord Sales' judgment is instructive:

> "32. It seems to the Board that the position might have been otherwise if the legislation made the general rule in section 49(1) a mandatory blanket requirement with no possibility of relaxation, **since the effect of that would have been tantamount to making the legitimate exercise of appeal rights in circumstances where the appeal was unsuccessful into a punishable offence.** Although the analysis in Ali was directed to section 49(1) and the Board did not need to address constitutional arguments which were raised in the appeal, the reasoning of the Board tends to support the view that a mandatory blanket requirement to issue a loss of time direction in every case would have been incompatible with section 4(a) [of the Constitution bestowing the right of the individual to life, liberty and security of the person].
>
> 33. As it is, it is true that, as the Attorney General accepts, the Court of Appeal failed to apply the law correctly, but that is simply an example of an error in a particular case rather than **an illustration of unfairness in the system as a whole**. As the authorities reviewed above make clear, the fact that a judicial error has resulted in a person being imprisoned for a period when they should not have been does not in itself show that the legal system as a whole is unfair." (Emphasis supplied)

[266] As reflected in **Duncan and Jokhan**, the JCPC was of the view that if section 49(1) were not a discretionary provision, but a mandatory one, it would be incompatible with the right to liberty which is recognised in section 4(a) of the Trinidadian constitution. Again, this discretionary nature of the provision was recognised by the JCPC in **Carlos Hamilton and Jason Lewis v The Queen**, where it was emphasised that its use should be proportionate with regard to the aim of curbing frivolous appeals (see paragraph [68] of the judgment of Sir Anthony Hooper).

[267] In **Ray Morgan v R**, Brooks P reviewed the history of the application of section 31(3) of the JAJA. Although lengthy, it is expedient to set out paragraphs [23] to [26]:

> "[23] Before November 2013, this court gave effect to section 31(3) of the JAJA in two ways. Firstly, a single judge, when refusing an application for leave to appeal, would have ordered the sentence to be reckoned as having commenced six weeks after the original date of sentence. Secondly, when the court refused the application or appeal, it would have specified the commencement date as three months after the original date of sentence.
>
> [24] The Privy Council, in **Ali v The State**, questioned a departure from the principle of sentences commencing on original date of sentencing. Their Lordships ruled that the Court of Appeal should not use a standard formula, in deciding the time from which a sentence should run. There should, their Lordships said, be a considered approach in each case. The Privy Council confirmed this stance in **Carlos Hamilton and Jason Lewis v The Queen** [2012] UKPC 37, which was an appeal from this court. In **Jason Lawrence v R** [2014] UKPC 2, the Privy Council stated that were it to have considered sentence, it would have stipulated the original date of sentence.
>
> [25] This court discontinued its previous practices after the Privy Council provided guidance on the point. Since that time, this court had generally ordered that the date, at which sentences are to be calculated, should be the original date of sentence. If Mr Morgan's appeal had been heard and a sentence of imprisonment, either confirmed or modified,

> the court would, most likely, have made an order in accordance with the present practice.
>
> [26] The question, therefore, of whether section 31(3) of the JAJA is unconstitutional is not a necessary question in Mr Morgan's complaint against his sentences, bearing in mind the facts of his case, and particularly the fact that his sentences have been served."

[268] Brooks P declined to consider the constitutionality of the section at that time. Before making any pronouncements on this issue, the other planks of Mr Williams' attack will be considered, as he has stressed that it is the combined effects of the delay within the context of the application of section 31(3) of the JAJA that has contributed to the unconstitutionality of the section.

The right to liberty (as it relates to section 31(3) of the JAJA)

[269] In relation to the right to liberty, section 14(1)(b) of the Charter reads thus:

> "14 (1) No person shall be deprived of his liberty except on reasonable grounds and in accordance with fair procedures established by law in the following circumstances –
>
> (a) ...
>
> (b) **in execution of the sentence or order of a court** whether in Jamaica or elsewhere, in respect of a criminal offence of which he has been convicted;"
>
> (Emphasis supplied)

[270] Mr Williams attempted to distinguish that section with article 5(1)(a) of the ECHR that was considered in **Monnell**. This was not one of his stronger arguments. Article 5(1)(a) provides:

> "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;"

[271] He has contended that section 31(3) of the JAJA conflicts with the applicant's right to liberty under the Charter, as the applicant, during that period of the review of his conviction and sentence, would not be in custody in execution of the sentence or order of the court; that this was in contrast to being in lawful detention after conviction by a court (as set out in article 5(1)(a) of the ECHR). However, the definition, as provided by counsel, of the words "in execution of" (set out in the Charter) as *the process for enforcing or* ***giving effect to the judgment of the court***, demonstrates the fallacy in his submission.

[272] The applicant had been in custody (prior to receiving bail pending appeal), pursuant to the execution of a sentence or order made in the trial court, in respect of a criminal offence of which he has been convicted (section 14(1)(b) of the Charter). This is a lawful order of the court which would remain in effect, until and unless the court of appeal determines otherwise, notwithstanding that the applicant has taken up his constitutional right to have his conviction reviewed (section 16(8) of the Charter). Section 31(3) of the JAJA as discussed above, sets out certain provisions regarding the status of an appellant during the period of time of the review process. The operation of that provision grants the applicant, as all other appellants, the opportunity to be given special privileges. The applicant spoke to those special privileges at paragraph 15 of his affidavit, although he denied receiving any such treatment from the prison authorities. Based on section 31(3) of the JAJA, the period of time during which an inmate is granted these special privileges should not count as part of his term of imprisonment but this is subject to the discretion of this court to direct otherwise.

[273] Section 31(3) of the JAJA does serve a useful function as recognised by the Privy Council and could only be considered to have breached the right to liberty, if a "loss of time" order is made indiscriminately and, in a manner detrimental to the applicant. As reflected in the summary set out in **Ray Morgan**, the application of the "loss of time" order has not been the practice of this court in recent times. In unsuccessful appeals, the sentence of imprisonment is usually backdated to the date that it was imposed.

Therefore, this complaint of Mr Williams is of no moment, as at the end of the appeal, failing any determination that his conviction should be quashed, the court would be obliged to exercise its discretion to order that his time spent pending appeal should be treated as part of his sentence (unless the court is of the view that the appeal is totally devoid of merit).

[274] The legitimate aim of the "loss of time" orders was reiterated in **Monnell**. In that case, the court (by a majority decision) found that as a matter of national law, a sentence of imprisonment passed by a Crown court was to be served subject to any order which the Court of Appeal might make as to "loss of time", in the event of an unsuccessful application for leave to appeal; that the power of the Court of Appeal to order "loss of time" was an inherent part of the criminal appeal process following the conviction of an offender; that it pursued the legitimate aim in discouraging the abuse of the court's procedures.

[275] At paragraph 34 of **Duncan and Jokhan**, Lord Sales expressed that the "loss of time" direction given by the Court of Appeal put the appellant in essentially the same position as any other person convicted and sentenced by a court in criminal proceedings, so far as concerns their ability to challenge the decision and have it set aside. Lord Sales stated thus:

> "34. ...The authorities referred to above make it clear that there is no violation of section 4(a) [the right to liberty] which arises from the fact that an appeal has to be brought to correct a legal error committed by the Court of Appeal as to conviction or the imposition of a sentence, where the appellant spends time in prison between the decision under challenge and the decision of the Board setting that decision aside. As explained in the authorities, **the ability to appeal is the manner in which the legal system as a whole affords protection to the right to liberty and security of the person by due process** in that type of situation so far as concerns the need to ensure that the order of the court is quashed and deprived of legal force."

Even though this was expressed by Lord Sales in relation to the process of review between the appellate court and the Privy Council, the same reasoning would apply to the process of review between the trial court and the appellate court. The application of section 31(3) of the JAJA is considered within the context of the applicant's right to review, which, as Lord Sales expressed, is the means by which the right to liberty is protected.

[276] The applicant has been convicted of a criminal offence for which he has been sentenced by an order of the court. Also, he has set in motion the appeal process (which is his constitutional right) that has triggered the application of section 31(3) of the JAJA. When one considers all these factors, bearing in mind the provisions of section 14(1)(b) of the Charter, it cannot be concluded that the applicant has been deprived of his liberty unlawfully.

The right to due process (as it relates to section 31(3) of the JAJA)

[277] Brooks P in **Evon Jack v R** considered the absence of records relevant to an appeal and reviewed several authorities, which included **R v Cecil Stewart, Sylvester Stewart v R** and **Delevan Smith**. What is clear from a review of these authorities is that each case will be decided on its own facts as to whether the absence of a record of proceedings equates to unfairness in the hearing of the appeal. This consideration is independent of any application of section 31 (3), which, as discussed above, has a legitimate aim. Unless the applicant's appeal is devoid of merit, he will not be subjected to a "loss of time" order. If the absence of a record of proceedings creates unfairness in the hearing of the appeal, then an appropriate remedy will be granted that is to the benefit of the applicant. In **Evon Jack v R**, for example, this court quashed the conviction, as the transcript of the evidence was never produced at the hearing of the appeal, and it was determined that there could be no proper review of certain aspects of the appeal. In the case at bar, we have already concluded that the portion of the record of proceedings in chambers that was unavailable did not prejudice the applicant during the hearing of the appeal, neither did the delay in the review process itself, as

the appeal was fully considered. Accordingly, we cannot conclude that any breach of the applicant's right to due process (that is, the right to review) has been exacerbated by any potential application of section 31(3) of the JAJA.

The right to protection against inhumane treatment

[278] Finally, Mr Williams is contending that the effect of section 31(3) of the JAJA, coupled with the delay in the hearing of the appeal, can be said to have resulted in a breach of the applicant's right to be protected against cruel and inhumane treatment.

[279] Section 16(5) of the Charter provides:

> "16(5) Any person deprived of his liberty shall be treated humanely and with respect for the inherent dignity of the person."

[280] In support of his contention, Mr Williams has relied on a number of authorities, including the Privy Council decision in **Pratt**, and **Higgs and another v Minister of National Security and others**, to ground his assessment of what may be considered to be cruel and inhumane treatment. These two cases dealt with the application of the death penalty. In **Pratt**, it was held that the carrying out of the death penalty after 14 years would constitute inhumane treatment. It was also stated, that if an execution is to take place more than five years after sentence, there would be strong grounds for believing that the delay is such to constitute inhumane or degrading punishment. **Pratt** has to be considered in its own context, as the JCPC made no pronouncements on how the appellate court is to consider prison conditions in general. In fact, the JCPC commuted the sentences of the applicants to life imprisonment. In the case at bar, the applicant had a limited term of imprisonment (and not a sentence of death) which would have had to be served, if his conviction were not quashed.

[281] In **Higgs**, there were other general considerations, which may be considered relevant to the case at hand. In dealing with whether the treatment of a prisoner awaiting execution could be considered to be inhumane treatment, the JCPC, by a majority decision, stated that the matter had to be looked at in the round, taking into

account all matters that made the totality of the appellant's punishment something more than the "straightforward death penalty". It was noted also that there had to be a nexus between the matters complained of and the sentence of death; that the establishment of the necessary link was more difficult when the conditions in prison were a generalised consequence of overcrowding, and lack of resources and the cruelties inflicted upon condemned prisoners were also inflicted upon other prisoners. The court found that the pretrial delay had no connection with the fact that the sentence of death was eventually imposed; pretrial delay could seldom be regarded as an additional form of punishment; and critically, it was held that it was difficult to regard detention in substantially the same general conditions as other prisoners as affecting the constitutionality of execution.

[282] The reasoning is apropos. The applicant is not under the threat of a penalty of death, but he has been sentenced to a period of incarceration under conditions that are general to all prisoners, whether those experiencing special treatment pending appeal or those of the general prison population.

[283] In his affidavit (filed on 30 April 2021), the applicant sets out his complaints at paragraphs 14 to 16. The first complaint was that he was advised by the prison authorities to abandon his appeal because of the length of time he had been in custody. Secondly, he was anxious and distressed that he had served his sentence, and his appeal was not yet heard. Thirdly, he did not receive the special treatment by virtue of being an appellant, pursuant to the Correction Rules. It certainly would not be sufficient for a complaint to be made concerning the applicant's treatment to determine that this right has been breached. He would also have to establish a nexus between the application of section 31(3) of the JAJA, and his treatment in prison, that could be said to amount to cruel and inhumane treatment. This would have to be established by factual assertions in the form of admissible evidence, allowing for a response from the relevant authorities to those assertions. This exercise is not ordinarily appropriate in the appeal process. It is well-settled that the Supreme Court has the constitutional mandate

to address such grievances by virtue of section 19 (1) of the Constitution (see **Paul Chen-Young and others v Eagle Merchant Bank Jamaica Limited and others**; **Dawn Satterswaite v The Assets Recovery Agency** and **Ray Morgan** at paragraph [32]).

[284] While we give due regard to the persuasive authority of the CCJ in **Solomon Marin Jr**, it does not assist Mr Williams in his submissions. Jamadar JCCJ's conclusion that the Court of Appeal of Belize could determine constitutional questions arising in proceedings before it, is based on an interpretation of section 20(3) of the Belizean Constitution. While sections 20(1) and (2) of that Constitution is fairly similar to our sections 19(1) and (3), we have no equivalent provision to section 20(3), which provides:

> "If in any proceedings in any court (other than the Court of Appeal or the Supreme Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 19 inclusive of this Constitution, the person presiding in that court may, and shall, if any party to the proceedings so requests, refer the question to the Supreme Court unless, in his opinion, the raising of this question is merely frivolous or vexatious."

[285] In any event, the CCJ only had to consider whether the Court of Appeal could grant any remedies for the post-conviction delay in Mr Marin's appeal. In relation to that issue, there is no debate, as this court has followed the line of authorities that have set out the principles to be considered in applying remedies where there has been post-conviction delay. These included the oft-cited case of **Tapper**, and even two years prior to that judgment, this court's decision in **Alan Cole v R** and more recently **Techla Simpson v R** and **Evon Jack v R**.

[286] Therefore, we will not be making any determination on whether the applicant has been subject to cruel and inhumane treatment.

[287] For all the reasons discussed above, we have concluded that section 31(3) of the JAJA cannot be said to be unconstitutional as regards its potential effect on the applicant. We regard the delay in relation to the hearing of the appeal, to be the real thrust of the breach of the applicant's rights, and any consideration of this breach ought not to be superimposed upon the application of section 31(3) of the JAJA. While it is understood that the breach of the reasonable time requirement could have added to the anxiety of the applicant, a remedy can be granted for that breach. The only remaining issue is the determination of the appropriate remedy.

Remedies

[288] Brooks P, in **Evon Jack v R**, summarized the court's approach as to the issue of remedies for breaches of constitutional rights:

> "**Redress for breaches of constitutional rights**
>
> [44] Redress for breaches of constitutional rights may take a number of forms, ranging from a public acknowledgment of the breach to a quashing of the conviction. Public acknowledgment of the breach, reduction of the sentences and quashing of the convictions are remedies that this court can grant, in appropriate circumstances, without the appellants having to apply to the Supreme Court, pursuant to section 19 of the Constitution. This court has previously granted redress for delays in the hearing of appeals. It reduced the respective sentences in **Tapper v DPP**, in **Techla Simpson v R** [2019] JMCA Crim 37 and **in Alistair McDonald v R** [2020] JMCA Crim 38. In all those cases, however, it was possible to hear the respective appeals.
>
> [45] In **Tapper v DPP**, Lord Carnwath of Notting Hill JSC, made it clear that quashing a conviction would not be a normal remedy for a long, even extreme, case of delay in the hearing of an appeal. In delivering the judgment of the Privy Council, he explained when it would be appropriate to take the extreme step of quashing a conviction for a breach of the constitutional right to have an appeal heard within a reasonable time. Their Lordships, at paragraph 26, approved a statement from the judgment of the House of Lords in **Attorney General's reference (No 2 of 2001)** [2004] 2

AC 72. The relevant portion of **Attorney General's reference**, states:

> '24 If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's [Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 of England] right under Article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established....**If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction.** Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.
>
> 25 The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by *R v Horseferry Road Magistrates' Court, ex parte Bennett* [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. **There may well be cases (of which *Darmalingum v The State* [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of**

> **professional duty is such (*Martin v Tauranga District Court* [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue.** It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.' (Italics as in original, emphasis supplied)
>
> [46] In applying the requirement of fairness, which is highlighted in that extract, it must be said that the deficiencies in this case make it impossible to afford Mr Jack a fair review of his trial. Further, without the full transcript, the court cannot determine whether the evidence against Mr Jack demands that, in the interests of justice, there should be a retrial. The length of time that has elapsed would also militate against ordering a retrial. Accordingly, a retrial was not considered to be appropriate. The appropriate remedy to adequately provide redress to Mr Jack for the breach of his constitutional rights was to have quashed his conviction."

[289] In the case at bar, Mr Williams has asked that the conviction be quashed, but we see no basis for this remedy to be granted. We are of the view that there was cogent evidence leading to the conviction of the applicant and that there has been no substantial miscarriage of justice that would require that the conviction be quashed. Further, the appeal, although delayed, has been heard and considered by this court in its entirety.

[290] The applicant was sentenced to 15 years' imprisonment at hard labour on 21 February 2011. It is noted that early release or remission of sentence is granted pursuant to rule 178 of the Correctional Institution (Adult Correctional Centre) Rules, 1991 ('the Correctional Rules'). Based on the said Correctional Rules, he may have been eligible to an early release date, after two-thirds of his sentence had been served, dependent on the assessment of his good conduct by the Commissioner or appropriate correctional officer ('the correctional services'). By this court's calculation, this early

release date would have been on 21 February 2021, and if he were to serve the full term of imprisonment, his latest release date would be on 21 February 2026. Fortunately, on 16 February 2021, the applicant was granted bail by a single judge of this court, which was one week before the early release date. In that event, he has not been subject to any breach of his right to liberty as a result of the delay in the hearing of the appeal.

[291] We have no correspondence from the correctional services as to his eligibility for early release. However, bearing in mind the egregious nature of the breach of section 16(1) of the Charter, that is of the right to be heard within a reasonable time, an appropriate remedy is required. In our view, the full period of time between the applicant's conviction and the disposition of his appeal should count towards his sentence, and the applicant having spent 10 years imprisoned, which is equivalent to his earliest available date for release date, should not be subjected to any further term of imprisonment.

Conclusion

[292] Therefore, having considered all the above we are of the view that the applicant should be subject to an order for time served.

Order

1. Application for leave to appeal conviction and sentence is refused.

2. The sentence shall be reckoned to have commenced as of 21 February 2011.

3. It is declared that the post-conviction delay is inordinate and constitutes a breach of the applicant’s constitutional right under section 16(1) of the Charter for which he is entitled to a remedy.

4. As the remedy for the breach, the period of imprisonment of 10 years already served by the applicant is to be treated as time served and deemed to be the full service of his sentence. Accordingly, he should be immediately released.