[2022] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NO 94/2017

KEMAR EFFS v R

Miss Nancy Anderson for the applicant

Miss Natalie Malcolm for the Crown

25 October 2021 and 4 February 2022

P WILLIAMS JA

[1] Mr Lawrence Smith (otherwise called 'Bingy') was shot in the neck on 23 March 2013. He succumbed to his injuries sometime between that date and 18 June 2013. Mr Kemar Effs ('the applicant') was arrested and charged with his murder. He was tried before Stamp J ('the learned trial judge') and a jury in the Manchester Circuit Court. After his subsequent conviction, he was sentenced to life imprisonment at hard labour with eligibility for parole after 27 years.

[2] Being aggrieved by that decision, he sought leave to appeal his conviction and sentence. However, after consideration by a single judge of this court, his application was refused. That application was renewed before us and heard on 25 October 2021. At that hearing, we considered eight supplemental grounds of appeal and the submissions advanced in relation thereto. We found no merit on those grounds of appeal, and so we made the following orders:

"1) The application for leave to appeal conviction and sentence is refused.

2) The conviction and sentence are affirmed.

3) The sentence is reckoned as having commenced on 3 November 2017."

[3] The promised reasons for that decision are stated below.

Background facts

[4] At about 8:00 pm on 23 March 2013, Mrs Charmaine Anderson-Smith ('Mrs Anderson-Smith') was behind the counter of her shop located at 36 West Road, Mandeville, in the parish of Manchester. Also present at the shop were her husband, Mr Bing Smith ('Mr Smith'), who was seated outside the shop, and her cousin, Bingy, who was seated on a chair inside the shop "over the other side of the counter" where "people come in to order".

[5] Two men, who Mrs Anderson-Smith did not know before, came inside the shop. She described one of the two men who entered the shop as being slim, tall and dark. She subsequently identified this man as the applicant. The other man she described as short, stout, thicker than the applicant and dark ('the second man'). She was able to see both men as there was sufficient lighting inside and outside of the shop. She was in close proximity to them and had multiple opportunities to see them as nothing was obstructing her view of their faces.

[6] The applicant asked Mrs Anderson-Smith whether she sold "grabba" (tobacco). She sold him some grabba and he gave her $50.00. At that time he was within touching distance from her. She took payment for the grabba and placed the applicant's change on the counter. The second man who had accompanied the applicant to the shop, took the grabba from the applicant and threw it down on the counter. The applicant then asked Mrs Anderson-Smith whether she sold "red rose grabba" to which she responded in the negative. The applicant then retrieved the grabba and left the shop with the second man.

[7] Shortly thereafter, Mr Smith entered the shop with the applicant behind him. The applicant said, "Robbery, nobody move", with a gun in his hand. The applicant then pushed Mr Smith in a corner, hit him in his stomach with his hand and "pop off the chain wah him have on and say 'Gimme dis bwoy'". The other man went over to Bingy and they began having a tussle as he tried to access Bingy's pocket and Bingy said, "No bwoy, you naw go inna mi pocket, you nuh". He threw off the second man's hand and said, "You nah go inna mi pocket eh nuh bwoy". During the tussle, the backs of both men were to the wall near the light switch, the light went out and then it went back on in a "[q]uick second, quick-quick time". Mrs Anderson-Smith stooped down behind the counter, intending to hide but one of the men said, "Weh the gal deh? Weh di gal deh?" She stood up and placed both her hands in the air.

[8] The tussle between Bingy and the second man continued. The applicant then walked over to Bingy. While the applicant was walking towards Bingy, Mrs Anderson-Smith took up a bottle intending to throw it at the applicant, however, the applicant turned to her, pointed the gun at her and said, "Hey gal, you nuh hear say fi put you hand inna the air". She dropped the bottle and once again placed her hands in the air. The applicant then turned to Bingy and said, "Hey bwoy a violate you a violate" and started to hit Bingy with the gun in his face. Mrs Anderson-Smith said to Bingy, "Just cool and mek them tek weh dem want and gwaan". Bingy replied, "You a idiot man, yuh nuh si seh no shot nuh inna di gun". The applicant then held the gun to Bingy's neck and fired a shot. Bingy fell and Mrs Anderson-Smith saw smoke. Both the applicant and the second man ran out of the shop.

[9] The police were summoned and Bingy was taken to the hospital. He was hospitalised for some time at the Kingston Public Hospital.

[10] Detective Corporal Keo Thompson, a forensic crime scene investigator visited the scene 11:00 pm, on the night of the incident, and after making certain observations, proceeded to take photographs, some of which were admitted into evidence.

[11] On 21 May 2013, acting on information, Detective Corporal Dwayne Card, the investigating officer, visited the Mandeville Police Station lock-up where he saw and spoke to the applicant. A visual identification parade was held on 5 June 2013. Mrs Anderson-Smith and her husband, Mr Smith, attended the identification parade. However, only Mrs Anderson-Smith was able to make a positive identification. She denied suggestions that police officers had taken the applicant to her in the CIB office before the parade was conducted and told her that it was he who had been in the shop.

[12] The applicant was thereafter charged with robbery with aggravation, wounding with intent and illegal possession of firearm. However, Bingy subsequently died sometime between 23 May and 18 June 2013. Dr Prasad Kadiyala, consultant forensic pathologist, indicated that his cause of death was "[s]epsis due to paraplegia, due to gunshot wound to the neck". The applicant was therefore charged with murder. When cautioned for that offence he said, "Boy, mi salt eeh man".

[13] The applicant called no witnesses but gave an unsworn statement in his defence. He denied any knowledge of or involvement in Bingy's murder. He indicated that he was invited to the police station for questioning. Upon that visit, he was placed in a cell. He stated that "Detective Chapel Reid" had asked Mrs Anderson-Smith whether she knew him and she said no. Detective Chapel Reid repeated the question to Mrs Anderson-Smith, told her the applicant's name, and identified him as the person who committed the shooting at her yard. He was later taken to a location by the police at "Brooks Park Road", removed from the car and told to run. When he refused to do so, he was returned to the car and, thereafter, to the police station. After being told by Detective Corporal Card that he was pointed out in the identification parade, he responded that he did not know anything.

[14] He was ultimately convicted and sentenced as indicated at para. [1] above.

The application for leave to appeal conviction and sentence

[15] In his application for leave to appeal his conviction and sentence, permission was sought and granted (with no objection from the Crown) to abandon the original grounds of appeal that had been filed and to argue eight supplemental grounds of appeal instead. Those grounds of appeal are as follows:

> "GROUND ONE
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> The trial judge erred in law by failing to give adequate, proper and appropriate directions to the jury in relation to the visual identification evidence of a sole eye witness, pursuant to the principles enunciated in **R v Turnbull** [1977] 2 QB 224 thus denying the Applicant a fair trial.
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> GROUND TWO
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> The Learned Trial Judge erred in failing to direct the jury on the lack of supporting evidence such as (1) no fingerprints, (2) no search for a gun or a chain, (3) no search for a second man and (4) no evidence by the second eyewitness as to a description or the failure to point out anyone at the [identification] parade.
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> GROUND THREE
>
> The Trial Judge erred in failing to direct the jury that the identification parade should not have been held as the description of the applicant was slim and inadequate and bore no resemblance to the applicant and thus there was no explanation as to why the applicant should be in an [identification] parade, resulting in miscarriage of justice.
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> GROUND FOUR
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> The Learned Trial Judge failed to direct the jury on the Applicant's right to have a lawyer or a friend present at the [identification] parade and thus the Applicant was denied his right to a fair trial.
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> GROUND FIVE
>
> The learned trial judge misstated the Applicant's defence at [pages] 270-271 and at page 309 (lines 1-3) by suggesting

that it was two fold [sic] and this was a misdirection operating to the prejudice of the Applicant and denying him a fair trial.

GROUND SIX

The Learned Trial Judge erred in his summation by constantly referring to the Applicant as 'the accused', never referring to him by name therefore failing to treat him equally under the law and failing to direct/demonstrate to the jury that he was presumed innocent until the prosecution had proved guilt beyond a reasonable doubt.

GROUND SEVEN

The delay in the hearing of the trial and this appeal are breaches of the Applicant's Constitutional right to a fair trial within a reasonable time – section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution [of Jamaica].

GROUND [EIGHT]

The Learned Trial Judge erred in sentencing the Applicant by misstating that the offence was murder in the course or furtherance of a robbery, and therefore the sentence is manifestly excessive."

[16] These grounds raised issues for our consideration relating to the adequacy of directions given on certain weaknesses in the identification evidence (grounds one and two) and the identification parade (grounds three and four); whether the applicant was prejudiced by the learned trial judge's reference to his defence being two-fold (ground five) and to him being "the accused" (ground six); whether the sentence imposed was manifestly excessive (ground eight); and whether his sentence should be reduced on account of pre and post-trial delay (ground seven).

Weaknesses in the identification evidence (grounds one and two)

[17] Miss Nancy Anderson, counsel for the applicant, argued that the identification evidence, itself, was "inherently fragile" (see **Alexander v The Queen** (1981) 145 CLR 395). This inherent fragility required directions on any weaknesses in identification to be

clearly and sufficiently identified to the jury. In the instant case, counsel argued that no clear or sufficient warnings had been given to the jury in relation to the fact that:

i) Mrs Anderson-Smith was the sole eye witness with no evidence supporting the correctness of her identification as no fingerprints, gun or the chain stolen from Bingy was presented nor was the location of the second man disclosed;

ii) no positive identification of the applicant could have been made based on the inadequate description of both assailants given to the police by Mrs-Anderson-Smith;

iii) the applicant had claimed that he was pointed out by the police to Mrs Anderson-Smith before the identification parade had been held; and

iv) the applicant had not been pointed out by Mr Smith (Mrs Anderson-Smith's husband) at the identification parade.

Counsel contended that the learned trial judge's failure to give adequate directions on these weaknesses in the identification evidence, rendered the applicant's trial unfair.

[18] Counsel for the Crown, Miss Natalie Malcolm, rejected the submissions made by Miss Anderson on this issue. She indicated that the learned trial judge, in his summation, had placed before the jury, all the weaknesses complained about by counsel for the applicant, and she urged this court to note Miss Anderson's difficulty in indicating to the court what more the learned trial judge could have said to the jury on those particular weaknesses. Miss Malcolm reminded the court of dictum from Brooks JA (as he then was) in **Lescene Edwards v R** [2018] JMCA Crim 4, which indicates that the lack of supporting evidence, without more, does not automatically render a conviction unsafe. Regard ought to be had to a variety of factors (stated in para. [56] of **Lescene Edwards v R**), some of which were highlighted to the jury by the learned trial judge, and others that did not

arise during the applicant's trial. As a consequence, the applicant's trial had not been rendered unfair due to the lack of supporting evidence. Moreover, as the directions given by the learned trial judge had sufficiently complied with the guidelines in **R v Turnbull and Others** [1976] 3 All ER 539, there was no merit in the grounds of appeal related to this issue.

[19] It is well-settled that the directions which ought to be given to juries in identification cases must accord with the principles expounded by Lord Widgery CJ in **Turnbull**. However, there is no fixed formula for restating those principles and it suffices if the directions given to the jury accord with the "sense and spirit" of the **Turnbull** guidelines (see **Mills and Others v R** (1995) 46 WIR 240). In keeping with those principles, this court was tasked with deciding whether the directions given to the jury by the learned trial judge, on the issue of certain weaknesses in the identification evidence identified by counsel for the applicant at para. [17] herein, were indeed sufficient.

[20] On our own perusal of the learned trial judge's summation, it was replete with statements to the jury that the case depended wholly on the credibility of Mrs Anderson-Smith and the correctness of her identification of the applicant. In fact, at the commencement of his summation to the jury, the learned trial judge said:

> "**So the essential issue in this case, and that is the issue that you will focus on during the summation and when you retire, is the question of the correctness of the identification made by Mrs. Anderson-Smith, who testified about the incident**. And also whether or not you can believe her, believe her testimony in what she recounted to you about what happened in the interim or during this robbery." (Emphasis supplied)

[21] The learned trial judge placed before the jury the applicant's contention about Mrs Anderson-Smith's evidence in this way:

> "**Now, the case against the [applicant] depends wholly on the credibility of Mrs. Anderson-Smith and on the correctness of the identification of the**

[applicant] as the shooter, as the gunman, in the robbery.

The [applicant] is saying she is either mistaken or she is lying or both. Now, to avoid the risk of injustice in this case, such as has happened in some cases in the past where persons have been wrongly convicted because of mistaken identification, I must therefore warn you of the special need for caution before convicting the [applicant]when relying on the evidence of identification. You should bear in mind that even if you find that Mrs. Anderson-Smith is an honest witness, as an honest witness is convinced in his or her own mind she may also be a convincing witness, but nevertheless be mistaken.

You should, therefore, examine carefully the circumstances in which the identification was made by Mrs. Anderson-Smith. You have to look carefully at all surrounding factors relevant to the identification. In particular for how long did Mrs. [Anderson-Smith] have the person she says was the accused under observation? At what distance? In what light? Was there any obstruction or anything to interfere with her line of vision or her ability to see his face?

And you have to consider whether there was any difference between the description given to the police and the appearance of the [applicant]. These are the elements of the identification that you would have to analyse with caution before you will be entitled to convict the [applicant] man on the evidence of Mrs. Anderson-Smith." (Emphasis supplied)

[22] After rehearsing all the evidence presented by the Crown, the learned trial judge also explored the issue of identification discretely, having regard to the elements of identification and the inherent weaknesses in the evidence of those elements. He examined the condition of the lighting including the fact that at some point the light in the bar went off; whether Mrs Anderson-Smith saw the applicant's face or whether was she looking at him sideways at particular times; and the opportunities she had to observe the incident. The learned trial judge also thoroughly canvassed the weaknesses surrounding the timing of the incident; the fact that the applicant was not known to Mrs

Anderson-Smith prior to the incident and that her identification of him may have been made while she was in fear and, hence, under difficult circumstances.

[23] On the issue of a lack of supporting evidence, Brooks JA in **Lescene Edwards v R**, at para. [56], stated, in reliance on **R (on the application of Ebrahim) v Feltham Magistrates' Court and Another; Mouat v Director of Public Prosecutions** [2001] 1 All ER 831, that consideration ought to be given to:

> "1. whether the investigating authorities were under any obligation to collect the evidence;
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> 2. if there were no such duty, whether any request was made by the defence for the material, before it became unavailable;
>
> 3. if there was a breach of duty in the collection or preservation of evidence, the court should consider whether there could have been a fair trial, bearing in mind that the trial process does compensate for many of such defects in providing evidence; and
>
> 4. whether the conduct of the prosecution was so egregious that it should not have been allowed to prosecute the accused and a quashing of the conviction is the only appropriate remedy."

[24] After exploring these considerations, we found ourselves agreeing with Miss Malcolm that many of these issues did not arise for consideration and the issues that did arise had been sufficiently canvassed by the learned trial judge. The fact that there was no supporting evidence of Mrs Anderson-Smith's identification of the applicant had been directly emphasized by the learned trial judge multiple times. During the trial, counsel for the applicant had raised questions, in cross-examination, surrounding the absence of fingerprint evidence to Detective Corporal Card and Detective Corporal Thompson. Detective Corporal Card said he could not recall if the scene had been processed for fingerprints and that he could not recall receiving information that the perpetrator had held on to anything at the scene. Detective Corporal Thompson was only asked whether fingerprints could be extracted from money to which he had responded that he did not

know if it could be done. However, no issue was raised regarding the failure of the police to locate Bingy's gold chain, the gun or the second man. Moreover, the learned trial judge may well have been derelict in his duty had he invited the jurors to speculate on the absence of that supporting evidence or the location of the second man.

[25] In specifically addressing the weakness with regard to Mrs Anderson-Smith's description of the applicant, and whether it was sufficient to identify him, the learned trial judge told the jury that they were to analyse, with caution, the description of the applicant given to the police by Mrs Anderson-Smith and the appearance of the applicant (as indicated at para. [21] herein). In summarising Mrs Anderson-Smith's evidence of the applicant's description to the jury, the learned trial had indicated that:

> "She was asked about the description that she gave to the police. She said she gave a description of the [applicant] to the police. She said she didn't tell them how tall he was. She showed them and they gave her a number. She said she told the police that the [applicant] was slim with low cut hair and of dark complexion and that he had some dust in his hair, and she was asked to describe the [applicant] in Court and she said his face was a little brown. He had low cut hair. His face is straight. And she referred to his hair line [sic] and she said he has a long mouth. She said she gave the description to the police based on what the police asked her. She told the police he was ugly but she did not recall if she told them any more by way of description apart from that he was slim, low cut hair, dark complexion and ugly.
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> So she agreed when she was shown her statement that there was no specific description of the face as she had described it when she described him in Court. She was also asked about how she came to know his name and she said that she heard his name first in Court."

[26] The learned trial judge also recounted Detective Corporal Card's evidence that based on the description given to him by both Mrs Anderson-Smith and her husband, it would have been insufficient to identify both assailants, especially the applicant.

[27] While specifically addressing the elements of identification, the learned trial judge had this to say to the jury regarding Mrs Anderson-Smith's description of the applicant:

> "She gave a description of the [applicant]. In cross-examination she said that she described him as slim, with low cut hair and dark complexion. And she told the police how tall he was. It is not said that her description is incorrect; it is said that when she described the [applicant] before she gave more details, when she was asked questions by the lawyers. And she said in explanation she answered all the questions the police asked her; however, the police did not ask the questions when they interviewed her like the lawyer is asking in court. He didn't ask the same questions in the same manner. So you have to have regard to the description, because the description maybe – the description given in this case.
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> It is also said, and it's a matter for your consideration, that her husband failed to identify the [applicant]. And that -- again, that is something that would undermine the correctness of identification."

[28] With regard to the weakness in identification related to the applicant's claim that he had been pointed out to Mrs Anderson-Smith prior to the identification parade, the learned trial judge, for instance, reminded the jury that the Crown's case "rests entirely on the evidence of Mrs. Anderson-Smith and it is evidence in respect to her visual identification of the [applicant]". He then said:

> "… **It is also said and put to [Mrs Anderson-Smith] that she was shown the [applicant] before the identification. So the issue of her credibility is also raised. So when you approach her evidence and you analyze it, you have to first decide on credibility. If you believe her and what you believe about what she said.**
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> If you don't believe her or if you have any reasonable doubt as to what she is saying happened, if you don't believe her when she said that she was not shown the [applicant] by the police officer and know that this was the man, then you should acquit. However, if you believe her, you must go on to analyse whether or not her identification is correct or if it was mistaken." (Emphasis added)

[29] He further stated that

> "[Mrs. Anderson-Smith's] evidence in brief is of the circumstances in which she says she made the identification. She saw the [applicant]. She said she saw him on more than one occasion and she observed him at certain distances… [W]hat is being said is two fold [sic]. A, either she is mistaken when she went and made the identification at the parade, or B, she was shown the accused man by the police and therefore she did not make an independent identification of him, because she was shown the accused man.
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> You have to compare the two aspect [sic] of the Defenses [sic] and assess it to see what you make of it, because one says she says she is mistaken at the parade when she makes the identification and the other says she is being dishonest. The policeman took the man to her and showed her to the man. Two lines of Defence that in the course of your examination of this case you have to consider."

[30] The fact that Mr Smith had failed to positively identify the applicant had also been placed squarely before the jury for their consideration. The learned trial judge stated that:

> "It is also said, and it is a matter for your consideration, that her husband failed to identify the [applicant]. And that -- again, that is something that would determine the correctness of the identification.
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> I told you earlier that you have to be careful about speculation, her husband was not called here to testify. We do not know or there is no evidence as to what happened with the husband outside. There is no evidence as to what the husband saw. There is no evidence … in respect to the opportunity to see and identify the [applicant]. We do not know.
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> What we do know is that he went to the identification parade and he did not point out the [applicant]. So, without further comment, that is a matter which you may consider. But you bear in mind, and it's a comment I make, that you have no evidence before you as to why the husband was unable to make that identification."

[31] In all these circumstances, we also noted that Miss Anderson struggled to indicate additional statements that could have been made by the learned trial judge, to the jury, to render, as adequate, his directions to them on those particular weaknesses in the identification evidence. It is evident, on the learned trial judge's summation, that a thorough analysis was done of the identification evidence and its weaknesses. His directions on these issues had explicitly complied with the sense and spirit of the **Turnbull** guidelines and so no merit was found in grounds one and two.

The identification parade (grounds three and four)

[32] In challenging the propriety of the identification parade, Miss Anderson argued that given the insufficiency of the description of the assailants that had been given to the police, the learned trial judge ought to have directed the jury that an identification parade ought not to have been held. She also submitted that no directions were given to the jury relating to the applicant's right to have an attorney present at the identification parade. These failures, she said, resulted in a miscarriage of justice and warranted a quashing of the applicant's conviction.

[33] Miss Malcolm relied on the written submissions that had been filed on the Crown's behalf, expressing surprise with respect to this ground of appeal, as the usual complaint made on this issue, tends to relate to the failure to hold an identification parade and not the fact that one was held. In any event, she contended in oral arguments that no miscarriage of justice was occasioned by holding an identification parade, as an identification parade merely provides a means of testing the witness's recollection of the assailant. Additionally, there was no harm in failing to direct the jury that the applicant had a right to have an attorney present, as the learned trial judge had directed the jury on the numerous attempts made by Inspector Valdin Amos to obtain counsel for the applicant, which proved futile. Consequently, Miss Malcolm stated that there was no merit in grounds three and four.

[34] Lord Hoffmann, on behalf of the Judicial Committee of the Privy Council in **Irvin Goldson and Devon McGlashan v R** [2000] UKPC 9, at para. 14, stated that:

> "The normal function of an identification parade is to test the accuracy of the witness's recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification…"

[35] In accepting the *ratio decidendi* of Lord Hoffmann in **Goldson and McGlashan v R**, Lord Brown, speaking for the Board, in the later case of **John v The State** [2009] UKPC 12, indicated at para. 14 that:

> "As a basic rule, an identification parade should be held whenever it would serve a useful purpose. This principle was initially stated by Hobhouse LJ in *R v Popat* [1998] 2 Cr App R208, 215 and endorsed by Lord Hoffmann giving the judgment of the Board in *Goldson & McGlashan v R* (2000) 56 WIR 444. Plainly an identification parade serves a useful purpose whenever the police have a suspect in custody and a witness who, with no previous knowledge of the suspect, saw him commit the crime (or saw him in circumstances relevant to the likelihood of his having done so, for example en route to a robbery). Often, indeed usually, that is the position and, when it is, an identification parade is not merely useful but, assuming it is practicable to hold one, well-nigh imperative before the witness could properly give identifying evidence. In such a case, Lord Hoffmann said in *Goldson*, 'a dock identification is unsatisfactory and ought not to be allowed,' although he added: '**Unless the witness had provided the police with a complete identification by name or description, so as to enable the police to take the accused into custody, the previous identification should take the form of an identification parade.**'" (Emphasis supplied)

[36] Mrs Anderson-Smith's description of both assailants was indeed overly general. However, with regard to the applicant, she added that he had a "long mouth" and was "ugly". She also did not know her assailants before and so could not thoroughly identify them by name or description. Detective Corporal Card, himself, accepted in his cross-examination, that Mrs Anderson-Smith's description of both men would not have enabled him to search for any specific person. As a consequence, in the instant case, given the

principles extrapolated from **Goldson and McGlashan v R** and **John v The State**, it is evident, contrary to the applicant's contention, that an identification parade was not only useful but most appropriate in the circumstances.

[37] At multiple times during his summation, the learned trial judge impressed upon the jury the principle that an identification parade was merely a test to assess the correctness of Mrs Anderson-Smith's identification of the applicant and that there was a chance that she could have been mistaken. While there was no account from the police as to how the applicant came to be in custody relating to the offence, he was subsequently identified by Mrs Anderson-Smith at the identification parade and she testified as to the multiple opportunities, length of time and distance she had observed the applicant during the incident. The jury clearly believed that she was not mistaken in her identification of the applicant, and they rejected his denial of knowledge of the incident.

[38] It is accepted that an accused is entitled to have his legal representative present during an identification parade. This representative could be his own counsel or duty counsel. In the instant case, Inspector Amos testified that the applicant had indicated to him that he had no counsel and was not intending to obtain one to represent him during the identification parade. Inspector Amos also testified that he made several attempts via telephone and visits to courthouses to secure counsel to assist the applicant, to no avail. In his summation, the learned trial judge directed the jury with regard to Inspector Amos's attempts to obtain counsel for the applicant to safeguard his interests. He also reminded the jury that when those attempts failed, the services of two Justices of Peace were utilised. In our view, the learned trial judge was correct to squarely place before the jury that the conduct and fairness of the identification parade had not been challenged, instead, the credibility of the parade itself was placed in issue on account of the applicant's assertion that he had been exposed to Mrs Anderson-Smith, by a police officer, prior to the parade. As indicated above, the issue regarding the applicant's alleged prior exposure to Mrs Anderson-Smith was adequately dealt with by the learned trial judge. As a consequence, we could find no merit in grounds of appeal three and four.

Prejudice to the applicant on account of the learned trial judge misstating his defence (ground five)

[39] The learned trial judge, in an aspect of his summation as set out at para. [29] herein, indicated that the applicant's defence was two-fold, in that, Mrs Anderson-Smith was either mistaken when she pointed him out at the identification parade or he had been exposed to her, by a police officer, prior to the identification parade and so she was dishonest in her purported identification. Miss Anderson contended that this was a complete misstatement of the applicant's defence which invited confusion on his case and led to prejudice. However, we found ourselves in full agreement with submissions made on the Crown's behalf that, on account of the suggestions made to witnesses in the trial and the applicant's unsworn statement, there had been no misstatement of his defence.

[40] The tenor of the cross-examination undertaken by counsel for the applicant, during the trial, was indeed two-fold. On the one hand, Mrs Anderson-Smith was challenged that she was mistaken when she claimed to have identified the applicant having regard to the distance, the lighting and the fact that, at some point, the light went off; her identification being made in difficult circumstances as she was fearful; the correctness of the length of observation of the applicant; and the inadequate description of the assailant given to the police. On the other hand, there was a claim that her testimony was clothed in dishonesty and hence incredible, as she had seen the applicant and had been told his name by a police officer prior to the identification parade.

[41] In his unsworn statement, the applicant himself raised two defences: (i) he knew nothing about the incident; and (ii) he was identified prior to the identification parade as Detective Corporal Card and a Detective Chapel Reid took his photograph prior to the identification parade and then Detective Chapel Reid had also identified him to Mrs Anderson-Smith, as the assailant, prior to the identification parade.

[42] We found that the learned trial judge adequately and sufficiently identified and stated the applicant's defence and gave proper directions to the jury on how to consider

it. Accordingly, we found that the applicant had not been prejudiced by the manner in which the learned trial judge referred to what this defence actually was. Indeed, in those circumstances, had the learned trial judge failed to adequately place the applicant's full defence before the jury, he may have been remiss in his duty to ensure that the applicant received a fair trial which may have resulted in a miscarriage of justice. In all these circumstances, we found that there was no prejudice to the applicant's defence by the learned trial judge's referring to it as being two-fold. Therefore, ground five failed.

Prejudice to the applicant on account of referring him as "the accused" (ground six)

[43] A complaint was made about the frequency of the learned trial judge's reference to the applicant as "the accused". This, Miss Anderson submitted, was "extremely prejudicial" as it indicated to the jury that the learned trial judge had an unfavourable view of the applicant and had been discredited.

[44] We found favour with the submissions of the Crown that where the learned trial judge had referred to the applicant as "the accused", "the Defendant" and even "Mr Effs", interchangeably, "without any comment or opinion as to [the applicant's] (then) probable guilt or even for that matter his innocence". Moreover, there was also no authority referred to or cited by Miss Anderson that could justify her proposition in law.

[45] We also agreed with the observation that the reference to the term "the accused" had not been disaggregated from the context in which it had been used. For example, when the learned trial judge referred to the elements of murder and the system employed in an identification parade the term was not used in relation to the applicant in particular. We were referred to a decision from this court **R v Bryan Davis** (1997) 34 JLR 222 where the appellant's alias was "Killer" and the fact that it was used extensively during the evidence from the Crown and by the trial judge was found to be prejudicial and denied the appellant a fair trial. It was submitted that, in the instant case, the usage of the term "the accused" was not pejorative or prejudicial when compared to the use of the word "killer" in **R v Bryan Davis**.

[46] Additionally, as was correctly pointed out in the Crown's written submissions, the learned trial judge had reminded the jurors: to return a true verdict according to the evidence; as to the characteristics of a juror and the fact they were the supreme judge of the facts; that they were not bound by his comments or those of counsel; to relieve themselves of any bias or prejudice; and that the applicant was innocent until proven guilty.

[47] We were further referred to **Ibrahim v R** [1914] AC 599, where the Privy Council, in addressing the circumstances where leave to appeal to it would be given, indicated at page 615 that:

> "… There must be something which, in the particular case, deprives the accused of the substance of fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future: *Reg. v. Bertrand* [(1867) L. R. 1 P. C. 520]…"

[48] There can be no denial that the applicant was before the court in the status of a person accused of committing an offence. He was, therefore, an accused, properly so-called. There was no basis on which it could be said that the use of the term "the accused" had deprived the applicant of the substance of a fair trial and the protection of law "which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in future". Consequently, we found no merit in ground six. It too failed.

Sentence (ground eight)

[49] Miss Anderson contended that the learned trial judge erred in his consideration of the applicant's sentence as he misstated the offence with which he was charged as being murder in the course of a robbery. This resulted in him imposing a sentence that was manifestly excessive when a sentence of a term of years, instead of life imprisonment, would have been more appropriate.

[50] Miss Malcolm indicated that although the learned trial judge did not outline the mathematical calculation, he utilised in arriving at his sentence, he nonetheless had regard to all the relevant factors including the aggravating and mitigating ones, and the period of pre-trial remand of four years and six months. Moreover, Miss Malcolm submitted that the sentence imposed was rather lenient having regard to the full circumstances in the instant case. The sentence, she said, was not manifestly excessive and ought not to be disturbed.

[51] Indeed, there was no reference to the range of sentence to be employed in the circumstances of this case and no starting point within that range. Consequently, there had been no demonstration of how the learned trial judge had arrived at the sentence he had imposed. This court must now determine the appropriate sentence that ought to have been imposed.

[52] Section 3(1C)(b)(i) of the Offences against the Person Act states that murder in these circumstances attracts a sentence of life imprisonment with eligibility for parole not being less than 15 years. Our own review of sentences for murder, in these circumstances, indicates that the normal sentence is life imprisonment with the normal range for eligibility for parole being 20 to 40 years.

[53] It is apparent that the learned trial judge had not misstated the applicant's offence when he merely indicated that the instant case was factually, a murder that had been committed during the course of a robbery and noted that the prosecution could have taken a different position in which the applicant would have been in a "much more serious position". This was clearly a reference to the fact that the option of charging the applicant with a more serious offence (capital murder, pursuant to section 2(1A)(c) of the Offences Against the Person Act) was open to the prosecution. This was a comment about the seriousness of the offence that he, the learned trial judge, was entitled to make as the fact that this was a murder during the course of a robbery was indeed a significant aggravating feature to which the learned trial judge could have had regard. This would justify a starting point of 25 years.

[54] The learned trial judge noted that the applicant utilised a firearm; Bingy's relative indicated that he had suffered immensely at the hospital before he died, as he was "crippled", his body rotted and he "died like a dog"; the applicant's intention to rob Mrs Anderson-Smith of what she "had worked so hard for"; the whipping of Bingy with the gun before shooting him; and the applicant's lack of remorse. The learned trial judge could have also mentioned that the incident occurred at night; the applicant did not act alone; he had pointed the gun at Mr Smith and hit him in his stomach before removing his gold chain; and the fact that he had also pointed the firearm at Mrs Anderson-Smith. He was, however, correct that the patrons of that shop were indeed terrorized during the incident. These aggravating features have all operated to significantly increase the applicant's sentence.

[55] The mitigating features considered by the learned trial judge included the fact that some good had been said about the applicant by the community, as recorded in a social enquiry report and his attorney; that he was a young man at the time of the commission of the offence; and had no previous convictions.

[56] When the aggravating and mitigating features were balanced, the aggravating ones far outweighed the mitigating ones. This would have resulted in the applicant's period of eligibility for parole being anywhere between 35-38 years.

[57] The learned trial judge also took into account the four years and six months spent by the applicant on pre-trial remand. When the pre-trial remand period is taken into account, a sentence in the region of 30-34 years would have been proportionate and commensurate with the crime.

[58] In all these circumstances, although the learned trial judge did not expressly indicate the methodology in sentencing he had employed, the sentence imposed was well within the normal range of sentences imposed for murder. Moreover, in the light of the extreme and substantial aggravating features (including those not considered by the learned trial judge) and the minimal mitigating ones, and having determined that the

most appropriate period for eligibility for parole would have been in the region of 30-34 years, the parole eligibility period of 27 years that had been imposed might well have been unduly lenient. Therefore, it could not reasonably be said that the sentence imposed was manifestly excessive. Ground eight was found to be without merit and also failed.

Delay (ground seven)

[59] Section 16(1) of the Charter of Fundamental Rights and Freedoms ('the Charter') in the Constitution of Jamaica states that "[w]henever 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". Miss Anderson contended that this constitutional right of the applicant had been breached on account of a pre-trial delay of four years and seven months and a delay in the hearing of the appeal for three years and eleven months. She relied on **Melanie Tapper and Another v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Court Criminal Appeal No 28/2007, judgment delivered 27 February 2009, where Smith JA indicated at page 75 that "delay without more constitutes a breach of the appellants' right to a fair hearing within a reasonable time". She indicated that she would not spend much time on this ground since she was aware of but not necessarily in agreement with the observations of this court in **Julian Brown v R** [2020] JMCA Crim 42. She also said that she realised from information provided by the Crown that there had been a previous trial which had been aborted and that the applicant had terminated the retainer of counsel then appearing for him during that trial. Counsel accepted that the applicant's conviction could not be quashed on account of the delay, itself, but indicated that the appropriate remedy for the delay in the hearing of the appeal ought to be a reduction of the applicant's sentence.

[60] Miss Malcolm accepted that there was *prima facie* a breach of the applicant's right to a fair trial within a reasonable time on account of the delay. However, she cautioned that it could not be said that the consequences of that delay had a deleterious and prejudicial effect on the conduct of the trial that would have amounted to a violation of

the applicant's constitutional right pursuant to section 16 of the Charter. Crown Counsel noted that although there was some delay occasioned when the trial had to be aborted owing to prejudicial evidence that had been adduced, there has been no demonstration, by the applicant, that his constitutional right to a fair trial within a reasonable time has been infringed as is required in the post Charter era and indicated in **Julian Brown v R.** As there was no basis upon which this court could analyse the applicant's claim and provide a remedy for this alleged breach, ground seven, she said, must fail.

[61] In the instant case, as was agreed by counsel, there was indeed a pre-trial delay of four years and seven months and a delay in the hearing of the appeal of three years and eleven months. This court in **Melanie Tapper v R** and the Privy Council in **Boolell v The State** [2006] UKPC 46, accepted that there is a breach of one's constitutional right where a criminal case is not heard within a reasonable time regardless of whether the defendant is prejudiced by the delay. However, in various decisions from the Privy Council and this court, there is an appreciation that there should at least be some explanation for the delay to assist in assessing the effect of this breach.

[62] In **Alfred Flowers v R** [2000] UKPC 41, the Board indicated that consideration ought to be given to "the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant". The Board also said that when considering the issue of prejudice, regard should be had to whether there was oppressive pre-trial incarceration; the anxiety and concern of the accused; and the extent to which delay had impaired his defence. The Board, in **Rummun v State of Mauritius** [2013] UKPC 6, said that regard should also be had to "i) the complexity of the case; (ii) the conduct of the Appellant; and (iii) the conduct of the administrative and judicial authorities". In **Celine v State of Mauritius** [2012] UKPC 32, the Board stated that if an appellant seeks to challenge his sentence on account of the delay, his attitude towards that delay must be closely examined. **Taito v R; Bennett and Others v R** [2002] UKPC 15 indicates the Board's view that delay for which the State is not responsible, cannot be prayed in aid by an appellant.

[63] Morrison P in **Lincoln Hall v R** [2018] JMCA Crim 17, Brooks JA (as he then was) in **Techla Simpson v R** [2019] JMCA Crim 37 and Phillips JA in **Ann-Marie Williams v R** [2020] JMCA Crim 40, have all accepted that there is a requirement for some reasons to be proffered when complaints about delay are being made and there must be some indication about the applicant's attitude towards the delay.

[64] In the instant case, although there was knowledge that a prior trial was aborted due to prejudicial information being adduced, there was no other information from the applicant regarding his assertion of this right during his trial and no indication of his attitude towards delay. It was apparent from the records that the applicant had himself contributed to the delay having fired his counsel and taken some time to get new representation. There was ultimately no information tending to show any prejudice to the applicant's defence having regard to any oppressive pre-trial incarceration, his anxiety and concern, and the extent to which delay had impaired his defence. We were, therefore, unable to say, conclusively, that there was a deleterious or prejudicial effect on the outcome of the applicant's trial, which would have violated his constitutional right to a fair trial within a reasonable time.

[65] It should also be noted that since the decision in **Melanie Tapper v R**, Jamaica's Constitution was amended (on 8 April 2011). Section 13(2) of the Charter now places a burden on the State to show that a breach of a constitutional right was demonstrably justified in a free and democratic society. This court explored the implication of that constitutional amendment on the right to a fair trial within a reasonable time in **Ann-Marie Williams v R** and **Julian Brown v R**.

[66] In **Ann-Marie Williams v R**, at para. [126], Phillips JA said this on the court's behalf:

> "This court in **Jamaica Bar Association v The Attorney General and Another** [2020] JMCA Civ 37 has adopted the two-stage approach in determining constitutionality which is as stated in **R v Oakes** [1986] 1 SCR 103, from the Supreme Court of Canada. That approach is

> premised on the basis that: (i) the party asserting the breach should prove the abrogation, abridgment or infringement of the right under the Charter, and (ii) the state has the burden to justify the constitutionality of that breach (see section 13(2)). In the light of the Charter, therefore, it is now clear that a delay without more cannot sufficiently ground a breach of a constitutional right to a fair hearing within a reasonable time. There must be proof of an abrogation, abridgment or infringement of the right, and the State must be given an opportunity to prove that the limitation of the right is demonstrably justifiable and the extent to which that limitation is demonstrably justifiable."

[67] In **Julian Brown v R**, the implication was explained in this way by McDonald-Bishop JA, writing on behalf of the court:

> "[91] Therefore, within the context of the Charter, the onus was on the applicant to not only assert but to establish in the court below a *prima facie* infringement of his constitutional right at the instance of the State. Once it was established that the State was responsible for the delay, which was such as to infringe his right to a trial within a reasonable time, then an evidential burden, as well as the legal burden, would have shifted to the State to demonstrably justify the breach, in accordance with section 13(2) of the Charter. It would then be upon the failure of the State to justify the breach that the issue of constitutional redress in the form of a reduction in sentence (or otherwise) would have properly arisen for consideration. This is so because if the breach were justified, then the delay, even if lengthy, would not be unconstitutional and the applicant would have been entitled to no relief under the Constitution.
>
> [92] In our view, the pre-Charter authorities must now be carefully read in the light of the Charter. Therefore, the dictum of Smith JA in **Melanie Tapper v R**, which was relied on by the applicant, that delay, without more, constitutes a breach of section 20(1) of the Constitution (now section 16(1)) had to be re-evaluated within the context of the letter, sense and spirit of the Charter. As a result, that case provided no material support for the applicant's arguments that his sentence ought to have been reduced by this court because of a breach of his constitutional right to a fair trial within a reasonable time.

> [93] The foregoing analysis led this court to the conclusion that the length of the delay in the circumstances of the case, albeit regrettable, did not automatically mean a breach of the applicant's constitutional right under section 16(1) of the Charter, as contended by him. The court could not properly arrive at a finding that there was a breach because the reason for the delay was never disclosed to the court. Furthermore, the delay may have been justifiable in a free and democratic society. However, the Crown was not given the fair opportunity to prepare its case to respond to the constitutional challenge that was belatedly raised on the appeal by way of submissions. For, as their Lordships pointed out in **Flowers v The Queen**, at paragraph 57, by reference to the dictum of Powell J in **Barker v Wingo** [(1972) 407 US 514], at page 522:
>
> > 'Thus, as we recognized in **Beavers v Hubert** [(1905) 198 US 77] **any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:**
> >
> > '**The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances**. It secures rights to a defendant. **It does not preclude the rights of public justice**'.' (Emphasis added)
>
> [94] This court was not placed in a proper position to conduct any 'functional analysis' of the applicant's right to a speedy trial 'in the particular context of the case', bearing in mind that his rights did not preclude the rights of public justice." (Emphasis supplied as in original)

[68] As a consequence, in the post Charter era, in the absence of *prima facie* evidence of infringement of one's constitutional right at the instance of the State, the State would be unable to discharge its burden of proving whether this breach was demonstrably justifiable. In the instant case, there being no evidence to that effect, this court was unable to make that determination.

[69] In any event, a breach of this constitutional right does not automatically attract a quashing of the conviction (see **Boolell v The State**). Other remedies for that breach may also appear in the form of a public acknowledgement; payment of compensation to the defendant; or a reduction in the sentence imposed (see **Attorney General's Reference (No 2 of 2001)** [2003] UKHL 68). Counsel, Miss Anderson, had asked for a reduction in sentence not only because of the pre-trial delay but also due to the delay in the hearing of the appeal. We must acknowledge that a delay of over three years is to be regretted. However, as we have found the sentence imposed was particularly lenient and not manifestly excessive, we also found that a reduction in the applicant's sentence was not warranted. Ground seven inevitably failed.

Conclusion

[70] It was for all these reasons that we found no merit in the eight supplemental grounds of appeal that had been filed and made the orders stated at para. [2] herein.