JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NO 49/2018

OSHANE GORDON v R

Patrick Peterkin for the appellant

Miss Claudette Thompson, Mrs Nikeisha Young Shand and Kemar Setal for the Crown

28 September 2023 and 17 October 2025

Criminal law – Murder – Identification – Dock identification – Recognition – Identification parade – Caution in addition to Turnbull warning to be given when witness fails to identify suspect at identification parade – Whether the trial was unfair – Sentence – Was the sentence imposed manifestly excessive - Applicable principles – Aggravating and mitigating factors

BROWN JA

[1] The appellant was convicted for murder, on 13 April 2018, before D Fraser J, as he then was, ('the learned judge'), sitting with a jury, in the Circuit Court for the parish of Clarendon. On 22 May 2018, the learned judge sentenced the appellant to imprisonment for life and stipulated that he serve 28 years before becoming eligible for parole. A single judge of this court reviewed the transcript of his trial and refused him leave to appeal against his conviction. However, the single judge granted the appellant leave to appeal against his sentence. The appellant has renewed his application for leave to appeal against his conviction. Although the appellant was not granted leave to appeal his conviction, he will be referred to as 'the appellant' throughout this judgment.

Background

Case for the prosecution

[2] The charges against the appellant arose out of an incident which occurred on Heavens Crescent, Effortville in the parish of Clarendon on 6 August 2015, at about 9:00 pm. Among the dwelling houses located on Heavens Crescent was one occupied by Mr Kemar James ('Mr James'), the deceased, together with Miss Sennetah Israel ('Miss Israel'), the mother of his three children. Miss Israel also had two other children, including a son, Otaney Dixon ('Master Otaney'), who lived at the house. They had been living in Effortville for approximately two years at the time.

[3] About 19 feet from the house, but on the same premises, was a wooden and zinc structure that was variously described as a shop and stall. However, from the crime scene photographs, it was more precisely a stall, with a door to the back that faced the house and an opening at the front, fitted with a trapdoor. This foramen at the front facilitated the sale of items from the stall. Consistent with the photographs used at the trial, this structure will be referred to as a stall. This stall was accessed through the door at the back which opened into the yard. The front of the stall faced the road. Mr James sold various items at the stall. There was electric light in the stall and across the road from the stall, about 11 feet away, was a utility pole to which was attached a street light. There was also another street light some distance away, but in proximity to the stall.

[4] And so it was that, on the night of this incident, Mr James was selling in his stall. While Mr James was so engaged, Miss Israel was seated in the settee in the hall (living room). The settee was located next to an open door which led to the verandah. Miss Israel got up, stepped onto the verandah, intending to go to Mr James for a drink she had asked him to mix, when she saw him being shot. Seeing that, Miss Israel stepped back inside the hall and closed the door after the first shot was fired. She took up a position at a glass window, without curtains and with missing panes.

[5] From this vantage point, Miss Israel observed Mr James standing in the stall. Standing in front of Mr James, a mere 2 ½ to 3 feet away, was the appellant. She described the appellant's complexion as "bleach-out, well brown" and said that he was sporting loose hair that appeared to have been unplaited corn row. The appellant had a small, black handgun in his hand from which he fired several shots.

[6] During the shooting, Miss Israel could see only the appellant's face to his chest. At the end of the shooting the appellant "shuffle[d]" to the gate, that is, to the side of the stall and looked in the direction of their house, still with gun in hand. The appellant was now under the street light. This allowed Miss Israel a complete frontal view of the appellant, as she put it, "from his head to his toe". Miss Israel estimated that from the time she stepped onto the verandah to when the appellant shuffled, she had seen his face for about six seconds. The appellant looked towards the house for between three and four seconds, then ran off.

[7] Master Otaney, 10 years of age at the time of the incident (12 years of age at the trial), supported his mother's version. At the time of the shooting, he climbed onto a whatnot and made his observation through a broken glass window from the same approximate distance of 19 feet from the stall. He saw the appellant, whom he knew as Chuckie, with a black gun in his hand. From this position, Master Otaney got a full-frontal view of the appellant (face, hands, chest and feet). He heard a loud noise and saw smoke coming from the stall, which he apparently associated with the use of the firearm. As he said, "I saw 'Chuckie' with a gun shooting … in the [stall] on Kemar".

[8] Master Otaney confirmed his mother's evidence that after the shooting the appellant shuffled over to the gate, with the gun in his hand, specifically, his right hand. The appellant remained here for about 15 seconds, according to Master Otaney. During those 15 seconds Master Otaney saw the appellant's face. In Master Otaney's account, the appellant placed the firearm under his shirt before running away from the scene (into Mario's yard). In Master Otaney's estimation, he saw the appellant's face for about one minute during the shooting.

[9] Aside from knowing the appellant as Chuckie, Master Otaney had seen the appellant several times before the night of the incident. A friend, Fabian Thomas, showed the appellant to Master Otaney at a football match, which was being played at night but was aided by electric light; he saw the appellant at a bar that was located at the appellant's home, during daylight hours; and while Master Otaney was on his way to school in a taxi and the appellant was walking along the roadway, also during daylight. On all these occasions Master Otaney saw the appellant's face, for varying lengths of time between six seconds and two minutes.

[10] Of all these encounters, the football match stood out for Master Otaney. He and his friend, Fabian Thomas, were playing hide and seek when the appellant (known to Master Otaney as Fabian's uncle) called Fabian. Fabian went to the appellant, accompanied by Master Otaney. The appellant gave Fabian money and asked him to buy cigarettes. Master Otaney then took Fabian to Mr James' stall to make the purchase.

[11] Like Master Otaney, Miss Israel also asserted that she had seen the appellant before the night of the incident. She had seen him once at a football match at "the Centre" in Effortville, at about 3:00 pm or 4:00 pm. That was about four or five months before the incident. Mr James was also vending at this football match, and the appellant had "come over to buy something" from him. On that occasion, Miss Israel was able to see the appellant's face, for about half an hour, as he wore no face covering.

[12] Not only had Miss Israel seen the appellant before, but she, like Master Otaney, knew him as Chuckie. However, on the night of the incident when she was asked by the police whether she knew Mr James' assailant, she did not answer. That she knew the appellant as Chuckie never found its way into any statement she gave to the police until after the case had been before the court. A statement disclosing that fact was recorded from her on 26 June 2017. Miss Israel explained that it was when her statement was read to her on the first occasion she came to court that she realised the name was omitted. She also never gave the appellant's name to the police on the night of the incident as,

she said, no statement was then being taken from her. She was only asked if she knew the killer.

[13] Miss Israel positively identified the appellant as the killer, from a video line-up on 29 January 2017. Master Otaney viewed a separate video line-up on which the appellant was present. Master Otaney did not pick out the appellant, although he said he recognised him. His reason for not identifying the appellant, he said, was fear for the lives of his family. Master Otaney admitted, however, that no one had threatened him.

Case for the defence

[14] For his part, the appellant made an unsworn statement. He advanced the defence of alibi. On the date of the incident, although he resided there, he was not in Effortville but at a "drink-out party" in Smithville. He asserted that he and the deceased had nothing and therefore he had no reason to kill him. Further, he had no gun. As for the witnesses, he did not know them and saw them for the first time in court. What was more, he had no nephew called Fabian and neither did he send any youngster to purchase anything for him at a football match.

The appeal

[15] At the commencement of the hearing, Mr Peterkin, counsel for the appellant, sought and obtained leave to abandon the original grounds filed in the appellant's Criminal Form B1, and to argue two supplemental and three further supplemental grounds in their stead. The respective supplemental and further supplemental grounds are listed below, in chronological order of filing:

> "It is submitted that the learned trial judge erred in Law [sic] in failing to impose the sentence as prescribed by Section 3 (1) (b) [sic] of the Offences Against the Person Act.
>
> i. The learned trial judge did not impose a sentence in accordance to [sic] the relevant legislature [sic], guidelines and case law.
>
> ii. The learned trial judge in formulating his sentence while making mention of the aggravating and mitigating factors did not illustrate

how he employed them in arriving at his sentence and in particular the pre-parole period.

iii. That the Learned Trial Judge ought to have exercised his overarching responsibility in directing himself on a no case submission in relation to the circumstances of the identification of Otaney Dixon which led to a dock identification and in so doing this denied the [appellant] of a fair chance of acquittal.

iv. That the Learned Trial Judge ought to have exercised his overarching responsibility in directing himself on a no case submission in relation to the weaknesses of the identification by Sennetteh Israel and in doing so denied the [appellant] of a fair chance of acquittal.

V. The Prosecution misquoted the evidence during an objection in the presence of the witness at page 70 paragraphs [sic] 3 to 10 of the transcript on the important issue of the opportunity to see the shooter which prompted the witness in her answer and affected the fairness of the trial."

Grounds iii, iv and v impugned the conviction, and so were argued first.

Appellant's submissions

[16] Grounds iii and iv may conveniently be taken together. Under ground iii, counsel for the appellant contended that the identification of the appellant by Master Otaney amounted to a dock identification in circumstances where it could not be said that the appellant was previously known to him. Further, there was no exceptional circumstance to allow a dock identification. Learned counsel classified Master Otaney's evidence of seeing the appellant on three occasions before the night of the incident as, "previous sightings". Consequently, this was not a recognition case. **Kevin Williams v R** [2014] JMCA Crim 22 was referenced for the court's guidance.

[17] Mr Peterkin contended that Master Otaney's failure to identify the appellant on the identification parade was tantamount to a situation where no identification parade had been held because the appellant was deprived of its benefit. Counsel argued that the explanation proffered by Master Otaney for not pointing out the appellant on the

identification parade did not render the circumstance exceptional. Additionally, the fear that Master Otaney expressed was prejudicial and without foundation.

[18] In light of this classification of Master Otaney's evidence, a duty fell upon the learned judge to assess his evidence before calling upon the appellant to state his defence. For this proposition, **Jermaine Plunkett v R** [2021] JMCA Crim 43 was cited. Reliance was also placed on **Dwayne Knight v R** [2017] JMCA Crim 3, at para. [30], in which McDonald-Bishop JA (Ag), as she then was, spoke to the trial judge's duty to assess the cumulative weaknesses in the quality of the identification evidence, to ensure there is a sufficiency of evidence upon which to require the defendant to state his defence.

[19] The brunt of counsel's submissions under ground iv concerned Miss Israel's omission of the appellant's name from her first statement to the police. It was counsel's submission that this witness' evidence was unreliable. Counsel argued that the learned judge should have considered that the conflicts in her evidence so eroded her credibility and reliability that there was nothing to be left to the jury.

Crown's submissions

[20] Miss Thompson, responding on behalf of the Crown, disagreed that the appellant was not someone who was previously known to Master Otaney. Accordingly, Master Otaney's identification of the appellant in court was not a dock identification in the classic sense of the phrase, but a mere formality. Miss Thompson sought to ground this submission on a summary of the evidence pointing to Master Otaney's prior knowledge of the appellant. In the same breath, **Kevin Williams v R** was said to be distinguishable from the present case as, in that case, the witness' evidence lacked adequate details tending to show that he knew the applicant, Williams.

[21] While Miss Thompson withheld any concession that the admissibility of dock identification evidence depends on the presence of exceptional circumstances, she argued that perhaps the something more in this case is Master Otaney's knowledge of the familial relationship between the appellant and his friend, Fabian. **Mark France and Rupert**

Vassell v The Queen [2012] UKPC 28 ('**France and Vassell**') and **Peter Stewart v The Queen** [2011] UKPC 11 were cited as authority for this submission. Miss Thompson also relied on **Jason Lawrence v The Queen** [2014] UKPC 2, to demonstrate that where the witness knew the defendant before but only identified him in court, the identification was not treated as a dock identification.

[22] Moving on to Master Otaney's failure to point out the appellant on the identification parade, Miss Thompson took a different view from Mr Peterkin. Miss Thompson argued that the reason Master Otaney gave for his omission was justified. Reliance was placed on learning from **R v George Robert Creamer** (1986) 80 Cr App Rep 248. In that case, it was said that the identification by the witness in court was valid, as long as the court was satisfied that he genuinely recognised the defendant and the accompanying failure to point out the defendant at the identification parade was not born of an improper motive. It was, therefore, argued that Master Otaney stands in the shoes of the witness in **R v George Robert Creamer**.

[23] In response to the complaint under ground iv, Miss Thompson's pithy oral submission was that the issues swirling around naming the appellant on the night of the incident were matters of reliability and credibility which the learned judge properly left to the jury for their resolution. For this proposition, **Delroy Barron v R** [2016] JMCA Crim 32 was referenced. In the instant case, as in **Delroy Barron v R**, the discrepancy was instantiated by the learned judge and the jury assisted in how to deal with it. In Miss Thompson's submission, both **Jermaine Plunkett v R** and **Dwayne Knight v R** are distinguishable from the present case. Whereas the eyewitnesses in those cases identified the assailant under fleeting and difficult circumstances, in this case Miss Israel was removed from the incident.

Discussion

[24] It is noted that although the appellant was represented in the court below by counsel of competent repute, the learned judge was not called upon to rule on a submission of no case to answer. That said, it is recognised that the learned judge had a

duty, notwithstanding the absence of that submission, to determine for himself whether there was a case requiring the appellant to answer. In a case where the evidence against the defendant depends wholly or substantially upon the correctness of visual identification, the duty of the trial judge to stop the case arises in this way.

[25] The trial judge has a duty to stop the case when the quality of the identification is poor. That is, even assuming the eyewitness to be honest, the base of the evidence is so slender that the risk of a miscarriage of justice resulting from a wrongful conviction is palpable. Lord Mustill in **R v Daley** (1993) 43 WIR 325, at page 334g, expressed it in the following way:

> "…in the kind of identification case dealt with by R v Turnbull the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction … When assessing the 'quality' of the evidence, under the Turnbull doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice."

It is palpable that the trial judge is called upon to assay the adequacy of the identification evidence, not the reliability and credibility of the witnesses through whom that evidence is given. This is the duty that McDonald-Bishop JA (Ag) perspicuously described as "non-delegable" (**Dwayne Knight v R**, at para. [30]).

[26] The question is, did the learned judge err in calling upon the appellant to state his defence and, thereby, abandon his duty to assess the sufficiency of the evidence against the appellant? In his oral arguments addressing the evidence of Miss Israel, Mr Peterkin frankly conceded that no issue was joined concerning the learned judge's instructions along the lines of the **Turnbull** guidelines (**Turnbull v R** [1977] 1 QB 224). To that end, it was not argued that Miss Israel's identification of the appellant was either a fleeting glance or a longer observation made under difficult circumstances. Instead, learned counsel argued that the inconsistencies and discrepancy in Miss Israel's evidence

rendered it unreliable to the extent where it affected the sufficiency of the evidence against the appellant.

[27] Does **Jermaine Plunkett v R** or **Dwayne Knight v R**, upon which Mr Peterkin relied, support his argument that the case should have been withdrawn from the jury's consideration? In **Jermaine Plunkett v R**, the eyewitness was awakened by voices outside his room at about 3:00 am. He got off the bed, intending to investigate, when three armed men forcefully or forcibly entered the room and fired several shots in the direction of a visiting male who was asleep on a chair next to the bed. The witness managed to jump to a corner of the room, with his back towards the men. From that position, he looked towards the doorway and, amidst fire and smoke from the guns, recognized the applicant as someone who was well-known to him. The witness initially gave names for the other two assailants but subsequently recanted.

[28] The identification in those circumstances was one made under difficult circumstances (men firing high powered weapons in what was described as a small room; a terrified witness). As the case unfolded, the witness testified to only being able to see the side of the applicant's face. Although he clung tenaciously to the assertion of having seen the face of the applicant for two minutes, he agreed that the incident lasted for 30 seconds. Cross-examination revealed that he had told the police that he was hiding in a corner at the time of the shooting. There were other inconsistencies in his evidence.

[29] It was against this background that V Harris JA, at para. [31], said:

> "We agree, in principle, that inconsistencies and discrepancies are matters within the purview of the jury … However, the learned judge was duty-bound, at the close of the prosecution's case, to properly evaluate the specific weaknesses in the identification, and assess their collective effect on the quality and adequacy of the identification evidence … Had the learned judge done so, she would have been obliged to withdraw the case from the jury."

V Harris JA was not counselling trial judges to trespass on the province of the jury. Rather, it was a reiteration of the law that in the face of tenuous evidence of identification and a

patently inconsistent and discrepant witness, the judge has a duty to evaluate the global impact of that evidence on the quality and adequacy of the identification evidence.

[30] The evidence in this case is markedly dissimilar from the circumstances in **Jermaine Plunkett v R**. Notable distinctions are: (a) whereas the eyewitness in that case was perilously close to the shooting, Miss Israel made her observations from an appreciable distance away, and from a place toward which no shots were being fired; (b) while Miss Israel's opportunity to view the face of the appellant was not challenged, the eyewitness' opportunity to view the face of that assailant was forcefully challenged. In short, the circumstances of the identification in **Jermaine Plunkett v R**, together with the vacillation of the eyewitness, made the case emblematic of those with a base so slender that the ghastly risk of a wrongful conviction was virtually unavoidable. This stands in stark contrast to this case, in which the objective conditions were unassailable.

[31] The thrust of the challenge to Miss Israel's evidence, primarily sounded in the vein of her credibility. That challenge expressed itself in questions such as the giving of the name of the applicant at the material time; whether she revealed to the police on the night of the incident or said so in her first statement to the police. This was plainly a matter for the jury's consideration and the learned judge was correct to allow the trial to proceed.

[32] We have arrived at the same conclusion in respect of Master Otaney's evidence. The nub of the challenge to the admission of Master Otaney's evidence was that his purported identification of the appellant in court was tantamount to a dock identification in the circumstances of this case. That is to say, Master Otaney's avowed previous knowledge of the appellant amounts only to previous sightings which was compounded by his failure to point out the appellant on the identification parade, his explanation for that failure notwithstanding. In short, the appellant should have been treated as a stranger to Master Otaney who was identifying him in court for the first time and, therefore, the inherent risks associated with a dock identification avoided by disallowing

his evidence, or, as the submission went, not leaving his evidence for the jury's consideration.

[33] We will first take a general look at dock identification. A dock identification, in the classic sense of the phrase, is the identification of an accused person for the first time, while he or she is in the dock, by a witness who does not claim previous acquaintance with the accused (see **France and Vassell**). The undesirability of dock identification appeared in the canons of Scottish law as early as 1833. In the Practice of the Criminal Law of Scotland it was said that "his [the accused] being in that situation helped them to believe he was the same [person who committed the crime]," as cited in **James Holland v HM Advocate** [2005] UKPC D1, at para. 50 ('**Holland v HM Advocate**'). Likewise, the chronicles of English criminal law speak to a similar position. Archbold 2022, at para. 14-59, cites **John Cartwright** (1914) 10 Cr App R 219 as an example. In that case, at page 221, it was said that it would have been "infinitely better" if the accused had been put with a number of men so that the witness might identify him, instead of by himself.

[34] The legal position is encapsulated in Phipson on Evidence 20th ed, at para. 15-14:

> "For a witness to identify the accused as the person seen on a previous occasion as he or she stands in the dock is unsatisfactory, because the setting is highly suggestive and the process involves no test of the witness' ability to distinguish between the accused and other people of similar appearance … In trials on indictment, … this manner of identification is regarded as highly unsatisfactory, more so where a witness who failed to pick out the accused at a previous identification procedure is then invited to make a dock identification."

Dock identification is regarded as unsatisfactory because it assails the usual safeguards of an identification parade namely, a test of the witness' ability to independently identify the perpetrator of a crime. On the one hand, dock identification places the accused in a conspicuous position; an accused sitting alone in the dock suggests to the witness that he or she was the person seen on the occasion of the crime. On the other hand, the accused becomes inconspicuous on an identification parade. The identification parade, by which the witness is forced to isolate the perpetrator from among volunteers of similar

appearance, whether in person or their images, places a check on the witness' accuracy by reducing the risk that the witness is merely fixating on someone bearing a resemblance to the actual perpetrator (see **Holland v HM Advocate**).

[35] Dock identification, therefore, has the potential to undermine the fairness of the trial by the possible dilution or erosion of the safeguards of an identification parade and the corresponding increase of the risk of an incorrect identification. Under section 16(1) of The Charter of Fundamental Rights and Freedoms, every person charged with a criminal offence is entitled to a fair hearing. Accordingly, whether the witness is allowed to make a dock identification is a matter for the exercise of the discretion of the trial judge. Against this background, it is of the utmost importance that before allowing a dock identification, the trial judge, as the guardian of the fairness of the trial, must first consider whether the dock identification will imperil the fairness of the trial (see **Tido v The Queen** [2011] UKPC 16; [2011] 2 Cr App R 23). Therefore, as an identification procedure, dock identification should be the last port of call.

[36] In the context of the present appeal, the pivotal question is whether what was done at the trial was a dock identification in the classic use of the phrase, or a mere formality as Miss Thompson submitted. We will now examine the trilogy of cases upon which Miss Thompson relied for the contrarian position that this was no dock identification in light of the reported prior familiarity of Master Otaney with the appellant.

[37] In **Peter Stewart v The Queen**, no identification parade was held, and the complaint was that the identification of the sole eyewitness amounted to a dock identification. The United Kingdom Privy Council disagreed. The evidence was that the witness attended the same primary school with the appellant, and both were in the same class. Subsequently, she regularly passed his house and would see him every day as the appellant was in the habit of purchasing items from her. This pattern continued up to the time of the murder. She had last seen him at church the previous Sunday (the murder occurred on 14 May 2001, at about 1:00 pm). She referred to the appellant as Peter Stewart throughout the trial. She also knew the appellant's mother and that she sold

goods at the school gate. Also known to her was the appellant's older brother by his Christian name. The Board found that there was no real challenge to the witness' evidence of previous acquaintance with the appellant and his family. Additionally, before pointing out the appellant in the dock at the trial, the witness had already identified the appellant at the preliminary inquiry.

[38] Against that background, it is no wonder that the Board was of the "clear view that this cannot properly be regarded as a dock identification case at all" (see para. 10 of the judgment). At the trial, when the witness was asked, "and you see Peter Stewart here today?", she pointed to the appellant in the dock. The pointing out of the appellant in the dock, in the circumstances of the case "was a pure formality" (see para. 10 of the judgment).

[39] **Peter Stewart v The Queen** was applied in **France and Vassell**. In the latter case, no identification parade had been held. The sole eyewitness gave detailed evidence of his previous knowledge of both appellants. The Board recapped that evidence which, in the interest of brevity is not reproduced here, then went on to say, at para. 27:

> "Although counsel for the appellants submitted that these were not cases of recognition, there is really no basis on which that claim can be made. Mr Sutherland described how he knew both appellants before the shooting of his brother. He gave evidence about his knowledge of where they lived. He was not challenged on that evidence. Nor was he challenged about his claim that Legamore [Rupert Vassell] attended the betting shop on Half-Way-Tree Road or on the evidence that France rode a CBR motor cycle [sic]. It is true that Mr Sutherland did not know Legamore's proper name before the killing but that is nothing to the point. His acquaintance with both men before the murder was extensive. He had countless opportunities to observe them. His claim to be able to identify them on the basis of earlier contacts cannot be characterised as anything but recognition."

After a brief review of the law on the holding of identification parades, the Board concluded that in the case of France, an identification parade would not have served any useful purpose. Likewise, the conclusion in respect of Vassell was that it was doubtful

that an identification parade would have served any useful purpose. The Board then referred to some seminal cases on dock identification including **Pop (Aurelio) v The Queen** [2003] UKPC 40 and **Tido v The Queen**, cited at para. [35] above.

[40] Particularly, the Board considered **Peter Stewart v The Queen** and formed the view that **France and Vassell** was indistinguishable. The Board extracted a section of Lord Brown's speech (referred to at para. [38] above) where he characterised the identification of the appellant at the trial in the dock as a pure formality, then said:

> "The same considerations apply here. This was not in any real sense a dock identification. It was, as Lord Brown said in [**Peter Stewart v The Queen**] a pure formality."

So then, the identification of an accused, for the first time, while he is in the dock may not be a dock identification, properly so called, where the witness was sufficiently acquainted with the accused before the incident and had had equally sufficient opportunity to observe him. Otherwise, the purported identification may well be a dock identification where different considerations will apply.

[41] A very good example of this contrast is **Jason Lawrence v The Queen** [2014] UKPC 2, the final case in the trilogy. In that case, the accused was identified by three witnesses while he was in the dock. The deceased was killed in the early morning of Christmas Day 2004. The case for the prosecution rested, principally, on the evidence of the three eyewitnesses: Leroy Williams, Jacqueline Linton and Nathan Smith. There was also evidence of a confession to a civilian but that is not relevant for present purposes.

[42] The witness Leroy Williams had known the accused for about five years and had spent several hours in his presence on the Christmas Eve at the café that became the scene of the crime. On the strength of that evidence, Lord Hodge, adopting the language of Lord Brown in **Peter Stewart v The Queen**, described Mr Williams' pointing out of the accused in the dock as, "a formality" (see para. 5 of the judgment).

[43] In contradistinction, the identification of the accused by Jacqueline Linton and Nathan Smith were characterised as "dock identifications properly so called as they identified the person in the dock for the first time," citing **France and Vassell** (see para. 6 of the judgment). Jacqueline Linton failed to recognise the accused on two identification parades and Nathan Smith failed to identify him on one identification parade. That these two witnesses had failed to identify the accused on the identification parades should have alerted the prosecutor not to invite them to make identifications while the accused was seated in the dock, in the absence of their antecedent acquaintance with him (see para. 11 of the judgment). The dangers associated with dock identification are heightened in this scenario, where there had been previous failed attempts to point out the accused in controlled circumstances when the image of the accused was fresher in the mind of the witnesses (see **Holland v HM Advocate** and **Jason Lawrence v The Queen**).

[44] From these authorities, dock identification is permissible when the witness had satisfactory antecedent acquaintance with the accused. That previous familiarity must admit of reasonable opportunities to make a cognitive record of his image, sufficient for accurate recall on the occasion of the crime, the objective conditions such as lighting permitting. Genuine acquaintance with the perpetrator and not mere passing familiarity must be established. That appears to be the gold standard.

[45] **Kevin Williams v R**, is a case that arguably falls into the latter category (passing familiarity). In that case, the sole eyewitness testified that he knew the applicant as Face Dog for two years prior to the incident; and had seen him on numerous occasions. He particularised only four of those occasions. The details, in sum, were limited to the places where he saw the applicant and that on one occasion, he searched the applicant and engaged him in a brief oral exchange. The witness also swore he had last seen the applicant six months before the material time. This court found, at para. [20] of the judgment, that that evidence fell short of "the requirement of the suspect being well known to the witness, in order to obviate the need for an identification parade". On his way to making that pronouncement, Brooks JA, as he then was, accepted the proposition

that, mere sightings antecedent to the relevant event cannot be equated with acquaintance (see para. [15] of the judgment).

[46] The distinction between acquaintance and mere passing familiarity is important. In **Kevin Williams v R**, this court apparently accepted that **R v Fergus** [1992] Crim LR 363 is authority for the basic proposition that alleged sight of an assailant once or twice before the commission of the offence is more likely to be treated as a case of identification, rather than one of recognition. These separate categories were named in the seminal case on identification evidence, **R v Turnbull**. At page 228, Lord Widgery spoke of the probability of recognition being more reliable than identification of a stranger, although mistakes are sometimes made even in the recognition of close friends and relatives; a reference to the phenomenon informally described as "I could have sworn it was you" (see **France and Vassell**, at para. 23).

[47] Recognition is one of Lord Widgery's two examples of good quality identification evidence: (a) identification made after a long period of observation, and (b) identification in satisfactory conditions by a relative, neighbour, close friend, co-worker and the like (see **R v Turnbull**, at page 229). This appears to be the foundation on which it was submitted in **Kevin Williams v R** that the witness' sightings fell short of Lord Widgery's test of recognition. What is clear is that the degree of association between the accused and the eyewitness ought to be such that it can be established that the witness either genuinely knew or was acquainted with the perpetrator. Accordingly, if the witness' previous purported encounter with the accused was casual and unremarkable and compounded by difficult circumstances at the time of the offence, the threshold for admission of dock identification evidence would not have been met (see **R v Fergus**).

[48] **Tido v The Queen** was a case built on circumstantial evidence inclusive of the identification of the accused as the person who appeared at a certain place and performed specific acts prior to the commission of the offence. A 16-year-old girl was discovered missing from her home where she was last seen the night before (30 April). The home telephone indicated that a call was received at that address approximately 1:20 am on 1

May from Mandingo's Restaurant. A female part owner of, and worker at, the restaurant, testified that at about 1:00 am, a man came in and asked to use the telephone. She gave a description of the man. Once he got permission to use the telephone, she kept him under close observation, anxious to prevent theft of money from the phone because the lock was broken. She overheard him identify himself "Scum" and told the other person, "[c]ome outside; I coming for you". He spent two to three minutes on the telephone, all along under the part owner's observation, from a distance of about 5 feet. She watched him leave the restaurant, board a Chevy truck at the passenger side that then drove away. Aside from 1 May, the part owner had seen the man in the restaurant twice before and had observed him for between 10 and 20 seconds. On 2 May, she identified him to the police as the man who made the telephone call the day before and identified himself as Scum. She was allowed to make a dock identification of him at the trial.

[49] On appeal from the Court of Appeal of the Bahamas to the United Kingdom Privy Council, although the appeal was allowed for deficiencies in the judge's summation, the dock identification could, potentially, have received the Board's nod. In Lord Kerr's opinion, the circumstances potentially favoured the admission of the dock identification evidence. Lord Kerr, at para. 23, listed five factors that arguably favoured the admission of the dock identification:

1. The opportunity the part owner had to observe the person she identified as the man making the phone call.

2. Her claim to have seen the man in the restaurant on a couple prior occasions.

3. Her having heard him identify himself as Scum.

4. Her evidence that he entered a Chevy truck, especially in light of other evidence that the man had a Chevy truck that night.

5. The evidence that she pointed him out to the police the day after he made the telephone call.

Notwithstanding the arguability of these factors, the Board was of the view that:

> "the failure of the trial judge to address – much less consider- the reasons that an identification parade was not held means that there was not a proper exercise of [the judge's] discretion. If those issues had been addressed, it is possible that the dock identification could have been properly allowed. Since they were not, its admission cannot be upheld."

Notwithstanding the presence of circumstances which could arguably allow the admission of dock identification evidence, whether the evidence is admitted or excluded is an exercise of the judge's discretion. It must, therefore, be demonstrated that the judge was aware of that fact and took into account the relevant factors.

[50] In the present appeal, although Master Otaney failed to identify the appellant on the identification parade, it was strongly urged by the Crown that when he pointed out the appellant in the dock, he was not making a dock identification. The main plank of that submission is Master Otaney's asserted previous knowledge of the appellant. It is, therefore, convenient at this time to weigh the claimed acquaintance then segue into the submission that his so-called prior knowledge amounted to no more than previous sightings.

[51] First, some general observations about the facts concerning Master Otaney. There is no evidence of how long he 'knew' the appellant up to the night of the murder. A corollary of that is the absence of evidence of either the frequency that he would see the appellant or the last time he had seen the appellant before the fateful night. On those factual bases, this case is distinguishable from **France and Vassell** as well as **Peter Stewart v The Queen**. However, if the factual circumstances of **Tido v The Queen** are to be given any credence, the absence of these factors cannot, by themselves, vitiate a claim of prior knowledge.

[52] Master Otaney said he knew the appellant as Chuckie. The appellant did not deny that he went by that alias although he denied the blood relations from whom Master Otaney said he got that name. Knowing the appellant's alias makes this case indistinguishable from **Kevin Williams v R**. However, when the circumstances are viewed in the round, although there was no direct interaction between Master Otaney and the appellant, as there was in **Kevin Williams v R**, the particularised sightings separate this case from **Kevin Williams v R**. Not only did Master Otaney testify to knowing where the appellant lived, his evidence was that he saw the appellant at the bar in that yard and saw his face for 30 seconds.

[53] Another timed occasion when Master Otaney saw the appellant's face was when Master Otaney was travelling in a taxi to school. While seeing his face for six seconds may be regarded as fleeting, since both he and the appellant were in motion, both were on the same side of the road and going in opposite directions, that is, facing each other, it was still an opportunity of note, occurring as it did, during daylight hours. Last, the occasion on which cigarette was purchased for the appellant by Fabian, accompanied by Master Otaney, is another distinguishing point from **Kevin Williams v R**. On this occasion, Master Otaney saw the appellant's face for two minutes. Admittedly, the evidence here suffers obvious deficiencies. It is not known how far Master Otaney stood from the appellant or where was the nearest light source since the football match was being played at night. And, it certainly would have been useful to know whether he accompanied Fabian back to the appellant after the purchase of the cigarette.

[54] So, in fine, cumulatively, the evidence of prior knowledge in this case, although falling short of the extensive acquaintance in **France and Vassell** and **Peter Stewart v R**, cannot fairly be equated with the circumstances in **Kevin Williams v R**. That is, although Master Otaney's claim of prior knowledge of the appellant was not extensive, it cannot be reasonably said to amount only to passing familiarity, meaning, slight or superficial acquaintance. When viewed in the round, the previous knowledge of the appellant cannot be described as casual and unremarkable and, juxtaposed with the

favourable conditions under which Master Otaney made his identification of the appellant at the material time, makes this case distinguishable from **R v Fergus**. Accordingly, we are constrained to disagree with the submission that Master Otaney's evidence of previous knowledge of the appellant amounts to no more than prior sightings.

[55] Notwithstanding Master Otaney's purported acquaintance with the appellant, he failed to point out the appellant when he attended the identification parade. Consequently, this case lacks the fortification advanced in **Tido v R**, in which the witness pointed out the accused to the police the day following the incident. This provided fodder for Mr Peterkin's submission that Master Otaney's failure at the parade was a missed opportunity to confirm that the appellant was the person he knew as Chuckie. Mr Peterkin argued, to have allowed Master Otaney to point to appellant while he was in the dock was tantamount to a dock identification. All these circumstances, it was advanced, should have propelled the learned judge to, on his own volition, withdraw the case from the jury's consideration.

[56] However, the failure to point out the appellant on the identification parade did not, by that fact, so erode the integrity of the evidence of acquaintance with the appellant to downgrade it from recognition, properly so called, to prior sightings, to make the identification in court classic dock identification. What the failure to point out the appellant did was to significantly increase the risks of mistaken identification beyond the ordinary boundaries of inherent risks of mistake associated with all eyewitness identification (see **Holland v HM Advocate**, at paras. 62, 82 and 83). The compounding of the risks of mistaken identification was a matter for carefully crafted and perspicuously delivered directions to the jury to view Master Otaney's evidence with clear-eyed circumspection. What it most certainly did not call for was a withdrawal of the case from the jury. Accordingly, the learned judge made no error in treating the case as one of recognition, allowing the dock identification and the trial to proceed to the point of asking the jury to return a verdict upon the evidence.

[57] Since the learned judge allowed the trial to proceed to verdict, rightly in our view, we are constrained to have regard to his treatment of the issue, in his charge to the jury. The learned judge gave the jury adequate directions on the purpose of an identification parade, namely, to test the ability of the witness to independently identify the appellant (see page 251 lines 1-3 and page 277 line 23 to page 278 line 4 of the transcript). The learned judge also directed the jury to assess the fairness of the conduct of the identification parade, noting that there was no complaint in this regard (see page 251 lines 7-25 of the transcript).

[58] More to the point, the learned judge discussed with the jury the importance of a witness pointing out a suspect on an identification parade and that that failure puts in sharp relief the issue of the witness' assertion of having seen the suspect either committing the crime or at the scene of the crime. At page 278 lines 5-14 of the transcript, the learned judge directed the jury:

> "We try to test to see if, in fact, they can identify the suspect, as being the person who was there at the time of the incident. And the reason why an identification parade is important is because it affords this opportunity to see if the witness can make a positive identification. If they can't make a positive identification, then it raises the question of whether they can properly speak to who was present at the time of the incident."

In short, the jury was cautioned that an unsuccessful attempt to identify a suspect on an identification parade ushers into sharp focus the reliability of the identification evidence of that witness. Although the learned judge did not express it in these terms, the jury was being invited to consider the possibility of mistake in the identification of the suspect in the face of the frustrated effort at the identification parade.

[59] That said, these directions were confined to drawing the jury's attention to the primary function of an identification parade, that is, a test of the accuracy of the witness' recollection of the assailant he asserted he saw commit the offence. However, this was a case of disputed identification; namely, the appellant disputed that he was previously known by Master Otaney or that he knew Master Otaney. Consequently, the honesty of

Master Otaney's claim of acquaintance with the appellant was also being challenged and so an additional purpose of the identification parade was a test of the honesty of the witness' assertion of acquaintance with the appellant(see **Goldson (Irvion) and McGlashan (Devon) v The Queen** (2000) 56 WIR 444; **John v The State** (2009) 75 WIR 429). Therefore, the jury should have been further directed that since Master Otaney did not point out the appellant on the parade, notwithstanding his explanation for not doing so, they had to consider whether he was being honest in his assertion of prior knowledge of the appellant. If they felt themselves unable to accept that he was being honest in his claim of acquaintance with the appellant, his evidence had to be discarded (see **R v Turnbull**). It was only if the jury accepted that Master Otaney was honest in this assertion, in the face of not identifying the appellant on the parade, that they could go on to consider the failure to point him out and its impact on the identification evidence.

[60] The learned judge then adverted to Master Otaney's failure to point out the appellant on the identification parade and his stated reason (fear), for failing to do so (see page 252 lines 1-7 of the transcript). The learned judge then instructed the jury as follows, at page 279 lines 2-15:

> "You have to look at that evidence very carefully, because if he did see him and was able to know that that was him, then if you accept that, that would support his identification that he made in court that that was the man; but, if you don't accept that he did see him, and didn't point him out because of fear then his identification in court, you might find of little value, because the man is there sitting all by himself. So it is a matter for you, do you believe him when he said he saw him but he was afraid, or is it that he never really identified him, but he is just now saying so."

The learned judge communicated two ideas to the jury. First, if they believed Master Otaney saw the appellant on the parade and did not point him out because he was afraid, that was not a true failure to independently identify him and, therefore, that was supportive of his identification of the appellant in court. Second, if they rejected Master Otaney's explanation for his failure to make a positive identification on the identification parade, then, identifying the appellant in court was of questionable value. In other words,

a determination resulting in the second position reduced Master Otaney's identification of the appellant in court to no more than a dock identification. And a dock identification carried with it the seeds of suspicion that the appellant was pointed out because of his conspicuous position in the dock, bereft of any of the safeguards of a properly conducted identification parade. The jury was amply directed earlier about this undesirability of dock identification (see page 278 lines 15-23 of the transcript).

[61] It was only if the jury concluded that Master Otaney did not see the appellant on the identification parade that the guidance given in **Holland v HM Advocate** would become imperative (see para. [56] above). That would mean, as Mr Peterkin submitted, that Master Otaney failed to confirm that the appellant was indeed the person he saw committing the murder, on the first opportunity he got when, presumably, the image of the appellant should have been fresher in his mind than at the trial. Accordingly, the learned judge was called upon to fashion his directions to make them commensurate with the compound risk of mistaken identity.

[62] Respectfully, telling the jury that if they rejected his explanation for not identifying the appellant then the identification in court is of negligible value, missed the mark and ultimately did not assist the jury to the requisite extent. The unsuccessful attempt to identify the appellant, if that was the view of the jury, had less to do with dock identification and more to do with the correctness of the primary identification, namely, the assertion that the appellant was the killer. Therefore, the jury should have been directed that if they did not accept that Master Otaney saw the appellant on the parade and failed to point him out because he was afraid, that raised the risk of mistaken identification and so they were required to exercise caution above that required in the usual case of visual identification before convicting upon his evidence. Although the learned judge, earlier in his summation, gave the jury full directions according to the **Turnbull** guidelines, telling them of the possibility of mistakes, **Holland v HM Advocate** required him to go this further step in these circumstances (see para. [55] above). This omission on the part of the learned judge, in an otherwise comprehensive summation,

was a non-direction, tantamount to a misdirection. However, in our opinion, no miscarriage of justice was occasioned by it.

[63] If the jury accepted Master Otaney's explanation for not pointing out the appellant at the identification parade, as we said above, this was no true failure and his identification of the appellant in court was, as argued by Miss Thompson, a mere formality. If Master Otaney's evidence was discarded, there remained the solid identification evidence of Miss Israel upon which it was eminently safe to return an adverse verdict. Notwithstanding the misdirection in relation to Master Otaney's evidence, the inevitability of the jury's verdict of guilty is palpable. The upshot of this situation is that the verdict of the jury is unimpeachable and the conviction is satisfactory.

Ground V: The prosecutor misquoted the evidence during an objection in the presence of the witness at page 70 paragraphs 3 to 10 [sic] of the transcript on the important issue of the opportunity to see the shooter which can be perceived to have prompted the witness in her answer and affected the fairness of the trial

Submissions

[64] The challenge mounted by this count arose out of an objection to a question posed during the cross-examination of Miss Israel. Defence counsel sought to undermine Miss Israel's evidence concerning the length of time Miss Israel had testified in examination-in-chief that she observed the incident, as well as the duration of the incident. The question posed by defence counsel assumed the witness to be saying it was the shooting that lasted for the time Miss Israel gave. It was to that characterisation that the prosecutor objected and, in making that objection, made reference to the evidence given by the witness in examination-in-chief.

[65] Mr Peterkin submitted that the prosecutor's intervention occurred while counsel for the appellant, appearing below, was exploring the very important issue of identification, specifically the opportunity to observe the assailant. He argued that even if the prosecutor's comment was innocent, she ought to have exercised care in guarding against making any utterance that could have affected the answer given by the witness.

In Mr Peterkin's opinion, the prosecutor's utterances might have affected the fairness of the trial and, consequently, the appellant's chance of being acquitted.

[66] The Crown's response was, essentially, the witness was not prompted by the prosecutor's intervention, and, in any event, all the witness did was to repeat the evidence she gave earlier.

Discussion

[67] Having reviewed the relevant parts of the transcript, we agree with the submission of the Crown for the reasons which follow. We are constrained to import the material sections of the transcript to give context to the complaint encapsulated in this ground of appeal. We will take first the evidence given in examination-in-chief. Miss Israel testified that at the time she stepped onto the verandah, the deceased was inflicted with the first gunshot. At that time, she stepped back into the living room, closed the door, took up her vantage point at the window and observed the continuing assault upon the deceased until the shooter left the scene. She was then asked:

> "How long would you say it lasted for in relation to the shooting, from when you stepped on to the verandah to when the shooting actually stopped?"

Miss Israel responded, "[t]hree to four minutes." (see page 30 lines 13-17 of the transcript).

[68] The cross-examination on the point, together with the objections and responses, began at page 68 line 25 and continued through to page 71 line 9 of the transcript. The impugned section is highlighted in the extract which appears below:

> "Q. Earlier in evidence you said when you were watching the shooting you were watching this for three to four minutes, that's what you told us earlier?
>
> A. Yes, yes.
>
> Q. A minute you know is 60 seconds?

A. Yes, sir.

Q. A minute is 60 seconds, so for each of those seconds shots were been [sic] fired?

MRS. TRACY-ANN ROBINSON: To be fair to the witness it was from she stepped out [sic] the veranda to the time that the shooter ran off, that is three to four minutes in relation to the incident.

MR. DWIGHT REECE: I am sorry, my note is, 'watch Kemar getting shot, watch this for three to four minutes.'

HIS LORDSHIP: The note I have is that 3 to 4 minutes from where I stepped on the veranda to when the shooting start, to when the shooting stops.

MR. DWIGHT REECE: There you go, three to four minutes.

Q. So, for this three to four minutes, which, based on my poor mathematics, and you can correct me, it would be a 180 seconds to 240 seconds, shots were being fired, is that what you are saying?

MRS. TRACY-ANN ROBINSON: **I am also going to object, because the witness was clear, she stepped on the veranda, there was shooting, the accused man also would have looked, shooting wasn't going on that time, shuffle and then ran off. So, the question is not a fair question to the witness**.

MR. DWIGHT REECE: I was relying on my notes, three to four minutes as she stepped on the veranda until the shooting …

HIS LORDSHIP: There is a particular note, there is a narrative in terms of her stepping on the veranda, etc. Now, there may be a question as to what the shooting stops means, I don't know if you want to explore that.

MR. DWIGHT REECE: That wouldn't be for me.

HIS LORDSHIP: Well, it may need to be explored at some point.

Q. So, all right, three to four minutes about how many shots you heard, let me ask you?

A. Eight shots, eight.

> Q. So, you are saying this shooting took place over three to four minutes, or you want to change that?
>
> A. No, I am not changing because when the shooting stop him nuh just run off, he was there for a period of time and before.
>
> Q. You just heard what my friend said, so it is all right?
>
> A. No, that's what I said." (Emphasis added)

[69] It is apparent that cross-examining counsel either understood Miss Israel to be saying, or was trying to get her to say, the actual shooting was continuous for the space of three to four minutes. However, that understanding was a clear oversimplification of Miss Israel's response to the prosecutor's question. The response, whether viewed by itself or in the context of her earlier evidence, did not lend itself to the interpretation of the cross-examiner. Therefore, the prosecutor was duty-bound to object to the question and for the reason she stated, that is, unfairness to the witness.

[70] Admittedly, asking Miss Israel how long "it" lasted, "in relation to the shooting" lacked the required precision. And, as the learned judge observed, ambiguity inhered the phrase "when the shooting actually stopped". However, a fair reading of the question and Miss Israel's reply, in the context of her earlier evidence, cannot reasonably lead to a conclusion that spoke to a continuous firing of gunshots. Miss Israel spoke of firing of the first shot when she stepped onto the verandah. Miss Israel went on to say she heard eight gunshots. At the end of the cross-examination, it became clear that when Miss Israel spoke of "three to four minutes" she had in mind the period that commenced with the firing of the first shot and ended when the appellant left the scene.

[71] Even if it is conceded that Miss Israel's articulation was influenced by the prosecutor's explanation in making her objection, that did not result in any vacillation in her evidence as she never accepted cross-examining counsel's interpretation of continuous gunfire for the period. Her description of the incident was left unchanged. In any event, the import of this evidence was the uninterrupted opportunity to observe the

appellant, from the safety of the living room. There was no change in that. Accordingly, there could not have been any unfairness to the appellant. This ground therefore fails.

Grounds i and ii:

I. The learned trial judge did not impose a sentence in accordance to the relevant legislation, guidelines and case law.

II. The learned trial judge in formulating his sentence while making mention of the aggravating and mitigating factors did not illustrate how he employed them in arriving at his sentence and in particular the pre-parole period.

[72] Both these grounds can conveniently be taken together. We will first summarise the learned judge's remarks during the sentencing exercise then present a summary of the relevant submissions made by both sides.

The sentence hearing

[73] To assist the learned judge in this aspect of the case, one witness to character was called on behalf of the appellant. Additionally, the court was provided with an antecedent report, and counsel made a plea in mitigation of sentence. In his mitigation plea, counsel asked the learned judge not to take the appellant's sole previous conviction (making a false declaration in 2011) into account. The learned judge was also invited to consider favourably the appellant's industry, schooling and socialization in his community, and the testimony of his character witness. The learned judge was also urged to say, this conviction, although serious, is out of character. Admitting that the killing was gruesome, counsel urged that it did not matriculate to the category of the "worst of the worst". Accordingly, counsel urged the court to impose the minimum term of incarceration before parole eligibility. In his submission, the appellant was still a young man and of whom the community spoke favourably. Therefore, counsel urged the learned judge to be lenient. Lastly, it was brought to the learned judge's attention that the appellant had spent one year and two months on remand prior to being released on bail and the later revocation of his bail. The appellant was therefore in custody for the duration of his trial.

[74] The learned judge found the facts "particularly disturbing" and made specific reference to the number of times Mr James had been shot in the head and neck. He told the appellant that the range of sentence was between a minimum of 15 years to life imprisonment.

[75] After highlighting aspects of the antecedent report and the character evidence, the learned judge spoke of the need to balance the aggravating and mitigating factors. Four aggravating factors were isolated by the learned judge as follows:

> (a) the manner in which the offence was committed;
>
> (b) the number of shots fired and the fact that they were to the head (4), and neck (1);
>
> (c) Mr James was shot where he earned his living and in front of his family; and
>
> (d) the family of Mr James had been robbed of his presence, love, financial and other support.

[76] Turning to the other side of the balancing exercise, mitigation, the learned judge highlighted the following. Firstly, the "passionate evidence" of his character witness, in particular, the appellant's loving, kind and generous nature. Secondly, all the things advanced in the plea in mitigation (see para. [40] above).

[77] Viewing the matter globally, the learned judge said, at page 316 lines 9-24:

> "considering all the circumstances of this case, including the gravity, the nature of the offence, the manner of commission, balancing all the significant aggravating and mitigating factors and I should include the mitigating factors that I have borne in mind, the fact that you are married with a small child dependent on you and deducting the time already spent in custody, which I have said I will take to be two years, deducting that from the recommendation of the years to be served before you become eligible for parole, I find that the

> appropriate sentence in this case is life imprisonment, not to be eligible for parole before the expiration of 28 years."

Appellant's submissions

[78] In his written submissions, Mr Peterkin charged that the learned judge erred in failing to impose a sentence as prescribed by section 3(1)(b) of the Offences Against the Person Act. However, in oral arguments, counsel resiled from this position and frankly conceded the correctness of the sentence. His focus was, therefore, on the calculation of the pre-parole period of incarceration. The learned judge, counsel said, failed to follow the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Court, December 2017 ('the Sentencing Guidelines') and case law. Counsel complained that although the learned judge mentioned the aggravating and mitigating factors, he failed to demonstrate how he employed these criteria in arriving at the sentence, and in particular, the pre-parole period.

[79] Mr Peterkin acknowledged that the learned judge assessed the appellant's level of culpability and harm. However, counsel contended that the learned judge should have used that, along with the Sentencing Guidelines, to arrive at a range and fix a starting point. In the end, Mr Peterkin submitted that the learned judge should have used a starting point of 25 years. He argued that since the learned judge assigned no mathematical value to the aggravating factors, we should assume those factors were rolled into the starting point. From the figure of 25 years, Mr Peterkin deducted four years for mitigation and two years for time spent on remand, resulting in a pre-parole period of 19 years. Mr Peterkin sought to place reliance on **Glenroy Mitchell v R** [2016] JMCA Crim 27, in which the applicant was sentenced to 25 years' imprisonment for the offence of murder. In answer to the court, counsel revealed that that was a case in which the applicant had pleaded guilty.

Submissions on behalf of the Crown

[80] Miss Thompson announced that for these grounds, the Crown relied on its written submissions. The Crown reminded the court of the circumstances in which this court will

interfere with a sentence, as articulated by Hilbery J in **R v Ball** and applied in **Meisha Clement v R** [2016] JMCA Crim 26, namely, failure to apply the correct principles. While the Crown agreed that the learned judge did not state a starting point and otherwise apply a mathematical formula, the sentence handed down was not manifestly excessive. **Lincoln McKoy v R** [2019] JMCA Crim 35 was cited as an example where this court upheld a similar sentence with a stipulated parole ineligibility period of 25 years. Accordingly, this court should leave the sentence and parole disentitlement period undisturbed.

Discussion

[81] Mr Peterkin's complaint that the learned judge did not expressly follow the Sentencing Guidelines, and the methodological approach counselled in the decided cases such as **Meisha Clement v R** and **Daniel Roulston v R**, is well-founded. In particular, as the single judge found, the learned judge did not state a usual starting point, in his calculation of the parole ineligibility period. Insofar as the learned judge did not apply the relevant principles, in arriving at the pre-parole period, this court may be at liberty to interfere with the exercise of his discretion in imposing sentence: **R v Ball**, **Alpha Green v R** (1969) 11 JLR 283 and **Meisha Clement v R**.

[82] Learned counsel for the Crown, Miss Thompson, submitted that, although the learned judge did not conduct the requisite analysis of the principles, the sentence of life imprisonment with the stipulation of incarceration for 28 years before becoming eligible for parole, is within the range of sentence for the offence of murder, especially in these circumstances. Therefore, it cannot reasonably be said that the sentence (parole ineligibility period) is excessive. This submission harmonises the guidance in **Meisha Clement v R**. At para. [43], Morrison JA, as he then was, said this:

> "On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual, known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is

> usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loathe to interfere with the sentencing judge's exercise of his or her discretion."

So, in the face of a failure to scrupulously apply the principles of sentencing, the ultimate question to be determined is, was the sentence imposed typical or atypical of the authorities, assuming its imposition to be within the competence of the sentencing judge?

[83] To answer this question, we must therefore determine the appropriate sentence that ought to have been imposed. **Lincoln McKoy v R**, on which the Crown relies, provides useful guidance. The applicant in that case was a serving member of the Jamaica Constabulary Force at the time of the incident. The applicant shot and killed his estranged common law spouse at the Errol Flynn Marina during an argument then shot himself twice in the head. The applicant shot the deceased in spite of her open supplication not to kill her. This court accepted, upon a review of the authorities, a range of between 20 and 40 years' imprisonment for the pre-parole for murders committed in the circumstances of that case. We will not depart from that range.

[84] We will now turn our attention to the starting point within the range of 20 to 40 years' imprisonment. A useful place to commence this determination is the mandatory minimum parole ineligibility period of 15 years' imprisonment upon the imposition of a sentence of imprisonment for life. It is also proper for us to take into our consideration (a) the circumstances in which the deceased came to his death, namely an apparent execution; (b) the use of a firearm; and (c) the deceased was executed while he went about his lawful business. In our view, these factors embrace a just starting point of between 27 and 30 years.

[85] Turning to the aggravating factors, the following are appropriate for our consideration. First, the commission of the offence has the hallmark of premeditation. Second, the prevalence of murders committed with a firearm is as well-known as it is well-documented in the Jamaican society. Third, the use of gratuitous violence in the

commission of the offence (four entry gunshot wounds to the head and one entry gunshot wound to the neck).

[86] Having considered the aggravating features, we now look to the other side of the ledger, so to speak, the mitigating factors. The appellant was 25 years of age at the time of the killing and just shy of his 27th birthday at the date of sentence. He was therefore a young offender but, arguably, a mature man. His character witness spoke of his reputation for kindness towards children and the elderly. These are indicia of his capacity for rehabilitation. However, that capacity is counterbalanced by the appellant's escalating criminal behaviour; by the commission of this offence, the appellant graduated from a non-violent offender to an offender given to extreme violence.

[87] All told, the aggravating factors outweigh the mitigating factors. Accordingly, after undertaking inevitable balancing exercise, the pre-parole incarceration should be between 30 and 33 years. We move on to adjust this figure for time spent on remand. The appellant spent one year and two months on remand which the learned judge charitably rounded up to two years. We will not depart from his charity. So, the appellant's parole ineligibility period should be between 28 and 31 years.

[88] So then, although the learned judge did not engage the methodological approach counselled by the authorities, opting instead for an omnibus shortcut, the sentence he arrived at for this flagrant and extravagant execution-style killing cannot be characterised as manifestly excessive. The pre-parole period falls both within the range of sentences which the learned judge was empowered to give for the offence of murder, and that usually imposed for murder committed in like circumstances. Consequently, not only are we loath to interfere with the exercise of the learned judge's discretion, but we are also constrained by authority from doing so (see **Meisha Clement v R** and **Lincoln McKoy v R**).

Conclusion

[89] This appeal challenged the sustainability of the conviction by attacks on the quality of the evidence of visual identification. Both witnesses knew the appellant before the fateful night and made their observation of the homicide from a distance which removed them from immediate peril but close enough to positively identify the appellant as the assailant. The issues surrounding the identification made by Miss Israel were clearly matters for the resolution of the jury, as were the matters raised in relation to Master Otaney. The learned judge was, therefore, correct not to withdraw the case from the jury, of his own volition since a submission of no case to answer was not made. Furthermore, the learned judge's misdirection concerning Master Otaney's failure to identify the appellant at identification parade did not result in any miscarriage of justice. The jury's verdict of guilty was inevitable.

[90] Regarding the sentence imposed, particularly the sentence to be served before becoming eligible for parole, the complaint of it being manifestly excessive is unmeritorious. Although the learned judge did not abide by the methodological strictures set out in the authorities, the sentence is within the range of sentences passed for this offence in similar circumstances.

[91] Considering the foregoing, both the conviction and sentence should be affirmed. We make the following orders:

1. The application for permission to appeal against conviction is granted and the hearing of the application is treated as the hearing of the appeal.

2. The appeal against conviction is dismissed.

3. The appeal against sentence is dismissed.

4. Both the conviction and the sentence are affirmed.

5. The sentence is reckoned as having commenced on 22 May 2018, the date on which it was imposed.