[2021] JMCA Crim 36

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 64/2017

RICKETO GRAHAM v R

Mrs Carolyn Reid-Cameron QC and Kimani Brydson for the appellant

Miss Sophia Thomas for the Crown

8, 9 June and 15 October 2021

BROWN BECKFORD JA (AG)

Introduction

[1] Mr Ricketo Graham was convicted on 7 June 2017 of the offence of murder after a trial by a judge sitting with a jury in the Circuit Court for the parish of Saint Ann. He was sentenced on 14 July 2017 to life imprisonment with the stipulation that he serves 35 years before being eligible for parole. He applied for leave to appeal his conviction and sentence on the ground that the learned trial judge erred and misdirected the jury. His application was considered by a single judge of this court who refused leave to appeal his conviction but granted leave to appeal his sentence. Before us he renewed his application for leave to appeal his conviction as is his right to do. Given that he has been granted leave to appeal his sentence, he will be referred to as the appellant for the purposes of the proceedings.

[2] On 9 June 2021, the court having heard and considered the submissions of counsel on the renewed application for leave to appeal conviction and the appeal against

sentence, and bearing in mind the evidence at the trial and the applicable law, made the following orders:

i. "The application for leave to appeal conviction is granted.

ii. The hearing of the application for leave to appeal conviction is treated as the hearing of the appeal against conviction.

iii. The appeal against conviction and sentence is allowed.

iv. The conviction is quashed and the sentence set aside.

v. A new trial is ordered and the case is remitted to the Circuit Court for the parish of Saint Ann for retrial at the earliest possible time. The case is fixed for mention on 27 September 2021 in the Circuit Court for the parish of St. Ann

vi. The appellant is at liberty to apply for bail in the Supreme Court or in the Circuit Court for the parish of Saint Ann as soon as is reasonably practicable."

We promised to put our reasons in writing. This judgment is a fulfilment of that promise.

[3] At the commencement of the hearing before us, permission was granted to the appellant to abandon the original grounds of appeal dated 18 July 2017 and to argue four supplemental grounds of appeal filed on 31 May 2021 and 7 June 2021 in the order as follows.

Grounds

i. "The learned trial judge erred in law in failing to leave for the jury's consideration the statutory defence available to the appellant by virtue of Section 13 of the Constabulary Force Act thus denying the appellant a fair trial.

ii. The learned trial judge erred in law and fact in failing to recognise the main witness for the prosecution, Reneque Pearson, as an accomplice or, at the very least, a witness with an interest to serve, and this deprived the appellant of a fair trial when the learned judge failed to: -

a. give the jury the required corroboration warning;

b. give the jury guidance/directions on the effect of the witness' status on his credibility and how to treat with it; and

c. disallow any references to the alleged text messages between the appellant and the main prosecution witness who clearly had an interest to serve.

iii. The learned trial judge erred in law when he failed to exclude the evidence of Dr Jerome Taylor regarding comments made to him by the patient he was treating as hearsay, thus depriving the appellant of a fair trial.

iv. The sentence is manifestly excessive."

Factual background

[4] The appellant was a police constable stationed at the Brown's Town Police Station. On 12 July 2013, he was on Criminal Investigation Branch (CIB) duties. He left the police station together with Constable Reneque Pearson on foot patrol. At about 2.00 am on the 13th, Mr Christopher Hill was seen at a nightclub and apprehended by the appellant on the basis that he resembled a person wanted by the police. Together with Constable Pearson, the appellant walked with Mr Hill to the Brown's Town Police Station but did not enter the building. Instead they boarded a police service vehicle intending to drive to Mr Hill's home. However, the appellant dropped off Mr Hill and Constable Pearson along the roadway, in the vicinity of a church, and drove back to the police station. He returned to where they were on foot. All three then walked to the police station where Mr Hill was questioned. The information given by Mr Hill was recorded in a notebook. A knapsack which he had with him was searched by the appellant and found to contain clothing.

[5] All three men then left the police station with Constable Pearson holding on to Mr Hill. Mr Hill's knapsack was left on a table at the station The appellant took them to an area which had a wall with a house in the vicinity. Constable Pearson was holding Mr Hill against the wall when he heard an explosion and saw Mr Hill begin to fall. The appellant then invited Constable Pearson to "give him one". Constable Pearson declined to so participate, saying he was afraid. He then saw the appellant shoot Mr Hill. Constable

Pearson returned to the police station by himself and made contact with his supervisor, Sergeant Davis. Sergeant Davis eventually came to the scene and he, Constable Pearson and the appellant took Mr Hill to the Saint Ann's Bay Hospital and left him there.

[6] Dr Jerome Taylor was the attending physician of a patient at the Saint Ann's Bay Hospital who identified himself as Christopher Hill. Dr Taylor gave evidence that Mr Hill jumped up from a stretcher, which was wheeled into the accident and emergency area, and shouted that he was not dead. On enquiring, Mr Hill told him that one police officer held him while the other shot him twice. Mr Hill subsequently died while undergoing treatment.

[7] Both the appellant and Constable Pearson related to The Independent Commission of Investigations (INDECOM) and senior police personnel that the deceased attacked them with a ratchet knife and the appellant defended himself and Constable Pearson. Constable Pearson later changed this account to state that he and the appellant were never attacked by the deceased and that he gave this account out of fear of the appellant.

[8] At trial, the appellant gave an unsworn statement from the dock. He asserted that he was a member of the Jamaica Constabulary Force. While performing his lawful duty as a police officer, the deceased attacked him and Constable Pearson with a ratchet knife. He defended them both by shooting the deceased. The appellant said that he sustained injuries in the attack by Mr Hill in the region of his abdomen. He further stated that the initial account given by Constable Pearson was a correct one, and that Constable Pearson was forced to change his account and give a false report after threats from a senior officer.

Analysis

Ground 1-The statutory defence available to the appellant by virtue of Section 13 of the Constabulary Force Act

[9] Counsel for the appellant relied on the cases of **Glenroy McDermott v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 38/2006,

judgment delivered 14 March 2008, **Vince Edwards v R** [2017] JMCA 24 ('**Vince Edwards**') and **Leonard Lindsay and Another v R** [2020] JMCA Crim 51 ('**Leonard Lindsay**') for the proposition that once the appellant was operating within the context of executing his lawful duties as a police officer. Section 13 of the Constabulary Force Act affords him a defence. This section provides that:

> "13. The duties of the Police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a Justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summonses, warrants, subpoenas, notices, and criminal processes issued from any Court of Criminal Justice or by any Justice in a criminal matter and to do and perform all the duties appertaining to the office of a Constable, but it shall not be lawful to employ any member of the Force in the service of any civil process, or in the levying of rents, rates or taxes for or on behalf of any private person or incorporated company."

[10] Counsel further submitted that the learned trial judge has a duty to advise the jury of this statutory defence once it arises even where it is not being relied on by the defence. In determining criminal liability against police officers, where both self-defence and the defence of an officer acting in the course of his duties arise, the learned trial judge must give full directions in respect of both defences.

[11] There was no issue that the appellant was acting in the course of his duties as he was on CIB duties when he apprehended the deceased on suspicion that he was wanted by the police. He was still purportedly so acting at the time when he shot Mr Hill.

[12] The appellant contended that, as stated categorically in **Leonard Lindsay**, once the statutory defence arises, even if not relied on, the trial judge's failure to so advise the jury was fatal to the conviction.

[13] The prosecution rightly conceded that the learned trial judge failed to direct the jury on the statutory defence available to the applicant, pointing out that the reasoning in **Vince Edwards** was followed and adopted in **Wayne Hamil v R** [2021] JMCA Crim 12 ('**Wayne Hamil**').

[14] Vince Edwards, a then corporal in the Island Special Constabulary Force was convicted for murder. The evidence produced by the prosecution was of an altercation which developed into a tussle between the deceased and another man. The deceased was pulled away by two friends in his company. All three entered a motor vehicle. The other man was seen beckoning to someone who turned out to be Mr Edwards. Mr Edwards fired at the motor vehicle. As the vehicle reversed, more shots were fired, hitting the deceased who was the driver. Mr Edwards' defence was that he observed a man being attacked by two men in his community. One had a knife. A fourth man in close proximity had a gun. Hearing gunshots, he challenged the men identifying himself as a police officer. The man with the gun fired in his direction and he returned the gunfire. The three men ran into a vehicle which drove off. Gunshots were fired from the vehicle as it drove off. He again returned the fire. The vehicle crashed and he observed a man around the steering wheel suffering from gunshot wounds.

[15] In allowing his appeal against conviction, Brooks JA (as he then was), writing for the court, espoused the law contained in Archbold Criminal Pleading & Practice, 35th Edition paragraph 2527, and as stated by Harrison JA in **Glenroy McDermott**, as follows:

> "…Where an officer of justice is resisted in the legal execution of his duty he may repel force by force; and if in doing so, he kills the party resisting him, it is justifiable homicide; and this is in civil as well as in criminal cases…And this is not merely on the principle of self-defence (for the officer or private person is not bound to retreat, as in the case of homicide…) but upon that principle, and the necessity of executing the duty the law imposed upon him, jointly…Still there must be an apparent necessity for the killing; for if the officer were to kill after the resistance had ceased… or if there were no

> reasonable necessity for the violence used upon the part of the officer…,the killing would be manslaughter at least…"

The learned trial judge directed the jury on the statutory defence but the direction was inadequate in that the judge did not instruct the jury on the application of their finding to the defence. The court found that it was incumbent on the trial judge to have advised the jury that if, on the examination of the case as a whole, it was their finding that Mr Edwards was acting in accordance with his duties as a police officer, and this resulted in the death of the deceased, if they found the force used was reasonably justifiable then the killing would be justified not only on the grounds of self-defence but also because of the duty imposed by statute.

[16] This issue was also considered in **Wayne Hamil**. In that case a police officer was convicted of the offence of wounding with intent to do grievous bodily harm for shooting the complainant after a traffic stop. The learned trial judge gave no directions on the statutory defence. On appeal, Fraser JA reviewed the authorities relied on by the appellant and confirmed that the conviction had to be quashed where the trial judge gave no direction to the jury in relation to the statutory defence available to the defence. Fraser JA opined that the appellant would have been "wholly deprived of a defence".

[17] In light of the above authorities the court found this complaint of the appellant to be well-founded and on ground one, he succeeded.

Ground 2- Failure to give a corroboration warning for an accomplice or at the very least a warning concerning a witness with an interest to serve

[18] The appellant contended that the learned trial judge failed to recognise that Constable Pearson who was present throughout, without demur, was an accomplice or, at the very least, a witness with an interest to serve. In the circumstances, it was incumbent on the learned trial judge to have warned the jury that it was dangerous to convict on the evidence of this witness, unless it was corroborated even though they may do so, if after considering the warning, they believed him.

[19] The appellant relied on **Davies v Director of Public Prosecutions** [1954] AC 378, which was followed in **Lawrence Brown v R** [2016] JMCA 33.

[20] The Crown also rightly conceded that on the evidence presented by the prosecution at trial, Constable Pearson would have been an accomplice. Firstly, Constable Pearson had admitted to holding the deceased when he was shot by the appellant; and secondly, based on the account reportedly given by Mr Hill to Dr Taylor, Constable Pearson would have held him while the appellant shot him. Given this evidence, the learned trial judge was required to give the jury the corroboration warning required in law. The jury, therefore, was not directed as to how to assess the evidence given by Constable Pearson.

[21] In **Lawrence Brown** the applicant was charged with the offences of illegal possession of firearm and robbery with aggravation. The two virtual complainants were held up and robbed of personal items including a cellular phone by two men one of whom was armed with a gun. One of the witnesses for the prosecution, Mr Henry, was arrested after he was found to be using the stolen cellular phone. He in turn took the police to premises where Brown was arrested. Brown was later identified by the complainants as one of the men who held them up and the man with the gun. Mr Henry gave evidence that he purchased the phone from Brown. A ground of appeal was that the learned trial judge failed to recognise that Henry was an accomplice and, therefore, his evidence required the appropriate corroboration warning or that the learned trial judge failed to properly treat with and assess his evidence as that of a witness with an interest to serve.

[22] Edwards JA (Ag) (as she then was), writing for the court, at paragraphs [21] and [22] of her judgment quoted the law as found in **Davies** as follows:

> "[21] In considering the question of who was an accomplice the House of Lords in **Davies v Director of Public Prosecutions** stated at page 400 that:

'In considering the question of who was an accomplice the House of Lords in **Davies v Director of Public Prosecutions** stated at page 400 that:

'On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category:-

(i) On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term 'accomplice.' But in two cases, persons falling strictly outside the ambit of this category have, in particular decisions been held to be accomplices for the purpose of the rule: viz.:

(ii) Receivers have been held to be accomplices of the thieves from whom they receive goods on a trial of the latter for larceny (Rex v Jennings 37: Rex v Dixon) 38...'

[22] Their Lordships also formulated three propositions at page 399, which we respectfully adopt as correct statements of the law, that:

> 'First proposition:
>
> In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.
>
> Second proposition:
>
> This rule, although a rule of practice, now has the force of a rule of law.
>
> Third proposition:
>
> Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if

> in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso...'"

[23] She further stated at paragraph [26] that a judge commits a fatal error if he fails to give the requisite warning where there is evidence that the witness might be an accomplice.

[24] In the circumstances, the failure of the learned trial judge to give a corroboration warning amounted to a misdirection and was found to be fatal to the conviction. The appellant also succeeded on ground two.

Ground 3- *Res Gestae*

[25] Counsel for the appellant contended that the statements reportedly made by Mr Hill to Dr Taylor should not have been admitted. It is necessary to recount the evidence given by Dr Taylor. He was the doctor on duty in the accident and emergency department when a patient came through the emergency door on a stretcher. He recounted the following as taking place.

> "THE WITNESS: He was lying flat on the stretcher and as the stretcher reached inside the department, the patient jumped up, meaning he got up with his shoulder up on the stretcher and he shouted, "me no dead, me no dead."

Dr Taylor was allowed to refresh his memory as to the name of this man as Christopher Hill and then he continued:

> "Q. Christopher Hill. After Christopher Hill, this man Christopher Hill jumped up and shouted "me no dead, me no dead", take it from there, what happened next?
>
> A. He was trollied to [sic] the minor operating theatre in the department.
>
> Q. Micro operating theatre?
>
> A. Minor

Q. Minor?

A. Yeah

HIS LORDSHIP: Why was he taken? Why was he taken to the operating theatre?

THE WITNESS: It is protocol where…

HIS LORDSHIP: You looked at the man?

THE WITNESS: Yes we saw him, when he came in on the stretcher, his clothes was covered with what appeared to be blood.

HIS LORDSHIP: Yes.

Q. Yes, sir?

A. So he was – a group of us is involved, the nurses that was on the floor, the emergency medical technician…

Q. Are we treating him right now?

A. Oh yes, he was in the minor theatre.

HIS LORDSHIP: Did you at any time speak to this gentleman?

WITNESS: Yes, your Honour.

Q. Right. The gentleman spoke to you?

A. Yes, counsel.

Q. Could you tell us what the gentleman spoke to you and said?

A. While he was on the stretcher, to find out what happened…

Q. Tell me what the gentleman said to you?

A. He said he was shot by police officers.

Q. Yes, sir?

A. Could you repeat, counsel.

Q. Continue. Tell us what he said to you, everything.

A. Well, before that we asked him his name to get him registered, his next of kin, which he gave us. And while assessing him, I was asking him what happened, so I could ascertain how he got injured and how to approach him in terms of treatment.

And he told us he was first taken to the station, a police station and some police officers picked him up to check if he was involved in some crime. He said after he went there they told him…

Q. A little slower, we writing, 'some police picked him up'?

A. Took him to the station and after he was…

Q. Not too fast, slower, 'to check if he is involved in a crime'?

A. He said he was interviewed and they told him that it wasn't him.

Q. Yes.

A. So he said they took him out of the police compound to some area. He said he had money with him and one of the officers took it from him. They took his phone and they called his mother to tell his mother that he was dead, then…

Q. Slower. Yes?

A. Then he said one of the officers told him to lie down, but he refused and he said another one hold him and then the other officer shot him twice.

Q. Anything else you remember?

A. He said after he fell to the ground, he hold his breath, and one of the officers place his hand over his nose, and then that officer said, the Jamaican term, batty bwoy dead, and then they left him there.

Q. Yes?

> A. He said that he left him there, and after they came back and he was lying there and he – then they took him and put [him] in the vehicle, and the next thing he remembers he was at the hospital."

[26] The appellant relied on the case of **Jordan Thompson v R** [2013] JMCA Crim 62 ('**Jordan Thompson**') and **R v Andrews** [1987] 1 All ER 513 ('**Andrews'**) as setting out the applicable law relating to res gestae as an exception to the hearsay rule. It was submitted firstly that there was no actual evidence connecting the person involved in the incident with the person seen and treated by Dr Taylor. It was pointed out that Dr Taylor had to refresh his memory as to the name of the person he treated.

[27] The Crown responded that there was sufficient factual or evidential connection between the man taken to the hospital by Sergeant Davis and the man treated by Dr Taylor. The Crown pointed to the appellant's defence of self-defence in which it was inherently accepted by the appellant that the deceased was the same person involved in the incident. There was also evidence that when interviewed at the police station, the man gave his name as Christopher Hill and was later led to a dark area by Constables Graham and Pearson and was shot by Constable Graham. Furthermore, there was evidence that Sergeant Davis who attended the scene of the shooting after a call from Constable Pearson saw a man bleeding who was taken to the hospital and handed over for medical treatment. Dr Taylor later treated a man at the St Ann's Bay Hospital who gave his name as Christopher Hill.

[28] There was an abundance of circumstantial evidence which, if accepted by the jury, would have led to the inescapable inference that the person treated at the hospital was the person shot by the appellant.

[29] The further argument of the appellant was that Dr Taylor recorded what was said to him by Mr Hill some 15 months later and thus his statement was not free from fallibility or concoction and may have been recorded incorrectly. This, the appellant argued, was clear from the fact that Dr Taylor had to refresh his memory as to the name of the person he treated.

[30] The Crown responded firstly that it was no violation of the rules of evidence for the doctor to have the opportunity to refresh his memory. The deceased of his own volition made the statement "me no dead, me no dead". This was not a statement made ordinarily. Mr Hill must have been emotionally overpowered and his mental state would have eroded the possibility of concoction. The delay in putting it in a statement was inconsequential as the purity of the statement was not lost by this delay. The Crown relied on **Julian Brown v R** [2020] JMCA Crim 42 ('**Julian Brown**') which followed the reasoning of the Privy Council in **Arthur Mills, Garfield Mills, Julius Mills and Balvin Mills v The Queen** (1995) 46 WIR 240 ('**Arthur Mills**').

[31] The Crown further submitted that the appellant's arguments conflated the issues of admissibility and probity/reliability. The former is a matter for the judge to decide as a question of law and the latter a question of fact for the jury. The question of admissibility was dealt with at pages 266 to 275 of the transcript.

[32] The Crown's application at the trial was that what was said to Dr Taylor fell within the ambit of the concept of *res gestae*. Reliance was had on **Andrews** that hearsay evidence of a statement made to a witness by the victim of an attack could be received as evidence as part of the *res gestae* if the statement was sufficiently contemporaneous with the attack to preclude the possibility of concoction or distortion. It was further submitted that the witness jumping up and indicating he was not dead was indicative of spontaneity. It was also sufficiently close to the time of the shooting in the particular circumstances which was some one to two hours prior to him being at the hospital, to preclude the possibility of concoction. The defence responded that the delay between the time the victim made the statement and the time it was written by the doctor would have distorted the event.

[33] The learned trial judge ruled that the hearsay evidence of Mr Hill was admissible as part of the *res gestae* on the basis that the distortion the cases speak of is of the declarant and not the witness who is reporting what was said.

[34] **Jordan Thompson**, as submitted by the appellant, provides a definitive statement of the law relating to the *res gestae* principle.

> "[18] The principle of *res gestae* is well accepted as a common law exception to the hearsay rule. Statements by the deceased made immediately upon the occurrence which caused the death, but not under such circumstances as would render them admissible as dying declarations may be admitted in evidence as part of the *res gestae*."

[35] The approach to be taken was set out in **Andrews** and as the Crown pointed out, was recently restated by this court in **Julian Brown**. The position set out by McDonald-Bishop JA bears repetition in full.

> "[42] In **R v Andrews** [1987] 1 All ER 513, the House of Lords clarified and refined *res gestae* as an exception to the hearsay rule. In dismissing that appeal, their Lordships agreed with the judgment of Lord Ackner, who opined at page 520:
>
> > `...[M]ay I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the *res gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as 'hearsay evidence'. (1) The primary question which the judge must ask himself is: can the possibility of concoction or distortion be disregarded? (2) To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity. (3) In order for the statement to be sufficiently 'spontaneous' it must be

> so closely associated with the event which has excited the statement that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event which provided the trigger mechanism for the statement was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading. (4) Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion ... (5) As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied on, this goes to the weight to be attached to and not to the admissibility of the statement and is therefore a matter for the jury. However, here again there may be special features that may give rise to the possibility of error'."

She further went on to point out that the modern approach places emphasis on the probative value of the evidence. This court adopted the position of the Privy Council in **Arthur Mills** that:

> "[45] …
>
> > 'Their lordships accept that the modern approach in the law is different: the emphasis is on the probative value of the evidence. That approach is illustrated by the admirable judgments of Lord Wilberforce in the Privy Council in *Ratten v R* [1972] AC 378 and Lord Ackner in the House of Lords in *R v Andrews* [1987] AC 281, and notably by the approach in the context of the so-called *res gestae* rule that the focus should be on the probative value of the statement rather than on the question whether it falls within an artificial and rigid category, such as being part of a transaction.'"

[36] The circumstances in which the statement was made were:

1) Mr Hill having been shot pretended to be dead.

2) He remained in the company of the two police officers involved who took him to the hospital with Sergeant Davis.

3) As Mr Hill was wheeled into the accident and emergency department on a stretcher on which he was lying flat, he jumped up and said "me no dead, me no dead."

4) While he was on the stretcher he gave his name and next of kin and when asked how he came by his injuries, he gave his account of the incident.

It is clear that, in these circumstances, it was open to the learned trial judge to conclude that the possibility of concoction or distortion by Mr Hill could be disregarded. The events must have still been very much in his thoughts. He was in the company of the police officers who were involved in the incident right up to the time he was left at the hospital. From his utterances, he was pretending to be dead while in their company. While not exactly contemporaneous to the shooting it was sufficiently proximate to the events. The time, though calculated in hours rather than minutes, in the circumstances of this case do no violence to the probative force of the evidence. We could not conclude that the learned trial judge erred in admitting the hearsay evidence of Mr Hill as part of the *res gestae*.

[37] Having ruled the evidence admissible, the learned trial judge directed the jury as to how to treat with the statement at pages 436 to 442 of the transcript. The directions of the learned trial judge on this issue are unassailable. He made it clear to the jury that:

1) the doctor made no note of what was said to him until he gave his witness statement (page 437 lines 12-16 of transcript);

2) they should be sure his recollection was accurate (page 438 lines 1-11 of transcript);

3) they should be sure of what Mr Hill said to the doctor (page 438 lines 12-19 of transcript); and

4) they should decide whether the words were spontaneous and reflected the situation as Mr Hill genuinely believed them to be or whether he had other reasons for saying so (page 438 lines 21-25 and page 439 lines 1-23 of transcript).

The question of the weight to be given to this evidence was properly left for the jury's determination. This ground of appeal therefore failed.

[38] The appellant succeeded on grounds 1 and 2, which were sufficient for this court to find that the conviction is unsafe and that leave to appeal conviction must be granted. The hearing of the application for leave to appeal conviction was treated as the hearing of the appeal and the conviction was quashed.

Ground 4- Sentence is manifestly excessive

[39] Having regard to the conclusion arrived at regarding conviction, it was not necessary for the court to embark on an examination of whether the sentence imposed was appropriate. However, given what we observed concerning the learned trial judge's approach to sentencing, we considered it useful to make some brief remarks concerning the ground of appeal challenging sentence.

[40] Counsel for the appellant had submitted that the sentence was manifestly excessive on the basis that the learned trial judge did not apply the usual known and accepted principles in the sentencing process. These submissions were not resisted by counsel for the Crown who agreed that the learned trial judge erred in principle.

[41] We accepted those submissions. Though this matter predates the Sentencing Guidelines for Use by Judges of the Supreme Court and Parish Courts, December 2017, this court, in **Meisha Clement v R** [2016] JMCA Crim 26 ('**Meisha Clement**') as well

as in older authorities, gave guidance as to how the sentencing exercise is to be approached by sentencing judges.

[42] The learned trial judge had the benefit of the guidance from **Meisha Clement** and the older authorities but he failed to apply the relevant principles of law. Our concern, therefore, was that the learned trial judge would have erred, in principle, in the determination of the appropriate sentence to be imposed.

[43] The failure of the learned trial judge to apply the relevant sentencing principles would have justified the interference of the court to set aside the sentence imposed, if it were found, after the court's assessment, to be manifestly excessive.

[44] This court continues to be guided by the principle stated by Hilbery J in **R v Kenneth John Ball** (1952) 35 Cr. App. R. 164 at page 165, that:

> "…this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses as to character he may have chosen to call. **It is only when a sentence appears to err in principle that the Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene**." (Emphasis added)

We found that there was merit in the complaint of the appellant that the learned trial judge erred in his approach to sentencing. However, given the court's findings regarding the conviction and the likely outcome of the appeal, it was not necessary for the court to embark on a determination of whether, in actuality, the sentence imposed by the learned trial judge was manifestly excessive. Given the findings regarding the conviction, it followed logically that the sentence would have had to be set aside and the court so ordered.

Retrial

[45] The ultimate question for the court was whether to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') or order a retrial, pursuant to section 14(2) of the Act.

[46] Sections 14(1) and (2) of the JAJA state that:

> "14.-(1) The Court on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal.
>
> Provided that the Court may, notwithstanding that they are of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.
>
> (2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

Counsel on both sides agreed that having regard to the cumulative effect of the deficiencies in the summing up to the jury, this is not a suitable case for the application of the proviso. The court accepted those submissions.

The authorities were reviewed by Brooks JA in **Vince Edwards**. He considered that the test of the inevitably of the conviction, applied by their Lordships in the Privy Council in **Stafford and Carter v The State (Trinidad and Tobago)** [1998] UKPC 35; (1993) 53 WIR 417 and followed in the several cases reviewed, was the applicable framework for the consideration of the proviso. In the case at bar, there is no question of the

insufficiency of the evidence presented by the Crown. The issue is a contest of credibility. The directions to the jury were critical to that consideration. It cannot be said that if the jury had been properly directed they would inevitably have come to the same decision. This is, therefore, not a proper case to apply the proviso.

[47] The appellant argued that a verdict of acquittal should be entered on the basis that his fundamental right as it relates to a fair trial, was breached. Mrs Reid-Cameron submitted on his behalf that in the first place his entitlement to the statutory defence was denied to him. Secondly, the gravamen of the Crown's case and the main source of information came from the witness, Constable Pearson, who was an accomplice. Queen's Counsel maintained that the issues that flowed from not treating with his status as an accomplice as well as his evidence were not addressed at all to assist the jury. This, she argued, robbed the appellant of his fundamental right to a fair trial. Queen's Counsel further noted that there were evidential deficiencies in Constable Pearson's evidence that were not and still have not been resolved. The text messages he spoke to were never made available which, according to Queen's Counsel, undermined the Crowns' case.

[48] It was further submitted that it is now eight years since the commission of the offence. Evidence which could definitely have assisted the defence were not produced at trial. A knife, merino and shirt were handed over but were never produced at trial though the jury heard of them. If compromised then, it was likely to be worse with the passage of time. Mrs Reid-Cameron pointed out that the cumulative failure of the learned trial judge in giving directions on certain matters, the admission of prejudicial evidence in the form of text messages, Mr Hill's reported conversation with Dr Taylor, and the failure to produce evidence beneficial to the appellant should be taken into account. According to Queen's Counsel, it was not in the interests of justice that the prosecution should be given another chance to cure the evidential deficiencies in its case.

[49] Counsel for the appellant relied on **Dennis Reid v R** (1978) 16 JLR 246 and **Shirley Ruddock v R** [2017] JMCA Crim 6 for the matters that the court should take into account. Counsel highlighted several matters that would militate against a retrial;

these were: the expense and length of time involved in a fresh hearing; the logistical and physical conditions in the St Ann Circuit Court; and that there were over 140 cases at the last circuit which lasted for four weeks, which would erode the likelihood of this matter coming on for trial anytime soon. The physical capacity of the court, she said, was also stretched. Queen's Counsel also noted "the ordeal suffered" by the appellant between 2013 and now and the fact that he has been in custody for the past four years as relevant considerations.

[50] Queen's Counsel argued that in all these circumstances, it was not in the interests of justice that the Crown be given another chance to cure the evidential deficiencies in its case.

[51] Miss Thomas contended in her response on behalf of the Crown, that this case was a proper one for a retrial. She noted that section 14 (2) of the JAJA empowers the court to order a new trial if the interests of justice so requires. The Crown further contended that this was a controversial shooting by an agent of the state where the allegation was that it was unprovoked, the deceased having been taken to a dark area where he was shot. The Crown relied on the learning in **Radcliffe Levy v R** [2019] JMCA Crim 46 (**Radcliffe Levy**) where a retrial was ordered after a period of 12 years had elapsed.

[52] **Wayne Hamil** is the most recent exposition of this court on the issue. In **Wayne Hamil** and **Vince Edwards,** both applicants were police officers whose defence included the statutory defence. In **Vince Edwards**, Brooks JA pointed out that though each case will depend on its peculiar facts, a killing done by a police officer would (normally) warrant a retrial. In those circumstances, the length of time, though a factor would not be determinative. In **Wayne Hamil,** Fraser JA conducted a review of cases, including **Radcliffe Levy** and **Vince Edwards,** where this issue was considered and concluded that the delay of seven years would not bar a retrial. As in **Wayne Hamil**, there was no indication that the appellant's defence would be compromised by a new trial. It was further submitted that the Crown would not be getting a second bite at the cherry. Also,

the evidential gaps in the case would not amount to any serious prejudice against the appellant if a retrial was ordered. Crown Counsel also submitted that the prosecution is in a position to expedite the trial if the court were to exercise its discretion to order a retrial.

[53] When consideration was given to the cogency of the evidence, we agreed with the submissions of the Crown and concluded that it was in the interests of justice that a retrial be ordered. Fraser JA in **Wayne Hamil** concluded that with no issue of evidential insufficiency and the conviction being overturned because of a technical deficiency in the summation, the public interest was best served by ordering a new trial. He noted that the case was one of wounding with intent by a policeman, where it was contended that the applicant used excessive force, which was a live ongoing concern in our society. Even more so, the same can be said when the policeman is accused of murder.

[54] The issue of delay could not be ignored and, therefore, it was given due consideration by the court in determining whether it would be unjust to order a retrial. Having done so, however, we found that the circumstances of this case, which the Crown contended was an execution of a subject of the land by an agent of the State, tasked with the protection of the citizenry, made it a most serious case. We concluded, in agreement with counsel for the Crown, that the public interest demanded a retrial despite the delay.

[55] It was for these reasons that we made the orders stated at paragraph [2] above.