[2023] JMCA Crim 40

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

SUPREME COURT CRIMINAL APPEAL NO 21/2013

RUSHON HAMILTON v R

Mrs Valerie Neita-Robertson QC and Robert Fletcher for the applicant

Miss Shauna-Kay James for the Crown

11, 12 January 2021 and 29 September 2023

Criminal law- Evidence - Cell confessions – Summation in respect of – matters to be considered

Criminal Law - Verdict whether unreasonable

Criminal law – Conviction quashed – Whether retrial appropriate

F WILLIAMS JA

Introduction

[1] The applicant is renewing before us, his application for leave to appeal his conviction and sentence for the offence of murder contrary to section 2(1)(d) of the Offences against the Person Act. He was convicted in the Home Circuit Court, in Kingston, after a trial before a judge of the Supreme Court ('the learned trial judge') and a jury between 26 September 2012 and 25 October 2012. He was sentenced on 1 March 2013 to life imprisonment with the stipulation that he should serve 35 years at hard labour before becoming eligible for parole.

Summary of the Crown's case at trial

[2] It was the Crown's case that, between 24 and 25 October 2008, the applicant murdered Jhanelle Goulbourne ('the deceased'), in circumstances directly attributable to her being a witness in pending criminal proceedings.

[3] The prosecution called 12 witnesses and elicited evidence that, on 11 October 2008, the deceased made a report at the Centre for the Investigation of Sexual Offences and Child Abuse against the applicant for carnal abuse. About 11:00 pm on 24 October 2008, whilst the now deceased was at her gate speaking with a friend, a white Hiace van with at least three men aboard, drove up and took her away at gun point. She was never seen or heard from again.

[4] One of the witnesses for the Crown, Devon Dockery, testified that, on 20 October 2008, he was first contacted via telephone by someone who said that he was a police officer and who gave his name as Hamilton. He testified that at first he thought that it was another individual, but later learned that it was the applicant. He further testified that the applicant asked him to find out the times the deceased usually left her house each day. Dockery told the court that he got the information the applicant requested and gave it to him. He further testified that he also met in person the applicant, who drove a white van. However, Mr Dockery failed to point the applicant out at an identification parade.

[5] Lennox Hinds also testified for the Crown to the effect that, during the time that he shared a cell with the applicant and others, the applicant asked him if he believed someone could be forgiven for doing something that they knew was wrong before they did it. He further testified that the applicant told him about taking the deceased out to sea and killing her by shooting her and then throwing her overboard. On another occasion, when he informed the applicant that the body of the deceased had been found, the applicant told him that he was 99.99% sure that they could not find her body. On a subsequent date, whilst he (Hinds) was housed at the medical centre, the applicant asked him to tell him what was going on, as he had been informed that it was he, Hinds, whom

Assistant Commissioner of Police Mark Shields had visited. He further testified that the applicant told him that he would be requesting copies of witness statements in his case to learn who was giving evidence against him and that he would be going to the funerals of those persons. Mr Hinds also testified that the applicant had told him that he knew that his girlfriend would not let him down, as she had washed the blood out his clothes after he had killed "the pickney".

[6] Also testifying for the Crown, Newton Bentley gave evidence that he overheard the applicant telling another person (named Gazada) in their jail cell that he (the applicant) and others "took the pickney out to sea and kill har and throw har off". He also heard the conversation between the applicant and Mr Hinds (to which Mr Hinds testified) in which the applicant said that he was 99.99% sure that the body of the deceased would not be found.

[7] The statement of Kemar Johnson, who died before the trial, was admitted into evidence pursuant to section 31(A) of the Evidence Act. In that statement, he stated that he was introduced to the applicant by the applicant's brother. He was informed that the applicant's name was Rushon and that he was a police officer. His statement also indicated that the applicant had asked for his help to get rid of a body.

Summary of the defence

[8] The applicant made an unsworn statement from the dock. He denied killing the deceased and said he had no reason to do so; that the prosecution witnesses were connected and that the case against him was all a part of a conspiracy to frame him. He also pointed out that he was a policeman with an unblemished record.

[9] Devon Brooks, who was an inmate at the Tower Street Adult Correctional Centre, testified on behalf of the applicant that he had met the Crown witness, Mr Hinds, at the Horizon Adult Correctional Centre Medical Block and learned of a plot to frame the applicant through Mr Hinds and Mr Dockery. He also told the court that Mr Hinds had

instructed him to not let the applicant come onto that section of the prison because he was a cop who had kidnapped and raped a girl and the girl's mother was his friend.

[10] The learned trial judge subsequently gave his summation to the jury and they thereafter returned a unanimous verdict of guilty.

The application for leave to appeal

[11] Being dissatisfied with the outcome of the trial, the applicant, by way of Criminal Form B1, dated 1 March 2013 and filed on 19 March 2013, sought permission to appeal against his conviction and sentence on the grounds that: (i) the prosecution witnesses had 'wrongfully' identified him; (ii) there was no forensic or scientific evidence to link him to the crime; (iii) the trial was unfair; and (iv) there was a miscarriage of justice. On 6 May 2016, a single judge of appeal duly considered and refused his application for permission to appeal against both conviction and sentence. As he is entitled to do, the applicant renewed his application before the full court.

The grounds of appeal

[12] Mr Robert Fletcher, who, along with Mrs Valerie Neita-Robertson QC, appeared for the applicant, sought and obtained permission to abandon the original grounds of appeal filed and to substitute them with the supplemental grounds of appeal filed on 23 December 2020. The supplemental grounds of appeal are as follows:

> "1. The learned trial judge erred in failing to caution the jury appropriately, about the cell confessions which lay at the heart of the prosecution's case. These omissions denied them, the jury, the tools to effectively assess those items of evidence and thereby denied the applicant a real chance of acquittal.
>
> 2. The learned trial judge erred further in failing to advise caution when, through a witness for the defence, evidence was given that the cell confessions were part of a stated plot to incriminate the applicant. The recurrence of this issue of improper motive and tainted evidence made it critical that a suitable warning be given. The failure to do this denied the applicant a fair trial.

> 3. The learned trial judge failed in several critical instances to provide the appropriate legal warning in respect to both visual, voice and dock identification. This failure denied the jury the tools to properly assess the evidence by those witnesses and thereby denied the applicant a fair trial.
>
> 4. The verdict is unreasonable having regard to the evidence.
>
> 5. The sentence is manifestly excessive."

[13] From a perusal of these grounds, supplemental grounds 1 and 2 of the applicant's application can conveniently be dealt with together. The other grounds will be dealt with separately.

Supplemental ground 1: The learned trial judge erred in failing to caution the jury appropriately, about the cell confessions which lay at the heart of the prosecution's case. These omissions denied them, the jury, the tools to effectively assess those items of evidence and thereby denied the applicant a real chance of acquittal.

Supplemental ground 2: The learned trial judge erred further in failing to advise caution when, through a witness for the defence, evidence was given that the cell confessions were part of a stated plot to incriminate the applicant. The recurrence of this issue of improper motive and tainted evidence made it critical that a suitable warning be given. The failure to do this denied the applicant a fair trial.

<u>Summary of submissions</u>

For the applicant

[14] Mr Fletcher argued that "jailhouse/cell confessions" required special attention by a trial judge when they arise in a trial. He relied on the cases of **Pringle (Michael) v R** [2003] UKPC 9 and **Bendetto v R and Labrador v R** [2003] UKPC 27 ('**Benedetto**') to submit that judges had an obligation to warn a jury about the special need for caution in relying on the evidence of prison informants which may be fraught with lies, if there was a perceived benefit to those informants. Mr Fletcher further argued that, while it was true that there was no formulaic requirement for a trial judge to follow, in a summation, to deal with the issue of a witness with an improper motive, once that issue arose, the caution to the jury should be in clear terms. He submitted that, on both the prosecution's

case (through the testimony of Mr Hinds and Mr Bentley) and the case for the defence (through the testimony of Mr Brooks), the issue of tainted evidence or improper motive arose; however, the learned trial judge never expressly cautioned the jury in relation to the dangers of cell confessions. This, he submitted, rendered the conviction unsafe, as a result of which it ought to be quashed.

For the Crown

[15] On behalf of the Crown, Ms James conceded that, although the learned trial judge brought to the jury's attention the possibility of an improper motive on the part of Mr Hinds and Mr Bentley, he failed to expressly warn or caution the jury about accepting their evidence. Crown Counsel argued, however, that, notwithstanding this failure, the verdict was not rendered unsafe, and relied, in this regard, on the case of **R v Price** [2004] All ER (D) 461. Ms James submitted that the overall tone and content of the summation was balanced, and heavy emphasis was placed on directing the jury on how to treat with the evidence of those witnesses (including Mr Brooks for the defence), if its members believed them. Whereas Mr Fletcher had submitted that the matter of cell confessions ought to have been specifically addressed by the learned judge in his summation, Ms James submitted that, in spite of the cell confessions not being specifically addressed in the summation, the summation, when taken as a whole, was fair and made the jury aware of the main issues that fell for consideration in the case. That, on her submission, was sufficient, and so the conviction was not unsafe.

[16] Crown Counsel, in this regard, submitted that the learned trial judge had highlighted the reason for each witness giving their evidence and further asked the jury to consider whether there was anything for them (the witnesses) to gain.

Discussion

[17] The most useful starting point in respect of these grounds is a brief review of the common law position with regard to cell confessions. In particular, how are trial judges to deal with the evidence of a confession allegedly made by a person in custody with another or others? Should a special warning or caution be given to the jury in all cases

where a prison informant gives evidence against his cell mate? If not, what are the circumstances that would alert a trial judge to the need to bring to the jury's attention the possibility that a prison informant's testimony may be tainted by an improper motive and to caution them accordingly?

[18] The authorities that are most often referred to in this area of the law, are the cases referred to by Mr Fletcher, that is, **Pringle** and **Benedetto**.

[19] Lord Hope, in delivering the judgment of the Board in **Pringle**, had this to say on cell confessions at para. 25 (also referred to by Mr Fletcher):

> "The problem as to how to deal with evidence of a cell confession is not new. There has long been an obligation on judges to warn a jury about the special need for caution in cases which are analogous to those of accomplices. These include cases where the witness' evidence may have been tainted by an improper motive…"

[20] The Board in **Pringle** had to contend with the question of whether there was evidence to suggest that the witness' testimony was of such a character as to require the trial judge to draw the jury's attention to the probability of his evidence being tainted, and what the trial judge ought to have said in his summing-up. Lord Hope further opined at paras. 30 and 31 as follows:

> "30 …It is not possible to lay down any fixed rules about the directions which the trial judge should give to a jury about the evidence which one prisoner gives against another prisoner about things done or said while they were both together in custody. There may be cases where the correct approach will be to treat the prisoner simply as an ordinary witness, about whose evidence nothing out of the usual need be said. Examples of that situation are where the prisoner is a witness to an assault on another prisoner or a prison officer, or is a witness to a drugs transaction which has taken place in the place where he is being held.
>
> 31 But a judge must always be alert to the possibility that the evidence by one prisoner against another is tainted by an improper motive. The possibility that this may be so has to be

> regarded with particular care where, as in this case, a prisoner who has yet to face trial gives evidence that the other prisoner has confessed to the very crime for which he is being held in custody. It is common knowledge that, for various reasons, a prisoner may wish to ingratiate himself with the authorities in the hope that he will receive favourable treatment from them. Of course, as Ackner LJ indicated in *R v Beck* at p 469A, there must be some basis for taking this view. The indications that the evidence may be tainted by an improper motive must be found in the evidence. But this is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence." (Emphasis added)

[21] Rose LJ in **R v Stone** [2005] EWCA Crim 105, at para. [83] reiterated the position that a judge's consideration and treatment of the issue was not trammelled by fixed rules and that not every case required a special caution or warning. He further opined that "[t]he trial judge will be best placed to decide the strength of such warnings and the necessary extent of the accompanying analysis". He also went on to say, at para. [84], that:

> "…in a case where the defence has deliberately not cross-examined the informant as to motive of hope of advantage, the law does not require the judge to tell the jury that, merely because the informant was a prisoner, there may have been such a motive."

[22] In **Pringle**, the Board ultimately found that the trial judge should have drawn the jury's attention to factors that might have indicated that the witness had an improper motive, which tainted his evidence. These factors were: (i) the informant was an untried prisoner; and (ii) it was not uncommon for persons in the informant's position to seek favour with the police, with a convenient way of doing so being the giving of evidence that his cellmate had confessed to him. As a result, the Board ruled that the appellant did

not receive a fair trial because there had been no express direction to the jury that they were to exercise caution before accepting the witness' evidence.

[23] Therefore, it follows from the cases cited above that a trial judge has a duty to warn a jury that the evidence of a witness may be tainted by an improper motive, where evidence of such an improper motive arises in a case. Further, while there are no fixed rules as to how that direction must be worded, the direction should be tailored to the particular circumstances of the case.

[24] Was the threshold for requiring such a warning crossed in the matter before us? As borne out by the evidence, Mr Hinds was awaiting trial for separate offences (conspiracy to murder, shooting with intent and illegal possession of a firearm, for which he was charged with two other persons). He testified that he learned of the deceased's name through a newspaper that he had borrowed from a warder. And, he said that, although he was approached unsuccessfully previously, he later decided to cooperate with the police by giving a statement while in custody because he was at that time approached by Mark Shields, the then Assistant Commissioner of Police, in whom he had enough trust. Further, in cross examination, Mr Hinds indicated he was offered bail months (a part of the transcript says "minutes", but that must be an error, given what is known about the bail process) after he gave that statement. It was suggested to him that he was an opportunist seeking to bargain his way out of trouble by fabricating stories against the applicant. He disagreed. It is apparent from these factors that Mr Hinds, a prisoner on remand, was being accused of fabricating his evidence in respect of the applicant.

[25] Was the learned trial judge's treatment of the evidence of Mr Hinds and Mr Bentley in this case sufficient? To ascertain this, we may commence with the learned trial judge's treatment of the evidence of Mr Hinds. Beginning at page 912 line 25 of the transcript, the learned trial judge addressed the jury as follows:

> "Do you, first of all, accept Mr. Hinds as a truthful and reliable witness when he said that this Defendant used those words

> to him after devotion, and after asking him whether or not he thought he could have been forgiven? If you suppose that these words were used by him, Mr. Foreman and members of the jury, you ask the next question, 'Were they true?' You might ask yourselves, 'If he used these words, would he be telling a lie on himself?' This is the question that you would have to ask to determine whether or not you accept, firstly, that these words were used and that they are true."

[26] At page 915, line 3 to line 10, the learned trial judge put the defence's submissions concerning Mr Hinds' evidence in this way:

> "The defence on the other hand is saying don't believe a word of what Mr. Hines [sic] is saying; Mr. Hinds is the one who is making up this plot to get this gentleman in trouble. So, you will have to look at it to see what you make of it, and will come back a little bit more in relation to what the defence is saying about him."

[27] Further with regard to the issue of receiving favours and bail, the learned trial judge told the jury, at pages 923 and 925 of the transcript, as follows:

> "He said he was charged with two other persons, and as far as he knows, they are still in custody. And you remember that came out, Mr. Foreman and members of the jury, because it was suggested to him that he was making up this story to gain favours. Now, you will have to look at that, Mr. Foreman and members of the jury, and one of the favours which was suggested was that he was granted bail.
>
> Now bail is granted after you are brought before the court."
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> "....But what was said is that Mr. Hinds…there might have been an expectation and these persons…in these persons' minds, that they would get a favour by 'mekking' up stories against this person. You would have to look at it now, you would never expect to get a favour from…certainly not from a judge in court. So, who could they get a favour from? Who did they get a favour from, finalizing bail? Did they get the favour?"

[28] In relation to the witness, Mr Bentley, the learned trial judge dealt with his evidence at page 929, line 23 to line 25 of his summation, as follows (after recounting Mr Bentley's evidence):

> "Remember the defence is saying all these conversations did not take place."

[29] Again, at page 938, lines 5 to 10:

> "Look at Mr. Bentley how he gave his evidence. Is it that he had forgotten certain things as he had said or was it that he had forgotten what he had made up and none of these things happened? These are matters for you."

[30] When reviewing the applicant's unsworn statement, the learned trial judge, at page 981, line 21 to page 982, line 1, warned the jury as follows:

> "Now, he has spoken, Mr. Foreman and members of the jury and you will have to pay attention to what he said. If you believe him that he had nothing to do with this and that the story was being made up against him, you would have to find him not guilty."

[31] At page 983, line 23 to page 984, line 6, the learned trial judge additionally pointed out to the jurors this part of the unsworn statement:

> "He said he is innocent of the charge laid against him and there is a lot of mix up in relation to the charge and all those persons that gave evidence trying to implicate him is because they have something to gain in giving evidence against him and he mentioned the fact he was never pointed out at an identification parade…"

[32] When dealing with the evidence of the defence witness, Devon Brooks, the learned trial judge, at page 988, line 15 to line 22, said the following:

> "…Mr. Brooks' testimony is important in this case, because if you believe him then it's either the witness [sic] for the Prosecution was concocting something against Mr. Hamilton. If it leaves you in doubt particularly if Mr. Bentley or Mr. Hines

> was speaking the truth then the Prosecution would not have satisfied you of the guilt of this accused man."

[33] Near to the end of the summation, when the learned trial judge was summarizing the evidence of the various witnesses, at page 993, line 1 to page 994, line 5, he stated the following (starting with the evidence of Mr Brooks):

> "He said he had nothing to gain he was serving a sentence and he would soon be out and he had nothing to gain whatever in coming to court to make up this story.
>
> Mr. Hines also said he has nothing to gain he has a matter pending, counsel for the defendant is saying that even if nothing would be gain [sic] by him there might be the perception that he can give and that would be a motivation so you would have to look at that also Mr. Foreman and members of the jury.
>
> There is also the question of gain in relation to the [sic] Mr. Bentley what it is for him to gain he has already been convicted but he has appealled [sic] before the court. Counsel is not saying that he expects that the court because of this would, look favorable [sic] on him, what counsel is saying he might think that this could be of assistance to him. These are matters for your consideration, Mr. Foreman and members of the jury.
>
> There is also the question of bail in relation to Mr. Hines. Remember I told you persons get bail although they might be charged for the same offence based on the evidence that is against them and certain other circumstances that exist, so you would also have to look at that. So that is the evidence, Mr. Foreman and members of the jury."

[34] With respect to Mr Bentley, his appeal having already been filed at the time he gave his evidence, its outcome at that time lay in the hands of the Court of Appeal. But could he, when he gave his statement to the police, have perceived or hoped, even unreasonably, that by giving evidence against the applicant, he might himself have received some favourable treatment in relation to his case; and could he have fabricated his evidence as a result of any such hope?

[35] Another factor that we have considered is that, in this case, there was nothing to objectively challenge/undermine or shatter the credibility of Mr Bentley, despite rigorous cross-examination, although, at the same time, there was also nothing to independently confirm that his testimony was truthful. In **Benedetto**, although general principles were therein stated, the Board also took into consideration, in arriving at its decision, the fact that there was proof that the witness, Plante, on whose evidence the prosecution's case was heavily dependent, was untrustworthy. For example, at paras. 44-45, the Board observed as follows:

> "44. There were a number of other passages in Plante's evidence where it is now plain that he was lying. Their Lordships do not find it necessary to explore in each and every detail all the points to which Mr Fitzgerald attached importance in the course of his argument. The following examples will suffice:
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> (1) He claimed not to remember the evidence which he gave against his fellow prisoner in Hawaii, and then suggested that it was so trivial that it took only about five minutes (transcript, volume V, 18 April 2001, p 98-99). A transcript of his evidence, which was produced at the trial, extends to 32 pages of evidence and legal argument. It indicates that his evidence, which was similar in some respects to that which he gave against Labrador, took at least thirty minutes.
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> (2) He lied about his past convictions. For example, he denied any convictions while in BVI (transcript, volume IV, 17 April 2001, pp 79-80). In fact he had been convicted of overstaying his landing rights in BVI for which he received a sentence of three months [sic] imprisonment on 12 October 1999. He stated that the only convictions which he had were in Texas (*ibid*, p 80). But he had also been convicted in Florida in 1964 for issuing worthless cheques. He denied that he had been convicted for passing a bad cheque in 1993 (*ibid*, p 158). In fact he was convicted of three such offences in 1993, and his parole was revoked in the same year for further offences of dishonesty. He admitted only one parole violation leading to his reincarceration. His record shows that his parole was revoked twice, in 1987 and again in 1993.

(3) He claimed several times that he had been given permission by his parole officer to leave Texas in 1999 to visit BVI (eg transcript, volume IV, 17 April 2001, pp 164, 169). He rejected the suggestion that he had a motive to lie in order to ingratiate himself with the authorities in BVI. He said that he had nothing to fear if he were to return to Texas (transcript, volume V, 18 April 2001, pp 27-31). This was not true. When he was returned to Texas in December 2001 his parole was revoked for, among other reasons, leaving the State without permission.

45. For these reasons and in the light of further material relating to his parole history referred to in paragraph 14, their Lordships have concluded that no value whatever can be attached to Plante's evidence. He has been shown to be a compulsive liar. His evidence is so lacking in credibility as to make it impossible to regard any conviction on his evidence alone as safe."

[36] Although not as strong as in **Benedetto's** case, the evidence in **Pringle** that suggested that the witness, Mr Simmonds, might have been motivated to give false testimony against the appellant, emerged from the possibility that Mr Simmonds might have been fed information by the police – particularly, in relation to the type of shoes that Mr Pringle might have been wearing at the time of the murder.

[37] At the end of the day, we will have to weigh Mr Hinds' and Mr Bentley's evidence against the requirements of **Pringle** and **Benedetto** to see whether the learned trial judge dealt with it adequately.

[38] We have a grave concern in relation to the evidence of Mr Hinds. Without a doubt, he was on remand awaiting trial on three serious charges. Was what the learned trial judge said about his evidence sufficient, given the requirements of **Pringle** and **Benedetto**? A judge's duty, when dealing with the evidence of a witness on remand testifying to what is said to be a cell confession, is set out at paras. 31 and 35 of **Benedetto** as follows:

"31. Their Lordships are conscious of the fact that it is undesirable to restrict the circumstances in which a judge

> may, as a matter of discretion, urge caution in regard to a particular witness when summing up to a jury, and the terms in which any warning should be given if the judge thinks that this is appropriate, by laying down rules as to when warnings of that kind must be given. But evidence of the kind on which the Crown relies in this case, where an untried prisoner claims that a fellow untried prisoner confessed to him that he was guilty of the crime for which he was then being held in custody, raises an acute problem which will always call for special attention in view of the danger that it may lead to a miscarriage of justice.
>
> ….
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> 35. It should be noted that there are two steps which the judge must follow when undertaking this exercise, and that they are both equally important. The first is to draw the jury's attention to the indications that may justify the inference that the prisoner's evidence is tainted. The second is to advise the jury to be cautious before accepting his evidence. Some of the indications that the evidence may be tainted may have been referred to by counsel, but it is the responsibility of the judge to examine the evidence for himself so that he can instruct the jury fully as to where these indications are to be found and as to their significance. Counsel may well have suggested to the jury that the evidence is unreliable, but it is the responsibility of the judge to add his own authority to these submissions by explaining to the jury that they must be cautious before accepting and acting upon that evidence."
> (Emphasis added)

[39] We take the view that, especially with respect to the evidence of the witness Mr Hinds, the learned trial judge failed to comply with the standard prescribed in **Pringle** and **Benedetto**. Although the summation in its entirety cannot, in our view, fairly be said to have been generally unfair or unbalanced, the case having been so heavily dependent on the purported cell confessions, the learning in **Pringle** and **Benedetto** behoved the learned trial judge to have gone further than was done in this case, having regard to the peculiar risks associated with cell confessions. In our view, the learned trial judge fell into error in failing to "…add his own authority to [the] submissions by explaining to the jury that they must be cautious before accepting and acting upon that evidence" (emphasis

supplied - para 35 of **Benedetto**). Neither does the summation reflect a heeding of the admonition that is given at para. 31 of **Benedetto** that the purported cell confession, such as was raised in this case, "…raises an acute problem which will always call for special attention in view of the danger that it may lead to a miscarriage of justice" (emphasis supplied). It is apparent that, in the trial, the need for caution first arose on the Crown's case. In our view, that need was further accentuated with the testimony of Mr Brooks, whose evidence supported the defence advanced by the applicant, of a plot arrived at in an attempt to "frame" him. Unfortunately, the summation does not show that any "special attention" was given to the risks associated with cell confessions. It reads as any other summation would, addressing issues (primarily credibility) in the usual, expected way.

[40] We have considered the other cases cited in this appeal, in particular **R v Price** (**'Price'**), relied on by the Crown. In **Price**, the Court of Appeal of England and Wales considered **Benedetto**, in a case which had facts that were different from the facts in this appeal. One important difference, for example, is that, unlike the instant case, in which the Crown's case relied very heavily on the evidence of Mr Bentley and Mr Hinds, in **Price**, the case did not rely primarily on the cell confession, but was presented on the basis of "a considerable body" (page 2 of the report) of other evidence. In those circumstances, it is understandable that the court rejected the argument that more comprehensive directions on the cell confession had been required.

[41] With regard to Mr Bentley's evidence, it is important to note that he was at the material time (that is, at the time he gave his statement to the police) a remandee awaiting trial for the offence of carnal abuse, and so in no different position from the informants in **Benedetto** and **Pringle**. Mr Bentley gave his statement in February of 2009 and was released on bail in October of 2010. When he gave evidence at the trial, he was on bail awaiting the hearing of his appeal from his conviction for attempting to pervert the course of justice, with which he was charged after being acquitted of the offence of carnal abuse. (In this regard, the learned judge was in error, at page 993, line 1 to page 994 of the transcript, set out at para. [33] hereof, in saying that, at the material

time he was on bail pending appeal. Certainly, at least a part of that material time when he gave his statement, on which his evidence of the cell confessions would have been based was when he was on remand for another matter. In Mr Bentley's cross-examination, it was asked of him:

> "…Did it ever enter your mind that by giving evidence in this matter, your sentence of 18 months could be reduced when it is heard in the Court of Appeal, has that ever entered your mind?"

In answer, Mr Bentley denied that it had.

[42] Further, the following was suggested to him at page 604 of the transcript:

> "Suggesting to you further, that in your warp [sic] mind you expect that you were going to get some favours."

This Mr Bentley also denied.

[43] In these circumstances, it would certainly have been better, and, in fact, was undoubtedly required, for that "special attention" mentioned in **Benedetto** to have been given to Mr Bentley's evidence as well. And, even if it could be contemplated that his evidence, taken by itself, might not have necessitated a warning from the learned trial judge, it is important to remember that his evidence did not stand alone; but was considered along with all the other evidence in the case, including that of Mr Hinds, and that Mr Brooks supported the applicant's contention of a concoction. A close reading of the transcript also unfortunately reveals that the learned judge failed even to identify the things the witnesses Hinds and Bentley testified were said by the applicant as cell confessions

[44] In the result, it is apparent that the conviction is unsafe and must be set aside.

[45] The resolution of these two grounds is sufficient for the appeal to be allowed and the conviction quashed. We will nevertheless go on to briefly consider the other grounds.

Supplemental ground 3: The learned trial judge failed in several critical instances to provide the appropriate legal warning in respect to both [sic] visual, voice and dock identification. This failure denied the jury the tools to properly assess the evidence by those witnesses and thereby denied the applicant a fair trial.

Submissions

For the applicant

[46] Counsel for the applicant submitted that Mr Devon Dockery's evidence was critical to the prosecution's case. It was further submitted that, with respect to Mr Dockery's dock identification of the applicant in court in particular, and his evidence in general, the learned trial judge had failed to give dock, **Turnbull** and voice identification warnings. (Reference to the "Turnbull" warnings being based on guidance given in the case of **R v Turnbull and Others** (1976) 3 All ER 54). Those omissions, it was argued, affected the fairness of the trial.

[47] Counsel for the applicant also proffered the argument that the applicant's trial was further prejudiced in that Mr Kemar Johnson's witness statement was admitted into evidence, as a result of his death, without any accompanying **Turnbull** warnings in respect of his knowledge and identification of the applicant.

For the respondent

[48] The Crown, on the other hand, submitted that the learned trial judge had adequately addressed the issues of visual, voice and dock identification, in circumstances in which the case against the applicant depended primarily on the evidence of the applicant's cell confession.

Discussion

[49] In relation to the visual identification evidence elicited from Mr Dockery and recorded at page 897 of the transcript, the learned trial judge reminded the jury that Mr Dockery testified that he had met the applicant at Lucas Road and that at that meeting he realised that the person with whom he had been conversing on the telephone was not

the person he had believed it to be. The following directions are recorded at page 897 of the transcript:

> "However, he said he went to an identification parade, but he pointed out somebody who was not this man, and he mentioned that he pointed out the person because this person had something tied over his head; all the men on the parade had something tied over their heads, and you bear in mind Mr. Foreman and members of the jury what he says here. All he said was that persons had something tied over their heads. But remember what he had said also was that **he could not remember the face of the person who he spoke to as Mr. Hamilton**." (Emphasis supplied)

[50] What is beyond doubt is that the learned trial judge, in clear and plain terms, directed the jury that the witness, Dockery, had failed to identify the applicant on an identification parade and even more so had testified that he could not remember the face of the person with whom he had spoken. In the circumstances of this case, in which the learned trial judge directed the jury that Mr Dockery could not identify the person with whom he had spoken, a **Turnbull** warning would have served no useful purpose. Ultimately, the jury was properly directed that Mr Dockery's identification evidence could not be relied on in support of the case against the applicant.

[51] A further demonstration of the adequacy of the learned trial judge's directions in relation to Mr Dockery's identification evidence and his dock identification of the applicant, can be seen at page 975, lines 5 to 22 of the transcript, where the learned trial judge directed the jury as follows:

> "Now in this particular case bearing in mind that he failed to point him out at the identification parade in October of 2008 **I would believe, Mr Foreman and members of the jury, that his identification of him in court is of no value**. He said he met with a man who he said was Hamilton and they spoke. Now, if the identification, Mr. Foreman and members of the jury, is of no value then what we have is that he spoke to somebody and that he eventually made a report to the police based on what he heard. So please bear that in mind, Mr. Foreman and members of the jury, if you consider

> whether or not this accused man spoke to Mr. Devon Dockery as Mr. Devon Dockery said, bear in mind **that in October 2008 he failed to point him out and merely point him out in court, four years later**." (Emphasis supplied)

[52] The learned trial judge, in the summation, clearly directed the jury that the dock identification was of no value. In other words, it could not assist them in establishing the case against the applicant. Therefore, in keeping with that direction, the jury could not properly have relied on the dock identification to find beyond a reasonable doubt that the applicant had murdered the deceased.

[53] Further treatment of Mr Dockery's identification evidence is recorded at page 904. There, the learned trial judge referred to Mr Dockery's statement made prior to the identification parade when he had stated that he had a photographic memory of the applicant. The trial judge directed the jury that they had to determine whether to treat it as an inconsistency and what weight, if any, was to be accorded to it. Those directions, in all reasonableness, could not be faulted.

[54] Several cases affirm the principle that the **Turnbull** guidelines should also be adapted and applied to voice identification evidence. In the case of **R v Rohan Taylor** et al (1993) 30 JLR 100, at page 107, for example, Gordon JA reiterated the following guidance:

> "In order for the evidence of a witness that he recognized an accused person by his voice to be accepted as cogent there must, we think, be evidence of the degree of familiarity the witness has had with the accused and his voice and including the prior opportunities the witness may have had to hear the voice of the accused. The occasion when recognition of the voice occurs, must be such that there were sufficient words used so as to make recognition of that voice safe on which to act. The correlation between knowledge of the accused's voice by the witness and the words spoken on the challenged occasion, affects cogency. The greater the knowledge of the accused the fewer the words needed for recognition. The less familiarity with the voice, the greater necessity there is for

> mere spoken words to render recognition possible and therefore safe on which to act…"

[55] The learned trial judge's direction in relation to Mr Dockery's purported voice identification of the applicant is recorded at page 893, lines 2 to 19 of the transcript and is quoted below:

> "He said on the 21st of October, he received another phone call from the same person because he recognised the voice as the same voice; he said this was Tuesday. He said on the Thursday about 5 o'clock, he received another call from the same voice. Now you will have to look at it because counsel for the defence is saying persons can't recognise voice of having spoken to a person briefly for just two minutes; but you will have in fact [to] bear that in mind, Mr. Foreman and members of the jury. Can you recognise the voice of somebody that you hear for two minutes prior, for a short while? There is no indication or no evidence at all as to whether or not there was any peculiarity with this voice, so you will have to bear that in mind Mr. Foreman and members of the jury."

[56] The learned trial judge directed the jury that they would have to decide whether there was sufficient opportunity for the witness to have recognised the voice he said he heard. Aside from the duration of time to hear the voice and the several instances of conversation, the learned trial judge pointed out that there was no further evidence of any peculiarity of the voice. In keeping with that observation, there would have been no need for further directions along the lines of **Turnbull** on the voice identification evidence of Mr Dockery.

[57] As such, the omission must be viewed in the context of the rest of the evidence that was before the court. We find no merit in the submission that the absence of **Turnbull** warnings on this identification evidence rendered the applicant's trial unfair.

[58] In our assessment, the treatment of the visual, voice and dock identification by the learned trial judge enured to the benefit of the applicant, as those pieces of evidence were ultimately held to be of no value.

[59] In relation to the witness statement of Mr Kemar Johnson, the learned trial judge directed the jury as follows:

> "Now, Mr. Foreman and members of the jury, we had a statement which was read to you, statement from Mr. Kemar Johnson who is called Ninja. Remember the warning and caution I gave you in relation to that. **He did not attend any identification parade to say this is the man he met who is called Rushon, he had not met him before. Remember he said this man called him several times on the phone, we do not know if there is any peculiarity in the voice, he came to recognise the voice.** Remember also that you did not see him, you were not able to assess his demeanor. Also, Mr. Foreman and members of the jury, what he gave was a statement which was not on oath and was not subject to the test of cross-examination. So we will have to bear that in mind. Also, Mr. Foreman and members of the jury, was this really the person he met? It was said this is the person and the person was called Rushon. Remember the example, somebody could always say this is my brother and is [sic] not their brother so you have to bear that in mind when considering your verdict." (Emphasis supplied)

[60] The learned trial judge's directions brought to the jury's attention the correct approach to be taken and the matters to be considered in treating with Mr Johnson's witness statement. Those included the fact that: (i) the witness statement was not given on oath or tested on cross examination; (ii) Mr Johnson had not identified the applicant on an identification parade; (iii) neither was any peculiarity of the voice identified by Mr Johnson, which could have assisted the jury in their assessment. We discern no error in these directions which could have undermined the fairness of the applicant's trial or the safety of his conviction. We, therefore, find no merit in the submission that the learned trial judge failed to properly direct the jury how to treat with the dock, visual and voice identification.

Supplemental ground 4: the verdict is unreasonable having regard to the evidence.

<u>Submissions</u>

For the applicant

[61] For the applicant, it was submitted that the case in the trial below consisted of circumstantial evidence, which was inadequate to safely secure the applicant's conviction. That deficit, it was argued, was further compounded by the learned trial judge's poor treatment of the identification evidence.

For the respondent

[62] Crown Counsel submitted that the case against the applicant rested primarily on the evidence of the cell confessions from Mr Hinds and Mr Bentley and the jury's acceptance or rejection of those pieces of evidence. In the light of those pieces of evidence, it was submitted that the verdict could not be deemed unreasonable.

Discussion

[63] We have already considered the circumstances surrounding the circumstantial evidence of the cell confession (grounds 1 and 2) and the treatment of Mr Dockery's identification evidence and dock identification of the applicant (ground 3). On the footing of the cumulative effect of the resolution of those grounds against the applicant, we find that it is only grounds 1 and 2 that would justify a resolution of this ground in the applicant's favour.

Supplemental ground 5: the sentence is manifestly excessive.

No written submissions were advanced for the applicant on this ground. In the light of how supplemental grounds of appeal 1 and 2 have been resolved, it is, in our view, unnecessary to discuss this ground.

The question of a re-trial

Summary of submissions

For the applicant

[64] On the applicant's behalf, Mr Fletcher submitted (in written submissions filed on 27 July 2023), that the question of whether there should be a re-trial gives rise to two categories of issues: (i) whether the decision is in the overriding interests of justice; and

(ii) whether the Crown can administratively mount a new trial or be allowed to do so, having regard to such considerations as the expense involved, the length of time of a new trial, the seriousness of the offence and other factors. He cited, as being among the cases setting out and discussing these considerations, the cases of: (i) Vaslyi v R SC Cr App No 255 of 2015 (Court of Appeal of the Bahamas) judgment delivered 25 July 2017; (ii) **Calvin Reid v R** [2020] JMCA Crim 14 and (iii) **Dennis Reid v R** [1980] AC 343.

[65] Apart from the contentions advanced in the hearing of the application for leave to appeal, as to what the applicant's counsel contend to be the weakness of the case against him and what they say were egregious errors made in relation to critical issues, some 10 other considerations were highlighted. Among them were: (i) that 10 years have elapsed since the conviction; (ii) One of the cell confession witnesses (presumably Mr Hinds) got bail shortly after he gave his statement; (iii) The entering into evidence of a statement concerning a way of disposing of a body, which was highly prejudicial; (iv) The possibility of having an admitted statement from Mr Hinds who, from a newspaper report, has died; and (v) The tremendous expense for the applicant.

[66] His overall submission was that a re-trial would not be in the interests of justice.

For the Crown

[67] On behalf of the Crown, submissions were filed on 31 July 2023, over the signature of Ms Kathy Pyke. Ms Pyke also relied on the case of **Reid v R**, cited by Mr Fletcher, and **Morris Cargill v R** JMCA [2016], in which Brooks JA (as he then was) discussed the case of **Reid v R** and reviewed what considerations are to be borne in mind when making a decision whether to order a re-trial.

[68] Ms Pyke stated that the two witnesses who testified to the cell confessions (Mr Hinds and Mr Bentley) were killed some time ago. In mounting a re-trial, the Crown would have to make an application for their statements to be entered into evidence pursuant to section 31 of the Evidence Act. It is believed that the other witnesses are available, based on the information received from the investigating officer. It was submitted, as well, that

this was not a case in which the appeal might be allowed because of the insufficiency of evidence. Neither would the Crown be given an opportunity to cure evidential deficiencies. Also the re-trial would not take an inordinately-long time. She also urged the court to consider that, although there is a concern about the length of time that has passed since the applicant's conviction, the prevalence of the crime and what she referred to as the quality of the evidence, were important factors in the Crown's favour that pull the weight of all the factors in the direction of a re-trial. A re-trial, she submitted, would be in the interests of justice.

The applicant's response to the Crown's authorities

[69] In response to the Crown's submissions, the applicant made further submissions dated 25 August, 2023. Those submissions were primarily based on the case of **Morris Cargill v R** [2016] JMCA Crim 6, in particular at para. [62]. At that paragraph, on the facts of that case, this court unanimously opined that a retrial would not be in the interests of justice, as, on a retrial, the absence of the prosecution's sole eyewitness would severely restrict the applicant in his defence by his having the task of confronting the witness' evidence on paper without the benefit of being able to demonstrate the difficulties in his evidence.

[70] It was Mr Fletcher's submission that the Crown's case below was based on circumstantial evidence in which the two witnesses as to cell confessions were now deceased. One of those witnesses, he submitted, benefitted from a *nolle prosequi* on which, on any retrial, he would be vigorously cross-examined as to its circumstances.

[71] He further submitted that:

> "Whereas in the trial the defence was faced with the prejudice of one witness who had died and two cell confessions which we opposed, if there was a retrial we would be faced with three disembodied testimonies where we would be severely prejudiced by our inability to test critical elements in them."

Discussion

[72] The starting point for a consideration of this matter is section 14(2) of the Judicature (Appellate Jurisdiction) Act. That section reads as follows:

> "(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."

[73] In **Reid v R** (cited by both sides), the principles to be followed when considering this section were reviewed. Among them are the following (set out at page 246 in the headnote):

> "Factors which may be taken into account include the seriousness or otherwise of the offence, its prevalence, the length of the previous trial and the length and expense of a new trial, the ordeal to be undergone a second time by the accused, the length of time between the offence and the new trial and the effect of this on the quality of the evidence. The probability that a new trial will result in a conviction is not a precondition to ordering a new trial as the interests of justice may nevertheless demand that the matter should be determined by the verdict of a jury."

[74] An important consideration as well is whether the quashing of the conviction comes about as a result of inadequacy of the evidence presented on the one hand, or as a result of a technical blunder or misdirection. In this case, the reason for the quashing of the conviction has been brought about by the learned trial judge's unfortunate omission, in an otherwise fair and balanced summation, to direct the jury in keeping with the principles set out in **Pringle** and **Benedetto**. We have given very careful consideration to the applicant's submissions as to prejudice. We do not take the view that the circumstances of this case reach the level of concern justifiably attained in **Morris Cargill v R**, in which the sole eyewitness had died and the fresh evidence called, which supported the applicant's alibi, raised the likelihood of a miscarriage of justice. In this application, the allegations against the applicant are very concerning, and speak to a deliberate,

premeditated, conspiracy to and actual murder of a virtual complainant orchestrated and carried out by the applicant himself. On our review of the transcript, any retrial should not take an unduly-long period of time. Additionally, the concern about the *nolle prosequi* put forward by the applicant could still be addressed, perhaps by the tendering of that document into evidence by consent, for the jury's consideration. Although, bearing in mind the presumption of innocence and the fact that the applicant will have to endure a second trial, as well as the fact that there has been a 10-year delay between the applicant's conviction and now, we entertain no doubt that, in the interests of justice, a retrial must be ordered, subject to the availability of witnesses and other similar considerations in the Director of Public Prosecution's review of the matter.

[75] It is for the foregoing reasons that we make the following orders:

i. The application for permission to appeal is granted.

ii. The hearing of the application is treated as the hearing of the appeal and the appeal is allowed.

iii. The conviction is quashed, the sentence is set aside; and, in the interests of justice, a re-trial is ordered, such re-trial to take place at the earliest possible time.