[2022] JMCA Crim 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 14/2017

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE BROWN JA (AG)

CLIFTON HARRISON v R

Gladstone Wilson for the applicant

Mrs Tracy-Ann Robinson and Miss Vanessa Campbell for the Crown

1, 2 July 2021 and 18 March 2022

BROWN JA (AG)

Introduction

[1] The applicant, Clifton Harrison, was convicted on 27 January 2017, after a trial lasting several days before David Fraser J (as he then was) ('the learned judge') and a jury of the murder of Louise Barnes ('Miss Barnes') on a day unknown between 30 September 2009 and 2 October 2009. On 27 January 2017, he was sentenced to life imprisonment with the stipulation that he serves 32 years before becoming eligible for parole.

[2] His application for leave to appeal his conviction and sentence was considered by a single judge of this court on 21 May 2020 and refused. As is his right, he renewed his application for leave to appeal his conviction and sentence before this court, which we heard on 1 and 2 July 2021. At the conclusion of the submissions, we reserved our decision.

[3] We will now consider the several grounds of appeal, together with the submissions and arrive at a decision. However, before embarking upon these considerations, it is appropriate that we encapsulate the evidence and material that was placed before the jury, and upon which, ultimately, they returned an adverse verdict.

The case at trial

(a) The case for the prosecution

[4] The case for the prosecution was wholly dependent on circumstantial evidence, inclusive of forensics, from the fact of death, through the identification of Miss Barnes to the nexus of her homicide with the applicant. The evidence at the trial swirled around the fact that Miss Barnes was missing; the efforts to find her, which involved much interaction between the family of Miss Barnes and the applicant; and, ultimately, the forensic examination of the house she owned at Wellside Lane, Old Harbour in the parish of Saint Catherine ('the Wellside Lane property'). The prosecution's case, understandably, commenced with evidence about Miss Barnes' last sighting and her connection to the Wellside Lane property.

[5] It was the prosecution's case that Miss Barnes was last seen alive on 30 September 2009. Miss Barnes left her home in Saint Thomas to visit the Wellside Lane property, where the applicant resided. Miss Cashara Williams, Miss Barnes' neighbour, saw her walking pass her home towards Cotton Tree Square, carrying a travelling bag and her handbag.

[6] On 2 October 2009, the Old Harbour police received information that led them to Thetford Farm in Old Harbour, where they discovered burnt human remains, with parts of both legs and arms lying separately from the rest of the body. A post mortem examination was done by Dr Prasad, a forensic pathologist, at the location, on the burnt human remains. Dr Prasad gave a part of the femur and mandible of the human remains to the police. This was taken to the Institute of Forensic Science and Legal Medicine

('IFS&LM') for analysis. The cause of death was, in the opinion of the pathologist, due to blunt force injury to the head.

[7] Miss Barnes' sister, Mrs Ida Johnson ('Mrs Johnson'), received information as a result of which she tried to contact the deceased by phone. She also contacted other relatives in order to find out if they knew the whereabouts of her sister. Unfortunately, the efforts made to locate Miss Barnes proved futile. Miss Barnes' two children, Nigel Williams ('Mr Williams') and Verinea Bourne ('Miss Bourne'), who resided overseas, were also made aware.

[8] On 12 October 2009, Mrs Johnson made a missing person's report about her sister at the Old Harbour Police Station. The police thereafter accompanied her to the Wellside Lane property. The applicant was at the premises. They went inside the house, where the police noted that there was a bed in one of the rooms without a mattress.

[9] The applicant told the police that Miss Barnes had instructed him to burn the mattress as it was infested with 'chinks' (bed bugs). Sergeant Lawrence, one of the police officers who went to the house with Mrs Johnson, also testified that the applicant told him that Miss Barnes had visited the house and had left on 25 September 2009 to Kingston en route to Saint Thomas and he had not seen her since.

[10] The Crown also relied on forensic evidence based on tests or analyses done on samples collected from the house. Miss Brydson, a former Government Forensic Analyst, visited the Wellside Lane property, collected samples from both bedrooms and made certain observations about the premises. Based on her visit, Miss Brydson concluded that there was no sign of forced entry to the dwelling house, an injured person came in contact with the bed linen in the north-western bedroom (the applicant's room) and that an individual was injured in the north-eastern bedroom (Miss Barnes' room).

[11] Miss Brydson collected samples of what appeared to be bloodstains for further analysis. Among the samples collected were a swab from a brown drop on the southern

door of Miss Barnes' bedroom and a sample from a brown stain on a white lace runner in that bedroom.

[12] Deoxyribonucleic acid ('DNA') analysis was conducted on the ten samples collected from the house at Wellside Lane, a portion of the mandible and femur from the severely burnt human remains, and buccal swabs from Miss Barnes' son, Mr Williams and her daughter, Miss Bourne. According to Mrs Brydson's evidence, the DNA analysis revealed that the mandible and femur contained female DNA. In addition, DNA analysis done on the femur and the mandible and the DNA obtained from the buccal swabs taken from Miss Barnes' children revealed a maternal relationship between the deceased and Miss Bourne and Mr Williams.

[13] The two samples taken from the white lace runner in Miss Barnes' bedroom corresponded with the DNA findings of the mandible and femur. These tests showed that the burnt remains found at Thetford Farm were those of Miss Barnes and that she had been injured in the house at the Wellside Lane property. Further, the applicant was in control of the premises. There was no sign that the house had been broken into, neither was there any record of any report of any such incident.

[14] The Crown also relied on oral statements made by the applicant to the police as well as a written cautioned statement and a question and answer interview in which he gave two different dates as to when he had accompanied Miss Barnes to the bus stop.

(b)The case for the applicant

[15] At the end of the prosecution's case, counsel for the applicant made a submission of no case to answer, which was rejected by the learned judge. The applicant then made an unsworn statement from the dock. In his statement, the applicant described himself as a forklift operator. He met the deceased sometime in August 2007 and became the caretaker of the Wellside Lane property. The deceased visited the property in September 2009. However, she left on 25 September at about 5:30 am. At about that time, at her request, and by prearrangement, he walked with her to the entrance of Wellside Lane.

He waited with her there until she boarded a public passenger bus that was coming from the direction of May Pen and going towards Kingston. After seeing her off, he returned home, slept for about half an hour, had breakfast, then left to Kingston to conduct business. That was the last time he saw or heard from Miss Barnes.

[16] Three weeks later, he received a telephone call from Mrs Johnson. That call caused him to return to the Wellside Lane property. On his arrival, he saw Mrs Johnson in the company of two other women. Mrs Johnson told him that she had not heard from Miss Barnes in three weeks. That news traumatised him. He commented that he would sadly miss her. He and Miss Barnes had never quarrelled, had any misunderstandings or issues. He ended by saying, she would take things for him on her visits to the property.

The appeal

[17] At the commencement of the hearing, the applicant sought and obtained leave to abandon the original grounds of appeal filed in the Criminal Form B1 and to argue five supplementary grounds filed on 8 April 2021. The supplementary grounds are listed below:

> "1. The [learned judge] fell into error by not upholding the non-case [sic] submission made on behalf of the Appellant and so allowed the Jury to speculate about possible, credible inferences from suggested information unconnected to any act of murder.
>
> 2. In his charge to the Jury the [learned judge] used two different standards of credibility that should be applied which was unfair to the Appellant and obviously contributed to the verdict of guilty.
>
> 3. The good character of the Appellant did not benefit from a fulsome direction which would have the effect of placing the Appellant's position in a favourable light which was a requirement in the circumstances.
>
> 4. The evidence adduced during the trial can best be described as tenuous and suggestive leading to a verdict that is inconsistent with any logical conclusion of guilt. This

> inconsistent verdict was also encouraged by some of the directions given by the [learned judge] that were unfair to the Appellant's expectation of a fair treatment of his case.
>
> 5. The sentence imposed by the [learned judge] was excessive in all the circumstances having regard to sentences handed down in other cases of Murder based partially or wholly upon circumstantial evidence."

Discussion

Applicant's submission on grounds one and four

[18] Mr Wilson, on behalf of the applicant, made submissions under grounds one and four together. The complaint under ground one was that the prosecution failed to forge a scientific link between the applicant and other confirmatory DNA samples from the crime scene. In the face of that failure, the learned judge appears to have satisfied himself that the remaining uncorroborated evidence was sufficient to be left to the jury, with proper directions. In so doing, it was argued, the jury was left to "make a convincing leap from proven facts to the act of murder". In his submission, counsel for the applicant placed the evidence for the prosecution in five categories: forensic, benign, gaps, suspicious and further suspicious.

[19] Under forensic evidence, counsel for the applicant submitted that no link was established, either inferentially or directly, with the applicant's presence in any of the two rooms or from any contact with the body of Miss Barnes. Citing an extract of the evidence of Detective Inspector Reynolds, in which he said the applicant showed him his body, but he saw nothing of interest, it was submitted that the learned judge insinuated this evidence bore some importance. In the next breath, the learned judge's charge to the jury not to use the blood found in the applicant's bedroom in any way adverse to him was labelled as ironic.

[20] From the attack on the forensic evidence, counsel for the applicant turned his attention to his benign evidence classification. Here the focus of his complaint was the prosecution's evidence that there was no forced entry. In this submission, for an adverse

inference to be drawn, the prosecution would have to first prove that no one else occupied or visited the premises during the life of Miss Barnes. In this regard, emphasis was placed on other persons accessing the property in connection with the unfinished construction work and a Mr Oswald, who had access to the interior of the house. In addition, no one questioned the prosecution's witness, Mr Steve White, to ascertain if the applicant was alone on the premises at the time of the disappearance of Miss Barnes.

[21] From the "benign evidence", the applicant's counsel moved to gaps in the evidence. In essence, he submitted that the whereabouts of Miss Barnes had not been established. It was submitted that although Miss Cashara Williams testified to seeing Miss Barnes on 30 September 2009, there was no evidence that Miss Barnes boarded any vehicle or that she arrived in Old Harbour on that or any other date. In the vein of establishing her whereabouts, it was also submitted that no checks were made at the Jamaica Public Service Company ('JPS Co') about an appointment that Miss Barnes had there. Another gap was the failure to contact Miss Michelle Stewart to verify the applicant's assertion that she had told him she saw Miss Barnes.

[22] In addition to the gaps in the evidence, according to Mr Wilson's terminology, there was also suspicious evidence. Under this head, counsel addressed the evidence of the applicant obtaining money from the relatives of Miss Barnes and the telephone call about the ransom. In respect of the former, it was submitted, firstly, that there was no evidence that the money was obtained by extortion, only in furtherance of efforts to find Miss Barnes. Secondly, that there was no record of which police officer received the report and possibly benefitted was not in itself proof that the activities did not occur. As it concerned the ransom, criticism was levelled at the police for not pursuing that angle.

[23] The submissions under further suspicious information, in essence, challenged the use of the call data at the close of the prosecution's case "without cogent and confirmatory voices". Counsel argued that without voice confirmation, the call data was no more than evidence of two instruments communicating with each other. Therefore, the leading of this evidence without more was "fuzzy, suggestive or conspiratorial".

[24] The submissions made under ground four may be shortly stated. Four pieces or areas of isolated and competing hypotheses were advanced. The first concerned the evidence of the date Miss Barnes was last seen by Miss Cashara Williams, 30 September 2009. It was argued that without evidence from Mr Steve White as to when in September he saw Miss Barnes and the applicant together or of any communication between Miss Cashara Williams and Miss Barnes, 30 September is a date of conjecture from which no adverse inference could be drawn. It was also highlighted that both the applicant and Mrs Johnson said they last saw Miss Barnes on 25 September 2009. The complaint was that the learned judge, in his directions to the jury, used the evidence of Miss Cashara Williams "by itself" to consider where the truth lies.

[25] The second was the alternative hypothesis to the accepted fact that both the applicant and Miss Barnes were known to each other. Citing the evidence of Mr White, the argument advanced was that there was nothing in the evidence about the relationship between the applicant and Miss Barnes or any of his named neighbours, from which a negative inference could be drawn. In essence, no motive arose from the evidence of the relationship between the applicant and Miss Barnes. The contention was that the learned judge erred in failing to point out this weakness in the evidence and its ultimate impact on the totality of the evidence against the applicant.

[26] The third item of evidence is related to the sponge or mattress. It was submitted that although the prosecution tried to establish contradictory statements by the applicant, the prosecution's evidence on the point was contradictory. In contrast, it was submitted, the applicant was credible and consistent.

[27] The fourth, and last category, focused on the DNA evidence. The submission on this point asserted that the scientific evidence, juxtaposed with other evidence, exposed internal contradictions. In so doing, it can be used to assess the reasonableness of the inferences put forward by the prosecution. The applicant's counsel then extracted from the learned judge's summation the section establishing the match/random occurrence

ratio of Miss Barnes' DNA profile and the maternal probability between her and her children who testified.

Crown's submissions on grounds one and four

[28] Mrs Robinson submitted, in relation to ground one, that the evidence for the prosecution was such that its strength or weaknesses depended on the view to be taken of matters that were within the province of the jury. In short, the learned judge's ruling on the submission of no case to answer fell to be considered under the second limb, in particular 2(b), of the celebrated case of **R v Galbraith** [1981] 1 WLR 1039. Therefore, the learned judge was correct in refusing to uphold the submission of no case to answer.

[29] Applying that learning to this case, Mrs Robinson referred to Dawson J's definition of circumstantial evidence in **Shepherd v R** [1991] LRC (Crim) 332, which was cited in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26 ('**Baugh-Pellinen v R**'). Reference was also made to **DPP v Selena Varlack** [2008] UKPC 56 ('**DPP v Varlack**'). We will discuss or refer to these cases below. Capping her submissions on this point, Mrs Robinson argued that the case does not fall within the class of cases to be withdrawn from the jury because the circumstantial evidence "is not capable in law of supporting a conviction".

[30] In essence, the submission in response to the challenge on ground four was that the learned judge adequately and thoroughly guided the jury and that the applicant's challenge of the evidence by a process of disaggregation is contrary to authority. It was further submitted that the learned judge's directions to the jury not to speculate was sufficient to meet the challenge levelled at the call data and voice note evidence.

Analysis

[31] It is convenient to discuss grounds one and four together as they overlap in the complaint the applicant makes in the appeal. Under ground one, the applicant argues that the learned judge erred in not upholding the submission of no case to answer. Ground four attacks the quality of the evidence that was, therefore, left for the jury's

consideration, which was described as tenuous. The further complaint is that some of the learned judge's directions fell below the applicant's expectation of a fair trial. For the orderly presentation of the discussion, we will commence with the criticism to call upon the applicant to answer the charge laid in the indictment.

[32] The question to be considered by a trial judge upon a submission of no case to answer is perhaps best understood against the backdrop of the nature of circumstantial evidence. Circumstantial evidence is to be distinguished from direct evidence. In respect of the latter, when the facts in issue are established by testimonial evidence, it is evidence which the witness claimed to have perceived by his senses and so asserts personal knowledge of the matters upon which he deposes; for example, that he saw the perpetrator discharge the firearm which resulted in the gunshot wound. Circumstantial evidence, on the other hand, is evidence of relevant facts, that is, facts from which the existence of facts in issue may be inferred (see Cross & Tapper on Evidence and Blackstone's Criminal Practice 2007 para. F1.10). Put another way, "[c]ircumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts", per Dawson J in **Shepherd v R**, at page 337.

[33] The distinguishing feature of circumstantial evidence is that no one circumstance is probative of guilt. Its efficacy is in an accumulation of circumstances from which the ultimate inference of guilt beyond a reasonable doubt may be drawn. Accordingly, the jury need not be sure of guilt in relation to individual items relied on by the prosecution. Instead, they may draw the inference of guilt upon a consideration of the whole of the evidence while holding the prosecution to the requisite incidence of the burden and standard of proof. In the language of Dawson J in **Shepherd v R**, at pages 337-338:

> "… the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to

> consider the degree of probability of each item of evidence separately."

[34] The classic statement of this proposition was delivered by Lord Simon of Glaisdale in **Director of Public Prosecution v Kilbourne** [1973] AC 729 ('**DPP v Kilbourne**'). At page 758, he said, "[circumstantial evidence] works by cumulatively, in geometrical progression, eliminating other possibilities". In Pollock CB's analogical articulation in **R v Exall** (1866) 4 F & F 922, at page 929; 176 ER 850 ('**Exall**'), circumstantial evidence is likened to a multi-cord rope, each cord comprising several strands. Whereas one strand may be insufficient to bear the weight, several strands, woven together, may prove of sufficient strength. We quote:

> "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but it is not so, for then if any one link breaks, the chain would fall. It is more like the case of a rope comprised of several cords. One strand of the cord might be insufficient to sustain the weight but three strands together may be of quite sufficient strength. Thus it may be in circumstantial evidence there may be a combination of circumstances no one of which would raise a reasonable conviction or more than mere suspicion, but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."

[35] The jury is, therefore, required to find proved, before they can be sure of the guilt of the accused, relevant facts which, to a reasonable mind, amounts to more than mere suspicion. To this end, the jury is called upon to scrupulously scrutinize the circumstantial evidence. Care must be taken to eliminate other possibilities, for example, contrary hypotheses and fabrication. According to Lord Normand in **Teper v R** [1952] AC 480, at page 489:

> "Circumstantial evidence may sometimes be conclusive, but it must always be narrowly examined, if only because evidence of this kind may be fabricated to cast suspicion upon another. Joseph commanded the steward of his house, 'put my cup, the silver cup, in the sack's mouth of the youngest', and when the cup was found there Benjamin's brethren too hastily

> assumed that he must have stolen it. It is also necessary before drawing the inference of the accused's guilt from circumstantial evidence to be sure that there are no other co-existing circumstances which would weaken or destroy the inference."

[36] The guidance from the **DPP v Kilbourne**, **Exall** and **Teper v R** suggests that at the end of the prosecution's case, the relevant facts which it is assumed the jury accepts must be collected and collated, together with the reasonable inferences open to be drawn by the jury. Some of these inferences may be favourable to the prosecution and some not. Firstly, it is not the function of the judge at the close of the prosecution's case to selectively sift the inferences which are reasonably open to the jury. Secondly, it must be left to the jury to cherry-pick the reasonable inferences supportable by the evidence elicited by the prosecution.

[37] If all the reasonable inferences favourable to the prosecution are incapable of impelling the mind of a reasonable jury in one direction and one direction only, that is, being sure of the guilt of the defendant, there is no case to answer. So that, the conclusion that there is no case to answer must rest upon a foundation of all reasonable inferences favourable to the prosecution being adjudged a wholly insufficient base upon which to found a conviction. In other words, the evidence adduced by the prosecution, however favourably regarded, cannot sustain a conviction.

[38] That, it appears, is the essence of the re-statement of the principles laid down in **R v Galbraith**, by the Supreme Court of South Australia in **Questions of Law Reserved on Acquittal (No 2 of 1993)** (1993) 61 SARS 1, 5 and accepted by their Lordships as an accurate statement of the law in **DPP v Varlack**. This is how it was cited in **DPP v Varlack** at para. 22:

> "… There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond

> a reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open upon the evidence."

[39] In **Baugh-Pellinen v R**, after collecting and collating the various items of circumstantial evidence upon which the prosecution relied, excluding the 'jailhouse confession', the court said that, without the jailhouse confession, it would have been difficult to resist the no case submission. Morrison JA (as he then was), at para. [36] opined, that it was:

> "… impossible to say that the various items of evidence … even read together and cumulatively, could give rise to an inference that the appellant was implicated in the deceased murder in any way …"

That was the view of the court, although admitting that some parts of the evidence were "puzzling" and "suspicious".

[40] Like the biblical account of Isaac relying on three circumstances to confirm the identity of Esau, a reasonable mind was not impelled in one direction, although the evidence was viewed cumulatively. Isaac directed Esau to go and hunt venison then prepare him a savoury meal whereupon he would bless Esau. Rebekah, the mother of Esau and Jacob, connived with Jacob to obtain Esau's blessing by subterfuge. That is, goats from their nearby flock were killed, Rebekah prepared the meal and dressed Jacob in Esau's clothing, covering Jacob's hands and neck with the skin of the goat to mimic Esau's hairy skin, when he presented the meal to Isaac. Isaac was thereby deceived in spite of the gaps: one, the return from the hunt was too brief and two, the voice was that of Jacob, even though his hands were hairy like Esau's and his clothing bore the smell of the fields.

[41] In the learning of **DPP v Kilbourne**, the circumstances relied on by Isaac did not work cumulatively, geometrically eliminating the possibility of deception. Closely examined, Isaac would have reasoned that the return from the hunt was contrived for its quickness, and his conclusion of Jacob's identity as Esau by his smell and touch,

undermined by his conclusion that it was Jacob's voice. This evidence was therefore incapable of causing a reasonable mind to exclude the competing hypothesis of fabrication through deception as unreasonable. It would, therefore, be insufficient to make a jury feel sure to return a verdict of guilty.

[42] If, however, the evidence at the close of the case for the prosecution "was such that a reasonable jury, properly directed, would have been entitled to draw the inference of guilt beyond reasonable doubt", then there is a case to answer (see **Baugh-Pellinen v R**, at para. [34]). The dispositive question for the tribunal of law at the no case stage is, to express the learning in **Questions of Law Reserved on Acquittal** in limited catechetical terms, is the evidence adduced able to persuade a reasonable mind to a conclusion that it is sure of the guilt of the accused and by so doing exclude all competing hypotheses of innocence as unreasonable? If the answer is in the affirmative, then there is a case to answer. If the answer is in the negative, the judge would be under a duty to withdraw the case from the jury, directing them to return a verdict of not guilty.

[43] It seems, therefore, that a trial judge is required to make a preliminary decision in law whether the quality of the circumstantial evidence, taken cumulatively, is fit to be left for the jury's consideration. If the judge considers that the evidence amounts to no more than mere suspicion, the case should be withdrawn from the jury: **Baugh-Pellinen v R.** This qualitative assessment of the evidence at the end of the case for the prosecution, as an obligation of the trial judge, is the fundamental proposition of what has been styled the canonical judgment of Lord Lane CJ, in **R v Galbraith**.

[44] From the principles distilled in **R v Galbraith**, in the straightforward case where one or more of the elements of the offence is missing, the trial judge has an uncomplicated decision to stop the case, upon a submission of no case to answer. The hard decisions arise in cases where the prosecution's case has reached this evidentiary threshold. Consequently, the problem addressed in **R v Galbraith** is one of nexus, that is, is there a link between the crime charged and the defendant? If there is no nexus, the judge will stop the case. In Lord Lane's expression, at page 127 of the report "(1) [i]f

there is no evidence that the crime alleged has been committed by the defendant there is no difficulty – the judge will stop the case".

[45] The nexus conundrum arises in cases where the evidence, which the prosecution says connects the defendant to the crime, is tenuous. It is here that the trial judge is called upon to make the preliminary assessment of the evidence. That assessment leads the judge to one of two conclusions, which falls under either (2)(a) or (b) of Lord Lane's propositions. The inevitable result of the former is that the case is withdrawn from the jury. The consequence of the latter is that the trial proceeds.

[46] In this case, the submission of no case to answer was made against the background of the evidence for the prosecution. Counsel for the applicant at the trial divided the evidence for the prosecution into two categories, namely evidence of a "general nature" and evidence of a "forensic nature". In the former category, he listed the burning of Miss Barnes' mattress by the applicant, the contradictory indications by the applicant of the dates he escorted Miss Barnes to the bus stop, the fact of their occupancy of adjoining rooms, the applicant's false claim to having made a report at the Central Police Station and the discovery of the remains of Miss Barnes approximately one mile from the Wellside Lane property. He submitted that these bits of evidence, which he characterised as the "essence" of this category, would be insufficient as circumstantial evidence.

[47] Counsel at trial then turned his attention to the evidence of a "forensic nature". Here, he listed blood found in Miss Barnes' room; the fact that that blood was established to belong to Miss Barnes; that Miss Barnes' blood from the room was forensically linked to the burnt human remains; and that there was blood in the applicant's room from a male contributor.

[48] Counsel at trial then submitted there was a "plethora of evidence" that was either consistent with innocence or pointed in that direction. Although he acknowledged that, based on **DPP v Varlack**, the presence of evidence pointing in the direction of innocence

was no warrant to stop the case, he submitted guidance could be had from **R v Goddard and Anor** [2012] EWCA Crim 1756 a decision of the England and Wales Court of Appeal.

[49] In so far as the evidence of a "forensic nature" was concerned, counsel at trial conceded that on the face of it, "it appears to be strong". He submitted, however, that guidance could be sought from **Attorney General of BVI v Michael Spicer and Alexander Benedetto** Criminal Appeal No 6/2001; **William Labrador v R** Criminal Appeal No 10/2001, judgment delivered 14 January 2001 (**'AG v Spicer'**). In seeking to relate **AG v Spicer** to this case, counsel at trial pointed to the equivocal nature of the blood found in the applicant's bedroom, in that, it was only classified as coming from a male contributor.

[50] The equivocal nature of the blood found in the applicant's bedroom was one of several items counsel at trial identified as "loose ends". Others falling under this label were the failure of the police to explore whether the applicant remained at the house throughout after returning from the bus stop; no follow-up on the ransom call received on 16 October 2009; Miss Michelle Stewart's sighting of the deceased downtown, Kingston; and the failure to exclude males residing in the vicinity as the possible contributors from the blood found in the applicant's room.

[51] The learned Senior Deputy Director of Public Prosecutions, who appeared at the trial, gave what, in our opinion, was a fulsome response.

[52] In rejecting the submission that there was no case to answer, the learned judge based his ruling on **DPP v Varlack**, **Baugh-Pellinen v R** and **Shepherd v R**. The learned judge adverted to the response of the prosecuting counsel, which highlighted the conflicting statements made by the applicant, the discovery of Miss Barnes' remains, the finding of Miss Barnes' blood in her room, together with the other forensic and medical evidence and the call data records. These, the learned judge found, cumulatively, to be capable of supporting an inference of guilt on all the evidence.

[53] Since the applicant, both at trial and before this court, placed reliance on **AG v Spicer**, we feel some constraint to examine this decision. Spicer and three others were charged for the death of the deceased, whose body was found in shallow water near a beach. Her cause of death was drowning in shallow water by force. Sand was found in her airways. The case against Spicer was wholly dependent on circumstantial evidence. A submission of no case to answer was upheld, the trial judge finding that the case against him was "less than thin even taking the individual bits of circumstantial evidence at their highest".

[54] The evidence led by the Crown against Spicer, as recorded at para. [111] of the judgment, related to:

> "(1) his friendly association with the deceased and the other accused (2) the fact they all socialized together (3) that they were together on the night of the Murder [sic] (4) they left together to meet someone that night in the general area where the deceased was found and about the same time she was killed (5) that sand associated with his shoes was, according to Professor Pye, **highly probable** to have come from the general area where the deceased body was found (6) that there was a blood spot on the shirt that he admitted wearing on the night of January 14, 2000 (7) that he was in charge of a house where unused tampons were found similar to the brand of the tampons found in the deceased hand bag, a house that Lois McMillen would visit (8) that he was part of a discussion with Benedetto to make taxi driver "Solo" unavailable for police investigation (9) that his fingernails were cut very low (10) that he told a lie to the police as to why his shoes were wet and sandy and (11) that despite his close association with the deceased family, he made no contact with them upon hearing of the death." (Emphasis as in the original)

[55] The prosecutor appealed, contending that, cumulatively, there was a prima facie case for Spicer to answer. Singh JA found that all the evidence, except the blood found on his shirt and the sand on his shoes, were of no probative value, even when taken cumulatively (see para. [113]). The Crown failed to establish a biological link between

the deceased and either the sand or the blood found on Spicer's shirt. It was against that background that Singh JA said, at para. [117]:

> "Taking the evidence at its highest, I agree with the conclusion of **Benjamin J** mentioned above. The forensic evidence of the Blood and Sand did not reach the standard required in criminal case[s], and, without that evidence, the other circumstances became meaningless in the context of the offence charged." (Emphasis as in the original)

[56] Mr Wilson tried to draw a straight line from **AG v Spicer** to the present case. The equivalence of this case with **AG v Spicer** is the failure of the DNA evidence to point inexorably to the applicant. That fact, according to Mr Wilson, should have led the learned judge to prefer the decision of **AG v Spicer** over the decision in **DPP v Varlack**. It was Mr Wilson's further submission that the fact of the DNA evidence should not have:

> "… lead straight into the principles asserted in Varlack … and totally ignore the practical decision in AG v Spicer of looking what was proved or not proved for which a negative inference can be drawn..."

[57] Respectfully, these submissions are based on three false premises. The first is the implication that there is a divergence in the law in relation to a trial judge's duty on a submission of no case to answer between **AG v Spicer** and **DPP v Varlack.** The bedrock principles applied in **AG v Spicer** were those laid down in **R v Galbraith** (see para. [11] of **AG v Spicer**). Likewise, in **DPP v Varlack**, the basic rule that a case should not be withdrawn from the jury unless a reasonable jury, properly directed, could not be sure of guilt emanated from **R v Galbraith**.

[58] Secondly, it is wholly inaccurate to suggest that the approach to evaluating the evidence was different in both cases. Both cases employed the cumulative methodology of assessing the evidence. What Singh JA endeavoured to do was to show that the so-called forensic evidence found on Spicer, in order to serve its cumulative purpose, must be capable of pointing in the direction of the deceased. Without that, the case against Spicer was "less than thin".

[59] Thirdly, the submission makes no allowance for the time-honoured principle of *stare decisis*. The United Kingdom Privy Council ('UKPC') is Jamaica's final court of appeal. Therefore, its decisions from another jurisdiction are highly persuasive, in light of the probability that the UKPC would arrive at a similar decision in a like case from Jamaica. Therefore, we would accord greater weight to the decisions of the UKPC than those coming from a court of appeal sitting in one of our sister territories. Mr Wilson, in his written submissions, said that it is not expected that our jurisdiction should follow the principles enunciated by the High Court of Australia. This point is misconceived.

[60] The case of **DPP v Varlack** was decided by the UKPC, the apex appellate court of this jurisdiction. In any event, what their Lordships accepted was the summarised version, or restatement, by King CJ in **Questions of Law Reserved on Acquittal**, of the principle from **R v Galbraith**, that the assessment of the strength of the evidence should be left to the jury. In fine, although both **AG v Spicer** and **DPP v Varlack** proceeded from the same bedrock principles, the refinement in the latter, especially its recast of **R v Galbraith** through the lenses of a case dependent on inferences, is to be preferred, quite apart from its precedential value.

[61] The applicant's insistent reliance on **AG v Spicer** stems from the lack of appreciation that Singh JA walked the fine line between ensuring that the forensic evidence was capable of pointing in one direction and its probative value of proof beyond a reasonable doubt by itself. In other words, the forensic evidence represented the strand that strengthened the rope, without which the others were too weak to bear the weight of a conviction. In this regard, the approach in **AG v Spicer** is not unlike the approach of this court in **Baugh-Pellinen v R**. In the latter, the circumstantial evidence only made sense when intertwined with the jailhouse confession. In neither case was the court advocating the individual assessment of each piece of circumstantial evidence for individual probative value.

[62] **AG v Spicer** and **Baugh-Pellinen v R** represent the 'portrait' archetypal circumstantial evidence case (as does this case) in which its proof depends on the view

the jury takes of the whole picture. In this type of circumstantial evidence case, it is against the weight of the authorities to assess the probative value of individual items of the evidence relied upon or, for that matter, to artificially disaggregate the evidence into categories of "forensic" and "general". This was made abundantly clear in **Kevin Peterkin v R** [2022] JMCA Crim 5 ('**Kevin Peterkin v R**'). In a judgment which compared and contrasted what is required of the trial judge in circumstantial evidence cases dependent for their proof on inferences to be drawn, on the one hand and, on the other hand, a consideration of the whole picture, by the jury, Edwards JA lucidly declared the law. At para [57], the learned judge of appeal said:

> "… The question for the jury at the end of the case, is whether all the circumstances, as they find them to be, lead them to conclude the prosecution has proven guilt beyond a reasonable doubt. In a case based on circumstantial evidence, where the pieces of evidence together form one picture leading to an inevitable conclusion of guilt, it would not be necessary for a trial judge to tell a jury to examine each piece of evidence and eliminate those consistent with innocence before arriving at an inevitable conclusion of guilt. In such a case, the jury would have to examine all the pieces of the evidence together to determine if the prosecution has painted such a picture on which they can feel sure that it leads to an inevitable conclusion of guilt."

[63] It is this misunderstanding of Singh JA's approach, compounded by an inadequate appreciation of the law, as articulated by Edwards JA in **Kevin Peterkin v R**, that has led counsel for the applicant to submit that **AG v Spicer** represents a more practical approach; meaning, once you can demonstrate that the forensic evidence, by itself, does not connect the applicant to the crime, the other circumstances should fall away. With all due deference, that is a fallacy.

[64] In this case, the forensic evidence was relied on to prove three facets of the prosecution's case, the identification of burnt human remains as those of Miss Barnes, the cause of her death and that she was injured inside the confines of her boudoir. From

these facts, it was an inference for the jury that Miss Barnes was killed inside her bedroom and her body removed to the place where her burnt remains were found.

[65] The inference that Miss Barnes was likely killed, or at least injured, in her bedroom was of critical and pivotal importance to the verdict of the jury. Therefore, the importance of the forensic evidence was no mere insinuation of the learned judge, as was submitted. Although the forensic evidence did not directly place the applicant in Miss Barnes' room, that did not render it worthless. The learned judge was, consequently, correct in bringing home its importance to the jury.

[66] We will shortly demonstrate the import of the forensic evidence by way of the inference to be drawn from it. Before doing so, however, it is convenient at this time to dispose of a related, though minor, complaint of the applicant. The applicant submitted that it was ironic that the learned judge directed the jury not to use the blood found in the applicant's bedroom against him. The irony complained of arises, respectfully, from a misunderstanding of the materiality of the forensic evidence. So that, what was mischaracterized as irony, was a demonstration of balance and fairness. In telling the jury not to use the blood found in the applicant's bedroom against him, the learned judge correctly assessed that evidence as having no probative value and was equally correct in guiding the jury away from the pitfall of speculating that it was the applicant's blood that could assist in their determination.

[67] As important as the forensic evidence was, by itself, it was insufficient to prove to the required standard that the applicant killed Miss Barnes. But, put with the other circumstances, namely, Miss Barnes and the applicant were the only two occupants of the house; no evidence of break-in; no report of any incidents at the premises at the nearest police station; the applicant giving inconsistent dates when Miss Barnes left the premises, made this a case to be left to the jury. To quote Morrison P in **Baugh-Pellinen v R**, at para. [34], when the Crown closed its case, the evidence "was such that a reasonable jury, properly directed, would have been able to draw the inference of guilt beyond a reasonable doubt".

[68] Once the jury accepted that Miss Barnes was killed in her bedroom at the Wellside Lane property, as their verdict says they did, then the following further facts became inescapable inferences. Firstly, since that was where Miss Barnes was killed, then it could not have been true that the applicant accompanied her to the bus stop and saw her off on a bus on 25 September 2009, as he asserted more than once. Secondly, which follows from the first, the jury would have asked themselves why the applicant lied about putting Miss Barnes on the Toyota Coaster bus.

[69] Having established that Miss Barnes was killed in the house, the next question for the jury would have been, how did Miss Barnes come to meet her death inside the private quarters of her bedroom? The prosecution asked the jury to find these three facts proved: the applicant and Miss Barnes were the only occupants of the house, sharing adjoining bedrooms; there was no evidence of forced entry; there was no report at the Old Harbour Police Station of any incident [namely, report of break-in] at the Wellside Lane property.

[70] In the submission of the counsel for the applicant, it was concisely stated that the jury could not have ruled out the presence of someone other than the applicant in the house. That person could have been either a construction worker or Mr Oswald. To hold as learned counsel urged would be to enter upon the forbidden territory of speculation. There was no evidence before the jury that at any time during what was Miss Barnes' last visit to the premises, she entertained workers or Mr Oswald in her quarters, as it was alleged that she had previously done. On this state of the evidence, the jury would have had no difficulty in excluding the presence of anyone else in the house at about the time Miss Barnes came to her death. That left the applicant as the only person with the opportunity to bring about the death of Miss Barnes.

[71] Similarly, the applicant's argument that there were gaps in the evidence is unsustainable. Firstly, the applicant complained about the absence of evidence of Miss Barnes boarding any transportation or that she arrived at the Wellside Lane property, notwithstanding Miss Cashara Williams' evidence about seeing Miss Barnes on 30

September 2009. Those facts became inferences for the jury to draw once they accepted the following primary facts.

[72] One, Miss Cashara Williams saw Miss Barnes on 30 September 2009, passing her home, carrying her handbag and a travelling bag. Two, Miss Barnes did not make her expected return to her dwelling in Port Morant. Three, Miss Barnes' burnt remains were found approximately one mile from the Wellside Lane property. Four, forensics established that Miss Barnes had been killed in her bedroom at Wellside Lane. Having accepted these primary facts, it became a matter of common sense deduction for the jury that Miss Barnes must have boarded a public carrier that took her from the parish of Saint Thomas and that she arrived at the Wellside Lane property after leaving the parish of Saint Thomas.

[73] The second and third "gaps" in the evidence may be addressed together. The applicant complained that the failure to check with the JPS Co concerning the applicant's "appointment" to meet Miss Barnes there on 28 September 2009 and to contact Miss Michelle Stewart to follow up on the applicant's allegation that she had reported seeing Miss Barnes downtown, Kingston on 26 September 2009, represented gaps in the case for the prosecution. It is reasonable to assume that where the evidence led by the prosecution conflicted with the applicant's narration of events, the jury accepted the former as telegraphed by their verdict.

[74] On that assumption, the jury's acceptance of the evidence of Mrs Johnson that she had last seen Miss Barnes on 25 September 2009 and that of Miss Cashara Williams on the date Miss Barnes left the parish of Saint Thomas would have led to their rejection of the applicant's claim concerning an arrangement to meet with Miss Barnes at the JPS Co on 28 September 2009, or that Miss Barnes was seen downtown, Kingston on 26 September 2009.

[75] Both claims, by, or through, the applicant, rest on the premise that Miss Barnes left the Wellside Lane property alive on 25 September 2009. Acceptance that Miss Barnes

visited with Mrs Johnson on 25 September 2009 would inevitably mean Miss Barnes could not have been concluding a visit to the Wellside Lane property, which had lasted a number of days, on the same date she was visiting with Mrs Johnson. And since Miss Barnes could not have been concluding a visit to the Wellside Lane property, it was highly unlikely that, in furtherance of that visit, she would have been seen downtown, Kingston the following day, 26 September 2009. There was no evidence that, in that period, Miss Barnes visited the Wellside Lane property, left, then went back. The undisputed evidence was that Miss Barnes was reported missing after her last visit to that property; bolstered by the forensic evidence from which the inference could reasonably be drawn that she was killed or, at least, seriously injured in her bedroom at the Wellside Lane property. In light of all this, it was open to the jury to accept Miss Cashara Williams' evidence that Miss Barnes was last seen alive, leaving Saint Thomas on 30 September 2009. There were, therefore, no gaps in the evidence to undermine the jury's verdict.

[76] Turning now to what the applicant's counsel described as "suspicious evidence", the preponderant complaint here was concerned with the conduct of the applicant in obtaining money from the family of Miss Barnes, purportedly to facilitate her safe return. Evidence of conduct is always relevant in circumstances where proof of the charge depends either wholly or substantially on circumstantial evidence. This conduct has to be viewed in the context of the jury accepting that Miss Barnes was killed no later than 2 October 2009, when her burnt remains were found at Thetford Farm in Saint Catherine.

[77] Seen through these lenses, the submission that the money obtained from the distraught relatives was not through extortion but in furtherance of efforts to find Miss Barnes is, to put it mildly, jaundiced. The jury may well have regarded this conduct, as they were entitled to do, as a calculated charade to cast suspicion elsewhere for the disappearance of Miss Barnes. Accordingly, the issue raised by the applicant of whether any police officer received the report and benefitted financially, was part and parcel of the charade. In any event, it would have been a matter of speculation for the jury to

conclude that maybe police officers acted corruptly in the manner suggested by the applicant.

[78] Moving from the complaint of possible corrupt action, the submission in relation to the ransom sought to condemn the police for their inaction. While an investigator is expected to follow potential leads, he has to exercise a judgment and not follow every will-ʻo-the-wisp, to resort to an idiomatic expression. The jury had to arrive at a verdict on the evidence before them, and there was no complaint that they were invited to make any use of this evidence in arriving at their verdict. In our view, the police not following up on the ransom call did not serve to weaken the case against the applicant or otherwise render the trial unfair.

[79] The applicant's counsel's assault on individual items of evidence ratcheted from "suspicious evidence" to "further suspicious information". The focus of the latter was on the call data evidence, which, he charged, did not rise above "fuzzy, suggestive or conspiratorial" without supporting voice confirmation. In short, the call data was not probative of guilt. Firstly, the probative value of this evidence was squarely brought home to the jury by the learned judge. The learned judge was careful to point out to the jury the fact that the call data told no greater story than that of two instruments communicating with each other. Secondly, as the learned judge highlighted in his directions, the call data activity showed that, inexplicably, the telephone and sim card attributed to Miss Barnes never left the general area of Wellside Lane in the parish of Saint Catherine. So that, far from being "fuzzy, suggestive or conspiratorial", the call data evidence confirmed the forensic evidence that Miss Barnes was never placed on a Toyota Coaster bus, which was heading from May Pen towards Kingston. This was underlined by the calls made on 3 October 2009, a date subsequent to the discovery of her burnt remains.

[80] We turn now to the first of the complaints made under ground four, which criticized the reliance on Miss Cashara Williams' evidence that Miss Barnes was last seen on 30 September 2009. We have already traversed the submission that 30 September 2009 was

a date of conjecture (see paras. [70]-[74]). The complaint that the learned judge used the evidence of Miss Cashara Williams "by itself" for the jury to consider where the truth lies is simply without foundation. The baselessness of the complaint arises from, we think, a misunderstanding of the learned judge's treatment of the evidence.

[81] The learned judge was merely explaining to the jury of laypersons why the particulars of the indictment stated that Miss Barnes was killed on a date unknown within a stated period, rather than on a specific date, as a layperson might have expected. And even then, the learned judge, quite properly, left it as a matter for the jury's determination. Against the background of the misapprehension of the learned judge's instructions to the jury, it is appropriate that we extract the relevant section of his directions. We quote from the transcript, at page 856 lines 13-25 and page 857 lines 1-18:

> "The accused is indicted before you in the name of Clifton Harrison, and he is charged on an indictment containing one count of Murder [sic]. The particulars of the offence are that he, Clifton Harrison, on a day unknown between the 30th day of September, 2009, and the 2nd day of October, 2009, in the parish of St. Catherine, murdered Louise Barnes. You will note that the time specified when the offence was committed is a day unknown between the defined dates. The law allows for charges to be framed in this way when the exact date of the offence is unknown, but there is evidence to indicate that the offence must have been committed between the defined dates.
>
> Now, these dates having been chosen by the prosecution as the 30th of September, 2009, is the last date that the deceased was seen alive by Miss Cashara Williams. On the 2nd of October, 2009, is the date when Sergeant Barrington Lawrence states that he received information which led him to the discovery of the burnt remains at Thetford Farm which were later, through the DNA analysis, identified to have the high probability, if you accept that evidence, to be those of Louise Barnes. If you accept those bits of evidence, it would be open to you to find that the deceased would have been killed between those defined dates of the 30th of September, 2009, and the 2nd of October, 2009."

The learned judge was simply saying to the jury, since no one saw the killing and there was no forensic determination of the date and time of death, it was permissible in law, and, we might add, a matter of common sense, that Miss Barnes must have died between the date she was last seen and when her burnt and dismembered remains were found. Therefore, it would have been not only ludicrous, but also against the weight of the evidence led by the prosecution, for the jury to have been instructed on any other originating date for the period other than 30 September 2009. This takes us to the complaint about the absence of motive.

[82] The pith and substance of the second challenge here was that the relationship between the applicant and Miss Barnes did not lend itself to a motive for the applicant to kill her, and this represented a weakness that the learned judge failed to point out to the jury. Two propositions may be distilled from this submission, both untenable. The first is that evidence of an antecedent good relationship between the victim of a crime and the perpetrator is evidence of the absence of motive. As a matter of logic, the fact of a previous good relationship between victim and assailant cannot be taken any higher than that "bad blood" was not the motive for the killing. The motives for murder are many, making it fallacious to assert that no evidence of a particular motive equates to no motive at all.

[83] The second proposition is that failure to prove that a motive arose from the relationship between the applicant and Miss Barnes metamorphosed into a weakness in the circumstantial evidence, which required a specific direction from the learned judge. No authority was cited for this novel proposition. Firstly, motive is not an element of any criminal offence. So that, although the collection of insurance money may be part of man's intention to kill his wife (uxoricide), it is not part of the mental element required to coincide with the physical act bringing about her death. The collection of the money is merely a desired consequence of the killing. The law on the point is clearly set out in Smith & Hogan's Criminal Law (1965 edition), at page 44, as follows:

> "… The reason why it [the desired consequence] is considered merely a motive is that it is a consequence ulterior to the *mens rea* and the *actus reus*; it is no part of the crime. If this criterion as to the nature of motive be adopted then it follows that motive, by definition, is irrelevant to criminal responsibility – that is, a man may be lawfully convicted of a crime whatever his motive may be, or even if he has no motive."

[84] Secondly, although the prosecution did not prove that the applicant and Miss Barnes were feuding or that there was otherwise some tension between them, does not translate into proof that there was no motive. As Channell J said in **R v Ellwood** (1908) 1 Cr App R 181, at page 182, adopting the trial judge's remark, "there is a great difference between absence of proved motive and proved absence of motive". What would have been a weakness in the circumstantial evidence is actual evidence of an absence of motive. In as much as evidence of a motive to commit the crime is relevant to show the likelihood to commit the crime, evidence of the absence of motive is relevant to show a defendant's unlikelihood to commit the offence: **R v Grant** (1865) 4 F & F 322. However, we reiterate, there was no evidence approximating proof of the absence of motive.

[85] Against that background, the directions of the learned judge on the point were adequate. At page 877, lines 18-25 and page 878, lines 1-3 of the transcript, in discussing the ingredients of the offence of murder with the jury, the learned judge told the jury:

> "Now you will no doubt have noticed that one of the things I did not mention the Prosecution [sic] has to prove is motive. Sometimes you never know why it is they do what they do and so the law does not impose any burden on the Prosecution [sic] to prove motive. What the prosecution has to prove is intention. So bear in mind that the motive, that is the reason why the accused may have wished to kill the deceased, is not an ingredient of the offence of murder."

The learned judge appreciated that the evidence of the relationship between the applicant and Miss Barnes neither gave rise to an inference of motive or the absence of a motive and so tailored his directions accordingly. In these circumstances, there was no weakness

which, upon the demands of fairness, would require the learned judge to bring that to the jury's attention.

[86] Moving from the challenge directed to the absence of motive, we direct our minds to the conduct of the applicant in relation to the burning of the mattress. The applicant's counsel submitted that the prosecution witnesses gave contradictory evidence in this area, which was to be contrasted with the applicant's consistency. All the witnesses were agreed that the applicant said he had burnt the mattress on the instructions of Miss Barnes. The discrepancy between the witnesses concerned the size of the burnt area. This was brought to the jury's attention by the learned judge, and he reminded them of his general directions on how to treat with discrepancies.

[87] Beginning at page 923, line 17 and continuing on page 924, lines 1-16, the learned judge directed the jury as follows:

> "In respect of the behaviour of the accused, I also want to highlight for you the issue of the burning of the mattress or the sponge that the accused said he did. Now a number of witnesses spoke to the accused indicating that he had burnt the mattress of the deceased at her request because it was infested with chinks or insects. And these witnesses, including Miss [sic] Ida Johnson, Sergeant Lawrence, Nigel Williams, and DSP Reynolds, he showed these witnesses the area where he said he burnt the mattress in the yard. Now as I pointed out to you earlier, there was some discrepancy as to whether the area he showed them was large enough to burn a mattress. Miss [sic] Johnson and DSP Reynolds was [were] of the opinion that it was too small from [sic] a mattress to have been burnt there, whereas the dimension of about 6 feet square [sic] given by Nigel will have suggested that the area may have been large enough. I already told you how to deal with discrepancies that you find between witnesses. Determine whether they are slight or serious or what you make of any such discrepancy."

The learned judge properly left the matter for the resolution of the jury.

[88] The question of significance for the jury was what to make of the evidence that the applicant had said he burnt the mattress that was missing from the bed in Miss Barnes' room. That the applicant had said so was never in issue at the trial. That notwithstanding, in his written submissions, counsel for the applicant argued that that fact was never communicated to the police by Mrs Johnson. Sergeant Lawrence received this information directly from the applicant. Therefore, there was no need for Mrs Johnson to have communicated it to the police.

[89] Returning to the issue of significance for the jury; once they accepted that the applicant had said he burnt the mattress, the size of the burnt area would have paled into insignificance. The question for them would become whether they could accept his stated reason for burning the mattress or, in light of the other evidence in the case, a more plausible reason could be inferred? To this end, the learned judge correctly directed the jury that while they should not speculate, it was a matter for their determination whether to accept the reason he gave for having done so. The learned judge directed the jury as appears below (page 925, lines 2-18 of the transcript):

> "Now, you have to consider the fact that the accused said that he burnt the mattress in the context of the reason he gave that he was requested to do so, because it was infested and also in the context of the medical evidence being that the deceased died from a blow to the back of the head and the opinion of Miss Brydson that someone was injured in the deceased's room and the DNA analysis, showing to a very high probability that the blood found in the room was the blood of the deceased. You should not speculate, but you should consider and determine what you make of that evidence and determine whether the accused's statement that he burnt the mattress and if so, was it for the reason he stated or for some other reason."

The evidence of the burning of the mattress was properly part of the circumstances for the jury's consideration, and the learned judge cannot be faulted in his directions to them on the use to be made of it.

[90] In not too dissimilar vein, the submission in relation to the focus of the DNA evidence can be shortly disposed of. Firstly, although it was submitted that DNA evidence, together with other evidence, can expose internal contradictions and thereby challenge the reasonableness of inferences, no attempt was made to demonstrate this by reference to the evidence. Secondly, the submission that much of the focus of the DNA evidence was on the familial relationship with Miss Barnes is not borne out upon an examination of the transcript. While it is true that the contribution of the forensic evidence to the circumstantial evidence began with the establishment of that maternal relationship, beyond the identification of the human remains as those of Miss Barnes, DNA played a pivotal role in the case.

[91] The axis upon which the case turned was arguably the DNA typing which found matching full profiles derived from the blood on the lace runner in Miss Barnes' room with the DNA obtained from the femur and mandible of her remains. However, that all sprang from first establishing that the remains belonged to Miss Barnes. This, together with the partial DNA profile type from the southern door in Miss Barnes' room, drove the analyst to the conclusion that someone (namely Miss Barnes) had been injured in that room. Therefore, the DNA evidence went beyond the familial relationship, establishing that she was possibly killed, or at least, injured at the Wellside Lane property. This challenge is also without merit.

Ground two: "In his charge to the jury the LTJ used two different standards of credibility that should be applied which was unfair to the Appellant [sic] and obviously contributed to the verdict of guilty".

Applicant's submissions on ground two

[92] The applicant's submission under this ground sought to contrast the learned judge's directions on the treatment of inconsistencies and lies. According to Mr Wilson, the learned judge qualified the proven inconsistent statements found in the evidence of Mrs Johnson, witness for the prosecution, as not intentional or pejorative. On the other hand, the submission went, whatever was said at the trial or reportedly said to the police by the applicant, must be treated as pejorative. Here, Mr Wilson highlighted the difference

in dates the applicant last saw Miss Barnes. The learned judge, it was submitted, gave no directions to treat the inconsistencies between the applicant's unsworn statement and his out of court statements, on the same basis as those found in the evidence of the prosecution witnesses. Instead, his directions on inconsistencies were overlaid with directions on lies.

Crown's submissions on ground two

[93] Crown Counsel countered that the learned judge was balanced in his treatment of the issue of inconsistencies. From the point of view of the Crown, the learned judge provided the jury with the correct law on how to assess the witnesses and determine their credibility. In support of these submissions, reliance was placed on the case of **Dwayne Brown v R** [2020] JMCA Crim 31 in which the dictum of Carey P (Ag), as he then was, in **R v Carletto Linton and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered 20 December 2002, was cited with approval. Following on that, several extracts of the learned judge's summation where he instructed the jury on this point were placed before the court.

Analysis

[94] The thrust of the complaint under this ground may be encapsulated as follows. Whereas the jury was instructed that inconsistencies in the evidence of a witness for the prosecution were not necessarily an indication of falsehood, an inconsistency in the applicant's account was to be regarded, presumptively, as a lie. In short, the criticism is that the learned trial judge did not present the case for the applicant in a fair and balanced way. We meticulously scoured the transcript and found not even a scintilla of support for this complaint.

[95] The learned judge prefaced his directions on inconsistencies and discrepancies with a reminder of the seven - year lapse between the commission of the offence and the commencement of the trial and the possible effects that may have had on the evidence led by the Crown and the applicant's unsworn statement. The jury was

instructed to give the applicant some latitude on account of the likely impact of the passage of time on his case. The jury was invited to put themselves in the shoes of the applicant in order to empathize with the problems a delay of seven years could cause. The learned judge further directed the jury that, even if they thought the delay to be benign, they should consider whether the applicant was disadvantaged as a consequence. If they thought he had been, they should consider that adverse effect in deciding whether the Crown had discharged its duty to make them sure of the applicant's guilt (see transcript at page 859 lines 14-25; page 860 lines 1-10).

[96] It was against this frame of reference that the learned judge instructed the jury on inconsistencies and discrepancies. After telling the jury that inconsistencies and discrepancies are commonplace in criminal trials, especially with lapse of time, the learned judge instructed the jury on how these might come about. He then instructed the jury on how an inconsistency might affect the witness' credit, providing an instantiation (see transcript page 865 lines 1-13). The learned judge went on to say, at page 865, lines 13-18:

> "… you may take into account the fact that previously the witness had stated something different on a particular point or points when you consider whether that individual is believable at all as a witness."

[97] After instructing the jury on how a previous inconsistent statement becomes evidence, the learned judge returned to the impact of a previous inconsistent statement on the witnesses' credibility. Beginning on page 865, line 24 and continuing on page 866, lines 1-4, the learned judge's charge to the jury was as follows:

> "The value of a previous inconsistency, whether you find one that exists that has not been accepted by the witness as true, is that you use it to determine if you believe the evidence that the witness has actually given before you."

[98] Following on this, the learned judge explained to the jury that a discrepancy is a divergence in the evidence of two or more witnesses on the same point. He then directed the jury as appears below, at page 866, lines 8-17:

> "Now inconsistencies and discrepancies can, but **do not necessarily mean that a witness or witnesses is or are not speaking the truth**. They can arise sometimes, for example, because of the passage of time, or due to the fact that witnesses have different powers of observation and recollection, understanding and expression and also separate individuals may, for reasons peculiar to them, have different pieces of evidence highlighted in their minds." (Emphasis supplied)

[99] Counsel for the applicant extracted the above quotation and pointed to the fact that during Mrs Johnson's evidence, five inconsistencies were tendered into evidence. It was then submitted that the learned judge "qualified the proven inconsistent statements as not intentional or pejorative". In expounding on this submission, Mr Wilson quoted the above words in bold and advanced that the learned judge was guilty of separate treatment of the prosecution witness or witnesses.

[100] The root of the fallacy in this submission lies in counsel's omission to take into account the learned judge's earlier directions on the subject, to which we have previously alluded. The jury had already been instructed on the use they could make of inconsistencies, namely, to decide whether the witnesses were capable of belief either on the disputed point in the evidence or their entire evidence. Set against the earlier directions on the deleterious effect of the passage of time on memory, which the learned judge repeated in the directions extracted above, there was no attempt to qualify the inconsistencies.

[101] The factual inaccuracy which undergirds this submission is made manifest in the learned judge's treatment of the inconsistencies in Mrs Johnson's evidence. The learned judge, after instructing the jury on how to assess the materiality of any inconsistency or discrepancy they found, reminded the jury of the inconsistencies exhibited from Mrs

Johnson's and Mr Steve White's evidence and the notable discrepancy between her evidence and Mr Nigel Williams' concerning the size of the space in the yard where the applicant said he burnt Miss Barnes' mattress or sponge (see page 866 lines 18-25; page 867 lines 1-25; page 868 lines 1-25; page 869 lines 25; page 870 lines 1-8).

[102] The learned judge once again focused the jury's mind on the import of these inconsistencies and discrepancies in assessing the witnesses' credibility. We feel constrained to quote the learned judge at length (page 870 lines 11-22):

> "…You have to consider what effect, if any, you find these inconsistencies have on the credibility of Miss [sic] Ida Johnson and of Mr Steve White. And what effect, if any, you find the discrepancy between Miss [sic] Ida Johnson and Mr. Nigel Williams has on their credibility, that is, your ability to believe each witness and determine what you accept to be the truth about their evidence given before you, either on the particular points raised with each inconsistency or discrepancy or in relation to each witness' evidence as a whole ..."

In our view, the jury could not have been left in any doubt that their task was to evaluate the witnesses' evidence in the light of whatever inconsistency or discrepancy they adjudged to be material and decide whether the witnesses were to be disbelieved on the point in issue or altogether.

[103] The foregoing extracts and examples of the learned judge's treatment of inconsistencies and discrepancies should be enough to demonstrate the hollowness of the base of the submission, which was the springboard for the purported contrast in the treatment of the applicant's out of court statement and statement from the dock. Mr Wilson contended that, in the learned judge's directions to the jury, whatever the applicant said at the trial or reportedly said to the police must be treated pejoratively. This submission concerned the evidence that the applicant gave two separate dates when he allegedly put Miss Barnes on a Toyota Coaster bus bound for Kingston. Mr Wilson complained that although the learned judge spoke of the statement on the dates as inconsistencies, he did not follow that up with directions to treat this inconsistency on the

same basis as pertained to the prosecution witnesses. Instead, it was submitted, the learned judge went on to direct the jury on a presumption that the applicant was telling lies.

[104] The analysis of this aspect of the submission must be set against the background of the live issues in the case. That is, a part of the prosecution's case was based on lies allegedly told by the applicant. Accordingly, the learned judge gave adequate general directions on lies, consistent with **R v Goodway** [1993] 4 All ER 894 and **R v Lucas** [1981] QB 720, which have not attracted any criticism. In his directions, at page 881, lines 1-25 and page 882, lines 1-4, the learned judge made it clear to the jury that it was a matter for them whether the applicant had told lies; the applicant could not be convicted merely because he told lies; there are several reasons for telling lies; they should consider whether or not the applicant's untruthfulness was a factor they could take into account as strengthening the inference of guilt; they were to take all the circumstances into consideration, including the lies, in deciding if the guilt of the accused was established; and lies are not an admission of guilt in and of themselves, they are just another piece of the circumstantial evidence from which they were to determine whether they were sure of the guilt of the applicant.

[105] These general directions provided the backdrop against which the learned judge reviewed the evidence about the applicant seeing off Miss Barnes. In a brief prelude, the learned judge reviewed the evidence that spoke to the applicant giving different times he accompanied Miss Barnes to the bus stop. In doing so, the learned judge impressed upon the jury to recall his earlier directions on inconsistencies.

[106] In his review of the dates, the learned judge not only reminded the jury of the date the applicant said he saw off Miss Barnes, 25 September, and the date allegedly told to Deputy Superintendent Reynolds and Mr Nigel Williams, 2 October, he also reminded them that the veracity of both witnesses was challenged. In the case of Mr Nigel Williams, the learned judge reminded the jury of his admission that he never said so in his statement to the police.

[107] Having laid that foundation, the learned judge categorised the variation in dates as an inconsistency and invited the jury to address the question of its materiality. The learned judge had, not long before, in reviewing the inconsistency regarding the time the applicant said he saw off Miss Barnes, asked the jury to remember his general directions on inconsistencies. It is difficult to see how the jury could have come away with an understanding that similarly characterised evidence required disparate treatment. Telling the jury to determine whether it was a slight or serious inconsistency was in effect also directing them to treat the inconsistency as any other in the case.

[108] Quite properly, the learned judge then put to the jury the prosecution's view of the different dates. At page 1011, lines 13-24, the learned judge instructed the jury:

> "… If you find that the [applicant] gave both those dates at different times, the prosecution is inviting you to say that the difference, if you find he did give both dates, was not just caused by a mistake or error, as is suggested by counsel for the defence, but was due to the accused telling lies. The prosecution is saying that the [applicant] never put the deceased on any bus, either on the 25th September or October, 2nd of October, but was responsible for her death and that is why there are these differences in his statement."

It is very clear that, whereas the learned judge himself characterised the difference in dates as an inconsistency and invited the jury to consider it as such, he juxtaposed that direction with the different views on the matter by both counsel.

[109] It was immediately after the juxtaposition of the prosecution's view that the learned judge, appropriately, adverted the mind of the jury to his earlier directions on lies. This was how the learned judge concluded his directions on the point (at page 1011 line 25; page 1012 lines 1-5):

> "Recall I directed you that if you find that the [applicant] is telling any lies you should consider the lie or lies as part of all the circumstances in this case, which altogether you should contemplate whether or not they raise the sure inference of guilt."

Without truncating the learned judge's directions, it is difficult to sympathize with the submission that, as it concerned inconsistencies in the applicant's case, the learned judge instructed the jury on the basis of a presumption of lies. In our view, the learned judge's approach is unassailable.

[110] In fine, the learned judge did not invite the jury to accord disparate treatment to the inconsistencies arising on the case for the prosecution and the defence. In our assessment, the learned judge placed the inconsistencies before the jury in a fair and balanced manner, consistent with the live issues in the trial. There is, therefore, no merit in this ground.

Ground three: The good character of the applicant did not benefit from a fulsome direction which would have the effect of placing the applicant's position in a favourable light which was a requirement in the circumstances.

Applicant's submission on ground three

[111] In his written submissions, the applicant's attorney-at-law acknowledged that the learned judge gave a full good character direction but complained that the evidence of Mr Steve White was completely ignored. The contention was that Mr Steve White was best placed to observe and comment on his knowledge of the interaction between the applicant and the deceased. In this regard, sections of the transcript were extracted for the benefit of the court. From there, reliance was placed on **Seian Forbes and Tamoy Meggie v R** [2016] JMCA Crim 20, in which P Williams JA (Ag) (as she then was) cited **Teeluck and John v State of Trinidad and Tobago** (2005) 66 WIR 319, and restated the relevant principles.

Crown's submissions on ground three

[112] Counsel for the Crown submitted that, on the contrary, the applicant benefitted from a fulsome good character direction, the learned judge erring on the side of caution. Quoting the relevant sections of the summation, it was argued that the learned judge was generous in directing the jury on both limbs of the good character direction. For these propositions, the Crown referenced **Craig Mitchell v R** [2019] JMCA Crim 8; **Tino**

Jackson v R [2016] JMCA Crim 13; and **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009.

[113] It was highlighted, on behalf of the Crown, that when the question of the breadth of the direction was canvassed before the summation, counsel appearing for the applicant below indicated that his instructions did not permit him to go beyond the boundaries of the unsworn statement. It was also submitted that it was prosecuting counsel who requested the standard directions.

Analysis

[114] Counsel for the applicant filed extensive written submissions on this ground. However, when it was pointed out to counsel that the learned judge, in fact, gave both limbs of the good character direction, notwithstanding the fact that the applicant did not testify, this ground was not pursued in argument before us. As it turned out, the applicant had two previous convictions. Therein lies the reason behind the reticence of the applicant's counsel at trial urging or acquiescing to the giving of standard good character directions. Although the applicant's previous convictions were stale dated, strictly, that disentitled him to a good character direction on either limb since he gave an unsworn statement. This ground clearly was without merit, and counsel rightly did not strive to support the unsupportable.

Ground five: The sentence imposed by the judge was excessive in all the circumstances having regard to sentences handed down in other murder cases based partially or wholly on circumstantial evidence.

Applicant's submission on ground five

[115] Mr Wilson submitted that a review of the sentences imposed by this court in cases of murder, the proof of which depended on circumstantial evidence, differ sharply from that imposed by the learned judge. To this end, cases in which the time to be served before becoming eligible for parole, ranging between 15 and 25 years, were cited. The cases relied on are **Lescene Edwards** [2018] JMCA Crim 4; **Jason Brown and Another**

v R [2017] JMCA Crim 29; **Sheldon Palmer v R** [2011] JMCA Crim 60; and **Baugh-Pellinen v R**.

Crown's submissions on ground five

[116] In their response, Crown Counsel submitted that, in arriving at the sentence, the learned judge demonstrated an appreciation of the principles established by this court in **Meisha Clement v R** [2016] JMCA Crim 26. It was highlighted that the learned judge not only considered the aggravating and mitigating factors but also gave the applicant full credit for the eight months spent on remand, generously rounding it off to one year. While the respondent acknowledged that the cases cited by the applicant reveal an average period of 25 years before parole, it was advanced that the recommended period of 32 years before parole eligibility is justified by the gruesome nature of the killing in this case.

Analysis

[117] In seeking to demonstrate that the recommended period before parole eligibility of 32 years was excessive, counsel for the applicant relied on a range of 15-25 years, derived from the cases he cited.

[118] In **Meisha Clement v R**, this court provided what may conveniently be described as the intellectual framework within which to approach the sentencing exercise. At para. [41], Morrison P said:

> "As far as we are aware, there is no decision of this court explicitly prescribing the order in which the various considerations identified in the foregoing paragraphs of this judgment should be addressed by sentencing judges. However, it seems to us that the following sequence of decisions to be taken in each case, which we have adapted from the SGC's definitive guidelines [See Andrew Ashworth, Sentencing and Criminal Justice, 5th edn, page 32] derives clear support from the authorities to which we have referred:
>
> (i) identify the appropriate starting point;

(ii) consider any relevant aggravating features;

(iii) consider any relevant mitigating features (including personal mitigation);

(iv) consider, where appropriate, any reduction for a guilty plea; and

(v) decide on the appropriate sentence (giving reasons)."

[119] In **Daniel Roulston v R** [2018] JMCA Crim 20, this court put a gloss on the approach and methodology set out in **Meisha Clement v R**. In that refinement, the sentencing exercise commences with the identification of the applicable sentence range, followed by the steps outlined in **Meisha Clement v R** and concluding with giving credit for time spent in custody, awaiting trial for the offence.

[120] The applicant fell to be sentenced under section 3(1)(b) of the Offences Against the Person Act, which gives the sentencing court the option of imposing either a term of years or imprisonment for life. In either case, the sentencing judge must stipulate a period of imprisonment to be served before the convicted person becomes eligible for parole. In this case, the election of the sentencing judge was imprisonment for life. The prescribed minimum period before parole eligibility is 15 years.

[121] The applicable range of sentence, therefore, is that set out in the Sentencing Guidelines for Judges of the Supreme Court and the Parish Court, December 2017 ('the Sentencing Guidelines'), in particular, at Appendix A. The range of sentence for the murder for which the applicant was convicted is, therefore, 15 years to life. As F Williams JA observed in **Paul Brown v R** [2019] JMCA Crim 3, at para. [22], for this offence, there is no prescribed usual starting point within this range, thereby endowing the sentencing judge with a wide discretion.

[122] After selecting a starting point for an offence of this nature upon conviction following a trial, the sentencing judge, consistent with the authorities, is then required to adjust that sentence upwards or downwards, according as the aggravating and mitigating factors dictate: **Meisha Clement v R**, at para. [26]. The sentence arrived at is then

adjusted for time spent on remand, where this is applicable: **Callachand & Anor v The State** [2008] UKPC 49; **Romeo DaCosta Hall v The Queen** [2011] CCJ 6 (AJ).

[123] This court will be hesitant to interfere with a sentence that was imposed in accordance with these principles. This court will only set aside a sentence where the sentencing judge erred in principle: **Alpha Green v R** (1969) 11 JLR 283, (which applied **R v Ball** (1951) 35 Cr App R 164). Therefore, where, as here, there is a complaint that the sentence is manifestly excessive, this court's task is to determine whether the sentence imposed falls within the bounds of established principles.

[124] According to Morrison P, at para. [43] of **Meisha Clement v R**:

> "On an appeal against sentence, therefore, this court's concern is to determine whether the sentence imposed by the judge (i) was arrived at by applying the usual known and accepted principles of sentencing; and (ii) falls within the range of sentences which (a) the court is empowered to give for the particular offence, and (b) is usually given for like offences in like circumstances. Once this court determines that the sentence satisfies these criteria, it will be loath to interfere with the sentencing judge's exercise of his or her discretion."

[125] Counsel for the applicant sought to ground his contention that the sentence is manifestly excessive by virtue of its dissimilarity with sentences imposed for murder where the conviction depended on circumstantial evidence. This is a misconceived basis upon which to challenge the sentence. While the applicant did not cite para. [43] of **Meisha Clement**, quoted above, we hasten to say the circumstance to which the applicant made reference falls outside of the contemplation of (ii)(b). To be clear, we understand the learned President to have been there referring to circumstances touching and concerning the commission of the offence and not its proof. The misconceived premise notwithstanding, we will review the sentence in accordance with the above guidance.

[126] It is a matter of note that the applicant was sentenced relatively soon after the seminal decision in **Meisha Clement v R** was delivered but ahead of **Daniel Roulston v R**. Therefore, it is doubted whether the learned judge had the benefit of the methodological approach the court articulated. However, the learned judge would have had available to him **Regina v Everald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered on 5 July 2002, which prescribed a similar approach.

[127] Before looking at the decided cases, the timely reminder of the lenses through which precedents ought to be viewed by an appellate court, given by F Williams JA in **Paul Brown v R** [2019] JMCA Crim 3, cited by counsel for the Crown, is apposite. At para. [19] of the judgment, F Williams JA said:

> "… Whilst trying to see whether the sentencing court arrived at a sentence that was suitable for the offence and the offender, this court will review cases that might be similar in facts and circumstances; but as each case and each offender involves its own peculiarities, the cases canvassed will never be the same as the one under review. They must therefore be used only as a general guide."

[128] In **Paul Brown v R**, this court's review of a number of cases between 2008 and 2018 showed a range of sentences between 45 years' and 25 years' imprisonment before parole eligibility. The higher end of the range was applied in cases of multiple murders.

[129] In addition to having regard to the cases reviewed in **Paul Brown v R**, we conducted a review of some cases which were decided subsequently. It is perhaps appropriate to commence with **Gavin Clarke v R** [2020] JMCA Crim 52, in which **Paul Brown v R**, among other cases, were considered. In **Gavin Clarke v R**, the appellant, the ex-boyfriend of the chief prosecution witness, was convicted of the shooting death of the current boyfriend of the main eyewitness. He was sentenced to life imprisonment with the recommendation that he not be eligible for parole until he had served 40 years' imprisonment. This court adopted a starting point of 26 years, applied four years for the

categories of aggravating and mitigating circumstances, then deducted the 27 months that was spent on remand, resulting in a sentence of 23 years and nine months.

[130] On its way to that pronouncement, this court also reviewed **Julian Brown v R** [2020] JMCA Crim 42. This apparent premeditated murder was committed in broad daylight. The deceased was initially shot once, then several times after he fell to the ground. The appellant was sentenced to imprisonment for life with the stipulation that he served 28 years' imprisonment before being considered for parole. His application for leave to appeal against his sentence was refused.

[131] **Jermaine McIntosh v R** [2020] JMCA Crim 28 was another case that this court considered in **Gavin Clarke v R**. The appellant, in that case, had shot the deceased in his head and back. He was sentenced to life imprisonment, with the stipulation that he served 30 years before becoming eligible for parole. This court refused to interfere with his parole stipulation.

[132] In **Jeffrey Peart and Roxanne Peart v R** [2021] JMCA Crim 18 ('**Peart v R'**), the applicants, who were siblings, were convicted for murder in circumstances where the female lured the deceased to a district in the parish of Saint Ann where her brother, a serving member of the Jamaica Constabulary Force, killed and decapitated him. Both were sentenced to imprisonment for life. In respect of Jeffrey Peart, the court stipulated a term of 35 years' and, in relation to Roxanne Peart, a term of 16 years' imprisonment, before parole eligibility. Roxanne Peart's application for leave to appeal against her sentence was refused. Jeffrey Peart's sentence before parole consideration was reduced from 35 to 33 years to give credit for time served.

[133] The final case we looked at was **Adrian Forrester v R** [2020] JMCA Crim 39. In that case, the appellant received a sentence of life imprisonment with the recommendation that he served 35 years before becoming eligible for parole. The deceased, an Australian national, was found dead in his hotel room on the north coast. The pathologist's report showed that he had died from multiple stab wounds, including

to his head and chest. The severity of some of these wounds could have individually resulted in death. There were defensive wounds on his body, and his room showed signs of a "massive struggle". The case against the appellant was based "by and large" on circumstantial evidence.

[134] His appeal against sentence was allowed. The court was of the view that the sentence he should serve before parole consideration should be 39 years. In coming to this view, the court took into consideration the appellant's previous conviction for shop breaking and larceny, to the limited extent that it had an element of invasion, together with the likely motive of the case before it being robbery. However, that period was reduced by four years and four months to give the appellant full credit for time spent on pre-trial remand, resulting in a pre-parole sentence of 34 years and eight months.

[135] Our brief but panoramic review of the cases decided subsequent to **Paul Brown v R** shows that the range remains between 25 and 45 years' imprisonment before the possibility of being paroled is considered. For purposes of further analysis, we propose to disaggregate the range into bands of five years except for the last band, which represents six years as follows: 25-29, 30-34, 35-39 and 40-45 years. Firstly, this leaves untouched the observation in **Paul Brown v R** that cases in the last band, at the upper end of the range, involved multiple murders. The cases which fall in the 35-39 band (before adjustment for time served on remand), **Peart v R** and **Adrian Forrester v R,** involved gruesome killings, decapitation in the former and multiple stab wounds in the latter. The latter was also aggravated by it being an invasion of private quarters and the limited extent of previous conviction with similar characteristics.

[136] Underscoring the poignant observation of F Williams JA, that precedents are a general guide, as each case and offender have their own peculiarities (quoted at para. [127]) is **Julian Brown v R** in which the deceased received several gunshots wounds, the majority whilst he lay bleeding and defenceless on the ground. His sentence of 28 years to be served before parole falls in the first band. On the other hand, the appellant in **Jermain McIntosh v R**, who engaged in a nocturnal attack upon his victim, shooting

him in the head and back, received a sentence of 30 years, which falls at the lower end of the second band. If at all the observation of F Williams JA can be improved, it is to say, while the court must be tireless in the effort to achieve consistency in sentencing, that ought not to become an altar upon which individualization and attendant circumstances of succeeding instances of the crime are sacrificed.

[137] In this case, the contention is that the sentence is manifestly excessive. As we said earlier, the premise upon which this ground is based is fallacious. A review of the cases relied on by Mr Wilson for the applicant shows that the murders were committed in varying circumstances, none of which is similar to those in the present case, and involved offenders of varying backgrounds. It would, therefore, be wrong in principle to use the so-called common thread of circumstantial evidence to say the range, 15-25 years, should be applicable in cases in which circumstantial evidence was relied on in proof of the offence.

[138] In pronouncing sentence, the learned judge opined that it was a "particularly gruesome case". That description rested on the fact death resulted from being bludgeoned at the back of the head, dismembered and burnt. The learned judge also noted that the murder was the ultimate breach of trust and accompanied by a heartless charade of pretending to help to locate Miss Barnes, thereby giving the bereaved false hope of finding Miss Barnes alive.

[139] The learned judge did not decide on a starting point but considered both the aggravating and mitigating factors. Although he did not expressly mathematically weight these factors, the former clearly outweighed the latter. The learned judge not only gave the applicant full credit for the eight months he spent in custody prior to being sentenced but generously rounded that figure up to one year. Although the learned judge did not follow the methodology set out in oft-cited, but then recently delivered seminal case of **Meisha Clement v R**, his approach appears to have followed the path of **Everald Dunkley v R**, which did not expressly require sentencing judges to show the

mathematical formula by which they arrived at the sentence they pronounced. What was then required was an articulation of the factors the learned judge took into consideration.

[140] Therefore, in arriving at the sentence of imprisonment for life with the stipulation that the appellant serves 32 years' imprisonment before becoming eligible for parole, the learned judge consciously applied the applicable principles. Of all the cases reviewed, the most applicable appears to be **Peart v R** (the fourth band before credit for time spent on remand) in which the deceased was decapitated. That is comparable to the desecration of the body of the deceased in this case. It is manifest that the sentence of 32 years before parole eligibility falls within the range of sentences usually imposed for this offence, and the learned judge clearly had the power to impose it. The ground challenging the sentence, therefore, fails.

Conclusion

[141] The evidence presented against the applicant at the trial was overwhelming. We are, therefore, in sympathy with the submission of learned counsel for the Crown that this case falls outside the category of cases that should be withdrawn from the jury because the circumstantial evidence was not capable in law of supporting a conviction. The learned judge was, therefore, correct in calling upon the applicant to answer after hearing submissions that there was no case to answer.

[142] Both counsel at trial and counsel appearing before us strove to succeed in challenging the case advanced by the prosecution by truncating the evidence. That approach, however, seeks to buck conventional wisdom. The cumulative, and correct, approach advocated makes it unproductive to isolate and weigh individual sections of the evidence (see Dawson J in **Shepherd v R** above at para. [33]; **Kevin Perterkin v R**, at para [62]).

[143] Having correctly rejected the submission of no case to answer, the learned judge gave unimpeachable directions to the jury. The jury's verdict of guilty, which followed, is supported by the breadth and depth of the evidence placed before them, making the

conviction both safe and satisfactory. In our view, a consideration of the submissions made on behalf of the applicant left the jury's verdict unshakeable. The application for leave to appeal against the conviction should therefore be refused.

[144] Similarly, the circumstances in which Miss Barnes was killed and her body desecrated warranted the imposition of the sentence of imprisonment for life. The learned judge's recommendation of the sentence to be served before the applicant becomes eligible for parole was eminently justifiable. Accordingly, it should not be disturbed.

Order

[145] The order of the court is therefore as follows:

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

2. The sentence is to be reckoned as having commenced on 27 January 2017, the date it was imposed.