

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE STRAW JA  
THE HON MRS JUSTICE V HARRIS JA  
THE HON MR JUSTICE BROWN JA**

**SUPREME COURT CRIMINAL APPEAL NOS 27 & 28/2017**

**APPLICATION NO COA2021APP00247**

**CARVEL HINES**

**BRUCE LAMEY v R**

**Mrs Jacqueline Samuels-Brown KC and Robert Fletcher for Carvel Hines**

**Clyde Williams for Bruce Lamey**

**Mrs Lenster Lewis-Meade for the Crown**

**18 December 2023 and 1 May 2026**

**Criminal Law - Amended application to adduce fresh evidence on appeal - Whether the information presented to the court for consideration satisfies the test for fresh evidence - Whether there was a duty on the prosecution to disclose the information to the defence at the time of the trial - Judicature (Appellant Jurisdiction) Act, section 28 - Constitution of Jamaica, section 16**

**BROWN JA**

[1] Carvel Hines ('the applicant') was convicted, along with Bruce Lamey ('Mr Lamey'), on 10 February 2017 by a seven-member jury for the offences of wounding with intent and murder before the Westmoreland Circuit Court, sitting in Savanna-la-mar. On 22 March 2017, they were both sentenced to 18 years' imprisonment at hard labour for the offences of wounding with intent and life imprisonment for murder, respectively. In respect of the sentence of imprisonment for life, each was ordered to serve 33 years' imprisonment before becoming eligible for parole. It was further ordered that the sentences should run concurrently. The application for leave to appeal both the

convictions and sentences was considered by a single judge of this court on 12 November 2018. The single judge refused leave to appeal the convictions but granted leave to appeal the sentences. They renewed the application for leave to appeal the conviction before the court, but the applicant also made an application for the admission of fresh evidence in the consideration of his application for leave to appeal. This application is supported by the affidavits of Demoy Williams and Jasneth Bailey. It is this application to admit the fresh evidence which will be considered here.

## **Background**

[2] The essence of the prosecution's case against the applicant was that he and Mr Lamey, on 27 January 2011, sometime after 8:00 pm, forcibly entered the home of Clement Clarke ('Mr Clarke') and his wife Bernice ('Mrs Clarke'), at Clark's Town, Lambs River in the parish of Westmoreland. In the ensuing attack, Mrs Clarke was killed, and Mr Clarke received gunshot wounds but survived. When reference is being made to both Mr and Mrs Clarke, they will be styled as 'the Clarkes'.

[3] Mr Clarke was the sole eyewitness for the prosecution. He gave evidence that he and Mrs Clarke were at home together in their bedroom. They occupied separate beds. While they were in the bedroom, Mr Clarke heard a bang in the vicinity of the front door that opened to outside from the hall (living room). He got up off his bed and went into the hall to investigate the bang. Mr Clarke discovered the front door was "hit off"; that is, the bolt which secured the door was now on the floor. Standing inside the hall was the applicant, armed with a gun. Mr Clarke knew the applicant before.

[4] Mr Clarke armed himself with his machete and tried to defend himself, but the applicant shot him, and the machete fell from his hand. Mr Clarke received other gunshot wounds as he tried, unsuccessfully, to retrieve his machete. He then retreated, backwards, to his bedroom, but the applicant shot at him several times. The applicant followed Mr Clarke into the bedroom and proceeded to shoot Mrs Clarke. Mr Lamey, also previously known to Mr Clarke, joined the applicant in the bedroom. He too possessed a firearm and participated in shooting Mrs Clarke. Mrs Clarke, thereafter, fell to the ground, and Mr

Clarke fell on top of her. Mr Clarke pretended to be dead until the men left the house. After the men exited the house, Mr Clarke managed to retrieve his mobile telephone and telephoned his daughter. Shortly after making the call, the police came to the house and took Mr Clarke to the hospital. Mrs Clarke had, however, already succumbed to her injuries.

[5] Mr Clarke made a report to the police, and eventually the applicant and Mr Lamey were arrested for the offences of wounding with intent and murder.

[6] At the trial, both men gave unsworn statements denying involvement in the shooting and being present at the crime scene at the time of the incident. The applicant said that he was with his "baby mother" in Saint Ann at the time of the incident. Mr Lamey said he was a father of three and would not do such a thing. He also called a character witness.

### **The application to adduce fresh evidence**

[7] The fresh evidence sought to be adduced before this court is from an entry made in the station diary at the Bethel Town Police Station on 28 January 2011 by Detective Corporal Michael Moore ('Det Cpl Moore'). The supporting affidavit evidence of Demoy Williams ('Mr Williams') includes a transcript of this entry, and it reads as follows:

"2:54AM- Report murder wounding with intent

CB/10

Det/Cpl Moore is reporting the murder of Bernice Clarke age 72 yrs old, D.O.B-31-14-38 Housewife and the wounding with intent of Clement Clarke age 67 yrs old, D.O.B-6-9-43 Farmer both residing at Lambs River District Westmoreland. Offences committed 27-1-11 about 8:30pm at Lambs River District in the parish of Westmoreland. Facts are that on the aforementioned date, time and place Bernice and her husband Clement were sitting inside the dining-room of their two (2) apartment dwelling house watching television when two (2) men armed with handguns forced open the front door of the house and entered. Bernice and Clement in an effort to escape from the gunmen ran inside a bedroom where they were confronted by the

gunmen who shot them both then escaped on foot. Bernice received gunshot wounds to her chest, back, both arms and right leg. Clement received gunshot wounds to his back and left hand. Both were subsequently taken to the Sav-La-Mar Public General Hospital where Clement was treated and admitted in a stable condition and Bernice pronounced dead by Doctor Deplas and her body removed to the Doyley's Funeral home to await post-mortem. The scene was visited by Inspector Medley along with members of the Sav-La-Mar C.I.B and personel [sic] from Bethel Town Police Station. Cons Watson and Spl. Cons. Hall of the Area One Scenes of Crime Unit processed the scene. Eight (8) 9mm spent shells and one (1) expended bullet were recovered at the scene. Motive is believed to be an act of reprisal. Det/Sgt. B. Miller is investigating." Signed MMoore D/Cpl"

[8] Mr Williams avers that this fresh evidence conflicts with the evidence of Mr Clarke at the trial and casts doubt on his evidence that he was not in dispute with anyone prior to the shooting, thereby affecting the credibility of his evidence that the applicant was involved in the crimes. Mr Williams further stated that this evidence, had it been disclosed, would have been vital to the preparation of the defence and would have provided material for further inquiries to be conducted.

[9] The Crown opposed the application, contending that the material was available at the time of the trial.

[10] The grounds upon which the application was made are set out below:

"(a) the extract from the Station Diary of the Bethel Town Police Station being the entry made by Det. Cpl. Michael Moore on January 28, 2011 at 2:54 am, is relevant to [the] assessment of the credibility of the witnesses call [sic] on behalf of the prosecution during the trial of the appellant/applicant;

(b) the extract from the Station Diary of the Bethel Town Police Station is relevant to issues raised on the prosecution's case in the trial of the appellant/applicant;

(c) the extract from the Station Diary of the Bethel Town Police Station is relevant to the credibility of the main prosecution witness;

(d) failure by the prosecution to disclose the extract from the Station Diary of the Bethel Town Police Station being the entry made by Det. Cpl. Michael Moore on January 28, 2011 at 2:54 am is in breach of their duty of disclosure and deprived the appellant/applicant of material of relevance to challenging evidence by the prosecution and to his defence;

(e) is relevant to the fairness of the trial proceedings at common law and by statute;

(f) is relevant to the appellant's/applicant's constitutional right to a fair hearing by an independent and impartial court according to law;

(g) is necessary for the fair and just disposition of the appeal."

#### Submissions on behalf of the applicant

[11] Counsel for the applicant, Mrs Samuels-Brown KC and Mr Fletcher, filed written submissions and made oral arguments. They referred to the test for adducing fresh evidence in section 28(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA'). Mr Fletcher also referred to and relied on the dictum of Panton JA (as he then was) in **Shawn Allen v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 7/2001, judgment delivered 22 March 2002, where he set out the principles adumbrated in **R v Parks** [1961] 3 All ER 633 for the consideration of an application to admit fresh evidence. These being:

- i. evidence which was not available at the trial;
- ii. evidence which was relevant to the issues;
- iii. evidence which was well capable of belief; and
- iv. whether there might have been reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence was given together with other evidence at the trial.

[12] As it relates to the first criterion, it was Mr Fletcher's submission that 'availability' means "knowledge of the entry". However, he also referred this court to **R v Page** (1967)

10 JLR 79, an example of a situation where there was knowledge, but this did not preclude the material from being allowed as fresh evidence. In that case, the court allowed material in an investigator's knowledge but not adduced at the trial as fresh evidence on appeal. Counsel drew from this case to support his conclusion that the entry in the diary satisfied the test of unavailability as its existence, though within the knowledge of Det Cpl Moore, it was not adduced at the trial and thus not available.

[13] He also opined that the entry in the diary was necessary for the line of defence as it directly affected the credibility and reliability of Mr Clarke's identification of the appellant as the perpetrator of the crimes. He argued that the entry would provide the applicant with a legitimate basis for making further inquiries during the preparation of his case. This, he says, could be from Det Cpl Moore himself, other police officers involved in the investigation, or even private citizens.

[14] Mr Fletcher submitted further that this entry and other material arising from it might have created reasonable doubt in the minds of the jury as to the guilt of the applicant. He contended that had there been disclosure, the defence would be in a position to test the responses of Mr Clarke coming out of cross - examination as to his reputation and, possibly, seriously impugn his credibility.

[15] Counsel therefore submitted that, in consideration of the fact that the evidence was not made available to the applicant at the trial, it being relevant and one which might have impacted the jury's deliberation in the applicant's favour, he asked this court to allow the admission of this fresh evidence.

[16] Counsel also turned our attention to the relationship between fresh evidence applications and constitutional fairness. He contended that the right to a fair trial guaranteed by the Constitution is applicable to fresh evidence application. This right, he averred, incorporates the duty of disclosure by virtue of section 16(6)(b) and (d).

[17] Mr Fletcher also referred us to **Sangster and Dixon v R** [2002] UKPC 58, where their Lordships recognised that the prosecution's duty of disclosure and the appellant's

right to adduce fresh evidence are two separate, but related concepts. He considered the true test of whether non-disclosure derogates from an appellant's right to a fair trial to be the impact the non-disclosure might have on fairness, that is, whether it "might reasonably have affected the decision of the jury to convict". This was also the position adopted in **Nickoy Grant v R** [2013] JMCA Crim 30, referred to by counsel.

[18] On this point of disclosure, Mr Fletcher submitted that there is a pre-trial and continuing prosecutorial obligation to disclose relevant material to the defence. This, he argued, is especially the case for materials such as the station diary, which is not a public document and as such is not available for inspection or review by the ordinary citizen. He relied on **R v White** (1976) 15 JLR 20 in support of this. We were also referred to the dicta of Glidewell LJ in **R v Ward** (1993) 2 All ER 577 for the proposition that the prosecution's duty of disclosure is independent of any requests being made by the defence.

[19] Mr Fletcher also relied on **R v Ward** for his proposition that the prosecution's duty of disclosure extends to the different arms of the prosecution and not only the prosecuting counsel. It was Mr Fletcher's position that since the evidence originated from the investigative arm of the prosecution, there was an obligation on the prosecuting counsel to take reasonable steps to obtain the material and make it available to the defence. He maintained that the absence of this disclosure significantly impaired and unfairly and unconstitutionally circumscribed the defence.

#### Submissions on behalf of the Crown

[20] Mrs Lewis Meade in submitting on behalf of the Crown agreed that the authority for admission of fresh evidence is found in section 28 of JAJA and that the guiding principles are contained in the judgment of Lord Parker CJ in **R v Parks**. However, she did not agree that the entry should be admitted as fresh evidence. She submitted that the entry being sought by the defence was available at the time of the trial and could reasonably have been provided to the defence had a request been made for it. Counsel

argued that there was ample time for the applicant to have made a request to the prosecution for the material so that it could be obtained in preparation for his case.

[21] It was also counsel's submission that the station diary, not being a public document, disclosure of the entry therein must be preceded by a request from the defence. She argued that, there being no record that a request was made for the diary to be disclosed before or during the trial, there was no obligation on the prosecution to make disclosure of it. She also made reference to the decision of the court in **R v Charles Jones and Raymond White** (1976) 15 JLR 20, where it was said:

"A police station diary is not a public document and evidence as to the contents of an entry therein cannot, therefore, be led to establish the truth of such entry as distinct from the fact that such entry was made."

[22] Further, she submitted that the entry in the diary, specifically, that the attack was an act of reprisal, was speculative, not credible and irrelevant to the issues in the trial. She asserted that the entry in the diary would not assist the applicant to impugn the credibility of Mr Clarke's identification of the applicant as the perpetrator. In fact, she contended that the applicant's attorney extensively challenged Mr Clarke's credibility in cross-examination in the suggestions of Mr Clarke's strained relationship with the community, and this failed to affect the verdict. She submitted that it is unlikely that this entry would have created reasonable doubt in the minds of the jury had it been given with other evidence, considering that the issues raised by the entry in the diary were already dealt with.

[23] Finally, it was counsel's contention that the applicant was aware that Det Cpl Moore was available and, as such, he could have been subpoenaed to give evidence for the defence or called on the prosecution's case and allowed to be cross-examined. She concluded that, having failed to request this available witness at the time of trial, the applicant cannot now apply to the court to have material readily available at the time admitted as fresh evidence.

## Discussion

[24] Two issues arise for resolution in the context of the amended application to adduce fresh evidence with its supporting grounds, many of which overlap. Firstly, is the entry in the station diary made by Det Cpl Moore on 28 January 2011, at 2:54 'fresh evidence', in the classic sense of the phrase? Secondly, broadly, was there a duty on the prosecution to disclose the entry in the station diary to the defence at the time of the trial? The issues will be discussed sequentially, notwithstanding the intermingling of the arguments.

[25] This court has the statutory power and discretion to admit fresh evidence for the effectual determination of an appeal. The criteria to be satisfied for such evidence to merit the description, 'fresh evidence', have been settled for over half a century. Both sides cited the judgment of Lord Parker CJ in **R v Parks**. We quote from page 635 of the law report:

"As the court understands it, the power under [section 28 of the JAJA] is wide. It is left entirely to the discretion of the court, but the court in the course of years has decided the principles on which it will act in the exercise of that discretion. Those principles can be summarised in this way. First, the evidence that it is sought to call must be evidence which was not available at the trial. Secondly, and this goes without saying, it must be evidence relevant to the issues. Thirdly, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. Fourthly, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial."

These principles have been considered and applied by this court on numerous occasions (see, for example, **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 78/2008, judgment delivered 18 June 2008. In that case, it was authoritatively laid down that the principles in **R v Parks** are cumulative and, consequently, the burden is on the applicant to satisfy each (see page 3 of the judgment)).

[26] We will, therefore, take each principle in the order it appears in **R v Parks**. There was convergence in the position of both sides that they were unaware of the existence of the entry in the station diary at the time of the trial. The applicant was arraigned on 31 January 2017, approximately six years after the date of the entry in the station diary. Therefore, chronologically, the material which is now the subject of this application existed before the trial. Against that background, it is understandable that counsel for the Crown submitted that the diary entry was available at the time of the trial and would have been disclosed had a request come from the applicant or his legal advisers. However, having considered the arguments, we are not persuaded of the correctness of that submission in the broader context of this case.

[27] Since neither side was aware of the entry, despite its pre-existence, in the circumstances of this case, the question becomes, was it available at the time of the trial?

[28] Mr Fletcher submitted, correctly, that available in this context ought to mean knowledge of the entry. This meaning resonates with that intimated by Panton JA in **Shawn Allen v R**, cited by Mr Fletcher. In that case, the applicant became aware of relevant entries in the station and crime diaries during cross-examination of the investigating officer. However, the matter was not pursued. In preparation for the appeal, that applicant had a different counsel who wished to examine the entry in the crime diary. Both the crime and station diaries had been, by then, inadvertently destroyed in the year the trial took place. A "crime book" was produced instead. The "crime book" contained similar information. Panton JA concluded that the applicant had satisfied the first requirement, namely, that the evidence which was sought to be adduced was not available at the trial. At page 4 of the judgment, he said, "[i]t was definitely not available to him as he never knew of its existence". That conclusion was predicated on the absence of any mention of the "crime book" at the trial, as well as the absence of any apparent reason for either the applicant or his trial counsel to have been aware of its existence.

[29] Mr Fletcher also relied on **R v Page** in arguing that available must be read in the sense of the applicant having prior knowledge of the existence of the material sought to

be adduced as fresh evidence. However, it is unclear from our perusal of that case that that was the basis upon which it was decided. It appears that evidence which contradicted the identification evidence led at the trial was disclosed to the Court of Appeal by the Director of Public Prosecutions, upon a renewed application for leave to appeal. Based on that disclosure, leave to appeal was granted, as well as a certificate for legal aid and counsel assigned to the appellant. The fresh evidence was received upon the application of the assigned counsel. Although the court referred to the principles in **R v Parks**, the fact that the evidence was unavailable at the time of the trial was assumed without discussion. Hence, we disagree that **R v Page** bolsters the position in **Shawn Allen v R**.

[30] In any event, the point is moot, as the guidance provided by **Shawn Allen v R** is dispositive. The meaning attributed to 'available at the trial', articulated by Panton JA in **Shawn Allen v R**, is supported by **R v Parks**, the classic case in this area. In **R v Parks**, on appeal, it was discovered that at the time of trial, one of the complainants, under another name, had seven convictions for dishonesty, a fact that could have been used to challenge her credibility at trial. Lord Parker CJ concluded that this satisfied the first requirement and, at page 634I, opined, "...this was a matter which was not known and could not reasonably be known to the defence at the time of the trial". The principle to be extracted is this: evidence that was not available at the trial includes evidence that chronologically antedated the trial but was not known, or could not reasonably have been known, to the defence.

[31] In this case, the author of the entry in the station diary, Det Cpl Moore, was not called as a witness by the prosecution. Neither did his name appear on the back of the indictment. However, Det Cpl Moore's involvement was adverted to in evidence by Mr Dave Cephas, a detective constable at the date of the incident, but no longer a serving member of the Jamaica Constabulary when he gave evidence. He will, however, be referred to as 'Det Cons Cephas' for the purposes of this judgment. Firstly, both Det Cons Cephas and Det Cpl Moore were briefed by an inspector concerning a report of murder

and wounding with intent before they both went to the crime scene, which was already cordoned with police caution tape (see page 346, lines 5-15 and page 347, lines 24-25, page 348, lines 1-3 of the transcript). Secondly, at the scene, one Constable Small briefed both Det Cons Cephas and Det Cpl Moore and led them to the front door of the Clarkes' house (see page 349, lines 10-15 of the transcript). Thirdly, it was Det Cpl Moore, who drove the vehicle in which Det Cons Cephas travelled to the Savanna-la-mar Public General Hospital, where Det Cons Cephas testified to recording a statement from Mr Clarke (see page 358, lines 7-20 and page 363, lines 6-11 of the transcript).

[32] From these extracts from the transcript, it is palpable that the fact that Det Cpl Moore made the entry in the diary was not raised at the trial. Equally, there was nothing to telegraph that he had done so as, it appears, his role in the investigations was subordinate to that of Det Cons Cephas, although Det Cpl Moore outranked Det Cons Cephas. In these circumstances, we are fortified by the learning in both **R v Parks** and **Shawn Allen v R** in holding that the applicant has passed the first hurdle.

[33] And so, we come to the second criterion: was the entry in the station diary evidence that was relevant to the issues upon which the case turned at trial? The main issue that arose on the prosecution's case was the correctness of the visual identification evidence, which rested on the foundation of uncontested recognition. The sole eyewitness, Mr Clarke, was extensively cross-examined on his description of the event and, more so, with a view to establishing that although there was no antecedent bad blood between the applicant and the Clarkes, there had been altercations between Mr Clarke and others in the community. The applicant raised the defence of alibi in his unsworn statement, as well as underlined the conflict between Mr Clarke and others in the community, and its absence between himself and Mr Clarke. Mr Clarke accepted that there was no conflict between himself and the applicant before the night of the incident. However, he denied having running conflicts with his neighbours. He admitted, however, that approximately nine years before this incident, he had been shot with a fish gun,

although he disputed that he had first chopped that person (see page 307, lines 6-25; page 308, lines 1-20 of the transcript).

[34] The above synopsis of the issues at trial provides the context in which submissions on relevance must be considered. In essence, and hopefully without oversimplification, it was contended on behalf of the applicant that the entry would have been relevant to: (a) the line of defence, namely the attack on the reliability and credibility of Mr Clarke and (b) lines of enquiry the defence may have wished to pursue. Mrs Lewis-Meade countered that the suggestion in the entry that the killing was the fruit of a reprisal was speculative and neither credible nor relevant to the issues.

[35] The general relevance of the entry cannot be disputed. The entry appears to be a synthesis of the information gathered by the police concerning the incident at the Clarkes' home. Its particular relevance to the defence is to be found in the last line of the entry, "[m]otive is believed to be an act of reprisal".

[36] This takes us to the third principle, where the question becomes, was this (the belief that reprisal was the motive for the attack upon the Clarkes) credible evidence in the sense that it was well capable of belief? In our survey of the decided cases in this area, the fresh evidence was assessable factual material which tended to contradict evidence given at the trial. A few examples will suffice. In **R v Parks**, the fresh evidence comprised previous convictions of the complainant in an indecent assault case. In **R v Page**, the identity of the assailant was in issue. Two witnesses identified Page, both claiming to know Page. However, fresh evidence revealed that the witness who claimed to have known Page for two months before the incident had referred to him as "an unknown man"; while the other witness, who answered in the affirmative when he was asked if he knew Page, when he was confronted with Page denied knowing him. In **Shawn Allen v R**, the fresh evidence in the crime book was the investigator's positive note that the crime had been committed by "a lone man on foot armed with a handgun," in circumstances where he had testified that he had been given a name.

[37] In this case, the subject of the fresh evidence application, certainly the section of particular relevance to the case, is the belief of Det Cpl Moore as to what was the motive for the commission of the crimes. Firstly, the admission of the diary entry is not being sought to contradict Det Cpl Moore, since he did not testify (see **R v Charles Jones and Raymond White**). Secondly, the entry cannot be used to discredit Mr Clarke because Det Cpl Moore never said in the entry that this belief was informed by anything said to him by Mr Clarke. Mr Clarke was resolute in his rejection of the suggestions that he was a man who lived in enmity with his neighbours and so warlike a character that he was monikered, "weapon".

[38] Implicit in this line of cross-examination was the suggestion that the attack upon the Clarkes was the bitter fruit of Mr Clarke's antagonism towards his neighbours and not the perpetration of the applicant, with whom he had had no dispute. Without that nexus (that the belief arose from Mr Clarke's report), or anything kindred, it cannot be said that the entry is assessable factual material which contradicts Mr Clarke. Lacking the quality of assessable factual material capable of contradicting Mr Clarke, it cannot be persuasively argued that the entry is credible, in the sense of being well capable of belief. Accordingly, this case is entirely distinguishable from **Shawn Allen v R** in which the diary entry contradicted both its maker and the witnesses who claimed to have named the assailant. Therefore, the applicant has failed to clear the third hurdle. Evidence that is not credible should not be admitted (**Lescene Edwards v The Queen** [2022] UKPC 11, applying **Lundy v The Queen** [2013] UKPC 28). Consequently, considering the applicant's burden to cumulatively establish the four principles (**Mario McCallum v R**), the application has foundered. However, we will go on to consider the fourth criterion, the discussion of which, we think, fortifies us in our conclusion.

[39] Had the applicant succeeded in establishing the third principle, **R v Parks** would have required us to examine the evidence in the diary entry and go on to say whether there might have been a reasonable doubt in the collective mind of the jury about the guilt of the applicant, if that evidence had been given, together with the other evidence,

at the trial. We preface our discussion with this general observation. It is doubtful whether Det Cpl Moore's station diary entry can properly be considered an assessable fact or material. That is, he recorded a belief, not anything apparently perceived by his senses, the foundation of evidence adduced from a lay witness. Any attempt to elicit Det Cpl Moore's belief at the trial would likely have been met with an objection on the grounds of being either speculative or hearsay.

[40] Accepting, for the sake of argument, that the objection was overruled and the belief that the motive for the killing was reprisal was admitted into evidence, it is arguable that that would not have adversely impacted the verdict of the jury. The defence presented the jury with what may conveniently be called a binary option in opposition to the identification evidence adduced from Mr Clarke. The first part, to which we earlier adverted, was to say Mr Clarke excited such animosity from his neighbours that the attack upon him and Mrs Clarke could have been launched by any of the number of persons with whom he had disputes or altercations. The second part of this dichotomy was the applicant's alibi. The acceptance of either or both prongs of the defence would have led to the return of verdicts of not guilty. The guilty verdicts are evidence of the rejection of the applicant's binary defence.

[41] Would evidence of Det Cpl Moore's diary entry alter the verdicts in the applicant's favour? That diary entry encapsulates the first part of the applicant's binary defence. At the risk of repetition, but for the sake of emphasis, Det Cpl Moore's note that the motive was believed to be an act of reprisal was, fundamentally, the defence at the trial, stripped of its peripheral details; its very essence. Therefore, the collective mind of the jury had already been directed to the theory of the applicant's case that the invasion of the Clarkes' home was the work of retaliation arising from Mr Clarke's fractious relationship with his neighbours. In short, Det Cpl Moore's station diary entry is not new material that, if it had been placed before the jury, together with the other evidence, would have raised a reasonable doubt in the collective mind of the jury, since its very essence was placed for consideration by the jury as part of the defence.

[42] So then, not only is the proposed fresh evidence not credible, but it would also have had no effect on the jury's verdict and, by extension the safety of the conviction, since it was already part of their deliberation. There is, therefore, no basis upon which to admit the proposed fresh evidence since it has failed on the third and fourth criteria.

### Disclosure

[43] We will now consider the second issue identified above: was there a duty on the prosecution to disclose the entry in the station diary to the defence at the time of the trial? It is pertinent to say at the outset what the word 'prosecution' embraces. The prosecution means not just the attorneys-at-law employed by the Crown and having conduct of the trial but includes members of the Constabulary and like State officials associated with the investigations and conduct of the case against a defendant: **Harry Daley v R** [2013] JMCA Crim 14, at para. [49]; **R v Ward**, at page 599.

[44] As was observed by McDonald-Bishop JA (Ag) (as she then was), in **Willard Williamson v R** [2015] JMCA Crim 8, at para. [44], the principles governing the issue of disclosure in criminal cases in this jurisdiction, emanate neither from statute nor rules of court. They are wholly common law derived, **R v Ward** being the leading case. McDonald-Bishop JA (Ag) then went on to distil from **R v Ward** a number of principles. Of relevance to this case is the first of that distillation, recorded at para. [45]. We quote:

“(i) The prosecution has a duty at common law to disclose to the defence all relevant material. Relevant material is evidence which tends either to weaken the prosecution's case or strengthen the defence. This duty of disclosure requires the police to disclose to the prosecution all witness statements in their possession and for the prosecution to supply copies of such statements to the defence or to allow them to inspect them unless good reason exists for not doing so.”

Although the principles were developed at common law, the prosecution's duty to disclose in criminal cases has been placed on a constitutional footing by reference to the due process provisions. In **Nickoy Grant v R** [2013] JMCA Crim, section 16(6)(b) of the Constitution (right to adequate time and facilities for the preparation of defence) was

interpreted to embrace a prosecutorial duty to disclose material evidence in a timely manner to facilitate preparation of the defence (see para. [27] of the judgment). In a similar vein, although not citing section 16(1) of the Constitution, Panton P, in **Harry Daley v R**, at para. [49], alluded to the right to a fair hearing, which involves neither raising obstacles in the path of the defence nor “withholding material relevant to the case”.

[45] Notwithstanding its constitutional underpinning, the prosecution’s duty of disclosure is, in the first place, limited to what can reasonably be held to be “relevant material,” as defined in **Willard Williamson v R. R v Ward**, at page 598, limited the obligation to disclose to two classes of evidence: (i) evidence that is material to the issues upon which the trial is expected to turn; and (ii) evidence that is material to the issues which unexpectedly arise during the course of the trial. Therefore, the duty transcends statements and may extend to other items in the possession of agencies of the State external to the prosecution service (see, for example, **R v Maguire** [1992] 2 All ER 433, which concerned scientific data in the hands of the Royal Armament and Research Development Establishment Forensic Scientists).

[46] In **Sangster (Mark) and Dixon (Randall) v R** [2002] UKPC 58, the appellants were convicted of the murder of a member of the security forces during the course of a robbery of a bank. The scene was captured by four security cameras, and a video was made from the footage. Police officers saw the video on the day of the robbery. However, it did not appear that the police informed the Director of Public Prosecutions of the existence of the video and, consequently, it was not disclosed to the defence. Although there were visual issues with the video, the appellants did not appear in what was shown to their Lordships. Lord Rodger, at page 385, held that the evidence of the videotape was “material in the sense that, if it had been disclosed to the defence and had been led at the trial, it ‘might reasonably have affected the decision of the trial jury to convict’”.

[47] There was no submission before us that the undisclosed material in the station diary entry was disclosable as defined in **Willard Williamson v R**, that is, that it was

evidence which tended to weaken the case for the prosecution or strengthen the case for the defence. Neither was it contended that Det Cpl Moore's belief fell into either of the categories identified in **R v Ward** mandating disclosure (see para. [44] above). What was advanced was a claim that the non-disclosure of the entry impeded the applicant in the preparation of his defence.

[48] Similar submissions were made in **Nickoy Grant v R**, a case upon which the applicant relied. In that case, the prosecution failed to disclose the medical certificate that was in their possession in a case of wounding with intent. The disclosure, when it was made, was court-ordered and came some months post-trial. It was submitted in that case that the non-disclosure prejudiced the defence in its preparation. There was, however, an acknowledgement by Mr Grant's counsel that it was for him to "show that the non-disclosure, or late disclosure, did in fact prejudice his fair trial..." (see para. [14] of the judgment). **Ferguson v Attorney General** (1999) 57 WLR 403 was cited to the court.

[49] Learned counsel for the applicant did not offer any factual basis for submitting that the non-disclosure was an impediment to the proper preparation of the applicant's defence. Instead, it was argued that preparation included the possibility of interviewing Det Cpl Moore. Such an interview could have revealed information that might have led the defence further, it was urged. Respectfully, the further submission that whether the information obtained was "qualitatively important or airy fairy was a matter for the defence," misses the mark. At this stage, the court is the arbiter of what is, to borrow Mr Fletcher's phrase, "qualitatively important".

[50] With all due deference to learned King's Counsel and Mr Fletcher, a very senior member of the Bar, these submissions amount to an invitation to the court to give its imprimatur to arguments which fade into the realm of speculation and the penumbra of the epithet, fishing expedition. Nothing concrete or, to use the phrase employed above, no assessable factual material was placed before this court. In **Nickoy Grant v R**, it was contended, among other things, that the medical certificate could have been instructive

in exploring whether the lesser charge of unlawful wounding was indictable. On the contrary, there is nothing tangible that can be isolated for assessment in accordance with the principles governing disclosure. We are, therefore, constrained to conclude that the entry made in the station diary at the Bethel Town Police Station by Det Cpl Moore, on 28 January 2011, was not disclosable.

[51] The prosecution's duty to disclose pertains only to disclosable material. Since the station diary entry was not disclosable, the corresponding duty on the prosecution to disclose all relevant material, as defined in **Willard Williamson v R**, did not arise (see paras [44]-[45] above). Therefore, the non-disclosure of the station diary entry did not result in any derogation from the applicant's right to a fair trial. As we have already shown, the disclosure of the station diary, taken with the other evidence at the trial, would not have reasonably affected the jury's decision to convict since the diary entry was, in essence, an encapsulation of an aspect of the defence at trial (see paras [40]-[42] above). In brief, because the proposed fresh evidence was not disclosable material, there was no engagement of the constitutional right to a fair hearing in the absence of disclosure of the diary entry. Accordingly, the prosecution was not in breach of its duty to disclose material evidence in its failure to disclose the diary entry.

## **Conclusion**

[52] The entry made in the Bethel Town Police Station Diary, on 28 January 2011, was not evidence that was available at the time of the trial, as its existence was unknown to the applicant and his legal advisers, as contemplated by **R v Park** and **Shawn Allen v R**. Although the diary entry bore some general and specific relevance to the issues at trial, it was not credible evidence in the sense of being well capable of belief, for want of any link between Det Cpl Moore's belief and a report from Mr Clarke, or like material. Therefore, the applicant failed to establish the third requirement and, consequently, the application to adduce fresh evidence must be refused.

[53] Similarly, the claim that the prosecution ought to have disclosed the entry in the station diary must be rejected because the diary entry was not disclosable evidence,

lacking as it did, the quality of assessable factual material which tended to contradict any fact that was an issue at the trial. In any event, even if we our conclusion concerning the third criterion is wrong, the application would still founder on the fourth criterion because the extract would not have affected the jury's verdict.

### **Order**

[54] The amended application for leave to call fresh evidence on appeal, filed on 13 February 2023, is refused.

### **Apology**

[55] Having regard to the length of time it took to deliver our decision, we wish to record our unqualified apology to the parties.