JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 42, 43 & 81/2018

RYAN MCLEAN
RICHARD GORDON v R
CHRISTOPHER COUNSEL

Ms Melrose G Reid instructed by Melrose G Reid & Associates for the applicants Ryan Mr McLean and Richard Gordon and the appellant Christopher Counsel

Orrett Brown for the Crown

8, 10 December 2020 and 21 May 2021

DUNBAR-GREEN JA (AG)

Introduction

[1] On 22 March 2018, Mr Ryan McLean, also known as "Twin" and Mr Richard Gordon, also known as "Belly", ('the applicants') were jointly convicted by a jury in the Saint Thomas Circuit Court for the murder of Mr Rojay Turner ('the deceased'), otherwise called "Jay Jay", who was killed on 11 October 2015. Mr Christopher Counsel ('the appellant'), also known as "Cody", who was also jointly charged for the murder, entered a change of plea to guilty on 12 March 2018, before the prosecution closed its case.

[2] They were sentenced on 2 May 2018 by Beswick J. Messrs McLean and Gordon were each sentenced to life imprisonment with the stipulation that Mr McLean was ineligible for parole before serving at least 21 years and Mr Gordon was ineligible for

parole before serving at least 18 years. In light of his change of plea, Mr Counsel was sentenced to 18 years' imprisonment with the stipulation that he should serve at least 10 years before he was eligible for parole.

[3] All three men applied to this court for leave to appeal against their convictions and sentences. On 8 January 2020, a single judge refused the applications of Messrs McLean and Gordon on the basis that the trial judge's summation was adequate and the sentences imposed were within the normal range for such cases. Mr Counsel was granted leave to appeal against conviction and sentence. This was based on his allegation that he had received poor legal representation and was "forced to sign a plea bargain paper". It was also determined that, although the sentence imposed may have been reasonable, the full panel was required to review it, on account of an apparent discrepancy in relation to the discount which had been applied because of the guilty plea. However, during the hearing of this appeal, with the leave of the court, the appellant abandoned his appeal against sentence.

[4] Messrs McLean and Gordon renewed their applications before us for leave to appeal conviction and sentence. These applications were considered together with Mr Counsel's appeal and, on 10 December 2020, we made the following orders:

> "1. The applications of Ryan McLean and Richard Gordon for leave to appeal conviction and sentence are refused.
>
> 2. The sentence of each applicant is to be reckoned as having commenced on 2 May 2018.
>
> 3. The appeal of Christopher Counsel is dismissed.
>
> 4. Conviction and sentence of Christopher Counsel are affirmed.
>
> 5. Sentence is to be reckoned as having commenced on 2 May 2018."

[5] We indicated then that our reasons would follow. We now provide such reasons. The applicants and appellant will be referred to individually by name.

The facts

[6] At about 8:30 on the morning of Sunday, 11 October 2015, Mr Robert Williams, otherwise called "Dadda" and Mr Christopher McKen, otherwise called "Chrissy", were having a conversation with the deceased along Friendship Pen Lane in the parish of Saint Thomas when they were accosted by the applicants and the appellant, who were armed with knives. Mr Williams fled and was chased by Mr McLean whom he eluded. Mr Gordon, Mr Counsel and subsequently Mr McLean, attacked the deceased, stabbing him multiple times after which they fled the scene. The medical evidence was that the deceased succumbed to haemorrhage from multiple stab wounds to the chest, likely caused by a single blade knife.

The trial

[7] Mr McKen testified that he was an eyewitness to the stabbing incident and had an unobstructed view of the applicants and the appellant. On the fateful morning, as he stood smoking weed with Mr Williams and the deceased, the applicants and the appellant approached. His back was turned to their direction so his attention was drawn to them by the deceased's instruction to him to "go fi a lass" and Williams' direction, "go fi a knife no dog". As he looked around, he saw the applicants and the appellant with three long knives. Mr McLean chased Mr Williams and stabbed at him while Messrs Gordon and Counsel stabbed at the deceased. Mr Counsel "lean up" the deceased onto a red van which was at his (Mr McKen's) gate and started stabbing him. Mr Gordon joined in and "start to cut and stab him to". Mr McLean, who had abandoned his chase of Mr Williams, returned and joined in stabbing the deceased. They eventually ran off in the direction of the river. Mr Williams went in hot pursuit of them and he, Mr McKen, went to assist the deceased.

[8] Mr McKen gave evidence that when he first saw the applicants and the appellant, it was daytime and the sun was out. He was able to see them clearly as nothing was

blocking their faces. They were some 3 feet away and side by side at that point. He then withdrew himself from the place of attack and stood closer to his gate, and from that distance of 15 to 20 feet, he witnessed the attack which lasted for about three minutes. He saw Mr Counsel's face throughout the incident and Mr Gordon's initially, for a minute, but also observed him throughout the stabbing incident. He saw Mr McLean's face for a minute then again when he returned from chasing Mr Williams and while he was stabbing the deceased.

[9] Mr Williams' evidence corroborated Mr McKen's account, in part. It was similar up to the point of him being chased by Mr McLean. He testified to seeing the applicants and the appellant as they approached the location at which he, Mr McKen and the deceased were standing. He was within touching distance of Mr Mclean, who "chucked" him. He responded in like manner and Mr Mclean chased him with a knife. He had not seen the stabbing of the deceased because by then he had taken refuge inside a nearby house.

[10] Mr Williams also testified that he had seen Mr McLean the night prior to the stabbing, at a close distance, for about half an hour and with the aid of streetlights. That was an encounter with Messrs McLean and Gordon, while they were in the presence of the deceased. At that time, both Mr Williams and the deceased impressed upon Mr Gordon that he needed to warn Mr Counsel about creating "war" with them over a woman. Mr Gordon, in turn, threatened to kill them.

[11] The learned trial judge permitted the applicants and the appellant to be identified by witnesses whilst they were in the dock. This was objected to by counsel but the objection was not upheld. Mr McKen identified all three men in the dock. Messrs Mclean and Gordon were also pointed out in court by Mr Williams. However, at that time, Mr Counsel, who had changed his plea to guilty, was no longer in court.

[12] Defence counsel objected to Mr Mclean being pointed out in the dock on the basis that there had been no indication, prior to trial, as to how he might be distinguished from his twin brother. Apparently, the information on how the men were able to distinguish

between the twins was revealed during the trial and had not been recorded in their statements to the police. Defence counsel also contended that the witnesses did not know Mr McLean and had mistaken him for his twin brother who was responsible for the crime and had since died.

[13] It was accepted by Messrs McKen and Williams that Mr Mclean was an identical twin but they both testified that they were able to distinguish him from his twin brother. They described Mr McLean as having a bigger build and the twin as having a scar on his face and walked with a limp. Mr McKen also testified that he had known Mr McLean for seven months prior to the incident and had seen him earlier in the same month when Mr McLean visited his aunt and mother in his (Mr McKen's) yard. Below, is part of the exchange between Crown Counsel and Mr McKen in relation to Mr McKen's previous knowledge of Mr McLean:

> "Q So you also said that you saw Twin?
>
> A Yes, Sir
>
> Q Why you call him Twin?
>
> A Because him have a next brother, a [sic] identical. Him have a next identical twin.
>
> Q You say him have a next identical twin?
>
> A Yes, Sir.
>
> Q And you say is this Twin you see?
>
> A Yes, Sir.
>
> Q How you able to say is this twin you see?
>
> A The next twin him more slimmer. Him walk and limp an him have cut in a him face a him ever…
>
> Q Slowly. So the next twin more slimmer. Walk and limp an have cut in him face?
>
> A Yes, Sir.

Q Have you ever spoken to this twin before?

A Yes, Sir." (pages 129 -130 of the transcript)

[14] For his part, Mr Williams testified that he had helped to care for Mr McLean's twin brother when he received a gunshot injury to the belly and had been friends with Mr Mclean, who was a daily visitor to his yard. He had known Mr Mclean and his twin since childhood and, as they got older, he and Mr Mclean would smoke and drink together. He acknowledged that Mr McLean went away for 15 years but maintained that he knew him well enough to distinguish him from his brother. He said he knew Mr McLean's face well and described it as "clean and smooth".

[15] Mr McKen gave evidence that he knew Messrs Counsel and Gordon well, prior to the incident. He knew Mr Counsel from an adjoining community and also knew his girlfriend. He would see Mr Counsel habitually at the girlfriend's gate, once or twice per week, and on occasion for the "whole day". He had seen him at the market and in the week prior to the stabbing incident. He knew Mr Gordon as a vendor and saw him once per week, at times. He would "ketch mango fi him" and received money. He had also known Mr Gordon's baby mother.

[16] Mr Williams testified that he had known Mr Gordon for some nine years prior to the incident. He had introduced Mr Gordon to his (Mr Gordon's) girlfriend. Like Mr McKen, he had caught mangoes for Mr Gordon and they also drank rum together. The evidence of prior knowledge was not challenged by counsel for Mr Gordon. Furthermore, Mr Gordon, in his unsworn statement from the dock, confirmed knowing both witnesses.

[17] The investigating officer, Detective Sergeant Courtney Daley, testified that he received a report from Mr Williams about the stabbing incident and carried out investigations, which included attending the scene of the incident and the homes of the appellants, and collecting statements. Sergeant Daley confirmed that identification parades were not held but provided no explanation for failing to do so. He testified that

both Mr McLean and his twin brother were previously known to him and that he was able to distinguish between them. His evidence as to how he knew them differently was consistent with that given by Messrs McKen and Williams. The police officer also testified that, on caution, Mr McLean had told him:

> "Mi nuh kill Jay Jay. A Dadda mi run down with mi knife an him run in a one yard. A Cody and Belly you have to talk to about that."

[18] No-case submissions were made on behalf of Messrs McLean and Gordon. Mr McLean's focus was on the absence of an identification parade. Defence counsel argued that since Mr Mclean was an identical twin and Mr McKen's evidence of prior interactions and knowledge of Mr McLean, did not rise to the level of "recognition", an identification parade was necessary. In relation to Mr Gordon, defence counsel focused his no-case submission on the identification evidence, which he said demonstrated no more than a fleeting glance, rendering the case unreliable and unsafe for the jury's consideration. Those submissions were overruled by the learned trial judge, who found that there was a case to answer in respect of each applicant.

[19] In answering the case against them, Messrs McLean and Gordon gave unsworn statements from the dock. Mr McLean denied participating in the killing. He claimed to have left Saint Thomas at age 20 and had been living in Kingston at the time of the murder. He stated that he and his twin brother were both known by the aliases "Bigga" and "Twin". He did not respond to the evidence about their distinguishing features. Mr Gordon also denied being in Saint Thomas on the date of the incident. He stated that he had left the parish several days earlier to sell various food items in Saint Ann, after which, he got work on a construction site.

The appeal

[20] With the leave of this court, only ground one of the filed grounds of appeal was pursued and a supplemental ground on sentence added for each applicant and the

appellant. As it concerned Mr Counsel, a third ground was permitted. In the result, the grounds advanced were as follows.

Ryan McLean

[21] On behalf of Mr McLean, the proposed grounds were:

> "(i) misidentification by the Crown witnesses; and
>
> (ii) a manifestly excessive sentence."

[22] These subsidiary grounds were advanced under (i) above:

> "(1) The learned trial judge erred in not upholding the no-case submission with respect to:
>
> (a) identification of Mr McLean, he being an identical twin, and called by the alias 'twin'; and
>
> (b) dock identification.
>
> (2) The learned trial judge erred in allowing the Crown to solicit evidence from the investigating officer with respect to differentiating the twins as he was not a witness of fact."

Richard Gordon

[23] For Mr Gordon, the proposed grounds were similar to those set out at paragraphs [21] and [22](1)(b) above in respect of Mr McLean. They were expanded in terms that the learned trial judge, in her summation to the jury, had failed to adequately deal with the issue of dock identification and the absence of an identification parade.

Christopher Counsel

[24] With respect to Mr Christopher Counsel, the grounds were:

> "(i) misidentification by the Crown witnesses;
>
> (ii) poor legal representation; and

(iii) a manifestly excessive sentence [abandoned during the course of argument]."

Submissions for Mr Mclean

[25] Ms Melrose Reid, appearing for the applicants and the appellant, argued strenuously that there was a case for misidentification as Mr McLean had an identical twin brother, a fact that was known to Crown witnesses, who failed to indicate, in their statements to the police, that they were able to distinguish between the twins or give information, which was capable of distinguishing them. In those circumstances, the learned trial judge ought not to have allowed the "dock identification" and, instead, should have upheld the no-case submission made on his behalf. This was expected, especially in light of the learned judge's explanation of the undesirability of dock identification, as well as the following observation at pages 674-675 of the transcript:

> "We were not told why there was no identification parade for the accused persons in this case. In a situation where the evidence is that one of the perpetrators is a twin, whose twin is in the same community, it would be expected that the witness will be allowed the opportunity to show that he knows the twins individually by putting the twins on an identification parade. An identification parade would have allowed the witness to be given the opportunity to point out the twin that he alleges was the perpetrator, and of course, it would give the suspect the chance of not being identified, which would be to his advantage…"

[26] Counsel also contended that since Mr McLean was an identical twin, had been arrested some six months after the incident in another parish and was referred to by an alias, there was a requirement for an identification parade to be held. The failure to hold one, she submitted, meant that there was no guarantee that the correct twin was convicted and that was fatal to the conviction. It was also argued that the learned trial judge's warning to the jury about the caution to be exercised, in the circumstance of an identical twin, was given only after the damage had been done, as she had allowed the prosecution to lead evidence, which was not contained in any statement to the police.

[27] On the question of the learned trial judge's charge to the jury, it was argued that she failed to give a balanced view on the evidence in relation to the identification of the twins and particularly in relation to the fact that the Crown witnesses only gave evidence pertaining to their distinguishing features during the trial and not at the time of giving their statements to the police. Ms Reid submitted that the learned trial judge should not have admitted the evidence relating to their distinguishing features and that her instructions to the jury to proceed with caution did not cure this error. In making those submissions, reliance was placed on the case of **R v Kevin Williams** [2014] JMCA Crim 22.

[28] In relation to the evidence of Sergeant Daley, regarding his knowledge of the difference between the twins, Ms Reid acknowledged that the learned trial judge had told the jury that the officer could not say which, if either, of the twins was involved in the incident as he was not present on the scene. She argued, nevertheless, that it was a serious error to have admitted that aspect of the police officer's evidence, which she characterized as prejudicial. That information, she contended, strongly corroborated the evidence of the other Crown witnesses, and the jury would have concluded from it that the twin before the court was the correct one. She was also more than subtly critical of the learned judge's comment in reference to the officer's evidence, at page 754 of the transcript:

> "Is it because he could tell the difference and he intended to arrest Rayon, not Ryan? It's a matter for you."

[29] In making those submissions, Ms Reid relied on the cases of **Jason Lawrence v R** [2014] UKPC 2, **R v Terrell Neilly** [2012] UKPC 12 and **R v Popat** (1998) 2 Cr App R 208.

[30] Counsel sought to further impugn the evidence of Sergeant Daley by arguing that he had also arrested the other twin because he was unable to distinguish between them. It should be noted, however, that there was no evidence that the other twin was arrested, and Sergeant Daley denied that he had done so.

[31] In support of her submissions that the directions to the jury were deficient, Ms Reid indicated that the learned trial judge had failed to point out that the distances of 3 feet and 20 feet, indicated by the Crown witnesses, were far distances from which to identify an identical twin, especially, in the circumstances of this case, where the encounter was a tense one. On this point, she also argued that the quality of the identification was of such poor quality that the case should have been withdrawn from the jury. She pointed to the headnote in **Wilbert Daley v The Queen** (1993) 30 JLR 429, for support, and added that although it was commonly accepted that recognition was more reliable than the identification of a stranger, the jury should have been reminded by the learned trial judge that mistakes in recognition of close friends and relatives were sometimes made.

[32] Based on those submissions, counsel urged that Mr McLean's conviction be quashed and no re-trial ordered.

[33] In response, Mr Orrett Brown, who appeared for the Crown, submitted that the learned trial judge was correct to overrule the no-case submission as it could not be said that the identification evidence had a base so slender as to be unreliable. In support of that submission, he referred us to the caution statement attributed to Mr McLean, viz:

> "Mi nuh kill Jay Jay. A Dadda mi run down with mi knife an him run in a one yard. A Cody and Belly you have fi talk to bout that."

[34] This statement, Mr Brown submitted, remained unchallenged and supported the identification evidence. Since Mr McLean had placed himself on the scene, armed with a knife and in the company of his co-accused, the issue of whether the correct twin was identified had been rendered nugatory, he argued.

[35] Crown Counsel also submitted that dock identifications were permissible with the necessary warnings to the jury on their undesirability and associated dangers. In its original sense, he observed, a dock identification entails the identifying of an accused person for the first time, by a witness who did not claim previous acquaintance. However,

in the present case where there was claimed acquaintance, by the Crown witnesses with Mr McLean, before the incident, this was not a case of dock identification in its truest sense. Mr Brown disputed that the learned trial judge had erred in permitting the evidence of Sergeant Daley in relation to his ability to distinguish between the twins and argued that the sergeant's evidence was relevant in establishing how the officer had determined which of the twins to arrest.

Submissions for Mr Gordon

[36] Ms Reid's submissions, in relation to Mr Gordon, were similar to some of those made on behalf of Mr McLean. As before, she suggested that the summation did not deal adequately with the issue of dock identification. Neither did it adequately address the dangers posed by the absence of an identification parade, in circumstances where Mr Gordon was known by an alias and was arrested months after the incident, in a different parish. She contended that the learned trial judge merely "regurgitated to the jury the purpose of an identification parade" and "the unhealthiness of a dock identification", without showing the danger. In alluding to the danger, she argued that the learned trial judge should have pointed out to the jury the danger of McKen's evidence that he had identified Mr Gordon from 3 feet and between 15 to 20 feet away, without the confirmation of Mr Gordon's identity on an identification parade. Counsel relied on **R v Kevin Williams and Goldson and McGlashan v R** [2000] UKPC 9, in support of the principle that where an accused is called by an alias, it is desirable to hold an identification parade.

[37] It was argued strenuously that such failures, on the part of the learned trial judge, resulted in the jury returning a verdict of guilty. The cases of **R v Turnbull** [1977] QB 224, **R v Oliver Whylie** [1977] 15 JLR 163 and **Junior Reid v R** [1990] 1 AC 363 were cited as authorities on how a judge should treat with identification evidence, generally, and in cases where recognition was alleged by witnesses.

[38] Mr Brown countered that the directions of the learned trial judge, on dock identification, were unassailable and consistent with the directions approved by the Privy

Council in the case of **Jason Lawrence v R**. In particular, the learned trial judge had advised the jury to be cautious in relying on the dock identification and explained the reasons for caution, as well as the disadvantage to the accused where there had been a failure to hold an identification parade. Again, Mr Brown argued that the term, 'dock identification' had been misapplied. The identification of Mr Gordon was not a dock identification in the true sense as he was previously known to the witnesses, and this view, he said, was fortified by the fact that their knowledge of the applicant was not disputed in cross-examination, but instead confirmed. It was also his submission, that the failure to hold an identification parade was not fatal as this was a case of claimed recognition.

[39] Mr Brown confidently asserted that the learned trial judge gave full and adequate directions in keeping with the **Turnbull** guidelines. She had also instructed the jury to approach the evidence with caution, given the risk of mistaken identification and the possibility that multiple witnesses might be mistaken, he posited.

Submissions for Christopher Counsel

[40] In light of the issues raised by Mr Counsel, it is necessary to set out additional background facts before outlining the submissions made on his behalf.

[41] By affidavit, filed in this court on 30 September 2020, Mr Counsel asserted that whilst the trial was taking place, and after hearing Mr McKen's evidence, his lawyer, Mr Lawrence Haynes, told him that it was better for him to "take a plea". Mr Counsel deposed that he refused to sign the "plea bargain" which Mr Haynes had prepared, because he was not guilty. He stated also that Mr Haynes had involved his father who told him to sign the paper as instructed by the lawyer, failing which he would no longer bring him lunch and "no business with [him] again".

[42] Mr Counsel claimed to have insisted in his refusal, after which, his lawyer told him to listen to his father as it was he who was paying the fees. He deposed further that everything happened quickly and he thought that by signing the paper the judge would

let him go. Consequently, upon his return to court, following that engagement with his lawyer, he was re-pleaded and entered a guilty plea, as instructed and advised by the lawyer, anticipating that he would be released. He was, therefore, surprised when he was returned to his cell and subsequently sentenced for murder.

[43] Mr Counsel was adamant that he did not commit the murder and that he would have gone through with the trial had he known that he was to be sentenced. Reproduced below, from his affidavit, is an account of what he claimed transpired on the day of the stabbing incident:

> "My Honour this is how it goh. Me ah walk fi go cross the river to do a casting work on a building with some other youths about six youth was walking, but ah me alone was going to my work. When we pass some other youths about four or five of them on the street side, and them shout 'if me cyaa give them some of the wuk' and before me could answer, one on [sic] the youth shouted out 'batty man nuh fi come pon fi we side come work'.
>
> Same time, some other youth shouted out 'batty man' and a youth stabbed after meh, and me back back to ketch me balance and I saw another youth stabbed him and a mini war started with men cursing and stabbing after each other. After me back back I dropped on my back and another youth come with an ice-pick and some other youth, jumped in a [sic] and one helped me to my feet, that the other youth dem dat get convicted, Mr McLean and Gordon were not there on the scene.
>
> … I know that the argument started over me as is me dem ask bout the work, but I did not stab nor had any cutting weapon. That I singed [sic] the plea bargain paper because my laya and my father said it is better to sign the paper and take a plea;…
>
> That I am talking the truth how the thing really guh, is another youth stab the youth weh dead, when them called me 'batty man'.
>
> My Lords, everything happen so fast that me cyaa seh which youth stab after me and which youth really stab the youth

> weh dead because it was nuff youth was there." (Paragraphs 23 – 27)

[44] In light of this evidence from Mr Counsel, his attorney-at-law in the court below, Mr Lawrence Haynes, swore an affidavit, on 7 December 2020, in which he indicated the circumstances of his retention and responded to the allegations levelled against him. Mr Haynes stated the following, in relation to his instructions:

> "CHRISTOPHER kept assuring me that he had reliable information that neither witness was going to be coming to court at his trial to give evidence against him." (Paragraph 6)

[45] Evidently, those assurances did not materialize. According to his averments, Mr Haynes pointed out to Mr Counsel his options and the overall prospects of the case against him in light of evidence that the primary witnesses claimed to know him very well. He also expressed to Mr Counsel that it was his opinion that it was best for him to change his plea before the case for the Crown concluded and he agreed to do so. Mr Haynes denied receiving any instructions from Mr Counsel to the effect set out at paragraph [40] above. He also exhibited a document signed by Mr Counsel and dated 8 March 2018, which he indicated was Mr Counsel's agreement to change his plea. The document states, in part:

> "I Christopher Counsel … being of sound mind and body do hereby declare that I have discussed my case i.e. the matter of THE CROWN v. RAYON Mr McLEAN, RICHARD GORDON and CHRISTOPHER COUNSEL for the offence of murder committed on the 11th day of October, 2015 of one ROJAY TURNER, with my Attorney-at-Law, Mr. Lawrence Haynes and I have agreed having reviewed with him all the evidence and the circumstances, to enter a plea of **guilty** to manslaughter or murder, whichever one the Prosecution may choose to accept." (Emphasis as seen on the original)

[46] The concluding paragraph of Mr Haynes' affidavit reads:

> "CHRISTOPHER freely agreed to change his plea and was fully aware of the consequences of doing so. At no time was he pressured by me to do so and I considered it to have been

> my foremost duty to highlight to him the overwhelming strengths of the prosecution's case." (paragraph 17)

[47] Ms Reid suggested that the learned trial judge erred in accepting the change of plea without ascertaining whether Mr Counsel understood the import of the change of plea. She contended that had the learned trial judge made the "necessary enquiries", Mr Counsel would have known that he was not going to be released. Those submissions, she made, notwithstanding her acceptance that Mr Counsel was represented by a very senior attorney-at-law. Still on the issue of the plea, Ms Reid indicated that the transcript did not reveal that a plea bargain had taken place and that, based on section 5 of the Criminal Justice (Plea Negotiations and Agreements) Act, the negotiation ought to have occurred before the trial. The learned trial judge should have had the entire proceedings of the change of plea recorded, she argued. By those submissions together with the affidavit evidence from Mr Counsel, it was implied that his change of plea to "guilty" was not done voluntarily, thereby rendering his conviction unsafe. In addition, counsel submitted that the learned trial judge was required to outline to Mr Counsel "the possible prejudice" that his change of plea would have had on Messrs McLean and Gordon.

[48] Finally, on that point, Ms Reid submitted that given the mix of circumstances and the averment of Mr Counsel that he did not participate in the killing (though present at the scene), the conviction should be quashed and no re-trial ordered. A re-trial in the circumstances, she argued, would afford the prosecution a 'second bite at the cherry' and be frustrated by inordinate delay.

[49] Despite Mr Counsel's account of the incident in his affidavit, Ms Reid repeated her earlier contention about dock identification and the absence of an identification parade, on the basis that Mr Counsel was only known by an alias and found some months after the incident, in Saint Ann.

[50] In rebuttal of Ms Reid's submissions, Mr Brown drew our attention to **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No

113/2007, Judgment delivered 3 April 2009, to make the point that this court should prefer Mr Haynes' account to that of Mr Counsel's. He suggested that it had not been shown by Mr Counsel that his lawyer had pressured him to sign the document. Rather, he deposed that he was told by Mr Haynes that it was better for him to "take a plea". This meant that Mr Haynes would have used moral suasion and not undue influence in guiding Mr Counsel, he argued. It was also evident, Mr Brown posited, that Mr Counsel did not say that it was his father's threat to remove support, which had caused him to sign the document.

[51] More pointedly, Mr Brown submitted, that it could not be reasonably argued that Mr Haynes was incompetent in his management of the case. Quite the contrary, Mr Haynes was duty bound to advise Mr Counsel of the strength of his case and to give his advice in good faith. Neither could it be argued, he observed, that a reasonably competent lawyer would not have adopted a similar course, given the nature of the information that was available to Mr Haynes. Finally, on this ground, Mr Brown submitted that the outcome of the case did not show the advice and decision to be unwise because Mr Counsel benefitted from a significantly lower sentence than his co-accused, and it was highly unlikely that the outcome of the trial would have been different had Mr Counsel not changed his plea. In support of his submissions, Mr Brown relied on the cases of **Leslie McLeod v R** [2012] JMCA Crim 59, **Leslie McLeod v R** [2017] JMCA Crim 35 and **Nash Lawson v R** [2014] JMCA Crim 29. He concluded by asking the court to order a retrial, in the event it disagreed with his submissions.

Submissions on sentencing – Ryan McLean and Richard Gordon

[52] Ms Reid, while acknowledging that the learned trial judge had the power to impose a life sentence under section 3(1)(b) of the Offences Against the Person Act, and had addressed her mind to the correct sentencing principles, submitted that a fixed term was within the jurisdiction of this court, by virtue of sections 14(3), 15 and 24(1) of The Judicature (Appellate Jurisdiction) Act, and was appropriate in the circumstances of the case. The effect of this, she stated, would be a reduction in Mr McLean's sentence from

life imprisonment to a determinate sentence of 18 years' imprisonment with 12 years before being eligible for parole. In addition to her reliance on the statutes referenced, she predicated her submissions on the absence of evidence as to which of the assailants had inflicted the fatal injury and those aspects of the trial which, she said, were prejudicial to the applicants.

[53] For his part, Mr Brown submitted, with respect to Mr Mclean, that the learned trial judge had addressed her mind to aspects of the relevant guidelines for sentencing. She had also identified the aggravating features that increased the sentence whilst discounting the sentence for time spent on remand. He conceded that the learned trial judge had erred by failing to demonstrate how she arrived at the starting point. Notwithstanding, the sentence was not shown to be manifestly excessive but rather generous. He submitted that a determinate sentence was not appropriate given the brazen premeditated daylight attack, with a deadly weapon, by an assailant who, seven months prior, had been released from prison with an antecedent of four previous convictions.

[54] As regards Mr Gordon, Ms Reid urged the court to exercise its discretion to reduce the sentence, regardless of whether the learned trial judge had made any errors in the sentencing process. This court was asked to remove the sentence of life imprisonment and to impose the mandatory minimum sentence of 15 years' imprisonment with eligibility for parole after 10 years. No reference was made, by Ms Reid, to the factual circumstances surrounding the crime or the subjective circumstances of Mr Gordon.

[55] Mr Brown opposed those arguments on the basis that the sentence was not manifestly excessive and was within the normal range of sentences for the offence. He pointed out that notwithstanding the absence of any previous conviction, Mr Gordon's actions were clearly premeditated and he carried out the offence in broad daylight. Further, he indicated that 18 years' imprisonment was on the lower end of the range of sentences for crimes of that nature.

Analysis

[56] The following issues arose for consideration in these applications:

(i) Whether the learned trial judge should have upheld the no-case submission made on behalf of Mr McLean based on the nature and quality of the identification evidence;

(ii) Whether the learned trial judge erred in permitting the prosecution to adduce evidence from the investigating officer as to his knowledge of the distinguishing features between Mr McLean and his identical twin brother, and if so, the effect of this error;

(iii) Whether the learned trial judge failed to give adequate directions to the jury in relation to dock identification, identification parades and the identification evidence, in general, as it related to both Messrs McLean and Gordon;

(iv) Whether Mr Counsel: a) received poor legal representation; and b) entered a change of plea voluntarily;

(v) Whether the learned trial judge erred in, a) not enquiring into the circumstances of Mr Counsel's change of plea; and b) failing to explain to Mr Counsel the possible prejudice to his co-accused if he entered a guilty plea; and

(vi) Whether the sentences imposed on Messrs McLean and Gordon were manifestly excessive and should be disturbed.

No case submission and identification evidence in relation to Mr McLean (Issue i)

[57] In determining whether to uphold the no-case submission, the learned trial judge was required to consider the well-known guidance from the leading case of **R v Galbraith** [1981] 1 WLR 1039, and, in particular, the question of whether it could be said that the evidence on the prosecution's case, taken at its highest, was such that a jury, properly directed, could not properly convict on it. The learned trial judge would have had to consider this in the context of the identification evidence, it being the main issue raised in the submissions. She was required to consider the sufficiency of the evidence relative to its nature and quality. So, she might have asked questions akin to these: Was the purported identification of the perpetrator a fleeting glance? Was the identification made in difficult conditions or circumstances? Was the quality of the identification evidence poor? Was there any other evidence identifying the particular accused? (**R v Turnbull**). The learned trial judge would have also had to consider the strength of the evidence in light of the failure of the police to hold an identification parade.

[58] The no-case submission, on behalf of Mr McLean, was concentrated on the purported visual identification of him by Messrs McKen and Williams at the scene and whether the witnesses could have and should have distinguished between him and his twin brother in their statements to the police. The substance of the submissions is captured in the following extract from pages 604-605 of the transcript of proceedings:

> "…the witnesses are saying that they are identical twins. That, my lady, when we examine the word identical it means facial recognition of one is virtually impossible. There must be distinguishing features and even where there are distinguishing features mistakes are often made because it has not [sic] to do with honesty of the identifying witness, it has to do with whether we as a people make mistakes.
>
> I ask Your Ladyship to look at that based on what Turnbull says. Turnbull says, mi lady, recognition, recognition, mi lady, of close friends and relatives are oftentimes vague…"

[59] In light of the challenge to the quality of the identification evidence, we examined the circumstances of the purported identification of Mr Mclean and noted that both Messrs McKen and Williams testified that they knew him differently and distinctly from his twin brother. They both spoke of the distinguishing features that are outlined at paragraph [15] above. Mr McKen stated that he knew Mr McLean for about seven months prior to the incident, and had spoken to him during the same month of the stabbing incident when he, Mr McLean, visited his home. Mr Williams testified that he knew both twins from childhood. He would see Mr McLean in his father's yard and as they got older, they became friends and would talk, drink, smoke and spend time together. He had interacted with Mr McLean for about half an hour on the night prior to the incident. He also knew Mr McLean had left the community for a significant period but was vehement in his position that he knew him differently from his twin. They both testified that at the time of the incident they saw him at close distances, in good light and for a sufficiently long period to recognise him.

[60] As regards the submission that Mr McLean was prejudiced because the evidence as to the distinguishing features of the twins was only adduced during the course of the trial and was not in the statements given to police, we noted that when this issue was raised at the trial, the learned trial judge gave defence counsel time to take instructions on the new information and defence counsel cross-examined the witnesses at length.

[61] Significantly, in our view, there was no real challenge, at trial, to the evidence that at the time of the incident the twins were distinguishable in their facial and bodily appearance. The main challenge, as we understood it, was to the time at which the evidence emerged and the absence of an identification parade. It must be emphasised that there was no complaint that the statements to the police were about the involvement of both twins, in which case there might have been an obvious need to distinguish between them in those statements. The complaint was about someone who happened to have been a twin, and there was no indication in defence counsel's challenge that the

description given to the police did not fit the twin who was before the court. In fact, it was Mr Williams' point, on being cross-examined, that when giving his statement, he was not asked anything about the alleged perpetrator's twin brother. By that retort, the witness seemed to have been saying that he had no basis on which to have referenced the twin who was not being implicated.

[62] The primary issue for the jury, therefore, would have been whether the witnesses were credible and their evidence as to identification reliable. In other words, were the twins known differently and well to either or both of the witnesses to fact, and were the conditions that obtained, at the time of the incident, of a sufficiently good quality to permit a reliable identification or recognition of the perpetrators. We formed the view, on the evidence produced, that the evidence as to identification was compelling and, in the circumstances, Mr Mclean ought to have suffered no prejudice.

[63] On the matter of the absence of an identification parade, we considered the well-established principle that "[t]here ought to be an identification parade where it would serve a useful purpose" (**R v Popat**). In our view, the necessity for an identification parade would turn on how well the alleged perpetrators were known to the witnesses. In reference to Mr Mclean, in particular, it would have been important whether there was information to indicate that he had an identical twin brother from whom he was indistinguishable. This seemed not to have been the case and that fact was apparently known to the investigating officer. Although the applicants were known by aliases, and an identification parade, would, in such circumstances be, at the very least, desirable, failure to hold one would not have rendered a conviction fatal unless the failure resulted in a serious miscarriage of justice. This was one of the takeaways from the case of **Goldson and McGlashan v R**. We found paragraph [21] to be useful:

> "…The position is therefore that although one may speculate about the possibility that a parade would have destroyed the prosecution's case (as one may about any other evidence which might be available to damage the credibility of a prosecution witness) it is not possible to say that the absence of a parade [in this case] made the trial unfair. **The judge**

was entitled to leave the question of credibility to the jury on the evidence before them." (Emphasis supplied)

[64] The distinguishing features described and the interactions alleged with Mr Mclean and his twin brother would have been plain and significant enough to enable the witnesses to confidently assert their ability to know them differently. Further, based on the evidence, the circumstances of identification were such that the twins could be identified differently on the date of the incident. Not least in significance too, as pointed out by Mr Brown, the jury would also have had the evidence of Sergeant Daley, regarding the words attributed to Mr McLean when he was cautioned. Those words, if accepted by the jury as having been said, would have confirmed that Mr McLean was on the scene with his co-accused and that he chased Mr Williams with a knife.

[65] We, therefore, concluded that the evidence from Messrs McKen and Williams, about the distinguishing features, was sufficient for the case to be left to the jury, notwithstanding the absence of an identification parade. An identification parade would not have served a useful purpose, in this case, where there was no real dispute that the witnesses and Mr McLean were known to each other at the time of the incident. Furthermore, it could not reasonably be argued that the quality of the identification evidence in relation to Mr McLean was poor or had a base so slender to be unreliable. On the contrary, a *prima facie* case had been made out against Mr McLean and, in the circumstances, the learned trial judge was correct in leaving it for the jury's consideration. The members of the jury, as the judges of the facts, were entitled to say whether they accepted or rejected the evidence of either or both of the Crown witnesses as to how they were able to differentiate between the twins and whether Mr McLean was one of the perpetrators.

[66] This case could, therefore, be distinguished from **R v Kevin Williams** in which it was determined that the evidence in support of recognition was not strong enough to obviate the need for an identification parade.

Evidence of Sergeant Daley (Issue ii)

[67] We found no merit in the proposed ground of appeal that the learned trial judge erred in permitting Sergeant Daley to give evidence of his knowledge of the distinguishing features of the twins as he was not a witness to the fact. It seemed to us, as was submitted by Mr Brown, that this was relevant evidence as it might have explained how the officer knew which of the twins was being accused of participating in the murder. We are also of the view that the learned trial judge could not be faulted for her directions on how to treat with that evidence. She made it plain, in her directions, that any corroborating effect of the police officer's testimony could only be to the extent of the existence of distinguishing features between the twins. It could not corroborate any evidence of Mr McLean's presence at the scene or participation in the crime. Those directions are found at page 754 of the transcript:

> "If you believe him [Sergeant Daley], understand that [sic] that evidence is to invite you to conclude that there is a difference between the twins which you can see. It does not confirm that any of the twins was on the scene. The officer was not there so no matter how much he can tell them apart he cannot say that either of them was there. "

The directions of the learned trial judge on dock identification, identification parade and identification generally (Issue iii)

[68] We accept as an accurate statement of the law Crown Counsel's submission that evidence in the form of dock identification, although undesirable, is not inadmissible *per se* and it is within the discretion of the trial judge to determine whether it is to be permitted. This turns on the question of fairness to the accused, including whether appropriate directions to the jury would be sufficient to counter any prejudice to which the accused might have been exposed (**Stubbs and Davis v Queen and Evans v The Queen** [2020] UKPC 27, at paragraph 77 and **R v Neilly**, at paragraph [32]).

[69] Where dock identification is permitted, a trial judge has a responsibility to warn the jury of its dangers and the disadvantage to the accused when there is no identification

parade. The approach is set out at paragraph 9 of Lord Hodge's judgment in the Privy Council case, **Jason Lawrence v The Queen**, viz:

> "9. … Where there has been no identification parade, dock identification is not in itself inadmissible evidence; there may be reasons why there was no identification parade, which the court can consider when deciding whether to admit the dock identification. But, if the evidence is admitted, the judge must warn the jury to approach such identification with great care. In *Tido v the Queen* Lord Kerr, in delivering the judgment of the Board, stated (at para 21):
>
> > '…Where it is decided that the evidence [i.e. the dock identification] may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged.'"

[70] Having reviewed the transcript in this case, we found that the learned trial judge's charge to the jury in relation to dock identifications and identification parades was impeccable and complied fully with the guidance of the Privy Council in **Jason Lawrence**. She not only explained to the jury the nature of dock identification and an identification parade but outlined why identification arising from an identification parade was more reliable than a dock identification, which she described as "unsatisfactory". At page 672 of the transcript it is seen where she specifically alerted the jury to the danger of dock identification, viz:

> "Generally speaking that type of evidence is regarded as being unsatisfactory in nature and I will tell you why. One reason why that is so, is because when the witness sees that the accused is seated in the dock, it will suggest to the witness that the person he sees seated in the dock is in fact the person who committed the crime..."

[71] In addition to impressing upon the jury the need for caution, when considering identification evidence in the absence of any identification parade, the learned judge explained the advantage to a suspect who was not pointed out on a parade. She also related her directions to the fact that the assailants were identified by their aliases.

[72] At page 672, line 14 she stated:

> "In an identification parade, the suspect would be placed among persons who are similar to him or her..."

[73] She continued at page 673, lines 15 to 19:

> "So I explain that so that you can understand that if an accused person is not placed on an identification parade, he is deprived of the chance of the witness not identifying him..."

[74] At page 674, lines 10 to 20, she addressed the identification of the men by their aliases in the following way:

> "…But if you have named a person and say it's that person who committed the crime and you use only a nickname, as in this case, it would be wise and fair to allow the witness to point out the person to whom he or she is referring before reaching inside the courtroom. It would be wise and fair to provide the opportunity for the witness to confirm that the person he or she calls by a particular name is in fact the person who the police have arrested."

[75] With respect to Mr McLean, the learned trial judge dealt extensively with the nature of identical twins and why she considered that an identification parade was desirable in the circumstances. She reminded the jury of the evidence in relation to each of the twins and directed them to exercise caution in their consideration of the evidence. The learned

trial judge directed the jury to consider whether the "dock identifications" were fair in circumstances where the accused men were known by aliases. She reiterated that in such circumstances, an identification parade was preferable. She also gave an adequate **Turnbull** direction to the jury which was explained in the context of the evidence.

[76] The Crown witnesses claimed to be well-acquainted with the accused men before the incident and provided relevant supporting details. There was no real challenge to that evidence. In the result, the learned trial judge's warnings may have surpassed what was necessary in the circumstances. The following statements found at paragraph 79 of **Stubbs and Davis v R and R v Evans**, are instructive:

> "79. In the Board's view, the distinction drawn by the authorities between cases of identification and recognition is more to the point. Where an identifying witness claims previous acquaintance with the person identified, different considerations will apply. In *Stewart* [2011] UKPC 11, (2011) 79 WIR 409 the identifying witness claimed to have known the accused and his family for a long time. In that case the Board considered that the identification in court could not properly be regarded as a dock identification at all. By the time the witness came to point out the accused in the dock she had already told the police precisely who he was. The dock identification was a 'pure formality' (per Lord Brown at para 10). Similarly, in *France v R* [2012] UKPC 28; (2012) 82 WIR 382, another case of recognition, Lord Kerr, delivering the opinion of the Board, observed (at para 33) that a dock identification in the original sense of the expression entails the identification of an accused person for the first time by a witness who does not claim previous acquaintance with the person identified and that the dangers inherent in such an identification are clear. He continued (at para 34):
>
> > 'There has been a tendency to apply the term 'dock identification' to situations other than those where the witness identifies the person in the dock for the first time. This is not necessarily a misapplication of the expression, **but it should not be assumed that the dangers present when the identification takes place for the first time in court loom as large when what is involved is the confirmation of an**

> **identification already made before trial. Nor should it be assumed that the nature of the warning that should be given is the same in both instances.** Where the so-called dock identification is the confirmation of an identification previously made, the witness is not saying for the first time 'This is the person who committed the crime'. He is saying that 'the person whom I have identified to police as the person who committed the crime is the person who stands in the dock'." (Emphasis supplied)

[77] We took the view that what transpired was not in a real sense dock identification and did not carry the level of danger inherent in cases where a witness, who claimed no prior acquaintance, identified an accused person in the dock for the first time. We discerned no error, in principle, on the part of the learned trial judge. Neither should there have been any prejudice to the accused, as a consequence of the absence of any identification parade. On the basis of the directions given to the jury, it was clearly open to its members to acquit the applicants if they felt unsure of the identification evidence or, in relation to Mr McLean, if they felt unsure that the Crown witnesses were able to differentiate him from his twin brother.

[78] We were perplexed that the issue of dock identification was argued in favour of Mr Counsel, having regard to the fact that he pleaded guilty to the offence, and by his affidavit placed himself at the scene of the crime. That being said, had he succeeded in his claim that the guilty plea was involuntary, those submissions on dock identification would not have availed him in this appeal, as the recourse would be a retrial. His having pleaded guilty meant that the jury was required only to return a formal verdict of "guilty", in keeping with his change of plea and not based on any evidence presented by the prosecution. Therefore, the aspects of Ms Reid's submissions pertaining to dock identification of Mr Counsel were misconceived.

Quality of legal representation and change of plea (Issue iv)

Legal representation

[79] Although the grounds of appeal filed on behalf of Mr Counsel did not expressly allege 'incompetence of counsel', it seemed to us that this was implied in the allegations he made about Mr Haynes and the averments about the change of plea.

[80] In dealing with this aspect of the appeal, we were guided by the principles enunciated in the following passages from the dicta of Morrison JA (as he then was), in the cases of **Michael Reid v R** and **Leslie McLeod v R (2012).** At paragraph [44](iv) of the **Michael Reid** case, Morrison JA observed that:

> "On appeal, the court will approach with caution statements or assertions made by convicted persons concerning the conduct of their trial by counsel, bearing in mind that such statements are self-serving, easy to make and not always easy to rebut. **In considering the weight, if any, to be attached to such statements, any response, comment or explanation proffered by defence counsel will be of relevance and will ordinarily, in the absence of other factors, be accepted by the Court**." (Emphasis supplied)

[81] At paragraphs [54] – [56] of the **Leslie McLeod** case, his lordship said:

> "[54] Few would dispute Lord Hope of Craighead's observation in ***Benedetto v R*** [2003] UKPC 27, [2003] 1 WLR 1545, that 'A defendant should be punished for the crimes he has committed, not for the failure of his representatives to conduct his defence as they ought.' However, the common law has been slow to admit error or even incompetence of counsel as a ground of appeal and in ***R v Clinton*** [1993] 1 WLR 1181, 1187, the English Court of Appeal, in a judgment delivered by Rougier J, reiterated the traditional position:
>
> > '…cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional…During the course of any criminal trial counsel for the defence is called upon to make a

> number of tactical decisions ... Some of these decisions turn out well, others less happily.'
>
> [55] **It will therefore ordinarily be difficult to impugn successfully decisions made by counsel 'in good faith after proper consideration of the competing arguments, and, where appropriate, after due discussion with his client'** (***Clinton***, per Rougier J, at page 1187). This is how Judge LJ (as he then was) stated the position in ***R v Doherty & McGregor*** [1997] 2 Cr App R 218, 220:
>
> > 'Unless in the particular circumstances it can be demonstrated that in the light of the information available to him, at the time no reasonably competent counsel would sensibly have adopted the course taken by him at the time when he took it, these grounds of appeal should not be advanced. In **Clinton** itself it was emphasised that the circumstances in which the verdict of a jury could be set aside on the basis of criticisms of defence counsel's conduct would 'of necessity be extremely rare'.'
> >
> > [56] However, ***Clinton*** also establishes that, exceptionally, a decision taken by counsel 'either in defiance of or without proper instructions, or when all the promptings of reason and good sense point the other way' (per Rougier J, at page 1188), may lead an appellate court to set aside a conviction on the ground that it was unsafe and unsatisfactory. In such cases, Rougier J considered that it was 'less helpful to approach the problem via the somewhat semantic exercise of trying to assess the qualitative value of counsel's alleged ineptitude, but rather to seek to assess its effect on the trial and the verdict'." (Emphasis supplied)

[82] We extracted parts of both affidavits, at paragraphs [45] – [50] above, which were important to our decision on this issue. It was left for us to say whether Mr Counsel met the test of putting forward evidence that was capable of being believed (See **R v Benedetto**). In that regard, we took note that, following his change of plea, when he was interviewed by the aftercare officer in preparation for the social enquiry report, Mr Counsel gave a very different account of the incident than that set out at paragraph [40] above. Mr Counsel reported to the aftercare officer that while on his way to a construction

site, he observed a group of men in a dispute. The men suddenly attacked him and a young man with whom he was walking. He was wrestling with one of the men when the deceased fell on top of him and someone stabbed the deceased in the back. Mr Counsel said he managed to push the deceased off and escaped across a river after being chased. It is our view that differences in both accounts diminished his credibility.

[83] It did not escape our attention that Mr Counsel was careful to tell the said aftercare officer that neither of his co-accused was involved in the stabbing, thereby lending credibility to Mr Haynes' evidence that Mr Counsel was very concerned about their fate at the time of deciding whether to change his plea.

[84] We did not accept Mr Counsel's account that he pleaded guilty in the belief that he would have been released by the court. That assertion was all the more incredible because he was educated up to the high school level and knew the difference between guilt and innocence as also the consequence that would flow from a guilty plea. His experience belied the claim, for Mr Counsel was not new to the criminal justice system, having been previously convicted for the offences of illegal possession of firearm and ammunition and was sentenced to seven and two years' imprisonment, respectively. He was also convicted for unlawful wounding for which he served nine months' imprisonment. We, therefore, considered it illogical that he could have formed the view that if he pleaded guilty to the extremely serious offence of murder, he would have been sent home, having served terms of imprisonment for lesser offences. Most notably, this fanciful expectation would have been his invention because nowhere in his affidavit did he say that Mr Haynes had told him any such thing. It was more believable, as Mr Haynes averred, that he gave Mr Counsel a projection of his likely sentence, if he changed his plea to guilty before the end of the prosecution's case.

[85] It was observed that Mr Counsel changed his plea after Mr McKen identified and implicated him in the crime. It also did not escape our notice that at no time did he indicate to the judge that he did not intend to plead, that he was mistaken as to its effect or that he was pressured to do so. According to the plea in mitigation, on his behalf, this

was a young man who was brilliant in mathematics and, while he was a guest of Her Majesty, was able to accomplish some achievement in english, mathematics and civics. This profile, in our view, was inconsistent with one who would sign a memorandum, unaware of its real consequences.

[86] We believed Mr Haynes that Mr Counsel had been banking on the absence of the Crown witnesses and when Mr McKen gave weighty evidence against him, he grasped the opportunity to get a lesser sentence, as advised by his attorney-at-law. We saw no basis for finding that a reasonably competent lawyer would not have adopted the course taken by Mr Haynes and, in the circumstances, rejected Mr Counsel's claim of poor legal representation, as incredible and self-serving. He failed to meet the standard of credibility and to discharge the burden of proof which was his, as enunciated by P Williams JA in **McLeod (2017)**, paragraph [24], to wit:

> "…It is he who is alleging what amounts to improper conduct on the part of his counsel and thus it is for him to prove. He is not entitled to benefit from a lower standard of proof merely because he is the appellant/defendant. The same fair standard, which is to be applied when considering the affidavit of [counsel], made in response to his allegations, must be applicable to the affidavit he relies on outlining those allegations."

Change of plea

[87] An accused person may enter a change of plea from "not guilty" to "guilty" at any stage before the jury returns a verdict. In such a case, the change of plea must be entered personally (**R v James Ellis** (1973) 57 Cr App 571) and must also be voluntary and unequivocal. The Blackstone's Criminal Practice 2021 ("Blackstone's"), Section D 12.101, puts it this way:

> "A plea of guilty must be entered voluntarily. If, at the time of pleading, the accused was subject to such pressure that there was no genuinely free choice between 'guilty' and 'not guilty', the plea is a nullity (*Turner* [1970] 2 QB 321). …

> Pressure to plead may come from a number of sources: the court, defence counsel or other factors. Whatever the source, the effect is the same."

[88] By his affidavit, Mr Counsel sought to leave the impression that he was pressured by defence counsel and his father to change his plea and, therefore, did not do so voluntarily. The role of defence counsel was to advise him on the best option based on the strength of the case he had to answer. Nothing would have been wrong if defence counsel did so persuasively, provided that the appellant was not forced into changing his plea. Reluctance on the part of Mr Counsel would not have been enough to establish an absence of voluntary action. Mr Counsel had to show that he had no choice in the matter, as in losing his 'free will' such as by manipulation, coercion, threat or inducement, to undermine voluntary informed consent. In considering the duty of defence counsel to advise an accused on his options, based on the strength of the case to be answered and whether the accused's plea was voluntary, the learned authors of Blackstone's propose the following at section D12.103:

> "… It is the duty of counsel to advise the client on the strength of the evidence and the advantages of a guilty plea as regards sentencing (see, e.g., *Herbert* (1991) 94 Cr App R 233 and *Cain* [1976] QB 496). **Such advice may, if necessary, be given in forceful terms** (*Peace* [1976] Crim LR 119).
>
> Where an accused is so advised and thereafter pleads guilty reluctantly, the plea is not *ipso facto* to be treated as involuntary (*Peace)*. **It will be involuntary only if the advice was so very forceful as to take away the accused's free choice.** Thus, in *Inns* (1974) 60 Cr App R 231, defence counsel, as he was then professionally required to do, relayed to D the judge's warning in chambers that, in the event of conviction on a not guilty plea, D would definitely be given a sentence of detention whereas if he pleaded guilty a more lenient course might be possible. This rendered the eventual guilty plea a nullity.
>
> **However, in the absence of a suggestion that counsel was acting as a conduit to pass on a threat or promise**

from the judge, it will be extremely difficult for an appellant to satisfy the court that the appellant was deprived by counsel's advice of a voluntary choice when pleading. Thus, in *Hall* [1968] 2 QB 788, D was charged with burglary and, alternatively, with handling some of the items stolen during that burglary. The prosecution were willing to accept a plea to the latter. Counsel advised D that, if he pleaded not guilty to both counts, he ran the risk of being convicted of the burglary itself since his defence would involve attacks on the character of prosecution witnesses and thus the revelation of his own bad character. If so convicted, he could expect to receive up to 12 years' imprisonment, whereas if he pleaded guilty to handling the maximum sentence would be five years.

Dismissing D's appeal, Lord Parker CJ said (at pp. 534–7):

> **What the court is looking to see is whether a prisoner in these circumstances has a free choice; the election must be his, the responsibility his, to plead guilty or not guilty. At the same time, it is the clear duty of any counsel representing a client to assist the client to make up his mind by putting forward the pros and cons, if need be in strong language, to impress upon the client what the likely results are of certain courses of conduct.**

His lordship then paraphrased the advice given by counsel:

> [Defence counsel], in the opinion of this court, was only doing his duty in setting forth the dangers, even, as [he] said, in strong language.
>
> … anybody who has heard the evidence in this case and has understood the workings of the law and our procedure, could not fail to realise that the appellant has no grievance at all … and that his counsel performed his duty to the best of his ability. This court has no hesitation in those circumstances in dismissing the appeal." (Emphasis supplied)

[89] Mr Haynes did not expressly address the allegations that he left Mr Counsel at court, returned with his father and told him to listen to his father as he was the one

paying the legal fees. Notwithstanding, we were of the view that those actions would not demonstrate that Mr Counsel was pressured to plead, or deprived him of his free choice. Mr Counsel's averment was that he thought that by changing the plea the court would release him. That statement was earlier dismissed as incredulous. From our reading of the affidavits, there was nothing to suggest that Mr Haynes' advice diminished Mr Counsel's free will when he changed his plea. In our opinion, Mr Counsel voluntarily changed his plea, and by all indications, he did so because Mr Haynes, in discharging the duty of defence counsel to properly advise his client, indicated the options, which were open to him in the light of the strength of the case against him.

The responsibility of the learned trial judge arising from the change of plea (Issue v)

[90] The transcript does not indicate that the learned trial judge made any enquiries of Mr Counsel to ascertain whether he knew and understood what he was doing by changing his plea. In our view, she was not required to do so because Mr Counsel was represented by a senior attorney-at-law and did not display any equivocation. We accepted the following statement from **Revitt and others v Director of Public Prosecutions** [2006] 1 WLR 3172 at paragraph 17, to be an accurate statement of the law:

> "If after an unequivocal plea of guilty has been made, it becomes apparent that the defendant did not appreciate the elements of the offence to which he was pleading guilty, then it is likely to be appropriate to permit him to withdraw his plea - see *R v South Tameside Magistrates' Court, Ex p Rowland* [1983] 3 All ER 689, 692, per Glidewell J. **Such a situation should be rare, for it is unlikely to arise where the defendant is represented and, where he is not, it is the duty of the court to make sure that the nature of the offence is made clear to him before a plea of guilty is accepted**." (Emphasis supplied)

[91] The learned trial judge was entitled to proceed on the assumption that Mr Haynes would have properly advised his client on the nature and effect of a change of plea. In addition, before the change of plea, Mr Counsel had sat in court throughout the evidence

of the prosecution's eyewitness, Mr McKen, who testified to Mr Counsel's involved participation in the crime.

Prejudice to the co-appellants (Issue vi)

[92] In a case where there are co-accused, a change of plea from "not guilty" to "guilty" by one, may or may not have an effect on the others. Each case has to be considered on its peculiar facts. What is clear, however, is that any allegation of prejudice should of necessity be raised as a ground of appeal by those who pleaded "not guilty", in this case, Messrs McLean and Gordon. However, neither applicant demonstrated or even sought to demonstrate that he suffered any prejudice arising from Mr Counsel's change of plea. This was different from what obtained in **R v Fedrick** [1990] Crim LR 403.

[93] Fedrick was charged, along with his co-accused, Sexton, on several counts of fraudulent trading and one count of cheating the Public Revenue. The Crown's case was that Fedrick was the mastermind of the crime. Both men pleaded not guilty initially, but on the eighth day of trial Sexton changed his plea on one count to guilty and the jury was discharged from returning verdicts against him on the other counts. In his summation of the case against Fedrick, the judge told the jury that Sexton's change of plea had no bearing whatsoever on Fedrick's case and instructed them to put the change of plea out of their minds. Counsel for Fedrick applied for a discharge of the jury because it would require "too great a degree of mental gymnastics" to ask the jury to ignore Sexton's guilty plea. This application was refused and Fedrick was subsequently found guilty and convicted on all counts. On appeal, it was determined that the judge was wrong not to have discharged the jury on the basis that his warning to them would have been ineffective as there was no scope, on the evidence, for Sexton to have acted fraudulently on his own. The case was akin to a conspiracy and it could not be said that had the case started again before a different jury that was unaware of Sexton's plea of guilt, the new jury would have been certain to convict. As such, the appeal was allowed and Fedrick's conviction quashed.

[94] A similar challenge, by Messrs McLean and Gordon, would unlikely have succeeded on appeal, because the crime of murder by stabbing would not of necessity require the involvement of all of them. That is to say, the involvement of one did not necessarily mean the others were automatically guilty. It was open to Messrs McLean and Gordon to deny involvement, which they did in seeking to put forward defences of alibi. It was also open to the jury to acquit Mr McLean and/or Mr Gordon, whilst still being aware of Mr Counsel's change of plea. The learned trial judge was therefore correct in her direction to the jury that they should not take Mr Counsel's guilty plea as indicative of guilt on the part of his co-accused but that the evidence against each co-accused should be examined separately.

[95] The transcript indicates that upon becoming aware of Mr Counsel's intention to change his plea, the learned trial judge allowed Mr Haynes and counsel for Messrs Gordon and McLean to make submissions on whether Mr Counsel should be re-pleaded in the presence or absence of the jury and whether the jury should be advised at that stage of the change of plea. Mr Haynes suggested that his client be re-pleaded in the absence of the jury. Counsel for both Messrs McLean and Gordon indicated that Mr Counsel's change of plea should be done in the presence of the jury and neither defence counsel expressed any concern of prejudice to his client. Counsel for Mr McLean went further and indicated the possibility of the defence calling Mr Counsel as a witness, after his change of plea.

[96] For completeness, we should point out that Mr Counsel referred to a "plea bargain" in his affidavit, but that was not accurate. We also did not agree that the change of plea was not properly recorded. The transcript gives a full account of the procedure, which was adopted by the judge and the procedure was a correct one.

[97] In the circumstances, we found no merit in any of the grounds of appeal that the conviction of the appellants was unsafe and should be quashed.

Whether the sentences imposed on Messrs McLean and Mr Gordon were manifestly excessive (Issue vii)

[98] As stated previously, no allegation had been made by Messrs McLean and Gordon that the learned trial judge failed to follow the requisite guidelines for sentencing, as embodied in the case of **Meisha Clement v R** [2016] JMCA Crim 26, The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017, or any other case decided since. In fact, Ms Reid submitted that the learned trial judge had applied all the requisite principles.

[99] Instead, this court was asked to exercise a discretionary power to reduce the applicants' sentences as allegedly permitted by sections 14(3), 15 and 24(1) of the Judicature (Appellate Jurisdiction) Act, which sections we now set out in full:

> **"**14.-(3) On an appeal against sentence the Court shall, if they think that a different sentence ought to have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.
>
> 15. Where on the conviction of the appellant the jury have found a special verdict, and the Court consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law.
>
> 24.-(1) If it appears to the Court that an appellant, though not properly convicted on some count or part of the indictment has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the judgment or verdict on the count or part of the indictment on which the Court consider that the appellant has been properly convicted."

[100] We did not agree with Ms Reid that these provisions empower this court to exercise a discretionary power to reduce a sentence, in circumstances where there was no error on the part of a trial judge in arriving at or passing such sentence. All three sections clearly empower this court to pass such other sentence "warranted in law". The plain objective is for this court to impose a sentence, which is justified in law, in circumstances where it concludes that the sentence that was passed by the trial judge was not warranted in law. Were it otherwise then there would be no consistency in sentencing and worse, a risk of judicial arbitrariness. In the case of **Meisha Clement v R**, Morrison P put it this way, at paragraphs [21], [42] and [43]:

> "[21] But in arriving at the appropriate sentence in each case, the sentencing judge is not at large. The view that '[u]ltimately every sentence imposed represents a sentencing judge's instinctive synthesis of all the various aspects involved in the punitive process', has now given way to a recognition of the need for greater objectivity, transparency, predictability and consistency in sentencing. As one Australian commentator has observed –
>
> > 'In order to have a coherent, transparent and justifiable sentencing system, the relevant principles must not only be articulated, but prioritized and weighted.'
>
> …
>
> [42] Finally, in considering whether the sentence imposed by the judge in this case is manifestly excessive … we remind ourselves, as we must, of the general approach which this court usually adopts on appeals against sentence. In this regard, Mrs Ebanks-Miller very helpfully referred us to **Alpha Green v R**, in which the court adopted the following statement of principle by Hilbery J in **R v Ball**:
>
> > 'In the first place, this Court does not alter a sentence which is the subject of an appeal **merely because the members of the Court might have passed a different sentence.** The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. **It is only when a sentence appears to err in principle that this Court will alter it.** If a sentence is excessive or

> inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles then this Court will intervene.'
>
> [43] 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**." (Emphasis supplied)

[101] In this case, the learned trial judge did not expressly state the starting points which she used in arriving at the sentences imposed but we were satisfied that, in all other respects, she applied the accepted principles of sentencing. In particular, she considered the well-established objectives of sentencing to include retribution, deterrence, prevention and rehabilitation. Further, she considered the relevant aggravating and mitigating factors, which were applicable to each applicant and discounted the sentences to account for the time that they each spent on remand.

[102] We were satisfied that life imprisonment without eligibility for parole before serving 18 and 21 years, imposed on Messrs Gordon and McLean, respectively, fell within the usual range of sentences for the offence of murder, especially when the act was carried out violently, with multiple perpetrators, and was clearly premeditated. Also for these reasons, we did not agree that a determinate sentence would have been suitable in this case, as this was a most heinous crime. We also concluded that the sentences imposed were not manifestly excessive.

Conclusion

[103] We found no merit in any of the grounds of appeal advanced by Mr Counsel in his appeal and Messrs McLean and Gordon in their applications for leave to appeal. Accordingly, there was nothing to justify an interference, by this court, with their

convictions and sentences. It is for these reasons that we made the orders referred to at paragraph [4] above.