JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE DUNBAR GREEN JA

SUPREME COURT CRIMINAL APPEAL NO COA2020CR00006

APPLICATION NO COA2022APP00233

TESHA MILLER v R

John Clarke for the applicant

Janek Forbes and Ms Alice-Ann Gabbidon for the Crown

23 January and 24 February 2023

FOSTER-PUSEY JA

[1] The matter before this court for determination is an amended notice of application filed on 22 December 2022. The applicant seeks the following orders:

> "1. The Shorthand writer, in relation to the original sentencing and the resentencing of Shevar Robinson, produce a typewritten transcript of the whole of the sentencing proceedings of Shevar Robinsons [sic] by the trial judge, the Honourable Mrs Justice G. Fraser, on the 13 November 2013 (and his original sentencing exercise by the same judge) to the Court, the Applicant and the Director of Public Prosecution[s].
>
> 2. That [sic] court directs the Registrar to request the court below to supply:
>
> a) a written report giving her opinion on the case generally,
>
> b) a certified copy of the whole of her notes of the trial to the court.

c) [sic] the judge's report is to be made available to the court, and the registrar must supply a copy of the report to the applicant and the Director of Public Prosecution[s].

d) Audio recording of the evidence taken [sic] court below.

3. The Applicant be granted an extension of time within which to file the following documents for his appeal/application for leave which is scheduled for hearing on 27 March 2023:

    a. Skeleton arguments

    b. Written chronology

    c. Any other document deemed fit

4. Leave be granted for the Appellant to adduce fresh evidence on appeal, namely:

    a. Affidavit of Tesha Miller

    b. Affidavit of Bert Samuels

5. Such further and/or other relief as this Honourable Court deems." (Underlining as in the original)

[2] The grounds on which the applicant seeks the orders are:

"1. Pursuant to section 16 (8) of the Constitution

2. Pursuant to sections 17 and 28 of the Judicature (Appellate Jurisdiction) Act

3. Pursuant to rules 1.7 (c), 3.2, 3.7(6), 3.8 and 3.9 of the Court of Appeal Rules

4. It is necessary and expedient in the interest of justice to allow the Applicant to receive the orders sought herein.

5. The material requested and other orders sought are relevant to the issues determined in the appeal. If received, the reports, notes, audio, affidavits, and statements would inform the basis of the grounds filed herein and could serve a 'useful purpose' in assisting the

parties and the court in narrowing issues demarcated in the application for leave to appeal the applicant's conviction.

6. The Applicant, and the fair hearing of his appeal, will be significantly prejudiced if this Honourable Court does not grant the orders sought herein.

7. The fair hearing of the appeal, the good administration of justice and the interest of justice would be best served by the court granting the orders sought herein.

8. The overriding objective, to do justice and avoid a substantial miscarriage of justice, would be achieved by granting the orders sought."

[3] The amended application that was supported by affidavits of Isat Buchanan filed on 15 November 2022 and 19 December 2022, Bert Samuels filed on 13 January 2022 [sic] and 19 January 2023, and Tesha Miller filed on 19 December 2022, first went before a single judge who, on 5 December 2022, directed as follows:

> "This matter should be listed in open court given the orders being sought, especially orders (2) and (4). The [other orders] sought may be considered at the same hearing. Please fix for an early date next term for consideration in the listing of the date fixed for hearing of the appeal."

[4] Much of the affidavit evidence concerns complaints about the learned judge's handling of the trial, and a detailed examination of the allegations is not required for a determination of this application. Where necessary we will refer to aspects of the evidence. A short background will assist in an understanding of aspects of the application.

Background

[5] On 27 June 2008, Douglas Chambers was shot and killed. The applicant was charged with the offences of being an accessory before the fact and after the fact in relation to the killing and, thereafter, was tried over the period 13-15, 18-19, 21, 26-28 November and 2-3 December 2019. The Crown led evidence from a witness, Shevar Robinson, who alleged that he was a former member of a gang led by the applicant. Mr

Robinson testified that it was the applicant who had given orders and arranged for Mr Chambers to be killed and then arranged for the shooter to be sent to Cayman on a boat to evade the police.

[6] On 3 December 2019, the applicant was convicted in the Home Circuit Court for the parish of Kingston for the offences with which he was charged. The learned judge sentenced the applicant on 9 January 2020. For the offence of accessory before the fact, he was sentenced to 38 years and nine months' imprisonment at hard labour while the sentence imposed on him for the offence of accessory after the fact was 18 months' imprisonment at hard labour, with the sentences to run concurrently.

[7] The applicant applied for leave to appeal his convictions and sentences and, as is the required procedure, this court requested that the Supreme Court provide the requisite material for the record of the proceedings. The court received on 5 November 2021 the documents comprising the record of the proceedings including a transcript of the judge's summation. A single judge of appeal, after reviewing the learned judge's summation at trial, refused the applicant's application for leave to appeal on 13 December 2021.

[8] As is his right, the applicant has renewed his application for leave to appeal conviction and sentence, and the matter is set for hearing on 27 March 2023.

[9] In preparation for the hearing of the renewed application for leave to appeal, the applicant applied for the notes of evidence of his trial, and the application was granted by a single judge of this court on 15 March 2022. The court received the notes of evidence on 11 August 2022.

Submissions

The applicant's submissions

[10] Counsel for the applicant, Mr Clarke, referred to and relied on a number of statutory provisions, including the Court of Appeal Rules ('CAR'), in support of his submissions that he should be granted the orders sought in the application. Counsel

emphasized that the applicant is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal, and is to have adequate facilities for the preparation of his defence. Counsel stated that there was no statutory right to disclosure, however, the material sought was necessary for the applicant to have adequate facilities to prepare his defence and would assist the court in determining where the interests of justice lie. The disclosure could also be necessary on the basis of fairness (see **R v Mills**, **R v Poole** [1997] UKHL 35, **R v Stephen John Keane** [1994] 1 WLR 746 and **R v Pendleton** [2001] UKHL 66).

[11] Counsel noted, in addition, that the applicant is entitled to have his conviction and sentence reviewed by a court superior to the one in which he was convicted (see sections 16(1), (6)(b) and 8 of the Constitution of Jamaica).

[12] In referring to section 28 of the Judicature (Appellate Jurisdiction) Act ('JAJA') and **R v Pendleton**, he submitted that Parliament's overriding intention in that provision was for the interests of justice to be served. Counsel also relied on section 17 of JAJA which provides for a judge before whom a person is convicted to provide his notes of trial and an opinion on the case or any point arising in the case.

[13] Counsel submitted that the material test to be used for determining whether the applicant should get the relevant orders for 'disclosure' of the relevant documents is whether this will be in the interests of justice. He submitted that the material sought would be relevant or possibly relevant to issues in the appeal, or could raise a new issue the existence of which is not apparent from the record the parties propose to use.

[14] Counsel referred to the affidavit evidence that was filed in support of the application, and highlighted the applicant's contention that the trial process was not fair in light of the conduct of the learned judge. He submitted that in considering the conduct of the learned judge, fairness would dictate that the court should have the benefit of her report or trial notes, especially in the light of "missing incidents" from the trial transcript. The audio recordings of the trial would also "give true colour" to the court's conduct. He

referred to **Randall v The Queen** [2002] UKPC 19, **R v Cordingley** [2007] EWCA Crim 2174, **R v Tedjame-Mortty** [2011] EWCA Crim 950, **R v Samah Naz** [2017] EWCA Crim 482, **R v Wood** [1996] 1 Cr App Rep 207 and **R v Lunkulu** [2015] EWCA 1350.

[15] Counsel drew the court's attention to the fact that the applicant has requested that the shorthand writer (now referred to as a Court Reporter) produce a typewritten transcript of the whole of the sentencing proceedings by the learned judge of Shevar Robinson on 13 November 2019, as well as his original sentencing exercise. Mr Robinson was being resentenced because of a plea agreement that had him giving evidence on behalf of the Crown against the applicant. In justifying this request, Mr Clarke highlighted the fact that the applicant's defence counsel were wrongfully prevented from entering the court room when Mr Robinson was being resentenced, although it was an open court hearing. He submitted that in carrying out the resentencing exercise, the Crown or defence counsel would outline certain information to the court, and "the court would orally respond and sentence Mr Shevar Robinson". Importantly, counsel submitted "[t]his information is needed in light of the great reduction approved by the material trial judge for Mr Robinson". Mr Robinson was originally serving a life sentence, and it was reduced to a fixed term of 10 years' imprisonment for the offence of murder. Counsel argued that the transcript would be relevant to the question as to whether the learned judge should have recused herself from presiding over the applicant's trial.

[16] Counsel did not pursue the fresh evidence application, and instead submitted that it would be best determined at the hearing of the appeal. However, he indicated that the applicant's attorneys-at-law required an extension of time within which to file their skeleton arguments and written chronology, in light of the additional material that the applicant seeks to obtain ahead of the hearing of the application for leave to appeal.

The Crown's submissions

[17] Counsel for the Crown, Mr Janek Forbes, indicated that the Crown did not oppose the orders that the applicant sought for the transcript of the sentencing of Mr Robinson. He noted that the plea agreement was disclosed and revealed the basis for the

resentencing exercise. Counsel also took no issue with the applicant's request for an extension of time within which to file the required skeleton arguments and chronology.

[18] On the other hand, counsel opposed the grant of the orders seeking a general or specific report from the learned judge on the basis that it was not necessary for the determination of the issue raised as to whether the learned judge should have recused herself from the hearing. He referred to pages 112-118 of the transcript of the trial where the application for, submissions in respect of, and the learned judge's ruling on the application for her to recuse herself, appear. Counsel submitted that the learned judge was cognizant of her role as judge of the law in contrast with the role of the members of the jury who were the judges of the facts. As a consequence, any familiarity with a witness in the trial would not affect her responsibility in the case.

[19] Responding to a query from the bench, counsel for the Crown stated that although on a reading of section 17 of the JAJA, the provision of a judge's report does not appear to be optional, it was his understanding that the official notes of the trial are those prepared by the court reporter as a transcript. Counsel submitted that if the transcript did not reflect certain aspects of the hearing, the audio recording of the proceeding, would satisfy that concern. While counsel had no difficulty with the request for the audio recording of the hearing he commented that if it is to be transcribed this could lead to a delay in the hearing of the appeal. Counsel did not think it appropriate to seek notes from the learned judge showing her thought process.

Analysis

What are the principles to be applied by the court in considering the application?

[20] It is interesting that the applicant's submissions appear to be premised on the basis that the material sought pursuant to the notice of application fall within the realm of 'disclosure'. Counsel for the applicant has relied on **Harry Daley v R** [2013] JMCA Crim 14 in support of his application. In **Harry Daley v R** one of the appellant's grounds of appeal concerned the refusal of the Senior Resident Magistrate, now referred to as Parish Court Judge, to allow access to certain recording devices on the basis of public

interest immunity. Counsel for the appellant submitted that the appellant did not have a fair trial due to non-disclosure of certain recordings, the antecedents of a witness in the trial and the search of the appellant's house and removal of documents from it in the appellant's absence . The court emphasized that a person charged with a criminal offence is entitled to receive a fair trial. This includes the prosecution not withholding material relevant to the case. The court noted that all parties in that case knew that the credibility of the witness, Tafari Clarke, was of critical importance. There was evidence that he made an application for asylum in the United Kingdom and the application was denied. When the appellant requested disclosure of a file in respect of the asylum application, the application was denied on the basis that the information sought was irrelevant. The court concluded that the file ought to have been made available to the defence in order for them to get a true picture of the individual whose credibility was to determine the outcome of the case. The court expressed the view that where recordings are made and are being relied on to prove a case, the entire recordings and the context are to be placed before the court for a determination to be made by the court on the question of relevance.

[21] On an examination of the facts and principles applied in the **Harry Daley v R** case it is clear that the principles in it are not applicable in this context. This is not a first instance case concerning the Crown's duty of disclosure.

[22] The applicant also relied on **R v Mills, R v Poole** a decision of the House of Lords. Lord Hutton succinctly outlined the issue of law that arose for decision on the appeals. This was whether the Crown was under a duty to provide to the defence copies of statements made by a person who has witnessed acts of violence in respect of which two accused have been charged, where counsel for the Crown has reasonably decided that the witness is not a witness of truth. The court opined that it is the duty of prosecuting counsel to provide a copy of the statement of the witness to the defence and that the duty is not limited to furnishing only the name and address of the witness. In the particular case, however, neither conviction was rendered unsafe by the failure to disclose. Again, that case is distinguishable, as it concerned the Crown's duty of disclosure at a trial.

[23] **R v Stephen John Keane** is another case on which the applicant relied. The grounds of appeal in that case related to the first instance judge's rulings as to disclosure and the scope of cross-examination that he permitted. At the start of the trial, the judge was asked to order the prosecution to disclose the sources of the information that led to the appellant's arrest. Lord Taylor of Gosforth, CJ, explored the question as to the approach that the court should take where the prosecution relies on public interest immunity or sensitivity. Lord Taylor CJ stated that if the disputed material may prove the defendant's innocence or avoid a miscarriage of justice, then the balancing exercise must come down in favour of disclosing the material. At pages 9-10 he stated:

> "But how is it to be determined whether and to what extent the material which the Crown wish to withhold may be of assistance to the defence?
>
> First, it is for the prosecution to put before the court only those documents which it regards as material but wishes to withhold. As to what documents are 'material' we would adopt the test suggested by Jowitt J in **Melvin and Dingle** (judgment 20 December 1993). At page 5 of the transcript, the learned judge said:
>
> > 'I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution:
> >
> > (1) to be relevant or possibly relevant to an issue in the case;
> >
> > (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use;
> >
> > (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)." (Emphasis as in the original)

[24] We again note, however, that those principles were being applied in the context of the duty of disclosure of the prosecution at the trial of a defendant. In our view, it would be inappropriate to rely on the test to which the Lord Chief Justice referred, when

there is no question arising in this application concerning the prosecution's duty to disclose and instead, this court is being asked to determine whether to order that certain documents emanating from the court system, should be provided, in addition to the record of appeal and notes of evidence, ahead of the hearing of an appeal.

[25] **R v Pendleton**, to which the applicant also referred, concerned the role of the Court of Appeal Criminal Division when fresh evidence is received on appeal against conviction and the appropriate test in deciding whether or not to allow an appeal in such a case. That is not an issue that arises in this application.

[26] The application, that we are considering, arises after a trial has been completed before a judge and jury of the Supreme Court. The usual course in an appeal is for this court to make a determination in light of the material that was before the court during the trial. The introduction of additional material for our consideration in the determination of the appeal is subject to special rules, and our power to allow it must be carefully exercised.

[27] In determining whether to grant the orders that the applicant seeks by paras. 1 and 2 of the notice of application, we will bear in mind the statutory construct provided by the rules and relevant legislative provisions, as well as what the interests of justice may require, bearing in mind the fact that this is not a court of first instance, but instead, a court of review. We acknowledge that, pursuant to section 28 of the JAJA, this court has the discretion to order the provision of documents that are necessary for the determination of the case. In that regard section 28(a) of the JAJA provides:

> "For the purposes of Part IV and Part V, the Court may, if they think it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case;…"

[28] The section makes it clear that the court will make an order for the production of a document or thing only if it considers it "necessary or expedient in the interest of justice" and "necessary for the determination of the case". We will apply this principle in considering the orders that the applicant seeks. This is in clear contrast with the criteria that the applicant has submitted should guide this court in determining the application. We do not agree that this court should order the provision of documentation for the purpose of "informing" the applicant's grounds of appeal, or to assist the applicant to "narrow the issues demarcated" in his application for leave to appeal. Such an approach leans heavily towards facilitating a "fishing" exercise.

Request for a typewritten transcript of the original sentencing and resentencing proceedings of Shevar Robinson (para. 1 of the notice of application)

[29] Counsel for the applicant acknowledged that the applicant's defence counsel received a copy of the post sentence negotiation and agreement entered between Mr Robinson and the Crown. A copy of the agreement dated 12 November 2018 was also provided to this court. Para. 2 of the agreement is headed "Statement of Facts", and reflects the following:

> "The facts relative to this agreement are that -
>
> Shevar Robinson is a convict; he is serving a sentence of life imprisonment with eligibility for parole after serving sixteen years for the offence of murder. Concurrent with this sentence is a term of years of three years for the offence of attempted arson. He pleaded guilty to the charge of murder when he was arraigned on January 24, 2018 and pleaded guilty to attempted arson when he was arraigned on March 13, 2018.
>
> Shevar Robinson is undertaking to testify on behalf of the Crown against Tesha Miller for a reduction in his sentence for the offence of murder."

[30] Para. 3 of the agreement outlined the sentence recommended by the Crown. It stated:

> "The Crown recommends that the witness be resentenced to a fixed term of years, that is, ten years' imprisonment for the offence of murder and that the term of years in respect of the attempted arson be unchanged. The Crown recommends that the sentence [sic] run concurrently."

[31] The notes of evidence, at pages 112-119, reflect defence counsel's application for the learned judge to recuse herself from the applicant's trial on the basis that the applicant was uncomfortable "with the tribunal who reduced the sentence in relation to the witness of fact in his trial", hearing the case. Counsel complained that he was barred from the plea negotiation hearing because the court was involved in a Chamber hearing. The learned judge, in response, stated that she was involved in an open court hearing before 10 am and she did not "know if anyone had a right to be in [there] unless they were engaged in that matter".

[32] The applicant's attorney-at-law complains that the barring of counsel from the plea negotiation hearing was a breach of the principle of open justice.

[33] The first question that arises is whether there was a proper basis on which the applicant's attorneys-at-law were barred from sitting in the courtroom when the learned judge was conducting the plea proceedings. An examination of the Plea Negotiations and Agreements Act ('PNAA') assists.

[34] The PNAA provides that the plea agreement is to be disclosed in open court when the plea is offered, unless the plea judge, for good cause, allows the agreement to be disclosed in camera (see section 9 of the PNAA). The proceedings in which the judge considers whether to accept the agreement are also to be held in open court unless the plea judge determines otherwise (see section 11 of the PNAA). In addition, the proceedings during which the accused person enters a plea must be recorded and entered on the record by a court reporter, by electronic or other means specified by the rules of the court or by the plea judge (see section 12 of the PNAA).

[35] In light of the fact that the learned judge, who was the plea judge for Shevar Robinson, stated that the plea proceedings were held in open court, we have not seen a

basis on which the defence counsel for the applicant could have been excluded from sitting in and observing the proceedings. The defence counsel ought to have been allowed to observe the open court plea proceedings.

[36] The question nevertheless remains whether the court should order that the transcript of these proceedings be provided to the applicant's attorneys-at-law. The applicant's defence counsel have stated that the learned judge would have orally responded to information provided to her and would thereafter sentence Mr Robinson. Furthermore, the applicant's counsel view with suspicion the learned judge's approval of the substantial reduction in Mr Robinson's sentence. It turns out, however, that the sentence was recommended by the Crown. When one considers the basis given for the request for the transcript of the plea proceedings, that is, to determine whether the learned judge ought to have recused herself from presiding over the applicant's trial, the request appears to border on being a "fishing" exercise. However, in the peculiar circumstances of this case, in particular, the fact that counsel was barred from sitting in the open court proceedings, we believe that it is expedient and in the interests of justice, and necessary for the determination of the case, for us to order that a type written transcript of the plea proceedings held on 13 November 2019 be provided to the court, the applicant and the Director of Public Prosecutions.

[37] The applicant has also requested the transcript of the original sentencing exercise for Mr Robinson. In our view, this would certainly take this court into the realm of facilitating a fishing exercise by the applicant's attorneys-at-law. We will not allow it. It is not necessary for a determination of the application for leave to appeal. There certainly is no material connecting that exercise to the applicant.

Request for a written report from the learned judge

[38] In considering the applicant's request, we reviewed the relevant legislative provisions and rules concerning the official transcript, the record of appeal and the learned judge's notes and reports.

[39] Section 16 of the Judicature (Supreme Court) Act ('the Act'), provides:

> " (1) There shall from time to time be appointed such number of Court Reporters who shall receive such salary as Government may determine.
>
> (1A) In respect of the proceedings referred to in subsection (2) or (3) commenced after the appointed day, the Court Reporter or such other person designated by the Judge or such clerk as may be directed by the Judge, shall be responsible for recording the notes of evidence in those proceedings.
>
> (1B) The notes of evidence referred to in subsection (1A) may-
>
> (a) be recorded by such means (which may include electronic means) as may be specified by rules of court;
>
> (b) bear the seal of the Court; and
>
> (c) be certified as a true copy thereof in such manner as may be specified by rules of court.
>
> (2) **Notes shall be taken of the proceedings at the trial of any person on indictment in the Supreme Court, and a transcript of the notes or any part thereof <u>shall</u> -**
>
> **(a) <u>on any appeal or application for leave to appeal be made and furnished to the Registrar if he so directs;</u> and**
>
> **(b) be made and furnished to any party interested upon the payment of such charges as may be fixed by rules of court whether the person tried was or was not convicted, or in any case where the jury were discharged before verdict.**
>
> (3) Subject to the provisions of subsections (4) and (5) notes shall also be taken of the whole or of any part of the proceedings at the trial of civil actions or proceedings in the Supreme Court …

(4) **The duties to be performed by the Court Reporters under subsection (2) shall take precedence of the duties to be performed by the Court Reporters under subsection (3).**

(5) A fee … for the attendance at the trial of a civil action … of a Court Reporter.

(6) Rules of court may make such provisions as is necessary for securing the accuracy of the notes to be taken and the verification of the transcript." (Emphasis supplied)

[40] The sections highlighted indicate that through the Act, Parliament has made specific provision for the appointment of court reporters, and for notes to be taken of the proceedings at any trial of a person on indictment. A transcript of the notes taken "shall" be furnished to the Registrar of the Supreme Court on any appeal or application for leave to appeal, if he so directs. The taking of notes at trials of persons on indictment, and the preparation of a transcript of the notes, take precedence over notes taken in civil proceedings. Section 16 of the Act also provides that rules of court may make provisions for securing the accuracy of the notes taken and the verification of the transcript.

[41] The applicant has relied on section 17 of the JAJA in support of his request for a report from the learned judge as well as her notes of the trial. That provision states:

"The Judge of any court before which a person is convicted shall, in the case of an appeal under this Part against the conviction or against the sentence, or in the case of an application for leave to appeal under this Part, furnish to the Registrar, **in accordance with rules of court**, his notes of the trial; and shall also furnish to the Registrar **in accordance with rules of court** a report giving his opinion upon the case or upon any point arising in the case." (Emphasis supplied)

[42] It is interesting that there is an emphasis in section 17 of the JAJA, that the judge at first instance is to provide his notes of trial and or his opinion on the case or a point arising in it "in accordance with rules of court". These words will impact our interpretation of the section.

[43] Section 4 of the Judicature (Rules of Court) Act provides that it is a function of the Rules Committee to make rules of court for the purposes of various pieces of legislation including the Act and the JAJA. It is in this context that the CAR were made.

[44] In continuing our review of the relevant rules and legislation, it is important to examine the CAR. Rule 3.7 provides:

> "(1) For the purpose of this rule '**the record**' means-
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> (a) the indictment or inquisition and the plea;
>
> (b) the verdict, any evidence given thereafter and the sentence;
>
> (c) notes of any particular part of the evidence relied on as a ground of appeal;
>
> (d) any further notes of evidence which the registrar may direct to be included;
>
> (e) the summing up or direction of the judge in the court below; and
>
> (f) copies of any undertakings given pursuant to rules 3.14 or 3.21.
>
> (2) Upon receipt of a notice under rule 3.3(1) or (2), the registrar must require the registrar of the court below to supply to the court -
>
> (a) four copies of the record;
>
> (b) the original exhibits in the case, as far as practical; and
>
> (c) any original depositions, information, inquisition, plea or other documents usually kept by him or her, or forming part of the record of the court below.
>
> (3) In any capital case copies of all the notes of evidence must be included in the record.
>
> (4) …

(5) Upon receipt of the documents referred to in paragraph (2), the registrar must give notice of such receipt to the appellant and respondent.

(6) **Either party may apply to the court or a single judge for a direction that all the notes of evidence be supplied to the court and to the Director of Public Prosecutions except for appeals from the [Parish] Court**…

(7) At any time after a notice of appeal or application for permission to appeal has been filed, any party may obtain from the registrar of the court below copies of any exhibits or other documents in his or her possession upon payment of the prescribed fee.

(8) An appellant -

(a) to whom an attorney-at-law has been assigned; or

(b) who is unrepresented,

may obtain the documents referred to in paragraph (7) free of charge unless …" (Emphasis supplied)

[45] It is noteworthy that it is only in capital cases that all the notes of evidence are automatically included in the record of the proceedings in criminal cases. However, as the applicant did in this case, an appellant may apply to the court or a single judge for a direction that all the notes of evidence be supplied to the court.

[46] Another provision to which the applicant has referred is rule 3.8 of the CAR, which provides:

"(1) The shorthand writer must certify as a full and correct shorthand record, any shorthand note taken by him of the whole or any part of the trial or other proceedings appealed.

(2) The registrar of the court below must supply for the use of the court a typewritten transcript of the whole, or such part as the registrar may direct, of the

shorthand note taken of the trial proceedings appealed.

(3) The person preparing the transcript must certify its accuracy in form B4.

(4) (i) a party to the appeal;

(ii) any person named in or immediately affected by the order of the court below; or

(iii) the attorney-at-law of such party or person,

may obtain from the registrar a copy of the transcript on payment of the prescribed fee.

(5) A copy of the transcript must be supplied free of charge-

(a) to the Director of Public Prosecutions;

(b) to the Attorney General; and

(c) any unrepresented party.

[47] In summary, rule 3.8 of the CAR provides that the registrar of the court at first instance must supply for the use of this court, a typewritten transcript comprising the certified notes of the whole or part of the proceedings in that court. In our view, it is this transcript, therefore, that comprises the official record to which this court will refer in the hearing of the appeal.

[48] What then is the impact of rule 3.9 of the CAR? This provision is important in the context of the order sought by the applicant. It states:

"(1) **On the direction of the court** the registrar must request the judge of the court below to supply -

(a) a written report giving his opinion upon the case either generally or upon any point arising in the appeal; and/or

(b) a certified copy of the whole or any part of his or her notes of the trial.

> (2) The report of the judge is to be made to the court and the registrar must supply a copy of the report and/or notes to the appellant and respondent." (Emphasis supplied)

[49] Upon an analysis of the provisions, it is our view that when rule 3.9 of the CAR is read together with section 17 of the JAJA, the report from the judge or certified copy of his or her notes of the trial is only to be required if, pursuant to or in accordance with the rules of court, the court so directs. There is, therefore, a discretion that the court exercises to determine whether the judge's notes or report ought to be required for the hearing of the appeal.

[50] Counsel for the applicant has submitted that a report from the learned judge whose conduct is being impugned would give the learned judge "the benefit of her report or trial notes" being considered by this court before the matter is determined. We disagree with these submissions. As is the usual procedure in cases in which there have been complaints concerning the manner in which a judge has conducted the trial proceedings, consideration of the complaints made by the applicant concerning the conduct of the learned judge should be carried out on the basis of a review of the official transcript. We agree with the submissions made by counsel for the Crown that it is not appropriate to seek notes from the learned judge revealing her "thought process".

[51] We note counsel for the applicant's complaint that matters such as a "lizard incident" are not reflected on the transcript. In our opinion, it is highly unlikely that a matter such as the appearance of a lizard in the jury box would find its way into the official transcript or even the learned judge's notes.

[52] We have concluded that it is neither necessary nor expedient for us to request a report from, and the notes of, the learned judge in this matter. They are not necessary for the just determination of the application for leave to appeal.

The audio recording of the trial

[53] As indicated before, the trial was held over the period 13-15, 18-19, 21, 26-28 November and 2-3 December 2019. The learned judged imposed the relevant sentences on 9 January 2020. The learned judged carried out her summing up to the jury over the period 2-3 December 2019.

[54] In seeking an order for the provision of an audio recording of the trial, counsel for the applicant has relied on **Randall v The Queen**. The primary ground of appeal argued before Their Lordships in that case was that the appellant's trial was conducted in a manner that was grossly and fundamentally unfair arising from the conduct of prosecuting counsel. Their Lordships reiterated that throughout a trial there is the overriding requirement to ensure that the defendant accused of the crime is fairly tried (see para. 10 of the judgment). In addition, the trial judge has the responsibility to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence (see para. 10(3)). Their Lordships concluded that there were such departures from good practice in the course of the appellant's trial due to the conduct of prosecuting counsel as to deny him the substance of a fair trial.

[55] Counsel for the applicant also relied on **R v Lunkulu** as demonstrating a case in which the Court of Appeal in England listened to an audio recording of the summing up made by the judge at first instance in light of the appellants' complaints that the judge adopted a dismissive tone of voice or choice of language that denigrated the defence arguments.

[56] In this application, the applicant complains that the learned judge adopted a "hostile" attitude to him whenever he spoke and, among other things, constantly interrupted his counsel. At para. 5 of his affidavit, filed on 19 December 2022, the applicant states "[t]he frequency, tone and overall mannerism of the judge cannot be adequately reflected in writing and only the provision of a [sic] audio recording could suffice to evidence the injustice". Counsel relied on a number of cases in which the court examined whether the fairness of the trials in question was undermined by the conduct

of the judge. The complaints examined ranged from unfair judicial treatment, the making of prejudicial remarks during the hearing, a summing up that included advocacy to bias in favour of the prosecution (see **R v Cordingley**, **R v Mustafa Kemal Mustafa** [2020] EWCA Crim 1723, **R v Natasha Myers** [2018] EWCA Crim 2191, **R v Samah Naz**, **R v Roger Rodney** [1996] EWCA Crim J1209-5, **R v Tedjame-Mortty** and **R v Wood**).

[57] Although there is no affidavit evidence addressing the question as to who would have custody of an audio recording of the proceedings, counsel for the Crown stated that to the best of his knowledge, the Court Reporters transcribe the notes from audio recordings made on their machines. If this is correct, in light of the complaint being made by the applicant, we have no difficulty ordering that the audio recording, if still available, be sent to the Registrar of this court who will make it available to the parties. It will be a matter for the applicant and his attorneys-at-law to identify the relevant portions of the recording that they believe will demonstrate and support their submissions. We do not see it as necessary or expedient in the interests of justice to request that the audio recording be transcribed, especially bearing in mind that the Court Reporters would have utilized the recording to prepare the transcript of the proceedings at the trial.

Extension of time

[58] It is understandable that the applicant's attorneys-at-law will require additional time to prepare their submissions as they will need to take into account the additional material that they will receive by virtue of the orders that the court will make. The Crown will also need to respond to the submissions. Bearing in mind the hearing date of 27 March 2023, the timelines will be close. We note that the applicant filed a chronology of events on 18 January 2023 and so it is unnecessary to extend time in this regard.

Application to adduce fresh evidence

[59] We agree with the position taken by counsel for the applicant and counsel for the Crown that the application to adduce fresh evidence should be heard at the same time as the hearing of the application for leave to appeal.

The orders of the court

[60] In light of the discussion above, we order as follows:

(1) The application is granted in part.

(2) The Registrar of this court, as a matter of urgency, is directed to request the following from the Supreme court:

(a) The type written transcript of the plea proceedings conducted on 13 November 2019 of Shevar Robinson by G Fraser J; and

(b) The audio recording of the trial of the applicant over the period 13-15, 19, 21 and 26-28 November 2019,

and, upon receipt of the material, is further directed to supply copies of them to the applicant and the Director of Public Prosecutions

(3) The applicant's attorneys-at-law are permitted to file their submissions and authorities on or before 10 March 2023 and the Crown is permitted to file its submissions on or before 17 March 2023.

(4) The application to adduce fresh evidence is to be determined at the hearing of the application for leave to appeal of this matter.

(5) The application for:

a. the typewritten transcript of the original sentencing exercise of Shevar Robinson,

b. a written report from G Fraser J giving her opinion on the case generally, and

c. a certified copy of the whole of the notes taken in the trial by G Fraser J

is refused.