[2021] JMCA Crim 6

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 100 & 101/2012

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

PASMORE MILLINGS
ANDRE ENNIS v R

Robert Fletcher for the applicant Millings

Miss Nancy Anderson for the applicant Ennis

Miss Kathy Pyke and Ms Deborah Bryan for the Crown

8 December 2020 and 19 February 2021

BROOKS P

[1] On Wednesday, 7 November 2007, Mr Taiwo McKenzie and his girlfriend Miss Janelle Whyte, went missing. Their respective relatives, who could not make telephone or any other contact with them, reported the disappearance to the police the following day. On 9 November 2007, the couple's dead bodies were found in bushes at Mount Salus, in the parish of Saint Andrew. Their throats had been slashed. It was good police work, the use of technology and the assistance of an accomplice that allowed the police to put together the case that the prosecution meticulously presented against the

applicants, Messrs Pasmore Millings and Andre Ennis, who, on 20 June 2012, were convicted of the murders.

[2] The applicants' convictions resulted from a trial in the Home Circuit Court presided over by Hibbert J (the trial judge), sitting with a jury. On 17 September 2012, the trial judge, in respect of each count of murder, sentenced both applicants to imprisonment for life. He ordered that they should each serve, before becoming eligible for parole, 50 years' imprisonment at hard labour in respect of Miss Whyte's death, and 40 years in respect of Mr McKenzie's death.

[3] Both applicants have filed applications for leave to appeal from the convictions and sentences. A single judge of this court refused the applicants' respective applications to appeal against their convictions and sentences. The applicants have both renewed their applications before the court, and learned counsel, on their behalf, have advanced closely reasoned grounds of appeal, which highlighted the issues of:

1. the adequacy of the trial judge's summation in respect of accomplice evidence;
2. the trial judge's directions in respect of circumstantial evidence;
3. the admission of evidence said to have been irregularly obtained;
4. the delay in the hearing of the trial and of the appeal;
5. the trial judge's summation on the issue of mere presence; and

6. the appropriateness of the sentences.

[4] Mr Fletcher, on behalf of Mr Millings, filed, but later abandoned, a ground dealing with the issue of the trial judge's directions on the issue of good character. Learned counsel properly conceded that the ground had no merit.

[5] Learned counsel also framed a supplemental ground that "the verdict is unreasonable having regard to the evidence".

The prosecution's case

[6] The main witness for the prosecution was the accomplice, Mr George Cooper. He testified that on 6 November 2007, at about 6:00 pm, he was the pillion passenger on a motorcycle that Mr Ennis was riding, when it collided with a car that Mr McKenzie was driving. Mr Cooper's ankle was injured and the motorcycle was damaged in the crash. Mr McKenzie said, at the time, that he would pay the medical expenses and the repair bill. They waited at the spot until someone, identified as Mr Millings, came to secure the motorcycle. Mr McKenzie then transported Mr Cooper, Mr Ennis and Ms Whyte, who was one of Mr McKenzie's two passengers, to the University Hospital of the West Indies, where Mr Cooper was treated and released.

[7] The police spoke to the parties while they were at the hospital. During that discussion and the examination of documents for the vehicles, it was discovered that the motorcycle was not registered for use on the public roadway. At that point, Mr McKenzie said that he would not pay for the cost of its repair. He maintained, however,

that he would pay for Mr Cooper's medication. Mr Ennis was unhappy with Mr McKenzie's position, and the parties parted company on that note.

[8] The following day, Mr Ennis contacted Mr Cooper and got him to arrange for Mr McKenzie to meet Mr Cooper at a particular location to deliver the required medication. It was, however, a ruse, and Mr Cooper said that Mr Millings forced him at gunpoint to play his part in luring Mr McKenzie to the spot. Mr Ennis also took another man (the other man) with him to the spot. Unfortunately for her, Miss Whyte accompanied Mr McKenzie to the location.

[9] When Mr McKenzie and Miss Whyte arrived at the location, Messrs Ennis and Millings commandeered Mr McKenzie's vehicle. Messrs Ennis and Cooper went on the front seats and the other four, including the other man, were on the rear seat. Mr Ennis drove to a "hilly part of Havendale" (page 111 of the transcript). At that location, Mr McKenzie was given a telephone to make calls to secure money to pay for the repairs to the motorcycle.

[10] Thereafter, Mr Millings, Mr Ennis and the other man tied up and gagged both Mr McKenzie and Miss Whyte, put them back in the car, and Mr Ennis drove everyone "up more in the hills" (pages 114-115 of the transcript). At the new location, Mr McKenzie was taken out of the car and the exercise with the telephone was repeated. By then it was afternoon, and Messrs Ennis and Millings, and the other man became frustrated and angry that their demands for the repair of the motorcycle were not being met. Mr Millings then turned his attention to Miss Whyte. He took her ATM card and demanded

the password for the card, which she told him. He wrote it down on a piece of tape and stuck it onto the card. Shortly afterward, Mr Millings said "Dis nah go no weh and it gone too far a better we finish them and done" (page 120 of the transcript).

[11] Messrs Ennis and Millings then led Mr McKenzie along a track leading into bushes. Mr Ennis was carrying a "tall shiny object resembling a knife" (page 122 of the transcript). At that time, Miss Whyte was sitting on the rear seat of the car along with the other man. A few minutes later Messrs Ennis and Mr Millings returned without Mr McKenzie. Mr Ennis still had the 'knife', but then it appeared bloody. The pair took Ms Whyte from the car and went with her along the same track into the bushes. After a few minutes, the two men returned together, without Miss Whyte. This time, however, Mr Millings had the 'knife'. They used some clothes from the car to wipe blood from their hands and the 'knife'. Mr Millings also took off his undershirt and used it in the clean-up exercise.

[12] Messrs Ennis, Millings, Cooper and the other man then left the location and went to an ATM at a petrol station in Havendale, where Mr Ennis got Mr Cooper to withdraw some money using Miss Whyte's ATM card. Mr Ennis accompanied Mr Cooper into the ATM's cubicle. An attempt was made to withdraw money from another ATM, but it was unsuccessful. The other man went his own way, and Mr Cooper went home.

[13] On the day following that incident, Mr Ennis took Mr Cooper to another ATM and had him withdraw more money using Miss Whyte's ATM card. Mr Cooper was then apprehensive of the frequent contact with Messrs Ennis and Millings. He left his home,

and, on Friday, 9 November 2007, went to stay at his father's home. On Sunday, 11 November 2007, in response to information that Mr Cooper had received, he, accompanied by his father, went to the Half-Way-Tree police station and was detained.

[14] Between 8 and 11 November 2007, the police were busy. Having received a report that Mr McKenzie and Miss Whyte were missing, police investigations led to the detention of Mr Ennis and an alarming revelation by Mr Millings. The distressing content of the latter was confirmed when the bodies of the two young people were found. The police investigators were also assisted by video footage from the first ATM cubicle, at which Mr Cooper used Miss Whyte's ATM card. The footage showed Mr Cooper and another man, who, Mr Cooper testified, is Mr Ennis.

[15] Mr Cooper pleaded guilty to the offences of conspiracy to kidnap and conspiracy to rob. On 25 February 2011, he was sentenced for those offences and thereafter, provided a statement to the police. That statement was the basis for his testimony in the case against the applicants.

The case for the defence

[16] Both applicants gave unsworn statements in which they denied any involvement in the killings. Mr Ennis stated that he did not go to Mount Salus, and did not go to an ATM. Mr Millings said that was not involved in any accident. He also denied picking up any bike. He further said that he did not go in any car, or have any dealings with Mr Cooper. The first time he saw Mr Cooper, he said, was at the Half-Way-Tree Court.

[17] Character witnesses, two for Mr Ennis, and one for Mr Millings, testified to their respective good characters.

Issue one: The adequacy of the trial judge's summation in respect of accomplice evidence

[18] Miss Anderson, on behalf of Mr Ennis, and Mr Fletcher, both argued that the trial judge's summation in respect of the accomplice evidence was inadequate and denied the applicants a fair trial. Mr Fletcher formulated the relevant ground, thus:

> "Given the nature, circumstances and issues which attended the evidence of the accomplice/witness, the directions by the learned trial judge concerning the treatment of an accomplice by the jury was inadequate. This inadequacy denied the applicant a fair trial[.]"

Miss Anderson framed the ground, which she argued, more pointedly:

> "The Learned Trial Judge failed to give the jury a proper direction on the danger of convicting on the uncorroborated evidence of an accomplice and failed to properly point out the lack of corroboration of the witness Cooper's evidence, resulting in the Applicant's conviction being unsafe and thus denying the Applicant a fair trial."

She, however, as part of her own presentation to the court, adopted Mr Fletcher's submissions in respect of the issue.

[19] Mr Fletcher argued that whereas the trial judge gave the required direction, concerning accomplices, "as a form of words", he failed to put the direction in a context that would have made it meaningful to the jury and fair to the applicants. Both Mr Fletcher and Miss Anderson contended that the trial judge failed to remind the jury, in the context of the danger associated with Mr Cooper's evidence, of:

a. Mr Cooper's attempt, during examination-in-chief, to retract his previous evidence about going to Mount Salus and witnessing something there (a retraction which he later said was untrue and motivated by fear); and

b. Mr Cooper's refusal, when being cross-examined, to look at statements that he had given to the police, which defence counsel contended, contradicted his testimony.

[20] These matters, Mr Fletcher submitted, made Mr Cooper a "self-discrediting witness". Learned counsel submitted that the trial judge, should have identified these issues in Mr Cooper's evidence at the time that he gave the corroboration warning to the jury. That would have enabled the jury, he submitted, to determine the extent of the danger in convicting on Mr Cooper's evidence. Mr Fletcher asserted that this failure by the trial judge amounted to a miscarriage of justice.

[21] Miss Pyke, for the Crown, after a careful outline of all the relevant directions that the trial judge gave on the issue of accomplice evidence, contended that he did what was required of him and that there was no merit in the ground of appeal.

[22] Learned counsel, for both the applicants and the Crown, are at one in respect of the principle that a trial judge should warn the jury that it is dangerous to convict on

the evidence of an accomplice, unless that evidence is corroborated. The principle was repeated in **Lawrence Brown v R** [2016] JMCA Crim 33 at paragraph [26]:

> "Where there is evidence on which a jury properly directed could find that the witness was an accomplice, the judge should warn the jury that, if, on the evidence, they consider that the witness was an accomplice, it is dangerous to convict on that evidence unless it is corroborated, even though they may do so, if after considering the warning, they believe the witness nevertheless."

[23] Learned counsel also all agree that the trial judge did give a corroboration warning that complied with the direction in **Lawrence Brown v R**. They, however, disagree as to the adequacy of the direction in the context of the circumstances of this case.

[24] In giving the relevant directions, the trial judge directed the jury as to what an accomplice was, what corroboration was, and the reason for the requirement for corroboration. His directions are recorded at various points of the transcript. Firstly, from page 876, at line 2, to page 877 at line 12:

> "Now, we heard a lot about Mr. Cooper and you will no doubt think that the Prosecution's case stands or falls on the evidence of Mr. Cooper. You heard Mr Cooper being described in several ways as a person who is seeking to save his skin as an accomplice, as somebody who might have been the one who did this act and is throwing it on others."

> "Now, where evidence is led in [sic] an accomplice, Mr. Foreman and members of the jury, I need to give you a special warning. Before I give you this warning, let me tell you who is an accomplice. An accomplice is one who is a party to the crime charged against the defendants, this crime which these two defendants are charged, two counts of murder. And, remember, Mr Cooper himself was charged

> along with these two persons for the murder of [Janelle] Whyte and Taiwo McKenzie."
>
> "Now, there may be all sorts of reasons for an accomplice to tell lies to implicate other people. It is therefore dangerous and this is where the warning comes in. **It is therefore dangerous to convict on the reliance of the evidence on the accomplice, Mr. Cooper, in this case, unless that evidence is corroborated; that is, independently confirmed by other evidence.** Let me go further in explaining what corroboration is. **Corroboration, Mr. Foreman and members of the jury, is some independent evidence, that is, evidence apart from Mr. Cooper's evidence which does not -- which confirms some material particulars, not only the fact that the offence was committed but also that it was the defendant that committed the offence**." (Emphasis supplied)

The learned judge then gave a differently worded definition of corroboration. He said at page 877, line 13 to page 878, line 6:

> "So let me go again, Mr Foreman and members of the jury, corroboration is evidence that is independent of Mr Cooper to show not only the fact that murder was committed but that these are the persons who committed the murder. You will have to look at the evidence and I will have to tell you, when I review the evidence, Mr Foreman and members of the jury, whether or not there is any evidence capable of amounting to corroboration in this case because as I said, corroboration has two prongs, you can't just pick one and say yes there is evidence to assist him that murder was committed, or that there is evidence to assist him in something else. What it must be to amount to corroboration that there is evidence to show [sic, support?] him, particular material that murder was committed and that these persons or anyone [sic] of them committed that murder."

[25] It is important to note that the trial judge, gave the jury full directions on the burden and the standard of proof, which the prosecution bore. He also directed the jury on the issue of accomplice evidence and Mr Cooper, at other points of his summation.

He reminded them at various points of the criticisms that the defence levelled against Mr Cooper, of someone seeking to save his own skin by throwing the blame on others. The trial judge reminded the jury of Mr Cooper's attempt at retracting his testimony and retracting his retraction. He placed that turn of events in the context of the burden and standard of proof. As this forms a significant part of Mr Fletcher's submission in this court, the trial judge's direction in this regard, requires examination. He said, in part, at pages 900, line 25 –page 903, line 5:

> "Now, we resumed on Thursday, the 7th [June 2012]. And after he was sworn, Mr Cooper said, yesterday I came here and misled this court. The truth is that I was never on a hill. Remember he said he has to be guided by his conscience and he is saying he gave a statement to the police when he was arrested and he answered questions from the police….Remember in relation to the statements what he said it was Mr. Fearon who brought a statement not that he dictated a statement. Mr Fearon brought a statement and gave it to him to sign and this is what he signed….
>
> Now on the resumption he was again sworn and he said I said I was not on the hill because I was in fear. It was not true he said that he misled the court the day before and when he said he had misled the court was because of fear. He said he, Mr. Fearon, did not give him any statement to sign and he said so also because of fear. So you will have to now look at that, Mr. Foreman and members of the jury, before that he said that he did all of this in the morning of Thursday. He said all of that was untrue. All that he said on Wednesday was not true that is what he said on the morning of Thursday. And in the afternoon of Thursday he said what he said on the morning of Thursday is not true but what he said on Wednesday was true. You have to look at it because in this case the credibility of Mr. Cooper is paramount. You might well think that the case for the prosecution rests or falls with Mr. Cooper.
>
> As the judges of the facts, you have to be satisfied to the extent that you feel sure that he is a truthful and reliable witness and that what he says you can act on…."

[26] At pages 1006-1007, the trial judge brought together those various threads of warning in respect of Mr Cooper. After addressing the statement that Mr Millings was alleged to have made to the investigating officer, Detective Inspector Alvan Fearon (Det Insp Fearon), in which Mr Millings cast himself as an innocent bystander, or spectator, the trial judge said, in part:

> "Now, if you were taking persons up to a secluded place to do them injury, would you carry a spectator? These are matters for you, Mr. Foreman and members of the jury. Did [Mr Millings] go there? Did he go there as a spectator? Do you believe Mr. Cooper that [Mr Millings] went there? Do you believe Mr Cooper that [Mr Millings] took part, that when they came back after leading [Janelle] away [Mr Millings] came back and he was the one with the bloody knife? Do you believe Mr. Cooper that [Mr Millings] was the one who used his merino to wipe off the blood? Let us go back to Mr. Cooper for a little while. Mr. Cooper would give us the impression that he was also an innocent bystander. He didn't take part, he had nothing to do with any murder. But even, Mr. Foreman and members of the jury, if you believe Mr Cooper lied about this and that Mr Cooper was active participant and that he was an accomplice, it doesn't mean that I have to disregard his statement or his evidence. You are to look at his evidence, Mr. Foreman and members of the jury and look at it, bearing in mind the direction that I have given you, in relation to corroboration and how you treat the evidence of an accomplice, that it is dangerous to convict on the uncorroborated evidence of an accomplice."

[27] The trial judge capped this aspect of Mr Cooper's testimony by unequivocally instructing the jury that Mr Cooper's testimony had not been corroborated. This is recorded at pages 1007-1008 of the transcript:

> "Now, remember I told you what corroboration was. Now, having reviewed all of his evidence, you would have noticed but just in case you did not, **it is my duty to tell you there is no evidence in this case to corroborate the**

> **evidence of Mr. Cooper.** However, the fact that there is no evidence to corroborate the evidence of Mr Cooper, if having heard it, having seen him, you believe that he is speaking the truth about what happened to Janelle and Taiwo at Mount Salus, you can bear in mind the caution that I have given you, accept his evidence if you find that it is truthful and reliable and act upon it. So, even though he might have been a participant, Mr. Foreman and members of the jury, it doesn't mean that it is the end of the matter. **You look at the caution that I have given, and if taking into consideration that caution you are still satisfied to the extent that you feel sure that he is speaking the truth, you may act upon his evidence, if you find that it is truthful and reliable**." (Emphasis supplied)

[28] A trial judge is not required to use any particular formulation in giving the directions to the jury. The summation will vary from case to case, according to the style of the judge and the jury being addressed. Carey JA, in **Sophia Spencer v R** (1985) 22 JLR 238, admirably explained the purpose of a summation to the jury. He said, in part, at page 244:

> "A summing up, if it is to fulfill [sic] its true purpose, which is to assist the jury in discharging its responsibility, should coherently and correctly explain the relevant law, faithfully review the facts, accurately and fairly apply the law to those facts, leave for the jury the resolving of conflicts as well as the drawing of inferences from the facts which they find proved, identify the real issues for the jury's determination and indicate the verdicts open to them.
>
> If it is so couched in language neither patronizing nor technical, then it cannot fail but be helpful to a jury of reasonable [men] and women in this country."

[29] The reliance to be placed on the intelligence of the jury in applying a judge's directions to the facts, as they find them, was set out in the following extract from **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 at page 507:

> "…The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. **It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence**. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt." (Emphasis supplied)

The case will be referred to below as **McGreevy v DPP**.

[30] The trial judge, on this issue, fulfilled his duty to the jury. The jury is to be taken to have reasoning powers to determine the effect of the evidence they accept. The fact that he did not place any stress, during his admonition of the need for caution, on Mr Cooper's instances of "amnesia" during cross-examination by defence counsel, did not lessen the impact of the direction to the jury of the importance of Mr Cooper's credibility. In the end, the jury believed Mr Cooper. That was their province.

[31] The grounds that are based on this issue cannot succeed.

Issue two: The trial judge's directions in respect of circumstantial evidence

[32] The ground on which this issue is based is framed as follows:

> "There was no direction given on circumstantial evidence in the case, denying the jury the tools to properly assess the case. This omission denied the applicant a fair trial."

[33] Mr Fletcher insisted that, despite the testimony of Mr Cooper, this case turned on circumstantial evidence. Learned counsel argued that as there is no direct evidence concerning the slaying of the victims, it was incumbent on the trial judge to specially direct the jury on the treatment of this fact. Mr Fletcher unhesitatingly accepted that the previous formula of summation, which was required in circumstantial evidence cases (see **Hodge's** case (1838) 2 Lew CC 227), had been superseded by a principle established in **McGreevy v DPP**. He argued, however, that the trial judge's failure to address the absence of direct evidence of the killing, resulted in the summation being unfair to the applicants. Mr Fletcher relied, in part, on the decision of **Lejzor Teper v R** [1952] AC 480.

[34] Mr Fletcher's submissions cannot be accepted. Although the replacement of the principle in **Hodge's** case was, for a time, resisted, this court has long accepted that that principle has been supplanted by the principle established by **McGreevy v DPP**. Smith JA set out in **Loretta Brissett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004, a comprehensive history of the development of the law relating to the requirements of a summation in cases involving circumstantial evidence. Smith JA included **Teper v R** in

his analysis. He demonstrated that the principle in **McGreevy v DPP**, that no special warning is required for circumstantial evidence, was to be applied in this jurisdiction.

[35] As Miss Pyke demonstrated in her submissions on this issue, the principle in **McGreevy v DPP** has since been applied in numerous cases decided by this court, including **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, **Dalton Reid v R** [2014] JMCA Crim 35, and **Jason Brown and Another v R** [2017] JMCA Crim 20. In **Baugh-Pellinen v R**, Morrison JA, as he then was, succinctly set out the principle in **McGreevy v DPP**. He said, in part, at paragraph [39] in that judgment:

> "As regards the proper directions to a jury on the subject of circumstantial evidence, **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 resolved the question whether any special directions were necessary in such cases by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused."

[36] Despite his acceptance of the principle in **McGreevy v DPP**, Mr Fletcher's submissions seek to resurrect the requirements of **Hodge's** case. **McGreevy v DPP** is now too well established in this jurisdiction to allow that resurrection.

[37] The trial judge fully discharged his duty, as mandated by **McGreevy v DPP**. He, more than once, directed the jury on the burden and standard of proof. Although an example of that direction has already been given above, the trial judge first addressed the point, at page 858, lines 14-22:

> "…It is for the prosecution to satisfy you that the [applicants] have committed this offence.
>
> Now this duty which the prosecution bears carries with it a particular standard and you heard counsel refer to the standard. It is you who must be satisfied, to the extent that you feel sure, that each or any of them committed the offence for which they are charged…"

[38] The trial judge also dealt with the matter of inferences. He did so at pages 848, line 17- page 850, line 7. He said, in part:

> "Now, from the evidence which you accept, Mr. Foreman and members of the jury, you are entitled to draw what we call inferences.
>
> Inferences are merely common sense conclusions. Inferences can only be drawn, however, if they are reasonable, again, can only be drawn if they come from facts which you find proved. I will give you an example…"

After giving his example, the trial judge said:

> "On what basis would you have drawn this conclusion? Let us look at the facts that you would have accepted Mr. Foreman and members of the jury [and after setting out the facts relevant to his example]. That is how we ask you to draw inferences with common sense conclusions in these cases."

[39] Based on those and the other directions given by the trial judge, the jury would have been in no doubt as to the manner in which they should approach the gap in the eyewitness' evidence. The gap being, the occurrences between Mr Cooper seeing the two victims being led away, bound, by knife-wielding persons, who later returned without the two victims, with the knife and their hands bloody, and the discovery two days later, in the same vicinity, of the dead bodies of the victims, with their hands bound and their throats slashed. There was also evidence that the development of

insects on the bodies suggested that the deaths had occurred between 36 to 48 hours before the bodies were found.

[40] There is, therefore, no merit in this ground.

Issue three: The admission of evidence said to have been irregularly obtained

[41] The ground used for this issue states as follows:

> "The admission of irregularly obtained evidence, in several respects and the use of questions in Q and A's to reinforce and/or add to the evidence of the accomplice/witness, introduced highly prejudicial elements into the trial which denied the applicant a fair trial."

[42] Mr Fletcher supported this ground by arguing that a statement (exhibit 5), claimed to have been taken by Det Insp Fearon from Mr Millings, in which Mr Millings indicated his presence, at the relevant time, at the scene in Mount Salus, was incredible. Also incredible, learned counsel submitted, is the explanation that Det Insp Fearon gave for the differences in paper and ink for the portion of his statement that contained the alleged statement by Mr Millings (see pages 672-677 of the transcript). Mr Fletcher also argued that the statement was not signed or dated.

[43] Learned counsel also submitted that the admission into evidence of the questions, in a record of questions put to, and answers given by, Mr Millings, improperly advanced the prosecution's case, despite the fact that the answers were not prejudicial. Mr Fletcher argued that "by allowing these irregular items to be admitted there was irreversible prejudice to [Mr Millings]" (see page 5 of his written submissions).

[44] The statement, said to have been made by Mr Millings, was not introduced into evidence as a separate document. It formed part of Det Insp Fearon's witness statement. Det Insp Fearon testified that he originally wrote Mr Millings' statement "on a piece of paper" because he did not have his notebook at the time of taking the statement. He later transcribed the statement, he said, and incorporated it into his own witness statement. He then discarded the original paper.

[45] He was closely cross-examined on these matters and explained that he would have used different pens when writing his statement (a total of 12 pages), and he would have used paper from his bag as they came to hand.

[46] The trial judge reminded the jury of this evidence and of Det Insp Fearon's explanation. He gave the jury proper directions on treating with this evidence. He said, in part, at page 983:

> "Now, Mr. Foreman and members of the jury, you have to listen carefully to what was said that Mr. Millings said. You will have to make a determination firstly, did Mr. Millings actually use those words? If you find that he did, what does it mean, to you?"

[47] It was for the jury to assess Det Insp Fearon's credibility in that context.

[48] The format for the questions put to Mr Millings, in large measure, followed the flow of events that Mr Millings had previously related to Det Insp Fearon and some of what Mr Cooper had described to the police. Mr Fletcher argued that the admission of the entire document into evidence, including those questions, amounted to a sort of

corroboration of Mr Cooper's evidence. He contended that since the questions repeated Mr Cooper's evidence, which required special warning, the trial judge should have also warned the jury of the dangers inherent in the questions in the question and answer.

[49] Miss Pyke quite properly pointed out that the question and answer session was conducted in the presence of Mr Millings' counsel. Learned counsel also pointed out that there was no objection at the trial to the admission of the document. She argued that it was within the trial judge's discretion whether to admit the document and he having done so, this court had no basis on which to disturb that exercise. She argued that the evidence was relevant and that its prejudicial effect did not exceed its probative value.

[50] Mr Fletcher's approach, as is his wont, is innovative. There is, however, no basis to support his submission that the reading of the questions, along with the respective answers, to the jury, was prejudicial. The trial judge not only defined corroboration for the jury but also specifically told them that there was no corroboration of Mr Cooper's testimony. It would not have been lost on the jury that it was Mr Cooper's account that was being put to Mr Millings in that question and answer session. Some of the questions were based on showing Mr Cooper's account to Mr Millings and asking him to comment on it. For example, at page 438 of the transcript, in part, captures question 45 that was put to Mr Millings:

> "...did you [Mr Millings] point a firearm at [Mr Cooper's] head and said sit down in a de Van, a dead you waan dead? Answer to Question 105 of page 11 of interview of George Cooper shown to attorney, [Mr Millings]? Explained?
> Answer, I have nothing to say, sir."

[51] The format of the questioning would not have misled the jury into thinking that it was some independent evidence, which supported Mr Cooper's account.

[52] This ground must also fail.

Issue four: The delay in the hearing of the trial and of the appeal

[53] The ground in support of this issue is one which is often argued in this court by Miss Anderson. It states:

> "The delay in the hearing of the trial and this appeal are breaches of the Applicant's Constitutional right to a fair trial within a reasonable time – section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter III of the Constitution."

[54] The thrust of Miss Anderson's argument is that the state took over four years to bring the applicants to trial and over eight years to have the appeal heard. The delay, she submitted, amounted to a breach of their constitutional rights to a trial within a reasonable time and that they were entitled to redress as a result. She relied, in part on the reasoning in **Tapper v Director of Public Prosecutions** [2012] UKPC 26 for support for those submissions.

[55] Miss Pyke indicated that not only was there no evidence that the delay in the hearing of the appeal was due to the court or the Crown, but there was evidence of counsel for one of the applicants asking that the case be taken from the list in order to facilitate obtaining further instructions.

[56] As in some of the other cases argued by Miss Anderson in this court, the thrust of the submission is blunted by the absence of evidence that the state was responsible for the delay. McDonald-Bishop JA explained in **Julian Brown v R [2020]** JMCA Crim 42 that an applicant for constitutional redress on this basis has to show that he has not contributed to the delay. The learned judge stated at paragraph [89]:

> "It means then that the enquiry into an alleged breach of section 16(1) cannot properly start and end with the length of the delay. The mere fact of delay, without more, is not sufficient to ground liability within the Charter. The investigation of the issue must necessarily involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case. This balancing exercise is necessary because the constitutional right of the applicant to a fair trial within a reasonable time is to be balanced against 'the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica'."

[57] This ground also fails.

Issue five: the trial judge's summation on the issue of mere presence

[58] Mr Fletcher framed the ground during the course of arguments. Learned counsel was sanguine that the ground, as framed, spoke for itself, and he provided little expansion. The ground states:

> "The learned trial judge erred in law in not leaving to the jury the issue of a verdict based on mere presence without more. This possible verdict arose as a result of evidence in the case that postulated [Mr Millings'] presence but non-participation. The failure to sum up on and leave the possibility of that verdict denied the applicant of the possibility of the full consideration of his case and denied him a chance of an

> acquittal and therefore [resulted in] a miscarriage of justice."

The ground proved to be deceptive in its depth.

[59] Miss Pyke responded by submitting that the trial judge gave a full direction on joint enterprise. She accepted that he did not specifically address the issue of "mere presence", but the direction on joint enterprise, she submitted, was sufficient to make the jury aware of the requirements that the prosecution had to satisfy.

[60] The depth of Mr Fletcher's submission on this ground is only revealed when Mr Millings' statement to Det Insp Fearon on 18 October 2007 is considered. The evidence is that Mr Millings said that he was involuntarily present at a particular location when he heard Mr Ennis tell the victims that he was going to cut them. At that time, he saw Mr Ennis with a ratchet knife. The text of Mr Millings' statement, as mentioned above, is set out in Det Insp Fearon's witness statement, which was admitted into evidence. The learned judge read it to the jury (see pages 983-984 of the transcript):

> "Officer, mi waan tell yuh how it goh. Mi up a di yard. Ricky tek mi in a di Rav4, him tek mi down a di park. Dem put mi in a di white car a di back seat behind the driver, beside di bway and di girl. One man did deh a di other side pon di left. Dem tek mi down a di road, pass Elephant mother house, straight down, then turn right, mek one turn right wey one hydrant deh, Mi noh know di road name. Mi know sey a one deadend road wid a big white house deh. The one pon di left sey, a wha' dah bway yah a pre man soh. A wha' dem carry him foh. Mi did a look pon him because mi noh know him face. Then mi realise sey mi never deh pon dat, soh dem put mask over mi face. The car drive out, mi couldn't si mi way. When the car reverse out, mi goh a one place wey di Digicel pole deh. Mi noh have on di mask noh more. Mi si Ricky because mi noh have on di mask noh

more. Mi si Ricky. Mi hear Ricky sey a cut mi a goh cut your throat, a cut time."

[61] The trial judge asked the jury to consider whether Mr Millings did make the statement attributed to him, and if so, whether they could rely on them. He said, in part, at page 996 of the transcript:

> "Are you satisfied to the extent that you feel sure that Mr. Millings used these words to Inspector Fearon. [sic] These are matters that you have to consider, in determining the issues which are placed before you."

[62] He then went on to ask the jury to consider the statement in juxtaposition to the prosecution's case. This is recorded at pages 1005-1006 of the transcript.

> "**Now, Mr. Foreman and members of the jury, counsel for the Prosecution is asking you to say that whatever was contained in these statements or the Question and Answer interview about their not being involved were lies**. Now, if you find that they were not speaking the truth, Mr. Foreman and members of the jury, and find that they were lying in these interviews, you cannot use that to mean that they were guilty. Lies do not necessarily indicate guilt. Persons can lie for all different types of reasons. For instance, Mr. Ennis might be lying about leaving his home because he might have been looking for insurance and if he was able to go up and down he couldn't be saying he was injured. This is one area, so you have to look at it.
>
> If you found that they lied, what was the reason? And, you look at that Mr. Foreman and members of the jury, in light of all the evidence, if you find that these things happened and that they went there, why were they lying? These are questions that you must ask yourselves. **If you find that Mr. Millings made the statement, that he went upon the hill and he was merely what one would call an innocent bystander, do you believe him? If you find that it was, do you believe he was an innocent bystander?** He said in this statement, if you

> accept that he made it, he was saying 'Why you bring this man?'
>
> Now, if you were taking persons up to a secluded place to do them injury, would you carry a spectator? **These are matters for you, Mr. Foreman and members of the jury. Did he go there? Did he go there as a spectator? Do you believe Mr. Cooper that he went there? Do you believe Mr. Cooper that he took part, that when they came back after leading Jhanelle away he came back and he was the one with the bloody knife? Do you believe Mr. Cooper that he was the one who used his merino to wipe off the blood?**..." (Emphasis supplied)

[63] The trial judge, in directing the jury, did not leave the option of any other offence, but murder, for them to consider. He told them that self-defence did not arise in the case and that there was "nothing from which [they] could say that whoever did this, had a lawful justification or excuse" (see page 862 of the transcript). In dealing with the separate culpability of the applicants, the trial judge directed the jury that:

a. they should consider the case against each person separately (pages 859-60, 867-868 and 1010 of the transcript);

b. the expert evidence tended to show that the infliction of the fatal injuries was deliberate, and it was for them to decide if the infliction was with the intention to kill or cause really serious bodily harm (pages 863-64 of the transcript);

c. if two or more persons acted together as part of a joint plan to commit an offence, they are each guilty of that offence (pages 866 of the transcript); and

d. "[t]he essence of joint responsibility for criminal offences is that each defendant share [sic] a common intention to commit the offence and played his part in it however great or small so as to achieve that aim" (page 867 of the transcript).

[64] He did not mention the issue of mere presence, which Mr Millings' statement suggested, but he did deal with the requirement of proof of the separate intention of each person accused of the killing. In this regard it is necessary to quote extensively from pages 867-869 of the transcript:

> "Your approach to the case should therefore be as follows; if looking at the case of either defendant you are sure that he committed the offence on his own or that he did an act or acted as part of a joint plan or agreement to commit it, he is guilty but put simply, the question is, were they in in together? So that is the question that is posed and this is the question you have to ask yourselves based on the evidence which you accept.
>
> Now, I have said, Mr. Foreman and members of the jury, that the prosecution must prove that each defendant shared a common intention to commit the offence. What is meant by common intention? It means either that the defendant each intended to kill or that the defendant or that they - because we have two defendants here now that there was a real possibility that this is what is likely to happen and nevertheless went ahead as part of this agreement.
>
> So, what you look at, Mr. Foreman and members of the jury, you look at evidence which has been led, you look

> to see whether or not you will accept that persons acted together in causing the death of Taiwo and Jhanelle. You have to look to see whether or not these persons who acted, acted with the common intention to kill. You remember the evidence of Mr. Cooper. Remember he told us about after all these telephone calls were being made and they say, 'Well, fed up, is cut time now'. And two persons led away Taiwo first. One came back with a bloody knife then they took Jhanelle, led her away, came back with a bloody knife and wipe it off. If you accept all of this, Mr. Foreman and members of the jury, what the Prosecution is asking you to say that whoever did this, marching these persons one by one and coming back with the knife, must have acted together for the common purpose of causing the death or at least really serious bodily harm of Taiwo McKenzie and Jhanelle Whyte."

[65] It has long been accepted by this court that mere presence is not enough to allow for conviction of an offence (see **R v Dennie Chaplain and Others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3 and 5/1989, judgment delivered 16 July 1990). Their Lordships in **R v Jogee; Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7 (**Ruddock**) repeated that principle when they said, in part, at paragraph 11:

> "…Nevertheless, neither association nor presence is necessarily proof of assistance or encouragement; it depends on the facts: see R v Coney (1882) 8 QBD 534, 540, 558."

[66] **Ruddock** is a decision of their Lordships' board on an appeal from this court. It radically changed the practice in respect of directing juries on the culpability of accessories to offences. It was decided after the conviction in this case and it may be said that a portion of the trial judge's summation was more consistent with the old

practice that was overturned in **Ruddock**. The portion referred to, is from the extract in the immediately preceding paragraph of this judgment. There the trial judge said:

> "…It means either that the defendant each intended to kill or that the defendant or that they - because we have two defendants here now that there was a real possibility that this is what is likely to happen and nevertheless went ahead as part of this agreement…"

[67] The error, however, is not critical in this case. This case is not one akin to **Ruddock**. Like Mr Ruddock, Mr Millings is said to have given a pre-trial statement in which he admitted being in the presence of the offender at the time and place of the offence, but his defence at the trial was that he was not present. Unlike Mr Ruddock, however, Mr Millings' pre-trial statement denies any active involvement in any offence against the victim.

[68] There was, therefore, no requirement for the trial judge to direct the jury to consider any lesser offence, because of the absence of intent, other than murder. He was only required to inform them that they should decide whether each applicant was guilty or not guilty of that offence. The jury, based on the trial judge's direction, had to consider whether each applicant:

a. was present;

b. participated in the offence; and

c. had the intention to kill or to cause grievous bodily harm.

[69] The verdict clearly indicated that the jury was satisfied about each element. Had they accepted that, or in doubt whether, Mr Millings was, involuntarily present, sitting on a stone, merely observing and hearing what transpired, their verdict would have been otherwise.

[70] As intriguing as it is, this ground cannot succeed.

The verdict is unreasonable having regard to the evidence

[71] Mr Fletcher submitted that this ground should be considered if the court harboured any lurking doubt about the propriety of the conviction. There, however, are no such doubts. Mr Cooper's account was comprehensive. The jury believed him, despite the warnings that the trial judge gave. The convictions should not be disturbed.

Issue six: The sentences imposed

[72] The trial judge imposed a sentence of life imprisonment for both counts of the indictment. In respect of count one, concerning the death of Miss Whyte, the trial judge ordered that each applicant should serve 50 years' imprisonment before becoming eligible for parole. In respect of count two, he ordered that the pre-parole period be 40 years.

[73] Both Mr Millings and Mr Ennis filed grounds of appeal complaining that the sentences were manifestly excessive. Mr Fletcher adopted Miss Anderson's submissions on the issue of sentencing.

[74] Both Mr Fletcher and Miss Anderson stressed the following points:

a. offenders must be sentenced as individuals;

b. the sentencing exercise must consider:

   i. the aggravating factors of the offence;

   ii. the mitigating factors for the offender;

   iii. the time spent on remand; and

   iv. the range of pre-parole periods set in similar cases; and

c. the ages of the applicants at the time of the offence (19 years) and the fact that they had previously been of good character with no previous convictions.

[75] They argued that the sentences were not consistent with the normal range of pre-parole imprisonment.

[76] Miss Pyke contended that the sentences were not manifestly excessive, given the "heinous, senseless and brutal manner in which the deceased were killed" (see paragraph 99 of the Crown's submissions). Although she cited **Meisha Clement v R** [2016] JMCA Crim 26 during the course of her submissions, Miss Pyke did not suggest that the trial judge followed the path that was recommended in **Meisha Clement**. She pointed out that this case was decided before the judgment in **Meisha Clement** was delivered in this court. Miss Pyke contended that the trial judge followed the then established principles of sentencing.

[77] There is no gainsaying, however, that, as has been pointed out in other cases, the principles in **Meisha Clement** were previously available to trial judges. Some of those cases were cited in **Meisha Clement**. As thoughtful as the trial judge's approach was, he did not arrive at the sentences after reminding himself of the context provided by the sentences in previous cases. It is necessary, therefore, to consider the sentences in this case, in accordance with the principles in **Meisha Clement** in order to determine whether the ground can succeed.

[78] The principles of the currently established approach to sentencing have been set out in The Sentencing Guidelines For Use By Judges Of The Supreme Court Of Jamaica And The Parish Courts, December 2017 (the Sentencing Guidelines). They were also tabulated in **Techla Simpson v R** [2019] JMCA Crim 37 at paragraph [54]:

> "Based on the governing principles, as elicited from the authorities, the correct approach and methodology that ought properly to have been employed is as follows:
>
> a. identify the sentence range;
>
> b. identify the appropriate starting point for the particular case, taking into account the relevant range;
>
> c. consider any relevant aggravating factors;
>
> d. consider any relevant mitigating features (including personal mitigation);
>
> e. consider, where appropriate, any reduction for a guilty plea;
>
> f. decide on the appropriate sentence (giving reasons); and

g. give credit for time spent in custody, awaiting trial for the offence (where applicable)."

[79] Before applying those steps, it should first be noted that a custodial sentence is mandated for this offence by the Offences against the Person Act (OAPA). In fact, the second conviction could have attracted the death penalty, but the prosecution, although it had given the relevant notice, did not press for that sanction and the trial judge decided not to impose it.

[80] In respect of the first conviction, the relevant law is that a person convicted of murder falling under section 3(1)(b) of the OAPA is liable to be sentenced "to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years". Section 3(1C)(b) of the OAPA provides that where, pursuant to section 3(1)(b), the court imposes "(i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should serve before becoming eligible for parole".

[81] It is section 3(1)(a) of the OAPA which prescribes the ultimate sentence as the maximum penalty. This provision applies when the offender is convicted of more than one murder. The minimum sentence in such cases is imprisonment for life with no eligibility for parole before 20 years. Section 3(1C)(a) of the OAPA states: "where a court imposes a sentence of imprisonment for life pursuant to subsection (1)(a), the

court shall specify a period, being not less than twenty years, which that person should serve before becoming eligible for parole".

[82] A sentence of imprisonment for life is the usual approach of the courts in cases of murder, with the variation being the number of years to be served before the offender is eligible for parole.

The sentence range

[83] Learned counsel for the applicants as well as the Crown provided the court with a wealth of information, by way of comparison, concerning the sentences in previous cases. The cases assist in determining the range of years to be served before becoming eligible for parole. Although only a small sample is set out below, the court is grateful for the assistance in this regard.

[84] The number of victims, the level of brutality and the general heinousness of these killings is used, somewhat, as a filter for the various cases that have been cited. It is noted, however, that in **Paul Brown v R** [2019] JMCA Crim 3, F Williams JA, writing on behalf of the court, after canvassing several cases involving sentences for murder, concluded, at paragraph [8], that the "cases show a range of sentences of between 25 years' and 45 years' imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder". **Paul Brown v R** did not, however, involve multiple counts. A few such cases are set out below.

[85] **Watson v R** [2004] UKPC 34 was a case decided by the Privy Council on appeal from this court. Mr Watson killed Miss Eugenie Samuels and the nine-month old child that she had borne for him. Miss Samuels died from "haemorrhagic shock resulting from severe blood loss from multiple incised wounds which had been inflicted by a very sharp and heavy instrument whereas [the child] died from severe haemorrhage secondary to laceration of the neck which had caused extensive damage to nervous vascular tissues…[resulting from] a most ferocious and intense attack" (page 3 of the judgment in **Lambert Watson v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 117/1999, judgment delivered 5 March 2001). The original sentence of death was overturned by the Privy Council and the case was returned to this court for re-sentencing. In **Lambert Watson v Regina** (unreported), Court of Appeal, Jamaica Supreme Court Criminal Appeal No 47/2006, judgment delivered 16 November 2009 this court ordered that he should serve life imprisonment with eligibility for parole after 20 years.

[86] The case of **Garland Marriott v R** [2012] JMCA Crim 9 deserves inclusion in this sample of cases. The deceased persons, Mr Warren and Ms Robinson, were found dead in their home. Mr Warren's cause of death was strangulation while Ms Robinson died from stab wounds to the chest. Mr Marriott was sentenced to imprisonment for life but ordered to serve 25 years' imprisonment before becoming eligible for parole. This court upheld that sentence.

[87] **Alton Heath & Others** [2012] JMCA Crim 61 concerned a group of men who abducted three women, and took them to a playfield where more men joined them.

The women were raped by several of the men and then taken, naked, to a sewage plant where they were shot and thrown into a pipe that led to the sea. Only one of the women survived. The sentence of this court was that three of the four offenders should serve 35 years before becoming eligible for parole. The fourth, who was sentenced some time later, because his death sentence was set aside, was ordered to serve 27 years before becoming eligible for parole.

[88] Another relevant case is **Calvin Powell and Another v R** [2013] JMCA Crim 28. In that case, a husband and wife were strangled to death and their bodies left in a garbage dump. The appellants were sentenced to imprisonment for life, with a stipulation that they should serve 35 years before becoming eligible for parole.

[89] Another relevant case is **Rodrick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008. In that case, Mr Fisher lay-waited his three victims, had them all lie on their faces, robbed them and then shot each of them in the head, killing them. This court upheld the sentence imposed, which included the order that Mr Fisher should serve 40 years' imprisonment before becoming eligible for parole.

[90] The reasoning of the court in **Rodrick Fisher v R** is instructive. G Smith JA (acting, as she then was), who wrote the judgment of the court, opined that if the circumstances of the killing are of a particularly heinous nature, the offender "can be regarded as twice as culpable as those who would be entitled to apply for parole after twenty years and deserving of spending twice as much time incarcerated" (see

paragraph 14). In dealing with Mr Fisher's case, Smith JA (Ag) said, in part, at paragraph 15 of the judgment:

> "…The facts outlined by both Counsel for the Prosecution and the learned trial judge leave no doubt that the murders were of so heinous a nature that the appellant should spend twice as much time incarcerated as one who simply killed while robbing. The shootings were deliberate acts carried out with the intention of taking the lives of the victims. An important consideration also is the fact that the trial judge was minded to sentence the appellant to death but he appreciated that there was no point in doing so because of the decision in **Earl Pratt and Ivan Morgan**…[1994] 2 A.C. 1. Accordingly, taking the gruesome circumstances of the murders, the number of victims, the fact that there are no mitigating circumstances, a pre-parole of forty years cannot be regarded as manifestly excessive."

[91] **Jeffery Perry v R** [2012] JMCA Crim 17 deserves inclusion in this sample of cases. Mr Perry was sentenced to life imprisonment and ordered to serve 45 years before becoming eligible for parole. He invaded a home and stabbed to death, three children therein.

[92] In **Peter Dougal v R** [2011] JMCA Crim 13, Mr Dougal broke into a house and killed the two occupants while they were in bed. A five-member panel of this court sentenced him to imprisonment for life and ordered that he should serve 45 years before becoming eligible for parole.

[93] A range of 20 to 45 years' imprisonment before parole, with a greater concentration at the higher end of the range, is demonstrated by this sampling of the cases.

Identify the appropriate starting point for the particular case

[94] An appropriate starting point for this case, bearing in mind the range set out above, is 35 years.

The relevant aggravating factors

[95] There are several aggravating features to this case, which contribute to the sense of horror that it generates. These are:

a. the luring of Mr McKenzie to the location on the basis that Mr Cooper was in need of medical assistance;

b. the abduction, binding, gagging and blindfolding of the two young people;

c. the intimidation of Mr McKenzie to have him make calls to try to solicit money;

d. informing the victims that they would be cut because the money had not been produced;

e. having Ms Whyte begging for her life;

f. leading them along a path to the place that they were killed;

g. the manner of the killing; and

h. the deceased's family left to wonder and worry while their loved ones lay dead in bushes in the hills of Saint Andrew.

[96] These numerous aggravating features may justifiably raise the sentence to 50 years. It has been mentioned above that the trial judge decided against imposing the death penalty. This, apparently, was partly in the pragmatic realisation that it would have been futile, as the various appellate processes could not have been completed within the five-year limit established by the Privy Council in **Earl Pratt and Ivan Morgan** [1994] 2 AC 1. It also is apparent that the learned judge was of the view that, as heinous as the killings were, they were not in the category of "the worst of the worst". His reasoning on this issue is at pages 1056-1057 of the transcript.

The relevant mitigating features (including personal mitigation)

[97] There are no mitigating features to the commission of the offence. The trial judge called them "heinous offences". The single judge of this court, who refused the applicants' application for leave to appeal, expressed genuine horror when he stated that "the deceased persons were slaughtered like animals".

[98] There, however, are a number of personal mitigating factors, which enure to the benefit of these applicants:

a. they were each 19 years at the date of the offence;

b. they were of previously good character;

c. they were gainfully employed and will lose employment by virtue of the conviction;

d. they had no previous convictions;

e. they had good social enquiry reports; and

f. their respective psychological reports indicated that they were susceptible to rehabilitation.

[99] These factors would reduce the pre-parole period to 40 years.

[100] Another consideration is that, in his address to the trial judge in mitigation, counsel for Mr Millings urged, as a factor for reduction in the sentence, that Mr Millings was expecting another child in the month following the sentencing, that is, October 2012. Credit would only be applied in exceptional circumstances, where there is evidence of hardship to the offender's dependent children if the offender is incarcerated. There being no such evidence in the present case, no credit will be given for that factor.

Give credit for time spent on remand

[101] It does appear that the applicants were on bail prior to the commencement of the trial, accordingly, there is no need to consider credit for time spent on remand.

[102] In the circumstances, the sentence imposed by the trial judge should be adjusted to reduce the pre-parole imprisonment from 50 to 40 years, in respect of each applicant as regards Ms Whyte's death.

Summary and conclusion

[103] In conclusion, the evidence presented by the prosecution amounted to a strong case against the applicants. The learned trial judge identified the relevant issues,

including the accomplice evidence warning, and dealt with them adequately. The conviction cannot be faulted.

[104] The aspect of the sentences that require pre-parole periods 50 years, in respect of each of the applicants does allow for adjustment however. Despite the heinous nature of the killings, those pre-parole periods should be reduced to 40 years.

Orders

1. The applications for leave to appeal against conviction are refused.
2. The applications for leave to appeal against sentence are granted.
3. The hearing of the applications for leave to appeal against sentence is treated as the hearing of the appeals.
4. The appeal against sentence in respect of count one is allowed in part. The sentence of imprisonment for life is upheld, but the pre-parole period of 50 years, in each case, is set aside and a sentence of 40 years substituted therefor.
5. The sentence in respect of count two is upheld.
6. The sentences in respect of each appellant are to run concurrently and are to be reckoned as having commenced on 17 September 2012.