[2018] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 67/2009

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

ZIGGY MILLS v R

Mrs Valerie Neita-Robertson QC and Robert Fletcher for the appellant

Adley Duncan for the Crown

28 February, 1 March and 28 September 2018

BROOKS JA

[1] This is an application by Mr Ziggy Mills for leave to appeal from his conviction and sentence in the Home Circuit Court. A jury found him guilty on 30 April 2009 of the murder of football coach, Kevin Thomas. Mr Thomas was also called "Kegan", no doubt in reference to that icon of English football, Kevin Keegan. On 15 May 2009, the learned trial judge sentenced Mr Mills to imprisonment for life, but stipulated that he should serve 25 years before becoming eligible for parole.

[2] Mr Thomas was found injured along the Mandela Highway in the parish of Saint Catherine on 6 October 2005, at about 7:00 pm. Mr Alden Miller immediately drove Mr Thomas to the nearby Spanish Town Hospital where he was treated, and, later died.

[3] A major question for the jury at the trial was the credibility of the police officers, who testified that Mr Thomas, when he arrived at the hospital, had identified his assailant in a statement, orally made to one of the officers. That evidence was admitted as evidence of a dying declaration. Their testimony was, however, seemingly contradicted by the evidence of the forensic pathologist who conducted a post mortem examination on Mr Thomas' body. Dr Ere Seshaiah testified that a person, upon receiving an injury such as was suffered by Mr Thomas, would immediately become unconscious or go into a coma. He later somewhat qualified that testimony.

[4] In this appeal, the credibility and significance of the police evidence concerning the dying declaration, was again, a major issue. Also of significance was the absence of the hospital records of Mr Thomas having been received at the hospital's accident and emergency department, and his admission to the hospital. That failure, it was argued, compromised Mr Mills' ability not only to challenge the prosecution's case at the trial, but also to prosecute his appeal.

The prosecution's case and the dying declaration

[5] Mr Miller's evidence was that at about 7:00 on the evening in question, he was sitting by a tyre shop along the Mandela Highway. The tyre shop is across the road from an area called Dela Vega City. At that time he saw Mr Thomas, whom he knew

before, jogging by on the opposite side of the road. He was accustomed to seeing Mr Thomas, who was a football coach, jogging. The jogging that evening appeared normal to Mr Miller.

[6] Within five minutes, or so, of seeing Mr Thomas pass, Mr Miller heard news that caused him to go into his car and drive to a stoplight along the Mandela Highway. The stoplight was at the intersection of the Port Henderson Road and Mandela Highway, about 500-600 feet away from where he had been sitting. There he saw Mr Thomas, injured. Mr Miller put Mr Thomas in his car and drove him to the Spanish Town Hospital, where he left him. No one gave evidence as to how Mr Thomas came to be injured.

[7] Coincidentally, two police officers, Detective Corporal Sherry Thomas and Detective Sergeant Orville Smith, were at the hospital, at about 7:30 pm, when Mr Miller drove in with Mr Thomas. The officers followed the stretcher on which Mr Thomas was put after being taken out of Mr Miller's car. Mr Thomas was wounded. While he was on the stretcher being attended to by nurses in the casualty department, Mr Thomas spoke to Detective Corporal Thomas. His oral statement was admitted into evidence as a dying declaration. He said:

> "Miss Thomas, a me Kegan, a Ziggy shot me. Ziggy from Dela Vega City. You know him to Miss Thomas. A Ula Lee Green son. She live a Parker shop A Dela. A she deh wid Parker. Mi feel cold, mi feel cold like mi a guh dead, cover me up."

Detective Sergeant Smith heard Mr Thomas' statement.

[8] Doctors came to attend to Mr Thomas and the police officers left the hospital. Mr Thomas later died at the hospital. The post mortem report showed that he had sustained gunshot wounds and a stab wound.

[9] Later that night the officers went on investigations. They saw Mr Miller's car at the tyre shop that is across the main from Dela Vega City but did not find him. The officers also went to the stoplights at Dela Vega City. They noticed that there were streetlights at the intersection where the stoplights were. Detective Sergeant Smith described the spot as the intersection of the Spanish Town bypass and Port Henderson Road.

The defence

[10] Mr Mills, in an unsworn statement, denied knowing or shooting Mr Thomas. He called no witnesses.

The grounds of appeal

[11] Mrs Neita-Robertson QC and Mr Fletcher, on behalf of Mr Mills, advanced, with the permission of the court, a number of grounds of appeal. They are listed below:

> Ground one
> "The learned trial judge erred in not accepting the no-case submission of counsel for the defence."
>
> Ground two
> "The learned trial judge's summation was unbalanced in several respects, denying [Mr Mills] a fair consideration of his case."

Ground three

"The learned trial judge failed to appropriately isolate the weaknesses in the identification evidence for the consideration of the jury. The weaknesses brought about by the absence of the opportunity for appropriate questioning were critical matters."

Ground four

"The learned trial judge erred in failing to give a *Lucas* [**R v Lucas** [1981] QB 720; [1981] 2 All ER 1008] direction in circumstances where the jury was being called upon to assess the credibility of [Mr Mills] in arriving at their verdict."

Ground five

"The sentence is manifestly excessive."

Ground six

"The prosecutor failed to disclose to the Defence, documentation which contributed to or supported the conclusions arrived at by the Pathologist and which document was of vital importance to the authenticity of the dying declaration, and the credibility of the Police witnesses."

Ground seven

"The failure of the State to provide supporting material post conviction, despite the Orders of the Court, has compromised [Mr Mills'] ability to prosecute his Appeal."

Ground eight

"That the Learned Trial Judge fell into grievous error when he misquoted the evidence of the pathologist which was clear and unambiguous and directed the Jury to put their own interpretation on it.

That this misquotation and direction was a misdirection resulting in [Mr Mills] being denied a fair trial."

Ground nine

"Requiring a standard direction which informs the jury of the established rationale for admitting a dying declaration as an exception to the hearsay rule is an invitation to convict on the dying declaration alone. This is presumptively prejudicial

> to an accused and precludes a fair and balanced consideration of the case."

[12] Mr Fletcher argued grounds one to five, and nine. Mrs Neita-Robertson QC argued grounds six, seven and eight. The grounds will be considered below, but not necessarily in the same order in which learned counsel argued them.

Ground one – The learned trial judge erred in not accepting the no-case submission of counsel for the defence

[13] Learned defence counsel submitted at the trial that Mr Mills ought not to have been called upon to state a defence. He relied on two bases. Firstly, he argued that the discrepancy between Dr Seshaiah's evidence and the police witnesses, Detective Corporal Thomas and Detective Sergeant Orville Smith, was such that no jury, properly directed could find Mr Mills guilty. His second basis was that the identification evidence was so poor that Mr Mills ought not to have been called upon to state a defence. Defence counsel submitted that the fact that a dying declaration had been made did not eliminate the principle that the visual identification must be proved to be reliable.

[14] The learned trial judge rejected those submissions and ruled that Mr Mills be called upon to state his defence.

[15] Mr Fletcher argued that Mr Mills ought not to have been called upon, since the prosecution's case depended on the accuracy of a visual identification and that the evidence in respect of that issue was substandard because of the uncertainty:

a. as to the place and time of the attack on Mr Thomas; and

b. as to whether Mr Thomas was able, having regard to his medical condition, to make the statement attributed to him.

Learned counsel submitted that the level of proof, which a visual identification case should attain in order to be left to a jury to decide, had not been achieved.

[16] Mr Fletcher is not on good ground with these submissions. As the learned trial judge observed at the time of the no-case submission, the issue of whether Mr Thomas was able to speak to the police was a question of fact. It was open to the jury to believe the police officers, who testified that Mr Thomas made the dying declaration to Detective Corporal Thomas.

[17] It is also to be noted that Dr Seshaiah did not absolutely rule out the possibility of Mr Thomas being able to speak. Although he said that a person, who had suffered such an injury would have immediately become unconsciousness or go into a coma, Dr Seshaiah stated that consciousness or unconsciousness would depend on the amount of brain tissue that had been injured. He said that he could not say whether Mr Thomas could have drifted in and out of the coma (page 102 of the transcript).

[18] The identification evidence in this case was not such that it would have prevented the case from being left for the jury's consideration. There was some evidence:

a. of the time and place of the attack, given that Mr Thomas was seen injured along the same road, on which, just five minutes before, Mr Miller had seen him jogging by, apparently normally;

b. of the proximity of the attacker to Mr Thomas, given the fact that the stab wound was to his chest; and

These elements of the evidence speak to the issues of time, distance and ability to see the attacker. It was therefore for the learned trial judge to give appropriate directions to the jury in that context.

[19] At the stage of a no case submission, to which the complaint in this ground is directed, the learned trial judge would only have been concerned with whether there was sufficient evidence on which a reasonable jury properly instructed could convict Mr Mills. The law on this issue is well settled. In **R v Galbraith** [1981] 2 All ER 1060, Lord Lane stated that where the prosecution's evidence "is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury". That learning has been established as the test for deciding whether or not there is a case for the defence to answer.

[20] That principle and learning has been authoritatively considered in the context of cases where visual identification is in issue. Their Lordships, in the Privy Council decision in **Wilbert Daley v R** (1993) 30 JLR 429; (1993) 43 WIR 325, stressed that there was no inconsistency between the principles drawn from **R v Galbraith** and those in the seminal case of **R v Turnbull and others** [1976] 3 All ER 549; [1977] AC 224), which deals with visual identification. Their Lordships' explanation, in **Daley v R**, of their analysis of the position, is reported at page 334 of the latter report:

> "A reading of the judgment in *R v Galbraith* as a whole shows that the practice which the court was primarily concerned to proscribe was one whereby a judge who considered the prosecution evidence as unworthy of credit would make sure that the jury did not have an opportunity to give effect to a different opinion. By following this practice the judge was doing something which, as Lord Widgery CJ had put it, was not his job. **By contrast, in the kind of identification case dealt with by *R v Turnbull* the case is withdrawn from the jury not because the judge considers that the witness is lying, but because the evidence even if taken to be honest has a base which is so slender that it is unreliable and therefore not sufficient to found a conviction**: and indeed, as *R v Turnbull* itself emphasised, the fact that an honest witness may be mistaken on identification is a particular source of risk. When assessing the 'quality' of the evidence, under the *Turnbull* doctrine, the jury is protected from acting upon the type of evidence which, even if believed, experience has shown to be a possible source of injustice. Reading the two cases in this way, their lordships see no conflict between them." (Emphasis supplied)

[21] Their Lordships analysis in **Daley v R** was considered by this court in **Brown and McCallum v R** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008. Morrison JA, as he

then was, delivered the judgment of the court. He stated the issue in a manner that provides good guidance for trial judges. He said at paragraph 35 of the court's judgment:

> "So that the critical factor on the no case submission in an identification case, where the real issue is whether in the circumstance the eyewitness had a proper opportunity to make a reliable identification of the accused, is whether the material upon which the purported identification was based was sufficiently substantial to obviate the 'ghastly risk' (as Lord Widgery CJ put it in R v Oakwell [1978] 1 WLR 32, 36-37) of mistaken identification. If the quality of that evidence is poor (or the base too slender), then the case should be withdrawn from the jury (irrespective of whether the witness appears to be honest or not), but if the quality is good, it will ordinarily be within the usual function of the jury, in keeping with Galbraith, to sift and to deal with the range of issues which ordinarily go to the credibility of witnesses, including inconsistencies, discrepancies, any explanations proffered, and the like."

[22] It must be accepted, however, that the situation to which those cases refer is somewhat different from the case where the person, who purports to identify the perpetrator of the offence, is dead. In such cases the trial judge has to consider the impact of a dying declaration against the requirements of **Turnbull**.

[23] That scenario was dealt with in the judgment of the Privy Council in **Nembhard v The Queen** [1982] 1 All ER 183. Although **Nembhard** did not deal specifically with the issue of treating with submissions of no-case to answer, it did deal with the admissibility of dying declarations. In this regard, the case is recognised authority for at least four principles. These may be found at pages 185-186 of the report:

a. "...it is important in the interests of justice that a person implicated in a killing should be obliged to meet in court the dying accusation of the victim, always provided that fair and proper precautions have been associated with the admission of the evidence...";

b. a dying declaration is admissible if there is evidence that the declarant, at the time of making the statement, expressed an expectation "that he was face to face with his own impending death";

c. there is no requirement for a dying declaration to be corroborated;

d. it is for the jury to decide on not only the reliability of the witness, who provided the evidence of the dying declaration, but also on the reliability of the dying declaration itself; and

e. the trial judge must give the jury the necessary directions on the issue of the dying declaration, and in particular:

    i. the issue of the veracity and accuracy of the witness as well as the probative value of the dying declaration;

ii. the inherent weaknesses of the dying declaration including the fact that it had not been tested by cross-examination;

iii. in cases, where visual identification is in issue, the dangers, in this context, of visual identification, as explained in **R v Turnbull**.

[24] It may, therefore, be gleaned from **Nembhard**, that once a dying declaration has been admitted into evidence in accordance with the necessary precautions to ensure fairness to the accused, the issue of the assessment of the evidence, including the dying declaration, would normally be a matter for the consideration of the jury. The trial judge will, in those circumstances, most likely, reject the no-case submission and call upon the accused to present his defence. The judge will not call upon the accused if, when the evidence, including such other identification evidence as there may be, is assessed along the lines of **R v Galbraith**, the trial judge is of the view that, on no account, could the witness, through whom the dying declaration is tendered, or alternatively, the dying declaration itself, be considered reliable.

[25] In applying those principles to the present case, it may be noted, by way of comparison, that the nature of the evidence in this case is not vastly different from that in **Nembhard**. In **Nembhard** the attack took place at 8:30 in the evening and there was no other evidence of the identity of the assailant other than that contained in the dying declaration. The trial judge in that case admitted the dying declaration into

evidence and it was accepted on appeal as being capable of being relied upon to support the relevant conviction.

[26] The learned trial judge in this case, faced with similar circumstances, was, therefore, not wrong to have rejected the no case submission made on behalf of Mr Mills.

[27] This ground fails.

Ground two – The learned trial judge's summation was unbalanced in several respects, denying [Mr Mills] a fair consideration of his case.

[28] In arguing this ground, Mr Fletcher complained that the learned trial judge failed to expose to the jury the gaps and weaknesses in the prosecution's case. Instead, learned counsel submitted, the learned trial judge attempted to explain away the evidence of the pathologist, which evidence was a weakness in the prosecution's case.

[29] The particular comment, which Mr Fletcher criticizes, appears in the summation, and is recorded at pages 161-162 of the transcript. At that point, the learned trial judge, after explaining the pathologist's evidence that the injury would have sent Mr Thomas into a coma, said:

> "…Because what defence attorney is suggesting to you is, that if you accept this evidence of the doctor, you could, depending on what you think he is saying, find that not only would the now deceased Kegan or Kevin Thomas have gone into immediate unconsciousness but would have died and not have been able to speak. **Then, you need to ask yourself, if this is so, what is the rush to take him to hospital, what would the nurses have been doing when he was at the hospital and what [would] the**

> **doctors have been trying to treat him for even after he is alleged to have [been] gasping**, that of course, is going to depend on the evidence that you accept…." (Emphasis supplied)

[30] Mr Fletcher submitted that the comment was not fair and amounted to advocacy. It imputed, learned counsel submitted, that Mr Thomas must have been in a state to make the dying declaration and that any challenge to such inference would be preposterous. Learned counsel also submitted that the learned trial judge, in making that comment, was not drawing a reasonable inference from the evidence.

[31] Mr Duncan, on behalf of the Crown, submitted that there was nothing wrong with the learned trial judge's comment. Learned counsel argued that commentary which operates to the prejudice of the accused was not, for that reason alone, unfair.

[32] Mr Duncan is correct in this regard. It cannot properly be said that the learned trial judge's comments were unfair. He sought to demonstrate to the jury that, on the evidence of the police, Mr Thomas was still alive and that the medical personnel were feverishly treating him. The evidence shows that Mr Thomas was alive for over an hour after he was taken to the hospital. In those circumstances, it was possible that he could have made the statement ascribed to him. Mr Fletcher is not on good ground with this complaint.

[33] This ground fails.

Ground three - The learned trial judge failed to appropriately isolate the weaknesses in the identification evidence for the

consideration of the jury. The weaknesses brought about by the absence of the opportunity for appropriate questioning were critical matters.

Ground nine - Requiring a standard direction which informs the jury of the established rationale for admitting a dying declaration as an exception to the hearsay rule is an invitation to convict on the dying declaration alone. This is presumptively prejudicial to an accused and precludes a fair and balanced consideration of the case.

[34] In grounds three and nine, which dealt with related issues, Mr Fletcher complained about the concept of a dying declaration, both in principle and in its application to this case. In respect of ground nine, Mr Fletcher argued that whilst the principle of admission into evidence of dying declarations cannot now be reversed, the explanation of the concept to the jury has become divorced from the origins of the principle. Learned counsel, in his written submissions on this point, argued as follows:

> "Requiring that the rationale must be told to the jury presents a challenge. To begin with, the rationale has been so transmuted into the rule itself and has led to the inevitable assertion that the dying declaration **is truth itself and cannot be contested,** rather than being what the **deceased believes to be true.**" (Emphasis as in original)

[35] On the issue of the explanation of the principle to the jury in this case, Mr Fletcher submitted that the learned trial judge failed to direct the jury that there was no evidence on which they could assess the elements of identification, which they were required to consider in determining the issue of the identification of Mr Thomas' attacker. Learned counsel also submitted that the learned trial judge failed to point out certain weaknesses in respect of identification in the prosecution's case, particularly the absence of evidence in respect of distance, lighting and time for viewing the attacker.

[36] In response to Mr Fletcher's submissions, Mr Duncan argued, at paragraph 13 of his written submissions filed on 28 March 2018, that the "question of a 'settled, hopeless expectation of death' is...a question of both law *and* fact; a question of law to govern its admissibility, and a question of fact to govern its credibility". He argued that there was no legal requirement to direct the jury on the historical rationale for the admission of dying declarations into evidence. Alternatively, learned counsel argued that, if a judge is required by law to direct the jury on the rationale for the dying declaration, Mr Fletcher was correct in his criticism of the basis for the admission into evidence of dying declarations. Mr Duncan argued, at paragraph 16 of his written submissions, that the rationale for admitting dying declarations into evidence "as an exception to the hearsay rule is eroded by the accompanying risks", about which Mr Fletcher complained. These risks, Mr Duncan identified, at paragraph 17 of his said written submissions, to be:

> "1. the declarant could himself err about the identity of the assailant;
>
> 2. the declarant himself could lie about the identity of his assailant;
>
> 3. the hearer of the statement could mishear the dying declarant, and honestly and convincingly repeat the mistake;
>
> 4. the hearer of the statement could lie about what was heard;
>
> 5. a dying declaration can be fabricated."

[37] Mr Duncan submitted that in directing the jury on the issue of the dying declaration, the learned trial judge did not make any improper comment. Learned counsel did express concern about a comment made by the learned trial judge as recorded at page 162 of the transcript, but did not consider it fatal to the conviction.

[38] Dying declarations have been considered, for centuries, as an exception to the rule against hearsay. Mr Fletcher is correct in conceding that there is no likelihood of reversal of that position, unless by way of statute. This common law exception to the rule against hearsay has had legislative support since 1995. Section 31A of the Evidence Act stipulates that statements which, before 30 March 1995, were admissible in evidence of any fact, by virtue of a rule of law, "shall continue to be admissible as evidence of that fact". The law in respect of dying declarations has been considered by a number of decided cases in this jurisdiction. In **Nembhard**, their Lordships of the Privy Council explained the origins of the principle of allowing the admission into evidence of such statements. They said at page 185:

> "It is not difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the general rule against hearsay. For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he was face to face with his own impending death."

[39] Similarly, in **David Sergeant v R** [2010] JMCA Crim 2; (2010) 78 WIR 410, Harrison JA, in delivering the judgment of this court in a case involving a dying

declaration eloquently stated the principles governing admission of such declarations. His explanation is set out at paragraphs [5] and [6] of the judgment:

> "[5] It is widely recognized that evidence of the deceased's statement is admissible at common law as a dying declaration if it were shown that the deceased had died; that there followed a trial for his murder or manslaughter; that the statement related to the cause of his death; and that when making the statement he was shown to have had a settled hopeless expectation of death.
>
> [6] It is the latter of these conditions which has provoked legal argument in several cases in which the dying declaration is raised. It is plain that this exception to the hearsay rule owes much to a pragmatic recognition that the deceased, had he survived, would have been better placed than anyone to identify his assailant and describe the circumstances of the fatal assault. It also owes much to a belief, now perhaps somewhat anachronistic, that a person knowingly facing the awful prospect of divine judgment would not dare to dissemble: see **R v Woodcock** (1789) 1 Leach 500, 502; 168 ER 352; **R v Osman** (1881) 15 Cox CC 1; **Nembhard v R** (1981) 74 Cr App Rep 144 at 146; [1981] 1 WLR 1518, 1518."

[40] That traditional explanation of the origins of the principle was more critically considered by their Lordships in Privy Council in **Mills, Mills, Mills, and Mills v R** (1995) 46 WIR 240. They were of the view that the modern approach to dying declarations placed less emphasis on the requirement that the "deceased was under a settled, hopeless expectation of death when he made the statement" (page 250), and was more inclined to the probative value of the deceased's statement. Their Lordships said, in part, at page 250:

> "Their lordships accept that the modern approach in the law is different: the emphasis is on the probative value of the evidence. That approach is illustrated by the admirable

> judgments of Lord Wilberforce in the Privy Council in *Ratten v R* [1972] AC 378 and Lord Ackner in the House of Lords in *R v Andrews* [1987] AC 281, and notably by the approach in the context of the so-called *res gestae* rule that the focus should be on the probative value of the statement rather than on the question whether it falls within an artificial and rigid category, such as being part of a transaction." (Italics as in original)

Their Lordships went on to say that it did not necessarily follow from their view that they considered that dying declarations should be excluded as an exception to the hearsay rule. They said, in part at pages 250-251:

> "On the contrary, a re-examination of the requirements governing dying declarations, against the analogy of *Ratten* and *Andrews*, may permit those requirements to be restated in a more flexible form. How far such a relaxation should go would be a complex problem." (Italics as in original)

[41] **R v Andre Jarrett**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 130/2001, judgment delivered 4 March 2003, is another example of the admissibility of a dying declaration made by the victim of a fatal attack. In that case, the badly injured victim, after asking for prayer, identified his attacker, and some minutes later he said that he did not think that he was going to live. Smith JA, in delivering the judgment of this court, approved the admission of the statement as a dying declaration. He said, in part, at page 10 of the judgment:

> "We agree with [Crown Counsel] that the declaration made between the request for prayer and the expression of feelings by the deceased was clearly admissible as a declaration made in extremity. The victim's serious injuries would have dominated his thoughts. The possibility of concoction or distortion could be disregarded. The learned trial judge was therefore correct in receiving the statement in evidence."

[42] The law in respect of dying declarations in the context of a dispute as to identification has also been considered by a number of cases in this jurisdiction. Their Lordships in the Privy Council dealt with this issue, over 30 years ago, in **Nembhard**. In that case, a woman heard the report of a gunshot outside her house. She went out to investigate the sound and saw that her husband had been shot. She testified that he had told her, 'I am going to die,' and then had said:

> "You are going to lose your husband. It is Neville Nembhard. Miss Nembhard's grandson that shot me and take my gun. Your husband did not do him anything. Just as I came through the gate and turned to lock the gate I saw him over me, and your husband could not help himself."

She explained that the Neville Nembhard, to whom her husband had referred, had lived at nearby premises for many years, and was well known to her and to her husband.

[43] In analysing that case in the context of the issue of visual identification, the Privy Council said, in part, at page 186 of the report:

> "Some attempt was made by counsel to argue by analogy that the comparatively recent example of the decision in *R v Turnbull* [1976] 3 All ER 549, [1977] AC 224 justified the definition of a new rule of law as to the need for corroboration in the area of dying declarations. But their Lordships accept neither the analogy nor its application in the present case. *Turnbull* does not purport to change the law. It provides a most valuable analysis of the various circumstances which common sense suggests or experience has shown may affect the reliability of a witness's evidence of identification and make it too dangerous in some of the circumstances postulated to base a conviction on such evidence unless it is supported by other evidence that points to the defendant's guilt. *Turnbull* sets out what the judgment itself described as 'guidelines for trial judges' who

> are obliged to direct juries in such cases. But those guidelines are not intended as an elaborate specification to be adopted religiously on every occasion."

[44] **Mills and others v R** was also a case involving the reliance, albeit in part, on a dying declaration for the identification of the assailant who caused the death of the declarant. Their Lordships seem to have suggested that in the absence of cross-examination of the deceased declarant, on the issue of identification by that person, a full direction on the dangers of visual identification was sufficient to address the issue. Their Lordships said, in part, at pages 251-2:

> "Finally, relying on *Nembhard*, counsel submitted that the judge failed in not giving a separate direction about the fallibility of the identification inherent in the deceased's last words. **The judge had already fully directed the jury on the dangers of visual identification. There had been no separate cross-examination on the danger of the deceased mistakenly identifying his assailants. Fairness did not require a repetition of what the judge earlier said.** The judge's directions were fair and sufficient." (Emphasis supplied)

[45] More recently, the issue of the interrelation of a dying declaration and a full **Turnbull** direction was dealt with in this court. Three of those more recent cases arose out of the same incident. They are **Dalton Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 65/2006, judgment delivered 21 November 2008 (**Dalton Reid No 1**), **Dane Bonner v R** [2013] JMCA Crim 9 and **Dalton Reid v R** [2014] JMCA Crim 35 (**Dalton Reid No 2)**. The basic facts are that on 17 February 2002, Ms Sheryl Powell was shot whilst she was in her bed. She was taken to the Spanish Town Hospital where she was said to have made a statement to Detective

Constable Christopher Royal (referred to as Constable Christopher Royale in **Dalton Reid No 2**) in which she identified her attackers. She succumbed to her injuries that night or early the following morning.

[46] Mr Dalton Reid was tried for that killing and was convicted on 26 March 2006. In **Dalton Reid No 1**, this court held that the trial judge had not given a **Turnbull** direction that was appropriate to the circumstances of that case. For that, and other reasons, it quashed the conviction but, in the interests of justice, ordered a new trial.

[47] Mr Dane Bonner was separately tried and convicted for that killing. In **Dane Bonner v R**, this court quashed his 27 May 2008 conviction, and entered a verdict of acquittal in its stead.

[48] It is easy to empathise with the sentiment expressed in Mr Duncan's submissions that there is no requirement that a direction be given concerning the rationale for the admission of a dying declaration. It is not usual that judges are required to explain the reason for admitting any material into evidence. However, the judgment in **Dane Bonner v R** runs contrary to Mr Duncan's submissions. It requires such a direction. In that case, one of Mr Bonner's grounds of appeal was that the trial judge had not directed the jury on the reasons for the admissibility of the dying declaration. This court found that the trial judge had erred when he failed to direct the jury "on the basis upon which a dying declaration is regarded as admissible and the tests which must be satisfied in that regard" (paragraph [13]). The court relied on the judgment of **Sergeant v R** for that principle. It went on to say, at paragraph [14]:

> "In our view, the directions given to the jury by the learned judge **were not sufficient to enable the jury to understand the basis on which dying declarations are admissible in evidence**, or that they needed to be satisfied that at the time of making the declaration the deceased had a settled, hopeless expectation of death." (Emphasis supplied)

[49] The court also found that the trial judge had seriously misdirected the jury on the vital issue of lighting, in respect of the identification evidence.

[50] It is also noted that in **Nembhard**, the trial judge, Smith CJ, "took pains to describe the basis upon which a dying declaration was regarded as admissible and the tests which must be satisfied in that regard" (page 185 of the report). Their Lordships approved of the "very fair and helpful summing up by Smith CJ" (page 186 of the report). They made no adverse comment about his explanation of the rationale for the admission of the evidence.

[51] Although the absence of a direction on the rationale may not, by itself, be fatal to a conviction, it is indeed helpful for a jury to understand the basis on which they are allowed to consider it.

[52] Mr Dalton Reid was retried, and on 10 February 2010, he was again convicted for the killing. The victim is reported as saying, before she died:

> "Mr. Royal [sic], mi a goh dead. A 'Brass' and Dane shot mi. Yuh nuh know Dane, 'Lagga' bredda, Miss Ena son, 'Brass'. Dem call him 'Castie' and Cast Iron. Dem shot mi…wi live 'pon the same road."

His appeal from that conviction was considered in the judgment of this court in **Dalton Reid No 2**. In that judgment, the court did not have to consider the issue of the admissibility of Ms Powell's statement before she died. It did, however, have to contend with the issue of the trial judge's direction on credibility and reliability of not only the dying declaration but also of Constable Royal's evidence. This court found that the trial judge was required to give a full **Turnbull** direction and relate it to the circumstances of the case. Morrison JA (as he then was) stated that the court was satisfied that the trial judge, for the most part, had done so. He held up, as a benchmark, the directions that Smith CJ gave to the jury at the trial, which was considered in **Nembhard**.

[53] In **Sergeant v R**, this court again considered the interaction between a dying declaration and a case in which visual identification was in issue. This court found that the trial judge made two serious errors in respect of the issue surrounding the dying declaration. It identified the first error at paragraph [17] of the judgment:

> "We are nevertheless concerned with the judge's directions as to how the jury should approach what was contained in the declaration itself and whether he had provided the required assistance to the jury. **It is our view that the learned judge ought to have made it sufficiently plain that it was for them to decide as a question of fact, whether they were satisfied that the deceased had, when making the observations in question, a settled hopeless expectation of death.** It was a patent misdirection to have told the jury that, 'If you find there is a settled hopeless expectation of death, **you have to believe him.** (emphasis supplied).' **The learned judge having adjudged the declaration to be admissible in principle, ought to have directed the jury that the reliability, meaning, effect and probative value of the statement were matters for them to consider.** We therefore agree with [counsel for Mr Sergeant] when he

> submitted that the learned judge had failed to sum up to the jury on the issue of the dying declaration in a fair and balanced way…." (Emphasis supplied)

[54] The second error, which this court found that the trial judge had made, was indicated at paragraphs [24] and [28] of the judgment. It said that the error was the failure to direct the jury on the weaknesses in the identification evidence and, in particular, that the absence of the victim, as a witness, was a weakness in the prosecution's case. At paragraph [24], the court said:

> "In the instant case, [counsel for Mr Sergeant] argued that the learned judge should have appropriately isolated the weaknesses in the identification evidence bearing in mind the absence of the opportunity for appropriate questioning on such a critical matter. We entirely agree with him. The learned judge appreciated the importance of directions on visual identification and had given directions on this issue. We are of the view however, that although he gave directions in general terms, they were not sufficiently focused on the circumstances of the case. He needed to have been more explicit in his directions on the absence of cross-examination of the deceased."

The court said at paragraph [28]:

> "Regrettably, however, the learned judge did not point out to the jury that they should bear in mind when they came to consider the evidence of the statement made by the deceased, that they did not have the advantage of the witness coming before the court and having what he said tested by cross-examination. **Furthermore, in our view, he should have told the jury of the disadvantage they faced by not having the witness in the witness box to determine whether what he said was true or not**. It was essential for the learned judge to have highlighted these weaknesses and his failure to do so was a non-direction which amounted to misdirection." (Emphasis supplied)

[55] Whereas, a trial judge is to inform the jury of the potential weaknesses in the identification evidence, the direction must be relevant to the particular case. Their Lordships in the Privy Council case of **Stoutt v The Queen** [2014] UKPC 14 made that point at paragraph 23 of their opinion in that case. They said in part:

> "...whilst it is the duty of the judge to identify for the jury potential weaknesses in identification and/or hearsay evidence, the extent of the duty depends entirely on the state of the evidence in an individual case. If the judge does identify points which the defence rely on as weaknesses, she should also normally remind the jury of all the evidence affecting such points. She is not required in effect to make a second speech for the defendant."

[56] The following principles have been distilled from the various authorities:

- It is well established that the evidence of statements made by a deceased declarant are admissible as dying declarations provided certain conditions have been satisfied:
  - (i) the declarant had died;
  - (ii) a trial for murder or manslaughter ensued in the light of his death;
  - (iii) the statements uttered by the declarant relate to his cause of death; and
  - (iv) it can be demonstrated that the declarant was under a settled, hopeless expectation of death at the time he made the statement.

See **Nembhard** and **Sergeant v R**.

- A trial judge is to direct the jury on the basis for the admission of a dying declaration, which is admitted in evidence, as well as the test which must be satisfied in that regard, that is, the need to be satisfied that at the time of making the declaration the declarant had a settled, hopeless expectation of death – See **Nembhard, Sergeant v R** and **Dane Bonner v R**.
- A trial judge is obliged to, having adjudged a dying declaration to be admissible in principle, direct the jury that the reliability, meaning, effect and probative value of the declaration are matters for their consideration, provided they were satisfied as to the reliability of the witness who ascribed the declaration to the deceased declarant - **Nembhard** and **Sergeant v R**.
- In cases where dying declarations are relied on for the purposes of identification, it is necessary for the trial judge to give a full **Turnbull** direction as to the circumstances under which the deceased purported to have been able to identify his assailant as well as any potential weaknesses in the identification evidence -

See **Nembhard**, **Sergeant v R**, and **Dalton Reid v R Nos 1 and 2**.

- The trial judge is obliged to direct the jury that the absence of the opportunity to hear and observe the declarant giving evidence, which could have been tested under cross-examination, as regards his purported identification of his assailant, constitutes a weakness in the identification evidence, acts to the disadvantage of the accused, and it ought to be taken into account when they are assessing what the declarant purportedly said – **Nembhard** and **Sergeant v R**.
- There is no rule of law or practice which requires the trial judge to give any special warning with regard to the absence of corroborative evidence where the prosecution solely relies on a dying declaration which implicates an accused - see **Nembhard**.
- No specific direction is required about the risks of mistaken identification as regards the declarant's purported identification of his assailant, in circumstances where there has been no cross-examination on the issue – **Mills and others v R**.

[57] The learned trial judge in the present case gave an explanation to the jury for the availability of the dying declaration for their consideration. This direction is recorded at page 152 of the transcript of the trial. After telling the jury that the dying declaration would not normally be allowed into evidence, he is recorded as giving a correct direction in respect of this exception to the hearsay rule. He said:

> "The general principle on which this species of evidence is admitted is that there are declarations made in the [extremity] that is, when the party is at the point of death and when every hope of this world is gone and where every motive to falsehood is silenced and the mind is induced by the most consideration to speak the truth. It is the situation so solemn and so awful that is considered by law as creating an obligation equal to that which is imposed by a positive oath. Now, that is the principle under which the law permits what is called, a dying declaration to be admitted in evidence, that is simply put, a person who believes him or herself to be dying, is said to be most unlikely at that stage in life or at that stage being near to death to be moved to tell lies and he is motivated by the onset of death to speak the truth. So, that it is admitted for your consideration because of this taken, it is admitted for your consideration because it is felt that such a person is not going to tell lies on anybody...."

[58] He made it clear, however, that the acceptance of the statement was a matter for the jury. The learned trial judge also told the jury of the weakness associated with the dying declaration. He directed them that it was critical for them to bear in mind the absence of Mr Thomas as a witness. His direction on these points is recorded at pages 152-154 of the transcript:

> "…Of course, I repeat, that it is still a matter of the evidence and the evidence is a matter for you, **so that you as the jurors, would have to decide one, whether the**

> **deceased or the person who is now deceased did say it and secondly, whether you accept it as a truthful statement** but it goes further than that Mr. Foreman and Members of the Jury, because normally in these courts, you the jurors are able to see witnesses when they give evidence and to see how they answer questions in examination-in-chief and in cross-examination and **that opportunity of course has been taken away from you by the fact that the person who uttered these words is dead. So that, you need to give careful consideration before you accept the words, that is, if you find that they were said further, since they are the only words which incomplete or which can, if you accept them, cause you to find that the accused man is guilty, you have to consider the fact too, not only have you not seen the witness, not only have you not heard the witness but in the normal course of things, if the witness had been in court and told you that he was shot by the accused, he would no doubt have been asked questions relative to the identification of the accused,** when the accused is saying he did not do it and evidence of visual identification which is relying on, in the statement made by the deceased, this is evidence which the prosecution is relying on…." (Emphasis supplied)

[59] The learned trial judge also gave the jury a full **Turnbull** warning and put that warning in the context of Mr Thomas' absence and the jury's inability to see him answer questions concerning identification. The learned trial judge is recorded, at pages 154-155 of the transcript, as saying:

> "…In the normal course of any summation, this court will have to warn you, that if the case against the accused depend wholly or to a large extent on the correctness of the identification of him, which the accused alleges to be mistaken, you must be warned of the special need for caution before convicting the accused in reliance on that of the evidence of identification. This is because, it is possible for an honest witness to make a mistaken identification. There have been wrongful convictions in the past, for the result of such mistakes and of course an apparent honest

> witness can be mistaken, you can examine carefully, the circumstances in which the situation by the witness was made. How long he had the person in observation, from what distance, in what light, whether anything did interfere with the observation and whether the witness knew the person before, for how long and so on. **So, that in the normal course of things if the witness had given evidence, you would have been told that you need to consider all the aspects of the visual identification of him by that witness, when coming or concerning the correctness of the visual identification. Now, in this case, you do not have that opportunity. It is therefore even more important that you be very careful and very cautious in accepting the evidence of the dying declaration but of course, if you consider it carefully, it being a matter of evidence, if it makes you feel sure of the guilt of the accused, then you are entitled to act upon it. What I ask you to do, is give careful consideration, special consideration to this evidence, especially in view of the fact that there is no corroboration of the evidence.** The law does not say it has to be corroborated but I want you to bear in mind, that there is nobody else who can speak to the events which are contained in the dying declaration. (Emphasis supplied)

[60] The learned trial judge therefore correctly dealt with the issues which have been identified in **Nembhard** and **Sergeant v R** as being required. Unlike the trial judge in **Sergeant**, he did not give the impression to the jury that because the statement might have been made whilst Mr Thomas could have been in a state of settled, hopeless expectation of death, that they were obliged to accept the statement as true or reliable. Mr Fletcher's fear that there may have been a conflation of the rule into an obligation to accept the evidence, did not materialise in this case.

[61] In **France and Vassell v The Queen** [2012] UKPC 28, their Lordships stressed that there should be no "formulaic" approach to the directions on visual identification,

but that the directions should be given in the context of the evidence given in the case. They said, in part, at paragraph 14 of their opinion:

> "...As a preliminary and general comment, the Board would observe that a formulaic recital of possible dangers of relying on identification evidence, if pitched at a hypothetical rather than a practical (in the sense of being directly related to the circumstances of the actual case that the jury has to consider) level may do more to mislead than enlighten.... A trial judge should always be conscious of the need to relate conceivable difficulties in relying on this type of evidence to the actual circumstances of the case on which they have to reach a verdict. As the Board said in *Mills v The Queen* [1995] 1 WLR 511, 518 the Turnbull principles do not impose a fixed formula for adoption in every case. It will suffice if the trial judge's directions comply with the sense and spirit of the guidelines."

[62] In this case, the learned trial judge told the jury of the weakness in the prosecution's case, caused by Mr Thomas' unavailability to give the evidence that would normally be given by an eye-witness. As was quoted above, he said, in part, at page 155:

> "…So, that in the normal course of things if the witness had given evidence, you would have been told that you need to consider all the aspects of the visual identification of him by that witness, when coming or concerning the correctness of the visual identification. Now, in this case, you do not have that opportunity."

[63] There was some evidence of the circumstances prevailing at the time Mr Thomas was found, which the jury could have considered in dealing with identification. These were not definitive but could perhaps have assisted the jury. They were:

a. the time that Mr Miller saw Mr Thomas jogging by;

b. the fact that the jogging seemed to be normal;

c. the short distance between where Mr Miller was sitting and where Mr Thomas was found;

d. the fact that Mr Thomas was found at a road intersection governed by traffic lights;

e. the fact that the police, that night went to an intersection, at seemingly the same location described by Mr Miller and noticed that it had street lights there;

f. the fact that the stab injury received by Mr Thomas suggested that his attacker came within arm's length of him.

The learned trial judge did not deal with these points in addressing the issue of visual identification. They were, nonetheless, relevant.

[64] The learned trial judge's direction would therefore not, in the overall scheme of the evidence, have been deficient in its failure to refer the details of the circumstances of Mr Thomas being able to see his attacker.

[65] On that analysis, there is no merit in these grounds of appeal.

Ground four – The learned trial judge erred in failing to give a Lucas direction in circumstances where the jury was being called upon to assess the credibility of the applicant in arriving at their verdict

[66] The issue of whether Mr Mills lied to the police, when he was asked to give his mother's name, brought about the question of whether the learned trial judge ought to have given a **Lucas** (**R v Lucas** [1981] QB 720; [1981] 2 All ER 1008) direction. The prosecution also led evidence from Detective Corporal Thomas that when she came across Mr Mills, he was a patient in the Spanish Town Hospital and, he was, at the time, admitted under a different name. He told her that that was his cousin's name.

[67] On 4 November 2005, when Mr Mills was arrested he was asked to give the name of a close relative. He gave his mother's name. He told Detective Corporal Thomas that his mother's name was Elaloo Green and that she lived in Dela Vega City.

[68] Earlier that day Mr Mills was asked questions in the presence of his counsel, who eventually represented him at the trial. He refused to answer any questions.

[69] In his summation to the jury, the learned trial judge addressed the matters of Mr Mills' refusal to answer the questions and his giving of his mother's name. The learned trial judge pointed out to the jury the difference between Mr Thomas' pronunciation of the name and Mr Mills' pronunciation. Mr Fletcher has complained about the direction. The relevant portion will, therefore, be set out below. The learned trial judge said, in part, at pages 158-159 of the transcript:

> "These are matters of evidence, and the evidence is a matter for you. You see, it is one thing to make up a story, it is

> another thing to have it faked. So that, in an effort – **not even the name of his mother did the accused tell them when he did the questions and answers**. Of course he was cautioned, and he was told that he didn't need [sic] to say anything. And of course the, the law is that he has no duty to incriminate himself. So he didn't have to say anything….
>
> Defence attorney has also suggested that it was improper of him to be asked what his mother's name was when he [defence counsel] was not there. I don't know if on that occasion he would have instructed him not to answer, if he ever did. **But the fact is, that he did answer, according to Detective Corporal** [Thomas]**, and he did give a name being [sic] it Eulalee or Elaloo, and whether it is because he cannot pronounce the name properly or because he was trying to fool somebody about the name, that is a matter for you**. Is he the son of Eulalee Green? Is he the son of Elaloo Green, who lives with Mr. Parka [sic]? Is he the son of Eulalee Green, who lives with Parka who has a shop in the Dela Vega City area? These are entirely matters which are contained in this dying declaration. These are matters of evidence, and as always, the evidence is a matter for you." (Emphasis supplied)

[70] Mr Fletcher submitted that the way that the learned trial judge couched his comments suggested guilt. Learned counsel argued that the direction required the learned trial judge to give a **Lucas** direction. In his written submissions on this ground, Mr Fletcher said, in part:

> "In **R V Goodway 1994 98 Cr. App R 11** it is reinforced that a *Lucas* direction pointing out that a lie told by a defendant can only strengthen or support evidence against that defendant if the jury are satisfied that (a) the lie was deliberate, (b) it relates to a material issue, and (c) there is no innocent explanation for it is required in appropriate cases."

[71] Three passages from **R v Goodway** [1993] 4 All ER 894; [1994] 98 Cr App R 11 assist in setting out the relevant principles that should be applied where an accused is said to have told lies and the prosecution seeks to rely on that prevarication. The Court of Appeal of England re-affirmed the need for trial judges, in such cases, to warn the jury that, before relying on the lies to the accused's detriment, it should be satisfied that there is no innocent motive for the lie. The court said, at pages 900-901 of the latter report:

> "It is well established that where lies told by the defendant are relied on by the Crown, or may be relied upon by the jury as corroboration, where that is required, or as support for identification evidence, the judge should give a direction along the lines indicated in *R v Lucas* [1981] 2 All ER 1008 at 1011, [1981] QB 720 at 724. That is to the effect that the lie must be deliberate and must relate to a material issue. The jury must be satisfied that there is no innocent motive for the lie and should be reminded that people sometimes lie, for example, in an attempt to bolster up a just cause, or out of shame, or out of a wish to conceal disgraceful behaviour. In regard to corroboration, the lie must be established by evidence other than that of the witness who is to be corroborated.
>
> …
>
> However, [counsel for the appellant] goes further and contends for a broader proposition. He submitted that a *Lucas* direction should be given wherever lies are relied upon by the Crown, or might be used by the jury to support evidence of guilt as opposed to merely reflecting on the appellant's credibility.
>
> …
>
> Accordingly, we consider [counsel for the appellant's] broader proposition is sound and that **a *Lucas* direction should be given, save where it is otiose as indicated in *R v Dehar*, whenever lies are, or may be, relied upon as supporting evidence of the defendant's guilt**." (Emphasis supplied)

[72] Mr Duncan agreed that the learned trial judge ought to have given a **Lucas** direction in the present case.

[73] It is impossible to agree with learned counsel on this point. There was no basis on which the learned trial judge should have given a **Lucas** direction. The basic requirement of proof that Mr Mills had told a lie was absent. There was no evidence that established that Mr Mills had told a lie about his mother's name. There was no evidence of the correct pronunciation of Mr Mills' mother's name. There was only Mr Thomas' reference to that name.

[74] If, during closing submissions, the prosecutor sought to use, against Mr Mills, the fact that he said that his mother's name was Elaloo, rather than Eulalee it might well have been trying to make a mountain out of a molehill. Indeed, the learned trial judge identified the possibility that the difference may have been a matter of pronunciation rather than an attempt to deceive. It was unfortunate, however, that he spoke of the possibility that Mr Mills may have been trying to "fool somebody about the name".

[75] The fact that he made that error would not be fatal to the conviction. Although not in the usual form, he did indicate to the jury that there may have been an honest explanation for Mr Mills' pronouncing his mother's name in the way that he did.

[76] This ground also fails.

Ground six - The prosecutor failed to disclose to the defence, documentation which contributed to or supported the conclusions arrived at by the pathologist and which document was of vital importance to the authenticity of the dying declaration, and the credibility of the police witnesses.

[77] Mrs Neita-Robertson submitted that a critical aspect of the case was the pathologist's evidence concerning Mr Thomas' ability to speak at the time that he was taken to the hospital. She submitted that the cross-examination of the forensic pathologist on this critical area was hampered by the prosecutor, who, learned Queen's Counsel argued, failed to disclose to defence counsel the availability, and the contents of, Mr Thomas' hospital docket.

[78] Mrs Neita-Robertson submitted that the documents subsequently shown to Mr Mills' counsel, for the purposes of the appeal, and shared with this court, cast "doubt on the authenticity of the dying declaration" and the "credibility of the Police witnesses" (paragraph 9 of the written submissions). Learned Queen's Counsel, in particular, pointed to the hospital's accident/emergency service record, which recorded that Mr Thomas "was unable to give...information" about his age, address, telephone number or religion.

[79] She submitted that the prosecutor knew of the existence of the documentation from the hospital's docket, and knew the information that was recorded thereon. Indicative of that knowledge, Mrs Neita-Robertson submitted, is the exchange during the examination-in-chief of the pathologist. This, she submitted, is recorded at pages 98-99 of the transcript, where the prosecutor asked the pathologist about other

documentation to which he had access, in connection with his examination of Mr Thomas' body.

[80] Learned Queen's Counsel submitted that the prosecutor had a duty to disclose the information to defence counsel, yet she did not disclose it. Mrs Neita-Robertson submitted that the failure amounted to a material irregularity and as a result, not only should the conviction be quashed, but a verdict of acquittal entered in its stead.

[81] Mr Duncan submitted that it was not reasonable to infer that the prosecutor knew, when she was examining the pathologist, that he had a copy of the hospital's docket in his possession. He further argued that the omission to provide defence counsel with the documentation was not prejudicial to the case.

[82] An examination of the relevant portion of the transcript does not support Mr Duncan's first submission. It does seem from the transcript that the prosecutor had some information concerning the documentation in the pathologist's possession. The relevant portions of the transcript are at pages 98-99:

> "Q. Now, after you examined the deceased body, did you examine any other documentation in coming, in making a general analysis of the particular man you saw and in order to arrive at your opinion?
>
> A. Yes, madam.
>
> Q. What did you do?
>
> A. I got a copy of the hospital docket before I did my opening.
>
> Q. Which hospital document did you say?

A. Spanish Town Hospital.

...

Q. Doctor, with regard to the notes that you have here today, can you say where the hospital records that you examined where they are?

A. It is a photocopy of the docket.

Q. That photocopy which you used, is it here today? The photocopy of the hospital records that you have examined, is it here today?

A. Yes, it is here."

[83] Mr Duncan is, however, correct in his submission that the failure to provide the document was not prejudicial to the defence. The first point to be noted in this regard is that the transcript discloses that the documents were in court. Defence counsel could therefore have taken the opportunity to peruse them, with the learned trial judge's permission. It does appear that defence counsel may have had thoughts about asking the pathologist further questions. The transcript at page 103 suggests that situation but he did not verbalise his thought process to the learned trial judge, who indicated that he had already excused the pathologist. At the end of the re-examination, the following exchange is recorded as having occurred:

> "HIS LORDSHIP: Thank you, doctor, you are free to go.
>
> [CROWN COUNSEL]: Counsel had been indicating certain things to me, if he does, m'Lord, I wonder if counsel...
>
> HIS LORDSHIP: I have excused the doctor, Madam Crown Counsel." (Continuation marks as in original)

[84] The second point to be noted in regard to this issue is that learned defence counsel, in his cross examination, had quite astutely identified the weakness in the prosecution's case. Arising from that cross examination was the evidence that the fracture of the zygomatic bone would have resulted in Mr Thomas immediately going into a unconsciousness or a coma and that death would have occurred "anywhere between half an hour to one hour" thereafter (page 101 of the transcript). Based on that evidence, it cannot be said that the defence was irreparably hampered by the absence of the prior disclosure of the documentation to the defence.

[85] This ground cannot succeed.

Ground Seven- The failure of the State to provide supporting material post conviction, despite the orders of the court, has compromised Mr Mill's ability to prosecute his appeal.

[86] It took a long time before this appeal, although filed in 2009, was eventually heard. Mrs Neita-Robertson noted that a major reason for that delay was the time painstakingly spent by counsel, Mr Fletcher, in attempting to obtain a copy of Mr Thomas' original patient docket, from the hospital authorities. Of particular concern was information on Mr Thomas' reception and treatment at the accident and emergency section and in particular the names of the doctors and nurses who attended to him when he was brought in.

[87] Mr Fletcher's attempts, despite the assistance of the process of this court, proved unsuccessful. All that was available to counsel and the court, were copies of documents, apparently taken from the original patient's docket. The documents spoke

to Mr Thomas' treatment, but did not state the identity of the doctors or nurses who attended to him when he was first taken to the hospital.

[88] It is to be noted that during the time that this court was attempting to obtain the material sought by Mr Fletcher, a representative from the hospital, Mrs Sandra McKenzie-Bird, attended this court on 17 March 2014. She informed the court that the docket had been kept for its allotted time and had been put aside. She said that searching for it was akin to looking for a needle in a haystack.

[89] Mrs Neita-Robertson submitted that the hospital's failure amounted to the State's compromising Mr Mills' ability to prosecute his appeal. She argued that the docket was important. Had it been available, she submitted, the critical issue of whether Mr Thomas' would have been able to speak, or did speak at the hospital, could possibly have been addressed by way of an application for the admission of fresh evidence. The absence, she contended, severely hampered Mr Mills' ability to prosecute his appeal. This was, learned Queen's Counsel argued, a failure on the part of the State.

[90] Mr Duncan argued that there is no indication that the failure to produce was intentional. He also contended that it was not prejudicial. He relied on the case of **Ralston Baker v R** [2013] JMCA Crim 32 in support of his submissions.

[91] Mr Duncan is correct that the absence of the material before this court has not been shown to have prejudiced the appeal. The question of fact, as to whether Mr Thomas was able to speak and did speak, when he was taken to the hospital, was

squarely placed before the jury and it accepted that he did speak; saying the words attributed to him by Corporal Thomas.

[92] As was noted above, Mr Fletcher and this court were provided with copies of the hospital record. The absence of the evidence of the doctor or nurses cannot result in the overturning of the conviction. The jury was entitled to make its decision on the evidence produced before it. The documentation revealed to this court, subsequent to the conviction cannot cast any doubt on the conviction. This ground, also, cannot succeed.

Ground Eight - That the learned trial judge fell into grievous error when he misquoted the evidence of the pathologist which was clear and unambiguous and directed the jury to put their own interpretation on it.

That this misquotation and direction was a misdirection resulting in Mr Mills being denied a fair trial.

[93] Learned Queen's Counsel submitted that the learned trial judge misquoted the evidence when he said that the pathologist had testified that a person shot, as Mr Thomas had been, could recover before dying. Mrs Neita-Robertson argued that the pathologist did not make any such statement. She argued that if the learned trial judge was making a comment on the evidence he should have so indicated to the jury and they would have known that they were entitled to reject it if they were so inclined.

[94] The direction that learned Queen's Counsel complained about is recorded at page 161 of the transcript. The learned trial judge said, in recounting the pathologist's evidence:

> "...He said none of the bullets showed no [sic] evidence of gun powder residue and then he was asked later on by Crown counsel, if such a person could recover before dying and he said, sometimes they could but the person would go - would have had [sic] immediately into a state of unconsciousness **and sometimes they could recover before they die**. Because what defence attorney is suggesting to you is, that if you accept this evidence of the doctor, you could, depending on what you think he is saying, find not only would the now deceased Kegan or Kevin Thomas have gone into immediate unconsciousness but would have died and not have been able to speak...."

[95] The pathologist's evidence is recorded, in part, at page 102 of the transcript:

> "Q. How soon, having gone into a coma, would the person be in a position to come out of the coma, drift in and out of the coma?
>
> A. Depends, well, based on how much of the brain tissue is injured, it sometimes immediately lead to consciousness or unconsciousness, I can't answer."

[96] It does appear that the learned trial judge overstated the pathologist's evidence in favour of the prosecution. This was a critical issue in the case. The learned trial judge's comment was, however, not in contradiction of the evidence. It is also not unimportant that although the pathologist opined that Mr Thomas would have died within half an hour to an hour of receiving the facial injury, he, in fact, survived for two hours. Accordingly, this ground fails.

Ground five – The sentence is manifestly excessive

[97] As was stated above, Mr Mills was sentenced to imprisonment for life, but ordered to serve 25 years before becoming eligible for parole. Mr Fletcher submitted

that although the sentence imposed was within the usual range of sentences for the offence of murder, it did not automatically make it appropriate in the circumstances.

[98] Learned counsel argued that the case required more than the standard antecedent history that the police provided. Citing the limited nature of an antecedent report, Mr Fletcher submitted that sentencing required more than an approach that proceeded on the basis that the punishment should fit the crime. He argued that the sentence should also be one that fits the offender. A Social Enquiry Report, he submitted, was a more appropriate method of providing the material required for informed sentencing.

[99] Mr Fletcher also submitted that, in considering the sentence, the learned trial judge did not appear to have given credit to Mr Mills for the two years that he had spent in custody prior to his conviction.

[100] Section 3(1)(b) and (1C)(b) of the Offences Against the Person Act stipulate the maximum sentences that may be imposed for the offence of murder. The statutory provisions combine to stipulate that in a case such as the present, the offender is liable to be sentenced to imprisonment for life or to a sentence of no less than 15 years. Where the sentence imposed is imprisonment for life, the court is also required to stipulate that the offender shall serve a period (not being less than 15 years) before becoming eligible for parole. Where some other sentence is imposed, the court is required to stipulate that the offender shall serve a period (not being less than 10 years) before becoming eligible for parole.

[101] The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts were published after the present case was concluded. In terms of setting out the normal range of sentence for the offence of murder, the guideline simply states "15 years – life". It does not stipulate a usual starting point for the consideration of a starting point for the offence of murder.

[102] The sentence imposed in the present case was therefore, as Mr Fletcher conceded, within the normal range of sentences for the offence of murder.

[103] Mr Fletcher's complaint seems to suggest that a sentencing exercise is fatally flawed if it is conducted without the benefit of a social enquiry report. If that is in fact learned counsel's submission, it must be viewed as being misguided. Although a court will benefit from any information that may be presented in respect of an offender, a trial judge, in preparing to conduct a sentencing exercise, is not required, on her own initiative, to order a social enquiry report. This court will not disturb a sentence on the sole basis that it was imposed without the benefit of a social enquiry report. This principle was considered and explained in **Michael Evans v R** [2015] JMCA Crim 33 (paragraphs [7]-[12]), **Sylburn Lewis v R** [2016] JMCA Crim 30 (paragraph [15]) and **Dean Elvey v R** [2017] JMCA Crim 21 (paragraphs [11]-[13]).

[104] There remains, however, the issue of the time Mr Mills spent in custody prior to his conviction. **Meisha Clement v R** [2016] JMCA Crim 26, paragraphs [34]-[35] is one authority for the principle that an offender should be given full credit for the time

spent in custody awaiting his trial. Where the sentence imposed is life imprisonment this court has adopted the approach of giving credit for the pre-trial incarceration by adjusting the minimum period to be spent prior to eligibility for parole. That was the approach used in a number of cases including **Kevin Young v R** [2015] JMCA Crim 12, **Lincoln Hall v R** [2018] JMCA Crim 17, **Jason Palmer v R** [2018] JMCA Crim 6 and **Anthony Russell v R** [2018] JMCA Crim 9.

[105] A different approach must be used when the sentence that had been imposed at first instance is not life imprisonment, but rather a fixed term of years. Any adjustment of the sentence imposed, in order to give credit for pre-trial incarceration, must be made to the sentence imposed. Thereafter, consideration may be given to the period to be served before eligibility for parole. The latter consideration would not give credit for pre-trial incarceration.

[106] This latter approach adopted in **Christopher Thomas v R** [2018] JMCA Crim 31. Mr Thomas was sentenced to 40 years imprisonment for murder. It was his third trial for that offence. He was ordered to serve 20 years before becoming eligible for parole. On appeal, this court considered that a sentence of 35 years was more appropriate. It however, reduced that time to 28½ years, in recognition of the 6½ years that he had spent in custody prior to his eventual conviction. It did not disturb the period which he should serve before becoming eligible for parole. Morrison P, in giving the judgment of the court, cited the cases of **Jason Palmer v R** and **Anthony**

Russell v R. He was of the view, however that there was "no reason to disturb the judge's order that the applicant should serve a minimum of 20 years in prison".

[107] Another principle to be considered in this context is that this court will not disturb a sentence imposed at first instance "merely because the members of the court might have passed a different sentence". Panton P expounded that principle in delivering the judgment of this court in **Matthew Hull v R** [2013] JMCA Crim 21. He said at paragraph [9]:

> "An appellate court does not alter a sentence merely because the members of the court might have passed a different sentence. A sentence is only altered when there has [sic] appears to have been an error in principle. If a sentence is manifestly excessive, that is an indication of a failure to apply the right principles - see **R v Ball** 35 Cr App Rep 164...."

[108] In the present case there is no basis upon which to disturb the life sentence imposed in this case. It certainly fits the offence and there is nothing to indicate, from what has been placed before this court, that it does not fit the offender. There is, however, need to address the issue of the pre-parole period of incarceration in accordance with the principle set out in **Meisha Clement v R**.

[109] In this case, Mr Mills was taken into custody nine days after Mr Thomas was killed. Defence counsel, in his plea in mitigation, pointed out to the learned trial judge that Mr Mills had spent two years in custody before he was granted bail. The learned trial judge did not mention that fact when he handed down sentence. It does appear,

therefore, that he erred in that regard. The period of 25 years before Mr Mills becomes eligible for parole should, therefore, be reduced to 23 years.

[110] This ground of appeal succeeds.

Summary and conclusion

[111] Although the prosecutor ought to have ensured the disclosure of the copies of the hospital's documentation on Mr Thomas' admission and treatment there, the conviction was not rendered a miscarriage of justice. The main issue of whether Mr Thomas was able to make the statement ascribed to him, was a matter for the consideration of the jury and was fairly and squarely placed before the jury. They accepted that Corporal Thomas, who testified that Mr Thomas had made the statement, was speaking the truth.

[112] As a result, the appeal should be dismissed and the conviction affirmed. The appeal against sentence should, however, be allowed on the basis that it does not appear that the learned trial judge credited Mr Mills with the period that he had spent in custody prior to his conviction. The sentence should be varied to reflect that period.

Orders

[113] These are the orders of the court:-

(1) The application for leave to appeal is granted.

(2) The hearing of the application is treated as the hearing of the appeal.

(3) The appeal against conviction is dismissed and the conviction is affirmed.

(4) The appeal against sentence is allowed.

(5) The sentence imposed by the judge is varied to one of imprisonment for life, with a stipulation that the applicant must serve a minimum of 23 years in prison before becoming eligible for parole.

(6) The sentence is deemed to have commenced on 15 May 2009.