[2025] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 88 & 94/2015

ORLANDO NEITA
HUSSAIN EDWARDS v R

Oswest Senior-Smith and Mrs Kimberly Reynolds-McDermott for Orlando Neita

Mrs Ann-Marie Feurtado-Richards for Hussain Edwards

Andre Wedderburn and Miss Devine White for the Crown

30 November, 1, 2, 3 December 2021 and 13 June 2025

Criminal practice and procedure – Murder – Evidence – Witness outside of jurisdiction – Voir Dire – Application for witness statement to be tendered into evidence, Section 31D of Evidence Act

Criminal Law – Evidence – Visual identification recognition –Turnbull principles

Criminal Law – Trial – Submission of no case to answer – Criterion on which trial should be allowed to continue – Whether material on which jury could be satisfied of guilt

Criminal Law – Trial – Direction to jury – Alibi – Whether direction undermining alibi defence – Whether conviction unsafe

Trial – Murder – joint enterprise – principles applicable – Whether the directions adequate

Criminal Practice and Procedure – Prosecution's duty to disclose – Duty of prosecution to disclose all relevant material – Failure by prosecution to

disclose all relevant material – Whether material irregularity in the course of trial

P WILLIAMS JA AND BROWN BECKFORD JA (AG) (EDWARDS JA CONCURRING)

[1] This was an audacious act of murder carried out by armed men on the morning of 31 March 2011, in the Rosalie Avenue area of Kingston. Shortly after 9:00 am, 17 year-old Xavier Brown, otherwise called 'Josh' ('the deceased'), was engaged in having a conversation at a cookshop operated by Mr Jason Johnson, otherwise called Porridge Man ('Mr Johnson'), when a group of men came on the scene and started firing shots. At the end of the shooting, the deceased was observed suffering from gunshot wounds, from which he later succumbed. Mr Johnson was also shot. Orlando Neita, also called 'Lando' ('Mr Neita'), and Hussain Edwards, also known as 'Gully Rat' ('Mr Edwards'), ('the applicants'), were subsequently identified during video identification parades as two of the individuals involved in the shooting. They were arrested and charged in connection with the incident, and both denied any involvement in the offence.

[2] The applicants were tried in the Circuit Court Division of the Gun Court for the parish of Kingston on divers days between 21 September and 7 October 2015, before a judge ('the learned judge') sitting with a jury, and were convicted. On 9 October 2015, the learned judge sentenced each to life imprisonment at hard labour and ordered that they should each serve a minimum of 15 years in prison before becoming eligible for parole.

[3] They both sought leave to appeal their convictions and sentences which was refused by a single judge of this court. As is their right, they have renewed their applications for leave to appeal their conviction and sentence. On 3 December 2021, after hearing the submissions, we reserved our decision. At that time, we did not anticipate the length of time it would have taken to deliver this judgment. We apologise for the delay.

The trial

The case for the prosecution

[4] The prosecution's case was that the applicants were two of four men who engaged in a joint enterprise which resulted in the death of the deceased. The events of the morning of 31 March 2011, were recounted through two purported eyewitnesses, Mr Marvin Harris ('Mr Harris') and Mr Johnson. However, Mr Johnson was not available to testify in court at the time of trial. Following a *voir dire*, his statements, previously given to the police, were admitted into evidence pursuant to section 31D of the Evidence Act ('the Act'). Evidence was also given by the police officers involved in the investigation which culminated in the arrest and the charge of the applicants for the murder of the deceased. Pursuant to section 31C(A) of the Act, by an oral agreement between the attorneys-at-law for the prosecution and the applicants, the report of the post-mortem examination conducted on the deceased was admitted as evidence, without the need to call as a witness Dr Rowan Ruwanpura ('Dr Ruwanpura') who performed the examination and authored the report.

[5] Mr Marvin Harris testified that he was the stepfather of the deceased. On the morning of 31 March 2011, he was at the gate of his brother's premises at 60 Rosalie Avenue when the deceased came there and spoke to him. The deceased then went to the cookshop which was located on the sidewalk in front of the premises at 59 Rosalie Avenue. This location was on the opposite side of the road from where Mr Harris was positioned. Mr Harris observed the deceased engaging in a conversation with Mr Johnson, after which the deceased began playing a "PSP game".

[6] Mr Harris then entered the premises where the cookshop was. While returning from the cookshop, at about 9:15 am, he heard gunshots. He ran to the gate and he saw Mr Johnson running into the yard. Mr Johnson told Mr Harris that he had been shot. Mr Harris said he asked Mr Johnson for the deceased and Mr Johnson responded that he did not know where the deceased was. After Mr Harris heard the last shot fired, he ran out to the road looking for the deceased. He eventually saw him "in de road". He looked in

the direction where the shots came from and saw two persons walking - about to go around the corner of the house on the premises at number 59 Rosalie Avenue. The men were behind Mr Johnson's cookshop and Mr Harris explained that once they went behind the house he "couldn't si dem no more". Mr Harris then went to look at the deceased, who was lying face down. The police were called and the deceased was taken away.

[7] Mr Harris testified that he saw "very clearly" one of the two persons walking in the yard after the shooting. This person he knew as 'Shamarie', someone he had known since the year 1990. He saw Shamarie with a pistol swinging as he walked backways towards the fence which was at the rear of 59 Rosalie Avenue. The other person he knew as Lando, who he had known for about three to four years. He pointed out Mr Neita as the person he knew as Lando. Mr Harris said he was able to observe Mr Neita's face to his feet as the two men were backing out. At the time he observed the men, Mr Harris explained he was in front of the gate where the deceased was lying, which was located at the entrance to Beatrice Crescent. He was invited to point out the distance he was from Mr Neita and this was estimated to be 100 to 150 ft. He said he was able to see Mr Neita's face for about "six seconds or four". He said that prior to that day he would see Mr Neita every day, morning and evening. The last time he saw Mr Neita was three days prior to the incident when he saw him on Beatrice Crescent waiting for Gully Rat. Mr Harris identified Mr Edwards as the person known to him from 1990 as Gully Rat.

[8] Mr Harris explained that when he saw Shamarie with a pistol, Mr Neita was about a foot behind Shamarie with nothing in his hands. At the time both men were walking and looking out to the road and over the fence. He said that he heard about 10 gunshots and the shooting lasted for less than a minute. He further indicated that the shots came from the direction of behind Mr Johnson's cookshop.

[9] Under cross-examination, Mr Harris was confronted with the statement he gave to the police on the same day the shooting occurred. He acknowledged that he had said in that statement that he had "seen the two men running into the yard" behind Mr Johnson's cookshop which was different from the evidence he gave in court that he saw the men

walking at a fast pace. He agreed that in the statement he had made no mention of the name Shamarie but had given a description of the man he had seen. He further agreed that in the statement he had not mentioned that anyone had a gun. During re-examination, Mr Harris sought to explain his failure to inform the police that he saw one of the men with a gun. He stated that he was still in shock and "some a di question dem, when [the police] a talk [he] not even a hear him".

[10] As already indicated Mr Johnson was not available at the time of trial. On the evidence presented by the prosecution on the *voir dire*, the learned judge found that the requirements of section 31D(c) of the Evidence Act had been established, in that Mr Johnson was outside of Jamaica and it was not reasonably practicable to secure his attendance. The evidence led in satisfaction of this criterion for the statements to be admitted will be examined later in this judgment. Accordingly, the learned judge ruled that three statements recorded from Mr Johnson were admissible. The statements were accordingly admitted into evidence and read to the jury.

[11] The first statement was recorded, on 7 April 2011, by Detective Corporal Horace Gardener ('Det Cpl Gardener') who was at the time stationed at Major Investigations Task Force for Kingston and Saint Andrew ('Kingston MIT') and was one of the police officers tasked with investigating the death of the deceased.

[12] The statement commenced with Mr Johnson detailing his knowledge of the deceased, 'Shamar' otherwise called 'Shamoy' or 'Shamary', 'Lando', 'Gully Rat', and 'Coolie Man'. Mr Johnson stated that at about 8:25 am, on 31 March 2011, the deceased came to the cookshop he operated on the roadside at 59 Rosalie Avenue, and they had a brief conversation. After the conversation ended, Mr Johnson, who had been cooking, continued with that task while the deceased commenced playing a game on a 'Play Station'. At approximately 9:00 am, he heard footsteps, and immediately thereafter heard explosions sounding like gunshots coming from behind his cookshop, located on the premises at 59 Rosalie Avenue. He heard "shuffling" coming from the yard, and upon looking in that direction, he saw Coolie Man and Lando, both with guns in their hands.

He also saw Shamar run through the gate of the premises at 59 Rosalie Avenue, firing in the direction of the deceased, who was fleeing towards Beatrice Crescent. Mr Johnson stated that when he saw Coolie Man and Lando, he ran through a tall door which is at the gate of number 57 Rosalie Avenue; upon coming out of the cookshop he saw Gully Rat leaning on the wall at 59 Rosalie Avenue. Mr Johnson ran towards 62 Rosalie Avenue and, while doing so, he felt a burning sensation on his left shoulder.

[13] Mr Johnson further stated that the incident lasted for "about less than a minute". Shamar was about three arm's length from him with a black "matic" in his hand when he first saw him. When he saw Lando, he was "about less than one arm's length" away, with only the wall at the back of the cookshop separating them. Lando had a black "matic" gun in his hand also. Mr Johnson stated that Gully Rat was "about two car length away when [he] ran out on the roadway,… at the small door of the shop". He did not see Gully Rat with a gun but said that Gully Rat "came there with Shamar, Lando, and Coolie Man because he was not there before the shooting started".

[14] Mr Johnson stated that the men came from the premises at 59 Rosalie Avenue and attacked the deceased and himself and then escaped back on the same premises. When he ran onto the premises at 62 Rosalie Avenue, he did not see the men run past that premises. When the shooting ended, he heard a voice say "forward dawg" and saw all four men, including Gully Rat, run back onto the premises of 59 Rosalie Avenue. He then returned to the roadway where he noticed the deceased on the ground, not moving. It was at that point he became aware that he was bleeding from his left side and left hand. He was subsequently assisted to the hospital, where he received treatment for gunshot wounds.

[15] The other two statements recorded from Mr Johnson were in regard to his identification of the applicants on separate video identification parades. The parades were organised and conducted by Inspector Colin Franklin ('Inspector Franklin'), who also recorded the statements. Mr Johnson stated that, on 11 April 2011, he was at his home when police visited and conducted the video identification parade. He pointed out

the person who appeared at position number nine as the person who shot him on 31 March 2011. Inspector Franklin testified that the person appearing at position number nine was Mr Neita.

[16] In a further statement, Mr Johnson stated that on, 27 May 2011, he attended the visual identification unit, situated at Kingston MIT, where he participated in a video identification parade and pointed out the person who appeared at position number four. The statement contained no indication of any reason given by Mr Johnson for pointing out the person in that position. However, Inspector Franklin testified that the person identified was Mr Edwards. Under cross-examination, Inspector Franklin maintained that Mr Johnson had stated that he pointed out Mr Edwards as someone who had shot him and his friend. Inspector Franklin accepted that that information was missing from Mr Johnson's statement and explained that the absence could have been an oversight.

[17] In March 2011, Detective Sergeant Robert Robinson ('Det Sgt Robinson') was stationed at Kingston MIT where he was a forensic crime scene reporter. On 31 March 2011, at approximately 10:00 am, he was one of the police officers who visited the scene of the murder along Rosalie Avenue in the vicinity of Beatrice Crescent. He processed the scene by making a sketch of the scene, taking several photographs at the scene with an authorised camera, and collecting items considered relevant to the investigations, which he packaged, labelled, and placed in an envelope. Among the items collected were six 9mm spent casings and one damaged bullet. Subsequently, at the Kingston MIT office, he transferred the images from the camera to a compact disk ('CD'). During the trial, he prepared an edited version of the original CD, and by agreement the edited version was tendered and admitted into evidence.

[18] Detective Sergeant Rodrick Muir ('Det Sgt Muir') was the lead investigating officer. He testified that he and other police officers, including Det Sgt Robinson, visited the scene on 31 March 2011 at 10:00 am. He observed that there was a section of the road that was cordoned with police tape, and the body of a male lying face down in a pool of blood

on Beatrice Crescent, near Rosalie Avenue. Later that day, he went to the Kingston Public Hospital where he saw and spoke with Mr Johnson.

[19] On 1 April 2011, Det Sgt Muir attended a post-mortem examination conducted by Dr Ruwanpura on the body he had observed on Beatrice Crescent. He witnessed Dr Ruwanpura remove a bullet from the head of the body. Constable Devon Brown ('Cons Brown') was also present, and he testified that this bullet was handed to him by Dr Ruwanpura. The report from this post-mortem examination, which was admitted into evidence, indicated that the body was identified as that of the deceased by Carren Fletcher. Miss Fletcher gave evidence that she had identified the deceased, who was her nephew. The report also revealed that the cause of death was fatal cranial cerebral injuries, which were caused by the discharge of a rifled firearm at a distant range.

[20] Det Sgt Muir testified that he subsequently saw and spoke with Mr Neita at the Hunt's Bay Police Station lock-up. He informed him that he was investigating the death of the deceased. Mr Neita responded, "Officer, mi noh know bout that". He, thereafter, applied for a video identification to be held in respect of Mr Neita and, upon being informed of the result, on 12 April 2011, he arrested and charged Mr Neita for the murder of the deceased.

[21] Corporal Shane Thompson ('Cpl Thompson'), in April 2011, was stationed at the Hunt's Bay Police Station and gave evidence of apprehending Mr Neita. He said that on that date, he was on mobile patrol in the Hunt's Bay Police division when he saw a man who raised his suspicion. He stopped the service vehicle and approached the man, quickly forming the view that the man was very nervous and "uneasy" in his presence. He then asked for his name and address, and the man identified himself as Mr Neita. Cpl Thompson took Mr Neita to the Olympic Gardens Police Station, where another officer, in Mr Neita's presence, informed him that Mr Neita's alias was Lando.

[22] Detective Constable Kascene Hanson ('Det Cons Hanson') was another police officer who was then attached to Kingston MIT and who assisted in the investigations.

On 16 May 2011, Det Cons Hanson along with Det Cpl Gardener went to the Hunts Bay Police Station and spoke with Mr Edwards who was, at the time, in police custody. A question and answer ('Q&A') session was conducted with Mr Edwards in the presence of an attorney-at-law. Det Cpl Gardener questioned Mr Edwards and Det Cons Hanson, as the scribe, recorded the questions and the response of Mr Edwards to each question. A total of 85 questions were put to Mr Edwards and he along with the police officers signed the Q&A document, which was admitted as an exhibit. Mr Edwards gave details about himself and his family as asked. He admitted knowing Lando, Mr Johnson, and the deceased, but he denied knowing anyone called Shamar. He stated that on the morning of 31 March 2011, between the hours of 9:00 am and 9:30 am, he was at 14 Cinnamon Crescent with his sister Anglin, who was combing his hair. He named three other individuals who were also present. He stated that he did not accompany anyone anywhere that day and had only left his sister's house to go to a bar nearby to purchase cigarettes. Mr Edwards further narrated that he did not go to Rosalie Avenue with Shamar, Coolie Man, and Lando that morning. He denied that they were all armed with firearms and fired shots at the deceased, killing him on the spot. Neither had he fired shots at Mr Johnson.

[23] Deputy Superintendent Dave Ricardo Brown ('Dep Supt Brown'), was assigned to the Institute of Forensic Science and Legal Medicine, in April of 2011, as a government ballistic expert. On 4 April 2011, he received two sealed envelopes from a police officer assigned to Kingston MIT, one contained six 9mm Luger expended firearm cartridge casings and one damaged 9mm calibre copper jacketed fire head firearm bullet; and the other contained a damaged 9mm calibre, copper jacketed fire head firearm bullet. Det Sgt Robinson identified one envelope as the one in which he had placed the spent casings and bullet he had collected at the scene. The second envelope was identified by Cons Brown as the one in which he had placed the bullet that was taken from the body of the deceased by Dr Ruwanpura.

[24] Dep Supt Brown testified that he examined and conducted tests on all the items. As a result of these tests and examination, he formed the opinion that the spent casings

and the bullets came from a Smith and Wesson class automatic pistol, but he was unable to say they all came from the same gun.

No-case submission

[25] At the close of the case for the Crown, Mr Lloyd McFarlane, who appeared on behalf of Mr Edwards at the trial, made a no-case submission. He submitted that the prosecution had failed to establish an important element of the offence, namely whether or not Mr Edwards was part of a joint enterprise that led to the death of the deceased. He drew attention to the evidence from Mr Johnson, which placed Mr Edwards approximately two car lengths away, leaning on a gate with nothing in his hands, after Mr Johnson had exited the cookshop. This, he argued, amounted to nothing more than evidence of Mr Edward's mere presence at the scene. Mr McFarlane contended that Mr Johnson's assertion that Mr Edwards must have come there with the other men because he had not been seen before the shooting, amounted to pure speculation on the part of Mr Johnson. Mr McFarlane further contended that Mr Johnson was also surmising when he stated that Mr Edwards ran off with the other men after the voice was heard saying "forward dawg" since he said it seemed like the men ran to the back of premises 59 having not passed where he was at premises 62.

[26] In response, Miss Kathy-Ann Pyke, who appeared on behalf of the prosecution, submitted that there was sufficient evidence for the jury to draw the inference as to what role each person played. She contended that from the evidence, where Mr Edwards was positioned, his role was to watch and guard that side of the cookshop. She further urged that the fact that Mr Edwards ran off with the other men meant it was more than just his presence but that he was a party to the shooting.

[27] Ultimately, the learned judge considered the question of whether a jury properly directed in all the circumstances presented could find that Mr Edwards was present and that his presence was not innocent but that he was a party to the enterprise. He found that this was something open to a jury to find, and consequently, there was a case for Mr Edwards to answer.

The defence

The case for Mr Neita

[28] Mr Neita gave sworn testimony in his defence. He gave evidence that at the time the deceased was murdered, he was assisting his uncle, in his restaurant, with the cooking and washing up. He said he worked at the restaurant from Monday to Sunday, leaving his home at about 7:00 am to arrive at the shop by 8:00 am, and he would remain there until between 1:00 pm and 1:30 pm. On 31 March 2011, he left his home at around 7:00 am to get to the restaurant early. He arrived at 9:00 am and stayed there until about 1:30 pm.

[29] Under cross-examination, Mr Neita admitted that he used to visit Rosalie Avenue and had last been there to attend a "nine night" for a relative of Mr Johnson, someone whom he knew from the community. He only became aware that Mr Johnson had a cookshop in front of 29 Rosalie Avenue while he was in custody. He explained that although he had seen Mr Edwards in the community, he "get fi have a tight relationship" with him since they were in custody. He stated that he did not know that Mr Edwards was known by the alias Gully Rat. He denied being on Beatrice Crescent three days before the date of the incident, waiting on Gully Rat. Although he had previously seen Mr Harris on Beatrice Crescent, he had not seen him there three days before the deceased was killed. He denied being friends with Shamar or Coolie Man. He maintained that he was not with Mr Edwards, Shamar, and Coolie Man and had not attacked and shot the deceased and Mr Johnson.

The case for Mr Edwards

[30] Mr Edwards also gave sworn testimony in his defence. He denied being in the company of persons who, on 31 March 2011, shot and killed the deceased. He admitted that he did a question and answer session with the police and said that the answers that he had given in the interview were true and correct.

[31] Under cross-examination, Mr Edwards admitted knowing Porridge Man from whom he used to purchase porridge up to around three to four years before 2011. He admitted that he used to see Mr Harris around Beatrice Crescent. He denied that he was friends with anyone called Shamar or Coolie Man or knowing anyone called Shamarie. He admitted to knowing Mr Harris but asserted that they were not friends. He maintained that at around 9:30 am, on 31 March 2011, he was at 14 Cinnamon Crescent where he was having his hair combed by someone named Jadean. He stated that this lasted for about an hour and a half. He arrived at Cinnamon Crescent sometime between 7:00 am to 7:30 am, and upon his arrival, there were three other persons there along with Jadean. He denied meeting with Mr Neita on Cinnamon Crescent on 28 March 2011. He admitted that he was called Gully Rat. He denied the suggestion that he was on Rosalie Avenue on the date of the shooting, leaning on a wall, positioned where the short door of the shop was located, and doing so in concert with three men who were attacking the shop. He also denied that he left with the men.

The appeal

[32] Counsel, Mr Oswest Senior Smith ('Mr Senior Smith'), who appeared on behalf of Mr Neita, was permitted to abandon the original grounds of appeal filed by Mr Neita and to argue the supplementary grounds of appeal filed on 21 May 2021, which were as follows:

> "GROUND ONE (1)
>
> The Applicant lost the protection of the Court when the compact disc (CD), along with its contents, was admitted as Exhibit 2 (page 68).
>
> **GROUND 2**
>
> Prejudicial and inflammatory evidence was introduced into the Applicant's trial thereby rendering the proceedings unfair and adverse to a just consideration of his Defence.
>
> **GROUND 3**
>
> The Identification Evidence was insufficient.

GROUND 4

The Prosecution failed to establish the evidentiary foundation pursuant to section 31(D)(c) of the Evidence Act. The statement of Jason Johnson therefore ought not to have been admitted in the Trial.

GROUND 5

The learned trial Judge's directions to the jury were otherwise insufficient in several material respects thereby rendering the conviction unfair and unsafe."

[33] Counsel, Mrs Ann-Marie Feurtado-Richards ('Mrs Feurtado-Richards') who appeared for Mr Edwards was granted permission to abandon the original grounds of appeal filed by Mr Edwards and to argue the amended supplemental grounds of appeal filed on 25 May 2021. Those grounds are set out below:

"**GROUND 1**

The Learned Trial judge erred by admitting into evidence the four (4) statements of Jason Johnson pursuant to an application by the Crown under Section 31D (c) and (e) of the Evidence Act.

GROUND 2

The Learned Trial Judge erred in failing to adequately direct the jury on [the] identification of the Applicant, amounting to a non-direction, on the evidence applicable to recognition of the Applicant.

GROUND 3

The weaknesses in the Summation of the Learned Trial Judge in relation to identification is compounded by the fact that the evidence was not viva voce but, in a statement, so no opportunity for cross-examination.

GROUND 4

The Applicant lost the protection of the Court when the compact disc along with its contents was admitted and tendered into evidence as Exhibit 2.

GROUND 5

Prejudicial and inflammatory evidence was introduced into the Applicant's trial thereby rendering the proceedings unfair and adverse to a just consideration of his Defence.

GROUND 6

The Learned Trial Judge erred by not upholding the No Case Submission as the issue of Joint Enterprise/Common Design was mutually exclusive from the Defence of Alibi contained in the Caution Statement of the Applicant.

GROUND 7

During the course of his summation the Learned Trial Judge erred as it relates to the misquoting and misrepresentation of the evidence to the Jury.

GROUND 8

The Learned Trial Judge's summation was inadequate and failed to assist the jury on several areas of law that they needed to consider to properly evaluate the evidence.

GROUND 9

The Learned Trial Judge usurped the function of the jury when he determined the facts rather than left [sic] the evidence to the jury to conclude.

GROUND 10

The Prosecution [sic] late disclosures throughout the trial amounted to unfairness to the Applicant."

The grounds of appeal common to both applicants may be conveniently grouped and addressed under the following headings:

1. The admission of the statements from Mr Johnson under section 31 of the Act (Ground 4 for Mr Neita and Ground 1 for Mr Edwards)

2. The quality and treatment of the identification evidence (Ground 3 for Mr Neita and Grounds 2 and 3 for Mr Edwards)

3. The admission of the CD (Ground 1 for Mr Neita and Ground 4 for Mr Edwards)

4. Prejudicial evidence (Ground 2 for Mr Neita and Ground 5 for Mr Edwards)

5. The summation (Ground 5 for Mr Neita and Grounds 7, 8, and 9 for Mr Edwards)

The grounds applicable to Mr Edwards only are the following:

1. The no-case submission (Ground 6)

2. The disclosures (Ground 10)

Both attorneys-at-law indicated that they were not pursuing appeals against the sentences imposed on each applicant, acknowledging that the sentences reflected the statutory minimum for the offence.

The admission of statements under section 31D of the Act (Ground 4 for Mr Neita and Ground 1 for Mr Edwards)

[34] It is considered appropriate to first outline the relevant provisions and the evidentiary basis upon which the prosecution relied in its ultimately successful application to have the statements of Mr Johnson admitted into evidence pursuant to section 31D(c) of the Act. The relevant provisions of section 31D of the Act are as follows:

> "31D. A statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –
>
> …

(c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;

(d) cannot be found after all reasonable steps have been taken to find him; or

(e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person."

[35] The prosecution called six witnesses in support of its effort to satisfy the requirements of section 31D(c) and (e) of the Act. Det Cpl Gardner testified about his recording of the first statement from Mr Johnson whilst Mr Johnson was in the hospital on 7 April 2011. Detective Corporal Carlington Simms ('Det Cpl Simms') testified that he recorded a second statement, on 18 April 2012, from Mr Johnson, in which he related concerns for the vulnerability of certain family members. This statement was not one that the prosecution sought to be admitted into evidence. Insp Franklin testified about recording statements from Mr Johnson on 11 April 2011, and 27 May 2011 with respect to the two identification parades.

[36] Miss Novelette King, the mother of Mr Johnson, provided his full name as Jason Anja Johnson, born on 26 June 1985. She testified that, at the time of the trial, Mr Johnson was residing in Trinidad. He had been there for "almost two years and odd" having left the island in about May 2013. Prior to leaving Jamaica, Mr Johnson resided at Rosalie Ave. Miss King stated that she would see him every other month and during holidays, and they maintained regular communication by telephone, sometimes speaking every week. Since he left for Trinidad, she only communicated with him by telephone, but not very often. She stated that she contacted him using a telephone number that began with area code 868. She further testified that Mr Johnson informed her that he left Jamaica due to threats he had received and that he would not be returning to Jamaica because of those threats. She also stated that she had purchased the airline ticket for his travel to Trinidad.

[37] Miss King said she had last spoken to Mr Johnson about two and a half weeks before the trial. At that time, she told him that Det Sgt Muir wanted to contact him, and

she gave him a number to call. Since that time, her efforts to speak to Mr Johnson were unsuccessful as the number she previously contacted him on, rang without answer. She stated that she had no other means of communicating with him and previously, he would return her missed calls. Miss King went on to testify that before the trial commenced, she called Mr Johnson and told him "court is going to start now, so he need to come". He told her that he had informed the police that "his hand was okay", he was not dead, and so he was "not worrying with the case". Further, he said he was getting threats to the effect that, if he came home "what they going to do". He questioned, why he would put his life and his family in jeopardy. She subsequently told the court that Mr Johnson had a large family of about 20 members, which included cousins, sisters, and a son who lived in the general area.

[38] In cross-examination, Miss King agreed that, in her statement, she had stated that Mr Johnson had said that he was "afraid of returning to Jamaica because his friends keep calling him and telling him all kinds of things such as it is better for him to stay where he is, because the man dem want to kill him". She further agreed that in referring to the "threats", she was speaking of the information Mr Johnson claimed to have received from his friends.

[39] Det Sgt Muir testified that, as the investigating officer, he interviewed Mr Johnson at the hospital on the same day of the incident. He stated, he received the statements that were recorded from Mr Johnson from Det Cpl Gordon, Det Cpl Simms, and retired Insp Franklin. Det Sgt Muir said he made efforts to procure the attendance of Mr Johnson to give evidence at the trial. He had "most recently" spoken to Mr Johnson one week prior to the trial, via telephone using a number with area code 868 and also via the video camera application known as IMO. Det Sgt Muir said that Mr Johnson indicated that he did not wish to attend court. He stated that Mr Johnson had expressed that he was fearful due to information he had received from friends in Jamaica, who lived in the same area where he had previously lived. According to him, Mr Johnson said that he heard from his friends, that friends of the accused men had threatened to kill him if he should return to Jamaica. Further, he received information that the men were stating that they heard he

was "linking with" the police, which he understood to mean he was talking to the police. Det Sgt Muir said he called Mr Johnson later that same night and was in the process of recording a further statement from Mr Johnson when the line went dead. In his efforts to continue speaking with Mr Johnson, Det Sgt Muir called all the numbers he had for Mr Johnson, and spoke with Mr Johnson's mother. However, he was unable to make contact with Mr Johnson and had not communicated with him since then.

[40] Det Sgt Muir also gave evidence that during the last conversation with Mr Johnson, he indicated that his immigration status in Trinidad was "not confirmed" and that he was in the process of having "that sorted out". As a result, Mr Johnson said he had serious concerns about going to any police station or the High Commission. Det Sgt Muir also testified that before that occasion, in June of 2014, he had spoken with Mr Johnson, who was then in Trinidad, and he expressed a reluctance to attend court to give evidence. Further, he had no home address or work address for Mr Johnson in Trinidad.

[41] Det Sgt Muir testified that before Mr Johnson left the island, he was introduced to the witness protection programme. However, he refused an invitation to enter the programme, indicating that he wished to be in touch with his family and also that he had family who would be left in the area and whose lives would be at risk as they were reluctant to move. Det Sgt Muir also gave evidence, explaining that the police were not in a position to provide Mr Johnson and his family with continuous, 24-hour protection. He stated that the only feasible measure available was to conduct patrols in the general vicinity.

[42] Under cross-examination, Det Sgt Muir acknowledged that Mr Johnson gave a statement on 18 April 2012, in which he had given no indication that he had been threatened. He agreed that Mr Johnson was not only concerned about or in fear of his own life but also for his relatives in the community. Det Sgt Muir admitted that he had not mentioned to Mr Johnson the possibility of giving evidence by Skype, it was Mr Johnson who suggested it. He further explained that, with respect to the further statement he was in the process of obtaining from Mr Johnson when the telephone

connection was lost, all that was left was for the statement to be signed. This statement was in relation to what Mr Johnson had said he was told by his friends.

[43] Miss Grace Dillon, Deputy Director for Immigration at the Passport Immigration and Citizenship Agency, gave evidence that she checked the records of the Advanced Passenger Information System and ENTEX, the Border Management System. Her checks revealed that one Jason Anja Johnson, born on 26 June 1985, departed Jamaica on 21 May 2013. There was no record of Mr Johnson returning to the country up to the time of her giving evidence.

[44] The learned judge found that the evidence did not meet the requirements of section 31D(e), especially as it related to whether threats were issued directly to Mr Johnson. However, the learned judge was satisfied that the prosecution had succeeded in relation to the requirements of section 31D(c), having established that Mr Johnson was outside of the jurisdiction and that it was not reasonably practicable to secure his attendance at trial.

The submissions

For Mr Neita

[45] The main thrust of the submissions of Mr Senior-Smith was that the prosecution failed to establish the evidentiary foundation to admit the statements of Mr Johnson under section 31D(c) of the Evidence Act. He contended that no reasonable effort was made by the prosecution to secure the attendance of Mr Johnson, who was only contacted two weeks before the trial. He further contended that there was no attempt between 2014 and the time of the trial to communicate with the witness. Counsel submitted that given the failure of the prosecution to expend greater demonstrable efforts to secure the attendance of the witness, it was not possible to distill whether or not the witness could have attended. There was no proof of any peculiar situation precluding the return of Mr Johnson. It was Mr Senior-Smith's submission that the prosecution was obliged to prove to the requisite standard, which was proof beyond a reasonable doubt, that it was not reasonably practicable for Mr Johnson to have been present at court to give oral evidence.

Mr Senior-Smith also submitted that, on the evidence presented, the court was in no proper position to arrive at that conclusion. Counsel relied on **Regina v Adidjah Palmer, Lenburgh McDonald**, **and Nigel Thompson** [2013] JMGCCDD 1.

For Mr Edwards

[46] Mrs Feurtado-Richards contended that the evidence presented by the prosecution failed to show that Mr Johnson was a witness who was outside of Jamaica in circumstances where it was not reasonably practicable to secure his attendance; rather it showed Mr Johnson was a reluctant witness, who did not wish to be located. Counsel submitted that this required the prosecution to pursue the limb under section 31D(d) of the Act, namely that the witness could not be found after all reasonable steps had been taken to find him. She further submitted that where a witness refuses to attend court not solely because he was overseas, but due to having received threats and being in fear, section 31D(c) of the Act would not be applicable.

[47] Counsel argued that the learned judge appeared to have combined the requirements of sections 31D(c), (d), and (e) when he granted the application for the statements of Mr Johnson to be admitted into evidence. She posited that the learned judge appeared to rely on the fact that the witness had refused to enter the witness protection programme and could not be compelled to attend court, as sufficient for establishing the requirements under section 31D(c) had been satisfied. She argued that the steps taken to secure Mr Johnson's attendance were inadequate and the efforts were insufficient. As a result, she maintained that the prosecution had not satisfied the requirements under the Act and the statements were therefore inadmissible. In support of her position, counsel referenced **Carlington Tate v R** [2013] JMCA Crim 16, **Rudolph Fuller v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 55/2001, judgment delivered 19 December 2003, and **R v Castillo and Others** [1996] 1 Cr App R 438.

[48] Mrs Feurtado-Richards also argued that the learned judge further erred when he refused the application for the statements to be excluded under section 31L of the Act,

as its inclusion would be unfair to Mr Edwards. She noted that this conclusion was based on the learned judge's view that the prejudicial effect of the statement did not outweigh its probative value.

For the Crown

[49] Mr Andre Wedderburn, on behalf of the Crown, submitted that the learned judge properly addressed his mind to all the evidence and did not err when he ruled that the statements were admissible. Counsel noted that the learned judge addressed each requirement the prosecution needed to satisfy as outlined by the authorities. The learned judge was correct in accepting that Mr Johnson was outside of the jurisdiction, and no real issue was taken with this. Counsel contended that it was clear that the witness was, from the outset, reluctant to attend court, and this meant that it was more than just an issue of cost and arrangement of travel which had to be considered when determining the reasonableness of the steps taken to secure his attendance. Mr Wedderburn submitted that the learned judge's reference to the witness protection programme was not solely in the context of addressing the threats or fear on the part of Mr Johnson, but rather as part of a broader consideration of the options available to secure the witness' attendance. Reference was also made to **Carlington Tate v R** and **Rudolph Fuller v R**.

Discussion and disposal

[50] In **Dwayne Badchkam v R** [2012] JMCA Crim 13, Hibbert JA (Ag) (as he then was) stated, at para. [14], that to satisfy the requirements of section 31D (c) of the Act, the prosecution was required to prove: "a) that direct oral evidence of what is contained in the document would be admissible; b) that [the witness] was outside of Jamaica; and c) that it was not reasonably practicable to secure his attendance" as a precondition to the statement of an absent witness being admitted into evidence.

[51] In **R v Castillo and Others**, the English Court of Appeal examined the meaning of "reasonably practicable" in the context of applying section 23 of the United Kingdom Criminal Justice Act, 1988, which contains provisions similar to section 31D (c) of the Act.

In **Carlington Tate v R**, this court also had the opportunity to consider what was meant by "reasonably practicable" as used in the Act and had regard to the observations of Stuart-Smith LJ in **R v Castillo and Others**. At paras. [15] and [16], Hibbert JA (Ag) explained as follows:

> "[15] Stuart-Smith LJ, in delivering the judgment of the Court of Appeal referred to the following passage in the judgment of Beldam LJ in **Maloney** (unreported) 16 December 1993:
>
> > 'The word 'practicable' appears in many statutes as a qualification of duties or obligations imposed on those required to carry out the relevant acts by the statute. It is to be noted that in section 23, the statements referred to may be statements of the prosecution or of defence witnesses, and the obligation which normally attaches to those who are presenting cases in the Crown Court is to secure, so far as possible, the attendance of witnesses to give evidence orally in court, but the word 'practicable' is not equivalent to physically possible. It must be construed in the light of normal steps which would be taken to arrange the attendance of a witness at trial. Reasonably practicable involves a further qualification of the duty to secure the attendance at trial by taking the reasonable steps which a party would normally take to secure a witness's attendance having regard [sic] to the means and resources available to the parties.' (Page 442 paras C- E)
>
> [16] In applying what was stated by Beldham LJ, Stuart-Smith stated:
>
> > 'Therefore, in our judgment the mere fact that it is possible for the witness to come does not answer the question. The judge has to consider a number of factors. First, he has to consider the importance of the evidence that the witness can give and whether or not it was prejudicial, and how prejudicial it would be to the defence that the witness did not attend…
> >
> > Secondly we have to consider the expenses and inconvenience of securing the witness's attendance…
> >
> > Thirdly, the judge has to consider the reasons put forward as to why it is not convenient or reasonably practicable for the (witness) to come. This is a question of fact, and this Court does not lightly interfere with findings of fact by the trial judge.'"

[52] In **Carlington Tate v R**, reference was also made to **Rudolph Fuller v R**. In that case, evidence was given that a witness who had testified at the preliminary enquiry had subsequently left the country to attend university. Her sister testified that she did not know the address or telephone number for the witness, although they had been in touch several times. The sister also indicated that she did not know of the witness returning to Jamaica in the near future, although she was aware there was communication with the witness about her attending court. Panton JA (as he then was), in delivering the judgment of the court, noted that there were no compulsory processes available to the prosecution to return a witness who was outside of the jurisdiction and that the Supreme Court did not have extra-territorial jurisdiction in that regard. In those circumstances, it was held that the learned trial judge was correct in holding that it was not reasonably practicable to secure the attendance of the witness at the trial.

[53] In the instant case, there was no issue taken with the fact that Mr Johnson was outside of the jurisdiction. The evidence accepted by the learned judge was that Mr Johnson was not prepared to voluntarily return to Jamaica out of fear for his life and concern for his family members' welfare, despite being offered protection under the witness protection programme. That being the case, the learned judge had to consider whether there existed any normal processes which could have been used to secure the attendance of the witness given his reluctance to return to Jamaica and to attend court. He properly found that there were none. In those circumstances, questions of whether it was financially feasible to secure Mr Johnson's attendance or whether the assistance of the foreign state or this government's representative in Trinidad would secure Mr Johnson's attendance were academic.

[54] The assertion that the prosecution and the learned judge focused on section 31D(d), rather than section 31D(c), is not supported by the record. During her submissions in the *voir dire*, Miss Pyke indicated that the application for the admission of the statements was being made under section 31D(c) and also (e) of the Act. She pointed to the evidence that the witness had expressed to his mother his state of fear. She proceeded to address the requirements under section 31D(e), namely that the witness

was kept away from the proceedings by threats of bodily harm, and that no reasonable steps could be taken to ensure his protection. However, it is noteworthy that reliance on this section was ultimately unsuccessful.

[55] The evidence revealed that Det Sgt Muir had been in contact with Mr Johnson in 2014, and had also reached out to him shortly before the trial to secure his attendance at the trial. Mr Johnson's mother had also been in communication with Mr Johnson, and she too had spoken with him about attending the trial. Section 31D(c) of the Act does not require a demonstration of reasonable steps taken to secure the attendance of the witness, but rather, whether it was reasonably practicable to secure his attendance. Given Mr Johnson's expressed unwillingness to voluntarily return to Jamaica and the reason for that reluctance and his further refusal to join the witness protection programme, the learned judge correctly concluded that these factors were sufficient to conclude that it was not reasonably practicable to secure Mr Johnson's attendance at the trial. The ultimate revelation that there was no further communication with Mr Johnson, despite efforts, therefore, did not stand on its own but was the culmination of his expressed intention or refusal to participate in the trial. In that event, the only likely option to secure the attendance of Mr Johnson at the trial was by some coercive means which were not at the disposal of the court nor available to the prosecution. There is no merit to the complaint that the learned judge erred in admitting the three statements from Mr Johnson into evidence.

Section 31L

[56] It is to be noted that Mrs Feurtado-Richards also mentioned that the learned judge should have exercised his discretion under section 31L of the Act to refuse to admit the statements as the prejudicial effect of the statements outweighed their probative value. That section gives the court the discretion to exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value. It is well-established that evidence that is probative of guilt would inherently be prejudicial, and as such, this by itself should not be a basis to exclude statements. Prejudicial evidence, even

if highly prejudicial, may be admitted once it is relatively more probative. . The judge's decision to permit the admission of such evidence must be guided by fairness, ensuring that the accused receives a fair trial.

[57] One of the pronouncements on the issue of the exclusion of evidence where its prejudicial effect outweighs its probative value, and the approach to take once such evidence is admitted, was in **Steven Grant v The Queen** [2006] UKPC 2. Lord Bingham, delivering the judgment of the Board, stated the following at para. [21]:

> "[21] Lastly, and very importantly, the law of Jamaica, properly applied, provides adequate safeguards for the rights of the defence when it is sought to admit a hearsay statement:
>
> (1) …
>
> (2) …
>
> (3) Section 31L acknowledges the discretion of the court to exclude evidence if it judges that the prejudicial effect of the evidence outweighs its probative value. In *R v Sang* [1980] AC 402, some members of the House of Lords (notably Lord Diplock at pp 434, 437 and Viscount Dilhorne (pp 441-442)) interpreted this discretion narrowly, and in *Scott v The Queen* [1989] AC 1242, 1256-1257, the Board appears to have accepted that reading. It is not, however, clear that the majority in *R v Sang* favoured a similarly narrow interpretation (see Lord Salmon at pp 444-445, Lord Fraser of Tullybelton at p 449 and Lord Scarman at pp 453, 454, 457). In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. Such a discretion has been recognised by the Court of Appeal in *R v Donald White* (1975) 24 WIR 305, 309, and *R v Michael Barrett,* above. It has been recognised by the Board in *Scott v The Queen,* above, pp 1258-1259 and *Henriques v The Queen* [1991] 1 WLR 242, 247: both these appeals concerned the admission of depositions, but the need for a judicial discretion to exclude is even greater when the evidence in question has never been given on oath at all. In England and Wales, the discretion has been given statutory force... Conscientiously exercised, this discretion affords the defendant an important safeguard.

> (4) The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted: see, for example, *Scott v The Queen,* above, p 1259; *Henriques v The Queen,* above, p 247. It is not correct to say that a statement admitted under section 31D is not evidence, since it is. It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful, to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only defence counsel) should direct the jury's attention specifically to them. It does not of course follow that the omission of some of these directions will necessarily render a trial unfair, but because the judge's directions are a valuable safeguard of the defendant's interests, it may." (Italics as in original)

[58] There is no demonstrable basis to interfere with the learned judge's exercise of his discretion in admitting the statements. There was sufficient evidence presented by the prosecution to provide the foundation necessary for the admission of the statements. Once admitted, the learned judge gave the required directions and warning to the jury as to how they should approach the hearsay evidence. Indeed, there is no complaint as to the adequacy of these directions. The learned judge did not err in admitting the statements or in the directions given relative to their admission. Therefore, there is no merit to Ground 4 for Mr Neita and Ground 1 for Mr Edwards.

The quality and treatment of the identification evidence (Ground 3 for Mr Neita and Grounds 2 and 3 for Mr Edwards)

The submissions

For Mr Neita

[59] Mr Senior - Smith submitted that the identification evidence was insufficient, weak, and unreliable in relation to Mr Neita. Counsel contended that the evidence elicited from Mr Harris was inherently implosive as he was self-contradictory. Counsel noted that Mr Johnson purported to have seen Mr Neita for more than three seconds, however, his gaze was split between the person he said was Mr Neita and Coolie Man. Counsel argued that, in any event, Mr Johnson's evidence did not establish more than a fleeting glance at the shooters, especially given the terrifying, dramatic, and injurious circumstances of the incident. The learned judge, it was submitted, ought to have withdrawn the case from the jury. Reliance was placed on **Regina v Carlton Taylor** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 57/1999, judgment delivered 20 December 2001.

[60] Mr Senior-Smith further submitted that the learned judge failed to conduct a proper analysis of the identification evidence and did not adequately assess the inherent weaknesses in the prosecution's case. Further, counsel argued these weaknesses were not brought to the jury's attention. Conversely, counsel also argued that the weaknesses were not presented to the jury in a structured or coherent manner. He concluded that taken as a whole, the directions on identification were bereft of a balanced approach and failed to apply principles as set out in **Regina v Turnbull and Another** ('**Turnbull**') [1977] QB 224 in a pragmatic way.

For Mr Edwards

[61] Mrs Feurtado-Richards submitted that recognition was a critical issue for the jury and that the learned judge failed to adequately direct the jury on the evidence relative to this. Counsel acknowledged that recognition may be more reliable than identification of a stranger and noted that the learned judge correctly pointed out to the jury that mistakes

can be made in recognition cases. She, however, contended that the learned judge failed to assess the weaknesses in the evidence to determine the witness' ability to properly discern his assailant's face and hence the correctness of the identification. She further submitted that Mr Johnson's ability to recognise Mr Edwards may have been impaired by the traumatic circumstances and the fleeting nature of the observation of the several men in the yard, being less than one minute. She posited that it was the learned judge's responsibility to do more than replay the evidence of the witness. Her further argument was that by reiterating Mr Johnson's evidence, without properly analysing the case for the jurors, the jury was not given a proper understanding of the dangers of relying on even an honest witness. Counsel argued that the learned judge improperly placed undue reliance on the witness' prior knowledge of Mr Edwards, and this was fatal.

[62] Mrs Feurtado-Richards submitted that the evidence was not only tenuous but was also uncorroborated. She contended that the learned judge did not attempt to indicate the exceptional circumstances that would permit the jury to rely on the witness' uncorroborated evidence of recognition in light of the clear danger that existed. In counsel's view, the weaknesses in the summation were further compounded by the fact that the evidence was not given *viva voce* but contained in a statement with no opportunity for cross-examination.

[63] Counsel submitted that the learned judge's directions were disjointed and incoherent, occurring at several places in the summation rather than in a clear, continuous manner. She argued that this approach could have resulted in an inconsistent verdict and concluded that, given the weaknesses of the visual identification evidence, the conviction was manifestly unreliable and could not be supported by the weak evidence. Reference was made to **Turnbull** and **Junior Reid v The Queen** [1990] 1 AC 363.

For the Crown

[64] Mr Wedderburn submitted that the learned judge correctly recognised that identification was the central issue in this and directed the jury in accordance with the

Turnbull guidelines. It was further submitted that there is no prescribed way in which a judge should direct the jury as long as the directions are sufficient to allow them to determine the issues. Counsel further noted that the learned judge transitioned from general directions before returning to the identification evidence in relation to each applicant. Reference was made to **Anand Mohan Kissoon and Rohan Singh v The State** (1994) 50 WIR 266, **R v Stephen Lawrence** [1982] AC 510, and **Adrian Forrester v R** [2020] JMCA Crim 39.

[65] In relation to Mr Neita, Mr Wedderburn pointed out that Mr Harris testified that he was able to recognise Mr Neita over a short distance after the shooting had subsided. Although it was for what may have been for a short period, it was a matter for the jury to determine if, in the circumstances, Mr Harris correctly recognised Mr Neita. Counsel submitted that the learned judge adequately and properly left the issue for the jury's determination. Reference was made to **Jerome Tucker and Linton Thompson v Reginam** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered 26 February 1996.

[66] In relation to Mr Edwards, Mr Wedderburn acknowledged that Mr Johnson spoke of recognising him in circumstances which may have amounted to a fleeting glance, but it was over a short distance and after the shooting had subsided. Counsel noted that Mr Johnson appeared to have had two opportunities to observe Mr Edwards: first, when he was standing nearby, and later, when he was seen running away. Mr Wedderburn submitted it was a matter for the jury and they were properly and fairly directed on how to assess the identification evidence and specifically alerted to the fact that Mr Johnson was not present to be cross-examined.

Discussion and disposal

[67] This court has, in several cases, consistently affirmed that the principles set out in the seminal case of **Turnbull** represent the proper approach in cases that depend on visual identification. Lord Widgery CJ, at pages 551-554, set out what has been accepted

as the **Turnbull** guidelines. For the purposes of this discussion, it is necessary to review the following, as stated at pages 551-552:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reasons for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can be all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made… Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence. Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

[68] It is well settled that after the Crown's case, the trial judge is to assess whether the material upon which the purported identification was based was substantially sufficient to obviate the risk of mistaken identification (see para. 35 of **Herbert Brown and Mario McCallum v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and 93/2006, judgment delivered 21 November 2008). The trial judge is obliged to withdraw the case from the jury's consideration if the quality of the identification evidence is poor. In the instant case, the shooting took place shortly after 9:00 am, hence the incident took place in daylight; there was no issue taken with the sufficiency of the lighting. The photographs of the scene were available to assist in assessing the distances over which the witnesses, according to their accounts, were able to observe the attackers. This is a case of recognition, and, as such, it is accepted that the length of time for observation need not be as long as in a case where the assailant was previously unknown to the witness at the time of the offence (see **Jerome Tucker**

and Linton Thompson v Reginam). Accordingly, the learned judge was justified in treating the issue of identification as a question properly to be determined by the jury in the circumstances of the case.

[69] A careful reading of the summation reveals that the learned judge's directions to the jury were in accordance with the **Turnbull** guidelines. He pointed out that the case against both men depended wholly or to a large extent on the correctness of the identification. He warned the jury of the special need for caution before convicting either of the men solely on the evidence. He noted the possibility of mistakes being made in identification by honest and convincing witnesses; and even where the persons are known to each other and the identification involved recognition. He warned the jury that because of the possibility of mistaken identification, they should examine the identification evidence with great care. The learned judge then directed the jury to look at the circumstances under which both the applicants were identified. He pointed out that these circumstances related to how long the witness had the person under observation, the distance between the witness and the perpetrators, the nature of the lighting, whether the persons were known to each other, and what if any description the witness gave of the perpetrator. There can be no fair criticism of the learned judge's summation in terms of the general directions that were given.

[70] In reviewing the evidence, the learned judge adopted the **Turnbull** guidelines, demonstrating their relevance to the evidence. From the outset of the summation, he indicated that he would not merely be reciting the evidence but would review the evidence in a way that told the story of the events of that day. And he did just that. He also directed the jury to consider all the evidence when determining which facts they found proven. He also correctly directed them that if in his review he failed to mention anything that they considered important they should not ignore it. The submission that the summation was disjointed stems from the fact that the learned judge did not merely recite the evidence witness by witness, but instead analysed the evidence by juxtaposing the evidence of one witness with that of another. In some instances, he highlighted aspects of the physical layout of the scene from the photographs. Notably, the learned

judge reviewed the evidence as it related to each applicant separately, completing his review of one before proceeding to the other.

[71] Although the learned judge did not explicitly use the word "weakness" in his summation, he highlighted for the jury's careful consideration the areas of the prosecution's case that could have affected the reliability of the identification evidence. In relation to Mr Harris, the learned judge noted that he stated in examination-in-chief that he saw two persons, one clearly, 'about to go around the house'. The learned judge urged the jury to consider "what time [Mr Harris] [would] have had to be able to recognise the persons whom he said he saw". He then instructed the jury to also note the evidence that the men were seen going behind the cookshop and to ask themselves the following:

> "...What part of these persons would then be turned toward this man, if he said they did not look back, and they were going toward the corner of the house. And you remember he showed the picture where the house was.
>
> If they were going toward the corner of the house, would they been [sic] going away from Rosalee Avenue [sic] and Beatrice Crescent, or would they be approaching. What part of him could have been seen at that time, and bearing in mind he said he could see one clearly.
>
> He said they were walking toward the fence. When they go [sic] behind the house, he could not see them no more."

[72] The learned judge proceeded to emphasise certain aspects of Mr Harris' testimony, particularly regarding the identification of Mr Neita. He stated:

> "Now, he says the [applicant] Lando is Orlando Neita and he comes from the community and he says how he come [sic] to know him; said he saw Lando's face and Lando was bleaching; said he was at the front of the gate where he saw Josh. So that is where he said he was when he saw [the deceased], but remember -- in front of the gate where Josh was. Remember you had the diagram that Josh was somewhere up Beatrice Crescent, so what he seems to be saying here, is that he stayed there and was able to see the persons going around the corner and couldn't see their faces. So it's a matter for you, Madam Foreman and Members of the jury. And remember he

> pointed out the distance from about there to across to the car park. You will have to see what you make of it. He said he looked at his face for about six seconds. Now, these are persons he said when he saw them first they were going around a house corner, but he says he saw their faces for six seconds. The same persons who he said he could see one clearly, but he couldn't see the other one clearly, but now he is saying he saw their faces for about six seconds."

The learned judge clearly alerted the jury to the weaknesses in the identification evidence, emphasising the need for careful consideration.

[73] The learned judge also highlighted a possible inconsistency in the evidence given by Mr Harris, who agreed that he had told the police, in his statement, that he had seen two men running in the yard behind the cookshop, but in his testimony, he said the men were walking at a fast pace. The learned judge directed the jury as follows:

> "How does it affect your view of the witness? Is he a person who you can believe in all the circumstances? He said something in 2011, just at the time when the incident took place, but now you might well think he is saying something completely different. Is it that he was making a mistake then? Is he making a mistake now? Can you believe what he is saying? These are matters for you to consider."

[74] Notably the learned judge also pointed to the fact that Mr Harris admitted to not naming Mr Edwards as the man he saw with Shamarie in his statement, nor did he mention seeing anyone, despite testifying to that effect. The learned judge then posed the question, considering the possible inconsistencies: "did [Mr Harris] strike you as somebody who was speaking the truth?"

[75] In regards to Mr Johnson, the learned judge began the review of the evidence outlined in his statement, by reminding the jury that they were deprived of the opportunity to assess his demeanour. The learned judge also noted, correctly, that the statement was not given under oath and had not been subjected to cross-examination. As he read the statement, he urged the jury to listen carefully to see "whether or not it is in sync with [the] other evidence, or if there's a difference". He proceeded to point out the conditions that the jury should consider in relation to the identification. He repeated

the extensive evidence Mr Johnson gave as to his knowledge of the applicants. The learned judge pointed out the time of day that Mr Johnson stated the incident occurred, noting that the sun was shining brightly. Regarding Mr Johnson's opportunity to observe the perpetrators, the learned judge highlighted a potential discrepancy between the evidence about the location of the spent casings and what Mr Johnson had stated when he said the following:

> "Now, you heard Sergeant Robinson indicate where he found spent shells. Did he find any on Rosalie Avenue? Did he find any on Beatrice Crescent? He doesn't speak of finding any there. Was there any shooting going on while Shamarie was at Rosalie Ave or Beatrice Crescent? These are matters that you have to consider, because when you remember Sergeant Robinson's evidence, he said that two shells were found at the back of the cook shop, one was found in the driveway of 59 and the other three were found inside of the cook shop. So you would have to look at that to see whether or not there is a conflict here between the other evidence and what Mr. Johnson said he saw. Is it that Mr Johnson didn't see all these things that he was speaking of, or is it that shells -- the shots were fired before he came in? Because he seems to give the impression, but these are matters for you, that it's after he came through the gate that he was firing at [the deceased]. So this is something that you have to look at, because you have to determine whether or not from this you can say that there is any reliability or credibility to be attached to the statement. These are matters for you, bearing in mind that it was not under oath, you didn't see the maker, he was not subject to cross-examination, but this is what he said."

[76] The learned judge also directed the jury to consider the time that Mr Johnson had for viewing the perpetrators. He said the following:

> "[Mr Johnson] said the whole incident lasted for less than a minute.
>
> Now, what incident do you think he is talking about? You might well think that the incident that concerns us, started when the first shooting started at the back of the premises. That is before he even looked out and saw who he said was 'Lando' and 'Coolie man'.
>
> And it would have ended, sometime later, when he said he heard certain words used, and the shooting stopped, and the men left.

> So, he said all that incident lasted for less than a minute.
>
> So again, you would have to look at any opportunity that he could have had to see and be able to identify persons.
>
> Remember, the first person he said he saw and was able to recognise was 'Lando'.
>
> Remember, he said 'Lando' was very near to him. They are climbing up on the wall and the only thing that separated them was the wall.
>
> Now remember he said he had known 'Lando' for some time, and it is not disputed by the defence that they knew each other for sometime.
>
> He is saying that he saw this person, recognised him, and then they ran.
>
> So you have to look at that. Was that sufficient time for him to be able to see and recognise somebody he is accustomed to seeing…
>
> Now, while he was running across the street, there is nothing to say that he was looking behind him. All he said, he ran.
>
> So you have to look at that, Madam Foreman and members of the jury, because he is saying that it was at this stage that he was able to see and recognise Mr. Edwards, leaning against this wall. So, these are matters that you have to consider.
>
> You have also to consider where he said he saw Mr. Edwards, was on the opposite side of the shop from where he exited. These are also matters that you have to consider…"

[77] The learned judge then went on to highlight Mr Johnson's statement regarding his account of how he was able to see Mr Edwards, comparing it to the photographs of the location, in an entirely fair manner. The learned judge said:

> "Now, you have evidence of where Rosalee [sic] Avenue is.
>
> Now, you have to look at that carefully, Madam Foreman and members of the jury. [Mr Johnson] exited the shop from the gate or the doorway close to 57.

> So, if he is running from 57, and 62 is right across, he would be running, you might well think, a matter for you, straight across the road to 62.
>
> Now, if this is the shop, (indicating), Madam Foreman and members of the jury, say 59 is over here, (indicating), 62 is over here, and he is running from here (indicating), across to here (indicating), would he have been able to see somebody over here (indicating) and be able to recognise that person who is standing, leaning against the wall at the back of the cookshop.
>
> You might well think, but it is a matter for you that the cookshop would have been between him and whoever, would have been anybody who might have been at the gateway to 59. But he says he was able to see and recognise 'Gully rat', leaning at 59. So you would have to look at that again, Madam Foreman and your members.
>
> Does that photograph that you have seen support his ability to see? Was the cookshop between him and where he said he saw this man leaning against the wall. These are matters for you, because he ran straight across."

[78] The learned judge, in continuing to read the statement from Mr Johnson, added at appropriate places a reminder of other issues that the jury should consider. For example, in relation to Mr Neita, he invited the jury to consider the distance between the two men, whether they were known to each other. In relation to Mr Edwards, the learned judge invited the jury to question the positioning of the men and whether Mr Johnson could have seen somebody leaning on the wall at the gate of number 59. Another important matter the learned judge urged the jury to consider was in relation to Mr Johnson's assertion about the men running off after the shooting. The learned judge said:

> "And [Mr Johnson] said further, that: 'I would say that they escape [sic] back on the same premises, because when I ran on to premises Number 62 Rosalie, I did not see them run pass [sic] the premises at no time. It seems as if they ran back on premises Number 59'.
>
> Now again, Madam Foreman and Members of the Jury, you would have to see what you make of it. How do you interpret this? Counsel for the defendant is saying, when he says it seems, it means that he didn't actually see. He is presuming so, because he didn't see them

> run pass in front of 62, so he presumes that they went back to 59. If you agree with that … then, issue would be taken with something that he says later, because later he says that [Mr Edwards] went back with them. Now, if he didn't see them going back,…, could he see how many of them went back together? If he didn't see the person he calls Gully Rat then, if you accept what counsel is saying, that he didn't see anybody running back in, therefore the only time he would have said, or you would have accepted that he said that he saw Gully Rat was leaning against the wall, but then again counsel for the defendant is saying he couldn't see anything because of where this column was. These are matters that you have to consider."

[79] After the learned judge completed the reading of Mr Johnson's statement, he remarked:

> "So that is his evidence… Remember I told you how to look at it, but the question you ask yourself, what weight do you attach to it. Do you find it to be truthful and credible? Do you find it to be untruthful and/or not credible? Do you find it to be reliable? Because that is important, because as I told you ...when you are looking at the evidence of identification, even an honest and apparently truthful witness can also be mistaken, so you have to look at the evidence and see whether or not it is reliable. Can you say that the evidence of identification as it relates to Mr. Johnson's statement, bearing in mind that it was not sworn, you didn't see him, he was not subject to cross-examination, would be considered truthful and reliable?"

There was sufficient evidence from Mr Harris regarding his identification of Mr Neita as one of the men who came to the cookshop that morning as a participant in the attack, which resulted in the death of the deceased. Additionally, Mr Johnson's statement provided sufficient evidence concerning his identification of both applicants. There was no requirement for the evidence from the statement to be corroborated, nor was the learned judge required to give a special warning regarding the lack of corroboration. The learned judge appropriately left the issue of the correctness of the applicants' identification to the jury and provided them with the appropriate directions in keeping with the **Turnbull** guidelines. There is no discernible error in the directions given by the learned judge, which amounted to a non-direction or misdirectio. As a result, the grounds

criticising the identification evidence and the manner in which the learned judge addressed it are without merit. Ground 3 for Mr Neita and Grounds 2 and 3 for Mr Edwards fail.

The admission of the CD (Ground 1 for Mr Neita and Ground 4 for Mr Edwards)

The submissions

For Mr Neita

[80] Mr Senior-Smith pointed out that the CD admitted into evidence contained 180 photographs. He contended that this constituted a clear breach of a court-sanctioned agreement, which stipulated that 30 edited photographs should be included. Counsel further contended that the learned judge did not seem to have had an opportunity to view the extent of the 180 photographs in order to "[determine] their appropriateness for exposure to the jury". He submitted that equally of concern is the fact that there were no directions cautioning the jury about the nature of the photographs. Mr Senior Smith posited that whilst it was certain that photographs were taken of the deceased's body, there was no certainty that these photographs were not included among those on the CD. Thus, counsel concluded, Mr Neita was unfairly exposed to a risk of conviction.

[81] In his submissions regarding the alleged introduction of other prejudicial and inflammatory evidence, Mr Senior Smith argued that the evidence disclosed that images of the deceased's body included one of which was a "zoom-up shot". He argued that this was such an "egregious departure" from the standard procedure that it could only have led to a "grave and incurable inflaming of the jury".

For Mr Edwards

[82] Mrs Feurtado-Richards argued that despite the assurances that the photographs would be edited such that only the relevant ones would be shown to the jury, this was not done. Instead, all 180 photographs were tendered and admitted into evidence. She submitted that although the learned judge attempted to contain the issue of the graphic images being shown to the jury, he did not give any directions and/or warnings about

the nature of some of the photographs. As a result, she contended that Mr Edwards was prejudiced, rendering his conviction unsafe. She relied on the case of **David Russell v R** [2013] JMCA Crim 42 for this point.

For the Crown

[83] Counsel for the Crown countered by stating that there was a clear indication of two CDs, one of which was an edited version. It was pointed out that the prosecution and the defence had arrived at an agreement to omit prejudicial photographs and this led to the creation of the edited version which was eventually admitted into evidence. Mr Wedderburn noted that there was no indication of any objection from either counsel who appeared for the applicants at the time of the admission. Further, it was submitted that while it appeared that there were photographs of the deceased body, there was nothing on the record to suggest that these photographs depicted the body in any distressing manner that would have inflamed the jury. It was, therefore, argued that any aspersion on the admissibility of the photographs on the edited CD would fall within the realm of speculation. In any event, the learned judge gave sufficient general warnings to the jury that they should not have sympathy for the deceased or his relatives during their deliberations.

Discussion and disposal

[84] Counsel for both applicants complained that the applicants were prejudiced by the admission of the entire CD with all the photographs into evidence, given the fact that some of the images were graphic and inflammatory in nature. This was although the prosecution and defence had previously agreed on which images would be entered into evidence. The first issue that needs to be addressed is understanding what the CD, which was ultimately admitted into evidence, contained. Det Sgt Robinson was the officer who took the photographs and prepared the CD. It is noted that before he began his testimony, Mr McFarlane indicated that Det Sgt Robinson "apparently will be dealing with certain images" and the defence was not in possession of them. Court was subsequently adjourned at 11:36 am for the learned judge to meet with counsel so that they could do

what the learned judge described to the jury as "sort out things" so that the trial could "move smoothly". The following morning, Det Sgt Robinson testified to taking photographs which "captured a section of Rosalee [sic] Avenue, this include [sic] the cookshop, the inside, inside and out, section of Beatrice Crescent, to include the deceased's body,…and the burnt cigar and other items". He went on to describe how he created a CD with some of the photographs taken.

[85] The following exchange then took place between Det Sgt Robinson and Miss Pyke:

> "Q. Were you asked to do anything in relation to those Images, since the trial began?
>
> A. Yes, ma'am.
>
> Q. And, did you place any Image [sic], do anything with any Image, at the request of the Prosecution and the defence?
>
> A. Yes, my Lord, the Prosecution and the defence agreed to make an edited copy or edited copies of those Images, and place them on Five Disks, which I did.
>
> …
>
> His Lordship: Miss Pyke, you had asked him earlier if he had prepared the C.D. [sic] which contained some of the photographs that you had originally taken. Isn't that what you said?
>
> THE WITNESS: Yes, sir.
>
> MISS PYKE: Just to indicate for the record that the position has been revised and there has been an agreement on what would be contained on that C.D. An agreement between the Prosecution and the defence."

Later, when asked if he had that CD with him, Det Sgt Robinson responded "the edited version". He further explained that the CD had been prepared on that same day and confirmed that the CD he had contained some of the images, specifically, those he had been asked to include. The application was then made for the CD (prepared on 23 September 2015), the date on which Det Sgt Robinson gave his evidence, of the scene at Beatrice Crescent to be admitted as an exhibit. Counsel for both applicants raised no

> objections, and up to this point, there had been no challenge to Miss Pyke's assertion that there had been an agreement on what would be included on the CD."

[86] Once admitted, the CD was inserted into the appropriate device so that its contents could be displayed to the jury. Miss Pyke attempted to show the images in a non-sequential manner, and the learned judge suggested that she present them in order rather than "jumping" between them. She, however, resisted this suggestion, indicating that she did not need the jury to see all of them at that time. She was satisfied that the CD in its entirety could be used by the jury at a "certain time" and maintained that all of the images were relevant but some were "directly necessary to be viewed for examination-in-chief". A discussion then took place between the learned judge and Miss Pyke as to whether all the images that had been agreed upon should be shown to the jury at that time. It was revealed that there were about 183 photographs on the CD. From the ensuing discussion, it became clear that during a meeting with the learned judge and all counsel the day before, Miss Pyke indicated she only needed 36 photographs. She now stated that she had however requested that all those she thought of relevance be placed on the CD. Mr McFarlane indicated that when he arrived at court that morning, counsel who appeared for Mr Neita, Miss Zara Lewis, gave him "a list of images the prosecution said would be excluded and [he] said fine". Counsel said he took the opportunity to check those at the time. He then stated he "did not know there were two takes [sic] of a hundred and odd". Miss Pyke maintained that she had "only edit [sic] out those that had a particular prejudicial effect". After further discussion, the learned judge permitted Miss Pyke to enquire about specific images, but 180 remained as the exhibit.

[87] From this sequence of events, it is apparent that the learned judge acquiesced to the admission of the CD with over 180 images without having seen them. However, Counsel for the Crown is correct that, contrary to the submission that no editing was done, the CD that was admitted into evidence was said to have been excised of the more inflammatory photographs. Miss Pyke was permitted to show to the jury several images depicting the scene along Rosalie Avenue, Beatrice Crescent, and the cookshop, with

crime markers highlighting areas where spent casings were found. Additionally, two photographs were shown that depicted the body of the deceased from different angles along the roadway. Significantly, there were no objections from either defence counsel to this, nor was Det Sgt Robinson asked any questions in cross-examination relating to the photographs he had taken or the CD that had been admitted in evidence.

[88] In **Michael Asserope v R** [2012] JMCA Crim 12, this court considered the question of whether the learned trial judge erred in not excluding the photographs of the crime scene and the body of the deceased, weighing the potential probative value of this evidence against its prejudicial effect. Panton P, writing on behalf of the court, affirmed that the authorities make it clear that it is in the judge's discretion to exclude admissible evidence if, in his opinion, the prejudicial effect outweighs its probative value. The facts of that case are as follows: the deceased was carnally abused and murdered, and the photographs presented were gruesome and graphic. This court took the opportunity to view the photographs and found that they not only confirmed the nature of the case but also presented a clear picture and understanding of the physical location and the circumstances of the killing. The learned trial judge made it clear to the jury, with appropriate instructions, that they should be calm and not be aghast at the pictures nor "get in any hype" over them. They were told to merely look at them and consider them in conjunction with the evidence. This court concluded that the learned trial judge could not be faulted for admitting the photographs.

[89] In the instant case, this court did not have the opportunity to view the photographs in issue. Although Mrs Feurtado-Richards submitted that three photographs of the body were highlighted by Miss Pyke during the examination-in-chief, our review of the transcript suggests that there were two. One of these was a photograph of the area near the entrance gate at 59 Rosalie Avenue, which was taken to capture a pair of black slippers. The following exchanges between Miss Pyke and Det Sgt Robinson indicated what was captured in the other two photographs:

"Q. Look at that, in the very centre of the picture, you notice anything? What does it capture, the road first of all?

A. This image captured a section of Beatrice Crescent.

…

Q. Which roadway is that?

A. That is Rosalee [sic], this Image also captures the intersection, both roadways.

Q. And where are you in relation to premises 59 Rosalee [sic] Avenue when you took this picture?

A. I would be somewhere in front of the cookshop.

Q. Okay, anything else captured in the picture roadway?

A. Yes, yes, my Lady, that would be the body of the now deceased Xavier Brown.

Q. So, if we -- -- relating that [sic] to where we saw the slippers, the markers with the [sic], the Two markers with the foot of slippers, about what distance, is that body there, from the entrance gate of 59 Rosalee [sic] Avenue?

A. Approximately seventy-five feet.

Q. Let's go to 0019 please.

(Shown)

Q. Okay sir, if you could just relate to us what does this capture?

…

A:This captures a section of Beatrice Crescent, and a closer photograph showing the body of the now deceased, Xavier Brown.

Q. But, sir, if you could assist us moving away from the body, toward those cars that are there in the background, could you indicate where is the cookshop in relation to the body when you took this picture?

A. The cookshop would be toward my back at the time."

Nothing here suggests that either of these photographs was a "zoom[ed]-up shot" of the deceased body.

[90] During the summation, the learned judge referred to specific photographs relating to the physical layout of the relevant premises while assessing the evidence. These were material and relevant, particularly in relation to appreciating the statements/evidence of Mr Johnson. In the circumstances of this case, given the absence of the main witness, an understanding of the physical layout of the scene became of greater importance. Therefore, the probative value would have outweighed any prejudicial effect.

[91] Ultimately on a perusal of the transcript, it seems the learned judge may not have looked at all the photographs at the time the application was made for the admission of the CD. However, it is reasonable to have expected that the experienced counsel who appeared for the applicants, would have challenged the admission of any photograph likely to inflame the jury. There is nothing in the records to support the contention that the photographs contained graphic images which ought not to have been shown to the jury. While some photographs did depict the deceased's body, the fact that counsel for the applicants raised no objections indicates that they did not view any of the images as prejudicial or likely to inflame the jury.

[92] The learned judge did not provide any specific directions in relation to the photographs or how they should be used. However, he did give the usual directions at the commencement of the summation, advising the jury that sympathy should not properly be used in their determination of the case. In any event, it has not been shown that there were any photographs admitted that required any specific directions regarding their use. The failure to provide such directions is not a sufficient basis to disturb the verdict reached by the jury. In all the circumstances, Ground 1 for Mr Neita and Ground 4 for Mr Edwards are without merit and must fail.

Prejudicial evidence (Ground 2 for Mr Neita and Ground 5 for Mr Edwards)

The submissions

For Mr Neita

[93] Mr Senior-Smith argued that, despite the indictment and trial being focused on the offence of murder, the proceedings were replete with "irrelevant and irreparably prejudicial information" about the shooting and wounding of Mr Johnson. This, counsel contended, was distracting and thereby depriving Mr Neita of a "linear consideration" of his defence against allegations of murder. Counsel also argued that, essentially, Mr Neita was placed in a situation where he had to defend himself not only against a charge of shooting with intent but also against a wounding offence.

[94] Mr Senior- Smith stated that he identified about 19 references to the shooting at and wounding of Mr Johnson and complained that any mention of it was unnecessary. He submitted that this was prejudicial evidence and its inclusion was devastating to the chances of acquittal of Mr Neita. Reference was made to **Adrian Forrester v R** and **David Russell v R**.

For Mr Edwards

[95] Mrs Feurtado-Richards posited that, at the time of trial, the legislation had not yet been amended to permit the prosecution to deal with these two offences in the same trial. Therefore, according to the convention prior to the amendment, an indictment for the offence of wounding with intent could have remained on file for trial at a later date. Counsel highlighted several instances where the shooting and injury of Mr Johnson were revealed in his statement and noted the occasions when the learned judge in his summation rehearsed this information without providing any guidance on how it should be considered. Counsel submitted that each time the circumstances of the injury sustained by Mr Johnson was mentioned in the trial was prejudicial.

[96] Counsel complained about other evidence which could be described as prejudicial. She highlighted a reference to "gang war" in the statement from Mr Johnson. She pointed

out that Det Cpl Gardener was allowed to testify that he had heard from Cpl Grant that the potential witnesses, whose names were mentioned by Mr Edwards and could have supported his alibi, were "tight-lipped". Counsel argued that this was hearsay and could have prompted speculation about the reasons behind their silence. She further emphasised the introduction of evidence regarding the killing of Andrew Cummings, which was included in the Q&A document from Mr Edwards and in Mr Johnson's statement. It was contended that this evidence was highly prejudicial, speculative, and irrelevant to the matter before the court. Further, it was posited that the learned judge mentioned the correlation between the Q&A and Mr Johnson's statement but gave no direction on the treatment of this issue. It was argued that this information could not be considered necessary as background evidence and that its absence would not have impacted the case for murder. The case of **David Russell v R** was relied on in support of the approach that this court is to adopt in addressing prejudicial evidence.

[97] Another complaint was that the learned judge ought to have ensured that when the post-mortem report was read into evidence, it was edited and in a form that could properly be presented to the jury. It was argued that sections of the report detailing the location and position in which the body was found, as well as where it was moved to, should not have been elicited and should have been edited out, as it amounted to hearsay. It was contended that appropriate editing of statements or recorded interviews was a matter for a trial judge's discretion, and the question for this court is whether the learned judge should have excluded such parts of the statement potentially prejudicial to Mr Edwards. Reference was made to **R v Jefferson and Others** (1994) 99 Cr App Rep 13.

For the Crown

[98] Mr Wedderburn submitted that the evidence contained in the statements of Mr Johnson was relevant and admissible in its entirety. It was contended that the mention of Mr Johnson's injuries was a necessary part of the case for the prosecution as it formed a part of the narrative. Regarding the reference to gang war in the statement, it was

argued that the context in which it was mentioned was crucial. It was noted that Mr Johnson mentioned it when accounting for when he had last seen the applicants and there was no suggestion that the applicants themselves were involved in any gang war. Mr Wedderburn conceded that certain information in one of Mr Johnson's statements regarding Shemari and his relatives, as well as references to gang involvement, could have been edited. However, he argued that these offending portions would not have affected what the jury needed to determine. He noted that, when reviewing the statement, the learned judge did not repeat some parts that could be classified as offending.

[99] Counsel pointed out that the learned judge directed the jury not to be swayed by references to the applicants' backgrounds, stressing that the stereotype that many persons from those areas are gunmen should not lead them to assume the applicants were gunmen. Counsel relied on **R v Oniel Lawrence and Carl James** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 82 & 83/2003, judgment delivered on 30 July 2004, in support of this point.

Discussion and disposal

[100] In **David Russell v R**, the question for this court's consideration was whether the learned trial judge "ought to have excluded such parts of the witness statement and the questions and answers as were potentially prejudicial to the appellant." Panton P, set out the appellate court's approach to this issue, stating:

> "[32] It is true that a trial judge may exclude evidence if its prejudicial effect outweighs its probative value. However, every case is dependent upon its own facts. Where the complaint relates to the improper admission of evidence, in making a determination as to the proper course which ought to be adopted by the trial judge, this court is under a duty to examine the case in its entirety. In its review of a case, the task of the court is to satisfy itself that, at trial, no miscarriage of justice had occurred and if the court is so satisfied, a conviction will not be disturbed.
>
> [33] It is well settled by the authorities that an appellate court is reluctant to interfere with a trial judge's exercise of his or her

> discretion except it is plain that such discretion had been wrongly exercised. The court, however, will only interfere in circumstances where an accused would be justified in asserting that that which had transpired at trial was severely overwhelming, incurably wrong and unfair to him or her. Where the subject matter of the complaint relates to the exclusion of evidence, the court will take into account whether failure to exclude the evidence would have adversely affected the fairness of the proceedings and whether the effect was so devastating, that it would render the admission of the evidence incapable of curative action by the trial judge.
>
> …
>
> [35] Evidence prejudicial to an accused may be adduced where its admission is essential in establishing the background of an alleged offence. The learned author of Blackstone's Criminal Practice 2007, at paragraph F12.7, places this proposition in the following context:
>
> 'Where an offence is alleged it may be necessary to adduce evidence of the background, against which the offence is committed even though to do so will reveal facts showing the accused in a discreditable light'."

[101] Similarly, in **Orville Brown v R** [2010] JMCA Crim 74, this court addressed the issue of admitting potentially prejudicial evidence. In that case, the appellant was charged with illegal possession of a firearm and robbery with aggravation. A witness testified that he had previously seen the appellant engage in questionable behaviour and frequently observed such conduct. Although the defence argued that this evidence was more prejudicial than probative, the court upheld its admission, ruling that it provided relevant background to the commission of the offences. Phillips JA, delivering the judgment of the court, at para. [30], stated that:

> "It is therefore patently clear that evidence can be led and will be considered relevant and admissible if providing a background against which the offence was committed and particularly if it is adduced to strengthen the visual identification."

[102] The statement from Mr Johnson would have been less coherent without the mentioning of the fact that he was shot. That evidence was relevant to the reliability of his recount of the events of that morning and particularly to the assessment of his

evidence of identification, in all the circumstances under which he purported to identify the applicants. It was, therefore, properly introduced as part of his narrative and could be viewed as falling within the category of evidence describing the full context and circumstances in which the deceased was killed. It also formed part of the narrative from Mr Harris and the police officers who testified about interviewing Mr Johnson in the hospital.

[103] The learned judge directed the jury, in clear and comprehensive language, that their duty was to determine whether the applicants were guilty of the offence of murder, being the charge to which the applicants had entered pleas of not guilty. The ingredients of that offence were explained to the jury, and the evidence was reviewed in relation to those ingredients. Although the learned judge did not expressly address the evidence in relation to the injury to Mr Johnson, the jury would have been under no misapprehension as to the specific offence they were required to consider.

[104] The reference to a "gang war" did not suggest that either applicant was a member of any gang. Mr Johnson mentioned it to explain the reason he was unable to remember the last time he had seen Mr Edwards, stating that he believed it was "because of the gang war why these men stay to their side". It is hard to understand how this statement can be considered prejudicial. It is also not apparent how the background information in the post-mortem report could be viewed as prejudicial. This information did not implicate either applicant nor did they contain any descriptions likely to inflame or prejudice the jury. The inclusion of these issues into evidence could not be regarded as "severely overwhelming, incurably bad, and unfair" to the applicants.

[105] There is no merit to the complaint that prejudicial and inflammatory evidence was introduced during the trial, making the proceedings unfair and averse to a just consideration of the applicant's defence. As a result, Mr Neita cannot succeed on Ground 2 and Mr Edwards on Ground 5.

The Summation (Ground 5 for Mr Neita and Grounds 7, 8, and 9 for Mr Edwards)

[106] In these grounds of appeal, the applicants seek to challenge several aspects of the learned judge's summation. Given the way these issues were presented; it is considered best to address the submissions raised by each applicant separately.

Submissions

For Mr Neita

[107] Mrs Kimberly Reynolds-McDermott ('Mrs Reynolds-McDermott') advanced these submissions on behalf of Mr Neita. The first complaint was in relation to how the learned judge dealt with the defence of alibi raised by Mr Neita. She submitted that the learned judge failed to instruct the jury on the weight to be given to Mr Neita's sworn evidence in relation to the defence. She contended that the learned judge did not present Mr Neita's testimony in a way that adequately explained his alibi, preventing the jury from giving it fair consideration. Counsel further contended that the fact that Mr Neita had subjected himself to cross-examination was a factor the learned judge ought to have urged the jury to consider. Ultimately, she argued that, given the circumstances of the case, the summation was not sufficiently tailored to address the issues as it related to Mr Neita. Reference was made to **Capron v R** [2006] UKPC 34.

[108] The second complaint was that the learned judge "failed to adequately assess the credibility of Mr Johnson and Mr Harris". Mrs Reynolds-McDermott contended that in that regard, the learned judge failed to properly deal with discrepancies and inconsistencies in their evidence. Further, she submitted that the learned judge failed to outline to the jury all the inconsistencies in the evidence of these witnesses, preventing the jury from making a proper determination of whether the witnesses could be considered reliable.

[109] The third and final complaint was that the learned judge failed to direct the jury in relation to murder, especially regarding whether all the ingredients had been proven. Additionally, the learned judge did not instruct the jury to consider whether there was sufficient evidence to establish that the applicants were a part of an orchestrated plan.

Discussion and disposal

[110] It must be noted that the Crown made no submissions on this issue. This court has, in several decisions, addressed the appropriate directions required when an accused raises the defence of alibi. In one of the earlier decisions, **R v Dean Nelson**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 138/2000, judgment delivered 3 April 2000, Forte P, in delivering the judgment of the court, said:

> "In dealing with the defence of alibi, the trial judge has a duty to inform the jury that the burden of proving that the accused was present committing the crime rests on the prosecution, that the accused has no burden to prove that he was elsewhere, that the fact that they did not believe the alibi of the accused, was not by itself a sufficient basis for conviction, as in keeping with the burden of proof, they will have to examine the prosecution's case to determine whether it has proven that the accused was present committing the crime."

[111] It is against this established approach that the directions given by the learned judge will be assessed. The learned judge, from early in the summation, correctly told the jury that the evidence from the applicants was to be viewed in the same way and judged in the same manner as all the other evidence given in this case. In giving general directions before reviewing the evidence, the learned judge then gave directions in keeping with what was required. He alerted the jury that the applicants had raised the defence of alibi, each claiming to have been elsewhere at the time of the incident. He directed the jury that the applicants did "not take on the burden of proving their alibi" and that it was for the prosecution to rebut this alibi by presenting evidence that could convince the jury that the applicants were, in fact, at Rosalie Avenue, to the extent that they felt sure of their presence there.

[112] While providing directions on the issue of identification, the learned judge also addressed the matter of alibi, stating:

> "You would have to look at the circumstances to see whether or not you are satisfied to the extent that you feel sure that these persons,

> or anyone of them was [sic] present on that morning which resulted in the death of [the deceased].
>
> I will come back to those circumstances, …when I review the evidence, but I would like to link it before I start to review the evidence to the question of alibi, because remember they say that they weren't there. If you reject this alibi,..., it doesn't necessarily mean that because they are lying they must have been the ones who were there. Persons lie for all sorts of different reasons. So you would have to look into all of that and to see whether or not, if you reject this alibi, the circumstances are such that you can say that they are lying because they are hiding the fact that they were there."

[113] When the learned judge reviewed the evidence presented by the applicants, he correctly began by instructing the jury that the fact that the applicants gave sworn testimony and subjected themselves to cross-examination did not mean that they were taking on any duty to prove their case. While reviewing Mr Neita's evidence, the learned judge specifically noted that "he is saying he wasn't there. Therefore, he could not have committed the offence at Rosalee [sic] Avenue". The learned judge then reiterated that Mr Neita had no duty to prove his alibi. Contrary to submissions made by Mrs Reynolds-McDermott, the learned judge gave appropriate directions on the issue of alibi as raised by Mr Neita in his defence.

[114] The second complaint was that the learned judge failed to properly deal with the inconsistencies and discrepancies that arose, especially in relation to the evidence of Mr Johnson and Mr Harris. It is well-accepted that trial judges are not required to highlight all inconsistencies or discrepancies that arise during a trial. They are required to explain to the jury the nature and significance of inconsistencies or discrepancies and to give some examples of the conflicts that have arisen during the trial, whether they are internal conflicts in the witnesses' evidence or between different witnesses (see **Regina v Fray Deidrick**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991).

[115] There was no challenge to the adequacy of the general directions provided by the learned judge regarding these issues of inconsistencies and discrepancies. Contrary to the submission that the learned judge failed to adequately assess the credibility of the witnesses, it was not his role to do so, and he correctly directed the jury, whose role it was, on how to evaluate their credibility and determine which evidence to accept or reject. For example, in his review of Mr Harris' evidence, the learned judge drew attention to the discrepancy between that account - specifically, that Mr Harris said he observed an exit wound to the deceased's mouth - and the post-mortem report, which indicated that the doctor did not identify any exit wound. The learned judge also drew the jury's attention to a possible inconsistency in Mr Harris' testimony, noting that while Mr Harris stated in his written statement that he saw two men running in the yard, during his examination-in-chief, he described them as walking at a fast pace. The learned judge further highlighted that Mr Harris could not recall whether he had mentioned the name Shamari in his statement or whether he had told the police that anyone was armed with a gun. The learned judge appropriately directed the jury to examine the material "to see whether or not [they] find [any] inconsistencies", and asked them to consider whether Mr Harris "[struck] [them] as somebody speaking the truth".

[116] Additionally, the learned judge even pointed out one possible discrepancy between the evidence of Mr Thorpe, who stated he did not attend the morgue for the post-mortem examination, and that of Miss Fletcher, who testified that both she and Mr Thorpe had gone to the morgue together. Upon reviewing the learned judge's directions and his treatment of the evidence, it can be concluded that his approach to addressing inconsistencies and discrepancies was unassailable.

[117] The third complaint about the learned judge's directions regarding the offence of murder is entirely without merit. Over several pages of the summation, the learned judge gave the classic definition of murder and the ingredients of the offence. There was no identification of any deficiency in the directions that were given.

[118] Mrs Reynolds-McDermott further posited that the learned judge failed to sufficiently address whether the applicants were part of an orchestrated design. The United Kingdom Supreme Court and the Judicial Committee of the Privy Council unanimously re-stated the principles concerning the liability of secondary parties in **R v Jogee; Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7. Edwards JA, in **Troy Smith and others v R** [2021] JMCA Crim 9, writing on behalf of the court, gave the following succinct definition:

> "[44] It has been well accepted that, where two or more persons embark on a plan to commit a crime, and act in furtherance of that plan, each will be liable for the acts to which they have agreed or assented, whether expressly or by implication. Even where there is no prior agreement and the parties come together spontaneously to commit the offence, the intentional giving of support or encouragement is sufficient to attract secondary liability. That principle is to be found in **R v Jogee; Ruddock v The Queen** [2016] UKSC 8; [2016] UKPC 7 at paragraph 78."

[119] From the outset of the summation, the learned judge said the following:

> "There is another area, that might have arisen… which you will have to consider. Because you heard from the evidence presented by the Prosecution, that there were Four [sic] persons who carried out this attack on that morning. You have heard of these Two being mentioned. You heard of 'Coolie man' and you heard of Shamari. You heard also, evidence which was contained in the statement of Mr Johnson, that he was the one who saw Mr Edwards. He said when he saw Mr. Edwards, he did not see him with any weapon.
>
> The Prosecution is asking you to say that these Four [sic] persons went together on a joint enterprise, to achieve a particular goal, and that goal was to kill somebody, or to cause really serious injury or death by gunshots.
>
> Now, this is what the Prosecution is relying on. They call it a common design or joint enterprise.
>
> Now, the Prosecution case …is that these two defendants with other, committed the offence jointly….

> Where a criminal offence is committed by two or more persons, each of them play a different part. But if they are acting together as part of a joint plan, or agreement to commit it, they are each guilty.
>
> …
>
> The word plan or agreement does not mean that it must be formal. They would have to have an agreement. It could be something that is formed at their arrival at a particular scene. But once you find that there was this plan or agreement to carry out something, and it is carried out, then each one would be liable for the act of the other.
>
> Your approach to the case should therefore be as follows. If in looking at the case, of any of the defendants, you are sure that he committed the offence, either on his own or did an act, or acts which was part of the joint plan or agreement to commit it, he is guilty.
>
> Simply put, the question for you is were they in it together."

It is clear that the learned judge provided the requisite directions. The complaints raised in Ground 5 on behalf of Mr Neita are without merit and, as a result, must fail.

Submissions

For Mr Edwards

[120] In Ground 7, Mrs Feurtado-Richards contended that the learned judge erred as it related to the misquoting and misrepresentation of the evidence to the jury. She submitted that the learned judge had a duty to relay to the jury the correct evidence, and failure to do so rendered the jury's function nugatory. Counsel thoroughly examined the summation and identified what she considered to be errors the learned judge made in reviewing the evidence. She pointed out where the learned judge narrated evidence, which he said came from a Sergeant Brown, rather than that it was a combination of evidence from Det Sgt Robinson and Det Sgt Muir. She contended the learned judge not only confused which witness gave which evidence but also misquoted the evidence from Det Sgt Robinson as to the amount of ammunition found and where they were found.

[121] Mrs Feurtado-Richards went on to identify the following as other errors found:

1. The learned judge incorrectly said that it was Mr Harris who had pointed out the applicants on identification parades when it was Mr Johnson who had done so.

2. The learned judge incorrectly stated that Cons Thompson had indicated that Cons Anderson had accompanied him to 51 Elleston Road when Cons Thompson had not given the name of the officer who accompanied him when he went to 51 Henderson Road.

3. The learned judge incorrectly named several witnesses - Det Cons Kascene Hanson was called Kasean Anderson, retired Insp Colin Franklin was referred to as retired Inspector Francis, and Collin Fletcher and Garnett Thorpe were mistakenly identified as Jarret Thorpe.

4. In reading the contents of the Q&A document the learned judge incorrectly said Mr Edwards had been asked if he was otherwise called Clive Edwards and had responded in the affirmative when he had been asked if he was the son of Clive Edwards.

5. The learned judge stated that Det Cpl Brown had testified that the date for the post-mortem examination was 1 April when the officer had in fact incorrectly said that the date was 31 April.

[122] Counsel concluded that these errors must have confused the jury, and the cumulative effect of these mistakes, along with the other grounds, rendered Mr Edwards' conviction unsafe. Therefore, she argued that the conviction should be quashed.

[123] In Ground 8, the thrust of the submissions was to challenge the adequacy of the summation, specifically regarding the learned judge's failure to assist the jury in several

areas of law necessary for them to properly evaluate the evidence. Reference was made to **R v Anthony Rose** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 105/1997, judgment delivered 31 July 1998, **Ellis Taibo v The Queen** (1996) 48 WIR 74, **Anand Mohan Kissoon and Rohan Singh v The State**, **The State v Mootoosammy and Henry Budhoo** (1974) 22 WIR 83 and decisions from the Court of Appeal of Trinidad and Tobago namely **Jay Chandler v The State** CA Crim No 19 of 2011, **Ramsingh Jairam and Krishna Persad v The State** CA Crim Nos 35 and 36 of 1988.

[124] It was submitted that the learned judge failed to provide the jury with full and proper directions on several important issues, resulting in an unfair trial for Mr Edwards. In particular, it was contended that the learned judge did not sufficiently caution the jury against speculation or address the risk of undue sympathy arising from the emotional display of Mr Harris when he broke down and cried during his testimony. Furthermore, the learned judge failed to properly explain the legal principles surrounding joint enterprise, leaving the jury without clear guidance on Mr Edwards' alleged role. The summing-up also did not adequately address critical discrepancies between the witness evidence and the post-mortem report, including incorrect information regarding the date and location of the post-mortem examination. In addition, while the learned judge referred to the good character of the defendant, the directions given were incomplete and fell short of the established standards set out in the Supreme Court of Judicature of Jamaica Criminal Bench Book, 2017 ('the Bench Book') and the case of **Nigel Hunter and Others v R** [2015] EWCA Crim 631.

[125] Ground 9 for Mr Edwards concerns the assertion that the learned judge usurped the function of the jury by making a factual determination that should have been left to the jury. Mrs Feurtado-Richards highlighted that the learned judge failed to address a discrepancy in the evidence of Mr Harris, who stated that he last saw the deceased alive on 29 March and that he believed the death occurred on 30 March. In summing up, the learned judge stated to the jury, "[Mr Harris] said he had last seen [the deceased] on 29th of March. He said he thinks that he died on the 30th of March, but the evidence as

you would have heard, indicates that he died on 31st March 2011". Counsel argued that the learned judge improperly assumed the role of the jury by definitively concluding that the death was on 31 March.

For the Crown

[126] Mr Wedderburn, in acknowledging the errors that were made by the learned judge submitted that cumulatively they did not affect the fairness of the trial. He contended that it could not be said that they had any impact on the outcome of the case. It was also submitted that any misrepresentation of the names of the witnesses was not fatal, and there was no need for confusion in the minds of the jury. It was further submitted that there was no error in the learned judge's summary regarding the amount of ammunition that was recovered.

[127] In relation to the other complaints, it was submitted that the directions were sufficient and satisfactory and covered all the relevant issues which were necessary for the deliberation of the jury. It was noted that, with respect to the directions given on good character, the trial took place before the publication of the Bench Book, and it was submitted that the directions given were unassailable. It was also submitted that the complaint that the learned judge usurped the functions of the jury was without merit, particularly as the learned judge had, from the outset, clearly instructed the jury that they were not bound by any views he expressed of the evidence. As it related to the date of the death, Mr Wedderburn noted that, in any event, other witnesses provided evidence indicating that the deceased died on 31 March.

Discussion and disposal

[128] Given the nature of the complaints Mrs Feurtado-Richards raised on behalf of Mr Edwards, it is useful to bear in mind the jurisdiction of this court in dealing with criminal appeals as set out in section 14(1) of the Judicature (Appellate Jurisdiction) Act. For this discussion, it is sufficient to use the following summary of the section as captured by Edwards JA, in **Adrian Forrester v R**:

> "[15] In order for the appeal to succeed therefore, the appellant would have to show that: (1) the jury's verdict was unreasonable or cannot be supported by the evidence, or (2) the judge erred on a question of law, or (3) there was, for some other reason, a miscarriage of justice. The appellant would also need to show that in any event, this is not a fit case for application of the proviso in section 14(1)."

[129] It is important to consider the purpose of a judge's summation to the jury, an issue that has been addressed in several decisions of this court. The guidance provided by Carey JA, in delivering the judgment in **Sophia Spencer v R** (1985) 22 JLR 238, remains instructive. At page 244, he states:

> "A summing up, if it is to fulfil [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 the 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."

[130] It cannot be denied that the learned judge made errors in his summation, but it remains to be determined how any of the errors identified could have resulted in a miscarriage of justice. Although the learned judge occasionally referred to witnesses by incorrect names, they were correctly identified at other times. More importantly, there was no suggestion that the evidence was not accurately reviewed. It is also true, that despite being corrected, the learned judge incorrectly stated that it was Mr Harris who had identified the applicants at the identification parades. However, the jury would have had access to the correct information through Mr Johnson's statements, which were available to them during their deliberations and should not have caused any confusion that would result in any unfairness to the applicants. It must be borne in mind that, in any event, it is the jury's recollection of the facts that matters, not the learned judge's. The learned judge emphasised this point repeatedly during his summation.

[131] A similar observation is made of the learned judge's incorrect reading of the Q&A document which suggested that the applicant was otherwise called Clive Edwards and not the son of Clive Edwards.

[132] The fact that an incorrect date for the post-mortem examination was given by one witness and not corrected by the learned judge is rendered entirely innocuous when considered in the context of the totality of the evidence, including the information in the post-mortem report itself. Similarly, of no major significance to the resolution of the issues in this case, is the fact that Cpl Thompson had erroneously given a name for an officer who accompanied him during Mr Edwards' apprehension, as well as the address of the apprehension. The apprehension itself was never in dispute. These minor inaccuracies are incapable of giving rise to any miscarriage of justice.

[133] A detailed reading of the notes of evidence is necessary to determine whether the assertion that the learned judge erred in his review of the amount and location of spent casings recovered. It is appreciated that this was particularly significant for the jury to determine the possible position of the shooter and ultimately whether the account from the witnesses was credible in light of that evidence. The evidence from Det Sgt Robinson was that he "observed three, nine millimetre spent casings inside the wooden structure in the vicinity of the Eastern door..." (he later agreed to refer to this wooden structure as the cookshop that he said was located along the sidewalk, against the wall of premises 59 and not a part of the premises). He also testified that he observed "two nine millimetre spent casings inside premises 59 in close proximity to the rear of the cookshop… also another spent casing, in the vicinity of the driveway of premises 59 and that particular spent casing was on the inside of premises number 59". Therefore, Det Sgt Robinson testified to finding six spent casings. He further testified that these six spent casings were among the items that he packaged in an envelope which was ultimately handed over to Dep Supt Brown, the government ballistic expert. Dep Supt Brown confirmed receiving the envelope with six spent casings. The learned judge said the following when reviewing the evidence:

> "So what we have, he is saying three spent casings were found inside the shop, and two were found in no. 59. He said he also saw another in the vicinity of the driveway of number 59. So remember in all he found these spent shells, two, in that corner there, three in the cook shop and one in the drive way of number 59"

[134] The learned judge clearly identified the finding of six spent casings by Det Sgt Robinson: three in the cookshop, two on premises 59; and one in the driveway of premises 59. This appears to accurately reflect Det Sgt Robinson's testimony. Accordingly, the complaint lacks merit, and Ground 7 of Mr Edwards' appeal fails.

[135] In relation to the complaint concerning the learned judge's failure to direct the jury on how to assess the witness's behaviour of sympathy and prejudice. The learned judge provided adequate and appropriate general directions. He expressly directed the jury to confine their deliberations to the evidence presented and to put aside any sympathies they might have for the deceased or his relatives. Further, the jury was appropriately directed that they were permitted to draw reasonable inferences from the evidence but cautioned against engaging in any fanciful speculation. While the learned judge did not offer specific guidance concerning Mr Harris' emotional display, namely his act of crying, such an omission was not fatal. Similarly, the absence of more detailed directions regarding the avoidance of extraneous matters not in evidence did not render the summation deficient in a manner that would undermine the fairness of the trial.

[136] The treatment of the discrepancies and inconsistencies by the learned judge has already been addressed in paras. [115] and [116] above. Likewise, the learned judge's approach to the issue of joint enterprise was discussed at paras. [118] and [119] above. However, Mrs Feurtado-Richards advanced a further complaint on the issue, asserting that additional and more specific directions were necessary with respect to Mr Edwards. After giving general instructions on the issue, the learned judge proceeded to state the following:

> "What the Prosecution is asking you to say is that although Mr Edwards, was not said to be seen with a gun, if he went there with them knowing that they had guns, and knowing the circumstances,

> or the reason for their going there, then although he had no firearm, the Prosecution is asking you to say he was part of this joint plan, and would therefore be responsible, and would therefore be guilty, if you find he was there and part of this plan."

[137] Mr Johnson's evidence was crucial to any assessment of whether Mr Edwards was a participant in the joint enterprise. When reviewing the evidence of Mr Johnson, the learned judge stated:

> "Now, [Mr Johnson] gets to what he said happened on the 31st of March and you have to listen carefully…, to see how it plays out with other evidence that you would have heard. Whether or not it is in sync with the other evidence, or if there's a difference. Because he is the main witness on which the Prosecution relies on [sic], in identifying these persons as part of the plan to kill [the deceased] and took part in this plan, which resulted in the death of [the deceased]."

[138] Thereafter, in further reviewing the evidence, the learned judge was focused on the issue of identification. Mr Johnson stated that he had not seen Mr Edwards before the shooting began, and it was only when he attempted to flee from the cookshop after the shooting that he saw Mr Edwards positioned near one of the doors, at a relatively short distance. From this, it could be reasonably inferred that Mr Edwards had arrived with the other men and was acting as a lookout during the shooting. At various points, the learned judge directed the jury to carefully scrutinise Mr Johnson's account, especially in light of the photographs of the scene, to determine whether they were satisfied that he was in a position to see and recognise any individual. In the circumstances, the question is whether the learned judge could have explored the possible significance of where and when Mr Edwards was said to have been seen as it related to the issue of joint enterprise.

[139] One of the key elements in the case against Mr Edwards, concerning the issue of the joint enterprise, was whether he was seen leaving the scene with the men after the shooting had ceased. At one point, Mr Johnson stated that he "would say" the men fled back on the same premises at 59 Rosalie Avenue, as he did not see them run past the

premises he had himself retreated. He further stated that upon hearing the words "forward dawg", the shooting stopped, and all the men, including Mr Edwards, ran back to premises 59. The phrase "forward dawg" could, in this context, be interpreted as a command for the men to retreat. The learned judge addressed the question of whether Mr Edwards left with the others in the following terms:

> "And he said further, that: 'I would say that they escape [sic] back on the same premises, because when I ran on to premises Number 62 Rosalie, I did not see them run pass [sic] the premises at no time. It seems as if they ran back on premises Number 59'.
>
> Now again, … you would have to see what you make of it. How do you interpret this? Counsel for the defendant is saying, when he says it seems, it means that he didn't actually see them run pass [sic] in front of 62, so he presumes that they went back on to 59. If you agree with that…then issue would be taken with something that he says later, because later he says that [Mr Edwards] went back with them. Now, if he didn't see them going back … could he see how many of them went back together..."

[140] Although the learned judge's assessment of the evidence against Mr Edwards was fair, he stopped short of exploring this aspect of the evidence with the jury in the context of its relevance to the issue of how it would affect the joint enterprise. The learned judge could, therefore, have specifically directed the jury to consider the evidence concerning Mr Edwards' actions, his positioning, and his departure with the men in determining whether the evidence pointed to his involvement in a joint enterprise to kill or cause grievous bodily harm.

[141] In **Pasmore Millings and Andre Ennis v R** [2021] JMCA Crim 6, Brooks P, writing on behalf of the court, reiterated the importance of relying on the jury's intelligence in applying the judge's directions to the facts, as they find them. The principle, as set out in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, was emphasised, with particular reference to the following passage found 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 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 is to 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 beyond all reasonable doubt." (Emphasis supplied)

[142] The learned judge gave sufficient directions on the principles of joint enterprise and how those principles applied to the evidence before them. Furthermore, there was sufficient evidence for the jury to properly consider the issue of joint enterprise. Ultimately, while a more tailored direction on the specific evidence relating to Mr Edwards' involvement could have been beneficial, the directions given were adequate, and the evidence available to the jury was sufficient to determine Mr Edwards' role in the joint enterprise. The jury had a sufficient evidential basis to arrive at their conclusion. Therefore, there is no reason to disturb the conviction of Mr Edwards based on the learned judge's treatment of the issue of joint enterprise in this case.

[143] The final complaint in this ground is with the learned judge's directions on good character. The main thrust of the submissions advanced was that the learned judge's directions fell short of the standard articulated in the Bench Book. Counsel for the appellant acknowledged that the learned judge referred to the two limbs of the good character direction - credibility and propensity - but contended that the treatment of these limbs needed further discussions. It was submitted that these partial and insufficient directions rendered the trial unfair to Mr Edwards.

[144] There is a plethora of authorities emanating from this court that have dealt with the requisite directions when dealing with a defendant's good character. In **Marlon Campbell v R** [2023] JMCA Crim 9, D Fraser JA, writing on behalf of this court, provides a comprehensive summary of principles flowing from some of these authorities regarding the issue. However, in assessing the appropriateness of the directions given by the learned judge, it is important to bear in mind that this case was heard in 2015 and the Bench Book was published in 2017. The learned judge would not have had the benefit of the guidance of the standard directions recommended in the Bench Book. It is best to consider the standard that would have been established by the authorities at the time of trial. One such is the guidance offered by Morrison JA (as he then was) in **Leslie Moodie v R** [2015] JMCA Crim 16, which remains of particular relevance:

> "[125] It is now fully settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case. The standard direction will normally contain, firstly, a credibility direction, that is a direction that a person of good character is more likely to be truthful than one of bad character; and, secondly, a propensity direction, that is that he or she is less likely to commit a crime, especially one of the nature with which he or she is charged. Generally speaking, it is the duty of the defence to ensure that the issue of the defendant's good character is brought before the court and failure to do so in a proper case may render a guilty verdict unsafe. There is no want of authority for these propositions, either from this court or the Privy Council and it suffices to mention, without further discussion, the decisions of the Privy Council in **Teeluck and John v The State of Trinidad and Tobago** [2005] 1 WLR 2421, especially paragraph [33], and of this court in **Michael Reid v R** SCCA No 113/2007, delivered 3 April 2009, especially paras 15-20."

[145] It is well settled that where a defendant gives evidence at trial and puts his good character in issue, he is entitled to both the credibility and the propensity limbs. Also well settled is that the trial judge is obliged to tailor his directions to the particular circumstances of the case. Once the trial judge directs the jury on the two respects in which good character may be relevant, an appellate court "will be slow to criticise any qualifying remarks he may make based on the facts of the individual case" (see **R v Vye;**

R v Wise; R v Stephenson [1993] 3 All ER 241 at page 247). In **Christopher Thomas v R** [2018] JMCA Crim, a decision from this court after the publication of the Bench Book, the obligation of the trial judge to suitably adapt directions to individual cases was still recognised. At para. [62], having considered the cases of **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22 and **R v Moustakim** [2008] EWCA Crim 3096, Morrison P stated:

> "[62] ..**Ronald Medley [sic] and Rohan Meikle v R** and **Regina v Moustakim** therefore make it clear that, where a full good character direction is called for, the trial judge must make an explicit, positive statement to the jury, using whatever language he or she considers appropriate, that the defendant's good character (i) supports his or her credibility; and (ii) renders it less likely than otherwise that he or she would have committed the offence in question."

[146] The learned judge gave the following direction in respect of Mr Edwards' good character:

> "… He said he has never committed any criminal offence. And I am going to pause here, because what he is raising here ..., is his character.
>
> Now, a person of good character you might well say, would more likely speak the truth, or you might say, would a person of good character do what it is alleged that he did? Would a person of good character be involved in this murder and shooting? These are matters that you will have to consider, Madam Foreman and Members of the Jury. You would have to say whether or not you accept that he is a person of good character and whether or not, if you so accept, whether or not he would be speaking the truth about what he said, or whether or not such a person would engage in this type of activity."

[147] The learned judge gave directions which were succinct but adequate. He correctly spoke to both limbs of the direction as required. It conveyed that Mr Edwards was of good character, and that it may mean that he was less likely than otherwise to have committed the crime with which he was charged. He then explicitly told the jury that it was a factor they should consider when deciding whether they believed Mr Edward's

evidence. The directions given by the learned judge were in keeping with what was required. The complaint that the direction was not identical to the example in the Bench Book and therefore resulted in unfairness to Mr Edwards has no merit.

[148] The complaint that the learned judge usurped the functions of the jury by assuming their role in concluding that the deceased died on 31 March 2011 can be summarily disposed of as being entirely unmeritorious. The learned judge was correct that the majority of the evidence was to the effect that the deceased had died on that date. The learned judge in stating that fact to the jury could hardly be viewed as usurping their role. In the final analysis, Ground 9 is without merit.

The no-case submission (Ground 6 for Mr Edwards)

The submissions

For Mr Edwards

[149] Mrs Feurtado-Richards posited that the basis of the no-case submission made at the close of the Crown's case was the Crown's failure to establish a key ingredient of the offence of murder. She contended that the principle of joint enterprise could not be made out due to the tenuous nature of the evidence contained in the statement of Mr Johnson. She referred to the learned judge's ruling on the submission and pointed to the fact that he had used answers given by Mr Edwards in the Q&A document, which raised the defence of alibi to reject the submission of no case to answer and to find that there was a case to answer. She noted that the learned judge opined that if it was found that Mr Edwards was not speaking the truth in that document, then the question must arise as to why he was lying about his presence there. Ultimately, the learned judge questioned, "could a jury properly directed in all the circumstances find that [Mr Edwards] was present and that his presence was not innocent but that he was a party?".

[150] Counsel argued that the defence of alibi, being relied on by Mr Edwards, did not arise on the Crown's case. Further, she argued that the principle of joint enterprise and the defence of alibi is mutually exclusive and as such the latter did not become an issue

for the learned judge to address in determining whether the Crown had established a *prima facie* case. She submitted the learned judge usurped the function of the jury by considering the Q&A document in arriving at the decision not to uphold the no-case submission. She concluded that the prosecution's case, taken at its highest, could not be said to have advanced a case that a reasonable jury, properly directed would have been entitled to draw the inference, beyond a reasonable doubt, that Mr Edwards, through the principle of joint enterprise had participated in the killing of the deceased. Reference was made to **Regina v Galbraith** [1981] 1 WLR 1039 and **Lescene Edwards v R** [2018] JMCA Crim 4.

For the Crown

[151] It was submitted that the learned judge was correct to consider whether the issue of alibi which emerged from the admission of the Q&A document on the Crown's case was sufficiently cogent to leave for the jury's consideration. It was contended that the nexus between identification and alibi was sufficient to place the issue of alibi squarely before the jury, thereby allowing them to assess its credibility and determine such weight as they deemed appropriate. It was accepted that the issues of joint enterprise and alibi are mutually exclusive. However, it was submitted that the relationship between the two could not be overlooked in this case. Mr Wedderburn further contended that it was apparent from the discussions between the learned judge and Miss Pyke, while she was responding to the no-case submission that the learned judge appreciated that there needed to be evidence from Mr Johnson suggesting more than the mere presence of Mr Edwards. The learned judge correctly found there was sufficient evidence for the jury to consider. Reference was made to Lord Parker CJ's **Practice Direction (Submission of No case)** [1962] 1 WLR 227, **Ellis Taibo v The Queen**, and **Jermaine Cameron v R** [2013] JMCA Crim 60.

Discussion and disposal

[152] Lord Parker CJ's **Practice Direction (Submission of No Case)** is recognised as establishing the correct test for dealing with no case submissions. It states:

> "A submission that there is no case to answer may properly be made and upheld: (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it."

[153] The English Court of Appeal, in the case of **Regina v Galbraith**, further clarified the appropriate approach to a submission of no case to answer, at page 1042:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution 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 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… There will of course, as always, in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[154] The principles established in **Regina v Galbraith** were subsequently restated in **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56. In that case, the Judicial Committee of the Privy Council adopted the formulation expressed by the Supreme Court of South Australia in **Questions of Law Reserved on Acquittal (No. 2 of 1993)** (1993) 61 SASR 1, 5 accepting it as an accurate and authoritative statement of the applicable legal principles. This is how it was cited in **DPP v Varlack**:

> "If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be."

[155] In the instant case, following an enquiry from the learned judge, Mr McFarlane commenced the no-case submission on behalf of Mr Edwards indicating, that he was advancing the submission on the basis that the prosecution had failed to establish an important element of the offence; specifically, "whether or not Mr Edwards was a part of the joint enterprise that lead to the death of the deceased…". During the submissions, it became evident that Mr McFarlane was challenging both the sufficiency and credibility of Mr Johnson's evidence regarding the circumstances under which he purportedly observed Mr Edwards at the scene and how he left.

[156] The learned judge in outlining reasons for his decision to reject the no-case submission failed to have regard to what has been described as the wise words of Lord Roskill in **R v Joan Olive Falconer-Atlee** (1974) 58 Cr App R 348, that when ruling on a no-case submission, a judge need only say there is evidence to go to the jury, and it was open for them to say whether or not the appellant should be convicted. This is a position this court adopted in **Regina v Eric Mesquita** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 64/1978, judgment delivered 9 November 1979, and more recently in **Shenidy Thomas v R** [2020] JMCA Crim 52. In so doing the learned judge provided the fodder for Mrs Feurtado-Richards' contention that he had erred in treating with the defence of alibi which she said did not arise on the prosecution's case. However, the issue did arise on the prosecution's case as the Q&A document was admitted and formed a part of the evidence for the jury to consider in determining the primary issue of whether Mr Edwards was present at the time of the incident. The presence of Mr Edwards at the scene was a question to be determined by the jury based on their assessment of the evidence they accepted from Mr Johnson's statement.

[157] Ultimately, following the guidance given in **Regina v Galbraith**, this was a matter where on one possible view of the evidence the jury appropriately directed, could have concluded that Mr Edwards arrived with the others, at least one of whom was armed, positioned himself to keep watch and then left with the others after the shooting ceased when the command was given. On that evidence, the jury could have found that Mr

Edwards was a part of the joint enterprise. There is no merit in this ground that the learned judge erred by not upholding the no-case submission. Accordingly, Ground 6 fails.

The disclosures (Ground 10 for Mr Edwards)

The submissions

For Mr Edwards

[158] In Ground 10, it is asserted that the prosecution made late disclosures throughout the trial resulting in unfairness to Mr Edwards. Mrs Feurtado-Richards acknowledged the well-established principle that disclosure is an ongoing process and as such the prosecution cannot be fettered in this responsibility. However, she submitted that there comes a point when late disclosures border on an unfair trial, particularly when the applicant continues to receive material - whether old or new - throughout the proceedings. Counsel noted a particular instance during the trial in which Miss Pyke served a statement from Det Sgt Robinson, dated 14 June 2015, on 24 September 2015. When Mr McFarlane brought this to the learned judge's attention, the learned judge confirmed that he had also just received the statement. Mrs Feurtado-Richards pointed out that the learned judge expressed his frustration about the untidy approach of the Crown as notices to adduce evidence were already served on 21 and 22 of September and the learned judge opined that although untidy, it did not amount to unfairness.

For the Crown

[159] Mr Wedderburn in response, pointed to another instance where a statement from Det Sgt Robinson, dated 18 September 2015, was served on the morning of 22 September 2015. Counsel noted that, on that occasion, the court was adjourned early shortly after this late service was revealed. In light of this, Mr Wedderburn submitted that, considering all the circumstances, the late disclosure, including the instance highlighted by Mrs Feurtado-Richards did not give rise to any unfairness to Mr Edwards. Reference was made to **R v Anneth Livingston, Ramon Drysdale and Ashley Ricketts**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77, 81 and 93/2003, judgment delivered 31 July 2006.

Discussion and disposal

[160] In **Leslie Moodie v R** one of the earlier decisions in which this court addressed the issue of disclosure in criminal trials, Morrison JA (as he then was) acknowledged the guidance provided by the English Court of Appeal in **R v Ward** [1993] 2 All ER 557. He also recognised the comprehensive review of the relevant authorities undertaken by Brooks JA (as he then was) in **Ronald Webley and Rohan Meikle v R**. Drawing on those authorities, Morrison JA was able to succinctly summarise the applicable legal position on the issue of disclosure as follows:

> "[70] It is therefore clear that, in the absence of special circumstances…, the prosecution bears a general duty to disclose to the defence all material in its possession which tends either to weaken the case for the prosecution or to strengthen the case for the defence. This duty, which also extends to all relevant scientific and/or forensic material, is a continuing duty. It is now generally accepted that disclosure to the defence is an essential aspect of the fair trial guarantee given by section 16(6)(b)(formerly section 20(6)(b)) of the Constitution and the decision of the Privy Council in **Franklyn and Vincent v R** (1993) 42 WIR 262 confirmed that the defence to be provided with 'adequate time and facilities' under section 16(6) extends to materials in the possession of the prosecution that are relevant to the issues in the case (see also **R v Bidwell**, SCCA No 50/1990, judgment delivered 26 June 1991). **However, failure to make disclosure in a timely manner will not inevitably result in irreversible prejudice or unfairness to the defence and much may turn in a particular case on the manner in which the failure is addressed by the trial judge. In some cases, it may be sufficient mitigation of such unfairness as there may be to offer or allow an adjournment, once the issue of late or non-disclosure has been raised, so as to enable the defence to deal with it**." (Emphasis supplied)

[161] In the instant case, the two instances identified - one by Mrs Feurtado-Richards and the other by Mr Wedderburn - were the occasions, upon a review of the transcript, where issues were raised concerning late disclosure. Notably, both instances related to statements provided by Det Sgt Robinson. This puts to rest the contention that late disclosures were made throughout the trial. The first occasion was on the morning of the

second day of the trial, 22 September 2015, and immediately after Det Sgt Robinson had been sworn when Mr McFarlane raised the issue, stating that the defence had been given a statement from Det Sgt Robinson, dated 7 September 2015, which consisted of several pages that they had not had an opportunity to read. Upon enquiry from the learned judge Miss Pyke indicated that the information in the statement was contained in a report which had been served from 2012. Mr McFarlane requested that the witness not be called until the defence had been allowed to review the statement. Following further enquiry as to the time required, the learned judge adjourned the trial at 11:41 am. This certainly can be viewed as the learned judge mitigating any possible unfairness to the applicant. Moreover, the fact that the contents of the statement appeared to merely formalise information that had already been disclosed, further diminished the risk of any prejudice or unfairness arising from the late service.

[162] On 24 September, the second instance arose when Mr McFarlane noted that the defence had been served with another statement from Det Sgt Robinson, dated 14 June 2014. In response, Miss Pyke explained that the statement contained information already included in a report previously disclosed and described the statement as a mere formality. The learned judge, in addressing the matter, made it clear that should disclosures continue to be made during the trial, he would not permit them if they were found to be unfair to the applicants. A clear indication that the learned judge was mindful of his duty to ensure that there is a fair trial. There is no indication that the late disclosure of this statement resulted in any prejudice or unfairness to Mr Edwards. Accordingly, this ground is without merit.

Conclusion

[163] The learned judge properly admitted the statements of Mr Johnson pursuant to section 31D of the Act and issued the requisite directions and warnings for the jury to consider in assessing their contents. The case was correctly left to the jury for determination; and adequate and appropriate directions were given on the relevant issues, particularly those of identification and joint enterprise, which were central to the

prosecution's case.. While it is accepted that the learned judge could have offered more assistance to the jury in analysing the evidence relating to joint enterprise, the omission is not of such gravity as to warrant setting aside the jury's verdict. Ultimately, there is no sufficient basis on which to disturb the convictions.

[164] In the circumstances, it is ordered as follows:

1. The applications for leave to appeal conviction and sentence are refused.

2. The sentences are reckoned as having commenced on 9 October 2015, the date on which they were imposed.