JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA

SUPREME COURT CRIMINAL APPEAL NOS 2 & 6/2015

JEFFERY PEART v R
ROXANNE PEART

Miss Gillian Burgess for the applicant Jeffery Peart

Mrs Carol Dacosta for the applicant Roxanne Peart

Miss Maxine Jackson and Miss Alexia McDonald for the Crown

15, 16, 17, 18 June 2020 and 21 May 2021

STRAW JA

[1] On 18 June 2020, after hearing submissions from counsel, we made orders in the following terms:

> "1. The applications for leave to appeal against conviction in respect of both applicants are refused.
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> 2. The application by Mr Jeffery Peart for leave to appeal against sentence, is granted and the hearing of the application is treated as the hearing of the appeal.
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> 3. The appeal in respect of Mr Jeffery Peart in respect of sentence is allowed and the sentence of 35 years is set aside and is reduced to 33 years to account for the time that he spent on remand before sentence.
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> 4. The application by Miss Roxanne Peart for leave to appeal against sentence is refused.
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> 5. The sentences in both cases are to be reckoned as having commenced on 17 December 2014."

These are the reasons which we promised to give.

Background

[2] The applicants, Mr Jeffery Peart and Ms Roxanne Peart are brother and sister. On 19 November 2014, after a somewhat lengthy trial before Daye J ('the learned judge') and a jury sitting in the Saint Ann Circuit Court, the pair were found guilty on an indictment charging them with the offence of murder. On 17 December 2014, the learned judge imposed sentences of life imprisonment on both applicants with the stipulation that Mr Peart should serve 35 years before becoming eligible for parole, and Ms Peart should serve 16 years before becoming similarly eligible for parole.

[3] Both applications for leave to appeal were refused by a single judge of this court and the applications were renewed before this court for consideration.

The Crown's case

[4] The Crown's case against the applicants was that Ms Peart lured Delroy Frame ('the deceased') to a district in the parish of Saint Ann where Mr Peart, then a member of the Jamaica Constabulary Force, murdered and decapitated the deceased. She did this by way of a series of telephone calls to the deceased. The case was based primarily on circumstantial evidence, which included evidence of mobile call data, as well as the testimony of over 20 witnesses who were called to give evidence.

[5] It is useful to briefly outline the facts of the case. On the evening of 19 May 2012, sometime between 9:00 and 10:00 pm, police officers, whilst on patrol, received a telephone call which caused them to proceed to the White Sand district in the parish of Saint Ann. This area is adjacent to the community of Bohemia on the border of the parishes of Saint Ann and Manchester. Upon arrival, they found a partially burnt out motor car parked to the left side of the road. There were no documents inside the said motor car, but the police were subsequently able to use the chassis number in their investigation, which was linked to the deceased.

[6] Blood was also observed further along the road. Upon conducting a search of some bushes and under a bridge, Corporal Clinton Grant, a member of the patrol team, discovered a headless body in a ditch. This was some 15 feet from the main road. The upper part of the body had several cut injuries.

[7] Along with the body, Constable Glenroy Williams removed blood and spent casings. The blood found on the road was matched to the headless body by way of forensic and DNA tests which were conducted. A post-mortem examination also revealed that there were three attempts to decapitate the deceased, who was subsequently identified as Delroy Frame, a taxi operator who operated between the parishes of Hanover and Westmoreland. This identification was initially made by Marcia Shirley and Dawn Frame, the deceased's common law wife and sister respectively, who recognised his clothing and a birth mark on one of his legs. DNA tests confirmed the identification of the deceased, based on a comparison to buccal swabs that were taken from the deceased's parents, Mrs Palmita Frame and Mr Harold Frame.

[8] At the time of his death, the deceased was a complainant and sole key witness in a criminal matter involving the applicant, Mr Peart. During the course of the investigation of the deceased's death, Mr Peart was apprehended by the police, at which time his licensed firearm was taken for ballistics testing. Mr Peart also participated in a question and answer session, where he provided cellular phone numbers for himself, his mother and his fiancée, Vivienne Reid. He was later released.

[9] Following additional investigation, Mr Peart was again taken into custody by the police. The spent casings recovered in the vicinity of the scene of the crime, were found to be a match with Mr Peart's licensed firearm. The police also recorded a statement from one of Mr Peart's girlfriends, Kadena Jarrett ('Ms Jarrett'). She did not testify at trial, having previously died, but her statement was read into evidence. Her account was that, on the morning of 19 May 2012, around 9:00 am, she loaned Mr Peart her 2007 Nissan Tiida motor car, which he returned the following day around 12:18 am. At the time of the return, Ms Jarrett stated that Ms Peart (who

she referred to as Roxene) was seated in the front passenger seat. Ms Jarrett drove with the applicants to their home in Little London, in the parish of Westmoreland and subsequently returned home in the said vehicle.

[10] Later that day, Ms Jarrett observed that Mr Peart did not return her car in the same condition that she had loaned it to him. She stated that it was dirty on the outside as well as parts of the interior. She observed that the spare tyre had been moved, as there was white dust on it and there was dust and what appeared to be blood in the trunk of the car. This caused her to take the car to be washed. Subsequent forensic analysis of Ms Jarrett's motor car revealed that the blood found in the trunk matched the blood found in the roadway and the deceased's body.

[11] Although Ms Jarrett gave details of knowing Ms Peart in her statement, she failed to point her out on an identification parade. When Ms Peart was apprehended by the police and cautioned, she told Detective Sergeant Alford Stoddart that she was previously employed to the Sunset Beach Resort. Detective Sergeant Stoddart's investigations led him to the said hotel where he received Ms Peart's job application form from the manager, Mr Samuel Henry ('Mr Henry'). The application form contained Ms Peart's personal information, including her address, date of birth, schools attended, telephone numbers, references and emergency contact details. Mr Henry recalled conducting an interview with Ms Peart and that she had worked at the hotel but he was unable to point her out in court.

[12] The Crown also relied on the testimony of Mr Shane Wint ('Mr Wint'), who claimed to know Mr Peart on account of being in the same grade at school with him. Mr Wint said that he saw Mr Peart in the vicinity of his uncle's shop in Wild Cane district around 8:30 pm, on the night of 19 May 2012. Wild Cane is an adjacent district to White Sand, where the deceased's body and motor car were respectively found. His evidence was that there was another person in the car with Mr Peart but he was unable to say who it was. On 31 May 2012, he identified the applicant, Mr Peart on an identification parade.

[13] As previously mentioned, mobile call data was a significant feature of the Crown's case and as such, a brief summary is necessary. Between 17 May and 19

May 2012, one of the telephone numbers on Ms Peart's application form (867-9243 which was listed as her contact number) was in constant communication with the deceased's telephone number (867-8664). There were over 50 calls between these two numbers during that period.

[14] On 19 May 2012 (the last day on which the deceased was seen alive), the call data analysis revealed what appeared to be almost simultaneous communication between 867-9243 and Mr Peart's telephone numbers (882-7082 and 446-8598; Mr Peart accepted the former but denied the latter number belonged to him). The Crown asked the jury to draw the inference that 867-9243 belonged to Ms Peart. There were also communications between 867-9243 and the numbers for Mr Peart, his girlfriends (namely, Ms Jarrett and Vivienne Reid) and the applicants' mother, Patricia Walker.

[15] Further, the call data records showed that the telephone numbers associated with the applicants were receiving calls in the coverage area of Bohemia (located on the border of the parishes of Saint Ann and Manchester, where the applicants grew up), which is adjacent to the districts of Wild Cane and White Sand. As part of its case, the Crown called Corporal Maurice Goode, a call data expert, to give evidence in relation to the movement of the numbers attributed to the applicants. His evidence was that there was movement from the parish of Westmoreland to Bohemia on 19 May 2012, and from Bohemia to Westmoreland from 19 May to around 12:18 am on 20 May 2012.

[16] There were calls between the number attributed to the deceased and the number attributed to Ms Peart. These converged in the Little London cell site area at 5:22 pm on 19 May 2012. The last call received by the deceased from Ms Peart's number, was at 5:44 pm that day, in the area of the Ferris Cross cell site area (at the border of Saint Elizabeth and Westmoreland).

The defence

[17] Both applicants gave unsworn statements denying their involvement in the murder and called character witnesses.

[18] Mr Peart raised the defence of alibi. He denied travelling to Bohemia on 19 May 2012. He stated that the last time he visited Bohemia was in 2011 and that he was in the parish of Westmoreland for the entire weekend. He also denied firing his licenced firearm in Bohemia, but admitted that it was fired at a shooting range in Westmoreland. Mr Peart denied borrowing Ms Jarrett's motor car.

[19] For her part, Ms Peart denied knowing the deceased and denied that the telephone number (867-9243) on the application form was hers. She was silent on whether she had worked at the hotel or whether the other personal information contained on the application form was hers. She did not deny knowing Ms Jarrett or that they spoke on the telephone.

The grounds of appeal

[20] The applicants were separately represented and each counsel sought to argue separate grounds of appeal with respect to their clients' applications. Accordingly, we treated firstly with Mr Peart's grounds followed by Ms Peart's.

Jeffrey Peart

[21] Counsel for Mr Peart, Ms Burgess sought leave and was permitted to advance the following five supplemental grounds of appeal:

> "GROUND ONE
>
> The learned trial judge failed to give the full **Turnbull** warning which resulted in an unfair trial.
>
> GROUND TWO
>
> The learned trial judge failed to give the jury adequate assistance as to the treatment of DNA evidence
>
> GROUND THREE
>
> The learned trial judge gave inadequate directions on the nature of the statements admitted into evidence

GROUND FOUR

The learned trial judge admitted evidence of bad character and then the learned trial judge's directions on bad character were inadequate in all the circumstances

GROUND FIVE

The Learned Sentencing judge failed to demonstrate that he had regard to the usual range of sentences when imposing a life sentence for murder, aggravating and mitigating factors, and to give credit for the time the applicant spent in custody awaiting trial, thus making the sentence for the offence of murder manifestly excessive"

Ground 1 – The learned trial judge failed to give the full Turnbull warning which resulted in an unfair trial

Submissions on behalf of Mr Peart

[22] Ms Burgess contended that an important part of the Crown's case was to create a nexus between Mr Peart and the location where the deceased's body was found. To that end, the Crown's witness Mr Wint, was invited to take part in an identification parade where he pointed out Mr Peart. Ms Burgess accepted that Mr Wint's identification was not determinative of the Crown's case, but submitted that each bit of circumstantial evidence was "an important nail in the coffin" and that was the reason the Crown sought to lead it.

[23] Given that Mr Peart's defence was an alibi, the accuracy of the visual identification was in issue and thus important. As such, Ms Burgess submitted that the learned judge erred insofar that he commenced the **Turnbull** (**R v Turnbull** [1977] 1 QB 224) warning but did not complete it. Reference was made to the transcript, specifically pages 1920 and 2072 to 2075. She submitted that the learned judge did not deal with the circumstances affecting the correctness of the identification. She gave as an example, the issue of the quality of the lighting.

[24] In the round, Ms Burgess submitted that the full **Turnbull** warning ought to have been given and even if this by itself, would not be fatal to the conviction, it was a factor to be taken into account in relation to the fairness of the trial.

Submissions on behalf of the Crown

[25] Crown Counsel, Ms McDonald submitted that the Crown's case against Mr Peart did not depend wholly or substantially on the correctness of one or more identifications of him. In view of the fact that the Crown's case depended substantially on circumstantial evidence, the learned judge's summation was correctly tailored to the facts of the case.

[26] Further, she said, the guidelines expressed in **Turnbull** were not strictly applicable. Ms McDonald submitted that the learned judge was not required to give the full **Turnbull** warning, nonetheless, he gave the jury the relevant guidance as to how to treat Mr Wint's evidence. She reminded the court that Mr Wint's evidence was not that he saw the murder of the deceased, rather that he saw Mr Peart in Bohemia, near the locale where the deceased's body was found. Further, Mr Wint indicated that he had spoken to Mr Peart briefly.

[27] It was submitted that, in any event, the failure of the learned judge to give a **Turnbull** warning was not fatal. In support of this, reference was made to the case of **R v Michael Freemantle** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 5/1987, judgment delivered 4 December 1987.

[28] Further, it was submitted that the court should be guided by the fact that the application of the **Turnbull** warning did not require an incantation of a formula or set form of words; and all that would be required, is that the sense and spirit of the guidance be complied with. The case of **Arthur Mills et al v The Queen** [1995] 1 WLR 511, [1995] UKPC 6 was cited in support.

Discussion and analysis on ground 1

[29] The evidence given by Mr Wint was that he was standing at the doorway of his uncle's shop, in Wild Cane district, at about 8:30 pm on 19 May 2019. He said that there was light on the shop outside as well as a nearby streetlight. A car drove up and parked in front of the shop, about 20 feet away, in front of the light. He identified Mr Peart as the person who alighted from the driver's side of the car, and came up to the doorway where he (Mr Wint) was standing. He knew Mr Peart before

for five years, as they were in the same grade together at Spaulding High School. He left school in 2005 and would only have seen Mr Peart once after that, before the night in question. He knew that he had lived in Bohemia (at that time he was attending school), which was about four miles away from Wild Cane district. He also knew his sister, Roxanne Peart and that she attended Christiana High school.

[30] Mr Wint stated that Mr Peart called to him saying, "Shane, wha a gwaan", that he responded to him and that Mr Peart entered the shop, ordered a 'Magnum' from his uncle, got the 'Magnum' and his change then exited the shop and went back into the car and drove away. There was light also in the shop. It was a 100-watt bulb on the outside and inside the shop. He stated that he was able to see Mr Peart's face, nothing obstructed his view of him; that Mr Peart came within touching distance of him when they spoke and that he saw his face for about a minute.

[31] In his direction to the jury, the learned judge pointed out that Mr Wint did not see Mr Peart committing any crime, but that his evidence was one link in the chain of circumstantial evidence. He went on to direct them as follows at page 1920, lines 16 to 25, and page 1921, lines 1 to 13:

> "Whenever the prosecution bring [sic] evidence of visual identification then as jurors you are to look at the visual identification in a certain way. You must first decide if you believe the witness who gave the evidence of visual evidence; if the person is an honest witness. If you decide the person is a [sic] honest witness, because the visual identification, the law says you must decide if the person, although honest could be making a mistake. Because the law says experience have [sic] shown where persons have made mistakes of person they claim to have seen; even though the person may be a close friend or even a relative. So, the law says before you convict upon the correctness of visual identification you must approach the evidence of identification with caution, bearing in mind that a [sic] honest witness can be a mistaken witness. So, you would have to decide since that issue arise [sic] whether Shane Wint is honest or whether he is a mistaken witness and then decide if you will accept."

Also, the learned judge had previously directed at page 1919, lines 9 to 24:

> "In his unsworn statement, Jeffery Peart is saying he has not said he doesn't know Shane Wint; he is only saying that we were not in the same grade, not, that is what he said. But he is still challenging, by the nature of his defence; he is challenging the correctness of the visual identification. And because there is an issue you the jury must make a finding of fact if you believe Shane Wint that he was present there. And if you find that he was present there that would be a primary finding of fact. And then you would have to decide if you can draw any reasonable inference from that primary finding of fact. Did he have opportunity to commit the murder of Delroy Frame as principal?"

[32] At page 2072 of the transcript, the learned judge summarised Mr Wint's evidence in relation to identification and told the jury that the essence of cross-examination was a challenge to Mr Wint's credibility; that he did not see Mr Peart that night or that he was mistaken, as he did not have sufficient opportunity to properly recognize the man, he claimed to be Mr Peart. The learned judge told the jury also, that the defence was contending that the two opportunities Mr Wint had for observation were when Mr Peart came from the car and when he was going back to the car; also that the witness was challenged on the fact that he could not give any date as to when he would have last seen Mr Peart after leaving school.

[33] Ms Burgess contended, therefore, that while the learned judge issued the warning to the jury about the special need for caution as required by the Turnbull guidelines, he did not specifically refer to the points to be considered by the jury, such as the opportunity to view, whether there was obstruction, the length of time, when the person was last seen. However, an examination of the summation (at pages 2072 to 2074), reveals that the learned judge did review the evidence with these issues in mind and reminded the jury of the challenges made in cross-examination to this evidence. The jury would have had all the evidence for their examination including what Mr Wint had to say about the lighting, that the bulbs inside and outside the shop were 100 watts.

[34] To be clear also, the prosecution was not relying wholly or substantially on the identification evidence of Mr Wint. As submitted by Crown Counsel, it was merely one link in a chain of circumstantial evidence. We concluded therefore that the jury

was directed sufficiently as regards the identification of Mr Peart by Mr Wint. The summation, in this regard, could not be faulted, as much will depend on the circumstances of the particular case, when determining whether slavish regard to all the factors affecting identification should be "considered exhaustive or of general applicability" (see **R v Michael Freemantle**, per Wright JA (as he then was) at page 16 quoting **R v Oliver Whylie** (1977) 15 JLR 163).

[35] As expressed by the Board in **Arthur Mills et al v The Queen**, at page 6:

> "*Turnbull* is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in *Reg. v. Turnbull* as restated by the Privy Council in *Reid (Junior) v. The Queen* [1990] 1 A.C. 363."

[36] We found this ground of appeal to be without merit.

Ground 2 – The learned trial judge failed to give the jury adequate assistance as to the treatment of DNA evidence

Submissions on behalf of Mr Peart

[37] Ms Burgess submitted that although the learned judge directed the jury on how to treat with the opinion of experts, he did not assist them to understand the evidence of the forensic experts. This was important, because the connection of Mr Peart to the killing hinged on the following: (1) the correct identification of the deceased, (2) the matching of Mr Peart's firearm with the spent shells found on the crime scene, and (3) the linking of the blood stains found in the trunk of Ms Jarrett's motor car to the deceased.

[38] Ms Burgess complained that the learned judge did not assist the jury to understand the evidence of the forensic witnesses. However, her submissions focused on the learned judge's treatment of the DNA evidence. In that regard, her

major area of concern was the correct identification of the deceased and the evidence relevant to blood stains found in Ms Jarrett's car.

[39] In relation to the DNA evidence, in particular, it was submitted that the learned judge "clearly and admirably" directed the jury several times, that it was a matter for them whether or not to accept or reject it. However, the learned judge's direction was lacking in terms of how to critically deal with the said DNA evidence.

[40] Reference was made to portions of the summation contained at page 1953 of the transcript, where the learned judge dealt with random match probability ratio. Ms Burgess submitted that the learned judge, in treating with the DNA evidence, failed to alert the jury to any factors which could cause the results to be inconclusive. In particular, the learned judge treated the expert evidence as conclusive that the blood belonged to the deceased.

Submissions on behalf of the Crown

[41] Crown Counsel submitted that the learned judge provided the requisite assistance to the jury in relation to the treatment of DNA, forensic and technological evidence as presented. The learned judge dealt extensively with the status of the forensic and ballistic professionals within the context of them being experts. The learned judge provided a fair and balanced analysis of all the evidence presented by expert witnesses who gave evidence at the trial. He did so in a manner which greatly assisted the jury to appreciate the material presented and he highlighted what was presented and the considerations that the jury should have, including the limitations of the expert evidence. It was further submitted that the learned judge directed:

(a) on the treatment of expert evidence, by asking the jury to consider whether the expert's findings assisted them in coming to a finding of fact in relation to the evidence presented (page 1861, lines 14 to 23, page 1949, lines seven to 17, and page 1966, lines 10 to 22 of the transcript); and

(b) that expert opinions are merely opinions and that they have to satisfy themselves about that expert's evidence to the extent that they feel sure (page 1947, lines 8 to 17).

[42] He also highlighted the issues which arose with each on cross-examination, and having carried out this exercise, he pointed out to the jury that it was their duty to draw the necessary inferences and come to a finding of fact in relation to the evidence. Having highlighted the considerations, the learned judge reminded the jury that as the fact finders, they could reject the opinions presented by the experts. In keeping with **Trevor Whyte et al v R** [2017] JMCA Crim 13, the learned judge also instructed the jury to treat the experts in a manner similar to any other witness.

[43] Crown Counsel made thorough written submissions in relation to the learned judge's treatment of the expert evidence in relation to the DNA and ballistics. However, in oral submissions, she indicated that since Ms Burgess' submissions were essentially confined to the treatment of the DNA evidence, this would be the subject of focus.

[44] For guidance on how trial judges should direct the jury on the treatment of DNA evidence, reference was made to the Supreme Court of Judicature of Jamaica, Criminal Bench Book ("the Bench Book"), **Trevor Whyte et al v R** and **R v Doheny** [1997] 1 Cr App R 369. Further, it was acknowledged that trial judges ought to explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw their attention to other relevant evidence, which provides the context that gives the ratio its significance; as well as to that evidence which conflicts with the conclusion that the defendant may be responsible for the crime.

[45] Crown Counsel submitted that the matter of DNA evidence, with all its possible shortcomings, was fully put to the jury for their consideration. While the learned judge did not make specific reference to the treatment of DNA evidence in relation to deceased persons, he adopted the general principles highlighted in the case of **R v Doheny**. The learned judge was keen to highlight the fact that, any finding as to who the samples of blood belonged to, was entirely within the jury's remit.

[46] In support of the submissions, Crown Counsel referred the court to specific portions of the learned judge's summation, where he provided guidance to the jury:

(a) in respect of the DNA/scientific evidence led in relation to samples of blood taken from the trunk of Ms Jarrett's car (page 1961, lines 4 to 11);

(b) in respect of the items which were examined by the analysts and noted their findings in relation to each, including the random occurrence ratio – the frequency with which the matching DNA characteristics are likely to be found in Jamaica (page 1962, lines 23 to 25 and page 1963, lines 1 to 12);

(c) in respect of the issues raised regarding the match probability, in view of the fact that six profiles were taken from the vehicle and only one matched the sternum that the expert received from the deceased's body. The learned judge brought to the jury's attention that based on the expert's finding, the blood of another male was present in the motor car (page 1965, lines 1 to 25 and page 1966, lines 1 to 9);

(d) on the jury's duty to arrive at a finding of fact as to whether the blood found in the trunk liner of Ms Jarrett's motor car was that of the deceased (page 1966, lines 16 to 22);

(e) in respect of how this bit of evidence should be used, namely to determine whether it formed any link to the rest of the case while considering that the case for the Crown rested greatly on circumstantial evidence (page 1967, lines 1 to 25, page 1968, lines 1 to 13 and page 1969, lines 12 to 24);

(f) in relation to the burden of proof being on the Crown to prove that the headless body was that of the deceased (page 1943, lines 15 to 23);

(g) in relation to the DNA evidence led by the Crown in a bid to satisfy the burden it had of proving that the body was that of the deceased, and that Harold Frame could not be excluded as being the deceased's father (page 1946, lines 9 to 13, page 1957, lines 6 to 19, page 1960, lines 3 to 25);

(h) in relation to the need to consider the fact that a random person may also have a match to the samples which were taken (page 1948, lines 3 to 13 and page 1960, lines 3 to 25).

Discussion and analysis on ground 2

[47] There were several experts who gave evidence in this matter. These included Dr Ruwanpura, the pathologist, whose report was admitted into evidence, DSP Carlton Harrisingh, the ballistic expert (in relation to the spent shells found on the scene which was matched to the firearm of Mr Peart), as well as the experts who presented evidence in relation to the collection of samples and testing relevant to the DNA evidence.

[48] We cannot agree with Ms Burgess' complaint about the judge's treatment of the evidence of the expert witnesses, including the evidence about the shell casings. The learned judge did direct the jury on how to deal with the evidence of the experts (see page 1861, lines 14 to 23, page 1947, lines 8 to 17, page 1949, lines 7 to 17, and page 1966, lines 10 to 22 of the transcript). He reviewed the evidence in relation to the various samples collected and the process of the testing carried out to determine the DNA profiles. It was left to the jury, to consider what they made of all these pieces of evidence, including their duty to draw necessary inferences and come to a finding of fact (see page 1972, lines 17 to 20).

[49] Specifically, in relation to the shell casings, the learned judge directed the jury as follows at page 1864, lines 1 to 21 and page 1968, lines 1 to 13:

> "This relates to the evidence of the ballistic expert, DSP Harrinsingh. [sic] You must decide if you accept his evidence and his opinion. And bear in mind, his evidence and his opinion only relate to one aspect of the trial; it is

> not the whole trial. What is that aspect? It relates to the spent shell, Exhibit 3 and the firearm which was taken from Jeffrey Peart. His private firearm and that is put in evidence as Exhibit 8. Exhibit 3 and Exhibit 8, spent shell and the firearm. So, his opinion in relation to that, that is not the whole case.
>
> It relates to one area of the case which I will look at. It relates to the question of the presence of the accused, Jeffrey Peart, at the area where the headless body was discovered, which is connected to where the burnt-out – one mile from where the burnt-out Toyota car was seen."
>
> "…And there is evidence that Jeffery Peart – well, it is challenged, but do you accept it? It was linked to that blood in that area by virtue of Exhibit 3, spent shell casing and his firearm – private firearm. So it's another link. And I remember I said mere presence is not sufficient, mere opportunity is not sufficient, but it would indicate -- and you must decide if it does, and you must draw the inference whether it indicates that Jeffrey Peart had, not only opportunity, but access. What do we mean by access? Physical contact with the deceased."

[50] The learned judge directed the jury that, if they accepted the evidence of DSP Harrisingh, this could assist them in determining whether Mr Peart was present on the scene. The jury was reminded that there were challenges made in relation to the findings of this expert and that they would have to decide whether they accepted this evidence. There was no basis for any challenge to the learned judge's treatment of the evidence in this regard.

[51] Several witnesses were called in relation to the receiving and collation of the various pieces of evidence for testing by the experts in relation to DNA material. The two main witnesses in this regard were Mr Justin Lewis ('Mr Lewis') and Mrs Sherron Brydson ('Mrs Brydson'). Ms Burgess did not challenge their expertise, the evidence of their findings, or the actual process of the tests done to arrive at certain conclusions. These conclusions included a DNA test conducted using samples taken from the parents of the deceased, with a resulting paternity test. Comparisons were made with the DNA profile extracted from the blood of the deceased.

[52] Comparisons were also made by way of DNA profiles created from the sample of blood, the sternum, and fingernail clippings taken from the body of the deceased with the DNA profile extracted from samples of blood found on the road leading to the ditch, in the ditch itself, as well as samples of blood found in the car of Ms Jarrett.

[53] The prosecution relied on these biological samples from which DNA profiles were extracted to assist, first of all, in establishing that the headless body found in the ditch was that of Delroy Frame and secondly to link the body to the blood in Ms Jarrett's car. The evidence to establish his identity was done by way of the paternity test described above. The learned judge reminded the jury of the expert evidence in this regard (see page 1957, lines 1 to 10). He told the jurors they would have to be satisfied that the headless body is that of Delroy Frame, based upon the expert evidence. Further, he reminded them that the evidence of the expert was not that Mr Harold Frame was the father; that any such conclusion would be for them to draw in the matter (see page 1957, line 11 to 19).

[54] The learned judge also reminded the jury that, Mrs Brydson, in her evidence concluded that the blood samples found on the scene, the fingernail clippings, and the blood found in the trunk liner could not be excluded as being that of the deceased. Mrs Brydson made this conclusion based on the comparison with the DNA profile in respect to paternity (see page 1960, lines 1 to 15).

[55] The jury was also reminded of the evidence of Mr Lewis, that the DNA profile of the deceased matched the DNA profiles of blood samples seen on the road leading to that ditch as well as the blood sample taken from the trunk of Ms Jarrett's car. At page 1960, line 19 of the transcript, he told them that they would have to ask themselves, what inference could be drawn from that evidence. He reminded the jury of the evidence of the experts as to their findings in this regard, that there was a random probability match of one over 59 quintillion, 171 quadrillion with these DNA profiles, which meant that there was a one in 159,170 billion chance, that a person, selected randomly in the Jamaican population, would have a match. The jury

was also reminded that the expert compared the DNA profile from the portion of the sternum with the blood sample taken from the scene of crime, as well as the sample taken from the trunk liner and the fingernail clippings from the hands of the deceased; that it was concluded that the random match probability of all these samples listed above was one over 159 quintillion (see page 1964). The evidence of Mr Lewis (at page 1605) was that the probability match was one in 59 quintillion 171 quadrillion, which meant that there was a 159 quintillion and 171 quadrillion chance, that a person selected at random in the Jamaican population would have a matching DNA profile.

[56] The jury was told that there were six profiles found in Ms Jarret's vehicle and that only one (the sample taken from the trunk liner) had the match probability with the deceased. The learned judge, therefore, brought to the jury's attention, that they would have to decide what they made of that and whether the existence of other DNA profiles was a coexisting circumstance that destroyed or weakened the scientific evidence, that there was a match between the blood in the trunk liner and the deceased (see page 1965, lines 14 to 25).

[57] In particular, the learned judge gave the following direction at page 1966 at lines 16 to 25 and page 1967, lines 1 to 25:

> "…the jury, must decide if the procedure outlined by this witness assist you in the relationship -- an opinion he gives you, assist you to come to a finding of fact in relationship to the connection between the deceased's body and blood in the -- found in the trunk liner of the car.
>
> Miss Brydson confirms that -- the same evidence about the DNA evidence, she confirms it. She confirms it, all right. And the significance of that scientific evidence about the comparison is that it is another link in the chain of circumstantial evidence. Who does that evidence link to? Because remember I said every time you look at the chain, you must see if it answers any of the questions of who, or what, or where. So you must ask yourself the question, if the scientific evidence is a link in the chain of circumstantial evidence, not in abstract, but who does it link? Which one of the accused, or does it link the both?

> That evidence links each of the accused in different ways. It links -- it would link -- and you must make that decision, it would link Jeffrey Peart to the blood out on the road where the body -- where the blood leads to the body in the ditch. That is what it links to, because the scientific evidence is that there is a match, and the probability of that match, you heard the figure, rare. It would link him to the sample taken on the road and over by the ditch. That blood there match the deceased when the postmortem was done on him. It matched the fingernail clippings taken from the deceased. And there is evidence that Jeffery Peart -- well, it is challenged, but do you accept it?"

Further at page 1972, lines 17 to 21:

> "At the end of the day you ask yourself if you are satisfied so you feel sure and even after you accept the DNA evidence if you do look what inference can be drawn from it?"

[58] In **R v Doheny and Adams**, Phillips LJ provided an overview of how DNA evidence is to be presented by the expert as well as of a trial judge's summation in that regard. This overview has been cited in the Bench Book as an example of a sample direction to the jury and is set out as follows:

> "In *Doheny,* Phillips LJ, suggested the following be addressed in the summing up on the aspect of DNA evidence:
>
> The Judge should explain to the jury the relevance of the random occurrence ratio in arriving at their verdict and draw attention to the extraneous evidence which provides the context which gives that ratio its significance, and that which conflicts with the conclusion that the defendant was responsible for the crime stain. In so far as the random occurrence ratio is concerned, a direction along these lines may be appropriate, although any direction must always be tailored to the facts of the particular case.
>
> 'Members of the jury, if you accept the scientific evidence called by the Crown, this indicates that there are probably only [*state number and category*] from whom that semen stain could have come. The defendant is one of them. If that is the position, the decision you have to

> reach, on all the evidence, is whether you are sure that it was the defendant who left that stain or whether it is possible that it was one of that other small group of men who share the same DNA characteristics'.
>
> In Jamaica, in the context of evidence of a random match probability of say l: ---- million it might be appropriate to direct the jury in the following manner:
>
> > 'What that means is that the probability of finding another person with the same DNA type from the local Jamaican population who is neither the sample donor or anyone related to him is one in … million.'"

[59] In essence, the learned judge gave proper directions to the jury in keeping with principles set out in the leading authorities, bearing in mind the particular circumstances of this case. Having rehearsed the evidence of the experts, he reminded the jury as to the evidence in relation to the paternity index, that it was not a conclusion by the expert, that Mr Harold Frame was the father but that he could not be excluded as the father of the deceased. He directed them as to the evidence of the random probability match relevant to all the DNA samples; and told them what the random probability match meant.

[60] While the learned judge used the word "matched", that the samples matched, as seen from the transcript, it was done within the context of an understanding as to the random match probability. In that regard, at page 1967, line 20, the learned judge said, "because the scientific evidence is that there is a match and the probability of that match, you heard the figure". The judge also told the jury (as seen at page 1972, line 20) that if they were satisfied, even after they accepted the DNA evidence, they would have to consider what inference could be drawn from it. The jury would have understood how they were to review and treat with the DNA evidence and to decide what inferences could be drawn, before considering the DNA evidence as a reliable strand in the chain of circumstantial evidence. It was not established therefore, that the learned judge lapsed in his duty in this regard.

[61] This ground of appeal therefore failed.

Ground 3 - The learned trial judge gave inadequate directions on the nature of the statements admitted into evidence

Submissions on behalf of Mr Peart

[62] In reference specifically to the statement of Ms Jarrett, it was submitted that statements given under caution are not sworn; that the learned judge admitted the documents in evidence pursuant to section 31D of the Evidence Act, and therefore the statements remained hearsay. Counsel complained that the learned judge omitted to mention that all the statements, admitted by virtue of the Evidence Act, were unsworn and by contrast, he referred to the statements of the applicants from the dock as unsworn statements.

[63] Ms Burgess contended, therefore, that the learned judge reinforced a distinction in a value (between the statements tendered into evidence by the prosecution and the statements from the dock) that was not an accurate juxtaposition. It was acknowledged however, that the learned judge did give a warning in relation to the statements that were tendered into evidence. Reference was made to pages 1873 and 1977 of the transcript.

Submissions on behalf of the Crown

[64] It was submitted that the learned judge repeatedly directed the jury in relation to the fact that Ms Jarrett was not cross-examined and as a consequence, the jury should attach whatever weight to her statement that they deemed fit. Counsel contended that although the statement was not referred to as unsworn, this fact would not have been lost on the jury, who were afforded the opportunity of seeing rigorous cross-examination of other Crown witnesses. It would have been apparent to the jury that Ms Jarrett's statement was not tested on oath or subject to any cross-examination.

[65] It was submitted that the plain purpose of section 31D of the Evidence Act was to permit the admission of an unsworn statement made out of court, where the statutory conditions are met and subject to any relevant judicial discretion. It was acknowledged that, but for section 31D, Ms Jarrett's statement would have been inadmissible as hearsay. Crown Counsel contended that there were safeguards

provided by section 31J of the Evidence Act, as well as the common law. Reference was made to the case of **Steven Grant v The Queen** [2006] UKPC 2, specifically paragraph [21] as to how statements admitted under section 31D should be treated and the direction that should be given to the jury in that regard.

[66] Crown Counsel submitted that the learned judge gave the jury proper directions for treating with the unsworn statements tendered by the prosecution. He told them in particular that they had decide what weight, if any, the statements would have.

Discussion and analysis on ground 3

[67] There were three statements tendered into evidence by the prosecution, without the witnesses being called. Apart from Ms Jarrett, these included the report of the pathologist, Dr Runwanpura and the statement of Ms Dawn Frame, the sister of the deceased, who purported to identify the body of the deceased by clothing and a birthmark. The focus of contention before us was that, while the learned judge gave the jury adequate directions on how to treat with the statement of Ms Jarrett, he did not specify that it was unsworn; that in contrast, he referred to the statements from the dock made by the applicants as unsworn. Was this non-direction a material source of unfairness to Mr Peart or indeed both applicants in general?

[68] The learned judge directed the jury in the usual terms, how they were to treat with the unsworn statements of the applicants (see pages 1883 to 1884). In regard to the statement of Ms Jarrett, he reminded the jury that they were not given the opportunity to see or hear her, nor did they have the opportunity of hearing her evidence being tested under cross-examination. He directed the jury, also, that it was a matter for them to determine what weight to attach to the facts in that statement and reminded them that Ms Jarrett's credibility was severely challenged. At page 1875, lines 11 to 14, he reiterated this issue:

> "So you going to have to deal with that, bearing in mind how to treat the evidence of a witness whose statement is before the court but that person was not cross-examined…"

[69] Additionally, the learned judge directed the jury to consider (1) whether there was any independent evidence, including call data analysis, which was led to support the assertions in Ms Jarrett's statement (page 1993, line 1 to 25 and page 1995, lines 1 to 5); and (2) the inconsistencies and discrepancies which were highlighted in relation to Ms Jarrett's statement (pages 2056 to 2058).

[70] The standard direction to be given to the jury in relation to statements tendered under section 31D of the Evidence Act is encapsulated in the Bench Book as well as in **Stephen Grant v The Queen** [2006] UKPC 2. In **Stephen Grant**, at paragraph [21] sub-paragraph (4), Lord Bingham of Cornhill stated as follows:

> "(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 s 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**." (Emphasis supplied)

[71] The learned judge directed the jury in the following terms at page 1874, line 23 to 25, to page 1875, lines 1 to 15:

> "So a primary finding of fact in relationship to that aspect [whether or not Ms Jarrett had loaned the car to Mr Peart and whether or not blood was seen in the trunk] of Kadena Jarrett's evidence, but she was not here to be tested you will have to decide, since she was never cross-examined in all the areas that they challenged her and I will come back to that; whether the facts that she gives evidence about is unreliable and you cannot accept her at all. So you bear that in mind, because in this trial we are faced with that and her evidence, there are several matters dealing with finding of facts that arise, but she is not here.
>
> So you going to have to deal with that, bearing in mind how to treat the evidence of a witness whose statement is before the court but that person was not cross-examined, never have the benefit of seeing her cross-examined."

[72] The learned judge omitted to use the words "unsworn statement" in his warning the jury; that is that the statement had not been verified on oath. But it would indeed not have been lost on the jury, as submitted by Crown Counsel, that they had a further step in the process of evaluation, when considering statements admitted into evidence (under the Evidence Act), including Ms Jarrett's statement as compared to the testimony of the witnesses who gave evidence in court. The omission of the words (that the statement was not made on oath), in these particular circumstances, would not have had any significant impact on the proper assessment to be made by the jury of Ms Jarrett's statement. This non-direction would, therefore, not have been a material one that would constitute unfairness to the applicants.

[73] We could not, therefore, accept Ms Burgess' view that the failure to denote Ms Jarrett's statement as unsworn, would have resulted in any unfair disparity in value between the statement of Ms Jarrett (tendered into evidence) and the unsworn statement of the applicants. Her statement was admitted into evidence because she was deceased. Once the statement was admitted pursuant to the

Evidence Act, it did become evidence for the jury's consideration, subject to its assessment within the context of the limitations described to the jury by the learned judge (see **Stephen Grant** at paragraph [21] sub-paragraph (4) set out at paragraph [70]).

[74] The concept of the unsworn statement made by the applicants is distinguishable, as they do not constitute evidence but are left to the jury to consider what weight, if any, were to be attached to them.

[75] This ground of appeal was without merit.

Ground 4 - The learned trial judge admitted evidence of bad character and then the learned trial judge's directions on bad character were inadequate in all the circumstances

Submissions on behalf of Mr Peart

[76] It was submitted that the learned judge admitted bad character evidence, led by the Crown, as part of its case to establish motive. It was contended that motive to commit murder was not an element of the offence and the general rule was that bad character evidence is inadmissible (save for a few exceptions including similar fact evidence to prove that the act was not accidental). It was submitted that the evidence must go beyond mere propensity and assist the jury to resolve an issue in the case. Reliance was placed on the case of **Myers v The Queen; Brangman v The Queen; Cox v The Queen** [2015] UKPC 40.

[77] Counsel contended that motive, in the case at bar, fitted squarely within propensity and did not assist the jury in resolving any other issue in the case; and that even if such evidence were properly admitted, it would have required careful directions about the purposes for which it could be used. It was insufficient to state that the jury was not to "use it prejudicially against him".

[78] Further, it was contended orally, that when the learned judge admitted Ms Jarrett's statement, there was a paragraph in it, which the defence asked to be taken out (at page 778 of the transcript). In her statement, Ms Jarrett stated that Mr Peart told her that he had been arrested by the anti-corruption police. Reference

was made to page 735 as well as page 756, where the learned judge made his ruling refusing the application. It was submitted that the learned judge applied the wrong test, as the nature of the evidence that the defence sought to exclude was in the nature of bad character evidence. Ms Burgess stated that the evidence was prejudicial and there were no compelling reasons to warrant its introduction.

[79] Ms Burgess submitted that, unlike other jurisdictions, there have been no statutory amendments to the common law position, as set out in **Makin v Attorney General for New South Wales** [1894] AC 57. Reference was made to the bad character direction given by the learned judge on page 1997 of the transcript. It was submitted that this direction was inadequate and that the general warning against bad character evidence was required.

Submissions on behalf of the Crown

[80] It was submitted that in its purest sense, the evidence contained in Ms Jarrett's statement could not be deemed as bad character evidence. In any event, the learned judge, having allowed the admission of what is characterised as bad character evidence, provided guidance to the jury through a balanced approach. Even though the applicants gave unsworn statements, the learned judge gave a full good character direction.

[81] Further, it was contended that criminal charges cannot be judged in a factual vacuum and, in many instances, background evidence will be elicited to provide context to a criminal matter and in the case at bar, the evidence was used to show an association with the deceased. Based on a careful assessment of Ms Jarrett's statement, it was submitted that it was purely exculpatory and did not show any criminal intent being harboured by Mr Peart against the deceased. Rather, the evidence showed that Mr Peart was maintaining his innocence in relation to the corruption charges against him.

[82] Additionally, it was submitted that the alleged bad character evidence (elicited through Ms Jarrett's statement) was merely a reflection of the information contained in the question and answer (reference was made to page 971, lines 7 to 11 and 21 to 24). The answers provided by Mr Peart through his question and answer

document were done after he was cautioned and informed, amongst other things, that he need not say anything unless he wished to do so, and that whatever he said, would be taken down in writing and given in evidence (reference was made to page 960, line 25, page 961, lines 1 to 3, page 962, lines 6 to 11 and 13 to 15 and page 968, lines 19 to 22).

[83] Further, it was submitted that Mr Peart's counsel was present throughout the question and answer session and made no objection to that document being admitted into evidence. Consequently, the evidence of the previous association between Mr Peart and the deceased was properly admitted into evidence by the learned judge for the jury's consideration. The learned judge warned the jury against arriving at a conclusion about the evidence. Crown Counsel submitted that this provided excellent guidance in relation to the treatment of the evidence. This was highlighted by way of reference to the portions of the transcript, where the learned judge provided guidance to the jurors regarding the need for them to consider the good character of Mr Peart, in relation to the likelihood of him committing a crime as well as his credibility (pages 1891 to 1892 and 2132, lines 2 to 17).

[84] The learned judge also analysed the contents of Ms Jarrett's statement which was read into evidence. He informed the jury, in clear terms, that the contents of Ms Jarrett's statement should not be viewed by them as proof of Mr Peart's guilt. Rather, he instructed them that that bit of evidence should not be considered on its own but that the jury should consider it in light of all the circumstances of the case (pages 1997 to 1998 of the transcript).

Discussion and analysis on ground 4

[85] In **Myers, Brangman, and Cox,** the Privy Council considered three connected cases, raising similar questions concerning the admissibility and proper ambit of evidence relevant to gang activities and the appellants' connection with them. The evidence involved implications of bad character, other than that related to the offences for which the appellants were charged. Lord Hughes, who wrote the judgment of the Board, reviewed the law surrounding the admissibility of this type of

evidence (see paragraphs [37] to [54]). I will attempt a brief summary as set out below:

1. Evidence is not admissible unless it is relevant. It is only relevant if it contributes something, either directly or indirectly to the resolution of one or more issues in the case.

2. Not all relevant evidence is admissible. At common law, relevant evidence for the Crown falls to be excluded if the judge, in the exercise of his judgment, forms the view that its admission is unfair to the defendant; that its prejudicial effect exceeds its probative value. This rule is given statutory effect in Jamaica by virtue of section 31L of the Evidence Act.

3. Evidence which shows that the defendant has a propensity to offend or behave badly may be relevant, but it is normally to be excluded on grounds of unfairness, unless there is some reason to admit it beyond mere propensity. "It may be so relevant if it bears upon the question whether the acts alleged to constitute the crime…. were designed or accidental, or to rebut a defence which would otherwise be open to the accused" (see **Noor Mohammed v The King** [1949] 1 All ER 365 per Lord Herschell at page 369). Admission requires justification beyond mere propensity.

4. In a case of murder or attempted murder, as in most criminal cases, evidence of motive is relevant but not necessary. Where there is evidence that the defendant had a motive to kill the victim, that goes to support the case that it was he, rather than someone else, who committed the act. Admissible evidence of motive may sometimes necessarily involve showing bad behaviour by the defendant on occasions other than that charged. Motive evidence need not prove the case against the defendant all by itself. It may be one strand in a case, together with either circumstantial or eye-witness evidence. As Lord Hughes states at paragraph [47] of his judgment:

> "…the evidence in these two cases rebutted the argument 'Why on earth should this defendant, who has no proven connection with, or dispute with, the deceased, have taken it into his head to shoot him?'"

5. Evidence is admissible, where it is necessary to place before the jury material about a continual background or history relevant to the offence charged and without the totality of which the account placed before the jury would be incomplete or incomprehensible (see **R v Pettman** (unreported) Court of Appeal (Criminal Division) in England and Wales, 2 May 1985).

[86] The evidence complained of by Ms Burgess, as contained within the statement of Ms Jarrett, is set out (page 777, lines 9 to 25 and page 778, lines 1 to 3):

> "In the month of April, 2012, Jeffrey [Mr Peart] was arrested and charged for Corruption. I asked him what happened and he told me that a man by the name of Delroy Frame who was driving a taxi for him at the time met in an accident and they had an agreement that Delroy would stand some of the expenses to fix the car and based on the agreement Delroy was supposed to give him $30,000.00 and that Delroy gave him $10,000.00 and owed him an additional $20,000.00.
>
> Jeffrey said Delroy was reluctant to pay him the money he owed him so he seized a car that Delroy was driving and told him he had to pay him the money that he owed him before he could get back his car and Delroy set the Anti-Corruption Police on him.
>
> Jeffrey seemed very upset at the time I was speaking to him and I told him to take things easy and he should learn from the experience and make him wiser."

[87] The relevant paragraphs speak to two very important issues, firstly that the applicant and one Delroy Frame, whom the Crown alleged to be deceased, were previously known to each other through a working relationship. Secondly, that they were involved in a dispute and the applicant had been charged for an offence related to corruption, because of a report made against him by the deceased. The learned judge, in assessing whether the offending paragraphs ought to be edited

from Ms Jarrett's statement, before it was put into evidence, considered whether the prejudicial effect outweighed its probative value (see page 760, lines 1 to 7). He concluded that the passages were relevant as they identified issues in the case (see page 760, lines 8 to 20). We arrived at the same conclusion, namely that the evidence was relevant and went beyond mere evidence of propensity. The fact that the evidence adduced, tends to show the commission of other crimes, does not render it inadmissible, if it is relevant to an issue before the jury (see **Makin v Attorney General for New South Wales**).

[88] In any event, the evidence as adduced through Ms Jarrett's statement was nuanced in that, it spoke to a previous charge against Mr Peart, but contained a denial of any such offence and an explanation by him for the deceased's accusation of criminal conduct against him. It cannot be denied, however, that the jury could have inferred bad conduct against Mr Peart, based on the admission of this evidence.

[89] In that regard, the learned judge did consider whether the effect of the statements on the jury would lead them to conclude that the applicant had the propensity to commit an offence and was therefore guilty of the charge before them. He concluded that this complaint could be dealt with by a proper direction to the jury.

[90] Ultimately, the learned judge considered the evidence that was being presented by the prosecution was circumstantial, and that the paragraphs in the statement could be viewed as one link in the chain; and that he had to decide whether he should exclude that link, when circumstantial evidence depended on more than one link and that no link alone could prove the case (see page 764, lines 1 to 3). He concluded, therefore, that the prejudicial effect did not outweigh the probative value (see page 763, lines 1 to 5, and page 764, lines 1 to 4).

[91] We were in total agreement with the assessment of the learned judge in this regard and found that he was correct, to allow the totality of the statement with the impugned paragraphs, to be placed before the jury. His conclusions could be justified as fitting comfortably within propositions numbered 1, 3 and 4 in particular,

and possibly 5, taken from **Myers, Brangman & Cox** (as set out at paragraph [85] above). The question is whether the learned judge directed the jury properly, as to how to deal with this aspect of the statement of Ms Jarrett. The learned judge would have been duty bound to direct the jury, appropriately, of the relevance of the evidence to the issues in the case and the limited purpose for which the evidence could be used by them.

[92] In relation to the actual impugned paragraphs in the statement, the learned judge indicated the following (at page 1997, line 21 to page 1999, lines 1 to 5):

> "What I wish to direct you, this is a statement he was charged for Corruption, do not use that prejudicially against him. It is only a question that he was charged, in any event when he was explaining to [Ms Jarrett] he explained his side of the story to this charge. He is saying that the man owed him money and him [sic] seized him car in those circumstance, [sic] because the man wouldn't pay him the balance he owed him. There is no admission by him of this Corruption charge and therefore do not use the fact that he was charged as proof of any guilt on his part, all right.
>
> However, the Prosecution has pointed out or has led evidence that this is part of the chain of circumstantial evidence; that he had a motive to be engaged in a common enterprise, joint enterprise and a common design to get Delroy Frame away from Westmoreland to St. Ann, the community in Bohemia adjacent to the Bohemia district where he is from.
>
> And that is just part of – that, in itself, don't [sic] prove anything. That is just part of the chain of circumstances."

[93] The learned judge directed the jury that the evidence that Mr Peart was charged for corruption could not be used in a prejudicial manner against him, and that it could not be used as proof of guilt. He also pointed out to the jury that Mr Peart was merely clarifying, from his point of view, what had transpired between himself and the deceased and there was no admission that he was guilty of any such offence. Further, he indicated to the jury the rationale behind the prosecution

leading this evidence, what issues it was relevant to and that it was part of a chain of circumstantial evidence relevant to a motive for the joint enterprise; and that this aspect of the evidence proved nothing by itself.

[94] We formed the view that the learned judge dealt adequately with this aspect of the evidence and left it squarely for the jury's consideration, not as evidence of bad character and the propensity of Mr Peart to commit criminal offences, but, as one link in a chain of circumstantial evidence, which could supply a possible motive and nexus with the deceased. Further, the issue of good character had been raised within the trial. Accordingly, the learned judge directed the jury on the issue of good character of Mr Peart, raising for their consideration, both the credibility and propensity aspect (see pages 1891, 1892 and 2132). The jury was, therefore, sensitised to the fact that Mr Peart was of good character and that this issue should be considered by them, when assessing all of the evidence in the case.

[95] There was no merit, therefore, in this ground.

Ground 5 - The learned sentencing judge failed to demonstrate that he had regard to the usual range of sentences when imposing a life sentence for murder, aggravating and mitigating factors, and to give credit for the time the applicant spent in custody awaiting trial, thus making the sentence for the offence of murder manifestly excessive

[96] It is convenient to deal with this ground later in the judgment, together with ground 8 of Ms Peart's proposed grounds of appeal, which also seeks to challenge sentencing.

Roxanne Peart

[97] Counsel for Ms Peart, Mrs Dacosta, originally sought leave and was permitted to advance the following supplemental grounds of appeal:

1) The learned trial judge erred in law when he admitted a document in breach of the hearsay rule (application form).

2) The learned trial judge erred in law when he interfered excessively and unnecessarily in the examination in chief of the Crown's witness Samuel Henry.

3) The learned trial judge erred in law when he allowed the contents of the statement of Kadena Jarrett to be read in full to the jury

4) The learned trial judge erred in law when he failed to direct the jury that the prosecution had failed to establish its case for joint enterprise.

5) The learned trial judge erred in law when he failed to uphold the no case submission.

6) The verdict was not supported by the evidence.

7) The learned trial judge erred when he directed the jury in biblical terms.

8) In any event the sentence was excessive.

[98] During the course of her oral submissions, counsel indicated that she wished to abandon ground 2.

Ground 1 – The learned trial judge erred in law when he admitted a document in breach of the hearsay rule (application form)

Submissions on behalf of Ms Peart

[99] It was submitted that the learned judge erred in admitting the application form for employment, relevant to Ms Peart, in the absence of proof as to the maker of the document. Mrs Dacosta conceded that Ms Peart told the investigating officer that she used to work at the Sunset Beach Resort; and that based on that information, he went to that location, where Mr Henry produced the application form. She contended, however, that insufficient foundation was laid to allow the Crown to tender the application form, which contained the telephone number

attributed to Ms Peart. Alternatively, the Crown failed to present any evidence to prove that Ms Peart was the maker of the document, that is to say, she was the one who completed the form.

[100] Reference was made to the testimony of Mr Henry, who stated that he was unable to recall the application form or its contents. As such, it was submitted that he failed to establish a nexus between Ms Peart and the form and there was no other evidence led to establish this. There was no evidence presented to show that Ms Peart had applied for a job at Mr Henry's place of business and therefore completed the application form.

[101] Mrs Dacosta referred the court to section 31F of the Evidence Act which governs the admissibility of business documents. She submitted that the purpose of this provision is to provide for the admission of a document, where the maker is unable to testify as to the contents of the documents, where one of the stipulated conditions has been satisfied. In the case at bar, Mr Henry was not the maker of the document and was unable to testify as to the maker nor even recall the contents of the document.

[102] It was further submitted that section 31F(3)(f) would be inapplicable. This section would only apply where the maker of the document is known, but is forgetful. However, in the case at bar, the maker of the document was unknown and unproven.

[103] Mr Henry could only testify as to the general nature of the process, concerning the application form for employment at his place of business. He was unable to speak to the relevant application form. Consequently, it was submitted that the Crown failed to prove who was the maker of the application form. Since the document contained information unique to Ms Peart, the jury was invited to infer that the application form was completed by her, which meant she was the maker of the document. Mrs Dacosta emphasised that there was no evidence to substantiate this.

[104] Further, Mr Henry was unable to identify Ms Peart as someone he knew and he stated that he did not witness her completing the application form; as such, there was no nexus between Ms Peart and the application form.

[105] Counsel also argued that there was no evidence concerning the chain of custody, that anyone could have had access to the application form; that there was no evidence of any padlock on the cabinet where the form was kept. It was submitted that anyone could have completed the application form, as the information contained therein was easily acquired. It was acknowledged that the admission of the document was important to the Crown's case, as the *viva voce* evidence of Mr Henry alone would not allow for the presentation of the cell number attributed to Ms Peart, which was present on the form.

[106] The inference that the Crown asked the jury to make, that Ms Peart applied to Mr Henry's place of business and, in so doing, completed the application form, was not proved by the presentation of any evidence. Therefore, there was no inescapable inference that Ms Peart was the maker of the document and the learned judge ought to have guided the jury as to the weakness in the Crown's case in this regard.

Submissions on behalf of the Crown

[107] Crown Counsel submitted that the application form may have originated with Ms Peart, but it was received by the Sunset Beach Resort, during the course of its recruitment process. Thus, section 31F of the Evidence Act was applicable, insofar as the document was created in the course of the hotel's business; and the court was empowered by virtue of this section, to receive into evidence a document obtained during the course of a business as an exception to the hearsay rule, where the supplier or the maker is unavailable. Reference was made to the case of **National Water Commission v VRL Operators Limited et al** [2016] JMCA Civ 19, and in particular, the dictum of Morrison P (Ag) (as he then was) in relation to the statutory intervention to provide for exceptions to the rule against hearsay.

[108] In relation to section 31F(3A) of the said Act, the point was made that there was no basis to suggest that there were any circumstances, from which any

inferences could have been reasonably drawn, to negative the accuracy of the information contained in the document.

[109] It was further submitted that the required nexus was established between the application form and Ms Peart through the evidence of Mr Henry and Detective Sergeant Stoddart. The document was identified by Mr Henry and the contents of same were read into evidence.

[110] Additionally, it was contended that Mr Henry had previously interviewed an applicant by the name of Roxanne Peart. That interview was conducted, based on the application form completed by that person. It was also contended that:

a. prior to the interview, Ms Peart was contacted through the cell number provided on the application form, which had 11:00 am written on it, as the time of the interview;

b. the time written on the document was identified in court as being in Mr Henry's handwriting; and

c. at the time Mr Henry supplied the information to Detective Sergeant Stoddart, he would have or reasonably had personal knowledge of the information contained in the application form.

Accordingly, section 31F of the Evidence Act was satisfied.

[111] It was contended that the admissibility of the document was not affected by the absence of a positive identification of Ms Peart by Mr Henry, as section 31F does not require the identification of the maker of the document. Having regard to the fact that the case was one of circumstantial evidence, the absence of any identification of Ms Peart would not render the documentary evidence useless, as it remained a matter for the jury to assess the evidence as a whole and to draw such inferences from the application form as they deemed fit. It was a matter for the jury whether or not to infer that the person listed in the application form was Ms Peart

and the learned judge directed them accordingly (page 2019, lines 7 to 14 of the transcript).

[112] Alternatively, it was submitted that if this court was of the view that section 31F of the Evidence Act was inapplicable, the application form fell within "the law of relevance as a condition of admissibility".

[113] The learned judge, having permitted the admission of the application form, provided proper and adequate guidance to the jury, in relation to their consideration of whether Ms Peart was the one referenced on the application form (page 2020, lines 22 to 24 of the transcript), as well as the weight (if any) that was to be placed on it.

Discussion and analysis on ground 1

[114] It is expedient to set out the provisions of section 31F of the Evidence Act on which both counsel made submissions:

> "31 F.- (1) A statement in a document shall be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible if in relation to -
>
> (a) criminal proceedings, the conditions specified in-
>
> (i) subsection (2); and
>
> (ii) subsection (3),
>
> are satisfied.
>
> (b) civil proceedings, the conditions specified in-
>
> (i) subsection (2); and
>
> (ii) subsection (4),
>
> are satisfied.
>
> (2) The conditions referred to in subsection (1) (a) and (b) (i) are that-
>
> (a) the document was created or received by a person in the course of a trade, business, profession or

other occupation or as the holder of an office, whether paid or unpaid;

(b) the information contained in the document was supplied (whether directly or indirectly) by a person, whether or not the maker of the statement who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement;

(c) each person through whom the information was supplied received it in the course of a trade, business profession or other occupation or as the holder of an office, whether paid or unpaid.

(3) The condition referred to in subsection (1) (a) (ii) is that it be proved to the satisfaction of the court that the person who supplied the information contained in the statement in the document-

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

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

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

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

(f) cannot reasonably be expected, having regard to the time which has elapsed since be supplied the information and to all the circumstances, to have any recollection of the matters dealt with in the statement.

(3A) In estimating the weight, if any, to be attached to a statement admissible in criminal proceedings as evidence by virtue of this section, regard shall be had to all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement, and, in particular, to the question whether or not the person who supplied the information recorded in the statement did so contemporaneously with the

occurrence or existence of the facts stated, and to the question whether or not that person, or any person concerned with making or keeping the record containing the statement, had any incentive to conceal or misrepresent the facts.

(4) Subject to subsections (5) to (8), the condition referred to in subsection (1) (b) (ii) is that the party intending to tender the statement in evidence shall, at least twenty-one days before the hearing at which the statement is to be so tendered, notify every other party to the proceedings as to the statement and as to the person who made the statement.

(5) Subject to subsection (6), every party so notified shall have the right to require that the person who made the statement be called as a witness.

(6) The party intending to tender the statement in evidence shall not be obliged to call, as a witness, the person who made it if it is proved to the satisfaction of the court that such person-

(a) is dead;

(b) is unfit, by reason of his bodily or mental condition, to attend as a witness;

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

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

(e) is kept away from the proceedings by threats of bodily harm.

(7) The Court may, where it thinks appropriate having regard to the circumstances of any particular case, dispense with the requirements for notification as specified in subsection (4).

(8) Where the person who made the statement is called as a witness, the statement shall be admissible only with the leave of the court."

[115] At the inception of his ruling, as to whether the document should be admitted into evidence, the learned judge indicated the basis on which the document was admissible. This is set out at pages 301 to 302:

"HIS LORDSHIP: The witness has given an evidence [sic] of a process, and a system so far. This is in relation to the application form. That, by itself, doesn't put in the application form as evidence of a process, or a system.

There is one additional [sic] evidence, that is the evidence of his handwriting. It's not any long handwriting. It's just simply a date, but it is sufficient. And he has been able to identify it, the document, just by that handwriting only, just by the time. And he gave evidence that he was the one who would have set this time for this interview. That, by itself doesn't really include to [sic] the admissibility of the document.

It goes on to say that the document – the application is made in the name of Roxanne Peart. So there is a nexus between the witness and the document and the female accused. So that is what we have so far, and that is sufficient basis to include to [sic] admissibility of the document.

The prosecution may ask one or two other questions, but once that is established then the document is admissible. And it doesn't give rise to that Section that you are – on the evidence, that you are talking about.

MR. HERBERT McKENZIE: As the court pleases, my Lord.

HIS LORDSHIP: Evidence of system, and evidence of system should show a nexus with the person involved. Once that minimum evidence is there, then it's sufficient.

That's the Court's ruling."

[116] Both counsel for Ms Peart below and Crown Counsel had made submissions to the learned judge based on section 31F of the Evidence Act. It is not clear from the transcript, however, whether the application form was actually admitted by virtue of the said Act. The learned judge referred to the evidence of a system, which should show a nexus with the person involved as being sufficient for admissibility.

[117] Section 31F of the Evidence Act, which has been set out above, speaks to the admissibility of documents in criminal proceedings, without the maker of the document being called, once certain conditions are satisfied. In **National Water**

Commission v VRL, Morrison P (Ag) examined that section and, at paragraph [78], gave the following summary:

> "[78] The conditions of admissibility of statements contained in a document under that section are, it will be recalled, that, firstly, the document must have been created or received by a person in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid; secondly, the information supplied in the document must have been supplied (whether directly or indirectly) by a person, whether or not the maker of the statement, who had or may reasonably be supposed to have had, personal knowledge of the matters dealt with in the statement; and thirdly, each person through whom the information was supplied must have received it in the course of a trade, business, profession or other occupation or as the holder of an office, whether paid or unpaid."

[118] We were of the view that the evidence did not fit squarely within the provisions of section 31F of the Evidence Act, as the Crown had been relying on a reasonable inference being drawn by the jury, that Ms Peart was the maker of the document. However, it could not be said that the learned judge would not have had a basis to admit this document into evidence through Mr Henry, pursuant to section 31F. The evidence, as led, showed that the document was received by the hotel, in the course of a business or trade. There was no direct evidence as to the maker of the document. It is a form that would be filled out by someone applying for a job at the hotel. The inference that the jury would have been asked to draw, if they accepted that the form was relevant to Ms Peart, was that she was the maker of the document, considering the nature of the information set out.

[119] However, an alternative inference is that the form was filled out by someone, who was given the requisite information by the person making the application. While the specific person who supplied the information was never identified, the application form would have been received by the employee of the hotel, during the course of business. The name on the application form was Roxanne Peart and she had told Detective Sergeant Stoddart that she used to work at the hotel.

[120] Mr Henry had provided evidence as to the system, including the filling out of the application form by someone applying for a job. He also indicated that his memory was vague in relation to the actual circumstances relevant to receiving the form. At the least, it could have been assumed, that the person could not be found or identified by any reasonable steps. In that regard, section 31F(3)(d) would have been satisfied, so as to allow the form being admitted into evidence. Any weight to be attached to the evidence contained in the form, could only have been established by something of evidential value linking the applicant, who was before the court, with the form (see section 31F(3A) of the Evidence Act).

[121] In any event, Mr Henry's handwriting was on the form and he had given evidence of the system through which it was received. There was also the information given to Detective Sergeant Stoddart by Ms Peart. As such, it would have been correctly admitted into evidence by the learned judge. In that regard, even if it could be argued that the provisions of section 31F of the Evidence Act were not satisfied, the evidence demonstrated that a sufficient nexus had been created between the document, Mr Henry and Ms Peart (as the learned judge appeared to be saying) for the form to have been properly admitted into evidence. The information on the form (names of contacts, including the name Jeffrey Peart, address of the applicant, information as to school attended - Christiana High School), was intimately connected with and relevant to the Roxanne Peart, that was before the court. As such, it would have been relevant to the jury's consideration once the form had been admitted into evidence.

[122] The application form, as submitted by Crown Counsel, would therefore have been relevant and admissible, as the contact number attributed to Roxanne Peart on that form was connected by call data analysis, to a number attributed to the deceased.

[123] Therefore, we found that there was no merit in ground 1.

Ground 3 - The learned trial judge erred in law when he allowed the contents of the statement of Kadena Jarrett to be read in full to the jury

Submissions on behalf of Ms Peart

[124] It was submitted that the learned judge ought to have redacted the portions of Ms Jarrett's statement relating to Ms Peart. Mrs Dacosta contended that all the relevant parts of the statement, which spoke to any relationship Ms Jarrett might have had with Ms Peart or any sight she might have had of her, should not have been heard by the jury. This is so, because Ms Jarrett failed to identify Ms Peart on the identification parade; and as such, Ms Jarrett should not have been allowed to tell the jury (through her statement) that she recognised Ms Peart. Her recognition of Ms Peart in the car with Mr Peart on the night of 20 May 2012, was prejudicial, as this went to the issue of joint enterprise.

[125] Mrs Dacosta contended that if Ms Jarrett were alive and present, she would not have been allowed to tell the jury that she saw and spoke with Ms Peart since she had failed to point her out on the identification parade. This extinguished her credibility regarding Ms Peart's identity.

[126] Having allowed the full statement, the learned judge ought to have directed the jury in clear and precise terms, as to how to treat with Ms Jarrett's inability to point out Ms Peart on the identification parade. It was submitted that the learned judge presented the contents of Ms Jarrett's statement as evidence of the truth of it, rather than just the fact of it. Reference was made to page 1989, line 5, page 1990, line 10 and page 1991, line 11 of the transcript. Mrs Dacosta argued that the learned judge's direction suggested that when Ms Jarrett attended the identification parade, she knew Ms Peart but lied about this. By this direction, the learned judge invited the jury to assume facts in evidence and by so doing impacted the minds of the jury to the detriment of the fairness of the trial.

[127] Finally, it was submitted that the learned judge's direction to the jury on Ms Jarrett's credibility was insufficient and rendered the trial unfair.

Submissions on behalf of the Crown

[128] The essence of the Crown's submission was that its case substantially relied on circumstantial evidence and that the evidence contained in Ms Jarrett's statement was intrinsically tied to the incident and was properly introduced into evidence as part of the narrative of the background of the Crown's case. Having properly admitted the statement pursuant to section 31D(a) of the Evidence Act, that is, on the basis that the witness was dead, the learned judge provided the jury with adequate guidance as to how they should treat the statement. The learned judge had regard to matters raised by the defence, related to possible motives Ms Jarrett may have had for giving the statement, as well as issues related to Detective Sergeant Stoddart, who recorded the statement. It was noted by Crown Counsel that there was no challenge that the requirements of section 31D were satisfied. Consequently, the question was whether any miscarriage of justice resulted.

[129] Crown Counsel referred to section 31L of the Evidence Act, which gives judges the discretion to exclude prejudicial evidence, as well as the case of **David Russell v R** [2013] JMCA Crim 42, at paragraph [33], where the application of this discretion was discussed. Reference was also made to paragraphs [35] and [36], of that judgment, where it was opined that prejudicial evidence may be adduced, where its admission is essential in establishing the background of an alleged offence.

[130] It was submitted, however, that there was no prejudicial material contained in the statement that related to Ms Peart. It was merely to prove background evidence as well as the context in which Ms Jarrett came to know the applicants, which fortified the Crown's case.

[131] Counsel contended that Ms Jarrett's statement was only one strand of the circumstances, which included call data records and documentary evidence, by which the Crown sought to prove its case. In that regard, it was submitted that Ms Jarrett's failure to identify Ms Peart was not fatal, rather it raised the question of whether Ms Jarrett knew Ms Peart prior to the identification parade.

[132] Reference was made to **Dwight Gayle v R** [2018] JMCA Crim 34, in support of the contention that an identification parade is only necessary, where the accused

is not previously known to the witness. It was submitted that the issue is whether the jury was properly directly on how to treat the lack of identification at the identification parade and that the learned judge provided adequate guidance to the jury in this regard. The learned judge urged the jury to make a finding of fact as to whether Ms Jarrett knew Ms Peart (page 1991, lines 14 to 20) and whether she was the person that she saw in the car on the morning of 20 May 2012 (pages 1925 to 1927 of the transcript). At page 1990, lines 10 to 22, the learned judge also reminded the jury, that they had to determine whether the Roxanne Peart, who was before the court, was the same person that Ms Jarrett failed to point out on the identification parade.

[133] Finally, it was submitted that the defence was entitled, by virtue of section 31J of the Evidence Act, to present evidence to refute the evidence of prior knowledge of the applicant. It was suggested that this could have been done by putting forward any material inconsistent with the assertion, but this was not done. Further, Ms Peart did not deny knowing Ms Jarrett. Accordingly, this was a matter for the jury's consideration.

Discussion and analysis on ground 3

[134] The statement of Ms Jarrett had disclosed her knowledge of the applicants. She stated that she was in a relationship with Mr Peart, and that she had loaned her grey Nissan Tiida sedan motor car to Mr Peart on 19 May 2012, as he wished to go to Manchester. She gave the address for both brother and sister at Bay Road, Little London, Westmoreland; and stated that she slept at that Bay road address on the night of 18 May and that Ms Peart slept there that night too. On 20 May, after midnight, Jeffrey came to her house in Chantilly to return her car. She saw Ms Peart in the car and they all drove in the car to Bay Road, where the applicants exited the car and she drove back home in the said car.

[135] That same day, she called "Roxene" by phone and spoke to her. She spoke of further conversations with "Roxene" and stated that she subsequently went back to the house at Bay Road, saw and spoke to her again "Roxene"; that she asked her, what she heard happened and that "Roxene" said "the same guy Jeffrey is in court

with he was found dead in Manchester". She asked "Roxene" what time they found the body, "Roxene" told her 11:00 pm, she asked Roxene where was she and Jeffrey at that time and "Roxene" said they were on their way coming down from Manchester. She then said she spoke to "Roxene" again on 23 May and she asked her where Jeffrey was at that time and that "Roxene" told her the "police release him and that he was in Negril".

[136] The learned judge directed the jury, in several instances, how to assess this evidence as contained in the statement of Ms Jarrett. In particular, he stated thus at page 1985, lines 6 to 20:

> "An issue arose whether it is Roxene or Roxanne. This issue arose there. And you, the jury, will have to decide when Kadena Jarrett say, [sic] in her statement, she met Jeffrey's sister, Roxene Peart, whether Roxene Peart and Roxanne Peart is one and the same. You must decide, as judges of the facts, because she puts Roxene. But beyond that, you are to decide if she knows Roxanne Peart. Of course, you have to bear in mind that when she was giving this statement she didn't have before her, or nobody to point to her that this is Roxanne Peart, but you are to look at the totality of her evidence to see if she knows Roxene Peart."

And further at page 1986, lines 21 to 25:

> "So, on her evidence, Roxanne Peart is a sister-in-law, that is, Roxanne Peart [sic] never married to him, but she was a sister-in-law. So you have to decide if she know her sister-in-law this particular way."

Further at page 1990, lines 10 to 22, and page 1991, lines 11 to 25 and page 1992, lines 1 to 22:

> "So we have in the evidence, Exhibit [12], a statement from Kadena Jarrett that she knows Roxanne Peart, and she knows her quite well. And you will have to decide if the Roxanne Peart that she knows is the Roxanne Peart sitting in court, particularly because it emerged that she went to the ID parade and didn't point her out. So you have to decide, is there any other evidence that can assist you whether the Roxene Peart that she knew and

she went to her house, and talk to her, and so, is the same Roxanne Peart. What is indicated on the indictment is Roxanne."

"So, all I am saying is that it is not a question that she only saw her, on her evidence, she was in her company from Chantilly to Bay Road in Little London. And you have to look at all of that to determine if Kadena Jarrett really knows Roxanne Peart, and whether for reasons unknown, or undisclosed, she choose [sic] not to point her out at the identification parade. You have to decide that. These are matters for you.

It doesn't mean, madam Foreman and members of the jury, I [sic] doesn't mean at all that the fact that he [sic] didn't point her out that she doesn't know her. Don't mean that at all. Of course, it's a matter for you, as judges of the facts. And it doesn't mean that you reject Kadena's statement completely, having regard to all the evidence – all the details that she gives about Roxanne Peart. It doesn't mean that. You have to consider it. The defence said it, that is their duty and you listen to it, but it doesn't mean that. You, the jury, must decide.

What you are to look at is whether there are internal consistencies in the evidence of Kadena Jarrett that can assist you in terms of her credibility. Not only internal consistencies, also look at whether there are internal inconsistencies. Look at either direction to determine whether she is reliable. The issue is about inconsistency or discrepancy in Kadena Jarrett's statement – evidence, Exhibit [12] is that she did not point out Roxanne Peart. That would be some inconsistency or discrepancy. And I indicated to you how to treat discrepancy. Would you reject the witness on that point or completely?"

[137] More specifically, as regards the identification parade, the learned judge had previously directed the jury as follow at page 1925, lines 16 to 25 and page 1926, lines 1 to 16:

"So she says she is somebody she knows. Notwithstanding that is someone she knows, when she goes to the ID parade, right here in the parish here, in Ocho Rios in June of 2012, she said she don't see her. And I am directing you that that does not mean that there is no case against Roxanne because Kadena go to

> the ID parade and said she don't see her. You have to look at other aspects of her evidence to see if she knows her, or if she is speaking the truth otherwise, and if Roxanne Peart is the person she saw in the night on the 20th, or early morning of the 20th of May, coming back in the car at her home in Chantilly, Westmoreland. And even if you say to yourselves, which you are entitled to do, I am in doubt, reasonable doubt, if you are in doubt whether she saw her that morning – Sunday morning, 20th of May, 2012, then you would have to give her the benefit of the doubt and say, well, you can't make any finding of fact on that. Does that mean that the case finish right there? No. You would have to consider the other aspects of the evidence, because, as I said to you, the case does not rest wholly, solely and substantially on visual identification"

[138] The learned judge directed the jury that they would have to assess whether Ms Jarrett knew Ms Peart and whether they could accept that "Roxene" referred to by Ms Jarrett and Ms Peart (who was in court) were one and the same person. He also directed them to consider the fact that she did not identify the applicant, Ms Peart on the identification parade; and that they had to consider whether that meant she did not know Ms Peart at all and whether that meant that they must reject her statement completely, having regard to all the evidence. He directed them to consider all of the above and come to a decision. He also told them that the failure to point out Ms Peart on the identification parade was an inconsistency or discrepancy and reminded them that he had told them how to treat with same.

[139] As submitted by counsel for the Crown, the learned judge also directed the jury in relation to whether Ms Jarrett may have had any ulterior motives for giving the statement as she did. Crown Counsel was also correct in her evaluation, that the evidence contained in the statement of Ms Jarrett was not prejudicial evidence against Ms Peart. It was direct eyewitness testimony and spoke to knowledge of the sister of Mr Peart as well as various conversations with her. The evidence of "Roxene's" presence with Mr Peart in the car, on 20 May 2012, would have merely been one strand of circumstantial evidence that would have been presented to the jury. The learned judge properly allowed all the contents of the statement into

evidence by virtue of the Evidence Act and directed the jury in sufficient terms, how to assess and treat with this evidence.

[140] This ground of appeal therefore failed.

Ground 4 – The learned trial judge erred in law when he failed to direct the jury that the prosecution had failed to establish its case for joint enterprise

Ground 5 - The learned trial judge erred in law when he failed to uphold the no case submission

[141] These grounds will be dealt with jointly.

Submissions on behalf of Ms Peart

[142] In relation to ground 4, it was submitted that the issue of joint enterprise, formed the basis of the Crown's case as it related to Ms Peart. However, this element of the offence was never established beyond a reasonable doubt by the Crown. The sum total of the evidence presented in this regard was through Ms Jarrett's statement, which stated that she saw the applicants together in a motor car at 12:30 am on 20 May 2012 at her home in Chantilly, Westmoreland.

[143] It was contended that the learned judge should have brought out the weakness/unreliability of Ms Jarrett's evidence regarding the identification issues, since it was this evidence that the Crown relied on to establish joint enterprise between the applicants. There was no other evidence presented by the Crown that was probative and independent of Ms Jarrett's statement, to establish any communication between the applicants.

[144] Mrs Dacosta submitted that, even if Ms Jarrett's evidence that she saw the applicants on 20 May 2012 was accepted as true, this, by itself, failed to prove communication between the applicants sufficient to prove joint enterprise. Further, this bit of evidence did not allow for any inescapable inference to be drawn. Specific reference was made to the learned judge's summation on joint enterprise at page 1906, line 18 and page 1908, line 13. Extensive reference was made to **R v Jogee** and **Ruddock v The Queen** [2016] UKSC 8 and [2016] UKPC 7.

[145] It was submitted that besides the call data, there was no evidence to establish intention by Ms Peart to participate in any joint enterprise. There was no evidence of any communication between the applicants or any action on Ms Peart's part that could be deemed to satisfy an intent to participate in the commission of the offence. The learned judge's failure to sufficiently point this out to the jury rendered the trial unfair.

[146] Turning to the call data relied on by the Crown, it was submitted that it was fatally flawed in relation to the method of attributing the number 867-9243 to Ms Peart and also because the Crown was unable to say who made the calls. Mrs Dacosta submitted that, to accept the evidence of the attribution would be to "make an inference upon an inference", that is to say, to accept as an inescapable inference, beyond a reasonable doubt that the said number (867-9243) was under the full knowledge and control of Ms Peart and then to further infer that she made the calls.

[147] Mrs Dacosta submitted that the evidence of the call data depended upon the application form and the idea of luring was the *actus reus* relied upon by the Crown, to prove the intention on Ms Peart's part to participate in the commission of the offence. It was contended that the learned judge, by his language, suggested to the jury that Ms Peart did what the Crown alleged and presented facts to the jury that was not in evidence. This was so, as there was no evidence as to the content of any conversation between Ms Peart and the deceased to substantiate the idea of luring. The court's attention was invited to the summation at page 1908 of the transcript.

[148] Counsel also complained that the learned judge failed to, clearly and effectively, state the applicable principles of joint enterprise to the jury and to identify the aspects of the evidence which proved the elements of the offence. Consequently, the jury was impeded in its ability to understand the issues to be deliberated.

[149] It was further submitted that the evidence, which the learned judge referred to as being evidence of conduct before the crime, was telecommunication between a number attributed to Ms Peart and a number attributed to the deceased. The

evidence relevant to conduct after the crime, was Ms Jarrett's evidence that Ms Peart was seen with Mr Peart on the morning of 20 May 2012. It was contended that these bits of evidence fell woefully short of the standard of proof required, because the conclusion that Ms Peart communicated with the deceased was not inescapable. This was so because of the unreliable evidence as to the identity of the person making the calls to the deceased from a number attributed to Ms Peart. Further, in relation to conduct after the crime, the credibility of Ms Jarrett was seriously doubted, coupled with the fact that there was no independent evidence that linked the number to Ms Peart.

[150] Finally, it was submitted (without any reference to the transcript) that it was unfair to Ms Peart, for the learned judge to have guided the jury to accept as a matter of law that whereas each chain in the link of the evidence presented to them by the prosecution was tenuous, weak and unsubstantiated, they could accept the cumulative effect of the evidence. Mrs Dacosta contended that the consequences of so doing led to the result that "an inference was made upon an inference, being made upon an inference being made," as there was no direct evidence. Counsel pointed out the following inferences which would have to be made in succession:

(i) Ms Peart filled out an application form;

(ii) the number attributed to her was her number;

(iii) she used a cell phone with that number to call the deceased; and

(iv) She actually conversed with him and invited him to meet her in Saint Ann [sic].

[151] However, it was submitted that the Crown failed to prove any communication between the applicants or any evidence of secondary participation by Ms Peart. Alternatively, it was submitted that the learned judge failed to guide the jury that mere presence is not by itself, evidence of intent; that he also failed to guide the jury, as to what evidence of intent existed or did not exist; and that leaving the

alternative offence of manslaughter, did not erase the failure to deal properly with this issue.

[152] In relation to ground 5, it was submitted that the learned judge should have upheld the no case submission based on the first limb of **R v Galbraith** (1981) 1 WLR 1039. That is, the learned judge should have stopped the case, because there was no evidence linking Ms Peart to the commission of the offence or to any plan with anyone to commit the offence.

[153] The evidence relied on by the Crown was direct evidence, inferences drawn from that direct evidence and inferences drawn upon inferences. While the Crown established that Mr Wint saw Mr Peart in the Wild Cane district of Saint Ann with another person in the motor car, there was no identification of that person. While Ms Jarrett stated (in her statement) that she saw the applicants together in a motor car on the morning of 20 May 2012 in Westmoreland, she could not place Ms Jarrett in any proximity to the offence.

[154] Counsel also submitted that there was no proof beyond a reasonable doubt, that Ms Peart was the person placing the relevant calls to the deceased during the afternoon of 19 May 2012. Even if the jury could make an inference from the telephone number, being a contact number in the application form, the Crown could not prove that Ms Peart was the person that made the calls or, more critically, the content of the conversation. In these circumstances, the learned judge ought not to have allowed the jury to draw "an inference from an inference from an inference". Mrs Dacosta pointed to the same series of inferences, set out at paragraph [150] above and submitted that the learned judge should have upheld the no case submission and discharged Ms Peart.

Submissions on behalf of the Crown

[155] The Crown submitted that, at the end of its case, there was sufficient evidence presented to allow the jury to find that the series of unexplained circumstances which were presented, could only be explained rationally by concluding that Ms Peart was guilty. Further, there was sufficient evidence led for the jury to find the applicants were acting together.

[156] It was reiterated that the sum total of the case against Ms Peart was presented through the statement of Ms Jarrett, the call data records and the application form. It was submitted that these bits of evidence, showed that Ms Peart was an integral part of the plan, which resulted in her luring the deceased from Westmoreland to Saint Ann. In support of this submission, Crown Counsel (by reference to the transcript) meticulously combed through the circumstantial evidence led in relation to the statement of Ms Jarrett, the call data, and the application form, and stated the inferences that could be drawn by the jury.

[157] Reference was made to the case of the **Director of Public Prosecutions v Selena Varlack** [2008] UKPC 56, which provided guidance on how the court treats with circumstantial evidence, where no case submissions are made. It was pointed out that there were some factual similarities, in that the prosecution's case against Selena Varlack was that she was used as a lure to get the deceased to go to a meeting place on the mountain road, where he was to be murdered. The prosecution's case was also based largely on the evidence of telephone calls made between the defendants, from which the inference could be drawn that Ms Varlack knew and agreed to the plan to kill the deceased. In relation to the trial judge's approach to the no case submission, the Privy Council held that the trial judge was correct, when he referred to the test of whether a reasonable jury properly directed might, on one view of the evidence, convict.

[158] Counsel submitted that the question for this court was similar to the one in **Selena Varlack**, that is, whether a reasonable tribunal could draw the inference that Ms Peart's conduct was to lure the deceased to Mr Peart.

[159] In assessing the necessary inferences that could be drawn from the evidence presented, it was submitted that there was sufficient material from which the jury could draw inferences of guilt beyond a reasonable doubt, namely that:

(i) Ms Peart was in contact with the deceased with a view to lure him to Bohemia, Saint Ann so that he could be in the same place as Mr Peart; and

(ii) the telephone calls between the applicants, especially those which were minutes or seconds apart from the calls to the deceased, were done as the applicants were acting together, to at least cause grievous bodily harm to the deceased.

[160] Specifically, in relation to ground 5, it was submitted that the learned judge gave consideration to the probative force of the mass of evidence presented by the Crown, rather than looking at it singularly/separately and properly ruled that Ms Peart had a case to answer.

[161] Further, it was submitted that the learned judge (at pages 1835 to 2129 of the transcript) gave comprehensive directions on the law of joint enterprise and circumstantial evidence to guide the deliberations of the jury.

[162] Reliance was also placed on the decision of **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26 in support of the principle that, in cases where the Crown relied on circumstantial evidence, the jury is required to decide the case, not on whether individual items of evidence have been proved beyond a reasonable doubt, but whether the inference of guilt had been proved beyond a reasonable doubt. In relation to the principles of joint enterprise, Crown Counsel referred the court the **R v Jogee** and **Ruddock v The Queen**, and **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25.

Discussion and analysis on grounds 4 and 5

[163] The Crown's case against Ms Peart depended solely on circumstantial evidence. The evidence included call data analysis, linking calls from the number attributed to Ms Peart to the deceased's phone, calls between the number attributed to Ms Peart and Mr Peart's phone, cell site analysis - which traced the trajectory of the three cell phones, the evidence of Ms Jarrett, which placed Ms Peart in the vehicle (loaned by her to Mr Peart) in the early morning of 20 May. If these pieces of evidence were accepted by the jury, which it was open to them to do, there would be cogent evidence from which certain reasonable inferences could be drawn.

[164] In relation to the issue of identification, the statement of Ms Jarrett revealed a history of relationship with Ms Peart, the sister of Mr Peart, both before and after the incident. She did not merely see her in the car, but also drove with her in that car, back to Ms Peart's home. Ms Peart, in her statement from the dock, did not deny that Ms Jarrett knew her. The jury, as directed by the learned judge, would have had to decide whether the evidence was credible, and that Ms Peart, who was before the court, was the same person that was described in the statement as "Roxene". The learned judge would not have been required to direct the jury, in any substantive way, in relation to identification evidence.

[165] In relation to the issue of the joint enterprise, it is accepted that the mere presence of Ms Peart in the vehicle at about 12:00 am on 20 May 2012, would not be sufficient evidence, to conclude that she was involved in any joint enterprise to kill or cause serious bodily harm to the deceased. However, the issue of any intent that Ms Peart might have had, did not rest solely on that presence. There were several passages in the summation dealing with the issue of joint enterprise and intention.

[166] The learned judge directed the jury adequately as to the law relevant to joint enterprise (see pages 1835 to 1836 of the transcript). He differentiated between the roles of both applicants based on the evidence presented. He told them also, that even though they were jointly charged, the evidence against both must be considered independently and separately (see page 1837). The learned judge then did an overview of the evidence presented and told the jury at page 1845, lines 1 to 9:

> "When you consider the evidence: the physical, the scientific, the documentary, the oral testimony, the prosecution is saying that in all of these aspects of the evidence are links in the chain of circumstantial evidence. That is, no one piece of evidence, physical or scientific, can lead to a conclusion in one direction, the guilt of either the accused. Look at the evidence accumulatively."

[167] He directed them also, that it is only after making certain primary finding of facts, that they could then go on to making findings based on inferences, drawing

reasonable inferences that were relevant to this particular trial, which was structured on circumstantial evidence (see page 1955, lines 15 to 23).

[168] In relation to the issue of joint enterprise and mere presence, the learned judge also (at page 1878, lines 9 to 22, page 1880, lines 4 to 7 and line 25 to page 1881, lines 1 to 3) directed as follows:

> "So the prosecution's case is that Jeffrey Peart was present and Roxanne Peart was present. The roles are different as far as the prosecution is concerned, but the point of law is that mere presence at the scene of the crime don't mean that you commit the crime. So bear that in mind. That – bearing in mind that a person's mere presence when someone else commit [sic] a crime will not, of itself, amount to such encouragement as you say, him or her, is an aider and abettor. Notwithstanding, the possibility that his or her presence at the scene may have an encouraging effect on the perpetrator of the offence."
>
> "So come back to the point – so what you will have to decide is that, since mere presence is not sufficient, it has to be presence, plus more, right."
>
> "prosecution said she was present, and her presence, in the circumstances, was encouragement. That is, the prosecution is asking you to draw that inference."

[169] The learned judge also directed the jury that the issue of presence "plus more" was not the same for Ms Peart as for Mr Peart; and that the prosecution was relying "on presence and antecedent, previous acts concerning [the deceased]" in relation to Ms Peart.

[170] He also said at pages 1882, lines 24 to 25 and 1883, lines 1 to 7:

> "That her presence those antecedents are present plus more, which is encouragement, that is what the Prosecution is asking you to find in relationship to her. So, I draw that to your attention to let you know, even though the Prosecution is relying on presence, but before you can deal with the more you have to decide if the persons were proved, if they were present, all right."

[171] Again at page 1906, the learned judge reviewed the issue of joint enterprise and the scope of the agreement and intention (see pages 1906, 1909, 1911, 1912, and 1930 to 1938).

[172] The learned judge directed the jury to consider the issue of intention relevant to Ms Peart and the joint enterprise. He instructed them also, depending on the evidence they accepted as credible and reliable, that the alternative offence of manslaughter should be considered. Mrs Dacosta submission that the learned judge failed to properly direct the jury on the issue of mere presence and intention was therefore without any basis.

[173] Further, her reliance on **Jogee**, to buttress her submissions in relation to the failure of the learned judge to assist the jury with the issue of intention and foreseeability, was also baseless. The principle of foreseeability as set out in **Jogee**, could not assist Ms Peart, as she was not saying she was present, but took no part in any violence against the deceased or that she withdrew from any original intention to do so. She maintained that she did not know the deceased, made no calls to him and was not present in any incident involving him. The learned judge, therefore, gave sufficient and accurate directions relevant to joint enterprise and the issue of intention based on the circumstances of the instant case (see **Germaine Smith et al v R** [2021] JMCA Crim 1, at paragraphs [64] to [74] which also referred to **Joel Brown and Lance Matthias v R** [2018] JMCA Crim 25).

[174] In relation to ground 5, on the basis of all the circumstantial evidence led by the Crown, which was reviewed in relation to our consideration of ground 4, the learned judge would have been correct to rule that a *prima facie* case had been made out against Ms Peart. It would have been the duty of the jury, as judges of facts, to make primary findings and draw reasonable inferences in order to determine whether Ms Peart was guilty of any offence.

[175] Grounds 4 and 5 therefore failed.

Ground 6 – The verdict was not supported by the evidence

Submissions on behalf of Ms Peart

[176] Mrs Dacosta referred to the learned judge's summation at page 1900, line 13, where he directed the jury in relation to circumstantial evidence. She submitted that the learned judge failed to instruct the jury that they must "rule out all inferences consistent with innocence, before they could be satisfied that the inference of guilt had been proven correct" (per Mangatal JA (Ag) in **Ian McKay v R** [2014] JMCA Crim 30, at paragraphs [26] and [27]). In support of the same point, the court was also referred to paragraphs [13], [16], [18] and [19] of the decision of the Judicial Committee of the Privy Council in **Taylor v R** [2006] UKPC 12, (2006) 68 WIR 401.

[177] It was contended that, while the learned judge was not expected to slavishly follow the words of Mangatal JA (Ag), he was obliged to clearly and unambiguously guide the jury to consider the aspects of the evidence which inured to the benefit of Ms Peart. This ought to have been done in the same way that he presented to the jury, the possible inferences that could be drawn from the evidence which benefited the Crown's case. Further, it was submitted, that the learned judge never referred to the weaknesses in the Crown's case and the failure to comply with the direction in **Ian McKay v R,** rendered the trial imbalanced, unfair and the conviction unsafe.

[178] It was submitted that, although the learned judge provided acceptable directions as to the general definition of circumstantial evidence, he failed to point out the weaknesses in the Crown's case, as well as the possibility of alternate inferences that could be drawn from the evidence. To demonstrate the alleged imbalance, Mrs Dacosta referred to the learned judge's summation at page 1912, line 6 to 13:

> "So he used a [sic] innocent front, his sister, to make this appearance of legitimacy, that is what the Prosecution is saying the inference points to. And she knowingly, somebody can be used innocently, but the Prosecution is saying she knowingly lured him, that is Delroy Frame, out of a sense of loyalty, a misguided sense of family commitment to her brother."

[179] Mrs Dacosta contended that there was no evidence to satisfy the conclusion that anyone, much less Ms Peart, lured or communicated with the deceased. There was no evidence, as to the content of the conversation and the fact that a certain number of calls were made from the number attributed to Ms Peart, to the number attributed to the deceased, coupled with a perceived northern movement of the numbers, was insufficient to ground the conclusion that Ms Peart lured the deceased.

[180] Issue was taken with the learned judge's direction at page 2029, lines 10 to 19:

> "Okay, so, there is no evidence as to the content of the conversation, in fact, the calls are very brief calls on an average. In one instance it would seem to indicate Roxanne Peart was trying to get in touch with Delroy Frame, and Delroy Frame as you heard, he is a taxi operator, was a witness against her brother, a complainant, that is what is known."

Mrs Dacosta argued that this direction was unclear. The learned judge acknowledged an "unalterable lacuna" but proceeded to present a conclusion based on this. There was no evidence to satisfy the inescapable inference that Ms Peart communicated with the deceased.

[181] Another criticism was made of the direction at page 2034 to 2035:

> "This is lure. The not -- the prosecution's case is that it is not a force of violence used on Delroy Frame from Ferris Cross. He was lured there. So there is no force or violence, and that he droved [sic] there, yes. His car didn't reach there by -- he never walked there. Delroy Frame never walked there during drive time, and the car never reached there by itself. And he wasn't dead or killed anywhere between Ferris and White Sand. Take into the account the forensic pathologist's report. He was alive when that throat was cut. Three times they tried to cut his throat, and he was gasping for breath. That is why you find blood coming down into the trachea. If you are going to make any inference, make it based on the evidence. And the prosecution's case and evidence is that they were present, and you must decide, is the reason why there was no call between himself and Roxanne

> Peart, because having met him at Little London, there was no further need to call him. That is an inference open on the evidence. Having come within the same cell site, there was to [sic] further need to call him, or the [sic] call this number. And there was no other communication between her number and his number from the point when they were both together -- the numbers were both together.
>
> And there is evidence, you are to consider it, how did she reach to -- if you find that she reached to Bohemia, how did she reach there? She couldn't walk. It is open to you to consider the evidence whether she was with Delroy Frame from point [sic] in time to Little London. How did Delroy Frame find this district? You are to consider this evidence when you come to draw an inference.
>
> So, you must consider whether the pattern of calls indicate her role was to lure Delroy Frame to his death, or as I said, into the hands of her brother to do some harm, at least. You are to consider that. Bearing in mind the direction I gave you on the scope of common design."

[182] Mrs Dacosta contended that the learned judge failed to guide the jury as to the aspects of the evidence, that could prove that Ms Peart and the deceased met. Even more damning, she submitted that the call data established that there were no calls between the two numbers after 5:44 pm on 19 May 2012. As such there was no inescapable inference that Ms Peart and the deceased were together, yet the learned judge presented it as such.

[183] Another aspect of the summation that was criticised as unclear and unsupported by the evidence was the following direction to the jury at pages 1882, lines 21 to 25 and page 1883, lines 1 to 2:

> "It is not the same in terms of Roxanne Peart. The Prosecution is just relying on presence and antecedent, previous acts, concerning Delroy Frame. That her presence those antecedents are present plus more, which is encouragement, that is what the Prosecution is asking you to find in relationship to her."

[184] Mrs Dacosta submitted that there was no evidence that Ms Peart was at the scene of the crime and the mere fact of a telephone call was insufficient to prove who made the call and the contents of the conversation could not be speculated upon. Therefore, there was no inescapable inference to be drawn relating to whether the Crown proved that Ms Peart was present at the scene of the crime before, during or after the offence.

[185] In order to establish encouragement as a secondary participation by Ms Peart, the Crown would have had to prove some communication between the applicants and it was submitted that there is no primary fact upon which this inference could be made. Even if the attribution of the relevant telephone numbers was accepted, there was no evidence of communication between them at any relevant time.

Submissions on behalf of the Crown

[186] It was contended that the verdict of the jury was:

a. consistent with the cogent circumstantial evidence presented by the Crown; and

b. amply supported by the evidence which showed that Ms Peart had much to gain from the death of the deceased, who was a complainant in a matter for which Mr Peart was placed on suspension and Miss Peart had a vested interest in helping her brother secure his employment.

[187] Crown Counsel submitted that, based on how this ground was coined, it was incumbent on Ms Peart to show that the findings of the jury were so against the weight of the evidence as to be "obviously and palpably wrong". Reliance was placed on the case of **R v Joseph Lao** (1973) 12 JLR 1238.

[188] Further, it was contended there was no requirement for trial judges to slavishly follow any special direction when directing a jury on circumstantial evidence. Rather, it has been held in numerous authorities, that this is amply covered by the duty of the trial judge to make clear (in terms adequate to cover

particular features of the case), to the jury that they should not convict, unless they are satisfied beyond a reasonable doubt of the guilt of the accused. In support of this, reference was made to the dictum of Morrison JA (as he then was) in **Melody Baugh-Pellinen v R**, at paragraph [39] where this principle was stated by reference to **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503.

[189] Crown Counsel reiterated the submission that the learned judge was comprehensive in his direction to the jury on circumstantial evidence, he was meticulous in directing the jury to consider the case against each applicant separately and their likely role in the matter. There was a careful highlighting of the DNA and ballistics evidence as well as all the areas of weakness raised by the applicants in their defence.

[190] It was submitted that the learned judge also carefully pointed to the weaknesses in Ms Jarrett's statement and highlighted the gaps. The unsworn statements of the applicants were placed before the jury and the learned judge gave comprehensive character directions.

[191] Lastly, it was submitted that the cases of **Ian McKay v R** and **Taylor v R**, were distinguishable and could not be relied upon. The case at bar had a cumulative force of several strands of strong circumstantial evidence and the learned judge gave careful directions on inferences. He also told the jury, that evidence should point in one direction and one direction only.

Discussion and analysis on ground 6

[192] We found that there was absolutely no merit in this ground of appeal. The weight and cogency of the evidence in relation to Ms Peart, was considered under grounds 4 and 5. It would have been a matter for the jury to decide what primary facts they accepted and whether reasonable inferences could be drawn from those facts.

[193] In relation to the directions of the learned judge, Mrs Dacosta did concede that the learned judge's direction on circumstantial evidence was essentially correct. At pages 1899 to 1900 of the transcript, the learned judge stated thus:

> "Now, circumstantial evidence consists of this, that when you look at all the surrounding circumstances, you find such a series of unexpected coincidences, that as a reasonable person, you say your judgment compels you to one conclusion. So you have to look at a series, to see if there is a series of undesigned, unexpected coincidences on the evidence, and whether, as reasonable persons, you are compelled to one conclusion, and that is the accused person is guilty of the offence.
>
> Circumstantial evidence can sometimes be conclusive, but it must be closely examined. If only because evidence of this kind may be fabricated to cast suspicion on another. By fabricating, we mean planned, put together. Joseph commanded the steward of his house to fill the men's sack with food, as much as they can carry, and put each man's money in the mouth of the sack. Put my cup, the silver cup, in the mouth of the sack of the youngest and his money for the grain, end of quote. When the cup was found there, Benjamin's brothers hastily assumed that he must have stolen it.
>
> It is also necessary, before drawing an inference of the accused's guilt from the circumstantial evidence, to be sure there are no other coexisting circumstances, which would weaken or destroy the evidence. That is how you approach circumstantial evidence. Circumstantial evidence must point to one conclusion. If it does not point to one conclusion, it means that the evidence presented by the prosecution has not met the standard of proof so that you that you [sic] feel of [sic] the accused persons' guilt.
>
> In considering circumstantial evidence, bear the following in mind. Circumstantial evidence consists of inferences to be drawn from surrounding circumstances, there being an absence of direct evidence. I direct you that if, on an examination of all the surrounding circumstances you find such a series of undesigned and unexpected coincidences, that as reasonable persons in your judgment you are compelled to act in one direction, and that all the circumstances to be relied on point in one direction and one direction only."

[194] Mrs Dacosta complained, however, that the learned judge ought to have added a particular direction applied by Mangatal JA (Ag) in **Ian McKay v R**. At paragraph [28] of that judgment the learned judge stated as follows:

> "Counsel for the prosecution, indeed both counsel, are quite correct that there is no rule requiring a special direction in cases in which the prosecution relies either wholly or in part on circumstantial evidence - see paragraph [40] of ***Baugh-Pellin v R***, per Morrison JA and paragraphs [32] – [35] of ***Sheldon Palmer v R*** per Phillips JA, and the cases therein referred to. Further, the learned trial judge also gave very clear directions about the standard of proof and inferences generally. However, in the circumstances of this case, it appears that the summation was inadequate in that the inferences that could be drawn from the applicant's statement were not spelt out, and the jury were not told that they had to rule out all inferences consistent with innocence before they could be satisfied so that they felt sure of the applicant's guilt."

[195] In that case, the learned judge cited the case of **Taylor v R**, where the Privy Council, at paragraph [18] of that judgment, had made those observations.

[196] With the greatest respect to counsel, Mrs Dacosta, whether or not that particular set of words may be required would depend on the circumstances of each case. In **Taylor v R**, the appellant had given a statement to the police. In that statement, while it was open to the jury to draw the inference of guilt, it included averments capable of an interpretation consistent with the appellant's innocence. It was within this context, that Lord Carswell stated that it would have been vital that the jury be given careful directions about the possible inferences which could be drawn and that they must rule out all possible inferences consistent with innocence.

[197] The learned judge (as set out at paragraph [193] of this judgment) gave the jury sufficient direction on the drawing of inferences, as well as on the liability of participants in a joint enterprise. He also directed the jury on the issue of intention and that the acceptance of evidence of primary facts could lead to their drawing of reasonable inferences. He directed them as to the extent of the evidence that had been presented by the prosecution, whether or not they accepted, that the several strands of circumstantial evidence could lead to the establishment of guilt against Ms Peart.

[198] In her brief statement from the dock, Ms Peart denied any knowledge of the deceased. She also denied that the phone number attributed to her belonged to her or that she made calls to the deceased. She denied knowing anything about the murder of the deceased. She did not deny knowledge of Ms Jarrett, nor did she make any statement contradicting, or offering an alternative scenario, to what Ms Jarrett had said about any interactions between them.

[199] There was nothing said by Ms Peart nor any evidence adduced by the Crown that would have made it necessary for the learned judge to direct the jury as set out in **Ian McKay v R** and **Taylor v R**. There was no factual matrix, that allowed for other inferences consistent with the innocence of Ms Peart, to be left with the jury for their consideration.

[200] Further, the fact that there was no evidence of the conversation between the caller, using the number attributed to Ms Peart and the number of the deceased, did not diminish the force of the evidence. The learned judge directed the jury, that it was up to them to decide what they made of the call data analysis.

[201] Based on the directions given by the learned judge, the jury would have had to be satisfied that the application form was connected to Ms Peart and that the phone number, that was placed on that form, belonged to her. Once the jury accepted that it belonged to her, they then would have had to accept the evidence of cell site analysis, that showed several calls between that number and the number attributed to the deceased; that the trajectory of those numbers showed a certain direction from which it was open to them to draw inferences, that she met up with the deceased in Little London and travelled with him to a certain point, where he came into contact with Mr Peart.

[202] Also, they would have had the evidence, as contained in the statement of Ms Jarrett, that Ms Peart was seen in the Nissan on the morning of 20 May 2012 and that she spoke to her later that day; that Ms Peart told her that at 11:00 pm, when the body was found, she (Ms Peart) and Mr Peart were driving back from Manchester to Negril, Westmoreland. All these circumstances would have provided cogent and compelling evidence, from which reasonable inferences about the

involvement of Ms Peart in the murder of the deceased, could be drawn by a properly directed jury.

[203] This ground of appeal therefore failed.

Ground 7 - The learned trial judge erred when he directed the jury in biblical terms

Submissions on behalf of Ms Peart

[204] Mrs Dacosta took issue with the portion of the learned judge's direction at page 1899, at lines 18 to 25, which is contained within the excerpt from the transcript set out at paragraph [193]. For the sake of convenience, it is again set out below:

> "Joseph commanded the steward of his house to fill the men's sack with food, as much as they can carry, and they put each man's money in the mouth of the sack. Put my cup, the silver cup, in the mouth of the sack of the youngest and his money for the grain, end of quote. When the cup was found there, Benjamin's brothers hastily assumed that he must have stolen it."

[205] She submitted that the learned judge's utilisation of the biblical account of Joseph's cup was inappropriate for the following reasons: (1) the principles relevant to a biblical parable are not contrary to those concerned with judicial decision making, nonetheless, the principles emphasise different aspects of the human experience, and (2) when so directed, there is the risk of seeming to indirectly influence the jury's mind, that is to say, that "we all belong to the same club, we all think the same".

[206] Accordingly, Mrs Dacosta contended that the principles applicable to religious thinking is extraneous to judicial decision making and it was improper and inappropriate, whether the learned judge used the biblical parable for the purpose of illustrating the effect of jumping to conclusions or for identifying with the jury and thus treating the matter as a moral issue. The effect of this was that the learned judge rendered the trial unfair and imbalanced and as a result the conviction was unsafe.

Submissions on behalf of the Crown

[207] Crown Counsel submitted that this ground was without merit. The portion of the summation relevant to the complaint was more of an instruction for the jury that was favourable to the applicants; and in that regard, the learned judge was making it quite clear to the jury, that suspicion can easily be cast on persons and the evidence must be considered carefully, so as to avoid the casting of aspersions.

[208] It was contended that this was no different than using common sense, to help the jury appreciate their role and function in assessing the evidence. Accordingly, the applicants were not negatively influenced by the use of the biblical analogy, particularly having regard to the directions on alibi and good character.

[209] In the circumstances, it was submitted that the learned judge's direction did not render the trial unfair or unbalanced. Further, it was not inappropriate, nor was there a risk of indirectly creating a negative influence on the minds of the jury. Rather, the resort to a biblical analogy was beneficial to the applicants, as it demonstrated to the jury the importance of assessing circumstantial evidence carefully.

Discussion and analysis on ground 6

[210] This ground did not detain us at all. The well-known biblical narrative of Joseph and the sack with the silver cup, could not, with any sense or reason, be considered to have run the risk of negatively impacting the jury, as regards their duty to assess the evidence with fairness. The judge did not present the jury with any moral issue to be resolved on the basis of a particular religious standard. They were being asked to assess the circumstantial evidence presented by the Crown, whether they could be sure that it compelled them to one conclusion, the guilt of each applicant.

[211] The words that preceded the impugned biblical narrative, were words by the learned judge warning the jury that, although circumstantial evidence could be conclusive, it must be closely examined because evidence of the kind could be fabricated to cast suspicion on another (see page 1899, lines 13 to 16). Crown

Counsel was indeed correct, that the narrative would only have enured to the benefit of the applicant as a warning to the jury of the dangers of accepting circumstantial evidence without careful analysis.

[212] This ground of appeal failed.

Appeals against sentence

Ground 5 of Jeffery Peart's appeal - The learned sentencing judge failed to demonstrate that he had regard to the usual range of sentences when imposing a life sentence for murder, aggravating and mitigating factors, and to give credit for the time the applicant spent in custody awaiting trial, thus making the sentence for the offence of murder manifestly excessive

Ground 8 of Roxanne Peart's appeal – In any event the sentence was excessive

Submissions on behalf of Mr Peart

[213] Ms Burgess submitted that the sentence of 35 years before eligibility for parole should be set aside. She acknowledged that the learned judge would not have had the benefit of the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaican and the Parish Courts, December 2017 ('Sentencing Guidelines') as they were published after the sentencing exercise in the case at bar.

[214] Nevertheless, the principles from the Sentencing Guidelines were distilled from numerous cases of this court and it was submitted that the learned judge did not reveal the process by which he arrived at his sentence. Reference was made to paragraph [20] of **Curtis Grey v R** [2019] JMCA Crim 6, wherein Edwards JA illustrated how trial judges should do same.

[215] By reference to the cases of **Lincoln McKoy v R** [2019] JMCA Crim 35 and **Paul Brown v R** [2019] JMCA Crim 3, Ms Burgess submitted that the accepted range for murder was 20 to 45 years, with the higher sentences reserved for multiple counts. She reminded the court that Mr Peart was sentenced for one count of murder and she referred the court to a number of decisions where there were multiple counts of murder and the sentences ranged from 35 to 45 years. The cases cited were:

(i) **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28 where the appellants were convicted of two counts of murder and their sentences of death were set aside on appeal and substituted for life imprisonment with 35 years before becoming eligible for parole;

(ii) **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica Supreme Court Criminal Appeal No 49/2006, judgment delivered 21 November 2008 where the appellant was convicted of three counts of murder and his sentence to life imprisonment without the possibility of parole before 40 years was upheld on appeal; and

(iii) **Jeffrey Perry v R** [2012] JMCA Crim 17, where the appellant was convicted of three counts of murder and his sentence of death was set aside on appeal and substituted for life imprisonment on each count, to run concurrently with 45 years to be served before becoming eligible for parole.

[216] In answer to this court's question of what sentence counsel thought appropriate, she submitted that the court should be guided by the sentence imposed on the appellant, Massinissa Adams, in the case of **Massinissa Adams, Kamar Dawkins and Rohan Townsend v R** [2013] JMCA Crim 59. It was submitted that this was an equally serious offence which resulted in a police officer being killed; as such it was comparable to the case at bar.

[217] The court's checks indicate that this court allowed Massinissa Adams' appeal against sentence and the sentence of death was set aside and substituted for life imprisonment, with 30 years to be spent before becoming eligible for parole.

[218] Finally, Ms Burgess submitted that the learned judge was obliged to consider the time Mr Peart spent in custody and give him credit for same. Her calculation was that Mr Peart spent about two years in custody prior to sentencing, that is, from 10 October 2012 to 17 December 2014 (the date of sentencing).

Submissions on behalf of Ms Peart

[219] Mrs Dacosta indicated that she wished to pursue this ground but was not in possession of the probation report. The extent of her urging was that Ms Peart was an appropriate candidate for a reduction of sentence.

Submissions on behalf of the Crown

[220] It was contended that the sentences imposed could not be said to be excessive. While the learned judge did not have the benefit of the Sentencing Guidelines, he displayed an appreciation of the principles enunciated therein.

[221] By reference to the transcript, Crown Counsel sought to demonstrate the learned judge's consideration in relation to each applicant.

[222] In relation to Mr Peart, the learned judge demonstrated his:

(a) determination of the normal range of sentences (pages 2190, lines 11 to 23, page 2191, lines 16 to 25, page 2192, lines 6 to 23);

(b) consideration of previous sentences in relation to offences of a similar nature (pages 2207 to 2210);

(c) identification of the appropriate starting point within the range for the particular offender;

(d) consideration of the impact of the relevant aggravating features, including –

- the gruesome nature of the death of the deceased (page 2180, lines 4 to 8 and page 2204, lines 21 to 22)

- the likely motive for the killing (page 2180, lines 13 to 25, page 2181 lines 1 to 9)

- the fact that the deceased was a witness in a pending criminal case against him - (page 2189, lines 13 to 17, page 2190, line 17, page 2204, lines 22 to 25 and page 2205)

- that the murder was planned (page 2204, lines 18 to 21)
- that he was a police officer, entrusted to protect society from crimes (page 2205, lines 1 to 4)

(e) consideration of the relevant mitigating features, including –

- the character evidence (page 2193, lines 3 to 12, page 2197, lines 18 to 25, page 2201, lines 9 to 13, page 2203, lines 6 to 13)
- the social enquiry report (page 2201, lines 14 to 25, page 2202, lines 1 to 25)
- that he has a young child (page 2204, lines 10 to 17)

[223] It was conceded that the learned judge did not give an indication to suggest that he gave account for the time Mr Peart spent in custody. Consequently, it was submitted that his sentence should be amended to give credit for same. It was confirmed that, from a review of the file, Mr Peart was in custody since 10 October 2012 up to the commencement of trial 21 October 2014.

[224] In relation to Ms Peart, it was submitted that the sentence of life imprisonment with 16 years before becoming eligible for parole was not excessive and there was no basis for any reduction. Further, the learned judge demonstrated his appreciation for the sentencing process by:

(a) determining the normal range of sentence (page 2214, lines 19 to 25)

(b) considering previous sentencing decisions in relation to offences of a similar nature (pages 2207 to 2210)

(c) identifying the appropriate starting point within the range;

(d) considering the impact of the relevant aggravating features, including –

- the gruesome nature of the death of the deceased (page 2180, lines 4 to 8 and page 2204, lines 21 to 22)

- the fact that the deceased was a witness in a pending criminal case against Mr Peart (page 2211, lines 24 to 25)

- the fact that the murder was planned (page 2204, lines 18 to 21)

(e) considering the impact of the relevant mitigating features, including –

- Her character (page 2212, lines 17 to 25 and page 2213, lines 1 to 9)

- Compassionate and humanitarian grounds, namely that she was with child and had a daughter (page 2214, lines 2 to 5).

Discussion and analysis on sentence (grounds 5 and 8)

[225] At the time of sentencing, the learned judge would not have had the benefit of the pellucid statement of the principles relevant to sentencing as set out by Morrison P in **Meisha Clement v R** [2016] JMCA Crim 26. However, some amount of guidance could be gleaned from the much earlier decision of this court in **Regina v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 55/2001, judgment delivered 5 July 2002.

[226] In **Evrald Dunkley**, Harrison JA (on behalf of the court) detailed the principles which govern the method by which the ultimate goals of sentencing are achieved. He commended a structured approach and at page 4 of the judgment he stated:

> "If therefore the sentencer considers that the "best possible sentence" is a term of imprisonment, he should again make a determination, as an initial step, of the

> length of the sentence, as a starting point, and then go on to consider any factors that will serve to influence the length of the sentence, whether in mitigation or otherwise. The factors to be considered in mitigation of a sentence of imprisonment are, whether or not the offender has:
>
> (a) pleaded guilty;
>
> (b) made restitution or
>
> (c) has any previous conviction.
>
> These factors must be considered by the sentencer in every case before a sentence of imprisonment is imposed."

[227] Further, it is noted that the learned judge followed the guidance of Harrison P from **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. Portions of the dicta from that case were actually quoted by the learned judge (see pages 2208 to 2209) relating to the aim of sentencing as well as the appropriateness of the sentences imposed in that case, which the learned judge regarded as having some similarity.

[228] The submission of Ms Burgess that the learned judge did not reveal the process by which he arrived at his sentence cannot be regarded as accurate. While there may be some criticism of the structure of the approach, a perusal of the transcript demonstrates a detailed account of the factors which the learned judge took into consideration. These factors included:

> (i) the roles of the applicants in the commission of the offence (see page 2186, lines 13 to 24 and page 2215, lines 1 to 9);
>
> (ii) the applicability of sections 2(1)(c)(i), 3(1)(a), 3(1)(b), 3(1)(c) and 3(2) of the Offences Against the Persons Act (see pages 2187 to 2195), in particular the fact that the deceased was a witness in a pending criminal matter and a complainant (see page 2191, lines 8 to 22) and that Ms Peart was pregnant (page 2194 lines 20 to 25 and page 2195, lines 1 to 9);

(iii) the statutory minimum before eligibility for parole (see page 2192, lines 3 to 22 and page 2194, lines 1 to 17);

(iv)the character and propensity of the applicants - that it was favourable to the applicants that members of the community of Bohemia did not regard them as a "threat" or "risk" to the community when they were growing up and since that time (page 2197, lines 21 to 25, page 2198, lines 1 to 4 and page 2201, lines 14 to 25) and Mr Peart's good character working as a police officer and that there was no misbehaviour, and he was regarded as dutiful and not violent (page 2202, lines 1 to 17) which was also reflected in the antecedent and social enquiry report (page 2203, lines 14 to 18), the uncontradicted evidence of the character witness (page 2203 lines 22 to 25 and page 2204, lines 1 to 5)

(v) Mr Peart being a father of a young child who was dependent on him (page 2204, lines 10 to 14) and Ms Peart being pregnant and being the mother of another child (page 2214, lines 1 to 11) which on the basis of "compassionate grounds" caused a further reduction of two years on her sentence (page 2216, lines 10 t0 19);

(vi)the nature and seriousness/gravity of the offence, which was regarded as "serious and very serious [and] falls in the higher scale of punishment" (page 2200, lines 1 to 11 and page 2204 lines 15 to 17);

(vii)the aggravating circumstances that were not favourable to Mr Peart, included (1) the murder was planned and not a spur of the moment killing, (2) the gruesomeness of the murder, (3) the fact that he was a police officer trusted by society (page 2204, lines 18 to 25 and page 2205, lines 1 to 8), and

in relation to Ms Peart, her seeming lack of remorse/regret (page 2215, lines 10 to 19);

(vii) other similar cases in which persons were convicted of murder involving joint enterprise, namely - **R v Beverly Champagnie, Ransford Taylor and Trevor Bailey** (unreported) Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 22, 23 and 24/1980, judgment delivered 30 September 1983, where the learned judge recounted that life imprisonment was imposed where a woman was involved but noted that the woman was the planner of the murder, unlike Ms Peart who was a secondary party; and **R v Anneth Livingston, Ramon Drysdale and Ashley Ricketts** – reference was made to sentences imposed, Anneth Livingston (60 years before becoming eligible for parole), Ramon Drysdale (55 years becoming eligible for parole) and Ashley Ricketts (45 years becoming eligible for parole). In respect of Anneth Livingston and Ramon Drysdale, their sentences were both reduced on appeal to life imprisonment with 35 years before becoming eligible for parole, Ashley Ricketts' conviction was quashed and he was sentenced to 20 years for the substituted verdict of manslaughter.

Jeffrey Peart

[229] The learned judge had due regard to previous sentencing decisions, and was particularly guided by the sentences imposed by this court in **R v Anneth Livingston et al**, which he regarded as a recent decision (it being decided in 2006). The learned judge also demonstrated his consideration of the impact of the aggravating and mitigating features, in determining the sentences (per **Evrald Dunkley v R**).

[230] Further, an additional benefit was given, in that, it seems that the learned judge treated Mr Peart as being of good character and placed no weight on his

previous conviction (which appeared to relate to the corruption offence involving Delroy Frame). It was noted that in the plea in mitigation for Mr Peart, his counsel asked that this not be considered, as the conviction was being appealed and the outcome of this was uncertain (page 2175, lines 11 to 23).

[231] We were not persuaded that a sentence of 30 years, as submitted by Ms Burgess, would be appropriate. It is well known that each case must be considered based on its own particular facts and we did not agree that the case relied on, **Massinissa Adams, Kamar Dawkins and Rohan Townsend v R**, was "equally serious" and comparable to the case at bar. While there was some similarity, in particular, the calculation/premeditation of the murder, the deceased (an assistant commissioner of police) was killed as a result of two gunshots fired by the appellant, Adams. After the killing, Adams took the service pistol of the deceased ACP and told his ex-girlfriend (who gave evidence for the Crown) to make a report to the police. In the case at bar, it bears repeating the fact of the gruesome nature of the killing. The deceased was not only lured to his death, but he was decapitated and his body discarded in a ditch. Another point of distinction was that Mr Peart was a police officer, in whom the public had reposed its trust that he would uphold the law and provide protection to those he encountered.

[232] The only aspect of the sentencing process with which this court found fault, relates to the failure of the learned judge to give Mr Peart full credit for the time spent in pre-trial custody. It is now well settled that the learned judge was obliged to consider the time Mr Peart spent in custody and give him credit for same (**Callachand & Anor v The State** [2008] UKPC 49, per Sir Paul Kennedy, at paragraph 9 and **Meisha Clement v R**, paragraph [34]). We accepted counsel's computation that Mr Peart had spent about two years in custody prior to sentencing, that is, from 10 October 2012 to 17 December 2014 (the date of sentencing). For this reason, we allowed Mr Peart's appeal in respect of sentence, set aside the sentence of 35 years and imposed a reduced sentence of 33 years to account for the two years spent in pre-trial custody.

Roxanne Peart

[233] We were not persuaded by Mrs Dacosta's submission that Ms Peart was "an appropriate candidate for a reduction of sentence". No authorities were cited in respect of this contention, nor was there any suggestion of what would have been a more appropriate sentence.

[234] Further, we noted that the learned judge determined the appropriate sentence by reference to the considerations which have been set out at paragraph [228]. Having indicated that Ms Peart should serve 18 years before becoming eligible for parole, he then reduced that period to 16 years instead, in response to counsel's request for the imposition of 15 years. In this regard, the learned judge stated (at page 2216, lines 10 to 17):

> "Well, I said I will change it, sixteen (16) years; sixteen (16) years. Two years will make a difference… As I said, this is compassionate grounds, you have a young child, nothing else can be done for her,… she is going to have a baby."

[235] Bearing in mind that the learned judge was sentencing Ms Peart in accordance with section 3(1)(b) of the Offences Against the Persons Act, he was constrained by the statutory minimum of 15 years. Undoubtedly, this is what informed defence counsel's spontaneous plea for the initial sentence of 18 years to be reduced to 15 years.

[236] Unlike Mr Peart, there was no contention that Ms Peart was entitled to be given any credit for time spent in pre-trial custody. In fact, the learned judge noted that at some point, Ms Peart was on bail (see page 2214, lines 14 to 16) and it was during this time she likely became pregnant. In the circumstances, we saw no basis upon which to allow Ms Peart's application for leave to appeal against the sentence.

Conclusion

[237] It is for these reasons, we made the orders set out at paragraph [1]. Finally, it would be remiss of us if we did not specially acknowledge and commend the extensive investigation carried out by the relevant police officers, in order to place

the applicants before the court for the murder of Delroy Frame. We also wished to commend the detailed approach to the prosecution of this matter by the Office of the Director of Public Prosecutions.