[2022] JMCA Crim 63

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE FRASER JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 58/2009

MOHINDER SINGH v R

Miss Dionne Meyler instructed by Dionne N S Meyler and Associates for the applicant

Miss Kathy Ann Pyke and Okeeto DaSilva for the Crown

2, 6 November 2020 and 9 December 2022

P WILLIAMS JA

[1] On 26 June 2003, Ryan Dacres ('the deceased') was shot multiple times in the vicinity of his home in Greenwich Town in the parish of Saint Andrew. He was rushed to hospital but succumbed to the injuries. In September of the same year, Mohinder Singh ('the applicant') was taken into custody and was subsequently charged with the murder of the deceased. On 8 May 2009, after a trial in the Home Circuit Court before D McIntosh J ('the learned trial judge') and a jury, the applicant was convicted of the offence. On 15 May 2009, he was sentenced to life imprisonment with the stipulation that he serves 30 years before being eligible for parole.

[2] On 29 May 2009, the applicant applied for leave to appeal his conviction and sentence. A single judge of this court considered and refused his application on 14 May 2010. As was his right, the applicant renewed the application before this court. On 2 and 6 November 2020, after we heard and considered the submissions from counsel, we made the following orders:

"1. The application for leave to appeal conviction is refused.

2. The application for leave to appeal sentence is granted.

3. The hearing of the application is treated as the hearing of the appeal.

4. The period of imprisonment to be served by the appellant before becoming eligible for parole is reduced by six years; so the sentence is therefore life imprisonment with the appellant serving a minimum of 24 years before becoming eligible for parole.

5. The sentence is reckoned to have commenced 15 May 2009."

[3] We promised then to reduce the reasons for our decision to writing. This judgment fulfils that promise, with profound apologies for the delay.

The case for the Crown

[4] The Crown had one eyewitness as to what occurred on 26 June 2003, the mother of the deceased, Miss Valerie Walker. By the time of the trial, she had died and the Crown, acting under the provisions of section 31D(a) of the Evidence Act ('the Act'), put in evidence two statements she had given to the police. In the first, she gave details of the incident, which, she stated, had taken place on Thursday, 26 June 2002. However, it was recorded in the statement that it had been given on Friday, 27 June 2003. The second statement outlined that Miss Walker had identified the deceased at a post-mortem examination held on 8 July 2003, at the Kingston Public Hospital morgue. In that statement she said that the deceased was killed by gunmen on Thursday, 26 June 2003.

[5] In the first statement, Miss Walker stated that the deceased resided at 6A West Avenue, Kingston 13, with her and other relatives. Located at that address was a two-storey concrete and board structure to the front and three other buildings to the rear of the premises. She is the owner of the premises and had lived there for over 40 years. She also operated a grocery shop at the premises.

[6] She stated that on the day of the incident, at around 9:00 pm, she was in her grocery shop located on the premises when she heard two gunshots coming from the rear of the premises. She looked outside, and she saw the deceased running towards the shop. He fell at the door as he tried to enter the shop. She looked up and saw two men running behind the deceased. Both men had guns in their hands pointed at the deceased, and they fired a "whole heap" of shots at the deceased.

[7] She identified these men to be persons whom she knew before as "Munda Singh…popularly called 'Mo Mo'" and a man she called "Dobbie". She shouted, "Wey oonu a shot him fah, a weh him do oonu". Immediately thereafter, Mo Mo pointed his gun at her and fired about three shots, which went into the door. The two men then ran towards the back of the premises. After the shooting, the police came, and the deceased was taken to the hospital, where he eventually succumbed to his injuries.

[8] She indicated that she knew that Mo Mo once lived at 10 West Avenue, Greenwich Town Kingston 13. She knew his mother as Carol, who lived somewhere in Saint Thomas. She also knew his father, Junior Singh, who lived at 10 West Avenue. She had known Mo Mo "from he was a child", and at the time of the incident, he was about "eighteen years old or so". She stated that he "actually grew up in [her hand]" and that he formerly attended the Greenwich Farm All-Age School. She described him as "half coolie", meaning he has "pretty hair". He was of clear complexion, "about 5ft 10 inches or so", very slim without any hair on his face.

[9] Miss Walker stated that she was able to see the two men who chased and shot her son (the deceased):

> "… cause the streetlight and shop lights did on and shine bright, so me see dem face and whole body good good. Nothing could or did prevent mi from seeing them clearly and mi look pan dem good and fi long enough fe recognize them. They came very very close to me because mi son drop near mi."

[10] Detective Sergeant Joseph Messam testified that on 26 June 2003, he received information and visited the premises at 6A West Avenue. The premises, he said, was a tenement yard with a shop at the front and houses to the back. He saw what he described as a "pool of blood at the side door of a shop" with what he described as "bloodstains leading from the premises on to the road, on to the sidewalk". He saw spent shells and ammunition leading from the rear of the premises to the section of the shop where the large pool of blood was seen. There were also bullet warheads in the vicinity of the large pool of blood. He said the pool of blood was exactly at the "door step of the shop". He testified that the premises was properly lit with electric lights, which were "at the shop, and on the outside of the houses leading to the rear of the said premises".

[11] Detective Sergeant Messam testified that whilst at the premises, he saw and spoke to Miss Walker, who he learnt operated the shop and who made a report to him. He subsequently contacted Deputy Superintendent Michael Phipps (an Inspector at the time) of the Saint Andrew South Homicide Division. He explained that all homicides in that area were investigated by that division. It was also his evidence that whilst at the premises, he summoned Corporal Stafford Aitchson, a scene of crime technician. On Corporal Aitchson's arrival, he showed him the layout of the premises, the spent shells, the warheads, the bloodstains, and the pool of blood. Detective Sergeant Messam saw Corporal Aitchson package the warheads, spent shells and blood samples.

[12] In September 2003, acting upon instructions, Detective Sergeant Messam and a team of police officers went to the premises of the Jamaica Railway Corporation along Eight Street in Saint Andrew. He saw the applicant and held on to him. The applicant gave his name as "Mohinder Singh", and when Detective Sergeant Messam asked him, "What dem call yuh", the applicant responded, "Mo Mo". The applicant further told the officer that he lived at 10 West Avenue, Kingston 13. The applicant was placed in an unmarked police vehicle and taken to that address, where a male of Indian descent who identified himself as Junior Singh was seen at the gate leading to the premises. He told Detective Sergeant Messam that the applicant was his son and confirmed the applicant's

name and alias in the applicant's presence. The applicant was then taken into custody at the Hunts Bay Police Station in the parish of Saint Andrew.

[13] Under cross-examination, Detective Sergeant Messam was questioned as to why he waited until five years after visiting the scene to write a statement. He said that he wrote the statement after being instructed by his superiors to do so. He went on to state that he was informed that his statement would not be relevant since he visited the scene to investigate a shooting that subsequently turned into a murder and the investigation was taken over by the homicide division. He denied suggestions that it had taken almost five years to write his statement because he never saw what he said he saw. He said that Constable Aitchson took photographs that night. When re-examined, he further explained that he had been on protracted sick leave for nearly five years and had resumed duties two months prior to the trial.

[14] Corporal Aitchson gave evidence that sometime after 9:00 pm on 26 June 2003, he received a call from Detective Sergeant Messam and proceeded to 6A West Avenue. After speaking with Detective Sergeant Messam, he processed the crime scene and labelled several spent shells, including expended bullets and blood samples. The spent shells were seen at the entrance upon entering the premises along a passageway, which led to the rear of the premises. Some were to the right of the premises where 'a little' shop was located. He took photographs of the spent shells. He said that there were some bloodstains on the right when entering the premises, of which he took samples. All these were also photographed. He collected and packaged 10 9mm casings, three expended bullets and blood samples. On 9 July 2003, he took them as exhibits to the Government Forensic Laboratory, where he handed them over to the analyst. The envelopes with the spent shells and the expended bullets were admitted into evidence.

[15] Corporal Aitchson testified that he attempted to produce photographs from the negatives but realised that the negatives were blank. He concluded that the flash in the camera he had used "was not synchronizing properly". He went on to explain that the flash was used to provide light "into" the camera and because it was a night scene, not

enough light was added, which resulted in the negatives being dark. Under cross-examination, he agreed that he needed the flash to assist in taking the photographs because the place was not sufficiently lit for him to capture the scene in the photographs but said that only some areas were dark.

[16] Deputy Superintendent Phipps testified that on 26 June 2003, he was a detective inspector of police and was in charge of homicide investigations for the Saint Andrew South Division. Having received a report sometime after 9:00 pm, he dispatched Inspector Judith Dixon and a team to 6A West Avenue. Inspector Dixon gave evidence that when she went to the premises, she saw and spoke with Miss Walker and then went to the Kingston Public Hospital, where she saw the body of a deceased male. Inspector Dixon testified that Miss Walker was deceased at the time of the trial.

[17] Deputy Superintendent Phipps testified that he interviewed and recorded a statement from Miss Walker. He identified the statement in court by his handwriting. A *voir dire* was conducted in the absence of the jury, and the statements from Miss Walker were admitted into evidence. Deputy Superintendent Phipps read the statement that he had recorded to the jury. He was invited to comment on the fact that he had recorded that Miss Walker stated that the incident had taken place on 26 June 2002, and, later in the statement, had recorded that the statement was given on 27 June 2003. He said that "2002" should really have read "2003" because "the incident she read [sic] was speaking about really took place in 2003".

[18] After Deputy Superintendent Phipps recorded the statement. It was given to Inspector Dixon, who testified that after reading it, on 28 June 2003, she obtained two warrants on information for two men. One was for "Mohinder Singh", otherwise called "Mo Mo". She made several attempts to execute the warrant. Sometime in September 2003, she spoke with Detective Sergeant Messam, and, as a result, she went to the Hunts Bay Police Station, where the applicant was pointed out to her. She asked him if he went by the name "Mo Mo" and if he knew 6A West Avenue, and he responded yes to both questions. She informed him of the report made to her, cautioned him, showed him the

warrant and read the contents to him. She arrested and charged him, and after cautioning him, he said, "just because mi and him nuh 'gree dem seh a me kill him and from wi a grow up wi nuh gree and unnu gwaann like Billy nuh kill people to".

[19] Corporal Mark Robinson was another officer from the Saint Andrew South Homicide Division who visited the scene at 6A West Avenue, at about 9:30 pm, on 26 June 2003. He also went to the Kingston Public Hospital and viewed the body of a deceased male. On 8 July 2003, he went to the Kingston Public Hospital morgue. He witnessed a post-mortem examination being conducted on the body, which was identified by Miss Walker as her son (the deceased). He recorded a statement from her, which he identified in court by his handwriting. The officer said that the next time he saw Miss Walker was "at the morgue dead". The statement he had recorded was subsequently read to the jury.

[20] The Crown also relied on the evidence of Dr Patricia Sinclair, who performed an autopsy on the deceased on 8 July 2003. She found that the deceased sustained multiple gunshot wounds to the trunk, back, chest, thigh and abdominal area. There were ten entry wounds and six exit wounds on the deceased's body. There were eight gunshot wounds to the back of the deceased between the upper extremities, trunk and lower extremities. Four bullets, one copper fragment and two lead fragments were recovered from the body and handed over to a police officer. The cause of death was multiple gunshot wounds involving the chest, abdomen and extremities complicated by multi-organ injury, cardiac tamponade, haemorrhage, and shock.

[21] Assistant Commissioner of Police Daniel Wray (Retired) testified that in July 2003, he was the government ballistics expert attached to the Government Forensic Laboratory who received three sealed envelopes from different officers. On 9 July 2003, he received one envelope from Constable Aitchson containing 10, 9mm spent shells, which were from four different manufacturers, and a second envelope which had three warheads. On 30 July 2003, he received the third envelope from Detective Sergeant Dixon, which contained four bullets, one piece of casing and two lead fragments which were said to have been recovered at the deceased's post-mortem.

[22] Assistant Commissioner Wray (Ret'd) testified that from the tests he did and the subsequent examination, he concluded that the exhibits were fired from two different firearms. He compared the bullets received and found matchings of the striation from which he concluded that three bullets were discharged from the barrel of the same firearm, most likely to be a 9mm pistol which, he stated, would be a short bar handgun. The other four bullets, he concluded, were discharged from the barrel of another semi-automatic firearm.

[23] The Crown, in seeking to comply with the relevant provisions of the Act and establish that Miss Walker was dead, led evidence that, on 23 September 2005, a statement verifying that fact was recorded from her common-law spouse and father of the deceased, Mr Bernard Dacres. He, however, could not be found at the time the trial commenced, despite steps to locate him, so the Crown relied on section 31D(d) of the Act to have his statement admitted into evidence. In his statement, Mr Dacres stated that on 7 October 2004, he attended a post-mortem examination at the Spanish Town Morgue, where he had identified the body of Miss Walker to the doctor who performed the post-mortem.

[24] After an unsuccessful no-case submission had been made at the end of the evidence presented by the Crown, Mr Dacres attended court. After being questioned by the learned trial judge to establish that he had indeed given the statement, counsel was permitted to question him. In answer to questions from Crown Counsel, Mr Dacres said that he was in the shop with Miss Walker on the night of the incident. He confirmed that Miss Walker was dead but denied giving a statement to the police or telling them about her death. He, however, acknowledged that it was his signature on the statement. In answers to questions from defence counsel, Mr Dacres said that on the night of the incident, both he and Miss Walker were inside the shop when he heard the shooting, but he could not see outside where the shooting was taking place. He maintained that "we inside, we inside. Where it coming from, we can't push we head and go outside".

Case for the defence

[25] The applicant gave a short statement from the dock where he denied knowledge of "this case what the court is talking about". He said he heard the police in the matter "saying the case happen 2002" and also heard the "police saying 2003 it happen". He maintained that he "never have killed anybody and [he] don't involved in any killing".

The appeal

[26] In his application for leave to appeal his conviction and sentence, there was a single ground set out: unfair trial. Before us, counsel Miss Dionne Meyler sought and was granted permission to argue six further grounds, which counsel submitted would incorporate that single ground. The grounds are as follows:

> "1. The learned Trial Judge erred when he allowed the admission of the statements of Valerie Walker and Bernard Dacres - that is, he failed to exercise his discretion in the interest of Justice and fairness. In the alternative, Defence Counsel failed to adequately establish factors or facts that would make it unfair to admit that evidence.
>
> 2. The Learned trial judge erred when he failed to tell the jury about the weight and dangers of a witness statement being entered as evidence, particularly since it was a mere police statement and not a deposition.
>
> 3. The learned trial judge erred when he treated the defence with disdain and disrespect before the jury must have had the effect if [sic] the jury holding both them [sic] and the [applicant] in low esteem. They were fettered and insulted at every turn and this would have resulted in prejudice and unfair trial.
>
> 4. The learned trial judge erred in law when he allowed the evidence of Corporal Eric Lindsay … for the purpose of dock identification to be adduced before the Jury.
>
> 5. The learned trial judge erred when he allowed the amendment of the indictment at the close of the crown's case and following on a no case submission being made which should have been upheld.

6. The Sentence meted out to Mohinder Singh was manifestly harsh and excessive."

In considering these grounds, the first two will be conveniently dealt with together since they concern the statements which were admitted into evidence.

Ground 1: The Learned Trial Judge erred when he allowed the admission of the statements of Valerie Walker and Bernard Dacres – that is, he failed to exercise his discretion in the interest of justice and fairness. In the alternative, defence counsel failed to adequately establish factors or facts that would make it unfair to admit that evidence.

Ground 2: The learned trial judge erred when he failed to tell the jury about the weight and dangers of a witness statement being entered as evidence, particularly since it was a mere police statement and not a deposition.

The submissions

For the applicant

[27] Miss Meyler commenced her submissions by acknowledging that the complaint regarding Mr Dacres' statement was irrelevant, given that he had, in fact, attended and gave evidence. She focused her submissions on the first statement from Miss Walker. She noted that Miss Norma Linton QC, who appeared for the applicant at the trial, objected to the statement being admitted into evidence on the bases that it was a statement and not a deposition; there had been no opportunity for the witness to be cross-examined; there was no corroborating evidence in relation to the identification; and the statement, if admitted, would be highly prejudicial. Counsel contended that these arguments, while important, were "superficial at best". She submitted that the real prejudice and injustice lay in the deficiency of the statement itself. She contended that the quality of the identification evidence from the statement was poor, and the learned trial judge failed to exercise his discretion properly when he allowed it into evidence.

[28] Counsel submitted that there is a residual discretion on the part of a trial judge to ensure that an accused person has a fair trial. In such a case, the onus rests on the defence to establish facts or factors that would make it unfair to admit that evidence. She relied on the case of **R v Horace Hibbert** (1988) 25 JLR 61 in support of this submission.

She further submitted that both the learned trial judge and the defence failed to meet this standard. She contended that the statement of Miss Walker did not meet the guidelines in **R v Turnbull and others** [1976] 3 All ER 549 on identification, which led to an injustice to the applicant. Counsel relied on the case of **Winston Barnes and others v R** [1989] 2 ALL ER 305; [1989] UKPC 10 and **R v Marlon Mitchell and Andrew Guthrie** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 33 and 34/1999, judgment delivered 12 February 1999, to ground her submission that the quality of the identification evidence is a crucial factor for a judge who is exercising his discretion whether to admit the deposition of a witness.

[29] Counsel referred to **Nyron Smith v R** [2008] UKPC 34, in which the Board held that once precautions were taken, it was only in rare circumstances that a trial judge was obliged to exercise his discretion to exclude a deposition. These precautions include warning the jury that they had not benefitted from hearing the evidence of the deponent tested in cross-examination. Counsel also noted that the Board had observed, by example, that if the deposition contained weak evidence of identification and there was no corroborative evidence, the judge should exercise his discretion to refuse to admit the deposition, for it would be unsafe to allow the jury to convict upon it.

[30] Counsel stressed the fact that it was a "mere statement" that had never been tested that contained the only evidence against the applicant. Thus, she concluded, in all the circumstances, the discretion to admit the statement of Miss Walker was wrongly exercised and led to the jury improperly convicting the applicant of this crime.

[31] Counsel submitted that the learned trial judge erred when he did not warn the jury that the statement relied on by the Crown was not sworn. Counsel went on to point to aspects of the learned trial judge's summation and submitted that although he expressly recognised that the case rested on Miss Walker's statement, he failed to direct the jury as to how they should treat the statement, and should have given full directions on the purpose and function of cross-examination which could not be done under these circumstances. She referred to **R v Carletto Linton and others** (unreported), Court of

Appeal, Jamaica, Supreme Court Criminal Appeal Nos 3, 4 and 5/2000, judgment delivered on 20 December 2001, and **R v Jeffrey Sutherland** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 116/2000, judgment delivered 28 October 2004.

[32] Miss Meyler further submitted that the learned trial judge failed to highlight the inconsistency between Miss Walker's statement that the deceased was murdered in 2002, when all the other evidence suggested that it was in 2003. This was a matter, she contended, that should have been left to the jury. She concluded that the learned trial judge's failure to give a fulsome explanation on the weight and dangers of the statement not being sworn, or to highlight the inconsistencies therein, resulted in the applicant not receiving a fair trial.

For the Crown

[33] Counsel for the Crown, Miss Kathy Ann Pyke, submitted that the learned trial judge did not err in exercising his discretion to admit the statements into evidence. Further, the evidence elicited was in compliance with the established requirements of the statute. She contended that there were no circumstances of unfairness which would necessitate the exclusion of the statement. Counsel noted that there was a wealth of case law in respect of section 31(D) of the Act. She submitted that it was now trite that the provisions of the section must be strictly proven, and all the requirements must be established, on the evidence, for the statement to be admissible. She relied on the case of **R v Brian Rankin and Carl McHargh** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 72 and 73/2004, judgment delivered 28 July 2006.

[34] Counsel contended that the question for the court in exercising its discretion as to whether to admit a document is one of fact, that is, whether the circumstances of the case fulfil the statutory requirements. Further, counsel submitted that the court must, as a matter of law, consider whether the statement should be excluded, notwithstanding that the conditions are satisfied. This, counsel said, must be approached from two perspectives. Firstly, the court should consider whether the prejudicial effect of the

evidence outweighs its probative value. Secondly, though the evidence may be relevant and admissible, the court, acting in its residual and overriding common law discretion, may exclude the evidence where its admission would be unfair and prejudicial.

[35] Counsel submitted that the decision as to whether a statement ought to be admitted involves a balancing exercise, and care and restraint must be exercised by judges when considering these applications. She urged that the cases are clear that it is only in rare circumstances that it would be right to exclude a statement. Further, she submitted that an essential aspect of the safeguards to ensuring the fairness of the trial is facilitated by proper directions to the jury to ensure that all relevant issues and characteristics of evidence admitted under section 31(D) of the Act are put before them. She acknowledged that the quality of the evidence is critical in the process and contended that it is only when the judge decides that particular directions cannot ensure a fair trial, that the discretion should be exercised to exclude the document. She relied on **Barnes and others v R**, **Steven Grant v R** [2006] UKPC 2 and **Nyron Smith v R** in support of her submissions.

[36] Counsel considered the contents of the statement and concluded that the evidence of identification was of a high quality and it was a strong case of recognition. She further contended that the conditions under which the witness said she was able to see the applicant were more than adequately detailed. She recognised that there was an absence of specific estimates as to time and distance, but she submitted that this was not a weakness or deficiency in this case. She posited that the time, distance and other factors could all be inferred once there are sufficient underlying facts speaking to the conditions and the events at the time. She contended that based on Miss Walker's description of the events, the jury could have found facts relating to the distance and whether the witness had enough time to see the applicant. She referred to **Jerome Tucker and Linton Thompson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 77 and 78/1995, judgment delivered 26 February 1996 and **Separue Lee v R** [2014] JMCA Crim 12.

[37] In relation to the learned trial judge's directions relating to Miss Walker's statements, Miss Pyke submitted that the summation must be looked at as a whole to assess its true impact on the jury. She contended that the jury was given very careful and detailed directions about the nature of the evidence, how they should use it, and the challenges they faced due to the absence of the witness insofar as there was a lack of cross-examination and an inability to observe demeanour. Most importantly, she noted, the learned trial judge repeatedly warned them to view the statement with care and caution in light of the absence of cross-examination. Further, counsel submitted that the learned trial judge gave a full and thorough identification warning, explaining the need and reason for caution and factors such as lighting, distance, time under observation and knowledge, and related the warning to the statement.

[38] Counsel concluded by submitting that the learned trial judge had properly exercised his discretion to admit the statement under section 31(D) of the Act. There was a multiplicity of evidence that satisfied all the statutory requirements and proved that Miss Walker was deceased. She further submitted that the learned trial judge gave satisfactory directions to the jury on how to deal with the statement, and there was no unfairness to the applicant.

Discussion and disposal

[39] The relevant provisions of section 31D of the Act are as follows:

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

[40] Section 31L of the Act provides:

> " It is hereby declared that in any proceedings the court may exclude evidence if, in the opinion of the court, the

> prejudicial effect of that evidence outweighs its probative value."

[41] Crown Counsel was correct that since the passing of this provision, several decisions relating to it have been made. **Steven Grant v R** is one of the earlier decisions, which is regarded as having settled many of the issues arising from the section. Lord Bingham, writing on behalf of the Board, sought to clearly identify the purpose for this provision as follows:

> "11. The plain purpose of section 31D is to permit the admission of an unsworn statement made out of court, where the statutory conditions are met and subject to the exercise of any relevant judicial discretion when, but for the section, the statement would have been inadmissible as hearsay..."

[42] On the issue of the exclusion of evidence where the prejudicial effect outweighs its probative value and how to treat the evidence once admitted, he had this to say at para. 21:

> "…
>
> (3) … In any event, it is, in the opinion of the Board, clear that the judge presiding at a criminal trial has an overriding discretion to exclude evidence which is judged to be unfair to the defendant in the sense that it will put him at an unfair disadvantage or deprive him unfairly of the ability to defend himself. … Conscientiously exercised, this discretion affords the defendant an important safeguard.
>
> (4) The trial judge must give the jury a careful direction on the correct approach to hearsay evidence. The importance of such a direction has often been highlighted: see, for example, *Scott v The Queen* [1989] AC 1242]…; *Henriques v The Queen* [1991] 1 WLR 242…. It is not correct to say that a statement admitted under section 31D is not evidence, since it is. It is necessary to remind the jury, however obvious it may be to them, that such a statement has not been verified on oath nor the author tested by cross-examination. But the direction should not stop there: the judge should point out the potential risk of relying on a statement by a person whom the jury have not been able to assess and who has not been tested by cross-

> examination, and should invite the jury to scrutinise the evidence with particular care. It is proper, but not perhaps very helpful to direct the jury to give the statement such weight as they think fit: presented with an apparently plausible statement, undented by cross-examination, by an author whose reliability and honesty the jury have no extraneous reason to doubt, the jury may well be inclined to give it greater weight than the oral evidence they have heard. It is desirable to direct the jury to consider the statement in the context of all the other evidence, but again the direction should not stop there. If there are discrepancies between the statement and the oral evidence of other witnesses, the judge (and not only the 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."

[43] There having been no challenge to the fact that Miss Walker was dead, there can be no dispute that her statement was admissible once it had probative value. The recognised limitation to the defence of the applicant would be that he was deprived of any opportunity to directly challenge her eyewitness account, identifying him as one of the men who shot and killed her son. Counsel was entirely correct that careful consideration had to be given to the contents of the statement and how the learned trial judge directed the jury in relation to it.

[44] The statement established that the applicant was well-known to Miss Walker since he was a child. She gave his alias, address, the name of his parents and where they lived. She stated that on the night of the incident, she heard gunshots, looked outside and saw her son (the deceased) running towards where she was in the shop and falling by the door. Miss Walker described how she had seen the applicant and another man "run round behind her son" with guns pointed and shots fired at him. She described the lighting, which assisted her in seeing the applicant. She spoke of calling to the men, and the applicant firing at her. She said nothing prevented her from seeing the men, and she had enough time to recognise them. Although she failed to give details as to the time and over what distance she saw the men, Miss Pyke's submission that, based on her

description of the events, the jury could assess for themselves to determine those matters, had merit.

[45] Significantly, there was evidence which could be viewed as supporting the evidence in Miss Walker's statement. There was no challenge to the evidence that when the police held the applicant, he confirmed his alias and home address given by Miss Walker. When the police officers visited that stated address, they saw and spoke with the applicant's father, who confirmed the alias given by Miss Walker. There was evidence from the officers as to the area where the incident took place, where they had observed spent shells in the yard and what appeared to be blood stains and a large pool of blood. The location of these items was significant in supporting the narrative given by Miss Walker about the chase she witnessed and where the deceased had fallen. There was also evidence from the officers as to the lighting in the area when they visited the scene within hours of the incident. Although there was an issue due to the fact that no pictures were developed as a result of the failure of the flash in the camera, the evidence from Corporal Aitchson, who had attempted to take the pictures, was that not all the areas were dark.

[46] Ultimately, there was enough evidence contained in the statement from Miss Walker to establish that she could have seen and recognised the assailants. It was a matter for the jury to determine whether they were satisfied, on the totality of the evidence, that the applicant was correctly identified as one of the men that shot the deceased. We were satisfied that the learned trial judge did not err when he admitted Miss Walker's statements into evidence.

[47] From his opening remarks, the learned trial judge alerted the jury "this case is one of those peculiar cases in that, it is called a paper case and essentially, the [p]rosecution is attempting to prove the guilt of the [applicant] by adducing what is called paper evidence". He later went on to tell them that "the case still boils down to the statement of the deceased, Valerie Walker" and went on to describe the statement as the "fulcra of the [p]rosecution's case, the basis, the foundation, whatever of the [p]rosecution's case".

He directed them that only if they accepted her as a witness of truth, could they accept her as a credible witness. He then stated:

> "… And then I speak of the evidence of Valerie Walker and certainly if you remember me telling you that the evidence comes from the witnesses who go into the witness box and give evidence on oath. There lies the first hurdle.
>
> It is a fact that the law gives a statement, in certain circumstances validity as evidence before you and that is the case in respect to the statements given by Valerie Walker whether it be the statement involving, concerning the death of her son or the statement involving her identification of the dead body of her son to Dr. Sinclair who performed the post mortem…
>
> The law is not saying that you must accept the statement and believe the statement. When the statement becomes evidence it is subject to you like any other evidence in this case and you must remember at all times that you are judges of the facts. **The problem with the statement is that you are not, were not and have never been, given the opportunity of actually seeing Valerie Walker or hearing her except through her statement, so you weren't able to look at her and see how she answered questions under examination and in cross-examination, which as far as we are concerned is the best way of exposing a witness to you so that you can properly evaluate that witness and decide for yourselves whether the witness's evidence is acceptable to you or not**.
>
> So you are challenged by that fact and because you are challenged by that fact you must look with great care, you must be cautious, you must approach stringently the statement, dissect it, examine it so that you are not left wondering if it is evidence that you accept and evidence that you don't really know. You must be in a position where, having examined it, having carefully looked at it, you can say I am satisfied so that it makes me feel sure, because when you approach it you are at a disadvantage, and we accept that …

> So that I warn you that you need to give the statement careful thorough consideration, that you need to approach it with caution." (Emphasis added)

[48] Certainly, these directions were sufficiently in keeping with what was required in law, and it was unfair to say the learned trial judge had failed to tell the jury how to deal with Miss Walker's statement.

[49] The learned trial judge went on to give a warning for the visual identification and stated:

> "… The other problem with this statement is the fact that had the witness been here before you her evidence would have been challenged because her evidence is evidence of visual identification and normally where there is a challenge to the correctness of the identification of an accused I would have had to give you a warning and so I am going to give you the warning as this is a case where the only evidence against the [applicant] is evidence of the correctness of the identification of him, which the defence alleges to be mistaken or not true…
>
> I must, therefore, warn you of the special need or [sic] caution before convicting the [applicant] in reliance of that evidence of identification.
>
> … [I]t is possible for a witness, even an [sic] honest witness to make a mistake of identification because in the past there are [sic] wrongful convictions as a result of such mistakes, and because even apparently convincing witness [sic] can be mistaken. You should, therefore, examine carefully the circumstances to which this identification of [sic] the witness was made. You should take into consideration how long did the person whom the witness says was the [applicant] was under observation, at what distance, in what light, whether or not anything interfere [sic] with the observation of the witness, whether the witness have [sic] ever seen the [applicant]".

[50] The learned trial judge then reviewed what had been said in the defence's address about Miss Walker's statement and warned the jury again, that, because they had not seen the witness, they were to examine it with great care. He pointed out the

discrepancies between the evidence in Miss Walker's statement and that of her common-law husband, Mr Dacres, highlighting the fact that Mr Dacres had said that he and Miss Walker had been in the shop and he could not have seen outside. Miss Meyler's complaint that the learned trial judge had dismissed this evidence was misplaced. The learned trial judge gave entirely fair comments on the evidence and reminded the jury that it was a matter for them to decide.

[51] Therefore, the learned trial judge cannot be faulted for admitting the statement into evidence. He gave the requisite warnings and correctly applied the law in leaving the statement to the jury for their consideration. His summation on this issue was unexceptional. There was no merit to either grounds 1 or 2 of the appeal relating to the statement, and they accordingly failed.

Ground 3: The learned trial judge erred when he treated the defence with disdain and disrespect before the Jury which must have had the effect of the Jury holding both them and the [applicant] in low esteem. They were fettered and insulted at every turn and this would have resulted in prejudice and an unfair trial.

The submissions

For the applicant

[52] Miss Meyler complained that the learned trial judge was harsh with the defence team at every turn. She contended that this extended to ignoring their objection to actually using humiliating words to them. The first and only example of this she pointed to in the notes of evidence was when Miss Linton sought to raise an objection, and the learned trial judge said, "anything else", and moved on. This, Miss Meyler said, was indicative of the learned trial judge failing to acknowledge the objection and ignoring it.

[53] Counsel then pointed to comments made by the learned trial judge during his summation: referring to the defence team as "a battery of lawyers who are experienced as Queen's Counsel Ms Linton and her junior Ms. [Diane] Jobson and to a lesser extent Mr [Patrick] Peterkin". Ms Meyler complained that this description in relation to Mr Peterkin could be used to construe the esteem in which that court held him. Miss Meyler

noted that the learned trial judge had referred to something that had been said by one of the attorneys as "her disingenuous argument", a reference which Miss Meyler said was not only unfortunate, but would cause the jury to think very little of the attorney and by extension the applicant.

[54] Miss Meyler pointed to another comment by the learned trial judge that she said was insulting: "I don't know why counsel - doesn't know anything about guns or firearm - then doesn't ask the relevant questions when the expert is in the witness box instead of assuming". This, Miss Meyler said, was clearly saying counsel was incompetent. Counsel concluded that words used by the learned trial judge to ridicule and humiliate counsel to the jury were unacceptable, would have been a 'talking point' for the jurors, and could have caused adverse inferences to be made against the applicant.

For the Crown

[55] Miss Pyke contended that there was nothing in the learned trial judge's conduct which could have caused the jury to view the attorneys or the applicant adversely. Counsel submitted that a judge is entitled to comment on a case once he informs the jury that the comment reflects his opinion. She submitted further that although the learned trial judge made pertinent observations and commented on certain aspects of the case, he made it clear that he was commenting on these aspects.

[56] Miss Pyke urged that the essence of the utterances of the learned trial judge could only be understood in context. When read contextually, it was apparent that he did not treat any of the attorneys with disdain and disrespect. Counsel considered all the comments complained about and submitted that the learned trial judge had caused no prejudice to the applicant, since the jury had been reminded of their role and counsel's right to give an opinion. She concluded that the comments did not fetter the defence or cause any unfairness to the applicant. Counsel referred to **Adrian Forrester v R** [2020] JMCA Crim 3 and **Uriah Brown v R** [2005] UKPC 18 in support of her submissions.

Discussion and disposal

[57] It is indeed trite that in any criminal trial, the overriding requirement is that the accused is given a fair trial. In **Barry Randall v R** [2002] UKPC 19, the Judicial Committee of the Privy Council was obliged to re-iterate what this entails. Lord Bingham, writing on behalf of the Board, stated at para. 10 of the judgment, some of the rules which have been developed to ensure that trials are conducted in a manner which is orderly and fair, one of which is as follows:

> "…
>
> (3) It is the responsibility of the judge to ensure that the proceedings are conducted in an orderly and proper manner which is fair to both prosecution and defence. He must neither be nor appear to be partisan. If counsel begin to misbehave he must at once exert his authority to require the observance of accepted standards of conduct. He should not disparage the defendant in the course of the evidence. Nor should he disparage the defence counsel, since jurors inevitably tend to identify clients with their counsel. Sometimes a trial judge may have briefly to check or rebuke defending counsel. If however he has occasion, in any serious or sustained manner, to criticise the conduct of the defence case to criticise or rebuke defending counsel, it will usually be prudent for the judge to do so in the absence of the jury and he should ensure that his disapproval of or irritation with counsel does not affect the jury's judgment. If he chooses to express personal opinions in the course of summing up, he should do so in a restrained, moderate and balanced way."

[58] One major complaint in this ground was that the treatment of counsel for the applicant, by the learned trial judge, during the trial, occurred at "every turn". However, there was a paucity of examples highlighted in support of that contention. Our review of the transcript did not reveal instances which demonstrated that the learned trial judge insulted, humiliated or treated the defence with disdain or disrespect, such that it could be said that the applicant was denied a fair trial.

[59] As regards a trial judge's comments in the summation, it is useful to note the observations of this court in **Adrian Forrester v R**. Edwards JA, writing on behalf of

the court, stated that in summing up a case to the jury, the trial judge is also entitled to, along with defining the issues, express his opinion, and, in a proper case, may do so strongly, so long as the jury is informed that they are entitled to ignore them, and the issues are left to the jury for their final determination (see para. [47]).

[60] The editors of Blackstone's Criminal Practice 2023, at para. D26.34, made the following observation:

> "**A judge is entitled to comment on the facts and express an opinion as to those facts, so it is rare that an appeal will be successful when it is based on such judicial comments**. It is only when a judge exhibits blatant unfairness and pro-prosecution bias that the conviction will be imperilled. In *Canny* (1945) 30 Cr App R 143, the conviction was quashed when the judge repeatedly described the defence case as absurd. Similarly, in *Berrada* (1989) 91 Cr App R 131, the conviction was quashed when the judge described allegations put by the defence to a prosecution witness as 'really monstrous' and 'wicked'." (Emphasis added)

[61] The Board in **Byfield Mears v R** (1993) 42 WIR 284, a matter from this jurisdiction, in a judgment delivered by Lord Lane, had this to say at page 289:

> "Their Lordships realise that the judge's task in this type of trial is never an easy one. He must of course remain impartial, but at the same time the evidence may point strongly to the guilt of the defendant; the judge may often feel that he has to supplement deficiencies in the performance of the prosecution or defence, in order to maintain a proper balance between the two sides in the adversarial proceedings. It is all too easy for a court thereafter to criticise a judge who may have fallen into error for this reason. However, if the system is trial by jury then the decision must be that of the jury and not of the judge using the jury as something akin to a vehicle for his own views...."

[62] Their Lordships indicated further on in the judgment that the task of determining whether the judge's comments went beyond the proper bounds of judicial comment is to:

> "… take the summing-up as a whole and ... then ask themselves in the words of Lord Sumner in *Ibrahim v R* [1914] AC 599 at page 615 whether there was-
>
> > 'Something which … deprives the accused of the substance of a fair trial and the protection of the law, or which, in general, tends to divert the due and orderly administration of the law into a new course, which may be drawn into an evil precedent in the future'."

[63] It was noted that the learned trial judge, early in his summation, alerted the jury that if in the course of his reviewing the evidence, he should express any views concerning the facts, they should remember that when it came to the facts of the case, it was their judgment that counts.

[64] Turning to consider the complaints, the context in which the comments were made is without doubt of primary significance. Firstly, before he reviewed the actual evidence from the witness, the learned trial judge stated:

> "Now, normally in the course of things all witnesses who give evidence go into the witness box… You see how they answer questions, whether on examination-in-chief or by cross-examination. And the purpose of cross-examination really is to test before your eyes the credibility of the witnesses so that you see how the witness stands to probing questions especially **when you have a battery of lawyers who are experienced as Queen counsel [sic], Ms Linton and her junior and to a lesser extent Mr Peterkin** then you get a good idea by looking at the witnesses as they answer questions whether or not they are credible witnesses…." (Emphasis added)

[65] This entire direction was certainly not incorrect as it pointed out the purpose of cross-examination. Further, it also correctly summed up the years of experience of the attorneys-at law who appeared for the applicant. The complaint that it could be viewed as a comment on the esteem with which the learned trial judge held one attorney-at-law was, in this context, entirely unsubstantiated.

[66] While reviewing evidence relating to the spent shells and warheads, the learned trial judge made two comments, which are also the subject of complaint. The section of the summation from which the comments were taken was as follows.

> "Now before I proceed any further, nobody asked [Aitchson] exactly where he got those warheads from and you probably remember defence attorney telling you that if warheads have been in the shop, if somebody had fired shots at Valrie [sic] Walker then warheads could have been in the building or lodged in the building or anywhere they would have known because they found them, but nobody asked him where he find these warheads. Nobody did bother at the time to ascertain whether it came from a building or anywhere else, but it is a matter for you whether you think that what the Counsel, Miss Jobson says about the warheads make sense [sic] or not. Because she does not give evidence and it is you who having heard the witness must decide what evidence you accept and what evidence you reject.
>
> Because he not only found spent shells, he also found warheads. **I don't know why counsel-doesn't know anything about guns or firearm-then doesn't ask relevant questions when the expert is in the witness box instead of assuming**, for instance, that the bullets are of a certain calibre, the muzzle of the guns which fire those bullets must always be of the same size or to expect a ballistic expert to be able to say a warhead which comes out of a shell could be identified like the shell as coming from the same gun.
>
> **You remember her disingenuous argument** when, after Retired Assistant Commissioner of Police, Dan Wray said that he found that the warheads came from two different guns and that the spent shells came from two different guns that there might have been more guns out there…. as I said before, she is entitled to tell you her opinion or give arguments or suggestions as it relates to the evidence, but ultimately it is a matter for you whether you accept her argument or you reject her arguments…" (Emphasis added)

[67] From this extract, it appeared that the learned trial judge was commenting on things that counsel had said to the jury without any evidential basis for them. Regarding the first comment, the learned trial judge would have been entirely correct that, if counsel

had not asked relevant questions from the expert on an issue of this nature, it was inappropriate for counsel to make assumptions. This full context did not give rise to a conclusion that the comment was clearly saying that counsel was incompetent.

[68] Further, regarding the second comment, the ballistic expert had given evidence that the recovered warheads and bullets were from two firearms. Although it was not apparent from the transcript what was actually said, from the comments by the learned trial judge counsel for the applicant seemed to have suggested to the jury that "more guns were out there". This would not have been reflective of the evidence, hence the learned trial judge's description of that argument as being "disingenuous", which, although a strong term, was certainly not entirely inaccurate. These comments could not have adversely impacted the fairness of the trial.

[69] Accordingly, no merit was found in this ground of appeal, and so it failed.

Ground 4: The learned trial judge erred in law when he allowed the evidence of Corporal Eric Lindsay … for the purpose of a dock identification to be adduced before the Jury.

The submissions

[70] Miss Meyler commenced her submissions on this ground by highlighting the fact that no identification parade had been held, although there had been sufficient time to do so after the applicant had been taken into custody in September 2003 and before Miss Walker died sometime in 2004. Counsel contended that in order to clear up this defect in its case, the prosecution belatedly called Corporal Lindsay as a witness to give a dock identification of the applicant. She contended that the discretion of the learned trial judge to allow the evidence was wrongly exercised, and, having been done, no warning was given to the jury concerning this. This evidence, counsel stated, was prejudicial in many respects, particularly since it came from a police officer. She submitted that, as a result, the trial was unfair, and the verdict was unsafe and ought to be quashed. She relied on **Holland v Her Majesty's Advocate (Devolution)** [2005] UKPC D1, **Terrell Neilly v R** [2012] UKPC 12, **Aurelio Pop v R** [2003] UKPC 40 and **Maxwell Tido v R** [2011]

UKPC 16, in relation to the benefits of holding an identification parade and the weaknesses of dock identification.

[71] In response, Miss Pyke submitted that the evidence from Corporal Lindsay, evidence identifying the applicant in the dock, did not fall within the category of a dock identification, as the Crown did not rely on it as assisting the evidence for visual identification. Furthermore, she contended that Corporal Lindsay's knowledge of the applicant was never challenged, and there was no issue of prejudice caused to him by Corporal Lindsay's evidence. It was on this basis that Crown Counsel submitted that the learned trial judge did not need to warn the jury on dock identification. For this issue, counsel relied on **Peter Stewart v R** [2011] UKPC 11 and **Irvin Goldson and Devon McGlashan v R** [2000] UKPC 9.

Discussion and disposal

[72] The term dock identification generally refers to the identification of an accused during the course of a trial as the perpetrator of an offence by an identifying witness. The first fact to be appreciated was that Corporal Lindsay was not an identifying witness seeking to link the applicant to the offence, and he spoke to his knowledge of the applicant by his name, his alias and where he lived. Significantly, there was no challenge to his evidence. This information, apart from being in the statement from Miss Walker, was confirmed by the apprehending officer as coming from the applicant himself and his father. This, too, was not challenged. Ultimately, Corporal Lindsay's evidence may well be considered to have been unnecessary since much of what he said had been supplied by other evidence which was unchallenged by the defence.

[73] Contrary to Miss Meyler's submission, there was absolutely no need for the learned trial judge to have given any warning about the evidence. He correctly told the jury that Corporal Lindsay "said he knew [the applicant] for some time from about 2013, but really what he was called to say was that he knew this man, he knew him by another name apart from Mohinder Singh, he knew him as 'Mo Mo', and he knew him before this

incident". Even though it could be viewed as unnecessary, nothing about this evidence could be so prejudicial that it resulted in any unfairness to the applicant.

[74] This ground was therefore found to be unmeritorious and also failed.

Ground 5: The learned trial judge erred when he allowed the amendment of the indictment at the close of the Crown's case and following on a no-case submission being made which should have been upheld.

The submissions

[75] Miss Meyler acknowledged that the court had the power to amend the indictment where there was no prejudice the defendant. However, in this case, she submitted that the learned trial judge fell into error when he allowed the amendment of the indictment at the close of the prosecution's case, permitting the date of the offence to be changed, where not all the evidence pointed to the offence being committed in 2003. Counsel contended that the learned trial judge had no power in law to amend the statement of Miss Walker, which was the critical evidence in this case and which had stated that the incident had not occurred in June 2003.

[76] Counsel referred to **R v Johal, R v Ram** [1973] QB 475, which she submitted had held that the longer the interval between arraignment and amendment, the more likely it is that injustice will be caused, and, in every case in which amendment is sought, it is essential to consider, with great care, whether the accused person will be prejudiced thereby. Counsel submitted that the fact that the prosecution took over six years to perfect the indictment was prejudicial to the applicant, who was called upon to answer a charge for an offence that would have taken place while he was in custody. Further, she submitted, the change in the date of an offence was a significant amendment that went to the "deepest root of a case", as it dictates how a defendant will prepare his case and a change at the end of the trial was dramatically prejudicial.

[77] Counsel recognised that section 6 of the Indictment Act permits the amendment of an indictment at any stage of a trial, but noted that it also provides "unless, having regard to the merits of the case, the required amendments cannot be made without

injustice". She submitted that the amendment caused an injustice to the applicant, and the change resulted in a trial outside the scope of the indictment and resulted in an unfair trial.

[78] In response, Miss Pyke acknowledged that a judge has the discretion to allow an amendment to correct defects and errors contained in an indictment if no injustice is caused. She referred to **Melanie Tapper and Winston McKenzie v R** (unreported), Court of Appeal, Jamaica, Resident Magistrates' Criminal Appeal No 28/2007, judgment delivered 27 February 2009, **R v Dossie** (1918) 13 Cr App Rep 158 and **Oneil Hamilton v R** [2014] JMCA Crim 50.

[79] Counsel pointed to the evidence from the witness who recorded the statement from Miss Walker, who had stated that he had recorded the statement on 26 June 2003 and that the date recorded in the statement of 2002 was an error. She also pointed to the evidence of Dr Sinclair, who conducted the post-mortem on the deceased on 8 July 2003. Further, she pointed to the evidence of one police officer who said that he had visited the scene on 26 June 2003, and had seen the body at the scene, which was later identified as the deceased.

[80] Miss Pyke concluded that no injustice was caused when the learned trial judge granted the amendment, as there was evidence that the offence had taken place in 2003, and the learned trial judge was empowered, by law, to grant the amendment.

Discussion and disposal

[81] There can be no dispute that the learned trial judge was empowered to make the amendment at any stage of a trial, where it appeared that the indictment was defective and the amendment could be made without any injustice to the accused. Section 6(1) of the Indictment Act provides:

> "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the

> circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for amendment as the Court thinks fit."

[82] The stage the trial had reached when the application for the amendment was made was at the end of the Crown's case. At that time, a no-case submission was made on behalf of the applicant relying solely on the fact that, in the indictment, the date of the offence was given as 26 June 2002, and the evidence which was given in court spoke to an incident which occurred in June 2003, one year later. The question for consideration was whether the amendment to the date could have been made at that stage without injustice to the applicant.

[83] In **Oneil Hamilton v R**, McDonald Bishop JA (Ag), as she then was, when faced with a similar question, considered the guidance from the learned authors of Blackstone's Criminal Practice, 1999 at para. D9.9. She sought to distil and restate some important points that the learned authors advanced concerning errors in the dates stated in an indictment. At para. [20], she listed them as follows:

> "(1) Where the evidence at trial as to time differs from the date laid in the count, that is not at all, fatal to a conviction (**Dossie** (1918) 13 Cr App Rep 158). There, however, may be cases in which the allegation as to date is not merely procedural but may determine the outcome of the case for example where the age of the victim is important.
>
> (2) Where the defence may have been prejudiced in the preparation of their case by a divergence between the evidence as to the time and date specified in the count, the trial judge, should adjourn to allow them to respond to the altered situation. Alternatively, it might be necessary to discharge the jury and have a second trial on indictment. Failure to allow an adjournment could result in the quashing of any resultant conviction as being unsafe or unsatisfactory. (These propositions, the learned authors, however, note, are derived from the case of **Wright v Nicholson** [1970] 1 WLR 142,

which they indicate should be applied with caution in applying that decision in the present context because, inter alia, the appeal was not against conviction on indictment.)

(3) Since divergence between a count and the evidence as to date is not fatal to a conviction, there is strictly speaking, no need for the prosecution even to apply for an amendment to the indictment on the divergence becoming apparent (**Dossie**). However, as a matter of practice, it may be preferable to eliminate divergence by an appropriate amendment, thus avoiding confusion to the jury."

[84] In granting the amendment at the end of the prosecution's case, the learned trial judge addressed his mind to the critical question of prejudice to the applicant and concluded that:

> "… In this matter, the Court will grant an amendment to the indictment as all the evidence indicate [sic] that this deceased died in the year 2003 and not 2002 as the indictment is presently framed, and as all the evidence is in this direction about this case and which is contained in the indictment and in the statement of Valerie Walker and this Court is of the view that no prejudice will be done by allowing this amendment, the Court so orders."

[85] The no-case submission had been made in the jury's absence, and once they were re-called, the learned trial judge had the applicant re-pleaded and gave an adjournment to the defence.

[86] What was the evidence as to the year of the incident for which the applicant was charged and which had remained unchallenged at the time the application for the amendment was made? It was the evidence of police witnesses, Detective Sergeant Messam, Corporal Aitchson, Detective Inspector Dixon, Deputy Superintendent Phipps and Corporal Robinson that they had received reports on 26 June 2003, that caused them to commence the investigations into the matter. Most of the officers spoke of visiting the scene and the observations they made. Others spoke about seeing the body of the deceased on that date. Most significantly, both Detective Sergeant Messam and Detective

Inspector Dixon testified that they spoke with Miss Walker, at the scene, on 26 June 2003, and Deputy Superintendent Phipps testified that he had recorded her statement on 27 June 2003.

[87] Other evidence which supported the fact that the incident had occurred in 2003 was that the post-mortem examination on the deceased was done in July 2003. In response to a question asked during cross-examination, the pathologist, Dr Sinclair, had stated that the information she received was that the deceased had been pronounced dead on 26 June 2003. It must also be noted that, in the statement recorded from Miss Walker pertaining to the identification of her son at the post-examination, she had stated that he had been killed on 26 June 2003.

[88] It was even more significant that, in the statement in which Miss Walker was recorded as saying the incident had occurred in 2002, she was also recorded as saying that the statement was taken in 2003. Thus, the learned trial judge was entirely correct that all the evidence pointed in the direction that the incident had occurred in 2003, and the amendment was necessary to meet the circumstances of the case.

[89] Miss Meyler submitted that the date having been changed meant that the offence had taken place while the applicant was in custody. However, the fallacy of that argument was immediately apparent. There was no challenge to the fact that the applicant was taken into custody and charged in September 2003. If the incident had occurred in 2002, the applicant would not have been in custody at that time.

[90] The prosecution was clearly negligent in preparing this indictment, and the wrong date was recorded on the indictment. This being a matter in which there was no preliminary examination, it was apparent from some of the questions asked of some of the witnesses and from comments made by defence counsel, that the statements on which the prosecution relied to establish their case had been disclosed. The applicant would have been aware when the trial commenced that the date stated in the indictment could have been incorrect. It has not been demonstrated that he would have been

prejudiced by the correction of the date. Further, the learned trial judge properly afforded the applicant an adjournment after the amendment was made. We were satisfied that, in all the circumstances, the year of the incident being changed on the indictment, without more, was not fatal to the applicant's conviction. Therefore, we did not find any merit in this ground of appeal.

Ground 6: The sentence meted out to [the applicant] was manifestly harsh and excessive.

The submissions

[91] Miss Meyler contended that the antecedent report of the applicant was good. She pointed out that, at the time of the offence, the applicant was 18 years old and had no previous convictions. He was self-employed, having learnt the trade of painting in addition to buying and selling in his spare time, until he was taken into custody. It was her contention that the applicant was a young man who was meaningfully engaged in productive activity with a proclivity to work, not to commit crime. She further submitted that the learned trial judge failed to take into account the time the applicant had spent in custody before arriving at the time at which he would be eligible for parole. Counsel complained that the learned trial judge made comments that suggested that he had stereotyped the applicant and had paid no attention to the applicant's good character. She opined that the learned trial judge expressed unfounded prejudices and bias in his sentencing rather than being objective and dispassionate. Counsel submitted that in the event the conviction was not quashed, the applicant having already spent 17 years in prison, his sentence ought to be reduced to time served.

[92] Miss Pyke countered this submission by stating that the learned trial judge, in conducting the sentencing process, considered the mitigating and aggravating factors. She pointed out that he mentioned that the applicant had no previous convictions, spoke about his background, and noted that he had spent some time in custody.

Discussion and disposal

[93] A reading of the sentencing remarks of the learned trial judge revealed that he failed to sufficiently demonstrate how he arrived at the sentence he imposed. When this matter was tried in 2009, there was useful guidance as to how the sentencing exercise should be conducted in cases such as **R v Evrald Dunkley** (unreported), Court of Appeal, Jamaica, Resident Magistrates Criminal Appeal No 55/2001, judgment delivered 5 July 2002. Harrison JA, writing on behalf of the court at page 4, 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."

[94] After making some general observations and comments, the learned trial judge imposed the sentence of life imprisonment with the recommendation that the applicant serves 30 years before being considered eligible for parole. He did not refer to any starting point nor did he demonstrate how the factors he mentioned influenced the length of the sentence. In the circumstances, this court felt obliged to conduct our own assessment in determining whether the sentence imposed was excessive.

[95] Having been convicted of a murder of this nature, the applicant had to be sentenced in accordance with section 3(1)(b) of the Offences Against the Persons Act ('the OAPA'), which provides for "imprisonment for life or such other term as the court considers appropriate, not being less than 15 years". This being a gun murder where the deceased was unarmed and attempting to flee, we think the imposition of life imprisonment was wholly appropriate. The concern was, therefore, with the period to be served before eligibility for parole. Section 3(1C)(b)(i) of the OAPA provides that where pursuant to section 3(1)(b), the court imposes "a sentence of imprisonment for life, the court shall specify a period, not being less than fifteen years".

[96] There are several decisions emanating from this court in which the exercise of reviewing various sentences passed for murder has been conducted to ascertain the most appropriate range of such sentencing. In **Christopher Thomas v R** [2018] JMCA 31, after such a review, it was concluded that the authorities suggested "a usual range of 20 to 40 years' imprisonment, or life imprisonment with a minimum period to be served before becoming eligible for parole within a similar range" (see para. [93]).

[97] For this offence, a starting point of 25-30 years would be appropriate. The fact that the applicant was one of two who invaded the deceased's yard at night, utilised a gun and pursued the deceased in the sanctity of his yard, shooting him several times in his back, were aggravating features that operated to significantly increase the sentence. The mitigating features, such as the applicant's age at the time of the offence and his lack of previous convictions, did not operate to significantly reduce the sentence. When balanced, the aggravating features far outweighed the mitigating ones. A term of imprisonment in the range of 28-34 years before eligibility for parole was, therefore, determined as commensurate for this offence. Thus, in all the circumstances, although the learned trial judge had not expressly indicated how he had arrived at the sentence he imposed, the sentence was well within the range, which could have been imposed and was not excessive, and so it was not disturbed.

[98] It is now established that a sentencing judge should grant full credit for time spent on remand prior to sentencing. This time should be fully taken into account by a mathematical deduction when assessing the length of the sentence that is to be served from the date of sentencing (see **Callachand and another v The State** [2008] UKPC 49 and **Meisha Clement v R** [2016] JMCA Crim 26). The applicant had spent six years in custody pending the trial and was entitled to credit for this time.

[99] Before completing this matter, although not raised by the applicant, it must be noted that it was of some concern that it had taken some 10 years before his application was heard. A review of the records of the court revealed that between 2010 and 2017, the matter had been placed on the list for hearing 13 times and had been removed on

each occasion on the request of counsel then appearing for the applicant. In November 2017, the services of that counsel were terminated, and when the matter was next before the court in August 2018, legal aid was granted to the applicant. The counsel who was assigned surrendered the assignment on being advised that the applicant had sought to secure his own counsel. The counsel who was named as retained for the applicant indicated that this was not the case so another assignment was made and the matter was listed for hearing in November 2020. It was in August 2020, that Miss Meyler informed the court that she had been retained, and commendably did not seek any further adjournments. In these circumstances, this delay could not have affected any aspect of the ultimate outcome of the application.

Conclusion

[100] It was for these reasons that we found no merit in the grounds of appeal challenging the conviction, found that there was merit in the appeal against sentence and made the orders at para. [2] herein.