[2025] JMCA Crim 29

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO COA2019CR00072

CONROY STEPHENSON v R

Cecil J Mitchell for the applicant

Miss Sophia Rowe and Sean Nelson for the Crown

13 May 2024 and 12 December 2025

Criminal Law – Application for leave to appeal conviction – Murder – Whether the verdict arrived at by the jury was unreasonable – Interventions by trial judge – Whether trial judge descended into the arena – Whether the applicant's trial was unfair due to interventions by trial judge during cross-examination of witnesses for the defence

Retrial – Whether a new trial should be ordered – Factors to be considered – Mandatory minimum sentence – Judicature (Appellate Jurisdiction) Act, s 14(2)

STRAW JA

[1] Following a trial in the Home Circuit Court between 4 and 11 February 2019, before Sykes CJ ('the learned Chief Justice' or 'the Chief Justice') sitting with a jury, the applicant, Conroy Stephenson, was found guilty of the offence of murder. On 12 April 2019, he was sentenced to 16 years' imprisonment, without eligibility for parole before serving 10 years.

[2] On 16 April 2019, the applicant sought leave to appeal his conviction and sentence, and, on 27 January 2022, a single judge of this court refused this application. On 13 May

2024, this court heard the applicant's renewed application for leave to appeal conviction and reserved its decision. The application for leave to appeal sentence was not pursued (as indicated by the applicant's notice and grounds of appeal filed 8 May 2024 and by counsel during the course of the hearing).

Background

Case for the prosecution

[3] The case for the prosecution rested primarily on the evidence of two witnesses, Miss Nadesha Williams, niece to Mr Nicholi Nesbeth ('the deceased'), and Miss Shanice Robinson, the girlfriend of the deceased. Miss Williams' evidence appears to have been intended by the prosecution to be used to support the case against the applicant's co-accused, Roland Bowes (also called 'Twist Teeth'), who was ultimately acquitted after the court accepted a no-case submission made on his behalf. Whereas, Miss Robinson's evidence was used to support the case against the applicant (whom Miss Robinson referred to as 'Cool Walk'). As counsel for the applicant, Mr Mitchell, argues that Miss Williams' evidence was also relevant for the jury in considering the case against the applicant, her evidence will also be summarised.

[4] Miss Robinson's evidence was that the deceased and the applicant were known to each other. She stated that on 17 March 2014, after she returned home from work at around 7:00 pm, she and the deceased spent the evening talking to each other in their community, Seaview Gardens. Initially, they spoke in front of the gate of her home, and subsequently, they went to sit on a bench at the end of Soviet Road. Whilst on the bench, there were three other persons outside. She knew those persons as Twist Teeth, "Puppy" and "Massino". They were standing at the top of a lane. Miss Robinson and the deceased spoke until the deceased said he was hungry, at which point Miss Robinson said she retrieved money from her home, which she gave to the deceased to buy food. The deceased then went into a lane, where there was a shop belonging to a person by the name of "Kazoo". She, therefore, called that lane "Kazoo lane". As soon as the deceased got up, Twist Teeth went down the lane where he and the other two men were standing.

This was a different lane from Kazoo lane. The other two men remained. Miss Robinson identified Twist Teeth as Mr Bowes.

[5] Miss Robinson said she sat for about 10 minutes waiting, then she got up and went to Kazoo lane. Just then, the deceased emerged, and Twist Teeth followed behind him. The deceased walked over to her, and by that time, the other two men were no longer present at the top of the lane where they had initially been. Miss Robinson and the deceased returned to the bench where they had been seated. Twist Teeth also went and sat on a bench that was about 25 feet away and stared at them. Miss Robinson testified that she and the deceased continued in conversation. They then got up. She had turned her back to walk off in the direction of her home, and the deceased was going into a lane. Twist Teeth was still sitting on the bench. As she was turning to go to her house, she heard a sound from the direction of the deceased. She described the sound as "when you throw a lighter and it had a lot of gas, like a brand new lighter on the wall and it burst" (see page 146, lines eight to 12 of the transcript). She then turned back to the direction of the deceased when she noticed a "'woshing' light thing … like a fireworks [sic]". She described it further "like fire, like it go in the sky and boom" (see page 147, line two of the transcript). She saw the deceased, who was shouting her name, and she saw "Cool Walk" facing the deceased, pointing a gun at the deceased's chest. No one else was in front of the deceased apart from Cool Walk. She identified the applicant as Cool Walk. She did not see where Cool Walk came from, and both men looked frightened. She testified that the deceased said, "Shanice, Shanice them shoot me. You si who shoot mi Shan-Shan? Look, look a who shoot mi and tell mi" (see page 149, lines seven to nine of the transcript). The deceased spoke loudly, then he turned and ran toward her and dropped at her gate. Cool Walk also ran into the same lane that Twist Teeth had gone into. This was the core of Miss Robinson's evidence-in-chief.

[6] Nadesha Williams testified that, on the date of the incident, she lived in Seaview Gardens with family, including the deceased, who was also called "Dad". On that same evening, between 10:00 pm and 10:30 pm, she was down the road talking to her

boyfriend, in his lane. She explained that she was on Soviet Road, but "up inna the lane", which was not really far from the road. Whilst there, she heard a gunshot. She continued speaking to her boyfriend when she saw two persons run past her. She recognised one of the persons to be Twist Teeth. She stated that when he ran past her, he had a gun. It was then she learnt that her uncle was shot, and she concluded that Twist Teeth was responsible for the act. Twist Teeth was the second man to run past her. She did not see the first man properly.

Case for the defence

[7] The applicant gave an unsworn statement from the dock stating that, on the night of the incident, he arrived at his home in Seaview Gardens at about 8:00 pm. He went to his wife's house to do a project for his daughter. This project involved building a house out of cartridge paper and toilet paper. About 15 minutes after his arrival, a young lady from next door by the name of "Britina" called him out to move his van, which was blocking someone. As such, he went outside, moved the van, and then went back inside to work on the project.

[8] At about 10:15 pm, his phone rang. His wife answered the phone and said it was his sister. He spoke to his sister, who asked him of his whereabouts and told him that the deceased was killed and that Miss Robinson said it was he, the applicant, who was responsible for the killing. He immediately got dressed and went outside. He and his family then got into his van and went to the police station. Whilst at the police station, he asked the police to come to his home to see that he was working on the project. He was told by the police that he would have to "hold on a little". Eventually, a police officer spoke to him. He told him his name and that his alias was "Smooth Walk". The police officer raised his voice at him and asked him if he was not also called "Tenderfoot", to which he replied "no". He again told the police officer that he was working on his daughter's project and asked them to visit his house, but he got no response. More police officers came. His hands were swabbed, and he was held for investigation. He was taken to the Hunts Bay Police Station.

[9] Another man from the Seaview Gardens community, whom he knew as "Raj", was also held by the police, and he was told that "Raj" confessed to killing the deceased. He (the applicant) was ultimately charged for murder and illegal possession of firearm. When told by the police that he would be charged, he asked the officer, "you really a goh charge me fi supp'n weh mi nuh duh". He was then taken back to the lock-up.

[10] The applicant also called two witnesses, Miss Tavajay Tennant, who gave evidence that she also went by the name "Britina", and Miss Sarafina McIntosh.

[11] It was Miss Tennant's evidence that she lived in the Seaview Gardens community, was a student, and worked at a call center. On the evening of the incident, after leaving class, she arrived in the community, in her lane, at about 8:05 pm. She stopped outside her neighbour's house and was speaking with her neighbour. She was there until about 10:15 pm. During that period, she had called the applicant out of his wife's house at about 8:35 pm to request that he move his van, which was blocking another neighbour. The applicant moved his van and then went back to his wife's house. She did not see the applicant leave the house while she was outside. She was sitting on a high wall facing the house, and since it had only one door, she would have seen the applicant if he had left the house. She was on the wall until about 10:25 pm when the applicant's sister arrived. Based on what was said by the applicant's sister, she accompanied them to the police station and, while there, protested against the accusations made against the applicant. It was her evidence (under cross-examination) that she was not allowed to speak to the police whilst at the station.

[12] Sarafina McIntosh testified that on the date of the incident, she was 17 years old and living in Seaview Gardens. At about 9:45 pm, she was in Seaview Gardens and was on her way to the shop, in the company of her then boyfriend, Twist Teeth. She was on Ball Plate Avenue, which was also called "lane". She did not make it to the shop, however, as there was a shooting. She testified to witnessing the shooting from a distance of approximately 40 feet. She said the shooting took place at an intersection and that the deceased was sitting on a "cut off light post" at the corner of a house. Although it was

night, she was able to see because of the lights on the houses. She said she was not able to see the deceased clearly at the time, but she had passed him at that spot about 20 minutes prior to the shooting. She had been walking with Twist Teeth on her way to the shop when she saw a short, slim gentleman walk through the lane, turn, and then she heard the gunshot. She said the deceased jumped up, used an expletive and then said "me get shot, me [sic] shot me" and then fell on the road, near his girlfriend's house. The man who shot him ran toward her, and she grabbed Twist Teeth's hand and ran down to her lane. She went and alerted others about the incident. She said she saw the shooter's face when he was running toward her. His face looked like that of a person who was bleaching, and his hair was plaited. She said that no one else was there when the incident occurred and, in particular, that neither the applicant nor Miss Robinson was present. She did not report what she witnessed at the time to the police, as she was under her father's care and would not have been allowed to do so.

Grounds of appeal

[13] In pursuing this application for leave to appeal, the applicant relied on two grounds of appeal relating to his conviction as follows:

> "1. Verdict unreasonable having regard to the evidence.
>
> 2. The jury failed to have proper regard to the case for the Defence."

Ground one: Verdict unreasonable having regard to the evidence

Submissions

[14] In arguing that the verdict was unreasonable having regard to the evidence, Mr Mitchell, on behalf of the applicant, relied on several bases: (1) the evidence of Miss Williams was relevant to the applicant's case, and eroded the evidence of Miss Robinson, such that it could be said that Miss Robinson was not an eyewitness to the events of the killing; (2) the case against the applicant was circumstantial, in that Miss Robinson did not see the applicant shoot the deceased or discharge the firearm and that Miss Robinson

testified that both men appeared to be surprised; (3) it was entirely unreasonable for the jury to have found the applicant guilty in light of Miss Robinson's evidence as to the words uttered by the deceased and the failure of the deceased to identify his shooter; (4) the directions given by the learned Chief Justice to the jury were confusing and unhelpful and this was to the applicant's detriment; (5) Miss Robinson's evidence regarding her statement to a Justice of the Peace recanting from her statement to the police should have caused the jury to find that Miss Robinson was an unreliable witness. Counsel submitted that Miss Robinson's statement to the Justice of the Peace was made a couple of days after her statement to the police. In that statement, she indicated that she did not know who shot the deceased. Counsel placed reliance on the case of **R v Joseph Lao** (1973) 12 JLR 1238 in maintaining that the verdict in the instant case was palpably wrong.

[15] In refuting ground one, Miss Rowe for the Crown submitted that the learned Chief Justice gave a comprehensive and fair summation, highlighting all relevant issues that arose in the trial. She stated that the Chief Justice dealt "delicately" with the utterances made by the deceased and presented to the jury the ways in which the utterances could be interpreted. It was left for the jury to decide which interpretation to accept.

[16] With respect to the evidence of Miss Williams, it was submitted that it did not touch and concern the applicant. Further, the jury accepted the evidence of Miss Robinson over that of Miss Williams and, in particular, they accepted that Twist Teeth was not in the vicinity of the deceased at the time of the shooting. It was asserted that Miss Williams' evidence did not erode that of Miss Robinson's, as they spoke from different vantage points.

[17] On the point that Miss Robinson did not see the applicant actually shoot the deceased, it was submitted that, based on the evidence, there was only one reasonable inference to be drawn.

[18] Reliance was placed on the case of **Lescene Edwards v R** [2018] JMCA Crim 4 ('**Lescene Edwards**') in relation to the issue of the reasonableness of the verdict. It was submitted that credibility and reliability are considerations for the tribunal of fact, properly directed, as they were in this case.

Discussion

The treatment of Miss Robinson's evidence in light of the evidence of Miss Williams

[19] As demonstrated in the summary of the case for the prosecution set out above, both Miss Williams and Miss Robinson had two different vantage points during the incident. Miss Robinson was at the actual scene of the shooting on Soviet Road when she heard a sound and turned around. At that time, she saw the applicant standing in front of the deceased. The applicant had a firearm. She saw a light like fireworks going skyward, coming from where the men were standing. She had also placed Twist Teeth on the scene for some time prior to the shooting, sitting on a bench. She did not observe him doing anything at that time. The deceased then called out to her, turned, ran toward her and fell. The applicant ran into a lane where Twist Teeth had been positioned. At that time, she did not see Twist Teeth.

[20] On the other hand, Miss Williams was in another lane when she heard the sound of a gunshot. This sound came from the direction of Soviet Road. She saw a youth run past her. She did not recognise him, nor could she say whether he had a firearm. She then saw Twist Teeth, with a gun in his hand, run past her. Twist Teeth came from the direction where she heard the gunshot. Someone bawled out. She then screamed and said, "Twist Teeth kill me uncle".

[21] These two witnesses did not contradict each other. Although Miss Williams could not identify the first man who ran into the lane and passed her, Twist Teeth was the second man to do so. Miss Robinson, however, saw Twist Teeth before the deceased was shot by the applicant, but not after. The learned Chief Justice, in his directions, made it clear that Miss Robinson gave no evidence that she saw anyone running away from the

scene with Twist Teeth. Also, that the only person she saw with a gun was the applicant. He emphasised that the jury could not conclude that, because Miss Williams saw Twist Teeth, running with a firearm, along with another person, it must necessarily be the applicant who was the other person, because there was no factual foundation to make such a conclusion.

[22] The learned Chief Justice made it clear to the jury that the evidence of Miss Williams was only relevant to Twist Teeth and that she could not assist them in proving the charge against the applicant (see page 384, lines 10 to 24 of the transcript). However, there was no inherent discrepancy between the evidence of both witnesses that should have caused the jury to conclude that Miss Robinson's evidence could not be relied on.

The fact that Miss Robinson did not see the applicant shoot the deceased

[23] Although Miss Robinson did not see the applicant pull the trigger, based on the factual circumstances, a reasonable inference could be drawn by the jury that he was the shooter. The learned Chief Justice reminded the jury of her evidence and stated at page 411, lines five to 20 and page 412, lines six to 17 of the transcript:

> "And then now, she says this [sic] what she saw was coming from right where 'Dads' and 'Cool Walk' where [sic] and nobody else was there. So, what the crown [sic] is saying then, is this, and this is essentially circumstantial evidence because what it has now come down to is that up to this point in the narrative the witness isn't really saying I saw him turn up point the gun, then I saw, then I heard the sound, and then, she is not saying that what she is saying, [sic] got up [sic] he is going to buy weed at some other lane, she going home, she hears the sound, turns around sees this whoosh like fire, the boyfriend speaks to her, so the sound and as far as we – as far as the evidence goes, one sound. …"
>
> "So, what the Crown is saying to you is simply this, if you accept Miss Robinson's evidence that there was just one explosion, and one explosion only as she turns immediately and sees the [applicant] with the gun or what appears to be a gun, and nobody else, and no other explosion the crown [sic] is asking you to say that the gunshot injury that the

> deceased died from could only have come from one place and one place only. And that is from the firearm that she claims that she saw in the hands of [the applicant]."

[24] The learned Chief Justice had sufficient justification for leaving this evidence for the jury's assessment and consideration.

The Chief Justice's treatment of the words uttered by the deceased

[25] Concerning the words used by the deceased to Miss Robinson – "Shanice, Shanice them shoot me. You si who shoot mi Shan-Shan? Look, look a who shoot mi and tell mi", the learned Chief Justice made these remarks and directed the jury (at page 409, line 25 to page 410, lines one to 11 of the transcript):

> "Now, the argument here, coming from [defence counsel], remember there was a series of questions to her about whether the lighting conditions then were such that it would be reasonable to conclude that 'Dads' would have seen what was happening. And, so, the argument seemed to have been that if he was really able to see, then in terms of vocalization, you would not expect him to be saying, 'You si who shoot mi Shan-Shan. Look a who shoot mi and tell mi.' Well, you must say what you make of that."

[26] Further at page 442, lines 13 to 25 to page 444, lines one to 21 of the transcript:

> " 'Question: Now in respect of 'Dads', can you indicate whether 'Dads' and 'Cool Walk' had any relationship?' She said: 'Yes, they were good, good, close friends.' So, you know that in Jamaica, when a man seh you a good, good friend, this is not casual acquaintance, you nuh, this is somebody who you know, very, very, well. Why is this important? Because, remember what the defence is saying, you nuh, listen to the language, young lady says, when she turned around and her boyfriend spoke, 'Shan-Shan, you see who shoot mi?' What is that question? Is it that he was genuinely asking: Shan-Shan, you mek out who shoot mi? In other words, are you able to see who shot me or was he asking, Shan-Shan, you really see a who shoot me? So, the question -- you know it is almost -- well, you go to Shakespeare, almost like when Julius Caesar was saying, my goodness, all you to

> Brutus. So, is it a question that he was genuinely asking Shanice, are you able to see who shoot me or Shanice, really now, look who shoot me, of all the people, because what the defence is saying is that, if the lighting was as good as Shanice seems to be suggesting, the deceased man, seeing someone who was his good, good, close friend, would not be asking Shanice, are you able to see who shoot me, but the most likely reaction would be, wait, 'Tenderfoot', 'Cool Walk', a you really shoot mi man. So, you will have to decide now, what it is that he was asking, if you accept that he said these words or words to that effect. Is it that he was genuinely asking, because he couldn't see? Because that is why the question was asked in cross-examination, you nuh, as to whether there was anything preventing 'Dads' from seeing 'Cool Walk'.
>
> Meaning having regard to the lighting condition, and everything, and we don't hear that 'Dads' is a blind man wearing 6-inch lens by all accounts he can see, at least see well enough to go up 'Kazoo' shop, come back down, and that kind of thing [sic] so there is nothing to suggest that anything is wrong with his eyesight. So, what defence is saying is that if this incident took place where the witness, Shanice Robinson said it took place it's a most usual [sic] question for 'Dads' to be asking 'cause he would have known who shot him. So, you will have to decide now is it that the lighting was bad and he couldn't see, or is it that it was an expression of surprise that is really this man of all the people, all the men albeit they don't talk now, but of all the people coming to shoot me. You will have to decide what you make of it."

[27] The learned Chief Justice correctly left the interpretation of the words to the jury, including the varied interpretations that could be drawn from them. It was the duty of the jury to determine what they made of the words.

The statement given by Miss Robinson to the Justice of the Peace

[28] There was a challenge to Miss Robinson's credibility as a result of a statement she gave to a Justice of the Peace, which contradicted her statement to the police, as well as her evidence during the trial. Miss Robinson admitted under cross-examination that she signed a document in which she stated that she did not see who shot the deceased. Specifically, it was her evidence that a couple of days after the incident, she went to the

home of a Justice of the Peace and signed a paper that had writing on it. She said she did not read what was on the paper, and neither was it read to her. Some days after signing the paper, she was contacted by the police, as a result of which she learned the contents of the document. She asserted that she was forced and bullied into signing the paper, that her mother's job was threatened, and that she did not want her mother to lose her job (see page 199, lines 19 to 25 to page 209, lines one to 19 of the transcript). The learned Chief Justice referred to this evidence and directed the jury as follows (see page 458, lines 17 to 25 to page 460, lines one to 10 of the transcript):

> "Then now we come to the Justice of the Peace name [sic] Miss Jones, Miss Jones' statement. So, what she is saying is that in the statement to Miss Jones or the statement, if you accept her version, the statement that she signed when she went back to Miss Jones later on in the day, that's the day that she went. The suggestion was put to her: You agree with me that you said that you did not see who shot 'Dad' [sic]? And eventually she said, yes, she did say that. What she is saying now is, well, apparently Miss Jones has now died. How we know this? At one point the witness says may her soul rest in peace, so you may infer that Miss Jones die [sic]. She said she gave me a paper she did not ask me, she said it had questions on it, when she went there the, ahm, in other words, writing was already on the paper. And she is claiming now that when she went there Miss Jones gave her the paper, and said she should sign because of what Merlene told her that my mother's job was in jeopardy. She said Miss Jones didn't ask her any questions [sic] they were already answered. She said when she went there in the first part of the day Miss Jones told her to come back at 5 o'clock, so she went back. And what she is saying now is that there was a protest at some point, apparently led by Merlene who was protesting now trying to whip up protesters to say that the mother – tell you this, is almost like a soap opera, the mother of Miss Robinson was to be barred or losing [sic] her job of teaching at the school in Seaview Gardens. Merlene was a part of that effort to whip up this protest as far as she was concerned. And it is in that context that she says she turns up at Miss Jones' place not once but twice, and it is in this context that she signed the documents. You are to say what you make of that. Is that an acceptable explanation for her saying she

> didn't see or know who shoot her boyfriend? Is it that the pressure was brought to bear on her and/or her family? Matter for you."

[29] In fact, the learned Chief Justice also directed the jury that when they were assessing the conflicting statements given by Miss Robinson, they were to take into account the evidence of the defence witness Tavajay Tennant, who gave alibi evidence on behalf of the applicant (see page 432, lines 15 to 25 of the transcript). Miss Tennant had testified that the applicant had been at home at the time of the shooting of the deceased.

[30] The issue goes to the credibility and reliability of Miss Robinson. It was the jury's function to assess this evidence and determine whether her testimony at the trial could be relied upon. The strength or weakness of a witness' reliability is within the province of the jury as judges of the facts unless the witness is so badly discredited that it would be unsafe to leave the case with the jury (see **R v Galbraith** [1981] 2 All ER 1060). At page 435, lines 15 to 25, to page 437, lines one to 14 of the transcript, the learned Chief Justice directed the jury as follows:

> "And then now when you come back to Miss Robinson you say well, notwithstanding Miss Jones statement, notwithstanding the uncertainty of this part of the evidence concerning the time of the shooting I am satisfied so that I feel sure that Miss Robinson is honest, reliable, truthful, trustworthy and so on and so forth, and you are prepared to convict him. Because the defence is going further to say that this is not just a light matter of oh, she give a statement to Miss Jones, and a slight variation of what she said to the police. Statement to police she places him there. Statement to Miss Jones he is not there or if you want to be generous she don't know whether he was there or not. But either way she is essentially saying she don't know who shoot him, that is the boyfriend. So, what do you do with this then, when taking it into account you ask yourself firstly, is this a significant inconsistency. Well, chances are you shouldn't have any problem concluding that it is indeed a significant inconsistency, from asserting that he was the shooter, to he is not the shooter. How do you approach it? You ask yourself

> is it a significant one, I think we can agree that it was. Does it mean I don't believe her at all on this vital issue of identification or do you accept her explanation, because she has given an explanation, you know, she has given an explanation, she is explaining that yes, I signed this document, but the reason I signed is the pressure that was being brought to bear, risk of mother losing job, and she is caught up in that. Do you accept that explanation or is it part and parcel of the make up story that the defence is saying? That's a question for you. So, when you assessing know that you have to take into account what explanation she has given; does that explanation make sense to you. If it makes sense to you, you can legitimately say well, yes, I accept that she gave that statement to Miss Jones. I accept that she said that in that statement in essence she really don't know who shoot her boyfriend. I accept that she said all of that, but having regard to her explanation I am prepared to say that the reason she gave was because of the pressure that she had spoken about."

[31] In the circumstances, the learned Chief Justice properly directed the jury on how to treat with the inconsistency that arose on Miss Robinson's evidence concerning whether the applicant was the person who shot and killed the deceased. It was entirely a matter for the jury to determine whether or not they accepted or rejected her on this aspect of her evidence. The jury's verdict is a clear indication that they found her to be a credible and reliable witness.

Whether the verdict was palpably wrong

[32] As far as the reasonableness of the verdict is concerned, this court in **Lescene Edwards** reiterated the general principle that the court will only interfere with the verdict of the jury relevant to questions of fact "if the verdict is shown to be 'obviously and palpably wrong'" (see para. [22]). And further at paras. [23] and [24]:

> "[23] The principle was carefully considered by this court in **R v Joseph Lao**. It is that case which is most often cited in this court when the issue of the reasonableness of the verdict is considered. Henriques P, in delivering the judgment of the court in **R v Joseph Lao**, approved the opinion of the learned editors of Archbold - Pleading, Evidence and Practice in

Criminal Cases. It is apparently from paragraph 934 of the 36th edition of that work that Henriques P quoted. The paragraph states, in part:

> 'In order to succeed an appellant must show, in the words of the statute [the equivalent of section 14(1) of the Judicature (Appellate Jurisdiction) Act], that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not a sufficient ground of appeal to allege that the verdict is against the weight of the evidence....Nor is it sufficient merely to show that the case against the appellant was a very weak one...nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict...nor that the judge of the court of trial has given a certificate on that ground...**The court will set aside a verdict on a question of fact alone only where the verdict was obviously and palpably wrong**....' (Emphasis supplied)

The relevant provision of the English statute was, at the time, in almost identical terms as section 14(1) of the Judicature (Appellate Jurisdiction) Act. That country's statute has since had its wording and standard, in this regard, changed. Jamaica's has remained unchanged.

[24] The standard approved in **R v Joseph Lao** has been supported in several judgments of this court (see, for example, **R v William March and others** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 87, 155, 156, and 157/1976, judgment delivered 13 May 1977, **Charles Salesman v R** [2010] JMCA Crim 31 and **Everett Rodney v R** [2013] JMCA Crim 1). In the last mentioned case, the court cited another extract, upon which Henriques P had relied in **R v Joseph Lao**. It is an extract from Ross on the Court of Criminal Appeal (1st edition) at page 88. The learned author is quoted by Henriques P, at page 1240, as saying, in part:

> '...The verdict must be so against the weight of evidence as to be unreasonable or insupportable....The jury are pre-eminently judges

> of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, **nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before the court**. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury.' (Emphasis supplied)"

[33] The learned Chief Justice placed all the relevant issues before the jury. We do not accept that there is any merit in the complaint of Mr Mitchell that the jury's decision based on these factual circumstances was palpably wrong.

[34] We find that there is no merit in ground one.

Ground two: The jury failed to have proper regard to the case for the defence

Submissions

[35] Mr Mitchell contended that the learned Chief Justice engaged in lengthy cross-examination of both defence witnesses, and thereby eroded their evidence. With particular reference to Miss Tennant's evidence, Mr Mitchell asserted that the learned Chief Justice's cross-examination suggested that the witness was either stupid or lying. He referred the court to pages 293 to 300 of the transcript. In relation to Miss McIntosh, Mr Mitchell stated that the learned Chief Justice's cross-examination came at the end of her evidence, painted her as incredible and thereby cast doubt on her evidence. He referred the court to pages 340 to 344 of the transcript. In the round, counsel submitted that these interventions by the learned Chief Justice went beyond what was permissible. Reliance was placed on the cases of **R v Hulusi** [1973] 58 Cr App Rep 378, **Carlton Baddal v R** [2011] JMCA Crim 6, and **Peter Michel v The Queen** [2010] 1 WLR 879. Mr Mitchell also argued that the jury failed to take account of: (1) the fact that the applicant voluntarily submitted to the police as soon as he heard that he was being accused of the offence; (2) that he was a person of previous good character; and (3) that he called two witnesses in support of his defence.

[36] Although not clearly raised on the grounds, Mr Mitchell also argued in oral submissions that the learned Chief Justice erred in failing to give a false alibi direction. He stated that such a direction was especially necessary in light of the extent of the interventions by the learned Chief Justice, as there was a real risk that the jury would have determined the witnesses were lying.

[37] On the other hand, Miss Rowe submitted that the Chief Justice fully recounted the case for the defence and the issues presented thereon. Regarding the interventions by the learned Chief Justice, Crown Counsel submitted that these interventions were warranted and made to clarify ambiguities and obscurities, as well as to assist counsel for both the prosecution and the defence. Further, arising from the questions, the credibility of the defence witnesses was bolstered. As a result, the interventions were permissible in law, did not hinder the conduct of the defence and did not prevent the applicant from receiving a fair trial. Reliance was placed on the cases of **Tara Ball and others v R** [2023] JMCA Crim 2 ('**Tara Ball**') and **Carlton Baddal v R**. The court has also been asked to consider the effect of the questions in the context of the entire trial as well as the summation. It was submitted that this would be an appropriate case to apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('the JAJA'), as there was no substantial miscarriage of justice.

Discussion

Interventions by the learned Chief Justice

[38] The transcript reveals that there were several interventions by the learned Chief Justice during the elicitation of the evidence from the two defence witnesses. In fact, he also intervened during the examination and cross-examination of the prosecution witnesses. However, Mr Mitchell raised no complaint in that regard.

[39] There are numerous authorities from this court dealing with this subject. In **Tara Ball**, several authorities were highlighted at paras. [76] to [79] of that judgment. At para.

[79], the court referred to **Lamont Ricketts v R** [2021] JMCA Crim 7, where F Williams JA set out the guidance gleaned from several authorities:

> "[79] In **Lamont Ricketts v R**, F Williams JA, at paras. [21] to [23] considered the authorities in relation to this issue, including **Peter Michel v The Queen**, as follows:
>
> > '[21] Also, in the case of **Peter Michel v The Queen** … Lord Brown, delivering the advice of the Board, gave the following guidance at paragraph 34:
> >
> > > '34. ….Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.'
> >
> > [22] Important as well is the case of **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005. In that case Panton JA (as he then was), writing on behalf of the court, made the following observations at paragraph 10 of the judgment:
> >
> > > 'It is obvious that the judge asked many questions. That by itself is not an indication of bias, and does not necessarily detract from a fair trial. There are so many factors that have to be taken into consideration, for example, the importance of the content of the question in the context of the case. There are questions that are necessary for clarification of what a witness is saying, in order that the judge may get a proper appreciation of the case that is being put forward. Having said that, although a judge is not expected to remain mute throughout a trial, he should be careful to ask only necessary questions, and not give the impression that he has descended into the arena.'.

> [23] **Christopher Belnavis v R** was also cited and discussed in the case of **Navado Shand v R**, in which this court (per P Williams JA (Ag), as she then was), observed, in allowing an appeal on grounds which included allegations of excessive and unfair interventions by a trial judge, as follows at paragraph [50]:
>
> > '…when the final issue related to the learned trial judge's appreciation of the defence is considered, the line of questioning the learned trial judge embarked on, may well have contributed to the appellant being denied a fair trial.'
>
> Subsequently, at para. [30] of **Lamont Ricketts v R**, F Williams JA set out guidance in the way of the main points gleaned from the authorities. He stated:
>
> > 'The main points gleaned from the authorities relating to interventions might be summarized as follows: (i) trial judges should, as much as possible, limit their questioning to what is necessary to clear up issues, better understand evidence and bring to the fore points overlooked or not sufficiently addressed; (ii) their questioning should not be of such a nature or go to such an extent as to give the impression that they have taken sides or have descended into the arena and lost their impartiality; (iii) they should try not to interrupt the flow of evidence and, as much as possible, should not take over the elicitation of evidence from counsel (though the temptation is likely to arise when the evidence is being led less than competently); (iv) they should not cross-examine witnesses; (v) they should not display any hostility or adverse attitude or convey any negative view of a particular case or witness whilst hearing arguments and evidence, although they are, of course, entitled to test the soundness of arguments and submissions; and (vi) they are required at all times and so far as is humanly possible to maintain a balanced and umpire-like approach to the task of adjudication'."

[40] Also in **R v Hulusi**, Lord Parker CJ described three types of interventions that would result in the quashing of a conviction:

> "… those [interventions] which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury ... The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way."

[41] Mr Mitchell's submission is that the interventions by the learned Chief Justice tended to bring into question the credibility of the defence witnesses before the jury. The excerpt set out below is of the learned Chief Justice's intervention during the cross-examination of Ms Tavajay Tennant by the prosecutor at page 292, lines 11 to 25 to page 300, lines one to 15 of the transcript:

> "Q. And during all of that time, did you get to go into the station?
>
> A. No.
>
> Q. Did you get to speak to any police?
>
> A. No. When he first go to –-
>
> Q. So when you went home, what time did you reach home?
>
> A. About 12:00 or minutes to 12:00
>
> Q. About minutes to 12:00?
>
> A. Yeah.
>
> Q. So when you got home, the next morning, did you go to the station knowing what you knew?
>
> A. No, because I thought everybody knew what I knew.
>
> HIS LORDSHIP, CJ: Everybody knew what you knew?
>
> THE WITNESS: In terms of by the station and the locked [sic] up everybody knew.

HIS LORDSHIP, CJ: Everybody knew what?

THE WITNESS: That the sister came yelling and saying what he --

HIS LORDSHIP, CJ: What counsel is asking you, is that: you are the witness. You know you said that's what you said you saw.

THE WITNESS: Understood. I thought you were referring to what happened in the station.

HIS LORDSHIP, CJ: What she is saying, news gets around, yes, police, all sort of things are being said.

THE WITNESS: Understood.

HIS LORDSHIP, CJ: When you go back home now, she is asking you: you never said, 'Boy, what a thing. Mek me go back down to the station and tell the police how this thing really go.'

THE WITNESS: I did not.

BY MISS M JACKSON:

Q. You did not?

A. I did not.

Q. You did not?

A. I did not thought [sic] this would reach here, because it was like impossible. It wasn't in my league to –

Q. It wasn't in your league?

A. It wasn't in my head that this would be the situation.

HIS LORDSHIP, CJ: I get the impression, understanding, that it was a police who took him down to the station?

THE WITNESS: No, he went to the station with his sister.

HIS LORDSHIP, CJ: Right, and the police keep [sic] him.

THE WITNESS: Yeah, they were there. They held him –

HIS LORDSHIP, CJ: Right.

THE WITNESS: -- and other persons –

HIS LORDSHIP, CJ: Yes.

THE WITNESS: -- so I did not know that he would be picked out with everybody else, to know I must go to the station.

BY MS. M. JACKSON:

Q. So why did you go?

HIS LORDSHIP, CJ: Just a minute. So you never hear police charged him?

THE WITNESS: When I heard he was charged –

HIS LORDSHIP, CJ: Yes.

THE WITNESS: -- and others, that he wasn't the only one being charged –

HIS LORDSHIP, CJ: That may very well be the truth. But, if yuh hear say police charge him, him, yuh nuh say, 'But goodness! What a thing doh. How the police charge di man and him nuh do nutten?' So you nuh go back to the station and say, 'Officer, I was by his house. As a matter of fact, I can tell you say dis shooting business unuh talking 'bout, it could never be him.'

THE WITNESS: When I was at the station with persons in the community, because you have some police in the community, I was yelling 'This nuh right.' I was actually saying, 'This nuh right. The man inna di house and a mi call him.' That is what I was saying -- and the police run me. I was saying it out and the police run me.

HIS LORDSHIP, CJ: What I am asking you, now you understand that the police really charge him now, night gone, police charge him -- it didn't come to your attention that police charge him for murder? You never hear that?

THE WITNESS: It came to my attention when they release the other persons that he was charged with it.

HIS LORDSHIP, CJ: The question I am asking you: did you get the information that the police had charged him with murder?

THE WITNESS: Yes, I am aware of it.

HIS LORDSHIP, CJ: Good. Essentially, what the attorney is asking you now, taking into account all of what you have been saying, everybody go down there, police released some, he is kept and he is now charged with murder.

THE WITNESS: That specific night he wasn't being charged.

HIS LORDSHIP, CJ: No, not the night -- afterwards.

THE WITNESS: Afterwards, I was always willing to say what happened.

HIS LORDSHIP, CJ: Why you didn't go back to the station? That is what she is asking you.

THE WITNESS: I didn't know it was a procedure.

HIS LORDSHIP, CJ: To go to the station?

THE WITNESS: Based on what I was saying and they run me, I didn't –

HIS LORDSHIP, CJ: I know you like to talk a lot, but listen to the question. You are an intelligent woman. Now, you understand that he has been charged -- let me repeat it, why didn't you go to the station to say: 'Police, I know, me, not people in the community, I know that he could not have been the person who murdered anybody, because' -- and then you tell the police the because: 'I was there. I was on the wall. I can know for sure that he came out, removed the van, go back in; and when him got back in him never come back out -- and I can say that, with absolute certainty, because the house has one door and it is at the front, and I was there for the whole time, and from him go back in, he never come back out.' Why you never go to the police and tell them that? That is, essentially, what she is asking you, you know. You understand now?

THE WITNESS: I understand.

HIS LORDSHIP, CJ: Good. Right.

BY MS. M. JACKSON:

Q. So answer the question.

HIS LORDSHIP, CJ: So that is what she's asking you.

THE WITNESS: I was aware that he was charged Monday, like seriously Monday, everything is like they have him into consideration that he is the only person; Monday I am aware of this. His sister asked, do you remember what happened? I told his sister.

BY MS. M. JACKSON:

Q. Listen --

HIS LORDSHIP, CJ: Monday when, this week?

THE WITNESS: Monday, yes, this week.

HIS LORDSHIP, CJ: This week?

THE WITNESS: Yes.

HIS LORDSHIP, CJ: No man, remember, picture the thing in your mind: the sister come up and mek this whole heap a noise, right?

THE WITNESS: Yes.

HIS LORDSHIP, CJ: People gone down to the station, right?

THE WITNESS: Yes.

HIS LORDSHIP, CJ: You were there, everybody talking about what happened and so on; eventually the police chased you and the others away; right?

THE WITNESS: Yes.

HIS LORDSHIP, CJ: This is from 2014. So the police tek up him and the other people, at some point you have this information that the police released the others; right?

THE WITNESS: Yes.

HIS LORDSHIP, CJ: And not only lock him up, but charge him now -- from 2014 you know. So you never understand from 2014 that he was charged by the police; you didn't understand that?

THE WITNESS: I understood.

HIS LORDSHIP, CJ: Good. So what the lawyer is asking you now, if from 2014 you understand that he was charged with this murder -- you understand that murder is a serious thing?

THE WITNESS: Understand.

HIS LORDSHIP, CJ: Good. If he is charged with murder now and you have this vital information, the attorney is asking you in 2014 or 2015, or 2016, or 2017, or 2018, how come it never occurred to you to go to the police station and say, 'Officers, you are making a serious mistake.'

THE WITNESS: Understand.

HIS LORDSHIP, CJ: That is what she's asking you.

THE WITNESS: Based on what I said at the station to the police and they run me, I think what I'm saying is not necessary to them because I said that to the police. I wasn't aware [sic] I was to go back another day and say it to the police. I wasn't aware. I was saying this is not right; I wasn't aware that I am to go back. Nobody said to go back. That is why his sister said, 'Do you remember?' "

[42] Also at page 302, lines 24 and 25 to page 304, lines one to 10 of the transcript:

"Q. See, I am going to suggest to you that you are here to help him out. You weren't even at the house?

HIS LORDSHIP, CJ: Two things, first one is that you are here to help him?

THE WITNESS: That is not true.

HIS LORDSHIP, CJ: It is not a bad thing, because you are talking the truth. I think what counsel is really saying to you, is that: you are making up the story?

THE WITNESS: No, I am not.

HIS LORDSHIP, CJ: When she say you come here to 'help him'; what is really being said, you don't come here to talk the truth. You come to mek up story -- not by telling the truth, but by telling the 'mek up' story?

THE WITNESS: No.

HIS LORDSHIP, CJ: What she is also saying is that, on the night of this incident you were not there?

THE WITNESS: I was there. The lady that called me to move the vehicle, you can even get in contact with her.

HIS LORDSHIP, CJ: Okay.

BY MS. M. JACKSON:

Q. The lady had called you to move the vehicle?

A. She is living next door [sic] me and you could ask her where I was sitting.

Q. What's the name of that Lady?

A. I don't know her name (laughing). She is my neighbour, but I don't know her name.

Q. She is your neighbour?

HIS LORDSHIP, CJ: She don't have any name like Miss Jones?

THE WITNESS: She don't speak to anyone, only Conroy and his family. She recently moved to that community."

[43] These were, indeed, lengthy interventions by the learned Chief Justice. Certain aspects of these interventions could be described as robust questioning. While it was couched as an effort to assist Miss Tennant in understanding the questions asked by the prosecutor, the learned Chief Justice descended into the arena at specific junctures by taking over the cross-examination and questioning the failure of this witness to make a report to the police. The effect of this will be discussed below.

[44] In **Navado Shand v R** [2018] JMCA Crim 45 at para. [47], this court stated that what remains crucial in a complaint of this kind is the quality of the interventions.

Additionally, as discussed in **Tara Ball**, the fact that the judge asks many questions is not by itself "an indication of bias and does not necessarily detract from a fair trial." However, the judge "should be careful to ask only necessary questions but not give the impression he has descended into the arena" (see para. [79] of Tara Ball).

[45] Questions were also asked of Miss Sarafina McIntosh by the learned Chief Justice after the close of cross-examination, which are set out at pages 340, lines one to 25, to page 344, lines one to 11 of the transcript:

> "**MISS SARAFINA MCINTOSH: QUESTIONED BY THE COURT (2:44 P.M.)**
>
> CHIEF JUSTICE B. SYKES: So you got a good look at the person who did the shooting?
>
> WITNESS: I saw the person's face and I can identify the person again, if I see the person.
>
> CHIEF JUSTICE B. SYKES: Okay
>
> WITNESS: And I am willing to.
>
> CHIEF JUSTICE B. SYKES: And that person you said was not there?
>
> WITNESS: No.
>
> CHIEF JUSTICE B. SYKES: Ah mean, that is how you phrased it, that he was not there?
>
> WITNESS: He was not there, I didn't see him.
>
> CHIEF JUSTICE B. SYKES: No, I am always fascinated by language. In respect of him, you said that he was not there, but in respect of 'Raj' you said you did not see.
>
> WITNESS: I did not see.
>
> CHIEF JUSTICE B. SYKES: I am just interested in the use of the language, yes.
>
> WITNESS: Okay.

CHIEF JUSTICE B. SYKES: And for -- when you move from Seaview Gardens?

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: When?

WITNESS: Two years ago, 2017.

CHIEF JUSTICE B. SYKES: And you are how old now?

WITNESS: Twenty-two.

CHIEF JUSTICE B. SYKES: And these two young men, you saw them in the community after they were charged?

WITNESS: Conroy?

CHIEF JUSTICE B. SYKES: Yes?

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: And Mr. Bowes as well?

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: Frequently?

WITNESS: After I leave Seaview?

CHIEF JUSTICE B. SYKES: No, man.

WITNESS: You mean after they got charged?

CHIEF JUSTICE B. SYKES: Yes.

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: Almost every day?

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: You spoke to them?

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: And you told them that you are prepared to give a statement to say that you know for sure

that these men, that they were not there, did you ever say that to them?

WITNESS: Did I tell them that –

CHIEF JUSTICE B. SYKES: No man, ah talking about you man, you.

WITNESS: Me?

CHIEF JUSTICE B. SYKES: Yes, you. Having seen them up and down in the community, you told them that?

WITNESS: Tell them what?

CHIEF JUSTICE B. SYKES: That, look here, man -- what you call him?

WITNESS: Conroy me call him.

CHIEF JUSTICE B. SYKES: Seh Conroy, what a thing happen to you eeh man, mi was out there the night, enuh?

WITNESS: Me fi go tell them she –

CHIEF JUSTICE B. SYKES: And mi know she a nuh you, you nuh seh a you friend man?

WITNESS: Me know in myself she –

CHIEF JUSTICE B. SYKES: I am just asking, isn't he your friend?

WITNESS: Yes.

CHIEF JUSTICE B. SYKES: Right. You nuh go to you friend and seh, boy, Conroy man, what a serious thing dem do to you, you know seh mi did down deh and mi know seh a nuh you, you nuh, you nuh go to your friend and seh that?

WITNESS: No.

CHIEF JUSTICE B. SYKES: So Rolando Bowes now, he was your boyfriend at one point?

WITNESS: Yes.

> CHIEF JUSTICE B. SYKES: So yuh ex-boyfriend, you didn't go to him and seh, bwoy Rolando mi know seh a lie dem a tell pon you, you nuh, mi and you nuh really talk now, but, you nuh, mi know seh a lie dem a tell. You nuh go to him and seh I was there, man, and mi know seh a nuh you?
>
> WITNESS: But the two of wi was there together soh him know seh --
>
> CHIEF JUSTICE B. SYKES: Remember that him back -- remember that him couldn't see, enuh.
>
> WITNESS: Yeah.
>
> CHIEF JUSTICE B. SYKES: Yes man. Remember seh him back turn and him couldn't see man, so forget 'bout it; but you now, you nuh, seh to him seh, Roland, what a thing eeeh, man, look how dem just lock you up soh. Me willing fi give a statement, you nuh tell him that?
>
> WITNESS: I didn't tell him that I am willing to give a statement. But I tell him that I see the person's face.
>
> CHIEF JUSTICE B. SYKES: All right, thank you." (Emphasis as in the original)

[46] Again, it cannot be denied that the learned Chief Justice descended into the arena at this juncture. This lengthy intervention did not demonstrate a need to clear up ambiguities or seek clarification from this witness. Miss McIntosh's evidence was given to support the applicant's case that he was not at the scene of the shooting and was not the shooter. The learned Chief Justice questioned Miss McIntosh about her conduct after she had witnessed the shooting. The impact of this has to be weighed, bearing in mind, for example, "the importance of the content of the question in the context of the case" (see **Lamont Ricketts v R**, quoting **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005). The quality of the intervention could be viewed as providing fodder for the jury to consider her reliability and credibility. This was one of the functions of the jury, and the learned Chief Justice made that clear to them throughout the summation (see page 352, lines 20 to 25 and page 353, lines one to 14 of the transcript where the learned

Chief Justice directed the jury that the interpretation of the evidence was a matter for them only).

[47] Unfortunately, the robust questioning (as set out above) could have severely undermined Ms McIntosh's credibility and ought not to have been embarked upon in the circumstances. The learned Chief Justice did not merely comment upon Ms McIntosh's evidence. He descended, quite extensively, into the arena to elicit evidence that ought to have been left to the prosecution. Having assessed the excerpts, the transcript as a whole, and the summation, we are of the view that the interventions during the evidence of both Ms Tennant and Ms Mcintosh could be described as falling into category one as set out in **R v Hulusi**. That is, interventions which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the standard direction that the facts are for the jury. As a result, we are of the view that the conviction should be quashed, as the applicant was denied a fair trial.

[48] We find it necessary to express our misgivings concerning the excessive cross-examination of the witnesses, in particular Miss McIntosh, and again take the opportunity to remind trial judges of the guidance from the relevant cases as well as the need for caution before "descending unnecessarily into the arena" (see para. [81] of **Tara Ball**).

[49] In light of our conclusion in relation to the above issue, we do not think it necessary to determine the question of whether the learned Chief Justice was required to give a direction on false alibi. Concerning the specific complaints that the jury failed to take into account the evidence that was proffered, and that the applicant voluntarily submitted himself to the police, we find no merit in these complaints. The learned Chief Justice reminded the jury of all the relevant evidence (see page 473 of the transcript). It would have been left to the jury to assess what they made of these things.

[50] Ground of appeal two, therefore, succeeds.

[51] Accordingly, the conviction cannot stand, and so leave to appeal must be granted, the hearing of the application treated as the hearing of the appeal, the conviction quashed and the sentence set aside.

[52] We must now consider whether this court should order a retrial in all the circumstances.

Whether there should be a retrial

Submissions

[53] Submissions on the issue of whether a retrial should be ordered were initially filed on behalf of the Crown and the applicant on 24 and 30 May 2024, respectively. In those submissions, Mr Mitchell contended that, in light of the interventions by the learned Chief Justice, the appropriate outcome in this case would be for the ordering of a retrial. Similarly, the Crown submitted that if the court finds merit in the grounds of appeal, then in the interest of justice, a retrial should be ordered.

[54] Subsequently, the court requested further submissions, particularly on the issue of the possibility of prejudice to the applicant arising from the mandatory minimum sentence applicable to the offence of murder. The Crown was also asked to provide information on the likely date for the conduct of a retrial.

[55] In these further submissions, Mr Mitchell submitted that a retrial should not be ordered in light of the time and financial expenses associated with a new trial, as well as the ordeal faced by the applicant. He also asserted that the possibility of prejudice to the applicant arising from the mandatory minimum sentence and the minimum term before eligibility for parole is a live issue. Further, the applicant's constitutional rights may be breached arising from possible delay in the conduct of a retrial. Ultimately, Mr Mitchell submitted that a retrial would not be in the interests of justice. Heavy reliance was placed on the case of **Shawn Campbell and others v R** [2024] JMCA Crim 30 ('**Campbell & Ors**') in making these submissions.

[56] On the other hand, the Crown maintained the position that a retrial should be ordered. An affidavit from Detective Sergeant Peter Pike was filed, in which the police officer indicated the outcome of his efforts to locate the witnesses who were involved in the trial. With respect to the main witness for the Crown, Ms Robinson, it was indicated that she was not located, but that checks showed that she was in the island and that she was still in contact with family members of the deceased. As such, further efforts were being made to locate her. All other Crown witnesses were located, with the exception of Detective Sergeant Lorenzo Rodriques, who has retired. The defence witnesses, Ms Tavajay Tennant and Ms Sarafina McIntosh, were not located. With specific reference to Ms Tennant, upon a visit to her home, she was not present, but neighbours indicated that she still resided there. Detective Sergeant Pike was of the view that she could be located. As for Ms McIntosh, she was not found at the address provided, and more efforts would be needed to locate her.

[57] It was also indicated on behalf of the Crown that with respect to Crown witnesses who are unavailable at the time of the retrial, section 31 of the Evidence Act could be used to mitigate the issue. Further, section 31D of the Evidence Act is also open to the applicant, in the absence of a witness.

[58] With respect to a date for the retrial, it was indicated that, based on communication from the Registrar of the Criminal Division of the Supreme Court, the earliest date that the matter could be set for retrial is 13 April 2026.

[59] As for the issue of the mandatory minimum sentence and the minimum term before eligibility for parole, the Crown submitted that it is "well settled" that a convicted person is to receive the full benefit for any time spent in custody awaiting trial, irrespective of whether the offence carries a mandatory minimum sentence. They relied on the case of **Cecil Moore v R**, Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/2016, judgment delivered 6 March 2025 (with reasons to follow).

Discussion

[60] Section 14(2) of the JAJA provides:

> "Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit."

[61] In relation to a retrial, the principles set out in **Reid v R** (1978) 27 WIR 254 have been consistently applied in this court. The headnote to the West Indian Report of that judgment provides an accurate summary of the guidance from the Privy Council, as follows:

> "(ii) The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury.
>
> (iii) It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case.
>
> (iv) Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal.
>
> (v) Among the factors to be considered in determining whether or not to order a new trial are: (a) the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so, that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive."

[62] This court also reviewed and expanded on these factors in the case of **Campbell & Ors**, which Foster-Pusey JA considered in **Oshane Thompson v R** [2025] JMCA Crim 18. In **Campbell & Ors**, this court refused to order a retrial after the Privy Council quashed the appellants' convictions and remitted the matters to this court for a determination as to whether the appellants should be retried. The factors that the court considered, as listed at para. [41] of the judgment, were as follows:

> "(1) the seriousness and prevalence of the offence committed;
>
> (2) the strength of the prosecution's case;
>
> (3) the availability of the prosecution's witnesses and exhibits;
>
> (4) the availability of witnesses and evidence which tended to support the defence at the first trial;
>
> (5) the time, financial costs and expense of a new trial;
>
> (6) the ordeal to be faced by the appellants;
>
> (7) the impact of prejudicial pre-trial publicity on the fairness of a new trial;
>
> (8) whether the new trial would give the prosecution an unfair advantage;
>
> (9) fault or error on the part of the prosecution;
>
> (10) legislative changes in the Jury Act and the potential legislative changes to the Offences Against the Person Act to increase the sentence for murder;
>
> (11) The possibility of prejudice arising from the mandatory minimum sentence and minimum term before eligibility for parole;
>
> (12) delay and whether a new trial can be facilitated within a reasonable time; and
>
> (13) breaches and likely breaches of the appellants' constitutional rights."

[63] As Foster-Pusey JA stated, at para. [85] of **Oshane Thompson v R**, "[t]he nature of each case will impact the factors that are relevant for consideration". The case at bar, in terms of length and complexity, is much simpler than the circumstances that existed in **Campbell & Ors**, so a detailed analysis of all the listed factors, as set out in that case, will not be necessary.

[64] The offence of murder is a very serious one and is prevalent in the society. It was carried out with the use of a firearm, which is also a disturbing element of criminal activity in this jurisdiction. The jury had entered a unanimous verdict of guilty of murder, and the reason for the conviction being quashed is not due to any fault of the Crown.

[65] There was only one eyewitness for the Crown and four witnesses in total. The eyewitness, Ms Robinson, has not yet been located. The applicant relied on two witnesses. Based on the affidavit of Detective Sergeant Pike, Ms Tennant appears to be living at the same residence, but Ms McIntosh is still to be located. If the witnesses are located and available, any memory lapses could be appropriately dealt with by applications for memories to be refreshed, if possible, as well as an appropriate direction by the trial judge on the issue of delay.

[66] We accept that the Crown could apply under the Evidence Act for the transcript of the evidence (from the first trial) of an absent witness to be tendered into evidence for the consideration of the jury (of course, where relevant, once the impugned portions are redacted). However, this has to be considered within the context of all the circumstances, as the main issues are identification and credibility of the witnesses. The applicant's two witnesses were called to cast doubt on the evidence of Ms Robinson. The assessment by the jury of their credibility would, therefore, be important, a task that is more difficult when they do not give oral evidence. However, there are directions that the trial judge is required to give to the jury that would assist them with how to treat evidence that is presented in this manner (see section 14-2 of the Supreme Court of Judicature of Jamaica Criminal Bench Book, which deals with an absent witness).

[67] The factors numbered 11, 12 and 13 in **Campbell and Ors** are of critical importance in our assessment (see para. [61] above). In **Kevin Williams v R** [2025] JMCA Crim 28, this court made certain observations at paras. [109] and [110] of that judgment that are helpful:

> "[109] In **Mark Russell v R** [2021] JMCA Crim 34, Brooks P considered the factors identified in **Reid v R** and observed that their Lordships recognised that some factors could carry greater weight than others depending on the circumstances of the case. He also referenced the case of **Bell v Director of Public Prosecutions and Another** (1985) 32 WIR 317, which acknowledged another factor to be taken into account, namely the issue of delay and the constitutional right to a fair trial within a reasonable time. At para. [72], he stated:
>
> > 'In assessing the constitutional right to a trial within a reasonable time, their Lordships introduced the element of the further time that will be required to commence the retrial. They said, in part, at page 326:
> >
> > > '…Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, **the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account**. ...'" (Emphasis as in the original)
>
> [110] We are also guided by the case of **Mikal Tomlinson v R** [2020] JMCA Crim 54, in which this court decided not to order a new trial, having considered, among other things, that the appellant had already spent six years and seven months in custody since his conviction (in relation to a sentence of 10 years' imprisonment for the offence of illegal possession of firearm and 15 years' imprisonment for the offence of wounding with intent). In addition, the uncertainty of the timeframe for a retrial and the preparation and production of

> the transcript in the event of an appeal were also considered, given the very real possibility that the appellant would remain in custody for a significant number of years."

[68] In the present case, the applicant was arrested in March 2014, and the trial took place almost five years later, over the course of five days in February 2019. It was, therefore, a relatively short trial process. It has not been alleged that the delay in the conduct of the trial between 2014 and 2019 was due to the fault of the State. The trial took place in the Home Circuit Court, and the matter, according to the affidavit of Detective Sergeant Pike, could be scheduled for retrial in April 2026. A period of 12 years would, however, elapse between the date of the offence and any potential retrial at that time. This is a significant length of time that should be taken into account.

[69] With respect to increased penalties for the offence of murder, the applicant would not be prejudiced by recent amendments to the Offences Against the Person Act, as section 16(11) of the Constitution of Jamaica ('the Constitution') prohibits the imposition of a greater penalty than could have been imposed at the time of the commission of the offence (see paras. [170] and [171] of **Campbell and Ors**). Section 16(11) provides:

> "No penalty shall be imposed in relation to any criminal offence or in relation to an infringement of a civil nature which is more severe than the maximum penalty which might have been imposed for the offence or in respect of that infringement, at the time when the offence was committed or the infringement occurred."

[70] What is of some concern is the possibility of prejudice arising from the mandatory minimum sentence and minimum term before eligibility for parole under the Offences Against the Person Act. In the event of another guilty verdict, the applicant would have already spent at least seven years out of a 16-year penalty originally imposed for murder, with 10 years before eligibility for parole. He had also been in custody for nine months before receiving bail prior to the trial. He was sentenced under the pre-amendment Offences Against the Person Act, which mandates a minimum sentence of 15 years' imprisonment with a minimum 10-year period before being eligible for parole (see

sections 3(1)(b) and 3(1C)(b)(ii) of the Offences Against the Person Act). If convicted, the applicant stands to be sentenced afresh in relation to these mandatory minimums. In the case of **Cecil Moore v R**, this court (with a panel of nine judges) determined that upon a retrial, time spent in pre-sentence custody, including the period of incarceration spent before the second trial, should be deducted from any mandatory minimum sentence period imposed by the sentencing judge. As such, in the event of a retrial, the approach adopted in **Cecil Moore v R**, may be available to the applicant.

[71] The residual prejudice facing the applicant is that, if convicted, he would have already been incarcerated for at least seven years prior to any sentencing hearing in a second trial. The applicant could, therefore, reach or surpass his original pre-parole eligibility date before a retrial and possible appeal is determined. This would be prejudicial to the applicant.

[72] All of the above circumstances must be balanced along with the impact on the applicant's constitutional right to a trial within a reasonable time (section 16(1) of the Constitution), as 12 years would have elapsed from the time of his arrest to the date of the projected retrial. It is also a legitimate concern that none of the civilian witnesses relevant to the case have been personally contacted to establish their availability at this point in time. In the round, assessing all the circumstances, we are of the view, that a retrial should not be ordered in the interests of justice.

Conclusion

[73] In conclusion, we did not find any merit in ground of appeal one. However, owing to the extensive interventions by the learned Chief Justice during the cross-examination of the witnesses for the defence, we found that ground of appeal two was meritorious and determined that the applicant was denied a fair trial. As a result, we concluded that the conviction should be quashed. It was our further determination that a retrial would not be the appropriate outcome in the particular circumstances of this case.

[74] We, therefore, make the following orders:

1. The application for leave to appeal is granted, and the hearing of the application is treated as the hearing of the appeal.

2. The appeal is allowed.

3. The conviction is quashed, the sentence imposed on 12 April 2019 is set aside and a judgment and verdict of acquittal is entered.