[2022] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE DUNBAR-GREEN JA
THE HON MR JUSTICE BROWN JA(AG)

SUPREME COURT CRIMINAL APPEAL NO 61/2014

RAYON WILLIAMS v R

John Clarke for the appellant

Miss Paula Llewellyn QC, Director of Public Prosecutions, Miss Tamara Merchant, Miss Camelia Larmond and Miss Cindi-Kay Graham for the Crown

20, 21 October; 1, 2, 3, 4, 19 November; 8, 9 December 2021 and 29 July 2022

DUNBAR-GREEN JA AND BROWN JA (AG)

[1] This is the judgment of the court.

[2] Rayon Williams ('the appellant') was convicted on 19 June 2014 of murder before McDonald-Bishop J (as she then was), sitting with an 11-member jury (one juror was discharged during the first day of the trial), at the end of a trial which lasted four days. On 26 June 2014, he was sentenced to imprisonment for life at hard labour, with the stipulation that he serves 50 years' imprisonment before becoming eligible for parole. It was further ordered that this sentence should run concurrently with the sentence he was then serving. His application for leave to appeal both his conviction and sentence was considered by a single judge of this court on 8 January 2018. The single judge refused leave to appeal his conviction but granted leave to appeal his sentence. Since he was granted leave to appeal his sentence, he will be referred to as the appellant below, in relation to both his conviction and sentence.

[3] As is the appellant's right, he now renews his application for leave to appeal his conviction before the court. The challenge to his conviction rests on the success of his application to adduce fresh evidence which was filed on 6 December 2018, as well as on grounds one, two and three of the supplemental grounds of appeal. His application to adduce fresh evidence is supported by evidence on affidavits and oral evidence of both ordinary and expert witnesses. Before addressing the application to adduce fresh evidence and the grounds of appeal, it is appropriate to provide the background which formed the basis of the appellant's conviction and sentence.

Background

The case for the prosecution

[4] On 18 December 2010 at about 10:10 pm, Geraldo Campbell was shot and injured in a shop on Oxford Road, Spanish Town in the parish of Saint Catherine. He was taken to the Spanish Town Hospital where he died while undergoing treatment. The principal witness for the prosecution was Miss Sharon Moore ('Miss Moore'), the appellant's maternal aunt. Consequently, it was accepted at the trial that the appellant and Miss Moore were well-known to each other. Indeed, the appellant's defence partially turned on this very fact. Miss Moore had known him since he was born and she thought him to be about 25 years of age at the time of the trial. She had last seen him the day before the incident and they spoke then.

[5] At the time of the incident, Miss Moore was standing on Oxford Road, in the vicinity of the probation office, selling Christmas lights. She had a shop in the nearby Redemption Ground Arcade ('the arcade') although she was plying her wares on the road. Open for business at this time was a shop that Miss Moore referred to as "Mr Charlie shop". Mr Charlie's shop was located in the vicinity of the probation office, which was closed. According to her, Mr Charlie's shop was "right in front of the probation [office]" where she was standing. That is, across the road from where she was. There was electric light burning both on the inside and the outside of Mr Charlie's shop. In addition, the area was well-lit with street lights.

[6] While standing there, Miss Moore observed the appellant and another man, known to her only as Maragh, approaching on foot from a distance of about 40 feet. Maragh stopped at a record shop, about 12 feet from Mr Charlie's shop, while the appellant walked to Mr Charlie's shop. Miss Moore was then about 15 or 16 feet away from the appellant. She was able to see his face, both while he was at Mr Charlie's shop and when he was 40 feet away. She never lost sight of the appellant and Maragh from the first time she saw them. Further, it took the appellant about five minutes to traverse the distance to Mr Charlie's shop from where Miss Moore first saw him. Nothing blocked her view of the appellant as he walked this distance. The appellant was not wearing any headgear or anything on his face.

[7] After the appellant reached the doorway of Mr Charlie's shop, he pulled a firearm from the front of his pants waist, held it downwards and looked around inside the shop. The appellant then, pushed his hand with the firearm inside Mr Charlie's shop and Miss Moore heard two explosions, sounding like gunshots.

[8] After Miss Moore heard these explosions, she saw a man fall across the doorway of Mr Charlie's shop. The appellant then walked to where Maragh was and both left the scene together. Miss Moore also left the scene. She walked to the arcade and sat inside her shop.

[9] While inside the shop Miss Moore heard screams. She left her shop and returned to the scene of the shooting. Lying across the doorway of Mr Charlie's shop was Al, a male she had known for about eight years. Al was lying in a pool of blood. She also knew Al's mother, "Miss Faith", and where both lived.

[10] Miss Moore said she called "Al" by his name and he shook his head. Miss Moore left the immediate vicinity and stood nearby. She observed the injured man being placed in a motor car which drove away from the scene. The police arrived on the scene sometime after and cordoned off the area. It was only after the police left that Miss Moore again left the scene.

[11] The following day Miss Moore visited Miss Faith. After visiting Miss Faith, Miss Moore went to the police station and made a report. At the trial, all Miss Moore's assertions about being an eyewitness to the murder were squarely challenged. In essence, the suggestions to her were that her evidence was a fabrication and she was motivated by ill-will to testify falsely against the appellant.

The case for the defence

[12] The appellant gave an unsworn statement and called one witness. The appellant said that Miss Moore accused him of stealing a gun from her. She asked him about the gun and he told her he knew nothing about it. Miss Moore responded that "she a goh fuck mi up". The appellant said Miss Moore complained to his mother, Mrs Claudette Williams ('Mrs Williams'), about the gun and he confronted Miss Moore since he had already told her, Miss Moore, that he did not have any gun for her. The next day, Steve, the father of Miss Moore's daughter, chased the appellant with a cutlass (machete). The appellant took up two stones, one of which he threw at Steve. Steve was later restrained by persons present.

[13] According to the appellant, while this was happening, Miss Moore's daughter was passing. The daughter exposed herself to the appellant and told him to suck a delicate part of her anatomy. She then ran off. The following morning the appellant saw Miss Moore's daughter and flogged her with his belt, apparently for her earlier indiscretion. After that, the appellant said, Miss Moore told him if she did not make him get 50 years' imprisonment, she would get a man to kill him.

[14] The appellant said Miss Moore and Steve had a problem because of the missing gun. According to the appellant, a sum of money was owed on the gun and Miss Moore's car was seized as a result. From what the appellant said, apparently the gun had been the subject of a sort of hire purchase arrangement, and its return was being required as Miss Moore could not complete the payments. Following on this seizure of the motor car, the appellant said he was accosted by one of two men to whom Miss Moore had given

his name. That man inflicted a wound on the appellant's forehead when the appellant told him that, he knew nothing about the gun.

[15] Mrs Williams, the appellant's mother, testified on his behalf. Mrs Williams' evidence was that on the night of the incident she was inside Miss Moore's shop at the arcade. Miss Moore asked her to get cigarettes. Mrs Williams left to her shop, about 25 feet away, to get the cigarettes. About the time Mrs Williams reached her own shop in the arcade, she heard the sound of two or three gunshots. Mrs Williams ran back to Miss Moore's shop. Reaching there, Mrs Williams addressed Miss Moore in these words, "Sharon sound like somebody dead 'round there soh". Miss Moore responded that Mrs Williams frightened her as she, Miss Moore, was led to think something had happened to Rayon.

[16] Both of them left to Mr Charlie's shop. Upon arrival at Mr Charlie's shop, in the testimony of Mrs Williams, Miss Moore turned over the man, who appeared to be dead, and said "Claudette a Al, yuh nuh". Both women then walked back to Claudette Moore's shop. Miss Moore was crying uncontrollably, saying she remembered her two sons (Orville Haynes and Kirk Haynes) that were killed by the police. Miss Moore cried until she urinated on herself. According to Mrs Williams, Miss Moore said it was she, Mrs Williams, who had caused the deaths of her sons and if her sons could have died, anybody else's son could die.

[17] Mrs Williams related that "months" before the incident at Mr Charlie's shop, Miss Moore had asked her to inquire of the appellant whether he had taken her gun. Mrs Williams said she did as Miss Moore had requested. Asked whether the appellant seemed pleased or vexed when she made that inquiry of him, Mrs Williams said no but added that the appellant never liked the idea.

[18] Mrs Williams also supported the appellant's unsworn statement that he was chased by Steve with a machete, and his account concerning the incident between him and Miss Moore's daughter. After the incident with Steve, Miss Moore and the appellant did not

have a harmonious relationship. Mrs Williams' account was challenged through suggestions put to her by the prosecutor, all of which she denied.

Application to adduce fresh evidence (ground four of appeal and grounds four and six of supplemental grounds)

[19] A key element of the appellant's fresh evidence application is an affidavit ('the recantation affidavit') sworn to by Miss Moore about four years after the conviction, on 30 October 2018. In the recantation affidavit she deposed, among other things, that the evidence she gave at the trial was not true and that: she had given false evidence because she was pressured by the police to do so; she did not see the appellant shoot and kill the deceased; it was a man named Maragh who had done the killing and the police pressured her to say it was the appellant who had done it; and she wanted to clear her conscience and tell the truth. There was also a handwritten letter, purportedly written and signed by Miss Moore, on 28 February 2018, addressed to the Director of Public Prosecutions ('DPP') ('the handwritten letter'), broadly similar in content to the recantation affidavit. A copy of the handwritten letter was exhibited to the appellant's affidavit filed, on 8 December 2018, in support of his application to admit fresh evidence. The recantation affidavit was also filed on that date.

[20] The appellant has asked this court to admit fresh evidence of and related to the purported retraction, by Miss Moore, as contained in the recantation affidavit and the handwritten letter ('the recantation documents'). Such fresh evidence, the appellant contends, conflicts materially with Miss Moore's evidence at the trial, goes to the heart of the conviction and affects the credibility of Miss Moore and the reliability of her evidence, casting doubt on the veracity of the identification and/or recognition evidence, at the trial, and thereby rendering his conviction unsafe.

[21] The Crown opposed the application on the basis that the purported retraction is not capable of belief. The Crown has also sought to adduce its own fresh evidence, contained in an affidavit filed by Miss Moore on 20 October 2021 ('the repudiation affidavit'), in which she denied that the retraction was voluntary and genuine, and claimed

that she had been forced by the appellant and his agents, including family members, to retract her testimony, at trial. The repudiation affidavit was further to a statement given by Miss Moore to the police on 8 April 2021 ('the repudiation statement'). Both documents together will be referred to as 'the repudiation documents'.

[22] In response to the repudiation documents, the appellant filed further applications for the admission of additional fresh evidence to challenge Miss Moore's assertion that the retraction of her evidence was involuntary and not genuine. The additional fresh evidence, sought to be adduced, includes affidavits and oral testimonies from multiple witnesses, a report from a handwriting expert (in relation to the authenticity of the signatures and handwriting in the handwritten letter), video recordings, and a transcript pertinent to the video recordings.

[23] The appellant's applications were primarily grounded in sections 28(a) and (b) of the Judicature (Appellate Jurisdiction Act) ('JAJA'), whereby this court may order "the production of any document, exhibit or other thing" connected with the appeal and any witness who would have been compellable at the trial to attend and be examined, where it is considered necessary or expedient in the interests of justice. It is the appellant's further contention that he would be significantly prejudiced if the fresh evidence is not admitted.

The appellant's fresh evidence- the recantation documents

[24] In the handwritten letter purportedly signed by Miss Moore and attested by Captain Herman Arthur Green, a Justice of the Peace for the parish of Saint Catherine ('the JP'), the writer stated, among other things, that she was writing "on the be off" (presumably "on behalf") of the appellant whom she sent to prison for two life sentences because she was forced by the police to say that it was he who had shot and killed the deceased; that she was afraid of the police because they had killed her two sons; she knew that the appellant was innocent; the statement she gave against the appellant was false; and she was "now a child of God" and confessing to the DPP.

[25] In the recantation affidavit, which Miss Moore admittedly swore to, she averred that her evidence, at the trial, was false and had been instigated by the police who put her "under a lot of pressure" and of whom she was afraid. She claimed to have not seen the appellant kill anyone on Oxford Road and gave reasons for the purported retraction. Among the reasons were that she wanted to "clear [her] mind and be at peace with God" as she had given her life to Jesus Christ and sought his forgiveness; and that she was sorry for the pain and anguish she had caused the appellant and his family. She also stated that it was a man by the name of Maragh who had done the killing but the police had pressured her to say it was the appellant because they "could not catch Maragh" and Maragh had subsequently died. She gave no reason for the delay of the purported retraction.

[26] Another account of the circumstances surrounding the purported recantation was contained in a separate typed letter, dated 12 May 2018, (annexed as an exhibit to the affidavit of Miss Diana Williams, the sister of the appellant), which Miss Diana Williams claimed was provided by Miss Moore. The letter purported that a policeman, - a "Mr Peart"- had conspired with Miss Moore to fabricate her evidence. It stated that Miss Moore was selling when she saw "a man [Maragh] walk up" and kill the deceased but Mr Peart (supposedly now deceased) told her to say that the appellant did the shooting because "[the police] did not like [the appellant because] he was an area leader and…[they] wanted to get him off the streets". Miss Moore was supposedly complicit in perpetrating the falsehood because the police promised to "step up a big link for [her]"; she was afraid of the police because they had killed her two sons; and she feared harm to herself at the hands of the police.

[27] This letter was described by Miss Diana Williams as a "material document", but there was no explanation as to how she came to be in possession of it and Miss Moore gave evidence stating that the signature did not look like hers.

The Crown's fresh evidence – repudiation documents

[28] In the repudiation affidavit, Miss Moore deposed, among other things, that subsequent to the trial, her sister, Mrs Williams, along with Miss Diana Williams, visited her house in Jackson Town, Trelawny, in 2015, and requested that she write and sign a letter for the appellant to "come out of prison". Miss Moore stated that she was afraid and said, "yes", but immediately relocated to Falmouth Gardens in the said parish. She did not disclose her address to her relatives. Soon after, she relocated to Martha Brae, also in Trelawny, because her nephew, Mr O'Neil Griffiths (also called Conrad Griffiths) ('Mr Griffiths'), had made an enquiry concerning her place of residence. She moved again to Harmons in Manchester, out of fear, after being visited by two men from "Capture Land" (where she had previously resided with other family members before the trial).

[29] Miss Moore also stated that, in 2017, while she was at a store in Kingston, she saw Mrs Williams who, along with two men, took her to the office of a female lawyer where she "signed a paper". She had promised to return to sign another document, on the appellant's assurance that she would not be harmed and could return to Capture Land but decided against returning to do so. She stated further that Mrs Williams showed up at her house, in Harmons Manchester, along with two men, one of whom hit her in the chest with a gun. She was then taken to the JP in Spanish Town and she and the JP signed a letter (the handwritten letter) which was given to her by Mrs Williams. She said she did not read the letter and so did not know its contents. She stated too that Mr Griffiths, subsequently, showed up at her home, in Harmons Manchester, along with two men, and instructed her to say certain things which were written on a piece of paper, while he made a voice note of it. He also threatened that she would be killed if she failed to follow his instructions. She indicated that she was afraid and recited what was written on the paper. But after Mr Griffiths and the men left she called the office of the DPP ('ODPP') and spoke to a police officer, Miss Elizabeth Muir ('Miss Muir'). She stated that she did not contact the regular police out of fear that they would divulge information about her whereabouts to "bad men".

[30] Miss Moore acknowledged that she made statements about buying a gun (referring to the contents of certain video recordings sought to be adduced by the appellant), but explained that she had only done so because Mr Griffiths threatened to kill her. She said that after she spoke to Miss Muir arrangements were made for a statement to be taken, which she gave on 8 April 2021. She maintained that the evidence she gave at the trial against the appellant was true and that she was forced, by the appellant, to sign the recantation documents in order to preserve her life. After giving the repudiation documents, Miss Moore went back on the Witness Protection Programme which she was on at the time of trial.

[31] The contents of the repudiation statement which Miss Moore gave to the police, on 8 April 2021, were broadly similar to the recantation affidavit.

Oral testimonies received *de bene esse*

[32] **R v Sales** [2000] ALL ER (D) 695 affirmed the general rule that the court may likely hear witnesses *de bene esse* where the fresh evidence sought to be adduced in written form, "is possibly capable of belief". Rose LJ concluded that if the proffered written fresh evidence is "plainly capable of belief" it will likely be admitted without the need to hear any witness. When it is "incapable of belief" such fresh evidence is not likely to be admitted. However, where it is "possibly capable of belief" the court may find it necessary to hear from witnesses, *de bene esse*, in order to determine whether the evidence is indeed capable of belief".

[33] We determined that the affidavits proffered on the appellant's behalf, as fresh evidence, were "possibly capable of belief", and so, found it necessary to hear the witnesses, *de bene esse.* Consistent with the approach taken in **R v Ishtiaq Ahmed** [2002] EWCA Crim 2781 (and with counsel's agreement), the Crown was allowed to examine Miss Moore first. She was then cross-examined by Mr John Clarke, on the appellant's behalf. Her testimony was followed by that of the other witnesses in support of the parties' respective positions.

Oral testimony of Miss Sharon Moore - examination in chief (by the Crown)

[34] Miss Moore's oral testimony substantially confirmed the contents of the repudiation documents. She maintained that the appellant pointed a gun inside Mr Charlie's shop and killed the deceased, and that she was coerced and threatened by the appellant and family members to retract her evidence. She denied having voluntarily written or signed any document or made statements purporting that the appellant was innocent. The main difference between her testimony and the repudiation affidavit was that she denied signing the handwritten letter before the JP and attributed her removal from Saint Catherine to threats, by alleged agents of the appellant, that she would be beheaded. She testified that the appellant had her talk on the phone to one "Scuffler", alleged head of the "One Order Gang", in a three-way conversation on Mrs Williams' phone, in which she was threatened with violence and death should she fail to carry out their instructions. She said family members constantly tried to "get to her" by "targeting her children".

[35] Miss Moore claimed that when she first saw the handwritten letter in Mrs Williams' possession, it had been pre-signed. However, acting on the appellant's and Mrs Williams' instructions, she told the JP that she wrote the letter and had mistakenly pre-signed it. She also stated that although Mrs Williams had brought papers for her to sign in May Pen, she did not do so. She, however, admitted to having signed typed documents at "the lawyer's office" and at the bus terminus in Spanish Town. By that time, she claimed to have been no longer able to evade her family members, so she signed documents which she did not read or the contents of which she did not remember because of "fear and trauma". She said she was forced to accept the contents of the handwritten letter as hers in order for the JP to "witness it".

[36] Miss Moore testified that since 2015, she had called the office of the DPP several times. On one of those occasions she spoke to a lady and made a report about the threats but a promise to call her back was not kept. She had also gone to the ODPP, in 2017, and spoke with Miss Muir (District Constable Elizabeth Muir) because "her life was under threat". In 2021, she made another report to Miss Muir, gave a statement to another

police officer and went back on the Witness Protection Programme. Miss Moore reiterated that she voluntarily gave the statement to the police about the killing and the appellant's involvement. She said she had done so because she witnessed the appellant kill the now deceased.

Cross-examination of Miss Moore by Mr Clarke (on the appellant's behalf)

[37] Under cross-examination, Miss Moore said that between the encounter with Mrs Williams in Jackson Town, Trelawny, and the alleged incident in Kingston, in 2017, Mrs Williams had telephoned her and met up with her in May Pen. Consequently, she had changed "the chip" (sim card) in her phone because she could not "take the terrorizing". She denied contacting Mrs Williams; giving her a phone number; and having telephone conversations with "Cherry" (Diana Williams). It was suggested to her that she had called Miss Muir, in March 2021, because of the posting of the videos on Youtube, earlier in the said month, but she denied that. She maintained that she called Miss Muir because she had been threatened by Mr Griffiths. She did not answer directly counsel's next question as to whether Mr Griffiths would have visited her some five months before she called Miss Muir, in 2021. She, however agreed that the first time she gave a written report about Mrs Williams' visit was six years after the visit when she gave the repudiation statement. Counsel had also suggested that she and Mrs Williams had at least 10 phone contacts during that period and she agreed, but with the explanation that she did not give her sister her phone number and she did not initiate the contacts. Miss Moore also denied telling Mr Griffiths that she would "sink him" because she alone "naw go down"; that she went to a JP in May Pen; and indicating to Mrs Williams that the lawyer "didn't put everything….[in the draft document and that she was] pressured by the police to tell lies on Rayon".

[38] Miss Moore was shown a video recording (VID-201811117-WA0010.mp4) on a compact disc ('CD') which was annexed as an exhibit to an affidavit filed by Mrs Williams. Miss Moore admitted being in the video along with Mrs Williams. She was seen reading from a document and heard having an exchange with a female whom she identified as

Mrs Williams. In portions of the video recording Miss Moore was heard (and seen) complaining that "the lawyer didn't put everything" in the draft document and making suggestions as to how the wording could be corrected. The following is an extract of that video conversation which was played:

> **Miss Moore**: "My son (inaudible) pressured by the police to give false evidence and two of them … killed by the police and (inaudible) was told I could be (inaudible) den it, Ya so nuh right. Should a say me were pressured by the police to tell lie on Rayon Williams and I was scared because the police murder two of mi son and I was fraid of the police. That he should a put deh so".
>
> **A voice**: "Den you should a go infront di (inaudible) and say it"
>
> **Miss Moore**: "But a di lawyer does that. Mi think a di judge you say gi you paper (inaudible) A nuh di judge. A di Court of Appeal. A di lawyer set up dat. A di lawyer mek up that himself (inaudible) No. But mi nuh know who tell the judge that. Cah mi nuh tell the judge dat. Memba mi did write one letter gi unuh one time and tell unuh se me were pressured by the police an mi did fraid a di police dem cah di police already kill two a mi son. But dem don't put it in good. Dem put it (inaudible) say the police a pressure two a mi son fi give evidence against Rayon."
>
> **Woman's voice**: "Unless a him secretary (inaudible) nuh"
>
> **Miss Moore**: "How mi son (inaudible) when the judge look back him a go see .... dat is a lie an a deh so me a go get (expletive) deh so when him si say deh so a lie. (inaudible) how dat come in when mi son dem dead over 10 year before Rayon go a jail (inaudible) Deh so haffi change pon the paper (inaudible) Mi haffi come a town wid you mek di lawyer fix it."
>
> **Woma**n: (identified as Mrs Williams smoking):" When mi reach home mi a go call Rayon cah him know more bout dis (inaudible)"
>
> **Miss Moore**: "Deh so cyan sign so mi haffi go (inaudible)."

[39] Miss Moore testified that the document being discussed in the extract was given to her by Mrs Williams and that her understanding was that it was "for the applicant to come out of jail". She stated that she did not know who made the video but said the recording was done on the roadside, in May Pen, after she was threatened by the

appellant and instructed "to read the paper and say what to go in[it]". In re-examination, Miss Moore said that the document she read from was returned to Mrs Williams and she later signed it, before the JP, upon being forced by the appellant and Scuffler to do so.

[40] Miss Moore was also shown certain of the videos recorded by Mr Griffiths, at her home in Harmons, Manchester. These were stored on a CD which was annexed as an exhibit to his affidavit. (These videos were mostly inaudible with varying degrees of picture resolution). On examining snippets of the video titled, VID 20201009-WA 0019 [1].mp4, Miss Moore admitted that she was the person having an exchange with Mr Griffiths, but said she was being instructed by him on what to say. She said she was aware of being videotaped. This contradicted her earlier evidence that she knew about being voice-noted but was unsure whether she was being videotaped. Miss Moore said she had spoken with Miss Muir, in the ODPP, shortly after her exchange with Mr Griffiths because she was frustrated.

[41] She explained that the several video recordings were from one conversation. She claimed Mr Griffiths had broken up the conversation into separate videos to exclude portions of what he said to her. He "just … cut it off", she surmised. She said, for instance, she had "braved it" and said to him, "you know Rayon not innocent", but he did not record that remark. She explained that the word 'lawyer' was mentioned in one of the videos because Mr Griffiths said he wanted her to tell the appellant's lawyer that she was forced to tell lies at the trial.

Additional fresh evidence tendered by the Crown

[42] In addition to Miss Moore's repudiation documents, the Crown sought to admit fresh evidence from District Constable, Elizabeth Muir, and Constable Zaine McIntosh, as contained in their affidavits filed 20 October 2021, as well as in a second affidavit sworn by Miss Muir on 23 November 2021.

[43] By his affidavit, Constable Zaine McIntosh confirmed that he took a statement from Miss Moore, on 8 April 2021, in which she detailed the allegations of attempts by family

members and others to get her to retract her evidence, at the trial. He also confirmed Miss Moore's return to the Witness Protection programme.

[44] Miss Muir's oral testimony confirmed that sometime between late November and December 2017, Miss Moore visited the ODPP, and made an oral report to her. The report was substantially about her being pursued and pressured by the appellant to give a written statement, to the ODPP, declaring his innocence. She described Miss Moore as "appearing to be stressed, worried [and] afraid" but stated that she went on leave shortly after and nothing was done about the report. She recalled Miss Moore making another report to her on 10 March 2021. This time, Miss Moore indicated that she was fearful because her sister, Mrs Williams, along with the appellant, and two other persons, asked her to sign documents to retract her evidence at the trial, even though the evidence she gave was true. Miss Muir said she relayed the report to Corporal Garnett and subsequently learnt that Miss Moore gave a statement in relation to those allegations. Miss Muir stated further that handwriting samples were taken from Miss Moore to facilitate a hand writing analysis by the Questioned Document Division of the Jamaica Constabulary Force on the Crown's behalf.

[45] Under cross-examination, Miss Muir testified that when Miss Moore made the first report, she did not form the view that her life was in danger. She had also failed to make notes of their interaction.

Additional fresh evidence proffered on the appellant's behalf

Handwriting Expert - Miss Beverley East

[46] We received oral testimony from the handwriting expert, Miss East, further to her affidavit and report. She stated that she was a forensic document examiner with 32 years' experience in forensic document examination. She studied and was trained in the United States and the United Kingdom, and had worked on several cases involving the authenticity of signatures. There was evidence of her extensive certification and training, including qualification to work in the courts of 38 countries.

[47] Miss East stated, in her report, that she was asked to determine, among other things, whether the signatures in the questioned document (handwritten letter) were Miss Moore's. She had examined a scanned copy of the handwritten letter (since the original was not available to her initially), as well as the signatures in the recantation affidavit and the repudiation documents which Miss Moore acknowledged contained her signatures (known documents). Those handwriting samples were examined for similarities and differences in movement, form, spacing, line quality, speed of writing, letter form and size. It was Miss East's opinion that there was an absence of fundamental or significant differences and as many as 10 similarities were apparent between the questioned and known signatures. She also found evidence of disguised writing in the handwritten letter, established by: overwriting of the 'S' and 'M'; formation of the 'S' in a different size; writing in script; and inconsistency in spelling. She concluded, among other things, that the purported signatures of Miss Moore, on the questioned document, were authentically hers. She also provided graphics to support her conclusions.

[48] During cross-examination, Miss East said that she examined a scanned image of the original handwritten letter. She explained that a scanned image of the original handwritten letter was not the same as a copy. She stated that she had examined just over seven signatures, none of which was original and she used no source documents. She admitted that best practice was to have examined 25 signatures but said the examination was reliable because the dates of the known documents were close in time to that of the questioned document. Ms East agreed that copying a document multiple times could cause it to lose its hesitation pattern. She acknowledged that the handwritten letter was written in script while the signature in the repudiation affidavit was in cursive but explained that the latter document also contained joined letters with similar characters to those in the signatures in the handwritten letter. She concluded that the signatures in the handwritten letter bore an element of "writing disguise", which she explained as "a method of handwriting modification to conceal the identity of the person and intended to not reveal the person's signature".

[49] In re-examination, Miss East said that movement, form, spacing and line quality in the writing led to the inescapable conclusion that the known signatures and the questioned signatures were too similar to be attributed to different persons.

Certified Question Document Examiner- Robert Farr

[50] Mr Farr gave oral testimony supporting the contents of an affidavit, filed 12 November 2021. He had created the graphics that were used by Miss Beverley East to arrive at her conclusions. In a further affidavit, filed 7 December 2021, he responded to a report prepared by Assistant Superintendent of Police George Dixon, stating that the report did not change "his' previous conclusion that all signatures on all the documents purported to be that of Miss Moore were authentic…"

[51] We noted that although sworn to by him, Mr Farr's affidavit of 7 December 2021 contains averments by some other person. For instance, at para. 10, it states, in part: "[T]hat after reviewing the said documents, I am more convinced that my original conclusions are correct. I have attached hereto a copy of a joint report from an examination done by myself and Mr Robert Hugh Farr in relation to this material...". Clearly, Mr Farr could not have been referring to himself in this manner.

The Crown's Handwriting Expert- ASP George Dixon (in response to report of Miss East)

[52] The Crown sought to admit an affidavit of handwriting expert, Assistant Superintendent of Police, George Dixon ('ASP Dixon'). His affidavit was given in response to the report and affidavit of Miss East. ASP Dixon's oral testimony was broadly consistent with his affidavit.

[53] He stated that he was a certified questioned document examiner with 10 years' experience in document examination and handwriting analysis. He had been trained by several well-recognized document examiners, including Miss Beverley East. He was requested by the Crown to determine whether the handwriting in the handwritten letter matched the known handwriting of Miss Moore. He examined specimen signatures and handwriting including three foolscap papers bearing known signatures of Miss Moore and

an original electoral registration identification card bearing her specimen handwriting, as well as the original handwritten letter (the questioned document). He used a video spectral comparator VSC 40 to do a side by side comparison of the documents.

[54] He concluded that the handwritten letter was not written or signed by the author of the known signatures, Miss Moore; and that it was a case of "traced and simulated forgery". He pointed to: differences in the identity patterns of letters such as the letter 'S' on the questioned document being traced; a fundamental and significant difference in the identity pattern of the letter 'm' within the questioned and the known documents; there being a fundamental connecting stroke at the top of the letters 'oo' in the known documents which was not present in the questioned document; and differences in the letter 'e' within the questioned and known documents. He stated that he examined, among other things, the degree of slant, letter size, height, pen stroke movements, alignments and proportions to arrive at his conclusions. Those findings were supported with graphics.

[55] In amplification of his affidavit, he stated that the questioned document was written in script and the known signature in the repudiation affidavit was in cursive. In what was a criticism of Miss East's report, he said that it was not recommended to compare the different styles. ASP Dixon indicated that if all the documents used in the comparison were copies he would not be conclusive in the opinion on whether Miss Moore authored the questioned document because a copy document cannot give the details of the signature or handwriting. He remarked that the process of copying and the equipment used could produce trash marks and black spots which might appear as a part of the signature.

[56] During cross-examination, ASP Dixon said he did not have sight of Miss East's report before he completed his. In carrying out his examination, he had used the original of the questioned document to verify whether the copy was genuine; and he not only compared signatures but words, for example, "Dear Madam". He stated that he had asked for 25 or more handwriting specimens because there are established characteristics in

traced writing. He had also relied on a source document (electoral registration identification card) because of "limitations between natural and disguised writing".

Additional fresh evidence proffered on the appellant's behalf

Claudette Williams

[57] The affidavits of Mrs Williams (filed on 25 November 2019 and 27 October 2021) were permitted to stand as her evidence in chief for the sole purpose of the *de bene esse* exercise. We also received her oral testimony.

[58] She averred to visiting Miss Moore in Jackson Town, Trelawny, in 2015, accompanied by her daughter (Diana Williams). This was at Miss Moore's invitation, she having "turned Christian and wanted to clear her conscience". Consequently, she advised Miss Moore to report her change of mind to the police but Miss Moore told her that the police had forced her to tell lies and "she… [could not] afford to go to prison…". She denied asking Miss Moore for a statement or to produce any document. It was Miss Moore who came crying and expressing remorse for what she had done. Mrs Williams also deposed that she did not know what to do with the information disclosed by Miss Moore and only realized its importance when she was advised, in 2017, that neither the appellant's lawyer nor the DPP was aware of it.

[59] Mrs Williams stated further that, in 2018, she spoke with the appellant's lawyer (Mr Equiano) and based on that conversation she immediately called Miss Moore who confirmed that what she told the jury, at the trial, was untrue. She stated that the lawyer did not speak to Miss Moore but advised that she should go to the police or the DPP. Miss Moore, however, did not want to go to the DPP because she feared the police would lock her up. In early February 2018, Miss Moore "decided" that they should meet at the police station in May Pen as she wanted Mrs Williams to collect a letter that she (Miss Moore) wanted to send to the DPP. When they met, Miss Moore took her to a JP, "to sign a confession letter" but the JP refused to sign. So, on 28 February 2018, at Miss Moore's invitation, they met in downtown Kingston and took a bus to the JP in Spanish Town

where the handwritten letter was signed. Miss Moore indicated then that it was too late for the letter to be mailed to the DPP and requested that Mrs Williams give it to the appellant's lawyer for transmission to the DPP. Mrs Williams said she did so on 7 May 2018. Subsequently, Ms Moore suggested that they visit another of the appellant's lawyers, Ms Zara Lewis, to give a statement. They visited the lawyer but she advised that Miss Moore should get independent legal advice. Mrs Williams stated that Miss Moore subsequently advised her that she had signed the recantation affidavit before the JP and she gave her a copy. (This was inconsistent with her oral testimony that she was present when Miss Moore signed "the documents"). Mrs Williams denied being given documents to take to Miss Moore, contrary to other testimony that she took the "papers" from the lawyer for Miss Moore to sign. She disputed Miss Moore's averment that she visited Miss Moore, in Harmons Manchester, with two men and forcefully took her to the JP.

[60] It was also Mrs Williams' testimony, during cross-examination, that she had taken Miss Moore to the JP and took possession of the documents (the recantation documents) from the JP. She also said that prior to signing the recantation affidavit, Miss Moore made changes to the first draft, when they met in May Pen. (This aspect of Mrs Williams' evidence was supported by the video evidence referred to at para. [37]). Mrs Williams referred to another recording in which Miss Moore was said to have read and accepted the contents of the handwritten letter. (We were made aware of an audio recording appended to her second affidavit but it was incapable of being played). Mrs Williams stated that the recordings were made, on her instructions, because she did not trust Miss Moore. She denied threatening or tricking Miss Moore into signing any document. She also stated that she did not force her to retract her evidence. Mrs Williams said that after visiting Miss Moore, in September 2015, in Jackson Town, they did not communicate again until 2018. They had not spoken since the recantation documents were obtained and attempts to locate Miss Moore, in 2019, had been unsuccessful. She admitted taking Miss Moore to the JP but said it was Miss Moore who gave him "the paper".

[61] Mrs Williams denied speaking to the appellant on the telephone after his conviction. She also denied talking to him about the lawyer or the recantation documents. (We note, in relation to the video that Mrs Williams produced of her conversation with Miss Moore, that the latter's unchallenged evidence is that Mrs Williams was the one who said that she would have to call the appellant as he knew more about the document being scrutinized). Mrs Williams also denied: calling the appellant (on a three-way call) and giving the phone to Ms Moore to speak with the appellant and "Scuffler"; and that it was upon the appellant's instructions, that she took Miss Moore to the lawyer's office to sign documents. Contrary to her averment at paragraph 29 of her second affidavit, Mrs Williams testified that she did not hear Miss Moore say, "if she [Miss Moore] a go down, [Mrs Williams] a go down to".

[62] In re-examination, Mrs Williams testified that when Miss Moore gave the JP the handwritten letter, it was missing an address which Ms Moore wrote in; and that the first time she, Mrs Williams, saw the handwritten letter was when Miss Moore brought it to the May Pen Police Station.

Conrad O' Neil Griffiths

[63] The applicant sought to admit an affidavit of Mr Griffiths, filed 27 October 2021, to challenge certain averments in Miss Moore's repudiation affidavit. Annexed to the affidavit as an exhibit was a CD containing several short videos.

[64] Mr Griffiths deposed that no one asked him to make the videos. He said he had visited Miss Moore because his mother (Miss Moore's sister), lived close by. He and Miss Moore were the only ones present when the recordings were made on 9 October 2020. Prior to that, he had been unaware of the circumstances of the appellant's conviction and the role played by Miss Moore, and he had no interest in the appellant's appeal.

[65] Mr Griffiths denied threatening Miss Moore and instructing her on what to say in the video recordings. He said the recordings were made because of her remarks about sending "Bobo to rotten in prison and [could] do it again because him mek her gun go

missing" and in the event she told a lie on his (Mr Griffith's) brother about whom she had made a previous remark that she would be prepared to "sink him as she did Bobo". He said he did not intend to share the video but was prompted to do so after a conversation with a family member about Miss Moore's character. He surmised that Miss Moore became aware of the videos when they went into circulation sometime in March 2021, and, in response, threatened to "sink" him, as "she alone naah go down". In turn, he made a report of defamation to the police at the Montego Bay Police Station, on 27 April 2021.

[66] In oral testimony, Mr Griffiths reiterated much of what is contained in his affidavit. He was shown four of the videos made by him. (While the film aspect was relatively clear, much of what was being said was inaudible. For the most part, it seemed that Miss Moore was regaling Mr Griffiths with stories about the ownership and use of certain guns as well as intemperate/violent conduct while being prompted by Mr Griffiths.) Mr Griffiths explained, under cross-examination, that there were separate video recordings of his exchange with Miss Moore because "that's how [his] phone works". He admitted there was no mention of his brother in any of the recordings even though he had said that one of the reasons for making the videos was to protect his brother. He did not deny that in one of the videos shown he had asked Miss Moore,"Wha happen wid Bobo" and Miss Moore answered, "Dem want me to let him go". Also, contrary to his evidence on affidavit, he testified that Miss Moore did not tell him she had been "moving from place to place because she owed money".

Certified Videographer – Mr Jethro Green

[67] Mr Jethro Green's oral testimony was received further to his affidavit. It was intended to support Mr Griffiths' testimony that the video recordings were done on 9 October 2020. Mr Green deposed that he reviewed the video recordings but his findings were limited due to the unavailability of the cellular phone on which the recordings were done. Notwithstanding, he formed the view that the most likely creation date was 9 October 2020. This was based on the consistency in the videos' generic name, a uniform modification date and the absence of evidence of tampering or modification of the

timestamp. However, during cross-examination, Mr Green agreed with counsel for the Crown that he could not say with certainty what was the original date of the video recordings.

Certified Transcriptionist - Rochelle Stultz

[68] Miss Stultz, an employee of the appellant's current attorney-at-law, testified about transcripts which she generated from the contents of the seven videos included in the CD appended to Mr Griffith's affidavit, as well as the video and audio track included in the CD appended to Mrs Williams's second affidavit. We received Miss Stultz's oral testimony although her affidavit did not compel us to the view that she had followed standard procedure in transcribing the material from the CDs for evidential purposes, and the threshold requirements for admissibility were not met (for example, there were concerns about the mechanical transcription device used, chain of custody and verification/authentication of the material). Her testimony was received solely for the purpose of the *de bene esse* exercise.

Diana Williams

[69] Miss Diana Williams' affidavit was allowed to stand as her evidence in chief for the de bene exercise. Her account of the visit to Miss Moore's home in Jackson Town was similar to Mrs Williams'. She also deposed that Miss Moore was the one who had produced the affidavit to the JP and told him that she was signing it for court because "she wanted to right the wrong". She stated that after the trial, Miss Moore had visited often with the family in Spanish Town. She described Miss Moore as, "coming with tears in her eyes, crying to the family" that her 'baby father' and 'first-born' had been slaughtered by the police since she left the Witness Protection Programme, and the police were coming for her. Miss Diana Williams also testified that, in 2018, Miss Moore told her on several occasions that the appellant did not kill the deceased, and in November 2018, Miss Moore read a letter to her over the phone.

[70] Miss Diana Williams' claim of frequent visits by Miss Moore was inconsistent with Mrs Williams' evidence that Miss Moore did not visit the family after the trial.

Captain Herman Arthur Green (JP)

[71] The appellant sought to admit the affidavit of the JP to counter Miss Moore's testimony that she did not sign the handwritten letter and to support a conclusion that she had genuinely and voluntarily recanted.

[72] In his affidavit, the JP deposed that, on 28 February 2018, Miss Moore and Mrs Williams attended at his office and he witnessed Miss Moore's signature on a letter (the handwritten letter) which she indicated was meant to be sent to the DPP. She had also read the letter aloud and confirmed its contents. He deposed, at para. 5 of his affidavit as follows: "Miss Sharon Moore indicated to me all the information contained in the statement. She also indicated further information and wrote this information on the statement and signed the statement in my presence…". This, he explained in oral testimony, had to do with a question by Miss Moore about the adequacy of the information contained in the letter. But the evidence of Mrs Williams was that the handwritten letter which was pre-prepared was only missing an address. At para. 7, the JP said, "[Miss Moore] also debated with the ladies present on exactly how she wanted to word the information contained in the statement". The JP confirmed that Miss Moore had also signed the recantation affidavit, in his presence, on 30 October 2018. He said she had taken it from her bag.

[73] The JP testified that the handwritten letter was pre-signed and so he instructed Miss Moore to affix her signature a second time. He had also matched the signatures with that on the identification card presented by her. He was, however, unable to recall whether the inscriptions, "Sharon Moore" and "S Moore" were in the left margin as shown on the original handwritten letter. Under cross-examination, he explained that the person who accompanied Miss Moore (Mrs Williams) showed him the letter and requested his signature on it but he departed from that position when being re-examined. According to him, Miss Moore returned on 30 October 2018, with an affidavit (recantation affidavit),

which she claimed had been prepared based on what she told a lawyer. On that occasion, as with the handwritten letter, she made it clear that she wanted to sign the affidavit. Miss Moore also told him that she was aware of its contents and "intended [it] to be used to correct an injustice which was occasioned by lies she was forced to tell on her nephew". To his knowledge, Miss Moore was never accompanied by a male but was always in the presence of someone.

Other deponents on the appellant's behalf

[74] The appellant also sought to admit the affidavits of attorney-at-law, Zara Lewis, Collin McPherson and Kamar Burgher. There was no oral testimony from these persons and their affidavit evidence did not advance the appellant's case that the fresh evidence put forward on his behalf is capable of belief.

Submissions on behalf of the appellant

[75] Counsel appearing for the appellant, Mr Clarke, in written and oral submissions, referred to the test for the admission of fresh evidence in section 28 of JAJA. He also placed heavy reliance on the Privy Council case of **Maharaj and others v The State** [2021] UKPC 27, particularly paras. 67 to 69, which, he submitted, introduced a new two-stage test for determining whether it is necessary or expedient to admit fresh evidence. Accordingly, the first question is whether it is necessary or expedient to admit the evidence in the interest of justice. This decision is taken where the fresh evidence is deemed trustworthy or 'well capable of belief' (**R v Alfred Parks** [1961] 3 ALL ER 633 and **R v Flowers** [1966] 1 QB 146). The second question (which arises only if the fresh evidence is admitted) is what impact the fresh evidence has upon the safety of the conviction.

[76] Mr Clarke submitted that the 'well capable of belief test', is satisfied if the jury might have had a reasonable doubt in the matter, had the (fresh) evidence been given together with the other evidence at the trial and in light of the character of the complainant (**Kenneth Clarke v R** [2004] UKPC 5).

[77] He outlined six principal arguments to support the position that the appellant's fresh evidence is capable of belief. First, the fresh evidence surrounds matters which have arisen after conviction and the alleged retraction also came after the conviction. The evidence was therefore not available to be produced at the time the appellant was tried. Second, the fresh evidence is credible in relation to Miss Moore's character, credibility, reliability and propensity to lie under oath about her Christian faith, involvement with illegal guns, the nature of her relationship with the appellant and the authorship of the handwritten letter. Third, the evidence pertaining to the signing of the recantation documents would have been admissible, at the trial, had those documents been available, and such evidence would have engendered doubts about Miss Moore's credibility and the veracity of her evidence. Fourth, the fresh evidence has satisfied the statutory criteria in section 28 of JAJA as it goes to the 'heart' of the safety of the conviction and raises a real doubt as to whether the sole witness for the Crown was reliable in all the circumstances, and a jury in receipt of this evidence would have inevitably convicted the appellant. Fifth, there was other evidence received *de bene esse* or in admissions which materially support the credibility of the assertions made by the appellant and the defence, at the trial. Sixth, the fresh evidence sought to be adduced by the Crown undermines the integrity and reliability of the evidence which Miss Moore gave at the trial. In support of those contentions, Mr Clarke referred us to several authorities, the most relevant and helpful ones being **Maharaj v The State**; **R v Pendleton** [2001] UKHL 66; **Bonnett Taylor v R** [2013] UKPC 8; **R v Peter Ditch** (1996) 53 Cr App R 627; **R v David Conway** (1980) 70 Cr App R 4; **R v Williams and Smith** [1995] 1 Cr App R 74; **R v Keith Twitchell** [2000] 1 Cr App R 373; **R v Ishtiaq Ahmed;** and **R v Warren Blackwell** [2006] EWCA Crim 2185.

[78] In responding to the Crown's authorities, Mr Clarke argued that neither **Maharaj v The State** nor **R v Kenneth Clarke** is authority for the proposition that the court should refuse to admit fresh evidence because it was not obtained freely. Consequently, they offer no assistance to the court in determining whether there is a basis for rejecting the fresh evidence as being incapable of belief**.** He also submitted that the Crown's

reliance on **R v Kenneth Clarke** was misplaced because, in that case, the issue of concern, unlike this case, was the correctness of the Court of Appeal's decision to decline hearing the matter *de bene esse.*

Submissions on behalf of the Crown

[79] In written submissions, counsel for the Crown agreed that the authority for the admission of fresh evidence is found in section 28 of JAJA and guiding principles are contained in the judgment of Lord Parker CJ in the case of **R v Parks**. For other relevant principles, the Crown relied on **R v Sales** and **Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 93/2006, judgment delivered 18 June 2008. We were also referred to **Queen v Alison Murphy** [2019] EWCA Crim 1274, for the principle that the court may consider the surrounding circumstances of the case in determining whether the new material is incapable of belief; **R v Kenneth Clarke** on how the court should treat with the conflict between the purported recantation and the evidence given at the trial; and **Maharaj and Others v The State** for guidance on how the court is to assess the fresh evidence.

[80] It was submitted that the recantation evidence is incapable of belief and Miss Moore should be accepted as a witness of truth. The court's attention was pointed to the pattern with which Miss Moore changed location, suggesting that she tried to escape the reach of the appellant, his agents and her family members. We were asked to consider that Miss Moore was forthright about the fact that she signed the recantation affidavit and gave a reasonable explanation for doing so, and also the fact that on each occasion when a document was to be signed, in an attempt to secure the appellant's release from prison, Miss Moore was in the presence of Mrs Williams, who gave her the documents and took possession of them.

[81] The Crown proffered the following arguments as to why the evidence of Mrs Williams, Miss Diana Williams and Mr Griffiths should be rejected: (i) their evidence was untrue and self-serving; (ii) the refusal of leave to appeal the appellant's conviction was the catalyst for the pressure on Miss Moore to recant and this made it less capable of

belief that Miss Moore worked willingly with her family; (iii) the information contained in the recantation documents did not evince any specificity as to why the evidence which was given at trial could now be impeached; (iv) the recantation documents contradict the evidence at trial; and (v) Miss Moore has maintained that she was not forced by the police to give false evidence against the appellant.

[82] It was also contended that Mr Griffith's evidence showed him to be less than truthful as, firstly, he stated that at the time he video-taped Miss Moore it was for the purpose of showing that Miss Moore wanted to 'set up' his brother, yet he admitted that there was nothing in the conversations with Miss Moore about his brother. Secondly, he said that he had no knowledge of what was happening with the appellant nor did he want to know, yet admitted that he was the person in the video initiating the conversation in which the appellant was the subject. Thirdly, the fact of seven short videos being created from one conversation, supports Miss Moore's evidence that the several pauses were to allow Mr Griffiths to instruct her on what to say and do. In these circumstances, the videos were more likely created to assist the appellant.

[83] It was counsel's contention that there was no real substance to the assertion that becoming a Christian would be a real reason to recant because Miss Moore had already professed to being a Christian, at the trial. We were asked to consider when making our decision about the admissibility of the applicant's fresh evidence: (i) that the handwritten letter purported that Miss Moore had lied because she was afraid of the police, yet her evidence was that she went to the police voluntarily; (ii) without more, fear of the police (as expressed in the recantation documents) could not provide the basis for Miss Moore recanting a statement which was willingly given to the police; and (iii) Miss Moore had also denied, at the trial, that she did not get on with her nephew and had told him she "was gonna F him up". Pointing to the depth of the retraction in **R v Kenneth Clarke**, counsel submitted that there needed to have been an explanation as to why the evidence, at the trial, was not the truth.

[84] As regards the testimonies of Miss Stultz and Mr Green, counsel submitted that these could not assist the court in determining whether the appellant's fresh evidence is capable of belief, and should therefore not be accorded any weight. The JP's evidence was also unreliable and had been contradicted, counsel asserted.

[85] Turning to Miss East's evidence, counsel for the Crown called attention to the reliance on copy documents and submitted that they rendered her conclusions unreliable, particularly in relation to the use of the copy handwritten letter which revealed visible trash marks and other specks. Also, her finding of disguised writing did not support the appellant's argument that the handwritten letter was created by Miss Moore and that the contents are true. On the contrary, the evidence of disguise served as a red flag that the letter was more likely a forgery, since there would be no need for Miss Moore to disguise her writing, if in fact she had declared herself a Christian and wanted to clear her conscience. Another challenge to Miss East's conclusions was her comparison of script handwriting with cursive, which did not accord with best practice. Similarly, Miss East's use of HP Office Jet 860 printer and Digital Microscope 10x140 magnification, was not best practice, and did not enable her to view documents side by side so as to make an 'on-the-spot' comparison. Furthermore, no weight should be given to the additional report of Robert Farr. Not only should it be deemed 'a second bite of the cherry' but Mr. Farr's role should assume no more significance than noted in his first affidavit - that of an assistant to Miss East, who created graphics.

[86] A contrast was drawn with ASP Dixon's report which was based on the examination of original documents, and therefore untainted by the reduced visibility in comparing copy to copy. Counsel for the Crown emphasised the method used by ASP Dixon - that of comparing handwriting specimens from Miss Moore with the handwritten letter, thus comparing the natural pattern of Miss Moore's handwriting as well as any pen pause and pressure patterns; comparing the handwriting specimen to the natural pattern of Miss Moore's signature from a source document (national identification card); and using a VSC 40 (an instrument designed for general examination of suspect documents)

to do a side by side comparison of the documents. The application of that methodology, counsel submitted, resulted in a sound and reliable conclusion that the handwriting was a "traced and simulated forgery" which supported Miss Moore's assertion that she did not write or sign the handwritten letter.

[87] The Crown concluded that the evidence adduced *de bene esse* showed that family members used different tactics to pressure Miss Moore to retract her evidence. It was plain, counsel asserted, that Miss Moore was made to converse with the appellant and Scuffler who applied pressure through threats of beheading, to ensure that she complied, and at every instance where a document needed to be signed, or a video recording made, the 'hand' of a close relative was at work. More so, there was no independent witness to show that the recantation was freely given or any explanation as to what would have prompted it. If nothing else, the evidence showed that the recantation was "plucked" from Miss Moore. The conclusion ought, therefore, to be that the recantation was contrived, unreliable, involuntary and incapable of belief, counsel submitted.

Discussion

The governing law for admitting fresh evidence

[88] There is no dispute about the statutory authority for the proper exercise of the court's discretion in admitting fresh evidence. Under section 28 of JAJA, the court may admit fresh evidence if, "it is necessary or expedient in the interest of justice". In **Benedetto v R and Labrador v R** [2003] UKPC 27, the Privy Council (examining section 41 of the West Indies Associated States Supreme Court (Virgin Island) Ordinance Cap 80, (which is similar to section 28 of JAJA), explained that the discretionary powers of the court to receive fresh evidence, "represents a potentially very significant safeguard against the possibility of injustice" and " while it is always a relevant consideration that evidence which it is sought to adduce on appeal could have been called at trial, the appellate court may nonetheless conclude that it ought, in the interest of justice to receive it and take account of such evidence" (see also **Lundy v The Queen** [2013] UKPC 28, para.120 and the recently decided case of **Lescene Edwards v The Queen** [2022]

UKPC 11). In the latter case, the Privy Council affirmed "the interest of justice" as the overriding test.

[89] The exercise of this very wide power by the courts, under the rubric "interest of justice", evolved into four principles which were summarised, as follows, by Lord Parker CJ in **R v Parks** (construing a similarly worded statutory provision to section 28 of JAJA):

> "…**First**, the evidence that it is sought to call must be evidence which was not available at the trial. **Secondly**, and this goes without saying, it must be evidence relevant to the issues. **Thirdly**, it must be evidence which is credible evidence in the sense that it is well capable of belief; it is not for this court to decide whether it is to be believed or not, but it must be evidence which is capable of belief. **Fourthly**, the court will after considering that evidence go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial." (Emphasis mine)

[90] These principles have been approved and applied by the Privy Council in a number of cases, including **Maharaj and others v The State**, a recently decided appeal from Trinidad and Tobago. In that case, the Privy Council applied the principle enunciated in **Moonsammy v The State** TT 2015 CA 15, by Mohammed JA, at para. 46, viz:

> "… the Court of Appeal is not simply a conduit through which the proposed additional evidence is uncritically advanced. The evidence must satisfy a minimum threshold standard of credibility and reliability in order to justify its reception, otherwise there would be no proper end to the adjudicative process."

[91] The facts of **Maharaj** bear striking similarity to this case so only a synopsis is warranted. The appellant and his co-accused were convicted on 7 August 2001 for the murder of Thackoor Boodram based on the evidence of a primary witness, Junior Grandison. Ten years later Mr Grandison, in a detailed statutory declaration, stated that the evidence he gave at the trial was not the truth. The oral testimonies of the witnesses were received *de bene esse*. In opposing the application, the State sought to adduce fresh evidence to the effect that the recantation by Mr Grandison was unreliable. This

included testimony from a retired assistant commissioner of police, who stated that Mr Grandison had confirmed to him that his retraction was a concoction and fabrication; and told him that some of the appellants had contacted him and asked him to change his testimony so that they could be freed. In the investigation which led up to the hearing, there was an unsigned statement by Mr Grandison which detailed, among other things, authorship of a repudiatory statement and reasons for authoring the false retraction. Mr Grandison, without good reason, did not attend the hearing which considered the admissibility of the fresh evidence.

[92] After a "rigorous assessment" of the fresh evidence, the Court of Appeal found, among other things, that the fresh evidence sought to be adduced by the appellant was contrived, there was post-trial manipulation of the witness and the retraction was tainted by the appellant's influence - all of which rendered the fresh evidence incapable of belief.

[93] In affirming that decision, the Board opined that adducing fresh evidence in circumstances where there is a recantation requires rigorous qualitative assessment because of the ease with which such evidence might be fabricated. At para. 55, Dame Julia Macur, writing on behalf of the Board, explained the Board's opinion in this way:

> "Upon whatever basis the retraction of material evidence is sought to be introduced into the appeal, as substantively true or for reason of impeachment, '[t]he ease with which mere recantations can be fabricated … demands an especially rigorous qualitative assessment … to give substance to the cogency requirement, which must be satisfied to permit the introduction of fresh evidence': *R v MGT* [2017] ONCA 736 at paras 110–111 per Watt JA. See also *R v Asif Patel* [2010] EWCA Crim 1858 at para 43 in which the Court of Appeal was 'astute to the risk of post-trial manipulation of any witness (and particularly one of significance) who may by one means or another be persuaded to assert after the event that his testimony at trial was untrue'. It is well established and patently correct that it would be contrary to the interests of justice to admit evidence that is unreliable in source and/or content: see for example *R v Kassa* [2013] ONCA 140 at para 97. Fresh evidence that lacks cogency cannot possibly provide a viable ground of appeal."

[94] She continued at para. 56:

> "…The Board considers it highly unlikely that any retraction evidence will be regarded as 'plainly capable of belief' at face value and unequivocally agrees with the Court of Appeal that in this case the new evidence falls within the third category which calls for a rigorous analysis. The Court of Appeal patently did carry out such an analysis."

[95] And, at para. 67, she reaffirmed the two-stage test, as follows:

> "…**The first question for the Court of Appeal is whether it is necessary or expedient to admit the evidence in the interests of justice**. This will depend upon the Court of Appeal's own analysis of the integrity and relevance of the fresh evidence and not what the jury may have thought of it. This assessment may be possible on the face of the evidence, although not in situations such as presented by this and other cases of recantations as the Board indicates above, but deciding whether to receive or accept the fresh evidence remains a distinct stage in the process. **Only if the fresh evidence is deemed trustworthy or "well capable of belief" (R v Parks [1961] 1 WLR 1484, 1486) by the Court of Appeal is it necessary to pose the second question: what impact does it have upon the safety of the conviction**." (Emphasis mine)

[96] There are also relevant and helpful decisions from this court including **Mario McCallum v R** in which the court stated at page 3, that "[the conditions in **Parks**] are cumulative hence the appellant must satisfy each one". There is also the decision of the Court of Appeal of Trinidad and Tobago in **Mario Pedro v The State** Civil Appeal No 72/1996, delivered 26 July 2000, in which de la Bastide CJ stated, at page 12, that in addressing an application for fresh evidence it is logical to ask two primary questions: (i) the reason that the witness had given for lying at the trial; and (ii) the reason he had given for telling the truth. The court must also be satisfied that if the fresh evidence had been given at the trial it might have created a reasonable doubt in the minds of the jury as to the guilt of the appellant.

Whether the appellant's fresh evidence is well capable of belief

[97] As reflected in the authorities referred to above, the first and overriding question for this court is whether it is necessary or expedient in the interest of justice to admit the fresh evidence. Only if the fresh evidence is deemed trustworthy or well capable of belief is it necessary to pose the second question in relation to its impact on the safety of the conviction - that is, whether it creates a real doubt about Miss Moore's evidence, at the trial, which ought to lead to the conclusion that the appellant's conviction is unsafe.

[98] In assessing the integrity of the fresh evidence put forward by the appellant the following matters will be considered: (i) the source, contents and circumstances of the purported retraction (including whether Miss Moore actually wrote the letter, whether she was forced to write and or sign the letter, and whether she was forced to sign the recantation affidavit); (ii) the reasons given for the alleged false evidence at the trial; (iii) the reason given for the purported retraction; (iv) whether the evidence received *de bene esse* support a conclusion that the recantation documents are well capable of belief; (iv) what impact, if any, do the repudiation documents have on the status of the recantation documents should these prior enquiries lead to a conclusion that the appellant's fresh evidence is not trustworthy or well capable of belief; and (vi) what, if any, effect does the credibility of Miss Moore have on the status of her evidence at the trial.

The source, contents and circumstances of the purported retraction

Whether Miss Moore wrote and/or signed the letter of recantation

[99] In the repudiation affidavit, Miss Moore stated that she did not write the handwritten letter but had been induced to sign it by force and threats of personal violence against her. She, however, contradicted herself in oral testimony. When pointedly asked by the court whether she had signed the letter, Miss Moore replied that she "did not write, sign or had anything to do with it".

[100] Both Miss Moore and the JP gave evidence that the handwritten letter was pre-signed and that Miss Moore provided an explanation to the JP for that. The JP said she

was asked to sign it in his presence, and, we believe, she did so, there being no good reason for her not to have affixed her signature to it, in his presence. Whether she wrote the handwritten letter is an entirely different issue. It is noteworthy that both experts came to the conclusion that there was tracing or overwriting as it pertained to the handwritten letter. They both agreed that overwriting goes to intent. In ASP Dixon's opinion, it was the intent of the forger while in Miss East's opinion it was the intent of Miss Moore.

[101] The Crown has invited us to say that ASP Dixon's evidence is more reliable because he used, among other things, original writings and source documents (a methodology in keeping with best practice) whereas Miss East relied on copy documents and made no comparisons with a source document. The Crown is correct, in its observation that Miss East did not always adhere to best practice standards, but we do not believe that to be determinative of whether Miss East's evidence is incapable of belief. Rather, the conflicts in the findings of the two experts are so profound, that we prefer to consider their testimonies in the context of all the other evidence.

[102] The JP, in identifying the original handwritten letter in court, stated that to the best of his recollection the name, 'Sharon Moore' and 'S Moore' which appear in the left margin were not present when he witnessed Miss Moore's signature. If he is correct, those details were inserted after he witnessed her signature. The evidence of who took possession of the letter after it was signed is relevant. Although, in re-examination, the JP said it was the person who signed the letter who had given it to him and to whom it was returned, there is evidence from both Miss Moore and Mrs Williams that Mrs Williams took possession of the letter after it was signed. Although she equivocated, Mrs Williams eventually said that after the JP signed the letter, on 28 February 2018, he gave it to her and she gave it to the appellant's lawyer on 7 May 2018. There is also material before us that the original handwritten letter was located in the office of the appellant's former attorney-at-law (with whom Ms Moore had no discussion about a letter, on the evidence).

[103] So, if it is accepted that the inscriptions were not in the left margin at the time of attestation, and that Mrs Williams took possession of the letter after it was signed by the JP, then the reasonable inference would be that some person other than Miss Moore made the inscriptions in the margin, after the JP gave it to Mrs Williams. Such a conclusion, however, would conflict with Miss East's finding that the signatures in the handwritten letter were wholly Miss Moore's. In our view, this unresolved issue renders this aspect of the fresh evidence unreliable. On that basis, we do not agree that Miss East's report and testimony are supportive of a conclusion that Miss Moore authored the letter or that the recantation is plainly capable of belief.

[104] Having said that, it has not escaped our attention that in the video recording of the exchange with Mrs Williams (referenced at para. 37), Miss Moore referred to a letter that she "give them". It was, however, not explained in the evidence whether this was the handwritten letter, what were the contents of that letter and what was meant by "give them". We have also taken note of Mrs Williams' evidence that she audio-recorded Miss Moore reading a letter that Miss Moore supposedly wrote and signed, accepting that the contents were true, and more importantly saying that what she told the court about [her son] was a lie. Mrs Williams claimed this was heard on "Track 2", in her CD appended to her second affidavit, but, as was indicated earlier, that recording was entirely inaudible.

[105] Returning to the findings of both experts that the letter contained disguised writing, we see no discernible reason in Miss Moore's evidence or from the appellant's witnesses, for Miss Moore to have disguised her handwriting and Miss Moore did not accept that she had done so. More significantly, the disguised writing does not match up with the appellant's case that Miss Moore had recanted because she had become a Christian, and wanted to "come clean". If that were the case, it seems implausible that she would attempt to disguise her handwriting in the letter purportedly retracting her evidence.

Contents and circumstances of the purported retraction

[106] There was conflicting detail on the source of the recantation affidavit. According to Mrs Williams, in May 2018, she was advised by "the lawyer" that the appellant had secured legal aid and Miss Moore suggested that she would give a statement. However, when they visited "the lawyer" later that month, "the lawyer" declined to take a statement in the matter. Miss Zara Lewis, attorney-at-law, stated in her affidavit, which the appellant sought to adduce in this hearing, that Miss Moore attended her office to give a statement which she refused to take and she warned her about perjury. The slightest import of this evidence would be the lawyer's refusal to take Miss Moore's statement but we cannot speculate or be conclusive as to why she might have done so. Miss Moore made no mention of that meeting. She said, instead, that she was taken by force to a female lawyer before whom she signed a document and promised to return to sign another but decided against doing so. Mrs Williams also referred to Miss Moore giving a statement to "a lawyer" but there was no clarity as to the nature of the statement and whether it was before the same lawyer who drafted the recantation affidavit.

[107] From all indication, the recantation affidavit was prepared and filed, in this court, by the attorney-at-law to whom Mrs Williams said she gave the handwritten letter, in May 2018, after it was signed by the JP in February 2018. When this was done and by what means the instructions were given for the recantation affidavit, have not been established. The lawyer who prepared it might have been able to shed some light on the matter but he was not called as a witness. Nonetheless, as it is not in dispute that Miss Moore signed the recantation affidavit before the JP, the determination of whether it is well capable of belief depends on how she came to sign it and the integrity of its contents.

[108] Mrs Williams' evidence was that she took the document (the draft recantation affidavit, as confirmed by Miss Moore) from the lawyer to Miss Moore, in May Pen and Miss Moore read it and made changes, after which Mrs Williams took possession of it. Miss Moore did not deny making changes to the document but she did not accept telling Mrs Williams that the lawyer "didn't put everything" and that she was "pressured by the

police " to tell lies about the appellant. We consider that Miss Moore was heard saying those things in the video recording which was generated by Mrs Williams. Miss Moore was clearly engaged in subterfuge and, contrary to her assertion, she was familiar with the contents of the recantation affidavit and was not entirely truthful about the extent of her participation in deciding its contents. But also important was that she was engaged in some sort of a conspiracy with Mrs Williams and others, to 'fix' a document that would stand up in court. She was also concerned with 'fixing it' in such a way that would not cause trouble for her because she laboured under the misapprehension that a judge or the Court of Appeal had directed that the document be done. Mrs Williams was concerned that there should be a call to the appellant, by her, to verify or confirm the contents. We find these aspects of the video evidence to be particularly concerning and material to the question of whether the contents of the recantation affidavit are capable of belief.

[109] Miss Moore's evidence that she had been pressured to secure the appellant's release was referenced in the cross-examination of Mr Griffiths, when he was asked about an alleged exchange between himself and Miss Moore, as depicted in one of several videos annexed to his affidavit. Mr Griffiths was alleged to have asked Miss Moore: "Wha happen wid Bobo" [and Miss Moore answered], "Dem did waan me fi let him go enuh". That portion of the exchange was not denied by Mr Griffiths. Although we did not hear it in any of the audible and intelligible fragments of the videos, we do not think that the text of any such answer given by Miss Moore would support a conclusion that there was a voluntary recantation. Neither would it be supportive of her evidence that her answers to questions posed by Mr Griffiths, were scripted by Mr Griffiths, as part of a conspiracy to force her to recant.

[110] It was contended that the recantation proved the appellant's innocence. However, we consider it to be significant that neither the handwritten letter nor the recantation affidavit disclosed any compelling material detail to support that conclusion and the statements contained in the recantation documents, to our mind, do not sufficiently or convincingly explain why the evidence, at trial, was a falsehood. Miss Moore also stated,

in her oral testimony, that she had posed the question to Mr Griffiths, in the video recording – "you know Rayon not innocent?" - but he had failed to record that. This aspect of her evidence was not challenged. We make the observation that any such rhetorical question would not be consistent with an unequivocal position that the evidence, at the trial, was a falsehood. We are also of the view that the delay of the purported recantation undermines its credibility. The purported recantation would have come some eight years after Miss Moore's statement to the police about the appellant's purported role in the killing, and only after the refusal of leave by the single judge for the appellant to appeal his conviction, but there was no reason given for the delay.

[111] Evidence of external influence and manipulation colour the retraction, as seen in the constant presence of Mrs Williams at each important juncture in the preparation of the recantation documents and by her comment that she would have to call the appellant in relation to the contents of the affidavit. That kind of influence coupled with Miss Moore's evidence that she (Miss Moore) was forced to have three-way telephone dialogues with the appellant and Scuffler, on Mrs Williams' phone, whenever a document was to be prepared, read or signed, makes it apparent that these documents were produced "in circumstances which give rise to considerable suspicion, and which cry out for explanation" (see **Asif Ibrahim Patel and Ors v The Queen** [2010] EWCA Crim 1858, at paragraph 40).

<u>The reason given for the alleged false evidence, at the trial</u>

[112] The handwritten letter purported that Miss Moore was pressured by the police officer and she was afraid of the police because they had killed her two sons. The recantation affidavit expanded the reasons proffered for Ms Moore's purported retraction. It not only indicated that she was under a lot of pressure from the police and was afraid but suggested that there was a named perpetrator other than the appellant - " a man name Maragh "- who had eluded the police and met his demise before he could be caught. This was established by the recantation affidavit as a sufficient reason for the false accusation against the appellant. The typed letter (which we now refer to for the sake of

comparison only), gave an entirely different reason for the appellant being chosen as 'the fall guy' so to speak. This was that the police did not like him because he was an area leader and they wanted to get him off the streets. Miss Moore was supposedly complicit because of a promise from the police "to step up a big link for [her]." Here, we pause to make the observation that "step up a big link for [her]" does not, on the face of it, suggest a threat but rather an incentive. We also observe that the typed letter named a 'Mr Peart' as the police officer who had allegedly forced Miss Moore to give incriminating evidence against the appellant, but neither the source nor the contents of that letter were verified, and Miss Moore did not accept the signature on the letter as hers.

[113] There was no detail, in the recantation documents, about the "the police" who supposedly pressured Miss Moore. We do not know who they were or when the alleged pressure would have been exerted. It also concerns us that the three documents evincing a purported recantation, differed significantly on a possible motive for the alleged 'conspiracy' to fabricate the evidence, at the trial, and there was no explanation for the differences. Not only was there a paucity of information in relation to the allegations of coercion by the police but there was also no evidence that those allegations had ever been reported or were the subject of any investigation. The explanation attributed to the alleged police co-conspirator, Mr Peart - that the police could not find Maragh and he subsequently died - came months after the handwritten letter was purportedly written, and struck us as having been contrived. We are, therefore, of the view that the information contained in the recantation documents does not advance the appellant's application for the fresh evidence to be adduced.

[114] The claim that Miss Moore gave false evidence, at the trial, because she was pressured, also contrasts starkly with her evidence that she had gone to the police voluntarily and given her evidence freely. Miss Moore testified that she went to the police station and gave her statement about the murder hours after it occurred. This would have preceded the search for Maragh and his death. But from the text of the recantation affidavit, the alleged conspiracy with the police supposedly occurred, not only subsequent

to their search to locate Maragh, but after he had been supposedly killed. There was no evidence that any subsequent statement had been given by Miss Moore. And there was no indication, at the trial, that the statement which Miss Moore gave the morning after the killing and prior to the alleged death of Maragh, differed from her evidence, four years later, in court, on the issue of whom she saw kill the deceased. There was also no evidence that she had, at any time after giving her initial statement, changed its contents to reflect "lies about the appellant" which were allegedly orchestrated by the police.

[115] The major conflicts, established in the evidence at trial, concerned: whether the perpetrator was wearing a peak cap; whether Miss Moore had seen him for 15 seconds as against five minutes; and whether she had omitted in her statement that she bought 'franks' from him in the morning preceding the killing. There was no challenge to Miss Moore's testimony on the basis that she had 'changed her mouth' about who had killed the deceased; and the jury rejected the bad motive theory, advanced by Mrs Williams, and that Miss Moore had not seen when the deceased was killed. Miss Moore also withstood the scrutiny of cross- examination, and on the face of the record, there was no reluctance to give evidence.

[116] As indicated earlier, one of the reasons attributed to Miss Moore for allegedly conspiring with the police to tell lies on the appellant was that she was afraid of the police because they had killed her two sons and her baby father. From the video recording, by Mrs Williams, we know that Miss Moore was complicit in providing that reason. It is nevertheless, not believable that she was afraid. Firstly, she testified, at the trial, that she voluntarily gave a statement about the killing. Secondly, she gave evidence then that her sons had already been killed. Thirdly, she said in her oral testimony, before us, that the police told her that they did not know who had killed her baby father. Fourthly, there is testimony that, in 2017 and 2021, she made reports to Miss Muir, a police officer, about being pressured to retract her evidence. Fifthly, prior to the trial and subsequently Miss Moore agreed to go on the Witness Protection Programme for her own safety. Lastly, she said, at the trial, that she was giving the evidence of her own free.

[117] According to the second affidavit of Mrs Williams, prior to the trial there was "bad blood" between the appellant and Miss Moore, which motivated her to give the incriminating evidence. As already indicated, that issue was raised and rejected by the jury at trial and we heard no testimony about it. The evidence to which we give much weight is Mrs Williams' video recording which is redolent of a conspiracy among a number of players including herself, and is supportive of a conclusion that the contents of the recantation affidavit were geared toward 'designing' a document that would find favour with the court for the appellant's release from prison. Without more, it is difficult to perceive any reason, other than those Miss Moore gave, at the trial, to explain a motive for her testimony. On the contrary, the reasons given for her supposedly false evidence, at the trial, are implausible and incapable of advancing the case for the admission of the appellant's fresh evidence.

The reason for the purported retraction

[118] The reason Miss Moore supposedly gave for the recantation is relevant to our consideration of the admissibility of the fresh evidence. The Crown has observed that there has been no accounting for the lapse of four years (after trial) for seeking to retract her testimony and no reason proffered for a retraction of her evidence except that Miss Moore had "now" become a child of God and wanted to "clear her conscience". But, some four years earlier, while giving evidence at the trial, Miss Moore gave that very reason for deciding to make a voluntary statement to the police, incriminating the appellant. We have concluded that since Miss Moore claimed to already be a professing Christian at the time she gave the incriminating evidence, that reason could not possibly sustain the plausibility of the purported retraction. There was nothing new that could reasonably establish the basis for a change of heart. We believe, therefore, that the reason given for the purported retraction of evidence is not supportive of a conclusion that the fresh evidence is well capable of belief.

Impact of the oral testimonies on the admissibility of the appellant's fresh evidence

[119] We have already assessed the oral testimony of Miss East and found that it does not support a conclusion that the appellant's fresh evidence is well capable of belief. We now turn to assess the oral testimonies of the other witnesses received *de bene esse*.

Mr Griffiths and his video recordings

[120] Mr Griffiths said that he clandestinely video-taped Miss Moore. As far as we were able to glean, Miss Moore was sitting in a room around a small table and Mr Griffiths was sitting opposite to her. Miss Moore was seen with a phone in hand. Although Miss Moore stated that there was a script, no paper was visible. Mr Griffiths accepted that Miss Moore was being prompted by the questions that he asked of her. Most of those recordings were, for the most part, inaudible; and the audible fragments did not afford us a coherent dialogue from which any reasonable inferences could be drawn. For instance, it was not clear what questions were being answered and what were the full answers. As indicated earlier, Miss Moore was heard speaking about owning firearms and violence associated with certain of her interactions but, generally, the exchange was unintelligible because of the absence of both text and context. We were therefore limited in our ability to scrutinize the context and contents of the video recordings.

[121] Mr Griffiths' evidence that he video-taped the conversation for the purpose of protecting his brother, is incapable of belief, he having admitted that there was nothing said on tape about his brother. Much of what Mr Griffiths stated that he heard from the mouth of Miss Moore including that she "sink Bobo and she will do it again" was also not confirmed by the video recordings. We were, therefore, unable to infer that the videos are supportive of a conclusion that the purported retraction of the evidence is credible.

[122] Mr Jethro Green's evidence did not definitively confirm Mr Griffith's evidence that the videos were recorded on 9 October 2020 and there was no admissible evidence as to the date when Miss Moore would have first learnt about the videos. We observe that a report was made to the police by Mr Griffiths but the police receipt did not disclose or

establish that it was about Miss Moore or what the report pertained to. Mr Griffiths' evidence was not supportive of a conclusion that the appellant's fresh evidence is capable of belief. Also, the transcript produced by Miss Stultz could not authenticate the contents of the video recordings or be used as an aid to understanding them for the principal reason that they were mostly inaudible and we were not convinced that the text was a verbatim transcription of the recordings. Her evidence was also unreliable because of the deficits noted earlier. In the circumstances, we are not of the view that the transcription evidence or the testimony of Miss Stultz's would advance the case for the admission of the appellant's fresh evidence.

Testimony from other witnesses

[123] Testimony on both sides revealed that there was a discussion between Mrs Williams and Miss Moore about a possible retraction of the incriminating evidence she gave. According to Mrs Williams, when she visited in 2015, Miss Moore shared that "she turned Christian and wanted to clear her conscience" but Miss Moore "never called back". There was no further dialogue between them until January 2018 (a month before the handwritten letter was purportedly written and signed) when, according to Mrs Williams, she alerted the appellant's lawyer, to the meeting with Miss Moore and Miss Moore's indication that she had told a lie on the appellant. By contrast, Miss Moore said that Mrs Williams and her daughter turned up at her house for the purpose of getting a letter from her to secure the appellant's release and she acquiesced, out of fear for her life, but she had no intention of and did not produce any letter.

[124] As indicated earlier, in Mrs Williams' video evidence, Miss Moore admitted that she "gave them" a letter to say she was pressured by the police to give false evidence, at trial. Although it is not clear whether it was the handwritten letter she was speaking about, that evidence clearly diminished Miss Moore's credibility, in relation to whether she had given the family a letter to assist in procuring the release of the appellant. Notwithstanding, there was agreement on both sides that between 2015 and 2018 Miss Moore kept changing her residence and phone number. Miss Moore's explanation for not

making contact with Mrs Williams after the home visit in Jackson Town was that her family was "terrorizing her" and that there were efforts, by family members and others, to find her between 2015 and 2018. In her bid to avoid them, she did not call, and kept moving from place to place and changing her phone number. She also said that despite such efforts, there were encounters between 2017 and 2018, in Kingston, Manchester, Trelawny and Clarendon (with Mrs Williams, other family members and "two men"), and at least one of those visits had caused her to complain to Miss Muir, in the ODPP.

[125] The evidence of Mr Griffiths that he visited Miss Moore in Harmons, Manchester supports her evidence that she moved from Jackson Town, Trelawny, where she had been living at the time of Mrs Williams' visit. Mr Griffiths had also, while being cross-examined, retracted his averment that the reason Miss Moore had given him for moving from place to place was that she was trying to avoid her creditors. It is also material that Miss Moore's whereabouts were unknown, in 2019, when this appeal first came on for hearing.

[126] The allegations of coercion and manipulation were denied by Mrs Williams and other persons implicated. Mrs Williams, in particular, testified that she did not see or speak to Miss Moore between 2015 and 2018, that is a period of some three years after Miss Moore supposedly told her that the appellant was innocent. Furthermore, Mrs Williams indicated that she did nothing with that information until, some three years later, in 2018.

[127] In our view, any alleged inaction for three years, on Mrs Williams' part, would have been incongruous with the receipt of supposedly credible information which might have exonerated the appellant. We think it quite unlikely that Mrs Williams would not have shared information about a promised recantation with her son, given the possibility that it could exonerate him. There is no indication that she shared with him any information which she said was given to her, voluntarily, by Miss Moore. We know from Mrs Williams' testimony that there was interest in the outcome of the appellant's appeal since she testified that she had talked about it while visiting with him in prison and had, along with

her heavily pregnant daughter, gone to Jackson Town, Trelawny, in 2015, to discuss a recantation.

[128] Although, in oral testimony, Mrs Williams denied speaking with the appellant by phone, her own video recording had audio to the effect that he was to be consulted by telephone about the contents of the recantation affidavit. This evidence is supportive of Miss Moore's testimony that the appellant was, by telephone contact, exerting influence over the contents of the recantation documents, that Mrs Williams was the appellant's agent and that Miss Moore was manipulated and or coerced into producing and/or signing the recantation documents. Although, generally, there was an absence of coherent evidence of the interactions between Mrs Williams and Miss Moore on the purported recantation and much of the interactions that there were seemed contrived, as far as we were able to distil Mrs Williams not only coordinated the activities but her adverse influence proliferated the process by which the recantation documents were obtained. For instance, she had taken or accompanied Miss Moore to the appellant's attorney's office to give a statement; had taken the draft recantation affidavit back and forth between the lawyer and Miss Moore; had been engaged, along with Miss Moore, in what seemed like a 'conspiracy' to 'fix the document' to favour a desired outcome in the court; had met up with Miss Moore in different places about the documents; and had accompanied or taken Miss Moore to a JP to have the documents signed and afterwards returned one or both to the appellant's lawyer. Those circumstances, make it capable of belief that the recantation documents were solicited by members of the appellant's family.

[129] It was not disputed that, in the video evidence exchange, Mrs Williams was heard to say that Miss Moore had to go to the lawyer anyway, and "when [she] reach home [she would] call Rayon cah him know more bout dis". As already indicated, that exchange was at the very least suggestive of a collaboration on the contents of the recantation affidavit, which undermines the authenticity of the recantation. So too was the evidence from the JP that, at the signing of the handwritten letter, Miss Moore was debating "with the ladies present [including Mrs Williams] on exactly how she wanted to word the

information contained in the document". If the JP's averment is correct, it begs the question as to why Miss Moore would have needed to be debating with Mrs Williams about the contents of a document which was supposedly wholly Miss Moore's. There was also testimony from the JP that, "the person who requested [his] signature on the document showed [him] the document (referring to the handwritten letter) …[and] the other woman...introduced Sharon Moore … [and said], 'Justice, me carry a lady fi sign a document'…" That evidence suggests that it was Mrs Williams who represented to the JP that they were before him for the signing of the handwritten letter.

[130] Quite apart from the testimony of Miss Moore that she was forced to sign the recantation documents and the 'conspiracy' disclosed by the video recording, there were other instances of post-trial manipulation disclosed in the evidence. Such manipulation was noticeable from Mrs Williams' conduct, starting in January 2018 (prior to the date of the handwritten letter in February 2018), when according to her testimony, she met up with the appellant's attorney-at- law and as a consequence of their discussion, called Miss Moore at the same time and discussed the recantation. Mrs Williams stated that she "immediately delivered the message" and Miss Moore called in early February 2018 and "decided" that they should meet in May Pen in front of the police station for her (Mrs Williams) to collect the letter that Miss Moore wanted to send to the DPP. Consequently, they met in May Pen to "sign a confession letter" which did not happen. So, Miss Moore called again on 28 February 2018 and Mrs Williams took Miss Moore to the JP before whom she signed the handwritten letter. Mrs Williams then took possession of the letter and facilitated its safe delivery to the lawyer.

[131] These matters weigh heavily in the assessment of the integrity of the recantation documents and whether they should be admitted in the interests of justice. A review of the authorities shows that it is only if the fresh evidence is deemed trustworthy or well capable of belief that it should be admitted. These circumstances make it doubtful that the purported retraction is trustworthy in the sense of being capable of belief. We should also say that whilst there is credible evidence that Mrs Williams was acting for the

appellant's purpose and as his agent, there was no direct independent evidence to support Miss Moore's claim that the appellant was himself forcing her to retract her evidence. Except for what Mrs Williams said in the video recording, about having to call the appellant because he knew more about the matter, the only other pertinent information we were provided, as regards the appellant's involvement, in securing the purported recantation, was what Miss Moore told this court, which was that he had consistently directed and threatened her, in relation to signing the documents. There was no indication, in the appellant's affidavit or otherwise, that he knew anything that had taken place in relation to obtaining documents for his appeal (including what was alleged to have transpired in Jackson Town). The substance of his affidavits was that he played no role. This, we also find incapable of belief.

[132] In the circumstances, we find Miss Moore's evidence - that she was unwilling to deliver on the promise to retract her evidence at the trial - a more plausible explanation for the delay between the time of her supposed expression of remorse and desire to make things right (in 2015) and when the purported documents of recantation were produced, in 2018. The conduct of Mrs Williams (or more aptly, her inaction) also undermines the reliability of the testimonies of both herself and her daughter - that when they visited Miss Moore in Jackson Town, she had voluntarily told them that the appellant was innocent and that she had lied about the appellant's involvement in the murder in her evidence, at the trial. The many contradictions in Mrs Williams' evidence also make her evidence incapable of belief.

[133] Miss Diana Williams' testimony that Miss Moore was in regular contact with the family and visited the family home on several occasions since the trial, was contradicted by Mrs Williams who stated that Miss Moore did not visit; that since they visited her in Jackson Town she did not call; and they did not speak again until 2018, after which she could not find Miss Moore. We think it implausible that Miss Moore would have been paying visits to the appellant's home, after the conviction, given that Miss Moore was said to have been on the Witness Protection Programme, during the trial, for fear of reprisal.

Miss Diana Williams did not establish how she came by the typed letter that was annexed to her affidavit. Considering the lack of detail in her testimony, on materially significant matters, and the undermining of her credibility, Miss Diana Williams' testimony is not supportive of a conclusion that the appellant's fresh evidence is capable of belief.

[134] The evidence received from the JP was unreliable in parts. For instance, he deposed that he met up with Miss Moore on three occasions including 10 April 2021 but other evidence revealed that he could not have met with her on that date as by then she had returned to the Witness Protection Programme. He had also admitted in cross-examination that certain evidence in his affidavit did not reflect accurately what Miss Moore had told him. His evidence that the handwritten letter was pre-signed, that Miss Moore signed it in his presence and that Mrs Williams made the request of him to witness Miss Moore's signature, though capable of belief, did not compel us to a conclusion that the appellant's fresh evidence is plainly capable of belief and should be admitted in the interest of justice.

[135] Having reviewed the testimonies of the witnesses, we are of the view that the fresh evidence sought to be admitted, by the appellant, is plainly incapable of belief.

Impact of the repudiation and the credibility of Miss Moore on the status of her evidence at the trial

[136] We turn now to the assessment of the fresh evidence adduced by the Crown to challenge the credibility of the purported recantation. The Crown posited that the contents of the repudiation documents support the contention that Miss Moore was forced and threatened into making the retraction by agents of the appellant; undermine the credibility of the recantation; and reaffirm Miss Moore's position that she was being truthful in her evidence, at the trial. Conversely, counsel for the appellant contended that the Crown's fresh evidence is contrived and further affects the credibility of Miss Moore and the reliability of her evidence, at the trial.

[137] It was Mr Clarke's contention that there was no satisfactory explanation for Miss Moore's delay in reporting the alleged threats, by family members, until some six years after Mrs Williams visited her in Jackson Town, in 2015. But both Miss Muir and Miss Moore testified that there was a report about threats, in 2017. It is noteworthy that counsel's cross-examination of Miss Muir was substantially about her not making a written note of the alleged report and whether she had formed the view that Miss Moore's life was in danger. It should also be observed that it was suggested to Miss Moore that no written report (as distinct from an oral report) was made and she agreed. We believe that Miss Muir's testimony is capable of belief and (although in no way corroborative of Miss Moore's evidence about threats of personal violence to retract her evidence) lends some support to Miss Moore's evidence that her complaint in 2021 was not a recent concoction. Although Miss Muir made no record of the first report (which is clearly unacceptable), she seemed certain that the first report was made before she embarked on leave from work, in 2017. There is no apparent reason why she would have lied about this.

[138] Counsel for the appellant also argued that the Crown's fresh evidence further affects the credibility of Miss Moore and the reliability of her evidence, which render the conviction unsafe. Specifically, Miss Moore would have demonstrated a propensity to lie under oath, having lied about several material things. A similar argument was raised and rejected by the Privy Council, at para. 84 of **Maharaj v The State**:

> "The Board regards it as axiomatic that evidence revealing a witness to be a fantasist may lead to an inevitable conclusion that their evidence at trial cannot be relied upon. In which case, the impeachment value of the evidence of retraction exists beyond its substantive veracity. However, there is no reasonable basis to regard the mere fact of a retraction to be determinative of admissibility. This is supported by *R v Flower* [1966] 1QB 146 at 150-151:
>
> > 'Mr McKinnon contends that, even if we were utterly to disbelieve the evidence which Mrs Brown gave in this court, we ought still to order a new trial because it would have been established that she was an

> unreliable witness and the jury, so he says, should be given an opportunity to reconsider her evidence in this light. It is to be observed that if that is the correct approach the function of this court in assessing the credibility of fresh evidence largely disappears, and, if any key witness has second thoughts after the trial, a quashing of the conviction would be almost bound to follow, because if this court believes the witness it would itself be bound to set the conviction aside, whereas if it disbelieves the witness it would have to send him back discredited, with a view to his being disbelieved by the jury at a new trial. If the witness's new version of the case is disbelieved this may very well show he is now unreliable, but it is a fallacy to assume from this that he was also unreliable at the trial. Witnesses may have second thoughts for a variety of different reasons. Some become emotionally disturbed, others brood on the effect of their evidence, whilst others are subject to more tangible pressures to induce them to depart from the truth. It is the witness's state of mind at the trial which matters and this ought to be judged by reference to the circumstances prevailing at the time. It is trite to say that every case depends on its own facts but in our view there is no general requirement for a new trial merely because the witness's account in this court differs from that given in the court below. So much depends in every case upon the reason, if any, given by the witness for having changed his mind or his testimony.'"

[139] On the strength of that authority, a recantation which is found to be incapable of belief will not invariably occasion the quashing of a conviction. This is more so in circumstances where the recantation is believed to have been induced by threats or force. Moreover, repudiation of the recantation, without more, affirms the evidence at the trial. We note that there was no admission by Miss Moore that she had perjured herself at the trial. Her explanation for signing mutually contradictory affidavits was that she had been forced to retract her evidence. She was cross-examined on that evidence and despite being discrepant on some issues, was consistent in the broad details of the circumstances which she said led to her signing the recantation documents.

[140] Miss Moore's assertion that the recantation was not genuine, is consistent with significant aspects of the evidence, including the conduct of family members. We have already pointed to the adverse influence of Mrs Williams in the creation and execution of the recantation documents; the suspicion surrounding the handwritten letter; the discrepancies among the recantation documents; the seeming conspiracy engaged in by Miss Moore and others, to 'manufacture' documents as disclosed in the video recording commissioned by Mrs Williams and shown in this court. These have resulted in the failure by the appellant's witnesses to advance the appellant's case for admission of the fresh evidence. It has also not eluded us that no credible and plausible explanation has been advanced as to why Miss Moore would have falsely accused the appellant, 'voluntarily' recanted and then repudiated the recantation.

[141] Counsel for the appellant pointed us to a number of authorities which could either be distinguished on the facts or were plainly unsupportive of the appellant's case. The most significant were **R v Smith**, in which there was post- trial evidence that it was the practice of the prosecution witnesses to concoct evidence and the Crown conceded that it was unable to argue, in light of the matters that had emerged since the hearing, that the verdicts were safe or satisfactory; **R v Twitchell** where the appeal was allowed on similar grounds; **R v Blackwell** in which new evidence gave rise to a real doubt that the complainant, who was found to have a demonstrable propensity to lie, had been assaulted by the appellant or anyone; **R v Conway** in which the court held that witnesses needed to be called so they could be cross-examined on alleged inconsistent statements by the main prosecution witnesses, who allegedly made post- trial statements which would support the account that the appellant gave in his defence; **R v Ditch** which dealt with a post-trial confession by a convicted co-defendant that exculpated the appellant who was cross-examined and found to be a credible witness; and **R v Ishtiaq Ahmed** in which a main witness who had made post-trial statements retracting her evidence, at trial, was able to convince the Court of Appeal that she had made her later statements as a result of threats or blackmail, notwithstanding discrepancies between her various accounts.

[142] Having heard the testimony of Miss Moore and that of the several other witnesses, we are of the opinion that the purported recantation is incapable of belief. Miss Moore's testimony supported the evidence contained in the repudiation documents that she was compelled to recant because of intimidation and threat of personal violence against her. The absence of specifics about the source, contents and circumstances in which the recantation documents originated as well as there being no plausible reason for them to have been voluntarily created by Miss Moore, counters the appellant's case that she made overtures to the appellant's family and worked willingly to procure the recantation documents. Mrs Williams' participation in the preparation and execution of the recantation documents; the manner in which she went about doing so; and her interactions with Miss Moore were redolent of post-trial manipulation. The integrity of the fresh evidence was also compromised by the inconsistencies in the evidence to support it. There being no credible testimony to rebut Miss Moore's assertion that the evidence she gave against the appellant at the trial was the truth, we believe that the appellant's fresh evidence is incapable of belief and that its admission is not "necessary or expedient in the interest of justice". Neither is the additional fresh evidence supportive of a conclusion that the retraction was voluntary, genuine and well capable of belief. Accordingly, ground four of the grounds of appeal and grounds four and six of the supplemental grounds fail.

The appeal

[143] The appellant applied for and was given permission to argue the following grounds of appeal, filed 27 October 2021.

> "1. The address to the jury by the prosecutor gave rise to a miscarriage of justice.
>
> 2.The learned judge failed to give appropriate and sufficient directions to the jury to cure the inappropriate and unfair comments by the prosecutor in his address to the jury. In any event, if such directions were incapable of curing the unfairness occasioned by the prosecutor's comment, the learned judge should have discharged the jury.

> 3. The absence of the record of proceedings breaches section 16 (7) of the constitution [sic] and prevents this Court of Appeal from carrying out a proper review of the impugned comments of the learned prosecutor pursuant to its duty under section 14 of the Judicature (Appellate Jurisdiction) Act.
>
> 4. The fresh evidence in this case goes to the heart of the conviction. It affects the credibility, reliability and character of the sole eyewitness. It renders the appellant's conviction on the mere words of sole eyewitness unsafe after a detailed assessment of the fresh evidence.
>
> 5. The sentence passed by the learned judge was not appropriate in all the circumstances of the case. The sentence passed warrants the court exercising its statutory power under section 13(3) of the Judicature (Appellate Jurisdiction) Act to pass an appropriate sentence."

[144] However, on 17 November 2021, the appellant filed a notice of further supplemental grounds of appeal, recasting ground three, tweaking ground four and adding a sixth ground, which appears to be an elaboration of ground four. The court granted permission for the supplemental grounds to be argued. The six further supplemental grounds appear below:

> "Ground 1: The address to the jury by the prosecutor gave rise to a miscarriage of justice.
>
> Ground 2: The learned trial judge failed to give appropriate and sufficient instructions to the jury to cure the inappropriate and unfair comments by the prosecutor in his address to the jury. In any event, if such directions were incapable of curing the unfairness occasioned by the prosecutor's comment, the learned trial judge should have discharged the jury.
>
> Ground 3: The absence of the record of proceedings in relation to the closing addresses of the defence and prosecutor, abrogates, abridges, and infringe[s] the spirit of section 16 (2) of the Judicature (Supreme Court) Act. It also contravenes section 16 (2) and 16 (8) of the Constitution. The true effects of these breaches is a miscarriage of justice and inability of the superior court of review to, on the facts of this case, truly certify the safeness of the impugned conviction.

> Ground 4: The fresh evidence in this case goes to the heart of the conviction. It affects the credibility, reliability and character of the sole eyewitness. It renders the appellant's conviction on the mere words of the sole eyewitness unsafe after a detailed examination of the fresh evidence.
>
> Ground 5: the sentence passed by the learned trial judge was not appropriate in all the circumstances of the case. The sentence passed warrants the court exercising its statutory power under section 13(3) [sic] of the Judicature (Appellate Jurisdiction) Act to pass an appropriate sentence.
>
> Ground 6: The fresh evidence of Sharon Moore, the prosecution's sole eyewitness as to fact, that she lied when she gave evidence at the trial of the material matter casts doubt on the safety of the conviction. In all the circumstances of this case, the Court cannot consider that no substantial miscarriage of justice has actually occurred in this matter."

Submissions on ground one

The appellant's submissions

[145] The complaint under this ground is that the learned prosecutor, in his closing address to the jury, commented that the appellant never said in his unsworn statement where he was at the time of the incident. This comment, it was argued, crossed the line of what is permissible in a closing address. **Randall v The Queen** [2002] 1 WLR 2237, **R v Russo** [2004] VSCA 183 (19 November 2004), **Livermore v R** [2006] NSWCCA 134 (20 December 2006) and **Eddie Dean Griffin v State of California** 380 U.S. 609, 85 S. Ct. 1229 (1965) were cited in support.

[146] It was, counsel for the appellant, Mr Clarke's further submission that the prosecutor's comment, on the face of it, specifically invited the jury to speculate or draw improper inferences on the appellant's exercise of his common law right to silence and his constitutional right not to be compelled to testify against himself. The court was referred to section 16(6)(f) of the Constitution.

[147] It was also submitted that the prosecutor's comment was not plainly relevant to the charge but invited the jury to speculate. Accordingly, the comment should have been

disallowed. The latter submission was grounded on **Noor Mohammed v The King** [1949] AC 182 and **R v Fleming** (1988) 86 Cr App R 32; [1987] Crim LR 690. In fine, the prosecutor's comment was prejudicial with no probative value and rendered the appellant's trial unfair.

Ground two

Appellant's submissions

[148] Mr Clarke, submitted, in essence, that the learned judge's treatment of the prosecutor's remark was inadequate and amounted to a misdirection or non-direction, resulting in an unfair trial. The learned judge ought properly to have instructed the jury to disregard the prosecutor's comment, it was argued. Further, the learned judge failed to make it clear to the jury that the appellant's silence on the issue was not evidence that could satisfy them of his guilt. In any event, even if the recommended directions had been given, it is unlikely that the directions would have had the desired curative effect. For these submissions, **Arthurton v R** [2005] 1 WLR 949 was cited.

[149] The cumulative effect of the prosecutor's comment and the learned judge's treatment of it renders the conviction unsafe. This undermining of the conviction is so egregious, it was submitted, that it does not admit of the application of the proviso under section 14 of JAJA.

Ground three

Appellant's submissions

[150] It was submitted that section 16(2) of the Judicature (Supreme Court) Act ('the JSCA') requires the shorthand writers to record the entire proceedings on indictment in the Supreme Court, inclusive of the speeches of prosecuting and defence counsel. It was contended that whereas section 16(3) of the JSCA bestows a discretion on the shorthand writers to take only a part of civil proceedings, that discretion does not extend to omitting the recording of the closing addresses in criminal trials. Accordingly, the shorthand writers

were in breach of their duty in failing to record the closing addresses of the defence and the prosecutor.

[151] It was then submitted that the absence of the respective addresses from the transcript of proceedings resulted in breaches of the appellant's constitutional rights. In his written submissions, filed on 27 October 2021, only breaches of section 16(7) and (8) were alleged. However, in the written submissions filed on 17 November 2021, the contraventions complained of concerned sections 16(2) and (8), reflecting the further supplemental ground three, filed on the same date. Mr Clarke then submitted that this court would need the record of proceedings to carry out a proper appellate review of grounds 1 and 2. He posited that the absence of the record of proceedings in this regard, makes it difficult for the court to assess the prosecutor's comments to determine whether the statements were permissible and did not cross any line.

[152] Five areas of possible assistance to the court from the record of proceedings were listed by Mr Clarke. The court is therefore hampered in effectuating its statutory duty to ensure that no miscarriage of justice was occasioned, he argued. Reliance was placed on **Adams and Lawrence v R** [2002] UKPC 14, particularly para. 17 in which their Lordships held that they were hamstrung in their effort to determine the materiality of an irregularity which occurred at the trial, by the absence of part of the transcript.

[153] Since this court is hampered, as Mr Clarke submitted, his further submission was that we should follow our own precedents in **Dwain Brown v R** [2021] JMCA Crim 33, at paras. [16]-[20] and **Evon Jack v R** [2021] JMCA Crim 31, at paras. [40]-[42] and hold that we are thereby prevented from carrying out our constitutional and statutory duty. This entreaty appears to rest on the further submission that the records give a reasonable basis for an argument that there may have been an irregularity in relation to the prosecutor's comment on the unsworn statement. In the absence of the record, this court is unable to assess the materiality of the irregularity and, by extension, unable to say whether the learned judge sufficiently corrected it. In these premises, the fairness of the trial cannot be guaranteed and the conviction should therefore be quashed.

Crown's submissions

Grounds one, two and three

[154] The learned Director of Public Prosecutions' ('the learned DPP') response was tailored to meet the challenges in grounds one, two and three. The learned DPP submitted that the normal practice was that the prosecutor's closing address was not produced, except in cases where the defendant was liable to be hanged. In essence, the learned DPP advanced, the appellant was inviting the court to speculate about what else the learned prosecutor at trial might have said. In her submission, she stated that, the usual practice is that the learned judge would stop the prosecutor, or defence counsel would object where potentially prejudicial material is included in the prosecutor's closing address. In this case, it was argued, the learned judge was quite clear in treating with the prosecutor's comments, when the learned judge commenced her review of the appellant's unsworn statement. To this end, the learned DPP referred the court to relevant sections of the learned judge's summation (pages 294-296, 297 at lines 16-25 and 298 of the transcript).

[155] With characteristic candour, the learned DPP admitted that the comment of the prosecutor about the unsworn statement was unacceptable and should not have been made. She argued, however, that the comment was appropriately addressed in the context of the learned judge's directions on the unsworn statement, bolstered by additional directions on the burden of proof. The learned DPP's submission was that these directions should also be viewed against the background of the learned judge's standard directions where she instructed the jury on their different roles in the trial. The learned judge directed the jury that whereas they were the sole judges of facts, she was the sole judge of the law and, accordingly, they were obliged to take the law from her and apply it (page 197 lines 18-25; page 198 lines 1-25). Therefore, the learned DPP concluded, the jury would have understood that it was mandatory that they take the law from her, and not the prosecutor, notwithstanding the learned judge's later use of the word "advise" in telling the jury that the appellant had the right to remain silent (page 297 line 24 of the transcript).

[156] It was the learned DPP's further submission that the learned judge was fair to the appellant in conducting a review of his unsworn statement, something the learned judge was not required to do. Reliance was placed on **Mills, Mills and Mill v R** (1995) 46 WIR 240, a decision of the Privy Council.

[157] The learned DPP argued that the appellant's submission that the court is not able to conduct a review of the appellant's conviction, without the full text of the prosecutor's address, is misconceived. The learned DPP urged that the learned judge extracted what the prosecutor said and dealt with it. According to the learned DPP, had there been anything else that was impermissible in the prosecutor's closing address, the learned judge would have been obliged to, and we would have seen where she dealt with it. The absence of anything of that nature from the record, gives rise to the inference that nothing else impermissible was said.

[158] The comment having been fully dealt with by the learned judge, the learned DPP's concluding argument was that the comment did not occasion any miscarriage of justice. This court is therefore mandated to make a decision on what is before it, in the circumstances where the learned judge was very detailed, the learned DPP concluded. Accordingly, it was the learned DPP's position that **Randall v R** is distinguishable from this case.

Discussion

Ground three

[159] Having regard to the way Mr Clarke pitched his submissions, it is perhaps more convenient that ground three be considered first. Mr Clarke submitted that our decision on ground three is pivotal to the outcome of the appeal. As we understand the submissions, if we were to conclude that the shorthand writer (now 'court reporter') had a duty to take shorthand notes of the prosecutor's closing speech, and, having failed in that regard, that would stymie this court's ability to review the appellant's conviction,

thus engaging the constitutional provisions; the remedy for which would be the quashing of the conviction.

[160] Three issues arise from this ground. Firstly, does the duty which section 16 (2) of the JSCA impose on the court reporter to record the proceedings of the trial of a person on indictment in the Supreme Court, include the prosecutor's closing address? Secondly, has the right of the appellant to a fair trial within a reasonable time been breached? Thirdly, can this court fairly review the appellant's conviction, without resort to the full text of the prosecutor's closing address to the jury, which does not form part of the transcript of proceedings at the appellant's trial?

Issue #1

[161] The first issue raises a question of statutory interpretation. In order to give context to the ensuing discussion, it is of importance that we quote section 16 of the JSCA. The section reads:

> "16. –(1) There shall from time to time be appointed such number of shorthand writers who shall receive such salary as Government may determine.
>
> (2) Shorthand notes shall be taken of the **proceedings at the trial** of any person on indictment in the Supreme Court, and a transcript of the notes or any part thereof shall –
>
> a) on any appeal or application for leave to appeal be made and furnished to the Registrar if he so directs; and
>
> b) be made and furnished to any party interested upon payment of such charges as may be fixed by rules of court whether the person tried was or was not convicted, or in any case where the jury were discharged before verdict.
>
> (3) Subject to the provisions of subsections (4) and (5) shorthand notes shall be taken of the whole or of any part of the **proceedings at the trial** of civil actions or proceedings in the Supreme Court upon request in writing to the Registrar by any party thereto and a transcript of the notes or any part thereof shall –

(a) on any appeal be made and furnished to the Registrar if he so directs; and

(b) be made and furnished to any party interested upon the payment to the Registrar of such charge, not exceeding five cents per folio of one hundred and sixty words and not exceeding twenty-five per cent of such charge for each carbon copy thereof, as may be fixed by rules of court.

(4) The duties to be performed by the shorthand writers under subsection (2) shall take precedence of the duties to be performed by shorthand writers under subsection (3).

(5) A fee of six dollars thirty cents per day of [sic] five hours and a further fee of one dollar and five cents for every hour or part of an hour over the first five hours, payable in advance unless a Judge otherwise orders, shall be paid to the Registrar for the attendance at the trial of a civil action or proceeding of a shorthand writer.

(6) Rules of court may make such provisions as is necessary for securing the accuracy of the notes to be taken and the verification of the transcript." (Emphasis added)

[162] On a plain meaning interpretation of section 16, the following is gleaned. Firstly, it is mandatory that court reporters take shorthand notes of the proceedings in all criminal trials upon indictment in the Supreme Court, as a matter of course. Secondly, it is mandatory to make and furnish a transcript of the notes or a part thereof, on any appeal or application to appeal, to the registrar if he so directs. Thirdly, it is also mandatory to make and furnish a transcript of the notes or part thereof, to any interested party, upon payment of a prescribed fee, whether or not the person tried was convicted or the jury discharged from returning a verdict.

[163] Fourthly, it is mandatory that shorthand notes of the whole or part of the proceedings at the trial of a civil action or proceedings in the Supreme Court be also taken. Unlike in a trial upon indictment, this is not as a matter of course but upon the written request to the registrar by a party to the proceedings. Fifthly, a transcript of the notes, or any part thereof, shall be made and furnished to the registrar, on an appeal being made, if the registrar so directs. Sixthly, a transcript of the notes or any part thereof

shall be made and furnished to any interested party, upon payment to the registrar of the prescribed fees.

[164] At the heart of this issue lies the breadth of the duty of the court reporter to take shorthand notes. The key phrase in the present section 16(2) of the JSCA is "proceedings at the trial of any person on indictment". This phrase, neither in its long form nor any its shortened versions, "proceedings at the trial" or "proceedings", appears in section 2 of the JSCA (the definitional section). Section 16 of the JSCA is of some antiquity. Although the JSCA dates back to 1880, section 16 was not always one of its provisions. Law 10 of 1960 amended the JSCA by inserting the present section 16. However, the provision as is now set out in the JSCA (apart from the stipulation as to prescribed fees), antedates the amending law 10 of 1960, appearing as it did in previous legislation.

[165] Section 16(2) in the JSCA, which bears directly upon this appeal, is similarly worded as its English counterpart, section 16 of Criminal Appeal Act, 1907 and, therefore, is legislation to which it is in *pari materia*. We quote section 16 of the Criminal Appeal Act, 1907 (see Halsbury's Statutes of England Volume 1V, at page 734):

> "**16. Shorthand notes of trial**. – (1) Shorthand notes shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorised to appeal under this Act, and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the registrar so directs, and furnished to the registrar for the use of the Court of Criminal Appeal or any judge thereof: Provided that a transcript shall be furnished to any party interested upon payment of such charges as the Treasury may fix.
>
> (2) The Secretary of State may also, if he thinks fit in any case, direct a transcript of the shorthand notes to be made and furnished to him for his use.
>
> (3) The cost of taking any such shorthand notes, and of any transcript where a transcript is directed to be made by the registrar or by the Secretary of State, shall be defrayed, in accordance with scales of payment fixed for the time being by the Treasury, out of moneys provided by Parliament, and rules of court may make such

> provision as is necessary for securing the accuracy of the notes to be taken and for the verification of the transcript." (Bold as in the original) (Underlined for emphasis)

[166] The word "proceeding" is given a closed meaning under the English Criminal Appeal Rules, 1908. Rule 52 says:

> "'Proceedings' means the evidence and any objections taken in the course thereof, any statement made by the prisoner, the summing-up, and sentence of the judge of the court of trial, but, unless otherwise ordered by such judge, does not include any part of the speeches of counsel or solicitors."

There can be no question that under the English legislation, upon which the Jamaican statute is fashioned, there was no duty on the court reporter to take shorthand notes of the closing address of the prosecutor.

[167] The corresponding Jamaican legislation dealing with the taking of shorthand notes, at that time, was the Judicature (Appellate Jurisdiction) Law, ('Cap. 178'), enacted 6 November 1935. This law established the Court of Appeal as part of the Supreme Court of Judicature, with jurisdiction to hear and determine appeals from the courts of the colony. Section 3(1) of Cap 178 reads:

> "There shall be established a Court of Appeal (in this Law referred to as 'the Court of Appeal') which is hereby declared to form part of the Supreme Court of Judicature established by the Judicature (Supreme Court) Law, and which shall have jurisdiction and power to hear and determine appeals from the Courts of the Colony specified in this Law, [Cayman Islands, Turks and Caicos Islands, see sections 9, 10 and 14] subject however to the provisions of this Law and to the Rules of Court made under this Law."

It is clear from section 3(1) of Cap. 178 that the Court of Appeal was not established as a specialist appellate court, quite unlike the English Criminal Appeal Court, referred to above. The court's appellate reach extended to all appeals arising in both civil and criminal jurisdictions.

[168] It is against this background that we now set out the provision in the 1935 statute in the 1935 statute, which is the equivalent of section 16 of the JSCA. Section 6 of Cap 178 is quoted in full:

> "1) There shall be appointed such number of shorthand writers who shall receive such salary as the Governor with the sanction of the House of Representatives may determine.
>
> 2) Shorthand notes shall be taken of the **proceedings at the trial** of any person on indictment in the High Court [Supreme Court], and on any appeal or application for leave to appeal a transcript of the notes or any part thereof shall be made if the Registrar of the Court of Appeal so directs, and furnished to the Registrar for the use of the Court of Appeal or any Judge thereof:
>
> Provided that a transcript shall be furnished to any party interested upon payment of such charges as may be fixed by Rules of Court whether the person tried was or was not convicted, or in any case where the jury were discharged before verdict.
>
> 3) Subject to the provision of this subsection shorthand notes shall also be taken of the whole or of any part of the **proceedings at the trial** of civil actions or **proceedings** in the High Court [Supreme Court] upon request in writing to the Registrar by any party thereto and on any appeal, a transcript of the notes shall be made and furnished to the Registrar for the use of the Court of Appeal or any Judge thereof:
>
> Provided always that the duties to be performed by the shorthand writers under the preceding subsection shall take precedence of the duties to be performed by the shorthand writers under this subsection. A fee of half a guinea per day of five hours and a further fee of five shillings for every hour or part of an hour over the first five hours, payable in advance unless a Judge otherwise orders, shall be paid to the Registrar for the attendance at the trial of a civil action or proceeding of a shorthand writer. A transcript of the notes shall be furnished to any party interested upon the payment to the Registrar of such charge, not exceeding sixpence per folio of one hundred and sixty words and not exceeding twenty-five per cent. [sic] of such charge for each carbon copy thereof, as may be fixed by Rules of Court.

> 4) Rules of Court may make such provisions as is necessary for securing the accuracy of the notes to be taken and the verification of the transcript." (Emphasis added)

[169] Consistent with the English legislative policy of including the definition of "proceedings at the trial" in the Rules, and not the substantive law, the meaning of the phrase as it appears in section 6 of Cap. 178 was reserved to the Court of Appeal Rules, 1935 (published in 1936). Rule 35 specifically excluded the speeches of both counsel and solicitor, unless the judge otherwise ordered. Rule 35 of the Court of Appeal Rules, 1935 states:

> "For the purpose of section 6 of the Law [Cap. 178] **proceedings at the trial** shall mean the evidence and any objections taken or legal submissions made in the course of the trial, any statement made by the prisoner, the summing up, and sentence of the Judge of the Court of trial, but unless otherwise ordered by such Judge shall not include any part of the speeches of counsel or solicitor." (Emphasis added)

Put another way, the duty imposed on the court reporter by section 6 of Cap. 178 to take shorthand notes of the "proceedings at the trial", was limited to shorthand notes of the evidence, any objections, any statement made by the defendant and the judge's summation; unless the trial judge directed the inclusion of the speeches.

[170] The Court of Appeal Rules, 1935 continued in force until for a short time after Jamaica gained independence in 1962 (see section 33(1) of the Judicature (Appellate Jurisdiction) Law, 1962). The Court of Appeal Rules, 1962 was published in the Jamaica Gazette Supplement of 11 October 1962. Rule 1(2) revoked the "Court of Appeal Rules, 1935 and all amendments thereto". The drafters of the Court of Appeal Rules, 1962 did not retain the closed meaning of "proceedings at the trial". Instead, the option of saying what "proceedings" included was adopted.

[171] This was addressed in rule 47. Under rule 47(1), the registrar of the Court of Appeal, upon receipt of a notice of appeal, application for leave to appeal or application for extension of time within which to file such notice, is charged with the responsibility to

require the registrar of the court below to furnish her with, among other things, four copies of the proceedings in the court below, together with a like number of copies of the summation.

[172] Rule 47(3) then lists what copies of proceedings should contain, conspicuous by its absence is any mention of the speeches by counsel or solicitor. Rule 47(3) states:

> "(3) For the purposes of this rule copies of proceedings shall contain-
>
> a) the indictment or inquisition and the plea,
>
> b) the verdict, any evidence given thereafter, and the sentence,
>
> c) notes of any particular part of the evidence or cross-examination relied on as a ground of appeal, and
>
> d) such other notes of evidence as the Registrar may direct to be included in the copies of proceedings:-
>
> Provided:-
>
> i. in capital cases copies of the notes of all the evidence shall be supplied, and
>
> ii. upon application by either party to an appeal, a single Judge of the Court or the Court itself may direct that copies of any particular part, or the whole of the evidence be supplied to the Court and to the Director of Public Prosecutions."

[173] There are some notable differences between rule 35 of the Court of Appeal Rules, 1935 and rule 47(3) of the Court of Appeal Rules, 1962, aside from the change in the breadth of the meanings already referred to. Firstly, whereas the former excluded the arraignment, the plea was included in the latter. Secondly, the verdict was not part of the proceedings under the former, while it was specifically included in the latter. Thirdly, under the former, the speeches of counsel or solicitor are expressly excluded, unless the trial judge made an order to include it. However, the latter is silent on the subject.

[174] The Court of Appeal Rules, 1962 remained in force until they were swept away by the Court of Appeal Rules 2002, ('CAR 2002') which came into force on 1 January 2003, subject to the transitional provisions contained in rule 1.17 of the latter rules (see rule 1.1(1) and (2) of the CAR 2002). The term "proceedings at the trial", which was whittled down in the Court of Appeal Rules, 1962 to "proceedings" was substituted with the words, "the record" in the CAR 2002. Rule 3.7(1) of the CAR 2002 lists what comprises "the record" of appeal in criminal appeals. Rule 3.7(1) is set out below:

> "For the purpose of this rule '**the record**' means -
>
> a) the indictment or inquisition and the plea;
>
> b) the verdict, any evidence given thereafter and the sentence;
>
> c) notes of any particular part of the evidence relied on as a ground of appeal;
>
> d) any further notes of evidence which the registrar may direct to be included;
>
> e) the summing up or direction of the judge in the court below; and
>
> f) copies of any undertakings given pursuant to rules 3.14 [deferment of the payment of a fine until the conclusion of the appeal] or 3.21 [bail pending the determination of the appeal]." (Bold as in the original)

Notwithstanding the change in appellation from "proceedings at the trial" to "proceedings" and latterly to "the record", the constituent parts underwent but one variation; that is, rule 47(1) of the Court of Appeal Rules, 1962, "the summing up or direction of the Judge of the Court below" conjunctively followed "copies of the proceedings". What is conspicuously absent from this list is any reference to addresses to the jury, whether made by the counsel or solicitor.

[175] It is of some significance that the legislative practice of breathing life into the meaning of "proceedings at the trial", and its permutations, through the mouth of the various rules of court, persisted after what is now section 16 of the JSCA ceased being

part of the appellate court's enabling statute. By virtue of section 1 of the Judicature (Appellate Jurisdiction) Law, 1962, which came into operation on 5 August 1962, Cap. 178 was replaced as the law governing the Court of Appeal. At this juncture the Court of Appeal ceased being a part of the Supreme Court. Whereas under the previous dispensation both courts were serviced by one registrar, when the courts became separate entities, each came to have its own registrar. This appears to be the background against which the now section 16 came to be inserted in the JSCA. Remarkably, a similar provision to section 6 of Cap. 178 was not inserted in either the Judicature (Appellate Jurisdiction) Law, 1962 or the Court of Appeal Rules, 1962.

[176] What is crucial, certainly for this appeal, is whether this transmigration inaugurated any change in the duty of the court reporter to take shorthand notes of the proceedings of a person on trial on indictment in the Supreme Court. The short answer to that question is no. The historical understanding of the term "proceedings at the trial", even making allowance for its later abbreviation and -modern-day metamorphosis, excluded the speeches. Therefore, it is fair to say that, and in consequence of that understanding, there has been a seamless practice, spanning almost 90 years, of court reporters not taking shorthand notes of either the opening or closing addresses of counsel, unless otherwise directed by the presiding judge.

[177] Viewed from this perspective, there is much force in the submission of the learned DPP that the normal practice is not to record the speech of the prosecutor, except in cases involving the death penalty. While we found no evidence of the exception, of the possibility of capital punishment, to which the learned DPP referred, her submission concerning the normal practice of not taking shorthand notes of the prosecutor's address is amply supported by the historical record of the provision. Perhaps the exception which the learned DPP had in mind, orally submitting as she did, is the obligation to include in the proceedings or the record "in capital cases copies of the notes of all the evidence", in contradistinction to notes of any particular part of the evidence relied on for a ground of appeal (see rule 47(3)(c); rule 47(3)(d (i) of the Court of Appeal Rules, 1962 and rule

3.7(1)(c) and rule 3.7 (3) of the CAR 2002). In capital cases, what is commonly referred to as a full transcript has always been required (**R v Lurie** [1951] 2 All ER 704). The only exception to the exclusion of the speeches of counsel that we found, as indicated above, was where the judge at trial made an order to that effect.

[178] In seeking to amplify the breadth of the court reporter's duty, Mr Clarke tried to contrast the duty of the court reporter to take shorthand notes of the proceedings at the trial on indictment in the Supreme Court, under subsection 16(2), with the like duty in "proceedings at the trial of civil actions or proceedings in the Supreme Court", under subsection 16(3). In short, Mr Clarke contended that whereas the court reporter has a discretion to take part of the civil proceedings, the obligation in criminal proceedings at the Supreme court is to take shorthand notes of the closing addresses and other activities.

[179] Respectfully, this submission is untenable for the reasons that follow. Firstly, and fundamentally, the breadth of the court reporter's duty to take shorthand notes of the proceedings at trial in a civil action or proceedings, does not depend on the exercise of a discretion by the court reporter. The language of subsection 16(3) declares that the shorthand notes in the civil arena is taken upon written request of a party to the action or proceedings to the registrar. Therefore, whether the court reporter takes shorthand notes of the whole or of any part of the civil action or proceedings must relate to the written request to the registrar, not the discretion of the court reporter. Secondly, as we endeavoured to demonstrate above, the parameters of the court reporter's duty to take shorthand notes in the proceedings at trial on indictment were first drawn by rules of court and evolved into the practice which is today anchored by the requirements of "the record" in the CAR, 2002.

[180] In our opinion, the technical meaning of the term "proceedings at the trial" specifically excluded the speeches of counsel. The technical meaning gave way to the ordinary meaning by reference to continuing use of the term, however expressed, in the rules of court. The ordinary meaning, retaining the same or similar constituent articles, maintained the technical meaning first ascribed in section 6 of Cap. 178. Therefore, the

court reporter's duty to take shorthand notes of the proceedings at the trial of any person on indictment in the Supreme Court, one, does not include taking shorthand notes of the addresses to the jury by counsel and two, to afterwards make and furnish a transcript of the proceedings at the trial which includes those addresses to the jury.

[181] Accordingly, the first issue raised by the reference to section 16(2) of the JSCA, is without merit.

Issue #2

[182] The second issue arising from ground three, whether the appellant's right to a fair hearing within a reasonable time under section 16(2) of the Constitution of Jamaica, was not argued, although it was not formally abandoned.

Issue #3

[183] And so we come to the third issue raised under ground three; can this court fairly review the appellant's conviction, without the full text of the prosecutor's closing address to the jury, which does not form part of the transcript of proceedings at the appellant's trial? The real issue raised by this ground is: whether this court's ability to properly assess the merits of grounds one and two is so severely hampered by the absence of the prosecutor's closing address that the conviction should be quashed. In the light of our decision on the first issue raised by this ground, this issue cannot be decided in favour of the appellant.

[184] In **Evon Jack v R**, this court held that it was not possible to conduct a fair review of the appellant's conviction on account of the missing transcript. The court also ruled that there were breaches of the appellant's rights under sections 16(7) and (8) of the Constitution of Jamaica. As redress for the breaches of the appellant's constitutional rights, his convictions were quashed, the sentences set aside and judgment and verdict of acquittal entered on each count (see para. [1] of the judgment). The factual background upon which this court so ordered was the absence of the transcript of the evidence; this court only had a transcript of the judge's summation which was compiled

from the court reporter's imperfect notes, supplemented by notes from the trial judge's notebook.

[185] On his way to that decision, Brooks P conducted a review of previous cases emanating from this court in which the issue of a missing transcript, whether in part or in whole, was considered. From that review, the following principles may be distilled:

> 1. An applicant or appellant is entitled to have his or her application for leave to appeal or appeal considered on the basis of a full transcript of the evidence, if the court requires it, and of the full summation (**R v Parker** (1966) 9 JLR 498);
>
> 2. The absence of a portion of the transcript will not always result in the conviction being overturned (**R v Cecil Stewart** (1967) 10 JLR 222);
>
> 3. If the available transcript can be supplemented by a report from the trial judge, giving his opinion on the case and his notes of the trial, which results in bolstering the sufficiency of the information for the consideration and determination of the appeal, the fact of unavailability of parts of the transcript will not, ipso facto, result in the quashing of the conviction (**R v Cecil Stewart**);
>
> 4. Where a part of the transcript of the evidence is missing but the full transcript of the summation is available, if the summation is unimpeachable in relation to the issues raised on appeal, the absence of part of the transcript of the evidence will not inexorably lead to a quashing of the conviction (**Delevan Smith and others v R** [2018] JMCA Crim 3).
>
> 5. The circumstances of the particular case, namely whether it was a judge alone trial, as in **Delevan Smith and others v R**, or a trial

with a jury, must be considered in weighing the impact of the missing transcript, whether in whole or in part, on the court's ability to fairly consider and determine the appeal.

6. Where the issue of missing transcript arises, whether in whole or in part, each case must be decided on its facts (**Evon Jack v R**).

[186] In **Adams & Anor v R**, which was not referred to in **Evon Jack v R**, the full transcript of the evidence was not available. Only the transcript of the evidence of one witness, together with the summation which rehearsed extensively the entire evidence that was before the jury, was available. The challenge to the appellants' conviction for murder was based on two irregularities: (i) hearing the no-case submission in the presence of the jury; and (ii) informing the jury of the ruling on the voluntariness of statements by Adams; as well as a misdirection concerning the finding of a firearm at the scene after the incident.

[187] For present purposes, the relevant irregularity was the learned judge informing the jury, during his summation, that he had concluded in the *voire dire* (hearing in the jury's absence) that two statements given by Adams were voluntary. It was argued that this was a material irregularity which unfairly prejudiced the appellants. While it was accepted that the comment had to be viewed in the context of the summation as a whole, their Lordships were of the view that, given the absence of part of the transcript, they were unable to say that the irregularity was not material. That is, their Lordships were unable to say what else, if anything, the trial judge may have said at the end of the *voire dire*. Their Lordships refused to apply the proviso on the bases of the misdirection and the two irregularities.

[188] Although their Lordships, at page 2, had expressed themselves as being able to deal with the appeal on the available material, it turned out that the absence of the part of the transcript of what transpired upon the jury's return to the courtroom, after the *voire dire*, figured prominently in their decision. In other words, since the question of the

materiality of the irregularity concerning the trial judge's ruling on the *voire dire* could not be settled without recourse to that section of the transcript, which was missing, the point had to be decided in the favour of the appellant.

[189] Before their Lordships, the Crown submitted that the trial judge's impugned comment about the voluntariness of the statements was brief and, accordingly, should be assessed in relation to the summation as a whole. In declining to adopt that approach, Lord Rodger of Earlsferry, addressed directly the impact of the missing part of the transcript. At page 10, he said:

> "At the very least it would have provided the background against which the relevant passage in the summing-up would fall to be assessed. Without that background and giving the benefit of every doubt to the appellant Adams in these circumstances, their Lordships are unable to hold that the undoubtable irregularity was not material. They do not require, however, to consider the effect of that irregularity in isolation since it is better considered along with the effect of the judge's misdirection about the discovery of the home-made shotgun."

The missing section of the transcript therefore left their Lordships in doubt as to what else the judge may have said, and the context in which he made the comment complained about.

[190] Unlike in **Delevan Smith and others v R**, it was the summation that was impeached in **Adams & Anor v R**. In the circumstances of **Adams & Anor v R**, the missing transcript assumed centre stage in light of the trial judge's injudicious remarks during his summation. Since the trial judge felt himself at liberty to inform the jury of his decision on the voluntariness of the statements, he may well have expressed other impermissible remarks upon the jury's return to the courtroom. It was in these circumstances that Lord Rodger spoke of "giving the benefit of every doubt to the appellant".

[191] Whereas a judge in the superior court is required, whether sitting alone or with a jury, to sum up the case, a judge of the Parish Court is required to provide written findings

of fact. This forms part of the record of appeal. In **Dwain Brown v R**, the conviction was quashed, the sentence set aside and a judgment and verdict of acquittal entered, consequent upon the failure to provide a summary of the findings of fact after the passage of more than a decade. The notes of evidence also wended their way to the appellate court, eventually arriving after the lapse of 10 years. It appears to us that the court in **Dwain Brown v R** quashed the appellant's conviction because it was not placed in a position to review the findings upon which the conviction was based.

[192] And that is the nub of the issue of a missing transcript. From the authorities discussed above and the principles deduced, the basic proposition is that a court of appeal, as a court of review, must be able to fairly review an applicant's or appellant's conviction, in relation to the issues which properly arise on appeal. Consequently, where the appellate court is unable to conduct this review, by virtue of the record of appeal being unavailable, either in whole or in part, the only fair recourse is the quashing of the conviction and setting aside of the sentence. This was amply demonstrated in **Evon Jack v R**, as well as by their Lordships in **Adams & Anor v R**.

[193] This provides the analytic background against which to interrogate Mr Clarke's submissions. Mr Clarke, in his written submissions, quoted para. 17 of their Lordships judgment in **Adams & Anor v R**, in which their Lordships spoke to the constraint upon their evaluation of the full impact of the irregularity of the trial judge's remark, imposed by an incomplete transcript. The false equivalence is then advanced that this court is similarly handicapped in reviewing the effect of the prosecutor's comment, in the absence of a record of the closing addresses. Counsel therefore urged a disposal of this appeal identical in terms to that adopted in **Dwain Brown v R** and **Evon Jack v R**.

[194] The proposition implicit in the submission is without precedent. That is, unless an appellate court can have regard to the context in which a prosecutor made an impermissible remake the conviction must be quashed. The complaint that a prosecutor's comment went beyond the pale of acceptable boundaries is not new (**Linton Berry v R** (1992) 41 WIR 244 (`**Berry v R**'). The approach of the UK Privy Council was to examine

how the trial judge dealt with the comment in his summation. The trial judge has ultimate management of the trial process and some latitude is given to him in when and how to cauterise potentially prejudicial or unfair material placed before a jury. The trial judge's vigilance in this regard can save a conviction from being characterized as unsafe on account of misplaced prosecutorial exuberance: **Christopher Thomas v R** [2018] JMCA Crim 31 (This case will be referred to as '**Thomas v R (No 2)**').

[195] The distinguishing point between **Berry v R** and **Thomas v R (2)** on the one hand, and **Adams & Anor v R** on the other hand, is that in the latter it was the gatekeeper of the fairness of the trial who had transgressed.

[196] Quite apart from the unprecedented nature of the course of action Mr Clarke urged upon the court, quashing the conviction for the reason argued would be without justification. That is, if, as we have concluded, the court reporter had no duty to take shorthand notes of the prosecutor's closing speech, then the claim that the closing speech should form part of the transcript available for appellate review, is without foundation. Therefore, "the record", as understood under the CAR 2002, is complete without the inclusion of the prosecutor's closing address. Accordingly, this court would have no basis upon which to say it is unable to properly review the appellant's conviction and thereby constrained to adopt the position in **Evon Jack v R**. There is, therefore, no merit in this ground of appeal.

Grounds one and two

[197] Grounds one and two may be conveniently discussed together. Two issues are raised by these grounds. Firstly, did the learned prosecutor go outside the boundaries of permissible comments upon the evidence and materials in the case to the jury? Secondly, if the comment transgressed those boundaries, were the directions of the learned judge sufficient to cure any resulting adverse effects upon the fairness of the trial? We begin with some general but time-honoured statements on the role of the prosecutor in a criminal trial.

[198] The touchstone of prosecutorial conduct is that the prosecutor is a minister of justice. The offshoot of that is, the prosecutor should neither "struggle" nor "press" for a conviction (**R v Puddick** (1865) 4 F & F 497, 176 ER 662; **R v Banks** [1916] 2 KB 621). Since he is a minister of justice, the prosecutor's first obligation is to assist in the administration of justice rather than to become a contestant in the professional rivalry characteristic of the adversarial system of justice.

[199] In **R v Banks** the complaint was that the prosecutor's comments, in particular, that the jury should "protect young girls", were calculated to prejudice the jury. Avory J, after observing that the complaint was more addressed to taste, rather than irregularity, said (at page 623):

> "It is true that prosecuting counsel ought not to press for a conviction. In the words of Crompton J in Reg v Puddick ... they should 'regard themselves' rather 'as ministers of justice' assisting in its administration rather than as advocates."

It seems, therefore, that while a prosecutor's comment may be in poor taste, it may not rise to the level of an irregularity. Although Avory J spoke of 'irregularity', his later pronouncement suggests that the irregularity must be of a character where it affects the verdict of the jury. Avory J found that it was "impossible to hold that the jury were misled by it [the comment] into finding the appellant guilty".

[200] In other words, the comment, to be objectionable in relation to the jury's verdict, must sound in the vein of unfairness. In **Randall v R**, in which both **R v Puddick** and **R v Banks** were cited, the challenge to the conviction was the conduct of prosecuting counsel. Lord Bingham, before setting out the principles which should govern the conduct of counsel during a trial (which are not relevant for present purposes), emphasized that ensuring that a defendant is fairly tried is an overriding requirement throughout the trial (at page 2241). Therefore, concordant with the position in **R v Banks**, "it is not every departure from good practice which renders a trial unfair", per Lord Bingham, at page 2251. Whenever there is complaint of a departure from good practice, whether by conduct or comment, the critical question to be answered is whether what was done or

said resulted in a denial of the substance of a fair trial to the defendant (see **Randall v R**, at page 2251).

[201] To arrive at the conclusion that the defendant was denied the substance of a fair trial, the conduct or comment must be examined. If when the comment is assayed, it is found to be "so gross, or so persistent, or so prejudicial, or so irremediable", the defendant would have been denied the substance of a fair trial and, accordingly, the conviction would be unsafe or unsatisfactory, resulting in it being quashed. Lord Bingham expressed it in this way, at page 2251:

> "… it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[202] Although it is not impossible that one comment from the prosecutor may rise to the level of attribution of gross, prejudicial or irremediable, it is often the cumulative impact of several colourable remarks which undermine the fairness of the trial. So that, for example, in **Randall v R** in which all the complaints concerned the prosecutor's conduct and comments, Lord Bingham stated, at page 2251:

> "… While none of the appellant's complaints taken on its own would support a successful appeal, taken together they leave the Board with no choice but to quash the appellant's conviction ..."

It must be said that in assessing the conduct of the trial, the Privy Council also took into consideration the trial judge's failure to "control the proceedings and enforce proper standards of behaviour".

[203] A similar view was expressed in **Dean John Livermore v Regina** [2006] NSWCCA 334 ('**Livermore v R**'). In that case the prosecutor's comments, during his closing address to the jury, were characterized as disparaging and dismissive of the defence's case. The court reviewed several cases from that jurisdiction (Australia) in which some of the propositions referred to above were reiterated and listed comments which attracted the court's censure in the past. It may be instructive to reproduce that list here, as it appears at para. 31 of the judgment:

> (i) "A submission to the jury based upon material which is not in evidence.
>
> (ii) Intemperate or inflammatory comments, tending to arouse prejudice or emotion in the jury.
>
> (iii) Comments which belittle or ridicule any part of an accused's case.
>
> (iv) Impugning the credit of a Crown witness, where the witness was not afforded the opportunity of responding to an attack upon credit.
>
> (v) Conveying to the jury the Crown Prosecutor's personal opinions."

[204] Although the court enumerated these censured comments, it was careful to point out that they do not represent a formula for assessing whether a prosecutor's remarks have transgressed the parameters of permissible comments. While the court acknowledged that some of these comments may negatively impact the fairness of a trial, it is the cumulative effect that is more telling. The court said, at para. 32:

> "In distilling these features, it is not suggested that a formulaic approach may be taken in assessing whether or not a Crown address exceeds the proper boundaries. On occasions, it may well be that the overall tenor or impression made upon a jury by a Crown address

> which exhibits few, if any, of these features nonetheless gives rise to the prospect that an accused has not received a fair trial. However, where a number of these features are present in a Crown address, there is a very real risk that a ground of appeal based upon the unfairness occasioned to an accused by such an address will succeed."

[205] While in **Livermore v R** the court was concerned solely with the comments of the prosecutor, **Randall v R** made it clear that the failure of the trial judge to rein in the prosecutor is taken into account in assessing the cumulative impact of the comments and/or conduct, upon the fairness of the trial. That was the position adopted by this court in **Gregory Johnson v R** (1996) 53 WIR 206. In **Gregory Johnson v R**, the accused was indicted for one count of murder arising from circumstances in which two persons had been killed. The prosecutor asked questions and made comments which communicated to the jury that the accused was involved in the second murder. Prosecuting counsel also made 'improper and unfounded allegations' against defence counsel on numerous occasions.

[206] The court regarded the conduct of the prosecutor as 'reprehensible', but went on to consider the role of the trial judge. The management of the trial is the judge's responsibility. In this management role, the judge is the guardian of the fairness of the trial. That role is made manifest in the exclusion of evidence which is more prejudicial than probative, upholding the dignity and authority of the court and the censuring of conduct that may improperly influence the jury. In the words of Patterson JA, at page 214:

> "… A judge has a supervisory role in a trial. It is his duty to decide what evidence is admissible, what evidence must be left to the jury, to stop irrelevant evidence being led before the jury, and to ensure that the course of the trial is scrupulously fair. Even in the absence of irregularity in a trial, a conviction may be quashed in exceptional circumstances if, due to the conduct of counsel, a defendant's case was not fairly placed before the jury (see Sankar v The State (1994) 46 WIR 452). It matters not how strong the case may be against a defendant, he has a right to a fair trial. A judge must guard against the admission of inadmissible evidence, and it is a settled principle

> of law that a trial judge, in a criminal trial, always has a discretion to refuse to admit evidence which is tendered by the prosecution if, in his opinion, its prejudicial effect outweighs its probative value (see R v Sang [1980] AC 402). The judge's discretion in such a case is based on his duty to ensure that the defendant receives a fair trial. But a judge has a further duty and that is to ensure and maintain the dignity and authority of the court, and to guard against conduct that may improperly influence jurors in the performance of their duties. In order to ensure a fair trial, the case against a defendant must be determined upon only those facts which have been proved by relevant evidence adduced in court in strict conformity with the rules of evidence."

In essence, in his gatekeeper role of the fairness of the trial, the trial judge must be astute to prevent the occurrence of anything which might militate against the fairness of the trial. The irregularities at the trial, judicial inaction, or belated action rendered nugatory by virtue of its untimeliness, and impermissible prosecutorial conduct, led to the quashing of the conviction, in that case.

[207] Whereas intemperate remarks and or indiscrete prosecution conduct, together with judicial passivity may result in a trial being adjudged unfair, firm and timely judicial intervention in the face of prosecution overreach may cauterise the impact of the prosecutor and thus preserve the integrity of the trial. It was so held in **Thomas v R (No 2)**, who was thrice tried for the murder of Detective Corporal Dave Daley. His first trial ended in a hung jury. The second trial was overturned on appeal for the twin evils discussed above, prosecution conduct that was beyond the pale of the acceptable and judicial inaction (see **Christopher Thomas v R** [2011] JMCA Crim 49; referred to as **Thomas v R (No 1)**).

[208] In **Thomas v R (No 2)**, the complaints were that the prosecutor repeatedly asked 'improper and irrelevant questions' which implied firstly, that the appellant was also identified by persons who were not called as witnesses and, secondly, seeking legal advice before surrendering to the police was evidence of guilty knowledge. It was also said that the prosecutor disrespected the trial judge. Notwithstanding the fact that "prosecuting counsel behaved as no minister of justice ought to have," per Morrison P,

at para. [49], the appellant was not denied the substance of a fair trial, on account of the robust vigilance of the trial judge in bringing an overzealous prosecutor to heel. According to Morrison P, writing on behalf of the court, at para. [50]:

> "The question is therefore whether, in all the circumstances, the appellant was denied the substance of fair trial. In our view, he was not. It seems to us that what distinguishes this case from cases like **Johnson (Gregory) v R**, **Christopher Thomas v R (No 1)** and **Randall (Barry) v R**, is the active role the judge played in forestalling and mitigating any potential prejudice to the applicant." (Emphasis as in the original)

[209] Similar statements were made in **R v Russo**, in which the conviction was quashed. In that case the defendant was on trial for the murder of his parents. The prosecution relied on circumstantial evidence. During his closing address to the jury, the prosecutor repeatedly posed the rhetorical question, "if it were not the applicant who murdered his parents, then who was it?" This, and other questions, were said to have had the effect of inviting the jury to speculate and reverse the burden of proof. The prejudicial impact of the questions was brought to the attention of the trial judge and he was invited to address it during his summation. Although the judge acceded to this request, he was lenient in his criticism of the prosecutor and did not tell the jury the questions were irrelevant. To compound matters, the judge repeated the question in his charge to the jury.

[210] It was against this background that Nettle JA opined at para. 46:

> "… It is conceivable that the judge could have annihilated the prejudice which … may have caused by instructing the jury that the question was an irrelevant inquiry so far as they were concerned; and that they were to put it out of their minds along with any other speculation about who else may have been responsible; and that they were to concentrate on the question of whether the evidence which the Crown had placed before them did or did not satisfy them beyond reasonable doubt that the applicant was guilty as charged …"

It is, therefore, clear that adequate directions from a trial judge are capable of rendering nugatory the prejudicial effect of impermissible prosecution comments which, left to ferment in the jury's mind, would undermine the substance of a fair trial.

[211] And so we come to the complaint in this case that the prosecutor's comment, in his closing address to the jury, that the appellant did not say where he was, resulted in a miscarriage of justice; in other words, that the comment undermined the substance of a fair trial. The comment, to put it in context, was made on the insufficiency of the content of the appellant's unsworn statement. The appellant had chosen not to retain his silence but elected to make a statement from the dock. Therefore, the prosecutor's remark was not a barefaced challenge to the exercise of the appellant's right to silence, according to how the submissions were couched. This case is therefore distinguishable from **Griffin v State of California**.

[212] In **Griffin v California**, state law allowed the prosecutor to comment on the failure of the accused to testify about "any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge". At his trial, the accused did not testify and the prosecutor made much of that fact. The judge also directed the jury along those lines. The federal Supreme Court held that the state law was a violation of the accused's Fifth Amendment guaranty against self-incrimination.

[213] It remains the law in this jurisdiction that the appellant has a right against self-incrimination. Accordingly, it is impermissible for the prosecutor to comment on the exercise of the right to silence by an accused. However, what the accused says in his unsworn statement is open to comment and analysis by the prosecutor. There is, however, a fine but crimson line to be drawn between commenting on what has been said and commenting on what has not been said. Even if the appellant had raised the defence of alibi at his trial, the burden remained on the prosecution to prove that he was at the scene of the murder and committed it. The comment of the learned prosecutor, although not flagrant, crossed the line of permissible comment.

[214] This takes us to the second issue, were the directions of the learned judge sufficient to cure any possible adverse effects upon the fairness of the trial? The learned judge first reviewed the unsworn statement of the appellant then addressed the comment made by the prosecutor. The learned judge is recorded at page 297 line 16 to page 298 lines 1 to 6 of the transcript, as instructing the jury as follows:

> "… Mr. Foreman and your members, that's the statement from the [appellant], you would have recognized that he said nothing about whatever might have happened on the 18th of December 2010, whether he knew anything about it or not. The Crown has made the comment that he didn't say where he was, but I will advise you that he need not say anything to you at all so you have to give his unsworn statement such weight as you think it deserves. The burden is on the [Crown] to prove that he was at Oxford Road and to prove that he shot and killed Geraldo Campbell it is not for him to come to say he did it or didn't do it; he said he is not guilty and he is innocent until proven guilty on the evidence."

The learned judge immediately followed up those directions with other directions on how the jury should treat with what the appellant said in relation to the evidence led by the Crown. Firstly, the jury was instructed if they believed the appellant or what he said left them in doubt about the Crown's case they should return a verdict of not guilty. Secondly, the jury was instructed if they disbelieved the appellant they could not, by that token, convict him. They had to return to Crown's case and only if satisfied, at the requisite standard, due account being taken of what the appellant said, only then could they return an adverse verdict.

[215] The question is, to adopt and adapt the question posed by Morrison P in **Thomas v R (No 2)**, were those directions sufficient to mitigate any potential prejudice to the appellant? In **Berry v R**, the Privy Council approved similar directions in circumstances where, although the appellant had been twice cautioned about his right to remain silent, the prosecutor improperly tried to cross-examine him and commented on the appellant's exercise of that right. In neither case was the prosecutor restrained by the trial judge. This was how Lord Lowry addressed the issue, at page 247:

> "… Undoubtedly Crown counsel's comment was improper, but when summing up the trial judge said, 'an accused man having been cautioned is under no obligation to say anything. The law gives him that right. You cannot use it adversely against him'. Therefore the real complaint is that the judge did not correct Crown counsel at the time. Their Lordships are satisfied with the course taken by the trial judge and are further satisfied that the adverse effect on the jury from the appellant's point of view was in the end no greater than it would have been if counsel had not made his improper observation ..."

If the directions in **Berry v R** were sufficient to nullify any adverse effects on the fairness of the trial, against the background of an open assault upon the right to silence, the directions of the learned judge in this case are more than adequate to achieve the same result, where the prosecutor wandered briefly out of bounds.

[216] We feel fortified in so holding when the learned judge's directions are considered against the background of the summation as a whole. In her general directions, the learned judge told the jury they were not bound to accept the comments made by both prosecuting and defence counsel; specifically, that they could accept or reject anything said, in whole or in part, concerning the facts (see page 199 lines 12 to 25 and page 200 lines 1 to 4 of the transcript). The directions on the comments were followed by fulsome directions on the incidence of the burden and standard of proof (see page 214 lines 1 to 2, page 215 lines 1 to 19 and page 216 lines 1 to 16 of the transcript).

[217] More to the point, at page 266 lines 23 -25 and page 267 lines 1 to 6, the learned judge addressed the issue of the appellant's presence, in the context of whether the eyewitness could have been mistaken. After highlighting that the challenge to the eyewitness was to her credibility, the learned judge invited the jury to consider:

> "… whether there is a possibility that she could have been a mistaken witness because you might find her to be honest, that she was there but because of the Defence [sic], they have not admitted being there. So, the [appellant] has put the burden on the Crown where it belongs to satisfy you that he was present and it's for that reason that you have to look carefully at the evidence of identification ..."

Viewed from the perspective of these earlier directions, the learned judge's treatment of the prosecutor's comment would have left no doubt in the mind of the jury that, notwithstanding the prosecutor's remark, the appellant bore no burden to say where he was; and that it was for the prosecution to prove that he was present at the scene of the killing and involved as alleged. There is, therefore, no merit in grounds one and two.

Ground five: The appropriateness of the sentence imposed

Appellant's submissions

[218] Miss Lewis, who previously appeared for the appellant, filed submissions which Mr Clarke adopted. In brief, those submissions invited this court to say **Meisha Clement v R** [2016] JMCA Crim 26 applies to this case and that it that it should review the minimum period the appellant has to serve before being eligible for parole. In his addendum, Mr Clarke submitted that the stipulation of 50 years before parole eligibility is arguably excessive, especially if his previous conviction is quashed by the Privy Council.

Crown's submissions

[219] Unsurprisingly, the respondent argued the opposite view, that the period to be served before parole consideration is fair, in the circumstances. While admitting that the brevity of the sentencing exercise was not as detailed as counselled in **Meisha Clement v R** (decided subsequent to the appellant's trial), the respondent argued that the sentence is in keeping with the core principles of the earlier case of **R v Evrald Dunkley**, (unreported), Court of Appeal Jamaica, Resident Magistrate Criminal Appeal No 55/2001, judgment delivered 5 July 2002.

[220] In the submissions of the Crown, the term to be served before parole eligibility is sustainable on the following bases. Firstly, the sentence ought to be viewed against the background of the statutory provisions, namely sections 3(1) (a) and 3(1C) (a) of the Offences Against the Person Act ('OAPA'). Secondly, although the appellant was liable to be sentenced to consecutive terms, the learned judge bore the totality principle in mind and ordered the sentences to run concurrently. If the learned judge had imposed the

minimum period before parole of 20 years, the appellant would have been faced with a minimum term of 55 years. Thirdly, the learned judge did not consider him 'the worst of the worst'.

The sentencing exercise below

[221] The learned judge was provided with the antecedent report for the appellant. That report disclosed that the appellant had one previous conviction for murder, recorded on 22 March 2013, for which the appellant had been sentenced to imprisonment for life, with the stipulation that he serves 35 years before becoming eligible for parole. There was no social enquiry report.

[222] In his plea in mitigation, learned counsel, who appeared at the trial, expressed constraint in what to urge in the appellant's favour in the face of the appellant's admission of one previous conviction for murder. As he expressed it, that effectively tied his hands. He also declared reticence in urging much in circumstances where the prosecution could have sought the imposition of the death penalty. Learned counsel at trial therefore confined himself to asking the learned judge to give the appellant as much consideration as she felt possible, in fixing the period to be served before parole eligibility.

[223] In sentencing the appellant, the learned judge commented that the appellant's peculiar position of having a previous conviction for murder limited the leniency she could bestow. Specifically, the learned judge took into consideration the following factors. Firstly, since this was the appellant's second conviction for murder, the prosecution could have moved for the imposition of the death penalty. Although noting that the appellant ought properly to have been sentenced to death (as a result of the statutory provisions), the learned judge concluded that this case was not the "worst of the worst". Secondly, the learned judge observed that the appellant was "engaged in the 'taking of lives'". Thirdly, the learned judge had regard to the objects of sentencing. Fourthly, that the recommended period of imprisonment before parole eligibility had to reflect that another life had been taken; therefore, she could not impose a like 35 years. Fifthly, the learned

judge commented that the sentences could be made to run consecutive but, having regard to the age of the appellant (28 years of age), declined to make that order.

Discussion

[224] In granting leave to appeal against sentence, the single judge stated two bases for granting leave. The first basis is to allow this court to consider the imposition of sentences generally. The second basis is for this court to consider whether the sentence of life imprisonment with a recommendation that the appellant not be eligible for parole before serving 50 years is manifestly excessive. It is therefore appropriate that we first set out the basis upon which this court will set aside a sentence imposed in the court below.

[225] This court will not be moved to interfere with a sentence imposed at first instance unless it can be shown that, (a) the sentence imposed was arrived at without due regard for established principles, (b) was excessive or (c) so trivial to, on its face, be a manifest departure from principle (**R v Ball** (1951) 35 Cr App R 164, at page 165; applied in **Alpha Green v R** (1969) 11 JLR 283, 284). In **Patrick Green v R**, [2020] JMCA Crim 17, at para. [23], Morrison P expressed the principle in this way:

> "…this court will not usually interfere with a sentence imposed by a judge in the court below, unless it can be shown that the judge erred in principle or that the sentence 'is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles'."

So then, appellate restraint is exercised where, upon an examination of the sentence, it is evident that the sentence imposed was the product of the application of the time-honoured principles of sentencing; is within the band of sentences for which the court had the jurisdictional competence and consistent with sentences imposed for similar offences in like circumstances (**Meisha Clement v R**, at para. [43]).

[226] Lawton LJ, in **R v Sargeant** (1974) 60 Cr App R 74, at pages 77-78, articulated the four classical principles which sentencing judges should have in mind as they

approach the task of sentencing, perspicuously acknowledged as unscientific (see **Regina v Sydney Beckford and David Lewis** (1980) 17 JLR 202, at page 203 ('**R v Sydney Beckford and Anor**')). These are retribution, deterrence, prevention and rehabilitation. These classical principles have been accepted by this court in a number of decisions, perhaps most notably in **R v Sydney Beckford and Anor** and **R v Evrald Dunkley**. The Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Court ('the Sentencing Guidelines'), published in December 2017, now captures the essence of the objectives of sentencing, including the classical principles (see section one of the Sentencing Guidelines).

[227] The basic ideas captured in section one of the Sentencing Guidelines include (a) an acknowledgement of the complexity of the sentencing process, (b) the duty of the sentencing judge to strive to arrive at a just sentence, (c) what constitutes a just sentence, (d) the principle of proportionality, (e) the principle of parity of sentences, and (f) modern statements of principle such as the promotion of a sense of responsibility in offenders.

[228] These principles form the backdrop against which the sentencing judge exercises the jurisdictional competence in imposing sentence. Therefore, it is also appropriate that some reference be made to the statutory provisions for the relevant offence, in this case, murder. The appellant was convicted of murder which falls outside the categories listed under subsection 2(1)(a) to (f) of the OAPA; that is, a murder which does not attract the alternative punishment of death. Therefore, he was liable to be sentenced, as directed by subsection 2(2) of the OAPA, which is quoted below:

> "Subject to subsection (3), every person convicted of murder other than a person –
>
> (a) convicted of murder in the circumstances specified in subsection (1)(a) to (f); or
>
> (b) to whom section 3(1A) applies,
>
> shall be sentenced in accordance with section 3 (1)(b)"

Section 3(1)(b) is extracted below:

> "3. – (1) Every person who is convicted of murder falling within –
>
> (a) section 2(1)(a) to (f) or to whom subsection (1A) applies, shall be sentenced to death or to imprisonment for life;
>
> (b) section 2(2), shall be sentenced to imprisonment for life or such other term as the court considers appropriate, not being less than fifteen years."

[229] For completeness, section 3(1A) states:

> "This subsection applies to a person who is convicted of murder and who, before that conviction, has been convicted in Jamaica –
>
> a) whether before or after the 14th October, 1992, of another murder done on a different occasion; or
>
> b) of another murder done on the same occasion."

Therefore, in accordance with section 3(1)(a) of the OAPA, a person who, on the date of his current conviction for murder, has a previous conviction for the same offence, is liable to be sentenced to death. Undoubtedly, this was the provision the learned judge had in mind when she made the comment about the appellant's exposure to the death penalty, referred to above. We will return to this point below.

[230] Section 3(1)(b) gives a sentencing court a choice in the sentence it imposes for murder: imprisonment for life or a term of years. Whatever the choice of sentence imposed, the court is required to specify a period which the person should serve before becoming eligible for parole. Each choice of sentence attracts a statutory minimum period to be served before parole eligibility. If the sentence is imprisonment for life for murder in the category under discussion, the statutory minimum is 15 years. On the other hand, if the sentence is a for a term of 15 years or more, the statutory minimum period before parole eligibility is 10 years (see section 3(1C)(b)(i) and (ii) of the OAPA)

[231] No issue was taken with the appropriateness of the imposition of the sentence of imprisonment for life. From the facts which the jury accepted, this was a wanton and quite possibly, premeditated, killing. The appellant journeyed to Mr Charlie's shop, looked around inside then discharged two rounds from the firearm inside the shop. The circumstances of the killing, together with the appellant's previous conviction, amply justified the sentence imposed. We would, therefore, affirm the sentence of imprisonment for life.

[232] The challenge that the sentence is manifestly excessive concerns the term of imprisonment to be served before becoming eligible for parole. While specifying a period of imprisonment to be served before becoming eligible for parole is mandatory, the trial judge has some discretion in fixing the length of the period, beyond the statutory minimum of 15 years. It is in the exercise of the discretion to stipulate the length of the parole eligibility period that the principles settled in **Meisha Clement v R** become applicable. At para. [41] of that judgment the learned President distilled a sequence of decisions that a sentencing judge ought to make in the sentencing exercise. We quote:

> "(i) identify the appropriate starting point;
>
> (ii) Consider any relevant aggravating features;
>
> (iii) Consider any relevant mitigating features (including personal mitigation)
>
> (iv) Consider, where appropriate, any reduction for a guilty plea; and
>
> (v) Decide on the appropriate sentence (giving reasons)"

[233] **Meisha Clement v R** was decided in 2016, approximately two years after the appellant was sentenced in this case. Consequently, the guidance given in that case was not available to the learned judge. Available to the learned judge, however, were the principles established in the earlier decision of **R v Evrald Dunkley**.

[234] In that case, at page 2, P Harrison JA (as he then was), declared that sentencing is the process by which the decision on punishment is arrived at. The learned judge of appeal went on to set out the four goals of sentencing (the classical principles referred to at para. [226] above), after which he encapsulated the intellectual exercise involved in deciding whether the sentence should be custodial or non-custodial. If, as in this case, the sentencing judge decides that a custodial sentence meets the justice of the case, P Harrison JA contoured the route by which the ultimate sentence is to be arrived at. At page 4 of the judgment, P Harrison JA said:

> "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 ..."

[235] Therefore, having decided that a sentence of imprisonment for life was the best possible sentence, the learning in **R v Evrald Dunkley** required the learned judge, in fixing the pre-parole period, to determine a notional sentence as a first step; what is more commonly referred to as a starting point. F Williams JA, in **Paul Brown v R** [2019] JMCA Crim 3, at para. [22], noted the absence of a starting point for murder (in the Sentencing Guidelines) and inferred from that the conferment of "a somewhat wide discretion".

[236] Although the learned judge did not use the words, 'starting point', it is arguable that the learned judge considered a sentence of 35 years, notionally, as an appropriate pre-parole period for the single count of murder, but that the 35 years had to be increased because this was the appellant's second conviction for murder. At page 325, lines 2-7 of the transcript, the learned judge said:

> "The court will have to sentence you accordingly but the [35] years, I cannot allow you to just be eligible for parole after [35] years because that would mean only one life is taken into account. So, I have to increase …"

Even if we were to accept that the learned judge made a determination as an initial step, as to what should be the length of the parole eligibility period, then increased it for the aggravating factors, it is not demonstrable that any mitigating features were factored into the intellectual exercise of fashioning the ultimate pre-parole period. Consequently, we are unable to say that the learned judge's mind was exercised by all the relevant principles in arriving at the figure of 50 years.

[237] In fairness to the learned judge, it is apparent from the transcript that she was alert to the objectives of sentencing, although she did not list them. However, from the learned judge's pronouncements it is clear that deterrence and rehabilitation were at the fore of her mind. We earlier made reference to the learned judge's remark that the appellant was in the business of taking lives. In declining to subject the appellant to consecutive terms of imprisonment, the learned judge made specific reference to his age. Unfortunately, taking up the several matters in the round does not elucidate the principles which ought to undergird the 50 years' pre-parole period.

[238] That entitles this court to quash the stipulation of 50 years before parole eligibility and set it aside (see **R v Ball**). We will adopt the methodological approach, foreshadowed in **R v Evrald Dunkley**, and expressly laid down in **Meisha Clement v R**, later refined in **Daniel Roulston v R** [2018] JMCA Crim 20 the leading authorities in this area of the law; as well as the Sentencing Guidelines. We will commence with a consideration of some authorities.

[239] In **Paul Brown v R**, this court accepted a review of murder cases in which the sentence imposed was imprisonment for life with recommendations of periods of incarceration before parole eligibility. Those were:

1. **Massinissa Adams et al v R** [2013] JMCA Crim 59, the appellant was convicted of the murder of an assistant commissioner of police. The sentence was life

imprisonment with a recommendation that he serve 30 years before becoming eligible for parole.

2. **David Russell v R** [2013] JMCA Crim 42, the appellant was convicted of two murders. On count one, he was sentenced to 30 years' imprisonment. On count two, he was sentenced to life imprisonment with the recommendation that he serve 40 years before becoming eligible for parole.

3. **Patrick Taylor v Regina** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 85/1994, judgment delivered 24 October 2008. The appellant was convicted of two counts of non-capital murder. His sentence of death was commuted and life imprisonment substituted, with the recommendation that he serve 35 years before becoming eligible for parole.

4. **Alton Heath, Desmond Kennedy, Marlon Duncan and Chadrick Gordon v R** [2012] JMCA Crim 61. The accused were convicted of two counts of murder in furtherance of abduction or rape or indecent assault. The sentence imposed was life imprisonment, with 35 recommended as the period to be served before being eligible for parole. The alleged ringleader, Chadrick Gordon was re-sentenced some time after and ordered to serve 27 years before parole eligibility.

5. **Jeffrey Perry v R** [2012] JMCA Crim 17. The appellant was convicted of three counts of murder of children. His

sentence was life imprisonment with the recommendation that he be not eligible for parole before serving 45 years.

6. **Ian Gordon v R** [2012] JMCA Crim 11. The appellant was convicted of two counts of murder. His sentence of death was commuted and life imprisonment substituted, with the recommendation that he serve 30 years before becoming eligible for parole.

7. **Calvin Powell and Lennox Swaby v R** [2013] JMCA Crim 28. The appellants were convicted of two counts of murder. They were sentenced to life imprisonment on each count. The sentence on count two included a recommendation that they serve 35 years before parole eligibility.

8. **Roderick Fisher v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 49/2007, judgment delivered 21 November 2008. The appellant was convicted of three counts of murder. His sentence of death was commuted and imprisonment for life substituted, with the recommendation that he serve 40 years before becoming eligible for parole.

9. **Jason Palmer v R** [2018] JMCA Crim 6. The applicant was convicted of one count of murder. He was sentenced to life imprisonment and ordered to serve 30 years before becoming eligible for parole, reduced to 25 years on appeal.

[240] F Williams JA observed, at para. [8] that:

> "These cases show a range of sentencing of between 45 years' and 25 years' imprisonment before eligibility for parole, with the higher figures in the range being stipulated in cases involving multiple counts of murder."

The observation of F Williams JA is supported by the decision in **Peter Dougal v R** [2011] JMCA Crim 13. The appellant was convicted two counts of murder and was sentenced to death. A five-member panel of this court set aside his sentence of death and sentenced him to life imprisonment with the stipulation that he should not become eligible for parole until he had served a period of 45 years.

[241] In **Gavin Clarke v R** [2020] JMCA crim 52, the appellant was convicted of one count of murder. He was sentenced to imprisonment for life with the stipulation that he should not be eligible for parole before serving 40 years. On appeal, the sentence was affirmed but the period stipulated that he serve 40 years before parole eligibility was set aside and 23 years and 9 months substituted.

[242] **Gavin Clarke v R** confirms that the upper end of the range identified above is not appropriate after a conviction for one count of murder. The appellant's case is, however, distinguishable from **Gavin Clarke v R**. The observation of the learned judge concerning the appellant's exposure to the death penalty is quite apposite. That is to say, the legislative intent is to treat someone in the position of the appellant differently from a person who has no previous convictions for murder. Consequently, the learned judge was correct in taking into consideration the appellant's previous conviction for murder.

[243] Although we endorse the learned judge's approach, the period recommended to be served before becoming eligible for parole is greater than that imposed in cases of multiple murders. **Peter Dougal v R** and **Jeffrey Perry v R** (45 years) represent the outer limit of previous cases of the higher end of the range. Following the principle that the most severe penalty is to be reserved for cases of 'the worst of the worst', a characterization the learned judge withheld from this case, we are of the opinion that the sentence imposed, in the circumstances of this case, is manifestly excessive.

[244] Based on the range of recommended periods of parole identified in **Paul Brown v R**, 35 years appear to be a just starting point. In deciding on the starting point, we considered that there was an element of premeditation, an illegal firearm was used in the commission of the offence, the offence itself is an act of extreme violence and the wantonness of the killing. We identified two aggravating factors: the prevalence of gun crimes generally and murders committed with the gun in particular and one previous conviction for murder. These factors would add 15 years to the notional sentence, resulting in period of 50 years before parole eligibility. Similarly, we identified the appellant's age (just shy of 28 years), his gainful employment at the time of arrest and one dependent as mitigating factors. To these we assigned the arithmetic value of five years, thereby reducing the period to be served before parole eligibility to 45 years.

[245] The appellant would therefore succeed in his appeal against the sentence imposed.

[246] The court therefore orders as follows:

1. The application to adduce fresh evidence is refused.
2. The application for leave to appeal against conviction is refused.
3. The conviction is affirmed.
4. The appeal against sentence is allowed in part.
5. The sentence of imprisonment for life is affirmed. The stipulation that the appellant should serve 50 years before becoming eligible for parole is set aside and substituted therefor is the stipulation that the appellant is to serve 45 years' imprisonment before becoming eligible for parole.
6. The sentence is reckoned as having commenced on 26 June 2014 and is to run concurrently with the sentence being served.