[2022] JMCA Crim 30

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE BROWN JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 3/2016

MARK WILSON v R

Mrs Ann-Marie Feurtado-Richards for the appellant

Mrs Christine Johnson Spence and Janek Forbes for the Crown

6, 8, 14 December 2021 and 17 June 2022

STRAW JA

[1] After hearing the submissions of counsel, we took some time to consider our decision and made the following orders on 14 December 2021:

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

2. The hearing of the application for leave to appeal conviction is treated as the hearing of the appeal.

3. The appeal is allowed.

4. The conviction is quashed and sentence set aside.

5. In the interest of justice, the case is to be remitted to the Circuit Court for the parish of Trelawny for a re-trial at the earliest possible time; the matter is set for mention on 14 February 2022 in that Court."

These are our reasons for that decision. In light of the fact that a re-trial has been ordered, we propose to give no more than a concise summary of the relevant facts.

The background

[2] On 13 November 2015, Mr Mark Wilson ('the appellant') was convicted by a jury in the Circuit Court Division of the Gun Court for the parish of Trelawny of the murder of Derron James otherwise called "Border" ('the deceased'). On 4 December 2015, the appellant was sentenced to life imprisonment with eligibility for parole after 35 years.

[3] The case for the prosecution was that the appellant and another man, both armed with guns, kicked off the door and invaded the home in which the deceased, his brother, Mr Delroy James ('Mr James'), and nephew, Mr Marlon Rowe otherwise called "Runkie", were asleep. This invasion took place sometime after 1:00 am on 29 August 2012, and during the course of this incident, the appellant demanded money and the deceased was shot and killed.

[4] Mr James gave evidence that on the night his brother was murdered, he was able to see the upper body of the two men as there was "a bright moonshine". He identified the appellant as one of the men and testified that he had known him previously. He stated that he knew the appellant as "Mark". Mr James' evidence was that he had seen the appellant before, at the spot where he bought yams, on more than 10 occasions. He had spoken to the appellant on some of these occasions and even purchased bananas from him. Mr James stated that, during the invasion, the appellant and another man had entered his bedroom, obtained a sum of money and both men then left his bedroom; he then heard a loud explosion and observed the appellant and the other man running out through the back door. He ran outside to wake the neighbours and returned to find the deceased lying down in a pool of blood in the living room. Subsequently, Mr James pointed out the appellant on an identification parade.

[5] In addition to Mr James, the prosecution called four witnesses: Ms Beverley Brown, the girlfriend of the deceased, who had been in another bedroom with him before he went into the living room; Dr Marari Sarangi, a consultant forensic pathologist; Detective Sergeant Brenton Williams, the investigating officer; and Detective Inspector Leroy Taylor, who conducted the identification parade.

[6] The appellant's defence was that he had been mistakenly identified and that he was elsewhere on the night in question. In his brief unsworn statement, he said "I never at the house that night is 'Gum' and 'Supa' commit this offence ... they is [sic] making a mistake". The appellant called no witnesses in support of his defence.

[7] The learned trial judge summed up the case for the jury and, after retiring just 10 minutes short of two hours, they returned a unanimous verdict of guilty against the appellant. At the sentencing hearing, no witnesses were called in mitigation of the sentence on the appellant's behalf and defence counsel, Mr Ernest Smith (now deceased) gave a brief plea in mitigation which was recorded as a single sentence.

The grounds of appeal

[8] The appellant having been granted leave to appeal against the sentence by a single judge of this court, proceeded to do so and, at the same time, renewed his application for leave to appeal against conviction.

[9] Counsel for the appellant, Mrs Feurtado-Richards, who did not appear for the appellant at trial, was given permission to abandon the original grounds of appeal and to argue the following amended supplemental grounds of appeal:

> "GROUND ONE (1):
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> The Learned Defence Counsel failed in his duty to his client in the conduct of the trial by:
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> 1. Not advising the Applicant of his options available to present his defence;
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> 2. Not obtaining full and complete instructions from the Applicant; and
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> 3. Not properly advancing the Applicant's defence of alibi.
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> thereby depriving him of the opportunity to present his defence to the jury adequately and/or in the manner actually desired resulting in a substantial miscarriage of justice.

GROUND TWO (2)

Sentence did not take into consideration time spent on remand"

[10] Ground one relates to the renewed application for leave to appeal against conviction and ground two relates to the appeal against sentence. In light of the disposal of this matter, whereby we granted the application for leave to appeal conviction, treated the hearing of the application as the hearing of the appeal, and ultimately allowed the appeal, it was only necessary to treat with ground one.

A preliminary matter

[11] At the outset, Mrs Feurtado-Richards requested that the affidavit of the appellant, filed on 27 January 2020, be allowed into evidence for this court's consideration. Similarly, Crown Counsel, Mr Janek Forbes sought and was given permission, without objection from Mrs Feurtado-Richards, to rely on a number of depositions from the preliminary enquiry (filed 6 December 2021).

[12] The primary reason for both applications was to facilitate submissions on the issue of the incompetence of counsel to be argued as a ground of appeal. Usually, a response ought to be provided by defence counsel who appeared at trial. This would not be possible in the instant matter since defence counsel was deceased. The affidavit of the appellant contained complaints relevant to defence counsel's failures. In relation to the depositions, Mr Forbes submitted that they gave a picture as to what took place at the preliminary enquiry, as such, they would allow the court to compare what took place at the preliminary enquiry versus what took place at the trial. This would put the court in a better position to assess whether the conduct of defence counsel fell below the standard as the appellant contended.

[13] We allowed both the affidavit and the depositions in evidence for our consideration pursuant to section 28(a) of the Judicature (Appellate Jurisdiction) Act ('JAJA').

Ground one

Submissions on behalf of the appellant

[14] Mrs Feurtado-Richards submitted that the appellant's defence was not properly put before the jury and as a result he did not receive a fair trial.

[15] She submitted that the appellant was not told of the options available to him, therefore he did not understand the implication of giving an unsworn statement as opposed to giving sworn evidence.

[16] Further, it was contended that the appellant was deprived of presenting his defence of alibi which in turn deprived him of a fair trial. It was submitted that if evidence had been elicited that the appellant was taking care of his child (who was two years old) on the night in question, this would have been a consideration for the jury, since credibility and identification were matters for them.

[17] Counsel also complained that although a statement was collected from the appellant's sister, Ms Tracey Wilson, she was never called to give evidence on his behalf, whether in support of his defence or as a character witness. Reference was made to **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009.

[18] In support of this ground, Mrs Feurtado-Richards also referred the court to the Caribbean Court of Justice's decision in **Paul Lashley and another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ) which cites **Cadogan v The Queen** [2006] CCJ 4 (AJ) at paragraph [11]. These cases stated that the court's approach to evaluating counsel's management of a case is to be with a reasonable degree of objectivity and if counsel's management resulted in a denial of due process, the conviction will be quashed regardless of the guilt or innocence of the accused.

[19] Counsel referred the court to the affidavit of the appellant, where he made certain complaints, namely that defence counsel did not take any written instructions from him.

The appellant also stated that he had seen Mr James previously but he never sold him any bananas, as he is a mason. He also denied knowing Mr James for 25 years and complained that defence counsel failed to challenge these assertions that were made by the said witness in his evidence; that he also told defence counsel orally that on the night in question, he was at home taking care of his two year old son; that defence counsel told him his son could not give evidence on his behalf because of his age; and that it was because of this, he failed to mention where he was at the time of the incident while giving his unsworn evidence.

The case of **Christopher Bethel v The State** (1998) 55 WIR 394 was cited in support of the point that defence counsel should, as a matter of course, make and preserve a written record of the instructions received. Instead, the appellant complained that defence counsel only whispered to him while he was in the dock to give an unsworn statement and that he should say is "Gum" and "Supa" commit the offence. He stated further that he did not know who committed the offence as he was not there. The case of **Sankar v The State of Trinidad and Tobago** [1995] 1 All ER 236 ('**Sankar**') was cited for its similarity to the instant case. In **Sankar**, the Privy Council found that counsel would not have fulfilled the duty owed to the appellant by unilaterally deciding, after giving no more than whispered advice to the appellant, not to put him in the witness box or allowing him to make an unsworn statement from the dock and thereby abandoning any attempt to make out a positive defence. Rather, counsel had owed his client the duty to explain to him how important his evidence would be to the outcome of the trial and that, without that evidence, in reality there was no defence.

[20] Further, there was a complaint that defence counsel had not prepared the appellant for trial generally, but specifically, that he had not prepared him to speak at the trial. Reliance was placed on **Andrew McKie v R** [2021] JMCA Crim 17, para. [60]. Reference was made to pages 245 and 246 of the transcript.

[21] In the circumstances, it was submitted that the appellant's conviction should be quashed or a re-trial be ordered.

Submissions on behalf of the Crown

[22] Mr Forbes characterised this ground as "convenient". He took issue with the timing in which the complaint was made in respect of the competence or conduct of counsel. At the time when the appeal was contemplated and considered by the single judge, no complaint was made of the defence counsel's conduct. Accordingly, it was submitted that the court should be even more cautious in accepting the appellant's account (as contained in his affidavit) particularly since defence counsel was not available to respond.

[23] Reliance was placed on **Leslie McLeod v R** [2017] JMCA Crim 35, para. [25] which cited **Michael Reid v R**, para. 44.

[24] Mr Forbes emphasised the need for an enhanced level of scrutiny as the appellant made a number of assertions to which there could be no response and these assertions were made over three years after the trial process ended.

[25] On the point of the alibi, Mr Forbes submitted that this defence was not pursued when the appellant was represented by other counsel at the preliminary inquiry. There was also no affidavit from the appellant's sister or any evidence from which the court could properly consider the appellant's account (in particular the allegations at paragraph 10 of his affidavit).

[26] Mr Forbes invited the court's attention to paragraphs 10 and 11 of the appellant's affidavit where he acknowledged that defence counsel (i) took a statement from his sister (according to what she told him) and (ii) surveyed other citizens. It was submitted that there was no cogent material to demonstrate that the conduct of counsel fell below what is expected of a reasonable attorney-at-law.

[27] In any event, it was submitted that the outcome of the trial was not adversely affected as the learned judge gave a careful direction on alibi (pages 357 to 359 of the transcript). So, even if the appellant was denied a full alibi defence being put before the jury, he still benefitted from a full direction. Therefore, Mr Forbes submitted that there would be no different outcome even if additional material was advanced. He pointed to

the fact that the appellant's sister would be unable to support the alibi as she was not at home with the appellant during the night in question, and his son (who was two at the time) could not be called to give evidence.

[28] Mr Forbes also expressed doubt as to whether the giving of sworn evidence would have significantly impacted the trial or the verdict. He submitted that the appellant had the benefit of a full good character direction (pages 363 to 365 of the transcript) and it was clear that by the verdict reached, the jury accepted the identification evidence adduced by the Crown.

[29] In the round, it was argued that there was no denial of due process to the appellant and the appellant benefitted from careful directions from the learned judge, which went above and beyond what is ordinarily given.

[30] Though remaining firm that there was no miscarriage of justice occasioned, in an exchange with the bench, Mr Forbes accepted that if the court found that the conviction was unsafe then, in the interests of justice, a re-trial would be the most appropriate course. For completeness, Mr Forbes weighed the factors. He observed that there was no technical error on the part of the learned judge but acknowledged that there has been a significant length of time since the incident (August 2012) and further indicated that the prosecution had made preliminary checks and the main witnesses were not located. Nonetheless, he submitted that a re-trial would still be appropriate.

Discussion and analysis

[31] An appropriate starting point is to restate the principles applicable to our consideration of this ground which concerns the conduct of defence counsel. To that end, we have had regard to para. 44 of **Michael Reid v R** and would also adopt the recent statement from **Jerome Dixon v R** [2022] JMCA Crim 2 at paras. [93] and [94]:

> "[93] When examining the issue of incompetence/inadequacy of counsel, the court 'is concerned with assessing the impact of what the Appellant's retained counsel did or did not do and its impact on the fairness of the trial' (per Phillips JA in

Andrew McKie v R [2021] JMCA Crim 17, at paragraph [61] quoting **Paul Lashley and Another v Det Cpl 17995 Winston Singh** [2014] CCJ 11 (AJ). It is appropriate also to set out certain paragraphs in **Boodram**, which are commended for consideration:

> '39. In any event, their Lordships are of the view that de la Bastide CJ, when he revisited *Boodram* (the instant case), correctly stated the applicable principles. Where counsel's conduct is called in question the general principle requires the court to focus on the impact of the faulty conduct: *R v Clinton* [1993] 2 All ER 998, [1993] 1 WLR 1181; *Sankar v State of Trinidad and Tobago* [1995] 1 All ER 236, [1993] 1 WLR 194. On the other hand, as the Chief Justice observed there may be cases where 'counsel's misconduct has become so extreme as to result in a denial of due process to his client'. The Chief Justice gave examples including the case where counsel conducted the defence without having taken his client's instructions. Substantively, the Chief Justice explained:
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> > 'In such a case, the question of the impact of counsel's conduct on the result of the case is no longer of any relevance, for whenever a person is convicted, without having enjoyed the benefit of due process, there is a miscarriage of justice regardless of his guilt or innocence. In such circumstances the conviction must be quashed. It is not difficult to give hypothetical examples of how such a situation might occur.'
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> Such cases are bound to be rare. But when exceptionally they do occur the conclusion must be that there has not been a fair trial or the appearance of a fair trial. Their Lordships would respectfully endorse the formulation of the Chief Justice.
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> 40. In the present case Mr Sawh's multiple failures, and in particular his extraordinary failure when he became aware on 17 February 1998 that he was engaged on a retrial to enquire into what happened at the first trial, reveal either gross incompetence or a cynical dereliction of the most elementary professional duties. **Their Lordships do not overlook that the**

> **appellant has twice been found guilty by the unanimous verdicts of juries after they had enjoyed the advantage of seeing and hearing her give evidence. Nevertheless it is the worst case of the failure of counsel to carry out his duties in a criminal case that their Lordships have come across. The breaches are of such a fundamental nature that the conclusion must be that the defendant was deprived of due process. Even without embarking on any investigation of the impact of the breaches, the conclusion must be that in this exceptional case the defendant did not have a fair trial. For this reason also the conviction must be quashed**.'
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> [94] We are also guided by the dictum of Lord Carswell in **Teeluck and another v R** [2005] UKPC 14 (**Boodram** was cited in **Teeluck**). In that case, Lord Carswell stated, in part, at paragraph 39, '[t]here may possibly be cases in which counsel's misbehaviour or ineptitude is so extreme that it constitutes a denial of due process to the client. Apart from such cases, which it is to be hoped are extremely rare, **the focus of the appellate court ought to be on the impact which the errors of counsel have had on the trial and the verdict rather than attempting to rate counsel's conduct of the case according to some scale of ineptitude**…'" (Emphasis as in the original).

While we acknowledge that it is only in exceptional cases that the conduct of defence counsel can afford a basis for a successful appeal against conviction, the instant matter caused some amount of misgiving. The assertions contained in the appellant's affidavit, if true, certainly support the contention that defence counsel failed woefully to discharge his duty in some material aspects. The appellant's affidavit advanced these aspects as set out above at paras. [19] and [20] but summarised below for the sake of convenience.

[32] The appellant complained that defence counsel had failed to take written instructions from him; also that he had instructed the appellant to tell the jury the words that it was "Gum and Supa" who committed the offence. He, however, did not know who committed the offence as he was not present at the incident. He also complained that the witness, Mr James, did not know him as well as the witness had testified and he had

so informed defence counsel, but there had been no challenge on this issue. Additionally, the appellant complained that the jury were deprived of hearing his sister testify that he was at his mother's house earlier in the day. Further, that the appellant had never been advised of the options available to him after the Crown had closed its case.

Counsel for the Crown is correct that the court should treat the complaints by appellants against their counsel with caution. As Morrison JA (as he then was) stated in **Michael Reid** at para 44(iv), the court is to bear in mind "that such statements are self-serving, easy to make and not always easy to rebut". As pointed out in **Leslie Mcleod v R** [2017] JMCA Crim 35, it is the person who is alleging what amounts to improper conduct on the part of his counsel who should prove it. In the latter case, P Williams JA stated at para. [24] that:

> "… He is not entitled to benefit from a lower standard of proof merely because he is the appellant/defendant. The same fair standard, which is to be applied when considering the affidavit of [defence counsel], made in response to his allegations, must be applicable to the affidavit he relies on outlining those allegations."

[33] In the case at bar, we were unable to receive any response from counsel below as he is deceased. However, it is of note that the appellant admitted in his affidavit that Mr Smith did collect a statement from his sister in relation to his defence of alibi. Therefore, it was somewhat difficult to accept that defence counsel would fail to take any written instructions from the appellant. Further, there could be no valid complaint that the appellant had any witness who could support his alibi, as his sister was never present with him at the relevant time and his two-year old son could not have done so. In any event, the learned judge gave full directions to the jury on the issue of alibi as well as identification evidence (see pages 357-359 of the summation). In relation to the complaint that there had been no challenge to the evidence of Mr James as to the length of time the appellant was known to him, we assessed this in light of the depositions taken at the preliminary enquiry. It was noted that no suggestions to that effect were made to Mr James by a different defence counsel representing the appellant at that time.

[34] Also, we did not think the complaint of the appellant, that it was defence counsel who instructed him to say that a "a Gum and Supa did it", could have resulted detrimentally on the overall verdict, even if it were true. This is so, as the case rested wholly on identification evidence and the appellant has not raised this issue as a ground of appeal. Further, the witness Beverly Brown, in cross-examination, admitted that she had told the police in her statement that she heard the voice of one "Gum" that night in the house and that he (Gum) had disappeared after the incident. On the other hand, Mr James (who was the only witness who saw the intruders), indicated that the two men in the house were the appellant and another man called "Supa". So the jury would have been familiar with the names of "Gum" and "Supa" as persons who were mentioned in connection with the incident by the prosecution witnesses. They would also have been aware that only two men entered the house and that the two names, "Gum" and "Supa," would not have been manufactured by the appellant out of thin air.

[35] However, we found that the complaint of the failure of defence counsel to advise the appellant of the options available to him in presenting his defence, in the particular circumstances existing, had merit.

[36] Our misgivings were based on the following extract at pages 245 (lines 17 to 25) to 246 (lines 1 to 15) of the transcript where the exchange between defence counsel and the learned judge, following the no-case submission which the learned judge refused, was recorded:

> "[HER LADYSHIP:] Now, can I enquire of counsel what he intends to do, so we can see the way forward.
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> MR. E. SMITH: Ahm, m'Lady, I will now share for the records what I have just told counsel for the prosecution, and that is, the prosecution having adduced into evidence the question and answer document conducted with the accused which amounts to his case, it is our intention to rest on the submission, and to rely on the question and answer document. So that will be the -- I would say. May I have a moment, please.

> HER LADYSHIP: That is your position?
>
> MR. E. SMITH: That is my position, m'Lady. The evidence that he will be giving is contained in the question and answer that he did or he will just be saying I will rely on the question and answer and end, defence case will end today.
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> HER LADYSHIP: I am not telling, ahm, defence counsel how to -- there will be addresses and there will be ...
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> MR. E. SMITH: He will make an unsworn statement, m'Lady."

[37] A response from defence counsel to this complaint may have gone a far way in dispelling or countering the appellant's account. However, without a response or any explanation (in the form of evidence) we could only make the assessment based on the transcript. It is highly suggestive of the fact that defence counsel decided that the appellant would rest on the submission of no case to answer; that, on the spur of the moment, he changed this position to state that the appellant would give an unsworn statement. There was nothing (indicated on the record) to suggest that he consulted with the appellant before advising the learned judge of the changed position. In the circumstances, it would be extremely difficult to discount the appellant's complaint in that regard.

In **Mcleod v R**, [2017] UKPC 1, the Board, in considering a similar issue, set out some parameters for consideration at paras. 13 to 16. For the sake of convenience, the relevant portions are set out below:

> "13. Allegations against advocates are easy to make and all too common. Frequently the question which they raise will be whether there is any more than a complaint about a finely balanced decision upon trial tactics, very often one which had to be made without any opportunity for reflection. In such circumstances, as the English Court of Appeal observed in R v Clinton [1993] 1 WLR 1181, 1187, it will no doubt be 'wholly exceptional' for it to follow, even if with the benefit of hindsight the decision turns out to have been wrong, that there has been any miscarriage of justice. On the contrary, such decisions, right or wrong, are an inevitable part of the trial process. The decision whether to give evidence or to

make an unsworn statement, or to do neither, is one such decision, important as it certainly is in most trials**. But in the present case the complaint is not that counsel made the wrong decision or gave the wrong advice. It is not a complaint about his tactics at all. It is an assertion that he wholly failed to discuss the question with his lay client and to give any advice at all about the pros and cons of each possible course.** Indeed, it is an assertion that he failed to speak to the appellant at all throughout the period between the first and second trials and all through the second trial; moreover that he failed to do so despite the efforts of the appellant to have discussions with him.

14. This assertion may or may not turn out to be capable of belief, but if it is true, what is alleged is not an erroneous, or even a negligent decision, but a wholesale failure to advise the appellant. There might well be two views about the wisdom of giving evidence. If considered advice not to enter the witness box had been given, it is very difficult to see that such advice could ever be described as negligent, let alone flagrantly incompetent. But the resolution of this appeal does not depend on any attempt to second guess a genuine tactical decision, if it had been made. The complaint here is that the decision was never properly addressed, indeed that all consultation between counsel and client was avoided.

15. The decision of the Court of Appeal was expressly made on the hypothesis that this assertion was true. If this were indeed true, then the appellant would effectively have been deprived of the opportunity of giving evidence in his own defence. He had a right to do so, whether it is common in this jurisdiction for defendants to give evidence or not, and whether or not he would have been wise to enter the witness box.

16. If the appellant's assertions were indeed true, then the question becomes whether it is possible to be sure that it would have made no difference if he had given evidence as he says he wished to do. It is certainly true that his alibi was a simple denial. But the jury was faced with a clear conflict of account between Reid on the one hand and the appellant on the other. The case depended on whom they believed, having due regard for the burden and standard of proof. Some fairly limited progress had been made in the cross examination of

> Reid, who was himself a drug user….. But as against this disputed evidence of Reid, the jury had only an unsworn statement. The judge gave the conventional direction. She made it clear that the conflict had to be resolved, and that the burden lay on the Crown, so that if what the appellant had said in court put the jury in doubt, acquittal must follow. That was correctly to state the test, and to give some value to the unsworn statement for assessment against the evidence of Reid. She correctly directed the jury to take good character into account in the appellant's favour in resolving the conflict. But she also told the jury, equally correctly, that the unsworn statement was of less weight than sworn evidence would have been. She said this:
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> > 'Now, Mr Foreman and members of the jury, the prosecution closed its case and at the close of its case the defendant, accused man … had three choices. He could stay there and say nothing at all, he could say, well, the prosecution has brought me here, let them prove me guilty; or, he could go up in the witness box and give evidence on oath and be cross-examined like any other witness or he could stay where he is and give a statement from the dock which is what he did. That is his right in law. So, he gave you a statement from the dock. But you remember you are going to give it what weight you see fit. It is not evidence that has been tested under cross-examination. So, you can't weigh it in the same scale as the evidence of the witnesses for the prosecution because they all gave evidence on oath.'
>
> Unless one is to assume that the jury would disregard this (accurate) judicial direction that the unsworn statement was of less value than a sworn one would have been, it is simply not possible to conclude that the absence of sworn evidence must inevitably have made no difference. It is no more than speculation, and moreover speculation which ignores the direction." (Emphasis added)

[38] In the instant case, the learned judge had directed the jury in a similar vein as the trial judge in **McLeod v R** (as is the norm), as to the weight to be given to the unsworn statement (see pages 324 – 325 of the transcript). Having regard to the concern expressed by the Board, and since we were unable to determine that the appellant had

been properly advised by defence counsel of the options available to him, we could not conclude that the absence of sworn evidence by the appellant would have had no impact on the ultimate decision made by the jury.

[39] Therefore, we considered the case at bar to fall substantially within the exceptional category of cases in which it was unnecessary to embark on any investigation of the impact of the actual breach and concluded that the appellant was denied a fair trial.

[40] In the circumstances, we accepted both counsel's submission that this was an appropriate case for the ordering of a re-trial and in the interests of justice we did so pursuant to section 14(2) of the JAJA. We also had regard to the guidance provided in **Dennis Reid v R** (1978) 27 WIR 254 as stated in **Beres Douglas v R** [2015] JMCA Crim 20 at para. [62]:

> "[62] The test for whether or not a re-trial should be ordered was stated by Lord Diplock on behalf of the Board, in the well-known Privy Council case of **Reid v R** (1978) 27 WIR 254, as follows:
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> > 'The interest of justice that is served by the power to order a new trial is the interest of the public that those persons who are guilty of serious crimes should be brought to justice and not escape it merely because of some technical blunder by the judge in the conduct of the trial or in his summing up to the jury. It is not in the interest of justice that the prosecution should be given another chance to cure evidential deficiencies in its case. Where the evidence against the accused was so strong that any reasonable jury if properly directed would have convicted the accused, prima facie the more appropriate course is to apply the proviso and dismiss the appeal. Among the factors to be considered in determining whether or not to order a new trial are: the seriousness and prevalence of the offence; (b) the expense and length of time involved in a fresh hearing; (c) the ordeal suffered by an accused person on trial; (d) the length of time that will have elapsed between the offence and the new trial; (e) the fact, if it is so,

> that evidence which tended to support the defence on the first trial would be available at the new trial; (f) the strength of the case presented by the prosecution, but this list is not exhaustive.' "

[41] In that regard, we took into account that the offence was of an extremely serious nature. It involved a home invasion at night and the death by firearm of one of the occupiers; there was no error that could be attributed to the prosecution and no technical blunder to be attributed to the learned judge. Also, there was adequate evidence for the issue of identification to be left to the jury. We considered, also, that there were only two civilian witnesses as to fact and it would be open to the prosecution to determine a way forward if the witnesses were not located.

[42] As previously indicated, our conclusion in respect of ground one was sufficient to dispose of the appeal and it is for the reasons stated above that we made the orders at para. [1], above.