[2013] JMCA Crim 59

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 116, 124 and 125/2009

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

MASSINISSA ADAMS v R
KAMAR DAWKINS
ROHAN TOWNSEND

Mrs Carolyn Reid-Cameron for Massinissa Adams

Leroy Equiano for Kamar Dawkins

L Jack Hines for Rohan Townsend

Mrs Lisa Palmer Hamilton and Mrs Christine Johnson Spence for the Crown

19, 20, 21, 22 March, 22 April and 29 November 2013

HARRIS JA

[1] Massinissa Adams, Kamar Dawkins and Rohan Townsend were charged on an indictment with the murder of Assistant Commissioner of Police Gilbert Kameka, who was shot and killed on 29 November 2007. They were convicted on 9 November 2009. Adams was sentenced to death and Dawkins and Townsend sentenced to life imprisonment with a stipulation that they should not become eligible for parole before a

period of 30 years and 20 years respectively had elapsed. Adams' application for leave to appeal against sentence was granted by a single judge but his application in respect of conviction was refused. The applications for leave to appeal against conviction and sentence in respect of both Dawkins and Townsend were refused by the single judge. Dawkins and Townsend have renewed their applications for leave to appeal against conviction and sentence before this court.

[2] Several witnesses gave evidence during the trial, most of whom were police officers, but the main witness for the prosecution was Miss Tina Gay McGowan who, it appeared, had been intimately involved with the deceased at the time of the murder, having been introduced to him in September of 2007. The appellant Adams was also known to her, in that he was her ex-boyfriend at the time of the murder and was someone with whom she communicated on a regular basis. At this point, it will be convenient to set out the evidence against each man separately as well as their respective defences.

The prosecution's case in relation to the appellant Adams

[3] Miss McGowan gave evidence that on the night before he was murdered, the deceased telephoned her, telling her that he wanted to see her. Although she resided in Gordon Town, St Andrew, at the time she had been staying with a friend, Tasheka, in Irish Town. The deceased and her made arrangements for him to visit her at Tasheka's house. Sometime after that conversation, she spoke to the appellant Adams over the telephone. She had seen the appellant about two days prior to the incident as she had gone to an area called Ravinia to comb his hair, he having asked her to do so. Adams

inquired whether she was still friendly with the deceased, to which she responded in the affirmative. He then told her that "we are going to come up there to get the gun". To this, she agreed. The appellant had learnt that the deceased carried a gun as Miss McGowan had told him of this a month earlier. She told the appellant that the deceased would be visiting her in Irish Town on the day following this conversation.

[4] On the day of the event, Miss McGowan received a telephone call from the deceased. She and Tasheka went to meet him, he having arrived in Irish Town and parked his vehicle in the vicinity of a wholesale shop on the road. The three of them walked back to Tasheka's house, which was located a few chains from the road, down a hill. This was sometime around 11:00 o'clock in the morning. There was another female at the house, but she left soon after they arrived. While they were at the house, the appellant called Miss McGowan to inquire whether the deceased had arrived and upon receiving the confirmation, he told her he was on his way. Miss McGowan then left the house again, this time accompanying Tasheka to the bus stop. On her way, she called the appellant Adams to find out if he had reached and on her way back, the appellant and another man joined her. She said she had seen the other man before in Ravinia when she went to see the appellant, but she did not know him. Both men were armed with guns. They all went back to the house where the appellant and the other man used handkerchiefs to cover their mouths and noses before entering the house. They pounced upon the deceased who was on his cellular phone in a room. The appellant fired two shots killing him, after which, he went over and took the deceased's service pistol from the deceased's waistband. Miss McGowan and the two men then ran from

the house. Upon reaching the road, the appellant told her to go to the police station to report the killing. However, he did not instruct her as to what she should tell the police. He and the other man then boarded a car and left.

[5] On 6 December 2007, a police party, on special operations, went to premises located at 64 Crescent Road. Upon entering a dwelling house, they saw a man (who proved to be the applicant Dawkins) hiding under a divan bed in a living room who directed them to the appellant who was hiding in the ceiling of the house in another room. Upon a police officer entering the ceiling to apprehend the appellant, he said,"Offisah, nuh kill mi, me did a guh gi up mi self but mi 'fraid." One of the police officers assisted the appellant in climbing down from the ceiling, but before the appellant did so, he threw a LG cellular phone to the floor, which was seized by the police and submitted for cell site analysis. Upon being apprehended he also said, "A nuh me shot the policeman, is 'Bling' and him point the gun at mi and tell mi fi rob him."

Adam's defence

[6] Adams gave a detailed unsworn statement from the dock in which he admitted knowing Miss McGowan but explained that when questioned by the police the reason he had denied knowing her was that the police "say when I am in custody, every day Tina McGowan say I kill somebody and I didn't kill anybody". The two of them, he said, had been involved in a relationship, but they had gone their separate ways and he had not seen her for almost two years. The reason, he said, he went into the ceiling was that he had heard some excitement and shots and it was not because he felt guilty. He denied knowing the applicant Townsend prior to being taken into custody, but admitted

to seeing the applicant Dawkins sometimes in the Liguanea area. He needed a place to stay for a while and through a friend of his, he learnt that the applicant Dawkins had somewhere available to rent, but that Dawkins had to get the permission of his cousin. Both he and the applicant Dawkins travelled to the cousin's house on Crescent Road. While the cousin had left the house, the police party went there. He said that Miss McGowan told the police that he was innocent, and she was persuaded by the offer of a visa to change her story.

The prosecution's case against the applicant Dawkins

[7] The evidence of the police was that on 6 December 2007, a police party, on special operations, visited the premises at 64 Crescent Road and discovered a man hiding under the bed; that man who was pulled out from under the bed identified himself as Kamar Dawkins, otherwise known as "Bling". Corporal Leighton Bucknor, said that, the applicant upon being pulled from under the bed, said to him, "Officer nuh kill mi, nuh kill mi, a nuh me kill the policeman," and under caution he said, "Officer a nuh mi kill the policeman a Irish Town, a Massi." Sergeant Glen McGill, who was also a part of the police party gave evidence that under caution the applicant said, "A Massy shot the policeman and force mi fi rob him."

[8] Evidence was also given by Paul Hayden that in December 2007, he was at the Half Way Tree lockup on a charge of receiving stolen property. He and three other men were in cell five when they were joined by the applicant Dawkins. The applicant was crying. He was distraught and complained that his friend's girlfriend had betrayed him, and his (the applicant's) mother had informed the police where he could be found. As it

was their practice to do, the prisoners questioned him with a view to ascertaining the particular charge that had brought him to the lockup. If a new prisoner had committed certain heinous crimes such as buggery or carnal abuse, he would be put in cell four. Hayden explained that, as a "yardie" in the cells, he was in charge of locking up the prisoners and serving them food and could therefore easily have the applicant removed to cell four. He said that one of his cellmates, Kevin, questioned the applicant about the reason for his incarceration, and he responded that it was the death of the "second in command Commissioner of Police" that had brought him there. The applicant then related that his friend's girlfriend had arranged with him and his friend to rob a contractor of his credit card. She had called them on the morning when that man visited her and they had gone to the house. His friend shot the man twice and took away the man's firearm. After they left the house they went to a place called Rat Bat Tavern and when the police had come into the area, his friend had gone to hide in the ceiling, while he lay on a bed pretending to be asleep.

[9] Hayden said that he did not volunteer information in relation to the incident as he had not wanted to get involved. However, his cellmate had given a statement to the police and his name had been mentioned to the police. He said that, before he was charged with receiving stolen property, he had been taken into custody on another case arising from the incident which had resulted in the charge of receiving stolen property. He denied receiving any benefit in giving evidence and said that his case was still before the court. In cross-examination he admitted that he had been transferred to the Half Way Tree lockup in November 2007 and had not been granted bail prior to then.

In further cross-examination, it emerged that he had given a statement to the police on 28 December 2007, concerning the statement made by the applicant. He, Hayden, had been granted bail in January of 2008, but had been re-arrested in February and again granted bail in April. It was put to him that it was on the day of the preliminary hearing while the appellant and the applicants were passing on their way to court that someone had pointed out Dawkins to him. He, however, denied this. He also insisted that he had been granted bail in April but disagreed that he had been granted bail in January.

[10] Two identification parades were held in which Dawkins was a suspect. Miss McGowan attended as the witness at one and Townsend was the witness at the other. Both Miss McGowan and Townsend failed to point out Dawkins.

Dawkins' defence

[11] Dawkins gave evidence. He testified that he had a friend who had enquired whether he knew of any place available for rent for a friend who was in need of a place to stay as he was being framed for murder. He said that the person who was in need of the accommodation was not his friend, although he had seen him before. He contacted his cousin who agreed to rent a room for $8000.00, and he arranged to meet his friend and the other man at Three Miles. The man was introduced to him as "Bobo". He and Bobo took a taxi to his cousin's place. About an hour after they had been there, he heard shots being fired and discovered it was the police, whereupon his cousin left the premises and he went to sit on a "fold-up" in the living room. Bobo was in another room, and when the police entered, his "baby mother" directed the police to Bobo. The police had started to beat them, but they were spared by a superior police officer who

instructed that they be taken to the police station. They were both taken to the Central Police lockup and then to the Half Way Tree lockup. He was placed in cell four but was transferred to cell three. However, he denied ever being in a jail cell with Kevin, making a confession to him, or relaying any story about committing murder to anyone. He identified Adams as Bobo and said that it was in court at the preliminary hearing that he knew that he was referred to as "Massi". He denied knowing the witness Hayden, Miss McGowan or the applicant Townsend and denied knowing or visiting Irish Town or Gordon Town. He also denied having any telephone conversation with Adams. He said he had never been previously charged for an offence.

[12] Evidence was given by Ricardo Bray on Dawkins' behalf. Mr Bray testified that he had known the applicant from childhood and had worked alongside him parking cars in the Liguanea area. They were very good friends and the applicant was with him working in November. However, he could not say where the applicant was on the day of the murder.

[13] The applicant's mother also gave evidence that she, the applicant and other members of her family lived in the same dwelling. She and the applicant shared a room. At work, she was assigned to different shifts from time to time. When she worked on the night shift, she would pass the applicant, at work, parking cars. During the week in which the murder was committed, she was on the night shift. She said that she did not see the applicant on the day after the murder, but she did not say whether she had seen him on the day of the murder.

The prosecution's case against the applicant Townsend

[14] The applicant Townsend, according to Miss McGowan, was Tasheka's cousin. She said that he had frequently spoken to her about Adams, and informed her that they were friends. On the morning of the murder, Miss McGowan passed the applicant Townsend in the vicinity of Tasheka's house while on her way with Adams and the other man. The applicant, she said, was fixing a pipe. After she had parted company with Adams and was on her way to the police station to report the murder, she saw the applicant at the door of the wholesale store and remarked to him, "You can believe them shot the man?" He laughed. She asked him to accompany her to the police station and he asked her what she was going to tell the police. He told her that she should tell the police that three masked men had "held her up", and had robbed and killed the deceased. Miss McGowan said that she had not told the applicant about her conversation with Adams in relation to the deceased having a gun, nor had she told him about the plan to rob the deceased. He accompanied her to the police station and remained there while she gave the version of the incident that he had concocted. They were instructed to return to the house where the deceased was killed and where the police would be, but upon leaving the police station, the applicant told her that he would not be going to the house and they parted company.

[15] Evidence was given by Corporal Fitz Fearon that Miss McGowan and the applicant Townsend had come to the police station to make the report. When asked if he had heard any shots, the applicant answered in the negative, and in response to the question as to whether he had seen the men, he replied that he had not because he

was fixing the pipe. He subsequently gave two statements as a potential witness for the prosecution.

[16] Evidence was also adduced in the form of data recording phone calls made around the time and in the area where the murder took place. The phone that Adams had thrown from the ceiling as well as those of the applicants Townsend, Dawkins and that of the deceased were submitted for analysis. From this evidence it was revealed that there had been about nine phone calls made between the applicant Townsend and the appellant Adams between 11:32am and 3:21pm on 29 November, which was around the time during which the murder was estimated to have been committed.

Townsend's defence

[17] Townsend gave an unsworn statement in which he said that he had been fixing a pipe and that he was not part of any plan to kill or rob anyone. His explanation for following Miss McGowan to the police station was that he did that because she had requested him to do so. He said he was arrested because he could not identify anyone at the identification parades.

The appeal

Massinissa Adams

Ground and submissions

[18] Mrs Carolyn Reid Cameron filed a single ground of appeal against sentence that the sentence of death be set aside and a sentence of imprisonment be imposed.

[19] She referred to section 3(1)(a) of the Offences Against the Person Act and

submitted that a sentencer has two options and thus the death penalty is discretionary. Relying on **Donald Trimmingham v The Queen** [2009] UKPC 25, she argued that in determining sentence: the court ought to adopt a comparative approach: it ought to consider the mitigating circumstances, the character of the appellant and the reasonable prospect of his reform. She submitted that the starting point, in the sentencing process in capital cases is life imprisonment. She submitted that as established in **Peter Dougal v R** [2011] JMCA Crim 13, the Jamaican position, was that life imprisonment should be imposed unless, "having considered all the available material and issues adumbrated in **Trimmingham** there is no prospect of social re-adaptation and the circumstances of the case qualify it as the 'rarest of the rare', the 'worst of the worst' or 'extreme and exceptional'."

[20] It was also her submission that the reports produced at the sentencing hearing showed that the appellant had no previous convictions and he had not demonstrated any signs of psychosis. There was no evidence that he was prone to violence and would be a recidivist. There was no indication as to what effect these mitigating factors had on the learned judge's deliberations, she submitted. It was further submitted that the learned judge did not show that she addressed her mind to the prospect of reform and that she was satisfied beyond reasonable doubt that the appellant could not be rehabilitated, even though the appellant's counsel had raised this issue. The circumstances of this case, she argued, pale in comparison to those of **Trimmingham** and **Dougal**, and therefore ought not to be placed in the category of the "rarest of the rare" to warrant the death penalty. It was also contended by her that although the

learned judge considered it significant that this case involved the loss of a loved one, this fact does not set this case apart into the exceptional category as that is a necessary incident of all murders.

Analysis

[21] At the sentencing hearing the prosecution strenuously argued in favour of the imposition of the death penalty.

[22] Before the court, at the hearing, were: an antecedent report, a psychiatric report, a social enquiry report and a corrections officer's report, in respect of the appellant. Character evidence was given on his behalf by two persons.

[23] In **Trimmingham**, the appellant was convicted of murder and was sentenced to death. The appellant held up the deceased with a gun and demanded money from him. The deceased told him that he had given the money to his daughter. He, however, offered the appellant his goats. The appellant proceeded to hit him in his stomach. Thereafter, by using a machete, he cut his throat, decapitated him and slit his abdomen. On appeal to the Privy Council, his conviction was upheld but the sentence of death was set aside. Although recognizing that it was a very bad case, in their Lordship's view it would not have been a case which would have invited the death sentence.

[24] In that case, the Privy Council, adopting and approving the sentencing approach outlined in **Pipersburgh v The Queen** [2008] UKPC 11, their Lordships declared that the approach should be recognized as having the force of law and then went on to say at paragraph 21:

> "21. It can be expressed in two basic principles. The first has been expressed in several different formulations, but they all carry the same message, that the death penalty should be imposed only in cases which on the facts of the offence are the most extreme and exceptional, 'the worst of the worst' or 'the rarest of the rare'. In considering whether a particular case falls into that category, the judge should of course compare it with other murder cases and not with ordinary civilised behaviour. The second principle is that there must be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any means other than the ultimate sentence of death. The character of the offender and any other relevant circumstances are to be taken into account in so far as they may operate in his favour by way of mitigation and are not to weigh in the scales against him. Before it imposes a sentence of death the court must be properly satisfied that these two criteria have been fulfilled."

[25] It is plain, as shown in **Trimmingham**, that on a conviction for murder, a sentencer should first direct his or her mind to the imposition of a life sentence. In so doing, he or she should first embark on a comparative analysis of other cases of murder to determine whether the case under consideration could be classified as "the most extreme and exceptional", "the rarest of the rare" or "the worst of the worst". Thereafter, he or she should give consideration to the likelihood of the offender's reformation.

[26] In **Earlin White v The Queen**, [2010] UKPC 22, the Privy Council reinforced the necessity and importance for sentencing judges to adhere to the principles laid down in **Trimmingham**. In that case, the sentence of death was quashed, the trial judge having failed to follow the sentencing guidelines.

[27] Where the offence of murder is committed by the use of a firearm, this in itself would not necessarily be a reason for the imposition of the death penalty. In determining an appropriate sentence, all factors relating to the offence and the offender must be considered. In **Reyes v The Queen** PCA No 64 of 2001, delivered 11 March 2002, Lord Bingham of Cornhill speaking to the question of sentencing in relation to the commission of murder by the use of a firearm, had this to say at paragraph 43:

> "The use of firearms by dangerous and aggressive criminals is an undoubted social evil and, so long as the death penalty is retained, there may well be murders by shooting which justify the ultimate penalty. But there will also be murders of quite a different character (for instance, murders arising from sudden quarrels within a family, or between neighbours, involving the use of a firearm legitimately owned for no criminal or aggressive purpose) in which the death penalty would be plainly excessive and disproportionate. In a crime of this kind there may well be matters relating both to the offence and the offender which ought properly to be considered before sentence is passed."

[28] In **Earlin White v The Queen** (supra) the deceased was killed by two of three shots fired by the appellant. Their Lordships found that the killing was swift, that there was no "element of sadism, torture or humiliation of the deceased", and that the facts of that case were not as atrocious as those of **Trimmingham** and held that the death penalty was wrongly imposed.

[29] In **Peter Dougal**, two persons were killed, having been shot by the appellant. They died immediately. The killing was premeditated and had been done in the course of a robbery. The appellant was convicted and was sentenced to death. On appeal, the sentence of death was set aside and a life sentence was substituted therefor.

[30] In the case under review, in sentencing, the learned judge found that the murder was premeditated as the appellant was the mastermind behind the robbery and murder and by his careful planning made an arrangement to get the deceased's gun. He was the one who fired the fatal shot. She said she took into consideration the reports of the character witnesses who testified on the appellant's behalf which she described as impressive. She also took into account the various reports which were before her and expressed the view that over the years the appellant displayed good behaviour and he was caring. She found as an aggravating circumstance the fact that the deceased lost his life and that it would have impacted on his family. It was her view that the case was an exceptional one worthy of the imposition of the death sentence. It is clear from the foregoing that the learned judge failed to follow the principles laid down in **Trimmingham**.

[31] The focus of the learned judge was essentially centered on the fact that the murder was premeditated. However, premeditation, in itself, would not have been a critical factor in determining whether the death penalty was justifiable in this case. It was not a sadistic killing nor was the deceased tortured or humiliated. The deceased was killed by one of two shots. Although the murder entailed a planned, cold-blooded killing, it could not be regarded as falling within the most extreme or exceptional cases.

[32] Further, the learned judge failed to consider a very important factor, and that is, whether there was any reasonable prospect in reforming the appellant. It would have been critical for her to have considered whether his reformation could have been

achieved instead of his execution. As shown in **Trimmingham,** the death penalty would only be in circumstances where the punishment of an offender could not be accomplished by any other process than by death, there being no reasonable prospect of the rehabilitation of the offender.

[33] At the time of sentencing, the appellant was 27 years old. The antecedent report shows that he had no previous conviction and was gainfully employed up to the time of his arrest. The social inquiry report discloses that members of the community in which he resided, although relating that he smoked marijuana, expressed surprise that he had committed the murder. They were of the view that he has "academic potential". Two other persons gave excellent reports of his good character. In obedience to the **Trimmingham** guidelines, all these factors ought to have been taken into account by the learned judge as they were indubitably compelling and weighed favourably in supporting the appellant's reformation.

[34] A review of several cases in which the death sentence was quashed and a life sentence imposed, show an eligibility period for parole ranging between 30 and 45 years, depending on the circumstances of the case. Mention will be made to two of these cases, namely, **Peter Dougal v R** and **Odel Daley v R** [2012] JMCA Crim 64. In **Peter Dougal v R** the sentence of death having been set aside, the appellant was sentenced to life imprisonment with the stipulation that his eligibility for parole should not become effective until he had served 45 years.

[35] In **Odel Daley v R** the appellant planned the killing of the deceased, which was

done in the course of a robbery. The death sentence which was imposed on him was set aside. A sentence of life imprisonment was substituted and the appellant's eligibility for parole was deferred for 30 years.

[36] In our judgment, the instant case is one in which a life sentence would have been the appropriate sentence. Accordingly, the imposition of the death sentence on the appellant is unjustified and is therefore manifestly excessive and ought not to stand.

[37] The appeal should be allowed as to sentence and the sentence of death quashed and a sentence of life imprisonment be substituted therefor. Despite the fact that the circumstances leading to the killing were premeditated, they are more akin to those in **Odel Daley v R**. For this reason, the appellant should serve 30 years before becoming eligible for parole.

The applications

Kamar Dawkins

Grounds and Submissions

[38] Six grounds of appeal were filed on behalf of the applicant Dawkins:

Ground one

> "The learned trial judge erred in law, when she allowed the caution [sic] statement of the Appellant [sic] to be admitted into evidence without first enquiring into the circumstances under which the statement was made, its voluntariness and fairness to the Appellant [sic]."

[39] Mr Equiano submitted that it was paramount that before the admission of the

cautioned statements of the applicant into evidence, the court ought to have made the necessary enquiry with regard to its voluntariness. Pointing to the circumstances under which the statements were made, it was submitted that the learned judge was required to rule whether these circumstances were oppressive. The court was also, it was submitted, required to determine if the words were spoken in return for any favour or fear of prejudice. He submitted that although the statements were not an admission it is possible that despite the judge's warning on how to treat the statement of a co-accused, the jury would treat both statements as evidence of guilt. In support of these submissions he relied on **R v Ricardo Williams** SCCA No 27/1997, delivered 26 March 1998, although he pointed out that unlike in that case, the cautioned statements in this case were oral.

[40] On behalf of the Crown, Mrs Palmer Hamilton submitted that the learned trial judge did not err in law as the statement, "Officer, nuh kill mi, a nuh mi kill the policeman," was exculpatory and not one requiring caution. The applicant, she further submitted, had spontaneously uttered the words without any questions being asked of him. Therefore, there was no requirement in law that the prosecution proves that the statement was given voluntarily or that it was given in circumstances in which its reliability was not affected. Relying on **Subramaniam v Public Prosecutor** [1956] 1 WLR 965, **Mawaz Khan v R** [1967] 1 AC 454 and **R v Binham** [1991] Crim LR 774 and **Ajodha v R** [1982] AC 204, she submitted that this being an exculpatory statement, it is not admissible to prove the truth of its content but to prove that the statement was made. She also submitted that it was not for the judge to invite

submissions in relation to a voir dire; instead, it was for the defence to make the request. She, however, conceded that the judge had failed to give a specific direction in relation to the statement in which the applicant had implicated himself, that is, "A Massy shot the policeman and force mi fi rob him". Cousel submitted, however, that this could be viewed as being addressed by the general directions as to how to treat the evidence of witnesses, that is, rejecting a part and accepting the other.

Ground two

> "The learned trial judge erred in law, when she allowed the evidence of the confession, by the Appellant [sic] as given by the witness Hayden. The learned judge failed to make the necessary enquiry as to the voluntariness of the statement and whether it was fair to admit the statement."

[41] In determining the fairness of admitting the statement Mr Equiano argued that the court would have to consider whether the witness Hayden was a person in authority and whether the circumstances were oppressive. Even though the court had been asked to make enquiries into the circumstances surrounding the confession, the judge was of the view that Hayden was not a person in authority but there was evidence tending to suggest otherwise, even though he may not have been in the same position as a police officer, he argued. He referred to Hayden's evidence that he was a "yardie" at the lockup, which meant that he was in charge of "locking up" the prisoners, feeding them and determining whether they stayed in a particular cell. He submitted further that it was significant that the statement that was allegedly made to Hayden by the applicant was after everything, including the identification parade, had failed. He highlighted the

circumstances surrounding the witness' bail, that is, the witness having been locked up without bail, being granted bail subsequently and then being rearrested for other similar offences. He submitted that great favours had been granted to the witness supposedly with a view to getting him to give evidence.

[42] It was also submitted by counsel that even where the statement may be admissible, the judge would have a discretion to refuse to admit the statement if in all the circumstances she considered it to be unfair. He referred to and relied on **R v Isequilla** [1975] 1 WLR 716, to support this submission. He also submitted that had the judge made the enquiries, she would have been able to say whether in the circumstances (the applicant being placed in a dark cell, crying and being distraught) it was fair to allow the evidence. Had the learned judge conducted an enquiry, he submitted, it is likely that the purported admission would not have been admitted into evidence.

[43] Mrs Palmer Hamilton submitted that the confession was an exculpatory one and the judge was, as with the case of the statements of the applicant, not obliged to enquire into the voluntariness of it. She referred to **Michael Pringle v R** [2003] UKPC 9, and submitted that that case was distinguishable as, unlike in that case, Hayden was not involved in the murder. She submitted that there was no inference to be drawn from the chronology concerning Hayden's incarceration. The circumstances, she submitted, did not involve any improper motive or benefit to be gained. The caution would therefore not have been necessary and the general direction on how to treat a

witness' evidence in relation to credibility was sufficient. It was submitted that the warning given by the judge in relation to the treatment of Hayden's evidence was sufficient as the authorities indicate that there is no strict formula to be adhered to as long as the spirit of the caution prevails.

Ground three

> "The learned trial judge erred in law when she did not uphold the submission of no case to answer made on behalf of the Appellant [sic]."

[44] Counsel submitted that the second limb of **R v Galbraith** (1981) 73 Cr APP R 124, [1981] 2 All ER 1060 would apply. There was, he submitted, a conflict as to what was said by the applicant when he was held by the police: on one account he said, "Officer, nuh kill mi, a nuh mi kill the policeman," and then when cautioned he said, "Massie inna di house ceiling", while according to the other account, he first said, "Officer, nuh kill mi, mek mi come from under the bed," and then when cautioned, he said, "A Massy shot the policeman and force mi fi rob him", then when asked he told the police that "Massy" was in the ceiling. In the first account, the applicant had not implicated himself, while in the other, he had, he argued. It was very important, counsel submitted, for the judge to ascertain what was said after caution before relying on it. The judge ought therefore to have directed the jury about what was said and whether they were voluntary. He further pointed to the weakness in the identification evidence in that Miss McGowan had been able to recognize the person she saw in the company of the appellant Adams on the day of the murder and had given a description

of him to the police, yet she failed to point him out on the identification parade. He further submitted that this aspect of the evidence was to be contrasted with the inconsistency in the evidence of the police officers as outlined earlier and there being no other evidence supporting the case against the applicant, the evidence was insufficient to support the charge. The case against the applicant was therefore tenuous and should not have gone to the jury, he contended.

[45] In response, Mrs Palmer Hamilton referred to and relied on **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26 for the principle that the correct approach to a no-case submission "is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt". She submitted that the learned trial judge was correct in ruling that the issues relating to reliability and credibility of the evidence of the prosecution's witnesses against the applicant were matters to be assessed and determined by members of the jury. It was submitted in writing that in **R v Galbraith** despite the fact that there were a number of inconsistencies and discrepancies in the case for the Crown, it was held that that case was one which should have been left to the jury.

Ground four

> "Having allowed the caution [sic] statement and the statement of admission to be admitted and the case to go to the jury, the learned trial judge failed to give adequate direction and assistance to the jury on how to treat with the said statements with the rest of the evidence."

[46] Mr Equiano submitted that it was essential for the judge to not only recite the evidence but to identify points of dispute and the evidence in support of each case. It was paramount that the variances as highlighted in ground three in relation to the police officers' evidence be specifically mentioned to the jury as they were relevant to the credibility of the witnesses in determining whether what the witnesses said had ever occurred, particularly when the defence had challenged these utterances, he argued.

[47] Mr Equiano also took issue with the judge's warning to the jury in relation to the evidence of the witness Hayden, which, he argued, did not go far enough as the judge ought to have told them the reason for the warning. For this submission, he relied on **Michael Pringle v R** and **Chan Wei-Keung v R** [1967] 51 Cr App R 257. He submitted that the witness had tried to conceal the information about when he was first granted bail and this gave rise to the question as to what could be the possible reason for this. The judge should have directed the jury to consider whether his evidence had been given in return for a favour. Similarly, the jury ought to have been given appropriate directions in relation to the confession, he argued. The judge, he contended, should have focused the jury's attention on whether the viewing of the applicant, on the day of the preliminary hearing by the witness Hayden, was contrived.

[48] In addition to relying on the arguments submitted in relation to grounds one and two, Mrs Palmer Hamilton submitted that the trial judge did direct the jury on how to treat discrepancies and inconsistencies and left it for the jury to determine the creditworthiness of the witness. She argued that the judge did highlight some of the

discrepancies and inconsistencies. **R v Omar Greaves & Ors** SCCA Nos 122, 123, 125 and 126/2003, delivered 30 July 2004 was cited in support of this submission.

Ground five

> "The direction given by the judge on character evidence in respect of the Appellant [sic] was inadequate. It deprived the Appellant [sic] of an opportunity for the jury to accept his evidence as being credible."

[49] On this ground, Mr Equiano submitted that the learned trial judge gave a character direction but only in respect of the propensity limb. The applicant having given evidence, of utmost importance was his credibility and whether the jury should accept his evidence as being truthful. For this submission, he relied on **R v Berrada** (1990) 91 Cr App R 131.

[50] Relying on **R v Vye**; **R v Stephenson** [1993] 3 All ER 241, it was submitted on behalf of the Crown that it was for "the trial judge in each case to decide how he tailors his direction to the particular circumstances". Mrs Palmer Hamilton argued that the judge had given directions in relation to both limbs of the good character direction. She gave the good character direction at the critical point when she was outlining the case for the applicant and this was the point at which it would lend the greatest support. In the alternative, it was submitted that the failure to give a good character direction does not automatically result in the appeal being allowed. Therefore, even if it could be said that there was an absence of the credibility limb of the direction, this court should find that the jury would have inevitably convicted.

Ground six

> "The Learned trial judge's summation was not balance[d] and heavily favoured the Crown.
>
> a. Failure to point out to the jury major weaknesses in the Crown's case.
>
> b. Failure to point out discrepancies and inconsistencies in the Crown's case whereas all discrepancies and inconsistencies in the Appellant's [sic] case were pointed out.
>
> c. Factual error with the evidence of identification."

[51] Mr Equiano referred to and relied on **R v Nelson** [1997] Crim LR 234 for the principle that "every defendant ... has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury". It was submitted that apart from the fact that the applicant was not identified by any of the eye-witnesses as being present at the crime scene, there was evidence of the descriptions of the persons who committed the crime, but such descriptions did not accord with the applicant. Further, it was submitted, in her summation, the learned judge wrongly stated that the applicant was known to Miss McGowan before. She told the jury that Miss McGowan had said that she had seen the applicant once and then the appellant Adams had gone to Irish Town with a man she could not identify. By giving that direction, it was submitted, the judge seemed to have linked this latter evidence to the applicant. He referred to **R v Wavel Richardson and Michael Williams** SCCA Nos 240 and 241/2002, delivered 8 November 2006 in which the judge had misstated the evidence. It was submitted that the learned judge's review of the applicant's case showed greater emphasis being

placed on the discrepancies and inconsistencies in the defence and very little or nothing being said in relation to any variance in the Crown's case and this substantial imbalance would have weighed heavily on the minds of the jurors and no doubt increased the chances of the jurors rejecting the applicant's case.

[52] Counsel for the Crown took no issue with **R v Nelson**, but accepted it as providing a correct statement of the law that "no defendant has the right to demand that the judge conceal from the jury such difficulties and deficiencies as are apparent in his case". It was submitted that the learned trial judge had highlighted in her summation the questions that had been put to the witness Hayden by counsel for the applicant in cross-examination. Further, it was submitted, as soon as the learned judge highlighted the witness' evidence, she directed the jury to consider whether it could have been tainted by improper motive or he had given it in the hope of receiving favourable treatment. It was also argued that the learned trial judge had not told the jury that the witness was known to Miss McGowan, but simply highlighted her evidence in relation to the occasions on which she had seen him. It was submitted that the judge dealt fairly with both the defence and the prosecution's case.

Ground seven

[53] Mr Equiano also sought and was granted leave to argue an additional supplemental ground in relation to sentence, as follows:

> "In all the circumstances of the case and taking into consideration the antecedents of the applicant, the sentence of the court is manifestly excessive."

He submitted that:

i. The applicant had no previous conviction.

ii. There was no complaint that he was a person of a particular character.

iii. In the worst circumstances, the trend has been to recommend a pre-parole period of 30 years.

iv. The Crown's case at its highest shows an intention to rob and not to kill.

v. There is no distinguishing factor between the applicant and the applicant Townsend who was sentenced to 20 years before being eligible for parole. The only person who would have made a difference was the one who actually fired the weapon.

Townsend

Grounds and submissions

[54] Four supplemental grounds of appeal were filed by the applicant. Grounds one and two, being closely related read:

Ground one

> "That the Learned trial judge erred in that she failed to direct the jury adequately, accurately and [sic] or sufficiently as to whether the applicant was in fact a part of the joint enterprise to murder the deceased in the face of convincing evidence that he was not."

Ground two

> "That the learned trial judge erred in that having given her directions on the law of joint enterprise or common design she failed to enlighten or assisted [sic] the jury on how to apply the law to the facts and largely recited the evidence on this complex aspect of the law."

[55] Mr Hines argued that the judge should have told the jury that the fact that the applicant had told Miss McGowan what account of the incident to report to the police did not make him a part of the joint enterprise, nor did the fact that he refused to go back to the house after leaving the police station. He argued that Miss McGowan was the one who had asked the applicant about what to say at the police station. He submitted that the learned judge told the jury about the applicant claiming that the appellant Adams was his friend, but she had failed to tell them that this did not mean that he was part of the joint enterprise. Mr Hines argued that the evidence in relation to the telephone calls was circumstantial and where the evidence is purely circumstantial then that evidence should be more than mere suspicion and one cannot put up acts of mere suspicion or even strong, natural and logical speculation and make proof of them. He relied on **R v Leonard Atter** The Times 22 March 1956 in support of this submission. Referring to the cases of **DPP v Selena Varlack** PCA No 23/2007, delivered 1 December 2008 and **Donald Phipps v R** [2010] JMCA Crim 48, he submitted that in those cases, the prosecution had relied on phone calls as a part of its case, but there was "something more", that is, some other evidence which pointed to the guilt of the accused. The judge should therefore have directed the jury that the mere listing of phone calls before or after the murder, or both was insufficient to prove

that the applicant was a part of the joint enterprise. There was nothing, he submitted, that could have elevated the linking of the applicant to the joint enterprise as it is agreed that the fixing of the pipe was a genuine task.

[56] It was submitted by Mrs Johnson Spence that the learned trial judge in her summation dealt extensively with the fact that the jurors should look at the evidence against each accused separately notwithstanding the fact that the prosecution was relying on the doctrine of common design. The learned judge, it was further submitted, outlined the prosecution's case in relation to the applicant, including the fact that despite the applicant having denied knowing the appellant Adams, the data in relation to the phone calls showed that they called each other at least six times within the critical period when the event took place. The learned judge also averted the jury's attention to the applicant's unsworn statement and reiterated the law on common design before they retired.

[57] Mrs Johnson Spence referred to **DPP v Varlack** and submitted that in that case, no fact by itself could have resulted in the conviction. However, the facts when taken together, although circumstantial, were sufficient. This principle, she submitted, should be applied in this case. Based on the phone records, it was reasonable to infer that the applicant had called the appellant Adams to keep him abreast of the arrival of the deceased. She submitted that the calls should not be considered in a vacuum but the totality of the evidence should be considered. She referred also to Miss McGowan's evidence that she had not told the applicant of the plan to rob.

Ground three

> "That the learned trial judge erred in not upholding the no-case submission on the appellants [sic] behalf."

[58] Mr Hines submitted that the essence of the no-case submission was that there was no evidence linking the applicant to the joint enterprise and this should have been upheld. Mrs Johnson Spence, on the other hand, submitted that the evidence was not so tenuous that the case should have been withdrawn from the jury. The jury saw the witnesses as they gave their evidence and were thus in a position to decide who they would believe.

Ground four

> "The learned trial judge also erred in that she failed to direct the jury that if the jury believed that the applicant told Ms McGowan to make a false story about the masked men, they should consider whether the applicant was an accessory after the fact based on the evidence presented, or even to consider it."

[59] Counsel outlined the ingredients of the law relating to accessories after the fact. He argued that Miss McGowan had told the applicant that in effect she went with others to rob the victim and she did not know that the gunmen would kill him, so he knew that an offence had been committed. He had concocted a story in order to impede her arrest, she being a person in a joint enterprise to rob which resulted in murder. He was therefore an accessory after the fact impeding her prosecution. He was not voluntarily present at the scene of the crime but had been outside the house and the witness Miss McGowan had approached him. Mr Hines submitted that it was of significance that prior to sentencing, the judge had said that the applicant had "played a small but important

role. He was the informer...[h]e kept Adams abreast of what was going on in Irish Town, while Adams was out of the area", which, Mr Hines submitted, showed that she may have well been mistaken about the applicant and his role.

[60] It was submitted on behalf of the Crown that section 36 of the Criminal Justice (Administration) Act makes it quite clear that accessories after the fact may be convicted of the substantive felony. The learned trial judge, it was submitted, rightly left the verdicts of guilty or not guilty of murder to the jury. The prosecution was relying on the doctrine of common design and as such each person who was a part of the pact would be liable for the consequences arising that were forseeable. It was reasonably forseeable that the carrying of a loaded firearm to relieve a firearm holder of his firearm could result in injury or death. Therefore, there was no obligation on the learned judge to leave the alternative of accessory after the fact to be considered. Relying on the case of **Dennie Chaplin and Others** SCCA Nos 3 and 5/1989, delivered 16 July 1990, it was submitted that the applicant was not merely accidentally present but was a vital party to the commission of murder and the subsequent attempt to conceal it. Therefore, the learned judge's directions were correct.

[61] It was submitted finally on the Crown's behalf that based on the totality of the evidence and the thoroughness of the summation, should the court find that there is any area that the judge may have been remiss in addressing, this was an appropriate case for the application of the proviso.

Ground five

[62] Mr Hines, acting upon the advice of the court, formulated a ground challenging sentence. The ground reads:

> "The learned trial judge erred in her sentence for murder in that the period for parole was manifestly excessive in the circumstances. In the alternative, a sentence of seven years as an accessory after the fact would be reasonable in all the circumstances."

[63] In this ground, Mr Hines placed reliance on his submissions on ground four and stated that a sentence of seven years would be adequate on a conviction of the applicant as an accessory after the fact. He further submitted that the only possible offence which could have been committed by him would have been that of an accessory after the fact as his role was described by the learned judge as minor.

Analysis

Kamar Dawkins

Ground one

[64] The first ground raises the issue of the voluntariness of the statements made by the applicant on the arrival of the police, at the time of his apprehension. The question arising is whether the statements made by the applicant can be categorized as a confession requiring an inquiry into their voluntariness. As shown from the evidence, Corporal Bucknor said that when the applicant was pulled from underneath a bed under which he was hiding, he said, "Officer, nuh kill mi, a nuh me kill the policeman." He then cautioned him. Upon caution, he said "Officer a nuh mi kill the policeman a Irish Town". Sergeant McGill stated that after caution, the applicant said, "A Massy shot the

policeman and force mi fi rob him." The applicant's contention, that in light of the circumstances under which the statements were made to the police, the learned judge ought to have embarked on an inquiry as to whether those statements were voluntarily made, is misconceived.

[65] The applicant's declarations were made immediately, upon the approach of the police. There is nothing to show that at the time, any inducement or threat had been exercised by the police or any fear of prejudice or hope of advantage existed or there was any oppression by them, when he made the statements which, in any way, could have elevated them to the category of a confession. Therefore, the question of the voluntariness of the statements made would not arise.

[66] Further, there is force in the submission of counsel for the Crown that the first two statements were exculpatory and the necessity to test the voluntariness would not have arisen. There is nothing in either statement to show that the applicant was admitting liability for the murder or for any involvement in it. In the third statement, he was asserting that the killing was done by Adams and not by him and that Adams forced him to rob the deceased. The admissibility of the statements would be relevant only to prove that they were made and not proof that their contents were true as established in **Subramaniam v The Public Prosecutor**.

[67] The statements were properly admitted into evidence. It is true, as counsel for the Crown conceded, that the learned judge did not address the issue as to the applicant implicating himself by saying that "A Massy shot the policeman and force mi fi

rob him" in her directions to the jury. However, her failure to do so would not have amounted to a substantial miscarriage of justice and would not have affected the safety of the conviction.

Ground two

[68] The complaint in this ground is that the statement made by the applicant while in custody amounts to a confession and the learned judge ought to have tested its voluntariness. At trial, counsel for the applicant, raised an objection to the admission of Hayden's evidence. After hearing submissions from counsel for the applicant and the Crown, the learned judge ruled that a voir dire would not be held and the witness Hayden should be called to testify.

[69] In **Peart v The Queen** [2006] UKPC 5, the Privy Council considered the Judges' Rules and the question of voluntariness in relation to the admission of a confession statement. In paragraph 24 of the judgment, the Board specified that the rules are not rules of law but administrative directions. Their Lordships went on to outline other propositions under the rules. However, for the purpose of this case, it will only be necessary to make mention of two of the propositions distilled by their Lordships in relation to these rules. They are as follows:

> "(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
>
> (ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's statement to be admitted

> notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed."

[70] The criterion for admission of a statement is fairness. The voluntary nature of the statement is the major factor in determining fairness. If it is not voluntarily made, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judge's Rules. However, the court may rule that its admission would be unfair even if the statement was made voluntarily.

[71] The statement made by the applicant could be treated as a confession. It was for the judge at the time of trial to be satisfied that the statement made by the applicant was voluntary, before determining that it was admissible.

[72] The first question arising is whether, in the circumstances of this case, a voir dire was necessary. Hayden stated that he was in charge of locking up prisoners, feeding them and that he had been in custody without bail, had subsequently been granted bail but re-arrested for other offences. He said he would interview new prisoners to ascertain whether they were homosexuals or child molesters as he did not want them in his cell.

[73] Hayden said that the applicant spent two or three nights in that cell in which there were five of them. The applicant, he said, was distraught, crying and complaining. Two of the men in the cell, Kevin and Steve, questioned the applicant. They enquired of him, the applicant, the reason for his presence in custody. He told them the

following: (a) It was due to the death of the second in "command Commissioner of Police"; (b) It was his friend's girlfriend who had set them up, by informing them (he and his accomplice, Adams) of the involvement of the girlfriend with the deceased and arranged for them to rob him of his credit card; (c) She called his friend on the deceased's arrival; (d) His friend had a gun with which he held up the deceased, asked him for his possessions, searched him and then shot him twice; (e) The deceased's service pistol was taken; (f) After receiving a call from the girlfriend, they left and went to Tavern; (g) He looked out and saw police and soldiers and he informed his partner of their presence; (h) He lay down on the bed and pretended to be asleep while his partner went to hide in the ceiling.

[74] Hayden did not volunteer the information which had been disclosed by the applicant. It was Kevin who had given a statement to the police and had told them about Hayden. Significantly, the applicant was allowed to remain in his cell, which shows that he had been accepted by the other occupants.

[75] The case of **R v Ricardo Williams** cited by the applicant is distinguishable from the instant case. In **R v Ricardo Williams**, the prosecution's case was dependent upon a confession statement given to the police by the appellant. Detective Sergeant Ashman, who testified for the Crown, indicated that the statement was voluntarily made by the appellant. The appellant in his testimony, in cross-examination, denied that the statement was voluntarily given. This court held that, at that juncture in the trial the judge had a duty to re-consider and rule on the admissibility of the statement. In the present case, there was evidence of the applicant's confession. Although the applicant

denied knowing Hayden, he did not deny making the confession. It should also be borne in mind that this was done on his being questioned by Kevin and Steve, not Hayden.

[76] **R v Isequilla** does not assist the applicant. In that case a policeman entered a car, which stopped outside of a bank, in which the appellant was a passenger and placed a handcuff on him while another policeman stood at the side of the car holding a gun. The police then took a briefcase which was lying at the appellant's feet, which the appellant sought to recover. An imitation firearm and a note written by the appellant stating, "Keep calm. Hand over £3,000 or I'll blow your head off," were found in the briefcase. When asked about these items, the appellant said he was stupid, began crying and became hysterical. He subsequently made a confession statement. On appeal, the confession was found to be admissible and although the appellant expressed fright, cried and was hysterical, these did not reflect a mental state requiring the exclusion of his confession statement.

[77] In the present case an inquiry, by way of a voir dire, into the applicant's statement to determine its voluntariness would have been unnecessary. In any event, the learned judge was not bound by the Judges' Rules to decide on its voluntariness. Obviously, she evaluated the circumstances surrounding the making of the statement before ruling on its admissibility.

[78] The learned judge, having not held a voir dire, in the interest of fairness, how then should she have treated with Hayden's evidence? In **Michael Pringle v R**, their

Lordships, in giving guidance as to how a trial judge proceeds where one prisoner gives evidence against another, said at paragraphs 30 and 31:

> "30. ... It is not possible to lay down any fixed rules about the directions which the judge should give to a jury about the evidence which one prisoner gives against another prisoner about things done or said while they are both together in custody. There may be cases where the correct approach will be to treat the prisoner simply as an ordinary witness about whose evidence nothing out of the usual need be said.
>
> 31. But a judge must always be alert to the possibility that the evidence by one prisoner against another is tainted by an improper motive.... Of course, as Ackner LJ indicated in ***R v Beck*** at p 469A, there must be some basis for taking this view. The indications that the evidence may be tainted by an improper motive must be found in the evidence. But this is not an exacting test, and the surrounding circumstances may provide all that is needed to justify the inference that he may have been serving his own interest in giving that evidence. Where such indications are present, the judge should draw the jury's attention to these indications and their possible significance. He should then advise them to be cautious before accepting the prisoner's evidence."

[79] It could be that Hayden was serving his own interest in giving the evidence as at the time he had cases pending against him and it could also be said that his evidence could have been tainted by improper motive. It is without doubt that the learned judge was mindful of this and she did not fail to warn the jury of the danger of relying on Hayden's testimony by giving full and adequate instructions to them. At pages 2463 to 2464 of the transcript she said:

> "Well, Mr. Foreman and members of the jury, Paul Hayden has given evidence of certain statements, certain admissions which the accused Kamar Dawkins made while they were both in custody in a cell at the Half Way Tree lock-up. This occurred in December, 2007. Mr. Hayden testified that he is now on bail, having been granted bail in April, 2008, and his trial is still pending. You have to consider, Mr. Foreman and members of the jury, whether Mr. Hayden's evidence was tainted by improper motive. He may have given his statement and evidence in an effort to appreciate [sic] himself with authorities, hoping that he would and will receive favourable treatment from them. You have to consider that; or did he just give the statement and the evidence because he was asked to do so. It's a matter for you.
>
> It is important, therefore, for you to exercise caution before accepting his evidence in respect of Kamar Dawkins. Examine what he has said carefully and if you believe that he was speaking the truth and giving a true and accurate account of what was said by the accused Kamar Dawkins, then it is open to you to take it into account. So you have to exercise caution in how you deal with this evidence. Examine what the witness has said carefully and if you believe he was speaking the truth and gave you a true and accurate account of what was said, without any improper motives, then it would be open to you to take into account what he has said in relation to the accused Kamar Dawkins' statement. That, Mr. Foreman and members of the jury, was the evidence of the Prosecution."

[80] It is clear that the learned judge had cauterized any prejudice which could have been occasioned by permitting Hayden to testify. She did not omit to properly draw to the jury's attention the fact that the witness might have had ulterior motives in giving the evidence. Nor did she fail to administer a warning that they should be cautious in accepting his evidence. The admission of the statement without an inquiry into its

voluntariness did not, in any way, operate unfairly to the applicant.

Ground three

[81] The applicant's complaint in this ground is that Miss McGowan failed to identify him at the identification parade and when her evidence is viewed against the prejudicial evidence given by Hayden, Corporal Bucknor and Sergeant McGill, there was insufficient evidence to show that the applicant participated in the murder. Therefore, the case against him should not have been left to the jury.

[82] A submission of no case was made on behalf of the applicant to which the learned judge did not accede. A trial judge, in making a decision to withdraw a case from the jury, takes guidance from the principles eminently enunciated by Lord Lane in **R v Galbraith** as to the approach which should be taken in a submission of no case. At page 126 he said:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's [sic] reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there *is* evidence, on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter

to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred."

[83] The approach to these principles governing a submission of no case was further re-visited by the Privy Council in **DPP v Varlack**, in which Lord Carswell said at paragraph 21:

"21. The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in ***R v Galbraith*** [1981] 1 WLR 1039, 1042. That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, is equally applicable in cases such as the present, concerned with the drawing of inferences."

[84] At paragraph 22, he cited with approval the principle as laid down in the Supreme Court of South Australia by King CJ in Questions of Law Reserved on Acquittal (No 2 of 1993) (1993) 61 SASR 1, 5 where King CJ stated:

"I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is

> a case to answer. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open to the evidence."

[85] Lord Carswell further made reference to **R v Jabber** [2006] EWCA Crim 2694 in which Moses LJ, at paragraph 21 said:

> "The correct approach is to ask whether a reasonable jury, properly directed, would be entitled to draw an adverse inference. To draw an adverse inference from a combination of factual circumstances necessarily does involve the rejection of all realistic possibilities consistent with innocence. But that is not the same as saying that anyone considering those circumstances would be bound to reach the same conclusion. That is not an appropriate test for a judge to apply on the submission of no case. The correct test is the conventional test of what a reasonable jury would be entitled to conclude."

[86] The quality of the evidence is the crucial determinative factor which attracts the exercise of a trial judge's discretion in making a decision on a submission of no case. It is clear that where there is credible evidence upon which a reasonable jury properly directed can act, the case ought not to be withdrawn from the jury. If, in weighing up the case, the evidence is found to be so weak that the defendant cannot achieve a fair trial, then the jury ought not to be allowed to convict on it. The question which arises is whether, in this case, there was evidence upon which the jury could have properly

convicted.

[87] In supporting his contention that the evidence against the applicant is highly tenuous and inherently weak, Mr Equiano made reference to the variance in the evidence of Corporal Bucknor and Sergeant McGill in respect of the statements made by the applicant at the time of his apprehension, by highlighting the discrepancies in their evidence as to what the applicant said. He also directed our attention to the fact that Miss McGowan failed to point out the applicant at the identification parade although a description of the applicant was given by her. It was also his view that Hayden's evidence was suspect.

[88] It is acknowledged that there were discrepancies and inconsistencies in the evidence of the two police officers relating to what was said to them at the time the applicant was apprehended. That would not mean that their evidence could not have been placed before the jury. The conflict in the evidence of the two policemen would have been a matter to be resolved by the jury.

[89] Apart from the discrepant evidence of Corporal Bucknor and Sergeant McGill, there was other evidence which was available for the jury's consideration. Despite Miss McGowan's failure to point out the applicant at the identification parade, on her evidence she had seen the applicant with Adams on the day of the murder and on a previous occasion. There was also evidence from Hayden in which the applicant made a confession that it was the death of the deceased which caused him to be in custody. Several cellular telephone calls were made between the applicant and Adams on the

day of the incident prior to their arrival at the scene of the crime from which the jury could have drawn the inference that an arrangement was made by them to go to that house in Irish Town where the deceased would have been arriving. The applicant and Adams arrived at the house together and left together. Sufficient evidence had been presented to the jury from which they could have reasonably inferred that the applicant was the person in the room with Adams when the deceased was shot.

[90] It could not be said that there was no credible evidence on which a reasonable jury properly directed could not have arrived at a verdict. The learned judge was correct in rejecting the submission of no case.

Ground four

[91] The applicant's contention on this ground is that the only evidence which implicated him was that from Corporal Bucknor and Sergeant McGill and the jury's attention was not drawn to the inconsistencies and discrepancies arising on their evidence. It was also his complaint that the learned judge failed to direct the jury how to treat with Hayden's evidence.

[92] A trial judge is not under a duty to point out every discrepancy and inconsistency arising on a case. In **Naresh Boodram and Ramiah (Joey) v The State** (1997) 55 WIR 304, Sharma JA had this to say on the issue, at page 335:

> "...Our criminal jurisprudence is replete with cases which are intended to guide trial judges; we think, however, that it would be unrealistic and impractical to ask a judge to point out all material discrepancies to the jury. After all, appellate courts have repeatedly said that jurors today are intelligent and enlightened; and by the same token the same appellate

> courts must not seem ready to erode that approach. It all depends on how a case is conducted, what are the salient issues; and the judge has to be very astute to ensure that the jurors' attention is not diverted from the live issues by exhaustive and copious directions."

[93] In great detail, the learned judge instructed the jury how they should treat the discrepancies and inconsistencies of the witnesses and discharged the duty placed upon her by informing the jury of the discrepancies and inconsistencies in the evidence of the policemen and directed them as to the approach they should adopt in dealing with them. She also properly instructed them how to deal with Hayden's evidence. The jury heard the evidence, it was for them to decide what they should have accepted or rejected.

Ground five

[94] The criticism in this ground is that due to the inadequacy of the directions on the good character evidence the applicant was not afforded the opportunity to have the jury treat his evidence as credible.

[95] The applicant gave evidence of his good character by saying that he had not been in trouble with the law previously. In **R v Vye** it was established that, generally, where evidence is given of the good character of a defendant, a judge is required to instruct the jury on his credibility as well as the relevance to his propensity to commit the offence for which he has been indicted. **R v Vye** was approved and applied in **R v Aziz** [1996] 1 AC 41.

[96] In **Edmund Gilbert v The Queen** PCA No 25 of 2005, delivered 27 March 2006,

Lord Woolf quoting Lord Steyn, in **R v Aziz**, speaking to the judge's discretion to give good character direction, at page 53, said:

> "I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with ***Vye***. I am reinforced to thinking that this is the right conclusion by the fact that after ***Vye*** the Court of Appeal in two separate cases ruled that such a residual discretion exists: ***Reg v H*** [1994] Crim LR 205 and **Reg v Zoppola-Barraza** [1994] Crim LR 833."

He went on to say:

> "That bring [sic] me to the nature of the discretion. Discretions range from the open-textured discretionary powers to narrowly circumscribed discretionary powers. The residual discretion of a trial judge to dispense with character directions in respect of a defendant of good character is of the more limited variety. Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with *Vye* [1993] 1 WLR 471 and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with *Vye*, the judge may in his discretion dispense with them."

Lord Woolf then stated:

> "I would only add two comments to this common sense approach, which is particularly relevant on this appeal. The first is that if a judge has a residual discretion it follows that there can be circumstances where a conviction can be upheld if a judge omits to give a direction due to oversight and secondly the circumstances where this can be the

> position are not necessarily as rare as was once thought (see Lord Brown's judgment in ***Bhola*** supra paragraph 17)."

[97] In directing the jury on the applicant's evidence of his good character, the learned judge said at page 2483 of the transcript:

> "He is seeking here to establish his good character. Character, by itself, it does not provide a defence but what the accused is seeking to do is to establish his credibility and the fact that he is unlikely to have committed the crime charged, that is what he does when he tells you that he has never been charged, he has never been in trouble before so you take that into consideration. By itself, it really doesn't provide a defence, it goes to his credibility and the fact that he is unlikely to have committed the crime charged."

[98] Mr Equiano contended that the learned judge gave directions on the propensity aspect of the good character direction only and the applicant did not obtain the benefit of a credibility direction. The applicant gave sworn testimony. The authorities show that where a defendant gives sworn testimony both limbs of the good character direction must be addressed, in that, proper directions ought to be given on these limbs.

[99] The learned judge, in giving instructions to the jury, referred to credibility but did not explain what this meant, by going on to indicate that the applicant's good character supported his credibility. This case is one in which the Crown relied on circumstantial evidence which made it desirable for an explanation to be given to the jury as to the purpose of a credibility direction. However, it may be that, in substance, the learned judge had given the applicant the benefit of a direction as to credibility, albeit it was not one which was full in content. But even if it can be said that she ought

to have fully instructed them on the issue, this does not mean that her failure to do so is fatal to the fairness of the trial or the safety of the conviction as the omission to do so, could be treated as an oversight. Further, there are recent authorities which have shown that in assessing whether the omission would have had any drastic effect on the trial, the critical issue is whether it would have made any difference to the trial or would have altered the verdict: see **Bhola v The State** [2006] 68 WIR 449 and **Teeluck & John v The State** (2005) 66 WIR 319. No substantial miscarriage of justice occurred, as the jury "would without doubt" have convicted if the error or irregularity had not occurred - see **Stirland v DPP** [1944] 2 All ER 13 at 15. In **DPP v Stonehouse** [1977] 2 All ER 909 at 919, this test laid down in **Stirland** was approved and adopted by the House of Lords.

[100] We are of the view that, in this case, an examination of the trial as a whole shows that the learned judge's omission to expand on the credibility issue would not have made any difference to the outcome of the case. As a consequence there would not have been any substantial miscarriage of justice.

Ground six

[101] The criticism in this ground is that the learned judge did not point out the weaknesses in the Crown's case but highlighted all discrepancies and inconsistencies in the applicant's case.

[102] It cannot be denied that, a defendant is entitled to have his defence properly placed before the jury. In **R v Nelson**, [1997] Crim LR 234, Simon Brown LJ, treating

with this matter, at pages 7-8, said:

> "Every defendant, we repeat, has the right to have his defence, whatever it may be, faithfully and accurately placed before the jury. But that is not to say that he is entitled to have it rehearsed blandly and uncritically in the summing-up. No defendant has the right to demand that the judge shall conceal from the jury such difficulties and deficiencies as are apparent in his case. Of course, the judge must remain impartial. But if common sense and reason demonstrate that a given defence is riddled with implausibilities, inconsistencies and illogicalities – as plainly this appellant's defence was – there is no reason for the judge to withhold from the jury the benefit of his own powers of logic and analysis....
>
> The truth usually is that the lack of balance is to be found in the weight and worth of the rival cases, an imbalance which the summing-up, with perfect propriety, then fairly exposes. Judges exist to see that justice is done. Justice requires that the guilty be convicted as well as that the innocent go free. Judges who go to the trouble of analysing the competing cases and who give the jury the benefit of that reasoned analysis assist in that process."

[103] The question now arising is whether in this case, the summation was biased in favour of the prosecution and as a result the applicant was not afforded a fair trial. It was contended that the learned judge failed to give specific instructions on: the weaknesses in the evidence of identification; the inconsistencies and discrepancies of the Crown's witnesses and Hayden's appearance in court before he gave evidence.

[104] It was Mr Equiano's contention that the applicant had not been identified by Miss McGowan but the learned judge directed the jury as to what she said about seeing the applicant once before the event and also that she said that Adams went to Irish Town with another man whom she did not identify. This, he said, would have

led the jury to believe that the applicant was previously known to Miss McGowan.

[105] Mr Equiano's argument is wholly devoid of merit. The learned judge drew to the jury's attention that Miss McGowan had given to the police a description of the person she had seen at the time of the murder and left it for their consideration. She also pointed out to them that the witness said she had seen the applicant once before and again on the day of the incident but failed to point him out at the identification parade. Then, at page 2396 of the summation, she went on to say this:

> "It is a matter for you Mr Foreman and members of the jury. What Tina McGowan said about her seeing the accused Dawkins once, and then the fact that the accused Adams had gone up to Irish Town with another [sic] who she really could not identify..."

[106] Taking into account all that the learned judge said and particularly, that the witness did not point out the applicant at the identification parade, on a reading of the direction, it could not be said that it would have caused the jury to have formed the view that the learned judge was saying that the applicant was known to Miss McGowan. It is clear that she informed the jury that Miss McGowan did not identify the applicant.

[107] The learned judge brought to the jury's attention the fact that Hayden entered the court room before he was called to testify and she made reference to the questions which were posed to him in cross-examination and his response thereto. There would have been no necessity for the learned judge to have given further directions in this regard. She carefully directed them on the question as to whether Hayden's testimony could have been tainted by improper motive and whether he had testified in the

expectation that he would have been accorded favourable treatment by the authorities. She did not fail to impress upon them to exercise caution before accepting his evidence. This would have clearly inured to the applicant's benefit. The fact that the learned judge did not tell the jury that the applicant denied knowing Hayden who came into the court prior to his giving evidence would in no way affect the fairness of the proceedings.

[108] The learned judge exposed the discrepancies and inconsistencies on both sides. The jury heard the evidence. Significantly, it was for them to decide whether a discrepancy or inconsistency existed, whether it was material or immaterial and the impact it would, in their view, have on the case. Where any contradictions were found to be material, it would have been open to them to decide whether they went to the root of the Crown's case.

[109] The learned judge gave full and fair weight to the evidence presented on each side. It could not be said that there was any imbalance in her directions. There is nothing to show that the applicant was deprived of the opportunity of having had his case weighed in the scales of justice.

Ground seven

[110] Mr Equiano's complaint, on this ground in essence, is that the applicant is of good character; the Crown's case demonstrates that he intended to rob and not to kill; and there is no distinction between the acts of the applicant and Townsend who would have to serve 20 years before becoming eligible for parole.

[111] In sentencing, the learned judge said at page 2577 of the transcript:

> "Yes, I am referring to the report. I am replying [sic] on what I see in the report and I believe Dawkins knew his role and he played it to the ilk [sic], it was perhaps committed to him to be a participant in this plan, he had his firearm and himself and Adams entered the premises, both armed. But it is Adams who insisted that Dawkins hold on to Miss McGowan and Adams it was who fired the fatal shot that took the deceased [sic] life."

[112] It is clear that Dawkins was fully aware that the deceased would have been killed. He went prepared for that eventuality, he having been armed with a gun. Although he was not the one who fired the shots, he was clearly an integral part of the murder. It is true that at the time of the killing, Adams told him to hold on to Miss McGowan but he could have declined to do so. The fact that he restrained her shows that it was his intention that the deceased should be killed. His act in participating in the killing of the deceased exceeded that of Townsend. Accordingly, the length of time which he would be required to serve before eligibility for parole would have had to be far in excess of that which was imposed on Townsend. In the circumstances of this case, the tariff of 30 years was reasonable as it falls within the gamut of the period for eligibility for parole where life imprisonment is imposed.

Applicant Towsend

Re: grounds one, two and three

[113] It is convenient to deal with these three grounds simultaneously. The complaints in these grounds are that the learned judge failed to adequately direct the jury on common design in relation to the applicant and failed to uphold a submission of no case.

[114] It is a settled principle that where two or more persons proceed on a joint enterprise to commit an offence, culpability is ascribed to each party. However, where the plan exceeds that which was tacitly agreed by the parties, that other party who did not intend to participate in the commission of the offence is not culpable. In **R v Anderson and Morris** [1966] 2 All ER 644, [1966] 2 QB 110, Lord Parker CJ, adopting with approval the submissions of counsel for Morris, outlined the doctrine of joint enterprise at page 647 as follows:

> "... where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, [and] that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) .... [I]f one of the adventurers goes beyond what has been tacitly agreed as part of the common enterprise, his co-adventurer is not liable for the consequences of that unauthorized act. Finally ... it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise."

[115] In **Chan Wing-siu v R** [1984] 3 All ER 877, Sir Robin Cooke, delivering the judgment of the Board, spoke to the relevant test in determining mens rea in relation to the issue of joint enterprise, at page 882:

> "The test of mens rea here is subjective. It is what the individual accused in fact contemplated that matters. As in other cases where the state of a person's mind has to be ascertained, this may be inferred from his conduct and any other evidence throwing light on what he foresaw at the material time, including of course any explanation that he gives in evidence or in a statement put in evidence by the prosecution. It is no less elementary that all questions of weight are for the jury. The prosecution must prove the

> necessary contemplation beyond reasonable doubt, although that may be done by inference as just mentioned. If, at the end of the day and whether as a result of hearing evidence from the accused or for some other reason, the jury conclude that there is a reasonable possibility that the accused did not even contemplate the risk, he is in this type of case not guilty of murder or wounding with intent to cause serious bodily harm."

[116] Mr Hines contended that the applicant was not a part of the joint enterprise in the killing of the deceased and the learned judge failed to adequately direct the jury in that regard. We are constrained to disagree. The learned judge, at pages 2173 to 2176 of the summation, gave a comprehensive and proper direction to the jury on the question of common design in relation to all three persons who were before the court. She warned the jury to consider each accused's case separately. Then later, in dealing with this applicant, she said at pages 2468 to 2470:

> "In relation to the accused Townsend, the Prosecution is saying he was fixing this pipe near the house in which the deceased was killed. In one witness statement to the police, he said he saw no one and he heard nothing. Next day in his witness statement to the police, he said he saw men go in the house, he heard two explosions and he saw two men and Tina run out. The accused Townsend, according to Tina McGowan's evidence, told her what to say at the station. She said, 'Imagine, you would believe seh dem kill di man'? On her way to the station she says, 'What a must tell dem'? And, he tells her about three masked men. Townsend stands beside her in the guard room at the Irish Town Police Station while she makes the report to District Constable Rose but he refused to go back to the house with her where the police were, or where she was to meet the police.
>
> There is evidence, the Prosecution led from Tina McGowan,

> that he, the accused Townsend told her that he and 'Massi' are friends and that calls extracted from the Digicel network were made from his phone to Adams and there were calls from Adams' phone to him and I have done it in this way, Mr. Foreman and members of the jury, to impress it upon you that you must consider the case against each accused separately and determine whether the doctrine of common design operates, whether there was a plan and whether they were all in it together."

[117] Miss McGowan informed Adams that the deceased was due to come up to Irish Town on the day on which he was killed. Adams had on the previous day, told her that they were coming up to get the deceased's gun. At 11:11 on the morning of the deceased's death, he, the deceased, called Miss McGowan to inform her of his arrival. At 11:11 am, Adams also called Miss McGowan. There is evidence from Miss McGowan that she informed Adams of the deceased's arrival. The applicant called Adams at 11:32 am which would have been after Adams learnt that the deceased had arrived. Miss McGowan had seen the applicant on the morning of the incident in adjoining premises fixing a broken pipe which she said he was asked to do by his cousin Tasheka. The applicant gave two conflicting witness statements to the police as stated by the learned judge.

[118] After the killing, Miss McGowan saw the applicant at the wholesale and said to him "You can believe that them shot the man." He laughed. She then asked him to accompany her to the police station. He asked her what she intended to tell the police. He told her to inform them that she was held up by three masked men who robbed and killed the deceased. Thereafter, Miss McGowan and the applicant went to the police

station. She made the report to the police in keeping with the terms of the applicant's instructions. He refused to go to the house where the deceased was killed despite the instruction by the police to do so.

[119] The question which now arises is whether the applicant had contemplated that there would have been a substantial or real risk that Adams might have possibly killed the deceased. It is what an accused contemplated which is significant. The applicant and Adams exchanged telephone calls prior to and after the deceased was killed. The applicant was in the vicinity of the house in which the deceased met his death. The jury could have inferred that the applicant knew that the deceased was due to arrive at Irish Town that day and he, the applicant, was aware that Adams intended to have taken his (the deceased's) gun. It would have been reasonable for the jury to find that the applicant would have known that Adams would have been armed in carrying out this undertaking and would have been aware of the risk that the deceased might be killed. He gave conflicting witness statements. After he was told of the death of the deceased he laughed. In addition, he told Miss McGowan to give a false statement to the police about the circumstances surrounding the murder. All these circumstances would have been sufficient to link the applicant as a participant in the deceased's death, as they would show beyond reasonable doubt that the applicant was a part of the pre-arranged plan to kill the deceased.

[120] Like the instant case, the cases of **Donald Phipps v R** and **DPP v Varlack** are based on circumstantial evidence. The evidence in those cases was substantially based on telecommunication between the parties involved in the crime. In the instant case,

the evidence against the applicant was strong enough for him to be caught in the web of common design.

[121] In **Donald Phipps v R**, the Crown relied on telephone calls between the appellant and three witnesses on the morning on which two persons, Rodney Farquharson and Daten Williams, were murdered. Cellular telephone conversations first took place between a witness for the prosecution, Rashford Kelroy and Farquharson, followed by a conversation with Phipps, which led to Phipps calling back. Kelroy and others went to Oliver Clue's house where he put his, Kelroy's, cellular phone on speaker. Calls were made to and from Phipps on Farquharson's phone from which it emerged that Phipps was holding Farquharson who was in trouble. Phipps told Clue, "You love Rodney this is the last time you are going to hear his voice".

[122] In **DPP v Selena Varlack** the evidence against Varlack linking her to the murder of a deceased was overwhelming. The evidence showed that she was intrinsically involved in the plot to murder the deceased with whom she had an intimate relationship in the past. The evidence against her, mostly through the telephone calls made and received by her, gave credence to the case against her by showing that she lured the deceased to the place where he was killed.

[123] There was, in the instant case, sufficient evidence on which the jury could have drawn the requisite inferences to prove beyond reasonable doubt that the applicant was involved in a concerted design to murder the deceased. The conviction is undoubtedly unassailable.

Ground four

[124] Mr Hines submitted that the only offence which the applicant could have possibly committed would have been that of an accessory after the fact as he played no part as a participant in a common design to kill the deceased. His only connection to the murder would have been the false report which he had given to Miss McGowan to give to the police and the learned judge should have left for the jury's consideration the offence of an accessory after the fact, he argued.

[125] Under section 36 of the Criminal Justice (Administration) Act an accessory after the fact may be convicted of the substantive felony and where an offender has been indicted as an accessory after the fact he may be convicted as a principal.

[126] However, where a defendant has been indicted as a principal, he cannot be convicted as an accessory unless he has also been indicted for that offence. **R v Watson** (1916) 12 Cr App R 62 shows that if a defendant is indicted for the principal offence, he cannot be convicted as an accessory after the fact, even if the evidence shows that he was an accessory after the fact.

[127] In this case, the applicant had been indicted as a principal for the offence of murder. It is clear that in order to sustain a conviction as an accessory after the fact an indictment would have had to be laid against the applicant charging him for that offence. He, not having been indicted for the offence, the necessity would not have arisen for the learned judge to have given directions to the jury on the offence.

[128] Section 3(1) (b) of the Offences Against the Person Act gives the court discretion

in sentencing an offender who has been convicted of murder. The sentence may be one of imprisonment for life or a determinate term of not less than 15 years. In the circumstances of this case, we are of the view that the applicant, having played a minor role in the murder of the deceased, he ought not to serve a life sentence but instead serve a sentence of 20 years imprisonment.

Sentence

Massinissa Adams

[129] Adam's appeal against sentence is allowed. The sentence of death is set aside and a sentence of life imprisonment is substituted. It is ordered that he should not become eligible for parole until he has served 30 years. The sentence should commence on 9 November 2009.

Kamar Dawkins

[130] The application by Dawkins for leave to appeal against conviction and sentence is refused. Sentence should commence on 9 November 2009.

Rohan Townsend

[131] The application by Townsend for leave to appeal against conviction is refused. The application for leave to appeal against sentence is treated as the hearing of the appeal. The appeal is allowed. The sentence of life imprisonment with the stipulation that he should not become eligible for parole until he has served 20 years is set aside. A sentence of a determinate term of 20 years imprisonment is substituted. Sentence should commence on 9 November 2009.