[2012] JMCA Crim 51

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 56 & 57/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MRS JUSTICE McINTOSH JA

KAREGA BARNES
MARLON BROWN v R

Leroy Equiano for Karega Barnes

Mrs Jacqueline Samuels-Brown QC instructed by Miss Velma Hylton QC for Marlon Brown

Mrs Kamar Henry-Anderson and Miss Keisha Prince for the Crown

17, 18, 19 April and 12 October 2012

MORRISON JA

Introduction

[1] On 16 April 2010, Mr Karega Barnes ('Mr Barnes') and Mr Marlon Brown ('Mr Brown') were convicted of the offence of murder, after a trial in the Home Circuit Court before Hibbert J and a jury. They were each sentenced to imprisonment for life and the court specified that they should serve a period of 25 years' imprisonment before becoming eligible for parole.

[2] On 18 October 2011, Mr Barnes' application for leave to appeal against his conviction and sentence was granted by a single judge of this court, but Mr Brown's application was refused. On 17 April 2012, the court commenced the hearing of Mr Barnes' appeal and Mr Brown's renewed application for leave to appeal. At the conclusion of the hearing on 18 April 2012, Mr Barnes' appeal was allowed, his conviction and sentence were set aside and a judgment and verdict of acquittal was entered in his favour. However, the court reserved its decision on Mr Brown's application for leave to appeal. This is the judgment of the court, which incorporates the reasons for the decision in respect of the appeal of Mr Barnes and Mr Brown's application for leave.

The trial

The case for the prosecution

[3] On 26 July 2005, Mr Edward Green ('the deceased'), who was a senior security guard and a supervisor employed to McKay Security Consultants Ltd died from gunshot wounds received while he was on duty at Caymanas Track ('the track'), in the parish of St Catherine. The single eye-witness to the killing was Mr Aubrey Barr, a colleague of the deceased, who was also stationed at the track on that day. Both Mr Barr and the deceased normally carried firearms while on duty.

[4] In the late afternoon of that day, Mr Barr, a former district constable, was on duty and assigned to the Gregory Park gate of the track, in close proximity to a playing field where football was played from time to time. Preparations for a match were

actually underway at that time. Whenever a football match was in progress, members of the track security detail were also asked to provide security for the playing field. At about 5:30 pm, while standing at the Gregory Park gate, Mr Barr saw three young men standing at a distance of about 15 yards across the road from him. He was able to see their faces and recognised two of them as men known to him before as 'Che' and 'Back to'. However, the third man was not known to him. He was at that position for about 40 minutes, during which he was aware of the presence of the three men across the road for about 10 minutes, and actually observed them for about two minutes.

[5] At about 6:10 pm, Mr Barr heard six loud explosions, sounding like gunshots, coming from the track in the vicinity of the Gregory Park gate. Seconds later, as he tried to get closer to the gate to see into the compound through the mesh fence attached to a concrete wall to the premises, he saw the man known to him as 'Back to' come through the pedestrian gate at the Gregory Park gate, with a handgun in each of his hands. This man held up his right hand and fired two shots in the air. The man known to him as 'Che' also came through the gate, with a handgun in his left hand. Both men were "moving fast", but not running. The two men were then facing Mr Barr, giving him an unobstructed view of their faces, as "the evening was clear and there wasn't anything to prevent me from seeing their faces". However, he could not recall whether or not the sun was down at that time. The men walked towards Mr Barr, coming closer to him, before making a right turn just beyond a stall which was to the right of the gate, going across the adjacent train line and heading off in the direction of Waterford. While they came towards him, Mr Barr was able to see their faces, then

saw them sideways as they made the right turn, then saw their retreating backs as they moved further away.

[6] Mr Barr described in court the distance at which the two men were from him when he saw them emerge through the pedestrian gate to the track and this was estimated at 27 feet. At the point where they made the right turn to go across the train line, they were about 20 feet away from him and he estimated the time that elapsed from their emergence from the gate to their making the right turn to be about 12 seconds. He recalled that 'Back to' was wearing a blue shirt and had a "twisted" hairstyle, but he was unable to recall how 'Che' was dressed. In court, Mr Barr identified Mr Brown as the man he referred to as 'Back to' and Mr Barnes as the man he referred to as 'Che'.

[7] After the men had left, Mr Barr entered the track compound through the pedestrian gate and, upon passing the guard house inside the compound, he saw the deceased lying face down on the ground in a pool of blood, his motorcycle beside him. The deceased was still alive and Mr Barr, knowing that the deceased would have been in possession of the licensed firearm issued by the security company, immediately checked to see if it was in the deceased's waistband. It was missing. The deceased was then placed in the motor car of a passerby and taken away.

[8] Mr Brown had been known to Mr Barr for about three years prior to July 2005. Mr Brown lived, he said, at Dennis Avenue, Church Yard, in the Gregory Park area. Mr Barr also knew Mr Brown's father ("Mr I. Brown"), who was a jockey who worked at the

track, and he was accustomed to seeing Mr Brown "one or three times for the month". At these times, Mr Brown would be seeking entry to the track through the Gregory Park gate for the purpose of visiting his father and would pass "very close" to Mr Barr, who would be sitting in or standing at the guard house at the gate. On these occasions, which were in the daytime, Mr Barr would observe Mr Brown's face, sometimes sideways, without obstruction.

[9] Mr Barnes had also been known to Mr Barr for three years, during which time he would also see him come to the track with Mr Brown one to three times per month. Mr Barnes and Mr Brown were, Mr Barr said, "always together", though he had never spoken to him before. Mr Barr did not know any of Mr Barnes' relatives, but, he said, Mr Barnes "lives at a place called 'Gulf' in Gregory Park".

[10] As might have been expected, Mr Barr was cross-examined at great length, especially by counsel for Mr Barnes. Among the matters canvassed extensively were the circumstances in which Mr Barr had ceased to be a district constable (he insisted that he had not resigned, but could not recall whether he had been dismissed). He agreed that there were "quite a few people at Caymanas Park" on the afternoon of 26 July 2005, also saying that "people keep coming and going". He did not know when Messrs Barnes and Brown moved from where he saw them standing with the third man outside the track compound, but, when asked to state the possibilities, his answer was that there were "lots of entrance, illegal entrance [sic]" to the track. One could either enter through the gate "or use the illegal entrance" and he did not see any of the three men enter through the gate. He was present when policemen arrived on the scene

after the shootings, but he did not make a report to any of them "at that time", as he had to think about his safety. However, he did report what had happened to his boss, Mr Jason McKay, but he did not tell him any names of the gunmen. When it was put to Mr Barr that Mr Barnes could not have been at the track at the time he said he saw him, as Mr Barnes was at that time just leaving the Linstead Police Station "on business", he repeated that he had seen him coming "through the gate with a gun in his left hand". When Mr Barr was questioned about his evidence that Mr Barnes lived in the Gulf area, it turned out that Mr Barr had never been to the Gulf area himself and that what he had earlier told the court was based on what he had heard from someone else.

[11] Cross-examined by counsel for Mr Brown, Mr Barr agreed that the only physical description he had given to the police of Mr Brown, apart from that he was wearing a blue shirt and had a "twisted" hairstyle, was that he was "of slim, dark complexion". Although he would see Mr Brown's face very clearly on the occasions when he saw him at the track, he was not aware that Mr Brown had either a scar to the upper part of his lip or a "very large tattoo to his right lower forearm". He agreed that when the two men emerged from the pedestrian gate after the shootings, he was actually hiding beside the stall to the right of the gate. He agreed that before he actually saw the two men coming through the pedestrian gate, there was "a gathering" on the inside of the gate, although by the time he went into the compound about 13 seconds after the shootings there was no-one "in the vicinity". He also agreed that he had said at the preliminary enquiry that he had been dismissed as a district constable.

[12] In re-examination, Mr Barr said that, although he was frightened and was hiding to protect himself after the shootings, this did not obstruct his view of the two men, which was "clear". Although he was himself armed with a firearm that day, he had not attempted "to engage" the escaping men, because there were other people around.

[13] Later in the evening of 26 July, responding to a report, Detective Sergeant Michael Simpson, who was on duty at the Portmore Police Station, went to the track, where he observed several spent 9 mm shells, as well as blood, on the ground inside the guard house at the Gregory Park gate. He also saw indications of gunshots on the walls of the guard house. (However, under subsequent cross-examination, Sergeant Simpson accepted that he had not mentioned either the spent shells or the gunshot impressions on the wall in his police statement dated 16 August 2005.) Later still, Sergeant Simpson visited the Spanish Town Hospital, where he was directed to the Spanish Town Funeral Home. There, he saw the deceased's body with several gunshot wounds.

[14] Sergeant Simpson, who was originally the investigating officer, subsequently drafted warrants on information for two suspects, known only as 'Che' and 'Back To'. However, because he was due to proceed on vacation leave, on 15 August 2005 he handed over the file along with the warrants to Detective Inspector Leighton Blackstock, who then took command of the investigation. The following day Inspector Blackstock attended a post-mortem examination conducted by Dr Kadiyala Prasad, a consultant forensic pathologist, at the Spanish Town Funeral Home, where the deceased's body was identified by Miss Evette Campbell, the deceased's cousin. Dr

Prasad observed two gunshot wounds to the deceased's body, both without any gunshot deposition, and concluded that the deceased's death had been due to multiple gunshot wounds. The likely time of death after receiving these injuries would have been 15 minutes to half an hour.

[15] On 18 August 2005, the warrant in respect of Mr Barnes was executed by Inspector Blackstock at the Portmore Police Station lock-up, where, after he was cautioned, Mr Barnes said "Mi nuh do it sir, Help me". In answer to Inspector Blackstock, he confirmed that he was also known as 'Che'. On 17 September 2005, Mr Barr attended an identification parade at the Hunt's Bay Police Station, where he identified Mr Barnes as 'Che', one of the men whom he had seen at the track on 26 July 2005. Mr Barnes, who was represented by counsel on the parade, signed the identification parade form.

[16] On 20 April 2006, Mr Brown was seen by Inspector Blackstock at the Portmore Police Station lock-up and he confirmed that he went by the name 'Back To'. On 16 May 2006, Mr Barr attended a second identification parade, again at Hunt's Bay Police Station, where he identified Mr Brown as 'Back To', the other of the two men whom he had seen leaving the track through the pedestrian gate after hearing the explosions on 26 July 2005. Mr Brown, who was not represented on the parade, refused to sign the identification parade form.

[17] Both men were charged by Inspector Blackstock with the murder of the deceased. After caution, Mr Barnes again said, "Mi no dweet", while Mr Brown said, "Dem say mi, Shelly and 'Che' dweet, mi no know nothing bout it."

[18] Under cross-examination by counsel for Mr Barnes, Inspector Blackstock was asked whether he recalled 'Hurricane Dennis' in 2005. He did not. Neither could he recall any time during 2005 when the Bog Walk Gorge was blocked. However, he was aware of the alternate routes coming from Linstead or Bog Walk in the direction of Kingston, when the gorge was closed, through Sligoville or Barry, and agreed that the latter "is a very long and tedious route". He also agreed that, if one took the Sligoville route heading to Kingston, there were two different routes, one which went over Sligoville via Red Hills and the other which terminated close to the Spanish Town Hospital. When the gorge was blocked, "the traffic would be heavier".

[19] While Inspector Blackstock could not recall Mr Barnes telling him, when he informed him that he was a suspect in the murder of the deceased, that he had been in Linstead reporting to the police all day on 26 July 2005, he did recall being asked something about that at the preliminary enquiry. As a result of what was said on that occasion, he had made an effort to check this information by making an enquiry at the Linstead Police Station, but had not had any success, as the station diary for that particular day could not be located.

[20] This was the case for the prosecution, at the end of which both Messrs Barnes and Brown were called upon to answer.

The case for Mr Barnes

[21] Mr Barnes opted to give evidence on oath. He gave his address as Trojan in the Linstead area, and stated that he had never lived at Gulf in Gregory Park. He did not know Mr Barr, having seen him for the first time at Half Way Tree Court in connection with this matter. He did not know Mr Brown before the start of this case and had never visited the track before July 2005. He was not in the vicinity of the Gregory Park gate to the track at about 5:30 pm on 26 July 2005. At about 4:25 pm on that day, he had gone to the Linstead Police Station for the purpose of fulfilling a daily reporting requirement, as he had been doing for the three months before. He identified the 'report book' which was signed by an officer at the station. After the book was signed, he was sent to the Criminal Investigations Bureau Office at the station, where he was questioned by a police officer, before leaving the station. When he left, he went home to Trojan, which is about four miles from the Linstead Police Station. The following morning at about 7:30 am, he again reported to the Linstead Police Station. During the month of July 2005, Mr Barnes told the court, the Bog Walk Gorge, with which he was familiar, was closed, as a result of blockages caused by a hurricane and a "whole heap of rainfall". Finally, Mr Barnes said in examination-in-chief, he used his right hand to make his signature.

[22] When he was cross-examined by counsel for the Crown, Mr Barnes accepted, after a period of hesitation, that he was familiar with the area known as Gulf in Gregory Park and that he had friends there. However, he maintained that he had never been to the track and that he did not know either Mr Brown or Mr Brown's father. After leaving

Linstead Police Station on 26 July 2005, he had arrived home at about 5:10 pm. By his estimation, it would take more than half an hour to get to Portmore from Linstead.

[23] Mr Henry Harrison was called as a witness for Mr Barnes. He was a District Constable stationed at the Linstead Police Station and had been so stationed in July 2005. He had on many occasions written up Mr Barnes' report book when he came to the station to report as a condition of bail. Having refreshed his memory from Mr Barnes' report book, he confirmed that Mr Barnes did report to Linstead Police Station in the afternoon of 26 July 2005 between 4:00 and 4:30 pm. Having reported at the police station, Mr Barnes left, telling Mr Harrison that he was going home, though Mr Harrison was unable to say whether or not he had in fact gone home.

The case for Mr Brown

[24] In a brief unsworn statement from the dock, Mr Brown said that he was innocent and knew nothing about the murder. He could not say exactly where he was at the material time, "because it is a very long time". He concluded as follows:

> "I am not going to say they don't call me "Back To". The witness says he knows me. How he don't mention the tattoos whey mi have on my hand and my scar and this is before 2005. See it deh. [accused indicates]...I do higglering for a living. The only time I know 'Che' is when I come to jail and know 'Che' and I never did a hide from no police."

The summing up and the verdict

[25] The learned trial judge summed up the case to the jury in considerable detail, covering in the process all the usual bases. In particular, he directed them as to how to approach the question of credibility and the law on common design, identification and circumstantial evidence.

[26] In due course, the jury was invited to retire and to consider its verdict. After some 90 minutes, the jury returned to court and indicated that although they had arrived at a unanimous verdict of guilty in respect of Mr Brown, they required further directions from the judge in respect of Mr Barnes. Asked by the judge whether there was anything that they would want him to assist them with, the foreman indicated that the jury's concern was "to do with Karega Barnes being one place and in Linstead and being seen in Spanish Town, the time frame between".

[27] Hibbert J then reminded the jury of the evidence as regards Mr Barnes having been at Linstead Police Station on the afternoon in question and the issue whether it would have been possible for him to travel from Linstead to Portmore within an hour or thereabouts. He told them that if they had a reasonable doubt that Mr Barnes was present at the track as alleged, "then you will have...to find him not guilty".

[28] The foreman then raised two further questions relating to the significance, if any, of Mr Barr having said that 'Che' held a gun in his left hand and whether he had been previously known to Mr Barr. After reminding the jury of the evidence on these points, the judge then invited them to retire further to consider their verdict in relation

to Mr Barnes and within 20 minutes or so they returned with a unanimous verdict of guilty.

Mr Barnes' appeal (SCCA No 56/2010)

[29] When this appeal came on for hearing, Mr Leroy Equiano for Mr Barnes sought and was granted leave to argue five supplemental grounds of appeal, as follows:

> "1. The Applicant [sic] did not get a fair trial as the Learned Trial Judge's constant intervention in counsel's cross-examination of the witness prevented counsel from effectively and adequately presenting the Applicant's [sic] case.
>
> 2. The learned Trial Judge's Interventions in counsel's cross-examination of the witnesses and comments made by the Learned Trial Judge undermined the integrity of the Applicant's [sic] case.
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> 3. The Learned Trial Judge invited the Jury to speculate on the most crucial aspect of the Applicant's [sic] defence.
>
> 4. The Applicant [sic] was of previous good character. Counsel was not allowed to present before the Jury evidence to support the character of the Applicant [sic], consequently, the Applicant [sic] did not benefit from a good character direction.
>
> 5. The Learned Trial Judge failed to point out to the Jury the weaknesses in the identification evidence."

[30] However, in his spirited oral submissions, Mr Equiano concentrated his efforts on grounds three and five, arguing them together. Ground three concerned the critical issue of identification, Mr Equiano describing the alibi set up by Mr Barnes as "the most crucial aspect" of the defence and pointing out that this was one of the matters upon

which members of the jury were undecided after their initial period of deliberation. There was no evidence to rebut Mr Barnes' evidence that the gorge was blocked at the material time and that that would have made it impossible for anyone to travel from Linstead Police Station to Portmore within the time that it would have taken Mr Barnes to get to the track from the station. In these circumstances, it was submitted, the learned trial judge's further directions to the jury on the point were tantamount to an invitation to them to speculate on the matter. The jury ought to have been reminded specifically that the burden of disproving the alibi rested on the prosecution. It was further submitted that the judge had failed to assist the jury as to the weaknesses in the identification evidence, in particular as regards the question of the source of Mr Barr's alleged previous knowledge of Mr Barnes.

[31] In a careful and conspicuously fair response to these submissions, Mrs Henry-Anderson for the Crown agreed that the learned trial judge's directions to the jury on these issues were insufficient and might have given the impression to the jury that Mr Barnes bore the burden of proving his alibi. She submitted that the jury ought to have been told that there was no evidence to rebut the alibi and ought not to have been invited to use their own experience to determine the time it would have taken to get to Portmore from Linstead, in the absence of any factual foundation for such an exercise. Mrs Henry-Anderson also pointed out that the judge's summary of the evidence in relation to Mr Barr's prior knowledge of Mr Barnes was inaccurate and as such apt to mislead the jury on the central issue in the case.

[32] There can be no doubt that Mr Barnes' alibi lay at the heart of his defence and we are happy to adopt Mrs Henry-Anderson's very helpful summary of his case:

i. He was at the Linstead Police Station at about 4:25 pm on 26 July 2005.

ii. Sometime after 4:30 pm, he left Linstead for his home in Trojan, some four miles away.

iii. It would have been impossible for him to get to the track at Caymanas Park by 5:30 pm, as the Bog Walk Gorge was blocked due to hurricane activity and the alternate routes, that is, either through Sligoville or Barry could not be navigated within the time required for him to be the person seen by Mr Barr at the Gregory Park gate to the track at 5:30 pm.

[33] In the main body of his directions to the jury, Hibbert J enjoined the jury to look at Mr Barr's evidence "very carefully" and gave them a ***Turnbull*** warning in fairly standard terms (***R v Turnbull*** [1977] QB 224). Thus, he took them through the actual circumstances of the identification, as regards lighting, distance and viewing time, and he also alerted them to the possibility that a seemingly honest witness might nevertheless be mistaken as to identity, even in relation to a purported recognition of a person previously known to the witness. He pointed out that Mr Barnes had raised the defence of alibi and told the jury in clear terms that "it is not for the accused man to prove the alibi, it is for the prosecution to disprove it". The way in which the prosecution sought to disprove the alibi, the judge said, was "by bringing evidence to say that he was at...Caymanas Park, at the time this offence was committed...if you

should accept that...common sense tells you that you cannot be at two places at one time".

[34] When it appeared that the jury needed more assistance on how to deal with Mr Barnes' alibi (see para. [26] above), Hibbert J revisited the matter, in a passage which we cannot avoid setting out in full:

> "MADAM FOREMAN: I think it has to do with discrepancies in time and place.
>
> HIS LORDSHIP: All right is there anything that you want me to assist you with or is it something you are trying to grapple with yourself.
>
> MADAM FOREMAN: Can I speak out?
>
> HIS LORDSHIP: Yes.
>
> MADAM FOREMAN: It is to do with Karega Barnes being in one place and in Linstead and being seen in Spanish Town, the time frame between.
>
> HIS LORDSHIP: You will recall what the evidence was.
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> MADAM FOREMAN: Yes, sir.
>
> HIS LORDSHIP: That the evidence from Mr Barnes and the witness District Constable Harrison was that up to 4:30 at least 4:30 he was in Linstead. The evidence from Mr. Barr is that at about 5:30 he saw him in Portmore. The question was posed to you bearing in mind all the circumstances and the distance would somebody be able to get from Linstead to Portmore by 5:30. Remember 5:30 is an approximate time and he said the shooting was about 6:10. So, you will have to look at it to see whether or not you are satisfied to the extent that you feel sure that one could travel from Linstead to Portmore by that time.
>
> Remember the accused man gave evidence that the Gorge was blocked. He said it was blocked for over a month. You

> would have to look at it to see whether you accept it. Other witnesses were asked about it nobody can [sic] recall that the Gorge was blocked at that time. You will have to look at it and see what you accept. Even if it was, was there sufficient time to get from Linstead to Portmore in an hour or shortly thereafter. This is something you have to look at and see. Remember I told you if you have a reasonable doubt that he was there that he was at Caymanas Park then you will have to resolve that doubt in his favour. You have to find him not guilty. You look at that you can only find him guilty if you feel satisfied to the extent that you feel sure that he was there. You look at the time frame that he was there you make your determination. You know where Linstead is you know where Portmore is knowing whether or not anybody can travel from Linstead to Portmore in one hour or a little under an hour. You use experience perhaps someone can use travelling from Ocho Rios to Spanish Town from Linstead to Portmore in one hour these are things you can consider."

[35] The evidence that the route through the Bog Walk Gorge was blocked at the material time was unchallenged and the prosecution called no evidence in rebuttal. Neither was there any evidence to suggest that Mr Barnes' estimate of the minimum time it would take to traverse either of the alternate routes was overstated in any way. In our view, both these considerations ought to have been specifically brought to the jury's attention by the learned trial judge, as important factors to be borne in mind in determining whether they could reasonably find that the prosecution had discharged its obligation to disprove the alibi.

[36] Put another way, the absence of any evidence in rebuttal from the prosecution on these points amounted to a clear weakness in the identification evidence, of which, on standard ***Turnbull*** analysis, the jury ought to have been reminded. Not only did the

learned trial judge not do this, but instead he invited the jury (i) to look at Mr Barnes' evidence "to see whether you accept this", thus implying that there was a burden on him in this regard; and (ii) to speculate based on their own experience and in the absence of evidence, "whether or not anybody can travel from Linstead to Portmore in one hour or a little under an hour".

[37] The other matter of significance on which the jury requested the judge's assistance had to do with the extent to which Mr Barnes was previously known to Mr Barr. The exchange between the foreman and the learned judge was as follows:

> "MADAM FOREMAN: One more, another thought the witness did not know Mr Barnes, Mr Barr did not know...
>
> HIS LORDSHIP: The evidence was that he knew him and he said he knew him from Gulf and that he knew where he lived and all of that. Remember Mr Barnes said in his evidence in cross-examination although initially he did not. He frequents Gulf when he was confronted he admitted that he frequents Gulf and he had friends there. You have to look at it what you accept whether or not you accept Mr Barnes as a witness of truth. This is what you do, you look at all of the evidence and to see whether or not the prosecution has satisfied you so. Would you wish to retire further to consider your evidence in relation to Mr Barnes.
>
> MADAM FOREMAN: Yes, sir."

[38] Mrs Henry Anderson quite properly conceded that this was not an accurate summary of the evidence. Although Mr Barr did say initially that Mr Barnes lived "at a place call Gulf in Gregory Park", the basis of his evidence on this point was completely eroded by cross-examination, in which it was revealed by him that he had never been to Mr Barnes' house, he did not know where in the Gulf area he lived and his statement

evidence. In the result, the court made the order allowing the appeal, as set out at para. [2] above.

Mr Brown's application for leave to appeal (SCCA No 57/2010)

[41] On behalf of Mr Brown, Mrs Samuels-Brown QC sought and was granted leave to argue a number of grounds of appeal, the effect of which may be summarised as follows:

1. The learned trial judge misdirected the jury on the proper way in which to approach Mr Brown's unsworn statement from the dock, failing in particular to tell them that, if his unsworn statement left them in a reasonable doubt on the case for the Crown, he was entitled to an acquittal.
2. There was no sufficient evidence that Mr Brown was in possession of a firearm or an imitation, within the meaning of section 25(2) of the Firearms Act.
3. The judge's directions on identification were inadequate and were not applied to the evidence in the case.
4. The judge's directions on circumstantial evidence were inaccurate and unclear.
5. The judge failed to apply the law relating to joint enterprise to the facts of the case.

that that was where Mr Barnes lived was entirely based on what he had heard from an unnamed source else (see para. [10] above). While it is a fact that Mr Barnes, having initially denied that he had ever been to Gulf, did admit in cross-examination that he had friends in that area and that he "frequent" the area, there was at the end of the day absolutely no evidence that Mr Barr knew Mr Barnes from Gulf and "knew where he lived and all that", as the learned judge told the jury. It therefore seems to us that the jury was being invited by the learned judge, on the basis of this inaccurate summary of the evidence, to allay the concerns which they obviously – and legitimately - entertained as regards Mr Barr's prior knowledge of Mr Barnes.

Disposal of the appeal

[39] For these reasons, we considered that the Crown's concession on grounds three and five was properly made and that Mr Barnes' appeal was accordingly made good on these grounds alone. It was therefore unnecessary for us to consider the other grounds dealt with in Mr Equiano's skeleton arguments, but not argued before us.

[40] The only remaining question was whether this court should order a new trial in the interests of justice. Having given this aspect of the matter careful consideration, we came to the conclusion that this was not a fit case for a new trial to be ordered. In the first place, more than seven years have now elapsed since the date of the murder and this may well pose a difficulty to Mr Barnes in being able to mount his defence effectively at the new trial. Secondly, and perhaps of even greater importance, a new trial would afford the prosecution an opportunity to 'cure' the deficiencies in the

6. The judge's summing up was unfair, in that he "effectively whittled down" the significance of discrepancies and inconsistencies and other weaknesses in the prosecution's case.

7. The sentence of the court was manifestly excessive.

[42] On ground one, it was submitted that the learned judge had failed to highlight to the jury the potential effect of the unsworn statement on the Crown's case, which was that, should the unsworn statement cause them to have any reasonable doubt as to Mr Brown's guilt, they should acquit him. This omission was exacerbated, it was submitted, by the judge having effectively told the jury that, for there to be an acquittal, Mr Brown must have "destroyed" the Crown's case. We were referred by Mrs Samuels-Brown to ***R v Alfred Hart*** (1978) 16 JLR 165, for a statement by this court on the proper direction to the jury on the potential effect of the unsworn statement.

[43] The complaint on ground two related to the question of whether there was any, or any sufficient, evidence that Mr Brown was in possession of a firearm as defined by section 25 of the Firearms Act. Mrs Samuels-Brown submitted that there was none and that there was therefore no evidential basis for the conclusion that he was armed with a gun at the material time. In support of her argument on this ground, reliance was placed by Queen's Counsel on ***R v Clinton Jarrett*** (1978) 14 JLR 35, ***Samuda & Miller v R*** (1980) 17 JLR 157 and ***R v Purrier & Bailey*** (1976) 14 JLR 97.

[44] On ground three, it was submitted that this was a case of identification in difficult circumstances, and that it was therefore imperative that the judge give to the

jury an appropriate ***Turnbull*** warning, which he had failed to do in this case. It was submitted that the judge had in effect withdrawn from the jury's consideration critical aspects of Mr Brown's case, by his treatment of the unsworn statement and by expressing his own view on the significance of the contention by Mr Brown that he had a tattoo and a scar, of which Mr Barr had made no mention. Mrs Samuels-Brown also referred us to the decision of the Privy Council in ***Beckford, Birch & Shaw v R*** (1993) 30 JLR 160, for the submission that, the instant case being one of recognition, the trial judge ought to have directed the jury specifically on the issue of credibility in the context of identification.

[45] On ground four, Mrs Samuels-Brown submitted that the trial judge was required to take great care in summing up a case based on circumstantial evidence to ensure that the jury were not left to speculate. It was submitted that the judge ought to have directed the jury that, if there were any factors in the case potentially consistent with any rational conclusion other than guilt, then they ought to acquit Mr Brown. It was further submitted that there were factors which might have been consistent with some rational conclusion other than guilt, "including the absence of any or any cogent evidence that [Mr Brown] was armed with a firearm as defined by law, no one saw him enter...[or leave] the place where the deceased was found, on the prosecution's case there was another man armed with a firearm; there were inherent weaknesses in the identification evidence". Taken as a whole, it was submitted, the jury had been misdirected on the proper approach to circumstantial evidence and we were referred in

support of this ground to ***R v Everton Morrison*** (1993) 30 JLR 54 and ***R v Cecil Bailey*** (1975) 13 JLR 46.

[46] The complaint in ground five related to the question of joint enterprise. It was submitted that the learned trial judge had misdirected the jury by telling them that Messrs Barnes and Brown were seen "together, talking", when in fact no such evidence had been given. It was submitted that, in a case of joint participation in the commission of an offence, it was incumbent on the judge to identify the alleged role played by a particular defendant and the evidence adduced in proof of that role. But further, Mrs Samuels-Brown submitted, no doubt by this time sensing the direction of the wind in respect of Mr Barnes' appeal, any conclusion in favour of Mr Barnes should also inure to Mr Brown's benefit, his having been convicted on the evidence of the same witness, on the basis that he and Mr Barnes had been together and had acted in concert on the day in question. In support of this ground, we were referred to ***King v R*** [1962] 1 All ER 816 and ***R v Abbott*** [1955] 2 All ER 899.

[47] On ground six, it was submitted that, instead of leaving it to the jury to make their own assessment of the impact, if any, of the discrepancies and inconsistencies in the prosecution's case, the judge sought to rehabilitate the witness by providing his own explanations and inviting the jury to find other explanations for them. In particular, the issue of the circumstances in which Mr Barr had ceased to be a District Constable was not properly dealt with. The summing up as a whole was therefore skewed in favour of the prosecution and Mr Brown was as a result deprived of a fair trial.

[48] And finally, on ground seven, Mrs Samuels-Brown pointed out that Mr Brown had no previous convictions and, on the prosecution's evidence, was essentially an accessory after the fact. In the circumstances, it was submitted, the sentence of life imprisonment, with a stipulation that Mr Brown should serve 25 years before becoming eligible for parole, was manifestly excessive.

[49] Mrs Henry Anderson responded for the Crown, supplementing her detailed skeleton argument with concise oral submissions. On ground one, she submitted that, although the judge may have made an "unnecessary" comment on the subject of the scar and tattoo to which Mr Brown sought to draw attention, his treatment as a whole of the unsworn statement was adequate and fair. On ground two, she submitted that there was more than sufficient evidence that Mr Brown had a firearm in his possession at the material time. There was in any event a distinction between a prosecution for illegal possession of a firearm, in which evidence to satisfy the statutory definition of a firearm was critical, and a murder case, in which the actual description of the firearm involved was "just a detail". On ground three, Mrs Henry Anderson observed that this was not a case of identification in difficult circumstances or a case of a fleeting glance and submitted that the judge had dealt with the question of identification adequately in the summing up. On ground four, it was submitted that the trial judge had dealt with the issue of circumstantial evidence adequately and in keeping with the decisions of this court, the most recent among them being ***Melody Baugh-Pellinen v R*** [2011] JMCA Crim 26. And on grounds five and six, it was submitted that the judge's directions on joint enterprise and the treatment of discrepancies and inconsistencies were adequate.

As regards the former, the point was made that although the law relating to joint enterprise was relevant to the case, identification and not joint enterprise was the paramount issue in the case, as it had been in ***King v R***, upon which Mrs Samuels-Brown relied.

[50] In a brief written reply, Mrs Samuels-Brown drew attention to ***Director of Public Prosecutions v Leary Walker*** [1974] 1 WLR 1090, to support the submission that specific directions must be given in relation to the impact of an unsworn statement on the prosecution's case. She also sought to distinguish the ***Baugh-Pellinen*** case.

Discussion

Ground one – the judge's treatment of the unsworn statement

[51] In ***Alfred Hart***, this court was concerned with the appropriateness of a direction to the jury by the trial judge that "an unsworn statement from the dock has no evidential value and cannot prove facts not otherwise proven by evidence" (a formulation derived from the judgment of Shaw LJ in ***R v Coughlan*** (1977) 64 Cr App R 11, pages 17-18). It was held that the trial judge had fallen into error and that a judge in an ordinary case should follow the guidance given on the objective evidential value of an unsworn statement in ***Leary Walker***, a decision of the Privy Council on appeal from this court. In that case, the Board said this (at page 1096):

> "The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so, what weight should be attached to it; that it is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond

> reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves."

[52] Thus, a direction that an unsworn statement should be given such weight as the jury may think it deserves, taking into account all the evidence in the case, has become the standard direction on the proper approach to the unsworn statement in this jurisdiction. In dealing with Mr Brown's unsworn statement in this case, the trial judge said this:

> "Mr Brown chose a different option. Remember I told you there are three options they have, say nothing, could make a statement from the dock or to give sworn testimony. Now Mr Brown gave a statement from the dock, as he has a right to do, bearing in mind he has no duty to prove anything. But you would have realized that when he gave his statement from the dock he did not take an oath. He did not have to swear to speak the truth nothing but the truth and you have noticed after he was finished his statement nobody could cross-examine him. He was not subjected to the test of cross-examination because the only time he can be subjected to the test of cross-examination is when he comes and give [sic] evidence on oath. Nonetheless, you have to take into consideration what he says. You will have to look at it. You have to make a determination as to what weight if any, you place on it. You make this determination Madam Foreman and members of the jury, bearing in mind that it was not on oath and was not subject to the test of cross-examination. But you look at it to see what you make of it and make your determination as to what weight if any, you will attach to it.
>
> Now he says, I am innocent I am telling the truth I don't know nothing about this I am telling the truth. I am not going to tell any lies I did not exactly know where I was because it is a very long time. Here he says it is a long time, he can't recall. I cannot remember exactly where I was when the murder took place. I am not going to say they don't call me 'Back To' this witness said he knows me. How

> he don't mention the tattoo I have on my hand and the scar I have since 2000. I do higglering for a living. Is when I come to jail I know 'Che'. I never a hide from the police."

[53] Then, having told the jury – obviously correctly – that Mr Brown had referred to the scar and the tattoo in order to suggest that "Mr Barr don't know him and he don't know Mr Barr because if Mr Barr knows him he would mention the tattoo and the scar", the judge went on to add a comment of his own, as follows:

> "I have looked and been looking at all of you since Monday. I can't say whether or not any of you have a tattoo. I have not been looking to see whether or not there was. Would Mr Barr have been looking to see whether or not one was there? Or it was so obvious if he said this tattoo and which was obvious Mr Barr did not see it. You have to see whether you believe Mr Barr as being a truthful and reliable witness."

[54] And finally, towards the end of the summing up, the judge invited the jury to "look at" what was being said on behalf of each defendant, saying, "In relation to Mr Brown is a mistake".

[55] We should say at once that, in our view, the learned judge's comment that he was unable to say whether any of the jurors had a tattoo was wholly unnecessary. It was a matter being put forward by Mr Brown for the jury's consideration and it deserved to be treated seriously, the right of a trial judge to comment on the evidence as he sees fit notwithstanding. However, despite this lapse on the part of the very experienced trial judge, we can see no basis for saying that his treatment of the unsworn statement was not in keeping with the authorities or that Mr Brown was in any

way prejudiced by it. Having already been directed on the applicable burden and standard of proof in a criminal case, the jury was plainly told that "you will have to take into consideration what [Mr Brown] says...[y]ou will have to look at it...to make a determination as to what weight, if, any you place on it". In our view, no further direction was necessary in this case and this ground must therefore fail.

Ground two – description of the firearm

[56] Section 20(1)(b) of the Firearms Act makes it an offence for any person to be n possession of a firearm except under and in accordance with the terms and conditions of a Firearm User's Licence, while section 25(1) makes it an offence to use or to attempt to use a firearm or imitation firearm with intent to commit or aid in the commission of a felony or to resist lawful apprehension of himself or any other person. Section 2(1) defines 'firearm' as "any lethal barrelled weapon from which any shot, bullet or other missile can be discharged, or...any prohibited weapon..." For the purposes of section 25, the definition of firearm is extended (by section 25(5)) to include "anything which has the appearance of being a firearm...whether it is capable of discharging any shot, bullet, missile or not".

[57] Where, on a charge of illegal possession of firearm, a firearm is in fact recovered and tendered in evidence, the question of whether the statutory definition has been met will usually be determined by the opinion of a ballistics expert. But where it is not, it will purely be a matter of inference to be derived from the evidence, an exercise which has given rise to an extensive consideration in the cases as to what evidence will

suffice for this purpose. One of the best known of the older cases, to which we were referred by Mrs Samuels-Brown, is ***Clinton Jarrett*** (a decision of a full court of the Court of Appeal), in which, after a careful analysis of the statutory provisions, Luckhoo P (Ag) said this (at page 43):

> "As to the nature of proof required to show that the object was a firearm as defined or an imitation firearm it is not possible to lay down any hard and fast rules. It is indeed for the resident magistrate or the jury as the case may be to decide whether as a matter of fact the object in question has been shown to be a firearm as defined or an imitation firearm. Part of such evidence may be the opinion of a non-expert as to the appearance of the object provided he describes the facts upon which he relies for his conclusion."

[58] Interesting as all of this may be, it will be immediately obvious that it has no relevance whatsoever to the instant case, which is not a prosecution brought pursuant to the provisions of the Firearms Act. This is a case of murder, in which the murder weapon was allegedly a firearm. In these circumstances, as Mrs Henry Anderson submitted, the actual description of the firearm involved is a mere matter of detail. In any event, even if this had been a firearm case *simpliciter*, it seems to us that Mr Barr's evidence of having heard explosions; his own conclusion, as a security guard himself, who was usually provided with a firearm for the purposes of his job (and a former district constable), that the objects which he saw the defendants carrying in their hands were guns; and the doctor's evidence of the gunshot injuries sustained by the deceased would have together sufficed to establish that the object involved was indeed a firearm. This ground therefore fails as well.

Ground three – identification

[59] This was a case in which the prosecution relied entirely on the visual identification of the defendants by a single witness, Mr Barr. Although it was to some extent a recognition case, Hibbert J was therefore obliged, as the Board confirmed in ***Beckford, Birch & Shaw***, to direct the jury in accordance with Lord Widgery CJ's canonical judgment in ***Turnbull***. No complaint appears to be made about what the judge actually told the jury in this case, which is to be found in the following long passage in the summing up:

> "Let us now, therefore, go to the question of identification. Identification is always an important issue in these cases and this is a case, Madam Foreman and members of the jury, where to a large extent, if not to the greatest extent, the prosecution is relying on the evidence of identification given by Mr Aubrey Barr. Now, because the prosecution is relying on this evidence and the correctness of this evidence of identification which is in relation to the accused man, Brown, he said that he was making a mistake and in relation to the accused man Barnes, it was suggested that it was a concoction, a make-up story given by him, you will have to look at this evidence carefully.
>
> Now I must therefore warn you, Madam Foreman and members of the jury, of the special need for caution before you can convict any of these accused persons in reliance on this evidence of identification, and there is a good reason for this, Madam Foreman and members of the jury, people can make mistake [sic] in identifying others. Because of this, you have to look at the circumstances which existed at the time when this identification was made.
>
> Now you have to look at the time which elapsed, how long did the witness have these persons who committed this offence in their [sic] view? When I deal with the evidence, I will go through all these circumstances but I must alert you from now as to the circumstances. How long did the

witnesses have these persons in view? What was the distance that separated them? Because you might well think the shorter the time that you have to see them the more likely that you are to make a mistake and contrastly [sic], the longer you are looking at them the more likely that you are to make a positive and correct identification. Same with distance, if the person is very far you are more likely to make a mistake than if the person is close to you, so you look at that to see.

Now, what was the nature of the lighting? You heard that this thing happened at 6:10 and you heard Mr Barr said [sic] it was bright. Now, Madam Foreman and members of the jury, counsel for the prosecution tells you that as the year progresses and especially in summer, you have more light than in the earlier months. You can look at that and you see what you make of it. In July, based on your experience, in July will it be bright enough for anybody to be able to see and recognize another person at ten minutes past 6:00? These are matters that you have to consider. Do you accept Mr Barr when he said it was bright enough to be able to see at that time? And another thing you have to look at is special circumstances, did anything interfere with the observation? Remember Mr Barr said he had a clear view of these persons first of all when he saw them approaching and secondly, when he saw them through the gate coming towards him. You have to look to see if you accept him and whether you accept that he had a clear view of these persons. Another thing that you look at as part of [sic] circumstances, did he know any of these men before? He said yes he did. You will have to look at it to see whether or not you accept him as a witness of truth.

In relation to Mr Brown, remember he told you how long he had known him, for three years; he was accustomed to coming to Caymanas Park, where he worked, in order to visit his father who is a jockey. Remember he told you he lived near to the accused, Mr Barnes. He said yes, he is accustomed to seeing him also and this is a person whom he had known before and always see him in the company of Mr Brown, so these are things you look at, Madam Foreman and members of the jury. You look at another factor, when was the last time before this event, this is before the 26th of July, 2005 that he had seen him, so you look at the evidence

> to see what unfolds from the evidence. You must also realize, Madam Foreman and members of the jury, that although he says that he had known them before, mistake can still be made and I have seen seemingly honest witness [sic] still make mistakes, so you will have to look at that also. Madam Foreman and members of the jury, you might well think that it is less likely that you can make a mistake if you had known the person before. However, mistakes have been known to be made even when a person is known to the observer, so you bear that in mind Madam Foreman and members of the jury, when you deal with the question of identification."

[60] It will be seen from these directions that the learned judge covered the usual bases: the general warning as to the need for caution; the duration of the witness' observation of the defendant; the distance that separated the witness from the defendant; whether there was any obstruction; whether the defendant was known to the witness before and in what circumstances; when was the defendant last seen by the witness; and the possibility of an honest witness nevertheless being mistaken, even in relation to persons previously known to the witness. The judge then went on, in the process of reviewing the evidence in detail, to relate the general directions to the evidence where necessary by reminding the jury to recall what he had already told them ("Remember, I told you...you should look at distance and time").

[61] While it is true that the judge did not in terms direct the jury to the weaknesses in the identification evidence, he did leave for their consideration the areas in which the evidence might have been considered to be vulnerable. Thus, he more than once acknowledged the importance of the question of the scar and the tattoo to Mr Brown's case, telling the jury that these were among the matters that they needed to look at in

assessing Mr Barr's evidence, and that they should ask themselves whether "he is misleading the court or is it something that one would not expect him to recall".

[62] Mr Barr's evidence was that the murder took place in the late afternoon in good light and that he had ample opportunity to recognise Mr Brown, who was a person known to him for about three years prior to July 2005. His evidence of where Mr Brown lived (Dennis Avenue, Church Yard, in the Gregory Park area) was not challenged in any way, neither was his evidence that Mr Brown's father ("Mr I. Brown"), a jockey, also worked at the track and that Mr Brown was in the habit of visiting him at the track "one or three times for the month" and would enter the track compound through the Gregory Park gate. (Indeed, in this regard, the only suggestion put to Mr Barr in cross-examination by counsel for Mr Brown was that "when you say that before that date, you would see the accused, Mr Brown, in the company of Mr Barnes, that is not true".) In our view, it was for the jury to determine whether on the basis of this evidence they could feel sure, taking into account the judge's directions on identification and credibility, that Mr Barr was in a position to make a reliable identification of Mr Brown. As the judge told the jury more than once, it was for them "to see whether [they] believe Mr. Barr as being a truthful and reliable witness". This ground therefore must fail as well.

Ground four – circumstantial evidence

[63] In this case, the actual circumstances in which the deceased was shot and killed are not known and, although both Mr Barnes and Mr Brown were charged with his

murder, the evidence of Mr Barr did not attribute a particular role to either of them. This aspect of the case for the prosecution therefore depended on circumstantial evidence, that is, the inferences to be drawn from the facts to which Mr Barr testified, viz, his observation of both defendants in the vicinity of the track, the hearing of explosions coming from inside the track compound, the emergence shortly thereafter from the compound of both defendants; both armed with firearms; their departure from the vicinity; and the subsequent finding of the deceased lying on the ground, suffering from gunshot wounds, inside the compound.

[64] In ***Cecil Bailey***, this court considered it to be a settled rule of practice, in cases of purely circumstantial evidence, that the jury should be directed that, although they might convict on such evidence, they should only do so if they are satisfied that the circumstances are consistent with the defendant having committed the act alleged and that they are also inconsistent with any other rational conclusion than that the defendant is guilty (per Edun JA at page 49). This was the so-called rule in ***Hodge's*** case (***R v Hodge*** (1838) 2 Lew. C.C. 227).

[65] In ***McGreevy v Director of Public Prosecutions*** [1973] 1 All ER 503, the House of Lords held that what the judge is required to do in a criminal case is to make it clear to the jury, in terms which are adequate to cover the particular features of the case before them, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the defendant. After full consideration of the actual decision in ***Hodge*** and the 'rule' to which it had given birth in several Commonwealth countries, though not in England, Lord Morris of Borth-Y-Gest, with whom the other

members of the House agreed, concluded that there was no rule that where the prosecution's case is based on circumstantial evidence the judge must, as a matter of law, give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the defendant, but also such as to be inconsistent with any other reasonable conclusion.

[66] Although in the later case of ***Everton Morrison*** this court had declined to follow ***McGreevy***, reiterating the continued authority of ***Hodge***, later still, in ***Loretta Brissett v R*** (SCCA No 69/2002, judgment delivered 20 December 2004), it was decided that the direction on circumstantial evidence based on ***Hodge*** should be abandoned in favour of that sanctioned by ***McGreevy***. This was later confirmed in ***Wayne Ricketts v R*** (SCCA No 61/2006, judgment delivered 3 October 2008) and most recently in ***Baugh-Pellinen***, where the court stated that "[t]here is therefore no rule requiring a special direction in cases in which the prosecution places reliance wholly or in part on circumstantial evidence" (per Morrison JA, at para. [40]).

[67] It is against this background that Hibbert J's direction to the jury on circumstantial evidence in this case falls to be assessed. This is what the judge said:

> "Now, as I indicate, Madam Foreman and members of the jury, the prosecution brought no witnesses to say that I saw this accused man or any of them fired [sic] shots at all. What the prosecution is asking you to do is to look at all the circumstances of this case. Look at what you accept as reliable and truthful and to see what inferences you can draw from it. The prosecution is relying on what we call circumstantial evidence. The prosecution [sic] asking you to look at all the circumstances and to draw reasonable conclusions from these circumstances, and the prosecution

is asking you to draw conclusions that these persons, although nobody has come forward to say that I saw this one shot [sic] Mr Green, the prosecution is asking you to say that from all the circumstances, this is what must be concluded and that is the only reasonable conclusion that can be given.
It is only sometimes, Madam Foreman and members of the jury, that you are asked to find some facts proved by considering direct evidence. Direct evidence could be for instance, if somebody should come and say, 'I saw this man shoot Mr Green.' That could be direct evidence. In this case, there is no such direct evidence. On the other hand, however, it is often the case that the direct evidence of a crime is not available and the jury is required to decide the case on so-called circumstantial evidence. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and to the defendant in order to demonstrate that some or all of the circumstances, when taken together, establish the defendant's guilt; that is because it is the only way that conclusions can be drawn from the evidence that it was the defendant who committed the crime from [sic] which he is charged.

Now, in so doing, Madam Foreman and members of the jury it is necessary for the evidence to provide an answer to all. It is not necessary, I'm sorry, for the evidence to provide an honest answer to all the evidence [sic] raised in the case, you may think that it would be unusual to have a case in which the jury can say, 'We know everything there is to know about the case', but the evidence must lead you to a sure conclusion that the charge the defendants face is proved against them.

Circumstantial evidence can be powerful evidence, but it is important that you examine [sic] with care, and whether the evidence upon which the prosecution rely [sic] in proof of its case is reliable, and whether it does prove it.

Further, before convicting on circumstantial evidence you should consider whether there is any other circumstance [sic] which may be of sufficient reliability and strength or weakness to destroy the prosecution's case. Remember I told you about inference and speculation.

> Finally, Madam Foreman and your members, you should be careful to distinguish [sic] arriving at a conclusion based on reliability on circumstantial evidence and furthermore, before convicting on circumstantial evidence you should consider whether there is [sic] any other circumstances which are or may be of sufficient reliability and strength to weakness [sic] or destroy the prosecution's case. And I mentioned earlier about the distinction between reasonable inference and speculation.
>
> Finally, you should be careful to distinguish to [sic] arriving at a conclusion based on the reliable circumstantial evidence and mere speculation. Speculation in a case amount [sic] to no more than guessing or making out of [sic] thing without guide, evidence to support it. Neither the prosecution nor the defence wants you to do this. As Mr Champagnie indicated, what he said you should do, is listen to the evidence, make your decision on who you accept, and draw reasonable conclusion from the evidence that you accept, and finally to return a true verdict in accordance with the evidence."

[68] We find no fault with these directions, which were, if anything, more expansive than they might have been. The jury was plainly told that "the evidence must lead you to a sure conclusion that the charge the defendants face is proved against them". In telling the jury that "before convicting on circumstantial evidence you should consider whether there is any other circumstance which may be of sufficient reliability and strength or weakness to destroy the prosecution's case", we do not consider that the learned judge was placing a burden on the defendants to "destroy" the prosecution's case, as Mrs Samuels-Brown suggested that he was. In our view, the judge was there doing no more than stating the obvious, which is that the jury should assess all the circumstances to determine whether they point inevitably towards the defendants' guilt, or whether there are some or other circumstances which have the effect of

undermining the prosecution's case. Accordingly, this ground must, in our view, fail as well.

Ground five – joint enterprise

[69] Hibbert J directed the jury on the subject of common design/joint enterprise in two parts. In his general directions, he directed them as follows:

> "The case which has been put forward as [sic] the prosecution, Mr Foreman and members of the jury, is that the two defendants committed the offence together. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they were acting together as part of a plan, or agreement, they are together. That is what is called joint enterprise. In relation to joint enterprise, for example, I will give you an example. If two persons set out to kill another person, each with a gun, they go and they accost this person together, and one of them shoots that person, and the person dies, and then they left together, there you will have the situation where the prosecution is be [sic] saying they are acting together in a joint enterprise, because they would have agreement to commit this offence. They went together to commit this offence. They were both armed with firearms, and even though it was one that fired the shot, they were there to achieve a common purpose. That common purpose is to kill this man. They left together, still being parties in this common purpose. If those situations should arise, then each will be guilty of the murder of the person. So, if you should find that two persons, set out together, to do an act and the act is done by them, even though one strikes the fatal blow, each will be guilty, each one will be guilty or responsible for the act of the other, and in those circumstances, each would be found guilty of the murder. I will come back to this when I review the evidence, Madam Foreman and your members, and what the prosecution is asking you to infer."

[70] After he had concluded his review of the evidence, the learned judge returned to the issue in a brief passage in which, after reminding them of his earlier directions, he said this:

> "Now, there need not be evidence of a written plan or that they said such and such together a common plan can be inferred...from that person. The prosecution can say you can confer [sic] that they were seen together, talking after these gunshots were heard. They came out through this gate together with guns in their hands and they left together across the train line. The prosecution is asking you to say that this indicates that there was this common plan."

[71] No complaint is made about the judge's general directions on common design and we agree with Mrs Henry-Anderson that the directions were full and accurate. But we also agree with Mrs Samuels-Brown that there was no evidence to support the judge's later statement that the defendants "were seen together, talking after these gunshots were heard" and we consider that this was accordingly a misdirection. However, we also consider it important to have regard to what the judge was obviously concerned to do in this passage, which was to remind the jury that the nature of the case being advanced against the defendants was that they were seen exiting the track compound together, armed with guns, after gunshots had been heard coming from inside the compound, and that they left the area together. That was indeed Mr Barr's evidence and we do not think that, taken in its context, the jury would have been diverted from its essential thrust by the judge's erroneous remark.

[72] But, on this ground, there remains Mrs Samuels-Brown's further submission on the impact on Mr Brown's application of a decision in favour of Mr Barnes in his appeal,

given that the two men were alleged to have acted in concert. Reliance was placed on ***Abbott*** and ***King***, for the submission that acquittal of Mr Barnes would render a verdict of guilt against Mr Brown unsafe.

[73] In ***Abbott***, the appellant and another were indicted together on separate charges of forgery. At the close of the case for the prosecution the appellant's counsel made an unsuccessful no case submission, after which the co-defendant gave evidence (which was hostile to the appellant), as did the appellant. Both defendants were convicted by the jury. On appeal, the Court of Appeal took the view that there had been no evidence at all against the appellant at the close of the case for the prosecution, and that the no case submission ought therefore to have been allowed. It was held that where two persons are joined in one indictment and charged with separate counts of the same offence, and there is no evidence against one accused that he committed the offence, either alone or in concert with the other, then it is his right to have his case withdrawn from the jury on his no case submission. In the course of delivering the judgment of the court, Lord Goddard CJ said this (at page 901):

> "If two people are jointly indicted for the commission of a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of not guilty against both because the prosecution have not proved the case."

[74] In ***King***, a case from Barbados, the appellant and another were tried for murder. The entire case for the prosecution was that the two defendants were acting in concert

and the trial judge told the jury that, unless they came to the conclusion that the defendants had a common design, they could not convict them both. The jury convicted them both. The appellant's appeal to the Federal Supreme Court was dismissed, but his co-accused's appeal was allowed and his conviction quashed. The appellant's further appeal to the Privy Council was allowed and, speaking for the Board, Lord Morris of Borth-Y-Gest said this (at page 820):

> "The jury found both accused guilty, which involves a finding that they were acting in concert. Accordingly, they were never obliged to consider the individual guilt of each of the accused on the footing that they were not acting in concert. The Federal Supreme Court has acquitted Yarde, so that the finding of the jury that both are guilty no longer stands, and it is not possible to ask them how they would have answered the question if it had been limited to the case of the appellant only. There are no means of knowing what the verdict of the jury would have been had it been ruled and had they been told that they could not hold that Yarde acted in concert with the appellant. There are various possibilities. They might have found that Yarde alone was guilty. They might have found that the appellant alone was guilty. They might have considered that the killing was done by one only (the other not being implicated) but that they could not decide which and so could have avoided acquitting both, leaving aside the question whether it could have been held that there was admissible evidence of a common design against the appellant, even though there was no such evidence against Yarde, the fact remains that, had the jury been directed in accordance with the view of the Federal Supreme Court, it cannot be said with certainty that the jury must inevitably have convicted the appellant."

[75] In our view, both cases are clearly distinguishable. In ***Abbott***, there was absolutely no evidence that the appellant, whether acting on his own or in concert with the co-defendant, committed the offence for which he was charged. In ***King***, the trial

judge had told the jury explicitly that, unless they concluded on the evidence that the deceased met his death as a result of a pre-arranged plan between the defendants, they could not find either of them guilty. In these circumstances, the Board considered that it could not be assumed that they would inevitably have brought in a verdict of guilty had the case stood against the appellant only, it not having been left to them on that basis. The Federal Supreme Court having allowed the co-defendant's appeal, the Board concluded (at page 820) that "it could not be satisfactory to allow the conviction of the appellant to stand".

[76] In the instant case, although Messrs Barnes and Brown were charged together for the murder of the deceased, it was, as the trial judge correctly told the jury, nevertheless necessary for them to consider the case against each one separately:

> "...you will have to look at the evidence as it relates to each one of them, because if you should find that the prosecution has satisfied you to the extent that you feel sure that one committed the offence, it doesn't necessarily mean that you have to say the other one did."

[77] The case against Messrs Barnes and Brown turned entirely on the correctness of the visual identification of each of them by Mr Barr and, as has been seen, there were distinguishing features in the evidence against each of them. It was therefore plainly open to the jury to conclude, as this court has done, that the identification evidence in the case against Mr Barnes was unsatisfactory, without that conclusion necessarily affecting the case against Mr Brown, who, on Mr Barr's evidence, was seen emerging

from the Gregory Park gate with a firearm in each hand shortly after explosions had been heard inside the track compound. This ground therefore also fails.

Ground six – the judge's treatment of inconsistencies and discrepancies

[78] Hibbert J directed the jury on inconsistencies and discrepancies in standard terms. Thus, he told the jury what amounted to an inconsistency (when a witness in court says something different from what was said on a previous occasion), and that it was for them to determine whether there were inconsistencies and, if so, whether they were serious or slight and what was their effect on the evidence of the particular witness. He also told them that they were free to accept part of a witness' testimony and to reject a part. Similarly with discrepancies, which the judge also defined ("where one witness talking about a particular set of circumstances, differs from another witness talking about the same event"), the jury was told to make their own determination as to whether there were discrepancies, serious or slight, and to look to see whether there was any explanation for them.

[79] While making no complaint about the judge's general directions, Mrs Samuels-Brown nevertheless submitted that, by providing unfounded explanations for various inconsistencies in Mr Barr's evidence, the judge sought to rehabilitate the witness. The most significant of these had to do with the circumstances in which Mr Barr ceased to be district constable. This is how the judge left the issue to the jury:

> "He said he did not resign from the Force and he can't recall if he was dismissed; said he still has a matter pending in the court from he [sic] being a district constable. You will have

> to see what you make of it. What is it saying, is it saying that because he still has a matter from he was a district constable he doesn't know if he was dismissed? This is what you will have to consider but there is something which he said later which I will draw your attention to. He said he was with Mr McKay from he was in the Force and remember Mr McKay who is in charge of McKay Security, apparently he is the owner of the company, he said he worked with him in his free time while he was employed as a district constable and after he ceased being a district constable, he worked with him full-time. So now, he has here that he has ceased being a district constable, he said he did not resign but he doesn't know whether or not he was dismissed."

[80] Again, we can find no fault with these directions, neither can we find fault with the judge's subsequent statement to the jury, of which complaint was also made, that "You must look at all of this and look at the Jamaican situation". In our view, the judge was here doing no more than inviting the jury to apply their own knowledge of Jamaica to the task of assessing the evidence, surely an unobjectionable invitation in the context of a jury trial. This ground therefore also fails.

Ground seven – the sentence

[81] Apart from submitting that, in the light of his having no previous convictions, the stipulation that Mr Brown should serve a minimum of 25 years' imprisonment before becoming eligible for parole was manifestly excessive, nothing was placed before us to suggest that this stipulation was outside of the usual range of sentences in comparable cases. As at the date of sentencing, the statutory minimum stipulation for murder was 15 years (Offences Against the Person Act, section 3(1C)(b)(i)) and we cannot in any event say that a stipulation of 25 years was manifestly excessive in the light of the

evidence, which by their verdict the jury accepted, that Mr Brown and another were responsible for the brutal slaying of the deceased. There is therefore nothing in this ground.

Disposal of the application for leave to appeal

[82] In the result, the application for leave to appeal is dismissed. The court orders that the 25 year period to be served by Mr Brown before becoming eligible for parole should commence from 16 July 2010.