[2024] JMCA Crim 16

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CRIMINAL APPEAL NO 80/2015

WEBSTER BROWN v R

Nicholas Edmond for the appellant

Mrs Christine Johnson Spence and Sean Nelson for the Crown

20 March and 12 April 2024

Criminal law – Summation – Murder - Provocation - Self-defence - Whether adequate direction

Constitutional law - Delay in applying for leave to appeal - Delay in the production of transcript of the trial - Delay in hearing the appeal – Whether complaint breached sections 16(1), (7) and (8) of the Constitution

FOSTER-PUSEY JA

[1] Mr Webster Brown ('the appellant') was charged on an indictment for the murder of Andrew Harrison on 24 November 2002. After a trial before McCalla J ('the learned trial judge', as she then was), sitting with a jury, he was convicted of the offence on 5 February 2004. We do not have the sentencing remarks, but it appears from other records that, on 20 February 2004, the learned trial judge imposed a sentence of life imprisonment at hard labour with the stipulation that the appellant should serve 25 years' imprisonment before being eligible for parole.

[2] The appellant applied for leave to appeal his conviction and sentence, and for an extension of time within which to do so, over 11 years later, on 5 November 2015. He gave the following as the reasons for his delay:

> "That I was convicted in the St. Ann Circuit Court on the 20th of February 2004 and admitted to the Tower Street Adult Correctional Centre on the 24-02-2004, I was told by my attorney that he was filing a notice of appeal prior to me admitted [sic] at Tower Street. I learn [sic] that no appeal was filed when I went to the Appeal & Bail Office to make Enquiries. Hence this late notice of appeal."

[3] On 13 July 2022, nearly seven full years after the appellant made his applications, and 18 years since the appellant's sentencing, the court received an incomplete transcript of the trial. On 14 November 2022, four months later, a single judge granted the appellant leave to appeal his conviction and sentence. The single judge highlighted the length of time that had elapsed since the appellant was convicted, as well as the fact that the transcript was incomplete. He requested the registry to take steps to supplement the missing portions of the transcript. The court received additional portions of the evidence on 28 February 2024, over eight years since the appellant made his applications, and twenty years since his sentencing. However, at the hearing before us, the full transcript was still not available.

[4] We heard this matter on 20 March 2024 and made the following orders:

> "(1) The appeal against conviction and sentence is dismissed.
>
> (2) The sentence is to be reckoned as having commenced on 20 February 2004, the date on which it was imposed."

[5] We promised to provide reasons for our decision and now fulfil that promise.

The case for the prosecution

[6] The sole eyewitness for the prosecution was Lennox Gibbs, a relative of the appellant. The deceased was also a relative of the appellant. Mr Gibbs testified that on

24 November 2002, at about 10:30 pm, he and the deceased were walking on Hopewell Bottom Road in the parish of Saint Ann. When he was about to arrive at the gate of the appellant's home, he saw the appellant, who was also known to him as 'Little', approaching them. As the appellant drew closer, Mr Gibbs went across to the right-hand side of the road. The appellant walked down the middle of the road and said, "Pussy ole, a long time mi waan kill yuh". Mr Gibbs responded, "Little, wey yuh a kill di man fah? What you a kill di man fah?". He then saw the appellant push his hand toward the deceased's right hand. Mr Gibbs said, "Little, what you doing? Wey yuh a kill Andrew fah?". When the appellant pushed his hand towards the deceased, the deceased "rock[ed] back". The appellant then spun around and aimed a chop at Mr Gibbs' head. Mr Gibbs 'ducked', and a cutlass fell from the appellant's hand. The deceased told Mr Gibbs to run. Mr Gibbs ran and fell to the ground. The appellant came above Mr Gibbs and used a knife to cut him on his hands and arm. Mr Gibbs said, "Little, yuh going kill yuh one cousin", and the appellant replied, "Pussy ole, unoo mash up mi life". Mr Gibbs testified that he did not know what the appellant meant by those words. Mr Gibbs pushed off the appellant and ran in a bid to escape. He hid in bushes, but the appellant came looking for him and then threw a stone at him, hitting him in his forehead. Mr Gibbs got up and wrestled with the appellant, who chopped him with a cutlass. Mr Gibbs then pushed off the appellant and ran. While running, he saw the appellant's brother 'Stoney' standing under an orange tree. Mr Gibbs testified that Stoney said to the appellant, "Little man a weh you a do", and the appellant responded, "Me kill one already".

[7] Mr Gibbs insisted that he and the deceased did not have anything or any weapon. The deceased had a tin of juice in his hand and was not attacking the appellant at any time. He stated that the last time he saw the deceased was at his burial.

[8] In cross-examination, Mr Gibbs insisted that he did not have any fuss with the appellant who "just attack the 2 a we so". He admitted that he knew the appellant's 'baby mother', who lived in the same community, but denied that he and the deceased were in the habit of "mouthing" the appellant about her. Mr Gibbs denied a suggestion made to

him that he and the deceased had attacked the appellant with a knife and that the appellant used a machete to "back" him off, causing injury.

[9] Constable Morris Halstead testified at the trial that at about 10:45 pm on 24 November 2002, he was on duty at the Discovery Bay Police Station. A white pick-up motor truck stopped in front of the police station, and a man made a report to him. He went to the pick up where he saw Mr Gibbs lying in the back. He noticed that Mr Gibbs had a wound to the back of his head and a wound to his left hand. Mr Gibbs made a report to him. Constable Halstead gave the driver of the pick-up some instructions and then proceeded to Hopewell Bottom District to make enquiries. While proceeding on the Hopewell Bottom main road, he saw the body of the deceased and observed a stab wound to his chest. The body was removed to the St Ann's Bay hospital and pronounced dead.

[10] Constable Halstead continued his investigation and went to the home of the appellant, whom he knew before. He found the appellant sitting on a chair on his verandah at about 11:30 pm. He informed the appellant of the report that Mr Gibbs made and told him that he was investigating a case of murder and wounding with intent. He cautioned the appellant, who stated, "Officer, a long time dem a trouble mi and mi have fi kill Andrew. A nuff more a dem have fi go down". Constable Halstead took a board-handle knife from the appellant's front pants pocket and secured it as potential evidence. He then asked the appellant for the weapon that he used. The appellant replied, "Officer, di machete wey mi use chop the one Lennox him, underneath a ackee tree and di knife dat mi use fi stab di other one, mi nuh know which part it drop". The appellant took Constable Halstead to an ackee tree, pointed to a wooden handle machete and told the officer that he had used that weapon to chop Mr Gibbs. When the officer asked Mr Halstead if that was the same machete that he used to chop the deceased, the appellant responded, "Officer, you nuh hear say mi nuh know which part that one drop".

[11] At about 6:00 am on the next day, Constable Halstead returned to the crime scene at Hopewell Bottom District and found a wooden handle machete with a substance resembling blood on its blade. He secured the machete as potential evidence and later

that day cautioned, then arrested and charged the appellant with the offences of murder and wounding with intent. The appellant stated, "Officer, dem always a trouble mi. A nuff more a dem fi go down. Mi just have fi do what mi have fi do".

[12] The portions of the transcript available to the court did not include a full record of the cross-examination of Constable Halstead.

[13] At the trial, the machete that the appellant showed Constable Halstead, as well as the machete that he found the morning after the incident, were entered into evidence as exhibits. However, the knife that Constable Halstead took from the appellant's right front pants pocket had been misplaced.

The case for the defence

[14] The appellant made the following unsworn statement from the dock:

> "My name is Webster Brown. I am from Ellican District, in Discovery Bay, St. Ann. Occupation, woodwork, drawing, joinery.
>
> That night when that incident happen, 2002, November, I was going along the road at Hopewell Bottom, just a few chains away from my home. Collect some feed for my cattle, when I come in contact with Lennox Gibbs and Andrew.
>
> When I reach almost close to them in the direction that I were coming from, Lennox run around me in that direction (indication) and the direction they were coming from, Andrew went back around that direction. One run in front of me, your Honour. I saw them with 2 knives and I turn back, facing the direction to my home. When my 'cutliss' in my hand, Lennox try to back me back down the road…
>
> Lennox trying to back me off, to keep me back down the road. That is why I slap him off with my 'cutliss' to get him back. He fell one time; get up back and run around me, run around in front of me and I start to slap him off me with my 'cutliss' until I get up to my home, nearby. That is where he fell once again…He fell again, once. That time I get to run into my gate."

The grounds of appeal

[15] Mr Edmond, for the appellant, indicated that he was approaching the original grounds of appeal in the following manner:

(i) Ground 1 was abandoned.

(ii) Ground 2 would be amended to read:

> "The learned trial judge failed to direct the jury on: (A) the eye witness (Lennox Gibbs) not remembering if he (Lennox Gibbs) had a knife; and (B) the absence of scientific evidence on the part of the Crown in not having knives and machetes fingerprinted such that the Crown had not disproved the appellant's case that the deceased and the eyewitness had weapons in their possession at the material time."

(iii) Ground 3 would be amended to read:

> "3(A) That the learned trial judge did not fairly present the appellant's defence in all the circumstances of the trial; 3(B) That the learned trial judge failed to give adequate direction on the issue of provocation."

(iv) The original ground 4 would be abandoned and replaced as follows:

> "The appellant's constitutional rights were breached by the deficiency in the record of trial thus preventing a fair hearing within a reasonable time."

(v) A new ground 5:

> "The sentence imposed on the appellant cannot be reviewed in light of the absence of the record of the sentencing process, social enquiry or antecedent reports."

[16] The Crown did not object to the proposed grounds, and the court permitted counsel to argue the grounds as proposed.

Concessions

[17] Mr Edmond conceded that ground of appeal 2(A) could not succeed in light of the material available from the trial. Counsel acknowledged that the learned trial judge referred to the "square" issue that Mr Gibbs denied that he attacked the appellant and remained vehement in cross-examination that neither he nor the deceased had attacked the appellant. The appellant, on the other hand, acknowledged that he was armed. Ultimately, Mr Edmond stated, it was a question of credibility as to who the jury believed.

[18] Ground 2B suffered a similar fate. Mr Edmond conceded that having read the case of **Errol Barrett v R** [2014] JMCA Crim 47, on which the Crown relied in its submissions in response, even in the absence of the fingerprinting of knives and machetes, it was a credibility issue for the determination of the jury as to whether the deceased and Mr Gibbs were armed on the date in question. Counsel stated that while ideally, scientific material may have assisted, there was other evidence that the jury was able to consider in order to arrive at its decision.

[19] Furthermore, Mr Edmond did not pursue ground 3(B), which touched on whether the learned judge had given directions on the question of provocation. While the full directions on provocation did not appear in the portion of the summation that was available to the court and counsel, Mr Edmond conceded that, from the available record, it appeared that the learned judge gave directions on the issue of provocation as at pages 66-67 of the transcript she stated:

> "**If you feel, Madam Foreman and members of the jury, that the accused may have been provoked, then provocation, legal provocation, as I have defined it to you, would reduce the offence of murder to manslaughter**…So in the final analysis…the verdict I leave to you are: Guilty or not guilty of murder; guilty or not guilty of manslaughter; or not guilty." (Emphasis supplied)

[20] Counsel also acknowledged that the learned judge informed the jury that it was open to them to find the appellant guilty of manslaughter.

[21] The court agreed that grounds 2(A), (B) and 3(B) had no merit for the reasons acknowledged by Mr Edmond and indicated by the Crown.

The remaining grounds of appeal

The appellant's submissions

[22] Mr Edmond pursued ground 3(A), in which the appellant claimed that his defence of self-defence was not put fairly before the jury. While he acknowledged that the learned judge gave the correct legal directions on the question of self-defence, he insisted that there was a gap. Counsel urged, for example, that the learned judge ought to have expressly addressed the application of the principles of law to the appellant's claim that he was "slapping" off either one or both of his alleged attackers.

[23] In respect of ground 4, counsel referred to sections 16(1), (7) and (8) of the Constitution of Jamaica as regards the appellant's right to a fair hearing within a reasonable time, as well as his right to a copy of the record of proceedings in which he was tried. Mr Edmond acknowledged that the length of time that it took for the appellant to initiate his application for leave to appeal would impact whether he could benefit from arguing that his rights were breached by delay in the provision of the transcript. Counsel agreed that the appellant could have made earlier enquiries as to the progress of the application that he thought his attorney had filed on his behalf. Counsel also stated that the appellant would have had to take some responsibility for the delay that occurred between the time when he applied for leave to appeal and when the partial transcript was provided. Nevertheless, he submitted that as a remedy for breach of the appellant's rights, it was open to the court to acknowledge the breach, reduce the appellant's sentence or even quash the conviction. In the case at bar, he submitted that the appropriate remedy was a reduction of the appellant's sentence by five years. This would have enabled the appellant to be immediately eligible for parole. He relied on **Evon Jack v R** [2021] JMCA Crim 31.

[24] On the question of sentence, ground 5, Mr Edmond, with admirable frankness, stated that he could not argue that the sentence was excessive in light of the sentences

handed down at that time for murder. Thus, although the sentencing remarks and other documents were not available, he was not able to pursue this ground.

The submissions for the Crown

[25] We asked the Crown to only respond to grounds 3(A), 4 and 5 in light of the concessions that Mr Edmond had made, in our view, quite correctly.

[26] Mr Nelson made submissions on behalf of the Crown. In respect of ground 3(A), counsel submitted that the learned trial judge did her best to put the appellant's case and his defence of self-defence to the jury. Counsel stated that the learned judge even referred to the appellant's unsworn statement as 'evidence', according it more weight than it was due. Counsel noted that the appellant did not, at any time, say that the deceased was attacking him. In addition, while the appellant referred to "slapping off" of one man, Mr Gibbs, the learned judge, in her summation, stated that the appellant was slapping "them" off, referring to both the deceased and Mr Gibbs. It was, therefore, a matter of credibility for the jury to decide whether the appellant was acting in self-defence.

[27] In respect of ground 4, on the question of delay, Mr Nelson admitted that there was delay and acknowledged that aspects of the trial transcript were still missing. Counsel urged, however, that some of the blame had to be placed at the appellant's feet as he did not apply for leave to appeal until 11 years after he was convicted and sentenced. He submitted that the blame could not only be laid at the Crown's feet and that a one-year reduction in sentence would be sufficient as a remedy in the case at bar, given all the circumstances. He relied on **Evon Jack v R**, **Tapper v Director of Public Prosecutions of Jamaica** [2012] UKPC 26, **Rockel West v R** [2023] JMCA Crim 14.

[28] On the question of sentence, counsel stated that the sentence imposed was not manifestly excessive, so that ground 5 was without merit. He relied on **R v Ball** [1951] 35 Cr App Rep 164, **Danny Walker v R** [2018] JMCA Crim 2, and **Loretta Brissett v R**

(unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004.

Discussion

Self-defence

[29] The court agrees with the Crown's submissions on the question as to whether the learned trial judge fairly addressed the appellant's case of self-defence. The learned judge repeatedly emphasized the appellant's case to the jury. This is evident on the available portions of the summation. At page 63, lines 9 to 14 of the transcript, we note the learned trial judge stating:

> "Well, you saw Mr. Gibbs. It's for you to say whether or not you accept his evidence. He said they were not armed. Do you accept Mr. Gibbs' evidence that they were not armed? Or do you believe what the accused man said to you, that both of them were armed with knives..."

Again, at page 64, line 22 to page 65, line 13, we note:

> "You have heard what the accused man has said and you have heard the witnesses for the Prosecution and what this accused man is saying in his unsworn statement in relation to what he says, that both men, as it were, went in opposite direction of him and both had knives and he was going to look feed. He had his cutlass and Lennox tried to keep him back and what he said he did was to 'slap' him off with his cutlass to get back to his home and that having done that, he got up back and came around to the front of him and he had to 'slap' him off with his cutlass. Those are the words that he used, 'slap' him off with his cutlass, so that he could get up to go to his home.'

[30] Later, at page 66, lines 1 to 5 of the transcript, we again note the learned trial judge saying:

> "On the defence, this accused man, the thrust of his statement to you is that both men had knives and they went in certain direction in relation to him and he had to use his knife to 'slap' them off.

[31] On a review of the appellant's unsworn statement, it is evident that the appellant did not at any time say that he had to 'slap' or ward off the deceased. However, the learned judge stated that the appellant had to "'slap' them" off (recorded at page 66, line 4 of the transcript), an interpretation that was more favourable to the appellant. We do not agree with Mr Edmond's suggestion that the learned judge could have used other language to describe the actions that the appellant claimed he was taking in self-defence. It was appropriate for the learned trial judge to use the appellant's own language to describe the actions that he was taking in self-defence. Even from the partial transcript of the learned judge's summation, it was clear that she placed the appellant's case in a fair and balanced manner before the jury for their consideration. This ground of appeal has no merit. The conviction is, therefore, sound.

Breach of fundamental rights and freedoms

[32] We turn now to consider the issue of delay in the provision to this court of the transcript of proceedings in the court below as well as in the hearing of the appeal. We examined the statutory framework surrounding the application for leave to appeal and the steps that are to be taken thereafter.

[33] The issues that the appellant raised in respect of delay hinged on the right to due process guaranteed by the Constitution of Jamaica. Every person charged with a criminal offence, or subject to the determination of his civil rights and obligations, is entitled to due process. Section 16 of the Constitution states in part:

> "(1) **Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.**
>
> ….
>
> (5) Every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.

> (6) **Every person charged with a criminal offence shall-**
>
> (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) **have adequate time and facilities for the preparation of his defence;**
>
> ….
>
> (7) **An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled,** if he so requires and subject to payment of such reasonable fee as may be prescribed by law, **to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.**
>
> (8) **Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."** (Emphasis supplied)

[34] The constitutional provisions indicate, among other things, that the appellant was entitled to have a court superior to the one in which he was tried review his conviction and sentence. In addition, the appellant had a right to have adequate facilities to argue his appeal. These facilities included the provision of a record of the proceedings in which he was tried and convicted.

[35] The appellant also had a constitutional right to have his appeal heard within a reasonable time. This court has, in numerous cases, made it clear that the reasonable time guarantee applies to appellate proceedings and is to avoid a convicted person remaining too long in a state of anxiety about his fate (see **Allan Cole v R** [2010] JMCA Crim 67 at para. [73]).

[36] In the case at bar, although Mr Edmond presented his submissions in a way that combined the appellant's right to adequate facilities with his right to have his appeal heard within a reasonable time, we thought it best to approach the matter by examining each right individually.

Was the appellant's right to obtain a record of the proceedings in which he was tried and convicted breached?

[37] The appellant ought to have applied for leave to appeal within 14 days after he was sentenced. Section 16 of the Judicature (Appellate Jurisdiction) Act ('JAJA') provides:

> "(1) **Where a person convicted desires to appeal under this Part to the Court or to obtain the leave of the Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal** in such manner as may be directed by rules of court **within fourteen days of the date of conviction.**
>
> (2) Such rules shall enable any convicted person to present his case in writing instead of by oral argument if he so desires and any case so presented shall be considered by the court.
>
> (3) Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court.
>
> (4) For the purposes of this section, the date of conviction shall, where the court has adjourned the trial of an indictment after conviction, be the date on which the court sentences or otherwise deals with the offender." (Emphasis supplied)

[38] Section 17 of the JAJA provides that where an application for leave to appeal has been made, the judge of any court before which the person was convicted, shall, in accordance with rules of court, furnish his notes of the trial to the registrar of this court.

[39] Section 18 of the JAJA provides that the registrar is to provide forms and instructions in relation to notices of appeal to any person who demands same and to other persons, including superintendents of adult correctional centres. The superintendents are to "cause those forms and instructions to be placed at the disposal

of inmates desiring to appeal…and shall cause any such notice given by an inmate in his custody to be forwarded on behalf of the inmate to the Registrar".

[40] Rule 3.3 of the Court of Appeal Rules ('CAR') refers to the forms that appellants are to file when they wish to appeal their convictions or sentences. It states:

> "(1) A person seeking to appeal a conviction or sentence in the Supreme Court does so by filing with the registrar-
>
> (a) a notice of appeal in form B1; or
>
> (b) a notice of application for permission to appeal in form B1.
>
> (2) An application for an extension of time within which to appeal must be in form B2 and be accompanied by-
>
> (a) a notice of appeal in form B1; or
>
> (b) a notice of application for permission to appeal in form B1.
>
> (No extension of time may be permitted when the conviction involves a death sentence).
>
> (3) ….."

[41] In order to consider appeals and applications for leave to appeal, this court must have a record of appeal. Consequently, it is important to also examine rule 3.7 of the CAR, which provides:

> "(1) For the purpose of this rule 'the record' means-
>
> (a) the indictment or inquisition and the plea;
>
> (b) the verdict, any evidence given thereafter and the sentence;
>
> (c) notes of any particular part of the evidence relied on as a ground of appeal;
>
> (d) any further notes of evidence which the registrar may direct to be included;

(e) the summing up or direction of the judge in the court below; and

(f) copies of any undertakings given pursuant to rules 3.14 [dealing with fines] or 3.21 [dealing with bail].

(2) **Upon receipt of a notice under rule 3.3(1) or (2)** [appeals and applications for extension of time in which to appeal]**,** the registrar must require the registrar of the court below to supply to the court - (a) four copies of the record; (b) the original exhibits in the case, as far as practical; and (c) any original depositions, information, inquisition, plea or other documents usually kept by him or her, or forming part of the record of the court below.

(3) In any capital case copies of all the notes of evidence must be included in the record.

(4) …

(5) Upon receipt of the documents referred to in paragraph (2), the registrar must give notice of such receipt to the appellant and respondent.

(6) Either party may apply to the court or a single judge for a direction that all the notes of evidence be supplied to the court and to the Director of Public Prosecutions except for appeals from the [Parish] Court…

(7) **At any time after a notice of appeal or application for permission to appeal has been filed, any party may obtain from the registrar of the court below copies of any exhibits or other documents in his or her possession upon payment of the prescribed fee.**

(8) An appellant –

(a) to whom an attorney-at-law has been assigned; or (b) who is unrepresented, may obtain the documents referred to in paragraph (7) free of charge unless …" (Emphasis supplied)

[42] It is evident that, while notes are taken of the proceedings in every trial, a transcript or record is only prepared where either an appeal or notice of application for

leave to appeal has been filed. The full notes of evidence are also provided in cases involving a conviction for murder.

[43] We noted that there are good reasons for the time limits outlined in the JAJA in respect of the filing of applications. No doubt, one of the reasons is to facilitate the procurement of the record needed for the consideration of the application. As time passes, the risk of a difficulty in obtaining the record increases. The appellant's long delay in applying for permission to appeal brought about a manifestation of those risks.

[44] The record that was provided in the case at bar, however, although late and incomplete, was sufficient to allow the court to consider and determine the grounds of appeal that the appellant pursued against his conviction. This is evident from the analysis that this court conducted, as well as the concessions that the appellant's counsel was able to make upon review of the record and notes of evidence. This situation is clearly distinguishable from that which obtained in **Evon Jack v R** when this court was unable to assess the grounds of appeal in the case due to the absence of the notes of evidence. On the other hand, it was similar to the circumstances in **Rockel West v R,** in which, at para. [37] of the judgment, this court concluded that the incomplete initial transcript, when supplemented by the notes of evidence taken by the judge at trial, was sufficient to put the court in a position to consider the merits of the renewed application for leave to appeal. Interestingly, in that matter, the applicant's counsel eventually informed the court that he was not challenging the applicant's conviction (see para. [41] of the judgment).

[45] We therefore concluded that the appellant's right to adequate facilities to pursue his appeal was not breached.

Was the appellant's right to a timely hearing of his appeal breached?

[46] In the case at bar, the appellant made his application for leave to appeal in 2015, 11 years after his conviction. This was in the face of the 14-day period mandated by the JAJA for such an application to be made. This court received the first portion of the record

of appeal on 13 July 2022, seven years after the appellant made his application and approximately 18 years after he was convicted and sentenced. Efforts to complete the record continued, and a further portion of the notes of evidence came to this court on 28 February 2024, a few weeks ahead of the hearing of the appeal on 20 March 2024. Importantly, the application for leave to appeal was reviewed within four months after this court received the initial record, and the appeal came on for hearing within two years after receipt of the incomplete record of proceedings. It was clear that the delay in the progress of the appeal was directly linked to the time it took for a record of proceedings to be provided to this court.

[47] While we sympathized with the appellant in light of the explanation he gave for his delay in making his application, the court had to balance his position and that of the State. As Mr Edmond candidly conceded before us, and this was a position with which the court heartily agreed, the length of time that it took for the appellant to initiate his application for leave to appeal had a significant impact on whether he could benefit from arguing that his rights were breached by delay in the provision of the transcript and the resultant delay in the hearing of his appeal. Section 18 of the JAJA expressly provides that the registrar is to make available to superintendents of prisons the form that applicants may file seeking to challenge their conviction, and the correctional institutions are to ensure that such notices are sent to the registrar of this court. The appellant was, therefore, in a position to sign and submit a notice of application for leave to appeal through the correctional institution. Even if he thought that his attorney had filed the application on his behalf, the appellant could have made earlier enquiries as to the progress of the expected application. In our view, the appellant had to take most of the responsibility for the delay that occurred between the time when he applied for leave to appeal and an extension of time within which to seek leave and when the partial transcript was provided to this court.

[48] In our view it would have been unreasonable to find that the State breached the appellant's right to a fair hearing within a reasonable time in the face of his excessive delay in making his applications. It was indeed extraordinary that, at the time of our

hearing of the appeal on 20 March 2024, 20 years had passed since the appellant was convicted and sentenced on 20 February 2004. It was commendable that despite the excessive delay on his part, the State provided sufficient material for the consideration of the merits of his appeal. The ground of appeal in respect of the delay in the hearing of the appeal, therefore, failed.

Sentence

[49] As regards ground 5 of the appeal, Mr Edmond was correct in conceding that the sentence that was imposed on the appellant was not manifestly excessive. **Danny Walker v R,** a case helpfully provided by the Crown, involved an applicant who discharged a firearm at a group of men in 2002. On 13 July 2012, he was sentenced to life imprisonment with the stipulation that he should serve a minimum of 25 years before being eligible for parole. This court did not disturb the sentence.

[50] In **Loretta Brisset v R**, another helpful authority relied on by the Crown, the applicant shared a visiting relationship with the deceased. The prosecution's case was based on circumstantial evidence. The deceased was not seen after 25 July 1999, and human remains were found in a pit latrine. A witness saw the applicant moving the deceased's furniture from his house and packing them on a truck. On 21 March 2002, the applicant was convicted and sentenced to life imprisonment with the stipulation that she should serve 25 years before becoming eligible for parole. On appeal, there was no challenge to the sentence that was imposed.

[51] In addition, we considered **Adrian Forrester v R** [2020] JMCA Crim 39, in which the appellant was found by circumstantial evidence to have stabbed the victim, causing his death in 2006. The appellant was sentenced by the trial judge to life imprisonment at hard labour with the stipulation that he would not be eligible for parole before serving 35 years. There were signs of a massive struggle as well as defensive wounds. Upon review of the sentence, this court indicated that a sentence of 39 years imprisonment before eligibility for parole would have been appropriate and imposed a sentence of life

imprisonment with a pre-parole period of 34 years and eight months - having taken into account four years and four months that the applicant had spent in custody.

[52] It was for the above reasons that we made the orders outlined in para. [4] above.