**[2024] JMCA Crim 30**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA**
**THE HON MISS JUSTICE P WILLIAMS JA**
**THE HON MR JUSTICE D FRASER JA**

**SUPREME COURT CRIMINAL APPEAL NOS 29, 30, 31 & 32/2014**

**ON REFERRAL FROM HIS MAJESTY IN COUNCIL**

**SHAWN CAMPBELL**
**ADIDJA PALMER**
**KAHIRA JONES** **v R**
**ANDRE ST JOHN**

**Isat Buchannan and Miss Alessandra LaBeach for Shawn Campbell and Adidja Palmer**

**John Clarke and Iqbal Cheverria for Kahira Jones and Andre St John**

**Miss Claudette Thompson, Director of Public of Prosecutions (Ag), Janek Forbes, Miss Loriann Tugwell and Rasheed Lee for the Crown**

**10, 11, 12, 13, 14, 18 June, 31 July 2024**

**Criminal law – Referral from His Majesty in Council – Convictions quashed and sentences set aside – Whether verdicts and judgments of acquittal to be entered or a new trial ordered – Factors to be considered – Section 14(2) of the Judicature (Appellate Jurisdiction) Act**

**MCDONALD-BISHOP, P WILLIAMS AND D FRASER JJA**

## Introduction

[1] On 13 March 2014, the appellants, Messrs Shawn Campbell also called "Shawn Storm" ('Campbell'), Adidja Palmer also called "Vybz Kartel" ('Palmer'), Kahira Jones ('Jones') and Andre St John also called "Mad Suss" ('St John'), were convicted of the murder of Clive Williams also called "Lizard" ('the deceased'). The appellants appealed their convictions to this court and then to His Majesty in Council. On 14 March 2024, 10

years and one day after they were convicted in the Supreme Court, the Judicial Committee of the Privy Council ('Privy Council') quashed the appellants' convictions and remitted to this court, for determination, the question of whether the appellants should be ordered to stand a new trial (or 'retrial').

[2] Over six days, we heard arguments by counsel for the appellants and the Crown (or 'the prosecution') on that question. Raising issues such as deficiencies in the prosecution's case, the unavailability of witnesses, delay, unfairness to the appellants, prejudicial publicity, and constitutional breaches, the appellants contended that a new trial would not be in the interests of justice and verdicts and judgments of acquittal should be entered. Contrariwise, the Crown contended that the interests of justice demand that a new trial be ordered given the seriousness and nature of the offence alleged to have been committed by the appellants, the prevalence of murder in Jamaica and the strength of the case against the appellants.

[3] This is the unanimous judgment of the court to which each member of the panel has substantially contributed.[1]

## Background

[4] It is convenient to adopt, with slight modifications where necessary, the summary of the allegations and chronology of events in this matter as outlined in the judgments of this court and of the Privy Council with neutral citations **Shawn Campbell and others v R** [2020] JMCA Crim 10 and **Shawn Campbell and others v The King (No 2)** [2024] UKPC 6, respectively.

---

[1] We give special commendations to Senior Judicial Counsel at the Court of Appeal **Mr Jordan Jarrett, Mrs Yumika Harris-McKenzie, Mrs Nicole McLennon** and **Ms Shaniel Hunter,** who worked tirelessly to assist the court in expeditiously preparing this judgment to meet the deadline we set for delivery of the court's decision.

A. Proceedings in the Supreme Court

[5] The allegations were that the deceased and Lamar Chow ('Chow'), the prosecution's sole eyewitness, had been given two unlicensed firearms belonging to Palmer for safekeeping. Palmer gave Chow and the deceased a deadline of 8:00 pm on 14 August 2011 to return them. They failed to comply. As a consequence, Chow and the deceased were summoned by Campbell to Palmer's house at Swallowfield Avenue, Havendale ('the Swallowfield premises'). They went there by taxi on 16 August 2011, accompanied by Campbell. On arrival, they were met by Palmer, Jones and St John. Palmer asked what plans Chow and the deceased had for replacing the firearms. The deceased replied that he would replace them. They were then both attacked after which Chow saw the deceased lying motionless on the ground, with Jones bending over him. Chow escaped, but the deceased was never seen again and calls to his mobile phone went unanswered.

[6] On 22 August 2011, a team of police officers went to the Swallowfield premises to investigate an alleged homicide. They noticed that the house smelled of disinfectant. On 24 August 2011, Chow provided a witness statement to the police. A police team accompanied him to Havendale, where he pointed out the Swallowfield premises as Palmer's house. On 25 August 2011, the police cordoned off the perimeter wall of the Swallowfield premises, treating the premises as a crime scene. When they returned on 27 August 2011, they found that the entire interior of the house had been destroyed by a fire, which had not been reported to the police.

[7] On 29 August 2011, a police forensics team visited the Swallowfield premises to conduct their investigation. They reported a foul odour emanating from the living room of the house. On a further police visit on 30 September 2011, it was discovered that the rear of the house had been demolished. The police dug at the premises but did not find anything of significance to their investigations.

[8] The appellants were taken into custody on 30 September 2011 and subsequently charged for the deceased's murder. They were never granted bail and so had been detained since 2011.

[9] The appellants were tried in the Home Circuit Court before Campbell J ('the trial judge') sitting with a jury. The trial lasted 64 days. At trial, the prosecution relied on the evidence of Chow, 21 other witnesses, telecommunications data contained in a CD ROM referred to as "JS2"; text messages, Blackberry phone messages, voice notes and a video extracted from mobile phones belonging to Palmer, St John and the deceased; and, a Blackberry Torch phone taken from the appellant Palmer along with its memory cards.

[10] The prosecution's case at trial, was that the correspondence and communication media, taken as a whole with Chow's evidence, proved the fact of the killing, the reason for the killing, the method of disposal of the deceased's body and the identity of, at least, one of the alleged killers, namely, Palmer.

[11] The prosecution's case was strenuously challenged in cross-examination by counsel for the appellants ('defence counsel'). The appellants each gave unsworn statements from the dock denying knowledge of and involvement in the murder.

[12] During the course of the trial, there were three incidents involving the jurors. The first and second incidents are not germane to these proceedings. It suffices to state that after the second incident, the jury panel was reduced to 11 members. The third jury incident came to light on 13 March 2014, the last day of the trial judge's summing up of the case to the jury. Following the report of possible jury misconduct, the trial judge convened a hearing in chambers and informed counsel on both sides that he had been made aware that a juror ('Juror X') attempted to bribe another member of the jury with an offer of $500,000.00 to decide the case in a particular way. The trial judge and counsel on both sides questioned the forewoman of the jury in chambers. She informed them that Juror X had spoken to all the jurors and encouraged them to free the appellants

without regard to the evidence. There was no evidence to connect any of the appellants with the activities of Juror X.

[13] Faced with the possibility of having to abort the trial, the trial judge heard submissions from the Director of Public Prosecutions (the 'DPP'), who was invited to attend in person to assist the court on that issue, and defence counsel. The DPP indicated that the prosecution was prepared to proceed, but suggested that the trial judge should "[j]ust warn [the jury] again about their oath". Defence counsel expressly resisted this course, raising concerns about the impact of the nature of the allegations on the jurors and the possibility of "compensation" in the discharge of their functions, among other things. Despite defence counsel's resistance, the trial judge decided to continue with the summing up, which he did. Several times during the resumed summing up, the trial judge reminded the jury of their oath to try the case based only on the evidence heard in court. He completed the summing up at 3:15 pm and handed the case over to the jury immediately thereafter.

[14] The jury, including Juror X, deliberated for over three hours and by a majority verdict of guilty (10:1), convicted the appellants of the deceased's murder on the same day.

[15] The appellants were each sentenced by the trial judge to imprisonment for life at hard labour, with the stipulation that Campbell and Jones should serve a minimum of 25 years in prison, and the appellants Palmer and St John should serve a minimum of 35 and 30 years, respectively before becoming eligible for parole.

B. The appeal to this court

[16] Aggrieved by the verdicts and sentences, the appellants filed applications for permission to appeal. On 13 March 2017, three years after they were convicted, a single judge of this court granted them leave to appeal.

[17] The appellants appealed against their convictions and sentences on a variety of grounds, which broadly concerned– (i) the admissibility of evidence derived from cellular

telephone analysis and video recordings; (ii) the credibility of the prosecution's sole eyewitness; (iii) the judge's management of various issues concerning the jury; (iv) the judge's directions to the jury; (v) the admissibility of certain aspects of the investigating officer's evidence; (vi) the impact of pre-trial publicity on the fairness of the trial; and (vii) whether the sentences which the judge imposed were manifestly excessive.

[18] By written judgments delivered on 3 and 17 April 2020, the court comprised of Morrison P, Brooks JA (as he then was) and F Williams JA dismissed the appeals against convictions and allowed the appeals against sentences, in part. The sentence of life imprisonment remained for each appellant. However, their sentences were varied by reducing the minimum term to be served by each of them before becoming eligible for parole, in order to give credit for the time spent by each of the appellants in pre-trial custody.

C. The appeal to the Privy Council

[19] Dissatisfied with the decision of this court, the appellants sought and were granted conditional leave to appeal to the Privy Council on 25 September 2020. Final leave to appeal to the Privy Council was granted on 7 March 2022.

[20] On 20 November 2020, before final leave was granted by this court, and on 12 November 2022, the appellants applied to the Privy Council for permission to appeal on additional grounds. Those applications were dismissed on 15 February 2023.

[21] In their appeal to the Privy Council, the appellants advanced three grounds of appeal that were certified by this court for the opinion of His Majesty in Council. It is only necessary for present purposes to focus on the second ground of appeal, which was determinative of the appeal to the Privy Council. The complaint in that ground of appeal was that the trial judge failed to properly enquire into allegations of jury misconduct.

[22] Their Lordships gave the following reasons for their decision to allow the appeal on this ground:

(1) In all the circumstances, the course followed by the trial judge, in dealing with the third incident of jury misconduct, was a material irregularity in the course of the trial, giving rise to a miscarriage of justice within the meaning of section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') (para. 42).

(2) The trial judge should have done more to investigate the third incident of jury misconduct. He should have interviewed each juror individually rather than relying solely on the forewoman's account. Had he done so, he would have been better placed to assess the situation and decide which course to take (paras. 40 – 42).

(3) The trial judge's directions to the jury did not address the allegations of bribery, so they were inadequate to rectify the situation. In any event, in these circumstances, no direction, however focused and firm, could rectify the damage to the integrity of the trial that had been caused in this case (paras. 43 and 44).

(4) Allowing Juror X to continue to serve on the jury was fatal to the safety of the convictions and was an infringement of the appellants' fundamental right to a fair hearing by an independent and impartial court under section 16 of the Constitution of Jamaica (para. 45).

(5) The Director of Public Prosecutions' endorsement of the course adopted by the trial judge was irrelevant. The fact that the prosecution was prepared to waive an irregularity in the trial did not absolve the trial judge of his responsibility to ensure a fair trial (para. 47).

(6) There was a real danger that the jurors may have been consciously or unconsciously influenced against the appellants by the knowledge that someone was willing to bribe jurors to secure the appellants' acquittal. In such a case, the court had no alternative but to discharge a jury and end the trial in order to protect the integrity of the system of trial by jury (paras. 52 and 54).

(7) Given that the appellants' guilty verdicts were returned by a jury which was not a fair and impartial tribunal of fact, there is no room for the court to apply the proviso to section 14(1) of the JAJA and to dismiss the appeals on the ground that no substantial miscarriage of justice has occurred.

**The present proceedings**

[23] The formal order of the referral from the Privy Council was received by the Registrar of this court on 12 April 2024. On the same day, directions for the filing and service of written submissions and the scheduling of hearing dates were issued by this court for the expeditious determination of the question remitted to the court.

[24] Subsequent directions were issued fixing timelines for the filing and service of submissions in reply and any evidence supporting factual assertions advanced by counsel for the parties in their written submissions.

[25] On 5 June 2024, the appellants filed a notice of application for permission to adduce fresh evidence pursuant to section 28(a) of the JAJA. The proposed evidence was contained in several affidavits from the appellants and other affiants and related to matters asserted to be relevant to the court's exercise of its discretion regarding whether a new trial should be ordered. Evidence was also filed by the Crown in support of the ordering of a new trial.

[26] In addition to seeking permission to adduce fresh evidence, the appellants in their notice of application sought declarations that their constitutional right to a fair hearing within a reasonable time under section 16(1) of the Constitution of Jamaica were infringed by the 10-year delay in the appellate process, and were likely to be infringed if an order for a new trial was made.

[27] Firstly, we observed that the evidence filed by the appellants and the Crown was not "fresh evidence" in the sense in which that expression is ordinarily used, although referred to as such by the appellants. Instead, the evidence was filed to assist the court on issues of fact in determining whether a new trial should be ordered.

[28] As will soon become apparent, the issues routinely considered by the court in determining whether a new trial should be ordered may often require evidence from both the prosecution and defence. It is, undoubtedly, within the court's broad discretion under section 28(a) of the JAJA to receive such evidence filed in order to determine whether a new trial should be ordered. Further, it is for this court to determine the relevance, admissibility and weight to be attached to the evidence filed, having regard to the relevant rules of evidence and procedure and the general law.

[29] Secondly, we do not consider it appropriate to consider the aspects of the notice of application seeking declarations relative to the appellants' constitutional rights. The exercise of the court's jurisdiction in these proceedings is limited to determining whether a new trial should be ordered, or whether judgments and verdicts of acquittal should be entered pursuant to section 14(2) of the JAJA. It is not a determination of the grounds raised in the appeals to this court and the Privy Council.

[30] To determine the question of whether a new trial should be ordered, the court has had regard to issues raised concerning the appellants' constitutional rights. However, we do not do so in contemplation of granting redress for constitutional breaches alleged by the appellants. Given the question for determination before this court and the mandate from the Privy Council, we have not considered it appropriate to consider any application

seeking declaratory relief for alleged constitutional breaches. The Supreme Court, as the court with original jurisdiction in constitutional matters, would be the proper forum for any such claim.

[31] Against that background, we now turn to consider the principles applicable to the court's discretion to order a new trial pursuant to section 14(2) of the JAJA.

**The applicable legal principles governing whether a new trial should be ordered**

[32] The starting point in determining whether a new trial should be ordered in this case is the general rule set out in section 16(9) of the Constitution of Jamaica, which provides that a person who has been convicted of a criminal offence shall not be tried again for the same offence unless so ordered by a superior court in appeal proceedings concerning that conviction.

[33] The court's power to order a new trial following a successful appeal against conviction emanates from section 14(2) of the JAJA, which states:

> "(2) Subject to the provisions of this Act the Court shall, if they allow an appeal against conviction, quash the conviction, and direct a judgment and verdict of acquittal to be entered, or, **if the interests of justice so require, order a new trial at such time and place as the Court may think fit**." (Emphasis added)

[34] Section 14(2) permits the court to order a new trial only if "the interests of justice so require". Therefore, where the interests of justice do not require a new trial, the court must direct that a judgment and verdict of acquittal be entered.

[35] In enacting section 14(2), the legislature gave no guidance on the approach to be taken by this court or the factors to be considered when determining whether the interests of justice require a new trial to be ordered. This court has consistently utilised the advice of the Privy Council in **Reid v R** (1978) 27 WIR 254 ('**Reid**') as a guide when making this determination. In summary, the Privy Council's advice in **Reid** was as follows:

(1) Whether the interests of justice require a new trial in a particular case may call for a balancing of a variety of factors, some of which will weigh in favour of a new trial and some against. The weight to be given to the various factors is a matter for judicial determination and may differ from case to case, although there are cases in which one factor might be decisive of the question.

(2) The interest of justice that is served by the power to order a new trial is the interest of the public in Jamaica that those persons who are guilty of serious crimes should be brought to justice and should not escape it merely because of some "technical blunder" by the judge in the conduct of the trial or his summing up to the jury.

(3) Some of the other factors deserving of consideration include, but are not limited to:

(a) the seriousness or otherwise of the offence;

(b) the prevalence of the offence;

(c) where the previous trial was prolonged and complex, the expense and length of time for which the court and jury would be involved in a fresh hearing;

(d) the effect of a new trial on the accused;

(e) the length of time between the alleged date of the commission of the offence and the new trial if, one is ordered;

(f) the evidence that would be available at the new trial; and

(g) the strength of the prosecution's case presented at the previous trial.

[36] Notwithstanding its vintage, the Privy Council's advice in **Reid** remains an appropriate starting point for determining whether a new trial should be ordered.

[37] More recently, the United Kingdom Supreme Court in **R v Maxwell** [2010] UKSC 48 ('**Maxwell**') adopted an approach similar to that of the Privy Council in **Reid**, when interpreting section 7(1) of the Criminal Appeal Act 1968, which permits the English Court of Appeal to order a retrial in the interests of justice. In construing that section, the Supreme Court stated at para. 19 that (i) the interests of justice is not a "hard-edged concept"; (ii) a determination of what the interests of justice require involves an "exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance"; and (iii) given the evaluative nature of the exercise required to be done by the court, "there may be scope for legitimate opinion" as to what the interests of justice ultimately require in difficult cases.

[38] Since **Reid**, several other factors and guiding principles relevant to the question of whether a new trial should be ordered have emerged from the case law. Counsel for the appellants submitted, and we accept, that of great significance is the consideration of the constitutional rights of the appellants. It goes without saying that in determining the manner in which we should exercise our discretion under section 14(2) of the JAJA, a paramount consideration has to be the appellants' fundamental rights and freedoms guaranteed and protected by the Constitution.

[39] In this regard, we adopt the statement of MacMenamin J in the Irish Supreme Court case of **The People (Director of Public Prosecutions) v JC** [2015] IESC 50, who, when dealing with the question of whether a retrial was in the interests of justice under Irish law, stated at para. [170] that "[t]the interests of justice must necessarily fall to be considered in a constitutional manner". In similar stead, in **Mark Russell v R** [2021] JMCA Crim 31 at para. [61], this court, speaking through Brooks P, treated the possible breach of the appellant's right to a trial within a reasonable time as relevant to the question of ordering a new trial.

[40] Other relevant factors arising from case law cited before us and relied on by the appellants include such questions as to:

(1) whether there was some error, fault or misconduct on the part of the prosecution (see **R v Maxwell** [2010] UKSC 48);

(2) whether the appellant has served a significant portion or all of the sentence imposed at the first trial (see **R v Thomas Clive Berry** [1996] 2 Cr App R 226 and **Mikal Tomlinson v R** [2020] JMCA Crim 54);

(3) the likely penalty the appellant would face on a new trial (see **Mikal Tomlinson v R**);

(4) the impact of any prejudicial publicity on the prospects of a fair trial if a new trial is ordered (see **R v Stone** [2001] EWCA Crim 297);

(5) whether a change in the law applicable to the elements of the offence charged and/or the trial process would unfairly prejudice the appellants (see **The People v JC** [2015] IESC 50); and

(6) whether a new trial would be oppressive or unjust (see **Mikal Tomlinson v R** and **Bowe v The Queen** [2001] UKPC 19).

**Analysis of the factors raised for consideration**

[41] Within the framework of the applicable principles, counsel on both sides have presented arguments and evidence concerning numerous factors which they argued, would support or militate against an order for a new trial. The 13 factors advanced by counsel for the appellants and the Crown, which we have considered and weighed in the balance, are:

(1) the seriousness and prevalence of the offence committed;

(2) the strength of the prosecution's case;

(3) the availability of the prosecution's witnesses and exhibits;

(4) the availability of witnesses and evidence which tended to support the defence at the first trial;

(5) the time, financial costs and expense of a new trial;

(6) the ordeal to be faced by the appellants;

(7) the impact of prejudicial pre-trial publicity on the fairness of a new trial;

(8) whether the new trial would give the prosecution an unfair advantage;

(9) fault or error on the part of the prosecution;

(10) legislative changes in the Jury Act and the potential legislative changes to the Offences Against the Person Act to increase the sentence for murder;

(11) the possibility of prejudice arising from the mandatory minimum sentence and minimum term before eligibility for parole;

(12) delay and whether a new trial can be facilitated within a reasonable time; and

(13) breaches and likely breaches of the appellants' constitutional rights.

[42] We have analysed each factor *seriatim*.

**(1) The nature, seriousness and prevalence of the offence**

[43] The Crown emphasised the seriousness of this particular murder and the prevalence of the offence of murder, generally, as a factor operating in favour of ordering a new trial. In our view, the appellants rightly did not argue the contrary.

[44] We consider the nature of the alleged offending in this case as highlighted by the Crown. We consider that the killing of the deceased emanated from transactions relating to illegal firearms, the body of the deceased has not been recovered, and the crime scene was interfered with while it was under the control of the police. The features of this case bear every hallmark of a deliberate attack on, and bare-faced defiance of, law and order. The egregious nature and seriousness of the offence is beyond argument; so too, is the prevalence of the offence of murder in Jamaica.

[45] Accordingly, we adopt the pronouncements of Brooks JA (as he then was) in **Morris Cargill v R** [2016] JMCA Crim 6 at para. [62], that:

> "... It cannot be gainsaid… that murder is not only a serious offence, but it has become distressingly commonplace in our society. It is important, therefore, that murder cases, wherever possible, are tried so that juries, and the society in general, derive a sense that the State does not accept the killing of its citizens lightly, and conscientiously takes steps to apprehend and place before the courts, those persons who are suspected to be the perpetrators of that particular type of crime."

[46] We are satisfied that the nature, seriousness and prevalence of the alleged offence in this case weigh heavily in favour of a new trial.

**(2) The strength of the prosecution's case at trial**

[47] The strength of the prosecution's case against the appellants at the trial is an important factor in determining whether a new trial should be ordered. Where the question of a new trial arises, the court need not be satisfied that a conviction is likely if a new trial is ordered. Instead, the court should, at the very least, be satisfied that, based on the evidence led by the prosecution at trial, the appellant will have a *prima facie* case

to answer (see **The Queen v Vasyli** [2020] UKPC 8 at para. 33 ('**Vasyli**')). The court must also be satisfied that a conviction is not improbable or will not be unsafe or unsatisfactory if the same evidence is proffered (see page 359A of **Au Pui-Kuen v Attorney-General of Hong Kong** [1980] AC 351 ('**Au Pui-Kuen**')).

[48] The weight to be attached to the strength of the prosecution's evidence at trial is, nonetheless, to be determined according to the circumstances of the case. As the Privy Council stated in **Reid** at page 258 of the judgment:

> "…the weight to be attached to this factor may vary widely from case to case according to the nature of this crime, the particular circumstances in which it was committed and the current state of public opinion in Jamaica. On the one hand there may well be cases where despite a near certainty that upon a second trial the accused would be convicted the countervailing reasons are strong enough to justify refraining from the course. On the other hand it is not necessarily a condition precedent to the ordering of a new trial that the Court of Appeal should be satisfied of the probability that it will result in a conviction. There may be cases where, even though the Court of Appeal considers that upon a fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery'."

[49] However, it is a well-settled principle that a new trial should not be ordered where the reason for the conviction being set aside was that it was unreasonable and could not be supported, having regard to the evidence adduced by the prosecution. To order a new trial in those circumstances, the authorities say, would impermissibly give the prosecution a second chance to make good or cure evidential deficiencies in their case against the accused. Based on the appellants' submissions (to which attention will soon be turned), this principle requires close examination.

[50] In **Reid**, the Privy Council explained at page 257 :

> "It would conflict with the basic principle that in every criminal trial it is for the prosecution to prove its case against the accused, if a

> new trial were ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed. **In such a case whether or not the jury's verdict of guilty was induced by some misdirection of the judge at the trial is immaterial; the governing reason why the verdict must be set aside is because the prosecution having chosen to bring the accused to trial has failed to adduce sufficient evidence to justify convicting him of the offence with which he has been charged. To order a new trial would be to give the prosecution a second chance to make good the evidential deficiencies in its case - and, if a second chance, why not a third? To do so would, in their Lordships' view, amount to an error of principle in the exercise of the power under s 14 (2) of the Judicature (Appellate Jurisdiction) Act 1962**." (Emphasis added)

[51] Applying these statements of principles, the Privy Council concluded that this court was wrong to order a new trial in that case, having allowed the appeal on the basis that the verdict of the jury was unreasonable and could not be supported having regard to the evidence.

[52] Relying on its decision in **Reid**, the Privy Council in **Evard Nicholls v R** [2000] UKPC 52 ('**Evard Nicholls**') refused to order a new trial in a murder case, partly on the basis that the prosecution had failed at trial to adduce expert evidence on the significance of five bullet wounds sustained by the deceased. The prosecution's failure to adduce that evidence was an "integral and essential part" of the Privy Council's reasons for quashing the appellants' conviction. At para. 32, the Privy Council said:

> "...It would be wrong to permit the prosecution through Dr. Bascombe-Adams or another expert to make good this deficiency. And a new prosecution without such evidence would in all probability fail either at trial or on appeal to the Court of Appeal or to the Privy Council."

[53] Therefore, the Privy Council in **Reid** differentiated between cases in which the conviction was quashed on the basis of an evidential deficiency on the Crown's case at trial, and those in which the conviction must be overturned because of an error by the

trial judge. In the former case, a new trial should not be ordered, while in the latter case, there was no similar rule. This distinction was further explained by the Privy Council in **Vasyli**.

[54] The appellant in that case argued before the Board that the Bahamian Court of Appeal was wrong to order a retrial after quashing her conviction for murder. The appellant's conviction had been quashed by the majority of the Court of Appeal on the basis that the trial judge was under a duty to direct the jury in keeping with the case of **R v Lucas** [1981] QB 720, but failed to do so. Relying on **Reid**, the appellant raised four evidential points which, she argued, were fatal weaknesses in the prosecution's case, that, individually and collectively, rendered her case one upon which a jury could not properly convict. The Privy Council was not persuaded and found that the prosecution's case, as it was presented at trial, gave rise to a case to answer. In coming to its conclusion, the Privy Council explained the position in **Reid**, stating at para. 31 of the judgment:

> "In the Board's view the unfairness of the prosecution having a second chance arises where the evidence adduced at the first trial was insufficient to amount to a case to answer and this is what makes it wrong in principle for there to be a retrial. **If there was a case to answer and the conviction is set aside on the grounds of the trial judge's handling of the trial or misdirections in the summing up, there is nothing inherently unprincipled or unfair about a retrial affording an opportunity for the prosecution to put forward further or different evidence, an opportunity also provided to the defence**." (Emphasis added)

[55] It is against the background of the foregoing principles that the appellants in this case contended that certain weaknesses in the prosecution's case at trial are conclusive against the ordering of a new trial. In broad overview, the appellants argued that there were discrepancies, deficiencies and gaps in the evidence that the prosecution led at trial. To order a new trial in those circumstances, they submitted, would allow the prosecution to make adjustments in its case to remedy the gaps in it, thereby giving the prosecution a "second bite of the cherry". Among the matters identified are that the

mobile phone evidence relied on by the prosecution has been tampered with, the unreliability of Chow, the prosecution's sole eyewitness, and the absence of direct evidence of Campbell's intention to commit the alleged murder.

[56] The Crown, on the other hand, submitted that the strength of its case against the appellants is a factor in favour of ordering a new trial. In sum, the Crown contended that there are no evidential deficiencies in its case to warrant the refusal of a new trial.

[57] The fundamental difficulty the appellants faced in advancing their arguments on this point is that this case did not involve the type of evidential deficiencies the court was concerned with in **Reid** and **Evard Nicholls**. In this case, the Privy Council declined to consider any of the grounds of appeal impugning the admissibility or strength of the prosecution's evidence. This was, therefore, not a case in which the appellants' convictions were quashed on the basis that the prosecution's evidence at trial was deficient in some material respect. Accordingly, the appellants' concerns about alleged deficiencies in the prosecution's case at trial would not automatically operate as a conclusive bar to ordering a new trial, in the way that it did in **Reid** and **Evard Nicholls**.

[58] Based on the Privy Council's advice in **Au Pui-Kuen** and **Vasyli**, the relevant considerations are whether the prosecution's case at trial gave rise to a *prima facie* case to answer and whether, based on that evidence, a conviction would not be improbable, unsafe or unsatisfactory. We have evaluated the prosecution's case against this backdrop. We have also taken into account the fact that the prosecution's case was based largely on circumstantial evidence. In assessing the strength of the prosecution's evidence, therefore, we are guided by the pronouncements of the Privy Council at para. [22] of **Director of Public Prosecutions v Varlack** [2008] UKPC 56, as to the threshold to be met for a case to answer in such cases.

[59] We have not considered it necessary to go trawling through and reciting, in granular detail, the evidence led by the prosecution and the possible inferences and hypotheses capable of arising from the evidence to demonstrate whether the appellants

would have a case to answer if a new trial is ordered. It suffices to state that, having considered the evidence led by the prosecution set out in the transcripts of the trial, we are satisfied that if the prosecution were to lead the same evidence in a new trial, each of the appellants would have a case to answer. Furthermore, there is nothing conclusive before us to suggest that if a new trial is ordered and the prosecution leads the same evidence, a conviction would be improbable, unsafe or unsatisfactory.

[60] The appellants may have well-founded concerns about discrepancies in the prosecution's evidence and the admissibility of the technical and technological evidence. However, these complaints would be for resolution by the court at a new trial. In this regard, we are guided by the pronouncements of the England and Wales Court of Appeal in **R v Whittaker** [2019] EWCA Crim 2185 at para. 24 that the court should not engage in "excessive speculation" in evaluating the strength of the prosecution's case when determining whether to order a new trial. We are fortified in that approach, even more so in this case, as no finding has been made by the Privy Council as to weaknesses in the prosecution's case, and no legal argument has been raised before us that would undermine the prosecution's case as it was presented at trial. Therefore, we decline to speculatively comment on the purported discrepancies and gaps referred to by the appellants.

[61] In these premises, the appellants' complaint about perceived discrepancies and gaps in the prosecution's case, as presented at trial, does not materially advance their position that a new trial should not be ordered. We are satisfied that the strength of the prosecution's case, as it was at trial, is a factor in favour of ordering a new trial.

### (3) Availability of the prosecution's witnesses and trial exhibits

[62] Counsel for the appellants focused heavily on the reported unavailability of some of the prosecution witnesses and the failure to account for crucial items of evidence by way of affidavit evidence. This, they contended, should affect the weight the court places on the Crown's assertions regarding the strength of its case on a new trial.

[63] Counsel for the appellants also maintained that despite the probability that the Crown may invoke section 31D of the Evidence Act for those unavailable witnesses, such a course would deprive the appellants of the opportunity to cross-examine those witnesses and would be inherently disadvantageous to them. It would also breach the appellants' constitutional rights to examine those witnesses under section 16(6)(d) of the Constitution.

[64] In an effort to ward off the appellants' challenge regarding the availability of its witnesses, the Crown relied on the second affidavit of Jeremy Taylor in support of the respondents' submissions for retrial filed on 12 June 2024. In that affidavit, Jeremy Taylor KC deposed that he was the lead prosecutor in the trial of the case in the court below and that if a new trial is ordered, "the ODPP will be able to have its witnesses available for court without delay …" (see para. 8). He then stated: "[t]hat I have made and caused checks to be made for the availability of the witnesses which were called by the Crown at the original trial and most are available" (see para. 9).

[65] Mr Taylor's evidence that he could have the Crown's witnesses available without delay is qualified by his follow-up assertion that not all the witnesses are available. That calls into question whether the Crown's witnesses would, in fact, be available for a new trial without delay. In addition, the affidavit does not indicate how Mr Taylor carried out his checks, the nature of those checks, how he caused checks to be carried out, and by whom. There is also no indication from Mr Taylor concerning who the available and unavailable witnesses are. In short, the affidavit is inadequate and could not properly assist the court on the matter of the availability of the Crown's witnesses.

[66] This, notwithstanding, the Crown asked this court to have regard to the list of witnesses produced in its written skeleton arguments. In those submissions, it was indicated that six of the prosecution's 21 witnesses were either unavailable or their availability had not yet been ascertained.

[67] In relation to the six witnesses who were not stated to be available, the Crown contended that resort might be had to section 31D of the Evidence Act, which would permit statements made by the unavailable witnesses and the portions of the transcript of the appellants' trial containing their evidence to be tendered and admitted into evidence at a new trial.

[68] We accept that if the witnesses stated to be so are, in fact, available and willing to testify, including the Crown's main witnesses as to fact, and all the exhibits are available as they were in the first trial, the appellants' would have a case to answer if a new trial were ordered and the evidence as anticipated is admitted. Additionally, we accept that section 31D provides an adequate and constitutionally compatible avenue for the admission of first-hand hearsay evidence, subject to the question of the extent of the likely prejudice to the defence. The statutory framework, as settled by the Privy Council in **Steven Grant v The Queen** [2006] UKPC 2, contains inbuilt safeguards to protect the appellants' interests and the fairness of the trial. Indeed, we are of the view that there can be no general rule that the possible need for the Crown to resort to the use of section 31D should be a factor against ordering a new trial.

[69] The court, however, has refused to attach any weight to the list contained in the Crown's skeleton arguments, especially in light of the challenge posed by counsel for the appellants regarding the weight to be attached to it. We attach no weight to the list because there is no indication of the source of the information from which the list was compiled and when and by whom the reported checks were conducted. Furthermore, Mr Taylor's affidavit neither cross-referenced nor attempted to verify this list. There is simply no correlation established between the list of witnesses and the contents of Mr Taylor's affidavit. In the end, both the list and the affidavit failed to comply with the procedural requirements for their contents to be relied on regarding the availability of the prosecution witnesses.

[70] The court had given the opportunity for both sides to provide evidence of the factual assertions contained in their arguments on which they wished to rely in

determining whether a new trial should be ordered. This was the order of the court, having seen the contents of the skeleton arguments filed. Any party that failed to comply with the clear orders of the court and the rules of procedure governing the admission of evidence in affidavit form did so at its peril.

[71] Regarding the directions of the court that factual assertions were to be contained in affidavit evidence, Part 30 of the Civil Procedure Rules, 2002 ('the CPR'), which applies to criminal appeals by virtue of rules 1.1(10)(i) and 3.1(1) of the Court of Appeal Rules, 2002 ('CAR'), are relevant. Rule 30.1 of the CPR provides that the court may require evidence or permit evidence to be given by affidavit instead of, or in addition to, oral evidence. Rule 30.2 of the CPR makes provision for the "Form of the affidavits", and rule 30.3 provides for the "Contents of affidavits". Rule 30.3(1) and 30.3(2) read::

> "(1) The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge.
>
> (2) However an affidavit may contain statements of information and belief –
>
> (a) where any of these Rules so allows; and
>
> (b) where the affidavit is for use in an application for summary judgment under Part 15 or any procedural or interlocutory application, provided that the affidavit indicates-
>
> (i) which of the statements in it are made from the deponent's own knowledge and which are matters of information or belief; and
>
> (ii) the source for any matters of information and belief."

[72] It goes without saying that the list contained in the skeleton arguments is not evidence. Having considered the Crown's affidavit evidence and submissions within the framework of the rules of court and the general law, we find that the Crown has failed to comply with the law regarding the presentation of evidence in proceedings of this nature.

[73] Proof to the satisfaction of the court that the Crown's witnesses are available is of great importance in a case such as this, given the time that has elapsed since the trial in the Supreme Court. The court cannot treat lightly the question of the availability of the Crown's witnesses after such a long delay, given all the complexities of this case and its time-consuming nature. So much has happened between 2014 and 2024, including a pandemic with its disastrous consequences. It would not be in the interests of justice for the Crown to await the order for a new trial to search for its witnesses to determine availability.

[74] The onus is on the Crown to satisfy this court in advocating for a new trial, after more than a decade has passed, that good faith efforts were made to locate and consult with its witnesses regarding their availability. It is difficult for the court to remit a case of this length, complexity, and vintage without a clear and compelling view of the status of the Crown's witnesses. Unfortunately, the Crown has not established the proper foundation for the court to readily and comfortably accept its contention that its witnesses are available, willing, and able to testify. Given the failure of the Crown to adhere to the requirements of rules 30.3(1) and 30.3(2) of the CPR, the Crown's position on the availability of its witnesses is not as formidable as it ought to be.

[75] The problem confronting the Crown in contending for a new trial is further compounded by the unexplained failure to account for trial exhibits that are supposed to be in the custody of the Supreme Court. The evidence contained in the affidavit of Ms Lorna Green, the registrar with responsibility for the criminal division of the Supreme Court, filed on 7 June 2024, at the instance of the Crown, indicates that 14 trial exhibits (exhibits numbered 1-14C) of the 25 exhibits disclosed on the transcript of the proceedings have remained in the custody of the Supreme Court and have been accounted for. No explanation has been given by the Crown for those that have not been accounted for, which include critical evidence contained in video recordings, voice notes, and defence exhibits.

[76] While missing exhibits might not automatically be fatal to ordering a new trial, the absence of some exhibits could lead to unfairness and a miscarriage of justice depending on their evidential value to the defence. In this case, of the exhibits that are unaccounted for, some are critical to the Crown's case, and some to the defence's case. Therefore, the absence of these exhibits in a new trial would have the effect of weakening the Crown's case as well as undermining the defence's case. In these circumstances, we can safely say that the strength of the Crown's case and the ability of the appellants to challenge that case and to mount their own defence would be adversely affected by the unavailability of crucial trial exhibits that have remained unaccounted for. The court cannot ignore the possibility of a miscarriage of justice occurring in a new trial as a result of missing exhibits critical to the case of the appellants.

[77] Given the complexities and peculiarities of this case, including the length of time the appellants have been in custody, and the time which has elapsed between the first trial and the likely time for a new trial to commence, the unsatisfactory explanation regarding the availability of the Crown's witnesses and critical trial exhibits strongly militates against ordering a new trial. Therefore, this is not a factor that swings the pendulum in favour of the order of a new trial. Rather, it serves to strengthen the appellants' position that there should not be a new trial.

**(4) Availability of defence witnesses and any evidence which tended to support the appellants' case at trial**

[78] In our view, even if all the Crown's witnesses were proved to be available and the trial exhibits were all accounted for, that would not, by itself, be enough for the court to order a new trial. The availability of the defence witnesses who testified at the first trial is also a significant factor to be weighed in the equation.

[79] In **Reid**, the Privy Council stated at page 258 that "…there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial". The appellants relied heavily on this pronouncement of the Privy Council in **Reid**

in advancing their complaint that evidence which tended to support their defence at the trial is unavailable for any new trial. They have particularly highlighted the evidence of Retired Senior Superintendent of Police Carl Major ('SSP Carl Major'), who is now deceased. At the time of the trial, SSP Carl Major was the chief handwriting expert attached to the Jamaica Constabulary Force and was called by the defence on Palmer's case. His evidence confirmed that a letter purportedly written by one "L Chow" and addressed to "the Public Defender" was written by Chow, the Crown's main witness as to fact. In that letter, it was indicated, among other things, that the purported writer (Chow) did not go to the police willingly as "[they] came for [him] in brute force, he legitimise[d] their theory of what happen[ed] on the 16 of August 2010 and that the reason why he did want to come to court was because he had seen the deceased…" after the date it is alleged the offence was committed. By calling SSP Carl Major, all the appellants sought to undermine Chow's credibility.

[80] The Crown submitted that the evidence of SSP Carl Major could be introduced by way of section 31D of the Evidence Act as the constitutionality of that section had been settled. Therefore, it was argued that the appellants would not be in a worse position if they were to be retried, and the evidence of SSP Carl Major was admitted in accordance with section 31D. Alternatively, the Crown's position is that another handwriting expert could be instructed by the appellants to examine the questioned letter.

[81] We agree with the appellants that the unavailability of SSP Carl Major, who was present at the first trial, would be disadvantageous to the defence. Similarly, it would also be disadvantageous to the defence in a new trial, if his evidence at the first trial was to be admitted under section 31D of the Evidence Act, as this would deprive defence counsel of the opportunity to further examine the witness. The jury would also be deprived of the opportunity to see, hear and assess the witness, which are accepted inherent limitations when witnesses do not appear in person to give evidence. Critically too, the use of the section 31D mechanism would mean that additional evidence would have to be elicited to satisfy the preconditions for admissibility of hearsay evidence under the statutory regime.

[82] Another consideration is that the original letter purportedly written by Chow, which was among the exhibits stored at the Supreme Court, has not been accounted for by the Crown. That letter would be required for analysis if a new handwriting expert is to be engaged by the appellants, given the death of SSP Carl Major. The fact that the letter is not accounted for means that the defence would be adversely affected in the preparation of their defence in seeking to establish that Chow is not a credible witness.

[83] Therefore, in all the circumstances, we are satisfied that the unavailability of SSP Carl Major and the original letter purportedly written by Chow, being evidence on which the appellants' relied at the trial, is a 'powerful factor' against the ordering of a new trial, in keeping with the relevant principle enunciated by the Privy Council in **Reid**. The unavailability of the main defence witness and the defence exhibits relating to that evidence, therefore, strongly supports the appellants' position that there should be no new trial.

[84] The appellants Campbell and St John, although they had not called witnesses at the trial, also lamented the unavailability of potential witnesses if there is to be a new trial. Campbell indicated that he had an alibi witness who could not be located. St John, for his part, indicated that if a new trial is ordered, he would want to call a witness to contradict the evidence given by Chow, that at the time of the alleged attack, he (St John) was living in Havendale. However, he had no means of communicating with that witness and the other person he would want to call as an alibi witness is dead. Therefore, he would also be without material witnesses for a new trial.

[85] Having had regard to the fact that the potential witnesses the two appellants would want to call were never witnesses at the first trial, we agree with the Crown that no weight should be attached to this belated asserted need for new witnesses as a factor to militate against a new trial. The unavailability of the potential witnesses Campbell and St John claimed to require in support of their defence is not taken into account as a factor tipping the scale in their favour. Their strongest position regarding the adverse impact of the unavailability of defence witnesses rests only on the unavailability of SSP Carl Major,

which has already been considered and resolved above. Accordingly, the unavailability of the potential witnesses for the appellants, who were not called at the trial, is a neutral factor in the balancing exercise.

### (5) The time, financial costs and expenses of a new trial

[86] In **Reid**, the length and likely expenses of a new trial are among the factors listed for the court's consideration when determining whether a new trial should be ordered. At page 258-G, Lord Diplock, writing for the Board, stated:

> "…where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations."

[87] The Bahamian Court of Appeal in **Simeon Bain v R** (unreported), Court of Appeal, the Commonwealth Bahamas, SCCrApp No 222 of 2013, judgment delivered 17 February 2022, acknowledged that the expense of any criminal trial was visited upon both the State and the appellant. The court also highlighted that there were important non-financial costs that should also factor into the contemplation. However, these considerations must be weighed against the wider public interest that persons accused of violent crimes be brought to justice. At para. 17, Crane-Scott JA, writing for the court, stated that:

> "As for the expense of a fresh trial if one were to be ordered, we venture to say that the expense of any criminal trial cuts both ways as any trial (whether freshly indicted or an older matter awaiting retrial) will involve a cost to either side. That cost may be financial or may involve the deployment of human and other resources which could otherwise be more efficiently deployed in other matters… However, it is in the interests of justice that persons who commit violent crimes are brought to justice and the society is well served by putting violent criminals in prison."

[88] In **Omar Blake, Omar Dunkley and Jason Coley v R** [2024] JMCA Crim 28, a recent decision emanating from this court, the time, costs and expense of a new trial were treated as two of the several factors that weighed against a new trial being ordered. In refusing to order a new trial, Dunbar-Green JA, writing for the court, ascribed weight

to the fact that the trial had been "long and tedious" and "the resources likely to be incurred for a new trial would be enormous".

[89] Against the background of the law, counsel for the appellants highlighted that the case management in this matter leading up to the previous trial spanned almost four years. The trial itself was long and complex. These facts are advanced as clear indicators that it was not in the interest of the public purse for such an expensive undertaking to be repeated. Counsel also contended that the trial and appellate processes to date had subjected the appellants to significant financial burdens which would only be exacerbated were a new trial to be ordered. Additionally, the appellants would not be able to afford counsel of their choosing, guaranteed to them under section 16(6) of the Constitution, if a new trial is ordered. Thus, ordering a new trial would be disadvantageous to them and possibly contravene their constitutional right to legal representation of their choosing.

[90] The Crown argued that, in this case, the cost and length of a new trial ought not to weigh heavily in this court's determination, because prosecuting murder, in general, and specifically the alleged murder in this case, which has attracted the attention of the entire society, is worth the cost. This is so because of the nature of the allegations involved in this case, and the circumstances surrounding its commission, including the unrecovered body of the deceased. Thus, the Crown contended that a fixed figure could not be put to justice, and in light of the public interest, this is a case worthy of any cost to the State associated with a new trial.

[91] On the issue of legal representation, the Crown argued that the legal aid system would provide legal representation for the appellants in the event they were unable to afford the legal representation of their choice. It was argued that if the appellants cannot afford counsel of their choice, the grant of legal aid would satisfy the constitutional guarantee to legal representation.

[92] We have given careful consideration to the parties' submissions on these factors. We observe that the length of the trial, spanning 64 working days, and its complexity are,

by now, notorious. The trial is reputed to be the longest murder trial in Jamaica's history. It involved 30 witnesses in total and included heavy reliance on expert evidence. We are of the view that if a new trial is ordered, there is a real possibility that it will be either equally lengthy and complex or lengthier and more complex than the first trial. The trial judge at the new trial would have to contend with a multiplicity of time-consuming processes, some of which did not feature in the original trial. These include enhanced jury selection and management procedures (discussed below) to be deployed on account of the widespread pre-trial publicity which has occurred, renewed challenges to the admissibility of certain aspects of the prosecution's evidence, and the expected use of the transcript of the trial to challenge witnesses on any conflicts that may arise between the evidence at the new trial and that at the original trial. In all likelihood, a new trial would span a longer time than the first one.

[93] It is axiomatic that the longer and more complex a trial, the higher would be the associated financial costs and expenses. It cannot be gainsaid that a new trial would require extensive time and resource allocations from the State, as evidenced by the first trial. The resources involved in the trial of the appellants were not only financial. A significant outlay of human resources was required to mount the trial. These included lawyers, jurors, and court staff's time and expertise. A review of the transcript reveals that 21 court reporters participated in the trial over its duration. At the end of its judgment in dismissing the appellants' appeal against conviction, this court acknowledged the impact of the trial on the Supreme Court's resources in this way:

> "[544] This court appreciates the sacrifice that the judge, jury, counsel and court staff of the Supreme Court made in taking what was clearly a difficult trial to completion. We are grateful to counsel who appeared in this court for their assistance in marshalling the mass of material that the trial generated."

[94] Although no specific attempt was made to quantify the costs to the State of the appellants' previous trial, the costs must have been staggering, given the length and complexity of the trial.

[95] Added to the costs to the State of the first trial are the costs incurred on appeal to this court and the Judicial Committee of the Privy Council, where the Board ordered that the State should pay the appellants' costs while having to bear its own. The appellants' costs before the Board included the expense of digitising the extensive record, air travel and accommodation for counsel who travelled from Jamaica, and the legal fees paid to Jamaican attorneys-at-law as well as English solicitors and barristers.

[96] In a context where there remains a backlog of cases before the Home Circuit Court, the reality must also be confronted that a new trial of the appellants would consume human and other resources such as time, that, in the words of Madam Justice Crane-Scott JA, in **Simeon Bain v R**, "could otherwise be more efficiently deployed in other matters". There are other cases where defendants are in custody for even more heinous murders awaiting trial.

[97] To compound the issue, the appellants, on the other hand, averred that they had spent millions of dollars to mount their defence. With varying degrees of particularity, they stated in their affidavits that their financial resources had been depleted and that they would not be able to afford a new trial. Each of the appellants has expressed concern about their abilities to pay attorneys and has some reluctance about accepting legal aid, given the complex issues involved in this case.

[98] We are mindful of the negative financial impact the trial would have had on the appellants, and we accept that if they are called upon to represent themselves in a new trial, this would be an additional financial burden on them. This is a factor to be weighed in the balance in their favour.

[99] However, the court is very cautious about the weight it should attach to the appellants' reluctance to accept legal aid if a new trial is ordered and they are unable to afford legal representation. We note that in the event they cannot afford legal representation of their choosing, the State is duty-bound to provide counsel to them at its expense pursuant to sections 16(6)(b) and (c) of the Constitution and the Legal Aid

Act. Therefore, the appellants' asserted aversion to legal aid does not advance their case against a new trial.

[100] We consider, however, that the duty of the State to provide legal aid to any of the appellants would add to the exorbitant costs already borne by the State as a result of the trial, which is a crucial consideration in considering the cost and expense of a new trial.

[101] The Crown contended that the circumstances of the alleged murder should outweigh the enormous costs and that arguments about the adverse impact on the administration of justice which a new trial would have, while fervently made, cannot be accepted in this case. Unfortunately, the experience in our society is that there are murder cases just as, or even more, heinous than the instant one. These murders are carried out in the course of the commission of other felonies, with the employment of more gruesome methods of killing, in situations resulting in the killing of the most vulnerable among us (especially children and the elderly), and in circumstances that resulted in multiple killings on a single occasion. With that said, the court cannot simply overlook the significant impact that this matter has had on the resources of the State and the appellants. We also cannot ignore the likely adverse impact it will continue to have on our scarce resources and the overall administration of justice with the staggering backlog of cases if a new trial is ordered.

[102] We are, therefore, propelled to the conclusion that the time, costs and expense of a new trial are factors which significantly weigh against ordering a new trial.

### (6) The ordeal to be faced by the appellants if a new trial is ordered

[103] Counsel for the appellants submitted that a significant factor weighing against a new trial is the ordeal that the appellants have so far endured, which would be prolonged were a new trial to be ordered.

[104] We are mindful that in **Reid**, the Privy Council acknowledged that by its nature, a criminal trial puts a defendant through an ordeal. At page 258(h), Lord Diplock writing

for the Board, stated that, in determining whether a new trial should be ordered, one consideration is:

> "...that any criminal trial is to some extent an ordeal for the accused, which the accused ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so."

[105] In **Linton Berry v R** (unreported), Court of Appeal, Supreme Court Criminal Appeal No 69/1988, judgment delivered 21 September 1992, Carey JA, in delivering the judgment of this court, relied on the guidance provided in **Reid** and also cited the following extract from the case of **Au Pui-Kuen** at page 356:

> "...the power to order a new trial must always be exercised judicially. Any criminal trial is to some degree an ordeal for the accused; it goes without saying that no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interest of justice required it."

[106] The ordeal suffered by a defendant during a trial also has to be balanced against other factors. Therefore, in **Reid**, Lord Diplock, relying on the Hong Kong case of **Ng Yuk Kin v Regina** [1955] 39 HKLR 49, made the telling observation at page 259(a):

> "There may be cases where, even though the Court of Appeal considers that upon fresh trial an acquittal is on balance more likely than a conviction, 'it is in the interest of the public, the complainant, and the appellant himself that the question of guilt or otherwise be determined finally by the verdict of a jury, and not left as something which must remain undecided by reason of a defect in legal machinery.'"

[107] Thus, as the Crown submitted, the appellants' interests must be balanced against the public interest.

[108] Against the background of the relevant law, counsel for the appellant, by reference to the appellants' affidavit evidence, sought to demonstrate the ordeal they suffered. They pointed to the physical conditions in which the appellants have been held in the

correctional facilities, the psychological impact of their prolonged detention and the impact on the personal and family life of each appellant.

[109] The appellants deposed, among other things, that they were subjected to unsatisfactory prison conditions: poor diets, inadequate sleeping and sanitary facilities, and degrading living conditions, which included insect and rodent infestation in their immediate surroundings.

[110] More specifically, as it relates to Palmer, there is evidence that he is suffering from Graves' disease, which has worsened over time. His medical condition, therefore, requires special consideration. In his affidavit, Palmer outlined the effects of the medical issues that he has had for most of his incarceration. He indicated that he continued to be concerned about his health as his condition worsened, and he wished to have the opportunity to address his medical needs, which could not be adequately addressed during his incarceration.

[111] The report of Dr Karen Phillips, medical doctor, consultant physician and endocrinologist, dated 3 June 2024, indisputably confirmed that Palmer has a history of Graves' Disease, and has been under her care for eight years. She reported that over the years, he had struggled to control his illness due to issues with treatment compliance and access to timely health care. Among her findings were that due to declining heart function, he might be getting closer to the possible risk of heart failure or cardiomyopathy that could lead to a heart attack. She also stated that Palmer had not achieved remission of his disease despite the use of antithyroid drugs for eight years. As such, she recommended definitive treatment in the form of radioablative therapy or surgery in light of the worsening complications of his Graves' Disease. She also recommended a cardiological evaluation as soon as possible to investigate the cause of his relatively rapid deterioration in cardiac function, to prevent further deterioration and the increased risk of mortality. Further, she indicated that if surgery were performed, Palmer should receive post-operative care in a hospital.

[112] Dr Phillips did not proffer an opinion on whether Palmer's condition would make his participation in a trial difficult. However, given her opinion on his current state, it is clear that surgery or radioablative treatment needs to be the priority, which would delay the commencement of any new trial, at least until he sufficiently passes through post-treatment convalescence.

[113] Bolstered by Dr Phillips' evidence in respect of Palmer's medical challenges, and the evidence of consultant psychiatrist, Dr Geoffery Walcott, regarding all the appellants' mental status, counsel for the appellants lamented the significant burden on the appellants who had endured a trial, an intense appeal process and now having to contemplate enduring a new trial after 13 years in custody. Counsel maintained that under the Constitution, no person in detention should be robbed of his inherent dignity in the pursuit of justice. Accordingly, the conditions of the appellants' incarceration have breached their constitutional right to be treated humanely and with dignity under section 14(5) of the Constitution. In the circumstances, counsel argued that a new trial would be oppressive and against the interests of justice in the light of the ordeal suffered by the appellants.

[114] In response, the Crown acknowledged that in any criminal trial, an accused will undergo a burdensome ordeal, and that burden will increase when that accused is convicted and appeals. Counsel also pointed out that there is the potential for witnesses to be distressed by the trial process, a fate that even experienced advocates may suffer. However, according to counsel, the potential for distress seems greater if the appellants were to benefit from the previously tainted jury, which thwarted the administration of justice and induced their ultimate acquittal. Thus, the balance is in favour of a new trial being ordered, where the issue of the guilt or otherwise of the appellants could be determined on the merits and the family and friends of the deceased achieve closure. The Crown relied on the cases of **Reid**, **Noel Campbell v R**, and **Linton Berry v R**, where the courts have stated that the ordeal of a trial could be endured for a second time if the interests of justice so require.

[115] The Crown relied on the affidavit evidence of Senior Superintendent Leslie Campbell ('SSP Campbell') of the Correctional Services to refute the complaints of the appellants about the conditions under which they were incarcerated. SS Campbell deposed, among other things, that the appellants' diet was adequate and varied and could be supplemented by family members; the sleeping, sanitary, and accommodation facilities of the appellants were all adequate; they were allowed sufficient time for exercise; and they received visitors.

[116] In respect of Palmer's illness, SSP Campbell asserted that the Tower Street Adult Correctional Centre has a hospital resourced with doctors and other medical professionals who could address the medical needs of all inmates. Further, he indicated that an existing protocol within the Department of Correctional Services allows inmates to receive medical treatment, including surgery, outside of the correctional facilities, and also, if necessary, to convalesce for a period in a hospital outside the facility.

[117] In treating with the submissions of the parties against the background of the evidence, we note that a number of the assertions of the appellants regarding the conditions of the facilities where they have been detained have been countered by SSP Campbell. However, there was no cross-examination of any of the affiants to support any ultimate findings of fact. Therefore, we have refrained from determining the issue of credibility with regard to disputed areas of the evidence adduced on both sides.

[118] We agree with the Crown that some distress may occur in a criminal trial that also affects witnesses or counsel and that a new trial could be burdensome for them. We are content to accept, as noted in the case of **Au Pui-Kuen**, that some degree of ordeal for an accused is inevitable in a criminal trial. We further accept that delay in the criminal process inherently has visited an ordeal upon the appellants who have been deprived of their liberty for well over a decade. Therefore, we are prepared to accept that the appellants' more-than-decade-long incarceration with the associated deprivations and reported mental anguish they suffered would have increased their anxiety at the prospect of a new trial, which could result in further incarceration if they are convicted and/or not

granted bail pending the new trial. It would be a matter of the cycle starting all over again.

[119] In the circumstances, the appellants have each undoubtedly suffered an ordeal over the almost 13 years they have been in custody, which a new trial would only serve to exacerbate. After such a lengthy delay between the commission of the offence and the possible new trial, the appellants would be once again faced with the ordeal of having to go through the trial process and, possibly, again, two further appeals to this court and the Privy Council. In the case of Palmer, he would have to face a new trial with failing health, while undergoing intense medical treatment. The hardship on him cannot be downplayed.

[120] In weighing this factor of the ordeal of a new trial on the appellants, in the balance, we find that it weighs more heavily against a new trial than in favour of it.

### (7) The impact of prejudicial publicity on the fairness of a new trial

[121] The appellants have raised extensive media publicity as a factor that should weigh heavily against a new trial. It is accepted by the appellants and the Crown that the existence of prejudicial publicity surrounding a criminal case is a relevant consideration for the court in determining whether to order a new trial. The position, in law, is, as the England and Wales Court of Appeal stated succinctly in **R v Stone** [2001] EWCA 297 at para. [27], that "[p]ublicity can impact on a trial at three stages – pre-trial, during a trial, or after a trial so as to affect a decision by the Court of Appeal as to whether or not to order a retrial".

[122] Against the background of the law, the appellants submitted that the extensive publicity surrounding these proceedings, since their commencement in the Supreme Court to present, would affect the fairness of a new trial if one is ordered. In essence, they argued that the nature and extent of the publicity is such that a new trial should not be ordered. They contended that the publicity has been widespread and prejudicial,

spanning years, over traditional and social media (in particular, the social media platform X (formerly known as 'Twitter'), YouTube and blog websites).

[123] The appellants contended that given all the publicity, it would now be "practically impossible" to strike a jury panel which could place out of their minds, the prejudicial material that had been circulated in the public. Thus, there was a "real danger" that jurors selected for a new trial would have been exposed to the prejudicial material and would not decide the case impartially.

[124] The Crown's response is that the prejudicial publicity in this case should not be a bar to ordering a new trial for two main reasons. Firstly, the publicity in this case is not such that it would be impossible to conduct a fair trial. Secondly, there are safeguards within the criminal justice trial process which the court may deploy to safeguard the fairness of a new trial. These measures include the polling of jurors, challenges to jurors under the Jury Act, and warnings by the trial judge to the jury during the course of the trial and in summing up the case to them.

[125] The court considers that at the heart of a complaint related to prejudicial publicity, in the context of a jury trial, is the concern that the minds of potential jurors, who will be called upon to determine whether or not the guilt of the defendant has been proven, will be compromised (whether consciously or subconsciously) by the prejudicial material. Such a complaint, therefore, necessarily engages the constitutional right of a defendant in criminal proceedings to a fair trial before an impartial tribunal, enshrined in section 16(1) of the Constitution.

[126] Having assessed the authorities relied on by the parties, it appears to us that where prejudicial publicity is raised to resist an order for a new trial, the relevant legal principles to be applied are to be gleaned from cases involving a complaint that prejudicial pre-trial publicity ought to prevent the commencement of a trial (for example, in the context of an application for stay of proceedings on the basis that there has been prejudicial publicity), and not those cases involving a complaint that a conviction was unsafe because

of prejudicial publicity. The Court of Appeal in **R v Stone** took a similar approach (see para. [27] onwards).

[127] In that context, we have distilled, adopted and applied some salient principles in determining whether prejudicial publicity should serve as a compelling reason for not ordering a new trial. These principles are outlined below.

[128] The first and overarching principle is that a court should not prevent a trial from proceeding, on account of prejudicial publicity, unless satisfied that the publicity has rendered it impossible to have a fair trial (see **Desmond Grant v Director of Public Prosecutions** [1981] 3 WLR 352 (‘**Grant v DPP’**) at page 357; **R v Abu Hamza** [2006] EWCA Crim 2918 at paras. [88] – [89]; **Nankisoon Boodram and Others v The State** (1997) 53 WIR 352 (‘**Nankisoon Boodram**’) at pages 367 – 369 and **R v Stone** at para. [27]). The applicable test is not whether adverse publicity (i) "may risk prejudicing a fair trial"; (ii) is "likely to have a prejudicial effect on the minds of jurors" or (iii) creates "a real danger of bias" in the minds of potential jurors (see **R v Abu Hamza** [2006] EWCA Crim 2918 at [92] and **Nankisoon Boodram** at 367 – 369). Such a test has been applied where, in an appeal against conviction, the safety of a conviction is in dispute on account of prejudicial publicity (**R v Stone** at para. [35]).

[129] The result of this high threshold of "impossibility" is that widespread, intensive, adverse or sensational publicity, without more, will not provide a good reason for preventing a case from proceeding to trial (see **R v West** [1996] 2 Cr App R 374 at pages 385 – 386). The reason for the high threshold is as the court accepted in **R v Stone** at para. [47]:

> "... [i]f it were enough to render a trial unfair that publicity has created a risk of prejudice against the defendant our system of criminal justice would be seriously flawed… If in the most notorious cases defendants were to claim immunity from trial because of the risk of prejudice public confidence in the criminal justice system would be destroyed".

[130] In similar stead, Lord Taylor CJ, in **R v West**, at page 386 of the reported judgment, said –

> "[t]o hold otherwise would mean that if allegations of [a crime] are sufficiently horrendous as inevitably to shock the nation, the accused cannot be tried. That would be absurd."

[131] In determining whether a fair trial is impossible, this court must bear in mind that "[t]he principal safeguards of the objective impartiality of a tribunal lie in the trial process itself and the conduct of the trial by the judge" (**Montgomery v HM Advocate** [2003] 1 AC 641 at 673). Accordingly, the proper forum for a complaint about publicity is the trial court. In that forum, the judge can assess the circumstances which exist when the defendant is about to be given in charge of the jury and decide what safeguards are to be deployed to ensure the fairness of the proceedings. The safeguards include the use of jury management techniques such as warnings and directions, challenges to individual jurors under the Jury Act, a change of venue for the trial, and postponement of the trial to allow the adverse publicity to fade in the minds of potential jurors (see **Boodram (also called Dole Chadee) v The Attorney-General of Trinidad and Tobago and Another** [1996] AC 842 ('**Boodram v AG**') at page 855, and **Grant v DPP** at page 357).

[132] When faced with a complaint about prejudicial publicity, the court is required to bear the following in mind:

> (1) Even if jurors have been exposed to prejudicial material, they ought to be credited with the will and ability to abide by a judge's direction to decide the case only on the evidence before them. The jury ought to be trusted to concentrate on what is relevant and to ignore irrelevant prejudicial matters even when they know of them. It is to be assumed that the jury will abide by their oaths, as they normally do (**R v Abu Hamza** at para. [89] and **R v Stone** at para. [32]).

(2) The lapse of time between the publication of the offending material and the trial may operate as a safeguard to the fairness of the trial (**Montgomery v HM Advocate** at page 673).

(3) The impact of a trial, including the actions of seeing and hearing the witnesses, and any warning the judge may give to the jury, can be expected to have a far greater impact on the minds of the jurors than the residual recollections that may exist about reports of the case in the media (**Montgomery v HM Advocate** at 673–674A and **R v West** [1996] 2 Cr App 374 cited at para. [89] of **R v Abu Hamza** at para. [89], and **R v Bow Street MSM ex parte DPP** [1992] 95 Cr App 91 at 18 cited in **R v Stone** at para. [36]).

(4) The risk of prejudice cannot be wholly eliminated. But the safeguards available to the court are designed to reduce them to a minimum. Therefore, the court ought not to be concerned with whether the possibility of bias can be eliminated, but instead with determining whether a fair trial is possible with the trial judge's assistance (**R v Abu Hamza** at para. [89]).

[133] Given all the foregoing principles, it naturally follows that, as a general rule, courts will rarely accede to a submission that prejudicial publicity should prevent a trial from taking place (**R v Abu Hamza** at para. [89]).

[134] We were pointed to only one case in which prejudicial pre-trial publicity was found to be a sufficient basis upon which to prevent a trial from proceeding – **R v Taylor and Taylor** [1994] 98 Cr App 361 ('**R v Taylor**'). In that case, it was contended that the appellants' convictions were unsafe because the prosecution failed to disclose a previous inconsistent statement by an important witness; and that the nature and extent of the press coverage of the trial were such as to render it impossible to say that despite several warnings which the trial judge gave to the jury, they were not influenced in their decision

by what they had read. The appeal was successful on both grounds. Full details of the extent of the media coverage were not particularised, but it was accepted by the Court of Appeal to have been "unremitting, extensive, sensational, inaccurate and misleading". On the issue of retrial, the court simply stated, "…by reason of the view we take of the way in which this case was reported, we do not think that a fair trial could now take place. Hence we do not order a retrial".

[135] Given the absence of any detailed analysis of the impact of the publicity on the possibility of a new trial, the case has been treated as "a decision on its own facts" (see **R v Stone** at para. 44). We agree with that conclusion. **R v Taylor** offers little guidance as to the circumstances in which the nature of publicity will render the fairness of a new trial. We, therefore, do not treat it as persuasive for the present purposes.

[136] The main evidence of publicity upon which the appellants rely is contained in the expert report of digital forensics expert Shawn Wenzel dated 6 June 2024. From that evidence, the court accepts the following as incontrovertible:

(1) There was extensive media coverage of the trial in the Supreme Court with journalists being present in court. Flowing from the coverage, several articles were published locally and internationally, detailing aspects of the trial and the evidence led by the prosecution and the appellants.

(2) The extensive media coverage persisted up until after the delivery of the Privy Council's judgment in 2024.

(3) Between 1 August 2011 and the date of the expert report, close to 110,000 tweets were posted which included a combination of words related to the case. 25.5% of those tweets originated from Jamaica.

(4) Over several years, online bloggers have given extensive coverage to the case, including sharing pointed assertions of the appellants'

bad character, guilt and involvement, along with their attorneys, in orchestrating the third jury incident.

(5) The case, generally, and the evidence adduced at the trial, have been the subject of discussion on popular radio and television programmes.

(6) Radio interviews concerning the case have been done by the appellants' attorneys, the Director of Public Prosecutions and others.

(7) Video and audio evidence adduced by the prosecution in the appellants' trial have been posted on YouTube and have garnered hundreds of thousands of views.

[137] The Crown maintained that the publicity, in this case, was less widespread and prejudicial than that in **Grant v DPP** – a case in which the Privy Council upheld the refusal by Jamaican courts to stay criminal proceedings on the basis of prejudicial pre-trial publicity. It was also argued that not all the publicity was negative and that substantial interest emanated from outside of Jamaica, while the jury pool from which jurors would be selected is in Jamaica; hence the potential taint was not as great as the appellants had suggested. In the circumstances, there is no basis upon which to refuse to order a new trial in this case.

[138] **Grant v DPP** concerned publications made in three widely circulated newspapers in Jamaica – the Daily Gleaner, the Sunday Gleaner and the Star. The publications accused the appellants of being murderers following an inquest into the killing of five persons in 1978 and demanded they be brought to trial.

[139] In our view, the publicity in **Grant v DPP** pales in comparison to the case at bar, which involves two popular individuals (Campbell and Palmer) whose influence has international reach. The publicity of the matter traversed not only traditional media but was amplified by popular social media platforms. However, not only has the publicity in

this case been widespread, it has also involved highly speculative, prejudicial and pointed commentary related to the appellants (especially Campbell and Palmer), their supposed guilt, character, and alleged involvement in the third jury incident. Most extraordinary is the publication on social media with universal coverage of video and audio evidence which were tendered by the prosecution at the trial and upon which reliance is expected to be placed at a new trial.

[140] In all the circumstances, we are hard-pressed to find or imagine any other case in this jurisdiction that has been the subject of the widespread and intensive publicity established to have taken place in this case. Put simply, the widespread publicity of this matter is unprecedented in this jurisdiction. This notwithstanding, although the nature and the extent of the publicity, in this case, are deeply concerning, the authorities to which we have earlier referred have made it pellucid that the fact of widespread, negative, sensational and prejudicial publicity, without more, is not a sufficient basis for refusing to order a new trial.

[141] As already established, the threshold to be satisfied for the refusal of a new trial on the basis of prejudicial pre-trial publicity is that a fair trial is impossible. Based on the authorities cited and what has been placed before us, we cannot come to that conclusion regarding this case. As the Privy Council in **Boodram v AG** held, the proper place for the determination of whether a fair trial is possible is the trial court. In that forum, the judge can determine whether a fair trial is, in fact, possible with the tools available to the court, including the measures permitted by the Jury Act, warnings to the jury and any other measures the judge considers appropriate to address the specific risks engaged by the publicity. Accordingly, the issue of the likely effect of publicity on a new trial would be one for the trial court at a new trial. The media publicity, standing without more, is not enough to tip the scale in the appellants' favour.

[142] However, quite apart from the extensive media publicity, counsel for the appellants highlighted that there has been attribution of the fault to the appellants for the third jury incident. Counsel submitted that the third jury incident was widely publicised; there have

been suggestions in the public that they were involved in orchestrating it; and the Privy Council found that no direction, however focused and firm, could have remedied the impact of the incident. Counsel contended that if a direction could not have cured the third jury incident at the trial, no directions in a new trial can immunise a jury from the prejudicial effect of the publicity surrounding the incident. Counsel for the appellants further argued that given the publicity of the third jury incident, the Privy Council's opinion regarding the insufficiency of a direction to cure the prejudice of the jury incident in the trial, and the attribution of fault to the appellants for the incident in the public domain, a fair trial cannot take place. In counsel's submission, the damage to the fairness of the trial process is irreparable, and like the children's nursery rhyme character Humpty Dumpty, it "cannot be put together again". For that reason, there could never be a fair trial.

[143] In our view, this line of argument does not advance the appellants' position that a new trial would not be in the interests of justice. The Privy Council's opinion that no direction could have cured the third jury incident is to be understood in the context of their Lordships' finding that there was no possibility of a fair trial taking place without Juror X being discharged from the jury in the trial. No direction could have saved the trial, given Juror X's continued presence as a member of the jury. It is an overextension of the impact and purport of the Privy Council's pronouncements to suggest that knowledge of the third jury incident, coupled with the attribution of fault in the public sphere to the appellants, would mean that a fair hearing is impossible because directions to potential jurors would not be able to stymie any unfairness.

[144] The appellants also highlighted the release in the public domain of the video and audio exhibits relied on by the prosecution at the trial as a matter that would adversely affect the fairness of a new trial. No account has been given of how the video and audio exhibits came to be disseminated in social media for widespread public consumption. Also, there is no evidence of fault on the part of either the Crown or the appellants for this state of play. From the submissions made, the appellants' concern is that potential

jurors may have been exposed to these exhibits, which might not be admitted into evidence at a new trial.

[145] In assessing the appellants' arguments, we note that no indisputable bar to the admissibility of that evidence has been raised before us. Therefore, whether those exhibits are admissible would be a matter for the judge at the new trial. As such, we cannot, at this stage, speculate about the admissibility of the video and audio evidence at a new trial, and hinge our decision on the possibility that the exhibits may not be entered into evidence. We do not consider it appropriate to treat the video and audio evidence any differently from any other publicised item of evidence in this case, which may be subject to challenges to admissibility in a new trial. As with all the other issues regarding publicity in the case, it would be for the trial judge at the new trial to deploy the necessary trial management mechanisms at his disposal to minimise the risk of prejudice to the appellants regarding the publicised video and audio evidence.

[146] We were not provided with any authority that deals with the release of trial exhibits, which will be the subject of challenges to admissibility at trial, and how that publicity will affect the possibility of a trial taking place. However, from our own research, we have found the rather instructive case of **Ali v The United Kingdom** (App No 30971/12) [2015] ECHR 30971/12, ('**Ali v The UK**'), a decision of the European Court of Human Rights ('ECtHR'), which provides some guidance by analogy, albeit based on different facts.

[147] The basic facts of the case are that the applicant, Ali, and others were arrested and charged for conspiring to construct and simultaneously explode bombs on transatlantic passenger aircraft in flight, using suicide bombers. The applicant was convicted of one count of conspiracy to murder, but the jury was unable to reach a verdict on a separate count of conspiracy. The jury was also unable to reach verdicts on some or all counts in relation to six other defendants. The announcement of the verdict was widely covered in the press and the media.

[148] The media reports included references to material which was never put before the jury. Examples of the material published included:

(1) disclosure of evidence not adduced at trial as to the applicant being in telephone contact with the leader of an earlier, failed bombing attempt in London;

(2) disclosure of evidence not adduced at trial as to deeper links between some of the applicants and others convicted of terrorist offences, including evidence that the applicant had taken trips to Pakistan at the same time as those responsible for an earlier bombing and attempted bombing in London;

(3) disclosure of evidence not adduced at trial as to the applicant's connection with Al-Qaeda's leadership;

(4) assertions which were not the subject of evidence or disclosure at trial that the plot might have been overseen by the former head of Al-Qaeda's external operations, who had allegedly overseen earlier plots to carry out bombings in London; and

(5) assertions which were not the subject of evidence or disclosure at trial that the alleged plot was disrupted following the interception of a text message encouraging the conspirators to act.

[149] These statements appeared in almost every national paper and national media and were many times attributed to different sources, including, among others, senior detectives, police, counter-terrorism officials, investigators, foreign ministers of government and senior British officials.

[150] The matter was set for retrial. Ali subsequently applied for a stay of the retrial on the ground, *inter alia*, that a fair trial was no longer possible because of the prejudicial publicity which had occurred following the conclusion of the first trial. The application

was, however, refused by the trial judge, and the learned judge's refusal was upheld by the Court of Appeal.

[151] Ali petitioned the ECtHR, complaining that the English Court's refusal to accede to the application for a stay breached his Article 6 right to a fair hearing before an independent tribunal (similar to the right to a fair hearing by an independent and impartial court under section 16(1) of the Constitution of Jamaica). The ECtHR refused Ali's application. In doing so, the court recognised the virulent and prejudicial press campaign against Ali, which included highly prejudicial matters not placed before the court in evidence and concluded that the trial judge's conduct of the matter was sufficient to secure the safety of the trial.

[152] Among the factors the court emphasised in coming to its decision were that: (i) six months had passed between the end of the prejudicial reporting and the commencement of retrial; (ii) the jury would follow the instructions given to them; (iii) the trial judge gave a careful direction tailored to the particular case and repeated it from time to time; and (iv) during jury selection, the trial judge took care to underline the importance of impartiality and asked questions to elicit any information which might put the impartiality of any particular juror in doubt.

[153] **Ali v The UK** was a case of extreme prejudicial pre-trial publicity. The publicity in involved in that case was more prejudicial in nature than that proven to have taken place in this case. Several of the statements which received widespread publicity were said to have been made by state actors and foreign state actors, and directly linked Ali to terrorist activities. The contents of the statements made were not in evidence at the first trial and were, therefore, highly prejudicial. All this notwithstanding, the Strasbourg court held that it was still possible for the trial judge to deploy mechanisms of jury management to achieve a trial which was fair to the accused.

[154] Bearing the reasoning and outcome of **Ali v The UK** in mind, we are fortified in our conclusion that even if the video and audio exhibits were excluded from a new trial,

it would not be beyond the trial judge's power to deploy the tools of jury management to neutralise the risk of prejudice and safeguard the appellants' right to a fair trial.

[155] However, given the extent and nature of the publicity in this case, the trial judge and counsel would, inevitably, be required to extensively engage the machinery of the trial process to ensure the fairness of the proceedings. The deployment of the various measures available to the judge, such as the polling of jurors, would likely occasion further delay in the disposal of the matter. The potential for further delays by the deployment of the trial mechanisms to insulate potential jurors from prejudicial material may be mitigated by the appellants' election for a trial by a judge alone. We, however, appreciate that this court cannot force the appellants to elect a bench trial. Therefore, we have resolved the issue regarding media publicity on the premise that the new trial, if ordered, would be a jury trial.

[156] The upshot of our reasoning is that although the negative publicity is of enormous magnitude in this case, it is not, as a matter of law, a factor of such gravity as to militate against ordering a new trial in the circumstances. The question is whether a fair trial would be impossible, and that is a question for the trial court to resolve.

**(8) Whether a new trial would give the prosecution an unfair advantage**

[157] In their unrelenting stance against an order for a new trial, counsel for the appellants raised the possibility of an unfair advantage to the prosecution in a new trial as another factor to be considered in the appellants' favour. Relying on the article, "When Should a Retrial be Permitted After a Conviction is Quashed on Appeal?" Modern Law Review Vol 74, No 5 (September 2011), pages 721-749, counsel submitted that each side now has full knowledge of the other side's case and can act to counter it. Thus, at a new trial, the prosecution would have an advantage it did not have in the first trial, based on the common law procedure and practice of disclosure.

[158] In our view, this concern of counsel for the appellants, taken to its logical conclusion, would mean that in every case where a new trial is sought, the disclosure of

the defence in the first trial would be a factor militating against a new trial. However, the prior disclosure of the defence is a necessary incidence of a new trial ordered in the interests of justice. Further, while the prosecution retains the primary duty of disclosure in a criminal trial, the law is increasingly moving away from "trial by ambush". We accept the Crown's submissions that in plea and case management hearings, the defence is encouraged to indicate the nature of its defence so that issues can be narrowed. It is also true, as the Crown noted, that while the details of particular defences may not be known beforehand, there is only a limited number of defences that are known to and contemplated by law, which have to be considered by the parties, in any event. The submission regarding unfair advantage to the prosecution, arising from their knowledge of the defence that will be raised in the new trial is, therefore, without merit.

[159] The soundness of the above position is supported by the pronouncements of the Privy Council in the case of **Vasyli**. In that case, a submission was made by the appellant based on **Reid** that a retrial would afford the prosecution an opportunity to make good evidential deficiencies and, therefore, be wrong in principle and contrary to the interests of justice. In addressing that submission, their Lordships had this to say at para. 31 of the judgment:

> "…In the Board's view the unfairness of the prosecution having a second chance arises where the evidence adduced at the first trial was insufficient to amount to a case to answer and this is what makes it wrong in principle for there to be a retrial. If there was a case to answer and the conviction is set aside on the grounds of the trial judge's handling of the trial or misdirections in the summing up, there is nothing inherently unprincipled or unfair about a retrial affording an opportunity for the prosecution to put forward further or different evidence, an opportunity also provided to the defence."

[160] In this case, the evidence adduced at the trial was sufficient to amount to a case to answer, as we have already found. The convictions were set aside because of error on the part of the trial judge's handling of the trial. Therefore, on the authority of **Vasyli**, this would not be an appropriate case for any argument to be entertained about the

unfairness of the prosecution having an unfair advantage due to the disclosure of the appellants' defence in the trial. Accordingly, we have placed no weight on this factor.

### (9) Fault or error on the part of the prosecution

[161] The appellants also alleged that there was some degree of fault or error on the part of the prosecution that led to the convictions being unsafe. Counsel, on their behalf, submitted that it was the prosecution who advised the trial judge against discharging the jury when submissions were made in chambers regarding the third jury incident. This, they said, should be a factor operating against ordering a new trial. We cannot accept this submission.

[162] The English common law recognises that fault on the part of the prosecution may be a relevant factor in determining whether a new trial should be ordered. The fact, that there has been fault or error on the part of the prosecution is, however, not decisive of the issue. Most recently, in the case of **R v Maxwell**, a retrial was ordered even though there was a cogent allegation and subsequent finding by the court of fault on the part of the prosecution in the trial process. The United Kingdom Supreme Court upheld the decision of the England and Wales Court of Appeal to order a retrial, notwithstanding the Court of Appeal's finding that prosecutorial misconduct had "infected" both the trial and the first appeal. The Court of Appeal had hinged its decision to order a retrial partly on the bases that: (i) a retrial could proceed on evidence which was not tainted by prosecutorial misconduct; and (ii) the public interest in convicting those guilty of murder outweighed the public interest in maintaining the integrity of the criminal justice system on the facts of the case (see paras. 30, 31 and 37 of the Supreme Court's judgment).

[163] No such allegation or finding has been made in the instant case. Fundamentally, the appellants' convictions were not quashed on the basis of any fault or error of the prosecution. The Privy Council laid responsibility for the error at the appellants' trial at the feet of the trial judge, whose duty it was to investigate the allegations of juror misconduct and determine the appropriate steps to have been taken based on his

investigations (see paras. 38 and 40 of the Privy Council's judgment). At para. 47 of its judgment, the Privy Council stated:

> "At the hearing in chambers, the Director of Public Prosecutions had expressly agreed that that course should be adopted. … The fact that the prosecution might be prepared to waive an irregularity does not absolve the court from its responsibility to ensure a fair trial." (Emphasis added)

[164] The Privy Council went further to find that the fault on the part of the trial judge was compounded by this court, which "while recognising (at para. 234) the existence of a risk that 'the jurors, being aware of the attempt at bribery, might have overcompensated against that threat by ensuring that a guilty verdict was returned, regardless of the evidence', failed to address it" (see para. 52 of the Privy Council's judgment).

[165] In the circumstances, we find no basis for attaching any weight to the appellant's allegation of fault or error on the part of the prosecution in our determination of whether a new trial should be ordered.

## (10) Legislative changes to the Jury Act and the potential legislative changes to the Offences Against the Person Act to increase the sentences for murder

A. Amendment to the Jury Act in 2015

[166] Relying on the Irish Supreme Court case of **The People v JC**, counsel for the appellants submitted further that amendments to the Jury Act brought into force by the Jury (Amendment) Act 2015 ('the 2015 Act'), after the trial, should weigh against a new trial being ordered. The aspect of the amendment about which they complain is section 13 of the 2015 Act, which, among other things, amended section 31 of the Jury Act. By virtue of this provision, the number of jurors required to form the array in the trial of this type of murder was reduced from 12 to seven. Counsel contended that given that change in the law, it would be unfair and oppressive to retry the appellants, as the reduced number of jurors would limit the appellants' opportunities to poll possible jurors to avoid

the risk of prejudice associated with the widespread pre-trial publicity. This, counsel argued, would have the effect of reducing the appellants' chances of an acquittal.

[167] We accept that changes in the law applicable to the trial process may be a relevant factor to be weighed in the balance when determining whether a new trial should be ordered. In **The People v JC**, there was a change to the common law on the admissibility of evidence obtained in breach of a defendant's constitutional rights. The change effectively bolstered the prosecution's case with prejudicial evidence that was not admissible in the first trial. The court weighed this fact in the balance and concluded that a new trial should not be ordered as it potentially exposed the defendant to a greater risk of conviction in a new trial.

[168] In this case, the appellants are not subject to any similar or analogous disadvantage or detriment. To the contrary, no authority has been cited or argument made that would justify the conclusion that a reduction in the number of jurors, without more, could serve to be unfair or oppressive, or potentially expose them to a greater risk of conviction. The safeguards of fairness in our jury system do not reside in larger numbers of jurors forming the array in individual cases. Rather, they are found in the age-old common law and statutory mechanisms, which have proven to effectively reduce the risk of bias on the part of jurors and yield fair verdicts. Mechanisms such as polling of jurors, peremptory challenges, and challenges for cause, remain available even with the reduction in the number of jurors. The efficacy of these mechanisms is not undermined by the reduction in the number of jurors occasioned by the amendment. Fairness is also maintained by the quality of the legal directions given to the jurors and the character and conduct of the jurors.

[169] We agree with the submissions of the Crown that the change in the Jury Act to reduce the number of jurors required to hear a case of this nature does not provide a sufficient basis for the court to conclude that a new trial would be unfair or oppressive. Accordingly, we conclude that the change in the Jury Act complained of is not a factor that tips the scale either for or against a new trial. Essentially, it has no bearing on the

balancing exercise the court has undertaken in determining the question of whether a new trial is warranted in the interests of justice.

B. Proposed legislative changes to the Offences Against the Person Act to increase the sentences for murder

[170] In speaking of the likely prejudice to the appellants of potential legislative changes, the appellants raise the Bill (An Act to Amend the Offences Against the Person Act), currently before Parliament, by which it has been proposed that the minimum term before eligibility for parole in murder cases such as this will be increased to 45 years imprisonment. Counsel for the appellants submitted that given this intended amendment, the legislative scheme under which the appellants were sentenced would be impacted as the minimum term that could be imposed on them would be increased. Therefore, a new trial would be prejudicial, oppressive, and unfair to the appellants. Counsel relied on section 16(11) of the Constitution, which prohibits more severe penalties from being imposed than could have been imposed at the time the offence was committed. The section reads:

> "No penalty shall be imposed in relation to any criminal offence or in relation to an infringement of a civil nature which is more severe than the maximum penalty which might have been imposed for the offence or in respect of that infringement, at the time when the offence was committed or the infringement occurred."

[171] It is, indeed, a time-honoured principle of criminal law that no one should retroactively be made subject to a penalty that is greater than could have been imposed at the time of the commission of the offence. That is the principle enshrined in section 16(11) of the Constitution. Accordingly, should a new trial be ordered, and there is a change in the law increasing the penalty for the category of murder for which the appellants are charged, that change would not apply to the appellants. In light of this reality, the appellants' concern about the imposition of increased penalties at a new trial, if ordered, due to likely changes in the law, is unwarranted. Consequently, the proposed legislative change to the sentencing regime for murder has no bearing on the court's decision as to whether a new trial should be ordered.

**(11) The possibility of prejudice arising from the mandatory minimum term before eligibility for parole**

[172] At the hearing of this matter, the court invited counsel on both sides to make submissions on the possibility that, due to the mandatory minimum term for murder stipulated by the Offences Against the Person Act ('OAPA'), and the adjustment of the minimum terms by this court on the appeal, Campbell and Jones, would be required to serve more severe penalties, if convicted following a new trial, than those previously imposed. The minimum term stipulated by this court in respect of these appellants was 22 years and six months, while 32 years and six months was stipulated for Palmer and 27 years and six months for St John.

[173] Counsel for the appellants contended that the case of **Mikal Tomlinson v R** has established that where a mandatory minimum sentence applies, and an appellant has served much of the sentence, a new trial should not be ordered. Counsel argued that the principle was applicable to the appellants in this case given the period of almost 13 years they had been in custody, the time that would elapse between now and a new trial, and the minimum terms each was sentenced to serve before eligibility for parole.

[174] Section 3(1)(b) of the OAPA stipulates the penalty for the type of murder for which the appellants are charged and reads as follows:

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

[175] Section 3(1C) further stipulates the mandatory minimum term that a person who is sentenced for murder under section 3(1)(b) is required to serve before becoming eligible for parole as follows:

> "(1C) In the case of a person convicted of murder, the following provisions shall have effect with regard to that person's eligibility for

> parole, as if those provisions had been substituted for section 6(1) to (4) of the Parole Act—
>
> > (a) …
> >
> > (b) where, pursuant to subsection (l)(b), a court imposes—
> >
> > > (i) a sentence of imprisonment for life, the court shall specify a period, being not less than fifteen years; or
> > >
> > > (ii) any other sentence of imprisonment, the court shall specify a period, being not less than ten years, which that person should serve before becoming eligible for parole."

[176] By virtue of sections 3(1)(b) and 3(1C)(b) of the OAPA, if the appellants were convicted at a new trial, they could either be sentenced to life imprisonment or a determinate sentence. If sentences of life imprisonment were to be imposed, the statutory minimum term before eligibility for parole would be 15 years, while if determinate sentences were to be imposed, the statutory minimum term would be 10 years.

[177] The court considers that if a new trial were ordered, and assuming that the appellants remain in custody, by the time the new trial commences, the appellants would likely have served a minimum of 15 years in custody. Thus, if they were convicted after a new trial and sentenced to life imprisonment, adding the statutory minimum term to the time they would have been in custody would result in each having to serve at least 30 years in pre-parole custody. This would be higher than the minimum term to which they were sentenced as a result of the first trial. Alternatively, even if they were granted bail before the new trial commences and they were sentenced to life with the statutory minimum term before eligibility for parole of 15 years, they would each have to serve at least 28 years (15 years plus the almost 13 years they have so far spent in custody). This, again, would translate into a higher sentence than was initially imposed.

[178] Given that reality, the Crown submitted that in respect of Campbell and Jones, the court would likely impose determinate sentences that would attract a statutory minimum term before eligibility for parole of 10 years. However, the Crown eventually acknowledged that even with that accommodation, Campbell and Jones would be placed in a worse position than when they were first sentenced, as they would have to serve at least 23 years before becoming eligible for parole (10 years plus at least 13 years they have spent in custody before the new trial, assuming they would be granted bail before the new trial commences).

[179] It is indisputable, therefore, that having regard to the minimum terms imposed on Campbell and Jones before their eligibility for parole, they would be unfairly prejudiced by a new trial. They would be exposed to serving longer periods in custody if convicted. In the case of **Mikal Tomlinson v R**, relied on by the appellants, a significant factor that persuaded this court not to order a new trial was that the appellant had already served almost half the mandatory minimum sentence. In that case, Brooks P concluded that given the uncertainty of the date of a new trial, and given that the judge would have had to re-impose the minimum sentence if the appellant was re-convicted, the length of time he would have had to spend in custody would have been oppressive.

[180] In these circumstances, we conclude that the potential prejudice to Campbell and Jones arising from the imposition of mandatory statutory minimum sentences is a factor that weighs against a new trial being ordered for these two appellants.

### (12) Delay and whether a new trial can be facilitated within a reasonable time

[181] The issue of delay is far-reaching, multi-dimensional and, to a large extent, overlaps with other factors that have already been examined. The appellants submitted that the time that has elapsed since the alleged commission of the offence is a strong factor against ordering a new trial. The Crown agrees that the delay is lengthy but contends that it should not be treated as decisive of the question of whether a new trial should be ordered, given the other factors which support a new trial.

A. The time that has elapsed since the commission of the offence

[182] Based on the submissions of counsel on both sides, the question with which we are immediately concerned is whether the delay of almost 13 years since the commission of the offence militates against subjecting the appellants to a new trial. The related question of whether the appellants' constitutional guarantee to a trial within a reasonable time has been breached, will necessarily also be considered.

[183] We note that lengthy periods of delay in the completion of criminal proceedings have been treated as a powerful and sometimes decisive factor against ordering a new trial. The primary impact of delay is to undermine an appellant's constitutional right to a trial within a reasonable time. Importantly, however, delay can also have a deleterious effect on the fairness of the trial. It has long been recognised that the longer the delay in the completion of criminal proceedings, the more likely it is that the defendant will be prejudiced (see **Tan Soon Gin v Cameron** [1992] 2 AC 205). Such prejudice may take the form of lapses in memory among the defendants and their witnesses, excessive pretrial incarceration, and the death or disappearance of witnesses.

[184] In cases of very long delay, prejudice may be presumed to be visited upon the defendant, and the delay will be decisive of the question of whether a new trial should be ordered. Thus, in **Bell v DPP,** at page 9 of the judgment, the Privy Council outlined that a delay of seven years between the alleged date of the offence and the eventual date of a new trial led to "inevitable" prejudice, the particulars of which the defendant did not need to prove. In **Charles (Curtis) Carter (Steve) and Carter (Leroy) v The State** (1999) 54 WIR 455, the Privy Council, when faced with a delay of 12 years between the incident and the proceedings before the Board, recognised that there may come a time when the delay is so great that, regardless of the public interest in convicting the guilty, it becomes "an abuse of process and unacceptable for a prosecution to continue".

[185] We have examined a number of cases decided by the Privy Council, this court, and other courts in the region, which serve to illustrate that delay is a weighty factor against

ordering a new trial, where there has been a lapse of time of eight years or more between the commission of the offence and the appellate proceedings. These cases involve murders (including the murder of a child), rape, robbery, kidnapping and illegal possession of a firearm. The cases and the respective periods of delay in each of them are:

(1) **Ajodha and others v The State** [1981] 2 All ER 193 (delay eight years);

(2) **Winston Fuller v The State** (1995) 52 WIR 424 (delay of 10 ½ years);

(3) **Adams and Lawrence v R** [2002] UKPC 14 (delay of 12 years);

(4) **Shivnarine and another v The State** (2012) 80 WIR 357 (delay of 12 years);

(5) **Simeon Bain v R** (delay of 13 years);

(6) **Mark Russell v R** [2021] JMCA Crim 34 (delay of 10 years); and

(7) **Lescene Edwards v R** [2022] UKPC 11 (delay of 18 years).

[186] Conversely, there may be situations in which long periods of delay are not necessarily decisive of the question of whether a new trial should be ordered. For example, in **Radcliffe Levy v R** [2019] JMCA Crim 46, the court ordered a new trial notwithstanding that 12 years had passed between the date of the offence and the hearing of the appeal. The appellant was convicted of killing his child's mother, and the evidence against him appeared to the court as strong. The appellant was on bail up to the date of trial but was in custody for approximately three years and nine months after conviction. In ordering a new trial, the court relied on several factors, including that prejudice to the appellant had been reduced by him having been on bail, as he had not spent excessive time in custody. There are other cases that this court has remitted for

retrial despite a significant passage of time. However, each case must be examined within the framework of its own unique circumstances.

[187] Considering the circumstances of this case against the backdrop of the authorities, we are impelled to conclude that the period of almost 13 years, since the commission of the alleged offence with the appellants detained in custody for the entire period, is a powerful factor against ordering a new trial. However, the mere fact of delay in respect of the passage of time does not stand alone. Even more noteworthy is that the delay has had an undeniable negative impact on the prosecution's case and the appellants' defence. Critical exhibits relied on both by the prosecution and the appellants in the court below have not been accounted for. Some prosecution witnesses are unavailable or their availability has not been ascertained, whilst one of the appellants' witnesses has since died. During that time, Palmer's health has deteriorated, and questions have been raised about the capacity of the prison system to adequately meet his medical needs. The detrimental impact of delay in this case is, therefore, manifest.

B. Whether a new trial can be facilitated within reasonable time

[188] Compounding the prejudicial impact of the delay on the appellants is the uncertainty surrounding the likely dates for a new trial. The Crown argued that the court's power under section 14(2) to order that a new trial takes place "at such time and place as the Court may think fit" prevents any uncertainty as to when a new trial would commence. Further, the impact of any further delays on the appellants can be mitigated through the grant of bail in the Supreme Court if a new trial is ordered. The Crown assured the court that it would be ready to proceed on a new trial as early as the 2024 Michaelmas term (between 23 September – 20 December 2024).

[189] Counsel for the appellants, however, contended, and we accept, that it is not likely that a new trial of the appellants will take place with such alacrity as contended by the Crown. In the first place, we do not consider the court's power under section 14(2) of the JAJA to specify the time and place of a new trial to be a guarantee that a new trial will take place within a reasonably proximate time. The power under section 14(2) to

specify the time and place of a new trial does not give the court the power to enforce such orders, as is the case in other jurisdictions such as the United Kingdom (see sections 7 and 8 of the UK Criminal Appeals Act 1968). Section 14(2) does not automatically operate to prevent a new trial from proceeding if it does not take place by the time the court orders. Also, the section does not give this court the power to make an order for a new trial on the condition that judgments and verdicts of acquittal be entered if the date specified by the court for a new trial has passed.

[190] The case of **Kenyatha Brown v R** [2018] JMCA Crim 24 and the affidavit of Kenyatha Brown, which was filed and relied on by the appellants on this point, highlight this statutory deficiency. In his affidavit, Mr Kenyatha Brown deposed to having been convicted and sentenced for rape in 2014. In May 2018, his conviction was quashed and his sentence set aside by this court, which also ordered that a new trial should take place at the next sitting of the Westmoreland Circuit Court. However, since then, several sittings of the Westmoreland Circuit have been held and yet, to date, Mr Brown has not been retried. This court is powerless to ensure that a new trial takes place in that case or any other case still languishing in the court system awaiting a new trial.

[191] Against that background, and given the text of section 14(2) of JAJA, we cannot treat the provisions of section 14(2) as a satisfactory answer to the appellants' concern that a new trial is unlikely to take place within a reasonable time.

[192] To determine the likely time within which a new trial may take place, the appellants also relied on Kenyatha Brown's affidavit to suggest that it might take as long as six years for them to be retried. In response, the Crown provided the court with affidavit evidence, which seeks to lay blame for the delay experienced in the case, largely, at the feet of Mr Brown and his counsel.

[193] However, even without the Crown's affidavit, in response, we find Mr Brown's affidavit to be of no assistance in determining a likely date for a new trial in the instant case, for the simple reason that Mr Brown was tried in the Westmoreland Circuit Court.

Therefore, his affidavit does not assist us with determining the likely time within which the appellants would face a trial in the Home Circuit Court. Accordingly, we refused to attach any weight to the assertions made in or based on Mr Brown's affidavit in determining the likely date of a new trial in this case.

[194] For guidance as to the likely date of a new trial, this court, of its own motion and with notice to the parties, requested empirical data from the Supreme Court regarding matters that have been remitted to the Home Circuit Court for new trials since 2018 (based on the date on which Kenyatha Brown's case was sent back to the Westmoreland Circuit Court for a new trial). In an affidavit dated 13 June 2024, the registrar of the criminal division of the Supreme Court advised that since 2018, two cases were remitted by this court to the Home Circuit Court for new trials to be held.

[195] The first case is R v Trevor Taffe (2013HCC150), a matter which was remitted on 30 September 2022. Mr Taffe has remained in custody since then and the date for the new trial is yet to be scheduled. The second case is R v Rushon Hamilton (2009HCC00065), which was remitted to the Home Circuit Court on 29 September 2023. Mr Hamilton has also remained in custody and a date for the new trial had not been fixed up to the date of the affidavit.

[196] The registrar also indicated that bench (or judge alone) trials in the Home Circuit Court are now being scheduled for late 2025, and jury matters are being scheduled for late 2026. She, however, indicated that there is "scope to treat with priority matters where the circumstances dictate".

[197] In light of the registrar's affidavit, it is evident that the regular current scheduling of criminal cases in the Home Circuit Court could not facilitate the appellants' jury trial until, at the earliest, late 2026. That would mean the appellants would likely face a new trial, no less than 15 years after having been detained in custody, without the charges against them determined by the court.

[198] The long delay up to the commencement of a new trial is also likely to be exacerbated by further unavoidable delays arising from peculiar features of this case already noted, such as the need for Palmer to receive medical care, which would require adequate time for recovery before a trial; the need for the appellants to obtain legal aid assignments and instruct new counsel if, as they have indicated, they are unable to retain their current counsel or other counsel of their choice for a new trial; the jury selection process that is likely to include the use of jury management techniques that would be required as a result of the extensive pre-trial publicity; and the probable need for the Crown to utilise section 31D of the Evidence Act to admit evidence of important witnesses who might remain unavailable.

[199] The Crown submitted that weight should be attached to the indication by the registrar that there is scope to expedite certain matters. Given the nature of the allegations against the appellants, any new trial of the appellants should be expedited and allowed to "skip the line" ahead of pending matters. We, however, find this proposed solution to be unsatisfactory. As we indicated earlier, when examining the many dimensions of the "costs" of this case, the impact it had on the resources of the court, which would be repeated if a new trial is ordered, is a significant factor weighing against an order for a new trial. Given the complexity and likely length of a new trial, the impact of prioritising this matter over other existing matters in the Supreme Court that are equally important, and some even more heinous, would only make worse the existing delays in the disposal of criminal trials at that level. This is likely to adversely impact the administration of justice in a crime-plagued country with an overburdened criminal justice system.

[200] In the premises, it is highly probable (almost to the point of certainty) that 15 years would pass without the charges against the appellants having been determined. Even if the appellants are granted bail, that would not be a sufficient answer in this case, as bail would not serve as an adequate remedy for the prejudice they have presumptively suffered from being incarcerated for close to 13 years, and which they would continue to suffer with the case not being determined for, at least, 15 years.

[201] Accordingly, both the lapse of time to date and the likely time in which a new trial would take place, conservatively being no less than two years from now, are powerful factors against ordering a new trial. Any such order would, at least, significantly engage the appellant's right to a fair hearing within a reasonable time, guaranteed by section 16 of the Constitution.

[202] Finally, it is to a consideration of the constitutional implications of a new trial to which we now turn.

## (13) Breaches and likely breaches of the appellants' constitutional rights

[203] The appellants have alleged that several of their constitutional rights are being breached or are likely to be breached if an order for a new trial is made. Therefore, a new trial should not be ordered. Having examined the breaches or potential breaches alleged in the circumstances of the case, we do not consider it necessary to delve into an analysis of the appellants' contention regarding most of those rights and freedoms as they are not materially relevant to the question the court is required to determine in these proceedings.

[204] The right which we accept is sufficiently relevant and which has been engaged in the circumstances of this case is the right to a fair hearing within a reasonable time by an independent and impartial tribunal established by law, which is protected under section 16(1) of the Constitution.

### A. Fair hearing by an independent and impartial court

[205] There is no dispute that the appellants' right to a fair trial before an independent and impartial tribunal was breached in the course of their trial in the Supreme Court. At para. 45 of its judgment, the Privy Council unequivocally found that the decision by the trial judge to allow Juror X to continue to serve on the jury "was an infringement of the [appellants'] fundamental right to a fair hearing by an independent and impartial court in accordance with section 16 of Chapter III of the Jamaican Constitution". The breach of the appellants' right to a fair trial by an independent and impartial court in the first trial

is, therefore, established without contradiction. However, it cannot be ignored that the appellants have already obtained a remedy for the constitutional breach in the first trial by the quashing of their convictions and the setting aside of their sentences. Accordingly, the court cannot rely on the breach in the first trial as a proper basis to not order a new trial.

[206] Furthermore, having discussed at length the impact of widespread publicity on the fairness of a new trial and concluded that this court is not in a position to say a fair trial is impossible, we cannot find that the appellants' right to be tried by an independent and impartial tribunal is likely to be breached if a new trial is ordered.

B. The reasonable time guarantee

[207] Counsel for the appellants submitted that due to the delay of almost 13 years since the appellants were charged, the reasonable time guarantee had been infringed. That breach, it is argued, will persist if a new trial is ordered. The Crown conceded that the reasonable time guarantee has, *prima facie*, been infringed but cautioned that the lapse of time must be examined within the context of the case as a whole. Thus, given the complexity of the matter, there would, inevitably, have been delays in bringing it to trial and through the appellate process. Therefore, the infringement of the reasonable time guarantee was demonstrably justifiable in a democratic society.

[208] We consider that determining whether the reasonable time guarantee has been breached is not purely a matter of arithmetical calculation of the time that elapsed since the commencement of the matter. However, as a matter of law, where there is a long delay in bringing a criminal matter to completion, it is presumptively prejudicial and triggers an enquiry into whether the breach can be explained or justified (see **Flowers v The Queen** [2000] UKPC 41).

[209] In assessing whether the right has been breached, the court should also balance the rights of an accused person against "the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing

economic, social and cultural conditions to be found in Jamaica" (see **Julian Brown v R** [2020] JMCA Crim 42 at paras. [88] and [89], relying on **Bell v The Director of Public Prosecutions** [1985] AC 937 at page 953). The factors ordinarily considered by the court are the reasons for the delay, the length of the delay, the complexity of the case, and whether the defendant had asserted their rights (**Dyer v Watson** [2002] UKPC D1 at paras. 52 – 55).

[210] Any explanation offered by the State for the delay is an important consideration in determining whether the reasonable time guarantee has been breached. The State ought not to be blamed for delays it has not occasioned. However, the Privy Council has, on more than one occasion, concluded that a time will come when the delay is so great that any explanation provided for the delay, or any fault on the part of the defendant, is irrelevant, and the conclusion that the reasonable time guarantee has been breached is irresistible. In **Boolell v The State of Mauritius** [2006] UKPC 46, **Elaheebocus v The State of Mauritius** [2009] UKPC 7 **and Aubeeluck v the State of Mauritius** [2010] UKPC 13, for example, the Privy Council readily accepted that the reasonable time guarantee was breached beyond justification by reason alone of the passage of 15, nine and 11 years, respectively, each of which time delay was deemed inordinate.

[211] A close examination of the circumstances of this case and the chronology of events since the alleged commission of the offence is required to determine whether the reasonable time guarantee has been infringed. As pointed out by the appellants' counsel, the appellants were not tried until two years after their arrest; the trial process took approximately five months to be completed; the appellants filed their applications for leave to appeal to this court within three days of being sentenced; the transcripts were received from the Supreme Court about two years after the filing of the appeal; the applications for leave to appeal were determined by a single judge almost three years after the filing of the appeal; the appeal was heard four years after the trial; the Court of Appeal's judgment was delivered two years after the appeal was heard; conditional leave to appeal to the Privy Council was granted two years after the appeal was determined;

and final leave to appeal to the Privy Council was granted almost 18 months after conditional leave was granted.

[212] In total, this case spent 10 years in the appeal process before being remitted to this court. There can be no doubt that, for whatever reason, much of the delay in this matter was experienced at the level of this court. These delays must be deemed inordinate, even for a complex case. The right of the appellants to a fair hearing within a reasonable time was engaged at the appellate level from the day they filed their application for permission to appeal. There is no acceptable justification for the delay. Furthermore, there is nothing before us to suggest that the appellants were, at any time, the authors of the delays at any stage.

[213] There can be no denying that there is inherent prejudice attendant on the appellants being in custody for almost 13 years without a determination of their guilt or innocence – an occurrence which the reasonable time guarantee is aimed at protecting against (see **Barker v Wingo** 407 US 514 (1972) cited in **Bell v DPP**).

[214] Having reviewed the authorities, we are impelled to conclude that the reasonable time guarantee has been infringed. Given our earlier discussion on the likely time within which a new trial can be facilitated, we are also satisfied that the infringement would continue with a new trial.

[215] We are mindful that the breach of the reasonable time guarantee is being established after a full trial has been conducted, and the convictions have already been quashed. However, our primary focus in these proceedings is to determine what, if any, impact the finding of a breach of the reasonable time guarantee has on the exercise of our discretion to order a new trial. We are satisfied that the exercise of our discretion is significantly impacted by this breach and likely continuing breach.

[216] In light of the inherent oppression and prejudice surrounding the breach of the reasonable time guarantee, and the fact that blame cannot be laid at the feet of the appellants for the further delay in the determination of their guilt or otherwise, we are of

the view that the continuing infringement of their constitutional right to a fair hearing within a reasonable time, is a powerful factor operating against the order of a new trial.

**Summary of findings and conclusion**

[217] The court has considered all the factors governing the determination of whether a new trial should be ordered and has given due regard to all the evidence and submissions presented by the appellants and the Crown.

[218] The egregious nature and seriousness of the offence in this case is beyond argument. So too, is the prevalence of the offence of murder in Jamaica. The features of this case bear every hallmark of a deliberate attack on and bare-faced defiance of law and order, involving allegations of transactions relating to an illegal firearm, an alleged killing in respect of which the body of the deceased has not been recovered, and interference with a crime scene while it was under the control of the police. The court is, therefore, satisfied that the nature, seriousness and prevalence of the alleged offence in this case are powerful factors that weigh in favour of ordering a new trial.

[219] The court is also satisfied that, even though the prosecution's case was based substantially on circumstantial evidence, the prosecution had presented sufficient evidence at the trial in the Supreme Court to make out a *prima facie* case for murder against the appellants. The strength of the prosecution's evidence at the time of the trial in the Supreme Court is also a factor that would weigh in favour of ordering a new trial.

[220] The court, however, finds that there are several equally powerful countervailing factors which, when combined, militate against ordering a new trial. In summary, these factors are:

(1) The inadequate account by the prosecution for the availability of its witnesses and trial exhibits.

(2) Witnesses and trial exhibits relied upon by the appellants, which tended to support their defence at their first trial, are now unavailable or cannot be accounted for.

(3) The appellants' trial in the Supreme Court was complex, lasting 64 working days and utilising a significant share of the court and the appellants' resources. Therefore, the time, financial costs, expenses, and resources of the court and the appellants, which a new trial would demand, and the impact which it would have on the administration of justice by delaying the completion of other serious cases pending in the Supreme Court, is likely to be significant.

(4) The psychological, financial and medical effects (demonstrated by medical and other affidavit evidence) that a new trial would have on the appellants are substantial. In particular, the court notes the serious medical issues faced by Palmer, which were brought to the court's attention through unchallenged medical evidence that speaks to his declining health in the penal system and the need for urgent medical intervention.

(5) The period of time between the commission of the alleged offence and the likely time within which a new trial would take place, which would be, in our most conservative estimation, at least 15 years in total.

(6) The unjustifiable interference with the appellants' constitutional rights to a fair hearing within a reasonable time under section 16(1) of the Constitution, which will continue if a new trial is ordered.

(7) The potential prejudice to two of the appellants (Campbell and Jones) who, if convicted after a new trial, would be required to serve a longer term of imprisonment before eligibility for parole than that

> which was originally imposed upon them after their first trial, due to the operation of the mandatory minimum term to be served before eligibility for parole prescribed for the offence of murder under the OAPA.

[221] Finally, there are factors presented to the court for consideration that ultimately had no bearing on our conclusion. These are described as the neutral factors, namely (a) the widespread publicity; (b) legislative changes to the Jury Act and proposed legislative changes to the sentencing regime for murder under the OAPA; (c) unfair advantage to the prosecution; and (d) prosecutorial error and/or fault.

[222] Having weighed, in the balance, all the material factors we have noted in favour of and against a new trial, the court concludes that the interests of justice do not require that a new trial be ordered for the appellants.

[223] Accordingly, the court orders that judgments and verdicts of acquittal be entered in relation to the appellants.

[224] We thank counsel on both sides for their industry and scholarly submissions, which were of great assistance to the court.