[2020] JMCA Crim 41

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO 80/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

STEVEN CAUSWELL v R

Garth A McBean QC and Miss Diana Johnson for the applicant

Miss Paula Llewellyn QC, Director of Public Prosecutions and Kemoy McEkron for the Crown

16, 17, 18 October 2019 and 18 November 2020

P WILLIAMS JA

[1] The applicant, Steven Causwell, was indicted for the murder of Nadia Mitchell, committed between 15 and 16 July 2008. His trial commenced on 12 July 2016 in the Home Circuit Court before Lawrence-Beswick J and a jury. After a trial that had several adjournments, on 8 September 2016 he was convicted for the offence. On 10 October 2016, the learned trial judge sentenced the applicant to imprisonment for life, with a stipulation that he should serve a minimum of 20 years' imprisonment at hard labour before becoming eligible for parole.

[2] The applicant applied for leave to appeal against both conviction and sentence and, on 12 February 2019, a single judge of this court refused the application. Having had his application refused, he has renewed his application before us, as is his right.

The background

[3] The applicant and the deceased had been in a relationship that had lasted about eight years. Early in 2008, the deceased began another relationship with Kevin McCormack and spent from 7 to 15 July 2008 with him, at his home. After they spent the night of 7 July together, Mr McCormack dropped the deceased off at her apartment at Oaklands Apartments, Block G. He saw the applicant standing at the front of the building and watched as both the deceased and the applicant entered the apartment building. He later saw her at his home and noted that she was crying. She stayed at his home until 15 July when, sometime after 6 o'clock in the evening, he dropped her off at her apartment, intending to return for her sometime later that night.

[4] At about 8:00 pm that night, Miss Jodian Brown, who had been friends with the deceased for many years, went to visit with her. At about 11:30 pm that night, the applicant arrived at the deceased's apartment. He asked Miss Brown to leave and, when she eventually did so, he thanked her. The deceased accompanied Miss Brown out and then returned to her apartment.

[5] At approximately 1:25 am, Constable Nevins Glenn and Corporal Renardo Israel were on patrol duty. They were at the August Town Police Station when they received a report that caused them to proceed to the University Hospital of the West Indies

("UHWI"). In the Accident and Emergency Department, they were shown the body of a female lying on a stretcher. The body was eventually identified as that of the deceased.

[6] A man was seen beside the body holding her hand and crying. The man was the applicant. He made a report of what he said had occurred that night leading to his transporting the non-responsive body of the deceased to the hospital.

[7] There were no eyewitnesses as to what had happened between the applicant and the deceased after she was last seen alive by her friend, Miss Brown. The Crown therefore relied on circumstantial evidence to prove the guilt of the applicant.

The prosecution's evidence at trial

[8] Miss Brown had met the applicant approximately one month before 15 July 2008. She described how, on the night of 15 July when he came to the apartment, the applicant told the deceased to ask her to leave, indicating that he needed to talk to the deceased, alone. When the deceased failed to do so, the applicant himself told Miss Brown that she needed to leave. However, she ignored his request. The applicant eventually said to the deceased, "since you don't want her to leave I am going to ask you in front of her. Are you fucking him?" The deceased did not respond to him.

[9] Miss Brown decided to leave shortly thereafter and the deceased walked with her downstairs. While they were on their way out, the deceased spoke with someone on her cellular phone. Mr McCormack was the person with whom she spoke. He testified that she had called him at about 11:45 pm. She told him she was letting Miss Brown

out of the apartment. She called him again at 11:46 pm to let him know that she was upstairs but was receiving another call and would call him back. She never did.

[10] Miss Brown testified that when she got home sometime after 11:45 pm, she called the deceased to let her know she was safely home, but the deceased did not answer.

[11] Sometime after 1:30 am on 16 July 2008, when Constable Glenn saw the applicant at the UHWI with the lifeless body of the deceased, he noted bruises and some blood on the deceased's body. He saw what he described as a black and blue left eye with a small laceration to the hairline. There was blood coming from the nose, some scrapes along the shoulder, back, arm, legs and the toenail of her big toe on her right foot was broken.

[12] Constable Glenn testified that the applicant was asked by Corporal Israel "what happen", to which the applicant responded that he had got into a fight with the deceased and that he was the one who punched her in the eye. The applicant further told him that the deceased had left the apartment and after about 10 minutes he had tried calling her and sending her text messages but got no response. Constable Glenn said the applicant described how he went in search of the deceased which took him downstairs where he found her lying motionless. He tried to speak to her and shook her but she didn't respond. Eventually, the applicant said, he lifted her up and took her to the hospital. Constable Glenn said at that the applicant was eventually escorted by himself and Corporal Israel to the Constant Spring Police Station.

[13] At about 4:00 am on 16 July 2008, Miss Brown received a phone call from the mother of the deceased, Miss Perdie Newman. After speaking to Miss Newman, Miss Brown called Mr McCormack who she knew to be the deceased's boyfriend at the time. Mr McCormack said he tried unsuccessfully to call the deceased. He eventually picked up Miss Brown and they went to the deceased's apartment. Miss Brown knocked on the apartment door but got no answer. They then went to the UHWI where they were shown the body of the deceased.

[14] Under cross-examination, Miss Brown was confronted with the statement she had given to the police and accepted that she did not see recorded in it that she had told the police that the applicant had asked the deceased, "are you fucking him?"

[15] Mrs Nadine Williams-Peart resided in the apartment directly above the one the deceased had lived in. She testified that during the night of 15 July 2008, sometime after 11:00 pm, she was awoken by a sound she described as similar to when she was "taking [her] laundry hamper down, that dragging, taking [her] laundry down the staircase sound" and as a "throbbing". The sound lasted for about two to three minutes and she said it seemed as if it was heading in the direction of the washroom/laundry area which was on the third floor.

[16] Miss Newman was at her home in Saint Elizabeth on 16 July 2008, when she received a call which caused her to call Miss Brown and to proceed to Kingston later that morning. She arrived at the UHWI at about 11:00 am and was shown her daughter's body. She then went to her daughter's apartment where she saw Mr

McCormack and some police officers. She was not permitted to enter the apartment at that time.

[17] Detective Sergeant Derrick Amos, who was a detective corporal stationed at the Constant Spring Police Station at the time, was another officer who received a report which caused him to proceed to the UHWI on the morning of 16 July 2008. On his way there, he received some information that caused him return to the Constant Spring Police Station CIB. There he saw Corporal Israel, Constable Glenn and Inspector Marlene Williams with the applicant.

[18] In the presence of the applicant, Corporal Israel handed to Detective Sergeant Amos the applicant's licensed firearm which had been taken from his motor car. Corporal Israel reported to Detective Sergeant Amos that he had received information from the authorities at the hospital that the deceased had been taken there by the applicant. Detective Sergeant Amos said Corporal Israel reported to him that the applicant had stated that he and the deceased had a dispute which developed into a fight at Oaklands Apartments, Apartment 405, Block G. Corporal Israel reported that the applicant further said that after the fight, the deceased ran out of the house and he later found her at the back of Block G.

[19] Detective Sergeant Amos said that he then asked the applicant if he heard what Corporal Israel had said and the applicant responded that he had. Detective Sergeant Amos testified that he then asked the applicant, "if that is so and he said yes".

[20] Detective Sergeant Amos testified that he then asked the applicant whether he wished to tell him what had happened and the following exchange took place between the officer and the prosecutor:

> "Q. Tell us what he told you?
>
> A. He told me that he went to visit [the deceased] at her apartment, and they have a dispute and a confrontation and a fight during that fight she gave him… he gave her thumps and licks…
>
> Q. He give hear [sic] some what?
>
> A. Thumps and licks and she ran out from there. He said he sat in the couch for a period of time and during that time, he did not seeing [sic] [the deceased] come back he began to call her on her phone and even send text message. He didn't get any respond [sic] and so he went out, he locked the door and went out the room door and went out to search for her. He later found her at the back of Block G. So he took her up, he tried to render CPR, he got no response, so he put her in the car and he drove her to the University Hospital."

[21] Following his conversation with the applicant, Detective Sergeant Amos went to Oaklands Apartments where he observed a cellular phone in what he described as a pool of blood at the back of Block G. Detective Sergeant Amos did not enter the deceased's apartment at that time and returned to the police station where he saw the applicant speaking with an attorney-at-law. Detective Sergeant Amos then contacted the Area 5 Scene of Crime Office requesting that the scene at Oaklands Apartments be processed. The Sergeant asked the applicant for the keys to the deceased's apartment and was told he had given them to his father who was by then on the outside of the station in the yard. Sergeant Amos collected the keys from the applicant's father. He

returned to Oaklands Apartments where he met with the Scene of Crime personnel. He explained that contact was made with a cousin of the deceased who lived on the apartment building and who met them at the complex. Detective Sergeant Amos said he handed the cousin the keys so the cousin could let them into the apartment 405. The keys were subsequently left with this cousin.

[22] At about 2:00 am on 16 July 2008, Detective Corporal Delroy Matterson, who was a Detective Constable at the time, was on crime scene duty in the Area 5 Scene of Crime Office when he received the call requesting that a scene of death at Oaklands Apartments be processed. Along with Detective Sergeant Irving Roye, he proceeded to the location. At the time of trial, Detective Sergeant Roye was no longer a serving member of the Jamaica Constabulary Force.

[23] Detective Corporal Matterson testified that, on his arrival at the scene, he spoke with the investigator and got instructions. He observed the apartment building which was Block G and noted that it was about six stories high. At the rear of the building was a passage with a dumpster. On the ground beside the dumpster, he observed a substance which appeared to be a pool of blood. Lying in the substance was a blue and silver cellular phone.

[24] Detective Corporal Matterson then proceeded to the deceased's apartment, which he said was open. He took photographs of the inside of the apartment and of the compound around Block G, to include the substance in the passage with the cellular phone in it. After leaving the apartment complex, he went to the hospital where he took

photographs of the deceased. A number of these photographs, taken by this officer, were admitted into evidence.

[25] Under cross-examination, Detective Corporal Matterson agreed that, given his training, if he had seen bloodstains in the apartment, or had seen anything out of place or overturned in the apartment, he would have taken photographs of them. He agreed that the photograph taken of the bed in the apartment showed the sheet "neatly in place on the bed". He said that the photograph of the passageway behind the apartment building showed what he described as two main bloodstains: one large pool and a smaller splatter of blood.

[26] Detective Sergeant Amos stated that when he went inside the deceased's apartment he noticed that the furniture appeared to be "shifted". By this, he explained, he meant "[l]ike for instance, the couch, chester [sic] draw, like there was some 'tossle' inside there". He also explained that by 'tossle' he meant "like they were fighting". Further, he explained that it seemed like the chest of drawers "was removed from the area that it was placed".

[27] Detective Sergeant Amos testified that he was the one who eventually retrieved the cellular phone which had been seen in what appeared to be the large pool of blood. He later handed it over to Deputy Superintendent Micheal Pommells, who was at the time a detective sergeant, and was the investigator in this case.

[28] By agreement between the parties, the statement of Detective Sergeant Roye was read to the jury. After the initial visit to Oaklands Apartments with Detective Corporal

Matterson, on 17 July 2008, Detective Sergeant Roye, accompanied by another officer, re-visited the apartment and took more photographs of the scene. He also collected samples from what he described as "brown marks resembling blood" from various locations, namely: the wall in the washroom close to the doorway, a step nearing the fourth floor and another step nearing the third floor, close to the washroom. These photographs were also admitted into evidence.

[29] On 24 July 2008, Detective Sergeant Roye attended the post-mortem examination of the deceased and took photographs. He also received from the pathologist who performed the examination, Dr Prasad, items of clothing the deceased had been wearing, along with one sealed envelope containing nail clippings from her hands, one sealed envelope containing muscle taken from her body and another sealed envelope containing vaginal swabs.

[30] Detective Sergeant Roye stated that he again visited the apartment on 25 July 2008. On this occasion, samples from brown marks resembling blood were taken from a picture in the bedroom, from the refrigerator inside the living room and from the wall inside the bedroom. Subsequently, on different days, he sealed, labelled and handed all these items taken from the apartment to the government analyst.

[31] Deputy Superintendent Pommells confirmed that it was he who had visited the deceased's apartment in the morning of 16 July 2008 with Detective Sergeant Roye. He said he had noticed that some of the furniture was slightly moved from their original position.

[32] Upon his return to the Constant Spring Police Station, after his visit to Oaklands, Deputy Superintendent Pommells was introduced to the applicant. He noticed what appeared to be blood on the applicant's shirt and pants. These items of clothing, along with the shoes he was wearing at the time, were eventually collected from the applicant. The applicant was by this time in the company of his attorney-at-law, Mr Michael Deans. Mr Deans advised Deputy Superintendent Pommells that the applicant would give a statement. Deputy Superintendent Pommells testified that he observed the applicant speaking to Mr Deans and observed Mr Deans writing while the applicant spoke. Mr Deans later handed the officer a document which he said was the statement from the applicant. When pressed under cross-examination, Deputy Superintendent Pommells agreed that he was not saying the statement was written by Mr Deans.

[33] The statement was admitted into evidence and read to the jury. The statement was in the following terms:

> "Steven Causwell, 32 years old, 1A Long Lane Kingston 8, 371-3623. States on, Tuesday the 15th day of July, 2008 I went to visit a friend of mine by the name …Nadia Mitchell with who I have shared an intimate relationship with for over 8 years. She had made several calls to my cell phone that evening. At approximately 11:40 p.m. I returned her call. She said I should come to her apartment, so that we could talk. I arrived at her apartment at approximately 11:55 p.m. She was with a friend of hers named Jody. Jody left so we could talk at approximately 12 a.m. Nadia walked her out and returned to the apartment at approximately 12:05 a.m. We begun discussing our relationship and an … argument ensued. She became emotional and stormed out of the apartment after I told her I want her to leave me alone.

Shortly after I began calling her as she had left her house keys on the floor of the apartment and I wanted to leave. She did not answer any of my calls. After sometime I went in search of Nadia. I took the elevator downstairs, went to the front of the building looked outside, up and down the road, … walk across to the nursery parking lot and look in the general area for her, as I thought she would have been outside smoking as this is something she would normally do when she is upset. Having not seen Nadia, I went back inside the building and glanced down the first floor corridor. I then went back outside to continue looking for her and started walking around the building to the rear.

On approaching the area of the garbage skip, I saw someone laying on the ground. I walked over to the person and as I got closer, I recognise it was Nadia at first I thought she was on the ground laying down and crying because of how emotional she was when she stormed out of the apartment. I called out to Nadia twice, but she did not respond. I then went over to her and shook her twice and once again she did not respond. I then observed what appeared to be blood on the ground beneath her. I turned her over on to her back to check for breathing. I did not detect any breathing. Then I tried to administer CPR by compressing her chest several times. I also pinched her nose and breathe [sic] into her mouth several times. She was still non-responsive. I then made several attempts to pick Nadia up off the ground. It was difficult because she was heavy. I was finally able to lift her up, place Nadia over my shoulder and took her to my car. I opened the door and placed Nadia in the front passenger seat of my car and then took her to the UWI emergency room. I further state that when I left the apartment to search for Nadia I had closed the door with the key behind me to secure her apartment until I returned, until I could return the keys, until I could return the keys to her. On Wednesday 16th of July, 2008 at Constant Spring Police Station, I read over same to the police. I signed as true and correct. Signature 16/7/08. This statement consisting of 3 pages each signed by me is true to the best of my knowledge and belief and I make it known that if it is tendered in evidence I shall be liable to prosecution if I have stated anything in it that is false or do not believe to be true. Signed 16/7/8. Name. Steven Causwell, 16/7/8."

[34] On 24 and 28 July 2008, the post-mortem examination was performed on the body of the deceased, which was identified by her sister, Shanna Forbes. The post-mortem examination was performed by Dr S N Prasad Kadiyala. The findings from this examination were later shared with Dr Christopher Milroy who gave evidence on behalf of the defence. Given the significance of the findings and the conflicting opinions of these two pathologists, the contents of the report and their evidence will be rehearsed below.

[35] Dr Prasad confirmed that, after the post-mortem examination, he gave Detective Sergeant Roye items of clothing, fingernail clippings, muscle samples, as well as blood samples, along with some of the contents of the stomach of the deceased to Detective Sergeant Roye.

[36] On 30 July 2008, Deputy Superintendent Pommells arrested and charged the applicant, who, upon being cautioned, stated that he was innocent.

[37] On 5 August 2008, the mother of the deceased, Miss Newman, was permitted to enter her daughter's apartment to pack up her belongings. She was in the process of folding a comforter, which she saw thrown on an ironing board, when she noted what appeared to her to be blood on it. Miss Newman immediately called a police officer at the Major Investigations Division. Detective Sergeant Roy and Detective Corporal Matterson returned to the apartment and took photographs of the comforter and also took possession of it. They also took possession of, and photographed, a burgundy

coloured towel. A Nokia telephone was also recovered from the home and was later handed over to Superintendent Errol Grant of the Major Investigations Task Force.

[38] Detective Corporal Matterson testified that on 5 August he used a clean cotton swab to collect what appeared to be a brown stain resembling blood from a yellow cushion which he packaged, labelled and sealed in a brown envelope. This cushion he had retrieved from a computer chair in the apartment. This swab was also eventually submitted to the forensic laboratory for testing.

[39] Deputy Superintendent Pommells testified that he later retrieved some of the items which had been submitted to the government forensic laboratory. When the items were being tendered into evidence, the officer explained that some could not be located in the police storage facility where they had been placed after being retrieved from the laboratory. The missing items were the pants taken from the applicant, underwear taken off the deceased's body and the comforter which had been recovered from the apartment.

[40] Deputy Superintendent Pommells was subjected to extensive cross-examination, the main focus of which was the nature of the investigations and included being tested on the proper procedure for the collection and preservation of exhibits. He acknowledged that, apart from the cellular phone that had been taken from the substance resembling blood and the Nokia cell phone that had been taken from the apartment, a Blackberry cell phone belonging to the applicant had also been secured. He testified that the number assigned to this cellular phone taken from the applicant

was 371-3623. He agreed that the number assigned to the deceased in relation to which calls were tracked and traced for the period 15 and 16 July was 588-8685. He told the court that the three cellular phones were submitted to the Major Investigations Task Force. He also agreed that he was aware of several applications being made by the defence for access to the phones and that he had attended meetings in relation to them. He accepted that the phones had up to the time not been produced. He was also shown several pictures taken of the scene and agreed that several objects in the apartment appeared to be upright and not "tumbled over". He conceded that, although he had testified that on his initial visit to the apartment the bed appeared shifted, this observation was not recorded in his statements.

[41] Miss Marcia Dunbar, a government analyst attached to the forensic chemistry department at the Institute of Forensic Science and Legal Medicine, testified to receiving the envelopes with the muscle samples, the samples of blood and stomach contents from Deputy Superintendent Pommells on 28 July 2008. Forensic officers under Miss Dunbar's supervision conducted tests on these samples commencing on 5 December 2008. The examination and analysis performed on the extracts from the samples from the deceased's body did not reveal the presence of dangerous drugs or toxic substances. Examination and tests performed on the sample of blood revealed a "very little" volume of ethyl alcohol which, Miss Dunbar explained, was just above the threshold where it would be said that none was found.

[42] The prosecution also led evidence from their witnesses about the relationship between the applicant and the deceased. Miss Newman said the deceased had

introduced her to the applicant in early 2000. She said she was not accustomed to seeing him often, having only seen him in the company of her daughter a few times. She said there was no relationship between him and her; and in explaining this she said, "not the usual relationship that a mother-in-law would have with a son-in-law. No, that was not there".

[43] She had last seen the applicant at about 2:30 am on 30 June 2008 when he came to her daughter's apartment while she was spending time there. She described how he had banged loudly on the apartment door. On her letting him into the apartment, he insisted that she call the deceased to come and attend to a cut on one of his fingers. The deceased had eventually done so.

[44] Mrs Williams-Peart testified that she had seen the applicant on at least four or five occasions at different areas of the apartment complex. On two occasions, she had seen him sitting in his car across from the block on which she and the deceased lived. On another occasion she heard him in an argument with the deceased, who, Mrs Williams-Peart said, she heard shouting.

[45] Miss Imani Prendergast, the daughter of the deceased, testified to having met the applicant when she was four years old. In 2008, when she and her mother lived at Oaklands Apartments, she was then 10 years old. She knew the applicant to be her mother's boyfriend. She said that she never liked him.

[46] Before they moved to Oaklands Apartments, she and her mother had lived at several places in Kingston. At one of those places, she would see the applicant almost

every day and he would sometimes pick her up from school. Before living at Block G on Oaklands Apartments, Miss Prendergast said she and her mother lived on Block F, and whilst living there, the applicant would visit at least once a week. Whenever he came to visit, she said he would come in whether he was invited in or not. He no longer assisted in picking her up from school. By the time they moved to Block G she remembered seeing him only once. They had lived at that apartment from the January before the July when her mother died.

[47] Miss Prendergast recounted how, the one time she had seen the applicant while living on Block G was in June when she said he came to the apartment and was rather rude. He banged on the apartment door shouting for her mother to come outside. At the time, her grandmother and uncle were also at the apartment.

[48] Miss Prendergast said she last spoke to her mother in the night of 15 July 2008 at about 11:54 pm. At that time she was spending the holidays with her grandmother, Miss Newman, in Saint Elizabeth. She expected to see her mother the following day when her mother was to have come for her to return to Kingston. Mr McCormack in fact testified that he was to have taken the deceased to Saint Elizabeth to collect Miss Prendergast on 16 July.

[49] Miss Prendergast told the court that, often, when the applicant visited the apartment where they were living on Block F, he and her mother would fight. She described how if they were fighting in the living room, when she would try to intervene, her mother would pull him into the bedroom and shut the door.

The case for the defence

[50] A submission of no case to answer was made on behalf of the applicant by Mrs Samuels-Brown QC, who was one of the attorneys-at law who appeared for him at the trial. The primary ground of the submission was that there was no evidence that the crime alleged against the applicant was committed by him. In the alternative, it was submitted that to the extent that there was some evidence it was speculative, vague, weak and of a tenuous character. It was submitted that there was no evidence as to who the initiator of either the argument was or when it became physical, and also no evidence of who was the aggressor and ultimately there was no evidence that the applicant caused the death of the deceased. After hearing the response from the Miss Llewellyn QC, who appeared for the Crown, in which she detailed the different bits of circumstantial evidence on which the prosecution relied, the learned trial judge, was satisfied that there was a case for the applicant to answer.

[51] Mrs Samuels-Brown then addressed the jury for approximately 25 minutes after which the applicant made an unsworn statement. He said he had not killed the deceased and that he stood by the statement he wrote of his own free will on the morning of 16 July.

[52] He denied enquiring about the deceased's sex life in the manner that Miss Brown had said he did. He said that after he found the deceased that night on the ground at the back of the building, he realised something was wrong and was in a state of shock. His only concern was to help her and so he rushed her to the hospital. When he learned she was dead, he said he was even more confused and very, very distraught.

[53] The applicant went on to describe what he said happened between himself and the deceased as follows:-

> "Nadia and I were in the apartment talking. She had called me there to talk. An argument ensued. She suddenly started hitting and grabbing at me. I hit back at her, get her away from me. I honestly can't say where my hand caught Nadia. I have nothing in --- I had nothing in my hand when I hit at her. She then stormed out of the apartment. I did not kill Nadia… I can't say how [the deceased] died."

[54] After expressing his sorrow that the deceased was gone, the applicant went on to stress that he was not responsible for her death which he said was "really, really, an unfortunate and tragic situation".

[55] By agreement, four statements from three persons were read to the jury and, arising from those statements, some items were admitted into evidence. The first statement was that of Mr Joseph Simmonds, who was employed as the head of business risk at the Digicel Group ("Digicel") in November 2011. He stated that as a result of a written request from the Communication Forensic and Cyber Crime Unit of the Jamaica Constabulary Force, records were produced from data obtained during the usual business of the company in relation to a number of telephone numbers that utilise the Digicel network. To assist the court, Mr Simmonds had produced a glossary of terms which explained the terms of the wording used on the data files produced by Digicel, along with CDs with call data relating to the period 1 July 2008 to 17 July 2008 for telephone numbers 371-3623 and 371-0470. The sealed copy computer CD reference was admitted into evidence.

[56] A statement from Detective Corporal Shawn Brown was also read to the jury. This officer was in November 2011 stationed at the Organised Crime Investigation Division ("OCID") and assigned to the Communication Forensics and Cyber Crime Unit. It was he who had attended on the Digicel office and obtained the witness statement and CDs from Mr Simmonds. He used one of the CDs to do an analysis and prepared a schedule of calls made and received between certain numbers, for the period requested. The data schedule prepared was for the period 5 July 2008 to 16 July 2008 and showed communications between mobile numbers 588-8685 and 371-3623, and also between 371-4070 and 588-8685.

[57] Detective Corporal Brown stated that he was informed that the number 588-8685 was attributed to the deceased and 371-3623 to the applicant. He noted that the schedule showed that mobile number 588-8685 called 371-3623 at 11:22 pm and 11:35 pm on 15 July through the Oaklands Apartments' Digicel cell site. The call data further showed mobile number 371-3623 making calls to 588-8685 between 12:01 am to 12:37 am on 16 July through Oaklands Apartments' Digicel cell site. Mobile number 371-3623 made calls through the United Theological College Digicel site at 1:00 am on 16 July 2008, to numbers 881-8391 and 931-2302. The call data schedule was also admitted into evidence.

[58] Mr Craig Henry, the Chief Technical Officer at Digicel Jamaica Limited at the time, gave evidence about cell site locations in certain areas in Kingston in 2008. One was located at the top of Oaklands Apartments, another at Calabar High School and another at the United Theological College, in the vicinity of the UHWI. He also went on to testify

as to the geographical areas which each cell site serviced. Mr Henry also explained how a record of calls made using the Digicel call network could be generated.

[59] Mr Henry was shown the CD that had been produced by Mr Simmonds and permitted to explain its contents to the jury. During that process and then during cross-examination, Mr Henry gave extensive evidence as to the amount of times the number 588-8685 called 371-3623 and vice versa, the duration of the calls and the locations from which the calls were made.

[60] Two statements from Detective Constable Kemar Wilks, who was a member of the same unit as Detective Corporal Brown at the time, were also read to the jury. In the first, he stated that on 18 July 2008 he was given three cellular phones for forensic analysis, namely, a black and blue Konka C625 cell phone, a black and silver Blackberry 8100 and a black and silver iPhone. He described how he extracted certain information from the cell phones which was then retrieved and presented in a single human readable report. The information extracted included call logs, short text messages (SMS), video content, audio content, photographic images, memos, emails, installed applications, configuration settings and network settings.

[61] In his second statement, Constable Wilks described how he was able to access and convert the extracted contents of the black and silver iPhone and the black and blue Konka C625 cell phone. He was unable to do the same with the third cell phone, the Blackberry 8100. He then made a compact disk containing the original and converted extractions along with Microsoft Excel compatible conversions for each

extraction. It was subsequently established that the Blackberry cell phone belonged to the applicant, the iPhone belonged to Miss Prendergast and the Konka cell phone belonged to Mr McCormack.

[62] Dr Judith Mowatt, the executive director of the Institute of Forensic Science and Legal Medicine, testified that she carried out the examinations on samples which were received by the law enforcement officers. The exhibits were tested to determine the presence of any biological fluids. Dr Mowatt explained that the items she received were mainly articles of clothing and swabs.

[63] The following are the items she received and her findings:

(a) A pair of blue denim trousers allegedly taken from the applicant on which was found human blood present in brown and serosanguineous stains on the front and brown drops and droplets and smudges on the outer aspects of the front and back.

(b) A blue and white plaid shirt allegedly taken from the applicant on which was found human blood in brown and serosanguineous stains with brown droplets and smudges on the front and brown stains in the lower back. A piece of the shirt was cut out for DNA analysis.

(c) A pair of brown shoes taken from the applicant - examination revealed the presence of blood in brown and serosanguineous stains with brown drops and droplets. The blood was human.

(d) Fingernail clippings allegedly taken from the hands of the deceased. Human blood was found.

(e) Vaginal swab taken from the deceased. A trace of human blood but no semen found.

(f) Swab allegedly taken from the stains on the third floor at Block G, Oakland's Apartment. Blood was present but tests failed to reveal if it was human blood.

(g) Swab allegedly taken from the wall of the washroom. Human blood was present.

(h) Second swab allegedly taken from the wall of the washroom. No blood was detected.

(i) Swab allegedly taken from stairs on 4th floor. Blood present.

(j) Swab allegedly taken from picture frame. No blood detected.

(k) Swab allegedly taken from the refrigerator in living room. Human blood was present. This was submitted for DNA analysis.

(l) Second swab allegedly taken from the refrigerator. Blood present which was human in origin.

(m) Swab allegedly taken from a Beretta pistol. No blood detected.

(n) One pair of worn soiled blue denim shorts allegedly taken from body of deceased with brown belt in the waist. Human blood present in brown and serosanguineous stains on front and back with brown smudges on outer aspects of front. Human blood was also found on belt.

(o) One pair of worn and soiled panties allegedly taken from the deceased. No blood detected but semen present in inner aspects of the front and back.

(p) One worn and soiled black brassiere taken from body of the deceased. Human blood present in brown and serosanguineous stains on the front and back.

(q) One purple patterned blouse labelled 'onyx', received with earth and earth stains and with several strands and pieces of hairs adhering. Human blood present in

clots on outer aspects of front with brown and serosanguineous stains in front and back.

(r) One soiled multi-coloured print queen size comforter. Human blood present in brown serosanguineous stains with brown drops, droplets and smudges was also present and an odd mixture of blood and semen was also found.

(s) One soiled purple patterned towel. No blood or semen was detected.

(t) Swab allegedly taken from chair. Human blood was present.

[64] Dr Mowatt said she was not given the cellular phone, which was recovered from the scene, neither was she given any swabs taken from any telephones found at the scene for testing. She was also never given swabs allegedly taken from the floor of the rear of Block G.

[65] She was shown the photograph of the substance seen at the rear of Block G by the dumpster and said it did not appear to her to be a pooling of blood. She opined that it was a bloodstained area, but the volume of blood that was present was not what she would describe as pooling.

[66] Miss Sherron Brydson, a government analyst from the Forensic Laboratory, who was at the time of trial on pre-retirement leave from the Biology Department, conducted DNA analysis on 33 samples she received from Dr Mowatt on 19 January of 2009. Miss Brydson testified that she identified, conclusively, four DNA profiles from four different sources or individuals. She was able to ascribe one to the deceased from

the vaginal swabs and fingernail clippings taken from her body. That profile was found in a sample taken from the pair of shorts taken from the deceased's body.

[67] Miss Brydson found that the blood sample from sections of the shirt and trousers of the applicant matched the profile of the vaginal swabs and the fingernail clippings of the deceased. Another profile, along with that ascribed to the deceased, was identified in the sample from the pants of the applicant and this profile was also found in samples from an area on the wall in the washroom, from the refrigerator and also from a chair at the scene of the investigations. A third profile was identified in the seminal stains found on the panties taken from the deceased. A fourth partial profile was found on the wall in the bedroom. There were also some components similar to this partial profile present on the comforter, on the deceased's panties and on the trousers allegedly taken from the applicant.

[68] Two witnesses were called who gave evidence as to the character of the applicant. The first was Danielle Irons, who was once in a relationship with the applicant and was the mother of one of his daughters. The other was Dr Clyde Morrison, a medical doctor, who said he was a friend of the applicant's family and the applicant, and over the years the applicant had been his patient.

The post mortem examination and the evidence of the pathologists

[69] Dr S N Prasad Kadiyala, was at the time a consultant forensic pathologist attached to the then Ministry of National Security and Justice. He testified that he examined the body of the deceased on 24 and 28 July 2008. His initial observation of the body whilst

it was still dressed was that there was a black eye present on the left side and the artificial fingernails of the right middle and ring fingers were broken at the tips, with parts missing. The artificial fingernail of the left ring finger was also broken at the tip and on the little finger, it was broken 5 cm below the tip.

[70] Dr Prasad gave the following as his findings on external examination of injuries which were ante mortem in nature:-

> 1. Abraded contusion 16 x 4 cm on the face extended from left cheek; that is zygomatic arch, along left temple to left side of the forehead, left frontal region unto hairline.
>
> 2. Contusion 1.5 x 0.7 cm present on upper part, outer margin of left ear.
>
> 3. Abrasion 1 x 0.7 cm present on lobule of left ear.
>
> 4. Laceration 0.5 x 0.15 cm and subcutaneous deep on right side of the forehead 1cm above the medial end of the right eyebrow.
>
> 5. Abraded contusion 11 x 3.5 cm on top and posterior left shoulder; semicircular shape convexity backwards and downwards.
>
> 6. Semicircular abrasion 1.4 x 0.2 cm on dorsal aspect of right foot on medial half of talus.
>
> 7. Abrasion 5.5 x 4 cm on left anterior knee on upper half of the patella or knee cap.
>
> 8. Abrasion 3 x 2.2 cm on left anterior knee unto tibial teberosity.
>
> 9. Abrasion 4 x 3 cm on right anterior knee on lower half of patella on medial.
>
> 10. Eight superficial lacerations in all half of size 0.4 cm on anterior aspect of the left ankle over an area of 4.5 cm in length.

11. Two abraded lacerations 0.4 x 0.2 cm and 0.2 x 0.1 cm on dorsal aspect of the left foot on head of first metatarsal; subcutaneous deep.

12. Abraded lacerations 0.3 x 0.2 cm on dorsal aspect of left foot, on head of 2nd metatarsal; subcutaneous deep.

13. Abrasion 1 x 0.5 cm on dorsal aspect of left foot on head of the fourth metatarsal.

14. Abraded laceration 0.15 cm in diameter, subcutaneous deep on dorsal aspect of left foot on talus.

15. Abraded laceration 0.15 cm in diameter, subcutaneous deep on dorsal aspect of left foot on medial bone.

16. Superficial abrasion 7.5 cm in length on dorsal aspect of right foot in the middle; laceration involving the nail of great toe of right foot.

17. Two superficial lacerations 1.5 x 0.5 cm and 0.5 cm in diameter on right upper anterior knee, just above the patella.

18. Laceration involving the nail of great toe of right foot which was raised but still attached to the nail bed.

19. Two lacerations 0.4 x 0.15 cm and 0.2 x 0.15 cm on head of third metatarsal on dorsal aspect of right foot; skin deep.

[71] He also found the following injuries which were post mortem in nature:-

a) Two abrasions 1.5 x 0.5 cm and 1.5 x 0.2 cm on left upper anterior leg; one below the other.

b) Abrasions 0.8 x 0.3 cm on medial aspect of left upper leg.

c) Superficial puncture laceration 0.5 cm on medial aspect of left upper leg on calf.

d) Superficial graze 7 x 3 cm on posterior leg in the middle.

e) Abrasion 4.3 x 3 cm on posterior left upper forearm.

f) Graze abrasion 8 x 4.5 cm on left upper chest on infraclavicular region.

g) Superficial puncture laceration 0.15 cm in diameter on anterio-medial aspect of left upper arm.

h) Superficial laceration 0.6 x 0.5 cm on bridge of nose at the junction of left ola of nose with nasal bone.

[72] Dr Prasad detailed his findings on internal examination as follows:-

i) Hematoma under the scalp 7 x 5 cm on left frontal region of the scalp.

ii) Subarachnoid haemorrhage on right parietal region of brain; opposite side of impact of injury at (i).

iii) Diffuse subdural haemorrhage on base of brain extending down to the cerebellum or small brain located at the back of the head.

iv) Contusion 2.5 x 1 cm in frontal lobe of the brain.

v) Fissured fracture 6.5 cm in length on left orbital plate (i.e. below the eyeball on the inside) of anterior cranial fossa extending on to the left frontal bone.

[73] It was Dr Prasad's opinion that the cause of death was subdural haemorrhage and cerebral contusion. He explained that that meant bruising of the brain due to blunt force injury to the head, due to impact with a blunt object. The doctor opined that the degree of force which would have been necessary to cause those injuries to the head was severe force, such as hitting or being banged against a wall or on the floor. The victim might become unconscious within a couple of minutes of the hit to the head and death might have occurred between 15 minutes to half an hour or more. Dr Prasad agreed that the ante mortem injuries would be consistent with the female being involved in a fight. In his opinion, the post mortem injuries were consistent with a

dragging on the floor or similar surface which was a little rough or during the transportation to the hospital.

[74] Dr Prasad testified that he visited Oaklands Apartments with Deputy Superintendent Pommells, on 25 July 2008. He found it necessary to do so due to what he had been told by the police about how the deceased could have come by her injuries. He made observations of a washroom on the third floor of the apartment building and the distance between the washroom and the building on the other block. He also observed what appeared to be a bloodstain on the ground in the passage between the two buildings. He concluded that the injuries were not consistent with a fall from a height. He explained that the distance and height were such that if a person of the deceased's height, which was five feet and four inches, fell from that height, the body parts and the limbs would get in contact with the rough surface of the walls and he would expect to see more grazing on the body.

[75] Dr Prasad opined that the substance seen on the floor of the passage, which appeared to be blood, might have come from the toe injury or from the nose due to congestion in the lungs resulting from the head injury.

[76] Under cross-examination, Dr Prasad testified that he had instructed Detective Sergeant Roye to take photographs of specific areas on the body. Some of these photographs were admitted into evidence, by consent, and Dr Prasad was extensively questioned about the injuries, with the assistance of the photographs. He remained adamant that the injuries were not consistent with falling in the type of closed space

that he had observed. He opined that the injuries could be more consistent with a fall in an open area where there was a wider space than the passage.

[77] Dr Christopher Milroy was the forensic pathologist who testified on behalf of the defence. At the time, he was the director of the Eastern Ontario Regional Forensic Pathology Unit at the Ottawa Hospital in Canada. He was also a full professor at the University of Ottawa and was involved in the training of hospital and forensic pathologists. He testified that he had been contacted and engaged in 2011 in relation to this matter. He had been provided with the autopsy report and photographs which included photographs of the deceased at the hospital as well as the scene of the incident. The report was signed by Dr Prasad. He noted that there were no photographs of the internal injuries provided in the autopsy photographs, so he had to rely on what Dr Prasad said because they were not independently reviewable by him. He had also visited the scene two weeks prior to the time he was testifying and was able to confirm that the place he was taken to was the one in the image of the scene provided by the prosecution. He subsequently testified that he estimated the height from the washroom window to the ground to be about 20 to 25 feet and that it would take about a second to one and a half seconds for one to fall over that height.

[78] Dr Milroy opined that the injuries to the left side of the face and those on the left shoulder of the deceased were caused by the person "going vertically downwards hitting their head and their shoulder as they come to the ground". The relationship between the injuries to the knee and the injuries to the shoulder and the left side of the face could be accounted for in one action of the person falling from a height and then

landing on the ground. The injuries to the feet were also very typical with a fall from a height. Dr Milroy indicated that he had regularly done post-mortem examinations in relation to which it was established that injuries were occasioned by a fall from a height.

[79] Dr Milroy was of the opinion that, despite the small space in between the wall of the washroom and that of the building beside it, which was estimated to be about four feet, the body would not necessarily have come in contact with the wall; and, if it did have impact on the wall, the impact would "be for a very short period of time". He was satisfied that the abrasions he saw on the body were caused when it impacted the ground.

[80] The injuries seen to the head were also, in Dr Milroy's opinion, entirely in keeping with a fall from a height. He told the court that the nature of the injuries seen to the head was more often seen in the context of a fall than from a direct blow with a weapon to the head. He explained that this was so because, "[t]ypically there is more force in a fall than there is if someone is striking you".

[81] The doctor was invited to comment on what he would expect to see if the person was injured and then dragged from one place to where it was said to have been discovered. Dr Milroy opined that, given that there was a series of "bleeding injuries", before the person was moved, there would be a blood trail as a consequence and one would expect to see drag marks on the body which would be "more pure abrasions". Further, he stated that he would have expected to see a different pattern of injuries if a

body, dressed in a similar manner to the deceased, was pulled either up or down the flights of stairs in the apartment building.

[82] Another scenario that was put to the doctor was of someone who is conscious being forcibly thrown out of a window and he was invited to comment on what he would expect to notice. Dr Milroy testified that one would expect that there would be injuries such as grip marks which he explained would result in bruising on the arms.

[83] It was ultimately Dr Milroy's evidence that, with the exception of the injury over the right eye, which could have been the result of a punch, all injuries could be accounted for by a fall from a height and there were no other injuries that indicate that there was an attack by another party. Notably, also, Dr Milroy was of the opinion that, from the photographs, the substance on the ground in the passage was blood.

[84] Under extensive cross-examination, similar to that to which Dr Prasad had been subjected, one suggestion with which Dr Milroy agreed was that the pathologist who actually did the post-mortem examination and the actual dissection of the body would be in a better position than somebody who was just reviewing the pictures of the external. He however expressed the position that "patently [he couldn't] review it but it is a failure [of] the quality of examination to not allow it to be reviewed". He accepted that the absence of photographs of the internal dissection did not necessarily take away from the integrity of the findings of the pathologist who actually performed the examination. He also agreed that he accepted the findings in respect of the internal examination as stated in the report of Dr Prasad. Dr Milroy went on to indicate that he

accepted that some injuries were ante mortem and some post-mortem and he agreed that the person who did the post-mortem examination was able to make an interpretation of whether they were ante mortem or post-mortem.

[85] Dr Milroy said that it was his initial opinion, after getting the report and the pictures, that the deceased had sustained the injuries from a fall from a height but there was no specific distance except that he was asked whether it could be from a third floor. It was his opinion that it could be such a fall based on the pattern of pathology, meaning, the distribution of the injuries and the type of injuries. He however accepted that the fall could have also been from the second floor. He accepted that one could not differentiate between whether someone was pushed out and whether they went out of their own volition from the third floor. He however expressed the opinion that the jury would have to consider, in terms of somebody who was thrown out, whether there would have been signs of a struggle before they were thrown out. There was no evidence of restraint or grip marks and that would be against somebody being thrown out. When asked specifically if it was his best opinion that the individual jumped out, he responded "they could have done".

[86] Dr Milroy estimated that the height between the ground in the washroom and the lower windowsill was about three feet and six inches. He said that a person the height of the deceased, which was five feet and three inches, could overcome that height of three feet and six inches but it would have taken a little effort to climb out of the window in order to dive to the ground.

[87] Dr Milroy, when asked if it was his opinion that the deceased committed suicide, stated:

> "Suicide is a determination of an inquest but it is possible that this was self-inflicted for what-ever, I can't read in somebody's mind."

[88] Dr Milroy said he would not have expected there to be more grazing on the exposed part of the body from falling in that concrete four-feet wide passage, whether from the side walls or the floor. In relation to the abraded pattern of the injury to the left shoulder, Dr Milroy accepted that it could have been caused if the deceased had been attacked and brought down hard on the ground from her height of five feet and three inches. He opined that the injuries to the lower body, that is, to the legs, feet and kneecaps could have occurred when the body impacted the ground, since there would have been some movement when the knees and feet made contact on the ground. He maintained that the injuries to the kneecaps were "very typical fall injury". He however agreed that those injuries could have been consistent with the deceased being dragged down to the ground from her height and being on her knees in a fight.

[89] Dr Milroy also agreed that the damaged and broken fingernails could have been as a result of a fight. In relation to the damage to the toenail, Dr Milroy agreed that it was possible that it could have been caused by the deceased, whilst being in a fight, kicking and connecting into a hard object. He however disagreed with the suggestion that the injury to the head was caused by either the blunt force being applied, such as the head being hit into a wall or hit on the floor. Neither was it caused by some blunt object being used to hit the head with a severe degree of force.

[90] Under re-examination, Dr Milroy sought to explain that the injuries must be looked at as a whole and not in isolation. He stated:

> "...Because in isolation, you could always say, well this could be caused by A or it could be caused by B. You have to look at all the evidence on the body and also other evidence that can assist you in making your determination such as the distribution of blood at a scene and that's what I had used. The pattern of pathology and also taking into consideration the blood pattern and the pattern you see is that from a fall from a height down to the ground and then the injuries occurring in that process and bringing about death."

The appeal

[91] The applicant originally filed the following grounds of appeal:

> "1. **Misidentity by the witness:** That the prosecution witness wrongfully identified me as the person or among [sic] any persons who committed the alleged crime.
>
> 2. **Lack of evidence:** That the prosecution failed to present to the court any 'concrete' piece of evidence (material, forensic, or scientific evidence to link me to the alleged crime).
>
> 3. **Unfair Trial:** That the evidence and testimonies upon which the Learned Trial Judge relied on for the purpose to convict me, lack facts and credibility thus rendering the verdict unsafe in the circumstances.
>
> **Unfair trial:** That the Learned Trial Judge failed to give adequate direction to the jury regarding [sic] the inconsistent and contradictory testimonies as presented by the prosecution witnesses.
>
> 4. **Conflicting Testimonies:** That the prosecution witnesses presented to the court conflicting and contrasting testimonies which amount to perjury, thus call [sic] into question the soundness of the verdict.

5. **Miscarriage of justice:** That the prosecution and the Learned Trial Judge failed to take into consideration the argument of my defence attorney as it relates to the no case submission.

B. That I was wrongfully convicted for a crime I knew nothing about and could not have committed."

[92] When the appeal came on for hearing, Mr Garth McBean QC, on behalf of the applicant, abandoned ground one of these original grounds and sought and was granted permission to argue 13 supplemental grounds which he indicated incorporated the remaining original grounds. After the hearing had commenced, Mr McBean sought and was granted permission to argue a further supplemental ground of appeal. The following are the 14 grounds urged on behalf of the applicant:

"1. The Learned Trial Judge erred in failing to uphold the no case submission made on behalf of the Appellant. The Learned Trial Judge so erred having regard to the following evidence and facts:

(a) The evidence of Dr. Prasad Kadiya at page 391 of Volume I of the transcript was that the cause of death of the deceased was subdural haemorrhage and cerebral contusion or bruising of the brain due to blunt force injury but the Prosecution failed to lead evidence to establish how, and where exactly such injury was inflicted. Further, the Prosecution expressed uncertainty as to where the fatal injury was inflicted as reflected at page 1279 of Volume 2 of the Transcript, page 2092 of Volume 3, page 2122, line 11 onwards to line 4 of page 2123 of Volume 3 of the transcript.

(b) The evidence of Dr. Prasad Kadiyala that the cause of death was subdural haemorrhage and cerebral contusion or bruising of the brain

due to blunt force injury caused by impact with a blunt object or abraded surface such as being hit against a wall or floor. (pages 390 - 391 of Volume 1 of transcript). There was no evidence that the Appellant had inflicted severe blunt force to the deceased to cause such an injury. Further, the evidence, particularly the photographs, show that no such surface exists in the apartment of the deceased and such blunt force against such a surface would cause sounds which would have been heard by the witness Nadine Williams.

(c) The evidence of Dr. Prasad Kadiyala that he was unable to say the method which caused the fatal blunt force injury to the head of the deceased.

(d) The evidence of the statements made by the Appellant to the police which did not indicate the application of such blunt force.

(e) The evidence and in particular the photographs and the evidence of DSP Pommells which established that the furniture and other items in the apartment of the deceased were in place or normal and not consistent with a fight or struggle in the apartment as contended by the Prosecution.

(f) The photographic evidence, exhibits 2U, 2P and 2Q (images 3101, 3096 and 3097), showing blood stains, hair strands, broken nail tips and the telephone of the deceased in the passage at the rear of the apartment building is consistent with the scene of the deceased [sic] death being in the said passage at the rear of the apartment building.

(g) The evidence of Dr. Prasad Kadiyala that in his opinion the injuries to the deceased are consistent with a fight such as being tackled to the ground is inconsistent with the evidence of the absence of injuries to

the deceased hands, the palm of her hands, more extensive facial injuries/abrasions and thorasic abrasions and also inconsistent with the photographic evidence of an abrading contusion to the top of the deceased left shoulder.

2. Alternatively, the learned Trial Judge erred in failing to uphold a no case submission having regard to the fact that the evidence of circumstances relied upon by the Prosecution for circumstantial evidence, including the circumstances/evidence outlined in ground 5 herein, were either consistent with innocence of the Appellant or equivocal.

3. Still further or alternatively, the learned trial Judge erred in failing to withdraw the case from the Jury and direct that a verdict of acquittal be entered in favour of the Appellant after the commencement of the case for the Appellant and the evidence of Defence witness Dr. Christopher Milroy. The Learned Judge so erred having regard to the evidence outlined in sub paragraphs (a) to (g) of ground 1 herein and the evidence of Dr. Christopher Milroy as follows: -

   (a) The injuries to the knees of the deceased are typical with impact to the ground or an abraded surface. (Page 1658 lines 19 - 21).

   (b) The injuries to the left side of the face and on the left shoulder of the deceased are consistent with the person going vertically downwards, hitting their head and their shoulder as they come to the ground. (Page 1658 lines 10 -14).

   (c) The injury to the feet are typical with a fall from a height. (Page 1659 lines 8 -10).

   (d) The injuries in the photographs and described by Dr. Prasad Kadiyala which were on the body of the deceased were caused when the body impacted the ground. (Page 1666 lines 4 - 6).

   (e) Dr. Prasad's findings of the injury to the brain and head of the deceased are in keeping with a fall from a height. (Page 1667 lines 14 - 15).

(f) The injuries to the deceased are more consistent with a fall than blows to the head or the head being struck against objects. (Pages 1667 to 1668 of Volume 3).

(g) Based on the photographs there were a series of bleeding injuries and if injuries occurred before the deceased moved to the washroom there would be a blood trail and if the body was dragged there would be drag marks on the body. (Page 1670 lines 6 - 23).

(h) The abraded contusions are not consistent with someone being dragged. (Page 1671 lines 6 - 9).

(i) If a body is being pulled up or down stairs one would expect a different pattern of injury. (Page 1676 line 23).

(j) Pulling a body on stairs would not account for the head injury to the deceased because of the force required to inflict such an injury. (Page 1676 line 25).

(k) The contrecoup injury to the deceased was unlikely to happen by having your [sic] head hit on the floor or wall because there isn't enough movement of the head to cause that. (Page 1751 lines 17 - 20).

(l) If someone was being forcibly thrown out of a window they would have injuries such as grip marks and other injuries which are not on the body of the deceased in this case. (Page 1671 lines 20 - 25).

(m) The injuries on the deceased can be accounted for by a fall from a height with the exception of the injury above the right eye. (Page 1672 lines 19 - 25).

(n) If someone administers several blows to the victim you would expect impact spatter, spatter of blood in the surrounding areas, the walls and passageway. (Page 1690 lines 3 - 8).

4. Further or alternatively the verdict is unreasonable having regard to the evidence outlined in subparagraphs (a) to (h) of ground 1 herein and sub-paragraphs (a) to (n) of ground 2 herein.

5. The learned trial Judge erred in failing to give adequate directions on circumstantial evidence as she failed to direct the Jury that the following circumstances were either not consistent with guilt or equally consistent with innocence and therefore could not be relied on to prove guilt of the Appellant as these circumstances had the effect nullifying [sic] or breaking the chain of circumstances relied upon by the prosecution: -

   (a) The evidence that no blood of the deceased was found in the apartment, the stairs, the window of the washroom.

   (b) The evidence of Nadine Williams-Peart that she heard the sound similar to the dragging of the laundry hamper down the staircase and that she did not look out to see what was making that noise. This evidence was equally consistent with a laundry hamper being pulled along the staircase and with innocence of the Appellant.

   (c) The photographic and other evidence which showed that the items and [sic] furniture in the apartment of the deceased were in place and normal which negates any struggle or serious fight taking place in the apartment as contended by the Prosecution.

   (d) The evidence of Craig Henry that 8 calls were made from the cellular phone of the Appellant to the cellular phone of the deceased between 12.01 am and 12.37 am on the 16th July 2008 which supported the Appellant's case the he called the deceased phone several times after she left the apartment.

   (e) The evidence that the Appellant was seen waiting in his car in the vicinity of the apartment was at the highest equivocal and equally consistent with innocence.

6. The Appellant's Constitutional right to have a fair trial within a

reasonable time was breached as his trial took place between July and October 2016, eight (8) years after July 2008, the date of the alleged offence, during which time the Appellant and his Attorney-at-Law made no application for adjournment. As a result of the breach of the Appellant's Constitutional right as aforesaid there was prejudice caused to the Appellant in the following respects: -

(a) The cellular telephones of the deceased and the Appellant were unavailable for analysis. The condition of the deceased phone could assist in determining whether the deceased fell from a height.

(b) Witnesses Detective Roye of the Scenes of Crime unit had left the Police force resulting in his statement being read into evidence without the opportunity for the Appellant or his Counsel to examine him in detail in relation to aspects of his duty which compromised the investigation.

(c) The pair of jeans worn by the Appellant, the comforter and clothing were missing/or could not be found and examination of same could assist in determining whether a struggle took place and the nature of same.

(d) Witness Joseph Dereck Simmonds, the Head of Business Risk for Digicel was no longer employed there and was now unavailable resulting in his statement being read into evidence without the opportunity to examine him in detail as to the nature of the request made by the Police in relation to call data Records and specifically the lack of records for the deceased as well as the text message data, voice mail data, roaming calls and third party network calls.

(e) Detective Wilks who carried out the forensic analysis on the phone instruments and who could have given

evidence of the unavailability of the said instruments as well as the potential data that should have been lifted from the cellular phones of the deceased including voicemail, text messages, call logs, videos and other such data was sent on leave out of the jurisdiction.

7. The Learned Trial Judge erred in failing to direct the Jury that in assessing the credibility of witnesses they should take into account objective reliable and unchallenged evidence such as; photographs, telephone or cellular phone records, and forensic evidence which contradict the oral evidence of witnesses and if such objective unchallenged evidence contradicts the viva voce evidence of witnesses that they should reject the viva voce evidence of such witnesses. In this regard and in particular, the Learned trial Judge failed to direct the Jury that they should in considering the evidence of Kevin McCormock, and in particular his evidence which tended to show that the deceased was afraid of the Appellant which was contradicted by and his credibility adversely affected by the objective and unchallenged evidence of numerous telephone calls specifically related to their times and the location the calls were being made from by the deceased to the Appellant and text messages being sent by the deceased to the Appellant, particularly during the period 7th July 2008 to 15th July 2008. The Learned Judge also failed to direct the Jury that in considering the evidence of a bad relationship between the deceased and the Appellant the Jury should take into account in assessing Imani Prendergast's credibility the unchallenged objective evidence of the several telephone calls and text messages sent by the deceased to the Appellant prior to her death.

8. The Learned Trial Judge erred in directing the Jury to consider whether in respect of the telephone calls made by the Appellant after the deceased stormed out of the apartment, as stated by him in evidence, 'the Appellant had started to build his defence immediately and that he made those calls knowing that no one would answer' (page 2270, lines 11 - 15). The Learned Trial Judge in so erring caused prejudice and unfairness to the Appellant as there was no evidential basis for the jury to consider such matters.

9. The learned trial Judge erred in directing the jury that 'Bear in mind the accused man has made mention of something more

than one black eye' (See Volume III page 2217, lines 2 – 9). Such a misdirection caused prejudice to the Appellant as it gave the jury the impression that the Appellant caused the fatal injury to the deceased.

10. The Learned Trial Judge erred in directing the jury regarding the evidence of Dr. Prasad Kadiyala in relation to injury number 19 when she stated at page 2107 line 16 of Volume 3 of the transcript 'No. 19 was two skin deep lacerations by the third toe, as it concerned the aceration, the doctor said that those could have occurred by dragging.' (the word aceration should be lacerations). Further, the learned Judge invited the Jury to take this injury into account in considering the question which she posed at lines 22 to 23 of Volume 3 'Was she dragged before she died?' The Learned Trial Judge so erred as Doctor Prasad Kadiyala clearly stated in his evidence that the post-mortem injuries were consistent with a dragging. (See page 401 lines 4 to 9.) However, the Doctors evidence was that injury number 19 was an antemortem injury. In so erring the learned trial Judge caused prejudice and unfairness to the Appellant.

11. The learned trial Judge erred in directing the Jury at page 2297 of Volume 3 of the transcript that there is evidence that the injuries to the deceased, according to one of the experts, are not consistent with being dragged downstairs. The Learned Judge so erred as both experts gave such evidence. Dr. Prasad Kadiyala at page 423 Volume I of the transcript and Dr. Milroy at page 1676 Volume 3.

12. The Appellant's Constitutional right to a fair trial was breached by the poor and inefficient investigation carried out by the Police in the following respects which were referred to by the learned Judge in her summing up: -

    I. No fingerprint impressions were taken from the scene or from the deceased's cellular phone.

    II. There was no collection of blood, nail and hair samples for testing by the Forensic Department from the passage below the washroom area.

III. No detailed and comprehensive photographs were taken of the cellular phone of the deceased.

IV. The Apartment of the deceased or the scene of death was not secured by the Police investigators.

V. Loss of the telephones of the Appellant and the deceased.

VI. The failure to procure any telephone records for the deceased to assist the investigation.

13. The Prosecution breached their duty of disclosure resulting in a breach of the Appellant's Constitutional right to a fair trial by failing to disclose and make available the four telephone instruments for independent analysis at the insistence of the Defence and to disclose the person or persons who were responsible for the availability or non-availability of the said telephone instruments despite repeated applications by the Defence. Such non-disclosure, particularly of the telephone instruments of the deceased which could have had vital evidence of video images of the movements and actions of the deceased shortly before her death, caused prejudice to the Appellant.

14. The Learned Trial Judge erred in failing to uphold the no case submission made on behalf of the Applicant/Appellant for the following additional reasons:

(a) The evidence of circumstances relied upon by the Prosecution and which the Prosecution outlined or listed in reply to the no case submission at pages 1223 to 1231 of Volume 2 of the transcript, details of which are in the Supplemental Grounds of Appeal, could not satisfy the jury beyond a reasonable doubt that the Applicant/Appellant inflicted the fatal injury to the deceased and was guilty of the offence of Murder.

(b) Alternatively, there was no evidence led by the Prosecution to rebut self defence as there was no evidence as to who was the aggressor in the altercation between the Applicant/Appellant and the deceased in the apartment."

[93] The several grounds overlap in such a manner that they will be dealt with under these headings:-

1. No case submission – grounds 1, 2 and 14.
2. Withdrawing case from the jury – ground 3.
3. Circumstantial evidence – ground 5.
4. Verdict unreasonable – ground 4.
5. Judge's directions to the jury – grounds 7, 8, 9, 10 and 11.
6. Breach of applicant's constitutional right to a fair trial – grounds 6 and 12.
7. Duty of disclosure – ground 13.

No case submission

The submissions

[94] Mr McBean set out the evidence on which he relied in support of the grounds of the appeal in a comprehensive way which will only be repeated if necessary. In his submissions on the relevant law on the issue of no case submissions, Mr McBean referred to the leading authority of **R v Galbraith** [1981] 1 WLR 1039, in which the principles to guide a court in making a determination of whether a prima facie case has been made out were clearly set out. Queen's Counsel referred to **Taibo v R** (1996) 48 WIR 74 and **DPP v Varlack** [2008] UKPC 56, where he noted that the Privy Council applied the principles outlined in **R v Galbraith**. In the course of his submissions, he also referred to **The Queen v Jahnoy Walters**, BVI Criminal Case No 5 of 2009, where these principles were demonstrably applied.

[95] Mr McBean contended that the prosecution had failed to prove that it was the applicant who had inflicted the fatal injury which was an essential element of the offence of murder. Further, he submitted, the prosecution's evidence had been so discredited as a result of cross-examination or was so manifestly unreliable that no reasonable tribunal could safely convict upon it. Thus, Mr McBean submitted that the learned trial judge erred when she failed to uphold the no case submission.

[96] Queen's Counsel noted that, in responding to the no case submission, the Director outlined the circumstances or pieces of evidence upon which the prosecution relied. Mr McBean considered those along with other various bits of evidence and submitted that none of the evidence, individually or cumulatively, could satisfy a properly directed jury beyond a reasonable doubt that the applicant inflicted the fatal injury. Further, he sought to demonstrate, by reviewing some of the evidence, that the circumstantial evidence was either consistent with the innocence of the applicant or was equivocal.

[97] Mr McBean acknowledged that it was not for the learned trial judge to seek to usurp the jury's function after the prosecution had closed its case, but the critical question was, whether at that stage, there was sufficient evidence on which a jury, properly directed, could be satisfied beyond a reasonable doubt that the applicant inflicted or caused the fatal injury.

[98] Although in the Crown's written response to the submissions, grounds one and three were addressed together, happily it was done in such a manner that it is possible

to identify those submissions which relate to each ground separately and in her submissions to us, the Director did endeavour to do so.

[99] It was Miss Llewellyn's main contention that there was an abundance of evidence at the close of the Crown's case which would have obliged the learned trial judge to call upon the applicant to state his defence. The Director was ad idem with Mr McBean as to the leading authorities relevant to this case and she also relied on **Melody Baugh-Pellinen v R** [2011] JMCA 26, **Enrique Montejo v R** Crim App No 4 of 2011 from the Court of Appeal of Belize, **R v Rudolph Dodd, Karl Wauchorpe and Billy West** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 184, 185 and 186/1999, judgment delivered on 8 October 2001, and **Japhet Bennett v R** [2018] CCJ 29 (AJ).

[100] Miss Llewellyn submitted that the case rested on the force of the circumstantial evidence, cumulatively, and it was not for the applicant to take out a few issues and highlight them as there was no duty to assess the weight of each individual issue. Miss Llewellyn pointed to the fact that the applicant was the last person to be seen in the company of the deceased and that he admitted inflicting injuries on her in his statement to the officer who first spoke with him at the hospital, coupled with the fact that there was no evidence of any intervening acts by a third party. She noted that based on those facts along with all the evidence of the injuries noted by Dr Prasad and his opinion about them, there was sufficient evidence for the applicant to be called upon to give his defence. The learned trial judge was therefore correct, as a matter of law, when she ruled there was a case to answer.

[101] The Director submitted that the authorities have demonstrated that it was for the jury to decide what inferences might properly be drawn from the preponderance of circumstantial evidence relied on by the prosecution, including the unchallenged statements of the applicant and the evidence of Dr Prasad. It was further submitted that there was sufficient cogent and credible evidentiary material to be placed before the jury, from which they could conclude that the applicant caused the death of the deceased. It was contended that the evidence, although circumstantial in nature, was not tenuous nor was it so manifestly discredited as to warrant the case being taken from the jury.

Discussion and disposal

[102] In **DPP v Varlack**, the Board considered the proper judicial approach for deciding on a submission of no case when the prosecution is relying on circumstantial evidence. Lord Carswell, delivering the judgment on behalf of the Board, stated the following:

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

22. The principle was summarised in such a case in the judgment of King CJ in the Supreme Court of South Australia in *Questions of law Reserved on Acquittal (No 2 of 1993)* (1993) 61 SASR 1, 5 in a passage which their Lordships regard as an accurate statement of the law:

> 'It follows from the principles as formulated in *Bilick* (supra) in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence... He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond a reasonable doubt and therefore exclude any competing hypothesis is not reasonably open on the evidence...
>
> I would re-state the principles, in summary form as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. **If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is capable of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer.** There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all the inferences most favourable to the prosecution which are reasonably open were drawn a reasonable mind could not reach a

> conclusion of guilt beyond a reasonable doubt, or to put another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence.'" (Emphasis mine)

[103] Lord Carswell, in applying the principle to the facts of that case, went on to comment that: "[w]hen one applies the principle, it follows that the fact that another view consistent with innocence, could possibly be held does not mean that the case should be withdrawn from the jury" (see paragraph 24).

[104] In **Melody Baugh-Pellinen v R**, Morrison JA (as he then was), in delivering the judgment of the court, considered this issue and after reviewing several authorities, concluded at paragraph [34]:

> "In light of these authorities, it therefore seems to us that the correct approach to the question of whether the learned trial judge ought to have upheld the no case submission in the instant case is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt."

[105] In her submissions, the Director outlined the various bits of evidentiary material which the prosecution had relied on in support of its circumstantial case that the applicant was guilty of murder. In her oral submissions, the Director commenced by pointing to the significant disparity in sizes of the applicant and the deceased: he was five feet nine inches and was described as being 40 pounds heavier at the time of the incident than he was at trial, and she was five feet four inches and weighed 140

pounds. In the written submissions, the evidentiary material relied on was detailed as follows:

> "a. The applicant and the deceased were in a relationship.
>
> b. This relationship seems to have had its 'highs and lows' which can be inferred from the evidence of her daughter Imani, Jody, Miss Newman and her new boyfriend Kevin McCormack.
>
> c. Fighting was a part of their relationship which came from the evidence of Imani and was challenged by the defence.
>
> d. The (applicant) was seen on at least two occasions outside of the deceased's apartment parked in his car in a manner which gave him a view of the entrance to the deceased's apartment which may speak to a perceived obsessive/possessive nature of the (applicant).
>
> e. Prior to the death of the deceased she had a new boyfriend, Kevin McCormack, with whom she had spent the week leading up to her death at his home.
>
> f. The (applicant) and the deceased were still in contact.
>
> g. On the night of the 15 July 2008 the (applicant) went to her apartment and saw her friend Jody whom he asked to leave. The conversation that occurred between the applicant and Jody may lead one to infer that the applicant was in an aggressive mood that night.
>
> h. The (applicant) was heard by Jody asking the deceased 'are you fucking him?', implying knowledge of her new boyfriend and also showing he was angry about this.
>
> i. Five minutes after Jody left the apartment she tried making contact with the deceased by phone and was unsuccessful.
>
> j. The deceased had a daughter that she was planning to pick up the following day, and had no dangerous drugs, toxic substances except a minute amount of alcohol in her system, and no injuries, was last seen in the company of the

(applicant). This may lead a jury to reject the inference that she caused harm to herself.

k. At some time after 11:45 p.m. her upstairs neighbour heard sounds as if laundry was being drawn along the stairs.

l. The deceased was brought to the hospital by the (applicant).

m. Admissions were made by the (applicant) of him inflicting physical violence to the deceased.

p. The post mortem examination report of Dr Prasad Kadiyala states the cause of death as subdural haemorrhage and cerebral contusion due to blunt force injury to the head, due to impact with a blunt object. This means that either blunt force came into contact with the deceased or the deceased came into contact with blunt force.

- The doctor noted 27 injuries in total, 19 ante mortem injuries to include the fatal blow that caused her death and eight post mortem injuries.

- The injuries on the body are not consistent with a fall from a height. Both are ante and post mortem. The reason for this is due to the width of the passage which is not more than 4ft and the deceased being not more than 5' 3". If a person were to fall from that height he body parts, likely the limbs will get in contact with the rough surface of the walls and you would expect more grazing on the body than what was seen.

- The post mortem injuries are consistent with a dragging on a floor or similar surface."

[106] It is to be noted that Mr McBean was primarily focused on the sufficiency of the evidence seeking to connect the applicant with the inflicting of the fatal injury. Certainly there was no witness who could speak to exactly where, when and with what the deceased received the fatal injury. However, such is the nature of reliance on

circumstantial evidence that it was incumbent upon the prosecution to lead sufficient evidence of circumstances that a reasonable mind could have reached a conclusion that it was the applicant who had caused the death of the deceased. The evidence presented up to this stage clearly established that the deceased was last seen alive with the applicant who admitted engaging in some form of violence with her before taking her dead body to the hospital. The evidence of the pathologist supported the possibility of the deceased having been in a fight and having suffered a blow to her head which ultimately led to her death. The evidence at this stage also refuted the view that she may have fallen to her death out of the window above where her body was allegedly found.

[107] Given what was required of the prosecution at the end of their case, there was indeed sufficient evidence presented by them for the learned trial judge to have properly left the matter for the jury to assess and draw inferences and to ultimately make a determination for themselves as to the guilt or innocence of the applicant. The stopping of the case at this stage would have amounted to the learned trial judge usurping the role of the jury. She therefore cannot be faulted for declining to uphold the no case submission and calling upon the applicant. Grounds one, two and 14 accordingly fail.

Withdrawing the case from the jury

The submissions

[108] Mr McBean submitted that the learned trial judge should have withdrawn the case from the jury after the defence's witness, Dr Milroy, had testified. It was his

contention that the learned trial judge ought to have intervened and withdrawn the case from the jury, given the contradictory evidence that Dr Milroy had given about the deceased's injuries seen at the post mortem examination and the doctor's opinion as to the cause of her death (the details of which are set out in ground three).

[109] Mr McBean referred to Archbold: Criminal Pleadings, Evidence and Practice 2019 edition paragraph 4-362, **R v Brown (Davina)** [2001] EWCA 961 and **Daley (Wilbert) v R** (1993) 43 WIR 325 in support of his submission that the learned trial judge retained a discretion to withdraw the case from the jury. He noted that the learned trial judge demonstrated her uncertainty about the nexus between the applicant and the fatal injuries and also questioned the quality of the evidence as to where exactly the incident leading to the death of the deceased could have taken place. It was Queen's Counsel contention that the learned trial judge erred in not stopping the case in these circumstances and directing the jury to enter a verdict of not guilty.

[110] Miss Llewellyn did not seek to dispute that the learned trial judge had the power to withdraw the case from the jury. She submitted that a unique feature of this case was that there were two submissions of no case as a second submission was invited by the learned trial judge when an email was sent on her behalf asking counsel "to present submissions, written and oral as to whether the case should proceed, focusing solely on the evidence linking the accused to the commission of an act or acts which caused the death of the deceased".

[111] Miss Llewellyn invited this court to consider the appropriateness of a second no case submission, after the evidence of the defence, especially in cases such as this when the Crown was relying on circumstantial evidence. It was submitted that in exercising the power to stop the case and withdraw it from the jury, the learned trial judge must exercise the discretion based on the quality of the evidence, according to law, and not fact.

[112] It was submitted that the evidence of Dr Milroy, which concluded that the injuries seen on the deceased were not consistent with a fight and were self-inflicted, meant that there were two competing experts. It was for the jury, properly directed, and not the judge, to decide as a matter of fact which version of events they accepted and whose opinion they should adopt in assisting them, if necessary, to come to their findings. The decision of **Enrique Montejo V R** was referred to in support of the submissions.

Discussion and disposal

[113] It is undisputed that a trial judge has a power and a duty to withdraw a case from the jury at any time even after the close of the prosecution's case, if he is satisfied that no jury, properly directed, could convict. The learned authors of Archbold noted that in **R v Ramsey** [2000] 6 Archbold News 3, the English Court of Appeal said that in a borderline case, even if the judge properly rules that there is a case to answer, he may be under a duty to re-visit the issue of the evidence, taking account of the evidence called on behalf of the defence.

[114] It is, however, the same principle that guides the judge in coming to a decision on whether to uphold a no case submission that should guide him in deciding whether to withdraw the case from the jury, which is that he must not appear to be assessing all the evidence himself and coming to a decision on the guilt or innocence of the accused, thereby usurping the role of the jury.

[115] In **R v Brown**, Longmore LJ, at page 49, after reviewing some decisions which reiterated the existence of the power, went on to say the following:

> "No doubt this is a power which should be sparingly exercised and only if the judge really is satisfied that no reasonable jury, properly directed, could on the evidence safely convict."

[116] It is perhaps useful to appreciate the circumstances under which the issue of withdrawing the case from the jury arose. The learned trial judge had heard extensive submissions on whether to uphold the no case submission and had found there was a prima facie case for the applicant to answer. At the close of the case for the defence, she directed the Registrar to send an email on her behalf to the attorneys-at-law stating: "I am inviting the Crown to present submissions written and oral as to whether the case should proceed focusing solely on the evidence linking the accused to the commission of an act or acts which caused the death of the deceased". She also indicated that the defence would be at liberty to apply. When the matter resumed, she made it clear that she wished for the focus to be on that single aspect.

[117] This was indeed an unusual turn of events, especially since the significant evidence that challenged the Crown's case on that aspect was the contradictory opinion

about the injuries and cause of death of the deceased that had come from Dr Milroy. In his submissions, Mr McBean impliedly acknowledged this when he outlined aspects of Dr Milroy's evidence and submitted that the learned trial judge erred in not withdrawing the case, having regard to that evidence.

[118] The assessment of the conflicting opinions of the two pathologists was the purview of the jury. It was for them to determine which, if any, they preferred and whether on the totality of the circumstantial evidence, they were satisfied beyond a reasonable doubt that the applicant had caused the death of the deceased. The learned trial judge did not fall into error when she ruled that the matter was to proceed to the jury. Ground three is therefore without merit.

Circumstantial evidence

The submissions

[119] In the ground of appeal relating to this issue, the complaint made was that the learned trial judge had failed to direct the jury about certain bits of evidence which were not consistent with guilt or equally consistent with innocence and therefore could not be relied on to prove the guilt of the applicant, as these circumstances had the effect of nullifying or breaking the chain of circumstances relied upon by the prosecution. Those particular bits of evidence were identified and set out (see ground 5 of appeal).

[120] In his submissions, Mr McBean acknowledged that there was no need for special directions when dealing with circumstantial evidence. He, however, maintained that the

learned trial judge was obliged to point out how individual circumstances impacted on the prosecution's theory of what happened that night. Two decisions from this court, **Calvin Rose v R** [2011] JMCA Crim 56 and **Melody Baugh-Pellinen v R**, were referred to in support of the submissions.

[121] In response, the Director submitted that the learned trial judge was explicit and detailed in her directions on circumstantial evidence, which were appropriately sandwiched between directions on the burden and standard of proof. It was submitted that there was no requirement in law for each piece of circumstantial evidence relied on by the prosecution to be strong or to point in one direction only or by itself establish the guilt of an accused person beyond a reasonable doubt. Further, it was submitted, there was no requirement in law for each piece of evidence to link the accused directly to the commission of the crime. Instead, what was required was a determination of whether or not there was material on which a jury could, without irrationality, be satisfied of guilt. We were referred to **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 and **Loretta Brissett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004.

Discussions and disposal

[122] In **Melody Baugh-Pellinen v R,** Morrison JA had this to say at paragraphs [39] and [40]:

> "[39] As regards the proper directions to a jury on the subject of circumstantial evidence, **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503 resolved the question whether any special directions were necessary in

such cases by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. Delivering the leading judgment of a unanimous House of Lords, Lord Morris of Borth-Y-Gest said this (at page 510):

> 'In my view, the basic necessity before guilt of a criminal charge can be pronounced is that the jury are satisfied of guilt beyond reasonable doubt. This is a conception that a jury can readily understand and by clear exposition can readily be made to understand. So also can a jury readily understand that from one piece of evidence which they accept various inferences might be drawn. It requires no more than ordinary common sense for a jury to understand that if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that if a fact which they accept is inconsistent with guilt or may be so they could not say they were satisfied of guilt beyond all reasonable doubt.'

[40] There is therefore no rule requiring a special direction in cases in which the prosecution places reliance either wholly or in part on circumstantial evidence. This was confirmed by this court in **Loretta Brissett v R** (SCCA No. 69/2002, judgment delivered 20 December 2004) and **Wayne Ricketts v R** (SCCA No. 61/2006, judgment delivered 3 October 2008), in both of which **McGreevy** was cited with approval."

[123] In her opening remarks to the jury, the learned trial judge demonstrated her awareness of what was required of her, when at pages 1958 to 1959 of the transcript she gave the following directions:

> "The prosecution must prove to you that [the applicant] is guilty. He does not have to prove to you that he is innocent. The burden of proving [the applicant's] guilt is always on the prosecution. How does the prosecution succeed in proving his guilt? The answer is, by making you sure of it. Nothing less than that will do. If after you have considered all the evidence, you are sure that he is guilty, then you must return a verdict of guilty. If you are not sure, your verdict must be, not guilty.
>
> Now, reference has been made in this case, to the type of evidence, which you have heard. Sometimes you see, Mr. Foreman and your members, the jury is asked to find some facts prove [sic] by direct evidence. For example, if there is reliable evidence that a person actually saw an accused person commit a crime, that's direct evidence, but that is not always possible. It is often the case that direct evidence of that is not available and so the prosecution relies on what is called circumstantial evidence to prove guilt. That simply mean [sic] that the prosecution is relying upon the evidence of various circumstances, relating to the crime and [the applicant] which they say, taken together, looked at globally, will lead to the sure conclusion that it is this man who committed the crime. No evidence had been led as to the actual moment [the deceased] received any injury, but the Crown is inviting you in this case, as I understand it, to examine all the circumstances and to reach the conclusion that it was [the applicant] who inflicted the injury that caused her death."

[124] It is particularly noteworthy that, in this passage, the learned trial judge focused the attention of the jury on the absence of direct evidence of the applicant inflicting the fatal injury to the deceased. The learned trial judge then, quite properly, at page 1960, concluded this aspect of her directions with the following:

> "The circumstantial evidence can be a [sic] powerful evidence, but it is important that you examine it with care and you consider whether the evidence on which the prosecution relies in proof of its case is reliable. Consider that and whether it does prove guilt. And before convicting on circumstantial evidence, you should consider whether it reveals any other circumstances which are of sufficient reliability and strength to weaken or destroy the Crown's case. You should be careful to distinguish between arriving at a conclusion based on reliable evidence, reliable circumstantial evidence and speculation, that is guessing.
>
> Speculating is no more [sic] making up theories without good evidence to support them and you are not to do that. You do not convict until you are sure of the guilt of the [applicant]."

[125] The learned trial judge went on to faithfully rehearse the evidence which was presented by both the prosecution and the defence. There was no obligation on her to do as Mr McBean suggests and identify circumstances which were either consistent with guilt or with innocence.

[126] The learned trial judge gave further directions, when she considered it necessary, reminding the jury of the need for them to be satisfied beyond a reasonable doubt before they could find the applicant guilty. At page 2093, she had this to say:

> "[t]here may be some questions you can ask yourself, but what you have to do is to consider the evidence, the circumstances globally. Consider everything. You will not get evidence, or you have not gotten evidence about every single element concerned, but what you are to do is consider all the evidence, but at the end of the day having considered all the circumstances, you have to be sure that the elements of murder are proved before you can convict the man. So it seems to me that you need to reflect on this and decide if you are satisfied so that you are sure of the guilt of this man."

[127] As she concluded the summation, the learned trial judge reminded the jury of the circumstances the Crown was relying on, in what she described as "point form". Then she said at page 2296:

> "Remember, Mr. Foreman and your members, that as you consider the circumstantial evidence, you have to consider any circumstances that would weaken the case for the prosecution. And I bring to your attention some that you might consider in that regard.
>
> Where the prosecution relies on [the applicant] sitting in the car waiting, and asked you to find a certain view, remember there is no direct evidence as to whether he was lay waying her or whether he was simply waiting on her."

The learned trial judge continued in this vein to highlight several pieces of evidence which, as she said, may have weakened the case for the Crown. This included a reminder that there was no evidence of who started the fight, if there was a fight and a reminder of Dr Milroy's evidence that the deceased's injuries were consistent with her falling from a height.

[128] The learned trial judge directed the jury, in a sufficiently accurate manner, about the standard and burden of proof. She rehearsed for them all the evidence and ultimately even went on to point out evidence which weakened the prosecution's case. She demonstrated that she was cognisant of the fact that there was no need for her to give any further special directions relating to circumstantial evidence. In these circumstances, there is no merit to the complaint about her treatment of this evidence on which the prosecution relied to prove its case. Ground five therefore fails.

Unreasonable verdict

[129] Mr McBean submitted that **R v Joseph Lao** (1973) 12 JLR 1238 established the principle that, in relation to questions of fact, this court will only interfere with the verdict of the jury if the verdict is shown to be obviously and palpably wrong. He noted that this case was cited with approval in several other cases from this court, including **Lescene Edwards v R** [2018] JMCA Crim 4.

[130] Queen's Counsel referred to the circumstances he had outlined which were either wholly consistent with innocence or insufficient to establish guilt, together with those he identified which ought to have resulted in the learned trial judge upholding the no case submission or withdrawing the case from the jury. He submitted that it was for these factors that the verdict of the jury is against the weight of the evidence, unreasonable, unsupportable and palpably wrong.

[131] The Director, in her submissions, agreed that **R v Joseph Lao** establishes the very important principle of the basis on which this court will interfere with the verdict of a jury. She however rejected the applicant's contention that, since the jury by its verdict rejected the defence's version of the case and accepted and returned a verdict based on the case presented by the prosecution, the verdict becomes unreasonable, unsupportable, against the weight of the evidence and palpably wrong.

[132] It was submitted that, the applicant, in this ground, was seeking to do exactly what this court in **Lescene Edwards v R** forbids, that is, to practically retry the case before us and substitute and prefer his version of events. The Director maintained that

the quality and quantity of the circumstantial evidence that was presented was such that the verdict of the jury cannot be viewed as unreasonable.

Discussion and disposal

[133] The head-note of **R v Joseph Lao** provides a useful statement of the principle which should guide this court when a complaint is made challenging the verdict of the jury as being unreasonable. It is set out at page 1238 as follows:

> "Where an appellant complains that the verdict of the jury convicting him of the offence charged is against the weight of the evidence it is not sufficient for him to establish that if the evidence for the prosecution and the defence, or the matters which tell for or against him are carefully and minutely examined and set out one against the other, it may be said that there is some balance in his favour. He must show that the verdict is so against the weight of the evidence as to be unreasonable and insupportable."

[134] We have found that the learned trial judge correctly determined that there was sufficient evidence presented that was to be assessed and determined by the jury. This she did at the end of the prosecution's case when she rejected the no case submission and at then at end of the defence's case when she declined to withdraw the matter from their consideration. There were several photographs taken of the scene, and there was evidence of several phone calls made by the deceased and the applicant along with text messages shared between them among the circumstances left for the jury to consider. The learned trial judge fairly outlined the competing cases for the jury and she also left for the jury's consideration the issues of provocation, lack of intent and self-defence in a manner in which we can find no fault. She invited them to consider the lesser verdict of manslaughter.

[135] In these circumstances, it has not been shown that the verdict of the jury, which demonstrated that they were satisfied on all the evidence that was presented so that they felt sure of the applicant's guilt, was unreasonable and insupportable. This ground also fails.

The judge's directions to the jury

[136] Mr McBean, in grounds seven, eight, nine, 10 and 11, identified areas where he complained that the learned trial judge had erred in the directions she gave to the jury. He relied on them as detailed in the grounds of appeal and hence was not called upon to expand on them in his submissions to us. Similarly, the written responses from the Crown were relied on without need for expansion.

[137] In ground seven, the general complaint was that the learned trial judge erred in failing to direct the jury that, in assessing the credibility of witnesses, they should take account of reliable, unchallenged evidence such as photographs, telephone or cellular phone records and forensic evidence which contradicts viva-voce evidence and reject the viva-voce evidence of the witnesses so found to be contradicted.

[138] In response to this complaint, it was submitted that the learned trial judge directed the jury adequately in how they should assess witnesses and, importantly, told them they could accept or reject parts of the evidence in assessing the credibility of witnesses.

[139] In **Lescene Edwards v R**, Brooks JA, writing on behalf of the court, set out a succinct reminder of what is expected of a trial judge in his or her summation at paragraph [26]:

> "A trial judge, in summarising to the jury, the evidence adduced during a case, is not required to do a minute examination of the evidence to explain the case of either the prosecution or the defence. The level of detail required will vary from case to case, but it will generally be sufficient to give a fair and balanced outline of each of the respective cases and to point out major discrepancies where they occur. A direction as to the method of dealing with discrepancies and inconsistencies, where they occur, is also required."

[140] The learned trial judge gave unexceptional directions to the jury on their functions including their duty to determine where the truth lies. In her opening remarks she had this to say at page 1948:

> "Now, Mr. Foreman and your members, you do not have to decide every single point which has been raised. You need only decide such matters that will enable you to say whether the charge laid against [the applicant] has been proved. You do that by considering all the evidence which has been called, including the evidence which was agreed and admitted and by forming your own judgment about each witness about the reliability and credibility of each witness."

Against this background she went on to review the evidence and several times reminded the jury that they were to consider all the evidence, including the exhibits, to help them to arrive at their decision.

[141] It is noted that the main thrust of the attack in this ground is concerned with the treatment of the evidence of the several telephone calls and text messages which were

exchanged between the deceased and the applicant and how it could have impacted on the assessment of the credibility of the witnesses. The learned trial judge did review this evidence and invited the jury to consider it. She also commented on the evidence in a manner which has not been the subject of any complaints. One example is at 2271 where she made the following comments;

> "Do these records help you to say what type of relationship existed between them? Does it assist you to determine if one party was pursuing the other party or were they both pursuing each other? ...
>
> Does this help you with their relationship that they, the prosecution says, was up and down? A matter for you."

And at page 2272 she had this to say:

> "So we have heard about a whole lot of calls going both ways, and that Mr. Foreman and your members, was just in July, 2008. And we hear about all these calls going both ways. You can count them if you want to count them, that's up to you... You decide what you make of that. What was going on between these people? Were they in control of their reasoning ability? You have to decide that, because that is one of the factors that you have to consider in order to come to a reasoned verdict."

[142] In any event, it may not have been fair or accurate for the learned trial judge to have invited the jury to accept that evidence of several phone calls, made between the applicant and the deceased, contradicted the evidence from Mr McCormack that he formed the view that the deceased was afraid of the applicant. Neither could it be fairly said that such evidence should be used to assess the credibility of Miss Prendergast in

the manner that Mr McBean posited. The learned trial judge did not err, in our view, when she dealt with this evidence in the manner she did.

[143] In ground eight, the complaint is about a comment made by the learned trial judge about the account given by the applicant about the telephone calls he said he made to the deceased after she had stormed out of her apartment. The comment identified was "the [applicant] had started to build his defence immediately and that he made those calls knowing that no one would answer?" It was submitted that the learned trial judge erred in asking the jury to consider this, thereby causing unfairness and prejudice to the applicant, as there was no evidential basis for the jury to consider such matters.

[144] In response, it was submitted that the learned trial judge had directed the jury adequately about how comments made by both counsel and herself, should be treated. From this response, it would seem that the invitation by the learned trial judge for the jury to consider the issue in this manner may have arisen from something said during the addresses made to them.

[145] The context in which the comment was made is significant. The learned trial judge was at the time reviewing the evidence of the several phone calls which had been made, between the applicant and the deceased, on the night of 15 July into the morning of 16 July. On pages 2269 and 2270 she said the following:

> "...When I look at this record the calls that are recorded are at 12:01, again at 12:01, 12:02, 12:03, 12:17, 12:35 and 12:37, all from Oaklands. So the last one I see here between

> those two numbers is at 12:37, and that call originated from - according to this - from 371, that's from the [applicant] at 12:37, and that call was of a duration of 1.7 seconds.
>
> ...So, now, Mr. Foreman and your members, do these calls- if you accept that this evidence is reliable and credible – does [sic] these calls support the defence's case? Or is it that this [applicant] had started to build his defence immediately and that he made those calls knowing that no one would answer? This, Mr. Foreman, you have to determine as you consider this amongst all the pieces of evidence to which you have been exposed."

In this context, the comment is the juxtaposition of the evidence given with what must have been the view of it the prosecution was inviting the jury to take. There is nothing unfair or prejudicial about this comment in these circumstances.

[146] In ground nine, the following statement of the learned trial judge is described as a misdirection which caused prejudice to the applicant:

> "Bear in mind the [applicant] has made mention of something more than one black eye." (at page 2217, lines 2 - 9).

It was submitted that this misdirection gave the jury the impression that the applicant caused the fatal injury to the deceased.

[147] In response, it was submitted that this challenge is unfounded and is isolated from the context within which the learned trial judge was speaking and the balancing the evidence.

[148] It was while the learned trial judge was reviewing the evidence of Dr Milroy that she made the comment that is the subject of the complaint in this ground. The passage in which the comment was made reads as follows at page 2217:

> "[Dr Milroy] said that with the exception of the injury over the right eye which could be a punch, all the injuries can be accounted for by a fall from height. According to him there are no other injuries that indicate there was an attack by another party.
>
> Bear in mind that the [applicant] has made mention of something more than one black eye."

[149] The evidence from the prosecution was that the applicant had said in the presence of Constable Glenn that he and the deceased had had a fight and admitted to punching her in her eye. Also, from Detective Amos, there had been evidence that the applicant had said he had given the deceased some thumps and licks. It seems, therefore, that on the totality of the evidence offered by the prosecution, the applicant did mention something more than one black eye.

[150] It is however true that the applicant, in his unsworn statement, did not admit to inflicting the black eye or any other specific injury. He had said that the deceased had started to hit and grab at him so he had hit back at her so that he could get away, but he could not say where his hand had caught her. He also had adopted the contents of the written statement he had given in which he had made no mention of any fight at all.

[151] It is useful to note what occurred after this comment was made. The court was adjourned shortly after. On the resumption, Mrs Jacqueline Samuels-Brown, in the

absence of the jury, reviewed the relevant evidence with the learned trial judge and urged on her the fact that the applicant had not said he gave the deceased a black eye. The learned trial judge re-visited the issue and upon the return of the jury, had this to say to them, at pages 2253:

> "Now, I need to correct something I said to you yesterday here, because I may well have given you the impression that this man had admitted to giving a black eye, that is not so. What he did say was that he punched her in the eye, and he also said, and by him, I mean, the [applicant]. He also said that he gave her thumps and licks and he also said that he hit her to get her away from him. He didn't use the word 'black eye', he said he punched her in the eye. This is courthouse, you have to be careful and precise, so I am sorry, I made that error but I am able to correct it. So you know what he said."

[152] In these circumstances, whatever misdirection the learned trial judge may have given initially was corrected in a manner that more accurately and fairly represented the evidence. There is no complaint about the manner in which the learned trial judge sought to correct the issue. There is therefore no merit to this ground which is concerned with the initial directions.

[153] The complaint at ground 10 relates to the directions the learned trial judge gave, touching the evidence of Dr Prasad, about one of the injuries he saw on the deceased. The complaint was in relation to the following, said by the learned trial judge at page 2107, lines 16-18 as follows:

> "No 19, was two skin deep lacerations by the third toe, as it concerned the aeration [sic], the doctor said that those could have occurred by dragging."

And shortly thereafter she asked "was she dragged before she died?"

[154] The complaint is that the doctor had in fact said that the post mortem injuries were consistent with a dragging and this injury number 19 was an ante mortem injury. It was submitted that in incorrectly rehearsing what the doctor had said about one of the injuries, the learned trial judge caused prejudice and unfairness to the applicant.

[155] In response, it was submitted that what was important was a comment the learned trial judge made subsequently, where she reminded the jury to use their common sense and consider the evidence.

[156] It is correct that the doctor had testified that injuries number 1 to 19 (inclusive of the injury by the toe) were all ante mortem in nature. In relation to these injuries the following exchange took place between the Director and the doctor:

> "Q. The other injuries, ante mortem [sic] that you described –everything else, the abrasions, would that be consistent with the individual –the female being involved in a fight?
>
> A. Yes, Ma'am."

[157] Also correct is that the doctor testified that the post mortem injuries could have occurred by dragging the body on a rough surface or on a floor or during transportation to the hospital. It is not clear from the way the evidence is recorded that the doctor offered any opinion as to the cause of injury number 19. The learned trial judge would therefore have erred if she sought to give the cause of this ante mortem injury as the body being dragged.

[158] It is useful to consider more of the portion of the summation from which the sentences being complained about were taken:

> "No. 19, was two skin deep lacerations by the third toe, as it concerned the aeration [sic], the doctor said that those could have occurred in dragging. He said in his opinion, all the injuries occurred before [the deceased] died, those 19 injuries, if he is correct. Was she dragged before she died? If the doctor is correct, we have heard no evidence of any noise what was in the apartment that night into early morning. A part [sic], of course, from what the neighbour spoke about. Did her body came [sic] into contact with a rough object or surface before death? If it did, in what circumstances did it come in contact with a rough object or a rough surface? Dr Prasad then described to us eight injuries after she died."

In this full context, although the learned trial judge did not actually say that injury number 19 was a post mortem injury, she would have been incorrect in saying that the doctor had said that the injury could have occurred from the body being dragged. However, as she continued, the questions which she posed for the jury's consideration seemed to have fairly raised issues that could assist them in arriving at a decision.

[159] The question, therefore, is, whether this error, in relation to one of the 19 ante mortem injuries, was such that it resulted in prejudice or unfairness to the applicant. It is not evident, from an appreciation of the entire section of the summation from which the sentences being complained about, that this is so. Indeed, the way the learned trial judge went on to raise issues for the jury to consider seems to be eminently fair. In any event, this error, taken by itself, is not in our view sufficient to disturb the conviction, given the totality of the evidence which the jury had to consider.

[160] The final ground attacking the directions of the learned trial judge is that she told the jury that the injuries to the deceased, according to one of the experts, are not consistent with being dragged downstairs. It was submitted that this was an error because both experts gave such evidence. The evidence from Dr Prasad that was highlighted was his admission, while being cross-examined, that if a person was pulled down the staircase (as seen in a photograph of the staircase in the deceased's apartment building), he would expect to see more abrasions and contusions than those he had observed on the deceased. The evidence from Dr Milroy, highlighted on this point, was that he would have expected to see a different pattern of injuries if the body had been pulled either up or down the stairs.

[161] In response, it was submitted that there can be no challenge to this summary of the evidence since the learned trial judge's recitation was correct.

[162] As the learned trial judge was concluding her summation, she endeavoured to bring to the jury's attention some of the evidence she thought "would weaken the case for the prosecution". It was against that background that she made the following statement at page 2297:

> "I remind you that there is evidence that injuries on her body, according to one of the experts, is that injuries on her body are not consistent with being dragged downstairs."

[163] It is, therefore, correct that the learned trial judge did not accurately represent the evidence, since it was indeed both the doctors who had testified that the injuries they saw on the deceased were not consistent with what they would have expected in

the circumstances of the body being dragged downstairs. This was an issue, which, as the learned trial judge properly identified, weakened the case presented by the prosecution. The error by the learned trial judge in attributing this evidence to one of the doctors only did not take away from that fact and the matter was therefore clearly placed before the jury for their consideration. Accordingly, in our view, no miscarriage of justice would have been occasioned by the learned trial judge's error.

[164] Ultimately, although two of the complaints made in relation to the directions of the learned trial judge have some merit, they do not render the verdict of the jury unsustainable.

Breach of the applicant's constitutional right to a fair trial

The submissions

[165] Mr McBean began the submissions on these grounds by considering the relevant law. He appropriately pointed to the Constitution, in which section 16(1) of the Charter of Fundamental Rights and Freedoms provides:

> "Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

[166] It was submitted that in the Privy Council decision of **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26, the Board affirmed the law as stated in **Attorney General's Reference** [2004] 2 AC 72 and as summarised in **Boolell v The State** [2006] UKPC 46. Further, it was submitted that in **Lescene Edwards v R** Brooks JA offered guidance on the factors to be considered when this

court considers whether an appellant's right to a fair trial within a reasonable time has been breached.

[167] It was submitted that the applicant's constitutional right to a fair trial within a reasonable time was clearly breached as his trial took place eight years after the date of the alleged offence. Further, it was submitted that as a result of this breach of the applicant's constitutional right, there was prejudice caused to the applicant in five respects as detailed in ground six. These will be considered in the discussion to follow, as necessary.

[168] The submission continued that the applicant's constitutional right to a fair trial was also breached by the poor and insufficient investigation carried out by the police. It was noted that the learned trial judge, in her summation, referred to six instances of poor investigation. These will also be detailed and considered in the discussion to follow.

[169] In the submissions in response, there was reliance on **Lescene Edwards v R** along with **R v Dalton Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 41/1997, judgment delivered on 25 January 2007 and **R v Flowers** [2000] UKPC 41.

[170] The Director appropriately conceded that the fact that the matter was prosecuted eight years after the incident, was proof of inordinate delay. She contended that this, however, was not enough since a consideration of the reasons for the delay indicate that blame can be apportioned equally between the Crown and the defence. The

Director supplied this court with and referred to the prosecution's records detailing the progress of the matter through the court before the trial eventually commenced.

[171] It was also accepted that the investigations, on the part of the police, left much to be desired and it was pointed out that this was admitted at the trial. It was submitted that the applicant would have suffered very little prejudice, if any, since the learned trial judge in her summation was at pains to highlight these weaknesses in the investigations. Further, it was contended that it was the prosecution's case that would have been put at a disadvantage by the lack of professionalism on the part of the investigators, for example, the inability to locate exhibits placed in the police's storeroom and the failure to process all the biological material that was on the scene.

[172] In conclusion on these grounds, it was submitted that it cannot be said that the delay in starting the trial or the absence of witnesses or material, resulted in a situation where it was unfair to subject the applicant to a trial, nor was the subsequent trial unfair to the applicant.

Discussion and disposal

[173] The issue of whether there is a breach of the constitutional right to a fair trial within a reasonable time only if there is a sufficient element of prejudice or unfairness or whether there is a breach if the delay is unreasonable without more, notwithstanding that the trial itself may be regarded as having been fair was recognised as settled by the Privy Council in **Boolell v The State**. Their Lordships found that the resolution of

the issue is to be found in the decision of the House of Lords in **Attorney General's Reference** where Lord Carswell writing on behalf the Board had this to say:

> " 31. Lord Bingham stated in paragraph 22 that the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. He went on to summarise his conclusions at paragraphs 24 and 25:
>
> '24. If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither conditions (a) or (b) applies, the prosecutor

> and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.
>
> 25. The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by **R v Horseferry Road Magistrate's Court, Ex p Bennett** [1994] 1 AC 42, but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which **Darmalingum v The State** [2001] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (**Martin v Tauranga District Court** [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.'
>
> 32. Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:
>
> (i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."

[174] In the Privy Council decision of **Melanie Tapper v Director of Public Prosecutions**, their Lordships affirmed that the law as stated in the **Attorney General's Reference** case, and as summarised in **Boolell**, also represented the law in Jamaica. The section of the Constitution that was considered in **Melanie Tapper v The**

Director of Public Prosecutions was section 20(1) which is the equivalent of section (16) (1) of the Charter.

[175] In **Lescene Edwards v R** Brooks JA usefully tried to determine factors that could guide the approach to be taken when the issue of the effect of a delay in bringing a matter to trial is being determined. He referred to the decision from the Privy Council of **Bell v Director of Public Prosecutions** (1985) 32 WIR 317; [1985] AC 937 and noted at paragraph [48]:

> "Their Lordship held that '[i]n determining whether delay in bringing an accused to trial constituted a breach of his right to a fair trial within a reasonable time under section 20(1) of the Constitution a court should have regard to the length of the delay, the reasons alleged to justify it, the responsibility of the accused for asserting his rights, and any prejudice to the accused' (318d). This approach was adopted in **R v Dalton Reynolds**, cited by Mrs Palmer-Hamilton. In **R v Dalton Reynolds**, this court also specifically considered the strength of the prosecution's case."

[176] Of course, it must be borne in mind that **Bell v The Director of Public Prosecutions** was decided before and was notably referred to, in **Boolell v The State**. It is no longer whether the delay constituted a breach as it is now accepted that a delay does in fact constitute a breach and this is so whether there is prejudice to the appellant. The question then becomes what, if any, remedy should be afforded to the accused person and the issue of fairness to the accused must then be factored in. However, the approach as adopted by Brooks JA in **Lescene Edwards v R** remains useful, as long as, ultimately, the issue of fairness to the accused is addressed.

[177] The delay of eight years in bringing the matter to trial in this case has been accepted as being an inordinate one. In the records compiled of the progress of the matter through the courts, it is seen that the matter was first before the court on 24 March 2009, on which date the applicant was granted bail. After several mention dates the matter first came on for trial on 19 October 2010 when it was adjourned and the records indicate that this was due to the absence of the doctor. Thereafter, the case came on for trial eight times before commencing on 11 July 2011. During this time there were several occasions the matter was mentioned for statements, reports and telephone records to be served on the defence. Curiously, there were also adjournments for a fingerprint report until it was recognised that none was forthcoming since no dusting for fingerprints had been done. It is noted that on four of the dates agreed for trial, the matter could not commence due to the fact that the court was engaged in other trials. Also notable is the fact that on two occasions the matter did not commence because the investigating officer had fallen ill. In the circumstances, there was no overriding unfairness to the applicant given the reasons for the delay and especially since it was not due entirely to the prosecution.

[178] There is nothing in the records to suggest that the issue of the delay was raised to challenge the matter eventually proceeding to trial. As noted by the Director in her submissions, there is also nothing presented by the applicant to indicate that he had asserted his rights in this regard in the court below.

[179] In ground six, Mr McBean detailed five respects in which he contends there was prejudice caused to the applicant as a result of the breach of his constitutional rights. They will be considered as presented.

(a) The cellular telephones of the deceased and the [applicant] were unavailable for analysis. The condition of the deceased phone could assist in determining whether the deceased fell from a height.

[180] Mr McBean presented to this court a bundle with copies of several letters exchanged between Mrs Samuels-Brown and the Director and members of OCID. In October 2010 there was a request made to the Director for an opportunity to inspect the phones that had been referred to by Deputy Superintendent Pommells and Detective Corporal Amos as having been taken, along with an enquiry as to whether relevant phone records had been secured. In July 2013 there was a request made to three officers of OCID for access to the telephone belonging to the applicant. There is no indication, what, if any, response she received from the officers. On 30 August 2013, the Director was asked to use her best efforts to ensure that the applicant's telephone would be made available for examination before the date of trial, which was then set for 23 September 2013.

[181] By September 2015, Mrs Samuels-Brown, in a letter to the Director, indicated that she had been made aware of the fact that the applicant's telephone and data from three mobile telephones were missing and she was supplied with statements addressing that issue. In April 2015, she complained that it would be unfair for the applicant to face trial without the records she had requested but submitted to a trial date being set,

without prejudice, to the applicant's basic right to fairness, given the time that had passed since he was charged.

[182] After the trial had commenced, she sought and obtained agreement to have statements of witnesses which were relative to the missing telephones being put into evidence. As a result, three such statements were read to the jury: those from Constables Shawn Brown and Kemar Wilks, along with that of Joseph Simmonds. Accompanying the statements from these witnesses were extensive call records from the applicant's telephone along with those of the deceased which became a part of the case for the applicant and was available for the jury to consider in their deliberations. From comments made by the learned trial judge, it is clear that extracts from text messages shared between the applicant and the deceased also formed part of the records and were relied on by both counsel in their addresses. In the submissions to this court, use was also made of the records. It is not clear what other analysis of those telephones could have been done and how failure to do so affected the case presented by the defence. In the circumstances, there was no demonstrable prejudice to the applicant caused by the absence of the telephones.

[183] There were no questions asked of the witnesses who handled the telephone taken from what was described as the pool of blood at the back of the apartment as to the condition of that telephone. The applicant himself, who said he found the deceased and spent some time trying to resuscitate her, made no mention of the telephone. It might well be accepted that, given the state of distress he said he was in at the time, this could hardly be surprising. The issue of the state of the telephone did not arise

such that it can now be said that the absence of evidence of its condition contributed to causing the applicant's trial to be unfair.

(b) Witnesses [sic] Detective Roye of Scenes of Crime Unit had left the Police force resulting in his statement being read into evidence without the opportunity of the [applicant] or his counsel to examine him in detail in relation to aspects of his duty which compromised the investigation

[184] It is useful to recount the role of this witness who was absent at the time of trial. The evidence from the statement of Detective Roye was that he was a crime scene investigator who witnessed Detective Corporal Matterson take photographs of the scene at the apartment, as also of the deceased at the UHWI on 16 July 2008. He also revisited the scene with Deputy Superintendent Pommells where he took photographs and collected samples from the wall in the wash room and on two sections of the steps. He examined a window in the washroom for latent fingerprints but found none. On 24 July 2008, he also attended the post mortem examination of the deceased, took photographs of the body and collected items from Dr Prasad. These items were eventually handed over to the government analyst. On 25 July, he again visited the scene with Deputy Superintendent Pommells and Detective Corporal Matterson and took more samples from substances resembling blood on objects in the apartment. There was evidence that all the items received from Dr Prasad and those that he collected himself were submitted for analysis and the relevant analysts gave evidence of the results in the case presented for both the prosecution as well as the defence.

[185] From his statement, it is apparent that Detective Sergeant Roye did not make any visits to the scene alone and the other officers who accompanied him testified and

were extensively cross-examined. The possibility of Detective Sergeant Roye being able to do anything to compromise the investigation was not raised with any of these officers. Whilst it is true that it would have been better for Detective Sergeant Roye to be confronted himself about that possibility, it is not apparent from his account of the role he played in the investigations and the eventual use that was made of the items that he collected, how he could have compromised the investigations such that his absence at the trial affected its fairness to the applicant.

(c) The pair of jeans worn by the [applicant], the comforter and clothing were missing/or could not be found and examination of same could assist in determining whether a struggle took place and the nature of same.

[186] There was no dispute that these items, which could not be located at the time of trial, were among those submitted for analysis and the analyst testified of the results from the tests done on them. There were no questions asked of either of any of the witnesses who testified about the collection of these items or the analysts raising the issue of the condition of the items and whether a view could have been formed about a struggle having taken place. Although the pants were not available for the jury to view, the shirt he was wearing at the time was admitted into evidence and no issues arose as to whether there was evidence of a struggle apparent from the shirt. It is highly speculative to assume such signs would be on the pants and not the shirt. Importantly, also, there were photographs taken of the comforter which were admitted into evidence. In any event, the applicant himself admitted to having been involved in an incident involving some amount of violence with the deceased. In these circumstances,

it is not apparent that any unfairness was occasioned to the applicant due to the absence of these items.

[187] The final two instances referred to by Mr McBean as causing prejudice to the applicant are the absence of witnesses Joseph Simmonds and Constable Wilks from the trial, with their statements being read into evidence. As already noted, the defence was not deprived entirely of the information that came from the call records and data that these two witnesses had assisted in collating and which were exhibited for the jury's consideration. In relation to the CD that had been produced by Mr Simmonds which was admitted into evidence, another witness called by the defence was permitted to explain and comment on its contents. Whilst the presence of these witnesses would have facilitated their being able to explain, themselves, the information contained in the exhibits, there is nothing to indicate that any unfairness to the applicant, occasioned by their absence, is sufficient to have an impact on the jury's verdict.

[188] In conclusion on this ground, the matters that were relied on as causing prejudice to the applicant do not support the contention that, as a result of the delay of eight years, the trial of the applicant was unfair and the unfairness was of such a nature that the jury's verdict ought to be disturbed.

[189] The question which is raised in ground 12 is whether the applicant's right to a fair trial was breached by the poor and inefficient investigation carried out by the police. The areas identified as being evidence of this poor investigation are the failure to collect fingerprint impressions from the scene or from the deceased's phone, failure to collect

blood, nail and hair samples from the passage below the washroom for testing, failure to take detailed and comprehensive photographs of the deceased's cellular phone, failure to procure any telephone records for the deceased to assist the investigation, failure to secure the scene of death and the loss of the telephones of the applicant and the deceased.

[190] The first thing that strengthens the contention that the police investigation was poor is that the Director herself, during the trial, conceded that this was so. During the summation, the learned trial judge referred to this fact and at page 2292 had this to say:

> "Mr Foreman and your members, the DPP, learned as she is, said the police work leaves much to be desired. She says the police work was sloppy and could be more professional. I agree with her. That's my view. She says that she will deal with it elsewhere and I commend her for that. But, Mr. Foreman and your members, you do not have the luxury of dealing with it elsewhere, you have to deal with it now. So, you have to consider all the evidence, including evidence based on what has been described as sloppy work, and come to a proper verdict. Do you agree with her description? You don't have to agree with it. That was just a comment. A comment I make. But you may find that the work was efficient to provide you with evidence. And I dare say, even if the work is sloppy, it can still provide you with evidence that you can consider. So the question is, when you consider all the evidence, has the prosecution satisfied you so that you are sure of the guilt of this man?"

The learned trial judge, here, very fairly and appropriately, pointed out to the jury that they were to focus and be satisfied on the evidence that was presented, in determining whether the applicant was guilty.

[191] In **Lescene Edwards v R**, Brooks JA, acknowledging the guidance given in **R (on the application of Ebrahim) v Feltham Magistrates' Court and another; Mouat v Director of Public Prosecutions** [2001] 1 All ER 831, recommended the following factors for courts to consider when there has been a failure to collect evidence or where evidence, though collected, has been lost or destroyed:

> "1. whether the investigating authorities were under any obligation to collect the evidence;
>
> 2. if there were no such duty, whether any request was made by the defence for the material, before it became unavailable;
>
> 3. if there was a breach of duty in the collection or preservation of evidence, the court should consider whether there could have been a fair trial, bearing in mind the trial process does compensate for many such defects in providing evidence; and
>
> 4. whether the conduct of the prosecution was so egregious that it should not be allowed to prosecute the accused and a quashing of the conviction is the only remedy."

The complaint here has nothing to do with the conduct of the prosecution and so the matter is to be resolved by considering the first three factors.

[192] Brooks JA, in considering the obligation to collect evidence, commented that "[s]ome level of reasonableness should however be applied. It would be unreasonable to say the investigators were in breach of their duty merely because of a slip to collect some bit of evidence which in hindsight could be thought material" (see paragraph [57]).

[193] The fact that there were no independent eyewitnesses to what had happened between the applicant and the deceased meant that the police were indeed under an obligation to collect all the possible available evidence that would assist in determining the events that had led to her death. In relation to the first complaint about the failure to collect fingerprint impressions from the scene, Detective Sergeant Roye, in his statement, had said he looked for impressions on the window in the washroom and there were none. From the sequence of events that night, it is hard to see how the existence of fingerprints anywhere else on the scene or on the deceased's phone would have assisted in a determination of how she had met her death. There was no breach of duty for failing to seek out fingerprint impressions in the circumstances.

[194] There, however, seems to have been a breach in the obligation to collect all relevant evidence by the failure to have any analysis done in relation to the substance in which the phone of the deceased was found. Although the opinions of the expert witnesses were solicited as to what the substance could have been, there was no scientific confirmation of whether the substance was in fact blood. The applicant did not point out where he said he had found the deceased; however, there was general acceptance that the area where the phone was recovered was that area. Although questions were asked in cross-examination of some of the witnesses for the prosecution, about items which, from the photographs, seem to have been in the substance, there was no evidence as to what those items were.

[194] The learned trial judge commented on this issue on more than one occasion during the summation. One such comment is found at pages 2091 - 2093, where, after

reviewing the evidence of Deputy Superintendent Pommells in relation to the failure to take samples from the substance, she had this to say:

> "We have no evidence from anyone as to the exact place where [the deceased] body was found. Is this evidence that you can use to draw an inference, a commonsense conclusion as to where her body was actually found, is there?
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> [The applicant] said he found her in his statement which he submitted. He said in that statement, that he found her in the rear of the building in the area by the garbage skip. That's what he said. If you believe that. And there was a stain in the passage which some persons have described as a pool of blood, some have said it is not a pool. You have the picture. How did that substance get there? What is it? If it is relevant to this case how did it get there? That substance that some describe as a pool, some say a stain, but we don't know scientifically what it is, but it is a substance in which the evidence is, a telephone was found. What is it? How did that substance get there?
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> The DPP, learned as she is, commented; it is a comment, that everything that happened in the apartment to [the deceased], everything that happen to her happened in the apartment - that was her comment, if you can agree or not agree with her. If you agree with her, answer the question; where was her body found? If it is that everything happened in the apartment; where was her body found? If the body was found in the apartment, is there evidence to show you that? If the body was found elsewhere, is there evidence to show you how it reached elsewhere? There maybe [sic] some more questions you can ask yourself, but what you have to do is to consider the evidence, the circumstances globally. Consider everything. You will not get evidence, or you had not gotten evidence about each single element concerned, but what you are to do is consider all the evidence, but at the end of the day having considered all the circumstances, you have to be sure that the elements of murder are proved before you can convict the man."

[195] The breaches pointed to, in relation to the telephone of the deceased, concerned failure to take pictures of it, its eventual loss and the failure to procure records from it. Also, added to that, there was the loss of the telephone belonging to the applicant. It has already been discussed how requests were made for the telephones from shortly after the matter was placed before the court. Eventually, when it was made known that the telephones were missing, call records and data from the telephones were provided to the defence. The applicant was therefore able to, and did, rely on the records which were provided. It would be speculative to presume that there was other material on the telephone, the absence of which impacted adversely the case for the defence. In any event, the fact that the telephones were missing was commented on by the learned trial judge and at pages 2258 – 2259, she had this to say:

> "The defence up to now, as I understand what is occurring, up to now the telephones have not been produced, so that the defence has not been able to have the telephone examined by its own persons or experts in order to find any information there. So it is in that context that they are relying on the statements of persons who have provided information to the prosecution and which the prosecution shared with them, but at no stage was the prosecution interested in or did it say it would be providing you with the information about the telephone. But the prosecution agreed for the evidence to go in."

And at page 2278, after reviewing some of the text messages that had been recovered from one of the telephones that had been exchanged between the deceased and the applicant, the learned trial judge said:

> "So, the question may well be asked, if they had gotten the telephone, would there be any Whatsapp, e-mail, anything on the actually [sic] instrument that would assist them? We

> don't know, because the first exhibit concerns telephone calls alone. This exhibit now concerns text messages. If it is possible that they are other messages? We don't know, but that is the complaint of the Defence, that they were deprived of the telephone and the consequence of that, but in any event the Prosecution says that they were not relying on telephone records. So where would Defence get the record from? Is the question, because the telephones were not provided. Well, provided or provideth not, you have to come to a decision, and you can't imagine what could have been, you deal with what you have."

In the circumstances, the breach occasioned by the missing telephones was adequately addressed and dealt with in a manner that did not interfere with the fairness of the trial.

[196] The failure of the investigators to secure the crime scene was raised with them, during vigorous cross-examination, and was explored with other witnesses. The issue was addressed several times by the learned trial judge whilst reviewing their evidence. At page 1991 she stated:

> "The officers told us, that is the Scene of Crime officers, who were processing the scene and they all stayed there until about 4:00 in the morning, during that time no one came to the apartment and it was still in the possession of the cousin. If you believe that evidence, this goes to the matter as to whether or not persons were allowed to interfere with the apartment. Had it been secured properly? You need to consider that, if you find that it wasn't and you say 'Yes, something unusual happened,' what?"

Later, at page 1994, she made the following observation:

> "Cross-examination of Mr Amos is, in my view, is inviting you to elicit evidence to say that the investigation was not properly done and that the scene may have been disturbed by persons and invite you to say that you should not rely on it."

And in relation to Deputy Superintendent Pommells' evidence on the matter, she said this at page 2087:

> "Officer Pommells said there that there was yellow tape set up on the premises in the area of the bloodstains and the purpose of the tape was to secure the scene and to prevent others from going there. He never knew that of all the photographs stated and taken, none of which showed a yellow tape. So, was there yellow tape? And if it was not taken, was the scene secured? The yellow tape is one thing, but the point is, so the real question is, was the scene properly secured for investigations to provide you with reliable evidence as to what really happened up there?"

[197] There can be no dispute that the best course was for the scene to have been properly secured while it was being processed. The possibility of this not being done was explored and properly left for the jury's consideration, in a fair manner, by the learned trial judge.

[198] Although it was conceded by the Director at the trial that there was indeed poor and inefficient investigation, the examples highlighted were not of such a nature that it can be said that it resulted in a breach of the constitutional right of the applicant to a fair trial, which could only be addressed by interfering with his conviction. Accordingly, ground 12 also fails.

Duty of disclosure

[199] The complaint in ground 13 is that the prosecution breached their duty of disclosure, resulting in a breach of the applicant's right to a fair trial, by failing to disclose and make available the four telephone instruments for independent analysis at the insistence of the defence. Further, the prosecution is said to have failed to disclose

the persons who were responsible for the availability or non-availability of the said telephone instruments, despite repeated applications by the defence. Mr McBean relied on the ground as stated and did not advance any submissions in support.

[200] There is no dispute that the prosecution has a duty at common law to disclose to the defence all relevant material which is evidence which tends either to weaken the prosecution's case or to strengthen the defence (see **Willard Williamson v R** [2015] JMCA Crim 8).

[201] As already discussed, from the letters provided by Mr McBean to this court, the defence did request and were never given the telephones that the police had taken during the course of investigation. It is also noted that although the initial request was for all telephones, the request became focused on the applicant's telephone. Also recognised is that the defence was advised that the telephones were missing and it is noted that the prosecution provided the defence with information pertaining to the telephones contained in statements from several individuals. The prosecution also offered to make the makers of those statements available to the defence, to be used in a manner the defence deemed appropriate. The prosecution was clearly unable to provide the items that the defence had requested, but took steps to try to ensure the applicant was not deprived of material from them. Ultimately, however, there was non-disclosure of material the defence requested which could have assisted them in advancing the case for the applicant.

[202] In **Willard Williamson v R**, McDonald-Bishop JA (Ag) (as she then was), considered the determinative question for this court when the issue of non-disclosure is raised. At paragraphs [81] and [82] she stated:

> " It is accepted ....that the pivotal consideration for this court in view of the complaint concerning non-disclosure is that stated in **Bonnett Taylor** [2013] UK PC 8; [2013] WLR (D) 104. There, Lord Hope, in speaking for the Board, opined at paragraph 13, in so far as is relevant:
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> > 'But, even if it was possible to say either that the prosecution was at fault for delaying its disclosure or that the appellant's counsel was at fault for not having made use of it, it would not be enough to justify a finding that there has been a miscarriage of justice. **The focus must be on the impact which those failings had on the trial, and on the verdict that was pronounced at the end of it, rather than attempting to assess the extent to which either the prosecution or defence counsel were at fault:** ***Teeluk v State of Trinidad and Tobago*** [2005] UKPC 14, [2005] 1 WLR 2421, para 39, per Lord Carswell. **The court must have material before it which will enable it to determine whether the conviction is unsafe.'**(Emphasis added)
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> [82] Their Lordships did go on to establish clearly in paragraph that the relevant test in determining whether a miscarriage of justice had occurred, is whether, after taking all the circumstances of the trial into account, there was a real possibility of a different outcome."

[203] The defence was able to include in its case the data and call records taken from the telephones of the applicant and the deceased. From the summation of the learned trial judge, it is apparent that both Queen's Counsel were able to use this material in the addresses they made to the jury. The learned trial judge appropriately left the

matter of the missing telephones to the jury and also used the records in a fair and balanced manner in her summation. The records were exhibited and the jury had them to assist in their deliberations. It is noted that the complaint is that the missing telephones "could have had vital evidence of video images of the movements and actions of the deceased shortly before her death". The possibility of this did not arise from the applicant himself during the trial and, for this court to consider at this stage if they could have had such evidence, would be an exercise in speculation.

[204] In the circumstances of this trial, it cannot be said that there is a real possibility there would have been a different outcome, hence there is no miscarriage of justice. Ground 13 also fails.

Conclusion

[205] There was sufficient evidence presented by the prosecution for the learned trial judge to have rejected the submission of no case and to decline from withdrawing the matter from the jury. The learned trial judge also identified the issues that arose and fairly rehearsed the evidence that was presented, in a manner that was appropriate for a case as this which involved reliance on circumstantial evidence. There was nothing in her summation that amounted to a mis-direction, resulting in a miscarriage of justice. The trial of the applicant was on the whole fair and the majority of the jury, properly directed, returned a verdict which cannot be said to be unreasonable. Although the trial was not heard and completed within a reasonable time, thus constituting a breach of section 16(1) of the Constitution, this does not provide a basis to quash the conviction in this case. Ultimately, there is no basis on which this conviction ought to be disturbed.

[206] The applicant did not pursue the application to appeal his sentences. In any event, the learned trial judge demonstrably applied the correct principles in arriving at the sentence of imprisonment for life, with a stipulation that the applicant should serve a minimum of 20 years before becoming eligible for parole. This sentence is well within the usual range of sentences normally imposed for an offence such as this. The sentence is accordingly affirmed and reckoned to have commenced on 10 October 2016.

Order

[207] Accordingly, the order of the court is as follows:

a. The application for leave to appeal conviction and sentence is refused.

b. The sentence is reckoned to have commenced on 10 October 2016.