[2021] JMCA Crim 35

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CRIMINAL APPEAL NO 51/2016

CHRISTOPHER DENTON v R

Leroy Equiano for the applicant

Adley Duncan and Vanessa Campbell for the Crown

2 March and 15 October 2021

SIMMONS JA

[1] On 2 March 2021, this court heard submissions from counsel for both parties and at the conclusion of the hearing we made the following orders:

1. The application for leave to appeal is refused.
2. The sentence is to be reckoned as having commenced on 26 May 2016.

[2] At that time, we promised to put our reasons in writing. This judgment is a fulfilment of that promise.

Background

[3] On 7 April 2016, after a trial before a judge and jury, in the Home Circuit Court, the applicant, Mr Christopher Denton, was found guilty, on an indictment charging him with the offence of murder. On 26 May 2016 he was sentenced to life imprisonment with the stipulation that he serve 20 years before becoming eligible for parole. That sentence

took into account several factors including the six years that the applicant had spent in custody awaiting trial.

[4] The applicant in his defence, denied being involved in the commission of the offence and asserted that the main witness, retired Senior Superintendent of Police Renato Adams, was motivated by malice and gave false evidence against him. As such, the main issue for the court below was that of credibility. The prosecution relied on three witnesses, those being; Senior Superintendent of Police Renato Adams, Ms Hazel Francis (the mother of the deceased) and Detective Inspector Peaches McCalla who was the investigating officer. The depositions of the latter two witnesses were agreed between counsel and read into the record without the need for them to be called. The applicant gave an unsworn statement from the dock.

The application for leave to appeal

[5] The applicant filed an application (dated 2 June 2016) in this court for leave to appeal conviction and sentence.

[6] The application which was considered by a single judge of appeal on 11 May 2020, was refused. The applicant has sought to renew his application before this court, as is his right.

The case for the Crown

[8] It was alleged that on 7 April 2006 two armed men including the applicant chased Mr Devon Francis ('the deceased'), along the Thompson Pen main road in Spanish Town. During the chase, they fired their weapons at him. At some point, the deceased fell on his face and the two men went over his body and fired several shots at him resulting in his death.

[9] As stated previously, the Crown relied on the evidence of three witnesses. Retired Senior Superintendent Renato Adams was the sole eye witness. The evidence of the three witnesses on which the Crown relied is summarised below.

Retired Superintendent Renato Adams

[10] The witness stated that at the time of the incident, he was a senior superintendent of police. His evidence was that on 7 April 2006 between 10:45 am and 11:00 am whilst driving his private motor car along the Thompson Pen main road in Spanish Town heading towards Spanish Town Road, he heard gun shots. He then observed three men running in his direction on the opposite side of the road. Two of the men were chasing the other man, who was later identified as the deceased and firing shots at him. At this time, the witness was in the left lane in a line of traffic about 15 yards away from the men. He stated that he recognized one of the men who was firing as the applicant, who was also called "Bigger Chris". He indicated that he had known him for approximately eight years before the incident and had last seen and spoken with him two months before. He indicated that he had observed the actions of the men through his car window which was down.

[11] The witness stated that, at some point, the deceased fell on his face and he observed that he was bleeding from his back. The two men then went over the deceased and fired several shots at him. He heard the deceased say "'Bigger Chris', 'Bigger Chris' wey yuh a shoot mi up fah, wha mi do yuh?". Senior Superintendent Adams then proceeded to draw his pistol and exit his motor car and shielded himself behind the door of the said car. He shouted to the two other men who were about 10yards away, "Police Police". In response both men looked in his direction and fired shots. The witness fired in their direction and they both ran through a lane. Senior Superintendent Adams drove onto Spanish Town Road in pursuit of the men. He stated that he subsequently saw them coming from the lane which led onto Spanish Town Road. They both had guns in their hands and the deceased was in front of the other men. The witness then alighted from

his car, pulled his pistol and shouted "Police, Police don't move", whereupon the applicant opened fire at him and eventually escaped.

[12] Senior Superintendent Adams returned to the scene of the crime and saw the deceased lying on the ground on his face, bleeding from wounds to his back. He appeared to be dead. Senior Superintendent Adams called the Spanish Town Police Station and subsequently, Detective Inspector Peaches McCalla and other police personnel arrived on the scene. The witness made a report and left the scene. He indicated that he gave a written statement about a month after the incident.

[13] In cross-examination, he stated that he had seen the deceased lying near to a vehicle but not under it. He stated that the deceased was about one yard away from the vehicle. He also indicated that he had shot the other man who had been chasing the deceased and that this was the first time that he was giving that information. His explanation was that he had never been asked. He also stated that this was the first time that he was saying that the men shot at him.

[14] Senior Superintendent Adams also stated that he did not make an entry in the station diary at the Spanish Town Police Station nor did he give instructions for a warrant to be issued for the applicant as he was not the investigator and was not stationed there and, as such, it was not his "prerogative".

[15] With respect to his recognition of the applicant, Senior Superintendent Adams stated that the first time that he was indicating that he knew the applicant was at the trial. His explanation was that he had never been asked. The witness also indicated that he was involved in an incident with the applicant some time prior to the date of the incident. He denied being motivated by malice because the applicant had made a report against him. Senior Superintendent Adams maintained that the applicant was one of the men who he saw firing at the deceased on the day in question. He indicated that he had made a report to Detective Inspector McCalla at the scene on the day of the incident and had given the applicant's name to her.

[16] In re-examination the witness indicated that his evidence that the other man had been shot was based on hearsay as he did not make that observation himself.

Hazel Francis

[17] The deposition of this witness was read into evidence. The witness indicated that she was the mother of the deceased. She stated that the last time she saw her son alive was the morning of the incident before he left the house in his motor vehicle. She stated that when she arrived at the scene of the crime, she saw her son's body lying under his van and it appeared as though he had tried to get into his van and fell beside it. She indicated that from where she stood it appeared as though blood was flowing from the back of his head. She observed that he was not moving. On 26 April 2006 she attended the post-mortem and identified his body to the doctor and police. Ms Francis also indicated that she had attended the deceased's funeral and that he was buried at Dovecot.

Detective Inspector Peaches McCalla

[18] The deposition of this witness was read into evidence. The witness indicated that at the time of the incident she was a Detective Sergeant of Police stationed at the Spanish Town Police Station. On 7 April 2006, she received certain information and as a result, went to the Thompson Pen area of Saint Catherine. On arrival she observed a male person lying in a pool of blood beside a white pickup. She indicated that he appeared to have been injured by gunshots on his upper body. She stated that the person who was identified as the deceased was taken to the Spanish Town Hospital where he was pronounced dead. Later that day she spoke to Senior Superintendent Adams.

[19] On 26 April 2006 the witness attended a post-mortem examination where the body of the deceased was identified by his mother. She stated that she again spoke to Senior Superintendent Adams who gave a written statement. Based on what he said orally and in his statement, the witness indicated that she had the name of two suspects, Andrew Campbell otherwise called "Bigga" and Christopher Denton otherwise called "Bigga Chris". She subsequently went to the lockups where she spoke to the applicant who was in

custody and informed him that she was investigating the murder of the deceased and that he was a suspect. When cautioned, she said he made no statement. A question and answer session was subsequently held in the presence of his attorney-at-law, during which the applicant denied any wrongdoing. He was then charged with the murder of the deceased.

[20] The post mortem report was admitted in evidence at the preliminary enquiry through this witness.

Case for the applicant

[21] The applicant gave an unsworn statement from the dock in which he denied being involved in the murder. He stated that he was innocent and that Senior Superintendent Adams was motivated by malice in identifying him as one of the perpetrators. He stated that "All of this, your Honour, is just a malice that Mr Renato Adams has been carrying, based on an incident that happened between the both of us, that he had fired a shot over mi head. I reported him …Little after that, 2007, he took me in, question me for couple days…then they release mi without a charge".

[22] He then explained that about eight months after that incident he was told that the police needed to speak to him and when he arrived he was told that they needed to charge him in relation to the offence for which he was being tried. He stated that he learnt of the incident whilst he was behind bars and had no knowledge of it. He also stated that he had been in custody for six years from 2008-2014. He further explained that "your Honour, all of this is just fabrication from Mr Adams trying to paint a bad picture on me". He also gave evidence of his involvement in the community and stated that he was a helpful and jovial person.

The grounds of appeal

[23] On 23 February 2021, the applicant filed a notice of application seeking leave to abandon the original grounds of appeal and to rely on two supplemental grounds of

appeal. At the hearing of the appeal, the applicant, was granted permission to argue the following supplemental grounds of appeal in place of the original grounds:

1. "The Applicant did not receive a fair trial because of the following:

    i. The Learned Trial Judge failed to give the jury direction[s] on how to treat with the evidence adduced on behalf of witnesses Miss Hazel Francis and Detective Inspector Peaches McCalla. Both witness depositions were read into evidence.

    ii. The Learned Trial Judge kept referring to the evidence of the absent witnesses as their sworn evidence thus equating this evidence to that of sworn evidence of the other witnesses.

    iii. The main issues in the case were credibility and identification, and although the learned Trial Judge did relate to and pointed out the variances in the evidence of Mr Ranalto [sic] Adams she failed to inform the jury that the evidence of Detective Inspector McCalla did not support Mr Adam's [sic] evidence on identification.

    iv. Although it is not a specific requirement for a judge to point out every specific point or weakness in a case to the jury, the Appellant's [sic] defence of malice, identification error and the issue of credibility would require the Judge to point out contrasting evidence in the Crown's case.

2. The Crown did not adduce any evidence to prove cause of death. Nor was the jury instructed or assisted on how to treat with evidence that might have support [sic] cause [of death]."

The issues

[24] The above grounds of appeal raise the following issues:

i. Whether the learned trial judge failed to properly direct the jury on how to treat with the depositions of Ms Hazel Francis and Detective Inspector Peaches McCalla?

ii. Whether the learned trial judge failed to properly identify for the jury the weaknesses in the Crown's case and how they may affect the credibility of the identification evidence of the sole eye witness?

iii. Whether the Crown had adduced sufficient evidence of the cause of death to meet the requisite standard of proof?

Issue one - Whether the learned trial judge failed to properly direct the jury on how to treat with the depositions of Ms Hazel Francis and Detective Inspector Peaches McCalla? – supplemental grounds 1(i) and (ii)

Applicant's submissions

[25] Mr Equiano submitted that the learned trial judge failed to direct the jury on how to treat with the depositions of Ms Hazel Francis and Detective Inspector McCalla, which were read into the record as opposed to the sworn evidence of Senior Superintendent Adams. He submitted that the learned trial judge erroneously referred to the contents of the depositions as sworn evidence. It was argued that whilst the witnesses may have been sworn at the preliminary enquiry, they had not been cross-examined and as such, the depositions could not be equated with sworn testimony given at the trial.

[26] Counsel submitted that the learned trial judge ought to have instructed the jury that the statements of the witnesses as contained in the depositions had not been tested by cross-examination and that they had not had the opportunity of seeing or hearing those witnesses and that they should bear those factors in mind in deciding the weight to be attributed to the said statements. This, Mr Equiano said, was important, as the jury was told that the depositions could be used to support the evidence of Senior Superintendent Adams who had been discredited in cross-examination.

Crown's submissions

[27] Mr Duncan submitted that the learned trial judge sufficiently directed the jury on how to treat with the evidence contained in the depositions of Ms Hazel Francis and Detective Inspector McCalla. The jury, he said, was advised to treat their evidence in the

same way as that of any other witness and that it would be their decision to accept or reject all or some of the evidence.

[28] Counsel submitted that a full direction on how to treat with agreed evidence was comprised of the following indications to the jury:

> "i. that the law permits evidence to be agreed.
>
> ii. that the contents of the agreed documents are evidence.
>
> iii. that the contents of the statements are not conclusive of the issues on which they speak.
>
> iv. that they can accept or reject all or parts of the adduced document.
>
> v. that in deciding how to accord weight to the contents of the document, they must bear in mind that they have not seen the witnesses."

[29] It was submitted that the sole omission was the invitation to the jury to consider how the absence of the two witnesses would affect their ability to evaluate their evidence. That omission, it was argued, did not affect the safety of the conviction as it would have been obvious to the jury that they had not seen the witnesses. In addition, the learned trial judge gave accurate directions on how to assess credibility.

[30] Furthermore, it was submitted that the learned trial judge was correct in classifying the depositions as evidence on oath, as they did not lose that quality at the trial. Counsel argued that although the witnesses were not cross-examined at the preliminary enquiry, the learned trial judge was not required to treat the depositions as unsworn evidence as they were produced from evidence given at the said preliminary enquiry. It was argued that, in any event, the proof of the Crown's case was dependent on the jury's assessment of the identification evidence and as such, any deficiency in the learned trial judge's directions regarding the depositions did not impugn the safety of the conviction.

Discussion and analysis

[31] The agreement to read the depositions of Ms Francis and Detective Inspector McCalla into evidence was made pursuant to Section 31C of the Evidence Act ('the Act'). Subsection (1) provides as follows:

> "31C.-(1) **Subject to this section, in any criminal proceedings, a written statement by a person shall, if the conditions specified in subsection (2) are satisfied, be admissible in evidence to the same extent and effect as direct oral evidence by that person**."

[32] There is no issue that the provisions of subsection (2) were satisfied.

[33] Counsel for the applicant has argued that the learned trial judge erred when she referred to the contents of the depositions as evidence. It was also asserted that her directions in respect of how the depositions were to be treated were insufficient. The sections of the summation with which counsel for the applicant has taken issue are set out below:

Page 206 line 3

> "[Ms Francis'] evidence on oath is that, I last saw Devon alive…"

Page 208 lines 16-19

> "The final witness for the crown was Detective Inspector Peaches McCalla. And she gave evidence on oath at the preliminary enquiry, that:-…"

Page 209 lines 21-23

> "[Detective Peaches McCalla's] evidence on oath is that due (sic) information that I receive I went to this area along with other police personnel, where I saw …"

Page 212 line 25 to page 213 lines 1-10

> "…the investigating officer is now saying, in her evidence, that based on the oral statement and based on – she spoke to Senior Superintendent Renato Adams who later gave her a written statement and based on what he said orally and in his statement, she had two names but Mr. Adams, in his evidence, Mr. Finson is submitting, only gave one name and not two names, it is a matter for you, Madam foreman and members of the jury.
>
> Now her evidence continues under oath…."

[34] I have also noted the following at page 176 line 18 to page 177 line 5 of the transcript, where the learned trial judge stated:

> "Now, in deciding what evidence you accept or what evidence to reject, bear in mind that you can accept all that a witness has said, if you are satisfied that the witness spoke the truth. Equally you can reject all of his or her evidence, and if you find that his or her evidence is otherwise unreliable. You can also accept part of what – part of a witness' evidence and reject another part, if you are satisfied that that witness was truthful and accurate as regards to parts of his or her evidence, or was mistaken or lying as regards to other parts."

She continued at page 178 line 8 to page 179 line 2:

> "Now, Madam Foreman and members of the jury, you will also remember that you have heard evidence that was read to you by the registrar. Now, you are to – the law allows for this. You will recall that Madam Crown Counsel would have gotten up and indicated to you that based on certain sections of the law, it allows for both the prosecution and the defence to agree to put certain evidence which they did, this was the evidence of the mother of the deceased and the evidence of the investigating officer. You are to treat this evidence as you would any other evidence that you have heard from the witness box. So, you heard evidence from Mr. Adams and he was cross-examined. You heard the evidence of the mother of the deceased and evidence of the investigating officer read into evidence and read to you, but you are to treat all evidence in a similar manner."

[35] The learned trial judge at page 209 of the transcript also indicated that the evidence of Detective Inspector McCalla that she received a call about a shooting incident

in the Thompson Pen area was not corroboration of Mr Adams' evidence regarding the said incident. She stated that it was evidence that they could use "… to support what Mr. Adams [was] saying… what Mr Adams' evidence [was]".

[36] In assessing the relevant directions required to be given by the learned trial judge where the deposition of a witness was utilized at the trial, the decision of **Carlington Tate v R** [2013] JMCA Crim 16 is instructive. In that case, the appellant was convicted for the offence of murder. At the trial, the evidence of the sole eye witness for the prosecution was contained in depositions which were taken at the preliminary enquiry. This evidence was adduced at the trial by virtue of the provisions of section 31D of the Act. On appeal, it was submitted that the learned judge erred in law by insufficiently directing the jury as to how they should assess the evidence contained in the deposition of the witness, thereby depriving the appellant of his right to a fair trial and consequently caused a substantial miscarriage of justice.

[37] The court, in assessing this ground of appeal, noted that counsel for the appellant had agreed that the learned trial judge had given proper directions to the jury in relation to the fact that due to the witness' absence from court and him not being subject to cross examination, his demeanour could not be observed and that it was for them to attach whatever weight they thought fit to the deposition. However, it was submitted that in the circumstances of the case, that direction was insufficient as the witness had not been fully cross-examined at the preliminary enquiry. The court found that the learned trial judge had cautioned the jury that the witness was not present in court so that his demeanour could be observed and that he was not subject to cross examination. In the circumstances, the jury was guided that they would need to make their own decision as to the weight which ought to be attached to the deposition and the credibility of the witness. Hibbert JA (Ag) at paragraph [44] stated:

> "[44] The learned judge, in outlining to the jury their functions, told them that the credibility of the witnesses is a matter for their determination. In reviewing the evidence of Mr Carl Brydson, the Deputy Clerk of Courts, who was present

> during the preliminary examination when Patrick Myers gave his evidence, the judge reminded the jury at page 384 of the transcript, that Mr Myers was bound over to return to court to continue his evidence but failed to return. At page 391 of the transcript, the judge also reminded the jury of the efforts of Detective Sergeant Blackstock to locate Mr Myers in order to have him attend court to give evidence at the trial. He also reminded the jury that the efforts of Detective Sergeant Blackstock failed to secure the attendance of the witness and that Detective Sergeant Blackstock concluded that the witness Mr Myers was not co-operating. The judge, having brought these to their attention, we do not believe there was the need for any further special directions, and therefore cannot agree that the appellant was deprived of a fair trial."

[38] In the instant case, the learned trial judge at page 158, lines 14-19 of the transcript, stated:

> "Now, the evidence is what it is, and only such evidence as you have heard from witnesses who gave evidence in this case, or read out to you, only such evidence as you have heard during the course of the trial must inform your decision."

She continued at page 178 lines 8 -12:

> "Now, Madam Foreman and members of the jury, you will also remember that you have heard evidence that was read to you by the registrar. Now, you are to – the law allows for this."

She continued at page 178 lines 19 – 25 and 179 lines 1-2:

> "You are to treat this evidence as you would any other evidence that you heard from the witness box. So, you heard evidence from Mr. Adams and he was cross-examined. You heard the evidence of the mother of the deceased and evidence of the investigating officer read into evidence and read to you, but you are to treat all the evidence in a similar manner."

[39] The Criminal Bench Book at page 185 gives the following as an example of the appropriate direction:

> "You are no doubt familiar with the traditional way in which evidence can be put before you. A witness comes into the witness box is sworn or affirmed, is questioned by counsel and gives his/her evidence. Another way is as follows – before the case comes for trial the defence receives a copy of all written witness statements and they decide which witnesses they need to ask questions of and which they don't. Where they have no questions for a witness it is unnecessary to bring the witness to court to say only what is in his/her statement. So, where both sides agree, it is permissible for the witness' statement to be read to you without the witness coming into court. The important thing for you to remember is that the contents of the statement are just as much evidence as if the witness had come into the witness box, taken the oath/affirmation and given the same information in answer to questions. What that means is that you are to treat the evidence in the statement of [name the person] in the same way you would have treated his/her evidence if he/she had come before you and testified. The contents of the statement are not conclusive. Therefore like any other witness you have the same three options to accept or reject all of what is in his/her statement or to accept parts and reject other parts as you see fit. As you make your determination you should bear in mind that you have not actually seen him/her testify to be able to assess his/her demeanour. [If necessary add – You will note that rebuttal evidence has been called or critical comment has been made on the contents of the statement in the closing speech of…to the effect that…You should bear that in mind as you determine what you make of the statement of…]"

[40] In the present circumstances, the learned trial judge sufficiently assisted the jury as to how to treat with the evidence of Ms Francis and Detective Inspector McCalla. A general direction was given to the jury that in assessing credibility, they would need to consider: the age and ability of the witness and their ability to express themselves. They were also directed that they could accept all that a witness had said, reject all or accept some and reject the rest. The learned trial judge also reminded the jury that Senior Superintendent Adams had been cross-examined and that the evidence of Ms Francis and Detective Inspector McCalla had been read into evidence. Whilst there was no explicit direction in respect of how the absence of the latter two witnesses may have affected

the credibility of their evidence, based on the directions given, we were of the view that it would have been clear to the jury that they did not have the opportunity to view the witnesses in order to assess the manner in which they answered questions. It was also our view that, based on the learned trial judge's directions, it would have been equally clear to the jury that they were required to make their own assessment as to credibility based on what was read into evidence.

[41] In recounting the evidence of the witnesses, the learned trial judge guided the jury that their depositions were read into evidence and then proceeded to recall what was said on oath. It was our view, that the reference to the contents of the depositions as evidence given "on oath" was correct. The fact that counsel at the preliminary enquiry did not cross-examine the witnesses does not diminish the quality of that evidence. In fact, the learned trial judge at page 208 of the transcript stated in relation to Detective Inspector McCalla, that "she gave evidence on oath at the preliminary enquiry". There was clearly no confusion as was asserted by the applicant. In any event, it would have been consistent with the statutory guidance set out in section 31C of the Act for the learned trial judge to direct the jury that the depositions were to be treated in a similar manner as the evidence given from the witness box.

[42] In addition, the evidence of Ms Francis had nothing to do with the identification of the deceased's assailants. Where the evidence of Detective Inspector McCalla is concerned, that too would have had very little, if any, impact on the evidence in relation to the identification of the applicant. The only aspect of her evidence which may have affected the evidence of Senior Superintendent Adams was that which concerned the time when the names of the deceased's assailants were given to her by him. That matter was dealt with by the learned trial judge when she addressed inconsistences and discrepancies. There was therefore, in our view, no basis for the applicant's assertion that the trial was unfair on the bases advanced in these grounds.

[43] These grounds were therefore, unlikely to succeed.

Issue two - Whether the learned trial judge failed to properly identify for the jury the weaknesses in the Crown's case and how they may affect the credibility of the identification evidence of the sole eye witness? – supplemental grounds 1(iii) and (iv)

[44] The following questions arise in the consideration of this issue:

(a) Whether the learned trial judge failed to point out the inconsistencies and weaknesses in the Crown's case; and

(b) Whether the learned trial judge failed to properly guide the jury on how to treat with the identification evidence of the sole eye witness?

Applicant's submissions

[45] It was submitted that the learned trial judge erred in failing to direct the jury's attention to the fact that the evidence of retired Senior Superintendent Adams was not supported by the evidence of Detective Inspector McCalla. Firstly, it was argued that there is an issue as to whether Senior Superintendent Adams gave the applicant's name to Detective Inspector McCalla on the date of the incident. Mr Equiano stated that from her evidence, it appears as though the applicant's name was only given to Detective Inspector McCalla on the date of the post-mortem examination. This inconsistency it was submitted, was crucial in supporting the applicant's defence that Senior Superintendent Adams was motivated by malice.

[46] Secondly, it was asserted that Senior Superintendent Adams's evidence that he saw the deceased lying face down with blood coming from his head was not supported by Detective Inspector McCalla's evidence, as she did not say anything about seeing the deceased lying face down with any injuries to his head. Rather she said that she saw what appeared to be gunshot injuries to the upper part of his body.

[47] Thirdly, counsel submitted that the learned trial judge failed to point out the main weakness in the Crown's case having regard to the applicant's defence of malice, identification error and the issue of credibility.

[48] Counsel also argued that based on the learned trial judge's comments at pages 207 lines 13 – 22 and page 209 lines 16 – 20 of the transcript, the conviction was unsafe as the jury was not warned that they should be careful when assessing the evidence contained in the depositions and as such could have interpreted that evidence as supporting that given by Mr Adams. The learned trial judge stated at page 207 lines 13 – 22:

> "Now, madam Foreman and members of the jury, you will recall the evidence of Mr. Adams to say that, in fact, he saw the deceased lying on his face and he saw them firing shots to his back region. And the mother of the deceased is saying that she saw blood coming from his head back.
>
> Now, this is not corroboration, madam foreman and members of the jury, but it is something you can take into consideration."

[49] Having referred to the evidence of Senior Superintendent Adams that he witnessed the incident at about 10:45 to 11:00 am on 7 April 2006 and Detective Inspector McCalla's evidence that about 11:00 am, she received a call about a shooting incident in the Thompson Pen area, the learned trial judge stated at page 209 lines 16 – 20:

> "This again, madam Foreman and members of the jury, is not corroboration, but it is evidence you can, in fact, use to support what Mr. Adam [sic] is saying – what Mr. Adams' evidence is."

[50] Mr Equiano submitted that due to the quality of Senior Superintendent Adams's evidence, it was important for the learned trial judge to have given clear directions on how to treat with the "unsworn evidence" of Ms Francis and Detective Inspector McCalla. In this regard, he pointed out that the learned trial judge had instructed the jury on how to treat with the untested statement of the applicant. He submitted that her failure to give appropriate directions on how to treat with the depositions of the two witnesses and her reference to them as being under oath may have led the jury to believe that they were on equal footing with the evidence of Senior Superintendent Adams. This

characterization of the evidence, he submitted was unfair and resulted in the applicant not having a fair trial.

Crown's submissions

[51] It was submitted that the learned trial judge in her summation, gave accurate and sufficient directions to the jury on the issue of credibility and how to treat with inconsistencies in the evidence. It was further submitted that the learned trial judge was not required to give specific directions on the variances between the evidence of Senior Superintendent Adams and Detective Inspector McCalla. He argued that there was no obligation to point out each inconsistency but rather, the jury having been given the proper directions would be properly guided on how to treat with any inconsistencies.

Discussion and analysis

[52] The learned trial judge in her summation (see pages 163-164 of the transcript), gave comprehensive directions on the issue of identification. She said:

> "Now, the case against the defendant depends wholly on the correctness of the identification of him and which he is alleging to be mistaken. Now, to avoid the risk of any injustice … I must therefore warn you of the special need for caution before convicting the defendant in reliance of the evidence of identification…"

She continued at page 165:

> "… you will remember the evidence of Mr. Renato Adams, he is the **only** witness called by the prosecution as to identification." (Emphasis supplied)

[53] She reminded the jury that Senior Superintendent Adams' evidence was that he gave the name Christopher Denton, otherwise called 'Bigga Chris' as one of the men involved in the incident and that he was not mistaken or motivated by malice. She also reminded them of the evidence of Detective Inspector McCalla whose deposition stated:

> "I spoke to Senior Superintendent Renato Adams, who later gave me a written statement. Based on what he said orally and in the statement, I had the name of two suspects, one Andrew Campbell otherwise called 'Bigga' and Christopher Denton, otherwise called 'Bigga Chris'."

[54] The learned trial judge then referred to counsel for the applicant's submission that the information stated above was given after the post-mortem examination. She then directed them that it was a matter for their determination when the said information was given to Detective Inspector McCalla.

[55] She invited the jury to consider whether the identification was made under difficult circumstances. She also indicated that the applicant had not had the benefit of an identification parade.

[56] The learned trial judge also reminded the jury of defence counsel's suggestion that if Senior Superintendent Adams had in fact seen the applicant, he would have made a note in the station diary or the crime diary. They were also reminded of Senior Superintendent Adams's evidence that he expected the name of the applicant to be recorded in the said diary but that he himself did not make any such entry as it was not his duty to do so and that he was on vacation at the relevant time.

[57] In addition, the learned trial judge pointed out to the jury that Senior Superintendent Adams was the sole eye witness. She also indicated that his evidence as to whether he was able to see the person who committed the offence had been challenged during cross-examination.

[58] The learned trial judge, in her summation, explained to the jury how to identify inconsistencies and discrepancies in the evidence and that it was their responsibility to either accept all, part or none of the evidence based on their assessment. She indicated that the defence had alleged that Senior Superintendent Adams was lying and that they had to consider whether he had any reason to do so. She also directed them that they were to assess any explanation given for discrepancies and inconsistencies. The learned trial judge pointed out to the jury that such conflicts in the evidence can impact on the

credibility of a witness and ultimately on their decision on the guilt or innocence of the accused. They were therefore, in our view, instructed that they were to assess whether any inconsistencies were significant and how they impacted on their assessment of the evidence. Later in her summation, she again pointed out that "Mr. Adams [was] the only witness as to fact". She continued: "The case will either succeed or fail based on your view on [sic] the evidence of Mr. Adams".

[59] In assisting the jury to identify any inconsistencies and discrepancies the learned trial judge directed them to the following aspects of the evidence:

i. Senior Superintendent Adams' evidence, where he said at the preliminary enquiry that he was shot at ten times by the assailants as against that at the trial, where he said that it was six times.

ii. Senior Superintendent Adams' evidence at the preliminary enquiry, where he said that the experience was traumatic, as against that at the trial, where he denied that it was so.

iii. The evidence of Senior Superintendent Adams that he saw the deceased lying on his face beside the vehicle, and that of Ms Francis who said that the deceased was lying under his van.

iv. Senior Superintendent Adams' evidence that he gave the applicant's name to Detective Inspector McCalla as one of the assailants, and her evidence that two names were given to her.

v. Senior Superintendent Adams' evidence that he knew the applicant before the incident, and his omission to say so on any previous occasion, or include that information in his statement.

[60] The learned trial judge also reminded the jury of the following:

i. Senior Superintendent Adams' evidence that 10 shots were fired, and counsel for applicant's suggestion that a .38 firearm did not carry 10 shots.

ii. The submission of the applicant that, based on the evidence, none of the shots allegedly fired at Senior Superintendent Adams dented his car. She indicated that, that was a matter for them.

iii. That when asked by counsel for the applicant if he had ever said that the presumption of innocence, that a man is innocent until proven guilty, is semantic or a figure of speech, Senior Superintendent Adams said that his words were taken out of context.

iv. That when Senior Superintendent Adams was asked by counsel for the applicant if he was referred to as "bad man police" – he said he was unaware. He also said that he saw in an article where he was referred to as the "Dirty Harry" of the police force.

[61] The learned trial judge also instructed the jury to disregard Senior Superintendent Adams' evidence that his prior contact with the applicant was through policing. Having pointed out the above, she stated:

> "Your task, madam Foreman and members of the jury, includes the assessment of the evidence of the witnesses, especially Mr. Adams, as he is the **only** eyewitness to the offence." (Emphasis supplied)

[62] The learned trial judge dealt extensively with the issue of malice. She indicated that the alleged malice in this case was said to have arisen as a result of the applicant having made a report to the police of an incident where Senior Superintendent Adams allegedly fired a shot over the applicant's head. The learned trial judge also highlighted to the jury, defence counsel's submissions on malice. Specific reference was made to the fact that the applicant was only taken into custody in 2008 some two years after the incident, released and then returned to custody. She reminded them that Senior

Superintendent Adams had agreed that he had an altercation with the applicant previously. She also reminded the jury that the applicant had from the outset denied any involvement in the commission of the offence. She stated:

> "Now, the defence in this case is saying that the witness, Mr. Adams, is mistaken or he was acting in malice."

[63] The jury was advised that it was a matter for their determination whether the witness was motivated by malice.

[64] The law is quite clear that there is no obligation on a trial judge to point out every inconsistency and/or discrepancy that may arise in a particular case. As indicated by this court, at page nine in **R v Fray Deidrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, it will be sufficient for the trial judge to "give some examples of the conflicts of evidence which have occurred at the trial…whether they be internal conflicts in the witness' evidence or as between different witnesses". In **Lloyd Brown v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 119/2004, judgment delivered 12 June 2008), Harrison P at pages 15-16 stated that "[i]t is sufficient that the learned trial judge points out some of the major discrepancies, as illustrations of such discrepancies, give proper directions of the manner of identifying such discrepancies and further advising the jury to decide whether they are material or immaterial and the way in which they should be treated". This is to be balanced with the caution given by Brooks JA (as he then was) at paragraph 30 in **Morris Cargill v R** [2016] JMCA Crim 6, that "it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case".

[65] In the present circumstances, it was sufficient for the learned trial judge to give the jury the standard directions on inconsistencies and discrepancies so that they could identify same in the case. The learned trial judge directed the jury's attention to some aspects of the evidence where inconsistencies and discrepancies could have arisen and dealt with the defence of malice in detail. There is not much more which could have been

expected of the learned trial judge. Furthermore, the jury having been directed on how to treat with the evidence of the witnesses, the learned trial judge was not required to give any specific direction as to whether Senior Superintendent Adams' identification evidence was supported by the evidence of Detective Inspector McCalla.

[66] The learned trial judge's directions in respect of the applicant's unsworn statement were impeccable. She also highlighted those aspects which spoke to his good character and directed the jury accordingly. She also reminded them that even if they rejected his statement that did not automatically translate into an acceptance of the evidence given on behalf of the Crown.

[67] In the circumstances, it was our view that this ground was unlikely to succeed.

Issue three - Whether the Crown had adduced sufficient evidence of the cause of death to meet the requisite standard of proof? – supplemental ground 2

Applicant's submissions

[68] It was submitted that the Crown failed to adduce evidence to prove beyond a reasonable doubt that it was the gunshots allegedly inflicted by the applicant, which caused the death of the deceased. Mr Equiano argued that in the absence of such evidence, the jury would have been left to speculate as to the cause of the deceased's death. He stated that the closest the Crown came to proving the cause of death was through the evidence of Detective Inspector McCalla at page 145 lines 16-19 of the transcript, who stated:

> "I looked beside this white pickup and saw a male person lying in a pool of blood. He appeared to be injured by gunshots on the upper part of his body."

[69] Counsel also took issue with the absence of the post - mortem report at the trial, which he submitted would have assisted the jury to determine the cause of death and whether it could be attributed to the applicant. Reliance was placed on the case of **R v White** [1910] 2KB 124, in support of that submission.

[70] Mr Equiano took issue with the fact that the post-mortem report had not been entered into evidence at the trial. He submitted that the Crown's case taken at its highest, was that the deceased who was being chased, fell and shots were fired at him. The applicant was one of the assailants. He was subsequently taken to the hospital where he was pronounced dead. A post-mortem examination was conducted and a report received.

Crown's submissions

[71] It was the Crown's submission that there was credible evidence from which it could be inferred that the deceased died as a result of the gunshot wounds he received when the applicant shot at him. Mr Duncan stated that there was no need for any medical evidence in light of the evidence that the deceased's mother saw him alive the morning of the incident and that of Senior Superintendent Adams who said that the applicant stood over the deceased and fired several shots at him. Thereafter, the deceased was seen lying in a pool of blood. Reference was made to **Briston Scarlett v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 90/2002, judgment delivered 20 December 2004, ('**Briston Scarlett**') in support of that submission.

[72] In the circumstances, it was submitted that the appeal should be dismissed and the conviction and sentence affirmed.

Discussion and analysis

[73] The learned trial judge at page 185 of the transcript, indicated to the jury that death needed to be proved by the prosecution. She stated:

> "… one of the elements that the prosecution needs to prove to you, beyond a reasonable doubt that, in fact, there was a death and that the death was not accidental, it was deliberate. So, if you accept this evidence, it is open to you to say whether or not Mr. Devon Francis is, in fact, dead and whether it is a result of the actions of the accused".

[74] At page 205 in addressing the issue of death, she quoted the following from Ms Francis' deposition:

> "He is at Dovecot. I know he is buried there because I was at the funeral."

The learned trial judge continued:

> "…the [C]rown has to prove to you that Devon Francis, in fact, died, and the mother gave evidence on oath at the preliminary enquiry that, in fact, he is at Dovecot. He was buried there and she attended the funeral.
>
> Now, this evidence, if you accept it, it is open to you to say that Devon Francis is dead."

[75] She also recounted the evidence of Senior Superintendent Adams who said that he had seen the applicant and another man firing shots at the deceased. She said:

> "…he saw the deceased lying on his face and he saw them firing shots to his back region. And the mother of the deceased is saying that she saw blood coming from the [sic] his head back.
>
> Now, this is not corroboration, … but it is something that you can take into consideration."

She later reminded the jury that Ms Francis had stated in her deposition that she attended the post mortem examination and had identified the deceased's body to the doctor and the police who were in attendance. The learned trial judge stated:

> "Again, madam foreman and members of the jury, if you accept this evidence, this goes in support of the – the prosecution has to prove that, in fact, Mr Francis is dead, and Miss Hazel Francis gave evidence on oath at the preliminary enquiry 26th April, 2006, that she attended a post-mortem in relation to her son, Devon Francis, and she identified her son's body to the doctor and police there."

[76] There is evidence from the sole eye witness that he "… observed the same man lying on the ground on his face, bleeding from wounds to his back…He appeared deceased". Ms Francis in her deposition stated that "[f]rom where I was I could see him. Blood was coming from his head back. He was not moving". There is also the evidence from Detective Inspector McCalla that "[she] looked beside this white pickup and saw a

male person lying in a pool of blood. He appeared to be injured by gunshots on the upper part of his body. Based on what I saw, he was taken to the Spanish Town Hospital where he was pronounced dead. I assisted in taking him there". The evidence of these witnesses cumulatively was in our view, sufficient for it be inferred that the death of the deceased was caused from the shooting incident involving the applicant.

[77] The learned trial judge, in her summation at page 208, recalled the evidence of Ms Francis that she attended a post-mortem examination on 26 April 2006 and identified her son's body. It was explained to the jury that if they accepted this evidence this would be in support of the prosecution's case who had the burden to prove that Mr Francis was deceased.

[78] In **R v White,** the appellant was convicted of the attempted murder of the deceased, his mother. At trial, the prosecution relied on evidence of cyanide poisoning based on the contents of a wine glass on a table beside the body of the deceased. There was also evidence that the appellant had purchased cyanide shortly before her death. Whilst the medical evidence showed that she did not consume any of the contents of the glass and that the cyanide therein was insufficient to be fatal, the jury found that there was an intention to kill her. On appeal, it was argued that there was no reasonable evidence on which the appellant could have been convicted. The appellant did not deny that he purchased the cyanide but rather sought to explain that it was bought for case-hardening a chisel and that he had placed it in the room where his mother was found dead and that she may have obtained it from there. The court, on this ground of appeal, considered the evidence that the appellant was aware of the deadly nature of cyanide and had hoped that a small dosage would have been sufficient. This it concluded was sufficient for the jury to infer that the appellant had put the cyanide in the glass with the intention to kill his mother.

[79] In **Briston Scarlett**, which was relied on by the Crown, the appellant had been convicted for the offence of murder in the course or furtherance of arson. On appeal, it was submitted that the learned trial judge erred in directing the jury that the cause of

death of the victim was as a result from the injuries sustained in the fire, as there was no evidence in support of that. The court in its determination of whether the prosecution had proved the cause of death of the victim, observed that the doctor who had performed the post-mortem examination had not given evidence at the trial. However, there was evidence from the police officer who had visited the home of the victim and observed that it was burnt out. The officer had also seen the victim whilst she was at the hospital and testified that she had severe burns to approximately 95% of her body. He had also attended the post-mortem examination.

[80] The court, at page 4 of its judgment, noted that "[t]he authorities have clearly established that the absence of medical evidence is not necessarily fatal to a prosecution for murder if there is other credible evidence from which the cause of death can be reasonably inferred". On that basis, the court found that there was sufficient evidence on which the death of the victim could be inferred to have resulted from her burn injuries. This was especially so as there was evidence that she had received serious burns, was taken to the hospital and died a few days later. As such, the cause of her death was not found to be a live issue at the trial.

[81] In light of the above, the failure of the Crown to present the post-mortem report as direct evidence of the cause of the deceased's death was not, in our view, fatal to the conviction. Based on **Briston Scarlett** and **R v White**, there was sufficient evidence from which the jury could infer that the deceased died as a result of the gunshot wounds inflicted by the applicant. The trial judge's directions on this aspect of the case could not be faulted and as such, we agreed that this ground of appeal was unlikely to succeed.

Sentence

[82] The applicant sought leave to appeal his conviction and sentence. However, at the hearing of the application, no submissions were advanced in respect of sentence nor was the application in relation to sentence withdrawn. The sentence imposed by the court, was, in our view, within the normal range of sentences imposed for the offence of murder

and could by no means be considered to be manifestly excessive. There was therefore, no basis on which it could have been disturbed.

Conclusion

[83] The learned trial judge correctly advised the jury of the role that they were to play in assessing the guilt of the applicant. She also pointed out that identification and credibility were central issues in the trial and reminded them more than once that Senior Superintendent Adams was the sole eyewitness. They were also instructed that conflicts could arise in the evidence by way of inconsistencies, discrepancies and omissions and given examples of those areas of the evidence where such conflicts may have arisen. Her directions in relation to identification, credibility, malice and good character could not be faulted. Accordingly, we saw no merit in the grounds of appeal advanced by the applicant.

[84] These are the reasons for the orders detailed at paragraph [1] above.