[2023] JMCA Crim 52

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CRIMINAL APPEAL NO 93/2017

KAYODE GARWOOD v R

Donald Gittens for the applicant

Miss Sophia Rowe and Mrs Christina Porter for the Crown

8, 9 November 2022, and 24 November 2023

Criminal Law – murder – confession – *voir dire* - admissibility of oral and written statements – adequacy of directions on the oral and written statements

Sentence – whether sentence manifestly excessive – proper consideration given to the social enquiry report although taken as read into the record

EDWARDS JA

Introduction

[1] On 12 September 2011, 11-year-old master Tareek Gregory ('Tareek') died from injuries he sustained when he was attacked at his home, at New Roads District, Harmon, in the parish of Manchester. He had just come home from school and was still clad in his uniform when he was lured into a room, his throat was cut, and he was suffocated and stabbed several times. Kayode Garwood ('the applicant'), who was the boyfriend of Tareek's older sister, Deneisha Gregory, was charged, along with her, with Tareek's murder. On 31 October 2017, following a trial in the Manchester Circuit Court, before Stamp J ('the learned trial judge'), sitting with a jury, the applicant was convicted of

murder. On 2 November 2017, he was sentenced by the learned trial judge to life imprisonment, without eligibility for parole before serving 26 years.

[2] On 10 November 2017, the applicant filed a notice of application for permission to appeal his sentence only. The application was reviewed and refused by a single judge of this court on 9 July 2019. The applicant renewed this application to the full court, on 29 July 2019, as he is entitled to do. In addition, he sought an extension of time within which to seek leave to appeal his conviction, leave to appeal his conviction, and an extension of time within which to file and argue supplemental grounds of appeal against conviction and sentence. On 8 November 2022, at the hearing of the applications, we granted the applicant an extension of time to apply for leave to appeal conviction and to argue the amended supplemental grounds filed on 8 November 2022, as further amended at the beginning of the hearing. Counsel was ordered to file and serve those further amended supplemental grounds.

Background

[3] The case for the Crown was that the applicant, along with Deneisha, murdered Tareek. Tareek's body was discovered by his mother, Elodie Gregory, and older brother Jermaine Gregory, in a back room in the house in which they lived. The post-mortem report which, by agreement, was read into the record by the registrar, noted that, among other things, the pathologist had observed stab and incised wounds to Tareek's body, one to the neck and two to the chest. The cause of death was noted to be the incised wound to the neck.

[4] Although there were no eyewitnesses to the actual killing, Tareek's grand uncle, Lewis Bailey, lived nearby and could see Tareek's yard from his own yard. He had seen Tareek when he came home from school that afternoon, in the company of two other boys. The two boys assisted Tareek in tying out his goats and then left. Tareek went inside his house and Mr Bailey said he heard Tareek "squeal" out "Deneisha yu frighten me where you was" and ran out onto the verandah. He heard Deneisha ask Tareek to fetch a bath pan from inside the house for her, and saw them both go inside the house.

He never saw Tareek alive again after that. Jermaine Gregory gave evidence that he came into the yard that afternoon at about 2:00 pm, picked some limes and left. He did not notice anything.

[5] The prosecution's case rested largely on the applicant's confession to the police, made orally and in a written caution statement, that he and Deneisha had committed the crime. In respect of the oral confession, the applicant was alleged to have told the investigating officer, Detective Sergeant Roan Waugh, that he and Deneisha had killed Tareek. In relation to the caution statement, the applicant was alleged to have made a similar confession, which was taken down in writing, in the presence of two Justices of the Peace ('JPs') as well as Detective Sergeant Waugh and Constable Melissa Morgan. The caution statement, which the applicant admitted to signing, was very detailed and consisted of several pages.

[6] In his caution statement, the applicant outlined the nature of his relationship with Deneisha as well as the tumultuous relationship she had with her mother. He said Deneisha had asked him to help her kill her mother, father and brother because they did not love her, and that after they were dead, she and the applicant would get their house. He gave extensive details as to what happened on that fateful day and how Tareek was killed. This included details regarding the manner in which they gained entrance to the house; how Deneisha lured Tareek into his father's room; how the applicant jumped out from behind a door and grabbed Tareek; how Deneisha covered Tareek's mouth when he began to scream; how the applicant squeezed his throat until he was unconscious and then cut his throat; and how he hit Tareek on the head with a baton and cut his throat again. The applicant also described how Deneisha asked him if Tareek was not yet dead and gave him a plastic bag to put over Tareek's head so that he would die faster. The applicant also described how he stabbed Tareek twice in his side when Tareek began to tear the plastic bag from his face.

[7] Aspects of the caution statement also corroborated Jermaine Gregory's evidence, as the applicant said, in his caution statement, that he had seen when Jermaine came

into the yard, picked limes and left. He also corroborated the evidence of Lewis Bailey that Tareek had come home from school with two boys who had helped him to tie out his goats. He also said Tareek had gone into a room, saw his sister and told her she had frightened him.

[8] The voluntariness and fairness of the statements were challenged at the trial, and a *voir dire* was conducted to determine the admissibility of the oral and written confessions on which the prosecution sought to rely. Having heard the witnesses on the *voir dire*, including the applicant, the learned trial judge determined that the statements had been voluntarily given in circumstances which were fair to the applicant. The learned trial judge, however, excluded part of the oral statement against interest (that the applicant and his girlfriend had killed Tareek), on the basis that, when it was made, the applicant was possibly already a suspect, and therefore, ought to have been cautioned prior, in accordance with the Judges' Rules (**Practice Note (Judges' Rules)** [1964] 1 WLR 152 ('Judges' Rules').

[9] Eight witnesses (including the two JPs) were called by the prosecution to give evidence before the jury. The caution statement was admitted (as exhibit 1) and read into evidence by Detective Sergeant Waugh. At the close of the prosecution's case, the applicant's trial counsel made a no-case submission. He challenged the caution statement, primarily on the basis of discrepancies in the evidence of the prosecution's witnesses as to whether questions had been asked of and answered by the applicant during the taking of the statement. The learned trial judge ruled that there was a case to answer.

[10] The applicant elected to give an unsworn statement from the dock in which he denied any involvement in the murder, and outlined the circumstances surrounding his arrest and the taking of the caution statement. He said that when he was taken to the Mandeville Police Station he was placed to sit handcuffed to a bench, in the CIB office. He said that Detective Sergeant Waugh came to him and asked him his name. Detective Sergeant Waugh introduced himself to him and told him that Deneisha said that he was

the one who had murdered Tareek and it was best if he said he had done it. He told detective Sergeant Waugh that he was not the one who did it. He was then taken to a room where he saw a female police officer seated at a desk who was introduced to him as Woman Constable Morgan.

[11] Detective Sergeant Waugh asked him if he had an attorney and he said no. He said he asked Detective Sergeant Waugh for a call to his parents so they could get him a lawyer but he was not given a call. Detective Sergeant Waugh told him that he wanted to conduct a question and answer session and that he would get two JPs. The applicant said that after Detective Sergeant Waugh called the two JPs, he asked Detective Sergeant Waugh for a phone call, once more, but he did not get it. After the JPs arrived they introduced themselves to him and told him they were there to protect his rights and to see to it that his rights were not taken away. He said they told him this in the presence of Detective Sergeant Waugh and Woman Constable Morgan. He said Detective Sergeant Waugh began asking him his age, name, and where he lived. Detective Sergeant Waugh then began asking him questions pertaining to the murder of Tareek and he told him he knew nothing about it. He said that after they were through with the questions and answers, Detective Sergeant Waugh asked him to sign the paper that Woman Constable Morgan wrote the questions and answers on. He said he, the woman Constable and the two JPs signed the paper, and Detective Sergeant Waugh also signed. Although the applicant admitted signing the caution statement, he said that what he signed was not read over to him.

The grounds of appeal

[12] The applicant argued the following proposed grounds of appeal:

1. "The confession admitted as exhibit 1 was unfairly taken from the Applicant."

2. "The confession was procured by oppression and pressure against the suspect, as the applicant then was, by showing to him a statement, made by a co-suspect, implicating him in the crime."

3. "The learned trial judge erred in law in ruling on the *voir dire* to admit into evidence the oral statement made by the applicant to [Detective Sergeant Waugh] that he was in trouble and to admit into evidence the written caution statement given by the applicant."

4. "Sentence is manifestly excessive."

[13] Grounds 1 to 3 all have to do with the assertion of unfairness surrounding the circumstances in which the confession of the applicant, embodied in both his caution statement and oral statement to Detective Sergeant Waugh, was taken. The contention in these grounds, in summary, is that the learned trial judge erred in admitting both into evidence on the *voir dire*. Those grounds will therefore be dealt with under that broad heading.

Whether the learned judge erred in admitting the caution statement and oral admission of the applicant into evidence (grounds 1,2 and 3)

The applicant's submissions

[14] In respect of ground 1, counsel Mr Gittens submitted, on behalf of the applicant, that there were four bases to support the assertion that the confession embodied in the caution statement had been unfairly taken. The first was that the police had failed to make a diligent effort to procure duty counsel before taking the statement from the applicant. This lack of effort, counsel submitted, was evident from the reason Detective Sergeant Waugh gave for not trying to call more than two lawyers (that at the material time it was after 7:00 on a Friday evening), and the fact that Detective Sergeant Waugh had failed to note or recall the names or telephone numbers of the two lawyers he alleged he had called. Further, counsel argued, there was no urgency in the investigation that justified the minimal effort to obtain duty counsel for the applicant, as the post-mortem examination was conducted on 19 September 2016, and the applicant was charged on 23 September 2016.

[15] Secondly, counsel argued that the police had failed to allow the applicant to call his relatives on the telephone. Counsel submitted that, even if the applicant had declared

an intention not to get a lawyer, depriving the applicant of such a phone call, where the officer did not know the purpose of the phone call, amounted to oppression and pressure placed on the applicant by Detective Sergeant Waugh.

[16] Thirdly, counsel submitted that the statement was procured unfairly because it was not solely a narrative put forward by the applicant but was partially a response to questions posed to him by the police about the killing. This, he said, was supported by the evidence of JP South, who testified that questions were asked of the applicant during the taking of his statement, in stark contrast to the evidence of JP Thompson, who said that no questions were asked. This conflict in the evidence, counsel argued, could not be "fairly resolved" based on a lapse of memory, as the learned trial judge invited the jury to do.

[17] Lastly, counsel highlighted the fact that, the applicant, who was then a suspect, was made to give his statement without any enquiry or effort to ascertain whether he suffered from "hunger or thirst". Counsel pointed to the fact that there was no evidence that the applicant had consumed any food or drink between 6:00 pm, at the earliest, and 11:00 pm that Friday evening. He submitted that the learned trial judge erred, by failing to leave, for the jury's assessment, the issue whether the taking of the statement, in those circumstances, was oppressive.

[18] In relation to ground 2, counsel submitted that the applicant's confession was procured by oppression and pressure, because the applicant could have "surrendered his rights" as a direct result of him being shown the statement of the co-suspect which implicated him in the crime. Counsel argued that the action was capable of having this effect, especially since the applicant was not told that the co-suspect's statement could not have been used as evidence against him.

[19] In respect of ground 3, it was submitted that the learned trial judge was wrong to admit both the caution statement and the part of the oral statement that he did, following the *voir dire*. In this regard, counsel noted that the applicant was still in handcuffs when

Detective Sergeant Waugh first saw him at the station, yet Detective Sergeant Waugh did not caution the applicant, as a suspect should be cautioned, before the applicant spoke, even though the applicant had indicated that he wanted to speak.

[20] Counsel relied on the authorities of **Ricardo Williams v The Queen** [2006] UKPC 21 and **Shabadine Peart v R** [2006] UKPC 5; (2006) 68 WIR 372 ('**Peart v R**'), in support of his contentions.

[21] Based on the foregoing matters, counsel argued that the written and oral statements should not have been admitted, and the judge having admitted them, gave insufficient and unhelpful directions to the jury, particularly "as to how the factors of oppression complained about could have operated against the applicant".

The respondent's submissions

[22] Counsel for the Crown, Mrs Porter, submitted that there was nothing in the transcript to suggest that there was anything unfair in the circumstances in which the applicant's caution statement was taken. She argued that, once the learned trial judge considered the question of voluntariness and fairness of that procedure, and found that the statement was given voluntarily, which he was entitled to find in the circumstances, he quite properly left the matter to the jury, as a matter for their discretion to attach what weight they thought fit.

[23] In relation to the specific complaints made, counsel for the Crown submitted that Detective Sergeant Waugh had made sufficient effort to contact duty counsel on the applicant's behalf, and that having failed, Detective Sergeant Waugh employed another available option, which was to get the assistance of two JPs to protect the rights of the applicant. The failure to give the applicant an opportunity to make a phone call, it was said, did not detract from the fairness of the process, as the applicant was not a child who was particularly vulnerable.

[24] Furthermore, with respect to the taking of the caution statement, it was argued that the applicant was advised as to the words of the caution; was given a clean sheet of paper and asked if he wanted to write his statement himself; was not in handcuffs whilst giving the statement; was not met with force (a fact to which he agreed); his statement was read over to him; he approved it; and he did not seek to correct anything when advised that he was entitled to do so.

[25] Although it was conceded that no refreshments had been offered to the applicant, counsel for the Crown submitted that a significantly long period of time had not elapsed as had occurred in cases where the lack of service of refreshments was treated as having been unfair or oppressive. Lastly, in response to the assertion that it was oppressive for the applicant to have been shown the statement of his co-suspect, it was submitted that that was not so, since the applicant was only shown the statement at his own request, after he had indicated his intention to give a statement. Further, although counsel accepted that Detective Sergeant Waugh had asked the applicant if he had heard what Inspector Pummels had said (that Deneisha had confessed), Detective Sergeant Waugh did not force the applicant to give a statement or mislead him in any way about how his statement could be used.

[26] The voluntariness of the caution statement, counsel submitted, is a question of mixed law and fact for the determination of the judge. She argued that the learned trial judge had properly conducted the *voir dire* in the absence of the jury, that he correctly applied the law and examined all the circumstances which arose on the evidence, including credibility. The learned trial judge, counsel submitted, went further to examine the overall circumstances in which the statement was taken, to see if there had been any unfairness. Counsel submitted further that, having concluded that there was no unfairness, the learned trial judge correctly left for the jury's consideration, among other things, the issue as to whether questions had been asked of the applicant during the taking of his statement, that issue being one of credibility to be determined by them.

[27] There was, therefore, counsel for the Crown submitted, no basis upon which to exclude the caution statement. The authorities of **Harold Berbick and Kenton Gordon v R** [2014] JMCA Crim 9 ('**Berbick and Gordon v R**'), **Ricardo Williams v R**, **R v Michael Fuller and Walford Wallace** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 32 & 33/89, judgment delivered 24 February 1992, **R v Rennie** [1982] 1 All ER 385, **Meir Goldenberg** (1989) 88 Cr App R 285 and **Peart v R**, were relied on in support of those submissions. Reliance was also placed on the article "Judges' Rules and Police Interrogation in England Today" by Col T E St Johnston (Vol 57, Issue 1, Article 12, of the Journal of Criminal Law and Criminology, 1966), in relation to the rules that form a part of common law in relation to these matters.

Discussion

[28] The admissibility of an accused's pre-trial statement is within the discretion of the trial judge. It involves questions of both law and fact. The overarching consideration is one of fairness, and for a statement to be admissible it must have been voluntarily made (see **Peart v R**, at para. 23). For that to be so, the statement must not have been obtained by "fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression" (see Lord Parker's preamble to the Judge's Rules in the **Practice Note (Judges' Rules)** at page 152, and **Ibrahim v The King** [1914] AC 599, at page 609).

[29] The burden of proving, beyond a reasonable doubt, whether a statement was made voluntarily, and in circumstances that were fair, is on the prosecution. The rationale behind excluding a confession made in oppressive and unfair circumstances is that the evidence may well be unreliable (as it may have been given with the intention simply to escape the oppression); it is incongruous with a person's constitutional right not to incriminate oneself; and, in a civilised society, a confession should not be extracted from a person by way of improper pressure or ill-treatment (**R v Mushtaq** [2005] UKHL 25, at para. 7).

[30] Although the Judges' Rules do not have the force of law, they have been adopted in this jurisdiction since 1 May 1964. The notice of adoption of these rules signed by the then Registrar of the Supreme Court, dated 25 March, 1964, fully set out the rules (see the reference to that in the case of **R v Winston Lincoln** (1981) 18 JLR 83, at page 86). The Judge's Rules provide settled guidance as to what fairness requires in the investigation of persons by the police in criminal matters, and are "designed to secure that only answers and statements which are voluntary are admitted in evidence against their makers…" (see Lord Parker's concluding comments in **Practice Note (Judges' Rules)** at page 156).

[31] The case of **Peart v R** provides some guidance as to how a trial judge should generally treat with the admissibility of a statement of an accused, the provenance, rationale and applicability of the Judges' Rules in our jurisdiction, as well as how a judge should treat with questions of admissibility where there has been a breach of the Judges' Rules. In that case, the Privy Council opined that a breach of the Judges' Rules is a factor that a judge ought to consider in determining whether the circumstances in which a statement was obtained was unfair, and whether the statement ought to be excluded. However, a judge still has the discretion, notwithstanding a breach of the Judges' Rules, to admit the statement, if he or she considers that, overall, it would not result in any unfairness to the accused. Similarly, even if there has been no breach of the Judges' Rules, a judge may still decide that, in all the circumstances, it would be unfair to admit the statement.

[32] At para. 24 of **Peart v R**, speaking of the requirements in Judges' Rule III (b), the Board distilled what it said were four brief propositions, which were stated as follow:

> "(i) The Judges' Rules are administrative directions, not rules of law, but possess considerable importance as embodying the standard of fairness which ought to be observed.
>
> (ii) The judicial power is not limited or circumscribed by the Judges' Rules. A court may allow a prisoner's

statement to be admitted, notwithstanding a breach of the Judges' Rules; conversely, the court may refuse to admit it even if the terms of the Judges' Rules have been followed.

(iii) If a prisoner has been charged, the Judges' Rules require that he should not be questioned in the absence of exceptional circumstances. The Court may nevertheless admit a statement made in response to such questioning, even if there are no exceptional circumstances, if it regards it as right to do so, but would need to be satisfied that it was fair to admit it. The increased vulnerability of the prisoner's position after being charged and the pressure to speak, with the risk of self-incrimination or causing prejudice to his case, militate against admitting such a statement.

(iv) The criterion for admission of a statement is fairness. The voluntary nature of the statement is a major factor in determining fairness. If it is not voluntary, it will not be admitted. If it is voluntary, that constitutes a strong reason in favour of admitting it, notwithstanding a breach of the Judges' Rules; but court may rule that it would be unfair to do so even if the statement was voluntary."

[33] The principles laid down in that case have been consistently applied in our jurisdiction. In the case of **Ricardo Williams v R**, the Privy Council considered the Judge's Rules, as well as the Administrative Directions annexed thereto, (see The Administrative Directions on Interrogation and the Taking of Statements in Appendix B of the Judge's Rules and Administrative Directions to the Police 1964 ("the Administrative Directions") and their application in the case of **Peart v R**, and this court has applied them in numerous cases, including **Berbick and Gordon v R**.

[34] In the instant case, the learned trial judge properly conducted a *voir dire*, in the absence of the jury, to consider the admissibility of both the oral statement the applicant was alleged to have made to Detective Sergeant Waugh, as well as the written caution statement that was subsequently taken. Detective Sergeant Waugh and the two JPs, as well as the applicant, gave evidence on the *voir dire.*

[35] On the *voir dire,* Detective Sergeant Waugh told the learned trial judge that he had attended the Mandeville CIB office and had seen the applicant sitting inside on a bench, alone. He had known the applicant before. The applicant shook his head and said to him, "Mr. Waugh, mi inna trouble, a man like you mi waan si long time". Detective Sergeant Waugh asked what kind of trouble, and the applicant allegedly said, "Mi and mi girlfriend kill har bredda. Mi want level wid yuh and tell yuh how everything goh". Detective Sergeant Waugh said he immediately cautioned the applicant.

[36] Detective Sergeant Waugh said that after he cautioned the applicant he told the applicant of his intention to write down everything he had to say. Detective Sergeant Waugh also told the applicant that he would need a lawyer to be present. He said the applicant told him he did not have a lawyer. Having asked the applicant if he or his family members had any intention of getting a lawyer, the applicant said no and indicated that he was on his own. The applicant's exact response was, "no, sir, mi deh pon mi own". Detective Sergeant Waugh said that he was the one who was concerned to get a lawyer for the applicant, but that the applicant insisted to go ahead with his story without one. He said the applicant was eager to give his story because Deneisha was giving hers. Nonetheless, he said, he still looked at the duty counsel list and called the offices of two attorneys but there was no answer from either one of them. He did not make any more attempts as he realized it was about 7:00 pm on a Friday, so no lawyer would be present. Detective Sergeant Waugh asked the applicant if he would be comfortable with him getting two JPs and the applicant said yes. Detective Sergeant Waugh then called and requested the assistance of two JPs from the parish of Manchester.

[37] Detective Sergeant Waugh further said that whilst awaiting the JPs, Inspector Pummels, in the presence and hearing of the applicant, pointed out Deneisha Gregory to him, and indicated that she had just given a caution statement implicating herself and the applicant as the two persons who had killed Tareek. Detective Sergeant Waugh asked the applicant if he had heard what was said. The applicant said yes and requested to see what Deneisha had said. The statement was copied and Detective Sergeant Waugh gave

a copy to the applicant. He said the applicant looked at the statement as if he were reading it and then said, "some a wah she sey nuh soh right, but mi a goh tell yuh how it goh".

[38] The JPs arrived at the CIB office at about 9:00 pm, and, on being asked by Detective Sergeant Waugh, the applicant indicated he was comfortable with them. Detective Sergeant Waugh heard the JPs tell the applicant that they were there to protect his rights and that they had received information that he wanted to give a statement. The applicant confirmed that this was so.

[39] Woman Constable Morgan was introduced to the applicant and the JPs as the person who would be taking down the applicant's statement. Woman Constable Morgan wrote down the words of the caution (Judges' Rule II) on a clean sheet of paper, showed them to the applicant, read them aloud and explained what they meant. The applicant was asked if he understood, and he replied yes. The applicant, along with the JPs and Detective Sergeant Waugh, then signed the paper. The applicant was asked if he wished to write the statement himself or if he wanted someone to write it for him. The applicant responded that he wanted someone to write it for him. The applicant's stated wish was written down, and he signed to it along with the JPs and Detective Sergeant Waugh. The applicant then gave his statement in his own words, which were written down by Constable Morgan. The applicant was asked if he wanted to read over the statement or if he wanted someone to read it to him. He elected for someone to read it to him. Constable Morgan advised the applicant that he could add, alter or correct anything he wanted during the reading of the statement. Woman Constable Morgan read over the statement to the applicant, and the applicant did not add, alter, or correct anything. The applicant then signed to the correctness of the statement, and the JPs both signed to it.

[40] Detective Sergeant Waugh said that the applicant gave the statement of his own free will. He indicated that no promise was made to the applicant before, during or after the giving of his statement, nor was any threat made to the applicant or force used in

the taking of the statement. He also stated that neither he nor Constable Morgan asked any questions during the taking of the statement, which lasted for about two hours.

[41] Under cross-examination, Detective Sergeant Waugh admitted that he had not recorded the names, addresses or phone numbers of the attorneys he had tried to contact on the applicant's behalf. He said he could not recall the names of the attorneys he attempted to contact and that it was not something he would normally write in his statement. He admitted that he had not noted in his statement that he had attempted to contact any attorney. He also admitted that he had not advised the applicant that he had the right to wait until an attorney was present.

[42] Detective Sergeant Waugh agreed that the applicant was in handcuffs when he first saw him that night but denied that the applicant was a suspect at that point. He said the handcuffs were removed when the statement was being taken. He stated that when he said in his statement that the applicant was a suspect, that was in error. He did not have reasonable grounds at that stage to suspect or believe the applicant had committed an offence. In relation to why he was present during the recording of the statement, he said, as an astute detective, he wanted to know what the applicant was saying. He admitted that no refreshments were given to the applicant during the period.

[43] Ms Karlene Thompson ('JP Thompson') gave evidence that she was one of the JPs who were called by Detective Sergeant Waugh and that she witnessed the applicant's statement being taken. She said that after she attended on the CIB office and was introduced to the applicant, she told the applicant, in the presence of the other JP, Mr Owen South ('JP South'), that he did not have to make a statement if he did not want to. The applicant said he was willing to speak. Detective Sergeant Waugh and Constable Morgan returned to the room, and Woman Constable Morgan repeated the caution to the applicant and told him that they (the JPs) were there to protect him and ensure he was in no way forced to make a statement. He was asked if he was willing to speak, and he said yes. JP Thompson observed the statement being taken in the presence of JP South, Detective Sergeant Waugh and Woman Constable Morgan. No threats were made to the

applicant by anyone present. The only time Woman Constable Morgan spoke was when she asked him to repeat. The applicant was not forced in any way, nor were any promises made to him. After the statement was taken, Woman Constable Morgan advised the applicant that she would read the statement back to him, and if he was satisfied, she would ask him to sign it. Woman Constable Morgan read the statement back to the applicant and he voluntarily signed it. JP Thompson said she and JP South, thereafter, witnessed the statement.

[44] During cross-examination, JP Thompson admitted that she never enquired of the applicant what had taken place between him and the police before her arrival. When asked whether she had said in her statement that the officers had left the room when she and JP South first spoke to the applicant before the taking of the statement, she said, "it probably wasn't said there". Upon being questioned by the court, JP Thompson said the applicant made no complaint to her about his treatment.

[45] JP South also gave evidence regarding the taking of the applicant's caution statement. He too attended the police station, having received a call from Detective Sergeant Waugh, and was introduced to the applicant. He said that the police officers left the room, and he and JP Thompson told the applicant that they were there to ensure his rights were protected. The officers returned with plain paper and told the applicant they were going to take a statement from him. The applicant agreed to give a statement. He was asked if he understood and he said yes. After the statement was taken, the applicant signed it. No force was used on the applicant, nor was any promise or threat made to the applicant in his presence. The applicant made no complaint to him.

[46] During cross-examination, JP South admitted he did not ask the applicant his age, nor did he seek to establish how long he had been in custody, whether he had eaten or had any injuries. To him, the applicant looked alright. He did not question the applicant about any interaction he had with the officers before his (JP South's) arrival. When it was put to him that he had not noted in his written statement that Woman Constable Morgan had left the room when he and JP Thompson had spoken to the applicant, he said he did

not say everything that had happened in his statement. He agreed that it would have been important for Woman Constable Morgan to have left the room at that stage. He said, also, that no refreshment break was taken, no enquiry was made of the applicant if he wanted a break, and the applicant did not ask for one.

[47] The applicant also gave evidence on the *voir dire*. He said that on the morning of 16 September 2011, he was in Spanish Town with Deneisha, when they were picked up by the police. The police took him to the Spanish Town lock-up, where he remained for about two to three hours. Thereafter, two more police officers came and took him to the Mandeville Police Station. Along the way, the officers drove on a back road through South Manchester, and the officer in the back seat with him threatened him. That officer said to him, "hey boy, think mi nuh know say a you kill the people dem pickney". He told the officer it was not him, but the officer said, "hey boy, know say a kick mi fi kick you out a the car an kill yuh an say a try yuh a try fi escape". He said the officer sat with his firearm between his legs, then took it out and hit him in the chest with it. The officer said nothing else to him after that. At the time, his hands were handcuffed behind his back.

[48] The applicant said that he eventually reached the Mandeville Police Station at about 4:30 pm to 5:00 pm. He was taken to the CIB office and handcuffed to a chair by a desk. Detective Sergeant Waugh came and spoke to him about an hour and a half later. The applicant denied saying any of the things that Detective Sergeant Waugh said he did. He did not say he was in trouble, that he killed anyone, or that he wanted to give a statement. He did not say Deneisha was in the office giving a statement and that he wanted to see what she had said. He was never shown a copy of Deneisha's statement. He said that before Detective Sergeant Waugh called the two JPs, he had asked him for a phone call to contact his parents to tell them he needed a lawyer, but he was never given the call. He never told Detective Sergeant Waugh that he was on his own when Detective Sergeant Waugh asked him if his family was getting him a lawyer, as he lived with his parents. He said it was Detective Sergeant Waugh who told him that Deneisha said he was the one who had killed her brother, and it was best if he said it was him. He

did not volunteer to make a statement at any time. He never agreed to have two JPs present as he wanted his own lawyer.

[49] The applicant stated that when the JPs came and spoke with him, Constable Morgan remained in the room at the desk and that Detective Sergeant Waugh stood at the door. He did not have the opportunity to speak with the JPs in private, outside the hearing and presence of the police officers. The JPs did not advise him that he did not have to make the statement if he did not want to. He gave the statement because of what Detective Sergeant Waugh had told him. He said that he felt compelled to give the statement and that the statement was not read over to him, but he signed it.

[50] Under cross-examination, the applicant denied that JP Thompson had told him she was there to protect his rights or that she told him he did not have to make a statement. He said he did not make any complaint to the JPs because he did not get the chance since both officers were there. He agreed that during the taking of the statement, he spoke and Constable Morgan wrote, and that during the period, which was about two hours, he did not tell the JPs that he was being forced to give the statement. Nor did he tell them that the officers transporting him took him to South Manchester. He also agreed that he did not tell the JPs that he had asked to call his parents and was not given the call. He did not tell the JPs he wanted his own lawyer there at the time, nor did he tell them that he wanted to talk to his parents so that they could get him a lawyer.

[51] The applicant further agreed that Detective Sergeant Waugh did not promise him anything or threaten him to give the statement. When asked if Detective Sergeant Waugh had forced him, he repeated that the officer had told him that Deneisha said he was the one who had murdered her brother, so it was best that he said he had done it. He did not tell this to the JPs because he did not get to speak to them privately and did not ask to speak to them privately. When asked if he gave the statement of his own free will, he said yes.

[52] Upon being re-examined by his trial attorney, the applicant said he gave the statement because of what Detective Sergeant Waugh had told him. Upon being questioned by the learned trial judge, the applicant admitted that when the JPs first spoke to him, they told him they were there to ensure his rights were not taken from him. He said he felt he could not complain to the JPs in front of the officers because they were so close and he felt afraid for his life.

[53] Having heard the evidence on the *voir dire*, the learned trial judge found that the statements had been "freely and voluntarily given in circumstances which were not of fear, and both statements were ordinarily given", and were, therefore, admissible. However, the learned trial judge exercised his discretion to exclude the part of the applicant's oral statement where he allegedly said, "Mi and mi girlfriend kill har bredda. Mi want level wid yuh", on the basis that the officer had failed to give a caution in accordance with Judges' Rule II, in circumstances where it was not proven that the applicant was not a suspect at the time these words were uttered. The learned trial judge was of the view that, "because this was the first encounter between the applicant and the investigating officer, it was important from the beginning of the contact that it be communicated to the applicant his right not to say anything before anything was said" (see pages 155 and 156 of transcript). The learned trial judge did not consider the first words spoken by the applicant to Detective Waugh ("Mr. Waugh, mi inna trouble, a man like you mi waan si long time") to be a statement against interest. That part of the statement was admitted. It is, however, the admission of the words, "mi inna trouble" that counsel has complained of.

[54] The questions for this court to determine, then, are whether the learned trial judge erred in finding that the caution statement and part of the oral statement ("mi inna trouble") were voluntary, and that in all the circumstances, it was fair to admit them.

[55] Before we deal with each statement separately, it is important to point out that, although the applicant asserted in his evidence, on the *voir dire*, that he had been threatened by a police officer *en* route to the Mandeville Police Station and hit in the

chest with a gun by that officer, the learned trial judge, having heard all the evidence, seemingly rejected that allegation. This, he was entitled to do, in what was clearly a contest of credibility, as there was no other evidence, medical or otherwise, to corroborate these assertions made by the applicant. The applicant also admitted in his evidence, under cross-examination on the *voir dire,* that Detective Sergeant Waugh did not threaten him or promise him anything in return for him to give the caution statement, and that he had given the statement of his own free will. He also admitted that he made no complaint to the JPs about being threatened or otherwise, and (under re-examination) that when the JPs had first spoken to him they had told him they were there to make sure his rights were not taken from him.

[56] These bits of evidence, we believe, must be borne in mind, when assessing the specific complaints of the applicant, as they would have formed part of the background against which the learned judge would have assessed the question of admissibility raised before him.

A. *The admissibility of the oral statement*

[57] Even though the learned trial judge excluded the portion of the oral statement in which the applicant implicated himself as the killer, counsel submitted that the entirety of the utterances should have been excluded, particularly the first words he allegedly spoke to Detective Sergeant Waugh, "mi inna trouble". Counsel argued that since the applicant was already in handcuffs when Detective Sergeant Waugh approached him for the first time, which meant he was already a suspect, he should have been cautioned.

[58] Rule I of the Judges' Rules provides:

> "When a police officer is trying to discover whether, or by whom, an offence has been committed he is entitled to question any person, whether suspected or not, from whom he thinks that useful information may be obtained. This is so whether or not the person in question has been taken into custody so long as he has not been charged

> with the offence or informed that he may be prosecuted for it.

[59] Rule II requires the following:

> "As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence.
>
> The caution shall be in the following terms:
>
> > 'You are not obliged to say anything unless you wish to do so but what you say may be put into writing and given in evidence.'
>
> When after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present."

[60] Counsel for the Crown submitted that the applicant was not yet a suspect when he spoke to Detective Sergeant Waugh for the first time. However, in response to a question, in examination-in-chief on the *voir dire*, as to whether there were any suspects in relation to the incident, Detective Sergeant Waugh answered in the affirmative and explained that there had been two persons of interest in the matter. These two persons, he explained, were persons who, from his inquiry into the matter, he would have wanted to speak to, although he had no evidentiary material in relation to them. He also explained that he went to the Mandeville Police Station that evening because he had received a call that both Deniesha Gregory and the applicant had been "held in a sting operation in Spanish Town". Under cross-examination, Detective Sergeant Waugh admitted that, in his statement, he had referred to both Deniesha Gregory and the applicant as suspects, but said that that was an error on his part. Detective Sergeant Waugh also admitted that when he arrived at the station, the applicant was in handcuffs, and that it is not usual for witnesses to be in handcuffs.

[61] Based on this evidence, the learned trial judge could not be faulted for concluding that the applicant was quite likely a suspect at the time of the interaction with Detective Sergeant Waugh, and that the prosecution had not shown it to be otherwise. In such a case, the applicant ought to have been cautioned and what he said, written down, in accordance with the Judges' Rules. The part of the oral statement that was excluded by the learned trial judge, was in our view, properly excluded. Particularly so, because, once the applicant had said, "mi inna trouble", in the circumstances as they existed at the time, the officer should have been put on alert. He should not have asked the applicant, "what trouble" until he cautioned the applicant in accordance with the Judges' Rules. It was in response to the officer's question that the applicant allegedly implicated himself.

[62] In relation to that first part of the statement, "mi inna trouble", we find nothing wrong in how the learned trial judge exercised his discretion. The learned trial judge was not of the view that those words amounted to a "statement against interest", and having heard submissions from both sides, accepted the submission of counsel for the prosecution that those words were a spontaneous statement not made in response to a question, and as such were admissible. With that, we agree. The words, "mi inna trouble", by themselves, do not directly implicate the applicant in any crime, as there is no indication as to what kind of trouble he was referring to.

[63] Based on Detective Sergeant Waugh's account, it was the applicant who first spoke to him when he approached the applicant. He would not have known that the applicant was going to say something to him and what that would be. Even though the applicant was in handcuffs, the statement would have been voluntary and spontaneous, and, therefore, admissible (see **Tonge v H M Advocate** 130 JC 1982). On Detective Sergeant Waugh's evidence, therefore, there would have been no breach of the Judges' Rules at that time. Moreover, since the applicant denied having said any of what Detective Sergeant Waugh said he did, the issue in this regard would have been one of credibility, which was properly to be left to the jury.

[64] We, therefore, find no basis on which to disturb the learned trial judge's ruling in the *voir dire* to admit that part of the oral statement.

B. *The learned trial judge's ruling on the caution statement following the voir dire*

[65] There were five circumstances complained of by counsel for the applicant, which, he said caused the taking of the caution statement to be unfair and provided a basis on which the judge should have excluded it. We will deal with the first two together, and the rest in turn.

(1) The failure to make a diligent effort to obtain duty counsel/the failure to allow a phone call

[66] Section 14(2)(d) of the Charter of Fundamental Rights and Freedom, in the Constitution of Jamaica, provides that any person who is arrested or detained shall have the right to "communicate with and retain an attorney-at-law".

[67] Regulation 12 of the Regulations to the Legal Aid Act sets out various requirements in relation to the obtaining of duty counsel pursuant to the legal aid scheme under the Act, if a person detained or charged is unable to afford an attorney-at-law of his choice. It provides:

> "12. ---(1) Where a person is detained at or charged with an offence and brought to a police station or lock-up, the officer detaining the person or making the arrest shall inform him of his right to legal aid and to representation by a duty counsel.
>
> (2) A person referred to in paragraph (1) who is unable to afford an attorney-at-law of his choice may request the services of a duty counsel.
>
> (3) Where a person requests the services of a duty counsel, the police officer to whom the request is made shall contact the first available duty counsel on the roster, and where a duty counsel cannot be contacted, the police officer shall contact the Council which shall assign a duty counsel.

> (4) There shall be placed in a conspicuous position in every police station or lock-up a sign to the effect that any person who is unable to afford an attorney of his choice may request the services of a duty counsel under these Regulations."

[68] The Administrative Directions which are annexed to the Judges' Rules, provide at 7(a), that "a person in custody should be allowed to speak on the telephone to his solicitor or to his friends provided that no hindrance is reasonably likely to be caused to the process of investigation, or the administration of justice by his doing so".

[69] In this case, the evidence on the *voir dire*, from the prosecution and from the applicant, regarding this issue, was in direct conflict. In contrast to the evidence given by Detective Sergeant Waugh, as outlined earlier, the applicant said he asked for a phone call to his family for them to arrange legal representation for him, but was denied the phone call. However, under cross-examination, the applicant agreed that he did not tell the JPs any of that (albeit his explanation was that he did not get the chance to do so).

[70] Detective Sergeant Waugh admitted, under cross-examination, that he had not advised the applicant of his right to a lawyer or that he had a right to wait until he had a lawyer before giving his statement. He also admitted that, in his statement in the matter, he did not say he had advised the applicant of his intention to get a lawyer for him or that he had made any attempt to call any lawyer (including duty counsel).

[71] This was the state of the evidence before the learned trial judge, on this issue. It would have been a question of credibility as to who the learned trial judge believed. If he had found the applicant's evidence to be credible, there would have been a breach of the applicant's right to communicate with counsel of his choice. Similarly, in respect of the omissions from Detective Sergeant Waugh's statement, vis-a-vis his evidence on the *voir dire*, in the absence of anything that completely destroyed the credibility of Detective Sergeant Waugh's evidence, that would have been a matter for the learned trial judge, having seen and heard the witnesses.

[72] In respect of the issue concerning duty counsel, it is clear on the accounts from both sides on the *voir dire*, that the applicant did not request duty counsel. On Detective Sergeant Waugh's evidence, even though he did not say he told the applicant of his right to duty counsel, as required by regulation 12(1), he did point to the fact that a notice was displayed in the station as to the right to duty counsel, and that he had indicated to the applicant his intention to get duty counsel for him. If the applicant had asked for duty counsel, Detective Sergeant Waugh's duty, based on regulation 12(3) would extend to contacting "the first available duty counsel on the roster", and if one could not be contacted, the officer would have had a duty to call the Legal Aid Council to have one assigned. Of course, if the applicant was not aware he had a right to ask, it would not be fair to say he did not ask. But, if Detective Sergeant Waugh's evidence was to be believed, the applicant indicated he did not have nor want a lawyer.

[73] In the case of **Berbick and Gordon v R**, Morrison JA (as he then was) dealt with similar complaints by the appellants who had been convicted of murder in a case that rested solely on confession statements alleged to have been made by them to the police. In assessing the main complaints of the appellant Berbick, Morrison JA noted that the circumstances of which the appellant had complained to be unfair sharply conflicted with the evidence of the police witnesses given on the *voir dire*. Morrison JA, in assessing the complaints stated:

> "[94] In our view, the essential problem with these complaints is that they invite this court to proceed entirely on the basis of the position taken by Mr Berbick in his evidence on the voir dire, without regard to the fact that, in what was a pure contest of credibility, the learned judge by her ruling obviously accepted the evidence of the police witnesses over that of Mr Berbick. The resolution of these conflicts in the evidence was entirely a matter for the judge, who saw and heard the witnesses; and accordingly, such findings of fact as are clearly implicit in her rulings in respect of both applicants are in our view plainly entitled to the usual deference that is paid to a jury's findings of fact after a trial. No basis has been shown,

> in our judgment, for this court to differ from the judge on matters that fell squarely within her province."

[74] Morrison JA similarly dealt with the admissibility of the appellant Gordon's caution statement, that is, as a matter for the judge based on the evidence on the *voir dire*. As regards the complaint that Gordon was not told of his right to have an attorney, it was found that, on the evidence, it was open to the judge to find that there had been no breach of the Legal Aid Regulations.

[75] In the circumstances of this case, we find no merit in the applicant's complaints that the circumstances of the taking of the caution statement were unfair because of the failure of the police to allow him a phone call and to secure duty counsel to act on his behalf. Based on the evidence, we find that these were issues that involved a question of credibility for the consideration of the learned trial judge in determining the admissibility of the caution statement. They were also matters to be left for the jury's consideration in respect of what weight to attach to the caution statement upon its admission into evidence.

(2) The improper questioning of the applicant during the taking of the statement

[76] Rule III(b) of the Judges' Rules provides as follows:

> "It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted. Such questions may be put where they are necessary for the purpose of preventing or minimising harm or loss to some other person or to the public or for clearing up an ambiguity in a previous answer or statement.
>
> Before any such questions are put the accused should be cautioned in these terms:
>
> > "I wish to put some questions to you about the offence with which you have been charged (or about the offence for which you may be prosecuted). You are not obliged to answer any of these questions, but if you do

> the questions and answers will be taken down in writing and may be given in evidence."
>
> Any questions put and answers given relating to the offence must be contemporaneously recorded in full and the record signed by that person or if he refuses by the interrogating officer."

[77] In **Peart v R**, the Privy Council dealt extensively with the rationale for and the import of this particular rule, and how a breach of the rule should be treated. In that case, the appellant had been arrested and charged for murder. When he was cautioned he indicated he had an alibi. The following day, he spoke with the officer in charge of the investigation of the murder and was advised by that officer of the officer's intention to ask him some questions. He was asked if he had any objections to being questioned and he said no. He was then asked some 63 questions, to which he gave answers, and these were all recorded. The officer gave evidence on the *voir dire* that he had questioned the appellant because the appellant had told him he wished to talk to him (the officer). He agreed that asking questions was not the normal way of taking a confession statement, and said that during the interview, he started asking questions when he had heard enough (of the narrative) from the appellant. In his submissions on the *voir dire,* the appellant's counsel argued that this was a breach of Judges' Rules III, as there were no exceptional circumstances in the case which would warrant the police asking questions of the accused after he had been charged. The trial judge, however, rejected those submissions and found that the confession was voluntary. The trial judge ruled that the questions and answers were admissible.

[78] The appellant gave sworn evidence before the jury, the result of which was that there were numerous inconsistencies as between his answers in the question and answer document and his evidence in court. He was convicted of capital murder. His appeal to this court was dismissed, and his conviction and sentence were affirmed. On the issue regarding the 63 questions and answers thereto, this court found that there were exceptional circumstances which justified the questioning of the appellant, after he had been charged. This court held that that the Judges' Rules were rules of practice for the

guidance of the police and were not law and that a statement made in breach of it was not, in law, inadmissible, if it were voluntarily made. It was also held that the test for admissibility of a statement was whether it was voluntary and that even if there had been no exceptional circumstances, the judge's use of his discretion to admit the questions and answers should not be disturbed. This court ultimately found that there was no miscarriage of justice arising from the technical breach of Rule III of the Judge's Rules.

[79] The appellant appealed to the Privy Council where it was argued before the Board that the trial judge had erred in admitting the questions and answers into evidence, as there were no exceptional circumstances to justify the questioning of the accused, and that its admission into evidence had put the appellant at a serious disadvantage in his defence. The Privy Council agreed with these submissions, thus disagreeing with this court, and held that there were no exceptional circumstances to justify the questioning of the appellant, after he was charged in breach of the Judges' Rules.

[80] In coming to its decision, the Board considered the dangers inherent in the police questioning a defendant after he had been charged, including the possibility of self-incrimination. The Board acknowledged the importance of the principle of voluntariness but did not accept that it was the sole applicable criterion. The Board said that the overarching criterion is that of fairness of the trial, the most important facet of which is that the accused's statement must be made voluntarily in order to be admitted in evidence. However, they agreed that other relevant factors may be taken into account by a trial judge in determining whether to admit an accused's statement.

[81] The Board found that, in Mr Peart's case, although the trial judge had a discretion to admit the questions and the answers into evidence, if it was fair to do so, notwithstanding the breach, the trial judge had not directed his mind to the correct considerations, in the exercise of that discretion. The Board held that the voluntariness of the questions and answers was not sufficient justification to admit them, and that other factors bearing on the fairness to the appellant were also relevant. The Board found that

this court did not consider the content of the trial judge's discretion or the factors to which he should have had regard in exercising that discretion.

[82] The Board then considered the relevant factors it agreed the trial judge ought to have taken account of, such as the age of the appellant; the fact that he did not have counsel before the question and answer interview; that he was in custody and charged with capital murder; and that he may have felt pressured to give replies where he otherwise might have remained silent. The Board found that the appellant's replies provided support for the prosecution's witness' evidence, which was otherwise uncorroborated, and put the appellant at a serious disadvantage by introducing material which provided grounds for concluding that he was telling lies and making inconsistent statements. The Board further considered that the exposure of the internal inconsistencies in his answers and with his evidence, was prejudicial to the appellant, and was likely to have had a material effect on the jury. This, it found, was made worse by the fact that the jurors were not given sufficient direction on the proper approach to lies told by the appellant. These circumstances, the Board said, made it unfair for the evidence to have been admitted and the appellant lost the advantage of possibly succeeding in his defence. The Board allowed the appeal and remitted the case to this court for consideration as to whether there ought to have been a retrial.

[83] **Peart v R** was considered by this court in **Berbick and Gordon v R**. In the latter case, the appellant who had been convicted of murder, had been questioned by the police, to which he provided answers. This court ultimately found that Rule III(b) did not apply, since the appellant had not yet been charged or informed that he would be prosecuted.

[84] It is important to note that, in the instant case, this issue was not raised during the *voir dire*, either by trial counsel (neither in cross-examination of any of the police witnesses, nor in submissions) or by the applicant, nor did it arise in the evidence of the JPs. What was before the learned trial judge, on the *voir dire*, was the applicant's evidence that during the taking of his statement, he spoke and Constable Morgan wrote. The

allegation that the content of the caution statement was not totally the narrative from the applicant simply did not arise on the *voir dire*.

[85] The issue, however, was raised on the evidence led before the jury. The evidence of Detective Sergeant Waugh and JP Thompson on the circumstances surrounding the taking of the caution statement, was consistent with their evidence on the *voir dire*. The evidence of JP South was also by and large consistent with what he said on the *voir dire*. However, JP South gave evidence before the jury that questions about the murder were asked of the applicant during the taking of the caution statement and the applicant answered freely. These questions, he said, began after the applicant had signed the caution. The learned trial judge sought clarification by asking JP South who it was that asked the questions, to which JP South responded, "the officers". In re-examination, JP South said the applicant was asked questions involving the killing of a "young man".

[86] Although in his unsworn statement to the jury, the applicant claimed that Detective Sergeant Waugh had told him he wanted to conduct a question and answer session, and that Detective Sergeant Waugh questioned him pertaining to the murder of Tareek, Detective Sergeant Waugh had denied this. JP Thompson had also denied that the applicant was questioned and had told the court that the applicant had spoken freely and that his story was as "straight as an arrow". She said the only time he had been questioned was when he was asked to repeat because he was going too fast for Woman Constable Morgan to write.

[87] The discrepancy on the prosecution's case as to whether questions were asked of the applicant, was one to be resolved by the jury on the basis of whose evidence they believed. Of note, is the fact that the jury had before them a full detailed account in the caution statement, of how the killing took place. The caution statement contained no questions nor answers. It was a matter for the jury to assess, at that stage, with the aid of appropriate directions on the matter from the learned trial judge, which, in our view, he gave.

[88] We, therefore, find no merit in the complaint regarding the questioning of the applicant during the taking of the caution statement. Later in the judgment, we will elucidate how the issue of questions being put to the appellant was dealt with by the learned trial judge when we come to discuss the directions given by him in his summing up.

(3) The showing of the co-accused's statement to the applicant

[89] Mr Gittens complained, in ground 2, that the applicant was shown his co-accused's statement, which implicated him in the crime, and this resulted in pressure and oppression on the applicant to give the caution statement.

[90] We note, however, that, although Detective Sergeant Waugh said he gave the applicant a copy of Deneisha's statement at the applicant's request, the applicant, in his own evidence on the *voir dire*, stated that he was not given any statement made by Deneisha. In that regard, if the learned trial judge believed the applicant, that what he now complains of, did not happen, it would not have been considered as a possible "unfair" circumstance.

[91] In any event, rule V of the Judges' Rules states the following:

> "If at any time after a person has been charged with, or has been informed that he may be prosecuted for an offence a police officer wishes to bring to the notice of that person any written statement made by another person who in respect of the same offence has also been charged or informed that he may be prosecuted, he shall hand to that person a true copy of such written statement, but nothing shall be said or done to invite any reply or comment. If that person says that he would like to make a statement in reply, or starts to say something, he shall at once be cautioned or further cautioned as prescribed by rule III (a)."

[92] If Detective Sergeant Waugh was to be believed that he, in fact, gave a copy of Deneisha's statement to the applicant, doing so would not have been in breach of the Judges' Rules.

[93] We, therefore, find no merit in this complaint.

(4) The failure to provide amenities for the comfort of the applicant

[94] Para. 3 of the Administrative Directions, under the heading, "Comfort and Refreshment", requires that "[r]easonable arrangements should be made for the comfort and refreshment of persons being questioned. Whenever practicable both the person being questioned or making a statement and the officers asking the questions or taking the statement should be seated". This court, in **Berbick and Gordon v R**, at para. [92], accepted that this is a standard that is reasonable to expect police authorities to adhere to in our jurisdiction.

[95] It is not disputed that the applicant was not given anything to eat or drink during the time he was in police custody. He was not asked if he wished to have anything to eat or drink, and he made no such request.

[96] Detective Sergeant Waugh's evidence was that when he arrived at the Mandeville Police Station at 6:30 pm, he saw the applicant seated on a bench. The JPs arrived at about 9:00 pm, and the caution statement was taken between 9:25 pm and 11:25 pm. However, the applicant's evidence was that he was taken into custody by the police, along with Deneisha, from in the morning of that day, and then taken to the Spanish Town Police Station lock-up, where he was detained for about two to three hours. He was then taken by police officers to the Mandeville Police Station. He said he arrived at the Mandeville Police Station at about 4:30 pm to 5:30 pm. Although there is no indication as to the exact time the applicant was initially picked up by the police, or how long the journey to the Mandeville Police Station took, there was no evidence to refute the applicant's assertions on this point. The applicant did not say whether he was afforded any refreshment during that period.

[97] This would then mean that the applicant would have been in custody without food or drink for at least four hours, and possibly eight hours, accounting for the time he would have been in transit and in the Spanish Town lock-up. This would have been a long enough time for him to be uncomfortably hungry or thirsty. Whilst we believe that the applicant should have been asked (in accordance with the Judges' Rules) if he wished to have anything to eat or drink, and provided with same if that answer was yes, we do not think the period of time that elapsed was so inordinate to have caused the applicant such distress to make the process in which the statement was obtained unfair, especially in the light of the fact that at no time did he make any complaint of hunger or thirst.

[98] In **Berbick and Gordon v R**, in relation to the complaint that Gordon had not been provided with refreshments, Morrison JA said the following:

> "[100]…[W]e consider it to be the duty of police authorities to make reasonable arrangements for the provision of suitable refreshments to persons being questioned. But the impact of the absence of any such arrangements on the overall fairness of the process was, in our view, a matter for the learned trial judge to assess in the light of the evidence on the voir dire. In this regard, the judge would clearly have been entitled to take into account Mr Gordon's own evidence that the decision not to partake of the second meal provided at Castle Police Station was his and that he had made no complaint of hunger at any time. In the light of all of the evidence, we have therefore come to the conclusion that there is no basis upon which this court can interfere with the judge's conclusion on this issue."

[99] In this case, we find, similarly, that the question of the impact of the lack of provision of refreshment to the applicant on the fairness of the process was a question for the learned trial judge, in all the circumstances, particularly in the light of the evidence that the time period was not inordinately long, and the applicant's admission that he had not requested any refreshment. We also find no merit in this complaint.

(5) The learned judge's directions to the jury

[100] In his summing up, the learned trial judge gave thorough directions to the jury as to how they should approach the caution statement. Having outlined the offence, the learned trial judge explained that the prosecution's case was that the applicant was the one who had committed the offence and that he had confessed to doing it. He also reminded the jury that the applicant had denied having confessed. He noted that the central issues in the case were whether the caution statement was made by the applicant, and whether it had been "made freely and voluntarily without any oppression applied to him", in circumstances that were fair. If not, he said, they could not rely on it. This, in effect, was a direction similar to the formulation approved by the House of Lords in the case of **Mushtaq** (widely referred to as the **Mushtaq** direction), which, in our view, the learned trial judge was correct to give, in all the circumstances of this case (see the reference by the Board in **Ricardo Williams v The Queen,** at para 21). Even though the applicant, in his unsworn statement in this case, said he was not involved in the murder and he did not know who killed Tareek, based on other evidence, there was a 'possibility that the jury could have concluded that he had made the statement, that it was true, but that it may have been induced by oppression' (see also **Barry Wizzard v R**, at para. 35). There was evidence from JP South, which could have led the jury to conclude that the confession may have been made by the applicant but under oppressive circumstances. Also, in his unsworn statement, the applicant spoke about not being given the opportunity to get a lawyer even though he asked for one, being handcuffed throughout the whole process, and being questioned by the officers (even though, on his account he would not have said anything incriminating).

[101] The learned trial judge correctly told the jury that particular care needed to be taken in assessing this issue, as the confession was the sole evidence connecting the applicant to the crime. He gave the usual and appropriate directions on the burden and standard of proof, the jury's role, generally, and how they should go about performing that role. The learned trial judge also expressly told the jury that they could only convict if they were satisfied by the evidence to the extent that they felt sure that the applicant was guilty. At pages 364 to 373 of the transcript, the learned trial judge dealt with the

issue of inconsistencies and discrepancies in the case. He began with the usual general directions on inconsistencies and discrepancies, what they are and the jury's role regarding them; the fact that they may exist in the evidence of witnesses; the fact that it is the function of the jury to determine, if they exist, whether they were material or immaterial, and how they were to treat with that in considering the credibility of a witness. He also gave examples of evidence which the jury were entitled to consider whether they amounted to inconsistencies and discrepancies, and if so, whether they were material or immaterial. The jury were also directed that they could accept what one witness said and reject another or they could reject a part of what a witness said and accept a part or reject the whole thing entirely, and the reasons why they were entitled to do so.

[102] With particular reference to the confession and the circumstances in which it was taken, the learned trial judge pointed out, at pages 435 to 441 of the transcript, the circumstances which the defence raised as amounting to evidence of oppression and unfairness, as well as the inconsistencies and discrepancies in the police officers' evidence and the JPs' evidence. The learned trial judge specifically pointed out the discrepancy between Detective Sergeant Waugh and JP Thompson's evidence in which they claimed that no questions were asked of the applicant during the taking of the statement, and that of JP South's evidence where he said that questions were asked of the applicant. In layman's terms, the learned trial judge explained, to the jury, the impropriety of it, if, in fact, questions had been asked of the applicant, and that it was a matter for them as to how the discrepancies and inconsistencies affected their view of the credibility of the witnesses.

[103] Before reviewing the evidence, the learned trial judge again emphasized the nature and importance of the jury's duty in relation to the confession and how their determination of it should inform their verdict. At pages 377 to 380 of the transcript, which we think important to set out *in extenso*, the learned trial judge said the following:

> "…I remind you…that the only evidence connecting the accused to the offence of murder is the statement, and

the prosecution must prove that the statement was freely and voluntarily given and not made as a result of oppression or unfair circumstances. When I reach to the statement I will review the terms of the statement but not every word. It's a long statement and I don't intend to go through every word.

You will have heard what the accused man said in his unsworn statement and I will give you further directions specifically on his unsworn statement later.

But it is a matter for you to decide what you understand him to mean and what he said…if it is your view that he is saying or he is possibly saying that he did not make the statement at all, then, is the written statement you have before you all he said is that he did not do it, and he did not know anything about it. **You must decide, firstly, whether or not he made the statement. Because, if you decide that he did not make that statement, then that's the end of the case, your verdict will have to be not guilty.**

If you are satisfied that he made the statement, then you have to go on to decide whether or not it was freely and voluntarily made and not given in circumstances of unfairness or oppression. A confession cannot be used as evidence against an accused person in those circumstances[.]

[I]f you find that the statement was freely and voluntarily made, that is a major factor in determining whether or not it was given fairly. If you are satisfied so you feel sure that it was freely and voluntarily given that constitutes strong reason for you to constitute [sic] that it was fair or given in circumstances that were not unfair to him. And in those circumstances you can act on it. You can decide whether it is true and reliable and enter a verdict based on that. A statement is free and voluntary where it is not extracted or induced by any source of threat or obtained by any promise or favour or by the execution of improper influence or oppression.

A statement that may have been obtained by oppression, if it is shown that it was obtained in

> circumstances which tended to sap and did sap the freewill of the accused.
>
> Oppressive questioning may be described as questioning by its nature, duration or other attendant circumstances such as hope and the release of fears such that affects the mind of the suspect at the time that he crumbles and he speaks when otherwise he would have remained silent.
>
> If you determine that the statement was not freely and voluntarily made you cannot rely on it or use it as evidence against the accused. If you find that it was freely and voluntary [sic] made you should decide whether in all the circumstances surrounding the existence of the statement, including the fact that it was freely and voluntarily given, you find that it was fairly obtained.
>
> It is therefore for you, as the jury, to decide whether or not the statement was made. If, yes, whether or not it was fairly obtained. If, yes, what does it mean? And what value, what weight you should attach to it? And when you look at all of these matters you must consider them in the context of all the others." (Emphasis added)

[104] After reminding the jury of what was said, from the prosecution's witnesses and from the applicant, about the circumstances surrounding what occurred whilst the applicant was in custody at the CIB office, at the Mandeville Police Station, and the taking of the applicant's caution statement, the learned trial judge said (at pages 439 to 441 of the transcript):

> " He has not expressly told you that he did not make the statement in the document. What he has said is that he told everybody in the presence of the Justices of the Peace that he was not, that he knew nothing about it and that he was not involved.
>
> Now, there is no burden on the accused man to convince you of the truth of his Defence, but if you believe the accused or if you are left in a state of doubt

> as to whether you should believe him, then you are entitled to acquit him. However, even if you disbelieve the accused he cannot be convicted on such belief. You are obliged to return to the prosecution's case to determine whether or not the evidence led by the prosecution makes you feel sure of the guilt of the accused.
>
> …
>
> Now, if you understand him to mean, when he said that he told them that he knew nothing about it and he was not the one who murdered Tareek, if you understand him to mean that he did not make the statement at all which statement is a confession that he did make that he murdered Tareek Gregory, then the first thing you have to decide is whether or not he made the statement…taking into account all the evidence which bears on this point…"

[105] At page 443 of the transcript, the learned judge continued:

> "If you are not sure that the accused man made the statement, then you must take no account of it at all, and if you take no account of it at all, then your verdict is not guilty. If, on the other hand, you are sure that he made the statement, then you go on to decide whether it was fairly obtained."

[106] The learned trial judge again reminded the jury of the circumstances raised by the defence which, if they accepted had occurred, they could find amounted to oppression. He also reminded them of the inconsistency in the evidence regarding whether questions had been asked of the applicant during the taking of the statement, and directed that only if they were sure that the statement had been voluntarily given without oppression or unfairness, should they rely on it, determine what they believe of it and what weight to give to it. He went on further to say, at page 444 to 445 of the transcript, that:

> "If you are not sure that the statement is true, that is, if you are not sure that what he said in his statement is a true account, then your verdict will be not guilty. If you are sure…then you can rely upon it and you can

> treat it as evidence to support the Prosecution's case. And if you are sure that it is true, then you will be entitled to return a verdict of guilty of Murder."

[107] We find that the learned trial judge's directions, taken as a whole, were sufficient, and that he properly guided the jury and left for their consideration what factual circumstances they found proved, and what weight and value to place on the confession, in determining whether the applicant was guilty of the offence as charged.

[108] No doubt the jury, having been properly directed, would have considered carefully the evidence presented, the applicant's unsworn statement, and particularly the level of detail that was in the caution statement (which, as stated earlier, contained no questions and answers) regarding matters that could have only been within the applicant's own knowledge, as well as matters that aligned with evidence given by the two other civilian witnesses. There is no merit in this complaint.

[109] We, therefore, find no merit in grounds 1 to 3. Accordingly, this court finds no proper basis to disturb the conviction.

Whether the sentence imposed by the learned trial judge is manifestly excessive – Ground 4.

The applicant's submissions

[110] The challenge to the appropriateness of the applicant's sentence is on two bases. The first relates to the learned trial judge's treatment of the social enquiry report ('SER'), and the second, involves his general approach to the sentencing exercise, in which, it was said, he failed to follow established sentencing guidelines.

[111] In relation to the SER, Mr Gittens argued that the learned trial judge erred when he deemed the SER to have been read into evidence, rather than actually having it read into evidence. He submitted that deeming the SER as read into evidence would have meant that it would not have officially become part of the record, and this would have deprived the applicant of his constitutional right to have a public trial. Further, it was contended that this failure by the learned trial judge resulted in him failing to sufficiently

consider or to demonstrate that he considered relevant and important information contained in the SER, having to do with the paternal abuse reportedly suffered by the applicant, the home and employment background of the applicant, and his attitude to employment or authority (as required by rule 3 of the Criminal Justice (Reform) Rules 2001). This, it was argued, would have also prevented the learned trial judge from appreciating the importance of the emotion referred to by counsel for the applicant in his plea in mitigation on behalf of the applicant.

[112] With respect to the approach used by the learned trial judge in arriving at the sentence he ultimately imposed, it was submitted that he failed to indicate a starting point, the increase or decrease in the sentence on account of the aggravating and mitigating factors, as well as the credit that was given for the time the appellant spent in pre-trial custody.

The respondent's submissions

[113] Counsel for the Crown submitted, in response, that the fact that the SER was not read into evidence, and only forms part of the record as an attachment, was of no detriment to the applicant, as it contained the same information that would have been read. It was submitted that the transcript demonstrates that the applicant's attorney had the opportunity to review its contents to which he referred during his plea in mitigation, and that the learned trial judge had the opportunity to review the report himself.

[114] It was further submitted that, whilst it is good practice for the court to obtain and consider a SER where necessary, such a report is not mandated by law to form part of the transcript. The Crown relied on the case of **Kurt Taylor v R** [2016] JMCA Crim 23, in which the court found that there was no ill in failing to read a social enquiry report into evidence, and that what was important, was that its contents were readily available to the court and all the interested parties.

[115] In respect of the paternal abuse suffered by the applicant, counsel for the Crown submitted that it was clear the learned trial judge took this into consideration, as he

himself had sought clarity from the probation officer as to the nature of the abuse, and the distinction between abuse and regular discipline. It was further submitted that the learned trial judge did, in fact, consider that the applicant may have been overcome with love when he killed the deceased, and he attributed the weight to it he thought it deserved, albeit, at page 460 of the transcript, he rejected it as a mitigating circumstance. Although the learned trial judge did not itemize all the factors from the report, it was argued, it was clear that he took them into consideration.

[116] In relation to the learned trial judge's general approach to the sentencing exercise, it was submitted that, although the learned trial judge did not use any mathematical formulation, he took into account the general principles of sentencing and the relevant factors, including the aggravating and mitigating ones, and the period of pre-trial remand. Further, it was argued, given the circumstances and heinous manner of the killing of a "helpless boy", the learned trial judge "tempered justice with mercy" in handing down his sentence. Moreover, it was argued that, although the learned trial judge did not use a specific starting point, the sentence is within the range for the offence of murder, is not manifestly excessive, and in any event, this is a case where the proviso should be applied, if necessary. The approach taken in the case of **Sanjay Splatt v R** [2022] JMCA Crim 39 was urged on this court.

[117] In written submissions filed subsequent to the hearing, at the request of this court, counsel for the Crown outlined what, in her view, the proper calculation of the pre-parole period of the sentence would entail, and suggested that a final pre-parole period of 27 years, would be appropriate.

Discussion

[118] In the sentencing exercise, the learned trial judge had before him an antecedent report and a SER in respect of the applicant, and heard a plea in mitigation by the applicant's counsel.

[119] Although the antecedent report was read orally into evidence, the SER was not. It was taken as read. There is no reason ascertainable from the transcript as to why one was read orally and not the other, but we do not believe, in the circumstances, that the report not having been read orally into evidence would have done any harm to the learned trial judge's assessment of what would have been an appropriate sentence to impose, and the sentence he ultimately imposed.

[120] We start by reiterating the stance of this court with regards to the use of SERs in sentencing matters. There is no statutory requirement that mandates the use of a SER in sentencing for the offence of murder, as in this case, and, therefore, whether one should be obtained and relied on is a matter for the discretion of the trial judge. This court has, however, accepted its utility in the quest to find a sentence appropriate to the offender, and considers it to be "good sentencing practice" to obtain one (see **Michael Evans v R** [2015] JMCA Crim 33 and **Sylburn Lewis v R** [2016] JMCA Crim 30, which were approved in the recent case of **Charles McDonald v R** [2022] JMCA Crim 48; see also paras. 2.3 and 2.4 of the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017).

[121] Counsel for the applicant asserted a breach of rule 3 of the Criminal Justice (Reform) Rules 2001, which, he said required the learned trial judge to consider various things, such as the home and employment background of the offender, as well as the attitude of the offender towards employment or authority, which, counsel alleged, the learned trial judge did not consider. To this, we say, the rule speaks to a mandatory SER in respect of an offender being sentenced in accordance with the Criminal Justice (Reform) Act ('the Act'), with a view to the imposition of a non-custodial sentence such as community service or specified training. The Act specifically excludes the offence of murder. It, therefore, strictly speaking, does not apply here.

[122] It goes without saying, therefore, that if a SER is not mandated by law then there could technically be no breach in not procuring one and in not reading it into the record. We do not believe, therefore, that any such failure, without more, could diminish the

propriety of the sentencing exercise. In any event, however, we agree with counsel for the Crown that it is clear from the transcript that the learned trial judge had in mind the importance of the SER to the sentencing exercise, and that he considered all the matters stated therein in arriving at the sentence he imposed.

[123] In that regard, we note the following matters. Firstly, after the jury returned its verdict, it was the learned trial judge himself who indicated to counsel his belief that a SER would be very useful, and he asked the probation officer who was present to procure one, along with an antecedent report, in time for the date he had set for the sentencing.

[124] Secondly, at the sentencing hearing, the probation officer gave sworn evidence in respect of the applicant's SER, stating that the report had been circulated to the defence, prosecution and the judge. The prosecutor asked for the report to be taken as read into the record, to which the learned trial judge agreed. No objection was taken by defence counsel, who stated to the court that he had no questions. The question here is what does "taken as read into the record" mean. In common parlance, it generally means that the contents of the report will form part of the record without the need for it to be orally read out and a transcript taken of the words as they are read. In such a case, the whole document becomes part of the transcript being the official record of the proceedings. Two approaches could be utilized in this regard, the first being to have the shorthand writer type the words from the SER into the transcript, or, as was done in this case, attach the SER to the transcript.

[125] Thirdly, in demonstrating that he was quite acquainted with the contents of the report, the learned trial judge sought to clarify, on his own volition, what was meant by the statement in the SER that the applicant had been physically abused by his father. The probation officer responded that the applicant's mother had indicated that the applicant's father had been physically abusive to her and the children, including the applicant. The learned trial judge went further to ask if that "physical abuse" was beyond what was used for correction, to which the officer said yes.

[126] Fourthly, during the plea in mitigation, defence counsel specifically referred to matters stated in the report and asked the learned trial judge to consider them.

[127] Furthermore, during the sentencing exercise, the learned trial judge again demonstrated his familiarity with and consideration of the report when he said he had been looking at the SER to see whether the applicant had been diagnosed with any mental illness that could have caused him to behave in the way he did. The learned trial judge further referenced the possible motive for the killing that was stated in the report (that the applicant had done it out of love for Tareek's sister) albeit he rejected it, as well as expressions of remorse by the applicant to the probation officer, which he said he considered to be very important. He then considered the "positive sentiments" the applicant's community had said about him, which were also noted in the SER.

[128] It is clear, therefore, that the learned trial judge did, in fact, fully consider the contents of the SER in considering the appropriate sentence for the applicant.

[129] Counsel's ultimate complaint involved the question of the applicant's right to have a public trial. However, in our view, the applicant did have a public trial and access to open justice, and even though the SER was not orally read out in court, its contents were extensively discussed and referred to, for anyone in court to hear. There was, therefore, no prejudice caused to the applicant in not having the SER read orally into the record and it does form part of the transcript of his trial.

[130] In respect of the sentencing exercise generally, we accept that the learned trial judge did not approach the sentencing exercise in the proper manner as set out in **Meisha Clement v R** [2016] JMCA Crim 26. It is commonly agreed that the learned trial judge did not indicate a starting point, and although he did consider the aggravating and mitigating factors, he did not show how he accounted for those factors, as well as the six years he noted the applicant had spent on pre-trial remand. The learned trial judge focused on the heinous and wicked nature of the offence, reciting the details of how Tareek was killed and how he had fought for his life. He was of the view that the applicant

should have a long time to reflect upon what he had done, but failed to indicate by way of calculation, how he arrived at the ultimate sentence he imposed.

[131] This failure by the learned trial judge, in principle, allows this court to approach the applicant's sentence anew (**R v Alpha Green** (1969) 11 JLR 283). Having done so, however, we are of the view that, in the circumstances, the sentence is by no means manifestly excessive.

[132] Counsel for the applicant took no issue with the sentence of life imprisonment imposed by the learned judge, but took issue, however, with the period of 26 years' imprisonment to be served before eligibility for parole. Counsel for the applicant suggested that this court follow the course taken in the case of **Cornelius Robinson v R** [2022] JMCA Crim 16, in which a starting point of 25 years was applied in respect of the murder by strangulation of a 14-year-old pregnant girl. We take the view, however, that, in this case, the manner in which Tareek was ambushed and murdered in his own home by the applicant, aided by the child's own sister, was more vicious, and calls for a higher starting point than that which was applied in that case. The serious nature of the crime was highlighted by the learned trial judge in his sentencing remarks, at page 459 of the transcript, when he said the following:

> "You certainly showed no mercy to young Tareek. When you cut his throat and he was struggling, blowing for life, you went and cut it again. When you heard him blowing for life, you went and cut it again, when you heard him blowing for life you tried to put a plastic bag over his head to asphyxiate him. When in fighting for his life he managed to pull it off, you stabbed him twice in his side, one stab going in 13 centimeters in the body of that little child. And then you bludgeoned him in his head with a bat to make sure he was dead. You showed no mercy. The callousness with which you committed this crime is unspeakable. I shudder to think what was happening in poor Tareek's mind as he was dying and you were killing him in that way."

[133] The learned trial judge stated that a sentence in a case of this nature ought to reflect the gravity of the crime. With that we completely agree. We, therefore, take the view that a starting point of 30 years would be appropriate in this case, having taken into account the age and vulnerability of the victim, and the vicious manner of the killing, which included the involvement of two perpetrators and the use of more than one implement or weapon to ensure the demise of the defenceless victim.

[134] Avoiding any possibility of double counting, but taking account of aggravating features such as the obvious premeditation; the apparent motive; the unauthorised entry into the house; the murderous attack in what should have been the sanctity of the child's home; the child's knowledge of his impending death and his futile fight to save himself; and the prevalence of murder in our society, there would be have to be an upward adjustment of the starting point to a period of 40 years. Applying the mitigating factors identified in the case, such as the applicant's age; the absence of previous convictions; the reported expression of remorse for the killing; and the positive community report, this would result in a downward adjustment to the starting point resulting in a period of 35 years. Taking into account the six years for time spent on pre-trial remand, a minimum pre-parole sentence of up to 29 years would have been appropriate for the learned trial judge to impose. It is, therefore, clear, that the sentence of life imprisonment without the possibility of parole before serving 26 years, imposed by the learned trial judge, is by no means manifestly excessive.

[135] This ground of appeal would also fail.

Disposal of the application for leave to appeal

[136] For the reasons we have expressed, there is no proper basis on which to disturb the verdict of the jury and the sentence imposed by the learned trial judge. The application for leave to appeal is, therefore, refused. The sentence is to be reckoned as having commenced on 2 November 2017, the date on which it was imposed.