[2023] JMCA Crim 48

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE BROWN JA

SUPREME COURT CRIMINAL APPEAL NOS COA2019CR00037 & 38

LAWRENCE OLIVER
DWAYNE OLIPHANT v R

Mrs Melrose Reid for the appellant Lawrence Oliver

Miss Zara Lewis for the applicant Dwayne Oliphant

Miss Paula Llewellyn KC and Miss Sharelle Smith for the Crown

29, 31 May, 1 June and 3 November 2023

Criminal Law – self defence – judicial interventions –whether descending into the arena – duty of trial judge when dealing with discrepancies and inconsistences in the evidence – constitutional right to a fair trial within a reasonable time - pre-trial delay – appropriate remedy for pre-trial delay - common design – joint enterprise – whether the lesser offence of manslaughter was appropriately left to the jury - whether sentence of 12 years for the offence of manslaughter manifestly excessive for secondary party – Charter of Fundamental Rights and Freedoms, section 16(1), (6) and (8)

STRAW JA

Introduction

[1] On 26 March 2019, following a trial before a judge and jury in the Saint Mary Circuit Court, the applicant, Dwayne Oliphant, was found guilty of the offence of murder and the appellant, Lawrence Oliver, was found guilty of the lesser offence of manslaughter. On 9 April 2019, Mr Oliphant was sentenced to life imprisonment without eligibility for parole before serving 20 years' imprisonment. On that same date, Mr Oliver was sentenced to 12 years and 10 months' imprisonment.

[2] Both Messrs Oliphant and Oliver sought leave from this court to appeal against their convictions and sentences. On 14 January 2022, a single judge of this court considered their applications and refused Mr Oliphant's application for leave to appeal his conviction and sentence but granted Mr Oliver leave to appeal his conviction. Before this court is a renewed application by Mr Oliphant, seeking leave to appeal both conviction and sentence, as well as Mr Oliver's appeal which related to conviction and a renewed application in relation to sentence.

Background

The Crown's case

[3] The main witnesses as to fact on behalf of the Crown were Messrs Jason Clarke and Louie McKenzie. It was Mr Clarke's evidence that on 6 November 2013, at about 6:30 pm, he, along with three other men, including his cousin Billy Dee Lawrence ('the deceased') and Mr McKenzie, were standing at the entrance of a lane called Spicy Grove in Oracabessa in the parish of Saint Mary. He heard footsteps behind him and when he looked around, he saw "Sticky Tie" and "Skinny" running toward them. He identified "Sticky Tie" as Mr Oliphant and "Skinny" as Mr Oliver. Mr Clarke testified to knowing the men for five and 10 years, respectively, before the incident. Counsel for Messrs Oliver and Oliphant indicated at the trial that identification was not in issue.

[4] It was Mr Clarke's evidence that neither he, nor any of the three men with whom he stood, had anything in their hands, but Mr Oliphant was armed with a cutlass/machete. Upon seeing Messrs Oliphant and Oliver, he jumped over a fence, whereas the other three men (who were with him) ran into Spicy Grove Lane. He observed Mr Oliver throwing bottles at all of them. He took a shortcut that led him back to Spicy Grove Lane. Mr Oliphant was also on the lane, as he had pursued the other three men. At that time, he saw the deceased bent down and holding his left arm which was bleeding profusely. The deceased eventually fainted and Mr Clarke put him in a taxi for transportation to the hospital. He did not see the deceased again until he saw his body at his funeral.

[5] Mr Clarke related that Mr Oliphant's attack was specifically intended for the deceased, with whom Mr Oliphant had a dispute about a month before. However, he did not see who inflicted the injury to the deceased.

[6] Mr McKenzie's evidence largely corroborated the evidence of Mr Clarke. He testified to knowing Messrs Oliphant and Oliver for at least five years prior to the incident. He identified Mr Oliphant as having a cutlass which he observed to be sharpened on both sides and he saw Mr Oliver with a Heineken bottle which he threw at Mr Clarke. Mr Clarke jumped over a wall while he and the other men including the deceased, ran onto the lane. The deceased was caught by Mr Oliphant who chopped him under his left arm. Mr Oliphant and Mr Oliver ran off whilst Mr McKenzie and the others tried to help the deceased.

[7] Detective Corporal Dowaine Lawrence, who was the investigating officer in the matter, also gave evidence. It was his testimony that further to a report that he received the day following the incident, he visited the Saint Ann's Bay Hospital where he was shown the body of the deceased. Thereafter, he visited the location of the incident. He observed spots of blood on the ground, at the entrance of and leading into Spicy Grove Lane. Arising from his investigations, on 8 November 2013, he arrested Messrs Oliphant and Oliver. He then charged both men on 18 November 2013, for the offence of murder. When cautioned, Mr Oliphant said, "Mi never mean fi duh it, it just happen". Mr Oliver remained silent. Corporal Lawrence was also in attendance at the port-mortem examination and received the examiner's report.

[8] It was deduced from the summation of the learned trial judge that the post-mortem report was received into evidence as a document agreed between the defence and the prosecution. This report revealed one chop wound to the deceased's left arm and that the cause of death was haemorrhage from the said chop wound.

The case for the defence

[9] Both Messrs Oliphant and Oliver gave unsworn statements. It was Mr Oliphant's account that on the date of the incident, he observed six to eight men at the entrance of Spicy Grove Lane. As he was walking past them, he was attacked, stabbed and cut all over his body by Mr Clarke. As he is a farmer, he had a cutlass in his hand, which he used to defend himself and that is how the deceased was chopped. He then ran off. The men chased him but he escaped and was eventually taken to the hospital by his sister, where he was admitted. Essentially, therefore, Mr Oliphant alleged that he was acting in self-defence.

[10] Mr Oliver on the other hand, simply indicated that he had nothing to do with the incident that took place on the night in question.

Grounds of appeal filed on behalf of Mr Oliphant

[11] Permission was sought by counsel for Mr Oliphant, and was granted by the court, to abandon grounds one and two of the original grounds of appeal that were filed and to argue the following supplemental grounds filed on 29 May 2023:

> "**1. Further Supplemental Ground 1**
>
> The Learned Trial Judge (LTJ) failed to have left any adequate direction to the jury on the critical issue raised on the defence's case that the Applicant acted or could have acted in lawful self-defence at the time.
>
> **2. Further Supplemental Ground 2**
>
> The Learned Trial Judge (LTJ) denied the appellant a fair trial by her excessive interference during the cross examination of the prosecution witnesses by Defence Counsel effectively becoming a participant at the bar instead of from the bench.
>
> **3. Further Supplemental Ground 3**
>
> The learned Trial Judge erred in her treatment of previous inconsistent statements and discrepancies and the effect these should have on the findings of the jury.

4. Further Supplemental Ground 4

That the trial judge erred in law when she failed to direct the jury to facts and credibility of the witness which rendered the verdict unsafe in the circumstances.

5. Further Supplemental Ground 5

The verdict arrived at was unreasonable having regard to the evidence before the Court."

[12] Additionally, during the course of the hearing, leave was sought and granted to argue the following further ground of appeal, being supplemental ground of appeal six:

> "The learned trial judge, in failing to consider the delay of six years for the hearing of the trial, amounts to a breach of the applicant's constitutional right to a fair hearing within a reasonable time under section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter 3 of the Constitution."

Each ground of appeal will now be considered.

Further supplemental ground one - The learned trial judge failed to have left any adequate direction to the jury on the critical issue raised on the defence's case that the applicant acted or could have acted in lawful self-defence at the time

Submissions

[13] Counsel Miss Lewis submitted that the learned trial judge failed to adequately sum up Mr Oliphant's defence, for the jury. She pointed to the commencement of the learned trial judge's summation, where there was an initial reference to self-defence, as well as other references in the transcript. She submitted that the learned trial judge only made three short references to Mr Oliphant's defence, whereas she extensively outlined the prosecution's case. Miss Lewis submitted therefore, that the learned trial judge failed to set out Mr Oliphant's defence, so as to counter-balance the evidence of the prosecution witnesses, and to fairly set out the evidence before the jury. Counsel cited the case of **Wilbert Pryce v R** [2019] JMCA Crim 40, as it concerned the law of self-defence and the role of a trial judge in assisting a jury to determine whether a person had a genuine

belief of being under attack. She indicated that the learned trial judge's summation failed to explain these principles. As such, Mr Oliphant's conviction was unsafe.

[14] In response, the learned Director of Public Prosecutions ('DPP') submitted that there is no correct formula for directing a jury, so long as the directions capture the salient points and the evidence. She disagreed with the submission that the learned trial judge failed to counter-balance the evidence from the prosecution with that of the defence and asserted that the learned trial judge gave a fair assessment of the law regarding self-defence and advised the jury of the options which were open to them and how to treat with those options. Further, the learned trial judge properly directed the jury on the correct burden and standard of proof to be applied.

Analysis

[15] The law with regard to the duty of a trial judge in directing the jury on the law of self-defence is well-settled and needs no prolonged analysis in the circumstances of this case. There were two distinct versions as to what took place when the deceased received his fatal injury. Both the prosecution's case and the case for Mr Oliphant have been set out above. In summary, the prosecution witnesses gave evidence that Mr Oliphant came to the scene armed with a machete and began to chase them. As they ran, Mr Oliphant caught up with the deceased and chopped him. The deceased was not armed. On the other hand, Mr Oliphant stated that he was walking past a group of about six to eight men including the deceased and the two prosecution witnesses, Messrs Clarke and McKenzie. He stated, "me hear somebody start like a noise and by time me look round is a knife run into me head side" and "Merchant [Mr McKenzie] stab me pon me ears, me get cut in my hand, my foot my, all over, miss". He said the deceased was the nearest to him and he (Mr Oliphant) had a machete in his hand (he was a farmer coming from work), which he swung and it caught the deceased on his hand.

[16] No issue arose as to whether he had an honest belief that he was under attack. The cases of **Beckford v R** (1987) 36 WIR 300 and **Wilbert Pryce v R** are useful in this regard. At paras. [24] – [29] of **Wilbert Pryce v R**, Morrison P examined the judge's

duty to direct the jury on this issue. He stated at para. [28] that, "in the light of the applicant's stated position that he was in fact under attack, an honest belief direction would have been of little or no assistance to the jury". Morrison P, also at para. [28], then went on to quote from Rowe P in **R v Derrick Wolfe** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 94/1991, judgment delivered 31 July 1992, that "the **Beckford** direction" as to honest belief must be given where there is a question as to the nature or existence of the attack; that when it is clear on the defence that the appellant was being attacked, the jury would not be assisted with a direction on honest belief.

[17] With regard to whether the learned trial judge dealt sufficiently with Mr Oliphant's defence, a perusal of the summation indicates that this is not a meritorious complaint. At pages 275 to 281 of the transcript, the learned trial judge directed the jury on the law as it relates to self-defence. At page 281, lines one to 13, she reminded the jury of what Mr Oliphant had said about the attack on him. At lines 14 to 22, she directed them on the issue of reasonableness of his actions, then at lines 23 to 25 and page 282, lines one to 18, she continued her directions based on the factual assertions set out by Mr Oliphant. Again at page 282, lines 19 to 25 to page 283, lines one to four, she reiterated that Mr Oliphant had said he was set upon by the men. The learned trial judge also pointed out to the jury that Mr Oliphant had indicated that he had been coming from a certain direction towards the 'lane mouth' when he was attacked (see page 322, lines 20 to 25 and page 323 lines one to seven). This was contrary to the evidence of the prosecution's witnesses. She then told the jury that they would have to determine which direction Mr Oliphant came from as this would have been important in their assessment of the issue of self-defence. There were no other circumstances presented in the defence that required the learned trial judge to expand her directions.

[18] Mr Oliphant stated that he had received injuries during the incident. There was no medical evidence or evidence from any other source to support his statements. However, the learned trial judge had given the jury the standard direction relevant to self defence

including the entitlement of Mr Oliphant to defend himself if they found that he was under attack, that they would have to find that he was not guilty. She also directed the jury that it was the duty of the prosecution to satisfy them so that they felt sure that both Mr Oliphant and Mr Oliver were not acting in self-defence. No issue has been taken with standard directions given by the learned trial judge.

[19] This ground of appeal fails.

Further supplemental ground two - The learned trial judge denied the appellant a fair trial by her excessive interference during the cross examination of the prosecution witnesses by defence counsel effectively becoming a participant at the bar instead of from the bench

Submissions

[20] Miss Lewis submitted that it appeared that during the trial, the learned trial judge descended into the arena in favour of the prosecution and gave an impression of being hostile toward counsel for Mr Oliphant. Reference was made to the cases of **Peter Michel v R** [2009] UKPC 41 and **Christopher Belnavis v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 101/2003, judgment delivered 25 May 2005. Miss Lewis quoted extensively from the transcript in highlighting several interventions by the learned trial judge during cross-examination by Mr Oliphant's attorney, particularly as he cross-examined Detective Corporal Lawrence. Miss Lewis submitted that the learned trial judge prevented defence counsel from exploring the sources of certain hearsay information relating to Mr Oliphant receiving injuries as a result of the incident. She stated further that, had exploration been permitted, the jury may have benefitted.

[21] On this point also, the learned DPP disagreed. She submitted that the interventions by the learned trial judge were with a view to protect the trial process against breaches of the rules of evidence. The learned DPP contended that at no point did the learned trial judge appear hostile or seek to belittle or denigrate Mr Oliphant's case. She also did not comment on the evidence. Reference was made to the case of **Carlton Baddal v R** [2011] JMCA Crim 6, in submitting that, the question to be answered in determining this

issue is, whether the quality of the trial was affected by the intervention of the learned trial judge so as to render it unfair to Mr Oliphant. The learned DPP maintained that the learned trial judge's interventions were with a view to ensuring the "orderly elicitation of evidence". Reliance was also placed on the case of **R v Hulusi** [1973] 58 Cr App Rep 378.

Analysis

[22] The focus of Miss Lewis' complaint concerned the cross-examination of Detective Corporal Lawrence found on pages 184 to 190 of the transcript. A perusal of the relevant passages demonstrates that the learned DPP was correct in her submissions on the point. The interruptions by the learned trial judge were to ensure that the rules of evidence were not breached, in particular, the rule against hearsay. This was in relation to whether the officer knew or was aware of injuries received by Mr Oliphant on the night in question. There was some inconsistency by the witness on this point. (This will be dealt with below.) However, the learned trial judge was at pains to impress upon defence counsel that he had to ascertain whether the officer was aware, from his personal knowledge, of any injuries sustained by Mr Oliphant. This is evident from the exchange between the learned trial judge and Mr Oliphant's counsel recorded at page 189 lines 15 to 25 and page 190 lines 1 to 19 of the transcript as follows:

> "HER LADYSHIP: Mr. Smith, I do not want you to cause the witness to go down a path where he is asked about things that are not admissible, not notwithstanding that it is containing [sic] in a document.
>
> MR. E. SMITH: I am going to put it to him from his personal knowledge.
>
> HER LADYSHIP: From his personal knowledge?
>
> MR. E. SMITH: Yes.
>
> Q. Mr. Lawrence, isn't it a fact?"

> "HER LADYSHIP: You say it was going to be from his personal knowledge?
>
> MR. E. SMITH: Yes.
>
> Q. I am putting it to you that you know that the accused, Oliphant, was treated at the Annotto Bay Hospital the night of the incident?
>
> HER LADYSHIP: Don't answer. Were you at the Annotto Bay Hospital on the night of the incident?
>
> THE WITNESS: No, ma'am.
>
> Q. You know though…
>
> HER LADYSHIP: Do not answer the question.
>
> Mr. Smith.
>
> Q. Didn't you see --- okay --- what date did you first come into contact with Mr Oliphant?
>
> HER LADYSHIP: That, oh, that's a question. What date did you first come into contact with Mr. Oliphant?"

[23] Also, the learned trial judge intervened to ensure that defence counsel did not submit on issues of law in the presence of the jury. These interventions are part and parcel of a trial judge's function to manage his or her court and ensure the orderly elicitation of evidence.

[24] At paras. [76] to [79] of **Tara Ball and others v R** [2023] JMCA Crim 2 ('**Tara Ball**'), this court did an overview of authorities relating to the issue of excessive interference by trial judges. At para. [79] it was stated:

> "In **Lamont Ricketts v R**, F Williams JA, at paras. [21] to [23] considered the authorities in relation to this issue, including **Peter Michel v The Queen**, as follows:

'[21] Also, in the case of **Peter Michel v The Queen** … Lord Brown, delivering the advice of the Board, gave the following guidance at paragraph 34:

> '34. ….Of course he can clear up ambiguities. Of course he can clarify the answers being given. But he should be seeking to promote the orderly elicitation of the evidence, not needlessly interrupting its flow. He must not cross-examine witnesses, especially not during evidence-in-chief. He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on the evidence while it is being given. And above all he must not make obvious to all his own profound disbelief in the defence being advanced.' …

Subsequently, at para. [30] of **Lamont Ricketts v R**, F Williams JA set out guidance in the way of the main points gleaned from the authorities. He stated:

> 'The main points gleaned from the authorities relating to interventions might be summarized as follows: (i) trial judges should, as much as possible, limit their questioning to what is necessary to clear up issues, better understand evidence and bring to the fore points overlooked or not sufficiently addressed; (ii) their questioning should not be of such a nature or go to such an extent as to give the impression that they have taken sides or have descended into the arena and lost their impartiality; (iii) they should try not to interrupt the flow of evidence and, as much as possible, should not take over the elicitation of evidence from counsel (though the temptation is likely to arise when the evidence is being led less than competently); (iv) they should not cross-examine witnesses; (v) they should not display any hostility or adverse attitude or convey any negative view of a particular case or witness whilst hearing arguments and evidence, although they are, of course, entitled to test the soundness of arguments and submissions; and (vi) they are required at all times and so far as is humanly possible to maintain a balanced and umpire-like approach to the task of adjudication.'"

[25] At para. [76] of **Tara Ball** it was stated:

> "In **R v Hulusi**, Lord Parker CJ observed at page 382 that interventions to clear up ambiguities and to ensure that the judge is making an accurate note are perfectly justified. However, he also stated that it is wrong for a judge to descend into the arena and to give the impression of acting as an advocate. Further, he described the type of interventions that give rise to the quashing of a conviction. These were threefold:
>
> > '… those [interventions] which invite the jury to disbelieve the evidence for the defence which is put to the jury in such strong terms that it cannot be cured by the common formula that the facts are for the jury . . . The second ground giving rise to a quashing of a conviction is where the interventions have made it really impossible for counsel for the defence to do his or her duty in properly presenting the defence, and thirdly, cases where the interventions have had the effect of preventing the prisoner himself from doing himself justice and telling the story in his own way.'"

[26] The principles enunciated in the above authorities demonstrate that the interventions of the learned trial judge in the case at bar were not of the nature deserving of any criticism by this court, or, such, as to give rise to the quashing of the conviction of Mr Oliphant.

[27] This ground of appeal fails.

Further supplemental ground three - The learned trial judge erred in her treatment of previous inconsistent statements and discrepancies and the effect these should have on the findings of the jury

Further supplemental ground four - That the learned trial judge erred in law when she failed to direct the jury to facts and credibility of the witness which rendered the verdict unsafe in the circumstances

Submissions

[28] Miss Lewis argued grounds three and four together. She submitted that the learned trial judge failed in her duty to highlight inconsistences and discrepancies on the prosecution's case, and particularly those inconsistencies that benefitted Mr Oliphant. Whilst acknowledging that the learned trial judge was not required to point out every

inconsistency and discrepancy in the case, she submitted that the learned trial judge failed to assist the jury in determining how to treat with inconsistencies and discrepancies on the prosecution's case. Miss Lewis stated that it was insufficient for the learned trial judge to simply recount the evidence without any assessment of how to treat with inconsistencies and discrepancies. Reliance was placed on the cases of **R v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991, **Morris Cargill v R** [2016] JMCA Crim 6 and **Vernaldo Graham v R** [2017] JMCA Crim 30.

[29] Counsel pointed to various inconsistencies and discrepancies in the evidence which she argued rendered the prosecution witnesses unreliable. She highlighted what she described as a material discrepancy in Mr Clarke's evidence regarding an incident which occurred a month prior to the killing of the deceased. Also, she contended that there were several inconsistencies in the evidence of Mr McKenzie regarding his possession of a knife during the incident. Further, that a discrepancy also arose in the evidence of Detective Corporal Lawrence. Particularly, that the evidence of Detective Corporal Lawrence regarding the blood pattern which he observed on the road, supported Mr Oliphant's account of the incident and not that of the prosecution witnesses. Miss Lewis asserted that where there were grave discrepancies on the evidence, or doubts, these should have been resolved in favour of Mr Oliphant.

[30] In refuting these submissions, the learned DPP submitted that the learned trial judge adequately dealt with the inconsistencies and discrepancies that arose in the case. She pointed to the aspects of the learned trial judge's summation in which she explained to the jury how to treat with conflicts in the evidence and the fact that they would be required to weigh the evidence of each witness with a view to determining their truthfulness. She submitted that the learned trial judge had adequately discharged the duty that was required of her.

Analysis

[31] While trial judges have an obligation to explain to juries the nature and significance of inconsistencies and discrepancies, they are not obliged to identify every single one that occurred during the unfolding of the evidence. They should, however, mention those which can be considered as "especially damaging to the prosecution's case" (per Brooks JA, as he then was, in **Morris Cargill v R** at para. [30]), or those that could be considered as major discrepancies (see paras. [31] – [33] of **Morris Cargill v R** where Brooks JA examined authorities relevant to the issue of treating with major discrepancies).

[32] The learned trial judge, in the case at bar, gave detailed directions to the jury on the issue of inconsistencies and discrepancies and how the jury should treat with them (pages 308 to 317 of the transcript). There can be no complaint in this regard. In particular, the learned trial judge pointed out several inconsistencies and discrepancies including those complained of by Miss Lewis. These were as follows:

> 1. Mr Clarke stated that it was a barb-wired fence that he jumped over when he saw Messrs Oliphant and Oliver at the lane mouth whereas Mr McKenzie said it was a wall (page 322, lines nine to 19 of the transcript).
>
> 2. Whether or not Mr McKenzie had a knife at the time of the incident: Mr Clarke indicated that none of the men in the group at the lane mouth had a knife at the time. Mr McKenzie also gave evidence that he had no knife at the time the deceased was chopped. Under cross-examination, Mr McKenzie admitted that he told the police that he had a knife but it was not in his hand, it was in his pocket. However, he was confronted with his evidence from the preliminary enquiry where he told the court that when Mr Oliver came on the scene, he (Mr McKenzie) had taken out his knife and had it in his hand. By way of explanation, Mr McKenzie stated that 15

to 20 minutes prior to the incident, he had been alone at the lane mouth. At that time, Mr Oliver had appeared by himself and there was an altercation between himself and Mr Oliver. It was during that time that he had taken the knife out of his pocket, as he felt threatened by Mr Oliver. Mr Oliver then left and returned 15 to 20 minutes later with Mr Oliphant. The learned trial judge reminded the jury of all of the above evidence (pages 337 to 339 of the transcript). Therefore, the issue was left with the jury to assess and make a determination as to whether this constituted an inconsistency and/or discrepancy in Mr McKenzie's evidence and how they would treat with it.

3. The evidence of Detective Corporal Lawrence as to whether he knew if Mr Oliphant had received injuries on the night of the incident: under cross-examination, he indicated that he was not so aware. He also stated that he could not recall whether he had given that evidence at the preliminary enquiry that he was aware that Mr Oliphant had received injuries. After being confronted with his evidence from the preliminary enquiry, he admitted that he had said he was aware that "[Mr Oliphant] received injuries". However, in answer to the learned trial judge, Detective Corporal Lawrence said he had no personal knowledge as to whether Mr Oliphant had been taken to the hospital on the night of the incident; that he was not at the hospital on the night of the incident and had no contact with Mr Oliphant on that night. The learned trial judge reminded the jury of the above evidence at pages 350 to 351 of the transcript. She also told the jury the following at page 351, lines one to 25 to page 352, lines one to four:

> "…he said he was not at the hospital at Annotto Bay on the night of the incident and the first time he came into contact with the accused man was when he had seen him at the police station at Annotto Bay he could not recall what date this was. Now, I pause here, Mr. Foreman and members of the jury, to address the suggestion or the question that was asked of the witness as to whether or not he was aware that the accused man had received injuries at the hands of the deceased man. Now, this officer was never present at the scene so he could not give any evidence about what had happened there and if the deceased man had injured the accused man, because all that he would be doing, if he had given an answer is to repeat hearsay as to what other persons had told him and this is not permissible, it is not permissible in a trial. So the most that the officer could say is that he heard that but he is not and was never in a position to say whether or not he witnessed the accused man received [sic] injuries at the hands of the deceased man, that was a proper question for the witnesses who were present and they had been so taxed and they say that they are not aware of that, of any such thing and they never see [sic] any such thing happening so, I point that out to you."

[33] There was also a complaint as to discrepancies in relation to the evidence regarding the crime scene and the testimony of the witnesses. Miss Lewis stated that the witnesses' evidence that the deceased ran from the lane mouth before being chopped would be indicative that he was chopped as he made his way into the lane; that this was to be contrasted with the evidence of Detective Corporal Lawrence, that when he came to the scene of the incident, he observed blood stains from the entrance of Spicy Grove (lane mouth) leading up a little lane. She stated that this evidence would have been corroborative of the statement of Mr Oliphant, that he was passing a group of men who were at Spicy Grove lane mouth when he was attacked and swung his machete to protect himself.

[34] In regard to this, the learned trial judge rehearsed the evidence of Mr McKenzie and pointed out to the jury parts in which there might be conflict/inconsistencies/discrepancies for them to address at page 332, line 15 to page 335, lines one to four:

> "He [Mr McKenzie] said when we were running, Sticky Tie run pon wi, he ketch Billy-Dee off guard, Skinny a fling 'pure' stones at us. Skinny threw stones when Sticky Tie chopped Billy and then dem run. When Sticky Tie goh down on Billy-Dee he was too close, so he ease off back soh (indicates) and chop him, none of us had anything in our hands. I was able to see, I stopped running**, it is at the lane mouth, underneath the streetlight that he chopped Billy-Dee.**
>
> So I remember yesterday when counsel, Mr. Smith, addressed you, he had a number of things to say in relation to the witnesses' evidence and where exactly the chopping happened but here you have Mr. McKenzie telling you that it is in the lane mouth, under the streetlight that he chopped Billy-Dee, so whilst he said that they had run into the lane, you must determine whether they had gone way down into the lane or it was just a little up from where they were previously but, he said that it was in the lane mouth, under the streetlight, that he chopped Billy-Dee.
>
> And if you will recall the evidence of Detective Corporal Lawrence, he said when he went to visit the area, and an area was pointed out to him, when he went to Spicy Grove and he said at the mouth of the lane and a little in he said he saw drops of what appeared to be blood stains, so you must decide whether there is any differences [sic] in the evidence of the witnesses; Mr. Clarke said he had gone around and come around to back where the incident had occurred, so that is a matter for you, so you decide whether the evidence is such that according to Mr. Smith you believe that it is two different evidence both witnesses were describing." (Emphasis supplied)

[35] Miss Lewis complained also about Mr Clarke's evidence (in cross–examination), that there had been an altercation between Mr Oliphant and himself a month prior to the incident. Although Miss Lewis cited this as an inconsistency, she does not indicate why it

was inconsistent evidence, except that at one point during the trial, Mr Clarke said two months prior and at another point said one month. At page 324, lines two and three of the transcript and page 328, lines one to five, the learned trial judge rehearsed these aspects of Mr Clarke's evidence to the jury, although not specifically highlighting it as an inconsistency.

[36] In the round, all these issues affecting the credibility of the Crown witnesses were left for the jury's assessment and determination.

[37] Grounds of appeal three and four fail.

Further supplemental ground five - The verdict arrived at was unreasonable having regard to the evidence before the court

Submissions

[38] In respect of this ground, Miss Lewis simply indicated that grounds of appeal one to four were supportive of ground five.

[39] The learned DPP submitted that this was not a serious ground of appeal and that the evidence on the transcript spoke for itself.

Analysis

[40] Bearing in mind our determination of grounds one to four, there is no necessity to consider the merits of ground five. There is simply none. This ground also fails.

Further supplemental ground six - The learned trial judge, in failing to consider the delay of six years for the hearing of the trial, amounts to a breach of the applicant's constitutional right to a fair hearing within a reasonable time under section 16(1) of the Charter of Fundamental Rights and Freedoms, Chapter 3 of the Constitution

Affidavit in support and submissions

[41] Reference was made to sections 16(1), (6) and (8) of the Charter of Fundamental Rights and Freedoms ('the Charter'), to submit that Mr Oliphant is entitled to a remission in his sentence. In support of this ground of appeal, Mr Oliphant, on 1 June 2023, swore

an affidavit, in order to detail the events, as he recalled them, which contributed to a delay of six years in the hearing of his case. By this affidavit, he indicated that following the incident, when he was taken to court on 25 November 2013, he was granted bail. He asserted that he, at all material times, adhered to his bail conditions.

[42] He stated that he attended court about five or seven times, and that he could not recall what happened on each occasion, but that although he was always present, his matter was not reached. It was his recollection that on some occasions, exhibits were being awaited or the relevant police officers were absent. Also, that the court had other cases to be tried or that his attorney-at-law was unavailable as he was engaged in trials in other courts.

[43] Mr Oliphant deposed that the delay in the completion of his matter caused him stress, unsettled his mind over the years, and made him take time away from his work as he had to comply with the reporting conditions of his bail. He stated that although he was on bail, he did not feel "free", as he could have been remanded to custody at any time by a judge.

[44] Miss Lewis, on his behalf, submitted that the delay between the date he was charged (18 November 2013) and the completion of his trial in March 2019, (which she calculated as five years and four months), was excessive and in breach of his constitutional rights guaranteed under sections 16(1), (6)(b) and (8) of the Charter. Reliance was placed on the Privy Council case of **Flowers v The Queen** (2000) 57 WIR 310 and in particular, on the factors to be considered in assessing the issue of pre-trial delay. Miss Lewis pointed, in particular, to Mr Oliphant's declared stress, anxiety, and inconvenience associated with compliance with his bail conditions, as having been prejudicial to him and also noted that he did not contribute to the delay in the hearing of the case. It was her submission that the delay in this case warrants a reduction in sentence in keeping with the case of **Lloyd Forrester v R** [2023] JMCA Crim 20.

[45] In addressing this issue, an affidavit in response was filed on behalf of the Crown and sworn by Miss Sharelle Smith, to which she exhibited the minute sheets relating to the proceedings and also provided a written chronology of the events.

[46] On the basis of this chronology, the learned DPP submitted that the matter progressed from the stage of a preliminary enquiry and that Mr Oliphant's attorney was absent from time to time. She submitted that there were only two or three occasions on which it could be said that the Crown was at fault for the matter failing to proceed. In all the circumstances, therefore, Mr Oliphant's matter was treated with fairness and completed within a reasonable time and there was no evidence that he suffered any presumptive prejudice.

Analysis

[47] The chronology provided by the Crown indicates that the matter first came before the court on 21 November 2013. It was set for three mention dates between that date and 22 May 2014 (a period of six months), in order to facilitate the completion of the case file. This time frame was not excessive. The preliminary enquiry commenced approximately 10 months later, on 5 March 2015. Therefore, between the first court date and the commencement of the preliminary enquiry was approximately one year and three months.

[48] Just four months later, on 7 July 2015, the matter was put before the Saint Mary Circuit Court, which has three gazetted sessions for the year. On that occasion, defence counsel was present, but the matter had to be adjourned as the Crown had only received the case file on the very morning of the hearing. At the next hearing date of 15 July 2015, the matter was set for trial to commence 23 November 2015. On that latter date, defence counsel was absent and it appears that another part-heard trial was also in progress. The investigating officer was also absent.

[49] On the next trial date on 7 December 2015, a part-heard matter was in progress and there was a low jury turn out. On 29 February 2016, defence counsel was again

absent and, in any event, it was noted that the matter could not be reached as defence counsel and Crown Counsel were related. On 18 July 2016, the matter could not be reached as there were two part-heard matters in progress. Up to this point, approximately one year after the matter first came before the Circuit Court, it appears that trial did not proceed due to a combination of factors, but primarily due to the exigencies of the court system, in having a number of part-heard trials.

[50] On 5 December 2016, the trial did not proceed as the Crown was not ready and one Crown witness was gravely ill. On 22 March 2017, the witnesses were not brought as there were two part-heard matters in progress. On 27 March 2017, the witness, Mr McKenzie was again absent and the matter was not reached. On 3 July 2017, the Crown applied for an adjournment as one witness was ill and another absent and unwilling to testify. On 22 and 28 November 2017, it appears the matter did not proceed due to the absence of defence counsel. Trial did not proceed on 27 June 2018 due to the absence of the investigating officer. The trial which commenced on 19 March 2019, took place approximately five years and four months after Mr Oliphant was arrested (8 November 2013) and placed before the court.

[51] There has been a plethora of cases in recent times in this court considering the issue of delay and its impact on an accused person's constitutional rights. This has been an endemic problem in this jurisdiction, albeit there is now an intentional focus by the courts to reduce backlog and delay. Brooks P identified the remedies available to an appellant in the event of a breach of the reasonable time guarantee, in the case of **Evon Jack v R** [2021] JMCA Crim 31. Among the possible remedies is a reduction in sentence, where deemed appropriate.

[52] As Brooks P pointed out in **Germaine Smith and others v R** [2021] JMCA Crim 1, at para. [122], "the length of time does not by itself, entitle … to [a] particular constitutional relief". He referred to the judgment of this court in **Julian Brown v R** [2020] JMCA Crim 42, that the applicant has to show that he has not contributed to the delay. In **Julian Brown v R**, McDonald-Bishop JA, who wrote the judgment of the court,

set out distinctly some principles to be considered when one is assessing a breach of the constitutional right to a trial within a reasonable time. These principles were summarized for expediency in **Lloyd Forrester v R** at paras. [51], [52], and [55] – [57].

[53] Suffice it to say, that the applicant contributing to the delay aside, the court has also to consider the prevailing system of legal administration including the exigencies of the court, as well as the prevailing economic, social and cultural conditions (see also para. [89] of **Julian Brown v R**).

[54] The issue of delay must, therefore, "… involve a balancing exercise with consideration being given to other relevant factors within the contextual circumstances of the particular case", (per McDonald-Bishop JA in **Julian Brown v R** at para. [89]). When these principles are assessed in the case at bar, it cannot be said that the State is to be blamed for the entirety of the delay in the commencement of Mr Oliphant's trial. As stated earlier, the period leading to the commencement of the preliminary enquiry was one year and three months. The case was set for mention in the Saint Mary Circuit Court in July 2015. The matter was set for trial in November 2015. Mr Oliphant's attorney was absent, albeit there were other trial matters being heard at that time.

[55] The adjournments up to the trial date of 5 December 2016 cannot, therefore, be said to be the fault of the Crown. However, although there were a variety of reasons for the adjournments between December 2016 and 3 July 2017, the Crown will have to bear responsibility for the failure to mount a trial during that period, as there had already been a delay of three plus years. Some measures should have been put in place to ensure that Mr Oliphant's trial was given priority status. Further trial dates of 22 and 28 November 2017 had to be aborted due to the absence of defence counsel but it is not clear why there was such a protracted period of delay between November 2017 and the final trial date in 2019. Based on the notations provided by the Crown in the chronology, the State must bear the blame for the further delay up to 19 March 2019 (when the trial commenced). Also, it is not evident why there was a delay beyond one year before the preliminary enquiry commenced, bearing in mind that the case file was completed within

six months. The State must be held responsible for the period beyond the year relevant to the holding of the preliminary enquiry (three months). Therefore, there are three specific periods of delay attributable to the State: the period of three months relevant to the holding of the preliminary enquiry, the period of eight months between December 2016 and July 2017 and the period of 16 months between November 2017 to June 2018 and, thereafter, June 2018 to March 2019. The State will, therefore, bear responsibility for the delay of approximately two years and three months.

[56] While we note the emotional anguish described by Mr Oliphant as he awaited his trial, there has been no complaint that the delay impacted him unfairly in the presentation of his case. It is the prejudice in the trial process itself that carries the most weight (per Brooks JA (as he then was) in **Techla Simpson v R** [2019] JMCA Crim 37 at para. [48]).

[57] The ultimate issue is whether any remedy should be afforded to Mr Oliphant to reflect the delay attributable to the Crown. There have been numerous cases where this court has had to determine this issue and, depending upon the particular circumstances, have afforded a reduction in sentence, due to the length of the delay. The following is a synopsis of how this issue has been dealt with in some cases.

[58] In **Curtis Grey v R** [2019] JMCA Crim 6 there was a delay of four years prior to trial and a further delay of six years between trial and the hearing of the appeal. Mr Grey's sentence was reduced by one year to account for these delays.

[59] In **Andra Grant v R** [2021] JMCA Crim 49 there was a four-year delay in the hearing of the appeal. The court afforded the appellant a one-year reduction in sentence.

[60] In **Anthony Russell v R** [2018] JMCA Crim 9 there was a delay of four years in the hearing of the appeal, as the transcript of the trial remained outstanding for that period. Whilst acknowledging that this delay was attributable to the State, this court declined to reduce Mr Russell's sentence to account for the delay.

[61] In **Lloyd Forrester v R** there was a delay in the commencement of Mr Forrester's trial of nine years and two months attributed to the State. This resulted in a reduction in sentence of one year.

[62] In **Techla Simpson v R** there was a delay of eight years prior to the commencement of the appellant's trial. This was found to be a breach of his constitutional right to a fair trial within a reasonable time and which warranted a reduction in sentence of two years.

[63] In **Germaine Smith and others v R** there was a delay of approximately three years and four months in the commencement of trial. This court concluded that there was no breach of the constitutional right to a fair trial within a reasonable time, arising from this delay.

[64] In the case at bar, based on the above assessment, we are not compelled to conclude that there has been a breach of Mr Oliphant's constitutional rights, as the period of delay attributable to the State cannot be considered as egregious. In that regard, there is no basis to order any reduction in the sentence of Mr Oliphant or to make any order or declaration in his favour.

[65] This ground of appeal fails.

Grounds of appeal filed on behalf of Mr Oliver

[66] Permission was sought and granted to abandon the original grounds of appeal that were filed and to substitute the following supplemental grounds:

> "**GROUND 1** - The Learned Trial Judge (LTJ) erred by not upholding the No case submission and erred in having left the Appellant's case to the Jury.
>
> **GROUND 2** – The LTJ misdirected the Jury on the Law of Common Design, resulting in the wrongful conviction of the Appellant.

> **GROUND 3** – The LTJ erred in her direction to the Jury that in essence that [sic] the Appellant had a duty of care to prevent his co-convict from inflicting harm to another.
>
> **GROUND 4** – The LTJ erred in law when she left manslaughter to the Jury, resulting in the jury wrongfully convicting the Appellant of Manslaughter.
>
> **SENTENCE**
> **In light of the circumstances the sentence is manifestly excessive.**" (Emphasis as in the original)

Ground 1 - The learned trial judge (LTJ) erred by not upholding the no case submission and erred in having left the appellant's case to the jury

Submissions

[67] Mrs Reid, on behalf of Mr Oliver, asserted that the central issue on the Crown's case being that of common design, the learned trial judge should have stopped the case against Mr Oliver at the point of the no-case submission made on his behalf. She submitted this on the basis that there was inadequate evidence of a common design as there was no evidence that both men agreed to commit the wrong, whether tacitly, by verbal communication, circumstantially, or by concerted action. The prosecution had failed to establish that the men had a meeting of the minds.

[68] Mrs Reid submitted that the evidence of Mr Oliver throwing bottles was insufficient to constitute common design and the strongest evidence against Mr Oliver was that he was throwing bottles and stones at the group and not specifically at the deceased. There was no evidence that he had a cutting weapon, so as to infer an intention on his part to do grievous bodily harm or to kill, she argued. There was also no evidence to prove that he had an intention to assist Mr Oliphant in the act of chopping the deceased. The no-case submission should therefore have been upheld. Reliance was placed on the case of **R v Locksley Muir** (1972) 12 JLR 882.

[69] In response, it was submitted on behalf of the Crown that there was adequate evidence that the men were acting in concert and as such, the central issue for the jury would have been credibility. The Crown, in its submissions, pointed to the evidence which

they said demonstrated that the men were part of a common design, namely, (1) the men arrived on the scene together; (2) both witnesses for the Crown asserted that on the approach of Messrs Oliphant and Oliver, Mr Oliphant had the cutlass in a chopping position; (3) whilst Mr Oliphant was chopping the deceased, Mr Oliver was throwing stones; and (4) both men ran from the scene together after the chopping. It was the submission of the learned DPP that had the learned trial judge upheld the no-case submission, she would have erred in law.

Analysis

[70] There was sufficient evidence to be left to the jury in relation to whether Mr Oliver was part and parcel of a common design to kill or inflict serious bodily harm on the deceased. Mr Oliver did not state that he was at another location during the material time. Also, he also did not deny having an earlier altercation with Mr McKenzie at the lane mouth and identification was never raised as an issue. The evidence of Mr McKenzie was that Mr Oliver left the lane mouth after that altercation and returned within 20 minutes with Mr Oliphant who was armed with a machete. By this time, Mr McKenzie was no longer alone at the lane mouth but was with Mr Clarke, the deceased and a third man. Based on the evidence, it would have been open to the jury to consider whether the prosecution had succeeded in proving the required joint enterprise between Messrs Oliphant and Oliver. The learned trial judge was correct in her refusal to uphold the no case submission made on Mr Oliver's behalf.

[71] This ground has no merit.

Ground 2 - The LTJ misdirected the jury on the law of common design, resulting in the wrongful conviction of the appellant

Submissions

[72] On this ground, it was Mrs Reid's submission that the learned trial judge gave confusing directions to the jury with respect to the law of common design, as during some parts of her summation, she relied on the old legal principles on common design.

Based on those misdirections, the jury would have been compelled to convict Mr Oliver, as he was present on the scene.

[73] Mrs Reid took issue with various aspects of the learned trial judge's directions, which she submitted were dangerous. In particular, she took issue with the learned trial judge's direction that if the jury found that Mr Oliver intended to assist or encourage Mr Oliphant to at least commit some grievous bodily harm, this would have been sufficient to find Mr Oliver guilty. Mrs Reid submitted that this is not the correct threshold test for showing common design.

[74] Mrs Reid stated that the evidence showed that Mr Oliver threw bottles at "the crowd" and not at the deceased only, whereas, it was Mr Oliphant who attacked the deceased. There was no evidence that Mr Oliver physically assaulted the deceased. Mrs Reid stated further that the imputation of the Crown that the throwing of the bottles was intended to ward off the deceased's companions whilst he was being attacked, was unfounded.

[75] Counsel submitted that the learned trial judge, during her summation, had lumped both men together, instead of treating with them separately. In the result, the jury had no choice but to convict Mr Oliver. Reliance was placed on the cases of **R v Jogee; Ruddock v The Queen** [2017] AC 387 ('**Jogee**') as well as **Jackson and others v R** [2009] UKPC 28 ('**Jackson**'). Mrs Reid submitted that the case of **Jackson** is similar to the case at bar as, the learned trial judge herein made similar errors, was incoherent, gave several definitions of common design and failed to bring the directions together. Furthermore, the participation of the co-accused in the **Jackson** case was more egregious than Mr Oliver's participation in the instant case, yet they were not found to be part of a common design. She asserted that, the fact that a person was present with a machete, did not necessarily demonstrate an intention to kill.

[76] The Crown, in response, cited extensively from **Jogee**, and pointed to the relevant aspects of the learned trial judge's summation. It was the submission of the learned DPP

that the directions of the learned trial judge, taken as a whole, were not ambiguous and were thorough.

[77] Further, that the learned trial judge dealt with the issues relating to both accused men separately and gave the "textbook" formulation in explaining Mr Oliver's role as aider and abettor. The learned DPP posited that had the jury convicted Mr Oliver of murder, then the Crown would have had to concede based on the factual circumstances. However, it was clear that the jury rejected the suggestion that Mr Oliver aided and abetted murder. In the round, the learned DPP submitted that the issues relating to common design were fairly left to the jury and that the mention of reasonable foreseeability did not occasion a miscarriage of justice.

Analysis

[78] The learned trial judge directed the jury on the law in relation to each ingredient for murder. In dealing with the issue as to whether the death of Billy-Dee Lawrence was caused by one or both men, she stated as follows at page 265, lines 19 to 22 of the transcript:

> "In respect of the accused man, Oliphant, this should not be difficult for you to determine, because this is not in dispute that the accused, Oliphant, chopped Billy Dee."

[79] Then at page 266, lines two to 16, she directed the jury in regard to Mr Oliver as follows:

> "Now, this ingredient, as it relates to the accused man, Mr Oliver, is an issue for you to decide depending upon what evidence you accept and what determination you make whether he was involved or not involved. The Crown or the Prosecution is saying that both men were acting together, and therefore, they are criminally responsible for the death of Billy Dee having acted together to commit the offence.
>
> Now, the accused man, Oliver, on the other hand, he says that he had nothing to do with it. So you will have to make a

> decision whether he had nothing to do with it or whether he had everything to do with it. A matter for you."

And at page 267, lines 17 to 25 to page 268, lines one to 11:

> "In relation to the accused man, Oliver, he says – sorry, in relation to the accused man, Oliver, he also is not saying that there was any accident involving the chopping of Billy Dee. He is saying he did not participate in the physical act that resulted in the death of Billy Dee, that he knows nothing about it.
>
> The Prosecution, on the other hand, is asking you to find, as a matter of fact, that the two men were acting together when Oliphant inflicted the wound to Billy Dee resulted [sic] in his death, and in those circumstances the act of one become [sic] the act of both. That is the Prosecution's case and you will have to decide if you agree, and if you find that proved on the evidence led before you. If you accept the Prosecution's case in relation to one or both of these Defendants, then it is open to you to say their actions were deliberate and voluntary. A matter for you."

Further, it is necessary to consider the entirety of the learned trial judge's directions to the jury on the issue of common design. These directions are to be found at page 290, lines one to 13:

> "Now, in relation to both accused men, as I pointed out to you yesterday, they are jointly charged, but they are also individually charged and you must, therefore give consideration to each person, individually.
>
> Now, a crime can be committed by one person or it can be committed by two persons or any number of persons. If two or more persons act together with a common criminal purpose to commit an offence, they are each responsible for that crime although the parts they play when carrying out that purpose may be different."

Also, at page 290, lines 22 to 25 to page 291, lines one to 25:

> "Now, an offence maybe committed by a principal or a secondary party. For present purposes, a principal party can

> be taken to mean, one who personally committed the conduct element of the offence, that is, the one who does the physical activity. For example, the triggerman in a case of shooting with intent.
>
> A secondary party, on the other hand, is one who, while not the principal offender, aids, abet [sic], counsel [sic] or procures the offence. For the purposes of the trial, a secondary offender is to be treated in the same way as a principal, because our law provides that any person who aids, abets, counsels or procures the commission of any indictable offence, such as the offence of murder, is liable to be tried and punished as a principal offender. One who aids and abet [sic], is one who is present giving active assistance to the principal or may be some distance away, but nonetheless lending some valuable assistance. For example, might be giving encouragement, might be restraining the victim, preventing the victim from escaping or acting as a lookout man.
>
> So, in a case of murder, although a secondary party does not deliver the killing strike, he must, however, be present and taking some part in the offence, whether by words, conduct and or presence, intentionally encourage another to commit the offence."

At page 293, lines 18 to 25 to page 294, lines one to nine the learned trial judge also stated:

> "A person participating, that [sic] joint criminal enterprise, either by committing the agreed crime itself or by being present at the time when the crime is committed and with knowledge that the crime is to be or is being committed by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime. The presence of that person, at the time, when the crime is committed, and already [sic] is to give aid to, if required, is sufficient to amount to an encouragement to the other participants in the joint criminal enterprise. As a result, a person may be found guilty of murder, although he or she did not commit the acts which physically caused the death of the victim."

[80] It is evident that the learned trial judge made a distinction between both applicants. Specifically, in relation to the issue of intention, the transcript reveals at page 296, lines 14 to 23, that the learned trial judge said in relation to Mr Oliphant:

> "… if you accept this to be true that he chopped the deceased with the intention to at least cause grievous bodily harm or indeed death and was not acting in lawful self-defence and that all the ingredients of murder are established, then it is open to you to say that having committed the physical act which resulted in the death of Billy-Dee, Mr Oliphant, is to be regarded as the principal in the offence of murder."

Continuing in relation to Mr Oliver, page 296, lines 24 to 25 to page 298, line one, record the learned trial judge as stating:

> "As it relates to the other accused man, Mr. Oliver, he denies any participation but witnesses gave evidence of him being present at the time of the incident, the evidence was not challenged, the Prosecution witnesses, however, said he was not only present but he was throwing bottles and stones at them. There is, however, no evidence that at the outset these two accused men planned to kill Billy-Dee or to cause him grievous bodily harm.
>
> Additionally, since there is no evidence that Oliver did any of the chopping or wounding that caused the death of Billy-Dee you will have to determine his conduct as a secondary party. You will have to decide if, in the circumstances, as described by the witnesses whether he is liable as an accessory to murder. You will do this by determining if Oliver assisted or encouraged or caused Oliphant, the principal, to commit the offence of murder and intended to assist or encourage Oliphant to act with the necessary intent. It is not necessary for the Prosecution to prove that Oliver intended to encourage or assist Oliphant in killing Billy-Dee, it is sufficient if you were to find that Oliver intended to assist or encourage Oliphant to at least commit some grievous bodily harm."

[81] Mrs Reid contends that this direction was an error. But there can be no quarrel with these basic directions on the principle of common design. In **Jogee**, the Privy Council did an extensive review of joint enterprise liability. At paras. 78 and 89 the Board stated:

> "**78** As we have explained, secondary liability does not require the existence of an agreement between D1 and D2. Where, however, it exists, such agreement is by its nature a form of encouragement and in most cases will also involve acts of assistance. The long-established principle that where parties agree to carry out a criminal venture, each is liable for acts to which they have expressly or impliedly given their assent is an example of the intention to assist which is inherent in the making of the agreement. Similarly, where people come together without agreement, often spontaneously, to commit an offence together, the giving of intentional support by words or deeds, including by supportive presence, is sufficient to attract secondary liability on ordinary principles. We repeat that secondary liability includes cases of agreement between principal and secondary party, but it is not limited to them.
>
> …
>
> **89** In cases of alleged secondary participation there are likely to be two issues. The first is whether the defendant was in fact a participant, that is, whether he assisted or encouraged the commission of the crime. Such participation may take many forms. It may include providing support by contributing to the force of numbers in a hostile confrontation."

[82] And at para. 90:

> "… In cases of concerted physical attack there may often be no practical distinction to draw between an intention by D2 to assist D1 to act with the intention of causing grievous bodily harm at least and D2 having the intention himself that such harm be caused. In such cases it may be simpler, and will generally be perfectly safe, to direct the jury (as suggested in *R v Smith (Wesley)* and *R v Reid*) that the Crown must prove that D2 intended that the victim should suffer grievous bodily harm at least. However, as a matter of law, it is enough that D2 intended to assist D1 to act with the requisite intent. …"

[83] The learned trial judge, as seen from page 298, lines 11 to 25 and page 299, lines seven to 25 through to page 300, line two of the transcript, further directed the jury on what the prosecution had to prove in order to establish the secondary liability of Mr Oliver, as follows:

"Now, to prove the secondary liability of Oliver, the Prosecution must establish the following:

One, they must, by the evidence, establish conduct by Mr. Oliver amounting to assistance or encouraging of Mr. Oliver [sic].

Two, they must establish an intention on the part of Oliver to assist or encourage Oliphant to commit the principal offence, Murder, or at least to cause Billy-Dee Lawrence to commit [sic] grievous bodily harm.

And thirdly, the Prosecution must establish knowledge on the part of Oliver of the essential matters which involves the principal offence of Murder. ...

Now, let us now look at the conduct of Oliver in relation to the Prosecution's evidence and you will decide whether there is evidence that you can consider and determine if he is criminally liable for the offence of murder.

Now, first of all, presence at the scene of the crime, both Crown witnesses have testified that Lawrence Oliver o/c Skinny was present at the scene but mere presence is not enough. For presence to amount to aiding and abetting it must be purposeful or deliberate, it cannot be accidental. If Oliver was present and intended by his presence to be encouraged [sic] or by his actual presence encouraged Oliphant, then it is [sic] to commit the offence, then it is open to you to find him guilty. Mere presence at the scene of crime is not enough to prove complicity, but deliberate and unexplained presence may give rise to unexplained contribution to commit the act."

[84] Further, at page 301, lines 18 to 25 to page 302, lines one to 11 she said:

"Now, to be guilty of aiding and abetting, the secondary party must give – must, in fact, encourage the principal by his presence, by gestures or actions to signify his approval. It is no criminal offence to stand by as a mere passive spectator of a crime, even the crime of murder. Non-interference to prevent a crime is not in itself a crime but the fact **that a person is voluntarily and purposefully present witnessing the commissioning of a crime and offered no opposition to it, though he might reasonably be**

> **expected to prevent and have the power to do so or at least to express the (sentiment) is cogent evidence that you, the jury, would be entitled to consider and make a finding as to whether or not Oliver wilfully encouraged and so aided and abetted Oliphant in murder,** but it is entirely a matter for you to decide." (Emphasis supplied)

[85] Parts of the learned trial judge's summation, especially the passage emphasized above, were not as clear as was desirable in relation to Mr Oliver's actions, bearing in mind the factual circumstances. The issue for the jury to determine was whether Mr Oliver had the requisite intention to assist Mr Oliphant in the infliction of the fatal injury on the deceased. In **Troy Barrett v R** [2022] JMCA Crim 24, Brown Beckford JA (Ag) summarized the basic principles extrapolated from **Jogee**, at paras. [77] and [78]:

> "[77] **Jogee** and **Ruddock** were concerned with what has become known as 'parasitic accessory liability'. As was explained in **Brown and Matthias** at para. [90] 'parasitic accessory liability…doctrine covers situations where two persons (D1 and D2) set out to commit an offence (crime A) and in the course of that joint enterprise one of them (D1) commits another offence (crime B). The question is whether the person who does not commit crime B, (D2) can be held liable for it'.
>
> [78] In **Jogee** and **Ruddock**, it was firmly established that it was an error as a matter of law to equate foresight with the intention to assist. The correct approach, according to the court, is to treat foresight as evidence of intent. It had to be proved that both parties shared the requisite intention to commit both crimes."

[86] The concept of reasonable foreseeability and its interplay with requisite intention was also clarified in **Jogee**, at paras. 83, 93, 94, and 95. The learned trial judge treated with the issue of reasonable foreseeability and the issue of intention at various passages. At page 305, lines 17 to 25 to page 306, lines one to eight, she stated as follows:

> "So, in such circumstances, the Prosecution is asking you to find that Oliver would have reasonably foreseen, at least, that grievous bodily harm would have befallen some person, that

> to include the deceased, if Oliphant chop [sic] anybody with that back and the [sic] front sharpened machete.
>
> Now, foresight, however, is not the same as intention, but if Mr. Oliver had the foresight that Mr Oliphant may commit the crime of murder, and nonetheless continue [sic] to participate in physical assault of Billy-Dee, then that is evidence that you, the jury, can consider, evidence that Oliphant intended to assist – sorry, evidence that Oliver intended to assist Oliphant, kill [sic], or at least cause grievous bodily harm to Billy-Dee Lawrence"

[87] She then concluded at page 307, lines 13 to 25 to page 308, lines one to three:

> "Most importantly, intention is not to be equated with foresight. Foresight may be good evidence of intention but it is not the same so, after considering all the evidence in the case, you are to determine:
>
> One, if the evidence supports that Mr. Oliphant commits the offence of Murder as a principal.
>
> Two, you then consider, if there is evidence that supports that Mr. Oliver was acting together with Oliphant, and was part of a common enterprise, that offence [sic], and if your answer is no, they were not, then you must acquit them. It is only if your answer is yes to those questions then you can convict the accused men."

[88] In the round, all the essential elements relevant to common design including the issue of the interplay between reasonable foreseeability and intention were left to the jury. It is evident that they understood that Mr Oliver could only be found guilty of the offence of murder if the prosecution made them feel sure that he assisted Mr Oliphant with the requisite intention to cause death or really serious bodily harm. They found that the prosecution had not proved that he had the requisite intention as they determined that he was not guilty of murder.

[89] This ground of appeal fails.

Ground 3 - The LTJ erred in her direction to the jury that in essence the appellant had a duty of care to prevent his co-convict from inflicting harm to another

Submissions

[90] Counsel Mrs Reid pointed to the areas of the transcript on this point, with which she took issue. She submitted that Mr Oliver had no duty of care to prevent a crime and that if such a duty existed, it would have been imposed on "all the members of the crowd that were gathered on the scene". She asserted that assuming that Mr Oliver was present on the scene, he could not foresee that Mr Oliphant would have utilized the cutlass to cause death. Further, that foreseeability, without "something more" was not enough. She cited the case of **R v Monica Williams** (1970) 16 WIR 74. She submitted that Mr Oliver would have had to assess whether to intervene and risk being harmed or killed. Reliance was placed on the case of **Smith v Leurs** (1945) 70 CLR 256. In the circumstances, she submitted, the learned trial judge misled the jury in juxtaposing duty of care with common design.

[91] In refuting the submissions on this ground, the learned DPP submitted that it was not true that the learned trial judge, in her directions to the jury, placed a duty of care on Mr Oliver. She submitted that the learned trial judge gave unassailable directions regarding the liability of secondary parties. Further, that the learned trial judge directed the jury on the difference between foresight and intention and gave concise directions on the salient issues of credibility, self-defence and joint enterprise. In the result, there was no confusion in this regard, in the summation of the learned trial judge.

Analysis

[92] We have concluded that the learned trial judge's juxtaposition of the issue of an aider and abettor standing by without intervening (see portion of transcript at pages 301 to 302 set out at para. [77] above) while directing the jury on the issue of common design may have been unhelpful and unnecessary. These circumstances would not have arisen in the case at bar as Mr Oliver was not present merely witnessing the crime but, on the

Crown's case, was actively involved in acts of violence. However, it would be incorrect to assert that the learned trial judge left the jury with the impression that Mr Oliver had a duty of care to prevent injury to the deceased. The totality of the learned trial judge's directions must be considered as she had also directed the jury at page 306, lines nine to 22, as follows:

> "Now, in these circumstances, you are to decide, as I said, if Mr. Oliver was merely present or whether he was deliberately present, and whether he also participated and acted in concert with Mr. Oliphant. Although Oliver continued in the company of Mr. Oliphant, until the chop was inflicted, this does not mean that he authorized the chopping and killing. This cannot be automatically inferred from that continued association. He continuing [sic] in Mr. Oliphant's company, however, is evidence that you can consider in determining whether Oliver had an intention to assist Oliphant to commit the offence."

[93] Further, the learned trial judge did make it clear to the jury that they had to establish conduct by Mr Oliver amounting to assistance or encouragement, as well as an intention to assist or encourage Mr Oliphant to commit the offence of murder (page 298, lines 14 to 20 of the transcript). Also, she stated at page 307, lines one to 12:

> "For if a person is present whilst an offence is in the [sic] progress, if he takes no part in it and does not act in concert with those who committed it he does not become an aider and abettor merely because he is present, and does not endeavour to prevent the offence or fail to apprehend the offender [sic] does not make him liable for the crime.

[94] There is no merit in this ground.

Ground 4 – The LTJ erred in law when she left manslaughter to the jury, resulting in the jury wrongfully convicting the appellant of manslaughter

Submissions

[95] Mrs Reid submitted that the summation of the learned trial judge did not include any direction to the jury on manslaughter. Further, that there was no evidence that Mr

Oliver was provoked in any form, such that manslaughter should have been left to the jury, or that there was any sudden and temporary loss of self-control on Mr Oliver's part. Mrs Reid stated that the learned trial judge had not "legally informed" the jury on how a charge of murder could be reduced to manslaughter and that the evidential requirement to satisfy manslaughter, had not been met. Mrs Reid contended that the learned trial judge had not separated the evidence in relation to each man, in order to explain to the jury how a verdict of guilty for manslaughter could apply to either. On this ground of appeal, Mrs Reid cited the cases of **R v Benjamin Stewart** [1996] 1 Cr App R 229, **Joseph Bullard v The Queen** [1957] AC 635, **R v Acott** [1996] 4 All ER 443 and **Bernard Ballentyne v R** [2017] JMCA Crim 23.

[96] In opposing this ground of appeal, the learned DPP relied on **Jogee** in order to assert that the law allows a person to be found guilty of manslaughter where he or she is deemed to be an accessory to the commission of the offence, but had no specific intention to kill or to cause grievous bodily harm. Additionally, she submitted that the learned trial judge did not err and gave adequate directions to the jury on the offence of manslaughter. Based on the summation of the learned trial judge, it was a matter for the jury to determine whether Mr Oliver could have been regarded as a secondary party and whether he had an intention to kill or to cause the deceased grievous bodily harm. Reliance was also placed on the case of **R v Church** (1966) 1 QB 59.

Analysis

[97] This ground requires no lengthy analysis. It has no merit. The rationale was set out by Brooks JA (as he then was) in **Shirley Ruddock v R** [2017] JMCA Crim 6 at para. [21] (see also para. 96 of **Jogee**). The learned trial judge properly directed the jury to consider the alternative verdict of manslaughter on the basis of a lack of intention (page 289, lines 21 to 25). She explained the legal basis for this alternative verdict; that if there is an unlawful killing of a person without the intention to kill or cause serious bodily harm, then the offence is manslaughter, not murder. She reiterated these directions on page 374, lines nine to 14, 21 to 25 and page 375, lines one to three.

[98] Ground of appeal four fails.

Ground 5 - In light of the circumstances the sentence is manifestly excessive

Submissions

[99] Mrs Reid posited that should this court dismiss Mr Oliver's grounds of appeal challenging conviction, there is merit in the ground that the sentence imposed was manifestly excessive. She stated that the learned trial judge seemed to have overlooked the general guidelines relating to manslaughter, as found in the Sentencing Guidelines for use by Judges of the Supreme Court of Jamaica and the Parish Courts, December 2017 ('the Sentencing Guidelines'), and focused on the aspects of the Sentencing Guidelines relating to diminished responsibility. As a result, the learned trial judge used a starting point at the higher end of the range, although she acknowledged that Mr Oliver's participation could not have been said to be the worst of the worst. Mrs Reid submitted that a more appropriate sentence for Mr Oliver would have been seven years' imprisonment.

[100] On this point, the Crown conceded that the sentence imposed was manifestly excessive and a starting point of 10 years was suggested.

Analysis

[101] As enunciated by this court in the case of **Alpha Green v R** (1969) 11 JLR 283, 284, "[i]t is only when a sentence appears to err in principle that this Court will alter it". This statement of principle was expressed by Hilbery J in **R v Ball** (1951) 35 Cr App R 164, at page 165, as follows:

> "In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this

> Court that when it was passed there was a failure to apply the right principles then this Court will intervene."

[102] The normal range, as set out in the Sentencing Guidelines, for the offence of manslaughter is between three and 15 years, with the usual starting point being seven years. The learned trial judge would, therefore, have used the highest point of the range – 15 years- as a starting point. In doing so, she did consider the various circumstances by which a verdict of manslaughter could arise and that it arose as a result of an act of violence. She did not, however, add any aggravating factors to increase that figure, but subtracted two years for the mitigating factors, which resulted in a figure of 13 years. The mitigating factors identified by the learned trial judge were the secondary role played by Mr Oliver, that he was not involved in the actual chopping of the deceased, and also that he had no previous convictions. She also deducted the pre-trial custody period of two months, resulting in the sentence of 12 years and 10 months imposed.

[103] The sentence of 13 years (prior to pre-trial custody deduction) following a trial and conviction for the reduced offence of manslaughter cannot, under ordinary circumstances be considered as manifestly excessive. In **Shirley Ruddock v R**, this court substituted a conviction of manslaughter and quashed the conviction of murder. Brooks JA reviewed a number of cases (see paras. [29] to [32]) and stated that the most common sentence passed for convictions for manslaughter involving personal violence has been 15 years and that the typical range has been between seven and 21 years (see para. [27]).

[104] The cases reviewed included **Dwight Wright v R** [2010] JMCA Crim 17, which was said to be at the lower end of the range. Mr Wright had stabbed the deceased in his chest resulting in his death. This court overturned his conviction for murder and substituted a conviction of manslaughter on the basis of provocation. The sentence imposed was seven years.

[105] In most of the cases reviewed by Brooks JA, in which a sentence of 15 years was imposed, the appellant had inflicted the fatal injury to the victim, who was either someone with whom they had a previous relationship or some "mutual connection". In two of the

cases, the appellants had pleaded guilty. In **Bertell Myers v R** [2013] JMCA Crim 58, the appellant pleaded guilty to the killing of his common law wife and this court reduced his sentence to 12 years. In **Emilio Beckford and Kadett Brown v R** [2010] JMCA Crim 26, the killing took place during the course of a robbery. This court substituted a conviction of manslaughter in relation to Mr Brown and imposed a sentence of 18 years. This case involved the use of a firearm. In **Dosane Jackson v R** [2020] JMCA Crim 3, F Williams JA opined at para. [20] that a sentence of 15 years would be nearer to the top of the range for manslaughter. In **Micheston Burke v R** [2020] JMCA Crim 29, a sentence of 20 years prior to a guilty plea discount was thought to be appropriate in circumstances where the appellant killed his intimate partner. This court stated that his previous conviction for violence against a person with whom he had an intimate relationship weighed significantly against him and took his case outside the usual range for the offence of manslaughter.

[106] In the round, it could be considered that the circumstances relevant to Mr Oliver would warrant a lesser starting point, particularly in light of the fact that he did not personally inflict any injury to the deceased. We are of the opinion that 12 years would be appropriate. We do not think there is any basis to add aggravating factors in the circumstances. We would subtract two years for the mitigating factors as identified by the learned trial judge, that is, his secondary role and the lack of previous convictions. We would also subtract the two months spent in pre-trial custody. The sentence to be imposed would therefore be nine years and 10 months' imprisonment.

Conclusion

[107] We see no basis for quashing the convictions of Messrs Oliphant and Oliver. There is no basis either for a reduction of sentence in relation to Mr Oliphant. However, we have determined that Mr Oliver is entitled to a reduction of sentence as we are of the view that the learned trial judge's use of the highest starting point when imposing the penalty on Mr Oliver was unjustified in all the circumstances. We, therefore, make the following orders:

1. Mr Oliphant's renewed application for leave to appeal against conviction and sentence is refused. His sentence is reckoned as having commenced on 9 April 2019, the date it was imposed.

2. Mr Oliver's appeal against conviction is dismissed. However, his application for leave to appeal sentence is granted. The hearing of the application is treated as the hearing of the appeal.

3. Mr Oliver's appeal against sentence is allowed and the sentence of 12 years and 10 months' imprisonment is set aside and substituted therefor is a sentence of nine years and 10 months' imprisonment.

4. Mr Oliver's sentence is reckoned as having commenced on 9 April 2019, the date it was imposed.