[2021] JMCA Crim 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE BROWN BECKFORD JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 82/2017

MARK RUSSELL v R

John Clarke for the appellant

Miss Latoya Bernard and Miss Devine White for the Crown

15 June and 15 October 2021

BROOKS P

Introduction

[1] The appellant, Mr Mark Russell, was convicted on 21 July 2017, in the Home Circuit Court for the offence of murder. On 31 July 2017, he was sentenced to life imprisonment and ordered to serve 24 years before becoming eligible for parole. He has appealed against his conviction and sentence. The bases of the appeal include, improper evidence being tendered before the jury, improper directions to the jury about the evidence of accomplices and improper handling of the jury's indication that they had not reached a majority verdict.

[2] The prosecution's case at the trial revealed a brutal, heartless killing that is totally unworthy of people who have sworn to serve, protect and reassure the public. According to three Jamaica Defence Force ('JDF') soldiers, who were the prosecution's eyewitnesses, two police officers, who were on mobile patrol with them on 27 July 2007, in their presence, shot and killed a helpless Mr Ravin Thompson at the side of the road,

at Darling Street in the parish of Kingston. This was done while the patrol unit was *en route* to take Mr Thompson to the hospital for treatment for a gunshot wound that he had earlier received at the hands of members of that same patrol unit.

[3] There was no dispute at the trial that Mr Russell, then Constable Russell, was one of the two police officers in that patrol unit. Mr Russell, however, categorically denied that he was present when Mr Thompson was first shot and injured, or present at the time of any shooting incident along the route to the hospital. Mr Russell asserted that the patrol was travelling in two JDF vehicles, and that on two separate occasions, the vehicle that he was in arrived at the relevant spot after he had heard explosions. He said that on the first occasion when his vehicle arrived at Alexander Road, in the parish of Saint Andrew, Mr Thompson was already lying on the ground, having previously been shot. Mr Russell further stated that on the way to the hospital with Mr Thompson, the two vehicles got separated and that when he next saw the other vehicle, in which Mr Thompson was, it was parked along Darling Street. At that time, the JDF soldiers were standing to the left of the vehicle and Mr Thompson was crouched over in it, with one of his legs hanging out.

[4] The credibility of the witnesses, therefore, played a critical role in the decision that the jury had to make. According to Mr Clarke, counsel for Mr Russell, the conduct of the trial skewed the case against Mr Russell and rendered the trial unfair.

Some further details

[5] At least one of the grounds of appeal requires some further details of the prosecution's case at the trial, as to the circumstances of Mr Thompson's death. One of the soldiers, Corporal Dwayne Salmon, testified that the patrol went to Alexander Road, in the parish of Saint Andrew. They were acting on information that a man there had a firearm. On arrival at the location, he saw a man fitting the description that had been given to the patrol unit. As Corporal Salmon approached him, the man pulled a shiny gun and pointed it at the Corporal, who fired at the man. The man ran into a yard. Corporal Salmon entered the yard and saw a different man lying on the ground just inside the

yard. That man had been standing outside the yard when the patrol approached. Inside the yard, a shiny gun was retrieved but the other man, who had that weapon, had made good his escape.

[6] Corporal Salmon said that he went back to the vehicle, in which he had come. There he saw that the man who had been lying on the ground, was now in that vehicle. The man, who has been identified as Mr Thompson, was injured. The patrol headed for the hospital with Mr Thompson. Corporal Salmon testified that shortly after leaving Alexander Road, he heard a woman in the vehicle crying. Mr Russell, who was now in that vehicle, called for the vehicle to be stopped. When it had come to a halt, said Corporal Salmon, Mr Russell put the woman out, and the vehicle was driven off, leaving her there.

[7] The woman was Andrea Thompson. She is Mr Thompson's aunt. Importantly, she said that while she was on the vehicle, Mr Thompson told her that he would be alright and that she should not cry. She said she is not sure who dragged her off the vehicle, but one of the soldiers, using expletives, had told her to shut up. She had to make her own way to the hospital.

[8] Corporal Salmon said that when the patrol reached Darling Street, Mr Russell again called for the vehicle to be stopped. At that location, Corporal Salmon said, Mr Thompson had blood on his chest but his chest was moving. Corporal Salmon said that after both vehicles had stopped, Mr Russell and the other police officer, Constable Lee, conferred with each other. After doing so, they put an M16 firearm in Mr Thompson's hand and fired it. The two police officers then put Mr Thompson on the sidewalk and Constable Lee fired at him three times, but apparently one shot missed. The two police officers then put Mr Thompson back in the vehicle and the patrol continued to the hospital, where, on arrival, Mr Thompson was pronounced dead.

[9] The two other soldiers in the patrol gave evidence along the same lines as Corporal Salmon. One of them, Lance Corporal Shadrach Fuller, testified that, at Darling Street, before the two policemen fabricated the scenario, he heard Constable Lee say, during a

telephone call, "Boss, wi find di gun but a di wrong man get shot, suh wi a guh done him". He said that after that call, he heard Constable Lee say to Mr Russell, "Come mek wi deal with it".

[10] At the hospital, the process of investigating Mr Thompson's death commenced. The scenes of crime personnel swabbed the hands of the relevant individuals and took relevant photographs, including photographs of the vehicle. The police officers surrendered their weapons to the investigators, but the soldiers refused to do so. The soldiers said that they made their reports through the relevant chain of command, according to the JDF's protocol.

[11] Dr Prasad Kadiyala performed the post mortem examination on Mr Thompson. He testified that he found four gunshot wounds to Mr Thompson's body, one to the face with a downward trajectory, one to the chin with an upward trajectory, one to the chest and one to the right forearm. Dr Kadiyala said that Mr Thompson would have survived 15-45 minutes if he had only had the injury to the chest. Dr Kadiyala testified that the amount of blood that he saw in Mr Thompson's chest cavity would have taken 15 minutes to accumulate there. Critically, he said that the injury to the head would have been 15-30 minutes after the injury to the chest. Also of critical importance, when Miss Thompson's testimony is considered, is Dr Kadiyala's testimony that Mr Thompson would not have been able to speak after receiving the gunshot injury to the chin, which went inside the skull upwards backwards and to the right. The doctor opined that Mr Thompson would have died instantly (or within two minutes) from that injury to the chin.

[12] The prosecution accepted that Mr Russell was not at Alexander Road when Mr Thompson was first shot. The main issues joined between the prosecution and the defence, at trial, were whether Mr Russell was:

a. in the vehicle in which Mr Thompson was being transported to the hospital;
b. the person who removed Miss Thompson from that vehicle;

c. present when Mr Thompson was said to have been shot at Darling Street; and

d. involved in concocting a scenario to suggest that Mr Thompson was shot by the patrol in response to shots fired by Mr Thompson.

The grounds of appeal

[13] Mr Clarke argued five grounds of appeal on behalf of Mr Russell. The formulation in his written submissions varied somewhat from that in the document headed "Supplemental Grounds of Appeal". Counsel indicated a preference to the ones in the written submissions. Accordingly, the ones in the written submissions will be the ones to which this judgment will refer.

"**Ground 1: the majority verdict**

> The learned trial judge erred in failing to give adequate or sufficient directions in relation to how the jury should seek to arrive at a majority verdict. The inadequate or insufficient directions ensures [sic] the resultant conviction is unsafe…"

"**Ground 2**

> The jury heard prejudicial evidence…
>
> a. The process and factual circumstances behind the extradition of Mark Russell to ensure his presence in Jamaica for the trial of the material offence before the court
>
> b. The role of the US Marshall and the Bureau of Special Investigation in the extradition of Mark Russell
>
> c. The fact that Mark Russell was placed in custody at the Gun Court Remand Centre
>
> d. The US Marshall turned up at Mark Russell's house in the [United States] and took him into custody where he remained until (and even after) extradited to Jamaica."

"**Ground 3**

The learned trial judge failed to give the jury the appropriate directions as regards the prejudicial evidence referenced in the foregoing ground…"

"**Ground 4**

The learned trial judge erred in failing to give the adequate and sufficient accomplice/ interest to serve direction in all the circumstances of this case…"

"**Ground 5**

The sentence passed by the learned trial judge was not appropriate in all the circumstances of the case. The sentence passed warrants the court exercising its statutory power under section 13(3) of the Judicature (Appellate Jurisdiction) Act to pass an appropriate sentence."

[14] Mr Clarke first argued grounds 2 and 3 together. He then argued ground 4, and finally, ground 1. He relied on his written submissions in respect of ground 5. That is the order in which the grounds will be considered.

Grounds 2 and 3- Admission and treatment of prejudicial evidence

[15] These grounds concern evidence adduced through Inspector Kevon Chambers, the first witness for the prosecution at the trial. He testified that in June 2012 he was assigned to the Bureau of Special Investigations of the Jamaica Constabulary Force ('JCF'). His duties involved investigating shooting incidents involving members of the JCF ('police officers'). In that month, he went to New York in the United States of America, and made arrangements at the offices of the U S Marshal, concerning the extradition of Mr Russell. On 15 June 2012, the U S Marshals handed Mr Russell over to him, and another police officer, at the John F Kennedy Airport. He and the other police officer escorted Mr Russell to Jamaica, and, on landing in Jamaica, he executed a warrant of arrest on Mr Russell for the murder of Mr Thompson. He cautioned Mr Russell, who did not say anything after

being cautioned. After arresting Mr Russell he escorted him to the Gun Court Remand Centre, where Mr Russell was placed in safe custody.

[16] Mr Clarke contended that the Inspector's evidence was irrelevant to the case and only had a prejudicial effect against Mr Russell. The inference that that evidence was intended to convey, learned counsel argued, was that Mr Russell had fled Jamaica because he was wanted for the murder of Mr Thompson. Its impropriety was critical in this case, Mr Clarke submitted, because this was a case in which the jury was divided, and was, at one stage, deadlocked.

[17] Mr Russell, in his unsworn statement, told the jury that when he went abroad, he did not know that he was a suspect in respect of the killing of Mr Thompson. He said that, he remained abroad for an extended period because he was tending to his sick grandmother. He did not know of his being wanted until the U S Marshals turned up at the door of one of the addresses that he had given in his immigration documentation, and took him into custody.

[18] The learned judge's direction to the jury, Mr Clarke submitted, was not only inadequate, but was inappropriate. On learned counsel's submission, instead of directing the jury to disregard the evidence of Inspector Chambers, the learned judge left, as an issue for the jury to decide, whether Mr Russell had deliberately stayed away from Jamaica because of this case. The learned judge also failed, Mr Clarke submitted, to indicate to the jury the aspects of the prosecution's case that supported Mr Russell's case, that he did not know, at the time that he left the island, that he was either suspected or wanted in relation to Mr Thompson's killing.

[19] Learned counsel argued that the inappropriate evidence and the treatment by the learned trial judge, adversely affected the issue of Mr Russell's credibility. The question of whether he had fled Jamaica, Mr Clarke submitted, was an issue which affected Mr Russell's credibility, in a case where it was Mr Russell's word against the word of the soldiers.

[20] Mr Clarke relied, in part, on the cases of **Noor Mohamed v R** [1949] 1 All ER 365 and **Arthurton v The Queen** [2004] UKPC 25.

[21] Learned counsel for the Crown had four basic plinths to their answer to those complaints. Whilst not specifically denying that Inspector Chambers' evidence was prejudicial, counsel for the Crown argued, in their written submissions, that:

a. the learned judge's directions were fair and balanced and "served to nullify the effect of the possibly prejudicial evidence";
b. the learned judge's treatment of the possibly prejudicial evidence was within his discretion and that he made no error in the exercise of that discretion;
c. stripped to its core, the case rested on the issue of the credibility of the soldiers as against Mr Russell and therefore the appellate court ought not to interfere with the jury's finding in that regard; and
d. even if the evidence was improperly admitted, the treatment of it by the learned judge ensured that there was no substantial miscarriage of justice and the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act ('JAJA') should be applied.

Learned counsel relied, in part, on **R v Joseph Lao** (1973) 12 JLR 1238.

[22] In analysing the evidence and these competing submissions, it must be said that this evidence was entirely prejudicial and had no probative value in resolving the issues that the jury was charged to decide. When the question is asked "What exactly does this purport to prove?" (see page 370 of **Noor Mohamed v R**), it is plain that it proves nothing about the incident and was aimed solely at demonstrating how Mr Russell came to be in custody and from whence he came. Despite the fact that there was no objection

from defence counsel to the testimony of Inspector Chambers, it should not have been allowed.

[23] There was no evidence that Mr Russell was informed that he was a suspect in any criminal investigation emanating from the incident. The evidence of the investigator, Detective Sergeant Grant, was that, at no time during his investigation did he speak to either of the two police officers who were part of the patrol. This is although he started investigating the shooting on the morning following the incident. At that time, he was told that they had already gone off duty. Later, he was told that they were both on sick leave. He learned, during the following month, August, that they had left the island.

[24] There was no evidence, therefore, from which it could be inferred that Mr Russell had fled the island in response to the investigation. Neither was there any evidence that he had been made aware of the investigation, so that it could be inferred that he had deliberately remained away as a result.

[25] Although a trial judge has a discretion as to the treatment of inappropriate prejudicial evidence (see **R v O'Neil Lawrence and Carl James** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 82 and 83/ 2003, judgment delivered 30 July 2004), the learned judge erred in that he did not treat the evidence as overwhelmingly prejudicial. Despite the fact that the learned judge had warned the jury about speculating, and despite the fact that he told them that there was no evidence that Mr Russell was wanted before he left the island, the learned judge left it open to the jury to consider whether Mr Russell "deliberately stayed away because of this case" (see page 553 of the transcript). Miss Bernard, for the Crown, properly conceded that there was no evidence from which it could be inferred that Mr Russell had stayed away for that reason. The learned judge, therefore, erred in that regard as well.

[26] The error, by itself, may not necessarily be fatal to the conviction. That aspect will be considered after assessing the other grounds of appeal. The primary issue is whether there has been unfairness to Mr Russell (see page 956g of **Arthurton v The Queen**).

R v Joseph Lao, which deals with giving deference to the finding of the jury, is not immediately relevant at this juncture.

Ground 4- The accomplice/interest to serve directions

[27] For this ground, Mr Clarke submitted that although the soldiers who testified for the prosecution, had not been charged for killing Mr Thompson, they had an interest to serve. He argued that the learned judge correctly identified that fact, but he did not properly warn the jury about acting on the soldiers' uncorroborated evidence. Learned counsel argued that the learned judge did not demonstrate for the jury, the relevance to this case of the need for corroborating the evidence of persons with interests to serve. For instance, Mr Clarke submitted, the learned judge did not remind the jury of the evidence that the soldiers said that they were obeying the orders of their commanding officer. He relied, for support, on the cases of **Pasmore Millings and Another v R** [2021] JMCA Crim 6, **R v Makanjuola; R v Easton** [1995] 3 All ER 730 and **Sophia Spencer v R** (1985) 22 JLR 238 at page 244.

[28] Learned counsel for the Crown, in their written submissions, comprehensively combed the summation to demonstrate that the learned judge, not only gave the appropriate warning about accomplice evidence, but properly applied it to the case. They also relied on **Pasmore Millings and Another v R**, for support.

[29] Mr Clarke's submissions cannot be accepted on this ground. The learned judge's approach cannot be faulted. The House of Lords in **Davies v Director of Public Prosecutions** [1954] AC 378 provided guidance on the definition of an accomplice. In delivering the judgment that all their Lordships agreed upon, Lord Simonds LC stated, in part, at page 400, that an accomplice, generally speaking, is a person who participates in a crime:

> "On the cases it would appear that the following persons, if called as witnesses for the prosecution, have been treated as falling within the category [of accomplices]:-

> (1) On any view, persons who are participes criminis [sic] in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term 'accomplice.'…"

Numbers (2) and (3), in his Lordship's judgment, dealt with exceptional cases that fall within the definition of "accomplice". They are not relevant for these purposes.

[30] The requirement of criminal participation is also mentioned in **David Gordon v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 161/2001, judgment delivered 12 December 2002. Smith JA, at page 17, also relied on the definition of accomplice given in **Davies v Director of Public Prosecutions**.

[31] The term "*particeps criminis*" has been defined by Osborn's *Concise Law Dictionary* (9th Edition) as "one who has a share in a crime".

[32] Lord Simonds LC, in **Davies v Director of Public Prosecutions**, did allow, in certain cases, for the tribunal of fact to determine whether a person is an accomplice. This, he did at pages 401-402:

> "My Lords, I have tried to define the term 'accomplice.' [sic] The branch of the definition relevant to this case is that which covers 'participes criminis' [sic] in respect of the actual crime charged, 'whether as principals or accessories before or after the fact.' But, it may reasonably be asked, who is to decide, or how is it to be decided, whether a particular witness was a 'particeps criminis' in the case in hand? In many or most cases this question answers itself, or, to be more exact, is answered by the witness in question himself, by confessing to participation, by pleading guilty to it, or by being convicted of it. But it is indisputable that there are witnesses outside these straightforward categories, in respect of whom the answer has to be sought elsewhere. The witnesses concerned may never have confessed, or may never have been arraigned or put on trial, in respect of the crime involved. Such cases fall into two classes. In the first, the judge can properly rule that there is no evidence that the witness was, what I will, for

> short, call a participant. The present case, in my view, happens to fall within this class, and [can] be decided on that narrow ground. **But there are other cases within this field in which there is evidence on which a reasonable jury could find that a witness was a 'participant**.' [sic] **In such a case the issue of 'accomplice vol non' is for the jury's decision**: and a judge should direct them that if they consider on the evidence that the witness was an accomplice, it is dangerous for them to act on his evidence unless corroborated: though it is competent for them to do so if, after that warning, they still think fit to do so." (Emphasis supplied)

[33] His Lordship also gave guidance on the requirement of corroboration for the evidence of accomplices. In extracting the learning from various cases, he said at page 399 of the judgment:

> '"First proposition:
>
> 'In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.
>
> Second proposition:
>
> 'This rule, although a rule of practice, now has the force of a rule of law.
>
> 'Third proposition:
>
> 'Where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso to [the equivalent of section 14(1) of the JAJA]."

[34] In **R v Barnes; R v Richards** [1940] 2 All ER 229 at page 232, the Court of Appeal of England and Wales also explained the basis of the requirement of corroboration for the evidence of a person who participates in the relevant criminal activity:

> "…As was stated in *R v Baskerville* [[1916] 2 KB 658] in this court, at p 665:
>
> > 'The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person **upon the unconfirmed testimony of one who is admittedly a criminal**. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it.'" (Emphasis supplied)

[35] Since the soldiers, in this case, plainly had an interest to serve, it was not inappropriate for the learned judge to have left it to the jury to decide if the soldiers were accomplices, and to give the jury relevant directions concerning the dangers of relying on the evidence of accomplices.

[36] The learned judge gave proper directions in that regard. In directing the jury on this issue, the learned judge:

a. explained who was an accomplice (page 495, lines 3-7);
b. explained the need for caution in treating with the evidence of accomplices (page 495, lines 7-16 and page 496 lines 2-21);
c. explained that more than one accomplice may collude to give false evidence (page 496, lines 22-24);
d. warned that "it is dangerous to convict on the uncorroborated evidence of an accomplice or more than one accomplice" (page 499, lines 20-24);
e. informed that there was no corroboration of the evidence of the soldiers, but that if the jury was sure that they were honest and speaking the truth, they could rely on that evidence (page 499, line 24 to page 500, line 23);

f. stated that, for the reasons explained, the jury had to carefully sift the evidence of the soldiers (page 500, lines 5-13 and page 532, lines 3-6);

g. reviewed the evidence of the soldiers in that context (page 497, line 12 to page 501, line 1 and page 513, lines 2-18); and

h. left it as a question of fact for the jury to decide if the soldiers were accomplices (page 494, line 25 to page 495, line 3).

(The page references above are in relation to the transcript)

[37] As was the case in **Pasmore Millings and Another v R**, the complaint about the learned judge's summation, in this regard, has no merit. This ground must fail.

Ground 1 - The direction on the majority verdict

[38] This ground is dealt with after those already considered because it addresses a later point in the trial. The backdrop for the complaints in this ground is that after the jury had retired for over four hours (10:36 am – 3:10 pm), they returned to the courtroom and announced that they were divided 4/3. The learned judge asked them to withdraw while he consulted with counsel. He sought the assistance of counsel as to whether he should direct the jury on arriving at a unanimous verdict or should "go straight to the majority verdict direction" (page 586, lines 9-10 of the transcript). After that consultation, the learned judge decided to give a majority direction. At page 587, lines 2-9 of the transcript, he is recorded as saying to counsel:

> "Well, the majority verdict does at least indicate the necessary majority, which we currently have one shortage. And in a sense, it is the only way [they] could be deadlocked if it is 4/3. I think that I will probably go straight to the majority verdict direction to at least give them the opportunity to try further and see what happens."

[39] When he recalled the jury, the learned judge gave the direction, with which Mr Clarke takes issue. The learned judge said, at pages 587, line 15 to page 589, line 23 of the transcript:

> "Madam Foreman and members of the jury, I am going to be giving you a direction on majority verdict. Please listen carefully. When you go back into the jury room your first duty is to try to arrive at an [sic] unanimous verdict, that is a verdict on which you all agree whether the verdict is guilty or not guilty.
>
> The law permits me in certain circumstances to accept a verdict of guilty or not guilty which is not unanimous that is to say a majority verdict, if 5 or more of you are agreed….
>
> However, I repeat that your first duty is to try to arrive at a verdict on which you all agree whether guilty or not guilty…
>
> If, regrettably, you are so divided that there is no hope that even five of you will agree, you may come back as having disagreed. Each of you has taken an oath or affirmation to return a true verdict according to the evidence. No one must be false to that oath or affirmation. But you have a duty, not only as individuals, but also collectively, that is the strength of the jury system.
>
> Each [of] you [takes] into the jury room with you your individual experience and wisdom. You do that by giving your views and listening to the views of your colleagues. There must necessarily be discussions, arguments and give and take within the scope of your oath or affirmation. That is the way in which agreement is reached.
>
> If, unhappily, five of you cannot reach an agreement you must say so. If, on the other hand, you reach or are likely to reach a verdict on which at least five of you are agreeing then you may be in a position to give a majority verdict. But as I say your first aim must be to reach a verdict on which you are all agreeing, if possible.
>
> So I am going to ask you to return to the jury room. You will know what the discussions are so far. You will know whether there is a real possibility of one person shifting their view or more than one person shifting their views. I am going

> to ask you to return to see whether a majority verdict can be arrived at within the scope of your duty as jurors while you be true to your oath and affirmation. I am going to ask you to retire and return when you have decided what the position is."

[40] Mr Clarke complained that the learned judge erred in not restricting himself to a majority direction, but giving a majority direction at the same time as a **Watson** direction (referring to **R v Watson and other appeals** [1988] 1 All ER 897), when a **Watson** direction is one of last resort. Learned counsel also submitted that the learned judge erred in:

a. failing to tell the jury that they could return without reaching a decision;
b. failing to enquire of the jury if they had any difficulty that he could assist with; and
c. sending the jury back to deliberate at that time of day, at 3:24 pm on a Friday.

[41] The cumulative effect of these errors, learned counsel submitted, placed undue pressure on the jury to arrive at a verdict. That result, Mr Clarke argued, was in breach of the principle, which the cases, including **Watson**, stridently uphold.

[42] Miss Bernard submitted that the learned judge did not place any pressure on the jury to arrive at a decision. She argued that no time limit was placed on the jury and there was no pressure to arrive at a unanimous decision. Considering that the jury had retired at 10:36 am, learned counsel argued, their going back at 3:24 pm to further deliberate did not constitute pressure. Miss Bernard submitted that the jury was well aware of the issues that they were asked to resolve and nowhere did the learned judge ask any juror to change their minds.

[43] **Watson** is an important decision in considering the validity of Mr Clarke's complaints in this ground. Lord Lane CJ, in delivering the judgment of the Court of Appeal of England, stated the principle behind the court's decision. He said, in part, at page 903:

> "One starts from the proposition that a jury must be free to deliberate without any form of pressure being imposed on them, whether by way of promise or of threat or otherwise. They must not be made to feel that it is incumbent on them to express agreement with a view they do not truly hold simply because it might be inconvenient or tiresome or expensive for the prosecution, the defendant, the victim or the public in general if they do not do so."

[44] The court later went on to give this guidance for trial judges who are faced with a situation where a jury is deadlocked. Lord Lane said, in part, at page 903:

> "In the judgment of this court there is no reason why a jury should not be directed as follows:
>
> > 'Each of you has taken an oath to return a true verdict according to the evidence. No one must be false to that oath, but you have a duty not only as individuals but collectively. That is the strength of the jury system. Each of you takes into the jury box with you your individual experience and wisdom. Your task is to pool that experience and wisdom. You do that by giving your views and listening to the views of the others. There must necessarily be discussion, argument and give and take within the scope of your oath. That is the way in which agreement is reached. If, unhappily, [ten of] you cannot reach agreement you must say so.'
>
> It is a matter for the discretion of the judge whether he gives that direction at all and if so at what stage of the trial. There will usually be no need to do so. Individual variations which alter the sense of the direction, as can be seen from the particular appeals which we have heard, are often dangerous and should, if possible, be avoided. **Where the words are thought to be necessary or desirable, they are probably best included as part of the summing up or given or repeated after the jury have had time to consider the majority direction**." (Square brackets as in original, emphasis supplied)

[45] It will be readily apparent that the learned judge attempted to give a faithful **Watson** direction. The court in **Watson** reviewed a number of cases dealing with the issue. Some of the cases showed that it was improper to give a direction speaking to a collaborative approach and the need to avoid the expense of a retrial (a **Walhein** direction – **R v Walhein** (1952) 36 Cr App R 167) before giving a majority direction. The court found that a **Walhein** direction, whether in its original or an amended version, could place undue pressure on the jurors who are in the minority, in a deadlock situation. It is for that reason that the court formulated the direction, which now bears the moniker, the **Watson** direction.

[46] The **Watson** direction does not tell the jury of the consequences of failing to reach a decision, but it is noted that the court stated that it would be best if the direction is given either as part of the original summation, or after a majority direction.

[47] If, however, a **Watson** direction may be given in the original summation, before a majority direction is given, it cannot be said that combining it with a majority direction, although undesirable, will automatically result in placing undue pressure on the minority jurors. Each case should turn on its own circumstances.

[48] An example of a case in which a modified **Walhein** direction was given along with a majority direction, is **R v Donoghue** (1987) 86 Cr App R 267. The court in **Watson** considered **R v Donoghue**, at page 901j:

> "In *R v Donoghue* … the appellant was convicted of wounding with intent by a majority of eleven to one. The jury returned after a retirement of two hours and ten minutes. They had not agreed on a verdict. The judge then addressed the jury thus (at 270):
>
> > 'Members of the jury, the time has now come when I can accept from you a majority verdict, that is to say, a verdict upon which at least ten of you agree. Members of the jury, it is obviously better if you can reach a unanimous verdict and you want to try to do so. Do not be so stiffnecked as to not listen to the other

> person's point of view, but none the less, members of the jury, you still have to be true to your oaths and be consistent with the jury oath. You can perhaps bend to the other person's point of view and should do so; but, on the other hand, if your [sic] cannot, you must be true to your oath.'
>
> After a further retirement of 14 minutes the majority verdict was announced.
>
> It was held that the judge's direction contained none of the potentially objectionable features of a true *Walhein* direction. It was little more than an invitation to the jury to listen to the arguments of their fellow jurymen and, if they thought fit, to change their mind consistently with their oaths. Watkins LJ in the course of giving the judgment of the court said (at 271):
>
> > 'Objection could undoubtedly be taken if the direction placed any improper pressure upon any member of the jury to subordinate his or her own judgment in order to avoid the expense and inconvenience involved in a new trial and the hardship suffered by a defendant who has to be tried again. In the present case we do not consider that there was any improper pressure. Accordingly this ground of appeal fails.'"

[49] In this case, the learned judge did not communicate any of the objectionable characteristics of a **Walhein** direction. There was no suggestion as to the consequences of not reaching a verdict. Unfortunately, he rolled up the **Watson** direction with the majority direction. The combined direction was, however, very similar in effect to the direction in **R v Donoghue**.

[50] At the time of the learned judge giving his direction on this point, the jury had been deliberating for an extended period of time. It was fairly late in the day on a Friday afternoon. The learned judge had reminded the jury that none of them should be false to their oath. He told them that the case could be decided on a majority and that there should be some "give and take" in the discussions. Contrary to Mr Clarke's submission, the learned judge left it open to the jury to "come back as having disagreed".

[51] The question is whether that situation and the directions would have placed pressure on a minority juror.

[52] Despite the fact that the jury returned after 16 minutes, following the learned judge's direction, this does not, by itself, indicate that this placed pressure on a minority juror. A similar situation occurred in **R v Donoghue** where the jury returned after 14 minutes, after having been given a modified **Walhein** direction. The court in **R v Donoghue** held that the direction did not contain "objectionable features of the *Walhein* direction" and did not place improper pressure on the jury. In this case, as in **R v Donoghue**, the learned judge's direction did not have the objectionable features of a **Walhein** direction.

[53] Another complaint by Mr Clarke warrants mention at this stage. It is correct that the learned judge did not enquire from the jury if there was any issue with which he could help them. It is not clear, however, if the jury needed further direction. When the jury first returned from the jury room, they were asked if they had arrived at a verdict. The exchange at that point is as follows (page 585 of the transcript, lines 8-18):

> "REGISTRAR: Madam Foreman, please stand. Madam Foreman and members of the jury, in respect to [sic] the accused, Mr Mark Russell have you arrived at a verdict?
>
> FOREMAN: Not sure, because…
>
> REGISTRAR: Is your verdict unanimous that is to say are you all agreeing?
>
> FOREMAN: No.
>
> REGISTRAR: In terms of numbers and numbers only, how are you divided?
>
> FOREMAN: 4/3."

It is at that point that the learned judge asked the jury to withdraw so that he could consult with counsel.

[54] There are authorities that encourage a trial judge to give assistance to the jury, wherever possible. In **R v Linton Edwards** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 250/2001, judgment delivered 21 May 2003, this court quoted from the advice given by their Lordships in **Berry v The Queen** (1992) 41 WIR 244 at pages 259-260; [1992] 2 AC 364 at page 383. Their Lordships said, in part:

> "[On the jury's return into court the] judge then gave a brief and accurate summary of the factual contest, adverted again to the burden of proof and reminded the jury that they were the sole judges of the facts. But he did not find out what was the problem which had brought the jury back into court and it is therefore impossible to tell whether anything said by the judge resolved the problem or not, because no one knows what the problem was. Their Lordships have already met this difficulty in some other recent cases. The jury has sought assistance and, once it appears that the problem is one of fact, the judge has not inquired further but has merely given general guidance, as in the present case. **The jury are entitled at any stage to the judge's help on the facts as well as on the law. To withhold that assistance constitutes an irregularity which may be material depending on the circumstances, since, if the jury return a guilty verdict, one cannot tell whether some misconception or irrelevance has played a part**.…Failure to clear up a problem which is or may be legal will usually be fatal, unless the facts admit of only one answer, because it will mean that the jury may not have understood their legal duty. The effect of failure to resolve a factual problem will vary with the circumstances..." (Emphasis supplied)

[55] In this case, the learned judge either did not hear the juror's, "because", in answer to the registrar's question, or did not appreciate it as being an opening to enquire if he could assist the jury further. To be fair to the learned judge, however, the foreman did not indicate that the jury needed any further assistance on any particular matter.

[56] Mr Clarke's complaint about the time that learned judge sent the jury back to deliberate, is without merit. The situation did not warrant the learned judge accepting the deadlocked position at that time.

[57] It is at this stage of balance that the circumstances of the improperly admitted evidence of Inspector Chambers become relevant. The combination of:

a. improperly, prejudicial evidence;
b. the deadlocked jury, after an extended period of deliberation; and
c. a **Watson** direction combined with a majority direction at that critical time

resulted in an unsatisfactory situation that can be characterised as a miscarriage of justice. The conviction, therefore, cannot stand, and it would be inappropriate to apply the proviso to section 14 of the JAJA.

[58] As a result, it is unnecessary to consider the ground complaining about the sentence imposed on Mr Russell. It is, however, necessary to determine whether a new trial should be ordered.

Should there be a new trial?

[59] The authority to order a retrial in any particular case, is governed by section 14(2) of the JAJA. The section states:

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

[60] Retrials are not ordered when there is a deficiency in the prosecution's evidence. This is not such a case. It is one where the conviction must be overturned because of a misdirection and a technical error by the learned judge. It is, therefore, appropriate to decide whether to order a new trial.

[61] In considering whether or not to order a new trial, the court must, in the interest of justice, perform a balancing act, taking into account a number of factors. Each case will turn on its own particular facts. The case of **Dennis Reid v The Queen** (1978) 16

JLR 246; (1978) 27 WIR 254; [1980] AC 343 ('**Dennis Reid**') is the pre-eminent authority for guidance on this issue. The relevant guidance is to be found at pages 250 – 251 of the JLR. Their Lordships pointed to some of the considerations that should be taken into account in deciding whether or not to order a new trial are:

a. the strength of the prosecution's case;
b. the seriousness or otherwise of the offence;
c. the prevalence of the offence;
d. length of the previous trial;
e. the time and expense that a new trial would demand;
f. the effect of a new trial on the accused;
g. the length of time that would have elapsed between the event leading to the charges, and the new trial;
h. the evidence that would be available at the new trial; and
i. the public impact that the case could have.

Their Lordships emphasised that this is not an exhaustive list of the relevant factors. They also recognised that, depending on the case, some factors may carry greater weight than others. Since **Dennis Reid** was decided, their Lordships have also considered, in this context, in **Bell v Director of Public Prosecutions and Another** (1985) 32 WIR 317 ('**Bell v DPP**'), the issue of delay and the constitutional right to a fair trial within a reasonable time. That factor should also be taken into account in deciding whether to order a retrial.

[62] These various issues will be considered below.

[63] The strength of the prosecution's case against Mr Russell is not of great assistance in this context. Although the prosecution had a number of witnesses, and the evidence was ostensibly strong, the jury, nonetheless, failed to reach a unanimous verdict.

[64] A factor that should carry significant weight is the prosecution's case as to the manner in which Mr Thompson was killed and the persons who were responsible for the

killing. This factor affects the seriousness of the offence and the public impact of the case. Serving police officers take an oath to serve, protect and reassure the public. The public and the members of the JCF should be made aware whether that oath was breached in any case and, if it were, the security forces should be aware that such breaches will not be winked at.

[65] In **Vince Edwards v R** [2017] JMCA Crim 24, this court said, at paragraph [142], that the "fact that this is a killing by a police officer is sufficiently important to warrant an inclination to order a new trial. It resonates with the issues of the seriousness of the case and the public impact that it would have". That sentiment resonates even more strongly in this case, where, if the evidence of the soldiers is to be believed, the killing was not done in circumstances that could be said to be an execution of duty, but rather, an execution of a citizen, for no other reason than to avoid an accusation of an improper infliction of a gunshot injury.

[66] The prevalence of the offence should not weigh as heavily in this case as in some others. Murder, undoubtedly, is one of the most prevalent and troubling offences in this country, and although the disregard for life is common to all cases of murder, the killing by a member of the security forces, in the context of their duties, resounds more with the issue of the public impact.

[67] The length of the trial is also not a significant factor. The trial took place over the course of two weeks. Although it could not be said to have been a short trial, it cannot be said that it involved a vast amount of State resources or judicial time. A new trial would, therefore, not be a daunting factor in respect of those factors.

[68] The various aspects of time, as they affect a decision to order a retrial, will vary according to the case. In an article cited by Mr Clarke, "When should a Retrial be Permitted After a Conviction is Quashed on Appeal?" MLR, September 2011, Vol 74, No 5, at page 721, the learned authors addressed the matter of lapse of time in this context.

They stated, at page 742, that there had been no consistency to be discerned from the decided cases:

> "…In one case in England and Wales [*R v Kaul* [1998] Crim LR 135], as short a period as nineteen months after the alleged events was held to rule out a retrial. In [*R v Saunders* (1974) 58 Cr App R 248], the court thought that it would be wrong to authorise a retrial after three years eight months, stating that 'none of us can remember a case in which it has been thought right to order a retrial after such a long period'. More recently, however, retrials have been ordered in cases involving far longer passages of time: over six years in [*R v Thornton (no 2)* [1996] 1 WLR 1174], [*R v Dallagher* [2002] EWCA Crim 1903] and [*R v El-Kurd* [2007] EWCA Crim 1888], over seven years in [*R v Jenkins* [2004] EWCA Crim 2047], almost nine years in [*R v Beckles* [2004] EWCA Crim 2766] and almost twelve years in [*R v Campbell* [1997] 1 Cr App R 199]. In Scotland, authority for a fresh prosecution was granted in *Hall v HM Advocate* [1999 SCCR 130] despite a time lapse of fourteen years. In some of these cases, this has clearly been because witness recall/availability was relatively unproblematic. In the others it may be that any problems posed were outweighed by other considerations such as the seriousness of the offence, although given the absence of reported discussion this is difficult to discern." (Italics as in original)

[69] The cases cited by the learned authors in that extract, were all from the United Kingdom, where the circumstances differ from those in the Caribbean. Decisions in other countries may be helpful, but not determinative. Their Lordships in **Dennis Reid** emphasised that it is for this court, with its knowledge of local conditions, to decide whether retrials are to be ordered.

[70] Nonetheless, a decision from a court closer to home should be cited. In **Winston Fuller v The State** (1995) 52 WIR 424, the offence involved was a murder during a bank robbery. The Court of Appeal in Trinidad and Tobago took the view that, based on constitutional provisions guaranteeing a trial in a reasonable time, it would not order a retrial since 10 and a half years had passed after the commission of the offence. This

position was taken in the light of the long delays in having a retrial heard and the prejudice to the accused. The court also took account of the failure of the prosecution to explain the previous delays in the case. Whilst the court considered **Dennis Reid**, it also took into account the constitutional requirement of a fair trial within a reasonable time should be included in considering whether to order a retrial. The court noted that delay was not raised in **Dennis Reid**.

[71] The issue of delay was taken into account in **Bell v DPP**, which was a decision of the Privy Council on an appeal from this court. In that case, Mr Bell complained about a five year lapse between a quashing of his conviction for firearm offences, and the attempt to retry him for the same offences. Their Lordships considered the constitutional right to a fair trial within a reasonable time, in their assessment of Mr Bell's attempt to prevent the retrial. The circumstances were, however, not identical to the present case.

[72] In assessing the constitutional right to a trial within a reasonable time, their Lordships introduced the element of the further time that will be required to commence the retrial. They said, in part, at page 326:

> "…Where, as in Jamaica, for a variety of reasons, there are in many cases extensive periods of delay between arrest and trial, the possibility of loss of memory which may prejudice the prosecution as much as the defence, must be accepted if criminals are not to escape. Nevertheless, in considering whether in all the circumstances the constitutional right of an accused to a fair hearing within a reasonable time has been infringed, **the prejudice inevitable in a lapse of seven years between the date of the alleged offence and the eventual date of retrial cannot be left out of account**." (Emphasis supplied)

[73] This court considered the issue of the probable date for a retrial, and the effect on an appellant, in the relatively recently decided case of **Mikal Tomlinson v R** [2020] JMCA Crim 54, which was also cited by Mr Clarke. The court quashed Mr Tomlinson's convictions for illegal possession of firearm and wounding with intent. It, however, declined to order a new trial because he had already served approximately six and a half

years of his mandatory minimum sentence of 15 years and would have been subject to another mandatory minimum sentence of 15 years for the offence of wounding with intent, if he were convicted after a retrial. These and other factors were considered as justifying his immediate release.

[74] There have been cases in which there have been long lapses of time. Most notably is the case of **Radcliffe Levy v R** [2019] JMCA Crim 46. Mr Levy was convicted of killing his child's mother and the evidence against him was strong. The length of time between the date of the offence and the hearing of the appeal was approximately 12 years. The court ordered a retrial. It found that there was great public importance in these offences in the communities.

[75] Mr Levy's case may be distinguished on the basis of the shorter time that he spent in custody. He was on bail prior to the trial and had spent three years in custody pending the appeal. The relevant times were set out in paragraph [17] of the judgment of the court:

> "…However, since the appellant was on bail up to trial of the matter which commenced on 27 January 2016, but has been in custody since the date of conviction on 23 February 2016, the substantial prejudice to the accused has been somewhat reduced, as he has only served approximately three years and nine months of his sentence, in respect of which it was ordered that he would only be eligible for parole after he had served 25 years."

[76] Perhaps as a consequence of those periods, the issue of his constitutional rights to a trial within a reasonable time were not considered by the court. That issue must be considered in this case.

[77] In applying to this case, the principles to be extracted from the cases cited above, the time factors are instructive. A period of 14 years has elapsed since Mr Thompson was killed. Mr Russell has been in custody for 10 years (although he was brought back to Jamaica in 2012, the learned trial judge seemed to have accepted that he was in relevant custody since 2011), as he was not granted bail since his return. Another time factor to

be considered is that the conviction took place four years ago. Finally, the length of time that it will take to bring a new trial on for hearing, and any possible appeal, must be taken into account.

[78] For the last mentioned factor, it must be noted that even in normal times, with the lists of the Circuit Courts as long as they are, it would take some time to bring Mr Russell's case on for hearing. The COVID-19 pandemic currently affecting the island has exacerbated those waiting periods, as jury trials have, in large measure, been suspended.

[79] There are other factors to be considered. The availability of witnesses and the effect that the lapse of time would have on their respective memories are issues that flow from the lapse of time. The Crown has stated that the current situation with the witnesses is as follows:

a. the investigating officer is still a serving member of the JCF and is available;
b. the scenes of crime officer has retired but is available;
c. no information is available concerning the civilian witnesses (one of which would be Miss Thompson); and
d. the JDF soldiers are still serving and are available.

[80] The availability of those witnesses indicate that a retrial would be possible. There would, of course, be the element of waning or altered memory caused by the lapse of time. Indeed, there was some indication of fading memory even at the trial, as Miss Thompson's testimony indicates.

[81] Although this case would be of public importance, the lapse of time that has been mentioned above and the possible time that it would take the matter to be brought on for trial, would be oppressive for Mr Russell. Additionally, the delay may possibly breach his constitutional right to a trial within a reasonable time. In the circumstances, a retrial should not be ordered.

[82] The court's next step is directed by the statute. The relevant section, which was quoted at the beginning of the analysis of this issue, directs the step that the court must take. Section 14(2) of the JAJA stipulates that upon the conviction being quashed, unless the court orders a retrial, it must direct that "a judgment and verdict of acquittal be entered". That is the order that must be made in this case.

Conclusion

[83] There were three issues which combined to vitiate the conviction in this case. The first is the adducing of improperly prejudicial evidence about the manner in which Mr Russell was taken into custody. The second factor is that the jury was deadlocked after an extended period of deliberation. The third issue concerned the learned trial judge's directions to the jury after they reported that they were deadlocked.

[84] The seriousness of the offence, and the manner of the killing, although of great importance to the public, is overshadowed by the long lapse of time since the events which led to Mr Russell being charged, the length of time that he has been in custody, and the further length of time that it would take to commence a retrial.

[85] The court, therefore, orders as follows:

i. The appeal against conviction and sentence is allowed.

ii. The conviction is quashed and the sentence is set aside.

iii. A judgment and verdict of acquittal is entered.