[2023] JMCA Crim 31

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CRIMINAL APPEAL NO 6/2017

ONEIL SHECKLEFORD v R

Isat Buchanan for the applicant

Miss Ashtelle Steele and Miss Tashell Powell for the Crown

2 May, 31 October, 1, 24 November 2022 and 14 July 2023

Criminal Law – Murder – Directions – Whether the learned trial judge failed to give adequate accomplice directions – Whether the learned trial judge failed to give appropriate directions on improper motive – Whether the learned trial judge adequately directed the jury on drawing of inferences – Whether the verdict was unreasonable – Whether the learned trial judge erred by introducing an irrelevant consideration

Constitutional Law – Delay – Whether the applicant's constitutional right to have his conviction and sentence reviewed by a superior court within a reasonable time breached – Constitution of Jamaica – Section 16

FOSTER-PUSEY JA

Background

[1] On 7 December 2016, the applicant, Oneil Sheckleford, was convicted of murdering Rochelle Chin, after a trial before Beswick J ('the learned trial judge'), sitting with a jury. On 13 January 2017, the learned trial judge sentenced the applicant to life imprisonment with the stipulation that he should serve 20 years' imprisonment before being eligible for parole.

[2] The applicant applied for leave to appeal his conviction and sentence. A single judge refused the application on 16 March 2021.

[3] As is his right, the applicant renewed his application. We heard the application on 31 October 2022 and 1 and 24 November 2022, and reserved our decision.

The case for the prosecution

[4] The main witness for the prosecution was Jermaine Channer, a cousin of the applicant. He testified that the applicant asked him to accompany him to Junction to check "Billy Boy" (o/c Dwayne Powell) and said he wanted to "page" Billy Boy's girlfriend. Sometime in the evening of 25 July 2011, the applicant picked him up in Manchester and they travelled together in the applicant's vehicle to Junction in the parish of Saint Elizabeth. On their arrival in Junction, they drove into a little lane. The applicant borrowed Mr Channer's telephone and went somewhere behind the motor vehicle. A few minutes later, Mr Channer heard gunshot explosions from a direction behind the motor vehicle. He eventually drove the motor vehicle towards a hill where he saw people converging. The applicant returned to the motor vehicle wearing a pullover, and with a gun in his hand. He told Mr Channer that he had lost Mr Channer's telephone.

[5] On the return journey, he heard the applicant discussing with someone on a cellular telephone that he had done something for the person for a lesser price than usual. He also heard the applicant asking someone to look for a telephone which he had dropped in the bush. Mr Channer's telephone and the telephone of Rochelle Chin were found in the vicinity of Miss Chin's body. Miss Chin's mother, who had come upon her body, handed the telephones over to the police. Mr Channer asked a female friend to say that his telephone really belonged to her and that she had lost it at a dance in Junction. He said he did this to protect the applicant and the applicant's friend "Billy Boy". The telephones were entered as exhibits in the trial. Mr Channer was, at one point, charged with murder, illegal possession of firearm and illegal possession of ammunition in relation to the incident. He was, however, relieved of these charges and, instead, pleaded guilty to misprision of a felony for having failed to report a crime.

The defence

[6] The applicant made an unsworn statement. He stated that Mr Channer, his cousin, had always been involved in a lot of trouble with the law, and had even gone to prison. He had never been close to or friends with him.

[7] The applicant stated that he did not know anything about any gun or any murder that was committed. He and Mr Channer had not travelled to Saint Elizabeth; he had never held or owned a gun in his life. He had nothing to do with Miss Chin's death and believed that Mr Channer was blaming him for the murder in order to save himself.

The grounds of appeal

[8] Mr Isat Buchanan, on behalf of the applicant, sought and was granted permission to abandon the original grounds of appeal and to, instead, argue the following supplemental grounds:

> "**Ground 1 -** The learned trial judge erred in failing to give the adequate and sufficient accomplice direction in all the circumstances of this case (pages 494 - 501).
>
> **Ground 2 -** The learned trial judge failed to give appropriate and sufficient directions to the jury in relation to the fact that the evidence of the sole eyewitness may have been tainted by improper motives. There was a need for sufficient warning in light of evidence from a co-accused/prison informant. The omission of the necessary steps from the summing up was in itself such a fundamental defect to deprive the Applicant of the hallmarks of a fair trial.
>
> **Ground 3** - The learned trial [sic] failed to direct the jury adequately, or at all, with respect to the drawing of inferences. The judge failed to give a proper summary of the defence's case to match that which she had given of the prosecution's case thus depriving the applicant of the tenants of a fair trial in this respect.
>
> **Ground 4** - The verdict is unreasonable having regard [sic] the evidence.
>
> **Ground 5 -** The judge erred when she introduced irrelevant consideration before the jury by saying 'the

[Applicant] has not said why his cousin would put the murder on him'. This has the effect of subtly putting a burden of proof on the accused in relation to this matter. Her reminders of the prosecution's duty to prove his guilt would not be sufficient to cure the unfairness occasioned by her comment.

Ground 6 - The applicant's constitutional right to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached by the effluxion of time. This has prejudiced his ability to extract and rely on fresh evidence at the appeal hearing eleven (11) years after the material incident."

Issues

[9] The issues that arise in this matter are as follows:

i. Whether the learned trial judge erred in law in her directions to the jury regarding the evidence of a potential accomplice (Ground 1);

ii. Whether the learned trial judge erred in law in her directions to the jury in respect of evidence given for improper motives (Ground 2);

iii. Whether the learned trial judge adequately directed the jury on the drawing of inferences (Ground 3);

iv. Whether the learned trial judge made a balanced summary of the case for the defence (Ground 3);

v. Whether the verdict is unreasonable having regard to the evidence (Ground 4);

vi. Whether the learned trial judge erred by introducing an irrelevant consideration and putting a burden of proof on the applicant (Ground 5); and

vii. Whether the applicant's constitutional right to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached (Ground 6).

Whether the learned trial judge erred in law in her directions to the jury regarding the evidence of a potential accomplice (Ground 1)

The applicant's submissions

[10] Mr Buchanan submitted that the learned trial judge erred when she failed to explain to the jury who was an accomplice and, further, failed to state definitively that Mr Channer was an accomplice. Counsel also complained that the learned trial judge failed to highlight that the evidence that Mr Channer gave was inherently dangerous and required a "special straining exercise", especially in light of the fact that the case was dependent on circumstantial evidence. He relied on **R v Barry Alexander Beck** [1982] 1 WLR 461.

The Crown's submissions

[11] Miss Ashtelle Steele, on behalf of the Crown, referred to **Pasmore Millings and Andre Ennis v R** [2021] JMCA Crim 6 and **Lawrence Brown v R** [2016] JMCA Crim 33 that outlined the duty of a trial judge where there is evidence on which a jury could find that a witness was an accomplice. Counsel submitted that, in such circumstances, the judge should direct the jury that if they consider the witness was an accomplice, it is dangerous to convict on the evidence unless it is corroborated, however, the jury could still do so if they believe the witness. Miss Steele referred to the directions given by the learned trial judge and submitted that she discharged her function as required by the law. Counsel emphasized that the learned trial judge described who was an accomplice when she stated that it was a person "participating in the crime" and she would have erred if she stated definitively that the witness was an accomplice, as this was a matter for the jury to determine.

Discussion

[12] Mr Buchanan's submissions on this point are not on good ground. In **Lawrence Brown v R**, Edwards JA (Ag) (as she then was) stated at para. [26]:

> "Where there is evidence on which a jury properly directed could find that the witness was an accomplice, the judge should warn the jury that, if, on the evidence, they consider that the witness was an accomplice, it is dangerous to convict on that evidence unless it is corroborated, even though they may do so, if after considering the warning, they believe the witness nevertheless."

[13] In the case at bar, the learned trial judge reminded the jury that, according to the evidence, at one time it could even have been said that the police considered Mr Channer as an accomplice of the applicant "participating in the crime" (see page 835 of the summation). The learned trial judge then stated at pages 835 - 836:

> "… The evidence is that it was at the time, … when the police considered him to be participating in the crime that he gave them a statement and that he gave a question and answer interview, which formed the basis of the charge against this man.
>
> So was he an accomplice? If you find that he was, in fact, an accomplice, then you may convict on his evidence, even though he may be an accomplice, but the law requires me to warn you that it is dangerous for you to do so, unless there is independent testimony, which connects him, Mr. Sheckleford, … it is dangerous for you to convict him on the evidence of Mr. Channer unless there is independent testimony, which implicates Mr. Accused man, ...
>
> There is no such independent evidence here, but remember, it is still opened [sic] to you to convict, as long as you exercise caution … in assessing the evidence of Mr. Channer."

[14] It is clear that the learned trial judge gave the directions that the law mandates in circumstances where a witness, on the evidence, could be seen as an accomplice. In addition, the learned trial judge reminded the jury of the evidence that Mr Channer was actually charged for the murder of Miss Chin, but was not tried for it; and that

he, instead, pleaded guilty to a lesser offence concerning the murder, that of knowing about it but not reporting it. This ground of appeal fails.

Whether the learned trial judge erred in law in the directions that she gave to the jury in respect of evidence given for improper motives (Ground 2)

The applicant's submissions

[15] Mr Buchanan submitted that the learned trial judge did not follow the established guidelines in relation to dealing with potentially tainted evidence coming from a prison informant. He relied on **Benedetto v The Queen; Labrador v The Queen** [2003] UKPC 27. Counsel submitted that the learned trial judge did not draw the jury's attention to the various factors which would justify the inference that Mr Channer's evidence was tainted by self-interest and an improper motive.

[16] Mr Buchanan also submitted that the learned trial judge did not analyse the effects of the bad character of the witness on the reliability of his evidence. He relied on a number of cases and materials including: **R v Spencer and others; R v Smails and others** [1987] AC 128, Archbold Criminal Pleading Evidence and Practice, 2002, paras. 4 - 404m and 4 - 404o, **R v Barry Alexander Beck**, **Chan Wai-Keung v The Queen** [1995] 1 WLR 251, **R v Ashgar** [1995] 1 Cr App Rep 223, **Michael Pringle v R** (2003) 64 WIR 159 and **Cairns, Zaidi and Chaudhary** [2002] EWCA Crim 2838.

The Crown's submissions

[17] Miss Steele acknowledged that a judge has a duty to warn the jury about the possibility of an improper motive in cases where the witness is of bad character. She referred to **Jason Lawrence v The Queen** [2014] UKPC 2 and **Pasmore Millings and Andre Ennis v R**. Counsel submitted that the learned trial judge warned the jury that Mr Channer may have had an interest to serve and identified aspects of Mr Channer's evidence that could have demonstrated this. Counsel submitted that the learned trial judge highlighted Mr Channer's bad character and asked the jury to consider whether he could be believed.

Discussion

[18] Mr Buchanan's submissions concerning evidence from a prison informant were clearly made in error, as Mr Channer was not a prison informant.

[19] The learned trial judge was, however, under a duty to direct the jury on how to treat with the evidence of a witness who could be seen as having an interest to serve in testifying in the matter. In our view, she fully discharged her duty in this regard. The learned trial judge directed the jury that the evidence could allow them to form the view that Mr Channer had an interest to serve and had some benefit to receive by giving the evidence that he gave against the applicant. The learned trial judge instructed the jury that if they formed that view, they should exercise care as they consider the evidence, as Mr Channer could be giving untruthful evidence against the applicant to paint himself in a better light. Nevertheless, if they believed his evidence, after examining it carefully, it was open to them to convict the applicant. The learned trial judge highlighted the evidence led to show that Mr Channer was of bad character, a liar, and that in cross-examination it was suggested that it was Mr Channer himself who had murdered Miss Chin. The learned trial judge highlighted, among other things, the lie that Mr Channer asked his female friend to tell about how his cellular telephone was lost. The learned trial judge referred to Mr Channer's previous convictions and stated at page 848 of the transcript:

> "… So, if you believe that, this goes to show that this witness is on a path of serious crime. Is he someone on whom you can rely? Can a criminal tell the truth, although, he is a criminal? Can a pastor tell a lie? I ask you that last question to tell you to reason out, is it possible for a criminal to tell the truth? This is a matter for you …"

[20] Bearing in mind all of the above, the learned trial judge fulfilled her duty to warn the jury that Mr Channer may have had an interest to serve and if they found that he did, his evidence should be treated with great care. The learned trial judge also highlighted Mr Channer's bad character (see **Jason Lawrence v The Queen** and **Pasmore Millings and Andre Ennis v R**).

[21] This ground of appeal fails.

Whether the learned trial judge adequately directed the jury on the drawing of inferences (Ground 3 (in part))

Whether the learned trial judge made a balanced summary of the case for the defence (Ground 3 (in part))

Whether the verdict is unreasonable having regard to the evidence (Ground 4)

The applicant's submissions

[22] Mr Buchanan argued grounds 3 and 4 together. Counsel submitted that the learned trial judge did not follow the well-established guidelines concerning the approach to be taken by trial judges in directing juries on the drawing of inferences. Such directions, counsel stated, should include directing the jury that reasonable inferences could only be drawn from proved facts if they were the only inferences that could reasonably be drawn. He relied on **Sophia Spencer v R** (1985) 22 JLR 238 and **Terry Foster v R** [2020] JMCA Crim 13.

[23] Counsel stated that the learned trial judge misquoted the evidence when she indicated to the jury that the only dispute was whether Miss Chin died as a result of the applicant's actions, as the learned trial judge failed to appreciate and give directions on the applicant's defence of alibi. Counsel relied on **Kenrick Dawkins v R** [2015] JMCA Crim 23 in support of his submissions. Counsel submitted that the learned trial judge also erred when she told the jury that there was no dispute that Miss Chin's death resulted from a voluntary act as there was an intention to kill or inflict serious bodily harm on her, and there was no issue of self-defence or provocation.

[24] Mr Buchanan submitted that, although the learned trial judge was required to give a balanced assessment of the case, "properly contrasting the prosecution theory as a whole with the defence theory as a whole", she failed to set out the defence's case in relation to the inferences that the prosecution was asking the jury to draw, or the defence's case that the applicant was not on the scene at all. Counsel also complained that while the learned trial judge gave a summary of the case for the prosecution, she did not do the same for the defence. He relied on **Lescene Edwards v The Queen** [2002] UKPC 11 (see paras. 54 to 57) in support of his submissions.

[25] Counsel submitted that there was no evidence that could lead to an inescapable inference that the applicant participated in any plan to kill Miss Chin, as his mere presence at the scene and conversation with an unknown party could not support such a conclusion. Counsel also complained that the learned trial judge failed to emphasize significant evidence and, overall, the verdict was unreasonable having regard to the evidence. Counsel relied on **R v Joseph Lao** (1973) 12 JLR 1238.

The Crown's submissions

[26] Miss Steele submitted that the learned trial judge gave general directions on inferences, identified that the matter rested solely on the evidence of Mr Channer, whose credibility was an important issue for the jury, and highlighted that the case was one involving circumstantial evidence. Counsel stated that the learned trial judge directed the jury as to how to treat with circumstantial evidence, and identified critical bits of evidence on which the prosecution was relying to prove the applicant's guilt. Contrary to Mr Buchanan's submissions, counsel for the Crown stated that the case for the defence, which was "substantially that Mr Channer [was] a liar and a criminal" was "extensively put to the jury". Miss Steele submitted that there was no need for a direction on alibi as the applicant had not raised it in his unsworn statement or in cross-examination of the witnesses for the prosecution.

[27] Counsel submitted that the applicant had not succeeded in demonstrating that the verdict was so against the weight of the evidence that it was unreasonable. She relied on **Kevin Peterkin v R** [2022] JMCA Crim 5, **Sophia Spencer v R** and **R v Joseph Lao** in support of her submissions.

Discussion

[28] The learned trial judge instructed the jury on inferences, describing them as "common sense conclusions" and followed up this description with a practical illustration (see pages 804 - 805 of the summation). The learned trial judge also guided the jury as to how to deal with inconsistencies and discrepancies in the evidence of the witnesses. Circumstantial evidence was described as "evidence of various circumstances related to the crime and to [the applicant] which … taken together, will lead you to the sure conclusion that it was [the applicant] who

committed the crime" (see page 814 of the summation). The learned trial judge emphasized that the members of the jury, before they could convict on circumstantial evidence, must consider whether there are circumstances that weaken or destroy the case for the prosecution. The learned trial judge outlined some of the circumstances on which the prosecution was relying in proof of its case (see for example pages 837 - 838 of the summation).

[29] The learned trial judge reminded the jury of the contents of the applicant's unsworn statement, including that Mr Channer was in trouble with the law, had been to prison, and after leaving prison got into trouble again. The learned trial judge emphasized the applicant's unsworn statement and then summarized it as follows at page 856 of the summation: he did not know about any gun or any murder committed with a gun, he did not go to Saint Elizabeth with Mr Channer and he had never held a gun in his entire life. In addition, the applicant believed that Mr Channer was trying to put the murder on him (the applicant) in order to save himself (Mr Channer). The learned trial judge also outlined at page 857 of the summation:

> "So his defence is that he is a person with stable employment and he is not a gunman, not involved in the murder of Miss Chin and he is only here because of a false accusation by his cousin."

[30] The applicant's submissions are not on solid ground. The learned trial judge directed the jury correctly on the drawing of inferences and gave a detailed summary of the applicant's case. In addition, proper directions were given to the jury on the matter of circumstantial evidence. When all the circumstances were considered together, the verdict was entirely reasonable having regard to the evidence. These grounds also fail.

Whether the learned trial judge erred by introducing an irrelevant consideration and putting a burden of proof on the applicant (Ground 5)

The applicant's submissions

[31] Mr Buchanan submitted that the learned trial judge introduced "explosive and prejudicial comments" when she stated "[h]e has not said why his cousin would put the murder on him". Counsel urged that this statement by the learned trial judge was

inappropriate and irrelevant, would have led to speculation, and gave the jury the impression that the applicant had a duty to explain why Mr Channer was telling lies on him. In addition, counsel submitted that the learned trial judge did not make it clear to the "untutored" jury that the applicant's silence on the issue was not "evidence" that could satisfy them of his guilt.

[32] Mr Buchanan complained that the learned trial judge should have reminded the jury that the applicant said that he was not at the scene and that the telephone that was found at the scene did not belong to him, but instead belonged to Mr Channer. Counsel complained that the learned trial judge did not properly handle the discrepancies in Mr Channer's evidence.

[33] Counsel acknowledged that the learned trial judge also directed the "untutored" jury that the applicant said he was not close to Mr Channer, it was not for the applicant to provide any answers, the applicant could say nothing at all and it was for the prosecution to satisfy the jury that the applicant was guilty. Counsel submitted that these other directions did not address the inherent risk that an innocent man could be convicted because he or his mother failed to state why a witness would lie. Counsel reiterated that the unfairness occasioned by the comment meant that the jury ought to have been discharged and it would be inappropriate to certify that no substantial miscarriage of justice had occurred. He relied on a number of cases including: **Arthurton v R** [2005] 1 WLR 949, **R v Bathurst** [1968] 1 All ER 1175, **R v Sparrow** [1973] 2 All ER 129, **R v Horncastle and others** [2009] UKSC 14, **Griffin v California** 380 US 609 (1965), **R v Mutch** [1973] 1 All ER 178, and section 14(1) of the Judicature (Appellate Jurisdiction) Act.

The Crown's submissions

[34] Miss Steele submitted that the learned trial judge was entitled to make comments in her summation, and she instructed the jury on how to deal with her comments. Counsel submitted that the critical matter for consideration is whether the judge usurped the jury's function by virtue of her comments. Miss Steele stated that the comment that the learned trial judge made was to be considered in the context of the entire summation in the course of which the learned trial judge emphasized the

applicant's good character and emphasized that the applicant did not have to provide any answers but was free to say nothing at all. Counsel submitted that if there was any possibility of the statement impacting the jury, the warning given by the learned trial judge was sufficient to cauterize any "malignant effects of the statement". Counsel relied on **Adrian Forrester v R** [2020] JMCA Crim 39 in support of her submissions.

Discussion

[35] In **Adrian Forrester v R**, the appellant complained that the judge presiding over his trial deprived him of a fair trial by giving an unbalanced summation to the jury. He said that the judge failed to remind the jury of key evidence on which he was relying, and made unfair comments which may have caused the jurors' minds to be prejudiced, particularly with reference to his credibility. Edwards JA stated at para. [23] of the judgment:

> "The ultimate aim of the trial judge must be to give directions that will assist and guide the jury based on the issues in the case. The judge's approach should ensure that the appellant gets a fair trial, inclusive of a balanced and fair summation. Whereas there is no obligation to rehearse all the evidence in a case, where a trial judge decides to recount the evidence, he should remind the jury of the evidence for the defence. The defence must be adequately put to the jury, including evidence relied on to support it. The failure to refer to a piece of evidence, however, is not generally fatal as there is no obligation to rehash all of the evidence. In summing up a case, a fair balance should be struck between the prosecution's case and the defendant's case by the trial judge."

[36] Edwards JA also addressed comments made by a trial judge at para. [47]. She said:

> "It is trite that, in every criminal trial, the defendant's case must be fairly put to the jury. In addition to reminding the jury of the salient facts in the case, the trial judge is entitled to comment on those facts. In summing up a case to the jury, the trial judge is also entitled to, along with defining the issues, express his opinion, and in a proper case may do so strongly, so long as the jury are informed that they are entitled to ignore them, and the issues are

> left to the jury for their final determination. In **Uriah Brown v The Queen** [2005] UKPC 18, at paragraph [33], the Privy Council opined that 'a judge is entitled to give reasonable expression to his own views, so long as he makes it clear ... that decisions on matters of fact are for the jury alone and does not so direct them as effectively to take the decision out of their hands'."

[37] In the case at bar, the learned trial judge gave detailed directions on the case for the defence. The learned trial judge also reviewed the cross-examination of the main prosecution witness, Mr Channer, and reminded the jury of what the defence sought to highlight arising from the cross-examination. At page 839 of the summation, for example, the learned trial judge stated:

> "In cross-examination, in my view, the focus was on providing evidence to show that Mr. Channer was a bad character and was a liar and was himself the person who had committed the murder and therefore you should not believe what he has said."

[38] The learned trial judge reminded the jury that Mr Channer asked a friend to tell a lie about what happened to his telephone and reminded the jury of the fact that Mr Channer had gone to prison and, at one time, was also charged for the murder of Miss Chin. The learned trial judge detailed the applicant's unsworn statement and reminded the jury that the applicant did not have anything to prove and could have remained silent. Earlier on in her summation, the learned trial judge reminded the members of the jury that they were not bound to accept any arguments made by either the prosecution or the defence counsel and went on to state at page 806 of the summation:

> "… Equally, if in the course of going through the evidence, I make a comment or I say something that appears to me to be the facts, equally, you don't have to follow what I said in that department. You only have to follow what I say when it comes to the law. Everything else is your department. You can listen to what is being suggested, now, when it comes to the evidence, but it is your department to decide what really happened there … ."

[39] It was within the purview of the learned trial judge to make the comment about which the applicant complains. It was a matter for the jury as to whether they found

the comment helpful. In any event, the applicant's defence was made very clear. He was suggesting that it was Mr Channer who committed the murder and was trying to blame him (the applicant). The defence was clearly put and the summation was not unbalanced, contrary to the applicant's assertion.

[40] This ground of appeal also fails.

Whether the applicant's constitutional right to have his conviction and sentence reviewed by a superior court within a reasonable time has been breached (Ground 6)

Pre-trial delay

[41] On 11 November 2022 the applicant filed an affidavit in support of his ground of appeal that his right to have his sentence reviewed by a superior court within a reasonable time has been breached.

[42] In his affidavit the applicant stated that he was arrested in 2011, in relation to the incident that allegedly took place on 25 July 2011, and attended court on more than eight occasions before he was given bail. He then reported to the police for five years while awaiting trial. He stated that he has been in custody since 2016. The applicant complains that he attended court for a total of 38 times from 11 December 2011 and, at all times, he was present with legal counsel, ready to advance his case. He stated that he could only recall two instances when his attorney-at-law did not attend but asked another attorney-at-law to represent him.

[43] The applicant stated that the prosecution was often unprepared leading to the case being frequently adjourned. The applicant indicated that the main prosecution witness, Mr Channer, absconded bail for close to two years causing a further delay in the hearing of the case.

[44] The applicant complained that the prosecution's lack of preparation lasted for over seven years, and there were issues as to disclosure not being done in a timely manner. He outlined that the court ordered the prosecution to present telephone records that could assist his case, however, the prosecution told his attorney-at-law that due to the length of time that passed, they were unable to find the records. He

stated that the inability of the State to hear his case for a total of 11 years, from the date when he was charged, breached his right to a fair hearing within a reasonable time.

[45] Insofar as preparing for his appeal was concerned, the applicant complained that his attorney-at-law wrote to various State organs seeking disclosure, and was told that the delay of 11 years from the date of the alleged incident to the date of trial made it hard to comply with the request. He stated that if the disclosure was provided it would have helped to identify the gaps in the case for the prosecution and better advance his defence. He insisted that it was not reasonable for him to have had to show up for court for a total of 38 times before the matter was heard.

[46] The Crown provided evidence of the progress of the matter in an affidavit filed on 18 November 2022 by Ms Tashell Powell. Ms Powell provided information gleaned from the files at the Office of the Director of Public Prosecutions and the details follow.

[47] The applicant was first brought before the Black River Resident Magistrate's Court on 10 August 2011, at which time, he was remanded in custody. He was later granted bail on 4 October 2011. The preliminary enquiry commenced on 27 September 2012 and was completed on 20 January 2014 with nine dates between its commencement and completion. The applicant's attorney-at-law was absent twice and, on one occasion, one of the applicant's co-accused did not appear.

[48] On the completion of the preliminary enquiry on 20 January 2014, the applicant was committed to stand trial at the next sitting of the Saint Elizabeth Circuit Court scheduled to commence on 17 February 2014.

[49] Ms Powell provided a table outlining what transpired on 15 occasions when the matter came up at the Saint Elizabeth Circuit. Between 17 February 2014 and 3 March 2014, the matter came up on three occasions with legal aid assignment to be made for Mr Channer who was a co-accused at the time. On those three occasions, the applicant's attorney-at-law was either present or had an attorney-at-law holding on his behalf. On 18 June 2014, the applicant's attorney-at-law was absent and no one held for him. The matter was fixed for trial on 4 November 2014.

[50] On 4 November 2014, when the matter came up for trial, two civilian witnesses were present and the other witnesses were available. However, one defence counsel was outside of the jurisdiction due to a family emergency. The applicant's attorney-at-law was present.

[51] When the matter next came up on 23 February 2015, the remarks on the Director of Public Prosecution's file indicate that insufficient jurors were present for the trial to proceed. The applicant's attorney-at-law was present.

[52] On 9 March 2015, the attorneys-at-law for both the applicant and a co-accused (Powell) were absent. No one held for the applicant's attorney-at-law.

[53] On 16 June 2015, there were again insufficient jurors for the hearing to proceed although four Crown witnesses were present. Although the applicant's attorney-at-law was absent, the attorney-at-law for Mr Channer held for him.

[54] On 16 November 2015, a legal aid assignment was made for Mr Channer. The applicant's attorney-at-law had another attorney-at-law holding for him. On 26 November 2015, the matter was mentioned. The remarks made in respect of the hearing on the date were that disclosure could not be made as the attorney-at-law for Mr Channer was absent. The applicant's attorney-at-law was present.

[55] The matter then came up for mention on 16 February 2016 for a trial date to be agreed upon and for counsel to determine the mode of trial. Two civilian Crown witnesses were present; however, the applicant's attorney-at-law was absent.

[56] The matter came up again for mention three days later on 19 February 2016 for a trial date to be agreed, however the applicant's attorney-at-law was absent and no one held for him.

[57] When the matter next came up, on 24 February 2016, a significant event occurred as Mr Channer, who was a co-accused at the time, pleaded guilty to an offence. A new trial date was fixed and the investigating officer was instructed to secure the other witnesses for the trial date. The matter then came up on 14 June

2016. The remarks on the file indicate that *subpoena* was to be issued for the Crown witnesses. No other notation appeared.

[58] Finally, on 8 November 2016, the matter came up for trial with five Crown witnesses present and bound over, however, the matter was not reached as the applicant's attorney-at-law was absent although with another attorney-at-law holding for him.

[59] Ms Powell stated that the applicant's trial took place within five years of the charge being laid against him. She highlighted that Mr Channer was not a prosecution witness until June 2016. Ms Powell asserted that the prosecution complied with its duty to disclose documents prior to the commencement of the trial. In addition, counsel refuted the suggestion that issues of disclosure contributed to the length of time that elapsed between the applicant's conviction and the hearing of the appeal.

[60] By way of comment, it is noteworthy that of the 15 dates outlined, in six of them, issues related to Mr Channer as co-accused which prevented the trial from proceeding. On two occasions, there were insufficient jurors present for a trial to take place. On one occasion, an attorney-at-law for another co-accused was absent. Over the various hearing dates, on four occasions, the applicant's attorney-at-law was absent with no one holding, while an attorney-at-law held for him on four other occasions when he was absent. He was present for court on six occasions and there is one occasion for which no endorsement is available.

[61] The applicant filed an affidavit in response, on 22 November 2022, in which he contended that the information in Ms Powell's affidavit showed that the inefficiency of the Crown resulted in undue delay. He complained about the period over which the preliminary enquiry was heard and challenged one of the hearing dates to which Ms Powell referred. He stated that Mr Channer's status as a co-accused was immaterial and insisted that disclosure issues hampered the preparation for his appeal and trial.

<u>The period of time between the applicant's conviction and the hearing of the appeal</u>

[62] The applicant filed his application for permission to appeal his conviction and sentence on 26 January 2017. The transcript came into the court on 16 November

2020, and a single judge refused his application on 16 March 2021. The appeal first came up for hearing on 2 May 2022, at which time, it was removed from the list on the application of the applicant's attorneys at law who sought statements and depositions from the Crown. The appeal was set for hearing for the week commencing 31 October 2022 after consultation with the registrar. The appeal was then heard on 31 October, 1 November and 24 November 2022 and judgment reserved.

The applicant's submissions

[63] Mr Buchanan submitted that the applicant's appeal was filed in 2017 and was only being heard in 2022, more than 11 years after the incident when the crime occurred. It was, therefore, not heard within a reasonable time. Counsel highlighted that it took the Crown more than six years to start the trial. Counsel submitted that counsel representing the applicant in this court sought material from State organs to advance his application but, due to the 11-year period, the material could not be found.

[64] Counsel submitted that one option open to the court is to quash the applicant's conviction or to reduce the time that he must spend in custody before he is eligible for parole. He relied on **Evon Jack v R** [2021] JMCA Crim 31 and **Curtis Grey v R** [2019] JMCA Crim 6.

The Crown's submissions

[65] Miss Steele submitted that the information provided showed that the delay in the trial did not lay squarely at the feet of the Crown. Counsel highlighted that the applicant's attorney-at-law was absent on a number of occasions and Mr Channer had absconded, which could have impacted the preliminary enquiry. Counsel stated that at the Circuit Court level, the majority of the adjournments were due to the need to settle representation for the co-accused, insufficient jurors, the matter not being reached, and the absence of the applicant's attorney-at-law. Counsel submitted that Mr Channer was a co-accused over a period of years and only became a Crown witness after he pleaded guilty in 2016, as such the adjournments that related to Mr Channer could not be laid at the feet of the Crown. Miss Steele stated that there was no delay between the time of Mr Channer's guilty plea and when the trial commenced.

[66] Counsel noted that the applicant was on bail from 4 October 2011 until 7 December 2016, when the guilty verdict was delivered, and refuted the assertions that any non-disclosure on the part of the Crown contributed to a delay in the trial or the hearing of the appeal. Counsel submitted that while 11 years had passed since the applicant was arrested, the applicant had not demonstrated that the period of time that elapsed resulted in an unfair trial.

[67] In her written submissions, Miss Steele submitted that if this court concludes that delay occurred, it was not significant enough to prejudice the applicant's right to a fair hearing and this ground of appeal should fail.

Discussion

[68] Every person charged with a criminal offence, or subject to the determination of his civil rights and obligations, is entitled to due process within a reasonable time. Section 16 of the Constitution states in part:

> "(1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> …
>
> (5) Every person charged with a criminal offence shall be presumed innocent until he is proven guilty or has pleaded guilty.
>
> (6) Every person charged with a criminal offence shall-
>
> (a) be informed as soon as is reasonably practicable, in a language which he understands, of the nature of the offence charged;
>
> (b) have adequate time and facilities for the preparation of his defence;
>
> …
>
> (7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be

> given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

[69] The applicant has a guaranteed constitutional right to have his trial as well as the application for a review of his conviction and sentence heard within a reasonable time (see section 16(1) of the Constitution and para. 15 of **Carlos Hamilton and Another v The Queen** [2012] UKPC 31; (2012) 82 WIR 371). It is noteworthy that the applicant's written submissions focused on the delay between his conviction and the hearing of the application for leave to appeal. However, in the hearing before us, counsel's submissions encompassed the issue of pre-trial delay. As we were provided with the relevant information in respect of the occurrences before the trial commenced, we included those circumstances in our review.

[70] Before assessing the complaint about delay in this matter, it is useful to review a number of authorities on the issue.

[71] In **Allan Cole v R** [2010] JMCA Crim 67, Harrison JA stated that the reasonable time guarantee regarding appellate proceedings is to avoid a convicted person remaining too long in a state of uncertainty about his fate (see para. [73]).

[72] As this court reiterated in **Jahvid Absalom and others v R** [2022] JMCA Crim 50 at para. [82]:

> "Section 16(1) of the Constitution … stipulates a right to a fair hearing within a reasonable time, by an independent and impartial court … [A] remedy should be given where the state must have caused an unreasonable delay. Where there is a breach of the right to a fair hearing within a reasonable time the court may grant a reduction in sentence as one of the remedies for the breach."

[73] In **Evon Jack v R**, Brooks P, after reviewing a number of authorities on the issue, including **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC

26 and **Attorney General's Reference (No 2 of 2001)** [2003] UKHL 68, indicated that redress for the breach of an applicant's right to the hearing of his appeal within a reasonable time may take a number of forms ranging from a public acknowledgment of the breach, reduction of sentence or a quashing of a conviction. However, the latter remedy would not be a normal remedy for a long, even extreme, case of delay in hearing an appeal (see paras. [44] and [45]).

[74] **Jahvid Absalom and others v R**, on which the Crown relies, is very helpful (see paras. [81] – [84]). In that matter Brooks P noted that in **Techla Simpson v R** [2019] JMCA Crim 37, there was a delay of eight years before Mr Simpson's case went on for trial, and he was granted a reduction of two years from his sentence for that breach of the constitutional right to a fair trial within a reasonable time.

[75] In **Jahvid Absalom and others v R**, the applicants were each sentenced to serve 15 years' imprisonment for illegal possession of firearm, 20 years' imprisonment for robbery offences and five years' imprisonment for simple larceny. Brooks P noted that there was a seven-year delay before the transcript of the trial, in that case, was produced, and no part of that delay could be attributed to the appellants. By the time that appeal came on for hearing, eight years had elapsed since the appeals were filed. The court determined that two years reduction in the appellants' sentences was appropriate as constitutional redress for the breach of their rights to a hearing within a reasonable time.

[76] It is important to recognize that in each case, the court exercises a discretion in determining the appropriate redress in the particular circumstances. In **Anthony Russell v R** [2018] JMCA Crim 9, the applicant was convicted for murdering two persons and was sentenced to life imprisonment on each count, to serve 25 years' imprisonment before he was eligible for parole. At the hearing of his application for leave to appeal, counsel referred to the three years that the applicant spent in custody from the time of his arrest until trial and the six years that passed between his conviction and the hearing of the application. The court stated that the applicant had every right to complain about the length of time that it took for his trial to be completed and for his appeal to be determined. The court acknowledged that a delay of four

years awaiting the transcript of the trial was due to the fault of the State. The court, however, while giving the applicant credit for the time spent in custody pending his trial, declined to reduce the applicant's sentence as redress for the delay (see paras. [102], [105] – [111]).

[77] On the other hand, in **Andra Grant v R** [2021] JMCA Crim 49, the applicant was convicted and sentenced to serve 10 years' imprisonment at hard labour in 2017; and due to the delay in the acquisition of the transcript of his trial, his appeal came up for hearing four years later in 2021. The court granted a one-year reduction in the applicant's sentence (see paras. [72] – [73]).

[78] In **Jerome Dixon v R** [2022] JMCA Crim 2, there was a 10-year delay between the applicant's conviction and the hearing of the appeal. The court noted that the period of delay was not attributable to the applicant in any respect. The court stated that, in light of the egregious nature of the breach of the applicant's right to be heard within a reasonable time, an appropriate remedy was required. The applicant had been sentenced to 15 years' imprisonment at hard labour for wounding with intent and had spent 10 years imprisoned. This was equivalent to his having reached his earliest available release date. The court decided that the full period that he served between his conviction and the disposition of the appeal should count towards his sentence, and he should not be subjected to any further term of imprisonment (see paras. [254], [288] – [291]).

[79] In **Tussan Whyne v R** [2022] JMCA Crim 42, the appellant was convicted of murder and sentenced to life imprisonment with a pre-parole eligibility period of 20 years. The applicant complained that the delay of eight years, between when he was charged on 31 October 2007 and tried in July and September 2015, was a breach of his right to a trial within a reasonable time. The court examined the main causes of the delay, concluded that it was equally contributed to by both parties and determined that the appellant's right was breached to the extent of the State's culpability. The court found that the appropriate remedy for the breach of the appellant's right was a one-year reduction in the period that the appellant was to serve before he would be eligible for parole (see paras. [2], [86] and [91]).

[80] In **Curtis Grey v R**, the appellant was tried and convicted on seven counts for varying offences, however the count for which the court was asked to concern itself in the appeal was robbery with aggravation for which the sentence imposed was 15 years' imprisonment. One of the grounds of appeal pursued concerned the four-year delay before the trial took place and six years that elapsed before the appeal was heard due to the unavailability of the transcript. The court reduced the appellant's sentence by one year as redress for the breach of the appellant's right to a trial within a reasonable time (see paras. [23] – [25]).

[81] In **Julian Brown v R** [2020] JMCA Crim 42, McDonald-Bishop JA explored a number of principles relating to a complaint that pre-trial delay resulted in a breach of the applicant's right to a fair hearing within a reasonable time. Among the principles highlighted are:

> a. The reasons for the delay must be attributable to the State before an infringement of the right can be established; and
>
> b. The right of an accused to be tried within a reasonable time must be balanced against the public interest for the attainment of justice in the context of "the prevailing system of legal administration and the prevailing economic, social and cultural conditions found in Jamaica".

[82] Lastly, in **Germaine Smith and others v R** [2021] JMCA Crim 1, Brooks JA (as he then was) emphasized that the length of time that elapsed before the trial took place did not by itself entitle the applicants to constitutional relief. The court concluded that the level of crime over the past two decades had provided more cases than the criminal courts could accommodate in short order. As a result, a lapse of almost four years, before a case went on for trial, was not considered so unreasonable as to constitute a breach of the applicant's right to a hearing within a reasonable time.

[83] We considered the applicant's complaint surrounding the delay in the holding of the trial. Miss Chin was murdered on 25 July 2011. The applicant was remanded in August 2011 and offered bail on 4 October 2011. He remained on bail until 7 December 2016 when a guilty verdict was handed down against him in the trial. The preliminary enquiry commenced on 27 September 2012 and was completed on 20 January 2014, with the applicant committed to stand trial on 17 February 2014. The hearing of the preliminary enquiry was impacted by Mr Channer's absconding at a time when he was a co-accused in the matter. In our view, in all the circumstances of this case, the period over which the preliminary enquiry took place cannot be seen as unreasonable.

[84] Between 17 February 2014 and the commencement of the trial on 24 November 2016, there were a number of reasons relating to Mr Channer as a co-accused that delayed the trial. The Crown cannot be blamed for these delays. It is noteworthy that on a number of occasions, counsel for the applicant was absent from court. There was no proof that the Crown failed to provide timely disclosure to the applicant's attorneys-at-law, thus contributing to a delay in the trial.

[85] When the reasons for the delay were assessed in the round, we concluded that the majority of them could not be laid at the feet of the Crown and so there was no basis on which we could find that the applicant's right to a trial within a reasonable time had been breached by the State. There was, therefore, no basis to consider redress for pre-trial delay.

[86] On the other hand, there was some delay in the availability of the transcript from the applicant's trial for the hearing of the applicant's appeal. Over three years and 10 months elapsed before the transcript was sent to this court in November 2020. In our view, this lapse of time was regrettable. However, the nature of any redress to be provided depends entirely on the context of the particular case. It is our view that, in the instant case, a public acknowledgment that the delay was regrettable is sufficient in light of the nature of the sentence imposed for the offence of murder - life imprisonment with a stipulated minimum pre-parole period of 20 years - and the fact that the delay in the provision of the transcript was not very long in the context of the prevailing conditions in our justice system.

[87] In all the circumstances, the application for leave to appeal against conviction and sentence is refused. The sentence is to be reckoned as having commenced on 13 January 2017, the date it was imposed.