[2024] JMCA Crim 33

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 35 & 38/2015

DEVON SWEENEY
ROY BRYAN v R

Mrs Valerie Neita-Robertson KC for the applicant Devon Sweeney

Gladstone Wilson for the applicant Roy Bryan

Mrs Sharon Milwood-Moore and Miss Monique Scott for the Crown

6, 7, 8 July 2022 and 18 October 2024

Criminal Law - Circumstantial evidence - Whether the learned trial judge erred by failing to uphold no case submission - Circumstantial evidence - Whether the learned trial judge failed to properly direct the jury on applicable law - Direction on conflicting evidence - Direction on opportunity and motive - Whether evidence amounted to uncorroborated and prejudicial statements - Whether verdict unreasonable and unsupported by weight of evidence

G FRASER JA (AG)

Background

[1] The two applicants in this case, Devon Sweeney ('Mr Sweeney') and Roy Bryan ('Mr Bryan'), were indicted for the offence of murder, in respect of the death of Devon Marsh ('Mr Marsh'), otherwise called 'Tim'. The indictment cited the murder as having taken place on a date unknown between 31 July and 5 August 2003, in the parish of Saint Catherine.

[2] The trial commenced on 14 January 2015, before Daye J ('the learned trial judge') sitting with a jury, in the Home Circuit Court, wherein Mr Sweeney and Mr Bryan pleaded

not guilty on arraignment. On 10 February 2015, the jury found Mr Sweeney and Mr Bryan guilty of the murder of Mr Marsh. Consequently, on 22 May 2015, both were sentenced to life imprisonment with Mr Sweeney being eligible for parole after serving 24 years' imprisonment at hard labour and Mr Bryan being eligible for parole after serving 20 years' imprisonment at hard labour. On 2 and 3 June 2015, respectively, Mr Bryan and Mr Sweeney applied to a single judge of the court for leave to appeal their conviction and sentence, but those applications were refused. As is their right, Mr Sweeney and Mr Bryan renewed their applications before us.

The prosecution's case

[3] The prosecution's case was extensively based on circumstantial evidence. The evidence left for the jury's determination was that Mr Marsh and Mr Sweeney were both employed as watchmen at Jam World, Waterford, Saint Catherine. Mr Marsh's mother, Lillian Dixon ('Ms Dixon'), gave evidence that the last time she saw her son alive was on 31 July 2003 between the hours of 6:00 am and 9:00 am. Ms Paulette Walton ('Ms Walton'), the secretary associated with Jam World and responsible for payment of the wages of Mr Marsh and Mr Sweeney, said that Mr Marsh visited her office at 58 Hope Road on 31 July 2003 at about 1:30 pm. As was the practice, she said Mr Marsh collected wages for himself as also that of Mr Sweeney. She said that was the last time she saw Mr Marsh alive. Ms Walton's further testimony was that Mr Sweeney, during a telephone conversation on 4 August 2003, asked her if he could find a replacement for Mr Marsh because it appeared he had quit his job.

[4] Ms Dixon testified that on Monday, 4 August 2003, Mr Sweeney came to her home enquiring angrily and loudly whether Mr Marsh was inside. When she told him that Mr Marsh was not there, he said to her "[y]ou know the boy gone wid man key yuh know". During the conversation that ensued, Mr Sweeney was alleged to have further asserted, "A boy like that body fi chop up and feed fish". Ms Dixon, at this point, actively began to seek out and make enquiries about Mr Marsh's whereabouts. She visited Jam World several times, where she searched for Mr Marsh but was unsuccessful in locating him. On

that same day, 4 August 2003, Ms Dixon said she spoke to Mr Sweeney and Mr Bryan, who made certain remarks about her. On one occasion, she enquired from Mr Sweeney about Mr Marsh's whereabouts, and in response, Mr Sweeney told her not to ask him about that. Mr Sweeney, however, informed her that Mr Marsh had moved from Jam World "from the other day" and had gone to "seaside" to live with Sylvie. Ms Dixon then proceeded to the seaside and made enquiries of Miss Sylvie, who was Mr Marsh's romantic interest, but did not get any useful information, nor did she locate Mr Marsh.

[5] Ms Dixon returned home, and whilst there, Mr Bryan came to her gate. She enquired from him whether the key was found. He hesitated a while and then replied, "…what key". She told him, "…Devon said Tim has move out and gone, take all his belongings and left with the key". He replied, "…no the key wasn't gone, because they were over there working from morning". He further told her that "he [Mr Marsh] didn't take all his belongings, he only take the bed". Mr Bryan left but returned later that same day and asked for a glass of water, which she served to him. Ms Dixon said Mr Bryan appeared nervous. According to the prosecution's case, Mr Sweeney and Mr Bryan behaved "deviously" whenever they interacted with Ms Dixon.

[6] On 4 August 2003, at about 5:00 pm, Ms Dixon made a missing person report at the Waterford Police Station. On the following day, Tuesday 5 August 2003, she was accompanied by the police to Jam World, where she saw a garbage heap with Mr Marsh's personal belongings, including an appointment card with bloodstains on it. She also saw a piece of grey carpet with something on it resembling blood. On the same day, Ms Dixon said she left and later returned to Jam World, where upon entering the building, she saw Mr Bryan inside, seated on a table; Mr Sweeney was also present. It was her evidence that she saw blood on the wall, on the table Mr Bryan was seated, in the creases of the floor, on the tiles and between the tile creases as well as on the window. She also saw in that room a bucket with water, a rag, and a mop. The room was being cleaned. The wall was wet, "and every bloodstain had wet on it". She chided Mr Bryan saying, "…all weh me do fi you, you mek the black boy have you over yah a clean bloodstain?". Mr Bryan

replied saying, "…me wouldn't do a thing like that" and "…[m]e one naah tek the blame". Ms Dixon further testified that she went into the room Mr Marsh had occupied, where she noticed bloodstains all over the wall and ceiling; she pointed out her observations to Mr Sweeney, who told her it was not blood, it was "paint".

[7] It was the evidence of Ms Latoya Daley ('Ms Daley'), Mr Marsh's sister, that she visited Jam World on 5 August 2003 with her mother. Upon entering the building, she saw Mr Sweeney wiping the wall and Mr Bryan wiping the floor with a mop. She said she saw blood on the wall and ceiling and bloody water in the creases of the tiles. The police were subsequently called to the premises. On the arrival of the police, they requested the key to the building and Mr Sweeney handed it over to them. Mr Sweeney and Mr Bryan, as well as Ms Dixon and Ms Daley, were escorted to the Waterford Police Station.

[8] According to Ms Dixon, whilst she was at the station, she again spoke to Mr Sweeney who told her that he would help her if she helped him and "…I am going to tell you everything and then you will understand". Mr Sweeney was alleged to have also uttered the following "…Miss Dixon, I know Tim is dead". When Ms Dixon enquired of him where Mr Marsh's body was, he replied, "I am gonna tell you everything … Miss Dixon, is not me kill him. … I want to do this and I want to tell the police too". Ms Daley said she, too, had a conversation with Mr Sweeney, and she told him that "…we find the bed yuh nuh", to which his response was "…eehee, which part, in a the water?". She said he also related to her that he knew Mr Marsh was dead, but he did not kill him.

[9] Detective Sergeant Everald Bennett ('Det Sgt Bennett') gave evidence that he was given instructions which caused him to proceed to Jam World on 5 August 2003. On arrival, he observed "small and large droplets of what appeared to be blood on the pavement to the front door". After accessing the building, he further observed what appeared to be blood on a wooden chair. In the back room, he noticed what appeared to be blood spots and splashes on all four walls and roof (ceiling). He saw on the wall a "…track wipe; [s]omebody is wiping something that is not totally clean as yet…". It was Mr Sweeney, he said who gave him the bunch of keys to access the building. Det Sgt

Bennett, after cautioning Mr Sweeney, asked him if he had noticed anything strange about the building when he entered; Mr Sweeny replied that he saw all Mr Marsh's furniture "look like him move out". He also denied that he saw anything other than the furniture; he denied that he saw anything which appeared to be blood in Mr Marsh's room. He said he had found the key "dem inna one block near the building, but a never deh so we always put the keys".

[10] On 6 August 2003, Ms Dixon returned to Jam World, where other persons were searching for Mr Marsh. A burnt-out bed said to be Mr Marsh's was found as well as some food items that were retrieved from a canal located at the back of the premises. She subsequently returned to Jam World in the company of the police and they searched the pit there, as a foul odour was emanating from it. Nothing of interest was found then.

[11] The police and Ms Dixon again returned to Jam World on 7 August 2003, and on that occasion, they recovered Mr Marsh's decomposing body from the septic tank on the premises. The body was wrapped in a sheet, and concrete slabs/stones were tied to it. The scene was photographed, and the autopsy was conducted on-site by Dr Ere Seshaiah who opined that the cause of death was as a result of sharp force injuries. There was an incised wound to Mr Marsh's neck and stab wounds to his chest. The time of death was estimated as being two to seven days before the recovery of the body.

[12] Detective Corporal Damion Johnson ('Det Cpl Johnson') visited the Jam World compound on 7 August 2003 and photographed the external surroundings. Detective Sergeant Willie Porter ('Det Sgt Porter') processed the scene along with Det Cpl Johnson; he observed and retrieved the following:

a. swabs from two droplets of blood at the entrance to the building (1Q and H);
b. a brown belt from under a tank with what appeared to be blood (I);
c. three machetes taken from inside the house (J, K and L);

d. a piece of carpet near the septic tank (pit) (M);
e. debris from what appeared to be a burnt-out mattress (N); and
f. two wet mops (O, P).

[13] The prosecution led evidence that personnel from the Forensic Science Laboratory, Ms Tamara Comrie ('Ms Comrie') and Ms Sharon Rose ('Ms Rose'), visited Jam World premises on 8 August 2003, where they examined, documented, and processed the premises. Their focus was to determine whether anyone had been injured there. They made observations of blood on the ceiling, on a wall and window, and in the window brackets. Observations were also made of blood present on a knife, deodorant bottle, and perfume bottle that were in a bucket, and on a hammer and a hacksaw blade in the northeastern corner of the room. They accordingly collected and examined fibres as follows:

a. fibres taken from brown drops on a perfume bottle marked 'Ophelia' in a bucket in room four;
b. fibres taken from brown drops on candy roll-on bottle in a bucket in room four;
c. fibres taken from film on hammer in the room (not in bucket);
d. fibres taken from running drop on wooden chair (broken armchair);
e. fibres taken from serosanguineous stain on floor between tiles in room one;
f. fibres taken from brown stains on grille before the window in room one;
g. fibres taken from brown stains on louvre blades in room one;
h. fibres taken from drop on tailed on northern wall;
i. fibres taken from drop on ceiling of room one;
j. fibres taken from drops tailed on eastern wall of room one;

k. fibres taken from drops on pavement before building;
l. fibres taken from knife blade in bucket in room four; and
m. fibres taken off handle of the hacksaw in room four.

[14] Ms Comrie returned to the Jam World premises on 11 August 2003, accompanied by the Government Analyst, Ms Sherron Brydson ('Ms Brydson'). The purpose of Ms Brydson's visit was to check and verify the notes of Ms Comrie and Ms Rose. She did her own walk through and examined the rooms and the layout of the building. Ms Brydson testified that she had noticed bloodstains in the southeastern bedroom, a bucket containing items, some of which had blood on them, bloodstains on an armchair in the central room, pale drops on the pavement, near the door (of the administration/guardroom building). She also observed a "burnt area with what looked like mattress coils". She conducted testing on the items taken from the scene of the crime and the swabs received, to determine the presence of blood. Significantly, blood was detected on a belt, a machete, and two mops. In relation to the mops and other items, the blood was present as serosanguineous stains. Ms Brydson explained that serosanguineous refers to blood that had a pale brown colouration, indicating dilution by something wet, which could have been water or some liquid. Based on her observations and analysis of the scene, Ms Brydson concluded that the blood detected was:

> "Human blood, an injured individual or individuals was inside room, in that area, room one and there was some evidence that suggests that there was some effort to wipe some of the stains away. They were pale and you know, seemed disturbed. As well as on the floor where the grooves of some of the tiles, you see a darker shade of brown as opposed to the tile itself, it was paler. There seemed to have been some cleaning up. And in the room number—the room with the bucket, it was room four, the storeroom, the bucket had some blood drops and droplets. So wherever those items were at the time an injured individual, the blood came in contact with them."

[15] Ms Brydson received and examined items submitted by Det Sgt Porter, Detective Constable Gordon ('Det Con Gordon') of the area five scene of crime, and Deputy

Superintendent Leslie Ashman. She also accepted and inspected DNA samples (buccal swabs) from Lillian Dixon and Errol Marsh, Mr Marsh's mother and brother. Ms Brydson further testified that, samples were taken from the items that had blood on them and handed to Mr Compton Beecher ('Mr Beecher'), senior forensic analyst, for DNA analysis.

[16] Mr Beecher gave evidence of DNA analysis he conducted on samples taken from various items present in the building as well as from surfaces within the building, sternum and blood samples from Mr Marsh, and DNA samples from Mr Marsh's mother and brother. Mr Beecher's evidence of DNA analysis was important to the prosecution's case as regards whose blood was found in the room(s) at Jam World. The random match probability from the samples was found to be 3.4 in 100,000,000, (this would be the probability of more than one person having the same profile). Mr Beecher was unable to detect any DNA profile from the sternum and blood sample taken from the deceased, because of degradation and insufficient sample. He consequently conducted a maternity analysis comparing the DNA of Ms Dixon to the profiles obtained from some of the swabs/samples from the premises. Mr Beecher concluded that Ms Dixon could not be excluded from being the mother of the profile that was observed in the swab allegedly taken from the wooden armchair (Exhibit C DNA 1), the fibre taken from the ceiling in the southeast room (Exhibit G5 DNA 1), and the fibre taken from roll-on bottle in the bucket in the storeroom (Exhibit G9 DNA 1). The probability of maternity, in this case, was found to be 99.7%. What could be inferred from all this evidence, was a high probability that the injured individual whose blood was detected in the premises was Mr Marsh.

The defence's case

<u>Mr Devon Sweeney</u>

[17] Mr Sweeney gave an unsworn statement in which he said that the last time he saw Mr Marsh was the Saturday before his arrest, and when he left him, he was alive. In fact, Mr Sweeny said after he left Jam World that Saturday, he did not return until he

reported for work the Monday morning. Mr Sweeney also denied making the utterances that Ms Dixon and her daughter said he made to them about Mr Marsh.

Mr Roy Bryan

[18] Mr Bryan gave an unsworn statement, in which he asserted that, although he did not work at Jam World, he would go there and "…help out sometime when I am available". He said he saw Mr Marsh along with Mr Sweeney on 2 August 2002, they all did some work digging up and loading dirt onto a van. He and Mr Sweeney left Mr Marsh at Jam World, and they both went to Barbican, where he assisted Mr Sweeney in unloading the dirt and other items that had been transported from Jam World. He, thereafter, left Mr Sweeney and travelled home to Tivoli. He did not return to Jam World until the following Monday morning. He never saw Mr Marsh alive again.

[19] They both denied being involved with or participating, in any way, in the killing of Mr Marsh.

Grounds of appeal

[20] Five grounds of appeal were initially filed by Mr Sweeney. King's Counsel Mrs Valerie Neita-Robertson on his behalf, sought and obtained the leave of the court to abandon those grounds and instead argued two supplemental grounds as follows:

> "1 The Learned Trial Judge ought to have accepted the no case submission on behalf of the Appellant, as the contents of and the way in which the case was presented highlighted the potentially egregious dangers of legally insufficient circumstantial evidence being left to the jury in the circumstances [sic] of this case clearly shows. As a matter of law, the evidence presented was insufficient to meet the standard of proof beyond reasonable doubt as required.
>
> 2. The verdict is unreasonable having regard to the evidence."

[21] Likewise, Mr Bryan had initially filed four grounds of appeal, which counsel Mr Gladstone Wilson, appearing on his behalf, applied to abandon. With the leave of the court he, instead advanced, supplemental grounds, to wit:

> "1. Although contact with and utterances made to Lillian Dixon were treated as significant from which inferences could be drawn, the LTJ [sic] failed to draw to the Jury's attention that those utterances, which were successfully challenged and denied were uttered in most instances in the presence of Devon Sweeney or Roy Bryan alone without the benefit of corroborated evidence which allowed the witness to relate damaging, inculpatory evidence that proved prejudicial to the Applicant."
>
> "2. From all the evidence, the Jury was invited to draw inescapable inferences not based on provable facts from which no other explanation exist [sic], an approach which robbed Roy Bryan of a fair and equitable treatment of his case."
>
> "3. No physical evidence exist [sic] which suggestively or directly linked the Applicant to the demise of the deceased. None."
>
> "4. The physical DNA samples were examined and with all the activity inside the house there was no trace whatsoever of any evidence linking Roy Bryan with any activity that could raise even a suspicion of wrong doing."

[22] The Crown addressed the grounds raised by both Mr Sweeney and Mr Bryan by adopting an issue-based approach and formulated the following issues:

> "a. Whether the learned trial judge erred by not accepting the no case submission (Ground 1- Applicant Sweeney)
>
> b. Whether the verdict is unreasonable having regard to the evidence (Ground 2- Applicant Sweeney and Grounds 3 and 4 Applicant Bryan)
>
> c. Whether the learned trial judge failed to properly direct the jury. (Grounds 1-2 Applicant Bryan)"

Issues on appeal

[23] The court noted that while the supplemental grounds of appeal filed on behalf of Mr Sweeney and Mr Bryan differed in the number of grounds advanced by each applicant,

they nevertheless overlapped considerably in content and reasoning. On the other hand, the Crown approached the task of responding to the complaints of Mr Sweeney and Mr Bryan by outlining the principal issues arising on the appeals and succinctly addressing them. The issue-based approach initiated by the Crown is echoed in this judgment. The issues identified as arising for consideration in this appeal, are as follows:

> Issue one - Whether the learned trial judge erred by not upholding the no case submission having regard to the nature of the circumstantial evidence. (Ground 1 – Mr Sweeney)
>
> Issue two - Whether the learned trial judge failed to properly direct the jury in relation to the applicable law, having regard to the nature of the evidence presented by the prosecution. (Grounds 1 and 2 - Mr Bryan)
>
> Issue three - Whether the verdict is unreasonable having regard to the evidence. (Ground 2 - Mr Sweeney and Grounds 3 and 4- Mr Bryan)

Issue one - Whether the learned trial judge erred by not upholding the no case submission having regard to the nature of the circumstantial evidence. (Ground 1- Mr Sweeney)

Submissions on behalf of Mr Devon Sweeney

[24] King's Counsel, in her written submissions, contended that "…if the evidence presented by the prosecution is taken one by one, the absence of weight which would enable evidence to pass the threshold of beyond reasonable doubt is manifestly clear". In support of this ground of appeal, King's Counsel referred to such cases as **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, **Loretta Brissett v R**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 69/2002, judgment delivered 20 December 2004 and **Director of Public Prosecutions v Varlack** [2008] UKPC 56 ('**DPP v Varlack**') among others. King's Counsel argued that where the prosecution relied

on circumstantial evidence to sustain their case, the learned trial judge had a serious duty to assess whether a no case submission ought to be upheld and factors including "[t]he necessary inferences that can be drawn from the whole of the evidence" must be examined and considered. She further contended that the prosecution, through its witnesses, all relatives of the deceased, put before the court alleged conduct and words they said pointed to Mr Sweeney's involvement in Mr Marsh's murder. The litmus test to be applied in the circumstances, King's Counsel said, "is whether the evidence is such that a reasonable tribunal could acquit".

[25] King's Counsel highlighted various aspects of Ms Dixon's and Ms Daley's evidence as to the words allegedly uttered by Mr Sweeney and certain conduct on his part, which, she posited were "inadmissible", "mere conjecture" and "entirely consistent with what is perfectly innocent". She submitted that the test in circumstantial evidence was not the opinion of a witness based on their inference, but rather the reasonable inferences that an impartial tribunal could draw and whether in the circumstances there were co-existing hypotheses. King's Counsel emphasised that the possible inferences would be for the judge's consideration or the jury's, if the case goes to them for trial, not for the witnesses. She was of the view that, in the instant case, the witnesses Ms Dixon and Ms Daley, in giving their evidence at the trial, drew inferences that Mr Sweeney tried to prevent them from entering the house and Mr Marsh's room based on Mr Sweeney's constant talking and telling Ms Dixon to go home. She posited that the inferences drawn by the witnesses were farfetched and should have been ruled inadmissible by the learned trial judge. Mr Sweeney, she opined, was merely trying to comfort Ms Dixon telling her to "go home, Tim soon come", which was "perfectly innocent".

[26] King's Counsel contended that no evidence placed Mr Sweeney at the premises at the time Mr Marsh was murdered. In addition, there was no evidence Mr Sweeney had exclusive access to the premises. No evidence was found at either the premises of Mr Sweeney or Mr Bryan, which implicated them. King's Counsel emphasized that there was no nexus between the evidence regarding Mr Marsh's belongings, which his mother (Ms

Dixon) claimed to have found in the canal, and the blood she observed. Further, Ms Dixon's evidence in that regard was unsubstantiated and, therefore, speculative, prejudicial, and lacking in any probative value.

[27] The evidence of blood found at the scene, King's Counsel indicated, could be taken no higher than that "the blood profile did not exclude relatives of the deceased, that it belonged to a relative of the mother and brother" of Mr Marsh. The forensic evidence, she said, was without value, in terms of any inference of guilt but was otherwise important as it weakened the prosecution's case relative to Ms Dixon's assertions that Mr Sweeney was wiping blood in the central room. King's Counsel contended that it made a "mockery" of what Ms Dixon was trying to suggest and put "a lie to her conjecture". It was, therefore, unsafe for the learned trial judge to have left such evidence to the jury on the basis that it was for the jury to determine which evidence to accept. King's Counsel posited that the issue was not one of credibility, but rather a matter of "incontrovertible scientific fact …" which totally undermined the prosecution's case. As a consequence, these were inherent weaknesses in the case as a whole that the learned trial judge should have considered in arriving at reasonable and necessary inferences.

[28] King's Counsel also noted that the prosecution's evidence disclosed that Mr Marsh was a watchman who lived at Jam World but would visit his mother and sister daily. These relatives lived at different places in Waterford, in close proximity to Jam World. King's Counsel highlighted the fact that there had been "bad blood" between Mr Marsh and his family members and that there was an altercation between him and his sister that caused him to relocate from the family home and live at Jam World. There was no clear time of death, she said, merely an estimate given by the pathologist that Mr Marsh was killed two to seven days before his body was found. King's Counsel intimated that the family members were the likely perpetrators of the murder and that the blood and other forensic evidence were placed at Jam World after Mr Sweeney and Mr Bryan were already taken into custody by the police.

[29] In conclusion, King's Counsel submitted that the learned trial judge should have upheld the no-case submission as there were inherent weaknesses in the evidence. She also argued that no reasonable inference could be drawn that there was a common design or joint enterprise based on the evidence presented at the trial. The learned trial judge's error in having left the case to the jury, King's Counsel argued, opened the door to the conviction of an innocent man because a jury that was properly directed could not infer that Mr Sweeney was guilty beyond a reasonable doubt.

Submissions on behalf of the Crown

[30] In response to this issue, the Crown referred to **R v Galbraith** [1981] WLR 1039 ('**Galbraith**') to reiterate the principle that a no case submission ought only to be upheld if, at the end of the prosecution's case, there was no evidence to indicate that the defendant committed the alleged crime. In addition, she referred to **Melody Baugh-Pellinen v R** as a guide to how a trial judge should approach a no case submission involving circumstantial evidence.

[31] Counsel relied on the abovementioned authorities when she submitted that the correct approach in dealing with a no case submission was to consider whether the evidence led by the prosecution at that stage was such that a reasonable jury, properly directed, would have been able to draw the inference of a defendant's guilt beyond a reasonable doubt. If there was evidence capable of proving the charge to the requisite standard, then the no case submission should not be upheld, because that means there was a case to answer no matter how weak the learned trial judge might have considered the evidence to be. The only time a no case submission should be upheld was when the evidence was incapable of supporting a conviction under the law.

[32] Counsel vehemently disagreed with King's Counsel that the evidence was inherently weak and referred to specific aspects of the evidence led at the trial detailing the conduct of Mr Sweeney and Mr Bryan, and from which, she submitted, reasonable inferences of guilt were open to be drawn by the jury. Firstly, she highlighted the

conversations between Ms Dixon and Mr Sweeney and the inconsistent accounts he gave as to Mr Marsh's whereabouts. Counsel juxtaposed those accounts with Mr Sweeney's conversation with Ms Walton, telling her it appeared that Mr Marsh had quit the job and whether he could replace him.

[33] Secondly, counsel pointed to the conversation between Ms Dixon and Mr Bryan regarding the cleaning up at Jam World and, in addition, the insistence of Mr Sweeney that the substance Ms Dixon was declaring to be blood was instead "paint". She compared Mr Bryan's and Mr Sweeney's conduct with the evidence of Ms Brydson and Mr Beecher who testified that it was human blood that was observed in the room at Jam World. All this evidence, counsel submitted, could lead to the inference of an intention to deceive and conceal the crime.

[34] Counsel also referred to the scientific evidence of DNA and the 99.7% probability that the injured individual whose blood was in the room at Jam World was a child of Ms Dixon. In all the circumstances that child was inferentially Mr Marsh.

[35] Counsel submitted that there was sufficient evidence in the case for the jury to draw inescapable inferences. Evidence such as that which indicated that Mr Sweeney and Mr Bryan both had knowledge of and participated in the killing of Mr Marsh and the concealment of his body. Therefore, the learned trial judge was entirely correct in ruling that the issues relating to the credibility and reliability of Ms Dixon and Ms Daley, which concerned the physical evidence that was connected to the scientific evidence, were matters within the province of the jury, as well as the inferences to be drawn from other pieces of evidence.

<u>Discussion</u>

[36] The defence's submissions at the trial that Mr Sweeney and Mr Bryan ought not to be called upon to answer the prosecution's case, did not find favour with the learned trial judge.

[37] In rejecting the submission that there was no case to answer, the learned trial judge based his ruling on the distillation of the legal principles he discerned from the authorities of **DPP v Varlack**, **Baugh-Pellinen v R**, Supreme Court of South Australia in **Questions of Law Reserved on Acquittal** (No 2 of 1993) (1993) 61 SASR 1, 5, and **Galbraith**. The learned trial judge adverted to the response of counsel for the prosecution, which highlighted the utterances and actions of Mr Sweeney and Mr Bryan as related by the witnesses Ms Daley and Ms Dixon. The discovery of the burnt mattress or bed frame identified as belonging to the deceased, his decomposing remains found in the septic tank (pit), the cause of death, together with the other forensic and medical evidence. The learned trial judge found all that evidence cumulatively capable of supporting an inference of guilt in all the circumstances.

[38] The issue for this court's determination was whether the learned trial judge erred in calling upon Mr Sweeney and Mr Bryan to answer the prosecution's case.

[39] It is settled law that the evidence adduced by the prosecution must sufficiently establish a *prima facie* case, barring which an accused should not be made to answer charges brought against him (Lord Parker CJ's **Practice Direction (Submission of No Case)** [1962] 1 WLR 227. Having considered the submissions on this issue, we recognised **Galbraith** as not only relevant but also the leading authority on how a court ought to treat a no case submission. In that case, Lord Lane CJ, at page 1042, had asked and answered that question when he stated:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of an inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or

> weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

[40] In the case at bar, the prosecution had presented a circumstantial evidence case. This meant that no witness had testified that they saw either Mr Sweeney or Mr Bryan doing any act that led to Mr Marsh's death. Circumstantial evidence by nature is direct evidence of a fact from which a jury may reasonably infer the existence or non-existence of another fact or other facts. A person's guilt of a crime may be proven by circumstantial evidence, if that evidence, while not directly establishing guilt, gives rise to an inference of guilt beyond a reasonable doubt (see **Clifton Harrison v R** [2022] JMCA Crim 15, paras. [36], [37], [42] and [43]).

[41] The authority of **Galbraith** was cited with approval in **DPP v Varlack**, a case in which the prosecution had relied heavily on circumstantial evidence. At para. 21, Lord Carswell stated that:

> "The basic rule in deciding on a submission of no case at the end of the evidence adduced by the prosecution is that the judge should not withdraw the case if a reasonable jury properly directed could on that evidence find the charge in question proved beyond reasonable doubt. The canonical statement of the law, as quoted above is to be found in the judgment of Lord Lane CJ in *R v Galbraith….*That decision concerned the weight which could properly be attached to testimony relied upon by the Crown as implicating the Defendant, but the underlying principle, that the assessment of the strength of the evidence should be left to the jury rather than being undertaken by the judge, **is equally applicable in cases such as the present, concerned with the drawing of inferences**." (Emphasis added)

[42] At para. 22, their Lordships regarded as an accurate statement of the law, the judgment of King CJ in **Questions of Law Reserved on Acquittal,** which states:

> "It follows from the principles…in connection with circumstantial cases, that it is not the function of the judge in considering a submission of no case to choose between inferences which are reasonably open to the jury. He must decide upon the basis that the jury will draw such of the inferences which are reasonably open, as are most favourable to the prosecution. It is not his concern that any verdict of guilty might be set aside by the Court of Criminal Appeal as unsafe. Neither is it any part of his function to decide whether any possible hypotheses consistent with innocence are reasonably open on the evidence ... He is concerned only with whether a reasonable mind *could* reach a conclusion of guilty beyond reasonable doubt and therefore exclude any competing hypothesis as not reasonably open on the evidence ...
>
> I would re-state the principles, in summary form, as follows. If there is direct evidence which is capable of proving the charge, there is a case to answer no matter how weak or tenuous the judge might consider such evidence to be. **If the case depends upon circumstantial evidence, and that evidence, if accepted, is *capable* of producing in a reasonable mind a conclusion of guilt beyond reasonable doubt and thus is *capable* of causing a reasonable mind to exclude any competing hypotheses as unreasonable, there is a case to answer**. There is no case to answer only if the evidence is not capable in law of supporting a conviction. In a circumstantial case that implies that even if all the evidence for the prosecution were accepted and all inferences most favourable to the prosecution which are reasonably open were drawn, a reasonable mind could not reach a conclusion of guilt beyond reasonable doubt, or to put it another way, could not exclude all hypotheses consistent with innocence, as not reasonably open on the evidence" (Emphasis added).

[43] The said principles have been adopted in this jurisdiction, notably in the case of **Melody Baugh-Pellinen v R**, another case wherein the Crown relied heavily on circumstantial evidence. Morrison JA (as he then was), having reviewed the authorities abovementioned, enunciated the following at para. [34]:

> "In light of these authorities, it therefore seems to us that the correct approach to the question of whether the learned trial judge ought to have upheld the no case submission in the instant case is to consider whether the evidence adduced by the prosecution at that stage was such that a reasonable jury, properly directed, would have been entitled to draw the inference of the appellant's guilt beyond reasonable doubt."

[44] The authorities made it clear that if after the prosecution's evidence was concluded there was no case for the defence to answer, then a no case submission should be upheld. However, where there was evidence, but it was weak, the judge must have considered whether, at its highest, a reasonable jury, properly directed could convict upon such evidence. The issues raised in the instant case concerned the sufficiency and cogency of the evidence led by the prosecution, which King's Counsel asserted was unsatisfactory, as it was riddled with discrepancies and inconsistencies.

[45] The learned trial judge was required to make an initial decision in law about whether the quality of the circumstantial evidence, taken cumulatively, was fit to be left for the jury's consideration. He had to consider whether that evidence amounted to no more than mere suspicion and, if so, withdraw the case from the jury (see **Melody Baugh-Pellinen v R**). In this case, the inferences to be drawn from primary facts, on which the circumstantial evidence was based, depended on the credibility and reliability of the witnesses. A qualitative assessment by the learned trial judge was necessary in this regard. It was here that the second limb of Lord Lane CJ's formulation in **Galbraith** was applicable.

[46] Where conflicts had arisen on the prosecution's evidence, that without more did not mean that the case ought to have been stopped and the charge(s) dismissed against an accused. In **Steven Grant v R** [2010] JMCA Crim 77, Harris JA at paras. [67] and [68] enunciated that:

> "[67] The substance of the complaint in these grounds is premised on the inadequacy of the evidence, most of which relates to the inconsistencies and discrepancies arising

> therein. The question therefore is whether the evidentiary material before the court was so insubstantial and weak that the case ought not to have been sent to the jury…
>
> [68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing inconsistencies or discrepancies. The aim of proving that a witness has made a contradictory statement is to nullify his evidence before the jury and it is for them to decide whether the witness has been discredited …"

[47] Indeed, the evidence led by the prosecution was conflicted in some measure. Mr Sweeney's complaints concerning the inconsistencies and discrepancies arising from the evidence given by the witnesses, Ms Dixon and Ms Daley, concerned their credibility and reliability as witnesses and could properly be regarded as possible weaknesses in the prosecution's case. Such conflicts or weaknesses, however, could only have been a basis for the no case submission to succeed if the learned trial judge had determined that the witnesses were so discredited that no reasonable jury properly directed could convict on such evidence. In a circumstantial evidence case, such as the present, it was not the purpose of the learned trial judge at the close of the prosecution's case to selectively sift the inferences that were reasonably open to the jury. Such issues were for the tribunal of fact to resolve. Some of those inferences may be favourable to the prosecution, and some not; it was for the jury to decide if there were reasonable inferences and if those inferences were supported by the evidence.

[48] The important consideration for the learned trial judge was to determine whether taking into consideration such weaknesses, the circumstantial evidence led by the prosecution was such that on his proper directions to the jury, they could reasonably have found that Mr Sweeney was guilty of murder. If all the reasonable inferences favourable to the prosecution were incapable of impelling the mind of a reasonable jury

as to the guilt of Mr Sweeney, to the extent that they were sure, then there would have been no case to answer.

[49] King's Counsel complained that the learned trial judge allowed Ms Dixon and Ms Daley to have drawn inadmissible inferences which, in her view, were "farfetched". In Blackstone's Criminal Practice, 9th edition, 1999 at paras. F10.1 and F10.2, the learned authors gave some useful insight as follows:

> "The general rule is that witnesses may only give evidence of facts they personally perceived and not evidence of their opinion, i.e. evidence of inferences drawn from such facts. The assumption that it is possible to distinguish fact from inference is arguably false (see Thaye, A Preliminary Treatise on Evidence at the Common Law (1898), P.524), but the distinction has given rise to little case law…
>
> There are two exceptions to the general rule:
>
> (a) Non-Expert. A statement of opinion on any matter not calling for expertise if made by a witness as a way of conveying relevant facts personally perceived by him, is admissible of evidence of what he perceived.
>
> (b) Experts. Subject to compliance with the Crown Court… A statement of opinion on any relevant matter calling for expertise may be made by a witness qualified to give such an expert opinion.
>
> A statement of opinion may be given by a witness, on a mater not calling for expertise as a compendious means of conveying facts perceived by him…."

Examples given included, testifying about a person's age (**Cox** [1898] 1 QB 179); or giving evidence of the general appearance of a person's state of health, mind or emotions. On a charge of driving when unfit through drink, the fitness of the accused to drive although "a matter calling for expertise, a non-expert may give evidence of his impressions as to whether the accused had taken drink, provided he describes the facts on the basis of which he formed that impression (**Davies** [1962] 1 WLR 1111)".

[50] Having given regard to the foregoing authority, the complaint made by King's Counsel that the opinions expressed by Ms Dixon and Ms Daley were inadmissible, in our view, is misguided. The situation was one where the witnesses purportedly gave factual evidence of their interaction with the applicant, Mr Sweeney. There was no dispute that Mr Sweeney made the utterance telling Ms Dixon to go home. The complaint was that the witnesses made their interpretation as to what his actions meant, and why they were being denied entrance to the premises and Mr Marsh's room. In the circumstances, the witnesses were at liberty to testify about their interpretation of his actions. Whether or not they made their own interpretation was not fatal to the conviction, for, indeed, it was the jury's opinion or interpretation that mattered. The learned trial judge had repeatedly directed the jury that it was their interpretations, opinions and findings perception of each witness, and assessment of the witnesses' credibility and reliability which were material

[51] It was clear, from our review of the transcript, that there were several matters for a jury to consider, not least of which were the possible inferences open to be drawn on the evidence that could be accepted as proved. We do not believe that the evidence, albeit largely circumstantial, was so tenuous, nor were Ms Dixon and Ms Daley so discredited that the case had to be withdrawn from the jury. This was certainly not a case "where the necessary minimum evidence to establish the facts of the crime [had] not been called" (see **R v Barker** (1975) 65 Cr App Rep 287, page 289, cited with approval in **Anand Mohan Kissoon and Rohan Singh v The State** (1994) 50 WIR 266 at page 275). Much depended on the correctness and adequacy of the learned trial judge's directions, and how the jury would ultimately determine any explanations given by the prosecution witnesses for the conflicted evidence. The jury, as arbiters of the facts, were eminently well-placed to assess the materiality of the contradictions and the explanations for them (if any); and to determine whether despite the conflicts they could accept the prosecution's evidence or any part thereof, and what inferences, if any, could be drawn from any fact that had been proved to their satisfaction.

[52] We are fortified in our view by the previous pronouncement of this court in **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 & 93/06, judgment delivered 21 November 2008. Morrison JA (as he then was), in dissecting the law propounded in **Galbraith**, at paras. 25 and 26 of the judgment, acknowledged that although **Galbraith** did reserve to a trial judge "a narrow discretion to stop the case where the prosecution evidence was tenuous", issues of credibility and reliability were matters for the consideration of the jury. Morrison JA opined that a case should not be removed from the jury because a witness was believed to be mendacious.

[53] King's Counsel alluded to the relatives of the deceased being suspects in the murder. She submitted that the jury could not have ruled out the presence of Mr Marsh's relatives at Jam World. It was insinuated that there was motive for them to kill Mr Marsh because there was a history of disagreement and confrontations between Mr Marsh and them.. King's Counsel emphasised that these relatives lived in the Waterford community in close proximity to Jam World so that there was ready access to Mr Marsh. We observe that Mr Sweeney also lived in the Waterford community, and Mr Bryan, on his account, was a frequent, if not a daily visitor to Jam World, so both of them equally had access to Mr Marsh. However, we agree that with so many other persons having access to Mr Marsh, this was a factor that would have weakened the prosecution's case.

[54] According to King's Counsel, the family members, the mother in particular, were instrumental in the recovery of certain items allegedly belonging to the deceased, as against the police initiating the finding of the items. The fact that it was Mr Marsh's relatives who gave the evidence from which inferences were to be drawn, she said, would raise an alarm bell, and such evidence ought to be viewed with suspicion. It is accepted that Mr Marsh's relatives, particularly his mother, played an active role in establishing that her son was killed. However, we cannot agree that this by itself should have raised alarm bells. In any event, at the trial, there was no evidence elicited in support of these allegations as to the involvement of Mr Marsh's relatives in his death.

[55] As far as we are able to discern, the case for the prosecution was not plagued by evidence from witnesses whose credibility had been completely eroded because of admitted untruths, blatant and unexplained contradictions and discrepancies, that rendered any witnesses' evidence so manifestly unreliable that no reasonable tribunal could safely act on it. There was no justification for the learned trial judge to have withdrawn the case from the jury (**R v Curtis Irving** (1975) 13 JLR 139).

[56] This court is of the opinion that at the end of the prosecution's case, there was sufficient evidence on which a competent jury, properly directed, could have, without irrationality, been satisfied of guilt. The learned trial judge cannot be faulted for leaving the case to be tried by the jury. Accordingly, this complaint by Mr Sweeney fails.

Issue two - Whether the learned trial judge failed to properly direct the jury in relation to the applicable law, having regard to the nature of the evidence presented by the prosecution (Grounds 1 and 2 - Mr Bryan)

Submissions on behalf of Mr Bryan

[57] Counsel, Mr Wilson, on behalf of Mr Bryan, complained that the learned trial judge failed to direct the jury on how to treat certain utterances that Mr Marsh's mother and sister attributed to Mr Sweeney and Mr Bryan. Counsel submitted that the learned trial judge treated the prosecution's evidence, especially that of Ms Dixon's, as proven facts, despite clear denials from Mr Sweeney and Mr Bryan about the veracity of the utterances attributed to them by the witnesses. The evidence from Ms Dixon and Ms Daley were purely self-corroborated statements, counsel said.

[58] Mr Wilson further submitted that those utterances allowed the witnesses to relate damaging and inculpatory evidence that would have proven prejudicial to Mr Bryan. The learned trial judge, according to counsel, "in setting out his charge to the Jury framed the chain of circumstantial evidence rooted around the conduct of each accused as well as statements made by them in the absence of each other or to other witnesses during July 31 – August 9, 2003. Other inferences suggested clear opportunity and access by one or both Applicants to the deceased that could only point to joint association of guilt".

As an example of his grievances, Mr Wilson referred to Ms Dixon's evidence that Mr Sweeney told her that her son's body should have been chopped up and used to feed fish. Counsel argued that this was never confirmed by any other evidence, like other aspects of the witness' account. He also stated that Ms Dixon was not a credible witness as there were inconsistencies in her evidence as it related to an alleged confession that she said Mr Sweeney made about knowledge of her son's murder. Counsel submitted that it was surprising, that this confession was not mentioned in any statement recorded by the police. Ms Dixon's evidence, he said, should have been treated as uncorroborated assertions made for the first time at trial. Also, on Ms Dixon's evidence, it does not seem that her daughter, Ms Daley, was present at Jam World on the day when the body was found.

[59] Mr Wilson also referred to Ms Dixon's alleged conversation with Mr Sweeney about the keys to Jam World premises when he visited her at her home on the morning of 4 August 2003. Counsel urged this court to find that there was sufficient acknowledgement that the keys that figured prominently as the inevitable source of access were found well before Mr Bryan's journey to Ms Dixon's house later in the day (4 August 2003). This inconsistent exchange, he said, was never reported to the police or recorded in a statement, any time prior to the trial, but was nonetheless accepted without the necessary treatments as a co-existing inference that could point to consideration of guilt. The jury ought to have been invited to consider whether both accused would have conveyed opposite positions of fact about Mr Marsh's whereabouts and the keys if they were planning or had already carried out the act that led to Mr Marsh's demise.

[60] Counsel further submitted that the learned trial judge's handling of the evidence in his summing up to the jury concerning the circumstantial evidence made it seem as though the evidence led by the prosecution was proven. Therefore, the necessary negative inference of guilt was inevitable. This approach, he said, robbed Mr Bryan of a fair and equitable treatment of his case.

[61] Mr Wilson posited that it was of significance that no evidence established an opportunity for Mr Bryan to have committed the offence of murder. Counsel said there was no "certainty what was the time and day of the occasion of death. The time and date of death are linked to the issues of access and what opportunity was presented on the Crown's case for Roy Bryan to have made himself available to commit the offence of murder". Furthermore, there was no evidence of any pre-existing circumstance in their relationship that would have caused a jury properly directed to use the knowledge that Mr Bryan had a reason to commit murder.

[62] Counsel, in his written submissions, referred to page 1076, lines 2 to 13 of the transcript and contended that the learned trial judge "pointed the [j]ury in the direction of guilt since Roy Bryan knew the deceased and members of his family and that the clear inference was that there was no one else to blame as to the issue of identity". He further submitted that the learned trial judge "eliminated any prospect of a co-existing circumstance of innocence to be considered by the [j]ury". Furthermore, the evidence led by the prosecution's witnesses did not align with the case put forward by the Crown. Counsel submitted that more than one co-existing circumstance ought to have been put to the jury to consider, which could have led to a conclusion of innocence. In essence, there was no evidence led by the prosecution that could have inferentially led to Mr Bryan being present when the murder took place or even having had access to Mr Marsh.

[63] Counsel submitted that with the narrow window of opportunity, there existed more than co-existing circumstances of innocence that should have been placed before the jury for their consideration. Counsel further complained that Ms Dixon, after not having seen Mr Marsh, had opportunities between Thursday and Sunday to have made physical checks of Mr Marsh's whereabouts. This, counsel submitted, was a lost opportunity to establish "any fact or facts that could be taken as unplanned occurrences or inferences properly considered".

[64] Another criticism Mr Wilson levied was of shortcomings which arose on the prosecution's case relating to a sketch of the premises tendered through Ms Comrie.

Counsel argued that the drawings admitted into evidence were rendered inconsistent with certain information of the physical layout described by Ms Comrie about the location of certain physical evidence important to the Crown's case. So, the evidential chain required to link what was described by Ms Dixon, her daughter, and the investigating officer showed no relation to what was presented as a part of the prosecution's case.

Submissions on behalf of the Crown

[65] Counsel for the Crown submitted that grounds 1 and 2, advanced on behalf of Mr Bryan, ought to fail as they were without merit. She submitted that in a trial where the prosecution relied on circumstantial evidence, the trial judge did not need to give any special directions to the jury. Counsel stated that what was important was that the jury was made to comprehend that they must not return a guilty verdict unless they were satisfied of guilt beyond a reasonable doubt.

[66] Counsel relied on the case of **Sophia Spencer v R** (1985) 22 JLR 238, where Carey JA enunciated that the purpose of summing up the case to the jury is to help them discharge their responsibility. Carey JA also made it clear that it was for the jury to resolve conflicts and draw inferences from the facts, to identify the real issues and arrive at a verdict. Counsel posited that the learned trial judge, in the case at bar, did, in fact, discharge his duty by correctly explaining the law and reviewing the facts that highlighted both the prosecution's case and the defence's case. He also rightly left the resolution of conflicts and the inferences to be drawn to the jury.

[67] Counsel pointed the court's attention to excerpts from the learned trial judge's directions to the jury and submitted that there was a fair and balanced outline of the case for the prosecution and the defence. The learned trial judge carefully went through the evidence by juxtaposing and highlighting the defence's position with the prosecution's case, for example:

a. The last time Mr Marsh was seen alive - According to Ms Dixon, the last time she saw her son alive was on 31 July 2003, between 6:00-

9:00 am. Ms Walton also saw him alive on that day in the afternoon. However, Mr Sweeney and Mr Bryan both said they saw him on Saturday, which would have been 2 August 2003. They said he helped them to load some dirt and flowers onto a van. Yet Ms Dixon said she called Mr Marsh on 2 August 2003 but did not get a response.

b. The missing keys - Mr Bryan, in his dock statement, said when Ms Dixon asked him if Mr Sweeney had found the key, he told her "yes". However, Ms Dixon's evidence was that when Mr Bryan came to her house asking for water, she enquired from him whether they had found the key. His response was, "no the key wasn't gone". However, when she later enquired from Mr Sweeney if the key was found he replied, "no, Miss Dixon".

c. Mr Marsh's property - Mr Bryan said that it seemed that Mr Marsh had moved out some of his things. On the other hand, Ms Dixon said Mr Sweeney told her that Mr Marsh moved out all his belongings.

[68] The learned trial judge, she said, also highlighted omissions, inconsistencies and discrepancies that arose on the prosecution's evidence and gave the jury full and correct directions as to how they were to treat with such evidence. In concluding this point, Counsel invited this court to view as persuasive the Australian case of **Shepherd v R** [1991] LRC (Crim) 332, where Dawson J at pages 337 to 338 said:

> "…But the jury may quite properly draw the necessary inference having regard to the whole of the evidence, whether or not each individual piece of evidence relied upon is proved beyond reasonable doubt, provided that they reach their conclusion upon the criminal standard of proof. Indeed, the probative force of a mass of evidence may be cumulative, making it pointless to consider the degree of probability of each item separately."

Discussion

i. The learned trial judge's directions on circumstantial evidence

[69] While special directions on circumstantial evidence are not necessary, careful directions ought to be given to the jury. The trial judge must indicate to the jury whether the case consists of only circumstantial evidence or a mixture of direct and circumstantial evidence. If both, the trial judge should summarise aspects of the evidence falling within both categories. Where the case is constituted of partially or wholly circumstantial evidence, the trial judge, in his directions, would include a basic definition of circumstantial evidence (see **R v Everton Morrison** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 92/1991, judgment delivered 22 February 1993). He must direct the jury's attention to that evidence and the conclusions that the prosecution say are to be drawn from it. Where the defence had led any evidence or mounted any arguments in rebuttal of the circumstantial evidence or conclusion(s) contended by the prosecution, this also must be brought to the jury's attention. The trial judge must tell the jury that they are to examine all the evidence in the case and pay particular attention to the evidence relied upon by the prosecution in proof of the guilt of the accused (see **Kevin Peterkin v R** [2022] JMCA Crim 5). The jury must be told that it is for them solely to decide if they accept any of the evidence and whether they find it to be cogent and reliable or not. The jury must then determine what fair and reasonable conclusions can be drawn from the evidence that they accept.

[70] There is, however, no requirement that the trial judge should direct the jury to acquit unless they are sure that the facts proved are not only consistent with guilt but also inconsistent with any other reasonable conclusion (**McGreevy v DPP** [1973] 1 WLR 276 ('**McGreevy**')). The House of Lords in **McGreevy** adumbrated that circumstantial evidence does not fall into any special category that requires a special direction as to the burden and standard of proof. The same standards apply whether evidence is direct or indirect. This court has consistently applied that reasoning in **Loretta Brissett v R**, **R v Anneth Livingston et al** (unreported), Court of Appeal, Jamaica, Supreme Court

Criminal Appeal Nos 77, 81 & 93/2003, judgment delivered 31 July 2006 and more recently in **Dalton Reid v R** [2014] JMCA Crim 35.

[71] Where the case is being left to the jury for determination, the task of the trial judge is to determine how best to assist the jury in arriving at a true verdict in accordance with the evidence elicited during the trial. We believe that the learned trial judge not only gave the jury the correct directions in law but also informed them of the critical evidence that they needed to consider and how such evidence could be interpreted. After he gave the general directions, the learned trial judge told the jury that the case was not one to be proven by the evidence of an eyewitness but by inferences. Having told them that they would be required to draw inferences, he said:

> "Before you can draw an inference, two conditions must be satisfied. A - it must be reasonable and B- the inference must be inescapable. Those are the two conditions that you satisfy yourself about before you draw any inference in the case and bear that in mind, as I said, because in this trial, you have to rely heavily upon inferences."

[72] In further fulfilment of his duty to assist the jury in coming to their decision, the learned trial judge specifically indicated to the jury that the case was one built on circumstantial evidence. He also gave the jurors a definition as follows:

> "Now, I think I have time just to say one thing to you today and I'm going to leave that with you, because you should have an idea what this case rests upon and that is what I need to tell you, I believe you should have an idea that the prosecution rests its case upon circumstantial evidence ... when there are no eye witnesses, a charge may be proved by inferences from surrounding circumstances, this is called circumstantial evidence … Now circumstantial evidence consist [sic] of this, Mr Foreman and members of the jury, when you look at the surrounding circumstance, you find such a series of unexpected coincidences that as reasonable persons, you say your judgment compels you to one conclusion [sic]."

[73] Counsel for the Crown also referred the court's attention to another passage in the transcript of the trial regarding the learned trial judge's direction on how the jury was to assess circumstantial evidence. He directed the jury thus:

> "Circumstantial evidence can sometimes be conclusive, but it must be closely examined if only because evidence of this kind may be fabricated to cast suspicion on another. By fabricated, we mean planned or put together."

[74] Further in his summation, he directed them that:

> "What you must find is an array of circumstances which points to one conclusion and that conclusion only. The facts must be inconsistent with any other rational conclusion. That is the approach and that is the test that you must apply in law to circumstantial evidence in this particular case. And we are going to look at the evidence presented by the prosecution, or the series of evidence presented by the prosecution or sometimes referred to as the chain in the links are presented by the prosecution in this case to see if it points in one direction or if there are any co-existing that weakens or destroys.
>
> The defence has challenged the prosecution's evidence saying that they are—they did not use those words—that there are co-existing circumstances, meaning that there are circumstances that also points to innocence or points away from the accused men.
>
> You the jury, it is your function to look at all the circumstances and then decide if you are satisfied so that you feel sure that the circumstantial evidence points and satisfy the test and points to the conclusion of guilt against each accused. And I will just leave you with aspects of the chain in the circumstantial evidence that you must consider that the prosecution is relying on.
>
> …
>
> In my view, the chain of circumstantial evidence that the prosecution is relying on consists of the following (A) Conduct of each accused. And under that conduct of each accused falls the statement made by each accused.

> A. (1) Which is it falls under that and
>
> (2) Meaning of each statement and
>
> (3) Statement made in the presence of each other, not only statement they made separately to various witnesses but statement, if any, that were made in the presence of each other and (4) what was done by each accused.
>
> So the prosecution is relying on the conduct of the accused that is one of the chain … in relationship to circumstantial evidence…
>
> Other chain which I mentioned to you, a lot of details come under that is physical evidence and the surrounding circumstances, and the physical evidence considered is which the prosecution relies upon, one aspect of it, there are many aspects of it, but one particular aspect which comes throughout the trial and it's the question of discovery of the body, where it was discovered and the question of blood, whether blood was seen [sic]."

[75] The learned trial judge alerted the jury that it was not only the alleged conduct of Mr Sweeney and Mr Bryan that was to be scrutinised by them but also that of Ms Dixon. He reminded the jury that the defence had challenged Ms Dixon's consistency, and they should determine whether other evidence supported her evidence. He told the jury it was ultimately a question of whether they could rely on Ms Dixon's evidence.

[76] The learned trial judge directed the jury on the treatment of the substantial evidence elicited and the inferences the prosecution asked them to draw from it. Further, he asked them to consider whether there were any challenges, evidence, or submission from the defence which would rebut those inferences. An example of the learned trial judge addressing this was when he highlighted that:

> "…the nature of the killing of the deceased, of the slitting of the throat would that have caused a lot of bleeding but there is not that according to the defence in cross-examination from these witnesses there was not that abundance of blood or pattern of blood. Consider if whether that means that the witnesses are not truthful and whether that means that there

> is no—the blood evidence is weakened in terms of drawing an inference from it. That is what you need to consider."

In his further directions, he indicated that:

> "But the interior is important in this case because the nature of the killing and the premise on which the prosecution is presenting the case is that this is a killing of the deceased inside where he was working and where he resides. Not only it was a killing in the inside but by persons who know and are aware of the inside of that building and not only those persons and they say the only persons are these two accused persons. That is the nature of the evidence here."

The learned trial judge went on further to express that:

> "But the point I am making, there is no evidence that that window was broken or in anyway disturbed or tampered. That's one. I only mentioned that to show you that the nature of the evidence the prosecution is saying that it is not anybody external. You, as jury, can draw the inference that it is not anybody external killed the deceased. That is what they are asking you but the circumstances are being pointed to that there is no evidence of persons on the inside--on the outside, rather."

[77] Mr Wilson complained that the learned trial judge "pointed the [j]ury in the direction of guilt…". We examined the trial transcript and the context of the learned trial judge's directions and concluded that counsel's accusation is unfounded. In our observation, the learned trial judge directed the jury on the constituent elements of murder and quite rightly told the jury that the central issue for their determination was "who" were the perpetrators of the murder. The learned trial judge related to the jury that in the perspective of the case, self-defence and provocation were not relevant considerations and neither was the lesser offence of manslaughter. In that, he was also correct. He instructed the jury that the determination that had to be made was "either murder or not murder". He pointed out that "there are times when identity becomes an issue to the question of who, because no one saw who or, who was seen was unknown or a stranger". He next highlighted that the question of:

> "[w]ho… is related to the issue of circumstantial evidence whether you accept the Crown's case that they were present, each accused was present during the relevant time and there is an issue, a question of time, relevant in the indictment whether they were present at the time and they were the only persons that had the opportunity and access that led to the death of the deceased man.
>
> …
>
> The prosecution is asking you to consider the circumstances and see if you are satisfied so that you feel sure that you can draw the inference, for instance these are the two accused persons that are responsible for the death of the deceased."

[78] That was the context that preceded the impugned words reproduced below:

> "So there is no issue as to their identity in this trial on the [C]rown's case and on their case they know, each accused person knows the deceased. The civilian witnesses know the accused persons, they were close…"

[79] In the context of the foregoing utterance, it would have been pellucid to the jury that the learned trial judge was in no way conveying to them that the identification of the perpetrator or perpetrators of the murder was not in issue. The context demonstrated that the learned trial judge was merely commenting that Mr Sweeney and Mr Bryan were not strangers to the witnesses nor Mr Marsh; all these persons were very familiar with each other. He had further carefully reiterated that "[n]one of the witnesses said they saw them [Mr Sweeney and Mr Bryan] in the act. The only act which Lilian Dixon and her daughter speak about, they saw them wiping up…".

[80] The learned trial judge gave the jury thorough directions on how to draw inferences from the evidence. One prime example was when he pointed out to the jurors that there was no time of death on the pathologist's report and told them to consider whether the absence of a specified time of death gave rise to co-existing circumstances or facts that weakened or destroyed any reasonable inference that Mr Sweeney and Mr Bryan had the opportunity to kill Mr Marsh.

[81] The learned trial judge pointed out specific aspects of the evidence and the inferences that the prosecution contended were inescapable, for example:

a. Ms Dixon's testimony, where she said that Mr Sweeney was at her gate talking loudly and said to her "You know the boy gone with the man key and the man over there can't get in the building". Also, "a boy like that him fi chop up and feed fish". After this, Ms Dixon said Mr Sweeney rode off on his bicycle. She also gave evidence that she left and went down to Jam World where she saw Mr Bryan moving up and down around her son's house as if he was doing something. The learned trial judge directed the jury to consider where this evidence fell in the chain of circumstantial evidence by looking at the reactions of Mr Sweeney and Mr Bryan as it concerned the missing person.

[82] The learned trial judge had posed the questions, "… What does the physical evidence suggest, what inference can be drawn". He pointed out the evidence of Ms Dixon that she saw blood in the house. He directed the jury that they would have to first determine if there was blood in the house and that they should make that determination in conjunction with the scientific evidence. Next, they were to determine whether the location of the blood (if they so found) accorded with the witness' evidence. The jury would then query, "what inference in the chain of circumstantial evidence arises from that" finding? The amount of blood that was seen by Ms Dixon and whether it was supported by any other evidence. One inference he said that could be drawn from a finding of the presence of blood, was that someone was injured in the room, and that injury was related to the deceased, if the jury answered those questions in the affirmative, then that would have to be examined against the backdrop of Mr Sweeney's and Mr Bryan's conduct.

[83] The learned judge ultimately directed the jury as follows:

> "So look at that aspect of the physical evidence to see if you find that the physical evidence about blood and all the witnesses concerned with that, is consistent with Miss Lillian Dixon's evidence, or it is inconsistent and if you find it is inconsistent, whether that leads you to draw the inference, along with the other inferences that you look at, that the accused persons are culpable, guilty of the murder of Devon Marsh.
>
> If you look at it as inconsistent, you ask yourselves if that is a factor, circumstance, coexisting factor or circumstances that is equivalent or amount to innocence. That is what you always have to look at. Does it also point to innocence? You must be satisfied in the circumstantial test that it does not point to innocence; that you are satisfied so that you feel sure it does not point to innocence."

ii. Directions on conflicted evidence

[84] The learned trial judge also gave clear directions to the jury on the evidence of all the witnesses. He emphasised the conflicts which arose within and between the evidence of the several witnesses. As it concerned the police statements of Ms Dixon and Ms Daley, he reiterated that those statements were devoid of any utterances allegedly made by Mr Sweeney and Mr Bryan. He pointed out to the jury that when Ms Dixon was cross-examined, several inconsistencies had surfaced, by way of omission. He then went on to identify those omissions and directed the jury as follows:

> "You remember I told you at the beginning that you must look at the question of omissions. An omission can give rise to inconsistency and so we are going to look at the areas of omission and so you have to consider whether you can accept her evidence in those areas, or at all.
>
> This is the extent of certain aspect of her evidence dealing with omissions. She was shown her statement and she said, 'I told the police at Waterford Police Station what Sweeney told me. I agree that this is not in my statement.'
>
> That is an omission and what they talked about is what was said at the police station. That is an omission.

> 'I agree—secondly—it is not in my statement that I told the police about the pit being sealed off.'
>
> …
>
> 'I agree I never told the police, in my statement, that when the burn out patch was found—that is another physical evidence—that Sweeney and Bryan was there.' She says she agree she didn't tell them that they were there, but it was not in her statement.
>
> Omission. That is the third one.
>
> Fourth one. 'I agree when I said I spoke to a red seam police, that is not in my statement either. I don't remember if I did tell the police that Sweeney told me about Ebenezer Lane. Sweeney asked me to tell the police. He said if I could help him. It is not in my statement, but I know I told the police that. I am not aware about any investigation done by the police and the police went to Ebenezer Lane.'
>
> Her statement was shown to her and she said, 'I do not see in any statement read to me, or that I read that I told the police about Ebenezer Lane, but I did tell the police.'
>
> 'It is true Sweeney told me to stop worry. It is true Sweeney told me that Tim had gone to live by Miss Sylvie. It is true I saw blood being wiped up in the presence of Mr. Sweeney and wiped up by Roy. It is true I said in Mr. Sweeney's presence, 'Roy, unno have the boy over here a clean up blood.'

[85] There is a plethora of authorities emanating from this court as to how trial judges are expected to deal with conflicts arising on the evidence during the course of a trial (see for example **R v Fray Diedrick** (unreported), Court of Appeal, Supreme Court Criminal Appeal No 107/1989, judgment delivered 22 March 1991 and **Steven Grant v R**). In **Morris Cargill v R** [2016] JMCA Crim 6, Brooks JA (as he then was) stated the principle thus:

> "[30] ...it must be pointed out that trial judges are required to explain to juries the nature and significance of inconsistencies and discrepancies and give them directions on

> the manner in which they should treat with those elements that occur in the evidence. Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case."

[86] In **R v Fray Diedrick**, Carey JA, in addressing similar issues concerning conflicts arising in the evidence presented, at page 9 said:

> "The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[87] In the case at bar, the learned trial judge did, in fact, direct the jury as to how they were to treat inconsistencies and discrepancies. Further, he gave them directions on the credibility of the witnesses. For example, he reminded the jury that Ms Dixon, one of the prosecution's witnesses, said that Mr Sweeney told her several things, and the prosecution relied on this. However, counsel on behalf of Mr Bryan had challenged her veracity and suggested that she was not telling the truth. The learned trial judge reminded the jury that Mr Sweeney, in his dock statement, specifically denied that he told Ms Dixon any of the things that she said he uttered. Contrary to Mr Wilson's submissions, the learned trial judge directed the jury to probe the prosecution's witnesses' credibility. In any event, credibility was not a matter for the learned trial judge to have determined. It was a matter of fact for the jury's determination, and the learned trial judge had correctly directed them on the treatment that should be applied in resolving the issue of credibility.

[88] As a result of our scrutiny of the transcript, this court is of the opinion that the learned trial judge had, in fact, repeatedly highlighted inconsistencies that could be

considered detrimental to the prosecution's case. He highlighted to the jury that the prosecution's witness, Det Sgt Bennett, gave evidence as to the layout of the premises and his observations of what he saw on the scene when he visited on Tuesday, 5 August 2003. Photographic images were recorded by someone from the Scenes of Crime Unit, Det Sgt Bennett testified. The prosecution relied on Det Sgt Bennett's evidence as to what he had observed at the premises. The learned trial judge pointed out that the photographs were absent and thus not entered as exhibits in the trial. He directed the jury to consider the credibility and reliability of the witness as also whether the absence of the photographs was an inconsistency by omission and whether said absence weakened or destroyed the evidence about the witness' observations, particularly his evidence that he saw blood on the inside of the building.

[89] There was a discrepancy between the evidence of Mr Marsh's mother and sister as it related to the utterances allegedly made by Mr Bryan at Jam World, which the learned trial judge highlighted to the jury. According to Ms Dixon's evidence, Mr Bryan said, "Mamma mi would not do a thing like that, mi one nah take the blame", whereas Mr Marsh's sister related that the words uttered on that occasion by Mr Bryan were, "Mi nah take blame fi nobody!". **Indeed,** the learned trial judge brought to the jury's attention this discrepancy. He told them:

> "Now, come back to the statement because, look to see, you look to see how Miss Latoya Daley, what she said, the statement made, because she was supposed to be there when the statement was made. Let us see, on the evidence, what she is saying. All right, this is what Latoya said and will just read it, 'I then call Devon, 'Come look here. Look, blood all over the place like somebody get murdered in this room.' He says, 'Stop yuh foolishness.' He was like trying to tell me shut up. After he said that my mom was talking to Roy. Roy said, 'Mi nak tek nuh blame fi nobody,' 'and there is a difference there, 'Mi nah tek nuh blame fi nobody.' That statement does not indicate that he was involved with anybody. So that statement, discrepancy there would go to whether the first statement was a statement of joint enterprise, it would be a

> statement of denial and disassociation, so you have to consider that on the case."

[90] In another instance, the learned trial judge highlighted another alleged statement uttered by Mr Sweeney at the police station, where he shouted to Mr Bryan, "memba, you nuh, Roy, me an you go wey wid Mr. Aston Saturday night". The learned judge pointed out that:

> "That statement came after and is consistent with what Miss Lillian Dixon was saying when she is talking about these alibis, but he is not admitting any participation in any plan to kill the deceased. Even though he doesn't admit it, the prosecution is saying his conduct and his time and everything points to his involvement. It's a matter for you …
>
> There is a slight difference in the sequence of how Latoya puts it. You remember I said differences may occur in the statements of witnesses. You are to look if the difference is slight, or serious and whether it means you cannot accept it because of the difference, there is a difference in the words used and it is material because it goes to whether this statement suggests a joint enterprise or whether it is a statement of a denial of participation."

[91] According to the authorities, there was no need for the learned trial judge to comb through the evidence and identify every iota of conflict but based on our observation, it appeared that he nevertheless did so substantially. One of the expected outcomes of a trial judge's directions is that he guides how a jury should handle conflicts arising from the evidence. He should clearly describe how conflict could arise and identify some examples of whether they were inconsistencies (internal differences in a witness' evidence), discrepancies (conflict between different witnesses), or omissions. Having examined the transcript and having observed the numerous instances where the learned trial judge highlighted conflicts in the prosecution's case, the complaint mounted on behalf of Mr Bryan, that the learned trial judge's directions to the jury were unsatisfactory in this regard, cannot be sustained.

[92] This court believes that in the instant case, the learned trial judge had correctly identified relevant instances where conflicts arose in the evidence, and more importantly, he provided proper guidance on how the jury should handle them. He highlighted not only the significant conflicts that arose from the evidence but also the impact of those conflicts and how they affected the chain of circumstantial evidence. He instructed the jury that they would have to determine whether they accepted the witness' testimony on those aspects of the evidence or any at all and ultimately to decide whether the prosecution had made them sure of the guilt of Mr Sweeney and Mr Bryan.

[93] The nature and significance of the conflicts that arose from the evidence required adequate directions, including alerting the jury to consider (a) the absence from the recorded police statements of the alleged assertions made by Mr Sweeney and Mr Bryan and dialogue between them and witnesses Ms Dixon and Ms Daley, and (b) whether that evidence could have undermined the prosecution's case, at trial, as it regarded Mr Sweeney's and Mr Bryan's denial of knowledge and participation in Mr Marsh's murder. The learned trial judge needed to have emphasised the significance of those omissions and other inconsistencies and discrepancies. We find that the learned trial judge effectively guided and assisted the jury in critically analysing that evidence and had thereby properly placed before the jury issues of fact, which were particularly important in determining whether the circumstantial evidence pointed to the irresistible inference of guilt.

iii. Uncorroborated and prejudicial statements

[94] Mr Wilson had also complained that although contact with and utterances made to Ms Dixon and her daughter were treated as significant, from which inferences could be drawn, the learned trial judge failed to draw to the jury's attention that those utterances were made in most cases in the presence of Mr Sweeney or Mr Bryan alone without the benefit of corroborated evidence. This, he said, allowed the witness to have related damaging, inculpatory evidence to the jury, which proved prejudicial to Mr Sweeney and Mr Bryan.

[95] The probative value of the evidence, in general, is to be determined by factors such as how logically related the evidence is to the issues joined, how important the issue is to the resolution of the case, and how necessary the evidence is (how far removed in space and time from the people, places, and events that arose in the trial).

[96] There is no requirement, in law or practice, which obliges the prosecution to have furnished corroborative evidence of the witnesses' testimony. Further, there was no obligation on the learned trial judge to have stopped the prosecution from eliciting said evidence. There is no such requirement in law or practice that the learned trial judge was obliged to have given the jury any special directions, such as a corroboration warning, as it concerned Ms Dixon's evidence. Corroboration warnings before the amendment to the Evidence Act and the Sexual Offences Act were only necessary for witnesses that fell within three categories, namely, an accomplice, a complainant in sexual offence cases, and evidence of children (**R v Spencer and others** [1987] AC 128).

[97] It was difficult to comprehend counsel's classification of Ms Dixon's and Ms Daley's evidence as prejudicial in the context of the trial. "Prejudicial evidence" usually refers to any evidence that tends to unduly influence the factfinder (jury) to decide a matter on an improper basis. It is appreciated that evidence may be prejudicial because it detracts from a fair trial, confuses the issues joined between the parties, misleads the jury, or wastes time. It is also appreciated that a trial judge, in his discretion, can exclude relevant evidence if its probative value is substantially outweighed by its likely prejudicial effect. For prejudicial evidence to substantially outweigh probative value, the probative value must have been immaterial or have been of little or no relevance. Inculpatory statements made by an accused person are evidence against him, in so far as it is relevant to any matter in issue in the trial. Counsel for Mr Sweeney and Mr Bryan were afforded the opportunity to challenge those impugned utterances allegedly made to the witnesses and to challenge the witnesses' veracity in cross-examination.

[98] Even if the impugned evidence of Ms Dixon and Ms Daley could be said to be prejudicial (and we make no such pronouncement in the premises), what would have

been expected of the learned trial judge was a determination as to whether the probative value of the evidence outstripped any prejudicial effect. The evidence of Ms Dixon and Ms Daley was relied upon by the prosecution as evidence establishing the guilt of Mr Sweeney and Mr Bryan, which implicated them in the crime of murder, and thus was probative..

[99] The correct approach was for the learned trial judge to point out to the jury that Mr Sweeney and Mr Bryan had denied the allegations made by the witnesses, and remind the jury of the context in which the witnesses said the utterances were made and the fact that the witnesses' police statements were devoid of any such utterances allegedly made by Mr Sweeney and Mr Bryan. It would then be for the jury to assess the evidence and determine if they believed the witnesses or not. This was the approach adopted by the learned trial judge. In his summation, he directed the jury's attention to the conflicting evidence given by the several witnesses and further pointed out that what existed on the defence's case was not an admission of joint enterprise but rather a denial of the prosecution's allegations. The learned trial judge's summation and treatment of the evidence, combined with his directions to the jury, were fair and balanced.

[100] In **Christopher Thomas v R** [2018] JMCA Crim 31, Morrison P stated that the important question to be answered was whether the directions given were sufficient to mitigate any potential prejudice to the applicants. Having reviewed the transcript, it is our view that the fulcrum of the learned trial judge's summation and the directions given to the jury were sufficient to avoid prejudice to Mr Sweeney and Mr Bryan.

iv. Opportunity and motive

[101] Mr Wilson posited that it was of significance that there was no evidence establishing the opportunity for Mr Bryan to have committed the offence of murder, moreover, there was no "certainty what was the time and day of the occasion of death. The time and date of death are linked to the issues of access and what opportunity was presented on the Crown's case for Roy Bryan to have made himself available to commit

the offence of murder". Furthermore, counsel contended that knowing someone, as Mr Bryan knew Mr Marsh, should not have led to an automatic conclusion that there was a predisposition to murder him.

[102] Mr Sweeney said he worked at Jam World as a watchman, a position similar to Mr Marsh's. Mr Sweeney also had unrestricted access to the keys to the Jam World premises. Although Mr Bryan said he did not live nor work at Jam World at the material time, he appeared to have been a frequent visitor there and was a friend of Mr Sweeney. Therefore, access to Mr Marsh would not have been impossible nor, indeed, difficult. On both Mr Sweeney's and Mr Bryan's accounts, they had access to the premises and were in Mr Marsh's company on Saturday, 2 August 2003.

[103] There was, indeed, no certainty as to the time of death. However, both Mr Sweeney and Mr Bryan said they saw Mr Marsh alive on Saturday, 2 August 2003, at which time Mr Marsh assisted them in loading dirt and other material onto Mr Austin's van. They both boarded Mr Austin's van and left Mr Marsh at Jam World. According to Mr Bryan, they left Jam World sometime after 5:00 pm that day. According to the evidence of Ms Dixon, Det Sgt Bennett, and others, Mr Marsh's body was recovered on 7 August 2003. A reasonable inference that could be drawn from Mr Sweeney's and Mr Bryan's statements was that they were the last persons who saw Mr Marsh alive. In any event, their statements as to when they last saw the deceased on 2 August 2003 were not inconsistent with the pathologist's band of the estimated time of when death occurred.

[104] The two to seven days estimated by the pathologist made the outer band of the time of death 31 July 2003, but it was known that the deceased was alive on that day as he was seen by Ms Dixon in the morning and Ms Walton in the afternoon. The inner band of the estimated time of death was 5 August 2003. Still, this would not be inconsistent with the death occurring between 1- 3 August 2003, the period during which Ms Dixon said she had not seen her son. Further, Ms Dixon had been actively searching for him from 4 August 2003. Contrary to counsel's submission, there was evidence presented by the prosecution from which the jury was entitled to determine whether there had been

access and opportunity for Mr Sweeney and Mr Bryan to have committed the offence of murder within that band of time.

[105] Mr Bryan, through his counsel, complained that the failure of Ms Dixon to check on her son between 1 and 3 August 2003 was a lost opportunity to establish "any fact or facts that could be taken as unplanned occurrences or inferences properly considered". Mr Wilson also contended that the relationship between Mr Sweeney, Mr Bryan, and Mr Marsh did not suggest a motive for them to kill him, and this represented a weakness that the learned judge failed to point out to the jury. Motive, as defined in Black's Law Dictionary 9th edition, 2009, means "wilful desire, that leads one to act" (defined in the 2nd edition of that dictionary published in 1910, as "Motive - in Law, this is why one committed the crime, the inducement, reason, or wilful desire and purpose behind the commission of an offense").

[106] There was evidence of a previously amicable relationship between Mr Sweeney, Mr Bryan, and Mr Marsh. While this could suggest the absence of a motive, the existence of a prior good relationship cannot be taken to mean that personal animosity was not a factor in the killing. Motives for murder are numerous and varied, and therefore, counsel's argument that the lack of evidence for a specific motive equated to no motive at all is flawed. If counsel was suggesting that the prosecution's inability to establish a motive weakened their case, that argument is also flawed, as the prosecution is under no obligation to establish a motive. Unlike intention, motive is not an ingredient of the offence of murder and, therefore, not a benchmark of the offence.

[107] The learned trial judge, in his directions concerning opportunity, reminded the jury that the prosecution was alleging that the murder was an "inside job" committed by persons familiar with Mr Marsh and the premises. He, nevertheless, reminded the jury that both Mr Sweeney and Mr Bryan denied committing the offence of murder or any participation in Mr Marsh's murder and that they had raised the defence of alibi. The learned trial judge explained the meaning of alibi and categorically told the jury that it was the duty of the prosecution to disprove the alibi and not for Mr Sweeney and Mr

Bryan to prove it. He gave fulsome directions on the issue of alibi, including an alibi warning. This redounded to the benefit of Mr Sweeney and Mr Bryan as neither of them positively raised a defence of alibi in the strictest sense. The learned trial judge also gave a good character direction for both Mr Sweeney and Mr Bryan. In giving the good character direction, he pointed out the absence of criminal records before both were charged with Mr Marsh's murder. He directed the jury to consider this factor when determining whether Mr Sweeney and Mr Bryan would have been likely to commit the offence.

[108] Taking into consideration the foregoing directions, Mr Wilson's argument that the learned trial judge eliminated any prospect of a co-existing circumstance of innocence to be considered by the jury was without merit. The learned trial judge had carefully highlighted each significant instance of conflict arising on the prosecution's evidence, and he not only directed the jury on how such conflict should be treated by them but also juxtaposed the defence's case where they denied the utterances and or posited a different interpretation. In the circumstances, counsel's complaints that the jury was invited to draw inescapable inferences on unproven facts, which robbed Mr Bryan of a fair trial, was also unfounded.

[109] Therefore, grounds 1 and 2 of the applicant Bryan also fail.

Issue three - Whether the verdict was unreasonable having regard to the evidence (Ground 2 applicant Sweeney and Grounds 3 and 4 applicant Bryan)

Submissions on behalf of Mr Sweeney

[110] King's Counsel Mrs Neita-Robertson argued that the evidence presented to the jury had significant weaknesses and, even after careful consideration by a tribunal of fact, a guilty verdict would be unreasonable given the standard of proof required.

[111] King's Counsel pointed to the fact that it was alleged that Det Con Gordon came and took photographs of the inner and outer parts of the building, the bed spring, and blood samples from the wall, chair, and pavement. However, there were no photographs

presented at the trial, and there was no account given of them. Further, Ms Brydson's evidence only accounted for specific items being taken to the lab (namely swabs from the doorway of the office building marked "A"; brown drops from the pavement in front of the administration building marked "B" and swabs taken from the wooden chair in the office building marked "C"). King's Counsel posited that on 7 August 2003, Det Sgt Porter and Det Cpl Johnson found items outside the building (belt, drops of blood on pavement at the entrance of the building) and inside the house (three machetes, two wet mops) but they found no other evidence of blood. What Det Sgt Porter saw was photographed, and the photographs were produced in court. This, King's Counsel contrasted with what Det Sgt Bennett and the civilian witnesses alleged, which was that they saw blood in the building on 5 August 2003 and that the areas appeared to have been wiped. She contended that the evidence marked "A" and "B" as labelled by Det Con Gordon was the same as those labelled "H" and "Q". King's Counsel further submitted that Det Con Gordon did not find anything different from Det Sgt Porter nor was it different from what Det Sgt Bennett said he saw on 5 August 2003. King's Counsel alluded to bias and impropriety on the part of Det Sgt Bennett and posited he had an interest to serve because he was familiar with Mr Marsh's mother, Ms Dixon.

[112] King's Counsel argued that the amount of blood reportedly seen by Ms Dixon and Det Sgt Bennett was not supported by the forensic evidence collected on 5 and 7 August 2003 by Det Con Gordon and Det Sgt Porter, respectively. Further, it was questionable, she said, that blood was discovered on 8 August 2003 by the forensic personnel Ms Comrie and Ms Rose. These discrepancies operated to undermine the prosecution's case and gave rise to a reasonable inference that the blood was placed at Jam World after 7 August, when Mr Sweeney was already in custody. That inference, according to King's Counsel, was strengthened by the fact that the forensic expert could not determine if or when the blood was planted at the premises.

[113] Further, King's counsel submitted that other than the forensic evidence, the inconsistencies and contradictions weakened the prosecution's case and thereby

weakened the inferences they sought to draw from proven facts. King's Counsel posited that the evidence of Ms Dixon as to what she saw when she entered the house on 5 August 2003, was contradictory and that the forensic evidence made a mockery of what she was trying to suggest and placed a lie to her conjecture. There was no blood found in places where the witness said she saw blood. Furthermore, the amount of blood she described was not supported by the evidence from the police who came to the scene. Special emphasis she said, should have been placed on the forensic evidence because it was analysed by an independent expert and, therefore, preferable.

[114] King's Counsel also questioned the evidence relating to blood allegedly present at the scene and items taken from the scene for analysis. It was strange, she said, that Det Sgt Bennett, the first policeman on the scene, did not take photographs. Of the 13 items taken from the crime scene for samples to be taken for DNA analysis, the only items from which profiles were recovered were the wooden chair, the fibres from southeast room 1, and the bucket. Importantly, the profile received did not exclude the blood as coming from Mr Marsh's relatives. Furthermore, at the trial, Det Sgt Bennett and other witnesses gave evidence that on 5 August 2003, they saw blood that appeared to have been wiped in the building. However, there was no photographic evidence to support this, and the items collected from the scene and taken to the laboratory were not supportive of this either.

[115] The search of the pit was another area of contention. King's Counsel posited that according to the evidence given by the witnesses at the trial, Mr Marsh's mother, sister, and the police visited Jam World on 5 August 2003 and noticed a foul smell coming from the pit, but after looking, they did not locate Mr Marsh's body. Ms Dixon said she paid a diver to go into the canal and search, and this diver discovered items of furniture and clothing belonging to Mr Marsh, but the police never corroborated this. Interestingly, on 7 August 2003, when Ms Dixon and other persons returned to Jam World with the police and upon searching, the police found the body in the pit wrapped in a white sheet with concrete blocks attached. Mr Sweeney and Mr Bryan had been in custody since 5 August,

so this evidence lent itself to an interpretation that the body was deposited in the pit after 5 August 2003.

[116] Another complaint raised was about the contradictions in and amongst the evidence of the prosecution's witnesses. Primarily, the utterances allegedly made by Mr Sweeney and Mr Bryan to Ms Dixon and Ms Daley were different in not just the words used but also the possible interpretations that could be drawn therefrom. An example cited was the allegation of Mr Bryan stammering and muttering, saying, "mamma mi would not do a thing like dat, mi one nah tek the blame". Ms Daley's evidence was different from her mother's evidence in that she said Mr Bryan said, "mi nah tek nuh blame fi nobody". King's Counsel referred to exhibit 6 (the sketch of the building executed by Ms Comrie) and submitted that from where Ms Daley was positioned she could not possibly have seen inside room 1 (southeast room) and seen blood in several places or the men cleaning.

[117] In her written submissions, King's Counsel posited that:

> "… a reasonable mind cannot exclude any competing hypothesis that [Mr Marsh] was killed during the night while he was at work (Saturday or Sunday).
>
> Unknown to Accused men:-
>
> a. The bed burnt and dumped in the canal.
> b. And body brought and dumped in pit later.
> c. That the Accused may not have seen blood (drops and droplets) not visible to untrained eye."

[118] She further submitted that Mr Sweeney's statement that he "knew Tim was dead" but that "he did not kill him" should not be viewed as an indication of guilt. Mr Sweeney's utterance was consistent with the hypothesis that he might have inferred Mr Marsh's death from Mr Marsh's continued absence from the compound and the absence of any communication from him. Mr Sweeney's statement only established knowledge that Mr Marsh was dead, and he would have been in no different position than Ms Dixon, who

declared her knowledge of her son's death. Mr Sweeney saying Mr Marsh had gone to Sylvie, King's Counsel said, was qualified by the evidence of the police officer that Mr Sweeney told him, "Tim 'mussi' gone live by the seaside with Sylvia". This she said clearly demonstrated that Mr Sweeney, if he said these words, would only have been participating in mere conjecture as opposed to an attempt to mislead anyone.

Submissions on behalf of Mr Bryan

[119] Mr Wilson argued that although the evidence led at trial was that Mr Bryan was seen wiping blood from the wall, no sample was taken of the blood or the rag to be sent to the lab. Furthermore, he submitted that the police did not have Mr Bryan swabbed to see if there was any evidence to link him to the murder. Therefore, the physical and scientific evidence collected from the crime scene showed no connection to Mr Bryan that could implicate him or circumstantially associate him with murder. Counsel further submitted that it was not established by any nexus, inferentially or directly, that Mr Bryan was present at the premises or had any contact with the body of the deceased. He referred to the evidence of Mr Beecher, in particular, the mixed partial profile taken from the northern wall (G4 DNA 1). He submitted that "[t]hat kind of probability of another individual translates into 1 in every 10 billion individuals and shows that neither Sweeney nor Bryan was anywhere near Tim at his death and as such is not responsible for his murder".

[120] Counsel also complained that the scientific evidence, juxtaposed with other evidence, exposed internal contradictions, and, as a result, it could be used to assess the reasonableness of the inferences put forward by the prosecution. Counsel then extracted from the learned trial judge's summation the section which discussed the match or random occurrence ratio of Ms Dixon's DNA profile and the maternal probability between her and her children who testified.

Submissions on behalf of the Crown

[121] Counsel for the Crown submitted that the contentions of Mr Sweeney and Mr Bryan in this regard were without merit because the finding of facts fell within the remit of the jury. To support her argument, she referred to **Lescene Edwards v R** [2018] JMCA Crim 4, where Brooks JA (as he then was) confirmed the general principle that the only time there would be an interference with a guilty verdict was if it was "obviously and palpably wrong". In that case, Brooks JA at para. [25] also stated that "[t]he question to be addressed, hereafter, is whether the issues of facts were properly placed before the jury".

[122] In all the circumstances, counsel submitted that the evidence in the case was cogent and convincing and captured a compelling picture of Mr Sweeney's and Mr Bryan's knowledge of, participation in, and concealment of Mr Marsh's murder.

[123] Counsel contended that notwithstanding the absence of scientific evidence to link Mr Sweeney and Mr Bryan to the scene of the crime, when the probative value of the cumulative effect of the evidence at the trial was considered, along with the balanced directions of the learned trial judge, it could not be said that the verdict of the jury was so "obviously and palpably wrong". Therefore, this court should not interfere with their finding. The evidence, counsel posited, supported the verdict of the jury.

[124] It was further highlighted that the following were some of the inferences that were open to be drawn by the jury concerning the conduct of Mr Sweeney and Mr Bryan:

i. Mr Sweeney visited the home of Ms Dixon on Monday, 4 August 2003, enquiring whether Mr Marsh was inside her home and about a key that was allegedly taken by Mr Marsh but was later handed over by Mr Sweeney to the police on 5 August. On the same day, Monday, 4 August 2003, an enquiry was made by Ms Dixon about Mr Marsh's whereabouts, and Mr Sweeney responded that Mr Marsh had gone to the seaside to live with Sylvie. Later the same

day Ms Dixon saw Sylvie but got no useful information about Mr Marsh. This could be juxtaposed with what Mr Bryan told Ms Dixon later in the day (on 4 August 2003) when he visited Ms Dixon's home and replied to her that "no the key wasn't gone" (the inference being that Mr Sweeney knew about the killing of Mr Marsh coupled with an inference of his intention to deceive Ms Dixon);

ii. Ms Walton gave evidence that on 4 August 2003, Mr Sweeney called her and said, "it look as if Tim lef di wuk". He went on to say that he went to work and there was no evidence of Mr Marsh or his belongings. He also asked whether someone else could be used to do Mr Marsh's work. Similarly, his utterances to Ms Dixon on the same day that Mr Marsh "move his things and gone…him gone a seaside from the other day, gone live with Sylvie. Him move out him things". The foregoing might be juxtaposed with what Mr Sweeney said at the police station on 5 August 2003 that Mr Marsh was dead but that he was not the one who killed him (the inference open to be drawn, was that there was an intention to conceal or deceive Ms Dixon about Mr Marsh's whereabouts);

iii. On 5 August 2003, Mr Sweeney told Ms Dixon on her visit to Jam World that "Ms Dixon why worry, Tim wi soon come home man. Go back a yuh yard and rest man". She told him she did not buy it and he responded, "you know Tim is a girls man". He told her she should go back home as her son would soon be home. Ms Dixon formed the opinion that Mr Sweeney was trying to distract her, which was juxtaposed with what he had said on 4 August 2003, about Mr Marsh going to live at the seaside with Sylvie.

(Inference open that there was an intention to deceive Ms Dixon about Mr Marsh's whereabouts);

iv. On 5 August 2003, when Ms Dixon spoke to Mr Bryan at Jam World, in response to Ms Dixon saying "you make the black boy have you over yah a scrub blood", he replied "me wouldn't do a thing like that and me one naah tek the blame" (inference of knowledge of Mr Marsh's murder). Mr Sweeney said to Ms Dixon that what she observed as blood on the wall in a room which her son occupied was "paint" which was to be juxtaposed with the scientific evidence from Ms Brydson who concluded that human blood of an injured person or persons was inside the room; with evidence of some effort to wipe some of the stains away and some cleaning up. In addition, Mr Beecher concluded that Ms Dixon could not be excluded as being the mother of the profile that was observed from swabs allegedly taken from the wooden armchair, fibre taken from the ceiling in the southeast room and the fibre taken from the roll-on bottle in the bucket in the store room (inference to be drawn of an intention to deceive and conceal the crime); and

v. Mr Sweeney told Ms Dixon at the police station on 5 August 2003, that "he knew Tim was dead but was not the one who killed him". When Ms Dixon asked Mr Sweeney about the body of her son, he replied "I want to do this and I want to tell the police". The foregoing was to be juxtaposed with the forensic evidence of the post-mortem report which indicates that the time of death was between two to seven days, 7 August 2003 (inference of knowledge that Mr Marsh was killed).

[125] Counsel for the Crown further submitted that there were other inferences that could be drawn from the scientific evidence, namely:

> "i. Blood (albeit inconclusive whether male or female) found inside the room where the applicants were seen by Ms. Dixon cleaning (mopping) (evidence of common design/joint enterprise).
>
> ii. Witness Lillian Dixon observed that the wall was wet and that the bloodstains were wet, this is to be juxtaposed with the evidence of Sherron Brydson that human blood present in serosanguineous stains was observed in the room, meaning blood that has a pale brown colouration, indicating dilution by something wet (inference of intention to conceal murder).
>
> iii. The utterances of Applicant Bryan who on August 4, 2003 told Lillian Dixon that the deceased only took his bed along with the utterances of Applicant Sweeney on the said day that the deceased moved out his things can be juxtaposed with the evidence of Latoya Daley, who spoke with Applicant Sweeney whilst at the police station August 5, 2003 and when told that the found the bed, Applicant Sweeney replied 'eeehee, which part, in a the water?' And this can be further juxtaposed with the fact that the shape of a burnt-out mattress was seen near to the bank of a canal and that a diver recovered a burnt-out bed base/leg and burnt-out spring from the canal (inference of knowledge of killing of the deceased and participation in the joint enterprise/common design and intention to conceal murder)."

Discussion

[126] King's Counsel, on behalf of Mr Sweeney, posited that the verdict was unreasonable having regard to the evidence. She based her arguments on what she labelled the inherent weaknesses in the prosecution's case, stemming from the witnesses' credibility or lack thereof. Mr Wilson posited that there was no evidence that inferentially or directly linked Mr Bryan to the death of Mr Marsh and, therefore, there was no basis to support the guilty verdict rendered by the jury.

[127] Where an applicant seeks to impugn a jury's verdict, it must be demonstrated to the court that the verdict was obviously and palpably wrong. In the Privy Council decision of **Lescene Edwards v R**, [2022] UKPC 11 at para. 53, their Lordships enunciated that in cases where the only ground of appeal "had been that the verdict of the jury had been unreasonable…", then the authority of **R v Joseph Lao** (1973) 12 JLR 1238 ('**Joseph Lao**') at 1240 to 1241 would be an appropriate precedent. In that case, Henriques P had cited with approval an extract from the text Ross on the Court of Criminal Appeal (1st edition) at page 88 as follows:

> **"It is not sufficient to establish that if the evidence for the prosecution and defence, or the matters which tell for and against the appellant, be carefully and minutely examined and set one against the other, it may be said that there is some balance in favour of the appellant. In this sense the ground frequently met with in notices of appeal – that the verdict was against the weight of evidence – is not a sufficient ground. It does not go far enough to justify the interference of the court. The verdict must be so against the weight of the evidence as to be unreasonable or insupportable.** Nor, where there is evidence to go to the jury, is it enough in itself that judges after reading the evidence and hearing arguments upon it consider the case for the prosecution an extraordinary one or not a strong one or that the evidence as a whole presents some points of difficulty, or the members of the court feel some doubt whether, had they constituted the jury, they would have returned the same verdict, or think that the jury might rightly have been dissatisfied with the evidence and might properly have found the other way. The jury are pre-eminently judges of the facts to be deduced from evidence properly presented to them, and it was not intended by the Criminal Appeal Act, nor is it within the functions of a court composed as a court of the appeal that such cases should practically be retried before the court. This would lead to a substitution of the opinion of a court of three judges for the verdict of the jury."
> (Emphasis added)

[128] Henriques P also referred to and quoted a similar passage from Archbold Criminal Pleading, Evidence and Practice in Criminal Cases, 36th edition, page 341 para. 934 as follows:

> "**The court will set aside a verdict on this ground, where a question of fact alone is involved, only where the verdict was obviously and palpably wrong**." (Emphasis added)

[129] The instant case falls squarely within the ambit of the **Joseph Lao** principle, so our task is to determine whether there has been a miscarriage of justice in this case. In doing so, we observe the guidelines laid down by Widgery CJ in **R v Turnbull** [1976] 3 All ER 549 at 553:

> "Having regard to public disquiet about the possibility of miscarriages of justice in this class of case, some explanation of the jurisdiction of this court may be opportune. That jurisdiction is statutory: we can do no more than the Criminal Appeal Act 1968 authorises us to do. It does not authorise us to retry cases. It is for the jury in each case to decide which witnesses should be believed. On matters of credibility this court will only interfere in three circumstances: first, if the jury has been misdirected as to how to assess the evidence; secondly, if there has been no direction at all when there should have been one; and, thirdly, if on the whole of the evidence the jury must have taken a perverse view of a witness, but this is rare."

This was the same approach that this court has consistently applied, pursuant to the Judicature (Appellate Jurisdiction) Act, and which we apply in the present matter.

[130] The approach to be utilised by a jury in circumstantial evidence cases was highlighted by Dawson J in **Shepherd v R** at page 337. He said, "[c]ircumstantial evidence is evidence of a basic fact or facts from which the jury is asked to infer a further fact or facts". The question for the jury's determination was whether the facts as they found them to be, led them to the conclusion that the accused committed the crime. This assessment is made against the backdrop that the standard of proof is beyond a

reasonable doubt and the prosecution is obliged to prove the guilt of the accused (see para. [67] above, enunciated by Dawson J).

[131] The same approach as postulated in the jurisprudence of the UK had been commended by this court consistently. In **Kevin Peterkin v R**, a judgment which underscored what was required of the jury in circumstantial evidence cases, Edwards JA at para. [57] said:

> "… The question for the jury at the end of the case, is whether all the circumstances, as they find them to be, lead them to conclude the prosecution has proven guilt beyond a reasonable doubt. In a case based on circumstantial evidence, where the pieces of evidence together form one picture leading to an inevitable conclusion of guilt, it would not be necessary for a trial judge to tell a jury to examine each piece of evidence and eliminate those consistent with innocence before arriving at an inevitable conclusion of guilt. In such a case, the jury would have to examine all the pieces of the evidence together to determine if the prosecution has painted such a picture on which they can feel sure that it leads to an inevitable conclusion of guilt."

[132] The cases of **Alrick Williams v R** [2013] JMCA Crim 13 and **Joseph Lao** make it clear that for a verdict to be considered unreasonable and insupportable, an appellant must show that the verdict was not in alignment with the weight of the evidence. In the latter case, the complaint was that the verdict of the jury was unreasonable and could not be supported by the evidence. The applicant therein had also argued that the verdict was unsafe and should have been withdrawn based on the state of the evidence. However, it was held that the trial judge had carefully gone through the evidence by contrasting and highlighting the defence's position with the prosecution's case and highlighted the omissions, inconsistencies, and discrepancies where they arose. In the instant case, Mr Sweeney's and Mr Bryan's main argument was that the prosecution's case contained weaknesses and inconsistencies. However, such weaknesses did not automatically render the verdict unreasonable.

[133] As far as the transcript revealed, the learned trial judge took the necessary care and followed the steps recommended by the authorities when dealing with the treatment of circumstantial evidence and ensured that the jurors were the recipients of a balanced and fair summation. Therefore, to establish that the verdict herein amounted to a miscarriage of justice, Mr Sweeney and Mr Bryan had to demonstrate that the evidence available to the jury was not capable of supporting a guilty verdict against both or either of them for the offence of murder, or that the verdict was otherwise perverse. The relevant evidence that the jury was left to consider can be sub-divided into four broad categories: (i) the alleged utterances and conduct of Mr Sweeney and Mr Bryan elicited from the evidence of witnesses Ms Daley and Ms Dixon; (ii) the forensic evidence relative to the blood deposits at Jam World and the subsequent DNA analysis; (iii) the medical evidence as to cause of death and the pathologist's estimated time of death; and (iv) access to Mr Marsh and opportunity for the commission of the offence by Mr Sweeney and Mr Bryan. The evidence falling under these sub-categories was already discussed under issue two. Some overlap was, however, unavoidable. Further discussion on these issues will be confined to determining whether the jury was entitled to draw a reasonable and inescapable inference of guilt from all the evidence presented.

[134] The prosecution was asking the jury to find that the blood seen at Jam World had come from Mr Marsh, who was killed there, and that Mr Sweeney and Mr Bryan were responsible for Mr Marsh's death. These issues were to be determined based on the primary evidence of Ms Dixon, Ms Daley, and Det Sgt Bennett. King's Counsel submitted that the blood the witnesses allegedly observed was "merely speculatively prejudicial" and not probative. We do not agree with this submission because there was some supportive and independent evidence of blood being at the location and the possible source of it. This evidence was elicited from the forensic experts, which was scientific evidence lauded by counsel for both Mr Sweeney and Mr Bryan to be independent, credible, and cogent.

[135] Ms Dixon testified that she observed blood in various locations at the Jam World premises during her visit on 5 August 2003, as well as an alleged conversation with Mr Bryan regarding the cleaning of blood. If the jury accepted her claim that Mr Bryan said he would not take the blame alone, this could be interpreted as evidence that Mr Bryan was aware of the killing and was involved in helping to conceal it.

[136] Det Sgt Bennett had spoken about seeing large and small droplets of blood at various places inside and outside the building, as also some indication of cleaning. In his directions to the jury, the learned trial judge pointed out that up to 13 samples were taken from the scene at Jam World, but no profiles were obtained from most of them. So he admonished the jurors to consider this aspect of Det Sgt Bennett's evidence and to determine whether he was a credible witness. The learned trial judge also directed the jury to consider the inconsistency in the physical evidence concerning the blood and the witnesses' evidence about it. At the highest, the jury would be entitled to ask themselves if Mr Sweeney and Mr Bryan knew nothing of or were not involved in the killing, why were they cleaning up the blood, which was established as human blood. Moreover, if the jury accepted Det Sgt Bennett's evidence about observing signs of cleaning up, it would have lent support to Ms Dixon's testimony.

[137] Ms. Brydson's testimony regarding her observations of bloodstains at various locations at Jam World, as well as on items recovered from the scene, supports the verdict when considered alongside other evidence. No reason was suggested as to why Ms Brydson's unchallenged evidence could not be accepted by the jury, as the only question would have been, who was responsible for attempting to clean the blood away. Ms Daley gave evidence that she saw Mr Bryan wiping the floor of the room and Mr Sweeney wiping the walls. There was, therefore, evidence that the room in which the forensic analyst detected human blood, was being cleaned by both Mr Sweeney and Mr Byran. Furthermore, Mr Sweeney was alleged to have retorted that the substance seen and identified by Ms Dixon as blood was not blood but "paint" but it was later proven to be human blood by the scientific evidence. If the jury accepted Ms Dixon's evidence that Mr Sweeney uttered those words, the reasonable inference that a jury could draw was that

Mr Sweeney was attempting to deflect attention from his suspicious conduct and was doing so to deceive Ms Dixon and conceal evidence.

[138] This body of evidence, if found to be credible by a reasonable jury, would support a conclusion that both Mr Sweeney and Mr Bryan were making efforts to destroy evidence and that they were acting in concert to do so. If both Mr Sweeney and Mr Bryan were destroying evidence or attempting to conceal the evidence of a crime, that raised the question, why? Having asked themselves the question, the logical and irresistible inference that a jury could draw in those circumstances was that both Mr Sweeney and Mr Bryan had guilty knowledge of and or were participants in the crime of murder and were trying to conceal it.

[139] The learned trial judge had directed the jury that the evidence of Ms Dixon and Ms Daley of seeing Mr Sweeney and Mr Bryan cleaning blood in the room, could be regarded as evidence of joint enterprise and/or common design. He directed them thus:

> "We saw two persons wiping up what appears to be blood'. All right. That is the evidence that the Prosecution is presenting to you as another aspect of joint enterprise. The defence challenged it because I think the defence is saying that no mop was taken, but I see, looking at the forensic things, mops were taken. In fact, three mops were taken. Two cutlasses, that is what she says, two. I don't know how many mops, and we can look at what the analyst got, but at least two mops they got and cutlasses were taken from the premises, among other things, but no profile was found.
>
> So, the question is, because no profile was found, and the fact that they were never seen with any mop wiping up, they can't accept the explanation that there was evidence of concealment of involvement by both accused men at the same time? Because that is the evidence relied upon by the Prosecution regarding common design."

[140] As indicated, the forensic evidence elicited from Ms Brydson, supported the fact that human blood was present in the room and that there was evidence that some

cleaning had taken place. Ms Bryson's evidence was addressed by the learned trial judge as follows:

> "Then she gave her expert opinion. Which reads: My opinion is that human blood from an injured individual or individuals was inside the room. That's her opinion. She is an expert, she wasn't there, she observed and analysed certain items and she gave her opinion. As I said to you you are not bound to accept the evidence of an expert but if you are satisfied the person is trained and went through the proper procedure in testing and analysing the items you are free to give that expert opinion due weight but if you find that you agree with her opinion that is not the end of the case. You ask what reasonable inference you can draw from that opinion.
>
> …She went on to say there is some evidence to suggest there was some effect to wipe the stain on the floor. …you must decide on the totality of the evidence whether you find that the evidence show that the injured individual was the deceased, Devon Marsh o/c Tim.
>
> …Then she go on in cross-examination to say the following and I am going to read it to you. She said she did not address her mind whether the blood that she see in the room could have come about by someone deliberately putting it there because you, the jury, have to consider whether if you find the blood was in the room and human blood, whether it was planted there; because one reason you are asked to consider in drawing an inference and that that inference is co-existence with innocence, is that persons had access to the, inside the room after the accused men were taken into custody, no matter what they said and none of this was discovered in their presence, so you have to consider that. And, too, the fact that whether the scene was contaminated and therefore evidence about blood is unreliable. It is a matter that you have to decide as members of the jury."

[141] The evidence of Mr Beecher was that he obtained a profile from Exhibit G5, which were fibres taken from the southeast room, that was "Room 1." He also got a profile from fibres taken from the bucket. He opined that Ms Dixon could not be excluded as being the mother of the profile found at the crime scene. The irresistible inference here was

that the blood came from Ms Dixon's deceased son, Mr Marsh. Mr Wilson had suggested to Mr Beecher that the profile taken from the samples could have come from other relatives of Ms Dixon and Mr Marsh's brother, Errol Marsh. Mr Beecher responded that it would have to be "from another first order relative, that is, they would have to be a son or a daughter of Lillian Dixon".

[142] In the circumstances where the evidence disclosed that Mr Marsh was the one who lived at Jam World where the profile was found, and it was his body that was found with multiple wounds, the irresistible inference to be drawn from that evidence was that it was Mr Marsh who was either injured or killed at the premises. This would have been depicted by Mr Beecher's finding of Ms Dixon's maternity probability to the person to whom the blood was found on the premises, being 99.7%.

[143] The determination of a nexus between Ms Dixon, and the person to whom the blood found at Jam World belonged, was conveyed by the learned trial judge to the jury in this way:

> "Is you the jury must decide on this evidence if you are satisfied that there is a nexus between the mother and the deceased, not only the physical aspect of it, you know, but with the things found in the room and whether you can find that the deceased was injured inside the room, and that his death took place inside the room within the time frame that the Prosecution says, and you have to put that together to decide—to hold the persons who have exclusive access and control were the two accused person, but that is what you must look at, that when you put all of this together it points in the direction, and direction of the two accused."

[144] So, although the forensic evidence could not directly place Mr Sweeney and Mr Bryan in the building or at Jam World at the time of Mr Marsh's death, since that precise time was unknown, that did not render that evidence worthless. The DNA evidence was confined to the identification of the blood in the rooms, and that inferentially it came from Mr Marsh. Consequently, the learned trial judge was correct in highlighting its importance to the jury. The aspect of the evidence the prosecution was saying was implicatory were

the allegations made by Ms Dixon and Ms Daley that they observed Mr Sweeney and Mr Bryan cleaning blood in the room and the subsequent remarks uttered by them both.

[145] Ms Dixon also spoke of seeing Mr Marsh's personal belongings on a garbage heap on 4 August 2003. This included a toothbrush and a health or appointment card that had blood on it. If the jury accepted this evidence as cogent, they were entitled to draw the inference that a person or persons attempted to dispose of or destroy Mr Marsh's personal belongings. This would have been contrary to the assertion allegedly made by Mr Sweeney that Mr Marsh had removed his belongings from Jam World premises. Further, the bed that Mr Bryan said Mr Marsh removed was found at the back of the building partially burnt. This evidence would have supported the inference that Mr Marsh had not voluntarily removed from the premises with his belongings. Therefore, the attempts to dispose of or destroy the items were executed by a person or persons with certain knowledge that Mr Marsh would have no further need of these items. This also gave rise to an inference that the destruction of the items was an attempt to conceal the crime of murder. Since Mr Sweeney and Mr Bryan were the ones giving conflicting accounts as to Mr Marsh's whereabouts, in the circumstances, a reasonable jury was entitled to find that they had knowledge of and were responsible for Mr Marsh's demise.

[146] The conversation on 4 August 2003, between Mr Sweeney and Ms Dixon, when he came to enquire about the key, could be viewed by the jury as Mr Sweeney setting the stage to deflect attention and suspicion from himself when Ms Dixon eventually appreciated that her son had gone missing. The jury was entitled to view Mr Sweeney's utterances that "[a] boy like that fi chop up and feed to fish" as prophetic and precognitive of the actual disposition of Mr Marsh's body, which was subsequently fished out of the canal, having been weighed down by concrete blocks. If one were to accept what Mr Bryan told Ms Dixon when she asked if the key had been found, it becomes clear that the key was not lost as Mr Sweeney had claimed. Mr Bryan appeared to have been puzzled by asking "what key?" and then indicated "no the key wasn't gone, because they were

over there working from morning". If Mr Sweeney was being truthful, would Mr Bryan who had been there from morning, not know that the keys were missing?

[147] There was also the evidence of Ms Walton, who Mr Sweeney telephoned telling her that "it look as if Tim lef the wuk" and further telling her he wanted to get a replacement. This occurred on 4 August, the same day Mr Sweeney visited Ms Dixon telling her that Mr Marsh had moved out and gone with the key. Ms Walton, the person responsible for employing personnel, told him no and that she needed to discuss that issue with one of the directors of Jam World, and in the meanwhile, Mr Sweeney was "to try and find Mr Marsh and ask him to get in touch with the office". Mr Sweeney voluntarily calling Ms Walton and seeking her approval to replace Mr Marsh so soon after his declaration that Mr Marsh was no longer at Jam World, could be regarded by the jury as indicative of his certain knowledge that Mr Marsh no longer needed to work because he was dead.

[148] Ms Dixon's evidence of the conversation with Mr Bryan regarding the cleaning of the bloodstains and his response "me wouldn't do a thing like that and me one naah tek the blame", coupled with Mr Sweeney telling her that he knew Mr Marsh was dead and that it was not him who had killed him, could, once accepted by the jury, support an inference of knowledge and guilt. This inference was further buttressed by Mr Sweeney's remarks when Ms Daley told him the bed was found. His response was enlightening. No one had informed him where the bed was found and neither was he present at the material time. His very accurate placement of the bed in the water could be regarded as an indication that he had knowledge of the method of disposal and or was responsible for depositing the bed in the water.

[149] Counsel Mr Wilson complained that Mr Bryan's hands were never swabbed and that none of the exhibits from which DNA was extracted, linked Mr Bryan "with any activity inside or outside the crime scene". Our appreciation of the DNA evidence is that, it was not presented by the prosecution to establish any nexus between Mr Sweeney, Mr Bryan, and Mr Marsh, but rather to establish whether it was Mr Marsh's blood that was at the

Jam World premises. So, as important as the forensic evidence was, by itself, it was insufficient to prove to the required standard that Mr Sweeney and Mr Bryan had killed Mr Marsh. Nonetheless, when considered alongside all the evidence cumulatively, it would not be accurate to say that the verdict was unreasonable.

[150] Mr Wilson argued that the jury was invited to draw inescapable inferences not based on provable facts from which no other explanation existed and that this approach robbed Mr Bryan of a fair and equitable treatment of his case. We are of the view that counsel's criticism is unfounded. The forensic evidence and its implications of Mr Marsh being murdered, viewed in conjunction with the other circumstances, provided a sufficient basis of provable facts from which the jury could reasonably find that Mr Sweeney and Mr Bryan were guilty of Mr Marsh's murder.

[151] The other circumstances include but is not limited to the accounts of Mr Sweeney and Mr Bryan that they might have been the last persons to see Mr Marsh alive on 2 August 2003, this sighting fell within the estimated timeframe of death, as provided by the pathologist. Furthermore, there was no evidence of a break-in, and Mr Sweeney and Mr Bryan said the key was found by them and used to access the building, including Mr Marsh's sleeping quarters. They made no report to the police of any incidents, or signs of foul play at the premises, despite the obvious presence of blood. They gave inconsistent accounts about the keys and Mr Marsh's whereabouts and made utterances regarding the fact of Mr Marsh's death. These were various aspects of circumstantial evidence that the jury could have accepted or rejected and, if accepted as truthful and reliable, would support the inference of the applicants' guilt beyond a reasonable doubt.

[152] We believe that the learned trial judge competently assisted the jury as he mapped out the timeline and gave them proper directions on how to treat the scientific evidence, and the conflicts arising in the prosecution's case. Moreover, he had highlighted all the possible interpretations arising from the evidence and entreated the jury that they should accept the interpretation most favourable to Mr Sweeney and Mr Bryan and that they

could only arrive at a verdict of guilty if and only if they were satisfied so that they felt sure that the evidence irresistibly pointed to their guilt.

[153] What distinguishes circumstantial evidence from other species of evidence, is that no one strand of evidence is probative of guilt. Its effectiveness lies in an accumulation of circumstances from which the ultimate inference of guilt beyond a reasonable doubt might be drawn. The finding of facts in the trial was solely for the contemplation and determination of the tribunal of fact, which was, the jury.

[154] Notwithstanding the conflicts that arose in the prosecution's case, the jury was entitled to consider the evidence as a whole and to accept such portions that were not inconsistent or wholly inconsistent, with any other evidence they found to have been satisfactorily proved, in determining whether Mr Sweeney and Mr Bryan were guilty. The jury was entitled to draw the inference of guilt upon a consideration of the whole of the evidence, bearing in mind the burden and standard of proof which the prosecution was obliged to discharge. Therefore, we do not find the verdict to be unreasonable having regard to the evidence. The jury was entitled to draw inferences based on such aspects of the witnesses' evidence that they accepted and on which a conviction could be sustained. Accordingly, this court will not interfere since the verdict has not been shown to be "obviously and palpably wrong".

Sentencing

[155] Initially, both Mr Sweeney and Mr Bryan, in their notices of application for permission to appeal, indicated a desire to pursue an appeal against their sentences. This was not, however, pursued on their behalf in the supplemental grounds of appeal advanced by their counsel. King's Counsel, in her oral submission, specifically indicated to the court that she would not pursue an application against sentence on behalf of Mr Sweeney. The court noted that a solitary mention of a challenge to the sentencing was contained in the prayer of the written submission filed on behalf of Mr Bryan wherein Mr Wilson entreated this court to set aside the sentence imposed by the learned trial judge

or, in the alternative, there be a reduction of the same. However, Mr Wilson did not develop any submissions or pursue any arguments in this regard.

[156] At the sentencing hearing, the learned trial judge, in relation to Mr Bryan, took into account relevant mitigating factors, including previous good character, no previous convictions, and capacity to reform. From the remarks of the learned trial judge, the egregious nature of the offence seemed to have been the determinative factor for imposing a sentence of life imprisonment versus a determinate number of years. In any event, on our review of the transcript, we find that the learned trial judge, in his sentencing exercise, demonstrated a clear awareness of the guiding principles of sentencing and did not consider any irrelevant factors.

[157] Although a disparity was observed in the penalties imposed on Mr Sweeney and Mr Bryan as to the number of years to be served before their eligibility for parole, the learned trial judge seemed to have been influenced by several factors and imposed a lesser pre-parole period on Mr Bryan. These factors included, (i) Mr Bryan's favourable community report, (ii) that Mr Bryan had some mental issues in his past and was said to be easily led, and (iii) the learned trial judge's conclusion that based on the evidence led by the prosecution, Mr Bryan played the lesser part in the common enterprise.

[158] As far as we are concerned, the sentence imposed on Mr Bryan was comparable to sentences imposed in like situations. We, therefore, conclude that the sentence imposed by the learned trial judge was appropriate and fell well within the normal range of sentences for the offence of murder. There is, therefore, no basis to disturb Mr Bryan's sentence.

Conclusion

[159] Having perused those detailed excerpts of the learned trial judge's summation, counsel's submissions on the grounds advanced on behalf of Mr Sweeney and Mr Bryan, are unsustainable. The learned trial judge correctly identified the circumstantial evidence elicited by the prosecution, as well as the submissions and rebuttals advanced by the

defence. We adopt the pertinent observation of the single judge of appeal that "[t]he learned trial judge gave extensive directions on circumstantial evidence, some of which exceeded what is now required but it cannot be said that those directions could have caused a miscarriage of justice". The learned trial judge detailed the most significant discrepancies between the evidence of Ms Dixon and Ms Daley, alongside the evidence of police officers and forensic analysts. He gave adequate directions to the jury on how the witnesses' evidence was to be treated. He specifically told the jury that they did not have to accept the evidence of civilian witnesses' or that of the experts or act upon it. Relative to the experts, he directed the jury to weigh their evidence in the light of their experience, education, and qualifications. He indicated to the jury that the expert's testimony was only a part of the evidence and that they could only reach a verdict having considered the evidence as a whole. Concerning all witnesses, he directed the jury to determine whether they found the witnesses credible.

[160] Despite the strenuous arguments mounted against the conviction of both Mr Sweeney and Mr Bryan, there is no compelling reason for this court to interfere with the decision of the jury. Neither is there any basis to disturb the sentences imposed by the learned trial judge.

[161] Accordingly, in all these circumstances, there is no meritorious basis on which to grant permission to appeal. in the grounds of appeal

[162] We cannot end without extending our sincerest apologies to the parties and counsel for the delay in the delivery of this judgment. The inconvenience, no doubt occasioned, is deeply regretted.

Order

[163] The applications for permission to appeal filed by Devon Sweeney and Roy Bryan are refused. The sentences are reckoned to have commenced on 22 May 2015, the date they were imposed.