[2024] JMCA Crim 23

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CRIMINAL APPEAL NO 125/2010

ROMAINE THOMAS v R

Ian Wilkinson KC and Lenroy Stewart for the appellant

Ms Kathy-Ann Pyke for the Crown

1, 2, 28 and 31 May 2024

Criminal Law – Identification evidence – Identification under difficult circumstances – Adequacy of directions of trial judge on identification evidence - Dock identification – Absence of identification parade – Whether no-case submission should have been upheld - Circumstantial evidence – ballistics evidence – Joint enterprise – Common design

Criminal law – Appeal - Missing portions of transcript – Whether missing portion of transcript caused a breach of constitutional rights - Appropriate remedy for breach of constitutional rights – The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, Ss 16(7) and (8)

STRAW JA

Introduction

[1] On 17 April 2009, following a trial in the Home Circuit Court before P Williams J (as she then was), sitting with a jury, the appellant, Romaine Thomas, was found guilty of three counts of murder. The deceased persons were Paul Henry, otherwise called "Matlock", Ms Cleta Atkinson, and Anthony Hunter, otherwise called "Theo". On 31 July

2009, the appellant was sentenced on each count to life imprisonment without eligibility for parole before serving 20 years' imprisonment.

[2] The appellant sought leave to appeal both his conviction and sentence, and on 14 January 2021, a single judge of this court granted leave to appeal. The appeal was heard on the 1 and 2 May 2024 and on 28 May 2024, the following orders were made:

1. The appeal against conviction and sentence is dismissed.

2. The sentence is reckoned as having commenced on 31 July 2009, the date on which it was imposed.

[3] We promised to provide the reasons for our decision in writing and now fulfil that promise.

Background

The Crown's case

[4] The case against the appellant was made up primarily of circumstantial evidence, much of which comprised ballistics evidence, and identification evidence.

Evidence of the main witness as to identification

[5] The main witness for the Crown, Stephan Williams, testified that on 22 February 2004, sometime after 9:00 pm, he was at his home in Watson Grove in the parish of Saint Catherine, with his wife, son and his wife's nephew, when he heard several explosions like gunshots. The explosions sounded like they were coming from the right side of his house, from the direction of "Miss Hazel", who lived in one of the homes on the right, close to him.

[6] Mr Williams said that upon hearing the explosions he turned off the lights inside his home and turned off the television. He then "barely crack[ed]" his front window open and looked outside. Upon doing so, he saw Cleta and Theo (two of the deceased persons who were spouses), walking on the road in front of his house, from the direction of the

right hand side of his house to the left. They were walking with four men, two of whom were known to Mr Williams as "Wassa" and "Beenie Bud". Theo and Cleta were being held tightly by the men, and Cleta appeared to be hopping as though she was being forced to walk with the men. This observation was made for about 20 seconds from a distance of about 12 feet, until Mr Williams was unable to see them any further. Mr Williams said he saw Theo and Cleta's face for about five seconds.

[7] Mr Williams said he then heard more explosions, this time coming from the open area in front of his house. He then saw two persons running towards his house, one of whom he identified as the appellant, whose alias was "Pogo". He did not know the appellant's correct name. The appellant and the second person, whom he identified as Junior, were each armed with a gun. The men ran to the left side of his house to where the door was situated. He heard banging and kicking on his front door, and he heard Junior's voice demanding that he come out of the house. Mr Williams took evasive action and used a cutlass to "chop" the wire connecting the outside light (that had been on) and also lay flat on the floor with his family. He heard the window that he was looking through being opened further, and then he heard explosions like gunshots being fired into his house. The explosions eventually stopped, and the place became silent. However, just a short moment later, he heard more explosions, this time coming from the direction of the lane, in front of his house. He then called the police, who arrived at the scene about half an hour later. The police investigated and collected a warhead that fell on a cot inside his house. The police then left.

[8] The following morning, at about 5:30 am, he observed a crowd in the open area in front of his house. He then observed the deceased Matlock's body. Matlock was his neighbour and had dreadlocks. His hands and feet were tied, and his mouth was gagged.

[9] Mr Williams testified to knowing the appellant for about three years prior to the incident and that during that time, he saw the appellant daily at Miss Hazel's house, both at night and during the day. He testified further that he knew that the appellant came

from Little Lane at Central Village in Saint Catherine, but he and the appellant never spoke.

[10] It was also Mr Williams' evidence that at around 5:00 pm on the evening of 22 February 2004, he had seen the appellant in the open area across from his home, talking to other persons, including Wassa, Beenie Bud, and Junior. Prior to that, he had last seen the appellant on the evening of 11 February 2004 with one John Taffe. During the course of his examination-in-chief, Mr Williams identified the appellant in the dock as being the person that he referred to as Pogo.

[11] With respect to the particular night of the incident, Mr Williams indicated that he had opened his windows to a width of about 2 inches in order to be able to see outside. Further, lights had been erected on the outside on the left hand side of the top of his house, which assisted him to see outside. There was also a light on the corner of the neighbour's fence to the left. After Cleta and Theo were out of sight and when he heard the second set of explosions and saw persons running toward his house, Mr Williams indicated that he was able to recognize the men (that is, the appellant and Junior) when they were about 10 to 20 feet in front of his house. When they came into his yard, he was able to see their faces, and he saw their faces from a distance of about 5 feet. When they went to the left side of the house toward the door, they passed under the outside light and this further aided him to see their faces. They did not have anything on their heads, and nothing prevented him from seeing their faces. He observed the appellant's face for a time frame between 10 and 20 seconds.

[12] Mr Williams made a report to the police that night but did not give a statement in the matter until approximately one month later, on 24 March 2004. He indicated that he moved out of the area with his family on the very next day, 23 February 2004 and that he was very busy and did not have the time to go to Portmore to give a statement to the police.

The police evidence

[13] The Crown presented evidence from several police officers, who carried out investigations and processed the different scenes of the crimes, as well as evidence from a ballistics expert who analyzed the various spent shells, bullets and fragments which were found at the scenes and recovered from the bodies of the deceased persons.

Detective Inspector Aston Ramsarupe

[14] Inspector Ramsarupe testified that he went to the Watson Grove area sometime after 9:00 pm on the night of the incident, where he saw the bodies of a female and a male on a dirt road. In the vicinity of the bodies, his attention was directed to "five spent shells, warheads and fragments" (page 23 of the transcript), being bullet fragments. These items were packaged in envelopes, sealed and labelled.

[15] It was also his evidence that he visited two one-bedroom board houses. At the second house (Mr Williams' house), which was some 100 yards away from the two bodies, he observed a gunshot hole and collected two 9mm spent shells on the outside of the house and one warhead on the inside. These were also packaged, sealed and labelled. All the exhibits were ultimately handed over to the Government Forensic Laboratory ('the Forensic Laboratory').

Detective Corporal Ewart Mitchell

[16] Corporal Mitchell gave evidence that he went to the Watson Grove area on 23 February 2004 at about 8:30 am, where he observed the body of a male with dread-locked hair lying face down in an open lot with hands and feet bound and mouth gagged. He observed three spent shells near the body, as well as, one live round. These were collected, placed in envelopes, labelled and ultimately handed over to the Forensic Laboratory. He also took pictures of the scene, including the body.

Deputy Superintendent of Police Leslie Ashman

[17] Deputy Superintendent of Police Leslie Ashman ('DSP Ashman') was the investigating officer. He testified to visiting Watson Grove on the night of the incident, further to receiving a report. Upon visiting the area, he saw a crowd and the bodies of a male and a female along a dirt road. These two bodies were 8 feet apart and had what appeared to be gunshot injuries. There were also spent shells and expended bullets around the bodies. He requested the assistance of scene of crime personnel, who processed the scene.

[18] Information caused him to go to a board house located about 100 yards away from the bodies, at which no one was seen. Additional information resulted in him visiting Mr Williams' home, which was in total darkness at the time. He spoke to Mr Williams, and upon inspecting the house, he saw bullet holes in the boards forming the walls of the house. Two spent shells were found in the yard and a warhead was found inside the house. The scene was processed by Inspector Ramsarupe.

[19] DSP Ashman left the area at around 6:30 am but revisited the area upon receiving certain information. On this second visit, he saw the body of a male rastafarian, gagged with his hands and feet bound. He appeared to have suffered gunshot wounds. This person was eventually identified as Matlock. Beside the body, DSP Ashman said he observed spent shells and a live 9mm bullet. The scene was processed by Corporal Mitchell. DSP Ashman also revisited the home of Mr Williams, where he saw two more spent shells in the yard. He collected and placed them in an envelope. He subsequently took those items to the Forensic Laboratory.

[20] DSP Ashman said he attended the post-mortem examinations that were conducted by Dr S Prasad. Post-mortem examinations were conducted on the bodies of all three deceased persons. Dr Prasad took a bullet fragment from the female deceased, and a copper jacket bullet was taken from Matlock's body. He placed them into envelopes, which were sealed and handed over to DSP Ashman, who delivered them to the Forensic Laboratory.

[21] DSP Ashman also testified to events which occurred after the appellant was taken into custody on 18 March 2004. He indicated that although he informed the appellant and his mother of his intention to place him on an identification parade, no identification parade was held as he was unable to locate the witnesses, particularly Mr Williams. In addition to returning to the Watson Grove area, he used electronic media and informed other police personnel of his desire to locate Mr Williams. He was eventually able to contact Mr Williams through the office of the Commissioner of Police and recorded a statement from him. Although he located Mr Williams, an identification parade was not conducted for the appellant as he had already been charged for the murders and brought before the court.

Deputy Superintendent of Police Carlton Harrisingh

[22] DSP Harrisingh gave evidence in his capacity as a ballistics expert attached to the ballistics section of the Forensic Laboratory. He testified to receiving exhibits from DSP Ashman, Inspector Ramsarupe and Corporal Mitchell, at which time he recorded the items received, analyzed them and prepared a ballistics certificate. His analysis consisted of making comparisons between the items received using a microscope. In total DSP Harrisingh received 12 9mm Luger expended cartridges from the three police officers.

[23] In making the comparisons he concluded that four of the 9mm Luger expended cartridges and the two 9mm Luger expended cartridges (all received from Inspector Ramsarupe), as well as two of the 9mm Luger expended cartridges and one of the 9mm Luger expended cartridge cases received from Corporal Mitchell and Inspector Ashman, respectively were fired by one and the same firearm of the class of a 9mm Luger Sig Sauer auto-loading pistol.

[24] Further, the remaining three cartridge cases received from Inspector Ramsarupe, Corporal Mitchell and DSP Ashman, respectively, were fired by one of the same firearm, but was a different firearm (from the 9mm Luger Sig Sauer auto-loading pistol) being of the class of a 9mm Luger Smith and Wesson auto-loading pistol. Still further, the firearm which fired the four 9mm Luger cartridges (that were received from Inspector

Ramsarupe) also attempted to fire the live bullet. As such, an attempt was made to fire the live bullet from a firearm of the class of a 9mm Luger Sig Sauer auto-loading pistol.

Summary of the ballistics evidence

[25] The inferences to be drawn from the ballistics evidence were that the same two guns were fired at the three scenes (Mr Williams' home, the area where Matlock's body was found and the area where Theo and Cleta's bodies were found). This evidence thereby connected the shooters to all three scenes.

[26] The spent shells found by DSP Ashman in the yard of Mr Williams and six of the spent shells found by Inspector Ramsarupe, comprising two from the house of Mr Williams and four from the vicinity of the bodies of Theo and Cleta, were fired from one and the same firearm, that is, the 9mm Luger Sig Sauer firearm.

[27] The other spent shells and the live round, found by Inspector Ramsarupe and Corporal Mitchell in the vicinity of the bodies of Theo, Cleta, and Matlock and one of the spent shells found at the home of Mr Williams by DSP Ashman, were fired from the same firearm, the 9mm Luger Smith and Wesson auto-loading pistol.

The medical evidence

[28] The evidence of Dr Prasad with respect to the findings of his post-mortem examination was that all three victims died from gunshot wounds. In the case of Cleta and Theo, gunshot wounds to the head and in the case of Matlock, gunshot wounds to the abdomen involving the chest.

<u>The case for the defence</u>

[29] The appellant gave an unsworn statement from the dock, denying that he was called Pogo and stating that he was innocent.

Grounds of appeal

[30] Permission was sought by counsel for Mr Thomas, Mr Ian Wilkinson KC, and was granted by the court, to abandon the original grounds of appeal and to argue supplemental grounds that were filed on 12 April 2024. Further, during the course of oral arguments, learned King's Counsel sought and was granted permission to argue a supplemental ground of appeal regarding common design. This was noted as ground 1b. As such, the supplemental grounds of appeal are as follows:

> "1a. The Learned trial judge erred in law when she failed to uphold the no case submission made on behalf of the Appellant, since the quality of the identification evidence given by the Crown's chief witness was weak, manifestly unreliable and uncorroborated.
>
> 1b. There was no evidence or alternatively, there was insufficient evidence to establish any common design between the appellant Romaine Thomas and any other assailant, particularly Wassa, Beenie Bud and Junior, regarding any of the three murders.
>
> 2. The Learned Trial Judge failed to adequately warn the jury on the dangers of relying on the identification evidence of the Crown's chief witness given the difficult conditions under which the observation was made.
>
> 3. The absence of an identification parade coupled with the weaknesses in the Prosecution's evidence resulted in a miscarriage of justice rendering the Appellant's conviction unsafe.
>
> 4. The incompleteness of the transcript, in that it is missing the pages pertaining to the sentencing process, constitutes a breach of the Appellant's right to have a copy of the record of proceedings made by or on behalf of the court and his right to have his sentence reviewed by a superior court under sections 16(7) and (8) respectively, of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica."

1a. The learned trial judge erred in law when she failed to uphold the no case submission made on behalf of the appellant, since the quality of the

identification evidence given by the Crown's chief witness was weak, manifestly unreliable and uncorroborated

1b. There was no evidence or alternatively, there was insufficient evidence to establish any common design between the appellant Romaine Thomas and any other assailant, particularly Wassa, Beenie Bud and Junior, regarding any of the three murders

Submissions on behalf of the appellant

[31] Mr Wilkinson, for the appellant, outlined the evidence of Mr Williams and submitted that the purported identification of the appellant was made under difficult circumstances. He submitted that the learned trial judge should have upheld the no case submission as the identification evidence was weak, uncorroborated, and the Crown failed to adduce any other cogent evidence in support of the appellant's guilt. Notably, the appellant disputed being called Pogo, and there was no other evidence to support that the appellant was known by this alias. As such, in the absence of any other evidence to support identification, the case should have been withdrawn from the jury. Reference was made to the cases of **Daley v R** [1993] 43 WIR 325, **R v Vincent Jones** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 187/2004, judgment delivered 7 April 2006 ('**Vincent Jones**') and **R v Turnbull** [1977] QB 224.

Submissions on behalf of the Crown

[32] Ms Pyke for the Crown, in contending that these grounds of appeal lacked merit, submitted that the learned trial judge was correct not to uphold the submission of no case to answer, as the evidence of the chain of circumstances constituted sufficient *prima facie* material, from which a jury could determine the appellant's guilt or innocence.

[33] It was submitted that the prosecution was not required to present evidence which individually, proved beyond a reasonable doubt that the offence was committed. It was sufficient if the evidence, taken as a whole, established beyond a reasonable doubt that the appellant was guilty.

[34] It was further submitted that the identification evidence was itself sufficient to establish, on a *prima facie* basis, that the appellant was known to Mr Williams prior to the incident. She noted further that the defence did not challenge Mr Williams' prior knowledge. In the circumstances, the absence of an identification parade did not render the identification evidence weak and unreliable.

[35] Ms Pyke submitted that in the round, the prosecution presented sufficient evidence to establish *prima facie* that the appellant was present and armed with a firearm, acting in concert with other men who attempted to attack Mr Williams and killed the three deceased persons. Reliance was placed on the cases of **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, **Germaine Smith and others v R** [2021] JMCA Crim 1 ('**Germaine Smith**'), **Pipersburgh and Robateau v R** [2008] UKPC 11, **Maxo Tido v R** [2011] UKPC 16 ('**Maxo Tido**') and **Dwight Gayle v R** [2018] JMCA Crim 34.

Analysis

[36] A no-case submission should be upheld if there is insufficient evidence that the accused committed the offence. Further, such a submission should also be upheld if the Crown is relying on unsupported identification evidence, the base of which is so slender that it is insufficient and unreliable to be left to the jury (see **R v Galbraith** [1981] 2 All ER 1060; **R v Fergus** (1993) 98 Cr App Rep 313; **Vincent Jones**; and **Daley v R**).

[37] Based on the identification evidence set out at paras. [8] and [10] above, there was sufficient opportunity for Mr Williams to make out the two men, including the appellant, whom he identified as Pogo. The learned trial judge was correct to refuse to uphold the no-case submission on this basis.

[38] All the evidence of shots being fired and the observations of Mr Williams took place at about 9:00 pm. The police arrived on the scene after 9:00 pm, so the inference to be drawn from the narrative is that all three incidents took place within a short frame of time (although it appears that Matlock's body was not discovered until the following morning). The evidence relied on by the Crown linking the appellant to the murders of the three

deceased was based on joint enterprise and circumstantial evidence, including the ballistics evidence presented. It is the identification evidence of Mr Williams that placed the appellant coming from the general vicinity where Matlock's body was found. The appellant came onto his premises with another man. Both were armed with firearms, and shots were fired into his premises. Mr Williams could not say who fired the shots, but the unchallenged ballistics evidence was sufficient for reasonable inferences to be drawn that the two guns used at Mr Williams' premises were inextricably linked with the shootings associated with the death of all three deceased. It would not matter who fired the shots in the particular circumstances of this case based on the law of common design (see **Germaine Smith** at paras. [70] – [73]). The ballistics evidence was not disputed, and neither was the evidence as to how all three deceased met their deaths. Mr Wilkinson took no issue with the directions of the learned trial judge concerning circumstantial evidence or common design. The learned trial judge also directed the jury on the drawing of inferences and the necessity not to speculate. It was open to the jury to draw reasonable inferences from the narrative, including the timeline, that the persons involved were together and acting in concert when the guns were discharged at all three scenes. The learned trial judge left all of this to the jury for their consideration. Once the jury accepted the correctness of the identification of the appellant by Mr Williams, there would have been cogent evidence from which reasonable inferences could be drawn (based on the ballistics evidence and the narrative of events that unfolded) to support the appellant's involvement in the death of all three deceased.

[39] Grounds 1a and 1b would, therefore, failed.

2. The learned trial judge failed to adequately warn the jury on the dangers of relying on the identification evidence of the Crown's chief witness given the difficult conditions under which the observation was made

Submissions on behalf of the appellant

[40] In respect of this ground, Mr Wilkinson complained that although the learned trial judge gave directions on the special need for caution, the directions given were only

general directions and were not tailored to the specific facts of the case. Further, the learned trial judge failed to direct the jury on the inherent weaknesses in the identification evidence, particularly on the night of the incident and of the dangers in relying on Mr Williams' uncorroborated evidence. In making these submissions, reliance was placed on the cases of **R v Turnbull**, **R v Whylie** [1977] 25 WIR 430, **Scott and another v R; Barnes and others v R** [1989] AC 1242 ('the **Scott** case') and **Junior Reid and others v R** [1990] 1 AC 363.

Submissions on behalf of the Crown

[41] On this ground, Ms Pyke submitted that the learned trial judge gave comprehensive and effective directions to the jury so as to impress upon them, the need to proceed with caution and to carefully examine the circumstances under which the identification was made. Ms Pyke demonstrated, by reference to several areas of the summation, that the learned trial judge reminded the jury that the appellant denied that he was called Pogo and also guided them on the usefulness and importance of an identification parade. The learned trial judge also carefully outlined the dangers of dock identification and the undesirable nature of dock identification. Ms Pyke asserted that in light of these directions, it could not, without irrationality, be stated that the learned trial judge failed to properly direct the jury as to the inherent weaknesses of the identification evidence. Neither could it be said that she failed to examine the difficult circumstances in which the identification was made. Ms Pyke submitted that this ground of appeal should fail.

Analysis

[42] This ground is unmeritorious. Ms Pyke is correct about the meticulous directions given by the learned trial judge to the jury. The identification evidence was uncorroborated. The learned trial judge made that clear to the jury (see page 327 of the transcript). She reminded the jury that Mr Williams had never spoken to the appellant before. She directed them as to the special need for caution in relation to identification evidence and that even in a case of recognition, a mistaken identification is still possible

(see pages 328 and 329 of the transcript). They were cautioned to be very careful (see **Junior Reid and others v R** at page 379A to H and the **Scott** case at page 1261). She then pointed out the circumstances of the identification and asked the jury to bear in mind the conditions under which it took place, including the length of time (10 to 20 seconds), the lighting that existed, the distance from which it was made (10 to 20 feet away) when he first recognized Junior and Pogo, then 5 feet as they walked past him under the light to go to the left hand side of his house (see page 345 of the transcript), the fact that he looked through a 2 inch crack in his louvre blade window, but without any obstruction. She directed them to ask themselves whether that was sufficient space for someone to look through (see page 341 of the transcript). It was after this opportunity for identification that Mr Williams turned off the outside light and lay on the floor. The learned trial judge also reminded the jury that a report was made to the police the same night of the incident, although no statement was given for some time. She also spoke of weaknesses in relation to the lack of an identification parade and the dangers of dock identification. The sufficiency of these two issues (identification parade and dock identification) will be considered under ground 3. We are not of the view that the learned trial judge was under any obligation to do more in terms of her directions on visual identification.

[43] Ground 2, therefore, failed.

3. The absence of an identification parade coupled with the weaknesses in the prosecution's evidence resulted in a miscarriage of justice rendering the appellant's conviction unsafe

Submissions on behalf of the appellant

[44] Mr Wilkinson submitted on behalf of the appellant that an identification parade would have served a useful purpose in this case since the appellant denied using the alias Pogo. This was especially so since Mr Williams testified that he did not know the appellant's family and had never conversed with the appellant. Further, in light of Mr Williams' delay in giving the police a statement, an identification parade was the most

appropriate means of testing Mr Williams' knowledge of the appellant's identity, as opposed to a dock identification.

[45] Mr Wilkinson acknowledged that the absence of an identification parade does not result in an automatic miscarriage of justice but that, in the circumstances of this case, there has been a miscarriage of justice in light of the poor quality of the identification evidence adduced by the Crown. He cited 15 reasons why the appeal should be allowed and the conviction quashed. These are summarized as follows:

i. There was no ballistics or other scientific evidence linking the appellant to any of the murders;

ii. Mr Williams failed to identify which of the alleged assailants fired shots inside his room;

iii. There was no evidence that the warhead retrieved from Mr Williams' home was fired by the appellant;

iv. There was no evidence that after the two alleged attackers had fired on Mr Williams' home, that the appellant went anywhere close to any of the three deceased;

v. There was no evidence that the copper jacket bullet that was retrieved from Matlock's body, was fired by the appellant;

vi. There was no evidence of the appellant firing a gun at any time;

vii. There was no evidence of motive on the part of the appellant with respect to any of the murders;

viii. The evidence from Mr Williams that he had seen the appellant with Wassa, Junior and Beenie Bud, did not mean that the appellant was party to any conspiracy to murder anyone;

ix. There was no evidence of the appellant being seen with Matlock, particularly on the night he was murdered;

x. There was no evidence that the appellant had been seen with or was in the vicinity of any of the other two deceased;

xi. The evidence of Mr Williams did not mention that the appellant was one of the persons holding Cleta or Theo;

xii. There was no evidence of who shot Cleta or Theo;

xiii. There was no evidence of common design or conspiracy between the appellant or anyone else to commit the murders; and

xiv. The appellant was not charged with or convicted of any other offences, such as illegal possession of firearm, shooting with intent or attempted murder (with respect to Mr Williams).

[46] According to Mr Wilkinson, the learned trial judge should have brought these matters to the attention of the jury and her failure to do so resulted in a gross miscarriage of justice to the appellant, warranting the quashing of the convictions.

Submissions on behalf of the Crown

[47] In opposing this ground of appeal, Ms Pyke contended that the basis for any complaint of a miscarriage of justice must, in law, mean that there is no evidential basis for a conviction and/or that inadequate directions were given by the learned trial judge. She advanced that in light of the chain of evidence and the directions of the learned trial judge, the jury was properly directed and provided with sufficient evidentiary material with which to reasonably arrive at a verdict.

Analysis

[48] The learned trial judge directed the jury at pages 358 to 359 of the transcript as follows:

> "They were all fired by the same gun. So what is the inference the Crown is asking you to draw here; whoever entered Mr. Williams' yard and fired those shots used that gun to fire shots where the bodies were found. That is the inference. That is how they are trying to make the link to Mr. Thomas here, saying Mr. Thomas came into the yard with Junior, both of them armed with guns. They are saying that, Mr – well, either Mr. Thomas and Junior fired into his house, Mr. William's house, fired shots in the yard. Spent shells were recovered and those spent shells were linked with spent shells found on the scene where they had the bodies. That is how they are trying to connect Mr. Thomas. It's a matter for you. Mr. Foreman and your members, have they succeeded in satisfying you so that you feel sure that it was Mr. Thomas who was in the yard. Have they satisfied you so that you feel sure that it was … Mr. Thomas who was involved with the other person who came in the yard who was also armed with a gun. Are they the persons who then went and killed Mr. Theo and Miss Cleta. Are they the persons who killed Matlock. They are saying the unexpended round, the live round that was found by Mr. Matlock's body also came from a nine millimetre pistol and they are saying importantly, that the copper jacket that was found in the body of one of the deceased persons was also fired from a nine millimetre Cig Sauer [sic] auto-load pistol. So Mr. Foreman and your members, piece together the evidence. That is what the Crown is asking you to do. After you have pieced it together, are you left with one conclusion and one conclusion only? Are you satisfied that it was Mr. Thomas who was seen and therefore when you link the other pieces of evidence, are you satisfied that he is guilty of the offence for which he has been charged? …."

[49] We have already stated that the circumstantial evidence raised through the exhibits recovered by the police witnesses and the evidence of the ballistics expert was sufficient to allow the jury to draw reasonable inferences about the appellant's involvement in all three deaths. Therefore, most of the complaints listed by Mr Wilkinson have been answered in relation to the analysis of grounds 1a and 1b.

[50] The absence of the identification parade, while undesirable, led to no miscarriage of justice in the particular facts of this case. Although the appellant denied being called

Pogo, there was no dispute that he was known to Mr Williams or had been seen in the Watson Grove area. Further, he did not deny that Mr Williams knew of him from Central Village. The learned trial judge, having described the lack of the identification parade as a weakness, directed the jury at page 331, lines one to 25, page 332, lines one to 25 and page 333, lines one to six, as follows:

> "The witness in this case purports to know Mr. Thomas by an alias 'Pogo'. Mr. Thomas you remember told you that he is not known by that alias. He said he is Romaine Thomas and I think in the evidence you heard from Deputy Superintendent Ashman from the very first time Mr. Thomas was arrested. He did tell Mr. Ashman he's not called 'Pogo'. He's Romaine Thomas. So it would have been useful to have put Mr. Thomas on what we call an identification parade to give Mr. Williams an opportunity to point out the person he said was the assailant on that night.
>
> Now, the main purpose of an identification parade is to test the reliability of a witness being able to identify the suspect. In this case where an alias is used it may be used for, [sic] to confirm Mr. William's assertion that he did in fact know the accused regardless of the name used. It would have been useful to test his honesty when he says that, yes he knew this man for as long as he said he knew him. It is true, however that even if he knew him before he still might have been mistaken in identifying him as one of the men he saw that night. The fact that the accused has denied the alias means he is disputing that Mr. Williams knew him by that name or could have known him by that name. So the ID parade again would have formed the basis of testing the ability of Mr. Williams to point out the accused, to point out the assailant he alleges he knew before that night. And more importantly, it is not only to point out the person he knew, but to point out the person he knew as the person who he saw on that night. Because [sic] he failed to do so the accused would have had the advantage of saying am [sic] not the person he knows whether as 'Pogo' or any other name and am [sic] also not the person he saw that night. So although he denied the alias you will notice that Mr. Thomas did not challenge Mr. Williams' evidence as to whether he visited that area of Watson Grove, because remember that was how Mr. Williams established how he knew Mr. Thomas, used to see him in Watson Grove

> area, used to see him at this particular house, used to see him with these persons, other individuals. That was not challenged. But what is being challenged is the usage of the alias. So, Mr. Foreman and your members, as you consider the evidence approach it with care bearing that in mind and you have to be satisfied that this man is the person Mr. Williams saw."

[51] Further she reminded the jury of the evidence of DSP Ashman at page 360, lines two to 16:

> "He's also saying that, Mr. Thomas told you that he told him that he was not called 'Pogo'. Mi nuh name 'Pogo'. My name is Romaine Thomas. Mi a 26 year ole and mi come from Little Lane Central Village. He admits that. Said himself didn't know the accused man before but based on the name and information and the description that he was given, he picked up this man, he charged him. Could not find Mr. Williams to put him on identification parade but he has charged him, brought him before the court to answer to this charge, these counts of Murder. You have to determine what you make of this evidence."

[52] These directions are consistent with the learning set out in **Maxo Tido** at para. 17 referencing **Pop v The Queen** [2003] UKPC 40, as follows:

> "17 Dock identifications are not, of themselves and automatically, inadmissible. In **Pop v The Queen** [2003] UKPC 40; 147 SJLB 692 the Board held that, even in the absence of a prior identification parade, a dock identification was admissible evidence, although, when admitted, it gave rise to significant requirements as to the directions that should be given to the jury to deal with the possible frailties of such evidence—see paras 9 et seq. In particular, the Board considered in that case that the failure to adhere to what was the normal practice in Belize of holding an identification parade should have led the judge to warn the jury of the dangers of identification without a parade. Delivering the advice of the Board, Lord Rodger of Earlsferry said at para 9:
>
> > '[The judge] should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an

> inconclusive parade to a defendant such as the defendant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care: **R v Graham** [1994] Crim LR 212 and **Williams (Noel) v The Queen** [1997] 1 WLR 548.'"

[53] The learned trial judge, at page 333 of the transcript, also directed the jury on the dock identification of the appellant. At lines 18 to 25 and pages 334, lines one to 14, she stated thus:

> "However, this being what in law I said is known as dock identification, there is a fear involved in such an identification that the witness would be – sorry, the very presence of the accused man in the dock would cause the witness to say that, that is the man who committed the offence. That is the fear associated with such identification. And that is why it is undesirable in principle or that you are required to consider it and approach it with care because in this case, the witness is asserting that he knew Mr. Thomas before. And therefore it will be hard to say it is the mere presence of Mr. Thomas there that led him to identify him because he's saying he knew him before. So you have to consider all that circumstances [sic], all the strengths and weaknesses of the purported identification. You have to be satisfied so that you feel sure that this man is the man who was seen by Mr. Williams that night."

[54] The issue of dock identification was also addressed by the Board in **Maxo Tido** at para. 18 and further at paras. 21 and 22. At para. 22, the Board reiterated that the discretion to admit evidence of dock identification must be exercised in light of the particular circumstances of the individual case. Further, "[r]elevant circumstances will always include consideration of why an identification parade was not held. If there was no good reason not to hold the parade this will militate against the admission of the evidence".

[55] In **Germaine Smith**, Brooks JA (as he then was) also reviewed the seminal principles relevant to dock identification. At para. [55], he noted:

> "One of the reasons for allowing a dock identification is if the witness claims prior knowledge of the perpetrator in circumstances where the sighting at the time of the offence would amount to recognition. This principle was set out in **Peter Stewart v The Queen** [2011] UKPC 11, which was cited at paragraph 79 of the recent Privy Council decision of **Stubbs and Davis v R** [2020] UKPC 27. Where prior knowledge is only by way of an alias or 'nickname', a formal identification parade may be appropriate (see **R v Forbes**, **R v Meggie** (2016) 88 WIR 400), unless the previous association is such that the identification parade would be a mere formality. The failure to hold one, where the knowledge is only by way of an alias, is not necessarily fatal. The circumstances of the prior knowledge would be determinant of the reliability of a dock identification."

[56] And further at para. [56], he quoted the judgment of Phillips JA in **Dwayne Douglas v R**:

> "[56] In **Dwayne Douglas v R**, Phillips JA, in delivering the judgment of this court, confirmed the principle that a dock identification is allowable where the witness claims previous knowledge of the perpetrator. The learned judge of appeal said, in respect of the dock identification that had been allowed in that case:
>
> > '[59] The learned trial judge also stated that the parade is not a complete safeguard but is at least better than a dock identification. She set out the dangers of the identification in the dock but stated that the danger is minimized if, as in this case, the witness and the accused are known to each other. In our view, this was a fair comment. The law is clear that a dock identification is admissible once the appropriate warnings are given, and so would be allowed in evidence. Also generally, the judge should direct the jury when a parade is not held, on the advantage that the appellant is deprived of with regard to the results of an inconclusive parade. In **Aurelio Pop v the Queen** (Privy Council Appeal No. 31 of 2002, delivered 22 May 2003) Lord Rodger of Earlsferry in delivering the decision of the Board made this very clear.'"

[57] We have rehearsed these authorities in order to underscore that the learned trial judge in the case at bar did not err in allowing the dock identification of the appellant. The evidence of prior knowledge (set out at para. [8] above), as well as the fact that there was no disclaimer by the appellant that he did not know Mr Williams, was sufficient to allow this evidence to be left to the jury for their consideration. All the requisite warnings were given to the jury in relation to both the lack of the identification parade and the dock identification.

[58] Ground 3 failed.

4. The incompleteness of the transcript, in that it is missing the pages pertaining to the sentencing process, constitutes a breach of the appellant's right to have a copy of the record of proceedings made by or on behalf of the court and his right to have his sentence reviewed by a superior court under sections 16(7) and (8) respectively, of the Charter of Fundamental Rights and Freedoms enshrined in the Constitution of Jamaica

Submissions on behalf of the appellant

[59] Mr Stewart addressed this ground of appeal on behalf of the appellant. He complained of the delay since the appellant applied for leave to appeal in 2010, however his submissions were based on the failure to produce the missing aspects of the transcript. He contended that this prejudiced the appellant and breached his constitutional rights, as the court was unable to assess the appropriateness of his sentence. Further, the court will be unable to assess whether the time spent by the appellant in pre-trial custody (estimated by him to be about a couple weeks short of five years) was accounted for in the passing of the sentence. Neither is it known whether the appellant's age was taken into account during the sentencing exercise, bearing in mind that he was 17 years old at the time of the incident. Mr Stewart submitted that the most appropriate remedy in the circumstances would be a quashing of the appellant's sentence, especially since he has already spent 15 years in respect of his eligibility for parole. Reliance was placed on the case of **Evon Jack v R** [2021] JMCA Crim 31 ('**Evon Jack**').

Submissions on behalf of the Crown

[60] Ms Pyke agreed that in the circumstances, the court is hampered in its ability to assess the basis on which the sentence was imposed. Nevertheless, she asserted that the circumstances of the **Evon Jack** case are distinguishable from the instant case and that a declaration or an apology would be a sufficient remedy for the appellant in the instant case. Ms Pyke noted that the sentence imposed by the learned trial judge was in keeping with the provisions of the Child Care and the Protection Act ('CCPA') as well as the Offences Against the Person Act ('OAPA') and, in particular, that the learned trial judge imposed the mandatory statutory minimum for cases of this nature. Resultantly, it would be improper for this court to reduce the sentence imposed or to give a remedy in the nature of time spent.

Analysis

[61] It is admitted that there has been a breach of the appellant's constitutional rights under section 16(7) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter'). However, there has been no breach of the appellant's constitutional rights under section 16(8) of the Charter. These sections stipulate:

> "(7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced."

[62] The appellant would have been entitled to have a copy of the sentencing portion of the transcript. This was never made available to him. The absence of the sentencing transcript has made it impossible for this court to review the learned trial judge's

consideration of this issue. The question is, what should be the appropriate remedy (see **Evon Jack**). Although this court has been unable to review the sentencing hearing, we consider that the learned trial judge would have been unable to impose a lower sentence based on the application of the relevant statutes. The appellant was convicted of the murders of three persons committed on the same date. Although he was 17 years old at the time of the commission of the offences, by virtue of section 78 of the CCPA, he would have been liable to life imprisonment. He would, therefore, have been liable to be sentenced under section 3(1)(a) of the OAPA, which sets out the imposition of life imprisonment for murder with a minimum pre-parole period of 20 years. The absence of the sentencing portion of the transcript did not, therefore, prevent this court from determining the appropriateness of the penalty imposed. As a result, there was effectively, no breach of section 16(8) of the Charter.

[63] In all the circumstances, it seems to us that the most appropriate remedy would be a public acknowledgment that there was a breach of the appellant's constitutional rights under section 16(7) of the Charter.

Conclusion

[64] Mr Wilkinson relied on four grounds of appeal. There was much overlapping of the grounds relating to conviction. However, we found no merit in any of these three grounds. In relation to ground four, we found that there was a breach of section 16(7) of the appellant's Charter rights. However, in the circumstances that exist (as expressed above), the most appropriate remedy would be a public acknowledgment of the breach. For these reasons, we made the orders set out at para. [2] above.