[2017] JMCA Crim 13

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NOS 230, 231 AND 232/2003

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE McDONALD-BISHOP JA
THE HON MISS JUSTICE WILLIAMS JA (AG)

TREVOR WHYTE v R
NIGEL CALDER
ALLAN BEECHER

Miss Nancy Anderson for the appellant Whyte

Robert Fletcher for the appellant Calder

Mrs Ann-Marie Feurtardo-Richards and Trevor Cuffe Jnr for the appellant Beecher

Mrs Natalie Ebanks-Miller and Miss Kamesha Campbell for the Crown

29 February, 1, 2 March 2016 and 7 April 2017

P WILLIAMS JA (AG)

Background

[1] On 27 November 2003, the appellants, Messrs Trevor Whyte, Nigel Calder and Allan Beecher were each convicted for murdering Icylin Vaughan and Milton Grey on 31 August 2001. The conviction came after a trial at the Home Circuit Court before James J and a jury in which the appellants were charged on an indictment containing two counts. Each victim was the subject of one of the counts. A fourth man, Omar Creary

was also charged and tried with the appellants but the jury was unable to arrive at a unanimous verdict in regards to him and his matter was set for re-trial.

[2] Each of the appellants was on the same day of conviction sentenced to life imprisonment for the first count of the indictment with the judge specifying that they each serve 30 years imprisonment before being eligible for parole. On the second count, they were each sentenced to death in the manner prescribed by law.

[3] Notice of appeal was received by this court on 10 December 2003 from all three men. They also at that time applied for legal aid. They each appealed against their conviction and sentence relying on identical grounds of appeal namely:

(a) Unfair trial.

(b) Miscarriage of justice.

(c) Fabricated evidence.

They also indicated that further grounds of appeal would be filed by "the legal aid assigned" to each of them.

[4] As was then the custom in these courts, because the death sentence had been passed, these matters came before the court as appeals, without applications for leave to appeal having been considered by a single judge. The transcript of the trial was received by this court in January 2005 and the appeal was listed to be heard on 25 July 2005.

[5] In June 2005, a practice direction was issued in the Supreme Court requiring the holding of a sentence hearing whenever any person was convicted of a murder which could attract a death sentence. Cases where the sentence had been passed without the benefit of such a hearing were listed for re-sentencing. Such a hearing was therefore held for the three appellants and on 22 August 2005, a sentence of life imprisonment was imposed on each appellant with a recommendation that they each serve a period of 25 years before being eligible for parole. The sentences were deemed to have commenced from the first day on which they were sentenced, 27 November 2003.

The Appeal

[6] Each appellant filed several grounds of appeal supplemental to those originally filed. Commendably, however, counsel for the appellants recognised that there was significant overlapping on the several grounds and in order to avoid repetition made a proposal that found favour with this court. The proposal was that rather than argue the grounds as raised, each counsel would make submissions on different issues which were largely identified as being the substance of the grounds. The issues were identified as being:

> "1. Identification.
>
> 2. Reasonable inference, circumstantial evidence, partial circumstantial evidence.
>
> 3. Common design.
>
> 4. Alibi.

5. Unsworn statement.

6. Inadequacy of summation

   (a) Duty of Judge, Prosecution-Jury not mentioned at all;

   (b) Burden of proof not properly explained;

   (c) Separate counts - not mentioned at all;

   (d) No sympathy, prejudice for accused or witness - not mentioned at all;

   (e) Ingredients of murder-not properly explained;

   (f) Prejudicial comment made by witness, Linval Thompson which was not dealt with by LTJ in his summation (comment about when in trouble would run away to country);

   (g) Corroboration - mentioned and not required;

   (h) Expert witness - not mentioned at all, and;

   (i) Verdict- not mentioned at all;

7. Discrepancies.

8. Usurping function of jury.

9. Delay."

The Case for the Prosecution

[7] The offences for which the appellants were charged and convicted took place at 100 Red Hills Road, also called Hundred Lane, in the parish of Saint Andrew. The quiet of the night of 31 August 2001 was shattered at about 2:30 am by the sounds of

explosions. A yard located at 100 Red Hills Road was invaded by a group of men some of whom were armed with firearms. More sounds of explosions were heard in that yard thereafter.

[8] The Crown relied on one witness who related what happened that night. Mr Linval Thompson was in the house located in that yard that night with other family members in other sections. He was first awoken at about 2:30 am by the sound of the explosions coming from the direction of a lane close to the one on which he lived.

[9] Upon hearing the sounds, Mr Thompson rose from his bed and looked through the metal louvre blades of his bedroom window out in to the yard. He saw nothing at that time so he returned to lying on his bed. Approximately half an hour later, he heard his dog barking in the yard. Mr Thompson looked through the window once more and saw men entering the yard.

[10] With the assistance of a 100 watt light bulb to the front of the house, Mr Thompson recognised four of the men entering his yard. From a distance of between 35 and 40 feet, he saw "Thunder Cat" who was pointed out in court as being the appellant Trevor Whyte. Mr Thompson saw a small hand gun in Mr White's hand. He also saw a person he knew as Nigel or "Stepa" and identified Nigel Calder as that man. He also saw a man he called "Twelve" who he identified as being the appellant Allan Beecher. He said Twelve had something in his hand but the object was not clearly seen as Twelve had it pointing down and was moving around with it. Mr Thompson also recognised a man he knew as Rohan who was armed with a small gun.

[11] Mr Thompson rolled off the bed and moved into an adjoining store room and looked through a hole in the door to look into the back of the premises. He was able to see out into this section of the yard with the assistance of another 100 watt electric light bulb located at the rear of the building. He saw some more men entered the yard. He recognised one of the men he knew as "Dinks" identified as Omar Creary.

[12] Mr Thompson then heard "shots begin to fire" inside the yard so he went and hid beside some sand stored in the store room. The shooting continued for approximately five minutes. Eventually, Mr Thompson emerged from the storeroom and went out on the veranda. He noticed that the door to his mother's room was kicked off. Upon entering that room, he saw his stepfather Milton Grey lying on his back with blood coming from all over his body. Milton Grey was not moving or breathing and appeared to be dead.

[13] Mr Thompson further observed that the room was "all turn up side down, everything pulled up inside there". He looked for his mother who shared that room with his stepfather. He noticed the back door to that room was also kicked out. He went through that door in to the passage that leads outside. He eventually returned to his mother's room and looked underneath the bed. There he saw his mother lying on her back. She too appeared to be dead.

[14] Detective Corporal Mark Foster was on duty at the Constant Spring Police Station at about 3:00 am on 31 August 2001 when he received a report that caused him to go to Park Lane. Whilst there he received yet another report and he thereafter went to

100 Lane. There he saw and spoke with Linval Thompson who showed him the bodies of the male and female lying on the floor in a bedroom of the premises. He was given the names of these two deceased persons.

[15] Detective Corporal Foster received a report from Mr Thompson and made observations. He saw spent shells on the ground. He made contact with police control radio room and requested the presence and assistance of personnel from the Scene of Crime Unit.

[16] Detective Constable David Campbell and Detective Corporal Butler were the two officers from the Scene of Crime Unit who visited the scene that morning. Detective Constable Campbell gave evidence of taking several photographs of the scene to include photographs of the bodies as well as the spent shells, damaged war heads and gunshot holes seen in different areas, mainly throughout the rooms to the front of the house. He did not take any photographs of the rear of the building.

[17] Several of the photographs he had taken were admitted into evidence. The other witnesses when giving their evidence used the photographs to assist in explaining where on the premises they said certain things happened. The photographs were also used to identify the deceased persons. Mr Thompson indicated who the persons in the photographs were, namely his mother Icylin Vaughn and his stepfather Milton Grey. The investigating officer Detective Corporal Wayne Joseph testified that those persons were the bodies on which post mortem examinations were conducted.

[18] Dr Ere Sheshiah performed the post mortem examinations on both bodies on 13 September 2001. It was his opinion that both Icylin Vaughn and Milton Grey had died as a result of multiple gun wounds.

[19] Detective Corporal Josephs received information on 31 August at about 8:00 am which resulted in him commencing investigations into the double murder of Icylin Vaughn and Milton Grey. He spoke with Detective Corporal Foster and together they visited the premises at 100 Red Hills Road. He interviewed Linval Thompson and read a statement that Mr Thompson had given. Detective Corporal Josephs eventually obtained warrants for the arrest of eight men - Anthony Smith otherwise called 'Lucky'; Rohan Nelson otherwise called 'Rou'; Nigel otherwise called 'Steppa'; 'Twelve'; "Dinks"; Gregory otherwise called 'Froggy; ' 'Richie' and Trevor Whyte otherwise called "Thunder Cat."

[20] On the same morning of 31 August Detective Corporal Josephs saw a young man who he said fit the description of one of the men for whom he had a warrant in the Criminal Investigation Branch Office at the Constant Spring Police Station. This young man was Dinks whose correct name was Omar Creary. He was arrested and charged.

[21] On 4 September 2001, Detective Corporal Josephs received some information which caused him to visit the May Pen Criminal Investigation Branch Office in Clarendon. There he saw two men fitting the description of two of the men for whom he had warrants. These men were Trevor Whyte otherwise called "Thunder cat" and

Nigel Calder otherwise called "Steppa". The men were cautioned and informed of the warrants and told they were to be charged for the offence of murder.

[22] Trevor Whyte when cautioned said "me nuh know nothing bout no killing". Calder when cautioned replied "Dah woman deh wey dead a trouble maker yuh know boss". The men were taken to Constant Spring Police Station.

[23] On 15 September 2001, Detective Corporal Josephs received further information that caused him to go to Saint Catherine South Police Headquarters in Port, Saint Catherine. There he saw Allan Beecher otherwise called "Twelve", who was eventually taken to Constant Spring Police Station and charged for the offence.

The Case for Trevor Whyte

[24] Mr Whyte gave an unsworn statement from the dock. He explained that he was not anywhere in Kingston on 31 August. Further he said that "from the week after from the 31st" he was in Clarendon on a construction site. That was where four police officers found him on 4 September. He was taken to the May Pen Police Station where other officers came and upon ascertaining his name asked him if he "kill the man and run whey to Clarendon". He told them "me nuh kill no one".

[25] Mr Whyte indicated that he wished to have the contractor with whom he was working called as a witness. However, efforts made to locate the witness proved unsuccessful and the case for Mr Whyte was closed.

The Case for Nigel Calder

[26] Mr Calder gave an unsworn statement from the dock. He said that when Mr Thompson claimed to have seen him at 100 Lane with a gun in his hand, he was not speaking the truth as he was in Clarendon at a work site in Carty Hill. He also explained that he was at the same work site when the police came. They enquired of him where he lived and he advised them he lived at 100 Red Hills Road, Kingston 19. He was told that he was to be taken to May Pen Station so they could "check [him] out". When at the station, he was charged for murder. Mr Calder's position, ultimately, was that he knew "nothing about no murder".

The Case for Allan Beecher

[27] Mr Beecher also gave an unsworn statement from the dock. He was in his bed on the night when the incident happened. The next morning he had ridden on his bicycle to Portmore and upon his return to the Hundred Lane area he heard that "two persons died in the lane". He explained further that when he "guh in the lane dem tell me say two persons dead and I say, which two persons and dem seh a female and a man dead".

[28] On the following Wednesday morning, he was riding along Mandela Highway when he was stopped by some police officers. He was held "as suspect" and taken to "Hundred Station". He saw two officers from Constant Spring who took him to that station where he was charged for murder. He told them that he knew "nothing about no murder".

The Issue of Identification

Submissions

[29] Miss Anderson submitted that the critical issue in the trial was the recognition of the appellants by a single witness Mr Linval Thompson. She contended that his ability to recognise the appellants under the circumstances which the jury may well have found to be (1) traumatic and (2) fleeting, under artificial light for less than a minute, in fear and with several men in the yard was not "adequately put to the jury in terms required by law".

[30] She submitted that the learned trial judge had a responsibility to do more than simply repeat the evidence but also to do an assessment and analysis to assist the jury. She complained that the directions given incorrectly placed heavy and undue reliance on the fact of prior knowledge and it was not made sufficiently clear that the fact that the men were known before did not necessarily mean that they were the men seen in the yard.

[31] Counsel also submitted that there was a disjointed analysis of the evidence with the warning concerning the factors involved in identification evidence not being given in a continuous and coherent manner. Further, she contended that the treatment of the identification of the appellants was done in a "wholesale" manner when the correct approach should have been to isolate the evidence as it applied to each appellant.

[32] Ultimately, she submitted, the inadequacy of the learned trial judge's direction on identification was compounded by the earlier directions that the verdicts of the jury must be consistent.

[33] For the Crown, Mrs Ebanks-Miller submitted that the learned trial judge directed the jury fully and accurately on the issue of identification. She noted that this issue was in fact addressed at different intervals of the summation, and towards the end of the summation the learned trial judge indicated that the crux of the prosecution's case was identification. Further, she submitted the learned trial judge showed an appreciation of the **Turnbull** principles and warned the jury of the dangers of convicting on the visual identification even in recognition cases.

[34] Mr Fletcher made submissions in relation to one aspect of the identification evidence. He submitted that there are two critical pieces of evidence which affect the cogency of the identification of all the appellants which was not dealt with at all by the learned trial judge. He noted that the eye witness had testified that he had recognised only four of the men who entered the premises that night. He further noted that the investigating officer had said that the witness had during an interview given him about eight names.

[35] Counsel submitted that this contradiction, even with the explanation, was a stark weakness in the identification evidence and it was both significant and critical. It required the learned trial judge to highlight the fact that if the jury found the investigating officer to be a witness of truth when he said he got eight names and they

believed that the witness Linval Thompson did give eight names even though he said he did not recognise four of the men then his credibility as far as the identification of any of the men may be substantially impugned. The submission of Mr Fletcher was that since there was no comment on the possible impact this conflict would have on the credibility of the sole eyewitness, the jury would not have been able to reconcile this diverse evidence.

[36] Mrs Ebanks-Miller highlighted sections of the learned trial judge's summation which dealt with the issue and in so doing submitted that he had outlined to them the opportunities which the witness had to observe the appellants. She concluded her submission on this issue by urging that the identification evidence led by the Crown was sufficient to found a conviction, particularly, since the identification rested on recognition and though made in what may be classified as difficult circumstances, which the learned trial judge outlined in great detail, the circumstances surrounding the recognition did not amount to a fleeting glance scenario.

[37] Mrs Ebanks-Miller referred to the Privy Council decision in **Mills and Others v R** (1995) 46 WIR 240 which she noted had said that the **Turnbull** principles do not impose a fixed formula for adoption in every case, and it will suffice if the judge's directions comply with the "sense and spirit" of the guidelines.

Discussion and Analysis

[38] It is indisputable that this was a trial where the case against each appellant depended substantially on the correctness of the identification of each made by the

single eyewitness. It is now well settled that there is a special need for caution when the issue in a trial turns on evidence of visual identification. The principles governing the duty of the trial judge in such cases have been laid down in the iconic case of **R v Turnbull** [1976] 3 All ER 549 by Lord Widgery CJ. The passages which outline what is now established as being the **Turnbull** guidelines are found at pages 551 to 554.

[39] There is no need to rehearse the entire guidelines here but for the purposes of this discussion, it is considered necessary to note the following found at pages 551 to 552:

> "First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms, the judge need not use any particular form of words.
>
> Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made."

[40] It is significant that even within the guidelines comes the proviso that no particular form of words is required so long as the requite warning is done in clear terms. In **Mills and Others v R**, Lord Steyn had this to say on the matter at page 246:

> "**Turnbull** is not a statute. It does not require an incantation of a formula. The judge need not cast his directions on identification in a set form of words. On the contrary, a judge, must be accorded a broad discretion to express himself in his own way when he directs a jury on identification. All that is required of him is that he should comply with the sense and spirit of the guidance in **Turnbull** …."

[41] In the instant case, compliance with the sense and spirit of the guidance in **Turnbull** required the learned trial judge to explain clearly to the jury, in his own way, the need for caution in approaching the evidence of identification. This explanation would include telling them the need for such a warning with some reference being made to the possibility that a mistaken witness can be a convincing one. He was also required to examine, with the jury, the circumstances in which the identification of each of the appellants by the witness came to be made. This being a case where the identification involved recognition, the learned trial judge was also obliged to remind the jury that mistakes in recognition, even of relatives and close friends are sometimes made.

[42] From early in his summation, the learned trial judge, when alerting the jury to their responsibility to consider the evidence in respect of each appellant, in what would be considered his opening remarks, had this comment:

> "Now when you approach the evidence in respect of each accused, Mr Beecher, Mr Calder, Mr Whyte, I am coming from my right, and Mr Creary, before you can return a verdict adverse to any of them, you must be convinced so that you feel sure that each of them participated in this gruesome incident that took place."

[43] He shortly thereafter quite simply, in his own way, pointed out to the jury what the most important issue in the case was, he said:

> "The thing in this case is the identification"

[44] Also in those opening remarks, the learned trial judge alerted the jury of the need to consider the evidence of the identification of each appellant carefully when he stated:-

> "What the Crown is saying is this that they, if you so find, you know, for when we go through the evidence of Mr Thompson, if you find that you can rely on his evidence when he said he knows all of them for a period of a year and more, that is his evidence, so you will have to analyse now the details of his evidence of how at three o'clock in the morning he was able to see these men or any of them."

[45] Whilst reviewing the evidence of the sole eye witness, the learned trial judge brought to the attention of the jury, issues relating to the identification evidence. In relation to the prior knowledge of the appellants he said:

> "And I think counsel for the defendants are not saying that Thompson don't know them. You know, what they are saying is that the conditions as existed at a Hundred Lane on the morning of the 31st August, 2001, were inadequate to allow him to recognise the persons he knew."

[46] In bringing to their attention the issue of the lighting, the learned trial judge had this to say:

> "Now, the witness, Madam Foreman and members of the jury, is telling you that what assisted him at that time of the morning to recognise these persons, all four of them, was this one hundred watt bulb, one to the front of the premises and the other to the side of the store room. Now, I don't know what size bulb you might use but he is telling you and some of you may have used one hundred watt bulb and may have had personal experience of the brightness or dullness of a hundred watt bulb, but Mr Thompson said that was how he was able to recognise these men and that is a matter for you."

[47] The learned trial judge reviewed the evidence of the eyewitness in a fairly comprehensive and adequate manner and assisted the jury in identifying, applying and assessing the evidence relating to the major criteria in the identification of each appellant.

[48] After reviewing the evidence, the learned trial judge made reference to the ultimate duty of the jury when assessing the evidence of Mr Thompson and stated:

> "Well, the prosecution's case depends solely and I say solely, on the evidence of Mr Thompson. If you can't believe Mr Thompson or if you are left in a state where you are not sure whether you can believe him you must acquit all of these men because no other witness can help you as to who came in and who was there and whether the persons could be seen from the description he gave."

[49] The learned trial judge then summarized the essential factors for the jury's consideration. He posited questions that he felt should guide them in their deliberations and briefly referred to the possible answers from the evidence. Among the questions were:

> "Now some of the things that you will have to look at is one, did Mr Thompson know these men before ?...
>
> Then you ask yourselves, at what distance he was when he said he saw them?...
>
> Then you will ask yourselves the question what was the lighting like? ...
>
> How often would he have seen each of these persons?
>
> Was his vision impaired in anyway?...
>
> And then now you will have to ask yourselves a crucial question, what distance would this light shine?"

[50] The learned trial judge then proceeded to give the jury general directions on the dangers of mistaken identification in recognition cases. He said:

> "Now, we in these courts have over time had experiences that people, honest people, make mistakes of people who are known to them and counsel said some of you may have experienced that. Mr Thompson said he has never experienced that yet. Counsel said he is still young but as times goes on he may yet experience it. And these mistakes, that is where the person is wrongly identified, has led to serious consequences. So this case, although it is a case of recognition because he knew them, the same principle that applies in identifying the person applies in this case too; because you have a set of circumstances: Distance, the lighting, whether there was any impediment between himself and Dinks, and the length of time he saw the person. All of those have to be considered before you can decide whether the circumstances as they existed on the morning of 31st of August were sufficient to enable Mr Thompson to, firstly, recognise one of these men as Thunder Cat, one as Nigel or Stepper, and the other as Twelve."

[51] Shortly thereafter, the learned trial judge concluded his review of the evidence

of Mr Thompson in the following terms:

> "...I must tell you that because of the risk that are(sic) embodied in wrong identification or recognition, whichever way you put it, you have to be cautious in examining the evidence of Mr Thompson, because a mistaken witness can be very convincing but it doesn't make it any less a mistake because he is convincing you know. And people with honest belief do make honest mistakes. But whether the mistake is a wrongful one or an honest mistake, I give you a special warning that you must approach the evidence with great caution...
>
> .... so you have to identify the circumstances, you have to identify carefully the circumstances under which Mr Thompson explained to you, and it is for you to determine whether he had sufficient time and lighting, and distance and the rest of it to be able to see and say yes, that is Mr So and So. That is so, that is Mr So and So."

[52] Whilst it may be true to say the learned trial judge did not give the requisite directions in a conventional manner, these directions that were given did not fall so short of what is required so as to amount to misdirection or to result in the appellants being denied a fair trial. There is no special incantation of words that a trial judge is required to use but the jury must be clearly alerted to the issues which arise in every case and advised as to the need for caution. In the present case the learned trial judge sufficiently tailored his summation to meet the particular circumstances of the case.

[53] Another complaint about the learned trial judge's treatment of the identification issue is that the inadequacies are compounded by earlier directions that the verdicts of the jury must be consistent. The following is the direction to which this complaint is addressed:

> "You are then asked to say whether the men who came in and were firing were responsible for the death of Miss Icylin and Mr Milton. So, if you find that one or all of them are not guilty of the death of Miss Icylin you must find, as a matter of law, that all four of them are not guilty of Milton's death too because the Crown is saying that the group of men who went in participated in the killing of the two. So too, if you find that Mr Beecher or Mr Calder or any of the other two are guilty of the killing of Miss Icylin, as a matter of law, on consistency, you must find that they too are guilty of killing the next person. They were in the same room and it is the same incident that took place that caused the death of the two of them."

[54] It is apparent that the consistency that the learned trial judge was urging related to the counts of the indictment rather than the appellants. He, correctly, was referring to the fact that whoever entered the premises that early morning and fired into the rooms would have been responsible for the death of both persons who had died as a result. It is therefore not fair to say the learned trial judge was urging that there be consistency in the sense that if one appellant was found guilty then all should be so found.

[55] In any event, to remove any possible doubt, immediately before the jury retired to deliberate on their decision, the learned trial judge gave this direction:

> "You must be consistent in your verdict. It does not mean that if one is not guilty it means that all the rest are not guilty because you have to try each case as if one man was on trial. Consistency should come with the return of the verdict. If you say that one or any of the four is not guilty of the death of Icylin Vaughn, then you would be bound to say that he is not guilty of the death of Mr Gray too. It is one activity although it was two persons who were killed."

[56] This direction made it sufficiently clear that the consistency was regarding the counts on the indictment and cannot be faulted.

[57] It is clear that throughout the summation the learned trial judge reminded the jury of the importance of the evidence of Mr Thompson. He encouraged them, in his own way, to scrutinize the evidence with care and to examine it to see if they could believe the evidence that Mr Thompson could and did correctly identify the appellants as being among the men who invaded the yard that night. The question then is whether the learned trial judge sufficiently brought to the attention of the jury the matters relevant to the credibility of the sole witness and the possibility of him making an honest mistake in his recognition of the appellants. In the circumstances it is clear that he did. The complaints relating to the issue of identification are without merit.

Reasonable inference, circumstantial evidence, "partial circumstantial evidence"

Submissions

[58] Mrs Feurtardo-Richards made the submissions on behalf of the appellants in relation to these issues. The main thrust of her complaint was that the learned trial judge failed to give the jury any directions on the principles of reasonable inference and circumstantial evidence, and gave a confusing misdirection on partial circumstantial evidence.

[59] It was her submission, that the learned trial judge gave an explanation of "proved facts", which was incorrect in law as he failed to direct the jury concerning

drawing reasonable inference from proven facts. She submitted that the concept of proved facts must be dealt with in directions dealing with reasonable inferences.

[60] Mrs Feurtardo-Richards submitted that the learned trial judge also erred in law when he directed the jury that the Crown's case was partially circumstantial. She contended that the learned trial judge ought to have given a comprehensive direction on circumstantial evidence and the lack thereof, makes the conviction unsafe.

[61] It was also counsel's submission, that the law is clear that where the prosecution's case is based on circumstantial evidence, as it does in this case, the learned trial judge must give a further direction that the jury must not convict unless they are satisfied that the facts proved are not only consistent with the guilt of the accused but also such as to be inconsistent with any other reasonable conclusion. She referred to **McGreevy v DPP** 1 [1973] All ER 503 in support of this submission.

[62] In relation to the appellant Allan Beecher in particular, Mrs Feurtardo-Richards argued that the evidence of the eye witness, at its highest, had this appellant in the yard with other persons with weapons in their hands. Mr Beecher was seen holding something in his hand pointing it down and moving around and the witness stated that he could not clearly see what Mr Beecher had in his hand. Counsel submitted that the question to be asked and answered by the jury, with the assistance of the learned trial judge, was - "using the principle of circumstantial evidence, could it be said that when the evidence was taken together, they lead to one inevitable conclusion - of the guilt of

the appellant". She opined that this was a critical question in light of the evidence that the witness did not see Mr Beecher go into the house or fire anything.

[63] Mrs Feurtardo-Richards' conclusion on this issue was that the summation was inadequate and failed to be clear and precise and in a manner for the jury to understand. She submitted that a jury properly directed could not come to the conclusion that all the circumstances relied on pointed in one direction and one direction only and that direction was the guilt of the appellants. She contended, that as is required by law, if the circumstantial evidence falls short of the requisite standard, if it leaves gaps, then it is of no use at all. Consequently her submissions were that this lack of proper direction resulted in a miscarriage of justice which cannot be cured by the proviso.

[64] In response, Mrs Ebanks-Miller agreed that **McGreevy v DPP** does provide guidance as to the proper directions to a jury on the subject of circumstantial evidence. She submitted that the case resolved the question of whether any special directions are now necessary in such cases, by holding that such evidence would be amply covered by the duty of the trial judge to make clear in his summing up to the jury, in terms which are adequate to cover the particular features of the case, that they must not convict unless they are satisfied beyond a reasonable doubt of the guilt of the accused.

[65] Mrs Ebanks-Miller noted that this position has been confirmed by this court in **Melody Baugh-Pellinen v R** [2011] JMCA Crim 26, **Loretta Brissett v R** SCCA No 69/2002, judgment delivered 20 December 2004; **Wayne Ricketts v R** SCCA No

61/2006, judgment delivered 3 October 2008; and **Annette Livingston, Ramon Drysdale and Ashley Ricketts** SCCA Nos 77, 81 and 93/2003, judgment delivered 31 July 2006.

[66] Counsel acknowledges that the learned trial judge did, in fact, make reference to the non-existent legal theory of "partial circumstantial evidence". She submitted that the context of the usage of the term, however, indicated that the learned trial judge was merely referring to the fact that part of the Crown's case placed reliance on circumstantial evidence, which was in fact correct. She submitted that the learned trial judge was clear in his direction as to the circumstances of the case and directed the jury that it was for them to draw whatever inferences they thought fit to be drawn from those circumstances. She contended that the jury could at no point have misunderstood the nature of the circumstantial evidence they were required to examine in order to determine what facts were proved and the inferences they could draw from such facts. Counsel referred to **Dalton Reid v R** [2014] JMCA Crim 35 in support of this submission.

[67] In response to the authorities relied on by Mrs Ebanks-Miller, Mr Fletcher made a further submission on this issue and submitted that the idea of "partial circumstantial evidence" poisoned the rest of the case and could be viewed as the source of all the problems.

Discussion and Analysis

[68] In **Melody Baugh-Pellinen v R**, this court did consider the proper directions to

the jury on the subject of circumstantial evidence. It was recognised that **McGreevy v DPP** had resolved the question as to whether any special directions were necessary in such case. Morrison JA (as he then was) considered the comments of Lord Morris of Borth-Y-Gest, delivering the leading judgment of a unanimous House of Lords, at page 510. Morrison JA, at paragraph [40] of **Melody Baugh-Pellinen v R**, concluded:

> "There is therefore no rule requiring a special direction in cases in which the prosecution places reliance either wholly or in part on circumstantial evidence."

[69] In the instant case the learned trial judge in outlining to the jury their duty stated:

> "It is like you are doing four cases in one because you have to be satisfied that each one participated in the crime. And let me hasten to say your verdicts- you must be consistent, and I say this part of the Crown's case is based on circumstantial evidence, part of the Crown's case, and I will pass over it and I will come back to it because there is no eyewitness. The only person that was on the building who came here, that was Mr Thompson and he said he saw none of those men fired a shot that killed any of the two persons.
>
> So, the circumstances, if you believe his evidence, would be like this: men including these four entered the premises, some of them had firearms, guns we usually call them, there was firing, there was kicking off of doors, he went to a store room to the back of his bedroom and after some time he came out and he went into the bedroom where his mother and stepfather were, they were dead...
>
> ... You are then asked to say whether the men who came in and were firing were responsible for the death of Miss Icylin and Mr Milton."

[70] The learned trial judge then went on shortly thereafter to indicate to the jury the burden that the Crown had of satisfying them so they feel sure that each of the appellant participated in this offence. He subsequently reminded them:

> "...it is open to you to draw inferences from the circumstances surrounding; from the kicking off of the gate to the entering of the premises by men, the possession of firearms, the kicking off of doors, the finding of two persons dead in the room from gunshot injuries.
>
> Now the Crown cannot say that all of the men fired guns. The Crown cannot say that any of them fired guns."

[71] It is also useful to note that from earlier in his summation, the learned trial judge did tell the jury that before they could return a verdict adverse to any of the appellants, they should be convinced so that they feel sure that each of them participated in this offence. He also instructed them that they were the sole judges of the facts, and as such they alone would decide what evidence they accepted as facts proven by the prosecution.

[72] It is correct that the learned trial judge did not give the jury any further directions as to what amounts to reasonable inference. He however did tell them what the critical issues were. He told them where the burden of proof lay and made it sufficiently clear that in order for the Crown to succeed they must prove to the requisite standard that each of the appellant participated in the incident at Hundred Lane that night. Indeed he clearly warned the jury of the need to be satisfied so that they feel

sure that Mr Thompson was able to, in the circumstances, make out who entered the yard that night.

[73] It is noted that it was as he was releasing the jury for its deliberations that the learned trial judge made the following final comments:

> "I have told you that the Crown's case is partially circumstantial and I pointed out to you the circumstances which would relate to that time that the witness said men entered the yard, some of the men had guns. He did not see anyone fire a gun, he did not see anyone kill any of the two persons, but you are asked to say that in the circumstances that took place, men on premises, kick down gate, fire gun, kick off door, fire shots all about the place, that the men who entered, if you believe men entered, guns were fired, persons died from gunshots, so whoever you find that entered the premises, were the persons whose guns killed the two persons.
>
> The crux of the prosecution's case rests on the identification of each accused."

[74] Just as the learned trial judge completed his summation, the following exchange took place between him and the prosecutor.

> "**Judge:** Crown Counsel what have I left out?
>
> **Mr Mahoney:** Two things my Lord. His Lordship in putting the case to the jury, said that the case is partially circumstantial.
>
> **Judge:** I said the crux of the prosecution's case, the main part of the prosecution's case is identification.
>
> **Mr Mahoney:** That is so My Lord, wonder your

> Lordship would mention circumstantial evidence vis-a-vis reasonable inference. You might want to mention to the jury what is meant by partially circumstantial."

[75] The learned trial judge subsequently said the following:

> "Madam foreman and members of the jury, from earlier this morning I said that the case is partially circumstantial because the prosecution has not brought any witness who said I saw, Mr White, Mr Calder, Mr Beecher or the other accused man, Mr Creary fired any gun, but you have evidence; one, men with guns entered the premises; two, guns were fired; three, two persons died as a result of gunshot injury. So from those, if you accept those as findings of fact, what conclusion would you arrive at as to who caused the death of the two persons who died by gunshots."

[76] The submission that the directions on circumstantial evidence were not clear is not without some merit. It is also apparent that the learned trial judge did not give the jury sufficient directions regarding reasonable inferences. Rather, he presented to the jury, in an accurate manner, the circumstances from which they had to determine if the persons who they found entered the yard must have been ultimately responsible for the death of the persons named in the indictment.

[77] In relation to the complaint regarding the evidence about Mr Beecher, it is true that the learned trial judge did not deal specifically with the evidence of the witness that he could not see clearly what Mr Beecher held in his hand. He did however make it sufficiently clear that the witness had not in any event seen anyone fire a gun and it was for the jury to be satisfied that all of the men who entered the premises were there

as participants in the acts which culminated in the death of the deceased persons. Thus the complaint was adequately addressed in the way that the learned trial judge dealt with the issue of circumstantial evidence together with that of common design. It is to be noted that there were no complaints about the treatment of the latter issue.

[78] In considering whether this treatment by the learned trial judge was sufficient it is useful to bear in mind what this court has said about the format of summations. In **R v Yvonne Johns & Fredrick McIntosh** SCCA Nos 102 & 103/1983, judgment delivered 8, June 1984, Carey JA said:

> "This court has made it abundantly clear in many cases hitherto, that it will not prescribe formulae for summations, the sanction for which will be the allowing of appeals. A trial judge should be free to tailor his summing up, having regard to his assessment of the jury who are called upon to determine guilt or innocence, the nature or complexity of the facts, and the law which is applicable to those facts. So long as directions are clear, accurate in point of law and adequate to enable a jury to understand the issues which fall to be considered, and the law they are called upon to apply to the facts before them, then a trial judge will have ably discharged his function and responsibility as such in relation to a criminal trial in this country. This court will not interfere in those circumstances."

[79] In the instant case, the learned trial judge correctly identified the significant issue of the case to be that of identification. He also correctly recognised that the prosecution's case rested partly on the issue of circumstantial evidence. His usage of the words "partially circumstantial" ought not to be viewed as seeking to use a non-existent legal-term. It was, at best, his own way of attempting to make the jury

appreciate the issues which arose. It is also clear that the learned trial judge correctly identified the circumstances from which the jury had to determine if the persons who entered the yard were responsible for the murders. He also, most importantly, made it clear that the jury had to be satisfied so that they felt sure before they could convict any of the accused for the offence for which they had been charged. In the circumstances, the learned trial judge adequately discharged his function relating to circumstantial evidence in a manner that ought not to be interfered with.

Alibi

[80] Mrs Feurtardo-Richards submitted that the learned trial judge erred when he failed to properly direct the jury on the law relating to alibi. She noted that the learned trial judge only made mention that the appellants said they were not there. The term "alibi" was never mentioned throughout the directions until after the prosecutor had pointed out the omission to him. She submitted that the directions given thereafter were still inadequate.

[81] Counsel further submitted that the law states that when the defence is an alibi, the jury should be directed that they cannot convict unless they definitely reject the alibi. She referred to **R v Finch** (1916) 12 Cr App Rep 77 in support of this submission.

[82] She acknowledged that the learned trial judge did tell the jury that the appellants did not assume any burden of proving their alibi, but submitted that he had failed to adhere to the full requirement of the law concerning the defence of alibi. She

submitted that this failure resulted in an unfair trial for the appellants and should result in the conviction being quashed.

[83] Mrs Ebanks-Miller conceded that the learned trial judge did not specifically use the term alibi. She however submitted that the learned trial judge, in a most balanced way, put forward the case for each defendant. She pointed out that the learned trial judge gave repeated directions on how to treat the unsworn statement of each accused and submitted that there was in fact no requirement for him to give direction on how the jury should treat the rejection of an alibi. She ultimately submitted that the failure to give specific directions on an alibi defence is not a non-direction that is necessarily fatal to the conviction. In support of these submissions Mrs Ebanks-Miller referred to **Mills and Others v R** and a decision from this court, **O'Neil Roberts and Christopher Wiltshire v R** SCCA Nos 37 and 38/2000, judgment delivered 15 November 2001.

Discussion and Analysis

[84] There is no dispute that in this case the learned trial judge failed to give any special direction referencing the word "alibi" to the jury before the prosecutor brought this fact to his attention. In presenting the case for each appellant, he practically repeated verbatim, his notes of what they had said.

[85] After rehearsing what each appellant had said, the learned trial judge gave the following direction:

> "So Madam Foreman and members of the Jury, all four accused, each in his unsworn statement, has said they were not in the premises of One Hundred Lane. Indeed, the ones called Whyte and Calder said they were in Clarendon at the time. Beecher said he was in his bed sleeping... .
>
> ...so if any of them or all of them convinced you and you believe what they said, you would be duty bound to acquit all of them. Even if you don't believe them you cannot convict, you have to be satisfied, so that you feel sure that Mr Thompson-because he is the key person in the case....
>
> ...you are so satisfied so that you feel sure that Mr Thompson was able to, in the circumstances that day, able to make out, what you mean by make out, see properly, those he said he knows, because there is no doubt, you may say, that they know each other, the question is, whether or not in the circumstances, he was able to make them out."

[86] After the prosecution had pointed out that he had not used the word alibi, the learned trial judge said:

> "The question of alibi, maybe I didn't use that word, I told you that the accused men need not tell where they were, there is no duty on them to tell you. They chose to tell you, stay in the dock and tell you what they said to you. They told you where they were, all of them. Two in Clarendon and two were in bed during the night. But the prosecution is saying that [sic] they were in the premises of Mr Linval Thompson.
>
> Now, it is for the prosecution to convince you that they were on Mr Linval Thompson's premises because if you believe them or have any reasonable doubt that they could be where they said they were, then the prosecution would have failed."

[87] The Privy Council in **Mills and Others v R** considered the question of whether a judge was required to give a direction on the impact of the rejection of an alibi where

the appellants' alibi had been put forward in unsworn statements from the dock. The Board held that no such direction was necessary and that such cases were governed by the guidelines given by the Board 20 years earlier in **DPP v Leary Walker** (1974) 21 WIR 406. In that earlier decision the Board had stated that what was required was for the jury to be directed that they should give the unsworn statement only such weight as they think it deserves.

[88] In the decision from this court of **Oniel Roberts and Christopher Wiltshire v R,** to which Mrs Ebanks-Miller referred, Smith JA (Ag), as he then was, in delivering the decision of the court, said:

> "We accordingly hold that a trial judge is only required to give a direction of alibi where there is evidence that the defendant was at some other particular place or area at the material time. Evidence which merely states that he was not at the place where the offence was committed does not raise the defence of alibi."

[89] In another decision from this court **R v Dean Nelson**, SCCA No 138/2000, delivered 3 April 2003, Forte P, in delivering the judgment of the court said:

> "In dealing with the defence of alibi, the trial judge has a duty to inform the jury that the burden of proving that the accused was present committing the crime rests on the prosecution, that the accused has no burden to prove that he was elsewhere, that the fact that they did not believe the alibi of the accused, was not by itself a sufficient basis for conviction, as in keeping with the burden of proof, they will have to examine the prosecution's case to determine whether it has proven that the accused was present committing the crime."

[90] The learned trial judge in the instant case had therefore been adequately compliant with the guidance given by this court. The directions given were sufficient for the purposes of this case. It cannot be concluded that the failure to use the term alibi or to give directions on the impact of rejecting the alibi resulted in unfairness to the appellants such that this complaint should succeed.

Unsworn Statement

[91] Mr Fletcher advanced the submissions in relation to this issue. The crux of the complaint was that the learned trial judge failed to direct the jury on the manner in which they should treat the unsworn statement of the appellants, Whyte and Beecher, and misdirected the jury on how they should treat the unsworn statement of Calder.

[92] Mr Fletcher submitted that the learned trial judge erred in law when he began his summation by directing the jury that they should "approach their duty as jurors solely on the evidence which comes from the witness box" and then went subsequently to direct them that each appellant had made an unsworn statement and that those statements were not evidence. Counsel's further submission was that the initial direction coming as it did at the beginning of the learned trial judge's summation, amounted to a clear injunction to the jury that what the appellants said ought not to be given any significant weight in their consideration.

[93] Mr Fletcher contented that the direction given was a very potent, if inadvertent, usurpation of the jury's right to be left to decide for themselves whether they could use the statement in deciding the case. He submitted that the "opening advice" was not

correctable by the learned trial judge's further direction to the jury, that they, in thinking about the statements, may attach such weight as they saw fit. He submitted further that in effect two different directions were given which must have created confusion in the minds of the jury as to how to approach the unsworn statements.

[94] In addition, Mr Fletcher submitted that when dealing specifically with the unsworn statement of Mr Calder further in the summation, the learned trial judge merely reiterated what the appellant had said and made no comment at all as to weight. Counsel submitted that from the outset of his guidance to the jury, the learned trial judge fatally devalued what the appellants had said and ultimately they were denied a fair consideration of their accounts. Counsel concluded that the inevitable effect of the lack of, any or any proper direction is that the jury was induced to dismiss the unsworn statements as having no importance in the case.

[95] Counsel for the Crown, in reply to these submissions, stated that the learned trial judge's direction on the unsworn statements was adequate in keeping with the authorities. She submitted that the direction given must be assessed within the context of the directions given on the standard and burden of proof. She accepted that the jury need not necessarily have been directed that the unsworn statement was not evidence but the invitation was extended to them to attach whatever weight they thought necessary to the statements and they were properly instructed to look back at the prosecution's case which would have required that they consider the defence of each appellant. Mrs Ebanks-Miller referred to the decision from this court in **Alvin Dennison v R** [2014] JMCA Crim 7.

Discussion and Analysis

[96] The Privy Council in **DPP v Leary Walker**, in response to a request from the court, gave guidance on the objective evidential value of an unsworn statement by an accused. In **Alvin Dennison v R**, Morrison JA (as he then was) conducted a thorough review and useful discussion on the major authorities that deal with the issue of the unsworn statement and its value. He concluded at paragraph [49]:

> "In a variety of circumstances, over a span of many years, the guidance provided by the Board in **DPP v Walker**, which also reflected, as **R v Frost & Hale** confirms, the English position up to the time of the abolition of the unsworn statement, has been a constant through all the cases. It continues to provide authoritative guidance to trial judges for the direction of the jury in cases in which the defendant, in preference to remaining silent or giving evidence from the witness box, exercises his right to make an unsworn statement. It is unhelpful and unnecessary for the jury to be told that the unsworn statement is not evidence. While the judge is fully entitled to remind the jury that the defendant's unsworn statement has not been tested by cross-examination, the jury must always be told that it is exclusively for them to make up their minds whether the unsworn statement has value and if so, what weight should be attached to it. Further, in considering whether the case for the prosecution has satisfied them of the defendant's guilt beyond reasonable doubt, and in considering their verdict, they should bear the unsworn statement in mind, again giving it such weight as they think it deserves. While the actual language used to convey the directions to the jury is a matter of choice for the judge, it will always be helpful to keep in mind that, subject to the need to tailor the directions to the facts of the individual case, there is no particular merit in gratuitous inventiveness in what is a well settled area of the law."

[97] In the instant case, the learned trial judge in his opening remarks in his summation to the jury, did embark on the proper exercise of alerting them as to their role in the case. It was in urging them not to consider what they may have heard about the case in the media that he instructed them that they were to approach their duty "solely on the evidence which comes from the witness box". It was after saying those words that he went on to make statements which include those which now form the basis of Mr Fletcher's complaint.

[98] The learned trial judge said:

> "And when I speak of evidence, you will remember that each accused when called upon made an unsworn statement. Now an unsworn statement is not evidence but let me hasten to tell you that none of them had any duty to give evidence or to say anything. They exercised a right that is afforded them in our jurisprudence and they made an unsworn statement. My only comment will be that you Madam Foreman and members of the jury, will think of what they say, and attach to it what weight, what importance you think it has in the case.
>
> Now, it is the prosecution who has brought these four men here, so it is the prosecution that has the burden or the duty to convince you on the evidence that each is guilty as charged."

[99] The learned trial judge, having told the jury that they were to consider the evidence that came from the witness box, quite appropriately recognised the need to tell them their duty as it related to what the appellants had said. In the circumstances, this explanation of the unsworn statements when juxtaposed with his direction as to the

duty of the prosecution can be viewed as sufficiently addressing any possible unfairness to the appellants which may have arisen.

[100] In continuing his opening remarks, the learned trial judge had this to say:

> "So then, the accused men, I touch on them already earlier, they said they were not there, and they had no duty to tell you where they were. Because in our law, an accused person, unless he goes into the witness box and subjects himself to cross-examination, he has no duty to tell us anything. So what they did when counsel said on behalf of each, they stayed in the dock and made an unsworn statement. That is one of his rights. He could stay there and say, I am saying nothing. Because you see, it is the Crown that must prove its case. The issue is then, was Linval Thompson able to identify any of these men charged with murder of Icylin Vaughn and Milton Gray?"

[101] After reviewing the Crown's case, before commencing his review of the appellants' defence, the learned trial judge had this to say:

> "I have already said that none of the accused need give any evidence. They could have stood there and say nothing. Each chose to give what is called an unsworn statement. An unsworn statement is not evidence but you are required to assess it and give it what weight you think it deserve."

[102] As has already been noted, the learned trial judge then recounted almost verbatim what each appellant had said. He commenced with and gave adequate directions as it concerned the statement of Mr Creary, the defendant for whom the jury failed to arrive at a unanimous verdict. These directions were given immediately before the reviewing of the statement of Mr White. The learned trial judge failed to give any

directions after doing this review. He then reviewed the statement of Mr Calder and then gave adequate directions on the duty of the prosecution and the fact that they could not convict Mr Calder if they rejected his statement or found he was lying. After reviewing the statement of Mr Beecher, the learned trial judge gave further directions in relation to all four appellants. His directions at this time, as set out in paragraph [83] above, dealt succinctly with the issues raised in the defence of each and sufficiently directed the jury on how to deal with them.

[103] The extracts from the summing up demonstrate that the learned trial judge made it sufficiently clear that it was a matter for the jury to determine what weight to give to the unsworn statements. He also went further to invite the jury to acquit the appellants if they were convinced by them that they were not on the premises of Mr Linval Thompson that morning. He also kept reminding them that it was for the prosecution to satisfy them so they felt sure as to the guilt of each accused. In the totality of the directions given, it is not fair to say that the learned trial judge substituted his own view of the weight to be given to the appellants' unsworn statements. Further, he did not usurp their role as being the arbiters of facts and their need to be satisfied on the evidence from the prosecution before they could return a verdict adverse to the appellants. In the result, the learned trial judge's treatment of the unsworn statement of each applicant was adequate and has not resulted in any miscarriage of justice.

Inadequacy of Summation

[104] matters which she submitted fell short of what was required of the learned trial judge. There were some which she submitted were not mentioned at all and others she said were not properly explained. The sum total of these failures, she submitted, was that the appellants received an unfair trial.

[105] In response, Mrs Ebanks-Miller submitted that the learned trial judge was a bit incoherent and disjointed, in that, issues were dealt with on more than one occasion and at different parts of the summation. She however submitted that the learned trial judge used simple language which the jurors would have understood. Further, counsel submitted there had been "no 'devastating occurrence' which would warrant interference with the learned trial judge's exercise of his discretion". She concluded that the defence for each appellant had been properly placed before the jury and the directions given were sufficient to address the issues that arose in the case and nothing said amounted to a miscarriage of justice. Mrs Ebanks-Miller relied on **R v Anthony Rose** SCCA No 150/1997, delivered 31 July 1998 and **R v Nelson** [1977] Crim LR 234.

Discussion and Analysis

[106] It is well settled that a summing up need not follow a prescribed format once it is fair to the defence. It is best left to a trial judge's discretion to choose the most appropriate words to make the jury understand that ultimately they must not return a verdict against an accused person unless they are sure of his guilt. It is the overall effect of the summation when looked at in its entirety that is important.

[107] There have been several observations made by various courts on the purpose of a summation. In the House of Lords' decision of **R v Lawrence** [1981] 1 All ER 974 Lord Halsham had this to say at page 977:

> "It has been said before, but obviously requires to be said again. The purpose of a direction to the jury is not best achieved by a disquisition on the jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive of more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides, and a correct statement of the inferences which the jury are entitled to draw from their particular conclusions about the primary facts."

[108] In the instant case, the learned trial judge did give sufficient directions with regard to the duty of the prosecution, judge and jury. He expressly stated that they were the sole judges of the facts; meaning that they alone were to decide what evidence to accept. He told them of his duty as the judge to tell them what the applicable law is and to review the evidence. He also directed them on the duty of the prosecution in so far as it related to the burden and standard of proof and indeed he repeated these directions, in his own way, at points he viewed necessary, which served to reinforce the importance of the directions.

[109] The learned trial judge did however fail to mention some of the issues which have become standard in a summation. However, the question remains as to whether the failures resulted in any unfairness to the defence. He did not mention the need for the jury not to allow themselves to be influenced by feelings of sympathy or prejudice for either the appellants or the witnesses. However, this failure can hardly have resulted in any miscarriage of justice since he did make it clear to them that they were "to return a true verdict according to the evidence and nothing else".

[110] He also did not specifically remind the jury of the verdicts which were open to them on the indictment. In the circumstances of this case the only verdict open to them would have been guilty or not guilty of murder. The directions that were given were sufficient to make that clear to the jury. Further with regard to the complaint that the learned trial judge failed to make any mention of how to treat separate counts, it was properly and accurately explained to the jury that two deaths had occurred from one activity and therefore if they found each or any of the appellants not guilty of killing one deceased they had to as a matter of consistency find them not guilty in relation to the other. There can be no complaint about the appropriateness of the instructions in the circumstances.

[111] The complaint regarding the failure of the learned trial judge to properly explain the ingredients of murder seem to stem from the fact that the learned trial judge did not give the full conventional directions to include whether there were issues of provocation and self-defence. The learned trial judge said the following:

> "Now murder is committed where a person or persons by a deliberate action, unlawfully kills another. And they had the intention at this time either to kill or at least to cause serious bodily harm."

[112] He then went on to consider the question of intention and later pointed out to the jury that there was no dispute that the deceased persons had died as a result of gunshot wounds. He pointed out to them also the circumstances the Crown were saying that men had entered the premises with firearms and started firing.

[113] In the circumstances, the directions given were appropriately tailored to meet the particular facts of this case given that no issue of self-defence or provocation arose in the case. The deficiency in the directions therefore did not result in any unfairness to the appellants.

[114] We are unable to agree with the submission that the learned trial judge did not deal with what could be viewed as prejudicial comments which were made by Mr Thompson in relation to Mr Whyte. The comment had come out while Mr Thompson was being cross-examined by counsel on behalf of Mr Whyte in the following exchange:

> "Q: From your personal knowledge, do you know that he used to live in Clarendon at what stage?
>
> A: I was told by someone that he usually frequent the Clarendon area whenever he does something wrong."

[115] Counsel for Mr Whyte sought to pursue this line but the learned trial judge ruled that he would be telling the jury to ignore what had been said. During the summation the learned trial judge stated:

> "And, then a little later he said something about when he did something wrong, and then I called Counsel's attention to the trend he was taking.
>
> Now, in this case, this case I don't no [sic] what he means by something wrong, and you must not interpret that to mean that he is breaking the law. A lot of us do things wrong without breaking the law, but whatever you might want to think, don't let that bit of evidence affect your reasoning of the evidence in respect of 'Thunder Cat'. It has no part in your determination of guilt or innocence. So, remove that from your minds."

[116] In **Machel Gouldbourne v R** [2010] JMCA Crim 42, this court considered the options for a trial judge when faced with prejudicial evidence being improperly led in the course of the trial. Morrison JA (as he then was) stated at paragraph [22]:

> "The authorities are clear that every case will depend on its own facts that the decision as to the appropriate course to be adopted in a particular case is primarily a matter for the discretion of the trial judge, based on the facts before him. Further, an appellate court will not lightly interfere with the manner in which the judge chooses to exercise that discretion in the face of what is usually a completely unexpected and (hopefully) purely gratuitous eruption from a witness during the course of giving his evidence at the trial. As Sachs LJ put it in the well known case of **R v Weaver** [1967] 1 All ER 277, 280, to which we were referred by Mr Fletcher, the correct course "depends on the nature of what has been admitted....”

[117] In the instant case the learned trial judge cannot be faulted for having prevented counsel from exploring the matter any further such that no other potentially prejudicial evidence came from the witness. In the circumstances, his reserving comment on the matter until the summation and then directing the jury to disregard it was an appropriate manner of dealing with it.

[118] Another complaint regarding the inadequacy of the summation was that the learned trial judge had mentioned the principle of corroboration when it was not required so to do. The context in which the learned trial judge commented on this principle, however, would suggest that it was considered necessary so to do because of something that may have been said during addresses made to the jury. The learned trial judge said:

> "Because you Madam, Foreman and members of the jury, heard quotations from the Bible and about shouldn't convict unless it is so much persons and things, that is not necessary. In Jamaica it is not part of our jurisprudence. It is so in certain types of offence [sic] that you need corroboration. In a charge such as this the law does not require corroboration, and they told you what corroboration, is. I won't go over it because it is not required in this case. All that is necessary for you is to return a verdict that you are either satisfied or not satisfied. Corroboration plays no part in our jurisprudence on a charge of murder."

[119] A trial judge cannot be faulted for seeking to correct any principles of law which may have been improperly placed before the jury in the closing addresses. A closing address should not, in general, contain instructions to the jury on the law applicable in

a matter but if it is done, the final word on the law remains within the province of the trial judge. A careful, fair and balanced summation requires proper directions on the law applicable in a matter and this includes commentary on any inapplicable or incorrect pronouncement on the law that may have been given in any of the closing addresses. As is currently the norm, in the instant case, there is no record of what was said in the closing addresses but it is apparent from the observations of the learned trial judge, something was said. His directions in the circumstances were appropriate.

[120] With regard to the submission that no mention was made in the summation as to how to deal with an expert witness, it is correct that the learned trial judge did in fact fail to do so. This was especially apparent when he was reviewing the evidence of the pathologist. Rather than inviting the jury to determine what they made of the doctor's evidence and how it would assist them in arriving at their decision, the learned trial judge told them the following:

> "You heard the evidence of Dr Seshaiah. And his evidence is that he is a Consultant Pathologist, and he performed the post-mortem on these two bodies, Icylin Vaughn and Milton Gray, on the 13th of September. And Madam Foreman and members of the jury, I will not go through the multiple gunshots injuries that were found on the body. Because it will not help you. What is important from his evidence is that Icylin Vaughn's death was due to multiple gunshot injuries.
>
> ...Likewise Mr. Milton Gray, remember he is the common law husband of Miss Icylin, he too had a number of gunshot wound injuries to his body and she [sic], too, died as a result of multiple gunshot wounds and she [sic] would have died within the same time; and he didn't find any gunshot

> deposits meaning that the muzzle of the gun was a certain distance. All of that is not going to help you."

[121] Evidence from expert witnesses is generally permitted to provide the jury with scientific and other such information as well as give opinions on matters within the witness's expertise. It is necessary however to bear in mind that such evidence may involve pure statements of facts as distinct from the expert's opinion based on those facts. Where the expert gives evidence involving his opinion it would be necessary for the trial judge to give directions reminding the jury that they could reject that opinion as they, as arbiters of facts, could treat the expert in a manner similar to any other witness. Where, however, the evidence of the expert involves statements of facts which are not in dispute, the need to give those directions may be diminished and failure to do so may not be fatal.

[122] In the instant case, there was no dispute that the deceased persons met their death as a result of multiple gunshot wounds. Hence the learned trial judge chose to treat the evidence of the doctor as being supportive of that fact. He repeatedly, in his own way, reminded the jury of what was correctly their ultimate duty in this case; that of determining who it was who entered the premises that morning.

[123] The other expert in this case would have been the photographer and there was no dispute about the pictures he took. Indeed, he was subjected to cross-examination about the pictures but was not challenged as to the fact that they accurately represented the scene upon his arrival. Some photographs were used by the Crown to

have the eye witness more clearly explain his various positions and hence his opportunities for seeing who entered the yard.

[124] In the circumstances, the failure of the learned trial judge to embark on a wholesale dissertation on the treatment of the evidence of the expert witnesses did not result in any miscarriage of justice.

[125] The final complaint touching the issue of the adequacy of the summation was that the learned trial judge failed to bring to the proper attention of the jury some of the material inconsistencies and discrepancies in the prosecution's case. Mrs Feurtardo-Richards in her submissions relative to this issue noted that there were at least three material discrepancies in the evidence of the eye witness. She noted further that the learned trial judge dealt with two of the three. She submitted that this failure was fatal to the appellants' conviction.

[126] Counsel relied on authorities from this court in support of her submission: **R v Fray Deidrick** SCCA No 107/1989, delivered 22 March 1991; **Lloyd Brown v R** SCCA No 119/2004, delivered 12 June 2008; **R v Lenford Clarke** SCCA No 74/2004, delivered on 29 July 2005 and **R v Hugh Allen and Danny Palmer** (1988) 25 JLR 32.

[127] These authorities re-affirmed the settled principle that there is no duty on a trial judge to point out to the jury each and every discrepancy which arises in a case. It is sufficient that the proper directions on how to identify and deal with inconsistencies and discrepancies be given along with the pointing out of some of them to demonstrate how the matter should be resolved.

[128] In the instant case, there is no complaint and there can be none, that the learned trial judge failed to give adequate directions on what amounts to discrepancies and how to treat with them. Further, the fact that it is acknowledged that the learned trial judge did, in fact, deal adequately with two of the three major discrepancies that arose is also acknowledgment that the he did what was required of him. Hence this complaint must also fail.

The Delay

[129] In advancing the submissions relative to this issue, Miss Anderson's main complaint was that the state had failed in its duty to the appellants to afford them a trial within a reasonable time and the inordinate delay between conviction and appeal and between re-sentencing and appeal, constitutes a breach of the appellants' right and the appropriate remedy for the breach is either that the conviction be quashed or a reduction in the sentence imposed.

[130] Miss Anderson pointed to the fact that the appellants, having been convicted on 27 November 2003, spent one year and nearly nine months on death row before the sentencing hearing was held in August of 2005. They have waited over 10 years for their appeals to be scheduled for hearing, their notice of appeal having been filed on 10 December 2003.

[131] She provided this court with a chronology of what has taken place. There were two dates set for hearing when the matter was adjourned due to the absence of the transcript of the "re-sentencing' hearing, which was received in March 2007. Thereafter

two dates saw the matter being adjourned due to the fact that parts of the transcript of the trial proceedings were discovered to be missing. The missing parts were received in June 2013. The time between conviction and the hearing of the appeal was 12 years and three months.

[132] Miss Anderson relied on the Privy Council decision of **Tapper v DPP** [2012] UK PC 26 and this court's decision in **McCordie Morrison v The Chairman of the Parole Board and Others** SCCA No 24/ 2003, judgment delivered 2 March 2004. She submitted that there can be no dispute that this delay was a breach of the appellants' right to a fair hearing within a reasonable time and that following the principles established in **Tapper v DPP** there should be a reduction in their sentences and/or a reduction in the period they serve before being eligible to apply for parole to the minimum of 20 years.

[133] In her response to these submissions, Mrs Ebanks-Miller reminded the court that there are a number of factors which had to be balanced in weighing the delay. She submitted that if the delay was entirely the fault of the appellant he could not be allowed to take advantage of it but conceded that in the instant case the delay could not be shifted from the feet of the state and was a breach. Whilst recognising that the time spent in prison by an appellant awaiting the determination of the appeal should count as part of the term of imprisonment, counsel agreed that the appropriate remedy for this breach was a reduction in the sentence prescribed by the learned trial judge of serving 25 years before being eligible for parole.

Discussion and Analysis

[134] It is readily recognised that for an appellant to have to wait for 12 years before having his appeal heard is totally unacceptable. It also is quite scandalous that the reason for the delay is the unavailability of the entire transcript of the trial proceedings. This court does not have to detain itself with any discussion whether this delay is a breach of the appellants' constitutional rights to a fair trial within a reasonable time.

[135] In **Melanie Tapper v DPP**, the board affirmed that the law as stated in the Attorney General's Reference case [2004] 2 AC and as summarised in **Boolell v The State** [2006] UKPC 46 represents also the law of Jamaica. In delivering the judgment of the board, Lord Carnwath, after rehearsing the summary of the relevant principles as stated in the Attorney General's Reference, said at paragraph [27]:

> "This statement of principle was followed by the Privy Council in **Boolell v the State** [2006] UKPC 46. Lord Carswell, giving the opinion of the Board, derived from it the following propositions, as correctly representing the law of Mauritius:
>
> (i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10 (1) of the Constitution, whether or not the defendant has been prejudiced by the delay.
>
> (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all. (para 32)".

[134] In the Attorney General's Reference case the following principle, relevant to this case was stated:

> "If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgment of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless(a) the hearing was unfair or (b) it was unfair to try the defendant at all it will not be appropriate to quash any conviction."

In the instant case, given the inordinate delay that the appellants have faced waiting for their appeal to be heard and disposed of, the appropriate remedy is for this court to reduce the sentence which was imposed.

Conclusion

[135] In conclusion, we find that the seminal issue in this case was identification. The learned trial judge adequately directed the jury on the issue and sufficiently tailored his summation to direct the jury on the issues of credibility and the possibility of mistaken identification, as it affected the sole eye witness and alibi, as it affected the defence proffered by the appellants in their unsworn statements. In so doing he also appropriately instructed them on the issues as it related to circumstantial evidence and common design. Though admittedly not done in a conventional and structured manner, the summation fairly presented the critical aspects of the evidence and the issues for the jury's consideration. On the evidence presented, it cannot be said that the verdict

was so against the weight of the evidence as to be unreasonable or unsupportable. In the circumstances the appeal against conviction should be refused.

[136] The circumstances of these killings are without doubt quite frightening and heinous. The appellants were convicted of launching a vicious attack on persons sleeping within the expected safety of their home. The imposition of life sentences was wholly appropriate and the specification that 25 years be served before eligibility of parole could be viewed as more than reasonable. We however, in acknowledging that there was an inordinate and inexcusable delay between conviction and appeal, find that in the interests of justice the period to be served before eligibility for parole be reduced to 20 years.

[137] In the circumstances, the appeal against conviction is dismissed. However, the appeal against sentence is allowed. On both counts of the indictment, the appellants are sentenced to life imprisonment and that each should serve a minimum of 20 years before becoming eligible for parole. The sentences are to be reckoned as having commenced on 27 November 2003.