[2024] JMCA Crim 26

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CRIMINAL APPEAL NOS 60 & 61/2015

COLLIN BENNETT
GREGORY BRYAN v R

Michael Jordan for Collin Bennett

Skeleton arguments filed by E D Davis and Associates for Gregory Bryan

Ms Paula Sue Ferguson and Ms Cygale Pennant for the Crown

12, 14 June 2023 and 14 June 2024

Criminal Law – Murder – Evidence - Conflicting witness testimony - inconsistencies and discrepancies – No case submissions – Whether the case should have been be withdrawn from the jury - Self-defence – Whether the judge failed to give correct directions on the issue of self-defence.

Criminal law - Summing up - Duty of the trial judge to direct the jury on the issue of common design/joint participation

P WILLIAMS JA

[1] On 23 July 2015, after a trial in the Saint Catherine Circuit Court, before a judge ('the learned trial judge') and a jury, Collin Bennett ('Mr Bennett') and Gregory Bryan ('Mr Bryan') ('the appellants') were convicted on an indictment for the offence of murder. The particulars of the offence were that on the 20 July 2010 in the parish of St Catherine, the appellants murdered Owen Brown also known as 'Deanie Blacks' ('the deceased').

[2] On 31 July 2015, Mr Bennett was sentenced to life imprisonment with the stipulation that he should serve eight years' imprisonment at hard labour before being

eligible for parole. Mr Bryan was sentenced to life imprisonment with the stipulation that he should serve 15 years' imprisonment at hard labour before being eligible for parole.

[3] Being aggrieved by those decisions, both the appellants sought leave from this court to appeal against their convictions and sentences. On 18 March 2020, a single judge of this court considered their applications and granted them leave to appeal the convictions. In granting the appellants leave to appeal the convictions, the single judge opined that a full review, inclusive of the following issues, was needed:

> "a) The prosecution's case reflected a number of inconsistencies and discrepancies. It should be considered and whether the no case submissions should have been upheld.
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> b) While Bryan did not rely on self-defence, it should be considered whether self-defence should have been left to the jury.
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> c) Whether the directions on common design/joint participation were adequate in light of the discrepancies in the evidence for the Crown."

She further noted that as it relates to the sentence, there was no reference to time spent in pre-trial custody by the appellants, although the record reflected a question posed but not pursued in respect of Mr Bryan.

[4] On 14 June 2023, after considering the oral and written submissions of counsel, we made the following orders:

> "1) The application of Collin Bennett to withdraw the incorrectly filed notice of withdrawal on 9 June 2023 is granted.
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> 2) The appeals against conviction in respect of both appellants are allowed;
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> 3) The convictions in respect of both appellants are quashed and respective sentences are set aside;
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> 4) Judgments and verdicts of acquittal are substituted therefor."

We promised at that time to put our reasons in writing. This is in fulfilment of that promise with apologies for the delay.

The background

[5] On 20 July 2010, Mr Christopher Thomas, ('Mr Thomas') who was 17 years old at the time, was involved in an altercation with some other young men which resulted in him being punched in his face by someone he knew only as 'King'. Mr Bryan was present with King when the punching took place. Mr Thomas went home and told his mother, Miss Doreen Thompson ('Miss Thompson') what had happened. Miss Thompson, her common-law husband Mr Owen Brown, ('the deceased') and her sister Miss Kay Coke ('Miss Coke') accompanied Mr Thomas to Bentline community in the parish of Saint Catherine. They saw a lady known to them as Novelette, the mother of Mr Bennett (who was also known as 'Spanner'). A fracas developed and ultimately the four persons separated and made their separate ways back to their home. The deceased was seen at the doorway of the home bleeding from wounds to his body. He succumbed to his injuries

[6] The appellants were identified as being present at the scene and were eventually arrested and charged for the murder of the deceased. The appellants admitted being at the yard where the incident took place but maintained that they were not a part of any attack on the deceased.

The prosecution's case at trial

[7] The prosecution led evidence from the three persons who went to Beltline with the deceased that fateful afternoon. Two police officers who participated in the investigation which culminated in the eventual arrest of the appellants also testified.

Christopher Thomas

[8] Mr Thomas, testified that when he went home after being punched, he armed himself with two knives but he put them down after speaking with Miss Thompson and the deceased. It was after telling them what had happened that Mr Thomas, Miss Thompson, the deceased and Miss Coke proceeded to Bentline District because the deceased "wanted to resolve the issue". They went to an area with different houses that was known to him as Villa. As they were going through Villa, he saw Novelette. An

argument developed between Miss Thompson and Novelette until the deceased called to Miss Thompson telling her to leave. While they were leaving, Mr Thomas noticed that Novelette went on her phone and appeared to make a call. Mr Thomas also noticed Mr Bryan standing near to her. He noted that there were other persons around. Some men were working nearby on a construction site on what was referred to as "the foundation" and some women were "standing and watching what was going on".

[9] About a minute and a half after Novelette made the call, Mr Thomas said he saw a group of men come to the scene. He stated that it was about five or six men, some had iron pipes, one had a mini sledge hammer and another, a cutlass. These men start to "run" Mr Thomas, Miss Thompson, Miss Coke and the deceased from the yard, telling them "to come out of dem place". Mr Thomas said that Mr Bennett was amongst the men with the weapons and had an iron pipe. Meanwhile, Mr Bryan remained "up front" chasing Mr Thomas, Miss Thompson, Miss Coke and the deceased out of the yard. Mr Thomas described Mr Bryan "running [them] mek bare talk as if dem want start some sort of war".

[10] Mr Thomas saw when Mr Bryan went up to the deceased and slapped him in the face and insulted him by saying "stinking mouth Rastabway". The deceased did not respond, but Miss Thompson dragged him, went in front of him and retorted to Mr Bryan "if you lick me baby father again mi a guh drop your belly right yah suh". The man known only as King jumped across with a cutlass and chopped the deceased in his face and the deceased fell to the ground.

[11] Another man known to Mr Thomas as "X-man" pulled a block from a pile and he dropped it on the deceased's head whilst the deceased was on the ground. Mr Thomas said the deceased managed to get off the ground. Mr Bryan ran for an iron pipe from inside of the foundation and swung it at Miss Thompson who took up a hammer and swung it back at him. The deceased then held on to Mr Thomas's hand and told him to come. They walked away quickly and as they did so, Mr Thomas said he looked back and saw Mr Bryan attacking Miss Thompson with a shovel.

[12] Mr Thomas testified that he and the deceased started "to run because a whole heap of them start to come dung after" them. They ran out of Villa and at that time, Mr Thomas noticed the deceased was bleeding heavily and watched as he apparently "lost focus" and went into a shop that was nearby. Shortly after Mr Bennett and some men who Mr Thomas described as "Spanner's friends", followed the deceased into the shop. Mr Thomas said he could see them hitting the deceased who was holding up his hand to "block off the chop dem". Later in his testimony Mr Thomas explained that he was able to see into this shop because it did not have four walls. It only had a cover and the deceased had actually gone under the cover which was to "the front of the shop".

[13] The deceased eventually managed to escape from the group of men and ran to where Mr Thomas was, who observed several cuts to the face of the deceased. As they ran off together Mr Bennett and the men chased them and began to throw stones at them, one of which caught the deceased on his right shoulder. Mr Thomas eventually ran past the deceased who turned off into another shop. Mr Thomas continued running and hid in some bushes where he could no longer see the deceased but was able to hear his voice. Shortly after, Mr Thomas left his hiding place in the bushes and went home where he saw the deceased at the doorway in a pool of blood with cuts to his face, chest, neck, under his arm, and in his back.

[14] On 22 September 2010, Mr Thomas attended a video identification parade where he pointed out Mr Bryan. He explained that he did so because the police officer who was present at the parade had asked him if he saw the person "in the incident with the deceased".

[15] Mr Thomas was subjected to extensive questioning under cross-examination. Notably, he was challenged as to things he had told the police in his statement to them as well as on evidence he gave at a preliminary enquiry that were inconsistent with his testimony. He was questioned as to what Miss Thompson had done with the knives she had taken from him before they had left for Beltline. He said he did not see what she did with them. He was also questioned about his knowledge of the appellants.

[16] Mr Thomas maintained when pressed that none of his family members who went to Beltline that afternoon was armed. However, he admitted that the deceased at some point had a bottle which he used to hit Mr Bryan after Mr Bryan had chopped him. When asked how many chops the deceased got, Mr Thomas said it was more than seven although he did not see where on his body he got them. He insisted that he saw Mr Bennett hitting the deceased with the iron pipe and refuted the suggestion that he had not seen when the deceased was beaten because he had run away.

[17] Mr Thomas explained that at one point Miss Coke was "at a part by herself watching what was going on". He was asked if he saw the deceased, Miss Coke and Miss Thompson holding on to an iron pipe during the incident. He said he saw when Miss Coke and Miss Thompson held on to an iron pipe that Mr Bryan had, which Mr Bryan used to swing at Miss Thompson who took it from him. It was at that point that Mr Bryan had picked up a shovel to attack Miss Thompson, which was when Mr Thomas said he and the deceased were running away. It was while being tested as to things he said at the preliminary enquiry that Mr Thomas agreed that he had then given evidence that a man who he knew as Ken was present that day and had also chopped the deceased. He also admitted that although he said otherwise at the preliminary enquiry did not see anyone "throw" a concrete block which hit the deceased in his head. He did not see the deceased or Miss Thompson go into the foundation. He did not see anyone beating the deceased in his head with a sledgehammer. However, he denied that the deceased was armed with a knife and "went up in [Mr Bryan's] face" causing Mr Bryan to have to back away. He was also insistent that they did not go to Bentline that day with the intention to create any more conflict.

Kay Coke

[18] Miss Coke gave evidence that she was present when Mr Thomas made the complaint to Miss Thompson and as a result, she accompanied Miss Thompson and the deceased to Bentline. She initially said Mr Thomas did not go with them but came to Bentline ten minutes after. On her arrival she said she saw "a lots of people were into

the yard, because there [sic] was making a house". She along with Miss Thompson and the deceased enquired who had "tump" Mr Thomas in his face but there was no response because "nobody nah tek any talk". She said Novelette and her kids were amongst those making the noise, and also began cussing and running them out of the yard. She saw Mr Bennett with a machete in his hand. He was cursing and saying "Rastabway, come out a mi yaad". She said she also saw Mr Bennett's brother, whom she knew as Ken, with a cutlass in his hand. She also saw Mr Bryan as he was entering the yard. He had nothing in his hands as he entered but he started cursing and asked "a who da rasta bwoy here" She saw when Mr Bennett, Mr Bryan and Ken stated to chop and hit the deceased.

[19] The deceased did not have anything in his hands and was able to get up and run into a shop that was nearby. She saw when the three men followed the deceased into the shop and continued to inflict chops upon the deceased who used his hands to "block off" the chops. He was eventually able to run out of the shop with the men chasing him. She said she went in the opposite direction to that taken by the deceased and the men and made her way home. The next time she saw the deceased he was lying down at the doorway at his home bleeding.

[20] Under cross-examination, Miss Coke was also challenged about various things she had said in her statement to the police and her evidence at the preliminary enquiry which differed from her evidence in court. For example, she was confronted with her having told the police in her statement that Mr Thomas was with her when she, Miss Thompson and the deceased went to Bentline District whereas she had testified that he came there some ten minutes after the others. She eventually admitted that he had in fact been with them and explained that it was because she was confused that she had earlier testified that he came ten minutes after they had. She however maintained that she did not see either Mr Thomas or Miss Thompson with any knife. She said when they got to Beltline she saw Novelette with a cutlass in her hand. She did not see when Novelette went on her phone and make a phone call. She said she saw when Mr Thomas ran off and he did so before the deceased did. She was unable to say how many times the deceased got

chopped but "he got a lot of chops". The men "started chopping him from the foundation go right to the shop".

[21] Miss Coke insisted that she had given the police more than just the descriptions of the men who she saw chopping the deceased, she had given the names "Spanner, Ken and Gregory". She said that Mr Bryan had hit the deceased with a piece of iron and a sledge hammer while they were at the foundation. She said that the shop the deceased ran into was a concrete shop which had a door and a window. She eventually agreed that it had walls too. She was standing at a position where she could "look into the shop" and she watched for 20 minutes as the deceased was in the shop being chopped by the men. She said after he was chopped in the shop he was then dragged out of the shop where the chopping continued. She denied the suggestion that she never saw when the deceased was chopped. She admitted that she had seen when a man name "Backass" hit the deceased with blocks. She denied telling the court at the preliminary enquiry that it was Ken who had used a half block and hit the deceased in his back. She went further to explain that a crowd had followed the deceased and the three men when they ran from the yard but only the three men were armed and chopped the deceased.

Doreen Thompson

[22] Miss Thompson testified that on the day of the incident, she saw Mr Thomas with the two knives. She stopped him and spoke to him and that was when he made a complaint regarding the altercation he was involved in. She noticed that his eyes and his mouth were swollen. She took the knives from him and had them in her hand when they set off to Beltline. She explained that her purpose in going to Beltline was "to see the young man who tump [her] son and ask him what is the matter".

[23] When they arrived in Beltline, Miss Thompson said she saw Mr Bennett (who she knew as 'Spannie') his big brother who she knew as Ken, and Novelette. She did not get a chance to make a complaint as Novelette approached with a cutlass in her hand held up in the air, saying "come out of my yard before mi chop one of you". The deceased was standing beside Miss Thompson and she said he did not have anything in his hands.

They were at that point inside the yard, but not in the foundation. Miss Thompson held onto the deceased and said "come". She pulled him out of the yard and stood in a shortcut that led to the yard. Mr Thomas and Miss Coke were standing next to them.

[24] The deceased was trying to speak to Novelette when she saw Mr Bryan run out and hit the deceased in his face and said "hey rasta bwoy, whey yuh deh yah a chat off yuh mouth seh?". The deceased used his hand to hit Mr Bryan. She positioned herself between the two men and told Mr Bryan if he hit the deceased again, she would "drop his gut". Mr Bryan then ran into the foundation for a piece of pipe iron, but she held on to one end and another man held on to the other end and took it away from him. Mr Bryan went back to the foundation took up a block and threw it at the deceased, hitting his head. The deceased fell next to the foundation, and she took him up, pushed him, and told him to run. He ran off into the lane heading back to the main road.

[25] After the deceased ran off, Miss Thompson remained standing in the foundation with Novelette, Mr Bennett and Mr Bryan who swung a shovel at her face. She moved to avoid getting hit. Mr Bryan told her he did not want to hurt her, and she responded by saying that she did not want to hurt him. He dropped the shovel and "took off behind the crowd". She explained that a crowd had gathered when the argument started. After the crowd and Mr Bryan left, she said "Collin Bennett mada and a young lady by the name of Gloria and Collin Bennett step-father, three of dem rush [her] wid a cutlass". She was eventually able to run off in a different direction from that in which the crowd had gone. She estimated that the crowd numbered 30 men and women.

[26] On her way home she noticed a trail of blood leading to her house. When she arrived at home she saw a group of persons and saw the deceased at the doorway lying in a pool of blood. The deceased was rushed to the Linstead Hospital. She observed injuries to the hand and shoulder of the deceased, his throat was cut, and he had wounds to his jaw and back.

[27] She later identified the appellants on two separate identification parades. On 22 September 2010 she identified Mr Bryan as being 'Gregory' and said she pointed him out because he was at the scene at the time of the incident. On 12 October 2010 she identified Mr Bennett as 'Spannie' as "one of dem at the foundation".

[28] Under cross-examination she agreed that she had not pointed out Mr Bennett because she saw him do anything to the deceased but because he was there during the time of the incident. She agreed that she never saw Mr Bennett chop up the deceased. She also agreed that she never saw Mr Bryan chopping up the deceased either. She did however see Novelette dialling on a phone after which she saw Mr Bryan come on the scene. She said she did not know the person named King. She did not see anyone at the foundation jump across and chop the deceased in his face. Neither did she "see X-Man drag off a block into [the deceased's] head".

[29] Further, Miss Thompson said Mr Bryan did not swing the iron pipe at her and she did not take up a hammer and swing at him, in self-defence. She could not remember whether at the point she told the deceased to run he had cuts anywhere on his body. She was sure that she did not see anyone chop the deceased while they were in the foundation. She did not see when the deceased received any of the injuries she subsequently saw on his body when she went home.

Sergeant Roger Kelly

[30] Sergeant Roger Kelly ('Sergeant Kelly'), was the officer who conducted the video identification parades in respect of both appellants. On 31 August 2010 he received two applications from Detective Corporal Brooks to conduct identification parades for the two men. He arranged for the parades to be held on 22 September 2010 at the Visualize Studio Den at the Linstead Police Station. The first was for Mr Bryan. Miss Thompson was the first witness called to the room where the video parade was being conducted. Sergeant Kelly testified that when asked if she knew why she was there, she responded "I am here to point out the guys that kill [the deceased]". She pointed out Mr Bryan. Mr Thomas was then called to the parade room and when asked if he knew why he was

there he responded "To identify the murderer of my step father". He too pointed out Mr Bryan.

[31] Sergeant Kelly testified that he arranged for video identification parades to be held at the Linstead Police Station in relation to Mr Bennett on 12 October 2010. Once again Miss Thompson was the first witness called to the room. Sergeant Kelly said that she stated that she was there to "point out the men that kill [the deceased]". She pointed out Mr Bennett. Mr Thomas was next called, he however failed to identify Mr Bennett.

Detective Sergeant Jeffrey Brooks

[32] The final witness for the prosecution was the investigating and arresting officer, Detective Sergeant Jeffrey Brooks ('Detective Sergeant Brooks'). He testified that on 20 July 2010, he was at the Bog Walk Police Station when at about 5:30 pm he received information, and as a result, he proceeded to West Prospect District in Bog Walk. On reaching there, he went to a house where he saw a small crowd and he noticed bloodstains at the doorway. Based on the information received he proceeded to the Linstead Hospital. Upon his arrival, he observed a body and he noticed several chop wounds all over the body. He went back to the home in West Prospect where he spoke with Miss Thompson, Miss Coke and Mr Thomas. He later collected statements from all the witnesses.

[33] On 20 July 2010, he attended the post-mortem examination on the same body he had observed at the Linstead Hospital. The body was identified by Miss Thompson as that of the deceased. The examination was done at the Spanish Town Funeral Home in St Catherine and was performed by Dr Rao. Detective Sergeant Brooks subsequently arrested Mr Bryan on 22 September 2010 and Mr Bennett on 12 October 2010 for the offence of murder.

No case submission

[34] At the close of the case for the Crown, Mr Michael Jordan, who appeared for Mr Bennett at the trial, made a no case submission relying on the authority of **Galbraith v**

R [1981] WLR 1039 ('**Galbraith**'). He first submitted that there was no evidence presented that indicated what exactly led to the death of the deceased. He contended that the court was being asked to infer that the deceased died from the alleged chop wounds that he received. He further submitted that the evidence which had been adduced was so discredited as a result of cross-examination that no reasonable tribunal could safely convict on it. He noted that there were different versions of the events from the various witnesses and the discrepancies, inconsistencies and omissions contained in the evidence of a particular witness and between the evidence of particular witnesses was "such a mountain that it would be manifestly unreliable" to leave it to the tribunal of fact. Mr Jordan proceeded to comb through the evidence pointing out the inconsistencies and discrepancies he considered significant.

[35] Mr Earl Hamilton, who appeared for Mr Bryan at the trial, adopted the submissions made by Mr Jordan in contending that there was no evidence that Mr Bryan had committed the murder for which he was before the court. He submitted that there were so many discrepancies between the three witnesses that it would be unsafe to convict the two men especially in light of the fact that the witnesses gave contradicting evidence as to who in fact stabbed or inflicted the fatal blow to the deceased. He contended that there was "no way that the case can be patched up from any of these witnesses….". He too combed through the evidence and pointed out the many discrepancies he considered significant.

[36] In response, Mrs Karen Seymour-Johnson, who appeared on behalf of the Crown, submitted that there was sufficient evidence from which the jury could reasonably be asked to infer that the deceased was seen alive and well on 20 July and after the altercation suffered several cuts and had succumbed to those injuries. She contended that the lack of medical evidence was not fatal to the Crown's case. She went on to submit that the Crown was relying on common design and was maintaining that the deceased and the family members who went to the Bentline community that day were met by a hostile crowd with the appellants being two in the crowd. As part of the crowd, the

appellants participated in the attack on the deceased and the Crown was not duty bound to establish that any one of the appellants inflicted the final and fatal blow. Counsel also made submissions on the issue of credibility, which involved a review of several authorities from this court. Her emphasis was on the matter of the correctness of the identification of the appellants. She submitted that the case was one in which identification was sufficient notwithstanding the inconsistencies which related to other matters. Counsel concluded that without going through the several points raised by the appellants' attorneys-at-law, since the learned trial judge was mindful of the evidence and that although there were inconsistencies, as it related to credibility of the witnesses, it was a matter for the jury.

[37] The learned trial judge in making his decision on the application recognised that the prosecution's case was that the appellants were part of a joint agreement in committing the offence. He acknowledged that the fact of death could be proved from circumstantial evidence. He found that the prosecution was also relying substantially on the witnesses for the identification of the appellants. He concluded that having carefully examined the evidence adduced both men should be called upon to answer the case stated in the indictment.

The case for the defence

[38] Each of the appellants gave an unsworn statement from the dock.

Collin Bennett

[39] Mr Bennett, in his unsworn statement, denied any involvement in the murder of the deceased. He explained that he was present at the time of the incident working on a foundation when he heard a lot of noise "like people a cuss" and saw that it was a lady, a little boy, a 'rastagirl' and a 'rastaman'. The rastaman and the lady each had two knives. He said it was a lady named Miss Gloria who was attacked by the lady and when Miss Gloria's nephew ran towards her with a sledge hammer the lady and the rastaman "rush down on him". The four persons then walked down to his yard demanding that they be

told "whe de boy deh". The little boy pointed out Mr Bryan as "one of dem". The rastaman rushed Mr Bryan while the little boy and the rastagirl ran off. Meanwhile a crowd gathered and eventually the rastaman ran off. Mr Bennett said he prevented Mr Bryan from using a shovel to hit the lady who had used a sledge hammer to hit Mr Bryan. He said his mother told the lady to "come out har yard wid her crosses". The lady ran off. After the incident he heard that "dem chop up the rastaman an him dead a hospital".

[40] Mr Bennett called witnesses. The pathologist who performed the post-mortem examination on the body of the deceased, Dr Danish Rao, was no longer resident in Jamaica. The necessary evidence was led from agreed statements of two persons and the oral evidence from two others, such that an application under section 31D(c) could be made for the post-mortem report to be admissible. Through these witnesses it was satisfactorily established that the doctor was outside of Jamaica and it was not reasonably practicable to secure his attendance. Dr Prasad Kadiyala, a medical practitioner and consultant forensic pathologist who was familiar with the handwriting of Dr Rao, identified the post-mortem report in relation to the deceased as one prepared by Dr Rao. The report was admitted into evidence and was taken to speak for itself. Dr Kadiyala was invited to explain what was meant by oblique, incise and wedge stab wounds. He indicated that a single sharp edge weapon would cause any of these wounds. He went on to describe a defensive wound as a wound that is sustained in an attempt by the victim to avoid major damage to the vital part of the body. They are normally seen on the forearms, hands, arms, and legs. He found none of the wounds on the deceased to be a defensive wound. He opined that a person could survive from 15 minutes to one hour of receiving an injury to the axillary artery, which is that main blood artery which supplies blood to the upper limb.

Gregory Bryan

[41] Mr Bryan, in his statement from the dock, said that on 20 July 2010 he was heading home from work when he saw King and someone he knew as Junior fighting. He, however, did not stop and continued home. He later went down to his mother's yard

taking a road that led him through Mr Bennett's yard. There he said he could hear a lot of "fussing". When he went into the lane he saw the deceased, Miss Thompson, Miss Coke, and Mr Thomas. As he got close to them he heard when Mr Thomas said "see one a him friend dem yah". The deceased had a knife in his hand. The deceased said something to him, came down on him, and swung the knife at him. Miss Thompson threw a sledgehammer at him which hit him. The four persons ran at him and he ran into Mr Bennett's yard. People in the yard started to attack the four persons. The deceased ran out to the road Mr Bryan explained how he then went in the foundation and took up a shovel which he swung at Miss Thompson. He said that Mr Bennett held him and Mr Bennett's mother "run Doreen Thompson out of the yard". He maintained that he was not guilty of the charge and had not hit the deceased at "any given time with iron, with block and none of these things…".

The appeal

[42] On 1 December 2020, the appellant Mr Bryan filed four supplemental grounds of appeal challenging his conviction. The grounds as filed are as follows:

> "**Ground One**
>
> The Learned Trial Judge erred in fact and law in failing to adequately direct the jury on how to treat the evidence on the issue of inconsistencies, contradiction [sic] and discrepancies.
>
> **Ground Two**
>
> The Learned Trial Judge erred in fact and in law in failing to uphold no case submission made by the Defence despite the unreliability of the three witnesses for the Crown.
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> **R v. Galbraith [1981] 1 WLR 1039, 1042**
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> **Ground Three**
>
> That the Learned Trial Judge erred in fact and in law in failing to properly direct the jury on the issue of Self Defence as it relates to Gregory Bryan although he was not relying on Self Defence, it should have been left up to the jury. The deceased attacked Gregory Bryan

with a bottle. Two [of] the witnesses and the deceased were struggling with Gregory Bryan when they attacked him with an iron pipe.

Ground Four

The learned Trial Judge erred in fact and law in failing to adequately direct the jury on the issue of Common Design/Joint Participation especially considering the discrepancies in the evidence for the Crown witnesses."

[43] Mr Bennett's original grounds of appeal complained of "1. Unfair trial, 2. Conflicting statements by witnesses, 3.Insufficient evidence to warrant conviction and 4. Sentence excessive". No supplemental grounds of appeal were filed on behalf of Mr Bennett who on 9 June 2023 filed an application to withdraw his appeal. This was largely due to the fact that there had been an eight-year delay in the hearing of the appeal and he would become eligible for parole in a matter of weeks. However, it became apparent that the application was not in the correct format and not properly before the court. He was, therefore, permitted to withdraw it. Mr Michael Jordan, who appeared for him in the appeal, adopted the supplemental grounds which had been filed on behalf of Mr Bryan.

[44] Mr Ernest Davis, on behalf of Mr Bryan, in filing the four supplemental grounds of appeal as set out above, filed a list of authorities with the case of **Everett Rodney v R** [2013] JMCA Crim 2 attached and which referred to two others which had been mentioned in that authority; namely **Palmer v R** [1971] AC 814 and **R v Williams** 78 Cr App 276 in support of the grounds. No written submissions were filed supporting those grounds. On the date of the hearing, Mr Davis was absent due to medical reasons and there was no representative for Mr Bryan. However, from the records, the matter had previously been adjourned and given the delay the court decided to proceed with the hearing of the appeal relying on what had been filed. It requested the Crown's representative to address it in respect to the supplemental grounds as filed.

Ground 1

The respondent's submission

[45] In respect of ground 1, Ms Paula Sue Ferguson, on behalf of the Crown, commenced by relying on the written submissions which had been filed for the Crown. It was submitted that the learned trial judge gave thorough directions to the jury in respect of the inconsistencies and discrepancies which appeared on the evidence of the Crown. She directed the court to pages of the transcript where inconsistencies in the evidence of the main witness, Mr Thomas were identified. It was pointed out that the learned trial judge gave further directions to the jury in respect of the three witnesses by telling the jury that it was a matter for them to determine whether or not they could rely on the evidence of the witnesses.

[46] In oral submissions, Miss Ferguson acknowledged that that there were other discrepancies, including the part each appellant played in the attack which led to the injuring and subsequent death of the deceased. Ms Ferguson contended that the learned trial judge did in fact address the issues. She noted that general directions were given as to the right of the jury as the tribunal of fact to accept parts of the evidence that they believed and reject those they did not. She however acknowledged that more thorough directions in the circumstances would have been required to adequately address the discrepancies on the Crown's case.

[47] Miss Ferguson submitted that the issue was whether this failure was so grave for it to be concluded that there has been a miscarriage of justice. She contended that that standard had not been reached and although there could have been more thorough directions, those given were sufficient for the jury to come to their own conclusion and to come to the finding that they did.

Discussion/analysis

[48] A trial judge in his or her summation is required to identify inconsistencies and discrepancies in the evidence and to explain their significance. However, there is no duty

on the trial judge to point out every inconsistency and discrepancy in the case. The jury's attention must be directed to inconsistencies and discrepancies which may be considered to be damaging to the Crown's case and the appropriate directions given. In **Regina v Fray Diedrick** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 107/1989 Carey JA, in addressing this issue, stated at page 9:

> "...Implicit in this contention is the belief, which we think to be without any foundation, that because a witness has been shown to have made some statement inconsistent with his testimony in Court, a resultant duty devolves upon a trial judge to show that the witness' evidence contains conflicts with other witnesses in the case.
>
> The trial judge in his summation is expected to give directions on discrepancies and conflicts which arise in the case before him. There is no requirement that he should comb the evidence to identify all the conflicts and discrepancies which have occurred in the trial. It is expected that he will give some examples of the conflicts of evidence which have occurred at the trial, whether they be internal conflicts in the witness' evidence or as between different witnesses."

[49] Brooks JA (as he then was) in **Morris Cargill v R** [2016] JMCA Crim 6, summarized the principle in this way:

> "[30]...it must be pointed out that trial judges are required to explain to juries the nature and significance of inconsistencies and discrepancies and give them directions on the manner in which they should treat with those elements that occur in the evidence. Trial judges are not, however, required to identify every inconsistency and discrepancy that manifests itself during the trial. Nonetheless, it would be remiss of a judge to fail to mention such inconsistencies and discrepancies that may be considered especially damaging to the prosecution's case."

[50] Edwards JA (Ag) (as she then was) in **Vernaldo Graham v R** [2017] JMCA Crim 30, stated that the trial judge's duty in directing the jury in regard to inconsistencies and discrepancies is as follows:

> "[104] Where the discrepancy or inconsistency in a witness' testimony calls into question her credibility on a point which is material to the issue the jury has to decide, they must be told that

they cannot make a positive finding of fact and accept and rely on the witness' evidence regarding that fact unless it is resolved by an explanation from the witness. See **R v Noel Williams and Joseph Carter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 51 and 52/1980, judgment delivered 3 June 1987. They should be reminded of the witness' explanation for the inconsistency and discrepancy, if there is one, and directed that it is for them to say if they accept it so as to find her a credible witness despite the discrepancy or inconsistency.

…

[106] Based on the authorities, the duty of the trial judge in directing the jury in the case of inconsistencies and discrepancies appearing in the evidence at trial may be summed up as follows:

1. There is no duty to comb through the evidence to find all the inconsistencies and discrepancies there may be, but the trial judge may give some examples of them or remind the jury of the major ones.

2. The trial judge should explain to the jury the effect a proved or admitted previous inconsistent statement should have on the evidence.

3. The trial judge should point out to the jury what the result may be if the inconsistency or discrepancy were to be found by them to be material and how it may undermine the evidence.

Once this approach is taken, it is then a matter for the jury whether they consider the witness to be discredited."

[51] Edwards JA (Ag) also cited at para. [109], with approval, the following passage from **R v Oliver Whylie** (1977) 15 JLR 163 at 166:

"[109] It is of importance that the trial judge should not consider his duty fulfilled, merely by a faithful narration of the evidence on these matters. He should explain to the jury the significance of these matters, enlightening with his wisdom and experience what might otherwise be dark and impenetrable."

[52] From the outset of the summation, the learned trial judge outlined, what he described as in a nutshell, the two versions which was before the court. He summarised the case for the Crown, at page 833 of the transcript, as follows:

> "The Crown is contending that the deceased, Owen Brown, along with his common law spouse Doreen and her son Christopher and Doreen's sister, Kaye went to an area in this parish called Bentline. They went there, according to the Crown, to resolve some issues concerning Christopher and another youth with whom Christopher has earlier had an altercation. They were chased from the home of a woman called Novelette, a relative of [the appellant] Bennett. After which [the deceased] hit back the person who assaulted him. After which a group of persons chased the deceased who fled as did the others with whom he had come. [The deceased] was later observed being chopped and hit by persons and was shortly thereafter in a pool of blood at his doorway. He was taken to the hospital where he succumbed to his injuries shortly after."

[53] However, it is indisputable that the three eyewitnesses gave three different accounts of the roles the appellants played in the events that unfolded that afternoon. It is therefore significant to note that the learned trial judge in his attempt to sum up the Crown's case in a nutshell did not ascribe any specific actions to either of the appellants in the chopping and hitting of the deceased by persons.

[54] The learned trial judge acknowledged that there were discrepancies when he was reviewing the evidence of Mr Thomas. He commented that when the evidence was looked at "things were happening very quickly". He stated, at pages 861-862 of the transcript:

> "Is it that these things were happening sequence behind sequence, this one stopped before the next thing happened or some of these things were going on simultaneously…. Is it being compartmentlised [sic] or there is this crowd and this thing going on all at once. It is a matter for you, because if that is so, it may assist you in saying that the witnesses, they are in fact trying to recall what transpired. They are at different places. You heard where they were standing and what their involvement were.

> It is for you now, to say whether in fact, they [sic] are discrepancies, because of the unfolding of the drama that was happening out there, or is it that these witnesses are being distinctive, or they don't remember or are they just unreliable."

This was said without any explanation of what a discrepancy was and without demonstrating from the evidence of any other witness that there was any difference in their accounts and that of Mr Thomas. It is questionable whether what was said at this time was of any real assistance to the jury in dealing with the issue.

[55] Later in his review of Mr Thomas' evidence the learned trial judge went on to recognise that Mr Thomas had spoken of King jumping in and chopping the deceased in his face. The learned trial judge pointed out that in this regard the two other witnesses "did not reflect this thing happening". At page 866 of the transcript the learned trial judge commented:

> "And thus lay the ground for the submissions of learned counsel in his address to you, well it sounds like three different stories. Remember what's happening here, I reminded you of that, these men coming in and a lot of activity. Was it that they were waiting until one thing is finished before another start or was acting at the same time."

[56] After concluding his review of the evidence of Mr Thomas, the learned trial judge acknowledged that there were several inconsistencies in the evidence and that he would tell the jury how to treat them. He pointed out that Mr Thomas gave a statement to the police and also gave a statement under oath at the Resident Magistrate's Court. He indicated there were "these discrepancies and inconsistences were made between his evidence in court and his former statement". Subsequently, after the learned trial judge had highlighted several of the inconsistencies, he stated at page 881 of the transcript:

> "So you have to look at all these things, to see what weight if any, you can place on them."

Shortly after, the learned trial judge remarked at pages 882-884:

"Now, having look at some of the discrepancies that were highlighted in the testimony of [Mr Thomas] I must tell you what a discrepancy or inconsistency is.

What he is attempting, what is being done, when a statement is shown as being inconsistent, it is said that the witness made a statement which is inconsistent with a statement which is being made at the trial. But you must remember, Mr. Foreman and your members, what he said is the case is really what you have before you.

If you find that something said on a previous occasion which conflicts with what is being said here, then you will have to decide which is true. You will have to decide how does it affect the credibility of the witness, if you find that was said previously or what was said today, is in conflict with each other, bearing mind that when you come to file [sic] about that type of conflict, whether you are really talking about inconsistencies, and discrepancies. And they can either be serious or they can be trivial.

So, you are going to look first of all, the first thing you are doing to say, is whether in fact there is a discrepancy or inconsistency. Then you go on to ask yourselves, is it serious or slight

If you find that there are discrepancies on the evidence, because it is you who will find whether or not there are discrepancies. You have to determine first of all, is the discrepancy serious, meaning is it of such a nature that it destroys the very fabric of the witness' testimony, and therefore make you feel unable to accept and act upon the testimony of that witness.

If that is the state of mind which the discrepancy leaves you in, in relation, in relation to the particular witness in this case, then you disregard the testimony of that witness.

But if you look at the discrepancy, and you say it is not serious, it does not in your view destroy completely the credibility of the witness, and if you are satisfied that not withstanding [sic] that discrepancy, the witness has spoken truthfully in other areas, then in the area which you find that the witness has not spoken truthfully, you can reject that portion of the testimony, but in other areas in which you find that the witness has spoken truthfully, you can accept and act upon those portions of the witness' testimony.

> Put it another way, Mr Foreman and your members, you can reject all of that witnesses' testimony or you can accept all of it. Or you can reject it in part and accept it in part."

[57] This turned out to be the only time during his summation that the learned trial judge gave specific directions on inconsistencies and discrepancies. He was not correct when he invited the jury to see what weight they attached to the inconsistencies in the evidence given by Mr Thomas. The way he commenced his specific directions on the explanation of an inconsistency and discrepancy lacked clarity. It is noted that at no point did the learned trial judge specifically address the nature and significance of a discrepancy arising between the evidence of several witnesses, neither did he sufficiently impress on them the necessary approach in resolving this type of conflicting evidence.

[58] In reviewing the evidence of Miss Coke (who he referred to initially as Kay Cole), the first major inconsistency that the learned trial judge pointed out was the fact that in court she had stated that Mr Thomas did not go to Beltline with them but in her statement had said otherwise. He correctly invited the jury to consider whether there was an inconsistency and directed them that it is a matter for them to say whether it was serious or trivial. The learned trial judge went on to mention other possible inconsistencies between Miss Coke's evidence and previous statements and gave sufficient directions on how the jury was to deal with them in an unexceptional manner.

[59] The learned trial judge, in reviewing Miss Coke's evidence, did not sufficiently point out areas where her evidence differed from that of Mr Thomas. While it was not necessary to point out every discrepancy which arose in the case, he should have pointed out major ones and aided the jury in how to approach their consideration of not only the witness but of the Crown's case. He noted that Miss Coke said that only Mr Bryan, Mr Bennett and Ken were involved in the attack on the deceased. This was a significant difference from the evidence of Mr Thomas that it was Mr Bennett and his friends that chopped and chased the deceased into a shop and continued chopping him there. This conflict in the evidence was further compounded by the fact that Mr Thomas said the shop had no walls thus facilitating him being able to see what was happening whereas Miss Coke said the

shop had four walls and she was only able to see because of her position in relation to the door of the shop. Thus, there was conflicting evidence from these two witnesses which could be viewed as giving rise to a major discrepancy which could have been viewed as especially damaging to the Crown's case. The learned trial judge failed to address the issue as such during the summation.

[60] The learned trial judge, in his review of the evidence, of Miss Thompson, noted that she started like all of the other two. The first possible discrepancy he pointed out was the issue of what happened to the deceased at the foundation. The learned trial judge noted that Miss Thompson had said "only one lick take place at the foundation". He addressed it in this way at page 916 of the transcript:

> "… she said only one lick take place at the foundation.
>
> And you will recall that she said that her baby father was struck in the face there. So, it is for you to say if that one lick, is what she is describing, and if so, you look at what the others have said, and consider whether it is consistent. If it is inconsistent or is a discrepancy, is it serious, or is it trivial?"

[61] The learned trial judge subsequently highlighted the fact that Miss Thompson said she had not seen Mr Bennett with any weapon and that he had not done anything to the deceased or to her. At page 921 of the transcript, the learned trial judge said:

> "She said she did not--Spanner was along from the line, he was there when the licking put on; I did not see him putting on any licks. She was asked about the name King. I hear the name King but I don't know the person. I didn't see anyone chop [the deceased] in the face with a cutlass. She said she did not see anyone chop [the deceased]. She said of Gregory, he didn't get an opportunity to swing the iron pipe at her that day. She said she don't know Backas. And she describes again in cross examination the interaction between herself and Bryan. He took up a shovel from the yard after the crowd left. She repeated that he swung the shovel after her face..."

The learned trial judge here merely set out areas where Miss Thompson' evidence conflicted with other witnesses, but he stopped short of assisting the jury with how they were to treat with the conflicting evidence.

[62] The learned trial judge failed to sufficiently identify the discrepancies between the evidence of the three witnesses who in effect gave three different narratives as to what happened that afternoon and most significantly as it related to who participated in the attack and the chopping of the deceased. The question that arose was whether the learned trial judge's approach to the issue of the discrepancies in the manner he did, in the circumstances of this case could be deemed to be sufficient. His directions on the inconsistencies and discrepancies were made after specifically reviewing the internal conflicts in the evidence of one witness, Mr Thomas. While the directions may have been sufficient in relation to the internal inconsistencies in the evidence of the witness, given the nature of the discrepancies that existed between the accounts of the three witnesses more was needed. Upon a detailed examination of the evidence and the learned trial judge's summation, it cannot be said that the directions given by the learned trial judge specifically on the issue of discrepancies was sufficient in the circumstances of this case. There was, therefore, merit to ground 1.

Ground 2

Submissions

For the respondent

[63] In the written submissions for the Crown, it was contended that the learned trial judge was correct in calling on the appellants to answer the prosecution's case. It was submitted that the case against the appellants depended on the reliability of the three witnesses and as such this would fall within category 2b, as outlined in the case of **Galbraith**. Accordingly, the learned trial judge could not properly withdraw the case from the jury where the matters to be resolved belonged solely in the province of the jury. Reliance was placed on the case of **Herbert Brown and Mario McCallum v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 92 and

93/2006, judgment delivered 21 November 2008 and **Steven Grant v R** [2010] JMCA Crim 77.

[64] In conclusion it was submitted that, having been properly directed in law it was for to jury to accept the prosecution's case that both the appellants were active participants in the murder of the deceased.

Discussion

[65] On the conclusion of the Crown's case, as indicated above, no case submissions were made on behalf of both appellants. In relation to the witnesses, Messrs Michael Jordan and Earl Hamilton had urged the learned trial judge to find that the evidence of the three witnesses as to fact for the Crown was so manifestly unreliable that a jury properly directed could not convict on it. Those submissions were, however, rejected by the learned trial judge.

[66] The issue, therefore, is whether the learned trial judge had erred in rejecting the no case submissions. Lord Parker CJ's **Practice Direction (Submission of No Case)** [1962] 1 WLR 227 is oft recognised as establishing the correct test for dealing with such a submission. It states:

> "A submission that there is no case to answer may be properly made and upheld: (a) when there is no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecutor is so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict upon it…"

[67] The English Court of Appeal, in the case of **Galbraith** further clarified the appropriate approach to a submission of no case to answer, at page 1042:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other

> evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury…. There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

[68] In **Steven Grant v R**, Harris JA writing on behalf of the court, at paras. [68] - [69], expounded on the principle in the following way:

> "[68] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that contradictory statements exist in the evidence adduced by the prosecution, does not mean, without more, that a prima facie case has not been made out against an accused. The existence of contradictory statements gives rise to the test of a witness' credibility. No duty is imposed upon a trial judge to direct a jury to discard the evidence of a witness containing contradictory statement is to nullify his evidence before a jury and it is for them to decide whether the witness has been discredited
>
> [69] It must always be borne in mind that discrepancies and inconsistencies give rise to the issue of the credibility of that witness. Credibility is anchored on questions of fact. Questions of fact are reserved for the jury's domain as they are pre-eminently the arbiters of fact. Consequently, it is for them to determine the strength or weakness of a witness' testimony."

[69] At the close of the Crown's case, three different narratives had been given as to what had happened that day. The versions differed not only in what each appellant was alleged to have done to the deceased but also as to what each witness said the other witnesses had done in the course of the melee. The question of whether to uphold the no case submissions for the learned trial judge's determination was, therefore not limited to the credibility of each witness arising from the internal conflicts in their evidence but

also whether the case for the Crown, given the conflicts between the witnesses was so manifestly unreliable that a jury properly directed would have been unable to arrive at a verdict of guilt beyond a reasonable doubt.

[70] It is noted that, in outlining the reasons for his decision to call on the appellants to state their defence, the learned trial judge failed to have regard to what has been described as the wise words of Lord Roskill in **R v Joan Olive Falconer-Atlee** (1974) 58 Cr App R 348 that when ruling on a no case submission, a judge need only say there was evidence to go to the jury and it was for them to say whether or not the appellant should be convicted. This is a position this court adopted in **Regina v Eric Mesquita** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 64/1978 judgment delivered 9 November 1979 (see page 6) and restated more recently in **Shenidy Thomas v R** [2020] JMCA Crim 52 (at para. [50].

[71] Ultimately, following the guidance given in **Galbraith**, this was a matter where on one possible view of the facts there was evidence that the jury could properly have arrived at the conclusion that the appellants were guilty. The learned trial judge was entitled to have left the matter for the jury to decide. Accordingly, we were satisfied that there was no merit in ground two.

Ground Three

Submission

For the respondent

[72] As it relates to the issue of whether the learned trial judge properly directed the jury on self-defence, it was contended that he gave adequate directions on the issue of self-defence having regard to the circumstances of the case. Mr Bryan who, on the Crown's case, was either hit with a bottle or slapped by the deceased did not rely on self-defence. Further, it was submitted that there was no need for the learned trial judge to give a detailed direction on self-defence as the evidence disclosed that the deceased was

chased and mortally wounded by both appellants. Thus, it was submitted the directions on self- defence was adequate having regard to the circumstances of the case.

[73] Upon an enquiry from the court regarding whether there was a misdirection on self-defence when the learned trial judge stated that the requisite test should be an objective one, Miss Ferguson agreed that there was a misdirection on the issue of self-defence. She, however, submitted that since the issue was not a live one, this would not amount to a miscarriage of justice. She further submitted that the learned trial judge's treatment of the evidence in relation to self defence did not amount in any way to a miscarriage of justice.

Discussion/analysis

[74] The issue that was before this court was whether proper directions were given to the jury in relation to the defence of self-defence, particularly on the facts of this case. The law as it relates to self-defence is well settled and it is useful to note the standard applicable to a consideration of the appropriateness of directions given in relation to the issue as stated in **Palmer v The Queen** (1971) 16 WIR 499:

> "In their Lordships' view the defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good sense and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but will only do what is reasonably necessary. But everything will depend upon the particular facts and circumstances."

[75] It is accepted that there are two limbs to be established in proof of self-defence. Firstly, the defendant must hold an honest belief in facts which if true would justify his acting in defence of himself or another (see **Solomon Beckford v R** (1987) 24 JLR 242) and, secondly, the defendant must be seen to have used such force as would have been reasonable in the circumstances which he honestly believed to exist, in defence of himself

or another. Ultimately there must be a consideration of the subjective knowledge of the defendant including the circumstances as he honestly believed them to be, even if mistaken, along with the objective assessment of what amounted to reasonable force. A trial judge is obliged where the issue arises, to clearly communicate to the jury, the sense of the law of self-defence and its application to the case (see **Ronald Webley and Rohan Meikle v R** [2013] JMCA Crim 22). Further a trial judge is obliged to leave for the jury's consideration any possible defence that arises on the evidence even if not relied on by the defence (see **Alexander Von Starck v The Queen** [2000] 1 WLR 1270 at page 1275)

[76] It is now apt to consider the direction that was given on the defence of self-defence. On pages 849 - 851, the learned trial judge in detailing the ingredients of the offence of murder had this to say on the issue of self-defence:

> "The next thing that the Prosecution must prove, is that the act which resulted in death, was not done in lawful self defence.
>
> Now, you have heard several things in this matter, in describing, telling you what self defence is. Mr Foreman and your members, the law says that a man who is being attacked in circumstances where he reasonably believes his life to be in danger, or if he is in danger of serious bodily harm or injury, he may use such force as is reasonable in the circumstances, to prevent or resist the attack or threatened attacked. And if in using such force, he kills his attacker, he is not guilty of any crime, even if the killing was intentional.
>
> In deciding whether it is reasonable to use such force, as was in fact used, regard must be made to all the circumstances.
>
> What is reasonable force depends on all the facts, including the nature of the attack, whether or not a weapon was used, and if so, what kind of weapon it was.
>
> But you must also recognise, Mr Foreman and your members, that a person defending himself is not expected to weigh precisely how much force is to be used.

> If you were to conclude that what the accused did was no more than what he instinctively thought was necessary, you can regard it as strong evidence, and if the amount of force used was reasonable and necessary, because it is for the prosecution to prove that the accused is guilty. It is for them to satisfy you so that you feel sure that the accused was not acting in self defence. If you conclude that he was or that he may be acting in necessary self defence, then you must acquit him."

[77] These directions by the learned trial judge concerning the defence of self-defence were clearly inadequate having regard to the guidance offered by the authorities referred to above. Significantly, the learned trial judge first misdirected the jury in relation to the law. As established by the authorities, the test for the need to act in self-defence is a subjective one. The learned trial judge clearly erred when he referred to a need for reasonable belief that life was in danger. The learned trial judge failed to make clear which of the appellants was entitled rely on the defence of self-defence and to whose case the direction on self-defence was applicable. The learned trial judge adverted to self-defence in a general manner, but he gave the jury no specific assistance with regard to any of the features of the evidence which might have supported it, whether it arose on the prosecution's case or the defence.

[78] On the prosecution' case, the question of self-defence could have arisen on one of the versions presented as it was stated in the evidence of Mr Thomas that the deceased had hit Mr Bryan on his shoulder with a bottle. This however may not have been sufficient for a finding of self-defence. Mr Bryan had asserted in his unsworn statement that the deceased came down on and swung at him with a knife and Miss Thompson threw a sledgehammer which hit him. At that point all four persons ran at him and he ran into Mr Bennett's yard where people there started to attack the four persons. However, the jury was not sufficiently directed to make the connection with any evidence on the issue. The real risk was that this could reasonably have resulted in a state of confusion for the jury as to whether or how they were to deliberate upon the issue. We were satisfied that there was merit to the ground.

Ground 4

Submissions for the respondent

[79] It was submitted that the learned trial judge gave thorough directions to the jury on the issue of common design with proper regard to the discrepancies in the evidence of the witnesses for the prosecution. It was contended that the learned trial judge carefully gave directions on the issue using the evidence of Mr Thomas and Miss Coke. It was noted that the learned trial judge reminded the jury of the evidence of Mr Thomas that he saw the appellant Mr Bryan hitting the deceased while Mr Bennett was standing behind him (Bryan). It was pointed out that the jury was reminded of Miss Coke's evidence that it was both the appellants and another man who participated in beating the deceased. It was further noted that the learned trial judge also reminded the jury of the evidence of Miss Thompson, although it did not support Mr Thomas or Miss Coke in relation to seeing both appellants acting together or with other persons in the attack on the deceased. It was contended that the jury being so directed was satisfied that both appellants were acting together with others and were responsible for the death of the deceased.

Discussion and analysis

[80] In this ground the learned trial judge's summation in relation to the law on joint participation/joint enterprise was being criticized. The Crown has posited that the directions by the learned trial judge cannot be impugned as the directions were adequate in the circumstances. It is a settled principle of law that where two or more persons embark on a joint enterprise, each party is liable for acts done in pursuance of that enterprise and the consequences that flow therefrom.

[81] The law in relation to the principle of common design was re-visited and restated in **R v Jogee; Ruddock v The Queen** [2016] UKSC 8; [2016] UKSC 7 and this judgment has been cited and followed in many cases decided by this court. In **Joel Brown and Lance Mathias v R** [2018] JMCA Crim 25 McDonald-Bishop JA, writing on behalf of the court at para. [77] said:

> "…The core of the principle, as restated in **R v Jogee; Ruddock v The Queen**, it that a person who assists or encourages another to commit a crime (the secondary party or the accessory) is guilty of the same offence if he 'shares the physical act', that is, through assisting and encouraging the physical act. Their Lordships further explained:
>
> > 'Sometimes it may be impossible for the prosecution to prove whether a defendant was a principal or an accessory, but that does not matter as long as it can prove that he participated in the crime either as one or as the other'
>
> These basic principles, their Lordship said, are long established and uncontroversial."

[82] The learned trial judge first mentioned the issue of common design when he was giving directions on the ingredients for the offence of murder. He instructed that the Crown must prove "it was the accused who killed" the deceased. He explained that in this case the prosecution was saying that the appellants were part of a common design and indicated he would explain later what that was. He, however, went on to comment that part of the agreement or plan and the object of that agreement or plan was to kill the deceased or to cause him serious bodily harm.

[83] It is necessary to consider the entirety of the learned trial judge's directions to the jury on the issue of common design which came while he was reviewing the evidence of Miss Thompson who was the last of the three eyewitnesses to testify. These directions are to be found at pages 910-912:

> "At this juncture I think I will give you a direction on what constitutes joint responsibility or common design. Like I told you the prosecution is relying on the doctrine of joint responsibility. The prosecution's case is that the [appellants] committed this offence together. Where a criminal offence [sic] by two or more persons, each of them may play a different part but if they, Mr. Foreman and your members are in it together as a part of the joint plan or agreement to commit it they are each guilty.
>
> The words plan, agreement do not mean that there has to be any formality about it. An agreement to commit an offence may arise

on the spur of the moment, nothing need [sic] to be said at all. It can be made with a nod or wink or a knowing look. An agreement can be inferred from the behaviour of the parties. The essence of joint responsibility or common design for a criminal offence is that each defendant share [sic] the intention to commit the offence and took some part in it so as to achieve that aim.

Your approach to the case should therefore be as follows, in looking at the case if [sic] either of the [appellants] you are sure they had the intention I had mentioned, he committed the offence on his own or he took some part in committing it with the other, he is guilty. I am to tell you mere presence, somebody who is just standing in that yard that day and not actively participating would not be involved. Mere presence is not enough to prove guilt**.** If you find that a particular defendant was on the scene and did, by his presence, encourage the other in the offence then he is guilty.

So the essence of the offence is that each [appellant] shared the intention to commit the offence however great or however small so as to the achieve that aim. So you look at all the circumstances and intention to effect this plan, men coming together directing their focus onto one individual, armed, chasing him from one point to another and pursuing him, didn't hear of anybody back out or saying stop. I am not a part of this. That is how you look at the total circumstance, the series of events, to say whether in fact you can infer if there was such an arrangement and such a plan.

And you bear in mind what the directions are. There hasn't got to be any, formality [sic] can come about at the spur of the moment with a nod and a wink."

[84] It is clear that the learned trial judge gave these general directions on joint enterprise in his recognition that the prosecution's case against the appellants was that they acted pursuant to a joint enterprise which resulted in the murder of the deceased. It was required that the prosecution prove that each appellant participated in the commission of the crime with the requisite intention to commit it or aid in its commission with knowledge of the facts constituting its commission. However, given the three versions of what role the appellants played, the learned trial judge should have outlined the principal components of all the differing evidence against the appellants and relate it to the applicable law.

[85] It was on the version presented in the evidence from Miss Coke that it was alleged that the appellants and another man engaged in the attack on the deceased. Although a crowd was present only the three men were armed and participated in the inflicting of injuries on the deceased. It was only on this version that the Crown had presented a narrative that gave rise to the issue of joint enterprise. It was therefore incumbent on the learned trial judge, having left the matter for the jury, to have made it abundantly clear that it was only if they were satisfied that Miss Coke was speaking the truth that they could consider his directions relative to the issue of joint enterprise.

[86] According to Mr Thomas, Mr Bryan was engaged in his own confrontation with Miss Thompson when Mr Bennett and a crowd consisting of his friends pursued and chopped the deceased and thus, up to the point of the deceased going into the first shop, would not have been party to any joint enterprise. This too ought to have also been made abundantly clear to the jury. On Miss Thompson's version neither men participated in any attack as far as she saw. She could speak to Mr Bryan running off in the direction of the crowd which had chased the deceased as he fled the scene. According to her, she did not see Mr Bennett do anything at all in relation to the deceased. On her version the appellants were present at the start of the melee but she did not see the chopping incident and so could not implicate the appellants or either of them in the deceased's death. The learned trial judge was duty-bound to assist the jury by correctly directing them on the law on common design by indicating the supporting evidence and he was equally duty bound to instruct the jury on the absence of evidence supporting the issue from what was also presented by the Crown.

[87] In light of the learned trial judge's failure to properly address those crucial issues which amounted to inadequate guidance to the jury regarding common design, we determined that this ground was meritorious.

[88] Having found that was merit to three of the four grounds relied on by the appellants, we found that the verdict of guilt in respect of the appellants was unsafe and thus made the orders outlined at para. [4].