[2023] JMCA Crim 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE STRAW JA
THE HON MR JUSTICE D FRASER JA

SUPREME COURT CRIMINAL APPEAL NO 18/2016

MARLON CAMPBELL v R

Delano Harrison QC for the appellant

Jeremy Taylor QC and Nicholas Edmond for the Crown

22 October 2020 and 10 February 2023

D FRASER JA

Background

[1] On 12 February 2016, following a trial before Campbell J ('the learned trial judge') and a jury, Marlon Campbell ('the appellant') was convicted in the Saint Ann Circuit Court, on an indictment for the offence of murder. On 19 February 2016, he was sentenced to a term of life imprisonment, with a stipulation that he should serve 20 years before becoming eligible for parole.

[2] On 29 July 2019, a single judge of this court granted the appellant leave to appeal his conviction. The cases advanced at trial by the prosecution and the defence will now be outlined to provide the context for the grounds of appeal filed and the submissions made by counsel on each side.

The case for the prosecution

[3] On 19 December 2011, at a bar in Exchange in the parish of Saint Ann, there was an altercation between Craig Hoilett ('the deceased') and the appellant who was known

as "Jelly Blacks". According to an eyewitness, Courtney Green, at the time of the incident he saw the deceased fall to the ground, then he "get up and go at the appellant" and they wrestled. The witness said the deceased was unarmed. The appellant pushed the deceased off him and the witness pulled the deceased from behind, came in between the disputants and said to the appellant "let go off dat".

[4] Mr Green also indicated that during this intervening moment, he saw the appellant closing a ratchet knife. The witness said he and other persons present spoke to the deceased who was holding his belly area and pointing at the appellant while relating that he had been stabbed by the appellant. The appellant ran off and Dwayne Hutchinson, an off-duty police officer, gave chase and caught him. However, the officer stated that he released the appellant, because he feared the friends of the appellant, who were armed with bottles and knives. The appellant ran off. However, days later, he surrendered to the police. According to the prosecution, the appellant volunteered no statement and bore no evidence of injury at the time of his surrender.

The case for the defence

[5] The appellant gave sworn evidence. He said he was a working man who had never been convicted of any prior offence. He testified that the deceased had approached him about talking to a woman and that he ignored him. The appellant said he used his shoulder to bounce the deceased off him, who in turn swung at the appellant but missed. He said four or five others joined in the attack on him. He was unarmed but tried to fight back and managed to escape without injury or wounds, by running through his assailants. He denied that any hugging up had taken place between the deceased and himself. He stated that he was not responsible for the death of the deceased, but was himself a victim. He also indicated that he never went to the doctor.

[6] Maria Powell, the appellant's witness, testified that it was the deceased who had used his shoulder to bounce the appellant and the appellant had used his shoulder to

ease off the deceased. She stated that the deceased was drunk and staggering and he "thump after" the appellant and fell. She indicated that after the deceased fell, she and the appellant went towards a car and when they got near, Kenroy Burke (also called "Bob Marley") ran over to the appellant and started to fight him. Then, a crowd of about six other persons joined in the fight against the appellant, during which the appellant was gunbutted in his forehead by an Indian policeman, causing swelling and a cut which bled.

[7] Ms Powell further stated that the deceased got up, ran across the road, "come in the midst" saying, "…a de pussy hole diss me so mek me defend me self". Mr Burke then opened a ratchet knife and stabbed after the appellant. The deceased got into the middle where Mr Burke was stabbing after the appellant and while the deceased was beating the appellant, the second stab from Mr Burke hit the deceased. The upshot of her testimony was, therefore, that it was Mr Burke who had stabbed the deceased by accident and that the stab had been directed at the appellant.

The appeal

[8] The original four grounds of appeal filed by the appellant were not pursued. Leave was granted by the court for Queen's Counsel for the appellant, Mr Delano Harrison, to advance two supplemental grounds of appeal. Those two supplemental grounds of appeal will now each be addressed in turn.

Ground (i)- The learned trial judge failed to give the jury proper and/or adequate directions on how to approach the evidence of the [appellant's] good character which arose so significantly on the defence's case.

The submissions

Queen's Counsel for the appellant

[9] Queen's Counsel Mr Harrison relied on his written skeleton arguments supplemented by brief oral submissions. He submitted that where an accused man provides evidence of his good character by sworn evidence, he is entitled to a good

character direction by the judge summing up to the jury. He cited the case of **Michael Reid v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 113/2007, judgment delivered 3 April 2009.

[10] He added that the appellant, having given sworn evidence in his defence that he had been a working man, employed to the same employer for 11 years prior to his arrest and that he had no previous conviction, was entitled to: a) a credibility direction that a person of good character is more likely to be truthful than one of bad character; and b) a propensity direction that he is less likely to commit a crime, especially one of the nature with which he is charged. He cited in support, the case of **Norman Holmes v R** [2010] JMCA Crim 19.

[11] Mr Harrison pointed out that approaching the close of his summing-up, the learned trial judge gave directions to the jury which related to the credibility limb of the good character directions. He submitted, however, that the learned trial judge entirely omitted to give the jury the propensity limb of the direction. A misdirection, he argued, that deprived the appellant of his right to a fair trial.

[12] In an overlap with ground two he also submitted that, given the evidence, the "excusatory circumstance" of self-defence had not been excluded. Therefore, he continued, in arriving at a proper verdict in light of all the evidence, the jury might have been significantly assisted by an appropriate good character direction with particular reference to the propensity limb, that the appellant was less likely than otherwise to have committed murder.

[13] He argued that, consequently, the court ought to quash the conviction, set aside the sentence and enter a judgment and verdict of acquittal, as the prosecution case was not of such a nature that, had they been properly directed, the jury would inevitably have convicted the appellant.

Queen's Counsel for the Crown

[14] Queen's Counsel Mr Jeremy Taylor relied on the written submissions settled by himself and Mr Edmond, on behalf of the Crown, supplemented by oral submissions.

[15] In his oral response, Mr Taylor indicated that it is undeniable that an appellant's good character is of probative value and where credibility is an issue, a good character direction is relevant. He cited in support the case of **Steven Grant v R** [2010] JMCA Crim 77 at para. [132] per Harris JA. He also acknowledged that it is accepted that the good character direction embraces both "credibility" and "propensity" limbs as outlined in the cases of **R v Vye** [1993] 1 WLR 471, **Bimal Roy Paria v State of Trinidad and Tobago** (2003) 62 WIR 471 and **R v Aziz** [1996] A.C. 41. Queen's Counsel additionally highlighted the case of **Patrick Forrester v R** [2010] JMCA 71, in which Mr Forrester gave sworn evidence of his good character. It was pointed out that his conviction was quashed, the sentence vacated and a retrial ordered, because the learned trial judge had not given himself the good character direction, as to either credibility or propensity.

[16] It was conceded by the Crown that, in the instant case, the learned trial judge's direction on good character was deficient, especially given that the propensity limb was entirely omitted. However, it was submitted that, the test was whether having regard to the nature of and the issues in the case and taking into account the other available evidence, a reasonable jury, properly directed, would inevitably have arrived at a verdict of guilty: see **Chris Brooks v R** [2012] JMCA Crim 5. Regarding the application of the relevant principles in different circumstances, the court was invited to consider the cases of **Mark Teeluck and Jason Ellis John v The State of Trinidad and Tobago** 66 WIR 319; **Michael Reid v R**; **Kevaughn Irving v R** [2010] JMCA Crim 55, **Jagdeo Singh v The State** (2005) 68 WIR 424; **Bally Sheng Balson v The State of Dominica** (2005) 65 WIR 128; **Ronald George Simmons and Robert Greene v Regina (Bahamas)** 68 WIR 37; and **Campbell v The Queen** [2011] 2 AC 79.

[17] Queen's Counsel maintained that, in the circumstances of the instant case, the jury had to contend with competing credibilities of the Crown and defence witnesses and had to draw certain inferences to convict — all in a context where self-defence was being considered and, quite generously in the opinion of Queen's Counsel, the learned trial judge had left provocation for the jury's consideration. The Crown's position was therefore that, on the facts of this case, even if the good character direction had been entirely omitted, that would not have entitled the appellant to have his conviction quashed. Therefore, *a fortiori*, as the learned trial judge had at least given the credibility limb of the direction, that strengthened the submission that the conviction should not be disturbed. Finally, Mr Taylor invited the court to apply the proviso, if it was determined that the summation was materially defective, in relation to the issue of good character.

Analysis

[18] The law governing when good character directions are necessary, their content when required and the effect of their inadequacy or erroneous omission, is now well settled. The cases cited, disclose that the following principles have emerged to guide courts on how to treat with the issue of a defendant's good character:

i) "The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State* [1998] AC 846, 852, following *Thompson v The Queen* [1998] AC 811, 844…The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen, ibid.*":**Teeluck and John v The State of Trinidad and Tobago** at para. 33.

ii) Where defence counsel fails to adduce evidence of good character, whether due to incompetence or otherwise, the focus moves to the impact of such

failure on the trial: **Teeluck & John v The State** at para. 39; **Campbell v The Queen** at para. 42; and **Michael Reid v R** at paras. 45 – 49.

iii) "When a defendant is of good character, i.e. has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: *Thompson v The Queen* [1998] AC 811 following *R v Aziz* [1996] AC 41 and *R v Vye* [1993] 1WLR 471.": **Teeluck and John v The State of Trinidad and Tobago** at para. 33.

iv) A direction as to the relevance of his good character:

(a) to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements;

(b) to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements.

R v Vye at page 479 and **R v Aziz** at pages 52 -53 para 5d.

v) "The standard direction should [therefore] contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged": **Teeluck and John v The State of Trinidad and Tobago** at para. 33.

vi) "The direction should be given as a matter of course, not of discretion…": **Teeluck and John v The State of Trinidad and Tobago** at para. 33.

vii) "Where credibility is in issue, a good character direction is always relevant: *Berry v The Queen* [1992] 2 AC 364, 381; *Barrow v The State* [1998] AC 846,

Sealey and Headley v The State [2002] UKPC 52, para 34": **Teeluck and John v The State of Trinidad and Tobago** at para. 33 and **Steven Grant v R** at para. [132].

viii) "If [a defendant] has not given evidence, but has merely made an unsworn statement, the importance of the [credibility direction] is reduced, but the direction may still be material in respect of propensity.": **Muirhead v R** [2009] 2 LRC 534 at para. 35 and **Bruce Golding and Damion Lowe v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 4 & 7/2004, judgment delivered 18 December 2009 at paras. 91 - 92.

ix) Where a good character direction has been erroneously omitted, the cases "where plainly the outcome of the trial would not have been affected by a good character direction may not…be so 'rare'": Lord Brown of Eaton-under-Heywood in **Vijai Bhola v The State** (2006) 68 WIR 449 at para. 17, qualifying dicta in **Teeluck and John v The State of Trinidad and Tobago** at para 33. See also **Balson v The State**; **Brown v R** [2005] UKPC 18 and **Jagdeo Singh v The State**.

x) The test to determine the effect of the omission or inadequacy of the good character directions on the soundness of the conviction, is whether having regard to the nature of and the issues in the case and taking into account the other available evidence, a reasonable jury, properly directed, would inevitably (or undoubtedly) have arrived at a verdict of guilty: **Chris Brooks v R**; **Sealey and Headley v The State**; **Whilby v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 72/1999, judgment delivered 20 December 2000, per Cooke JA at page 12; **Jagdeo Singh v The State** per Lord Bingham at pages 435 – 436; and **Michael Reid v R** per Morrison JA (as he then was) at pages 27 – 28.

[19] The sworn evidence of the appellant in this case was that he had been a working man, employed to the same company for 11 years prior to his arrest and that he had no previous convictions. On the basis of that evidence, it was conceded by the Crown that the learned trial judge in the instant case had a duty to give the standard two limbs of the good character direction to the jury.

[20] The learned trial judge however only gave the first (credibility) limb of the good character directions in these terms:

> "There is one thing I must tell you, Madam Foreman and your members. In relation to the [appellant], I have told you how to deal with his evidence. And you have heard this-the defendant is a young man of good character. Of course, good character cannot, by itself provide a defence to a criminal charge, but it is evidence which you should take into account in his favour. He has given evidence, and as with any man of good character, his character supports his credibility. This means it's a factor, which you should take into account when deciding whether you believe his evidence."

[21] The jury was not directed concerning the relevance of the appellant's good character to the likelihood of his having committed the offence charged. The court will therefore need to apply the "test" to determine whether in all the circumstances of this case, the jury would inevitably or undoubtedly have convicted the appellant, if they had been given the benefit of the propensity limb of the good character directions. In that regard, it is important to review some of the "cases to be found on both sides of the line" as observed by Morrison JA in **Chris Brooks v R** at para. [55].

[22] It will be convenient to first review cases in which the absence or inadequacy of the good character directions were fatal to the convictions. In **Campbell v The Queen** where the good character direction was totally omitted, Lord Mance writing on behalf of the Board, explained at para. 45, why the Board advised that the case be remitted to this

court, with a direction that the verdict should be quashed and a determination made whether or not to order a re-trial. He stated that:

> "[O]n the facts of this case the credibility and reliability of Mr Anglin's identification stood effectively alone against the credibility of the appellant's denial of any involvement. This is a case in which the appellant gave sworn evidence. The absence of a good character direction accordingly deprived him of a benefit in precisely the kind of case where such a direction must be regarded as being of the greatest potential significance. The Board also notes in this connection that at the appellant's first trial, the members of the jury were unable to agree, and it would appear, on the appellant's evidence, that his good character was at least before them…In the result the Board does not feel able to treat the absence of a good character direction in this case as irrelevant to the safety of the verdict,…"

[23] In **Jagdeo Singh v The State**, the appellant, Mr Singh, was afforded the benefit of the propensity but not the credibility limb of the good character directions. The appellant at the time of his conviction for two counts of corruption, was a young lawyer in his early to mid thirties, regarded by many as competent. He was involved in many social, cultural and sporting activities and was captain of all the teams for which he played. He had no previous convictions. The charges concerned an allegation that he requested money from the partner of a defendant he represented, to bribe the magistrate and the prosecutor. Mr Singh who was held in a "sting" operation when he went to collect money from his client's partner, always maintained that the money was for his fees and was not for the purpose of paying any bribe. The Board, in allowing the appeal and quashing the conviction, criticised the inferences and conclusions drawn by the Court of Appeal of Trinidad and Tobago based on the behaviour of his client's partner; mischaracterisation of statements made by Mr Singh; and a failure to recognise that the evidence of the police investigator more closely supported the defence case rather than the prosecution's case. In a context where the Board observed that the jury deliberated for an unusually long time by local standards they held that, "[i]t cannot be said that,

properly directed on the appellant's credibility, the jury would inevitably or without doubt have convicted".

[24] **Michael Reid v R** was a matter in which the applicant was convicted of rape. The issue was consent, with the complainant maintaining that she was forced and the appellant insisting that the encounter was consensual. The prosecution called the complainant and two police witnesses, while the defence case rested on the applicant's unsworn statement. After the case was left to the jury, they deliberated for just over two hours and returned a unanimous verdict of guilty. Thereafter, three witnesses were called in mitigation of sentence, who all spoke in glowing terms of the applicant's character. The conviction was quashed and a new trial ordered, on the basis that, had the applicant been advised of the value of giving sworn evidence and adducing character evidence, or of having his unsworn statement buttressed by character evidence, it could not be said that had the jury had the benefit of directions on good character, "the jury would inevitably or without doubt have convicted".

[25] In **Kevaughn Irving v R** the applicant was convicted of illegal possession of firearm, abduction, rape, indecent assault and robbery with aggravation. In his defence, he alleged that he was a prisoner of the other men who assaulted the complainant and that contrary to the evidence of the complainant, he never assaulted her. He complained on appeal that he was deprived of the opportunity to call evidence of character during his trial. Relying on the decision of **Michael Reid v R**, this court ordered a new trial on the basis that:

> "The issue of credibility being of utmost importance in this matter, we are of the view that the applicant ought to be given the opportunity to present to the tribunal of fact evidence as to his character."

[26] In **Teeluck and Jason Ellis John v The State of Trinidad & Tobago,** the trial judge did not give an appropriate good character direction in respect of either appellant.

The prosecution's case against the appellant Teeluck was very strong overall, hence the Board considered his conviction safe and dismissed his appeal. However, in respect of the appellant John, the Board held that his counsel should have raised the issue so he could have benefitted from a good character direction, because, as stated at paragraph 36:

> "[H]is credibility was of material importance in the issue of the conflict between his evidence and that given on behalf of the prosecution in relation to his treatment in police custody and the making of the confession statements attributed to him."

[27] **Patrick Forrester v R** was a case triable by judge alone in which identification was the issue. Despite the appellant giving evidence of his good character, the trial judge omitted the good character direction in her summation. This court in quashing the conviction and ordering a new trial, observed at para. [22] that, 'If the learned trial judge had directed herself on the evidence of his good character, she might have viewed the evidence in a different light".

[28] In **Norman Holmes v R** in another judge alone trial, the appellant who gave evidence as to his good character was convicted of illegal possession of firearm and robbery with aggravation. The learned trial judge, in summing up the case, mentioned the propensity limb of the good character directions, but made no reference to the credibility limb. In quashing the conviction, the court held on this point that, as the case turned on the complainant's word against the appellant's regarding his alleged participation in the robbery, his credibility was significantly in issue and it could not be said that a conviction would inevitably have resulted if a proper direction had been given.

[29] Let us now turn to some cases in which the absence or inadequacy of the good character directions did not vitiate the convictions.

[30] In **Balson v R** at the appellant's trial for murder, his counsel failed to lead evidence as to his good character, with the result that the trial judge gave no direction in that

regard. The Board however opined that, as the only question was whether the deceased was killed by the appellant or by an intruder, any assistance the appellant might have received from a good character direction was, "wholly outweighed by the nature and coherence of the circumstantial evidence", which pointed to the appellant as the murderer.

[31] In **Vijai Bhola v The State**, the appellant to their Lordships' Board was convicted of demanding money with menaces. The evidence, including that from a co-accused, which was not challenged by the appellant, clearly revealed that the appellant was party to a joint enterprise in which drugs were planted in the car of the virtual complainant and money demanded from him, in exchange for him not being prosecuted for the drug find. Through the fault of defence counsel, no evidence of good character was called on behalf of the appellant, who, at the time of his arrest for the offence, was a serving policeman with an unblemished record. In those circumstances given the strength of the case against the appellant, the Board held that a properly directed jury would inevitably have convicted the appellant.

[32] In **Simmonds and Greene v R**, a case in which the appellants were convicted of murder and housebreaking, the Board gave short shrift to the argument that, through incompetence of counsel, they were denied the benefit of a good character direction. While it was not clear that each was of good character, the Board observed that, even if they were, and evidence disclosing that fact had been adduced, the overwhelming weight of direct and circumstantial evidence against them, which included confession statements, meant that the jury's verdict would inevitably have been the same, even if they had benefitted from a good character direction.

[33] In **Brown v R** where the appellant was convicted of two counts of manslaughter (vehicular), one of the complaints raised before the Board was that the appellant, who was a serving police officer of good character, through the fault of his counsel, was denied the benefit of a good character direction. In concluding that the omission did not lead to

a substantial miscarriage of justice, the Board highlighted that the prosecution and defence cases of how the accident occurred were diametrically opposed to each other. The Board also noted that the appellant having given sworn evidence, the jury were afforded the opportunity to judge his credibility as well of the credibility of the main prosecution witness. The Board opined that while not seeking to minimise the importance of evidence of good character and the accompanying directions they considered that:

> "[I]n a case of the present type such a direction will be of less significance in assisting the jury to come to a correct conclusion than in other types of prosecution."

[34] **Chris Brooks v R** was a case in which the appellant was convicted of illegal possession of firearm and shooting with intent. The appellant gave sworn evidence and also called a witness who attested to the appellant's good character. The directions on good character given by the trial judge were "economical" and misleading, as they only highlighted that good character evidence by itself was not a defence to a criminal charge, but it should be taken in the accused man's account. The issue in the case was identification and involved a "contest of credibility" between two Crown witnesses on the one hand and the appellant on the other. The omission of proper directions was however found not to be fatal as the visual identification evidence was supported by forensic evidence that was consistent with the Crown's case but "wholly inconsistent" with the defence.

[35] The review of the cases "on both sides of the line" has shown that where there is a total absence of good character directions or such directions are inadequate due to being perfunctory in nature, or the omission of one of the two limbs, the conviction will usually be quashed, where the issue of credibility or propensity looms large in the case, and a proper direction may have affected the outcome. However, the total or partial omission or other inadequacy in the directions, will not result in the quashing of the conviction, even when the issue of credibility or propensity is significant, where there is strong evidence against the defendant which outweighs any benefit a proper direction

would supply; or if it is the type of case where the clear choices open to the tribunal of fact would not have been affected, either way, by a proper direction.

[36] Turning to the instant matter, as pointed out by Queen's Counsel for the Crown, there are some telling features in the evidence which unfolded in this case. On the Crown's case, although he did not see the stabbing, Courtney Green testified that after he had parted the appellant and the deceased, he saw the appellant closing a ratchet knife. Additionally, his evidence was that he saw the deceased bleeding next to his navel. The witness Dwayne Hutchinson, an off duty policeman, also testified to seeing the deceased with a wound to his belly. Both Green and Hutchinson further said that in the presence and hearing of the appellant, the deceased pointed at the appellant and accused him of stabbing him in his belly. They both also speak to the appellant running off and Mr Hutchinson chasing him. Mr Hutchinson's evidence also indicated that he caught the appellant but had to release him when he came under attack from friends of the appellant.

[37] The evidence of Mr Burke also supports that of Mr Green and Mr Hutchinson in that he saw the deceased after he was injured and saw Mr Hutchinson run after and catch a man, whom he had to release because the man's friends had knives and bottles and "get ignorant pon him". He was extensively cross examined by counsel for the appellant and denied the suggestion that he was the one who stabbed the deceased.

[38] The appellant, in his defence, denied having a weapon or stabbing the deceased that night. Under cross-examination, he maintained that he was the one who came under attack by five or six men including the deceased and Mr Burke. However, despite that, he suffered no cut. He stated that he never saw Mr Burke with a knife nor was he aware that the deceased had gotten stabbed. He also indicated that he did not see the witness Green at the time of the incident. He further stated that, when he went to the police station accompanied by his attorney-at-law, he never reported to the police that he had come under attack. His supporting witness however testified that the appellant received

a cut over his eye from a gun butt and that the deceased received his injury by accident when Mr Burke, armed with a knife, stabbed at the appellant.

[39] The jury was therefore left to assess the credibility of the three witnesses to fact for the Crown, whose evidence was largely consistent with each other, against that of the appellant and his witness between whom there were significant discrepancies. In a case involving a contest of credibility, the jury received the credibility limb of the good character directions, which would have assisted them in assessing the credibility of the appellant.

[40] The internal logic of the prosecution's case must have been apparent to the jury. The Crown's witnesses did not speak to seeing the stabbing but to noticing the deceased injured, the appellant closing a knife, and then running off after being accused by the deceased of stabbing him. The defence case on the other hand was discordant. Not only did the appellant, who painted himself as the victim of an attack by five to six men, suffer no injury, he also declined to report the alleged attack to the police. Though he admitted he was aware that the police were looking for him on 19 and 20 December 2011, he did not turn himself in until 21 December 2011. His witness, who placed the knife in Mr Burke's hand, curiously noted that the appellant suffered a cut from a gun butt, which, based on the appellant's evidence was untrue. Given the stark contrast in credibility and cogency of the prosecution and defence cases, which the jury had to resolve, it is inevitable, we find, that even if the jury had the assistance of the propensity limb of the directions, their verdict would have remained unchanged. As in **Chris Brooks v R**, any assistance that such a direction might have provided was, in this case, wholly outweighed by the nature and the cogency of the prosecution's evidence. On the evidence before them, the choice was clear and it is unsurprising that the jury took less than an hour to return a unanimous verdict of guilty of murder.

[41] Accordingly, this ground of appeal fails.

Ground (ii)–The learned trial judge failed to ensure the jury's verdict had rested upon their having in fact excluded self-defence, effectively depriving the applicant of a fair chance of unqualified acquittal of his charge of murder and accordingly occasioned a miscarriage of justice.

The submissions

Queen's Counsel for the appellant

[42] Queen's Counsel again relied on written and oral submissions. He advanced that, as the appellant testified in his defence that he was under attack by the deceased and his friends, and that even on the prosecution case, there was evidence suggesting an attack on the appellant by the deceased, the learned trial judge was duty-bound to take care to ensure that the jury's verdict rested upon their having in fact excluded the "defence" of self-defence, although that particular "excusatory circumstance" was not in express terms relied upon by the appellant.

[43] He complained that the learned trial judge defaulted in this duty, which deprived the appellant of a fair chance of an unqualified acquittal on the charge of murder and, accordingly, occasioned a miscarriage of justice. He cited in support the case of **R v Kachikwu** (1968) 52 Cr App R 538, 543.

[44] Counsel argued that the narrative given by the eyewitness Mr Green, gives rise to the inference that the deceased was the aggressor and that the injury was inflicted by the appellant during the wrestling, using a ratchet knife.

[45] He further advanced that although the deceased was unarmed, there is no evidence that his "bare hands" were not the potentially lethal hands of a martial arts expert; nor is there any evidence that during the actual wrestling between the deceased and the appellant, the appellant might not have felt so overpowered by the greater size (height/body weight) of the deceased that he honestly believed that he — the appellant — had to defend his life or limb by using the knife. He contended that on the evidence, the appellant was a relatively small man. Further, that there is no like evidence in the

case "in relation to [the] physical body" of the deceased, or, of whether, at some point unseen by Mr Green, the deceased's stronger arms\hands though "bare", did or did not move from body to throat.

[46] He ended his submission by asserting that, on the basis of all the foregoing, including the fact that the appellant was deprived of the propensity limb of the good character direction, the appellant's conviction ought properly to be quashed, the sentence set aside and a judgment and verdict of acquittal entered.

Counsel for the respondent

[47] Mr Edmond, in responding, adopted the Crown's written submissions. Counsel acknowledged that a trial judge has a duty to leave for the jury's consideration, a defence that arises on the evidence (in this case self defence) even where the defendant has not relied on it: **R v Kachikwu** and **Alexander Von Stark v R** [2000] UKPC 5. Counsel further submitted that the duty extends even to situations where such a defence may appear inconsistent with the defence actually advanced, by, or on the defendant's behalf: **R v Bonnick** (1977) 66 Cr App Rep 266 and **Director of Public Prosecutions v Bailey** [1993] UKPC 46.

[48] Counsel additionally cited the cases of **Scantlebury v R** (2005) 68 WIR 88 and **Wilbert Pryce v R** [2019] JMCA Crim 40, both matters in which self-defence was held to have arisen on the evidence. Conversely, counsel pointed out the case of **Troy Stanford v R** [2017] CCJ 7 (AJ), in which it was held that self-defence did not arise.

[49] Referring to the cases of **R v Daisy Robinson and Winston Rankine** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal Nos 27 & 28/1998, judgment delivered 11 April 2003, **R v Derrick Wolfe** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 94/1991, judgment delivered 31 July 1992 and **R v Mary Lynch** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 30/1994, judgment delivered 24 June 1996, it was submitted that, if

a defendant indicated that he was in fact under attack, an honest belief direction would have been of little or no assistance to the jury. Consequently it was argued that in the circumstances of the instant case (where the appellant maintained he was actually under attack), the learned trial judge was more than generous in giving a "quasi-Beckford" direction as to the existence of an honest belief of being under attack, in his summation on the prosecution's case.

[50] In his submissions, counsel also referred to the case of **Ronald Webley & Rohan Weikle v R** [2013] JMCA 22 in which it was stated that, "no special words are necessary to convey to the jury, the meaning of self defence". He maintained that the directions to the jury were sufficient and that the learned trial judge should "be commended for effectively walking the tightrope between…factually competing defences". Thus he contended that the learned trial judge was "effectively constrained from placing the knife in the appellant's hand or attributing the fatal blow to the appellant in circumstances of self-defence".

[51] He also argued that the learned trial judge had no duty to ensure that the jury had completely excused self-defence (which could not be achieved unless the learned trial judge inquired into the "sacred deliberations made during the sequestration of the jury"), but rather his duty was to leave it to them to assess whether it did in fact arise on the available evidence.

[52] Further, counsel advanced that the Crown had negated self-defence through the Crown's conduct of the case, as the issue of the deceased having a weapon and the circumstances of the deceased and appellant wrestling were explored both on the Crown's case and in cross-examination of the appellant and his witness on the defence case. He contended, therefore, that the jury had all the available evidence to assess the circumstances.

[53] Counsel highlighted that the complaint was being made in a context where the defence case was that the fatal stab had been misdirected and accidental from the deceased's friend. Counsel also pointed out that when asked about the attack he said was made upon him by the deceased, the appellant indicated that he had felt no way about it and when asked details as to who was attacking him and how, and the nature of his response, he was less than helpful to the jury. Counsel therefore advanced that there was no other material from which the learned trial judge could have gone further to elaborate on self defence beyond the directions he gave, opening the avenue of that defence. Counsel cited **Troy Stanford v R** in support of that submission. Counsel also submitted that the learned trial judge generously left provocation with the jury although, quite possibly, it did not arise.

[54] Counsel submitted finally that the conviction be affirmed and that should the summation be found materially defective in relation to the issue of self-defence, that the proviso be applied.

Analysis

[55] The responsibility of a trial judge to ensure that a trial is fair is admittedly sometimes quite onerous. In **R v Kachikwu** that duty was expressed by Winn LJ, at page 543, in this way:

> "It is asking much of judges and other tribunals of trial of criminal charges to require that they should always have in mind possible answers, possible excuses in law which have not been relied upon by defending counsel or even, as happened in some cases, have been expressly disclaimed by defending counsel. Nevertheless, it is perfectly clear that this Court has always regarded it as the duty of the judge of the trial to ensure that he himself looks for and sees any possible answers and refers to them in summing up to the jury and takes care to ensure that the jury's verdict rests upon their having in fact excluded any of those excusatory circumstances."

[56] Lord Clyde in **Alexander Von Stark v R** contrasted the onerous responsibility of the trial judge with the lesser duty borne by counsel. He said at para. 12:

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions."

[57] Thus, even where a defence arises on the facts that is at variance with the one advanced by the defendant, to ensure that the jury considers all the avenues for fair disposition open on the evidence, the trial judge is obliged to leave that defence for the assessment of the jury. In fact, the duty extends to defences that are not just at variance, but which are plainly inconsistent with the one relied on by the defendant at trial. Hence in **R v Bonnick**, the court held that there may be evidence of self defence even where a defendant asserts he was not present; but that, for the defence to arise, there would have to be cogent evidence in support, for example coming from the prosecution witnesses, when the best available witness disables himself by his alibi from supporting it (see also **Director of Public Prosecutions v Bailey**).

[58] It is important also to highlight that, when a trial judge leaves for the jury's consideration a defence inconsistent with the one advanced by the defendant, the judge is not thereby undermining the case of the defendant. As noted at para. 33 in **Troy Stanford v R**, a case where the defendant relied on the defence of accident and argued on appeal that self-defence should also have been left for the jury's consideration:

> "The sole consideration was whether there was evidence sufficient to raise a prima facie case of self defence. Once that threshold was met, it was for the trial judge to give the jury the appropriate direction on self defence. Once there was sufficient evidence, there could have been no question of Standford's case being undermined. Self defence, unless disproved by the prosecution, would have entitled him to a 'clean acquittal'."

[59] It is therefore clear from the cases that, in discharging the duty to leave all defences that arise on the evidence, a trial judge has to be guided by that evidence. The logic which follows from that observation is that the manner in which those defences are left for the consideration of the jury should maintain fidelity to the evidence.

[60] The complaint levelled at the summation of the learned trial judge was that he failed to ensure that the jury's verdict rested upon their having excluded self-defence, although that defence was not in express terms relied upon by the appellant. Mr Harrison also posited that in encountering the deceased, the defendant might have been confronted by the bare hands of a martial arts expert or someone who could overpower him.

[61] The second part of the complaint may be summarily disposed of. In the words of Stephenson LJ in **R v Bonnick** at page 269, if a trial judge were to invite a jury to consider a defence without there being *prima facie* evidence of that defence, "would be to invite speculation". That sage admonition must surely also apply to the nature of the evidence capable of establishing the defence. There is absolutely no evidence of the deceased being a martial arts expert or of him being of a size that may have place the appellant at a disadvantage in a physical altercation. In fact, there is positive evidence coming from the post-mortem report, received into evidence by virtue of section 31C(b) of the Evidence Act, that the deceased was only 5 feet 4 inches tall and moderately built. While there is evidence coming from his witness that the appellant was shorter than the men attacking him, there is no evidence suggesting that he may have been generally

physically inferior to the deceased. His counsel at trial did not pursue such an avenue. Most importantly, the jury saw him and had the information about the deceased's height and build to make whatever use of a comparison between their physical statures, if any, they saw fit. There was therefore no basis on which the learned trial judge could properly have invited the jury to consider the realm of possibilities, creatively conjured up by Mr Harrison, in his directions on self-defence.

[62] Concerning the first part of the complaint, I agree with counsel for the Crown that the duty of the trial judge should not be expressed as a requirement to ensure that the jury had rejected self defence before convicting the appellant. Such a duty, taken literally, would be impossible of performance, as nobody, including the learned trial judge, is allowed to inquire into the jury's reasons for verdict: **R v Qureshi** [2002] 1 WLR 518 and **Regina v Mirza Regina v Connor and Rollock** [2004] 1 AC 1118. The duty of the learned trial judge was to give the jury correct directions in law, that they were required to follow, and to remind them of the evidence in respect of which it was their sole purview, to determine which facts they found to be proved. The respective roles of judge and jury were a part of the directions given to the jury at page 401 of the transcript. During the summation, the jury was dutifully guided on the law that they should apply in assessing the facts that raised the issue of self-defence as they considered the appropriate verdict. On appeal, the concern of the appellate court in this regard, is whether the jury was properly and accurately assisted.

[63] How then did the learned trial judge direct the jury on the issue of self-defence? At page 410 of the transcript the learned judge said:

> "…Madam Foreman and your members, a deliberate and intentional killing is not necessarily murder, a deliberate and intentional killing done in lawful provocation is not murder, and also a murder [sic] done in lawful self–defence is no offence at all."

[64] Then, at pages 415 – 419, he directed the jury in detail as follows:

> "Now, Madam Foreman and your members, a person who is attacked, or believe that he is about to be attacked may use such force as is reasonably necessary to defend himself. If that is the case, he is acting in lawful self-defence, and is entitled to be found not guilty.
>
> Madam Foreman and your members, it is for the Prosecution to make you sure that the [appellant] was not acting in lawful self-defence, it is not for him to prove that he was. There is no burden on the [appellant] to prove anything, the burden remains on the Prosecution right throughout and it never shifts. A person only acts in lawful self-defence if in all the circumstances he believes that it is necessary for him to defend himself and if the amount of force which he uses in doing so is reasonable. If the amount of force he uses in doing so is reasonable. So Madam Foreman and your members, there are two main questions for you to answer, the first question is, did the [appellant] honestly believe or may he honestly have believed that it was necessary to defend himself? A person who is the aggressor or is acting in revenge knows he does not mean [sic] to resort to violence does not act in lawful self defence. Madam Foreman and your members if you are sure that the [Appellant] did not honestly believe that it was necessary to defend himself then self-defence does not arise in the case and he is guilty but if you decide that he was or may have been acting in that belief, you must consider the second question. And that second question, is taken the circumstances that you heard outlined of what was taking place outside Pacca's bar and the danger as the [appellant] honestly believed them to be, was the amount of force which he used reasonable? Was the amount of force which he used reasonable? Force used in self-defence is unreasonable force. Self-defence is unlawful if it is out of all proportion to the nature of the attack. If the force is out of proportion to the nature of the attack or is in excess of what is really required of the defendant to defend himself when deciding whether or not force used by this accused was reasonable, you have to think, you have to think of such questions as, was there a weapon used by the attacker? We are going to come and look at these closer detail but at the outset I am telling you, one

> of the things you can look at to say whether if the defendant thought he was honestly defending himself, whether the force he used was reasonable, you have to determine firstly, did his attacker if he was being attacked, did his attacker have a weapon? If so what sort was it, and how was it used? You also have to consider, was the attacker on his own or was the accused being attacked or in fear of being attacked by two or more persons. Remember that a person who is defending himself cannot be expected in the heat of the moment to weigh precisely the exact amount of defensive action which is necessary. If you conclude that the defendant did no more than than [sic] he honestly and instinctively thought was necessary to defend himself, you may think that it would be strong evidence that the amount of force used by him was reasonable. If you are sure that the force used by the [Appellant] was unreasonable, he cannot have been acting in lawful self-defence and he is guilty but if the force used was or may have been reasonable then he is not guilty. So the defence in relation to the circumstances of this case ask questions, was the attacker armed? Was their [sic] more than one attacker? Do you form the view he honestly believed that he needed to defend himself? Those are the questions you have to look at."

[65] As pointed out by counsel for the Crown, this direction, in so far as it included a direction on honest belief was generous. Cases such as **R v Daisy Robinson and Winston Rankine**; **R v Derrick Wolfe** and **R v Mary Lynch** have long established that where an accused indicates that he was actually under attack, as opposed to believing that he was under attack, a direction on honest belief is otiose.

[66] In fact, the learned trial judge later in his summation specifically reminded the jury that even on the Crown's case, there was evidence that the deceased had at some point been the aggressor. At page 428 the learned trial judge said:

> "One of the things you will recall in Crown Counsel's address, what she said and this is what the witness is saying, she saw when [the deceased] got up, he got up and go straight to [the appellant]. Now is that the truth? Because if that is accepted at this point [the deceased] is the person who is the

> aggressor, who is pushing what is taking place there and that is coming from the witness."

[67] It is difficult to see how the learned trial judge could have done more to place the issue of self defence fairly before the jury, especially when that was not the defence the appellant relied on. Further, as counsel for the Crown rightly observed, the learned judge had to be careful not to place the knife in the appellant's hand on the defence case. The learned trial judge could not go beyond what the evidence permitted. The observation made by the Caribbean Court of Justice in the case of **Troy Stanford v R**, at para. 36, bears repetition here:

> "Where self-defence is in issue, the state of mind of the accused is important. The accused is in those circumstances always best placed to assist the jury as to whether he was acting in self-defence. We recognise however that the accused has no obligation to provide that assistance and his failure to do so cannot be held against him. But if, as in this case, the accused gives no evidence whatsoever of self defence (electing to give evidence entirely and thus rely completely on the defence of accident) and if there is no material in his statements from which it can reasonably be inferred that he was or may have been acting in defence of himself or someone else, then the judge must examine the remainder of the evidence to see whether the issue of self-defence reasonably arises."

[68] It is clear, therefore, that the learned trial judge left the defence of self-defence for the assessment of the jury in accordance with how the evidence unfolded. Considering that it has been repeatedly held in cases, for example **Ronald Webley & Rohan Meikle v R** per Brooks JA (as he then was) that "no special words are needed to convey to the jury the meaning of self-defence", considering the detailed formulaic direction given by the learned trial judge, the complaint on this ground is obviously misconceived. This ground fails.

The route to verdict

[69] Although it was not pursued as a ground of appeal, the court invited counsel on both sides to submit on whether the route to verdict left to the jury by the learned trial judge made it sufficiently clear that the three possible verdicts were: not guilty, guilty of manslaughter or guilty of murder.

[70] Queen's Counsel Mr Harrison asked the court to examine the route to verdict which he complained did not mention anything related to self defence and what the verdict ought to be in relation to that.

[71] Queen's Counsel Mr Taylor, while acknowledging that the learned trial judge did not leave the path to verdict in the classical sense, noted that he left the possibility of the jury finding the appellant guilty or not guilty of murder and also for them to convict of a lesser offence, if they find he was provoked. He submitted that even without the classical route, it was still open for the jury to come back with a verdict of guilty of murder. He highlighted the use of the word "only" on page 490 line 16 of the transcript. He submitted that, in this way, the learned trial judge gave the path to verdict, supplemented by earlier directions at page 415 line 13 and very extensive directions from pages 416 – 419.

Analysis

[72] It is, as noted by learned Queen's Counsel for the Crown, that the route to verdict was not left by the learned trial judge in the classical sense. The summation, however, has to be taken as a whole. At page 407 to 408 the jury were given the standard direction on the presumption of innocence as follows:

> "I must tell you this, Madam Foreman and your members, in all criminal cases as this one is, the accused is presumed innocent until you by your verdict say he is guilty. There is no burden on him to prove his innocence. The burden of proof rests on the prosecution throughout, the burden never shifts. Before you can convict the accused the Prosecution must satisfy you, Madam Foreman and your members, so that you

> feel sure he is guilty, although there is no duty on the accused to prove his innocence. He may attempt to do so, if he attempts and he succeeds then he is not guilty. If he leads [sic] you in a state of doubt then equally he is not guilty. But even if he should fail in his attempt that does not mean that you automatically say he is guilty. You have to consider all the evidence including what he has said and see whether you are satisfied so that you can feel sure that the Prosecution has proven its case. It is only when you are so satisfied that you can properly say he is guilty. In any other case your verdict will have to be one of not guilty."

[73] The jury also benefitted from detailed directions on self-defence from pages 415 – 419 already earlier extracted. Then on page 490, while giving directions on provocation, the learned trial judge expressed himself in this way:

> "Madam Foreman and members of the jury, I am going to direct that before you can convict this [appellant] of murder, the Prosecution must make you sure that he was not provoked to do as he did. Provocation has a special meaning in this context which I will explain to you. If the Prosecution does make you feel sure that he was not provoked to do as he did he will be guilty of murder. If on the other hand you conclude either that he was or that he may have been provoked then the [Appellant] will not be guilty of murder but guilty of the offence of manslaughter, a lesser offence. **And I must tell you, it is only in the circumstances where you are sure that it was the [appellant] who inflicted the [sic] to the abdomen of [the deceased] which injury resulted in death and at the time the [appellant] was not acting in self defence**." (Emphasis supplied)

[74] Towards the end of that passage therefore, the learned trial judge brought home to the jury that to convict the appellant of any offence, they had to be sure both that he was the one who inflicted the injury on the deceased which caused death **and** that at the time he was not acting in self defence. The learned trial judge then went on to give further directions on the distinction between manslaughter arising from provocation and murder, if the existence of provocation was disproved by the prosecution.

[75] While on the totality of the summation, we find that the jury was adequately assisted, we take this opportunity to remind trial judges that it is good practice to take care to leave all the options for verdict open to the jury among the final directions given to them. As the jury should normally first consider the defence case, it may be best to leave the verdict that would result in a clean acquittal first, then the verdict that would result in conviction of a lesser offence, if any, and then the option of conviction of the full offence as charged, if the defence or, where relevant, each defence has been rejected.

Conclusion

[76] In light of all the foregoing, we have come to the conclusion that this appeal must be dismissed and the conviction and sentence affirmed. The sentence is to run from 19 February 2016, the date it was imposed.