[2024] JMCA Crim 10

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MRS JUSTICE G FRASER JA (AG)

SUPREME COURT CRIMINAL APPEAL NO 29/2017

VASSELL DOUGLAS v R

Miss Deborah Martin for the appellant

Mrs Sharon Milwood-Moore and Mrs Christina Porter for the Crown

27, 28, 29 September 2021 and 23 February 2024

Criminal Law - No case submission - Self-defence - Summation on inconsistencies and discrepancies - Treatment of defence's case - Whether defendant entitled to good character direction - Wrong section of legislation cited in the statement of offence (the Offences Against the Person Act) – Appellate court's powers of amendment.

G FRASER JA (AG)

Background

[1] The appellant, Mr Vassell Douglas, was charged on an indictment for the offences of illegal possession of firearm (count one) and wounding with intent (count two). The matter was tried in the High Court Division of the Gun Court for the parish of Kingston on various days between 5 July 2016 and 24 March 2017 by a judge of the Supreme Court ('the learned trial judge'), sitting without a jury. The appellant was convicted of the above-mentioned offences and, on 6 April 2017, was sentenced to eight months' imprisonment at hard labour on both counts. The sentences were ordered to run concurrently.

[2] A single judge of this court, in granting the appellant leave to appeal both convictions and sentences, opined that further exploration of and full arguments on the following issues would be useful in determining the matter:

i. whether there were a number of deficiencies and misdirection as it relates to the issue of self-defence in particular the issue of honest belief,

ii. whether the learned judge ought to have given a direction on the propensity limb of the good character direction,

iii. whether, although the learned trial judge identified a number of inconsistencies and discrepancies in the evidence given by the prosecution witnesses, she failed to demonstrate how she resolved them.

iv. the incorrect section recited in the statement of offence relative to count two of the indictment, and no amendment was sought by the prosecution to rectify the section to substitute section 20 instead of section 21 of Offences Against the Persons Act ('OAPA').

v. the inappropriate sentences imposed by the learned trial judge on both counts of the indictment, having regard to the sentencing guidelines and the 2010 amendment to section 20 of the OAPA.

[3] At the hearing of the appeal, counsel for the appellant indicated that the appellant would only be challenging his convictions and not the sentences. Counsel informed the court that the appellant had not been granted bail pending appeal and had served the sentences imposed in respect of both offences. Our understanding of counsel's utterances in this regard, is that, the appellant already served the very short sentences of eight months imprisonment on each count and was released.

[4] At the end of the hearing, we reserved our decision and indicated that we would provide same as soon as possible. This is the fulfilment of our promise. We apologize for the delay in providing this decision.

A general outline of the facts

[5] The appellant was an armed plainclothes security guard assigned to the National Water Commission office ('NWC office') located at the Portmore Mall in the parish of Saint Catherine. On 3 January 2014, while he was on duty there, an incident occurred between him and the complainant named Senator Hylton, who had visited the NWC office on more than one occasion to complain about damage done to his water pipe by NWC workers.

[6] The complainant felt that his concerns were not being addressed. As a result, he became upset and began to behave in a boisterous manner. The appellant cautioned the complainant and asked him to calm down and lower his voice. The complainant refused to adhere to the appellant's instructions and was asked to leave the NWC office. Soon after, an altercation ensued between both men which resulted in the complainant being shot in his left arm by the appellant.

The evidence for the prosecution

Senator Hylton

[7] On 3 January 2014, the complainant went to the NWC office to make a report about the damage that workers from NWC had caused to a pipe at his home.

[8] He had gone earlier in the day, left, and returned near 3:00 pm. None of the customer service agents were paying him any attention and he began to complain loudly. The appellant came over to him, told him to stop making noise in the office, and told him to leave. The complainant responded by asking the appellant "who are you that I should be mindful of". The appellant insisted that the complainant needed to leave the NWC office. The complainant saw the appellant go over to the customer service desk, take out his phone and appeared to be speaking on it.

[9] The appellant then returned to where the complainant was and pushed him in his chest three times with his hands. The complainant said that he was "railing" at the appellant, that is, speaking loudly. He told the appellant "martial arts is [sic] not for aggression, it's for self defence". The complainant, while at arm's length from the

appellant, reached for his phone from his pocket, and had the phone in his right hand, when the appellant pulled his firearm and shot him in his left arm. The phone fell from the complainant's right hand.

[10] The complainant testified that he did not push the appellant at any point, and did not, at any time, have anything in hand, apart from his phone. After the appellant shot him, his phone fell and broke into pieces, and the appellant kicked away its pieces. The complainant went to the Spanish Town Hospital where an x-ray was done, and it was revealed that there were broken bones at the point where he was shot in the left arm. He was treated and admitted.

[11] He remained in hospital for "[m]aybe a week or so". While in the hospital, the police came to him and took a report. The complainant stated that he had seen the appellant many times when he went to the NWC office to pay his water bill, however, he did not know what function the appellant played at the office, "just a regular person" he had never spoken with him before the day of the incident.

[12] The complainant testified that when the shot was fired, the appellant's gun was pointed at him. The complainant reiterated that he did not touch anyone in the building during the incident.

[13] In cross-examination, the complainant stated that he had been trying to have the issue of the damage to his pipes resolved for some time. He followed one of the customer service representatives, Mrs Anderson, when she went out of the NWC office, complaining loudly, but he eventually returned to the office.

[14] He agreed that when he returned to the NWC office, he was "cursing" for attention and venting his anger, he felt he was being sent from one person to another "like a pass round donkey". It was at that point that the appellant approached him.

[15] The complainant agreed, when confronted with his statement, that he had not been truthful when he said that he did not know the appellant's function at the NWC

office. He knew that the appellant was a security officer dressed in plain clothes. He agreed that he was cursing, to describe how he felt and how the NWC was treating him. He agreed that he told the appellant to call the police, and he saw the appellant using his cellular phone afterwards. The complainant agreed that while the appellant was speaking on his cell phone, he (the complainant) continued to curse about the poor service that was being offered. The complainant testified that when the appellant came to him, and again asked him to leave the premises, in response, he told the appellant "[i]f you name Jung Lue, a me name Carter Wong" and "[m]i nuh fraid a nobody".

[16] He denied that he slapped the appellant in his face, but admitted that after the appellant pushed him, he pushed the appellant. The complainant agreed that when he testified that he had not pushed the appellant, it was untrue. He agreed that he was taller than the appellant, who would reach him somewhere in the region of his chest if they were to stand next to each other. The complainant admitted that in his statement to the police he said, "[h]e then hit at my face with a firearm, I then blocked it with a force so as to hurt him". He agreed that this was called a "strike block" and that he had stated that he did "Tai Chi Kung Fu". The complainant stated that the strike block was to prevent himself from getting hurt, and to block the appellant's attack. He agreed that the appellant's initial use of the firearm was to slap him, and this made him even more angry. He thought the whole pushing incident was embarrassing. He agreed that it was after he countered with a strike block, that the appellant stepped back and pulled his firearm. The complainant denied a suggestion that he was pulling a ratchet knife. He also denied that he approached the appellant. He denied that the appellant shouted at him to drop it, and that he refused to do so. He agreed that the appellant fired a single shot at him but was adamant that he did not have a knife. He denied that the appellant fired a shot to stop his approach on him.

[17] In re-examination, the complainant agreed that, in blocking the appellant, he had to touch him.

Ms Elizabeth Badhu

[18] On 3 January 2014, sometime after 3:00 pm, Ms Badhu was at the NWC office conducting business. She heard and saw the complainant talking very loudly in an angry tone, insisting that he had been in the office for too long and that someone needed to come to talk to him. Eventually, the appellant, whom she knew as the security officer working there, spoke to the complainant asking him to stop the noise and the loud talking, but the complainant continued and insisted that he needed someone to come to speak with him. The appellant raised his hand as if to push the complainant out of the office but did not actually touch him. Upon seeing that the appellant had tried to push him, the complainant made a fist with his hand, but then his telephone rang, and he answered it, by which time his hand was no longer fisted nor in the air. The complainant was still angry and agitated while he was speaking on the phone, and the appellant again told him to "come out with the loud noise". The complainant said that he was not leaving and was saying something like he knows karate (martial arts). Ms Badhu then saw the appellant back up a little, pull a gun, and then she heard a loud explosion.

[19] At the time when the complainant said that he knew karate, he was just gesticulating, "like people talk and move their hand freely". The complainant did not do anything with his feet - he was just standing. Ms Badhu testified that she did not see the complainant with anything in his hand and did not see him do anything to the appellant. Before the appellant stepped back, the complainant was just "loud and carrying on". She further testified that, after the explosion, the appellant went into an enclosed area, she saw a lot of blood that came from the complainant's hand, and he went through the door to the outside.

[20] In cross-examination, Ms Badhu stated that the appellant spoke to the complainant about three times. In response to counsel's question Ms Badhu agreed that the complainant was being "loud and aggressive," but she did not hear him use any expletives. She agreed that in her statement to the police, she had said that the complainant swung his hand with his fist folded as if he was punching at the security

guard, but his hand did not catch the man, and that this was an accurate recording of what she saw. She agreed, that after that happened, the appellant stepped back a little, then the complainant's phone rang, and he spoke on the phone. After the complainant ended his conversation on the phone. The appellant she said, came to speak to the complainant again, and it was in that third interaction that she heard the complainant tell the appellant that he knew martial arts. Ms Badhu did not recall seeing either the appellant or the complainant pushing or hitting each other. She did not recall seeing the appellant attempting to strike the complainant and the complainant blocking the blow.

[21] She did not see the complainant hitting the appellant or boxing him two times across the face, nor did she see the appellant pushing the complainant at any time. She did not see the complainant reaching for something on his right side. At the time when she heard the explosion, the appellant and complainant were within touching distance of each other. After the single explosion, the arguments stopped. Subsequently, police officers came to the location.

Ms Angella Burford

[22] On 3 January 2014, Ms Burford was in the NWC office at the Portmore Mall. The complainant was sitting beside her then he got up and went to speak with someone. He asked to speak to the supervisor, as no one was attending to him. The receptionist spoke with him, and he returned to his seat and remained there for up to 45 minutes. A female worker came out, and the complainant walked towards her and complained, but she did not attend to him.

[23] The complainant returned to his seat and then began to quarrel. While he was quarrelling, the appellant came to him and told him to stop the noise, but the complainant began to speak even more loudly. The appellant told the complainant to stop the noise, or he would put him out, and that he should not make so much noise and use indecent language. The complainant went into his pocket and took out a little black phone into which he spoke. He said, "Mama who you say you talk to out here?" and mentioned the name "Miss McCalla". After that, he continued quarrelling, cursing bad words and

behaving loudly. Then the appellant stepped toward the complainant and again told him to leave. The complainant raised his hand as if to "block" the appellant, Ms Burford said "I don't know what the security do" to cause this action on the part of the complainant. She had been speaking on her own phone and not paying attention to the two men. The next thing she observed was she heard when the phone that was in the complainant's hand, fell. The appellant told the complainant that he was going to put him out, and the complainant responded, "put me out put me out" and spoke even louder. Then the appellant went to his waist, took out a "shotgun" [short gun] and put it to the front of his waist. At that time the complainant was still quarrelling, making noise, and cursing a lot of bad words. The appellant then pulled the gun and said to the complainant "a seh to come out". At that time the gun was pointed in the direction of the complainant, Ms Burford in an act of self-preservation moved away, as she had been close to the complainant, "and if anything, she did not want it to catch" her. While moving away, Ms Burford was not able to see what was happening, as her face was turned away from the men, but she heard a shot "go off". When she turned around to look, she saw the complainant's hand covered with blood. She knew the appellant as a security officer at the NWC office. Miss Burford testified that she did not know whether the appellant or the complainant touched each other during the incident.

[24] In cross-examination, Ms Burford stated that she had been going to the NWC Office over a long period to pay her bills and had been seeing the appellant at the premises. Although the appellant wore plain clothes, she formed the view that he was a security officer because he controlled the premises and had the key to open and close the door. She saw him talking to customers to see what they wanted and helping them. She described the appellant as a nice, quiet, and soft-spoken person. She had seen many upset customers at the office on the occasions when she was there. Although persons would be there quarrelling, the appellant never got angry with them. At times he would assist them, by arranging for them to speak to the supervisor, or by trying to find out what problem they had.

[25] Ms Burford saw the complainant follow an NWC employee outside, calling to her. She stated that the complainant had been cursing for about an hour before she heard the explosion. During that hour, she did not see the appellant touch the complainant. The complainant raised his hand after the conversation on the phone. She did not see either the appellant or the complainant push each other. When confronted with her police statement she agreed that recorded therein under her signature, were the words, "I saw when the security pushed the man towards the doorway and when the man pushed him back…". She explained that that while giving her statement, at times when she was talking the police was not writing, "and sometimes I have to say I did not say that, and that is not what I was saying". She also stated that, she was "dramatize" (traumatized) when she was giving her statement to the police, and so did not read over everything that was written, "I was so frightened and nervous I didn't read over everything". Ms Burford said that she had never seen the appellant with a firearm before that day. She did not see the complainant box the appellant twice, neither did she see the appellant push the complainant. Her face was turned away from them when she heard the explosion. She did not hear the complainant mentioning martial arts on that day.

Corporal Cyril Francis

[26] Corporal Cyril Francis, of the Spanish Town Police Station, although called as a witness by the prosecution, did not give any evidence in chief but was cross-examined by counsel appearing for the appellant at the trial.

[27] On 3 January 2014, at about 2:00 pm, he was standing at the front of the station when the appellant, whom he did not know before, came to him crying. The appellant introduced himself to Corporal Francis, told him that he was a security officer, and asked to speak with him. The appellant told Corporal Francis that he had a firearm on his person, and he had just been involved in an incident at his workplace at the NWC office in Portmore. The appellant told Corporal Francis that a man came into the office behaving in a boisterous manner, he tried to calm him down, but the man would not do so. The staff was becoming fearful as he tried to calm this man. The man pulled a knife and hit

him twice in the face. The man advanced to him more and more, and he pulled his firearm and fired one round. Corporal Francis told the appellant that the matter would have to be investigated, and the appellant said, "I know". The appellant gave the firearm to Corporal Francis who put it in a black plastic bag and put it in his drawer. When the appellant was telling Corporal Francis what happened, he appeared to be frightened. Corporal Cyril Francis then handed over the firearm to Sergeant Fabian Francis, after telling him what the appellant had told him. The appellant then left with Sergeant Francis.

Detective Corporal Keith Myers

[28] On 3 January 2014, Detective Corporal Myers was stationed at the Portmore Criminal Investigation Bureau ('CIB'). At about 3:00 pm, he heard information relayed from police control, and he proceeded to the NWC office, Portmore Mall, in the parish of Saint Catherine. The first responder, Corporal Plummer, spoke to him and took him inside the NWC office. Inside that building he observed bloodstains and a bullet fragment on the floor, and on the sidewalk outside the building, he saw blood stains.

[29] He spoke to a security officer there and interviewed other workers and customers inside the NWC office. He then contacted the Saint Catherine Crime Unit and commenced an investigation into a case of shooting with intent. He proceeded to the Portmore CIB office and received an envelope. He opened the envelope in the appellant's presence and saw a .38 Taurus revolver. He told the appellant that he was investigating a case of shooting and cautioned him, whereupon the appellant said "I was fearful for my life. My life was in danger".

[30] On 9 January 2014, Detective Myers went to the Portmore Police Lock Up, and at his request, the appellant was brought to him. In the presence of the appellant's attorney-at-law, Detective Corporal Myers informed the appellant that he was charged with the offences of wounding with intent and illegal possession of firearm. When cautioned separately on each charge the appellant said, "officer I was fearful for my life, my life was in danger".

[31] Detective Corporal Myers collected statements in relation to the matter from Ms Angela Burford, Ms Elizabeth Badhu and the complainant.

[32] In cross-examination, Detective Corporal Myers stated that he also collected statements from NWC employees including Natalie Anderson-Knight, Faithlyn McCalla and Marcia Green, a security officer at the NWC.

[33] He made checks to ensure that the firearm that the appellant had was a properly licenced firearm, which was the property of Vanguard Limited, and was assigned to the appellant while he was on duty. Detective Corporal Myers spoke to the appellant on 3 January 2014, and the appellant was crying at the time. He saw the appellant again on the 9 January 2014 and the appellant was also crying on that occasion.

The case for the defence

<u>The appellant</u>

[34] In his unsworn statement, the appellant stated that, on 3 January 2014, he was a security guard on duty at the NWC office. The complainant visited the office to lodge a complaint and spoke to a customer service representative at about 8:30 am. He then left the office. However, about a minute after, he returned, spoke to the same representative, and then began speaking loudly and using expletives. The complainant left the office again, and at about 2:45 pm, he returned, and started to behave in a boisterous manner. Things became progressively worse. The appellant approached the complainant and asked him to calm down, but the complainant started to curse, using expletives. The appellant walked away, then came back to the complainant, and "begged" him to calm down as someone would assist him soon. The complainant, using expletives, told him to move away from him. At this point, the appellant said he called 119, but it rang without an answer, and then he was calling the Portmore Police Station, "then he [complainant] start to behave bad, bad".

[35] The appellant stated that once again he approached the complainant and asked him to calm down. However, the complainant told him to move, pushed him and slapped

him in his face twice, and kept advancing towards him. The appellant stated that he observed the complainant "taking out a ratchet knife and advancing to me", which resulted in him pulling his firearm. The appellant said the complainant "pulled the knife and I identified myself to him as a security and he lift his hand. When he lift his hand I was fearful for my life, then I fired one gunshot from the service revolver". He said "the crowd was coming down" so he proceeded to the Spanish Town Police Station to report the incident. He also said, "I was so fearful of my life because of the crowd was coming down".

Ms Faithlyn McCalla

[36] On 3 January 2014, Ms McCalla, a receptionist at the NWC office at Portmore Mall, was at work. She saw the complainant behaving boisterously and quarrelling loudly using curse words. She noticed the appellant standing beside the complainant, telling him to calm down and to change his behaviour. She heard the appellant explaining to the complainant that if he did not change his behaviour, he would have to leave the office. The complainant was upset with the appellant and said that he could not tell him to leave the office. The appellant told the complainant that if he would not leave, he would push him out. The complainant began directing expletives at the appellant and insisted that he was not leaving and wanted to speak to a supervisor. His telephone rang, and during the course of his conversation on the telephone, the complainant said "[w]ho name Miss What's it McCalla?" On hearing her name, Ms McCalla stood up to look at him, but from the position where she was, the complainant could not have seen her. The complainant shouted and said that he was a mad man, but this was not directed at anyone in particular.

[37] The appellant came to her and asked her to call the Waterford Police Station, however, she did not get through to the station. Ms McCalla called 114 to get another telephone number for the Waterford Police Station. The appellant, while standing at her desk, reached down for a baton, but he did not take it up, she is not sure why. In the meanwhile, the complainant kept walking closer to where the customer service

representatives were stationed out in the open. The appellant walked away from beside her, went to the complainant, and told him that he was asking him to leave the office. The complainant refused. The appellant held on to the complainant, who was still "cursing", and was moving him towards the door. The complainant "flashed off' the appellant, and then pushed him. The appellant pushed the complainant, and again held his arm to take him out of the office. At that point, the appellant was holding his firearm with it pointed towards the ceiling. Ms McCalla observed the complainant reaching towards his waist, but she could not see for what he was reaching, as he was wearing a "baggy" shirt. She then heard the shot. Ms McCalla stated that, just before she heard the shot, the complainant was "[m]ore like shouting, and he was like, his body language was like he was in a rage. Further that "[h]e was moving, something like this, not his foot, his body like when you punch something like that".

[38] Before Ms McCalla heard the shot, the appellant seemed calm, but concerned. After the shot, the complainant went outside then returned. Ms McCalla began to see blood splatter on the tiles as he walked. The complainant appeared to be in even more of a rage and was going after the appellant who was stepping back as the complainant came towards him. Ms McCalla thought that the complainant was about to harm the appellant, but he suddenly stopped and left the room.

[39] In cross-examination, Ms McCalla stated that she did not hear the appellant tell the complainant to stop the noise and the loud talking, but she agreed that he spoke to the complainant on several occasions. She also did not hear the complainant say to the appellant "you can't tell mi fi stop talk, mi a talk fi mi right".

[40] She stated that Ms Natalie Knight was not at work while the incident was taking place. Ms McCalla testified that she believed that the complainant was starting a fight. She did not see a knife; she only saw the complainant reaching to his waist. Ms McCalla agreed with the suggestions that she thought the complainant's behaviour was inappropriate and she did not like it, whereas she was of the view that the appellant was a "nice person". She agreed that she did not see when the shot was fired, she only heard

it, because at that point she was trying to call the police. She agreed that she did not see the complainant with anything in his hand and did not see the entire interaction between the complainant and the appellant.

[41] She explained that the appellant held on to the complainant and pulled him first. She then took her eyes off them, and when she looked back, she saw the appellant with the firearm in his hand pointing to the ceiling.

Ms Natalie Knight

[42] Ms Knight was working as a customer service representative at the NWC office in January 2014. On the day of the incident, the complainant came to her while she was on her way out of the office. He was very upset and was speaking loudly. After she spoke with him, she went through the door. The complainant followed her into the pharmacy, speaking loudly. Ms Knight said that she did not bother to purchase what she had gone to purchase at the pharmacy, because she was not sure what the appellant was capable of doing. Instead, she went away, and did not return to the NWC office.

The appeal

Grounds of appeal

[43] In the Criminal Form B1, the appellant outlined the following grounds of appeal:

> "(1) That the learned Trial Judge erred in not upholding the No Case Submission made by the Defence at the close of the Crown's case.
>
> (2) That the verdict was manifestly unreasonable having regard to the evidence.
>
> (3) That the learned Trial Judge failed to direct her mind to critical issues of law that arose from the evidence whereby [the appellant] was severely prejudiced."

[44] However, on 16 June 2021, the appellant abandoned grounds 2 and 3 as originally filed and filed supplemental grounds of appeal. In challenging the learned trial judge's decision, the grounds on which the appellant relied were:

"**Ground One:**

That the learned Trial Judge erred in not upholding the No Case Submission made by the Defence at the close of the Crown's case.

Ground Two:

That the Learned Trial Judge having reviewed the evidence:

I) rejected the evidence of the defence in its entirety inclusive of the defence witnesses and

II) accepted the Crown's case in its entirety inclusive of dismissing all inconsistencies and contradictions as being of little or no weight.

before coming to her decision, and having done so, failed to demonstrate that she shown [sic] any regard for the issue of self defence based on the appellant's honest belief which had been raised on the accepted evidence when there was;

i. evidence from the believed police officers that the appellant had stated at the earliest that he been [sic] in fear of harm to himself and to the staff of the NWC,

ii. the complainant's own admitted conduct of pushing the appellant more than once, resisting the appellant's efforts to curtail his boisterous behavior [sic] and striking the appellant with the intention of hurting him right before being shot,

iii. the two civilians who spoke of aggressive behavior [sic] directed at the appellant from the complainant prior to him being shot.

That this failure to recognize and specifically address the issue of self defence which was raised to include the appellant's honest belief, albeit she rejected the Appellant's account of events, denied the appellant a fair trial.

Ground Three:

That the Learned Trial Judge, in dealing with the discrepancies and inconsistencies that arose on the crown's evidence;

I. Mentioned only three (3) of the numerous instances that arose on the complainant's evidence by way of examples before finding him to be a witness of truth,

II. Indicated that though there were discrepancies with the second witness and the complainant, they were not vital, and

III. Said she took into account inconsistencies and discrepancies during the course of the third witness' evidence and her explanations and found her to be believable

did not identify these numerous inconsistencies that arose in evidence or their discrepancies with each so as to demonstrate how she resolved the issues and/or assessed their impact on the complainant's credibility before arriving at her verdict of guilty on the basis that she felt sure.

That failure to resolve the numerous, identifiable inconsistencies and discrepancies outside of a general review of the evidence and to indicate how they were resolved denied the appellant a fair trial.

Ground Four:

That the Learned Trial Judge indicated her dismissal of the Defence;

I. When she found that the defendant had not been hit in the face, and

II. When she found that the complainant had not had a knife

and after she;

I. reviewed the unsworn statement without comment,

II. Found the witnesses [sic] Faithlyn McCalla unreliable save where she said she did not see the complainant with a knife although she saw him reach for his waist and was not looking at the time the shot was fired which was when he was alleged to have pulled the knife,

III. Found the witness Natalie Knight to be of no assistance when she had given evidence of being menaced and followed out of the NWC's premises by the complainant,

even where the unsworn statement and/or evidence was consistent with the crown's witnesses without demonstrating why they were totally rejected even on agreed facts.

That the failure to indicate or demonstrate why they were totally rejected even on agreed facts denied the appellant a fair trial.

Ground Five:

That the Learned Trial Judge failed to demonstrate that she had any regard for the evidence as to the Appellants [sic] good character which arose on the Crown's case, in particular as to his propensity, when assessing the evidence when she failed to make any reference to his character in her analysis of the evidence or defence.

That this failure to recognize and/or deal with his character as an issue touching on his credibility denied the appellant an essential element of a fair trial."

[45] In light of the foregoing, the appellant has sought the following orders:

"1. The conviction of Guilty on two [2] counts on the indictment dated 6th April, 2017 be quashed,

2. The sentence of eight [8] months imprisonment on each count be set aside.

3. Any other relief that this Honourable Court deems just."

Issues

[46] We distilled the grounds of appeal into the following issues:

i. Whether the learned trial judge erred in rejecting the no case submission (Ground 1);

ii. Whether the learned trial judge erred in her handling of the issue of self-defence (Ground 2);

iii. Whether the learned trial judge failed to demonstrate how she resolved the inconsistencies and discrepancies that arose on the Crown's case (Ground 3);

iv. Whether the learned trial judge properly treated with the case for the defence (Ground 4); and

v. Whether the learned trial judge failed to have any regard to the appellant's good character, in particular his propensity, and if so, whether that is fatal to the conviction? (Ground 5).

Issue i: Whether the learned trial judge erred in rejecting the no case submission (Ground 1)

The appellant's submissions

[47] Ms Martin, counsel for the appellant, submitted that the Crown had not negatived self-defence although it had arisen on their case. Counsel relied on **Galbraith v R** [1981] 1 WLR 1039 ('**Galbraith**'). After recounting the evidence presented in the court below, counsel submitted that there was credible evidence on every witness' account that the complainant was angry, aggressive, abusive and responded physically to the appellant's efforts to have him leave the NWC office.

[48] Counsel highlighted that the complainant admitted that before he was shot, he used physical force intended to hurt the appellant. Counsel argued that this raised the issue of self-defence as a reasonable response to the complainant's admitted use of force as a result of which *mens rea,* an ingredient of the Crown's case, had not been proven. As a consequence, the appellant ought not to have been called upon to answer. Counsel

relied on **Sigismund Palmer v R** [1971] AC 814 ('**Palmer**') and **R v Garnett Shand** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 2/1993, judgment delivered 5 July 1993 ('**Garnett Shand**') in support of her submissions.

The respondent's submissions

[49] In response, Mrs Milwood-Moore, counsel for the Crown, contended that at the end of the Crown's case, there was sufficient evidence for the learned trial judge to call upon the appellant to answer. Counsel submitted that a *prima facie* case had been established, as the evidence was that the appellant had a gun, pointed it at the complainant, and shot him in his left arm after unsuccessful attempts to get him to comply with his instructions to desist from making noise and to leave the NWC office.

[50] Counsel acknowledged that there were inconsistencies and discrepancies on the Crown's case but submitted that these were matters for the jury mind of the learned trial judge within whose purview the credibility of witnesses fell. Counsel submitted that although the case at bar was difficult, the issues considered by the learned trial judge were narrow and were largely based on her assessment of the credibility of the witnesses. She noted that on the day in question, the altercation took place between the appellant, an armed security guard, and a customer who was at the NWC office to conduct legitimate business. The evidence revealed that there would often be irate customers at the office. Although the complainant was highly expressive, boisterous, unwilling to leave the office or to desist from making noise, his behaviour did not justify the use of force. Counsel urged that the use of a firearm was not to be called in aid because of a boisterous customer.

[51] In concluding her submissions on this issue, counsel stated that, ultimately, the learned trial judge did not err in rejecting the no case submission, as the prosecution's case had not been so discredited that a reasonable tribunal could not have safely convicted. In support of her submissions counsel relied on **Galbraith**, **Practice Note** [1962] 1 All ER 448 and **Michael Rose v R** [1994] 46 WIR 213 ('**Michael Rose**').

<u>Discussion</u>

No case submission

[52] It was the Crown's burden to provide sufficient evidence that Mr Douglas committed the offence of wounding with intent. At the close of the Crown's case, the question for the learned trial judge's determination was, whether the Crown's evidence was so manifestly unreliable that a jury properly directed would have been unable to arrive at a verdict of guilt beyond a reasonable doubt. Lord Parker CJ's **Practice Direction (Submission of No Case)** [1962] 1 WLR 227 is oft cited as the correct test. The Chief Justice said:

> "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…"

[53] This test was later refined by the English Court of Appeal in **Galbraith**. Lord Lane CJ, in delivering the judgment of the court, outlined the approach that a judge should adopt upon a submission of "no case" at the close of the prosecution's case. At page 1042 he enunciated:

> "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 vague-ness 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."

[54] In this jurisdiction, we continue to be guided by the principles enunciated by Lord Lane CJ as evinced in the decisions of **Ovando Anderson v R** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 133/2004, judgment delivered 8 November 2006, at pages 8-11, and **Ricardo Wright v R** [2016] JMCA Crim 15 at para. [24].

[55] Counsel for the appellant had submitted that there was a *lacuna* in the Crown's case as the *mens rea* for the offence of wounding with intent had not been established. This, counsel said, was predicated upon the fact that self-defence had arisen on the prosecution's case and had not been negatived. In calling upon the appellant to answer the indictment, the learned trial judge would have been obliged to determine whether in fact, self-defence arose on the prosecution's case and whether it was negated, because, for the offence of wounding with intent to be established, the prosecution must lead evidence to satisfy the judge that the appellant had acted "without lawful excuse or justification". This is, after all, an essential ingredient of the offence which the prosecution was obliged to prove.

[56] The complainant in his testimony, had denied any acts of physical aggression on his part, he said he had not touched the appellant. He, however, in cross-examination, recanted and admitted that he did in fact touch the appellant, but it was reactionary. More significantly, he vehemently denied he had a ratchet knife, had pulled or attempted to pull a ratchet knife and was approaching the appellant with same. Two eye-witnesses Ms Burford and Ms Badhu had testified about the interaction between the appellant and the complainant, which according to their evidence was mostly verbal in nature. Neither of these witnesses had seen the complainant produce a knife or reach to his right side during the interaction. Ms Burford agreed that it was the appellant who had initiated

physical contact between the two men when he pushed or held onto the complainant. Significantly this witness agreed that the complainant's physical contact with the appellant was in response to the acts of the appellant, she saw the complainant do a motion with his hand "like him block the security".

[57] In the instant case, whilst there were conflicts amongst and within the evidence of the several Crown witnesses, it is clear, that, a physical altercation took place between the appellant and the complainant; after the complainant had behaved in a boisterous and belligerent manner over an extended period. At pages 92 - 95 of the transcript, we noted the following in the course of cross-examination of the complainant:

> "Q. … So the person that push you, and you push him back hard, is a fellow who is at your chest?
>
> A. (No answer).
>
> Q. Yes?
>
> A. Right.
>
> Q. And you said you have had your training in what, Taekwondo, mixed martial arts?
>
> A. Ninjutsu.
>
> Q. I see. And you would consider this a form of what, describe it for us who don't know.
>
> A. Self-defence.
>
> …
>
> Q. So allow me to review you what you said to the police, on the 5th of January, right after the event. "He then pushed me in my chest, again, and I pushed him back, hard. At this point he pulled a gun from his waistband, held it in a striking manner." You said those words to the police; what do you mean by striking manner?"
>
> A. Ready to use.
>
> Q. Ready to use is what you mean by striking manner?

A. Yes.

Q. In your statement you say. 'He then hit at my face with the firearm, and I block it with a force.' Sir?

A. Yes.

Q. You said that?

A. Yes, I did.

Q. 'I block it with a force so as to hurt him.'

A. I can never block something to hurt.

Q. Listen to what you said in your statement.

A. Yes, yes.

Q. 'He then hit at my face with a firearm, I then blocked it with a force so as to hurt him.'

A. Yes

Q. 'This is called a strike block.'

A. Correct

Q. 'Because I do Tai Chi Kung Fu.'

A. Correct

Q. Did that happen?

A. Yes, it do happen.

…

Q. And then you went on the say to the police in your statement, 'Because of the block which I used to counter his strike, he just pointed his gun at me and deliberately shot me in my upper left arm. [sic]'

…

Q. You said that to the police?

A. Yes.

…"

Further at page 132:

> "Q. Yes. Well, does the block include you touching this person, when you block him, do you have to touch him, to block him?
>
> A. You have to, you have to."

[58] It is noted that the series of questions posed by counsel Ms Martin, who was also defence counsel at the trial, as to the actions of the complainant as elicited at the trial, included the following phrases, "**pushed him back hard**", "**counter his strike**", "**blocked it with a force, so as, to hurt him**", and "**ninjutsu is a form of self-defence**" (emphasis added) which, in our view, supports the complainant's actions as being retaliatory or defensive rather than offensive. It appears that the complainant was merely attempting to avoid the assault that was being committed by the appellant, which any reasonable man is entitled to do. On that evidence, it cannot be said that self-defence arose on the Crown's case. It was the appellant who introduced the allegation of a knife, an allegation which was not supported by any evidence in the trial.

[59] Although the complainant belatedly admitted that a physical altercation occurred between him and the appellant, and admitted that he had touched the appellant, he was adamant that he was only repelling an assault. The learned trial judge cannot be said to have been wrong in accepting the Crown's version as to what happened leading up to the shooting and in determining that the elements of the offences had been made out. In any event, the question would still arise as to whether the appellant believed that he was under attack or was in fact being attacked. In addition, the question would arise as to whether it was necessary for him to defend himself and whether the force used in so doing was out of proportion to what was necessary in the circumstances. These were questions to be answered by the tribunal of fact and necessitated the case proceeding beyond a no case submission.

[60] Ultimately, it was a matter for the learned trial judge to determine which of the prosecution witnesses she believed, and whose account or which parts of the witnesses' accounts reflected what occurred at the NWC office that day. This was a case in which the strength or weakness of the prosecution's evidence depended on the view that the learned trial judge took of the witnesses' credibility and reliability. Accordingly, we agree with the submissions made by counsel for the Crown that a *prima facie* case was established as the complainant had been shot and injured, and the matter was to be determined by issues falling within the 'jury mind' of the learned trial judge. It is our view that a reasonable jury properly directed, on the evidence led by the prosecution, could have found the charges in question proved beyond a reasonable doubt and, therefore, we cannot fault the learned trial judge's decision to call upon the appellant.

[61] This ground is, therefore, without merit.

Issue ii: Whether the learned trial judge erred in her handling of the issue of self-defence (Ground 2)

<u>The appellant's submissions</u>

[62] Counsel for the appellant noted that the learned trial judge identified the main issue for determination as being whether the appellant honestly believed, or may have honestly believed, that he needed to defend himself because he was under attack or in imminent danger of attack, and if he did, whether the force which he used was reasonable in the circumstances. Counsel contended, however, that the learned trial judge erred when she concluded that there was no such attack or danger of attack upon the appellant by the complainant and, therefore, self-defence did not arise.

[63] Counsel referred to the complainant's evidence that the appellant hit at his face and that he blocked it with a force so as to hurt the appellant. She also referred to the evidence of Ms Badhu who testified that the complainant raised his hand and made a fist, but did nothing with it, and also stated in cross-examination that she had told the police that the complainant had swung his hand with his fist folded as if he was punching at the appellant. Counsel noted that this evidence was corroborated by Ms Burford, another

witness for the prosecution. This evidence, counsel submitted, revealed danger, real and/or anticipated, which could have formed the basis of honest belief on the part of the appellant. The issue of self-defence, therefore, arose not only on the defence's case, but also on the case for the prosecution, all of whose witnesses the learned trial judge accepted and believed. Counsel submitted that, in light of the burden of proof on the prosecution, the learned trial judge should have treated with the complainant's aggression, pushing, and use of force which raised the issue of self-defence on the appellant's part, however, she erred by treating the issue as arising solely on the defence's case. As a result, the appellant's defence was not fully considered, and he was deprived of a fair trial. In buttressing these submissions, counsel relied on **Leonard Lindsay and Tyrone Findlay v R** [2020] JMCA Crim 51 and **Sherwood Simpson v R** [2017] JMCA Crim 37.

<u>The respondent's submissions</u>

[64] Counsel submitted that although the learned trial judge, being the finder of fact, had the power to reject all of the defence's evidence, she did not. The evidence led at trial was that the complainant was angry, upset, and shouting, but had not displayed any physical aggression before the appellant initiated physical contact by pushing him.

[65] The learned trial judge, in addressing the issue of self-defence, found that there was no attack or danger of attack upon the appellant by the complainant, and that she was sure the accused held no such belief. Counsel urged that the learned trial judge's summation should be viewed in its entirety. In support of her submissions counsel referred to and relied on **Beckford v R** [1987] 3 All ER 425 ('**Beckford**'), **Director of Public Prosecutions v Bailey** [1993] 44 WIR 327 ('**Bailey**') and **R v Peter Senior and Clayton Bryan** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 133/2003, judgment delivered 11 March 2005 ('**Peter Senior and Clayton Bryan**').

[66] Counsel, referring to **Garnett Shand**, submitted that, like the case at bar, there were contradicting accounts both on the case for the Crown as well as that for the

defence. Counsel argued that the learned trial judge in the instant case addressed the credibility of the witnesses and the inconsistencies in the evidence before she arrived at her decision. Counsel submitted that since self-defence only arose on the defence's case through the unsworn statement of the appellant, the weight attached to the statement was for the sole determination of the learned trial judge. Counsel referred to **Beckford**, in which the court accepted that the jury may not be disposed to accept "a bare" unsworn statement and also relied on **R v Lobell** [1957] 2 WLR 524 in support of her submissions on the issue.

<u>Discussion</u>

Self-defence

[67] Counsel, Ms Martin, submitted that the learned trial judge denied the appellant a fair trial by her "failure to acknowledge and address that honest belief arose on the facts found in the evidence of aggression both in words and actions on the crown's case… and denied the appellant from having his defence considered". The issue, therefore, was whether the learned judge's directions on self-defence were in fact, insufficient or erroneous.

[68] The legal principles concerning the issue of self-defence are well established in our jurisprudence. In **Palmer**, Lord Morris, in delivering the judgment of the court, stated that if there is some relatively minor attack, it would not be common sense to permit retaliation or a response out of proportion to what was necessary in the situation. The essential principles to be extracted from **Palmer** are as follows:

> (i) A person who is attacked or who believes that he is about to be attacked is entitled to defend himself.
>
> (ii) In defending himself he is entitled to do what is reasonably necessary.
>
> (iii) The defensive action must not be out of proportion to the attack.

(iv) In a moment of crisis, a person may not be able to weigh to a nicety the exact measure of his necessary defensive action.

(v) In a moment of anguish, a person may do what he honestly and instinctively thought was necessary.

(vi) If there has been no attack, then the issue of self-defence does not arise.

(vii) Once self-defence is raised in a case on a proper evidential basis, the burden is on the prosecution to negative that defence and not on the defence to prove it, and that unless the prosecution discharges that burden the defendant must be acquitted.

(viii) There is now no general duty to retreat in all cases where self-defence is raised. The question whether the accused retreated is an element which the jury may consider in deciding whether the force was reasonably necessary.

[69] In **Beckford**, a Privy Council decision emanating from this jurisdiction, their Lordships considered the issue of honest belief and approved certain principles which had been outlined in **R v Williams** [1987] 3 All ER 411 ('**Williams**'), including the following at page 415:

> "In a case of self-defence, where self-defence or the prevention of crime is concerned, if the jury came to the conclusion that the defendant believed, or may have believed, that he was being attacked … and that force was necessary to protect himself …, then the prosecution have not proved their case. If however the defendant's alleged belief was mistaken and if the mistake was an unreasonable one, that may be a powerful reason for coming to the conclusion that the belief was not honestly held and should be rejected.

> Even if the jury come to the conclusion that the mistake was an unreasonable one, if the defendant may genuinely have been labouring under it, he is entitled to rely on it."

[70] In **Garnett Shand**, Gordon JA addressed two different scenarios in which self-defence would arise. At pages 5 - 7 of the judgment he stated:

> "The appellant said he was under attack when he discharged his firearm in self-defence. The defence was presented on this basis. In his state of mind there was an attack and he articulated this. There is no room for there being in him an honest belief in an imminent attack. A distinction must be drawn between an actual attack and a belief in the imminence of an attack …
>
> When there is belief in the imminence of an attack this must be articulated and directions on honest belief must be given.
>
> When there is no evidence of an attack, direct or inferential, then for honest belief to arise, there must be an assertion of this state of mind emanating from the appellant. This must necessarily be coupled with the circumstances which induced that state of mind. Evidence of the circumstances inducing in the appellant an honest belief in the imminence of an attack will be subject to the scrutiny of the jury. Honest belief being a state of mind is subjective …
>
> The jury had a choice between two accounts: **the case for the prosecution which left no room for self-defence**, and the case for the defence which raised self-defence as an issue." (Emphasis supplied)

[71] In **Peter Senior and Clayton Bryan**, this court again considered the question as to when a direction on honest belief is required. K Harrison JA (Ag) (as he was then), noted that on the prosecution's case the appellant was the attacker, and so self-defence did not arise on their case (see page 12 of the judgment). At page 14 he went on to state:

> "It is abundantly clear that the **Beckford** direction must only be given where there is a question as to the nature or existence of an attack; when it is clear on the defence that

> the appellant was being attacked, the jury would not be assisted with a direction on honest belief: …
>
> We are of the view, after a careful examination of the facts presented at the trial that the learned trial judge was not required to give directions in relation to honest belief as the evidence of the two accounts of the incident was correctly left to the jury to choose between them. On the Crown's case, the appellant was the attacker and on the appellant's case, he was under attack. **There was no third possibility of the appellant harbouring a mistaken belief that he was under attack which would have necessitated a direction on honest belief.** This ground therefore fails." (Emphasis supplied)

[72] In the light of the law, as distilled in the foregoing cases, it is, therefore, necessary to consider the accounts given in the case at bar and how the learned trial judge addressed the issue of self-defence. At page 411 of the transcript, the learned trial judge indicated that:

> "The main issue for adjudication by the Court are one: Was the eyewitness for the Crown are [sic] to be believed? Two, whether [the appellant] honestly believed, or may he honestly have believed that he needed to defend himself, because he was under attack or eminent danger of attack. If [the appellant] did generally believe, or may generally have believed that he needed to defend himself, whether the force he used was reasonable."

The learned trial judge concluded at page 446 of the transcript:

> "Having considered both cases, I find as a fact and conclude that there was no such attack or danger of attack upon [the appellant] by the complainant with a knife hitting him twice in the face, advancing to him causing him to pull his firearm and shot [sic] the complainant; nor do I find that he observed the complainant taking out a ratchet knife and advancing towards him pulling the knife, lifting his hand causing him to be fearful for his life when she shot the accused [sic]. I am sure that [the appellant] held no such belief. Therefore, self-defence does not arise. It is therefore, unnecessary for the Court to consider whether the force he used was reasonable. Based on

> these findings of fact, I am sure the Prosecution has discharged its burden of proof and I find [the appellant] guilty on counts 1 and 2 of the indictment."

[73] The learned trial judge had quite correctly identified that the central issue for her determination was self-defence and that this determination hinged on the Crown witnesses' credibility. She further stated that she would need to determine whether "the appellant honestly believed or may he honestly have believed that he needed to defend himself, because he was under attack or eminent danger of attack". This utterance is not an accurate statement of the law as the learned trial judge seemed to have conflated the two different scenarios that Gordon JA had identified in **Garnett Shand** in which self-defence can arise. The task of this court is to determine whether the appellant was prejudiced by that error and whether his conviction has resulted in a miscarriage of justice.

[74] Counsel for the Crown contended that, the appellant had acted without lawful justification and, therefore, was not acting in self-defence. She advanced her submission based on the evidence of Hylton, Burford and Badhu.

[75] According to the complainant's version of events, the physical contact he made with the appellant was in reaction or in retaliation to certain physical acts first committed by the appellant. Even if the complainant had pushed the defendant hard, and the strike block was meant to hurt, these were acts provoked by the appellant's own actions. Ms Badhu had testified that she had not seen any physical interaction between the two men. She had seen the complainant make a fist but had not raised his hand to the appellant, however, on being cross-examined, she eventually said, he had swung at the appellant but maintained there was no physical contact made. Significantly, she said the fist was swung only after the appellant had attempted to push the complainant out of the NWC office. Another witness, Ms Burford said she did not see any contact between the parties but had observed the complainant doing a blocking motion.

[76] At the end of the prosecution's case, the learned trial judge, had heard evidence that although the complainant had behaved in a despicable manner, he had made no oral threats to anyone, the evidence established that the complainant was reacting to overt acts of violence initiated by the appellant, but it was the appellant who was the aggressor. The issue of self-defence, therefore, did not arise on the prosecution's case relative to the appellant. It was the appellant who introduced the issue of self-defence in his statement from the dock. The learned trial judge was, therefore, faced with two diametrically opposed versions. She, consequently, had to make a choice as to what version to accept if any, or indeed if she was unsure was duty bound to resolve the uncertainty in favour of the appellant, bearing in mind the burden of proof which rested on the prosecution.

[77] The prosecution's evidence which the learned trial judge accepted, would support the view/conclusion that if anyone was acting in self-defence, it was the complainant. Considering the events which unfolded before the appellant discharged his firearm, the learned trial judge was entitled to find that there was no attack upon the appellant. In the circumstances we disagree with the submissions of counsel, Ms Martin, that the actions of the complainant, on an evidential basis, raised the issue of self-defence as a reasonable response to the complainant's admitted use of force. We further disagree that self-defence arose as a part of the prosecution's case.

[78] On the prosecution's case, at best it could be said that there were acts of provocation committed by the complainant, such as the loud talking, cursing and refusing to desist from his obnoxious behaviour, or go outside when requested to do so. He clenched his fist but never made physical contact with the appellant. He boasted about his ability in martial arts, but never attempted to do anything to the appellant until he laid hands upon him. Provocation, however, was not relevant to the learned trial judge's contemplation of the offence of wounding with intent. Even if by some stretch of the imagination such acts as admitted by the complainant could be viewed as acts requiring self-defence by the appellant (but we make no such concession), using a gun to shoot the complainant, was neither a reasonable nor proportionate response.

[79] Nonetheless, the appellant having raised the issue of self-defence, the learned trial judge had to decide whether the prosecution had negated the issue raised. In so doing, she was entitled to assess all the evidence in the case and to say whether she believed the appellant's statement and to determine whether it was necessary for him to have defended himself.

[80] The appellant presented a diametrically opposed version of events when he made his statement from the dock. The appellant indicated that the complainant inflicted gratuitous violence to his person by striking him in the face twice, and furthermore, the complainant he said, brought a deadly weapon, a knife, into play. He said the complainant was advancing on him and did not desist although he identified himself as a security guard and told him to stop. He said the complainant had the knife raised in his hand while advancing on him. This is what he said caused him to fear for his life and which spurred him to defend himself, in his own words, "[w]hen he lift his hand I was fearful for my life, then I fired one shot from the service revolver". There was, therefore, no grey area as to the scenarios presented by both sides.

[81] The defence witness, Ms McCalla, did not support the appellant's version of events as it relates to the critical aspects of the purported self-defence. On the contrary, her testimony buttressed the complainant's version that it was the appellant who first assaulted him. Ms McCalla testified that, although the complainant was behaving vociferously it was the appellant who first made physical contact by holding onto the complainant's shoulder and was pushing him towards the door. It was then that the complainant flashed off the appellant's hand and pushed him back. She had also spoken of the appellant having his gun already in his hand when he held onto the complainant a second time, and again attempted to push him outside. She, however, subsequently sought to recant this aspect of her testimony. This attempt to resile from her previous utterance would be an inconsistency on Ms McCalla's evidence.

[82] Based on his own account, as emerged from the appellant's dock statement, the loud talking and indecent language used by the complainant was not what induced his

alleged fear nor his action of discharging his firearm. The appellant had said he was attacked; he was under attack. In this instance when it was clearly indicated by the appellant that the danger to life and limb was already in train and not merely anticipated as imminent danger, this therefore begs the question whether a direction on honest belief would have been appropriate.

[83] Where a defendant at trial, seeks to invoke the issue of honest belief and the need to use reasonable force, two crucial issues must be established:

(i) that the defendant had an honest belief in facts which, if true, would justify self-defence. The issue of the reasonableness of the belief is relevant only to the question whether the accused's mistaken belief was honestly held (**Beckford**).

(ii) that the defendant had used such force as would have been reasonable in the circumstances which he honestly believed to exist, in defence of himself or another (**R v Delroy Wynter** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 173/1999, judgment delivered 25 October 2001).

Furthermore, a person who believes he is in imminent danger of attack does not have to await the first blow before responding. He can take pre-emptive action to foil the attack.

[84] The learned trial judge considered the appellant's assertions and his version of events and made the finding that she did not believe him, that there was no such attack upon him nor any danger of attack upon him. Implicitly, she would therefore have considered the two different scenarios wherein self-defence can arise, as identified in **Garnett Shand**.

[85] The appellant had plainly said that he was already under attack when he discharged his firearm. The version presented by him, did not support the contention that there could be any possibility of the appellant harbouring an honest belief that he was

about to be attacked. In keeping with the **Beckford** directions as postulated by the Privy Council, and restated by K Harrison JA, in **Peter Senior and Clayton Bryan**, an honest belief direction would not have been relevant. In all the circumstances of the case, the issue of honest belief did not arise for consideration by the learned trial judge. There was, therefore, no scope for an honest belief direction.

[86] The learned trial judge was obliged to determine if the prosecution had negated the issue of self-defence even though it was the appellant who had raised it. Lord Lane CJ's following statement in **Williams**, at page 414, was cited with approval by the Privy Council in **Beckford**, as correct: "The mental element necessary to constitute guilt is the intent to apply unlawful force to the victim. We do not believe that the mental element can be substantiated by simply showing an intent to apply force and no more". At page 431 Lord Griffiths further explained the Privy Council's reasoning by the following statement:

> "It is because it is an essential element of all crimes of violence that the violence or the threat of violence should be unlawful that self-defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail [sic] to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful."

[87] Ultimately the learned trial judge rejected the appellant's assertions that the complainant brandished a knife, and which he said put him in fear, and caused him to shoot the complainant, wounding him. She said she did not believe him, she expressly found that "there was no such attack or danger of attack" upon the appellant. We, therefore, disagree with the submissions made by counsel for the appellant that the learned trial judge failed to demonstrate that she considered whether, on the case for the prosecution, the appellant might have honestly believed that he was under attack or was about to be attacked by the complainant.

[88] The learned trial judge was confronted with two disparate situations. She considered both sides and after assessing the prosecution witnesses as credible and reliable, she accepted the Crown's version of events. This gives rise to the inference that she had determined that self-defence was not live on the Crown's case and rejected the issue as raised by the appellant.

[89] The appellant through his counsel had further complained that the learned trial judge had failed to assess the use of force in the accepted circumstances and hence denied the appellant from having his defence fully considered and, therefore, denied him a fair trial. We do not agree that the appellant would have been prejudiced by the learned trial judge's decision not to assess the reasonableness of the use of the firearm. The law as laid down in **Palmer** is that, if there had been no attack, then the issue of self-defence does not arise. Having determined that there was no attack or danger of attack, the learned trial judge was making a finding that it was not necessary for the appellant to have defended himself in the circumstances as she found them to be. She could not, therefore, be faulted in her further decision not to give any consideration to the reasonableness or otherwise of the force used by the appellant, that is the use of the firearm.

[90] It is true that the learned trial judge had not expressly indicated how she assessed the appellant's unsworn statement, and true that at no point in her summation had she indicated whether the appellant's unsworn statement had any value and if so, what weight she had ascribed to it (see **Director of Public Prosecutions v Leary Walker** (1974) 12 JLR 1369). She, however, overtly rejected the appellant's version of events and inferentially decided that his statement had little or no value or weight. This was clearly within her purview. She indicated that she disbelieved the appellant, going on to indicate whether the unsworn statement had value or otherwise was otiose, because the unsworn statement entirely concerned the sole issue of the purported self-defence triggered by the complainant's alleged attack upon him.

[91] In the final analysis, the version put forward by the appellant was rejected by the learned trial judge. She specifically said she did not believe him, she found as a fact that he was not under any attack from the complainant. Moreover, she asserted that she had assessed "both cases" in coming to her conclusion. Having rejected the appellant's assertion of self-defence, the learned trial judge's further task was to determine if the other ingredients of the wounding offence was proved beyond a reasonable doubt. Since there was no issue taken as to whether the complainant was shot by the appellant, nor whether he intended to wound or to cause serious bodily harm to the complainant, the real issue was whether the wounding was justified.

[92] The question for this court, is, whether there was evidence to support the finding that the learned trial judge made, and the answer is yes, there was ample evidence from which she could have made such a finding. Having rejected the appellant's version of events and considering the appellant's admission relative to the *actus reus*, the learned trial judge was entitled to find him guilty of the offences as charged. There is no basis for this court to say that the learned trial judge was plainly wrong in her findings.

[93] Ground 2, therefore, has no merit.

Issue iii: Whether the learned trial judge failed to demonstrate how she resolved the inconsistencies and discrepancies that arose on the Crown's case (Ground 3)

<u>The appellant's submissions</u>

[94] Counsel argued that the learned trial judge recognized that an issue before the court was whether the eyewitnesses for the prosecution were to be believed. Having reviewed the evidence, the learned trial judge found their evidence to be credible despite several inconsistencies and discrepancies on the prosecution's case. For example, although the learned trial judge found an inconsistency in the evidence of the complainant, when he told the court that he did not push the appellant, but later admitted to doing so during cross-examination, there was no indication how she resolved the matter of the use of force. Additionally, counsel noted that the learned trial judge

observed the complainant's behaviour including that he was angry, among other things, but made no comment on his demeanour. Counsel submitted that the learned trial judge failed to resolve how she found the complainant to be a truthful witness after he had been discredited in a number of instances, and his account was not fully supported by the other prosecution witnesses.

[95] Counsel noted that in responding to the no case submission made at the trial, counsel for the prosecution conceded that the complainant had been discredited but stated that there were other witnesses on whom they could rely on to prove the case for the prosecution. The evidence of these other witnesses was, however, not consistent and reflected discrepancies. Counsel also submitted that the learned trial judge, in her review, identified some of the inconsistencies and discrepancies in the evidence led by the prosecution, but did not demonstrate how she treated with them. Consequently, this failure to identify, scrutinize and analyse the inconsistencies and discrepancies was a non-direction amounting to a misdirection for which the conviction ought to be quashed and set aside. Counsel referred to and relied on **Oliver Johnson and Karl Roberts v R** [2019] JMCA Crim 20 ('**Oliver Johnson**'); **Dwayne Brown v R** [2020] JMCA Crim 31 and **Sherwood Simpson**, in support of this point.

The respondent's submissions

[96] Mrs Milwood-Moore relied on **Michael Rose** and **Sherwood Simpson** in which the court has stated that a judge need not refer to all the inconsistencies and discrepancies in a case, or to take each piece of evidence and minutely analyse it, as it is the effect of the totality of the summation that is critical.

[97] Counsel acknowledged inconsistencies in the complainant's evidence as to whether he knew the appellant was a security guard, whether he pushed the appellant after being pushed, and whether he blocked to hurt the appellant. Counsel submitted that, although the complainant was not the best witness, he was steadfast in his account that he was first attacked by the appellant.

[98] Counsel also acknowledged that the learned trial judge did not refer to the discrepancies between Ms Badhu's evidence and that of the other witnesses for the prosecution, but nevertheless stated that the learned trial judge addressed the inconsistencies in the case for the prosecution and also assessed the effect they had on the credibility of those witnesses. Counsel reiterated that on the issue of credibility, it was a matter for the learned trial judge who had the opportunity of observing the witnesses.

[99] In response to an enquiry from the bench, counsel acknowledged that she could not identify in the transcript any point at which the learned trial judge indicated which version of the events of the day, as they came from the witnesses for the prosecution, she accepted. Counsel reiterated, however, that the learned trial judge was clear in her findings in respect of the appellant's case.

[100] Counsel also relied on **Willard Williamson v R** [2015] JMCA Crim 8 ('**Willard Williamson**'), **Ashwood, Gruber and Williams v R** [1993] 43 WIR 294 ('**Ashwood**') and **Peter Senior and Clayton Bryan**.

Discussion

Inconsistencies and discrepancies

[101] This issue pertained to the learned trial judge's treatment of the credibility factor, resulting from what defence counsel has submitted are critical discrepancies and inconsistencies arising on the evidence. It was generally contended on the applicant's behalf that a judicious consideration of the case against the applicant required a more careful assessment than that made by the learned trial judge. It was Counsel for the Crown's contention that there was adequate proof of factual matters to be resolved by the jury as to innocence or guilt of the appellant and thus there is no merit in this ground.

[102] Discrepancies and inconsistencies are not uncommon features in every case. Some are immaterial; others are material. The fact that conflicting statements exist in the evidence adduced by the prosecution does not mean, without more, that the acceptance of a witness' evidence as credible and reliable makes a conviction unsafe. In **Willard**

Williamson, it was accepted by this court that "it is open to a finder of fact to accept some parts of a witness' evidence and reject other parts".

[103] During a summation, a trial judge is expected to address conflicts arising in the evidence of a witness or witnesses, particularly where she made findings based upon her assessment of the credibility and reliability of the witnesses she had seen and heard. There is a plethora of judicial authorities providing guidance on the issue of what is required of a trial judge sitting without a jury. One of the earlier observations of this court on the proper approach of trial judges sitting without a jury is **R v Junior Carey**, (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 25/1985, judgment delivered 31 July 1986, where Campbell JA, at page 8 had deemed the criticism levied by the appellant as unjustified as a trial judge in the Gun Court is not "obliged to take each piece of evidence, and viva voce minutely analyse it so that his analysis appears on the record". The authorities of **Taibo (Ellis) v R** [1996] 48 WIR 74 and **Steven Grant v R** [2010] JMCA Crim 77 make it clear that it is not customary for a trial judge to go through the evidence line by line. The trial judge ought to use his or her discretion to identify the evidence that needs to be scrutinized to ensure that a verdict, if founded on it, is safe. The approach enunciated in **Oliver Johnson** makes it clear that the court must look at the inconsistencies cumulatively in relation to the material issues to see if they made the Crown's case unreliable and tenuous.

[104] In **Tyrone Headley v R** [2019] JMCA Crim 33 ('**Tyrone Headley**'). At paras. [62] – [67], P Williams JA referred to the above-mentioned cases and went on to indicate thus:

> "[63] It is a fact that the learned trial judge did not give the usual directions to himself on the issue of discrepancies and inconsistencies. Mr Knight is correct in his complaint that the learned trial judge did not specifically identify the discrepancies or inconsistencies that arose from the evidence of the witnesses. Having identified the issue in the case to be credibility, the learned trial judge went directly to conducting a review of all of the evidence of the witnesses including that of the appellant."

[105] After setting out the relevant section of the transcript containing the trial judge's treatment of the witnesses' evidence and findings, the learned judge of appeal then went on to enunciate at para. [67] that:

> "[67] The learned trial judge made findings based upon his assessment of the credibility and reliability of the witnesses he had seen and heard. This is a clear and distinct advantage, which this court in reviewing his decision does not enjoy. It is well established that this court must be slow to reverse any findings based on these considerations. **It is - only if it can be shown that in the totality of the case the finding is plainly wrong that this court will interfere** (see The **Queen v Crawford** [2015] UKPC 44, **R v Horace Willock** and **Everett Rodney v R** [2013] JMCA Crim 1)." (Emphasis supplied).

[106] We have taken all the foregoing principles into account in reviewing the decision of the learned trial judge herein. This appeal was a case tried in the Gun Court, and therefore a bench trial wherein the learned trial judge was both the arbiter of law and fact. The case of **Terrence O'Gillvie v R** [2022] JMCA Crim 56 is, therefore, also relevant as it indicates the approach to be adopted by trial judges for bench trials. That decision also emphasized the well-established principle, that an appellate court should be slow to interfere with the findings of a trial judge's assessment of the credibility of the witnesses. Furthermore, even where there are inconsistencies, a trial judge may still rely on the evidence if it is not tenuous.

[107] In the Caribbean Court of Justice case of **Dioncicio Salazar v The Queen** [2019] CCJ 15 (AJ) Wit JCCJ at para. [29] said:

> "Equally, a judge sitting alone and without a jury is under no duty to 'instruct', 'direct' or 'remind' him or herself concerning every legal principle or the handling of evidence. This is in fact language that belongs to a jury trial (with lay jurors) and not to a bench trial before a professional judge where the procedural dynamics are quite different (although certainly not similar to those of an inquisitorial or continental bench trial). As long as it is clear that in such a trial the essential issues of the case have been correctly addressed in a guilty

> verdict, leaving no room for serious doubts to emerge, the judgment will stand."

[108] We have distilled from the foregoing authorities that in any trial, more so a bench trial, the judge is not required to identify all the inconsistencies or discrepancies that arise during the trial unless it is considered damaging to the Crown's case.

[109] It is also, well established that, a trial judge can appropriately reject portions of a witness's evidence and accept other parts of it. As was stated in **Ashwood**, the relevance however, of the impeached parts of the witness's evidence to the central issues to be determined by the court is crucial to an assessment of the overall credibility of the witness (page 294d).

[110] In the instant case, the learned trial judge in arriving at her decision, only highlighted some of the inconsistencies in the prosecution's case. She had indicated that she did not regard these inconsistencies as significant to her decision, but she did not explain how she arrived at that conclusion. The questions for this court are, whether the learned trial judge erred by not highlighting all the conflicts arising on the prosecution's case, and in relation to those conflicts she did identify, whether by not providing an explanation as to why she concluded those conflicts were not significant to her decision, those shortcomings are fatal to the convictions.

[111] How did the learned trial judge in the instant case, treat with the conflicts arising on the evidence, particularly the inconsistencies and discrepancies in the case for the prosecution? The learned trial judge, at pages 419 - 420 of the summation said, in relation to the complainant:

> "I have taken into account the inconsistencies during the course of this witness' testimony and the admission and explanation he gave to determine whether he is believable as a witness. I will mention three of the admissions he made as an example. One, he admits that he was upset and cursing, using expletives; two, he admits that the accused came and asked him to stop the noise and get out of the place with the noise; three, he admits that when the accused pushed him

> three times in the chest, he pushed back the accused and what he told the Court earlier that he did not push the accused was not true.
>
> In relation to Exhibit 1, the words 'Guh push your mother', I find that this inconsistency is not important. I acknowledge that it exist [sic], but it does not affect the credibility of the witness.
>
> I observed his demeanour during the course of his testimony. I accept him as a witness of truth."

[112] The learned trial judge indicated how she resolved the inconsistency in respect of Exhibit 1, but did not state how, if at all, the other inconsistencies which she identified, affected the complainant's credibility. There was no explanation as to why the complainant had been untruthful as to whether he had pushed the appellant or had touched him at any time. In addition, she did not mention the fact that the complainant had been untruthful when he said that he did not know that the appellant was serving as a security guard at the NWC office that day. So, was it sufficient for the learned trial judge to indicate that, after observing the appellant's demeanour, she accepted him as a witness of truth?

[113] A discrepancy arises where witness A and witness B, each gave different or contrary accounts as to the same aspect or aspects of an incident, or two or more witnesses for the same side give varying accounts of the same incident. There were, in fact several discrepancies as between the evidence of Ms Badhu and Ms Burford on the one hand versus that given by the complainant on the other hand. The significant one is, whether there was any contact between the appellant and the complainant.

[114] Several factors can account for differences in the accounts given by witnesses to an event. Such factors include level of intelligence, power of observation and power of recall.

[115] The learned trial judge recounted Ms Badhu's testimony and highlighted that Ms Badhu did not see the complainant make a fist when he was gesticulating or do anything

to the appellant when he stepped back. In addition, she did not see the complainant swing his fist in a punching motion, she did not recall the appellant stepping aside to use his cellular phone, she did not recall either the appellant or the complainant pushing each other, and she did not recall the appellant striking the complainant and the complainant blocking the blow. The learned trial judge then stated, at page 425 of the transcript:

> "… I have observed the demeanour of the witness during the course of her testimony. I believe she was forthright to answer question [sic] asked of her by the prosecution and the defence.
>
> I have taken into account the discrepancies in the evidence of this witness and that of the complainant. I have determined that the discrepancies are not vital to the case or the credibility of the witnesses."

[116] It is a fact that Ms Badhu said she could not recall certain events and did not see other aspects of an incident that other witnesses related. This, however, did not mean there was a discrepancy arising, merely because she related her account from a different point of view or vantage point. When asked about her statement recorded by the police, she agreed that the complainant had swung his fist, but was emphatic that it did not make contact with the appellant. In those circumstances we do not regard the learned trial judge's acceptance of Ms Badu as a truthful and reliable witness as unreasonable.

[117] Ms Burford had indicated by way of explanation that she was not always focussed on the exchange between the complainant and the appellant: for example, she saw when the complainant "block" the security, but she did not know what the security had done to cause this action on the part of the complainant. She said she had been talking on her phone and was not paying attention to the two men. Ms Burford also said when she saw the appellant brandish the firearm she moved away and whilst doing so her back was to the men. It was whilst she was moving away, she heard the discharge of the firearm and by the time she turned to face the men again, the complainant was already injured. She, therefore, could not say what had occurred between the two men immediately before the appellant discharged the firearm. In relation to the inconsistency in her statement

regarding the complainant touching the appellant, her explanation was her state of mind when the statement was being recorded, she was nervous, and frightened and therefore did not read over her statement in its entirety before signing it. Furthermore, she said the recorder did not always maintain accuracy during the process.

[118] Insofar as the evidence from Ms Burford was concerned, the learned trial judge, at pages 430 - 433 of the transcript, said:

> "… She never saw the complainant raised [sic] his hand with a fist. She saw the complainant blocking, but she cannot say what he was blocking, because the accused was standing before him. After the complainant spoke on the phone, she saw him raised his hand. She never saw anyone push each other. She agreed she told the police in her statement that 'I saw when the security guard pushed the man towards the doorway when the man push him back...'
>
> …
>
> It was suggested to her, that what she said in her statement, that she actually saw pushing between the accused and the man, was true. She said that she does not remember the [sic] anybody pushing. She remember [sic] seeing the complainant holding up his hand and she demonstrated to the Court.
>
> I have taken into account the discrepancies and inconsistencies during the course of this witness' testimony and explanation given by the witness to determine if her evidence is to be believed. I bear in mind the approach of the Court must take in addressing discrepancies and inconsistencies, since they raise the issue of credibility of a witness, or more than one witnesses. I remind myself that discrepancies can, but do not necessarily mean that witnesses are not telling the truth. I observe the demeanour of the witness during the course of her testimony. I believe she was forthright in answering questions asked of her by the prosecutor and the defence attorney.
>
> One area where a discrepancy arose, relates to whether the accused pulled his firearm before the complainant spoke on his telephone or after he spoke on his

> telephone. The complainant's evidence on this point is that he was taking his phone from his pocket when the accused pulled his firearm and shot him on his left arm. The phone fell out of his arm, drop and was broken in pieces. Miss Badhu's evidence is that the complainant spoke on the phone before [the appellant] pulled his firearm and she heard a loud explosion…
>
> Miss Burford's evidence is that the complainant spoke on the phone before the accused pulled the gun from his waist and pointed it in the direction of the complainant."

[119] Again we say that the treatment of Ms Burford, by the learned trial judge as a credible and reliable witness cannot be said to be unreasonable. So were there really discrepancies amongst the witness' accounts, or is it that, based on their individual capabilities and powers of observation they would have recounted what they perceived differently? We are of the view that as regards Ms Burford and Miss Badhu the differences in their account can be attributed to the latter.

[120] It is true that the learned trial judge did not indicate what she determined to be the sequence of events which led to the shooting that day. This was so although counsel for the defence expressly drew this to her attention. At page 444 of the transcript, we see the following exchange:

> "MISS D. MARTIN: You are at the end?
>
> HER LADYSHIP: I am almost at the end. I am just asking you whether I have omitted anything, or is there anything to be clarified?
>
> MISS D. MARTIN: M'Lady, it is my view that you have not indicated what facts you have accepted, having found the witnesses…
>
> HER LADYSHIP: That is to the end, Miss Martin.
>
> MISS D. MARTIN: Then I am asking prematurely, because I am waiting to hear certain things and you have indicated that you have not completed."

[121] The learned trial judge then asked counsel for the prosecution whether she had omitted anything, and counsel said that the learned trial judge had not done so. It was immediately after that interchange that the learned trial judge, ended her summation by rejecting the appellant's statement that the complainant had hit him twice in his face and had advanced towards him with a knife.

[122] It cannot be ignored that the complainant's credibility was severely challenged. Whilst testifying in his examination-in-chief, he insisted that he had not touched the appellant during the incident, however, in cross-examination it emerged that he had in fact pushed the appellant but only after the appellant had pushed him. He also conceded that, contrary to his statements during examination-in-chief that he did not know of the appellant playing any role at the NWC office, he knew that the appellant was a security officer who worked there. Further, there was the unresolved conflicted evidence as to whether the complainant was reaching for his phone when he was shot, or whether he already had the cell phone in his hand at that time.

[123] Upon a review of the totality of the summation of the learned trial judge, it is our view that indeed some inconsistencies and discrepancies on the prosecution's case were not adequately addressed, so there is therefore, some merit in Ms Martin's contention as to the inadequacy of this direction. The question now, is whether, the shortcomings as identified has led to a miscarriage of justice and whether the conviction ought to be set aside on that basis.

[124] In making that determination it is important for this court to have regard to the issues that were not in dispute between the parties. Both the prosecution and defence are agreed that the appellant at the relevant time was present at the NWC office located at the Portmore Mall, Saint Catherine. He was posted there as an armed security officer, therefore, there is no issue of visual identification. It is also common ground that the complainant was present at the location as a customer and was behaving as less than a model citizen. There is further no dispute, that the appellant pointed and discharged his firearm at the complainant and that his actions were deliberate and voluntary. This

thereby obviated any issue of accident. The appellant having posited the issue of self-defence, is taken to accept that he had the necessary intention to shoot and injure the complainant. In any event the necessary intention was appropriately inferred by the learned trial judge as a gun is not a toy but a deadly weapon and the acts of the appellant pointing at the complainant and discharging a gun supports such an inference. The further undisputed evidence and fact is that the complainant was injured as a result of the gunshot discharged by the appellant and had to seek medical attention at the hospital where he was admitted for some time.

[125] The pivotal and very narrow issue that the learned trial judge was required to determine, was whether the appellant had acted in lawful self-defence. The question for this court is whether there was probative evidence before the learned trial judge to support a conclusion that the prosecution had negated the issue of self-defence.

[126] On the evidence before her, it was open to the learned judge to assess and reject the statement of the appellant which raised the importation of a knife in the hand of the complainant during the altercation. The assertion of a knife and the menacing advancement by the complainant towards the appellant, was not supported by any other witness. This is the essence of the self-defence that the appellant raised: he said it was that action on the part of the complainant which caused him to be fearful for his life. There is no basis here for honest but mistaken belief. He did not say he saw the complainant reach to his pocket or waist and he thought he was going for a weapon. He said the complainant took out a knife, advanced on him with the knife brandished and he told him to stop and desist several times. This was an order which the complainant, he said, refused to comply. The appellant was, therefore, contending that he was under actual attack and had to defend himself. On his account the appellant was pitting a deadly weapon against another deadly weapon (gun versus knife). The learned trial judge was entirely within her competence to have rejected the defence as raised by the appellant and thereby make the finding that the appellant was not acting in lawful self-defence at the material time.

[127] As far as we could discern, the general narrative given by the three eyewitnesses called by the prosecution was not significantly different. All three witnesses agreed on the core evidence, that the complainant was behaving obnoxiously because he felt he was being ignored and his complaints not being addressed and ultimately, he was shot and injured by the appellant. Indeed, there were unresolved issues of inconsistencies and discrepancies, concerning certain utterances by the complainant, none of those, however, related to the core issue of self-defence which the learned trial judge had resolved adequately. Whilst the learned trial judge did not conduct a detailed examination of the inconsistencies in the complainant's evidence, she indicated that she was aware of them. She accepted that the appellant had a firearm, which he pointed at the complainant and accepted inferentially, that it was the appellant who fired a shot at the complainant in circumstances which did not warrant such an action on his part. The facts referred to were a sufficient basis on which the learned trial judge could have found the offence of illegal possession of firearm and wounding with intent proved. We noted that just before arriving at that conclusion, the learned trial judge stated at page 425:

> "I have taken into account the discrepancies in the evidence of this witness [Badhu] and that of the complainant. I have determined that the discrepancies are not vital to the case or the credibility of the witnesses."

In **Sherwood Simpson**, F Williams JA, in delivering the judgment of the court, after referring to **R v Dacres** (1980) 33 WIR 241 ('**Dacres**'), noted that it was not intended that fetters be imposed on trials in the Gun Court, considering the fact that, the Gun Court Act was intended to operate to simplify such trials. We acknowledge, however, that despite the intended simplicity of such trials, there are still certain requirements that must be met to reflect and ensure a fair trial (**Sherwood Simpson and Dacres**). It is our view that when cumulatively assessed, the conflicts arising within the evidence, which the trial judge did not explain or resolve neither renders the prosecution's case tenuous nor the verdict unsafe. It is, therefore, safe to say that she did not err. Consequently, this court should refrain from disturbing the trial judge's verdict.

[128] Based on the foregoing, this ground of appeal also fails.

Issue iv: Whether the learned judge properly treated with the case for the defence (Ground 4)

<u>The appellant's submissions</u>

[129] Counsel argued that the learned trial judge erred when she rejected the evidence of Faithlyn McCalla, on the basis that it was unreliable and unable to assist the court. Counsel contended that evidence from Ms McCalla and Ms Knight supported the appellant's defence that:

i. He made efforts to call the police on account of the complainant's conduct;

ii. Members of staff at the NWC office were in fear that afternoon as a consequence of the complainant's conduct; and

iii. Ms McCalla was of the view that the complainant intended to harm the appellant.

[130] Counsel submitted that this complete and utter rejection of everything flowing from the defence, without indicating her reasons, when coupled with the failure to assess any of its relevance to the defence of self-defence on facts agreed by all civilian witnesses (including those who testified for the defence), denied the appellant a fair trial.

<u>The respondent's submissions</u>

[131] Counsel submitted that the defence witnesses were not able to assist the court due to their position at the time of the shooting. Counsel disagreed with the submission that the learned trial judge erred when she refused to accept the evidence of Ms Knight. The evidence, counsel submitted, reflected that Ms Knight was not present at the time of the incident and therefore the evidence she proffered could not assist the court.

Discussion

[132] Counsel for the appellant has submitted that the learned trial judge failed to demonstrate the basis on which she totally rejected the evidence of the witnesses for the defence, although there was evidence which was consistent with the Crown's witnesses. It is, therefore, prudent to examine the findings of the learned trial judge in that regard, and to determine whether there is any basis for counsel's criticisms. The evidence given by Ms McCalla on behalf of the appellant, was consistent with certain aspects of the accounts given by Ms Burford and Ms Badhu on behalf of the prosecution, and even the evidence of the complainant. In assessing Ms McCalla's evidence, the learned trial judge said at page 443 of the transcript:

> "Having assessed the witnesses' account, that is the prosecution witnesses' account sorry, let me repeat. Having assessed this witness [sic] account, I accept that at no time did she see anything in the complainant's hand. However, that having been said, the Court is of the view that her account is otherwise unreliable."

[133] Based, on the foregoing utterances, the learned trial judge chose to accept at least one aspect of Ms McCalla's evidence; the complainant was unarmed at the time of the shooting. She, therefore, did not reject all that Ms McCalla said. She accepted the aspect of her testimony which supported the prosecution's case, and which was inconsistent with the self-defence issue raised by the appellant. The further evidence that Ms McCalla gave regarding the actions of the complainant in the aftermath of the shooting is irrelevant to the issue of self-defence. According to her, after the appellant discharged his firearm, the complainant went outside. She saw him looking around on the ground as if he was looking for something. He came back inside and was advancing on the appellant who still had the gun in his hand. She "thought the complainant was going to hurt the appellant, but he stopped, turned around and went back outside". Furthermore, that aspect of her evidence is in stark contrast with the evidence given by Ms Badhu, who testified that after the appellant shot the complainant he went into an enclosed area, whereas the complainant went outside. There is no evidence from any of the prosecution's witnesses

that the complainant ever "came back inside". On the contrary, the complainant said he was on the outside until he was assisted to the hospital. In all the circumstances, there was a basis for the learned trial judge to have regarded aspects of Ms McCalla's evidence as unreliable, particularly as it did not accord with other evidence she had accepted.

[134] Insofar as the evidence of Ms Knight is concerned, the learned trial judge rehearsed the evidence from this witness and noted at page 444 of the transcript:

> "… she was not there when the incident happened. The date when the incident happened is the same day the complainant followed her into the pharmacy.
>
> This witness cannot assist the Court, because she was not present when the incident occurred."

[135] We disagree with the submissions made by counsel for the appellant, that the learned trial judge ought to have assessed whether the evidence of Ms Knight regarding the complainant's behaviour could have demonstrated heightened fear of him and his potential to resort to violence. Contrary to counsel, Ms Martin's submission, that members of staff at the NWC office were in fear that afternoon "as a consequence of the complainant's conduct"; no one gave any such evidence. Although the complainant, in cross-examination, admitted that he had followed Ms Knight as she left the NWC office, complaining loudly as he walked behind her; the incident related by Ms Knight happened out of the view and hearing of the appellant. Ms Knight said she gave a statement as to what happened between herself and the complainant. The appellant made no reference to that incident in his dock statement or that he had even witnessed it, or that it in anyway impacted his behaviour. Ms Knight said she was not present when the incident involving the appellant and the complainant occurred. Ms McCalla said Ms Knight had left the office before she returned from lunch, she returned at or after 2:00 pm and that is when the confrontation between the appellant and the complainant occurred. This submission by counsel is, therefore, misguided.

[136] It is not discernible how an exchange between Ms Knight and the complainant would have impacted the appellant's apprehension of the complainant or the

complainant's potential to resort to violence and consequently impact the issue of self-defence. Furthermore, Ms Knight did not indicate any overt or covert acts of violence by the complainant, only how she was feeling about him. Whilst the evidence of Ms Knight carried no probative value and was hearsay and irrelevant, there was no prejudice to the appellant as it was elicited at his behest and could only have had a prejudicial effect on the complainant. We cannot see how this evidence would have assisted the learned trial judge in determining the pivotal issue of self-defence; on the contrary, Ms Knight's evidence was not at all relevant and the learned judge was correct to disregard it.

[137] It is also important to refer to an issue to which we adverted earlier in the judgment, as regards how the learned trial judge treated with the appellant's unsworn statement. At page 437 of the transcript the learned trial judge, as she recounted the appellant's case, stated:

> "… He pushed me a second time and slapped mi in mi head two times then him keep on advancing on to me. I observed that he was taking out a ratchet knife and advancing to me. He pulled the knife. I identified myself as security. He lift his hand. When he lift his hand, I was fearful for my life."

[138] These seem to be significant acts which were critical in an assessment of self-defence, these acts are diametrically opposed to the versions given by not only the crown witnesses but also the defence witness, Ms McCalla. This is the activity which the appellant said led to him drawing and discharging his firearm, so we cannot agree that the appellant's statement was consistent with the Crown's evidence. Having rejected his allegations and version of events, clearly, the learned trial judge did not believe the appellant, and this must mean his statement had no weight or value to her determination of the issues joined. Her comments at page 446 of transcript, we believe is indicative of her evaluation of his dock statement.

[139] This ground we find, is also without merit.

Issue v: Whether the learned trial judge failed to have any regard to the appellant's good character, in particular his propensity, and if so, whether this is fatal to the conviction (Ground 5)

The appellant's submissions

[140] Counsel submitted that prosecution witnesses such as Ms Burford, Corporal Francis and Corporal Myers gave evidence which spoke to the appellant's good character. The appellant was described as quiet, soft spoken, compliant, and cooperative. However, the learned trial judge at no time in her summation, reasoning, or findings, addressed the issue of the appellant's good character which arose on the Crown's case.

[141] This failure to address the appellant's good character denied him of the benefit of having his defence considered against the background as to whether he had the propensity to commit the offences for which he was tried. Counsel relied on **Joseph Mitchell v R** [2019] JMCA Crim 2, para. [34] and **Sherwood Simpson** in support of her submissions.

The respondent's submissions

[142] Counsel for the Crown conceded that the appellant was entitled to a good character direction, in relation to the propensity limb. Nevertheless, Counselel submitted that, in the instant case, considering all the circumstances, it was inevitable that the appellant would have been convicted of the offences and consequently there was no substantial miscarriage of justice. For this proposition, counsel relied on the authority of **Teeluck v State of Trinidad and Tobago** [2005] 1 WLR 2421 ('**Teeluck**'), in which their Lordships in the Privy Council noted that it is the duty of defence counsel, and not the judge, to ensure that a good character direction is obtained. Counsel reiterated that, that reasoning was adopted by this court in **Jason Richards v R** [2017] JMCA Crim 5 where it was held, that the failure of a judge to give a good character direction will not automatically result in an appeal being allowed. Counsel submitted.

Discussion

Good character direction

[143] Brooks JA (as he then was) in **Tino Jackson v R** [2016] JMCA Crim 13 ('**Tino Jackson**'), in his usual pellucid manner, outlined the salient principles governing good character directions. He said:

> "[26] Those facts should be borne in mind in considering the following statement in Blackstone's Criminal Practice 2010, where the learned editors state at paragraph F13.3:
>
> > '**There is, however, no obligation for the trial judge to deal with good character unless the issue has been raised by the defence** (*Thompson v R* [1998] AC 811; *Brown v The Queen* [2006] 1 AC 1, where it was noted that a judge would be 'ill-advised' to mention good character unless he had been given information from which he could properly and safely do so). **It follows that defence counsel is under an obligation to raise the issue in an appropriate case, so that the accused does not lose the benefit that the direction is designed to confer** (*Teeluck v The State of Trinidad and Tobago* [2005] 1 WLR 2421) ....'
>
> In the context of the environment mentioned above, it is implicit in that extract that **even if the accused does give sworn testimony, the issue of good character must be specifically raised**." (Emphasis supplied)

[144] After reviewing the Privy Council case of **Teeluck**, Brooks JA continued to say:

> "[32] Their Lordships gave a number of guidelines concerning the management of cases in which the issue of the accused's good character is said to be important. Among those guidelines, set out at paragraph 33 of their judgment, is subparagraph (v), which stipulates where the obligation lies on raising the issue and how it is to be discharged. They said:
>
> > '**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. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. **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.' (Emphasis supplied)

...

[34] The issue was explained in another scenario in **Norman Holmes v R** [2010] JMCA Crim 19. In that case, Morrison JA said at paragraph [47]:

> 'There is no question that both the applicant, who gave sworn evidence, and his witnesses testified to his good character. Neither can there now be any question that in these circumstances the applicant was entitled to a credibility direction, that is, that a person of good character is more likely to be truthful than one of bad character, and a propensity direction, that is, that he is less likely to commit a crime, especially one of the nature with which he is charged…'"

[145] In addressing the impact of the failure to give a good character direction, Brooks JA in **Tino Jackson** pointed out at para. [45] that:

> "The failure to give the good character direction, when it is required, does not automatically amount to a miscarriage of justice. It was said in **Michael Reid v R** SCCA No 113/2007 (delivered on 3 April 2009), at pages 27-28, that **the focus in each case should be the impact that the omission had on the trial and the verdict.** The question to be decided in such circumstances is whether the jury, given the case as a whole, would inevitably have convicted the accused, even if the proper direction had been given." (Emphasis supplied)

[146] It is appreciated that good character evidence can come from any source, even from a prosecution witness or witnesses. However, as gleaned from the known authorities, evidence of the appellant's "good character is to be distinctly, and not obliquely, raised" (see **Alton Baker v R** [2022] JMCA Crim 15 ('**Alton Baker**')). Although counsel for the Crown has conceded that the appellant was entitled to a good character direction based on propensity, this court disagrees, that the appellant's good character was in issue.

[147] The evidence of good character the appellant relied upon, was recounted by the learned trial judge on the evidence given by Ms Burford. At page 428 of the transcript the learned trial judge stated:

> "Under cross-examination she said she had been going to the National Water Commission over a long time to pay bill [sic] and she would see [the appellant] dressed in plain clothes. He had the keys to close and open the door. She describes [the appellant] as quiet, nice and soft spoken. Most times when she attend [sic] the National Water Commission, there is always somebody cursing and quarreling [sic]. She has never seen [the appellant] attack anybody before."

[148] Having gone through all the evidence in the case and the dock statement made by the appellant, we are of the view that the appellant had failed to distinctly raise his good character during the course of the trial, bearing in mind that the responsibility to do so is his. Therefore, the learned trial judge was not obliged to give him a good character direction, even one restricted to propensity. The decision of **Alton Baker** and the in-depth review undertaken by a judge of this court of relevant cases, provides some very helpful insights as to the treatment of this issue, particularly, paras. [117] – [135]. The judge of appeal has also dealt with the application of the proviso and when its application is appropriate. Of note is para. [128] where reference is made to another case:

> "[128] Similarly, in the case of **Rayon Williams v R** [2020] JMCA Crim 7, a witness for the appellant testified, "I have never seen Rayon in that situation before". He was referring to the appellant's murder charge. It was submitted that he

should have been given the benefit of a good character direction as to his propensity to commit the murder. Morrison P, delivering the judgment on behalf of this court, said:

> '[57] We were strongly inclined to doubt whether, on the basis of Mr Robinson's exiguous statement that he had never seen the appellant 'in that situation before', the appellant was in fact entitled to a good character direction at all'."

[149] Having carefully scrutinized Ms Burford's evidence, we noted that it was counsel Ms Martin who asserted that the witness was going to the NWC location "for a very long time" and the witness agreed. What amounts to a long time is subjective, so we do not know what that period entailed. We do not know how often the witness would go to that NWC location. We could make an educated guess and say once per month owing to the billing cycle. That, however, would be tantamount to speculation. So firstly, was Ms Burford sufficiently familiar with the appellant's character or at all, so as to give good character evidence on his behalf? Secondly what she said about him, "he is nice, quiet, soft-spoken" and later indicated that he was helpful, he had assisted her and other customers to get the attention of NWC staff members, did this amount to more than "exiguous statements" on Ms Burford's part? We think not.

[150] Although the credibility of the appellant was in issue, he gave no evidence from which such could be assessed and neither did he rely upon any pre-trial statement. It is indeed correct that the learned trial judge recounted the evidence of the witnesses, but she did not, at any point in the summation, give herself a good character direction on the propensity limb. The learned trial judge was required to determine whose account of the incident she believed. She chose to accept the Crown's version. What is clearly illustrated by the authorities on this issue, is that the absence of a good character direction is not necessarily fatal to a conviction, even where such a direction is warranted. In our view, the evidence which Ms Burford gave in this case, that the appellant was quiet, nice and soft-spoken amounted to no more than exiguous statements. Even if it could remotely be said that her comments might well have been relevant to the question as to whether the appellant had the propensity to unnecessarily resort to the use of his firearm in the face

of an angry and boisterous customer, its importance pales into insignificance in light of the fact that the appellant did not deny the *actus reus* of the offence. His assertion of self-defence having been rejected, a good character direction on the propensity limb would not have changed the outcome of the guilty verdicts. A direction by the learned trial judge, in that regard, would have been wholly outweighed by the nature and cogency of the evidence presented on the Crown's case, in those circumstances, a jury properly directed, would inevitably have arrived at a verdict of guilty. We have considered the consequence of not giving a good character direction based on propensity, with respect to all the circumstances of this case and such a direction would have been of no assistance to the appellant. Considering the narrow issues that the learned trial judge had to determine, her failure to give a good character direction, even if one was warranted, we agree with the submissions of counsel for the Crown, was not fatal.

[151] This ground also fails.

Wrong section averred in indictment

[152] The indictment upon which the appellant was arraigned and convicted had cited incorrectly section 21 of OAPA, as the section infringed, instead of section 20. No amendment was sought by the prosecution neither at trial or before this court; and neither did the appellant advance any arguments nor take issue with that fact. We, however, think it is prudent that this court addresses this point in short. By virtue of section 6(1) of the Indictments Act a judge is empowered to make an amendment to correct defects and errors in an indictment in any proceeding in criminal cases, if it appears to the court that it is defective unless the amendment cannot be made without leading to injustice. The exercise of the power to amend in these circumstances was enunciated and approved by the Privy Council in **Director of Public Prosecution v Stewart** [1982] 35 WIR 296 ('**Stewart**').

[153] In **Stewart**, the Privy Council made it clear that where a count on an indictment recited the wrong section of a statute, the Court of Appeal was empowered to amend the indictment. The court's discretion to amend is usually exercised in circumstances where

the court considers that the amendment would cause no injustice to the appellant. Particularly, when the defect is of a technical nature and the particulars provided in the count of the indictment had given the precise and full notice to the defendant of the allegations made against him.

[154] In the case at bar, the statement of offence had referred to the correct offence of "wounding with intent" and the name of the statute under which the appellant was indicted. The particulars of the offence clearly outlined the appellant's alleged conduct and included the name of the complainant, and the place and date of the alleged offence. Although there was no application by the Crown for us to amend the indictment, we have in any event considered the implications of the incorrect section averred in count two. We have determined that the appellant was aware of the charge against him and was not in any way hampered or prejudiced in mounting his defence.

[155] In light of the foregoing, the indictment should be therefore amended by deleting the numeral "21" in the statement of offence of count two and substituting therefor, the numeral "20". Considering the foregoing reasons, the court found no basis for interfering with the learned trial judge's findings of guilt. Accordingly, the convictions and sentences are affirmed, and the appeal dismissed.

Orders

[156] The orders of the court by majority (Foster-Pusey JA dissenting) are as follows:

1. The indictment is amended by deleting the numeral "21" in the statement of offence of count two substituting therefor, the numeral "20".
2. The appeal is dismissed.
3. The convictions and sentences affirmed.
4. The sentences are deemed to have commenced on the date they were imposed, being 6 April 2017.