**[2015] JMCA Crim 16**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CRIMINAL APPEAL NO 90/2010**

**BEFORE: THE HON MR JUSTICE MORRISON JA**
**THE HON MRS JUSTICE MCINTOSH JA**
**THE HON MRS JUSTICE LAWRENCE-BESWICK JA (AG)**

**LESLIE MOODIE v R**

**Mrs Jacqueline Samuels-Brown QC for the appellant**

**Mrs Lisa Palmer-Hamilton and Mrs Paula-Rosanne Archer-Hall for the Crown**

**24, 25, 26, 27, 28 March, 1 April 2014 and 31 July 2015**

**MORRISON JA**

**Introduction**

[1] In October 2008, the appellant was a serving member of the Jamaica Defence Force ("the JDF") and a licensed firearm holder. In the early morning hours of 20 October 2008, he was one of many patrons in attendance at the Double Diamond Club and Gaming Lounge ("the club"), situated in the Boulevard Shopping Centre ("the shopping centre"), Duhaney Park in the parish of St Andrew. A birthday party was in progress inside the club at that time. Popular music was being played over a sound system and people were dancing, drinking and enjoying themselves. At a point in these

proceedings, the appellant, using his licensed firearm, discharged several bullets inside the club, as a result of which four men lost their lives.

[2] After an extensive investigation, the appellant was arrested and charged on an indictment containing four counts of murder. The deceased were William Winston Wilberforce, Lynchmore Forbes, Ejon Peart and Davion Carr. The appellant's case at the trial was that, in apprehension of an attack from at least two of these men, and others, he had used such force as was reasonably necessary in the circumstances to defend himself. On 28 June 2010, after 26 days of trial before Marsh J and a jury in the Home Circuit Court, the appellant was convicted of four counts of murder. On 26 August 2010, after a sentencing hearing, it was ordered that the appellant should suffer death in the manner authorised by law.

[3] In wide-ranging complaints on appeal, the appellant contends that he was denied the substance of a fair trial by various failures and/or omissions on the part of the prosecution and the learned trial judge. In addition, the appellant contends that, in the circumstances, the sentence of death imposed by the learned trial judge was manifestly excessive. However, counsel for the prosecution, Mrs Lisa Palmer-Hamilton, indicated from the outset that the prosecution would not seek to uphold the sentence of death.

**The case for the prosecution**

[4] The matter was first listed for trial on 21 April 2010. But the trial did not commence on that date, despite the apparent anxiety of the defence (represented on

that occasion by Mr Michael Deans) that it should.[1] In the result, the matter was adjourned to 12 May 2010 for trial. On that date, Mr Pierre Rogers was also present and appearing with Mr Deans for the defence. Upon the prosecution's indication that it was ready to proceed, the following exchange took place between Mr Deans and the court:

> "MR. DEANS: Might it please you, m'Lord, we were served with the indictment in this matter yesterday. On the back of the indictment, the crown has indicated that they intend to call fifteen witnesses - - out of -- we have received statements in excess of thirty-nine witnesses, and in any event, the accused man has indicated his desire…
>
> MR. DEANS: Yes, m'Lord, he has indicated a desire - - a family member had contacted senior counsel to represent him in this matter. It has not been finalized or settled, as yet, m'Lord, and in the circumstances, the defence would be asking for an adjournment in this matter.
>
> HIS LORDSHIP: An adjournment until when, counsel?
>
> MR. DEANS: We were hoping for some time early in June.
>
> HIS LORDSHIP: No, counsel.
>
> MR. DEANS: Yes, m'Lord, in this matter. This matter had been set for trial for today from when? It is a short date. It was last

[1] It is not entirely clear why the matter did not proceed on that date. The transcript of the trial proceedings reports counsel for the prosecution as saying (at page 773) that "[t]he Crown indicated that it was not ready at that stage". However, in its skeleton arguments filed in this court on 25 March 2014, the prosecution states (at para. 32) that "[t]he Crown was unable to commence trial of the matter on the 21st of April 2010 as scheduled as a part heard matter was in progress". Of course, it could also be that there is no inconsistency between these two statements.

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| | before the court the 21st of April, m'Lord. |
| HIS LORDSHIP: | Prior to that, when was the matter before the court? |
| MR. DEANS: | The first date, m'Lord. |
| HIS LORDSHIP: | I am going to adjourn, and I am going to ask both you and the prosecution to attend my chambers. |
| MR. DEANS: | Yes, m'Lord. |
| HIS LORDSHIP: | Just rise for me." |

[5] After a 27 minute adjournment, the court resumed its sitting. When the matter was again called on, Mr Rogers sought leave to provide an "additional basis" for Mr Deans' application. Mr Rogers advised the court that (i) there were several persons whom the defence had only recently been notified would not be called as witnesses by the prosecution and to whom the defence wished an opportunity to speak; and (ii) there was a "medical document", which had only recently come to the attention of the defence, which it considered to be "of paramount importance". In these circumstances, Mr Rogers' request was for "a short adjournment…[o]f no more than two weeks", to enable counsel to do "that which we believe we ought to do".

[6] The application was opposed by the prosecution. Mrs Palmer-Hamilton, who also appeared at the trial, pointed out that, although "admittedly, the preparation time for both sides has been a short one", the defence had been served with all the statements since 14 April 2010 and, upon a request from the defence in writing on 11 May 2010 (the day before the trial), they had also been served with a copy of the indictment.

Further, that Mr Deans had been "very involved" in the preliminary enquiry, which had commenced in November 2009 and ended in January 2010, at which 15 of the 16 witnesses whom the prosecution intended to call at the trial had been deposed. Accordingly, since all the witnesses were present at court on that day, Mrs Palmer-Hamilton proposed, as "a fair compromise", that the jury be empanelled and that the case could start the following day.

[7] Accepting Mrs Palmer-Hamilton's suggestion, the learned trial judge ruled that -

> "…the matter will begin today, and the only consideration this court is prepared to make is to have the empanelling take place, and we adjourn to begin hearing evidence tomorrow."

[8] A total of 28 witnesses for the prosecution, four of whom purported to give eyewitness testimony, were called at the trial. Apart from the pathologist and those persons called for the purpose of identifying the bodies of the deceased to the pathologist, the other witnesses were all police officers involved at various stages of the investigation.

[9] In order to understand the evidence, it may be helpful to establish the general layout of the club, which was at the material time situated on the first floor of the shopping centre. Access to the club was by way of a staircase leading from an entrance at ground level, up one flight to a landing; then, after a turn to the right, up another to a glass door and into the club. Upon entering the club, there was a bar to the left (the front bar) and chairs and tables to the right. In the vicinity of the front bar, there were

a pool table and a number of gaming machines. Also to the left, was the entrance to a bathroom area. Beyond the area in which the front bar was located, there was a second bar (the back bar), also on the left. To the right of the back bar was a room which was variously described in the evidence as the "music booth" or the "DJ booth". This was the room in which the persons who were responsible for providing the music ("the selectors") were located and from which they controlled the sound system. For the purposes of this judgment, we will refer to it as the music booth.

[10] As we have already indicated, four of the witnesses were patrons of the club on the morning of 20 October 2008. But, because each of them gave evidence from a different perspective and location inside the club, it is impossible to gain a full appreciation of what happened that morning without considering the evidence of each.

[11] The first was Mr Kemar Carr and his evidence was to the following effect. He arrived at the club at about 12:15 am, accompanied by his brother, Davion Carr. Upon their arrival there, they went straight to the music booth, in which there were two persons, described by Mr Carr as "Face" and "Ejon". These were the selectors. The appellant, who was previously known to him as "Souljie", and a frequent patron of the club, was seated at the back bar. At some point, Mr Carr said, he heard a Vybz Kartel song ("Me bus me gun whenever me like") being played over the sound system. While this song was being played, he saw the appellant "go over to the wall and lick it like an angry person", after which, according to Mr Carr, "I see blood on the wall". The appellant then returned to his seat at the back bar. While he and two other men (one of whom Mr Carr knew as Ray Rochester) were there talking, a young lady wearing a

purple dress walked over to the back bar close to where the appellant was sitting. The appellant then appeared to put his hand on the girl, whereupon she "like flash him off" and walked back in the direction from which she had come. She appeared to be complaining to the two men and they looked in the appellant's direction. The appellant then got up, took out a cellular telephone, appeared to dial a number and walked off in the direction of the exit to the club. The two men to whom the young lady had spoken, who appeared taller than the appellant, followed behind him and all three men went out of sight for a while.

[12] After about two minutes, the appellant came back towards the back bar. The same two men were about two feet behind him. However, before getting to the back bar, the appellant spun around and pulled out a black, short gun, "with the magazine loaded on it", from his waist. The appellant then started firing shots in the direction that he had come from. Two men fell to the ground and the appellant stood over one of them firing more shots. While this was going on, the appellant released the magazine from the gun and pushed another one into it. People in the club started to run. Mr Carr then went back through the open door into the music booth and bent down. His brother, Davion, went with him and Ejon was also there. No music was being played at this time and the appellant was heard to say, "[a] who next, a who next." The appellant walked towards the entrance to the club, gun still in hand, and more gunshots were heard. All three men inside the music booth stooped down. The appellant next came to the door of the music booth, gun still in hand, but pointed downwards, asking, "[a] who in yah?" All three men stood up in response, Mr Carr saying, "Soulji, a me…the selecta".

The appellant responded, "[o]h", and walked away in the direction of the entrance to the club. After more gunshots were heard, the three men in the music booth resumed their stooping position. The appellant then came back to the door of the music booth, with the gun now pointing in the direction of the three men, and opened fire on them before walking off again. Mr Carr saw blood coming from his right hand and from his chest. Davion, who was right beside him, was also bleeding, as was Ejon. Neither man appeared to be moving. When Mr Carr heard more gunshots coming from the direction of the entrance to the club, he left the music booth, went behind the back bar counter and lay there on the ground. After a while, he saw policemen and identified himself to them. Taken in due course to the Kingston Public Hospital ("the KPH"), Mr Carr was found to have been shot seven times, sustaining injuries to his right upper chest and right arm, his left arm and right foot. Davion and Ejon were both dead. Mr Carr estimated that the entire incident inside the club, which begun at about "after 3:00", lasted for "about 20 minutes or more than that".

[13] Mr Carr did not see anyone other than the appellant with a gun in the club that morning. He specifically denied seeing (i) either Davion or Ejon firing a gun at the appellant; (ii) one of the men who were following the appellant with a ratchet knife in his hand; (iii) the appellant being attacked and shot from behind before drawing his gun and firing; or (iv) just before he (Mr Carr) was shot and injured, the appellant being attacked by men armed with knives and guns coming from the direction of the music booth.

[14] Mr Roy Green (who was also known as "Daddy Roy") arrived at the club sometime after midnight on the morning of 20 October 2008. He was with the birthday celebrant, Nancy, and "a couple more girls". The party was already underway, with music being played and a group of three to five men at the back bar drinking "Hennessey" and other alcoholic beverages. Arriving after him were two gentlemen who were known to him before, Messrs Lynchmore Forbes and William Wilberforce. As he stood there listening to the music and "watching", Mr Green observed a gentleman who, every time certain music was played, would come up to the wall of the club and beat it with his right hand. Mr Green, who took this to be a celebratory gesture of some kind, would in due course identify the appellant as this man. The "birthday thing" started at around 2:00 am. Birthday greetings were given, the cake was cut and pictures were taken. Subsequently, the partying resumed.

[15] At this point, Mr Green was spoken to by Miss Latoya McLaren, who would also give evidence in the case. As a result of what Miss McLaren told him, Mr Green twice exchanged words with one of the men drinking at the back bar. The appellant was present on the first occasion, but not on the second. However, shortly after that, the appellant was seen coming from the front section of the club. At a distance of about 12 feet from where Mr Green was standing, the appellant pulled a gun from his waistband and started firing shots, first one to the right and then three more in front of him. One person fell to the ground after the first shot was fired and, after the other three shots were fired, a second person also fell to the ground. Then, standing over this second person, the appellant held the gun down and, as Mr Green put it, "emptied that gun on

that person". The appellant removed the magazine from the gun, inserted another and walked off towards the front of the club. Although Mr Green could not see what was happening, he heard the sound of more shots being fired at the front. The sound of gunshots then appeared to be coming towards the back bar again, so Mr Green moved closer to the front, saw the entrance door open and decided to exit through it. There was a body lying in the doorway, which Mr Green recognised to be that of Mr Forbes, who had been the victim of the first shot fired by the appellant. Mr Green stepped over the body, left the club and went downstairs. There, he could still hear shots being fired in the club. Soldiers and policemen attempted to go upstairs and into the club, but retreated when the shots were fired. After the shots subsided, Mr Green saw the appellant being taken down from the club and put in a "soldier jeep". Once inside the jeep, the appellant appeared to be talking on his cellular telephone.

[16] Mr Green did not see either Mr Forbes, or the second person who was shot by the appellant, with a gun that morning. Nor did he see anyone armed with knives and guns come into the club. He did not see two men, one armed with a gun and the other with a knife, walking closely behind the appellant. Nor did he see anyone attack the appellant. In fact, he said, he did not see any confrontation of any kind that morning. He further said that, when he left the club, he did not know that the appellant was wounded.

[17] Corporal Wayne Roberts, who was at the time of the incident a constable in the Jamaica Constabulary Force, was also an invited guest at the club on the night of 19 October 2008. Upon entering the club, he had positioned himself at the back bar with a

group of about eight persons. To his immediate left was another group of four men, "standing at the bar corner". A group of five ladies were on the dance floor. One of the men in the latter group, who Corporal Roberts later identified as the appellant, touched one of the ladies, causing her to turn around and gesticulate aggressively towards him. The appellant was spoken to by another man, but continued to enjoy himself. The group of men in which the appellant stood "seemed to be highly intoxicated". The appellant came over to the column against which Corporal Roberts was leaning and beat his hand on the wall about four times, apparently in appreciation of the music that was being played over the sound system. He then walked back to the corner "and continued drinking and partying". The appellant subsequently approached the bartender, who indicated to him that she "was not selling him any more liquor". The appellant then "reloaded" his cup with the assistance of someone else and continued dancing. As the appellant danced, he spilt some of his drink on the floor. When the Vybz Kartel song, "'Me bus' me gun whenever me like", begun to be played, the appellant again approached the wall and beat it with his hands "[a]bout six more times". One of Corporal Roberts' friends then told the appellant that, "police is hear [sic] and he must behave himself better than that". In response, the appellant patted the friend on the shoulder, leaving some red markings, which appeared to be blood, on the friend's peach-coloured polo shirt. Not long after that, at about 4:00 am, Corporal Roberts and his friends left the club. During the time when he was at the club and while on his way out of it, Corporal Roberts did not see any men armed with knives or guns.

Neither did he see the appellant being surrounded by a group of persons in attendance at the party after the young lady had been touched.

[18] Miss McLaren arrived at the club at about 11:30 pm on 19 October 2008. Her account of the events of that morning was as follows. Upon her arrival at the club, Miss McLaren said, there were a few people there drinking and enjoying themselves, but Nancy, the birthday girl, was not yet there. The appellant and a few other persons were sitting at the back bar. Sometime after Nancy arrived at around midnight, she took the microphone and started "bigging-up" everyone for coming, after which the cake was cut and the drinking and dancing resumed. Among the persons on the dance floor was Miss McLaren's friend, Toy. The appellant touched Toy on her bottom. An argument ensued between the two of them and a few people started to gather around them. But after a while things calmed down and everyone started to have fun again.

[19] Miss McLaren said, sometime later, while a Vybz Kartel song containing "gun lyrics" was being played, the appellant started to beat his hand against the wall and splash the liquor in his cup all over, wetting her up in the process. This caused her to turn around and stare at the appellant, following which he came over to her and said in a low tone, "[y]ou don't know is the wrong somebody you looking at". Miss McLaren walked away and spoke to Mr Green and another person who were nearby, then went back towards the back bar. Just at that time, she also saw Mr Forbes and Mr Wilberforce coming towards the back bar. Addressing the appellant, who was also at the back bar, Mr Forbes said, "[w]hat kind a idiot thing that you a keep up". As far as Miss McLaren could see, there was nothing in Mr Forbes' or Mr Wilberforce's hand at

this time. A couple seconds later, the appellant pulled a gun from his waistband and, as Miss McLaren put it, she "[s]tarted to hear gunshots…the fire gash from the gun". Mr Forbes, in whose direction the gun was pointed, fell to the ground. Miss McLaren tried to run, but slipped on liquid which was on the tile flooring. As she lay on her belly, almost under the pool table, Mr Wilberforce, who was also running, fell on his face at the left entrance to the back bar, some 9 to 10 feet away from where she was. Miss McLaren testified that the appellant came over to Mr Wilberforce, used his foot to turn him over on his back, and said, "[f]rom night you a gwaan like you a bad man, a tonight you a go dead"; and she heard gunshots and saw Mr Wilberforce's body start "to shake up and down".

[20] The appellant next went towards the music booth, where Miss McLaren heard him say to the selectors, "From night, unooh a big up the Sherlock man", after which she heard gunshots again. Getting up from her position by the pool table, Miss McLaren ran towards the female bathroom, where she started knocking on the door. But no one would let her in. The same thing happened when she tried the male bathroom. Then, returning to the female bathroom, she identified herself by name and was finally let in by a friend of hers who was in there. Once she was inside, the door was again locked and she then heard more gunshots. After some more time passed, someone peeped out the bathroom door and it was ascertained that police officers were inside the club. In due course, everyone was ordered out of the bathroom. Outside, Miss McLaren saw Mr Wilberforce lying on his back close to the pool table where she had fallen, while Mr Forbes was lying on his chest on the ground at the entrance. While

the former appeared to be dead, the latter tried to get up, but then fell back down. She then looked for and retrieved her purse, which had fallen from her during her initial flight, and went downstairs.

[21] Miss McLaren said that she did not see anyone attack the appellant with knives or guns that morning. Nor did she see any of the persons who were in the vicinity of the back bar surround the appellant in a hostile or angry manner, though she was not, she said, "one hundred percent sure" that persons had in fact surrounded him. She did not know what a "magazine" was and she did not see the appellant remove anything from any part of the gun which he had. During the search for her purse after the shooting, she did not see any knives on the floor of the club. She did not see the appellant "spin around" immediately before the shooting; neither did she see Mr Forbes and Mr Wilberforce walking behind the appellant at any point or hear a gunshot while they were behind him. She disagreed with the suggestion that it was after the appellant had received a wound to his back that he spun around and started firing shots. She further disagreed with the suggestion that Mr Wilberforce, whilst on the ground, reached for the gun beside him, and that it was at that time that the appellant, who had walked away, fired at him again, from a distance. However, she admitted that she did not see who fired the shots subsequent to the shooting of Mr Forbes and Mr Wilberforce.

[22] Corporal Jason Dawkins was part of a team of 11 police officers and 12 soldiers which assembled at the Olympic Gardens Police Station about 3:30 am on 20 October 2008. After a briefing from a member of the JDF, the team proceeded to the shopping

centre in a convoy of marked vehicles. Upon arrival at the back gate to the shopping centre at about 4:30 am, Corporal Dawkins observed a number of persons on the compound running about and screaming. Once inside the compound, Corporal Dawkins exited the vehicle in which he was travelling and approached the entrance to the club. Moving with him were a Constable Danvers and about three soldiers. At the ground floor entrance, the door to which was closed, he heard "two - - three to five" loud explosions coming from inside the club. As he opened the door less than five minutes later, a man ran out. Corporal Dawkins grabbed on to him, searched him quickly, but found no weapons on him. In answer to Corporal Dawkins' question as to what was going on upstairs, the man replied, "[o]fficer waa man up de, in a green shirt and short pants a kill off di bombo claat people dem". On that note, the man was released.

[23] Corporal Dawkins then led his team, moving "tactically", up the first flight of stairs towards the club. This meant, Corporal Dawkins explained, that each man had the stock, or front part, of the M16 rifle with which he was armed in his left hand and the butt, or the bottom part, against his right shoulder. In addition to an M16 rifle, Corporal Dawkins himself was armed with 35, point six rounds of ammunition, a Glock service pistol and 30, 9mm rounds of ammunition. At the first landing, Corporal Dawkins said, he "peeped around the corner" up to the second landing, where he observed a man, who was bleeding, lying down on his belly across the entrance to the club. As he continued up the stairs, Corporal Dawkins heard about six more explosions and crouched with his rifle at the "ready position", that is, with the rifle pointed forward. He then saw a man, dressed in a green shirt and short pants, walk out from

the left with a 9mm pistol, pointing downwards, in his right hand. The man, who was about nine and a half to 10 feet ahead of Corporal Dawkins, then pointed and fired "bam, bam, bam" to the right. Corporal Dawkins shouted out, "police, don't move, and drop the gun"; whereupon the man turned swiftly, faced Corporal Dawkins and pointed the gun in his direction. Immediately fearful of his life, Corporal Dawkins said, he took evasive action, fired two rounds of ammunition from the M16 rifle in the man's direction and retreated to the ground floor entrance at the foot of the stairs.

[24] Having ascertained that he was uninjured, Corporal Dawkins and his team regrouped and he again began moving up the first flight of stairs. On reaching the first landing, he heard a male voice saying, "Soulji, Soulji"; and, peeping "around the corner" again, he saw the same man in a green shirt and short pants whom he had seen before. Corporal Dawkins shouted to the man to come down, at which point he heard "the clanking sound of a metal [sic] falling down the stairs" from the direction in which the man was standing. Corporal Dawkins realised that it was the gun which had been thrown down when he saw it on the floor of the first landing. About 10 to 15 seconds later, the man in the green shirt and short pants came down the stairs by himself. He was bleeding from, and holding on to, his right side and blood was all over his right hand, running down to his pants. When first seen by Corporal Dawkins at the top of the stairs, the man was not bleeding. At the entrance downstairs, the man, who was subsequently identified as the appellant, appeared to be staggering. He was assisted by members of the JDF into a JCF service vehicle, which drove out of the premises of the shopping centre.

[25] After the vehicle carrying the appellant had departed, Corporal Dawkins went upstairs to the club. There, he saw policemen and soldiers conducting searches, both of the persons who were inside the club and the club in general. No guns were found on the persons who Corporal Dawkins searched, but he did see a ratchet knife on a pool table. Inside the music booth were two bodies in a pool of blood, while on the left, beside a pool table, was a third body lying on its belly. All three bodies appeared to be dead. There were also persons hiding in the bathrooms. Although he did not search them himself, Corporal Dawkins said that these persons were searched and, as far as he was aware, those searches revealed nothing. The M16 rifle, serial number 8103369, with which Corporal Dawkins was armed and from which he had fired two rounds was handed over by him to an officer of senior rank and his hands were also swabbed at the Duhaney Park Police Station at about 9:00 am that same morning.

[26] The club was in due course cordoned off and, later that morning, various police officers from the Major Investigation Task Force ("the MITF") visited the scene. Bloodstains were observed on the first flight of stairs up to the club from the ground floor entrance door. The glass door at the entrance to the club at the top of the stairs was shattered, withtwo holes, which appeared to have been caused by bullets, in the lower section. One officer spoke of seeing three knives on the floor of the club, two closed and one open. An empty shell casing was seen at the club entrance. Bloodstains were also seen. Other spent casings, bullet fragments and expended bullets were seen in various sections of the club, including inside the music booth. In the end, 29 spent casings, seven bullet fragments and seven expended bullets were collected from inside

the club. An empty magazine was found on the first (front) bar counter. A trail of blood was observed leading to the second (back) bar counter, where a second empty magazine was also found. Items such as female shoes and telephone cases were also observed in different locations. The cushions of several sofas in the back bar area seemed to be disturbed and bar stools were seen lying on their sides, giving the club the appearance of having been ransacked. Samples of blood seen at several places in the club were taken for subsequent analysis and the palms and the backs of the hands of the deceased men were also swabbed. A ratchet knife (unopened) was found under the body of Mr Wilberforce.

[27] The firearm which Corporal Dawkins had described as having been thrown down the stairs of the club was picked up by a soldier in his presence immediately it had fallen on the first landing. It was in due course given to one of the several police officers who were on the scene at the shopping centre. At that time, both the firearm and the magazine were covered with what appeared to be blood. On 21 October 2008, the day following the shooting at the club, a parcel containing the firearm and a magazine was handed over to Detective Constable Orlando Williams of the MITF. Detective Constable Williams took the parcel to the MITF laboratory, opened it and removed the firearm, which he observed to be a 9mm Smith and Wesson model 910, serial number VJL1444. There were 11 rounds of ammunition in the magazine and these were removed. Using gloves, Detective Constable Williams then took swabs from the firearm and the magazine for, as he put it, "DNA purposes". The ammunition, the

firearm, the magazine and the swabs were separately packaged and passed on to another member of the MITF.

[28] Post mortem examinations later revealed that each of the four deceased men had succumbed to multiple gunshot wounds (two to Ejon Peart, seven to Damion Carr, six to Lynchmore Forbes and nine to William Wilberforce). Save in the case of Mr Forbes, whose death would have occurred within 15-30 minutes of his being shot, death in each case would have occurred either instantaneously or within 2-5 minutes.

[29] Bullet fragments were retrieved by the pathologist from the bodies of all four deceased men and a fragment of a bullet was also taken from the appellant's body at the KPH. These and various other items gathered by the police during the course of the investigation were delivered to Superintendent Sidney Porteous at the Forensic Science Laboratory for testing and analysis. In addition to the bullet fragments retrieved from the bodies of the deceased and the appellant, there were a total of 26 firearms, including the 9mm Smith and Wesson model 910 firearm, serial number VJL1444, allegedly thrown down the stairs of the club by the appellant on the morning of 20 October 2008 and the M16 rifle, serial number 8103369, from which Corporal Dawkins said that he had fired two rounds of ammunition that morning; the magazines recovered from inside the club after the shooting; and the spent casings and other material collected from inside the club.

[30] Superintendent Porteous' findings were as follows:

1. Of all the firearms submitted to and tested by him, only the 9mm Luger Smith and Wesson model 910 firearm, serial number VJL1444, and the M16 rifle, serial number 8103369, showed evidence of having been recently fired, and this could have been on 20 October 2008.
2. The 29 9mm spent shells and the fired bullets found inside the club after the shooting were fired from the 9mm Luger Smith and Wesson model 910 firearm, serial number VJL1444.
3. The bullet fragments retrieved from the bodies of all four deceased men were discharged from the 9mm Luger Smith and Wesson model 910 firearm, serial number VJL1444.
4. There were a few pieces of lead core and copper jackets that could not be identified with a particular firearm.
5. The two magazines recovered from inside the club were 9mm Luger firearm magazines for use in the 9mm Luger Smith and Wesson model 910 firearm, serial number VJL1444, although the magazines used

> in that model firearm could also be used in the same model firearm manufactured two years later.

[31] With regard to the M16 rifle, Superintendent Porteous explained that this is a long range firearm which "can shoot a target over a certain amount of distance". Because an M16 rifle is fired with a closed breech, only a small amount of gunshot powder is emitted through the muzzle of the firearm, thereby resulting in a very small amount of gunshot residue on the hand of its user.

[32] On 14 November 2008, Detective Sergeant Dolphie Graveney formally charged the appellant with the murder of the four deceased. When cautioned, the appellant said, "[m]inuh have anything to say, is one thing I would like to ask, how it look on my side". Sergeant Graveney's response was that "it is left for the court to decide".

[33] That was the case for the prosecution. Mr Rogers for the appellant immediately sought to address the court on a matter, which it was said, involved points of law and the jury was accordingly excused. Mr Rogers advised the court that, during the course of the trial, "a statement collected by a member of the JDF military police from an individual, purporting to be a witness was made available to [the defence]". While the statement (which, for ease of reference, we will refer to hereafter as "the JDF statement"), which appeared to have been collected on 22 October 2008, had not come through counsel then appearing for the prosecution, Mr Rogers indicated, "it did come to [the defence] by virtue of an arm of the State". Mr Rogers stated that he had been advised that, after the JDF statement was collected, the maker was directed to the

"MIT[F]" to give a statement to the police. However, he was unable to say whether this was ever done. There, after a meeting between the judge and counsel on both sides in chambers, the matter rested. But, as will presently emerge, it would surface again at a later stage of the trial (see para. [42] below).

[34] Before turning to the case for the defence, it is necessary to mention three other matters which arose during the course of the case for the prosecution on which the appellant bases a substantial part of his complaint, certainly as regards the issue of disclosure, in this appeal. The first arises in this way. Up to the date on which the trial commenced, no test results were available in respect of the swabbing of the hands of the four deceased men. The court was told that the defence had made an oral request that it be provided with these results from as early as the preliminary enquiry and a further request was made to the prosecution by letter dated 17 May 2010, that is, a few days after the trial had commenced. The results were in fact made available to the defence on 1 June 2010, whereupon an application for Mr Carr and Miss McLaren to be recalled for further cross-examination was made and granted. On 2 and 10 June 2010, respectively, Mr Carr and Miss McLaren attended and were duly asked further questions in cross-examination.

[35] The second matter arose out of the evidence of Detective Corporal Williams, to which we have already referred (see para. [28] above). At the close of his examination-in-chief, Mr Rogers for the defence indicated that he was unable to embark on cross-examination without having had sight of the results of the DNA testing to which Detective Constable Williams had referred. In response, Mrs Palmer-Hamilton told the

court that the Crown was not in possession of any such results and that it appeared that they were still pending. The court then ruled that the cross-examination should proceed, subject to the learned trial judge's assurance that, "if the need arises for any further cross-examination and the application is made to [him], then [he] will grant the application". The cross-examination accordingly proceeded on that basis and, at the end of it, Mr Rogers indicated to the court that he had "no further questions of this witness at this point in time".

[36] And thirdly, on 7 June 2010, an application was made on behalf of the defence for a stay of proceedings on the ground of late and/or non-disclosure by the prosecution of relevant material. The basis of the application was that (i) although investigations by the defence revealed that gunshot residue swab results had been prepared and ready from as early as February 2009 and collected in August 2009, these had not been delivered until 1 June 2010, when the trial was already well underway; and (ii) the results of DNA analysis of swabs of blood taken inside the club on the morning of 20 October 2008 were still outstanding. In these circumstances, it was submitted, there had been an abuse of the process of the court. In response, counsel for the prosecution, while acknowledging that the swabbing results were served on the defence "at a very late stage…after the commencement of the trial", pointed out that the results had been provided to the defence as soon as they were received by the prosecution. As far as the DNA results were concerned, the court was told that, although they were still pending, they had been promised by the forensic laboratory within a few days.

[37] In refusing the application for stay, the learned trial judge said that he was not convinced that the failure to disclose complained of in this case was unfair. The learned trial judge then repeated his earlier statement that, if it became necessary to recall any of the witnesses whenever the DNA results became available, any request by the defence to do so would be granted if made.

**The case for the defence**

[38] The appellant made an unsworn statement from the dock and called five witnesses in his defence. In his long and detailed unsworn statement, he gave his age as 33 years and identified himself as a corporal, with almost 13 years of service, in the JDF. At the time of trial, he had been assigned to the JDF Coast Guard Unit for four years and his area of specialisation was outboard marine engineering. He had lived in Pembroke Hall, Kingston 20, for over 20 years and he had been visiting the club for over three years. He visited the club on 20 October 2008 and sat at the second bar, where he bought drinks for patrons and for some of the selectors whom he knew. He also bought himself a drink. At a point, having assisted in clearing up some broken glass on the bar counter, he cut his right index finger, necessitating a visit to the bathroom. He also assisted in calming down what appeared to have been an argument between some male patrons of the club. By this time, the party was in "full swing". The patrons were enjoying themselves, while popular songs were being played by the selectors. The appellant continued as follows:

> "While sitting at the bar, a few minutes later, I observed men coming to that location at the second bar where the

selector booth and the side of the right bar counter is [sic] located. I observed these men sporting knives, in the motion of opening and closing them. I also observed men passing what appeared to be items, wrapped in what appeared to be handkerchief, to one another. Some of these men bundled in the vicinity of the DJ booth, others gathered to the right of the back bar counter in the vicinity where three pool tables are located. I became very suspicious and decided to leave. I requested my bill from the bartender. While that was being processed, I heard an announcement over the music system bigging up men from different areas of the corporate area, to include Sherlock, Drewsland, Marverley, also Pembroke Hall, just to name a few that I can recall just now. I also heard specifically, big ups going out to Tristan Palmer Junior. This name was known to me as a person wanted in connection with – m'Lord?

HIS LORDSHIP: Never said a word, sir.

ACCUSED: Okay. This name was known to me to be a wanted man in connection with the shooting death of one of our known dance hall [sic] acts, Bogle. As I was taught, I acted by going on my cell phone to contact one of my seniors in relation to this name. I then exited the club at the left side of the front bar to the exit entrance, which leads down a flight of stairs to a landing which leads down another flight of stairs to a door which leads in the parking area, upon the advise [sic] of my commander. He told me that a joint military patrol will be heading in that direction as soon as possible. I also related, as I was suspicious of the men that had the knives, that I saw other items that were passing from one person to another

which I could not detect at that time. This was now approximately 3:30 a.m.

I was still downstairs awaiting further instructions in relation to the patrol vehicles. I got very impatient for this call and decided to leave, when I remember that I did not complete my transaction with the bartender. I proceeded into the club, but, while proceeding up the first flight of stairs which lead to the first landing, I observed two men following closely behind me. As I was trained to [sic], in being observant, I glanced over my shoulders for every three steps forward. I now reached the entrance of the club, I still observed these men following me. Upon entering the club, I decided to go to the left of the first bar counter, which is a longer route to reach where I was presently at, which was the second bar counter. I still observed these two men following me whom I now know to be William Wilberforce and Litchmore Forbes.

Upon passing the pool table, which is located at the first bar counter to the left, I still observed these men following me. I became very fearful of what these men were about to do to me. As I was trained to do, I still observed by glancing over my shoulders. I now reached the entrance that leads to the second bar area which is directly to the left of the first bar counter, I observed these two men still following me. I now reached or entered

the second bar area in the vicinity where three pool tables are located, I then heard an explosion, I felt an impact on my right rear shoulder. At this time, I was even more fearful for my life. As I was taught to do or trained to do, in preserving life and in preserving life you have to preserve your own life first. I then pulled my licensed firearm whilst simultaneously turning in the direction where these two men were following me. Whilst turning, I heard another explosion, at this time I felt an impact on the right side, as I turned, I fired at the men that I saw attacking me. I saw men with guns and I saw men with knives.

At this time, my head seems to be enlargened [sic], I further took evasive action as I was trained to do. Men fired at me, I returned fire, these men retreated to the vicinity of the first bar area. I begun [sic] to search, while holding my right side, as I was feeling a burning sensation inside of me, in the vicinity of my abdominal area to the upper part of my stomach area just below the lower portion of my chest area. I felt as if I was dying, but, as I was trained to do, I tried my best to maintain my composure seeing that I have [sic] thought that I was the only person present that was able to protect those that are innocent and law-abiding. I scanned for hostiles in the vicinity of the pool tables located at the second bar area. I observed, whilst scanning for hostiles, that one of the men that fell to

the ground pointed a weapon at me. I took further evasive action as taught and trained to do. I fired at the man that was pointing this weapon at me. I did not attempt to retrieve this weapon at this time as I did not know where other hostiles were.

At this time I began to feel weak, but, I tried my best to maintain my calm. I slowly scanned further for hostiles, I saw personnels [sic] stoop closely to the walls, persons were screaming, persons were under the pool tables, others were in the vicinity just before the second bar area, these persons were not a threat to me.

I further scanned for hostiles holding onto my wound on the right side of my body, I then scanned further in the vicinity between the selector booth and the left side of the second bar area. I observed movements within the selector booth. I further recognized that these were persons I knew, so I further scanned for hostiles by looking in the direction where the first bar area is located. While I was scanning that area, I then heard another noise coming from the selector booth, this time I realized that there was someone firing at me, I observed flashes coming from what appeared to be a firearm. As I was trained to do and to observe, I became even more fearful because I thought these persons were persons I knew. I had to take evasive action. I then fired in the direction where I saw the flashes

and where I heard explosions coming from. I had to take evasive action, retreated to the wall that runs between the selector booth and the back bar counter, which is the second bar counter.

In returning the fire, I had to change my magazine as the weapon was empty. As I was trained to do, I reloaded my weapon and fired into the selector booth. I took further evasive action, retreated cautiously going into the direction of where the three pool tables were located. In doing so, I remember [sic] that I was attacked in that very location, so I decided to retreat to the other side of the club, which is the entrance to the front of the club, in the vicinity of the first bar counter. Upon heading in this direction, I heard explosions coming from the front bar, of the bar area or in the vicinity of the bar area, the first bar area. At this time, I was even more weary [sic], I assumed it was because of the great amount of loss of blood, I still maintained my composure as I was trained to [sic].

In hearing these explosions at the front bar, I retreated to the back bar. Upon retreating to the back bar, I again heard explosions coming from the selector booth area. I observed flashes of light. At this time I did not know what to do, but, I still maintained my composure as best as possible.

I fired again in the selector booth, while doing so, I felt an impact on the back of my right forearm. I took further evasive action as I was trained to do. I tried once more to advance to the front bar. Upon advancing to the front bar, upon reaching the opening which leads from the back bar into the front bar, I observed a man lying at the doorway which is the entrance to the Double Diamond Gaming and Lounge, I further scanned for hostiles while being very vigilant. I went to the window which is located right of the front bar upon entering the club. I observed a window that was open, I proceeded to the window, I then looked through the window cautiously, seeing that there were hostiles, I then saw what appeared to be men in military fatigue and police fatigue.

I then shouted, "soljie, soljie, me a come downstairs to you." I also told them that I had a firearm, owing to the fact [sic] I did not want to be mistaken for a gunman. I proceeded cautiously to the exit - - entrance of the club. The man that was at the door seemed motionless. I further, cautiously, opened the door fully and proceeded slowly down the stairwell, upon reaching the vicinity of the first landing I slowly peeped down the second landing, I saw what appeared to be police personnels [sic] and military personnels [sic]. I shouted again, "Soljie." I was asked by one of these personnels [sic] if I had a firearm, I told them yes. They told me

> to surrender the firearm, which I slowly threw down the stairway, then protruded both left and right hand from behind the wall of the first landing, I then slowly went down the second landing."

[39] After recounting his apprehension by "military personnel" and his journey to the KPH, the appellant concluded his statement with a summary of his case:

> "I, Leslie Lloyd Moodie was attacked at the Double Diamond Gaming Lounge on the 20th of October at or about 4:30 a.m. I saw men with guns, I saw men with knives. I took to defending myself, I had to preserve my life, so that I'll [sic] be able to preserve the lives of all law-abiding citizens of Jamaica and visitors alike. I had to act in the way I was trained to preserve my life in order to be able to preserve others. I acted in accordance with the colours I swore to uphold at or about July 17, 1997".

[40] The appellant's five witnesses were, in the order in which they were called, Major Roderick Rowe of the JDF; Miss Marcia Dunbar, a government analyst and, at that time, the deputy director of the forensic science laboratory; Dr Mark Williams, a registered medical practitioner and the regimental medical doctor of the JDF; Mr Robert Finzi-Smith, at that time the senior director of safety and security at the University of Technology, Jamaica; and Dr Akir Baker, also a registered medical practitioner, who had treated the appellant at the KPH on the morning of 20 October 2008.

[41] Major Rowe's evidence was to the following effect. The appellant had been well known to him for approximately seven years, as a soldier under his command in the engineer regiment and in the JDF Coast Guard. From time to time, he had also

interacted with the appellant on social occasions, though he had never been with him to a night club or anything like that. He knew the appellant to be a member of the Jamaica Rifle Association. He was also familiar with the appellant's voice and they had shared telephone numbers with each other. In the early morning hours of 20 October 2008 (he could not be more specific about the time than this), Major Rowe said, he was awakened by his ringing cellular telephone. When he answered, it was the appellant on the line, asking him if he "knew someone by the name of Tressann Palmer". His response was that he did not know that person. The appellant then said that he had heard that that person was a gunman, at which point the conversation ended. Some moments later, Major Rowe received another call from the appellant. The appellant told him that he needed some assistance, in that "there were a lot of gunmen in the club". In answer to Major Rowe's enquiry whether "they knew that he was a soldier and that he had a licenced [sic] firearm", the appellant said yes. Major Rowe then advised the appellant to stay out of their way and told him that he would speak to the duty officer at Up Park Camp, which he did. Some minutes later, the appellant called again, now telling Major Rowe that "the gunmen were all over the club". This was the last call received from the appellant that morning and it ended at 3:17 am. Major Rowe said that when the appellant called the first time, he sounded "quite okay"; when he called the second time, he sounded "concerned"; and when he called the third time, there was "like urgency in his voice". Major Rowe then called Up Park Camp again, spoke to a different duty officer from the one he had earlier spoken to, and relayed to him what the appellant had said. Asked to give his assessment of the appellant as a soldier, Major

Rowe said that "[h]e was of exemplary character, very jovial and would take part in any activities that the unit had arranged, he liked to get involved in all activities, very mannerable [sic], he is a social person".

[42] At this point in the trial, immediately before Miss Dunbar was called to give evidence on behalf of the appellant, the question of the JDF statement (see para. [33] above), was again raised, this time by the prosecution. Mrs Palmer-Hamilton stated that she had asked for a copy of the JDF statement and Mr Rogers' response was that the original statement was in the possession of the JDF. The learned trial judge expressed the view that, if the JDF statement existed, "it should be made available to both sides in the same or similar circumstance [sic] or nobody at all"; and further, that "what it amounts to is an arm of the state collecting a document and not making it available to the prosecutory [sic] arm of the state". Mr Rogers' final comment on the matter was that it would have been "[f]ar more useful for the defence had it been obtained earlier". Nothing more was heard about this statement during the trial, save that both Mrs Palmer-Hamilton and Mr Deans subsequently acknowledged having seen it.

[43] Miss Dunbar is the holder of a Bachelor of Science degree in chemistry from the University of the West Indies and a Master of Science degree in forensic chemistry from the University of Strathclyde. At the time of trial, she had had over 25 years of experience at the government forensic laboratory and had previously given evidence in court on behalf of both prosecution and defence. On 22 October 2008, she received three sealed envelopes, containing swabs of the hands of Andy Muir, Corporal Dawkins and Lynchmore Forbes. On the following day, Miss Dunbar received additional

envelopes containing swabs of the hands of Ray Rochester, William Wilberforce, Davion Carr and Ejon Peart. Also received by Miss Dunbar were one pair of blue denim trousers and one multi-coloured striped shirt, allegedly taken from Ray Rochester.

[44] After examining and analysing the various swabs for the purpose of detecting the presence of gunshot residue, Miss Dunbar's findings were as follows:

(i) There was no evidence of gunshot residue on the palm of the right hand or the back of the left hand of Andy Muir. However, the back of his right hand and the palm of his left hand revealed the presence of gunshot residue at trace level.

(ii) There was no evidence of gunshot residue on the swabs taken from Corporal Dawkins, Ray Rochester or the deceased Lynchmore Forbes.

(iii) The palm of the left hand of the deceased William Wilberforce revealed the presence of gunshot residue at intermediate level. However, there was no evidence of gunshot residue on the back of his left hand, the palm of his right hand or the back of his right hand.

(iv) The back of the right hand of the deceased Davion Carr revealed the presence of gunshot residue at elevated level. However, there was no evidence of gunshot residue on the palm of his right hand, the palm of his left hand or the back of his left hand.

(v) The back of the right and left hands of the deceased Ejon Peart revealed the presence of gunshot residue at trace level. However, there was no evidence of gunshot residue on the palms of either his right or left hand.

[45] Miss Dunbar explained that gunshot residue is the product of hot gases under pressure inside the firearm, seeking an escape and exiting by way of the muzzle and any other openings that might be present in the firearm. Some of this gunshot residue will follow the projectile leaving the firearm and some will be "blown backwards and becomes [sic] deposited on any surface that will be in its path". Miss Dunbar went on to add that "[t]race level indicates a small amount of gunshot residue", "[i]ntermediate level is the level above trace level" and "[e]levated level indicates a large amount of gunshot residue". Miss Dunbar was familiar with the term "transference", indicating that it relates to "gunshot residue from an initial deposit being made to another area". Miss Dunbar also said that different types of firearms will result in different levels of gunshot residue escaping from the firearm and washing of the hands can remove gunshot residue. Miss Dunbar also indicated that it is possible to find gunshot residue at elevated levels on the hands of someone who has not fired a firearm. This could happen if the hands of that person are in the path of the gunshot residue as it is emitted from the fired firearm, within a distance of 9 inches from the end of the muzzle.

[46] Under cross-examination by counsel for the prosecution, Miss Dunbar identified the test used by her to test for gunshot residue as the "Harrison Gilroy" test. Making a number of concessions, she acknowledged that, although that test had at one time gained general acceptance internationally for testing gunshot residue, "they have now moved past it in terms of development…for testing of gunshot residue". The Harrison Gilroy test and the test for nitrates currently in use at the government forensic

laboratory were not "definitive" and several other tests had now been developed, in the quest "to improve the methodology of testing for gunshot residue". Accredited labs internationally were now utilising "a more definitive testing", in the form of the Scanning Electron Microscope ("SEM"). In the light of all of this, steps were being taken by the government forensic laboratory "to make testing for gunshot residue more definitive". Consequently, a new piece of equipment, which would be more sensitive in terms of the sensitivity of the detection of gunshot residue, had been acquired. The findings produced by the testing methods used in this case did not necessarily mean that the person fired a weapon. With several shots being fired in a closed environment, gunshot residue being emitted by a firearm "will become deposited on anything in it's [sic] path".

[47] Dr Mark Williams was the next witness for the defence. As the regimental medical doctor of the JDF, Dr Williams' duties included visiting "with soldiers who are admitted to hospital or turn up at the emergency department of any hospital or make contact with the hospital". Dr Williams' evidence was that, in response to a telephone call early in the morning of 20 October 2008, he went to the emergency department of the KPH. There, he saw the appellant lying on a stretcher, conscious and apparently in pain. Upon examination of the appellant, Dr Williams observed "multiple wounds under the right side of his body, the front, that's in his abdomen region and in his back…also a wound in his right forearm". Dr Williams accompanied the appellant to the x-ray department, where x-rays were done and the films taken back to the doctor on duty in

the emergency department. However, Dr Williams played no active role in the appellant's treatment, describing himself as "merely a visitor to the hospital".

[48] Next was Mr Robert Finzi-Smith, who was also a former JDF officer. Mr Finzi-Smith gave evidence of a general nature about his experience as a trainer in the use of firearms, "close-quarter combat" and other like matters. But he did not know the appellant and had never trained him in any of these skills.

[49] The appellant's final witness, Dr Akir Baker, saw and treated the appellant at the Accident and Emergency Department of the KPH at a little after 5:00 o'clock on the morning of 20 October 2005. The appellant, who was not known to him before, presented with a total of 15 gunshot wounds. Two of the wounds were to the back aspect of the appellant's right shoulder, three were just below his right shoulder blade, three extended from his lower back to his right flank, two were over his right buttock region, two (which seemed to be entry and exit wounds) were to the lower aspect of his right arm, one was to the outer aspect of his forearm along the thumb side, one was just below his rib cage on the right and one just below the groin crease in the level of the upper thigh. Save for the wound along the back to the right flank, the wounds to the arm and the wound below the rib cage (five in all), Dr Baker considered most of the appellant's wounds to be superficial. There were no fractures. The x-ray films which Dr Baker had seen revealed bullet fragments (consistent with shattered bullets) in the appellant's abdominal cavity. However, he did not count the fragments. In Dr Baker's opinion, the injuries seen by him were not consistent with "a M16 high velocity round

fired from [nine] feet away".[2] Dr Baker gave as the basis for this opinion his expectation that a bullet fired from a high velocity weapon such as a M16 rifle would produce "a large entry wound…a lot of internal damage and…a large exit wound". Instead, the entry and exit wound which the appellant had received appeared to Dr Baker to have been caused by "a tumbling medium velocity bullet".

[50] That was the case for the defence. After addresses from counsel and the learned trial judge's summing up, the jury returned a unanimous verdict of guilty of murder on all four counts on the indictment.

**The grounds of appeal**

[51] At the outset of the hearing of the appeal, the appellant sought and was given permission to argue a total of 12 supplemental grounds of appeal. In the light of the prosecution's concession with regard to the sentence of death imposed by the learned trial judge, only 11 of these grounds are now relevant. They are as follows:

> "1. The application for [sic] by the appellant's attorneys for the adjournment of the trial to another date ought to have been granted having regard to the fact that this was based on the non and/or late disclosure of material by the prosecutorial arm. As a consequence the appellant has been denied a fair trial and there has been a miscarriage of justice.

[2] At page 1274 of the transcript of the proceedings, the witness is recorded as having referred in examination-in-chief to a distance of "five feet away". However, during cross-examination (at page 1286), counsel for the prosecution, Dr Baker and the trial judge are all recorded as referring to the witness having spoken of a distance of "nine feet away". We therefore proceed on the basis that the distance given by the witness was in fact nine feet and that the five feet recorded at page 1274 is an error in either recording or transcription.

2. The prosecution having failed to make timely and/or any disclosure of material relevant to and/or necessary for the preparation and presentation of the appellant's case he has been denied a fair trial and there has been a miscarriage of justice.

3. The learned trial judge erred in excluding evidence which as a matter of law was admissible and relevant to the appellant's defence whereby he has been denied a fair trial.

4. The learned trial judge unduly curtailed cross examination [sic] of witnesses by the defence whereby the appellant has been denied a fair trial.

5. On numerous occasions throughout the trial, defence attorneys attempted, via cross examination [sic] to adduce evidence in support of the appellant's case but was [sic] prevented from doing so on the apparent basis that the evidence was inadmissible. In so doing the learned trial judge erred and the Appellant was thereby prevented from putting forward his complete defence.

6. The learned trial judge failed to give the jury any or any adequate directions as to the application of the law on self defence to the evidence and in particular to the appellant's defence; which said non direction amount to a non direction in law. The appellant's chances of acquittal were thereby impaired and there has been a miscarriage of justice.

7. The learned trial judge failed to give the jury any or any adequate directions as to the application of the law on provocation to the evidence and in particular to the appellant's defence; which said non direction amounts to a non direction in law. As a consequence the appellant's chances of acquittal was [sic] impaired and there has been a miscarriage of justice.

8. The learned trial judge's summing up is [sic] unfair and/or unbalanced and/or inadequate as the learned trial judge failed to identify for the jury the weaknesses in the prosecution's case and which as a matter of law enured to the benefit of the appellant.

9. The learned trial judge failed to put the appellant's defence to the jury whereby his chances of acquittal were impaired and there has been a miscarriage of justice.

10. The learned trial judge failed to assist the jury with any or any sufficient analysis of the evidence and/or the law applicable to the said evidence, whereby the appellant has been denied a fair trial …

12. The appellant was denied a fair trial by the prosecution's failure to call as its own witness, an expert from whom it had obtained relevant evidential material and whose evidence had elements both adverse to and favorable [sic] to the defence."

[52] For convenience, we will consider the issues raised by these grounds under the following broad headings: (i) the adjournment issue (ground one); (ii) the disclosure issue (ground two); (iii) the wrongful exclusion of evidence issue (grounds three, four and five); (iv) the non-direction/misdirection issue (grounds six, seven, eight, nine and ten); and (v) the unfair trial issue (ground twelve).

**The adjournment issue (ground one)**

[53] This issue arises out of the learned trial judge's refusal to grant an adjournment to enable the appellant to explore the possibility of retaining senior counsel to represent

him at the trial (see paras. [4]-[7] above). Mrs Samuels-Brown QC referred us to section 20(6) (now section 16(6)) of the Constitution of Jamaica ("the Constitution"), which guarantees to every person charged with a criminal offence the right to "adequate time and facilities for the preparation of his defence" (section 16(6)(b), formerly section 20(6)(b)); and "to defend himself in person or by a legal representation of his own choosing" (section 16(6)(c), formerly section 20 (6)(c))[3]. In reliance on this provision, Mrs Samuels-Brown submitted that the learned trial judge's refusal to grant the adjournment amounted to a breach of the appellant's constitutional right to legal representation of his choice and adequate time and facilities to allow him to prepare his defence. It was further submitted that, as a matter of practice and good sense, a defendant in a case of the complexity of the instant case ought to have been allowed the opportunity of retaining senior counsel.

[54] Mrs Palmer-Hamilton, on the other hand, while accepting the existence of a constitutional right to be permitted to defend oneself by a person or legal representative of one's choice, submitted that this did not extend to a constitutional right to be represented by senior counsel. In this case, the appellant's right to legal representation was not breached as the appellant was at all times represented by two attorneys-at-law retained by him. In any event, it was submitted, the right to legal representation is not an absolute right and the learned trial judge was obliged to consider all the circumstances in determining whether to allow an adjournment.

[3] The actual words used in section 20(6)(c) were "a legal representative of his own choice". Although we were referred by counsel to the pre-2011 version of the Constitution, in which these provisions were to be found in section 20(6), we will use the current numbering hereafter.

[55] The leading authority on the construction of section 20(6)(c) (now section 16(6)(c)) of the Constitution is still the decision of the Privy Council, on appeal from a decision of this court, in **Robinson v R** (1985) 32 WIR 330. That was a case in which, despite the refusal of the trial judge to permit them to do so, the two counsel retained by the defendant to represent him on a charge of murder withdrew and took no further part in the proceedings. It appeared that the arrangements for the payment of counsel's fees had not been satisfied and the defendant was therefore left to conduct his own defence. Upon his conviction and an unsuccessful appeal to this court, the defendant appealed to the Privy Council. It was contended on his behalf that his trial and conviction without legal representation amounted to a breach of his fundamental constitutional rights. By a majority, it was held that the constitutional requirement that legal representation should be "permitted" meant that the State should not, by judicial or executive act, prevent an accused from exercising his right; but the right to legal representation was nevertheless not an absolute one, necessarily requiring that the trial judge should always exercise his undoubted discretion to grant adjournments in favour of an accused person, so as to ensure that no-one who wished to be represented was without such representation. Other relevant considerations, including the present and future availability of witnesses, had to be taken into account.

[56] Speaking for the majority, Lord Roskill said this (at page 338):

> "…Their Lordships do not for one moment underrate the crucial importance of legal representation for those who require it. But their Lordships cannot construe the relevant provisions of the Constitution in such a way as to give rise to an absolute right to legal representation which, if exercised

> to the full, could all too easily lead to manipulation and abuse.
>
> In the present case the absence of legal representation was due not only to the conduct of counsel but to the failure of the appellant, after his decision not to seek legal aid, to ensure that those by whom he wished to be represented were put in funds within a reasonable time before the trial or, if such funds were not forthcoming, to apply in advance for legal aid. If a defendant faced with a trial for murder (of the date of which the appellant had had ample notice) does not take reasonable steps to ensure that he is represented at the trial, whether on legal aid or otherwise, he cannot reasonably claim that the lack of legal representation resulted from a deprivation of his constitutional rights…."

[57] In the result, the Board dismissed the defendant's appeal and in so doing approved the earlier statement of Sir Joseph Luckhoo JA, delivering the judgment of this court, in **R v Pusey** (1970) 12 JLR 243, at page 247, that, section 20(6)(c) (now section 16(6)(c)) of the Constitution notwithstanding, "the trial of an accused person cannot be delayed indefinitely in the hope that he will by himself or otherwise be able to raise at some indeterminate time in the future sufficient money to retain the services of counsel".

[58] The Board's decision in **Robinson v R** survived a direct challenge in the subsequent case of **Dunkley and Robinson v R** (1994) 45 WIR 318. As Lord Jauncey of Tullichettle explained (at page 324), the background to the case was that the appellant in **R v Robinson**, having appealed unsuccessfully to the Board, went on to secure a ruling from the Human Rights Committee under the Optional Protocol of the International Covenant on Civil and Political Rights in **Robinson v Jamaica** (1989)

Communication No 223/1987, para. 10.3. to the effect that, in the light of the provisions of article 14(3)(d) of the covenant[4] -

> "…it is axiomatic that legal assistance be available in capital cases. This is so even if, the unavailability of private counsel is to some degree attributable to the author himself, and even if the provision of legal assistance would entail an adjournment of proceedings. This requirement is not rendered unnecessary by efforts that might otherwise be made by the trial judge to assist the author in handling his defence in the absence of counsel. In the view of the Committee, the absence of counsel constituted unfair trial."

[59] On the basis of this ruling of the Human Rights Committee, the appellant in **Dunkley and Robinson v R** submitted to the Board that a defendant facing a capital charge had an absolute right to legal representation throughout the trial. Rejecting this submission, Lord Jauncey said this (at page 325):

> "…Although Jamaica is a signatory to the [Optional Protocol of the International Covenant on Civil and Political Rights] it has not been incorporated into Jamaican law which accordingly remains as stated in *Robinson v R.* Their lordships are satisfied that there is no absolute right to legal representation throughout the course of a murder trial, although it is obviously highly desirable that defendants in such trials should be continuously represented where possible. It is unnecessary to say more in relation to this argument…."

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[4] "In the determination of any criminal charge against him, everyone shall be entitled … (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing … (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it…"

[60] It therefore remains the position that, although the right to legal representation, particularly in a capital case, is a right of fundamental importance, it is not an absolute right. The question of whether or not it has been breached in a particular case will therefore depend on all the circumstances. In this case, one of the matters relied on by counsel for the appellant in making the application for an adjournment was that it was still a relatively "young" case, it having had only one previous trial date (21 April 2010). But on that date the appellant, who was at that time represented by Mr Deans who had also appeared for him at the preliminary enquiry (at which, the court was told, 15 of the 16 witnesses whom the prosecution intended to call at the trial had been deposed), had been ready and, it appeared, anxious for the trial to proceed. When the matter was again called on for trial on 12 May 2010, with the addition of Mr Rogers to the team, the appellant was now represented by two counsel of his choice. The prospect of retaining senior counsel to lead the team was not advanced with any certainty. The indication to the court was that, although contact had been made with an unnamed senior counsel by a relative of the appellant, the arrangements had not yet been "finalized or settled". The length of the adjournment sought at that stage was to a date "some time early in June". On the other hand, the date for trial had been set with the cooperation of Mr Deans and all of the witnesses for the prosecution were present at court.

[61] Against this background, it seems to us to be impossible to say from this remove that the learned trial judge's first response to the application for an adjournment, which was negative, was based on any erroneous consideration of principle. This was a matter

entirely within the judge's discretion, taking into account all the competing factors. The appellant's last-minute wish to be represented by senior counsel fell to be balanced against the fact that he was already represented by competent counsel, at least one of whom was intimately familiar with the case. Further, the case for the prosecution, which involved numerous witnesses, was ready for trial. But the matter did not end there. After counsel had attended on the judge in chambers, at his invitation, Mr Rogers renewed the application on an additional basis, which was that the defence wished an opportunity to speak to potential witnesses (specifically, persons in respect of whom it had only recently been intimated that they would not be called by the prosecution); and that the defence had only recently become aware of a "medical document" of "paramount importance". In refusing the application for an adjournment of "no more than two weeks", the learned trial judge opted to direct the immediate empanelling of the jury, but to postpone the actual commencement of the prosecution's case until the following day. It is obvious that in adopting this approach, the learned trial judge must have had in mind not only the exigencies of the situation from the standpoint of the prosecution, but also the overarching requirement of fairness to the defence.

[62] We naturally cannot discount the importance of the consideration that, in a proper case, particularly in a capital case of the obvious gravity of this one, senior counsel may bring significant added value to the presentation of the case for the defence. However, it is clear that, just as there is no absolute right to representation by counsel, there is equally no "right" to representation by senior counsel of one's choice. All will depend on the circumstances of each case. In this regard, Mrs Samuels-Brown

referred us to **R v Winston Anderson** (1966) 9 JLR 578, in which the trial of the appellant proceeded to conviction in the absence of his counsel, through the usual lunch adjournment, despite the fact that counsel had taken steps to advise the court of where he could be found in the event that the trial was to commence. In these circumstances, Duffus P observed (at page 580) that it was possible that, had the appellant been represented by counsel and had the advantage of his counsel cross-examining the witnesses for the Crown, the case may have taken a different course and the verdict may have been different. In these circumstances, the court considered that "justice does not appear to have been done".

[63] However, there has been no suggestion of any kind in the instant case that absence of senior counsel was in any way detrimental or disadvantageous to the appellant's case. Nor have we been able to discern any reason for so thinking. We have therefore come to the clear conclusion that there was no breach of the appellant's constitutional rights in this case and that the first ground must accordingly be dismissed.

**(ii) The disclosure issue (ground two)**

[64] Mrs Samuels-Brown argued this issue in conjunction with the first issue. She characterised her submission that timely disclosure to the defence of used and unused material touching on the case in the possession of the prosecution is an essential incident and ingredient of a fair trial as "trite law". Accordingly, it was submitted, where the prosecutor is aware of material potentially helpful to the defence, reasonable efforts

must be made to obtain same. In this case, it was submitted, it was clear that there had not been timely disclosure of material relevant to the preparation and presentation of the appellant's defence. In particular, complaint was made of the late or non-disclosure of (i) the witnesses upon whom the prosecution intended to rely (by the service of the indictment on the defence only the day before the scheduled commencement of the trial); (ii) the additional statement taken by a member of the JDF; and (iii) the results of (a) the DNA analysis and (b) the tests carried out to determine the presence of gunshot residue on the hands of various persons. These failures on the part of the prosecution also had a constitutional dimension, Mrs Samuels-Brown complained, by virtue of the requirement in section 16(6)(b) of the Constitution that an accused person must be afforded "adequate time and facilities for the preparation of his defence".

[65] In response to these submissions, Mrs Palmer-Hamilton contended that the appellant was provided with adequate notice of the case against him and was afforded ample time and opportunity to prepare his case. The duty of disclosure was, she pointed out, a continuing one and, while the prosecution may have been guilty of late disclosure, this was not the same as non-disclosure. The late service of the indictment did not alter the shape or complexion of the case for the prosecution in any way and the admitted late disclosure of the forensic results did not render the trial unfair, having regard to the principles of law applicable to disclosure. Finally, as regards the complaint that there had been late disclosure of the statement taken by a member of the JDF, Mrs Palmer-Hamilton maintained that the prosecution was never in possession of the

statement and was therefore not in a position to disclose it at any stage of the proceedings.

[66] On this issue, both counsel referred us to a number of authorities, of which we must mention a few. First, in **Linton Berry v R** (1992) 41 WIR 244, at page 250, Lord Lowry observed that, "[i]n relation to the disclosure to the defence of material in the possession of the prosecution, the key is fairness to the accused; but the practice varies between different jurisdictions in the common law world".

[67] Second, in **R v Ward** [1993] 2 All ER 577, the Court of Appeal of England and Wales held that the prosecution's duty at common law to disclose to the defence all relevant material, that is, evidence which tended either to weaken the prosecution case or to strengthen the defence case, generally required, unless there were good reasons for not doing so, the disclosure of all witness statements to the defence or that they be allowed to inspect the statements and make copies. Furthermore, the prosecution was under a duty, which continued during the pre-trial period and throughout the trial, to disclose to the defence all relevant scientific material, whether it strengthened or weakened the prosecution case or assisted the defence case and whether or not the defence made a specific request for disclosure.

[68] Third, in **R v Neville Williams** SCCA No 117/2001, judgment delivered 18 March 2005, in which, although articles had been delivered to the forensic laboratory for testing, no evidence had been led at the trial as to the results of that exercise, Forte P, giving the judgment of the court, observed (at page 5) that –

> "…in cases such as this it is incumbent on the prosecution in whom knowledge would rest, as to the reference to the Forensic Laboratory for examination of specimens and garments, to ascertain the results of these examinations before the commencement of the trial. In the event that the results favour the case of the defence, it is the duty of the prosecution to pass over the results to the defence. In this case, it appears that neither the prosecution nor defence knew of the results of the forensic examination, so that no accusation of deliberate concealment of evidence can be placed at the prosecution's door."

[69] And lastly, in **Ronald Webley & Rohan Meikle v R** [2013] JMCA Crim 22, Brooks JA, in a passage warranting full quotation, very helpfully reviewed some of the relevant authorities (at paras. [59]-[63]):

> "[59] There is no doubt that **Linton Berry v The Queen** initiated a process in this jurisdiction whereby the prosecution, as a matter of course, discloses, and is expected to disclose to the defence, all material in its possession. That process was, no doubt, hastened by the recommendation of their Lordships of the Privy Council in **John Franklyn and Ian Vincent v The Queen** PCA Nos 20 and 21/1992 (delivered 22 March 1993). Their Lordships, at page 11 of the judgment said:
>
> > 'Clearly it would be preferable if the need to consider each case in relation to its particular circumstances could be avoided by **a general practice being promulgated which requires the disclosure of statements of witnesses or alternatively giving the defence a statement of the nature of the evidence, which will be relied upon by the prosecution, before trial (in the absence of special circumstances) to assist the defendant in the preparation of his defence**. In making this suggestion, their Lordships have in mind the judgment delivered

by Lord Lowry in the case of **Linton Berry v The Queen**…' (Emphasis supplied)

[60] Despite the general adherence to that practice, it is to be noted that failure to make disclosure in a timely manner to the defence, does not necessarily result in irreversible prejudice to the defence. The method with which the failure is addressed is important to determining whether the trial was conducted with fairness to the defence. A number of decided cases show that where an adjournment was allowed, after the discovery of non-disclosure, to allow the defence to address the issue, the proceedings in that regard were held not to be unfair.

[61] In **R v O'Brian Muir** SCCA No 50/2007 (delivered 2 May 2008), the granting of an adjournment after the discovery of non-disclosure of important material was held to have counterbalanced the result of the non-disclosure. As a result the court held that Mr Muir was not unfairly prejudiced in his defence. The conviction was, however, overturned on other bases.

[62] Similarly, in **Regina v Robert Bidwell** SCCA No 50/1990 (delivered 26 June 1991), the granting of an adjournment after the late disclosure of material by the prosecution was held to have given Mr Bidwell 'an opportunity to prepare his defence even after he had heard the major part of the prosecution's case' (page 10).

[63] On the contrary, where no opportunity was given to the defence to address the consequence of non-disclosure, or where the non-disclosure resulted in irremediable prejudice to the defence, the proceedings were held to be unfair and the conviction was overturned on that basis. That was the situation in **Mardio McKoy v R** [2010] JMCA Crim 27 and in **Harry Daley v R** [2013] JMCA Crim 14."

[70] It is therefore clear that, in the absence of special circumstances (none of which has been said to apply in this case and which it is therefore not now necessary to explore), the prosecution bears a general duty to disclose to the defence all material in its possession which tends either to weaken the case for the prosecution or to

strengthen the case for the defence. This duty, which also extends to all relevant scientific and/or forensic material, is a continuing duty. It is now generally accepted that disclosure to the defence is an essential aspect of the fair trial guarantee given by section 16(6)(b) (formerly section 20(6)(b)) of the Constitution and the decision of the Privy Council in **Franklyn and Vincent v R** (1993) 42 WIR 262 confirmed that the requirement that the defence be provided with "adequate time and facilities" under section16(6) extends to materials in the possession of the prosecution that are relevant to the issues in the case (see also **R v Bidwell,** SCCA No 50/1990, judgment delivered 26 June 1991)[5]. However, failure to make disclosure in a timely manner will not inevitably result in irreversible prejudice or unfairness to the defence and much may turn in a particular case on the manner in which the failure is addressed by the trial judge. In some cases, it may be a sufficient mitigation of such unfairness as there may be to offer or allow an adjournment, once the issue of late or non-disclosure has been raised, so as to enable the defence to deal with it.

[71] Against this background, we come now to consider the appellant's specific complaints of late/non-disclosure. The first has to do with the late service of the indictment, which, it is common ground, was served on the defence (in response to their request) on 11 May 2010, that is, the day before the trial was scheduled to commence. We would say at once that no explanation of any kind was proffered by the prosecution for the failure to serve the indictment at an earlier date. So it is not clear why it was not served in preparation of the previous trial date of 21 April 2010,

[5] See generally 'Disclosure - A Jamaican Protocol', issued by the Office of the Director of Public Prosecutions in October 2013.

especially as all the statements upon which prosecution intended to rely were served on the defence on 14 April 2010. It appears to us that it must surely have been possible, in a case in which we were told by Mrs Palmer-Hamilton that the shape of the prosecution's case at trial was intended to mirror substantially the case which it had presented at the preliminary enquiry which was completed in January 2010, to have arranged for earlier service of the indictment.

[72] But, that having been said, it is difficult to discern what prejudice was caused to the defence by the late service of the indictment in this case. Mr Deans, who appeared for the appellant at the preliminary enquiry, was apparently ready for trial on 21 April 2010, when the case did not go on, and certainly participated in the fixing of 12 May 2010 as the new trial date. We have not lost sight of the fact that when the matter did come on for trial on the latter date, the defence did indicate that it needed time to consider its position in relation to those witness whom it appeared would not be called by the prosecution. However, it was partially in response to this request that the learned trial judge decided to delay the actual commencement of the evidence until the following day. This was, as we have already indicated, a matter entirely within the learned trial judge's discretion and nothing has been put forward on appeal to suggest that the appellant suffered any specific prejudice by virtue of an inability to interview potential witnesses for the defence.

[73] The appellant's second complaint is that the gunshot residue results were served on the defence late (on 1 June 2010, while the trial was in progress). But it is clear that, despite this, the appellant was able to put these results to good use by availing

himself of the opportunity to call Miss Dunbar as part of his case. It accordingly seems to us that any potential unfairness to the appellant by reason of the late disclosure of this material (described by Mrs Palmer-Hamilton, not unfairly, as "a gift to the defence") was fully mitigated by this means and it cannot therefore be maintained that he suffered irremediable prejudice as a result of it.

[74] The appellant's third complaint relates to the DNA evidence. Forensic certificates served on the defence on 3 June 2010, again while the trial was well underway, confirmed that swabs of substances taken from different areas of the club were in fact human blood. A notation on those certificates indicated that DNA analysis in respect of the blood was "pending". When the matter first arose, in response to Mr Rogers' request that he be allowed to defer cross-examination until the results of the DNA analysis became available, the learned trial judge's ruling was that the cross-examination should proceed, subject to the defence being given an opportunity, at its request, for further cross-examination on the basis of the results. The learned trial judge restated this position more than once after that.

[75] During the hearing of the appeal, we were told by Mrs Palmer-Hamilton, without demur from Mrs Samuels-Brown, that the results of the DNA analysis in fact became available on 8 June 2010 and would have been served on the defence shortly afterwards. Nothing further was heard during the trial - from either the prosecution or the defence - about the DNA results and it is clear that they played no further part in the trial. It seems to us in these circumstances that the complaint of late disclosure of the DNA results must necessarily fall away completely. For, in the first place, the

defence, perhaps advisedly, did not avail itself of the opportunity for further cross-examination which the learned trial judge had offered; and, secondly, it is obvious that the late disclosure of the results, the content of which remains unknown, could not have prejudiced the appellant in any way.

[76] Finally on this issue, there is the appellant's complaint of non-disclosure of the JDF statement. However, there is no evidence that this statement ever came into the possession of counsel responsible for the conduct of the prosecution. It is true that the Office of the Director of Public Prosecutions and the JDF are both, as Mrs Palmer-Hamilton described them, "emanations of the state". But it seems to us to be impossible to lay the charge of non-disclosure of the JDF statement at the door of the prosecution in the wholly unusual circumstances of this case. Indeed, the only indication of its existence came by way of Mr Rogers' intimation to the court, after the prosecution had closed its case, that it had been "made available" to the defence (see para. [33] above). It therefore seems to us that, to the extent that one of the key objectives of timely disclosure is to assist the defence in its preparation for trial, the appellant could have suffered no prejudice from the alleged failure of the prosecution to disclose the JDF statement, since the contents of the statement were, as it turned out, already known to his legal advisors. And, although it was plainly open to them to call the maker of the JDF statement as a witness if they chose, they did not do so.

[77] For these reasons, we cannot accept the appellant's contention that, by reason of the late or non-disclosure of material relevant to and/or necessary for the preparation and presentation of his defence, he was denied the substance of a fair trial.

**(iii) The wrongful exclusion of evidence issue (grounds three, four and five)**

[78] Mrs Samuels-Brown drew our attention to a number of areas of the trial where, it was submitted, the learned trial judge had erred by (i) excluding evidence which was admissible and relevant to the appellant's defence; (ii) unduly curtailing cross-examination by counsel for the defence on relevant matters; or (iii) preventing the defence from eliciting evidence of opinion, while at the same time allowing the prosecution to adduce evidence falling into the same category. As a consequence of these errors, it was submitted, the appellant had been unable to put forward his complete defence.

[79] As it turned out when the details of these complaints were explored, they in essence related to two matters only. The first arose during Mr Rogers' cross-examination of Miss McLaren. It was suggested to Miss McLaren that, "a couple of seconds" before the shooting started, Messrs Wilberforce and Forbes were walking behind the appellant, both of them armed, one with a knife and the other with a gun. The witness disagreed. In fact, the witness said, Messrs Wilberforce and Forbes were facing the appellant, while she was walking towards them. Her evidence was that she then stopped and started talking to Messrs Wilberforce and Forbes. Mr Rogers' next question, which was whether, "[t]he talking that you had with them or to them, had anything to do with the soldier", drew a rather diffident objection from Crown counsel and an immediate ruling from the learned trial judge:

> "MRS ARCHER-HALL: M'Lord, I am just wondering, this is trying to bring out hearsay.

HIS LORDSHIP: Yes, counsel, not going to allow that question. Yes.

MR ROGERS: That is [sic] not of the view that is sufficiently close in time to the incident, m'Lord.

HIS LORDSHIP: No, counsel. No counsel."

[80] Mrs Samuels-Brown compared the exclusion of this evidence with the learned trial judge having allowed, without comment, Corporal Dawkins' evidence of what he was told, minutes after hearing gunshots from the club, by a man who ran out of the club (see para. [22] above). When questioned by Corporal Dawkins as to what was going on upstairs, the man replied, "[o]fficer waa man up de, in a green shirt and short pants a kill off di bomboclaat people dem". Mrs Samuels-Brown submitted that, if this evidence were properly allowed, then Miss McLaren's evidence of what Messrs Wilberforce and Forbes had said to her before the shooting started ought to have been admitted also. Mrs Palmer-Hamilton submitted that Miss McLaren's evidence was pure hearsay and that the learned trial judge had been clearly correct to exclude it, while Corporal Dawkins' evidence was clearly admissible as part of the *res gestae*.

[81] We agree with Mrs Palmer-Hamilton on both counts. In his celebrated judgment in **Ratten v R** [1971] 3 All ER 801, Lord Wilberforce, after a full review of the authorities, formulated the principle of *res gestae* as an exception to the rule against hearsay as follows (at page 808):

> "…These authorities show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such conditions (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of

> concoction or distortion to the advantage of the maker or the disadvantage of the accused…."

[82] As regards the evidence which Mr Rogers' question sought to elicit from Miss McLaren, it seems to us that the principle has only to be stated to be excluded: even if, as it would turn out, the shootings which ended in the deaths of the four men were imminent, the conversation which Miss McLaren was being asked to relate could not, on any view of the matter, be said to have taken place in circumstances of such involvement with the event itself as to diminish the dangers of concoction or distortion. In fact, this was a conversation which took place before the event. In clear contrast, in our view, Corporal Dawkins' evidence of his conversation with someone who had only just made good his escape from the club, minutes after the last shots were heard, could scarcely have taken place in conditions of greater involvement or pressure. This is therefore at least as strong a case for the application of the doctrine of *res gestae* as **R v Andrews** [1987] 1 All ER 513, in which the House of Lords held, applying **Ratten v R**, that the statement made by the victim of an attack to police officers who arrived on the scene several minutes after the event was admissible evidence as to the identity of his attackers.

[83] It accordingly appears to us that the appellant's complaints on the issue of the learned trial judge's supposedly wrongful exclusion of evidence cannot be sustained.

**The non-direction/misdirection issue (grounds six, seven, eight, nine and ten)**

(a) Self-defence

[84] While no issue was taken with the learned trial judge's general directions on self-defence, Mrs Samuels-Brown did complain that the learned trial judge failed to relate those directions to the evidence which was supportive of the defence, in particular the evidence (a) of the finding of gunshot residue on the hands of the deceased; (b) of the fact that the appellant had himself received gunshot wounds, none of which was consistent with having been inflicted by an M16 rifle; (c) of Mr Carr that, before the shooting started, two men, who appeared taller that the appellant, were seen following him as he walked in the direction of the exit to the club and, after about two minutes, as he made his way back towards the back bar; (d) of Miss McLaren that the appellant had at some point been surrounded by "an angry mob" (counsel's language); (e) that knives were found in the club; and (f) that the club was not secured before it was taken charge of by the police.

[85] For the prosecution, Mrs Archer-Hall submitted that the learned trial judge's review of the evidence and his directions on self-defence could not be faulted. He had chosen the style which he considered appropriate to the matter, which was helpful to the appellant and fair in the circumstances.

[86] Both counsel referred us to a number of authorities on this issue. On the learned trial judge's duty where self-defence is raised, Mrs Samuels-Brown relied on **R v Badjan** (1966) 50 Cr App R 141, in which it was held that, where a cardinal line of

defence, for example self-defence, has been placed before the jury, but has not been referred to at all in the summing up, it would in general be impossible for the appellate court to apply the proviso (Judicature (Appellate Jurisdiction) Act, section 14(1)) and refrain from quashing the conviction. Reference was also made to **Dwight Fowler v R** [2010] JMCA Crim 51, in which this court reiterated that the fact that self-defence had plainly been raised "called for a careful presentation by the Judge as well as a painstaking examination of the details in assisting the jury" (per K Harrison JA at para. [26]).

[87] To support the contention that, in a case in which self-defence arises, the learned trial judge is obliged to relate the directions to the actual evidence in the case, Mrs Samuels-Brown relied on the decisions of this court in **R v Lancelot Webley** (1990) 27 JLR 439 and **Sophia Spencer v R** (1985) 22 JLR 238. In the former case, the appeal was allowed on the grounds that (i) despite telling the jury on several occasions that it was for the prosecution to negative self-defence, the trial judge had used language which left the distinct impression that the jury had to find self-defence proved, contrary to "the true rule…that once the issue of self-defence is raised on a proper evidential basis, unless the prosecution negatives that defence, the accused must be acquitted"; and (ii) the appellant having squarely raised the issue of self-defence, he was entitled to have his defence placed squarely before the jury and, as the learned trial judge "did not relate his general directions on self-defence to the defence offered, there was a material non-direction which vitiated the conviction" (per Rowe P, at page 445). And in the latter case, the appeal was allowed on the ground

that the trial judge had failed to relate his general directions on self-defence to the facts of the case and "to point out to the jury that in considering self-defence all the circumstances should be taken into consideration" (per Carey JA at page 241).

[88] Mrs Archer-Hall, however, though naturally having no quarrel with the propositions emerging from these cases, was careful to remind us that, generally speaking, as Lord Morris explained in **McGreevy v Director of Public Prosecutions** [1973] 1 All ER 503, at page 507 -

> "…The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful…."

[89] Dealing specifically with self-defence, Mrs Archer-Hall referred us to Brooks JA's recent observation in **Ronald Webley & Rohan Meikle v R** (at para. [19]) that "no special words are needed to convey to the jury, the meaning of self-defence"; as well as the comment by P Harrison JA (as he then was) in the earlier case of **R v Anthony Rose** SCCA No 105/1997, judgment delivered 31 July 1998, at page 8, that "[w]hat is required is a careful direction of the jury of their functions, the relative law involved, what evidence to look for and how to apply that evidence to the law in order to find facts".

[90] The cases cited on both sides support the propositions that (i) a jury must generally be carefully directed on their functions, the relative law involved, what

evidence to look for and how to apply that evidence to the law in order to find facts; (ii) once the issue of self-defence arises, the defendant is entitled to have it placed squarely before the jury by the trial judge for their consideration; (iii) the trial judge must relate the general directions on self-defence to all the evidence in the case, pointing out to the jury the necessity to take all the circumstances into consideration, and a failure to so may amount to a material non-direction sufficient to vitiate the conviction; and (iv) no special form of words is needed to convey the meaning of self-defence to the jury and the form and style adopted by the trial judge in a particular case will depend on the particular features of that case and the trial judge's view of what is appropriate in the circumstances.

[91] Against this background, we come now to examine the learned trial judge's directions in this case. No complaint has been made about the experienced trial judge's careful and accurate general directions on the burden and standard of proof; the respective roles of judge and jury; the requirement that the jurors should approach their task honestly, applying their common sense and knowledge of their own communities; and that they should base their consideration of the case solely on the evidence given in court.

[92] The learned trial judge's first mention of self-defence came in the context of his directions on intention, at the end of which he told the jury (at page 1322 of the transcript) that they should consider "whether the required intention has been proven that the killing was unprovoked and the killing was not in self-defence…I will tell you later on Mr. Foreman and your members what is in law, self-defence". The learned trial

judge opted to deal with self-defence in detail close to the end of the summing up, in a long passage which it is necessary to reproduce in full (pages 1557-1563 of the transcript):

> " Now, Mr Foreman and your members, you have heard the term self-defence used and the defence put forward by the accused is one of self-defence. Now, normally, where one person use [sic] deliberate violence towards another and injures or kill [sic] another person [sic], acts unlawfully. However, it is both good law and good sense that a person who is attacked or had belief that he is about to be attacked may use such force as is reasonably necessary to defend himself. If that is the situation, his use of force is not unlawful. He is acting in lawful self-defence and is entitled to be found not guilty. As its [sic] the prosecution's duty to prove its case against the defendant it is for the prosecution to make you sure that the accused Mr. Moodie was not acting in lawful self-defence. The defendant does not have to prove that he was.
>
> Now, what does acting in lawful self-defence means [sic]. The law is that a person only acts in lawful self-defence if in all the circumstances he believes that it is necessary for him to defend himself, and the amount of force which he uses in doing so is reasonable. It is for this reason therefore, that in relation to this issue you must answer two main questions. Did the defendant believe or may have honestly believed that it was necessary to defend himself? Mr. Foreman and your members, you recall that what the defendant was saying is that he did not only think that he was about to be attacked he was in fact attacked. If the prosecution has made you sure that the defendant did not in honest belief did [sic] what was necessary to defend himself, then the defence of self-defence simply does not arise in this case and he is guilty.
>
> If you decide that he was or may have been acting in that belief, you must go on to answer the second question.

Having regard to the circumstances that the defendant believed them to be, was the amount of force that he used reasonable?

Remember, Mr. Foreman and your members, that it is said that that [sic] person [sic] who attacked him had both guns and knives. The law is that force used in self-defence is reasonable [sic] if out of proportion of the nature of the attack, or if it is [sic] excess of what is really required on [sic] the defendant to defend himself. It is for you the jury to decide whether the force used by this defendant is reasonable and your judgment of that must depend on your view of the facts of this case in considering these matters. You should have regard to all the circumstances, what is the nature of the attack to him. As I pointed out before, he said, with knives and gun. Was a weapon used by the attackers? If so, what kind of weapon was it and how was it used. [sic]

Was there a concerted attack by two or more persons? Each case that comes before the court is different. There are so many possibilities that the law does not attempt to provide a scale of answers to jurors; these matters are left to your common sense experience, knowledge of human nature and of course, your assessment of what actually happened at the time of this incident…

Now, in deciding whether the force used by the defendant was reasonable, you must judge what the defendant did against the background of his honest belief. If he honestly believed that he was being attacked with a knife, his actions are to be judged in that light. You should also bear in mind that a person who is defending himself, cannot be expected to judge the exact amount of defence action that is necessary. The more serious the attack on him, the more difficult the situation will be. You remember he said he was being attacked by men with knives and guns; hostile [sic], he calls [sic] them. If in your judgment, the defendant believed or may have believed that he may have had to defend himself against these hostiles and he did no more than what he thought was [sic] honestly to do, that

> would be very strong evidence that the amount of force, that you bear this matter in mind, that you are sure that the force used by the defendant was unreasonable, he cannot be acting in lawful self-defence and he is guilty; if he was [sic] and he did, he is not guilty.
>
> Now, you recall from what the accused man said in his statement, [sic] was that he was attacked not once, but more than once. That these men were surrounding him and that he did what he was trained to do to defend himself and to defend other law-abiding persons who were present. Remember, that it is the Prosecution that must prove to your satisfaction that the accused was not acting in lawful self-defence. Because if the Prosecution does not make you sure, that the accused was not acting in lawful self-defence, then, the accused man cannot be found guilty.
>
> If you have any doubts as to whether or not he was acting in lawful self-defence the very same applies, it would mean that the prosecution have not proven the case beyond a reasonable doubt."

[93] In our respectful view, these are completely accurate and unexceptionable directions. Having told the jury squarely that appellant's defence was self-defence, the learned trial judge went on to tell them right away that, once self-defence was raised, it was for the prosecution to negative it by making them sure that the appellant had not acted in lawful self-defence. He explained to them the meaning in law of self-defence. He next asked them to consider whether, assuming that they found that the appellant honestly believed that it was necessary to defend himself, the force used by him in doing so was reasonable in all the circumstances or out of proportion to the nature of the attack. The learned trial judge reiterated the circumstances as the appellant had described them, before ending on the note he had already struck, which was that it was

for the prosecution to prove to the jury's satisfaction that the appellant did not act in lawful self-defence and that, if they were left in any doubt as to this, the prosecution would have failed to do so. It strikes us that the learned trial judge's decision to leave these directions right to the end of the summing up must have been a deliberate — and wholly admirable — strategy to ensure that the jury would retire with the appellant's defence at the forefront of their minds.

[94] But, as we have already indicated, Mrs Samuels-Brown's real complaint was that the summing up fell short of being fair and adequate because of the learned trial judge's failure to point out to the jury those aspects of the evidence given on behalf of the prosecution which supported the appellant's case. It is therefore necessary to deal briefly with each of the items highlighted by Mrs Samuels-Brown (at para. [82] above).

[95] First, as regards the finding of gunshot residue on the hands of some of the deceased persons, it will be recalled that Miss Dunbar's evidence was that gunshot residue was detected at intermediate level on the palm of the left hand of Mr Wilberforce; at elevated level on the back of the right hand of Davion Carr; and at trace level on the back of the right and left hands of Ejon Peart. It will also be recalled that Miss Dunbar testified that it is possible to find gunshot residue at elevated levels on the hands of someone who has not fired a firearm, and that this could happen if the hands of that person are in the path of the gunshot residue as it is emitted from the fired firearm, within a distance of 9 inches from the end of the muzzle. With several shots being fired in a closed environment, Miss Dunbar concluded, gunshot residue being

emitted by a firearm "will become deposited on anything in it's [sic'] path" (see paras. [44]-[46] above).

[96] In relation to the proper approach to Miss Dunbar's evidence, the learned trial judge reminded the jury of his general directions on the treatment of expert witnesses, that is, "that they are like any other witnesses except that they have expertise in a field of study or by virtue of experience and that like any other witness you are free to accept or reject anything they say, if that is their opinion". Then, after rehearsing Miss Dunbar's evidence for the jury in detail, the learned trial judge added only this:

> "Now, with regards [sic] to the evidence given by Mrs. [sic] Dunbar, it is a matter for you, Mr. Foreman and your members, but you may ask yourselves, in the light of the evidence given by Mrs. [sic] Dunbar, with regards [sic] to the possibility that the gunpowder or the gunshot residue found on these gentlemen who were swabbed whether or not you can conclude that the test [sic] were tests that you could rely on the results because remember her evidence about the possibility of gunshot residue being on the hands of persons who did not in fact fired [sic] a firearm. And she told you how that would be but essentially a matter for you, Mr. Foreman and your members."

[97] We accept that the learned trial judge did not tell the jury, as he might have done, that Miss Dunbar's evidence of having detected gunshot residue on the hands of three of the deceased was, on the face of it anyway, capable of supporting the appellant's case that there were men in the club firing shots at him that morning. But it seems to us that the impact of Miss Dunbar's findings of gunshot residue was sufficiently qualified by her answers in cross-examination so as to justify the learned trial judge's cautionary observation on what weight the jury might want to attribute to

those findings. As part of his general directions, the learned trial judge told the jurors that, in considering their verdict, they could take into account anything which was omitted from the summing up, or substitute their own view for any view expressed by him. On this basis, it therefore appears to us that, the learned trial judge's omission (and comment) notwithstanding, Miss Dunbar's evidence remained fully available for their consideration for what it was worth.

[98] Second, as regards the significance of the appellant's gunshot wounds, there was evidence on the prosecution's case which suggested that the appellant had sustained injuries during the morning's deadly events and that as a result he was taken to the KPH for treatment. In addition to the evidence that when the appellant emerged from the club he appeared to be bleeding, there was the evidence of the appellant's witnesses, Drs Williams and Baker, who spoke to his having been seen at the KPH suffering from multiple gunshot wounds (see paras [47] and [49] above). But despite the fact that a fragment of a bullet taken from the appellant's body was delivered to Superintendent Porteous for analysis, he was unable to match it specifically with any of the firearms which were also sent to him, including the M16 rifle with which Corporal Dawkins had been armed on the morning of 20 October 2008.

[99] However, despite accurately recounting Superintendent Porteous' evidence to the jury (in, we cannot help but observe, quite bewildering detail), the learned trial judge did not advert their attention to this fact specifically. In our view, it is clear that this might have been pointed out to the jury as a factor capable of supporting the

appellant's case that he had been attacked and shot by unknown assailants while he was inside the club and had been obliged to retaliate purely in self-defence.

[100] But, in assessing the impact of this omission on the jury's verdict, it seems to us to be necessary to keep in mind Superintendent Porteous' evidence that all of the 29 9mm spent shells and the fired bullets found inside the club after the shootings were fired from the 9mm Luger Smith and Wesson model 910 firearm, serial number VJL1444; that is, the appellant's firearm. In addition to this, it will be recalled, Corporal Dawkins' evidence was that he did not observe anything resembling blood on the appellant when he first saw him at the top of the stairs leading into the club; however, when the appellant started to come down the stairs, after an exchange of gunfire during which Corporal Dawkins fired two rounds of ammunition from his M16 rifle in the appellant's direction (see paras. [23]-[24] above), he was holding on to and appeared to be bleeding from his right side and there was blood all over his right hand. In our view, the clear inference from this evidence, which the jury must have accepted, was that the appellant was injured by gunfire from Corporal Dawkins' firearm, rather than in the manner described by him. In these circumstances, we find it difficult to suppose that, had the jury been told that the absence of a finding by Superintendent Porteous that the fragment removed from the appellant's body came from the M16 was capable of providing some support for the appellant's case, their verdict would have been any different.

[101] Third, it will be recalled that Mr Carr's evidence (see paras. [11]-[12] above) was that, before the shooting started, two men, who appeared taller that the appellant,

were seen following him as he walked in the direction of the exit to the club and, after about two minutes, as he made his way back towards the back bar. While the learned trial judge did remind the jury of this evidence in the summing up, he did not specifically label it as an item of evidence, arising on the prosecution's case, which supported the case for the defence. However, the learned trial judge did remind the jury of Mr Carr's evidence (supported by Miss McLaren's evidence) that these men (Messrs Wilberforce and Forbes) were not armed and did not attack the appellant. Further, that the only firearm which he saw discharged that night was that of the appellant. In these circumstances, it seems to us that the fact that the learned trial judge did not tell the jury that the evidence, which arose on the prosecution's case, that these men were following the appellant supported his case, cannot possibly have caused any prejudice to the appellant. For the more significant question, which was squarely before the jury, was whether these men were among those who were, as the appellant said, armed with guns and knives and whose attack he was obliged to repel.

[102] Fourth, there was Miss McLaren's evidence that, at some point in the proceedings, the appellant touched Toy on her bottom, an argument ensued between them and "a few people" started to gather around them (see para. [18]) above). During the course of her submissions, Mrs Samuels-Brown candidly accepted that the description of the persons standing around the appellant at this point as an "angry mob" may have been something of an overstatement. We entirely agree and, in light of Miss McLaren's further evidence that, after a while, things calmed down and the

festivities resumed, it seems to us that nothing at all turns on the learned trial judge's omission to tell the jury anything in particular about the incident.

[103] Fifth, there was the evidence of the finding of knives in the club after the incident. It will be recalled that more than one police officer spoke of knives having been found in the club - three on the floor, one on a pool table and one under the body of one of the deceased men (see paras. [25]-[26] above). Although in his review of the evidence the learned trial judge reminded the jury of this evidence, in terms about which there has been no complaint, Mrs Samuels-Brown submitted that the jury were nowhere told that this evidence was relevant to the issue of self-defence.

[104] We agree that this evidence certainly contextualised to some extent the appellant's case that, before any shooting started, he had observed men "sporting knives, in the motion of opening and closing them"; and that, after hearing a second explosion and feeling an impact on his right side, he turned and fired at the men who were attacking him with guns and knives. It is true that the crucial question for the jury was not so much whether there were persons in the club who were armed with knives that morning (as it appears clearly that there must have been), but whether (i) the appellant honestly believed that he was under attack from some or all of those men when he decided to retaliate by using his firearm; and (ii) the amount of force used by the appellant in response was reasonable. And this is indeed the way in which the case was left to the jury by the learned trial judge, who urged them to, "[r]emember…that it is said that that [sic] person [sic] who attacked him had both guns and knives…force

used in self-defence is reasonable [sic][6] if out of proportion of [sic] the nature of the attack, or if it is in excess of what is really required on [sic] the defendant to defend himself". But the presence of knives in the club after the incident was certainly one of the various factors to be taken into account by the jury in their overall assessment of whether the prosecution had negatived self-defence and, in our view, the jury ought to have been told this.

[105] But although this evidence would have been relevant to the first aspect of self-defence which the jury had to consider, viz, whether the appellant honestly believed that he was under attack, it would not have assisted them in any way in respect of the second aspect, which was the proportionality of the appellant's response. It seems to us that, given Superintendent Porteous' unchallengeable evidence that all 29 9mm spent shells and fired bullets found in the club after the shootings, as well as the bullet fragments retrieved from the bodies of all four deceased men, were fired from the appellant's firearm, the jury may well have considered the finding of a few knives in the club to be a matter of relative insignificance.

[106] And sixth, there was the appellant's complaint of a failure to preserve the integrity of the evidence, in that the club was not immediately and properly secured after the incident. Indeed, there was some evidence that, when the police officers did arrive, persons were seen picking up items from off the floor. But no link was posited in the argument between this uncontrolled situation and the issue of self-defence, save perhaps the implication that more evidence of the presence of knives and firearms

[6] It seems clear from the context that the word actually used by the judge must have been 'unreasonable'.

might have been found had the scene been properly secured. So while, again, this undesirable situation might have been mentioned to the jury, we doubt very much that, in the light of all the other evidence in the case, the appellant's case could have been prejudiced by the learned trial judge's omission to do so.

[107] Our conclusion on the issue of the learned trial judge's directions on self-defence is therefore that, although the general directions were accurate, there were some areas in which the learned trial judge might have done more to relate those directions to the actual evidence in the case. However, we consider that the appellant suffered no ultimate prejudice as a result of any of these shortcomings, this being a case in which, even if the jury been properly directed on the matters complained of, the jury would inevitably have come to the same conclusion (in the familiar language of Viscount Sankey in **Woolmington v Director of Public Prosecutions** [1935] AC 462, at pages 482-483).

(b) Provocation

[108] Section 6 of the Offences Against the Person Act provides as follows:

> "Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

[109] Therefore, once the judge considers that there is some evidence, no matter the source, from which the jury could find that there was provocation in a particular case, the question whether there was in fact provocation must be left to the jury's determination. In this case, the learned trial judge gave no directions on provocation in the main body of the summing up. At the end of it, however, in response to his question whether anything had been omitted, Mrs Palmer-Hamilton enquired, somewhat diffidently, whether the court might not want to consider saying something about provocation, in the light of Miss McLaren's evidence that, shortly before the shooting started, Mr Forbes had asked the appellant "[w]hat kind a idiot thing that you a keep up?" (see para. [19] above). The learned trial judge immediately obliged:

> "Mr. Foreman and your members, this relates to Count Two of the indictment only, because if you remember that Mr. Moodie and the witnesses for the prosecution who said that Lynchmore Forbes had said to the accused man; 'what kind of idiot thing this?'. Now, before you can convict the defendant of murder on this count, the Prosecution must make you sure that he was not provoked to do what he did and provocation has a special meaning in this context which I will explain to you in a moment. If the prosecution does make you sure that the accused was not provoked to do as he did, he will be guilty of murder and this is in regards [sic] to the count of Lynchmore Forbes. If on the other hand, you conclude that he was, he may have been provoked, then the defendant would not be guilty of murder but guilty of the less serious offence of manslaughter. How do you then determine whether the defendant was provoked to do what he did?
>
> There are two questions which you have to answer before you are entitled to conclude that the defendant was or may have been provoked on this occasion. A; the conduct

of the deceased, that is Lynchmore Forbes, that things he said or did, could they have provoked, that [sic] caused the accused to suddenly and temporarily lose self-control. If your answer to that question is no, then the Prosecution would have disproved provocation and provided that the Prosecution had made you sure of the ingredient of the murder to which you are sure, your verdict would be guilty of murder. If however, your answer to that question is yes, then you must go on to consider the second question. May that conduct have been such as to cause a reasonable and sober person as the accused man [sic] age and sex to do what he did? A reasonable person is simply a person who has that degree of self-control who [sic] is expected of [sic] ordinary citizen who is sober and of the defendant's age and sex. If you think that the conduct would have been more provoking to a person, who, like the defendant, was a serving soldier, then you must ask yourself whether that person, like him, might have been provoked to do as he did and when considering this question, you must take into account everything which was done or said in the evidence because to [sic] the effect, in your opinion, [sic] would have had on that person. If you are sure that what was done or said, could not have caused an ordinary person of the defendant's age and sex to do as he did, the Prosecution would have disprove [sic] provocation. Then, providing the Prosecution has made you sure of the ingredient of the offence of murder, your verdict would be guilty of murder. If on the other hand, your answer is that what was done or said would have or might have caused an ordinary, sober person like the defendant to do as he did, your verdict would not be guilty of murder but guilty of manslaughter by reasonable provocation.

So, Mr. Foreman and your members, this relates to count two only, where the verdict can be either guilty or not guilty of murder or guilty or not guilty of manslaughter."

[110] While it is true that, despite promising to explain to the jury that "provocation has a special meaning", the learned trial judge did not formally define the concept in the passage set out above, Mrs Samuels-Brown made no real complaint about this reasonably comprehensive – and even generous – direction. However, she submitted that the learned trial judge ought not to have limited it to the count relating to the killing of Mr Forbes, since there was also evidence of provocation in relation to the other counts. Not surprisingly, Mrs Palmer-Hamilton submitted that there was no evidence of provocation in relation to any of the other counts and that, had the learned trial judge given a general direction on provocation, the jury would have been left to speculate.

[111] We entirely agree with Mrs Palmer-Hamilton. There is a clear consensus in the authorities that, as Hibbert JA (Ag) said in **Omar Reid** [2011] JMCA Crim 62, para. [16], "before the issue of provocation can properly be left to the jury, there must be some evidence of a specific act or words of provocation resulting in a loss of self-control". Accordingly, as Lord Steyn observed in **R v Acott** [1997] 1 All ER 706, at page 713, "[i]f there is no such evidence, but merely the speculative possibility that there had been an act of provocation, it is wrong for the judge to direct the jury to consider provocation". In our view, this was a case in which, save for the single instance which led the learned trial judge to give any direction at all on the topic, there was no evidence of provocation fit to be left to the jury and the learned trial judge was plainly right to limit the direction in the way in which he did.

[112] We feel obliged to make one last point on the topic of provocation. As Mrs Palmer-Hamilton pointed out, the learned trial judge's enquiries as to whether he had left out anything from the summing up, both before and after his direction on provocation, elicited no response from counsel for the defence. We fully accept that a trial judge is under a clear duty to leave provocation to the jury, irrespective of whether or not it has been relied on or raised at all by the defence (see **Bullard v R** [1957] AC 635, 642). However, we would observe that, on appeal against a conviction, counsel's failure to do so is not an entirely irrelevant consideration, as the following extract from Archbold (2008, para. 19-54), under the rubric, "Duty of counsel", demonstrates:

> "If there is evidence on which the jury could find provocation, counsel should regard it as their duty to point it out to the judge and to remind him, if he agrees, to leave it to the jury: *R. v. Cox (A.M.)* [1995] 2 Cr. App. R. 513, CA. It does not follow from this that an appeal will not succeed if defence counsel has not advanced the defence to the jury; but it does follow that if counsel has not raised the issue with the judge, an appeal based on the judge's failure to leave the issue to the jury is extremely unlikely to be entertained, let alone be successful."

(c) Intoxication

[113] Submitting that intoxication clearly arose on the prosecution's case, Mrs Samuels-Brown directed our attention to evidence which suggested that the appellant had had too much to drink. Thus we were referred to Corporal Roberts' evidence (para. [17] above) that, before the shooting started, the appellant was part of a group of men who appeared to be "highly intoxicated"; spilt his drink and beat the wall with his fist until it bled; and continued to drink even after being refused service by the bartender.

We were also referred to Miss McLaren's evidence (para. [19] above) that the appellant beat his hand on the wall and splashed the drink in his cup all over, wetting her up with the liquor. On this basis, it was submitted, the learned trial judge erred in not leaving to the jury the consequences in law of intoxication.

[114] In support of this contention, Mrs Samuels-Brown relied almost exclusively on **Von Starck v The Queen** [2000] UKPC 5, a decision of the Privy Council on appeal from this court. Of significance for present purposes, firstly, is Lord Clyde's restatement (at para. 7) of the legal position with regard to the potential effect of intoxication on a charge of murder:

> "…As a matter of law it is not disputed that the voluntary consumption of drugs, as well as the voluntary consumption of alcohol, may operate so as to reduce the crime of murder to one of manslaughter on the ground that the intoxication was such that the accused would not have been able to form the specific intent to kill or commit grievous bodily harm…."

[115] But the facts of **Von Starck** are also important. That was a case in which the defendant was charged with the murder of a lady with whom he had been in contact shortly before her death. In an unsworn statement given at the trial, his defence was to the effect that he did not know what had caused her death. However, there was some evidence, including a caution statement made by him, to suggest that he may have killed her while under the influence of cocaine. He was convicted of murder and the issue on appeal was whether the trial judge ought to have left the possibility of a verdict of manslaughter to the jury, on the basis that the defendant might have killed the lady while under the influence of cocaine.

[116] In this court, it was held that the trial judge was correct in considering that the defendant's defence was inconsistent with the caution statement and that it was therefore not necessary to leave the exculpatory part of his caution statement as an issue to be determined by the jury. The Board disagreed, holding that the trial judge ought to have left manslaughter to the jury, notwithstanding the fact that this was not the line of defence relied on at the trial. The rationale was explained by Lord Clyde as follows (at para. 12):

> "The function and responsibility of the judge is greater and more onerous than the function and the responsibility of the counsel appearing for the prosecution and for the defence in a criminal trial. In particular counsel for a defendant may choose to present his case to the jury in the way which he considers best serves the interest of his client. The judge is required to put to the jury for their consideration in a fair and balanced manner the respective contentions which have been presented. But his responsibility does not end there. It is his responsibility not only to see that the trial is conducted with all due regard to the principle of fairness, but to place before the jury all the possible conclusions which may be open to them on the evidence which has been presented in the trial whether or not they have all been canvassed by either of the parties in their submissions. It is the duty of the judge to secure that the overall interests of justice are served in the resolution of the matter and that the jury is enabled to reach a sound conclusion on the facts in light of a complete understanding of the law applicable to them. If the evidence is wholly incredible, or so tenuous or uncertain that no reasonable jury could reasonably accept it, then of course the judge is entitled to put it aside…But if there is evidence on which a jury could reasonably come to a particular conclusion then there can be few circumstances, if any, in which the judge has no duty to put the possibility before the jury. For tactical reasons counsel for a defendant may not wish to enlarge upon, or even to mention, a possible conclusion which the jury would be entitled on the evidence to reach, in the fear that what he might see as a compromise conclusion would detract from a more stark

> choice between a conviction on a serious charge and an acquittal. But if there is evidence to support such a compromise verdict it is the duty of the judge to explain it to the jury and leave the choice to them…"

[117] On the strength of this decision, Mrs Samuels-Brown submitted that the learned trial judge should have left manslaughter to the jury on the ground of the evidence of the appellant's intoxication, irrespective of the fact that this was not the basis on which his case had been put at the trial. Mrs Palmer-Hamilton submitted that **Von Starck** was distinguishable on the grounds that there was evidence from the defendant himself in that case suggesting that he was under the influence of cocaine at the material time, while in this case there was no evidence as to the quantity of alcohol consumed by the appellant before the shooting started.

[118] Mrs Palmer-Hamilton referred us to the well-known older case of **Director of Public Prosecutions v Beard** (1920) 14 Cr App R 159, at page 194, in which Lord Birkenhead LC had stated that "evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent"; but that "evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion does not rebut the presumption that a man intends the natural consequences of his acts".

[119] We were also referred to the decision of the Courts-Martial Appeal Court in **R v Alden** [2001] EWCA Crim 3041, in which the court considered (at para. 35) that "[t]he crucial question in every case where there is evidence that a defendant has taken a substantial quantity of drink, is whether there is an issue as to the defendant's formation of specific intent by reason of the alcohol which he has taken". The court in **R v Alden** also referred to the decision of the Court of Appeal in **R v Sheehan, R v Moore** [1975] 2 All ER 960, as well as the decision of the Privy Council on appeal from the Court of Appeal of Trinidad & Tobago in **Sooklal and another v The State** [1999] 1 WLR 2011.

[120] In **R v Sheehan**, delivering the judgment of the court, Geoffrey Lane LJ said this (at page 964):

> "...where drunkenness and its possible effect on the defendant's mens rea is an issue, we think that the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent.
>
> Secondly, and subject to this, the jury should merely be instructed to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent...."

[121] And in **Sooklal**, delivering the judgment of the Board, Lord Hope of Craighead said this (at page 2017):

> "…Whenever reduction of a charge of murder on the ground of self-induced intoxication is in issue, the ultimate question is whether the defendant formed the *mens rea* for the crime charged…What is required is evidence that the defendant was so intoxicated that he lacked the specific intent which is essential for murder: that is the intent to kill or to inflict grievous bodily harm upon the victim…
>
> This test is not satisfied by evidence that the defendant had consumed so much alcohol that he was intoxicated. Nor is it satisfied by evidence that he could not remember what he was doing because he was drunk. The essence of the defence is that the defendant did not have the guilty intent because his mind was so affected by drink that he did not know what he was doing at the time when he did the act with which he has been charged. The intoxication must have been of such a degree that it prevented him from foreseeing or knowing what he would have foreseen or known had he been sober…"

[122] Finally on this point, Mrs Palmer-Hamilton very helpfully provided us with an extract from the Crown Court Bench Book (2010), produced by the Judicial Studies Board of England and Wales, in which, under the rubric, "Intention Formed in Drink or Under the Influence of Drugs", the following appears (at page 47, paras. 2-5):

> "2. An intent formed in drink or under the influence of drugs is still an intent. The fact a person may not have formed that intent if sober is not a defence.
>
> 3. Where a crime of specific intent is alleged, the jury should take the defendant as they find him. They should have regard to his state of intoxication together with all other relevant circumstances when deciding whether he acted with the intent required.
>
> 4. The mere fact that the defendant had taken drink does not trigger a requirement to give the jury a direction about it. What is required is evidence of

consumption of a quantity which may have affected the defendant's state of mind. Where there is uncertainty, discussion with the advocates is desirable.

5. The issue for the jury is not whether the defendant had the capacity to form the intention; the question is whether he did have the intention."

[123] This brief survey of the material to which we were referred by counsel appears to us to provide support for at least the following propositions:

(i) As a corollary of his or her responsibility to ensure that the trial is fair, the trial judge is obliged to leave for the jury's consideration all the possible conclusions which may be open to them on the evidence presented in the trial, whether or not they have all been canvassed by counsel on either side in their submissions.

(ii) An intent formed under the influence of drink or drugs is still an intent and the fact a person may not have formed that intent if sober is not a defence. The mere fact that the defendant has taken drink or drugs does not therefore trigger a requirement for the judge to give the jury a direction about it.

(iii) Evidence of intoxication is significant only if and to the extent that it renders the defendant incapable of forming the specific intent required for the crime with which he or she is charged.

(iv) The crucial question in every case in which there is evidence that a defendant has taken a substantial quantity of drink or drugs is therefore whether there is an issue as to the defendant's formation of the specific intent by reason of the drink or drugs which he or she has consumed or taken.

(v) On a charge of murder, the ultimate question for the jury in a case in which intoxication is in issue will therefore be whether there is evidence that the defendant was so intoxicated that he lacked the specific intent required for murder, that is the intent to kill or to inflict grievous bodily harm upon the victim.

(vi) In such cases the jury should be instructed to have regard to all the evidence, including that relating to the drink or drugs consumed or taken, to draw such inferences as they think proper from the evidence and on that basis to ask themselves whether they feel

sure that at the material time the defendant had the requisite intent.

(vii) Where the judge entertains some uncertainty as to whether the requirement for a direction has arisen, discussion with counsel in the case is desirable.

[124] The starting point in the analysis in this case is that there was no evidence of the actual amount of alcohol consumed by the appellant either before or during the period that he was at the club. The only direct evidence of his intoxication came from Corporal Roberts, who described the group of men among whom the appellant was standing at one point as "highly intoxicated". Although the other evidence of the appellant's spilling of his drink, splashing liquor all over the place and beating the wall with his fist until it bled was clearly capable of supporting an inference that he had had too much to drink, it does not in our view give rise to the further inference that his state of mind was affected by that fact. The case is therefore distinguishable in this respect from **Von Starck**, where there was evidence emanating from the appellant himself that he had ingested a considerable quantity of cocaine over a prolonged period of time before the deceased was killed. But even more to the point is the fact that there was absolutely no issue in the case that the appellant's mind was so affected by drink that he did not know what he was doing at the time when he opened fire on the persons who, on his account, he perceived to be his attackers. Put another way, there was no evidence that his level of intoxication was such as to render him incapable of forming the specific intent to kill or at the very least cause grievous bodily harm to those persons. It

therefore seems to us that, unlike **Von Starck**, this was not a case in which the learned trial judge's duty to give appropriate directions on the issue of intoxication— and hence the possibility of the lesser verdict of guilty of manslaughter — was triggered by the evidence.

(d) Good character directions

[125] It is now fully settled law that where a defendant is of good character he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case. The standard direction will normally contain, firstly, a credibility direction, that is a direction that a person of good character is more likely to be truthful than one of bad character; and, secondly, a propensity direction, that is that he or she is less likely to commit a crime, especially one of the nature with which he or she is charged. Generally speaking, it is the duty of the defence to ensure that the issue of the defendant's good character is brought before the court and failure to do so in a proper case may render a guilty verdict unsafe. There is no want of authority for these propositions, either from this court or the Privy Council and it suffices to mention, without further discussion, the decisions of the Privy Council in **Teeluck and John v The State of Trinidad and Tobago** [2005] 1 WLR 2421, especially paragraph [33], and of this court in **Michael Reid v R** SCCA No 113/2007, delivered 3 April 2009, especially paras 15-20.

[126] In this case, prompted by Major Rowe's evidence (see para. [41] above) that the appellant was a person of "exemplary character", the learned trial judge directed the

jury that "where the good character of the accused is proffered, the value of that is that looking at all the evidence you will ask yourselves, whether somebody of the good character of the accused would commit the offences that the prosecution is saying the accused committed". In our view, this was clearly a sufficient propensity direction, as Mrs Samuels-Brown accepted. But, it was submitted, that the learned trial judge ought also to have given the appellant the benefit of a credibility direction, thus begging the question whether a defendant who, as the appellant did in this case, makes an unsworn statement from the dock is entitled to such a direction.

[127] The foundation of the modern law of good character directions is commonly acknowledged to be the decision of the Court of Appeal of England and Wales in **R v Vye, R v Wise, R v Stephenson** [1993] 3 All ER 241. That case established definitively that, while the propensity direction should generally always be given if the defendant is of good character, where such a defendant "does not give evidence and has given no pre-trial answers or statements, no issue as to his credibility arises and a [credibility] direction is not required" (per Lord Taylor CJ, at page 245).

[128] For the obvious reason that the right of a defendant to make an unsworn statement from the dock had long been abolished in England[7] by the time **R v Vye** was decided, the court did not consider the position of such a defendant at all in that case. Nevertheless, in **R v Syreena Taylor** SCCA N0 95/2004, judgment delivered 29 July 2005, at page 12, this court, basing itself on **Vye**, did observe that the trial judge was under "no obligation" to give directions as to the credibility of a defendant who made

[7] By section 72 of the Criminal Justice Act 1982

an unsworn statement. As far as we are aware, the Privy Council has yet to put the matter as categorically as this and it may well be that, at an appropriate time, this could be a question for further exploration.

[129] But be that as it may, even on the assumption that a defendant who makes an unsworn statement may be entitled to the direction, the Privy Council has on several occasions in appeals from this court expressed strong reservations as to the value of a credibility direction in such circumstances. Thus, in **Muirhead v The Queen** [2008] UKPC 40, Lord Hoffmann observed (at para. 26) that, "[a]s the appellant did not give evidence on oath, the value of the [credibility] direction may be doubtful"; and, in their separate concurring opinion, Lords Carswell and Mance added (at para. 35) that, if the defendant "has not given evidence, but has merely made an unsworn statement, the importance of the [credibility direction] is reduced". Then, in **Stewart v The Queen** [2011] UKPC 11, para. 15, Lord Brown said that "the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pre-trial statements) than when he has given sworn evidence". Next, in **France and Vassell v The Queen** [2012] UKPC 28, para. 48, Lord Kerr emphasised (at para. 46) that "[w]here, as in this case, a defendant who complains about not having had a good character direction has not given evidence, the force of the argument that the credibility limb of the good character direction rendered the conviction unsafe is greatly diminished". And, most recently, in **Lawrence v The Queen** [2014] UKPC 2, Lord Hodge reiterated (at para. 23) that, since the appellant did not give evidence on oath, a

direction on the relevance of good character to his credibility "would therefore have been of less significance than if he had".

[130] So it is plainly open to doubt whether, even assuming that the appellant was entitled to a credibility direction, it would have been of any value at all to him, since the learned trial judge would have been equally entitled in those circumstances to remind the jury that, by opting to give an unsworn statement, the appellant had not exposed himself to cross-examination (see **Lawrence v The Queen**, para. 23 and **Stewart v The Queen**, para. 16). Added to this, there is the consideration urged on us by Mrs Palmer-Hamilton, which also finds clear support in the authorities, that there may be cases in which "the sheer force of the evidence against the defendant was so overwhelming…that in those cases it should not prove unduly difficult for an appellate court to conclude that a good character direction could not possibly have affected the jury's verdict" (per Lord Kerr in **France and Vassell v The Queen**, para. 46). In our view, this was a case in which the evidence implicating the appellant— the compelling eyewitness accounts of Messrs Carr and Green and Miss McLaren, as well as the expert ballistic and forensic evidence of Superintendent Porteous and Miss Dunbar — was so overwhelming that a credibility direction would have had no greater effect on the jury than did, as appears from their verdict, the propensity direction which they were given.

(e) The learned trial judge's treatment of discrepancies, inconsistencies, etc.

[131] Mrs Samuels-Brown referred us to a number of instances in which the eyewitness accounts of the events of the morning of 20 October 2008 differed in some

matters of detail. Thus, it was pointed out that although Mr Carr's evidence was that he had seen the appellant "lick" the wall, "like an angry person", Mr Green characterised the appellant's beating of the wall as "celebratory". Also, although Mr Carr testified to seeing the two men following the appellant shortly before the shooting started, Mr Green's evidence was that he did not see anyone following the appellant. And there were other examples, including a couple instances in which witnesses admitted to having said different things in either their police statements or their evidence at the preliminary enquiry. Mrs Samuels-Brown's general complaint was that the learned trial judge's summing up was deficient, in that it failed to identify for the jury the areas of weakness in the prosecution's case which enured to the benefit of the appellant.

[132] Mrs Palmer-Hamilton's contrary submission was that the learned trial judge had dealt fully and adequately with inconsistencies and discrepancies in his summing up, both in his general directions and in relation to specific instances in the witnesses' evidence. In order to test this submission, it is necessary to refer in some detail to certain passages from the summing up. Firstly, the learned trial judge gave general directions to the jury on the manner in which they should assess the witnesses:

> " As I told you it is your duty to assess the evidence and to come to conclusions with regards [sic] to the evidence as to whether you believe or don't believe a witness. Mr. Foreman and your members, as judges of the facts you are free to believe all of what a witness says, some of what a witness says or nothing that the witness said. It is all a matter for you.

> Now, all of you or most of you may have been sitting as a jury for the very first time and Mr. Foreman and your Members, it is a task of some responsibility but it is not a supremely difficult task, because what you are asked to do is to bring to bear some of the things that you practice everyday in your respective lives. You are asked to approach this matter as learned defence counsel told you in his opening not by dispensing your commonsense [sic], you are to use your commonsense [sic]. You are also asked to approach your task with honesty, because, Mr. Foreman and your Members, were you to find on the evidence that you did not believe that the Prosecution had satisfied you until you feel sure and you are to in your verdict say otherwise that would not be honest. And the contrary is true, if you in assessing the evidence came to the conclusion that the accused man is guilty and you said otherwise that would not be honest, so you bring to bear honesty as well.
>
> You are also using your assessment, your knowledge of the community in which which [sic] you live, Kingston and St. Andrew the Jamaica of today, because your knowledge of as they say what is happening on the street is also important to assess the evidence. You look at the demeanour of the witness how did that witness strike you. Did the witness strike you as telling the truth? Did the witness strike you as lying? Did the witness strike you as not telling the whole truth? All of those are considerations for you."

[133] Next, the jury was directed on what constituted inconsistencies and discrepancies and how to approach them:

> "HIS LORDSHIP: There are some other things Mr. Foreman and your members, that you may consider in your assessment of the evidence. You may recall that in some of of [sic] the evidence provided by witnesses, were questions

asked which reiterated what a witness may have said in a statement before, or what a witness may have said at the preliminary enquiry, at Half-Way-Tree before and that may be different from what that witness may have said in the witness box before you. That is what is called a previous inconsistent statement and what it means, Mr. Foreman and your members, is that the witness would have said one thing on another occasion and before you said another thing.

Now, what is before you -- what is said in your presence and hearing that is evidence. But what the witness may have said before in a statement or may have said before in another court at the preliminary enquiry, that is not evidence. But you may use that when you come to assess the credit worthiness of that witness, to say whether or not you can believe the witness, that said one thing on one occasion and something else on another ie., in the trial before you.

There are also cases where the witness would have given evidence and said one thing about a particular subject matter and said something else that [sic] are discrepancies.

Now, how do you treat that? You look at what the witness said in the first place and you decide if a discrepancy or an inconsistency has occurred and then having decided that it is a discrepancy or an inconsistency, you decide whether it is of importance or of little importance.

If you find it is important -- it may be a situation you cannot believe a witness on that point or you cannot believe the witness at all. If you find it is unimportant then it is a matter entirely for you, but what that one brings to mind is, when a witness is supposed to have said in either a statement or the preliminary enquiry, that the place was poorly lit and then supposed to have said the place was dark, you look to see whether or not, one, it is an inconsistency or a discrepancy and two, whether you consider that to be important or unimportant. But as I go along with the evidence where there are others, I will point

> it out to you and it is going to be a matter for you as to the view you make of it."

[134] Mrs Palmer-Hamilton also pointed to various instances in which the learned trial judge, in his review of the evidence, faithfully called the jury's attention to areas of inconsistencies by witnesses with their previous statements. So, for example, the learned trial judge reminded the jury of the evidence given by Detective Special Corporal Robinson under cross-examination that, when he arrived at the club at about 6:45 am that morning, the club was "poorly-lit". But when his police statement was shown to him in court, he agreed that what he had in fact said was that it was "dark". The learned trial judge's direction to the jury was that they should "remember what I told you about previous inconsistent statement [sic], you can ask yourselves whether or not there is an inconsistency between poorly-lit and dark, it is a matter entirely for you".

[135] In our view, the learned trial judge did as much as might have been expected of him in the circumstances. As Harrison JA pointed out in the decision of this court in **R v Peter Senior and Clayton Bryan** SCCA No 133/2003, judgment delivered 11 March 2005, at pages 9-10, "there is no need for the trial judge to list the weaknesses in drawing the jury's attention to aspects of the evidence nor is there a need to refer to all of the discrepancies". Equally apposite, it seems to us, are Lord Morris' observations on the limits of a summing up in **McGreevy v Director of Public Prosecutions**, at page 507:

> "…The particular form and style of a summing-up, provided it contains what must on any view be certain essential elements, must depend not only on the particular features of a particular case but also on the view formed by a judge as to the form and style that will be fair and reasonable and helpful. The solemn function of those concerned in a criminal trial is to clear the innocent and to convict the guilty. It is, however, not for the judge but for the jury to decide what evidence is to be accepted and what conclusion should be drawn from it. It is not to be assumed that members of a jury will abandon their reasoning powers and, having decided that they accept as true some particular piece of evidence, will not proceed further to consider whether the effect of that piece of evidence is to point to guilt or is neutral or is to point to innocence. Nor is it to be assumed that in the process of weighing up a great many separate pieces of evidence they will forget the fundamental direction, if carefully given to them, that they must not convict unless they are satisfied that guilt has been proved and has been proved beyond all reasonable doubt."

**(v) The unfair trial issue (ground twelve)**

[136] The appellant's complaint on this issue was that, rather than his having been obliged to call Miss Dunbar as a witness for the defence, the prosecution ought itself to have called her to give evidence as part of its case. It was submitted that where a potential witness, particularly an expert witness, gives a statement to the prosecution which contains material both favourable and unfavourable to the defence, the prosecution should put the witness forward as its own, thus making the witness available for cross-examination on behalf of the defence. As regards the extent of the duty of the prosecution to call witnesses named on the back of an indictment, Mrs Samuels-Brown relied on Lord Bingham's observation in the decision of the Privy

Council on appeal from this court in **Steven Grant v The Queen** [2006] UKPC 2, para. 25:

> "…Plainly the prosecutor has a discretion. It is a discretion to be exercised by the prosecutor acting as a minister of justice, in the interests of fairness…."

[137] Naturally, as a matter of general principle, Mrs Palmer-Hamilton did not dispute this, but she submitted that in this case the prosecution had fulfilled its duty by making Miss Dunbar available to the defence and providing a copy of her report. In this regard, our attention was directed to the decision of the Court of Appeal of England and Wales in **R v Russell-Jones** [1995] 3 All ER 239, to which Lord Bingham had referred in **Steven Grant v R** (at para. 25) as having provided "authoritative guidance" on the point. In that case, after a full review of some of the older authorities, Kennedy LJ summarised the general principles in this way (at pages 244-245):

> "(1) Generally speaking the prosecution must have at court all the witnesses named on the back of the indictment (nowadays those whose statements have been served as witnesses on whom the prosecution intend to rely), if the defence want those witnesses to attend. In deciding which statements to serve, the prosecution has an unfettered discretion, but must normally disclose material statements not served.
>
> (2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.
>
> (3) The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial….

(4) The next principle is that the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say 'incredible', then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.…

(5) It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.

(6) The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others.

(7) A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies. To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.

> Plainly, what we have said should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations to which we have not adverted; and in every case, it is important to emphasise, the judgment to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle."

[138] In our view, this summary makes it clear that the decision whether to call or tender a witness is a matter within the discretion of the prosecution, to be exercised in the interests of justice, so as to promote a fair trial. Generally speaking, the prosecution ought normally to call or offer to call all the witnesses who give direct evidence of the primary facts of the case; or, as it was put by the Privy Council in **Seneviratne v R** [1936] 3 All ER 36, 49 (in a dictum referred to with approval by the court in **R v Russell-Jones**), "[w]itnesses essential to the unfolding of the narratives on which the prosecution is based". In that case, the Board also made the telling point that confusion would be "very apt to result…if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination".

[139] In this case, Miss Dunbar was, of course, an expert witness and not a witness as to the primary facts upon which the prosecution was based. So it appears to us that, in keeping with the general principles enunciated in **R v Russell-Jones**, it was therefore entirely a matter for the prosecution to decide whether it would call her or make her available to the defence. In any event, as was said by Glidewell LJ in **R v Ward** (at page 628) in respect of a trio of government forensic scientists who were accused of being partial to the police, it was Miss Dunbar's clear duty as an expert witness to

"assist in a neutral and impartial way in criminal investigations…[and to]…act in the cause of justice". In our view, there is absolutely nothing in the careful and highly professional manner in which Miss Dunbar conducted herself, either in examination-in-chief, as witness for the defence, or under searching cross-examination on behalf of the prosecution, to suggest that she was anything other than fully mindful of her duty in this regard.

**Conclusion and disposal of the case**

[140] Save in respect of those aspects of the learned trial judge's directions on self-defence in respect of which we have indicated that it may have been desirable for him to have given the jury more assistance than he did, we have come to the conclusion that the several grounds of appeal so expertly argued on the appellant's behalf have not been made good. For all the reasons which we have attempted to state, we consider that, as this court said in **R v Michael Adams and Frederick Lawrence** SCCA Nos 35 and 36/1993, judgment delivered 7 April 1995, at page 16, any deficiencies in the learned trial judge's summing up "paled into insignificance when viewed in the light of the overwhelming evidence put forward for the prosecution against the appellant, and…no substantial miscarriage of justice has actually occurred". To the extent that it is necessary to do so, therefore, we would apply the proviso to section 14(1) of the Judicature (Appellate Jurisdiction) Act[8].

[8] "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

[141] Accordingly, the appeal against conviction is dismissed and the convictions of the appellant on all four counts are affirmed. As regards sentence, as we have indicated, the prosecution did not seek to uphold the sentence of death imposed on the appellant by the learned trial judge. The appeal against sentence is therefore allowed and the matter is remitted to the Supreme Court for the appellant to be re-sentenced by a judge of that court after a sentencing hearing.